No. 19-15738

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

OMICS GROUP INC., DBA OMICS PUBLISHING GROUP; ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada, Las Vegas
No. 2:16-cv-02022-GMN-VCF
Hon. Gloria M. Navarro

BRIEF OF THE FEDERAL TRADE COMMISSION

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The Federal Trade Commission (FTC) agrees with appellants' jurisdiction statement.

INTRODUCTION

For more than six years, Srinubabu Gedela and his companies (collectively, OMICS) published hundreds of purportedly reputable online academic journals and hosted scientific conferences allegedly featuring prominent researchers. OMICS solicited articles by touting the rigor of its journals' peer review process and high "impact factors," a well-known measure of a journal's importance. Consumers who submitted manuscripts were then hit with previously undisclosed fees. They later learned that OMICS's claims of strict peer review and other indicators of its journals' quality were not true.

Likewise, OMICS attracted customers for its conferences, which could cost more than $1,000 a head, by claiming that leading scientists were participating in – or even organizing – the events. But many of the promised scientists had no connection with the conferences.

The FTC sued Gedela and his companies to stop these deceptive practices and to obtain relief for consumers. The district court found that undisputed evidence proved that the defendants violated the

Federal Trade Commission Act (FTC Act) and granted summary judgment in favor of the agency. It held Gedela personally liable for the unlawful acts, enjoined all defendants from further deceptive practices, and ordered them to return the $50.1 million they had wrongfully collected.

QUESTIONS PRESENTED

1. Did undisputed facts show that OMICS (a) made material misrepresentations in marketing its journals and conferences and (b) failed to adequately disclose its publishing fees?

2. Was Gedela, who founded and ran all three companies, knew they were making the deceptive statements, and personally participated in aspects of the scheme, properly held individually liable for his companies' practices?

3. Was the district court correct to order monetary relief equal to OMICS's net revenues, where it was possible that a few individual consumers may not have been misled, but where OMICS failed to offer any evidence to support reducing the award?

STATEMENT OF THE CASE

A. Liability Under The FTC Act

Section 5 of the FTC Act prohibits "deceptive acts or practices" and directs the FTC to prevent them. 15 U.S.C. § 45(a)(1). An act or practice is deceptive under Section 5 if it involves (a) a material representation or omission that (b) is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). A misrepresentation is material if it involves facts that a reasonable person would consider important in choosing a course of action. *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Express claims are presumed material. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994). Consumer action based on express statements is presumptively reasonable. *See id.*

A representation is deceptive if the maker of the representation lacks a reasonable basis for the claim. *See FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010). If the maker lacks adequate substantiation evidence, she necessarily lacks any reasonable basis for her claims. *Id.*; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989).

Disclaimers must be prominent and unambiguous to change the apparent meaning and leave an accurate impression. *Kraft, Inc. v. FTC*, 970 F.2d 311, 325 (7th Cir. 1992); *Removatron Int'l*, 884 F.2d at 1497. Similarly, qualifications that clarify otherwise deceptive statements must be likely to come to the attention of the person who sees the basic claim; for that reason, qualifications in small print or its equivalent are unlikely to be effective. *See FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214 (D. Nev. 2011); *see also In re Thompson Med. Co.*, 104 F.T.C. 648, 789 n.9 (1984).

In considering whether a claim is deceptive, the Court considers the "net impression" created. Thus, a claim can be deceptive even if contains some truthful disclosures. *Cyberspace.com*, 453 F.3d at 1200; *FTC v. AMG Servs. Inc.*, 29 F. Supp. 3d 1338, 1365 (D. Nev. 2014) ("[A] section 5 violation is not determined by fine print, technicalities, and legalese."), *aff'd* 910 F.3d 417 (9th Cir. 2018). And because the FTC Act is a consumer protection statute, any ambiguous representation should be construed in favor of the consumer. *Resort Car Rental Sys. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

B. OMICS's Deceptive Academic Publishing And Conference Practices

1. The Academic Publishing Industry

Academic journals are peer-reviewed publications that focus on a particular academic or scientific discipline. Op. 2-3.[1] Articles published in these journals typically include "original research, review articles, commentaries, or clinical case studies" by academics or other experts. *Id.*; ER118 ¶5 (Backus Decl.). An author ordinarily may not publish the same article in more than one journal. ER120 ¶11. Before publication, the author usually signs an agreement giving the journal the right to publish the article. Op. 3; ER121.

Journals test the quality of submissions by subjecting manuscripts to a process known as peer review. *See* Op. 3; ER120. In that process, a manuscript is scrutinized by experts who are qualified to evaluate the work's quality and significance. Op. 3; ER120. Peer review typically takes several months and is an interactive process during which reviewers offer constructive criticism and authors respond and

[1] Op. refers to the district court's opinion, which appears at pages 2-41 of the Excerpts of Record. ER___ refers to OMICS's Excerpts of Record (App. Doc. 17). SER___ refers to the FTC's Supplemental Excerpts of Record. DE__ refers to the district court's docket entry numbers.

implement the recommendations. Op. 3; ER120-21 ¶¶13-14. A journal's reputation for publishing quality articles reflects the strength of its peer review process.

A journal's "impact factor" likewise indicates its reputation. Op. 3-4; ER122 ¶¶15-16. In the academic publishing industry, that term is understood to mean the proprietary citation measure calculated by Thomson Reuters and published in its Journal Citation Reports®, and in particular, its "two-year" impact factor.[2] Op. 4; ER122 ¶16. The impact factor measures the average number of citations in certain scholarly literature to the articles published by a particular journal. Op. 3-4; ER122 ¶16. A higher impact factor indicates a more important or credible journal. Op. 4; ER122 ¶15. To receive an impact factor, a journal must be included – or "indexed" – in one of two proprietary citation indexes. Op. 4; ER122 ¶16.

Whether a journal is indexed also indicates its credibility and prestige. Op. 4; ER122 ¶17. The United States National Library of Medicine ("NLM"), an arm of the National Institutes of Health ("NIH"), produces and manages three bibliographical resources: PubMed

[2] Thomson Reuters was succeeded by Clarivate Analytics. SER541 admission 35 [OMICS Admissions].

Central,[3] PubMed,[4] and Medline.[5] Op. 4; ER123 ¶18; SER542 admissions 42, 43. Journals must apply for inclusion in Medline and PubMed Central and be reviewed by an NIH-chartered advisory committee. Op. 4; ER123 ¶¶20, 22. Only a small percentage of journals that apply meet NLM's quality standards and are accepted. *See* Op. 4; ER123 ¶¶20, 22. Because of their selectivity, inclusion in Medline or PubMed Central is considered by many to be a mark of a journal's high quality. Op. 4; ER123 ¶¶21-22.

Traditionally, academic journals supported their operations by charging subscription fees to libraries or individuals; the authors did not pay to publish. Op. 3; ER118 ¶6. In recent years, an alternative "open access" publishing model has developed. Op. 3; ER118 ¶7. Under this newer model, readers pay nothing to access content. Rather, open access journals fund their operations by charging authors publication

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[3] PubMed Central contains the full text of over 3.9 million journal articles in biomedicine and the life sciences. ER123 ¶22.

[4] PubMed is a bibliographic database containing over 26 million citations and abstracts, primarily regarding biomedicine and the life sciences. PubMed includes citations for all journal articles contained in PubMed Central. ER123 ¶19.

[5] Medline is a very large subset of PubMed (about 90%). Most users view PubMed as being synonymous with Medline. ER123 ¶¶20-21.

fees or by receiving funding from universities or other organizations. Op. 3; ER118 ¶7.

2. OMICS And Its Deceptive Journal Publishing Practices

The OMICS companies – founded, operated and solely owned by Srinubabu Gedela – operated websites that claimed to publish hundreds of academic journals on "science, health, and technology," and invited the submission of articles for publication.[6] *See* Op. 1-2, 4-5; *see, e.g.,* ER270 ¶20; ER61 ¶¶5, 8 (Gedela Decl.).[7] The sites invited the submission of articles for publication. Op. 9. OMICS also solicited articles through frequent and repeated emails to academics and researchers. Op. 9; SER252 (Spears Decl.); ER270-71 ¶¶12, 22, 23; SER538 (Admission 16); ER62 ¶18; SER304, 306, 324; SER528-32. The websites and emails were permeated with deception.

[6] The three OMICS companies operated as a common enterprise controlled by Gedela. Many described practices continue.

[7] The journal count in OMICS's advertising varied and grew rapidly. *See* Op. 6; *see, e.g.*, DE 86 at 10 n.6. Gedela claimed more than 700 journals. ER61 ¶14.

a. Deceptive promises of peer review

OMICS's websites stated repeatedly that all articles published in its journals are subject to standard peer review. Op. 5-6.[8] For example, on the website OMICSonline.org, OMICS claimed that "OMICS Scholarly Journals strictly adhere to standard review process" and that "[a]ll the articles are subjected to peer-reviewing prior to publication." SER144; *see also* SER601 ¶182. OMICS also claimed that the "goal of peer-review is to assess the quality of articles submitted," that its journals' articles "are peer-reviewed and edited by the experts in the related areas," and that "[p]eer-reviewed articles provide a trusted form of scientific communications." SER149; SER254 (Spears Decl.); SER530 Myburgh Decl.); SER362, 472-74, 476, 482, 487-90, 521; OMICS made similar claims in its emails to consumers soliciting articles, including that its journals employed "Robust Peer-Review." Op. 5; SER636; *see also* SER608-14 (admissions 235-282), 629-30.

[8] ER4 ¶23; SER545 (admission 60), 546 (admissions 65-66); SER548 (admissions 61-64); SER553 (admission 75.1), 554 (admissions 77.1, 78.1), 555-61 (admissions 79.1-83.1, 85.1-87.1, 89.1); SER595-99, 601-04 (admissions 175, 182-83, 185-95); *see also* ER62 ¶23. Each item in the FTC's Fifth Request for Admissions (SER562) was deemed admitted because OMICS did not timely respond. Fed. R. Civ. P. 36(a)(3).

These claims were false. In many cases, OMICS published articles without any review at all, and as quickly as a few days after submission—far too short a time for meaningful review. Op. 6; SER77 ¶4; ER314 ¶10; SER304, 314, 320, 324-25, 331; *see also* ER120-21 ¶¶12-14, ER125-26 ¶¶28-31. Numerous authors reported that they received *no* comments or proposed revisions from peer reviewers; OMICS simply published the articles as originally submitted. Op. 6; *see, e.g.,* ER279 ¶4; SER77 ¶ 4; SER46-47 ¶¶ 5-6; SER301-337. The few who did receive comments noted that they were not substantive. Op. 6; ER299 ¶4 (Hoevet Decl.); ER313-14 ¶¶6, 10; SER314.

OMICS's peer review was further proven to be a sham through experiments run by journalists from two separate publications. Op. 6. In 2012, John Bohannon, a scientist and writer for *Science* magazine, submitted papers with obvious and egregious scientific flaws to two OMICS journals. Op. 6; SER186-87 ¶3 (Bohannon Decl.). Both journals accepted Bohannon's plainly flawed papers without substantive comment. SER187-88 ¶¶5, 7. OMICS admitted that the papers were published without peer review. SER549 (admission 68); SER552 (admissions 70, 71).

Similarly, in 2016, a journalist for the Ottawa Citizen/Ottawa Sun submitted a deliberately flawed article to an OMICS journal. Op. 6; SER248 ¶2 (Spears Decl.). The manuscript, which combined text taken from Aristotle, unrelated modern words, and invented words, was "unintelligible" "gibberish." SER248 ¶2. But OMICS published the manuscript anyway – without any changes, and without any reviewer or editor contacting the submitter before publication. Op. 6; SER248 ¶3. The FTC's expert opined that it was clear that neither article had been subject to peer review "as that term is understood in the academic publishing industry." Op. 6-7; ER125-36 ¶¶29, 31.

OMICS had no legitimate explanation for its publication of these obviously flawed papers, and could not substantiate its representations that all articles are peer-reviewed. *See* Op. 15. In discovery, OMICS produced a list of almost 69,000 articles published by its journals, along with a list that OMICS claimed was its only record of manuscript reviews. Op. 7; SER659; SER662-64. For more than half of all published articles, OMICS had *no* record of peer review. SER279 ¶10. OMICS could show some form of review for *only 49%* of the published articles, but there was no indication it was the rigorous, substantive review true

peer review requires. Op. 7; SER279 ¶10. And for 166 journals that OMICS advertised as peer-reviewed publications, OMICS had *no* evidence that *any* of their published articles were ever peer reviewed. *Compare* SER282 ¶16 and *Id.* at 286-90 *with* SER 132-139; SER566 (admission 100).

b. Deceptive promises of "expert" editors

In addition to misrepresenting that articles were peer-reviewed in the first place, OMICS also misrepresented who did the reviewing. OMICS claimed that its journals were reviewed and edited by various scientists, researchers, and academics, including by as many as 50,000 experts.[9] Op. 6-7. Indeed, OMICS's websites included hundreds of names, pictures, and biographies of reputable scientists and researchers who allegedly served on the editorial boards of its publications. *Id.*; SER145-46, 165-71.

OMICS could not substantiate these claims. The evidence showed that OMICS had nowhere near the number of touted editors and that many of them had not, in fact, agreed to serve in an editorial role. Op. 7;

[9] *See, e.g.*, SER145-46, 165-171; SER601-03 (admissions 180-86, 188, 190); ER63-64 ¶37; SER473-74 (2018 website lists 50,000+ editors), 522 ("Only top scholars are appointed to Boards of Editors"); DE 84 at 52.

ER296-97 ¶¶3-7 (Howland Decl.); ER326 ¶11 (Rusu Decl.); SER308, 317. Others had at some point agreed to serve as editors, but later asked to be removed, although OMICS did not remove them. Op. 7; SER48 ¶11, 73 (Regan Decl.); SER78 ¶6, 89 (Vagefi Decl.). Yet others indicated they had agreed to serve on an editorial board, but that OMICS then listed them as editors-in-chief of the journals without their authorization. SER3-4 ¶¶3, 5-8 (Woods Decl.). OMICS did not dispute these facts.

OMICS was able to produce the names of only 14,598 individuals—a fraction of the 50,000 reviewers it claimed. Op. 7; SER277 ¶3. Worse, OMICS could identify *only 380* people for whom it had any confirmation of an agreement to serve as an editor on one of its journals, and that small figure represented only 130 of the 700+ journals OMICS claimed to publish. Op. 7; SER656 (request 18); ER177 ¶15.[10]

[10] OMICS misrepresented the roles and views of other academics during the district court proceedings. In one brief, OMICS identified purported editors who allegedly supported the inclusion of OMICS's journals in major indices. *See* DE Nos. 33-4 to 33-16. When the FTC contacted more than 50 of these academics, over half of those who responded said they regretted their affiliation with and endorsement of OMICS, or that they would no longer recommend OMICS's journals for

c. Deceptive promises of high impact factors

OMICS misrepresented that its online publications had high impact factors, a claim prominently featured in its solicitation emails and journal websites. Op. 7-8; SER144, 147, 154, 158, 160-61; SER604 (admissions 196-97 (statements made even after preliminary injunction)); SER371-90, 475, 491-513 (listing purported impact factor for all journals); SER528; DE No. 84 at 92-93; SER668 (lines 75:15-24), 674. OMICS admitted that, since at least 2015, its websites have claimed that OMICS "hosts many high impact factor journals," and that "OMICS International journals are among the top high impact factor academic journals." Op. 7-8; SER475, 514; SER604-07.

As OMICS admits, its journals did not even have Thomson Reuters impact factors, let alone high ones. Op. 8; ER98 (OMICS Group admission 15)]; ER101 (iMedPub admission 15); ER104 (Conference Series admission 15)]; ER112 (Gedela admission 19). Instead, the numbers that OMICS reported as "impact factors" were calculated by *OMICS itself* based on "the number of citations found through a Google

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indexing. *See* SER241-42 [Al-Najjar Decl.]. The record contains numerous other examples of researchers ending their affiliation with OMICS after discovering its unscrupulous practices. *See*, *e.g.*, SER200-01 ¶¶6-8; SER242 ¶¶ 6-7.

Scholar search." Op. 8; SER567-68 (admission 103); SER162; SER388, 513. OMICS did not consistently or clearly disclose this critical fact. To the contrary, OMICS sometimes described the impact factors as based on Journal Citation Reports, which is where Thomson Reuters impact factors are published. Op. 8; SER604-07 (admissions 198-211). Elsewhere, OMICS described them as an "unofficial impact factor" based on Google Scholar Citations, but these disclosures typically did not appear near the marketing claims mentioning impact factors. Op. 8; *e.g.*, SER567 (admission 103); ECF No. 84 at 92-93. Rather, they were buried inconspicuously near the bottom of the webpage, sometimes following dozens of pages of content. Many times, there was no disclosure whatsoever, leaving unqualified the claim that OMICS's journals had "high impact factors." Op. 8; *see*, *e.g.*, SER144, 154; SER514. Likewise, OMICS's solicitation emails did not alert the recipients that the impact factor was not the familiar industry-standard Thomson Reuters metric. Op. 8; SER528.

d. Deceptive promises of indexing

OMICS further misrepresented its journals' reputations by advertising that they were indexed in well-known, reputable indexing

services; it even used the logos for such indices (without permission). Op. 8-9; *see* DE No. 84 at 8, 11, 14, 17, 20, 24. For example, on its websites, OMICS claimed that "[m]ost of these journals" were "indexed in MEDLINE, PUBMED." SER140, 144, 148; *see also Id.* at 153, 164 (using PubMed and Medline logos); DE 84 at 8, 11, 17, 20, 24] (use of logos dates back to at least 2011). OMICS's email solicitations similarly claimed that "a good number" of OMICS journals were published in PubMed and that "OMICS's open access journals are listed in dozens of highly acclaimed indexing databases." ER319; SER474. It made numerous similar claims over the years. *See, e.g.,* ER234 (claims of indexing in Medline and PubMed Central), ER245 (claims of indexing in Medline), ER246 (Medline and PubMed Central), ER247.

In fact, as OMICS admitted, none of its journals was indexed in PubMed Central or Medline. Op. 9; ER98 (OMICS Group admissions 13-14); ER101 (iMedPub admissions 13-14); ER104 (Conference Series admissions 13-14)]; ER111 (Gedela admission 18). Indeed, NLM refused to index OMICS's publications in its databases due to OMICS's questionable publishing practices. Op. 9; ER127-28 ¶¶32-34; SER269-70 (Backus Decl.). And on multiple occasions, NLM informed OMICS of

this fact and requested that OMICS stop making deceptive statements regarding its purported affiliation with NIH and PubMed Central. Op. 9; ER128 ¶¶35-36; SER271-73. OMICS admitted to receiving multiple notices from NIH that PubMed Central would not accept any journals from OMICS, and that OMICS needed to stop referring to PubMed Central.[11] SER543 (admission 54); SER564-65 (admissions 96-99); DE No. 36-4 at 2-3 (letter from Gedela to NIH); SER544 (admission 58).

Despite these warnings, OMICS continued to tout its journals' inclusion in PubMed and to claim that its publishing practices comported with NIH's standards. *See* Op. 9. For example, a solicitation email sent almost a year after NIH's cease-and-desist letter stated, "A good number of Academic Journals of OMICS Publishing Group are indexed in famous indexing services like PubMed." ER319; *see also* SER153, 163. And as recently as 2018, OMICS made similar claims on its website. ER234 (2018 website), ER245, ER246, ER247.

[11] In some instances, OMICS acquired journals that were included in PubMed Central or Medline, but once NLM learned of the acquisition, it discontinued their inclusion. ER129-30 ¶¶37-38 (Backus Decl.). While a few individual articles published in OMICS's journals have appeared in PubMed Central, that is only because NLM is required by law to make NIH-funded research available there. *See* ER124 ¶¶24-26. That does not mean that the journal itself has been approved for inclusion. ER125 ¶27.

3. OMICS's Failure To Adequately Disclose Publishing Fees

Once authors responded to OMICS's solicitations by submitting articles, OMICS charged them exorbitant publication fees that it had not disclosed. Op. 9-10. In OMICS's frequent solicitation emails, it invited recipients to submit articles simply by responding to the email. Op. 9; SER252, 254 (Spears Decl.); ER284 (Katz Decl.); SER108-109; ER335 (Rusu Decl.); SER358, 361-65; SER528-532 (Myburgh Decl.). But these emails did not mention the fees associated with the advertised publication service.[12] Op. 9; *see* ER284; ER302 (Hoevet Decl.); SER107-09; ER335; SER320, 324, 326, 328, 335, 338, 341-42, 344; SER608-613, 625-47 (admissions 235-278 and associated solicitations FTCRFA0200-221)]; SER361-365.

OMICS's email solicitations also urged the recipients to submit papers by uploading manuscripts to online portals. Op. 9.[13] But these

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[12] This conduct continued even after the preliminary injunction. SER252 [Spears Decl.]; SER318; SER528-32 [Myburgh Decl.].

[13] *See* SER613-14, 648-52 (admissions 279-282 and associated records FTCRFA0222-FTCRFA0226), 607, 611, 615, 637 (admissions 215-216, 258 and associated records FTCRFA0034 ("Submission and Review Tracking System") and FTCRFA0212 (inviting submission to Editorial Manager)]; SER528-32.

portals did not disclose fees, either.[14] Op. 9.[15] For example, the 2018 version of OMICS's "Instructions for Authors" webpage contained no mention of fees. ER235-44; SER570 (admission 108), 583-92. Nor were fees disclosed on the 2018 version of the "Online Submission" page or on the editorial manager journal home pages. *See* SER523-24.

The home pages of many of OMICS's journals likewise did not adequately disclose that authors would be charged publication fees. Op. 9; *see, e.g.,* SER154-159, 172-175; ER183-84 ¶29; *Id.* at 225, 227, 229; SER523-24. The same was true for the "Instructions for authors" and "Submit Manuscript" pages for many journals. *See, e.g.,* SER141-43, 150-52; SER650; SER477-86.

In a few instances, OMICS buried a fee disclosure on secondary webpages that submitters would not otherwise need to visit. Op. 9. For example, at the very end of its hyperlinked "Guidelines For Authors" webpage, OMICS made a generic reference to fees, with no specific amounts disclosed. SER125-131. But visitors to a journal's homepage

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[14] OMICS's attempt to explain away Dr. Hoevet's declaration, Br. 29, fails for this reason.

[15] *See* SER607, 611, 613-15, 637, 648-652 (admissions 215-216, 258, 279-282 and records FTCRFA0034, FTCRFA0212, FTCRFA0222-FTCRFA0226).

could navigate directly to a manuscript submission page without seeing any disclosure. Op. 9. For example, neither the online submission page for iMedPub journals nor the page for the "OMICS Publishing Group Online Submission System" made any mention of fees.

Many authors learned of these fees only after OMICS accepted their articles for publication and sent them a bill for hundreds or thousands of dollars. Op. 10.[16] When authors contested the fees and asked that their articles be withdrawn, OMICS often ignored the requests and continued demanding payment, or demanded a previously undisclosed withdrawal fee. *See* Op. 10; ER279-280 ¶¶6-8 (Katz Decl.); SER47 ¶¶6, 8 (Regan Decl.); SER77-78 ¶¶5, 8 (Vagefi Decl.); SER87, 95; ER299-300 ¶¶5-9 (Hoevet Decl.); ER314 ¶9; SER302-03 ¶¶32-38; SER309, 314, 320, 324-25, 333, 335-35, 338-42, 334, 359, 370, 391-470. One author received so many payment demands from OMICS that he feared harm to his credit score. ER280 ¶7 (Katz Decl.).

[16] ER279 ¶5 (Katz charged over $2,000); SER46 ¶5 (Regan charged $1,819); SER77 ¶5 (Vagefi charged $2,719); ER299 ¶4 (Hoevet charged nearly $1,800); ER313-15 ¶¶6, 11 (professor charged $919); SER307-45, 404 (BBB users charged between $500 and $4,000+), 494-95 (Gotterbarm charged €829).

When OMICS did remove articles from its websites and stop sending payment requests, it often was because of threatened legal action. *See, e.g.*, SER78-79 ¶¶9-10; SER47 ¶¶7, 9.

Beyond the direct monetary harm, this conduct further harmed authors by preventing them from submitting work to other journals, potentially diminishing their employment and tenure prospects. *See* Op. 10; ER120 ¶11; SER47 ¶8; SER314. Victims also reported concern that their reputations would suffer if their articles were not retracted and their work were associated with a disreputable journal. *E.g.*, SER54; ER297 ¶7; ER313.

4. OMICS's Deceptive Conference Practices

In addition to its deceptive journal activities, OMICS also deceptively advertised conferences on scientific and other topics. Op. 10-11; *see* SER343, 346-47. OMICS marketed conferences, with registration fees exceeding $1,000 per person, on its websites and through email solicitations to researchers. *See* Op. 10; ER286 ¶3; SER204 ¶5.

To induce registration for these expensive conferences, OMICS touted the participation of well-known academics and researchers.

Op. 10; ER286-87 ¶¶3, 5; ER188, 92. In reality, however, many of the people listed had no involvement whatsoever with the conference. *See* Op. 10-11; ER286-87 ¶5; SER7-9 ¶¶6-12; SER305, 312, 332, 343, 349-57 ("OMICS! Those bastards. I had nothing to do with them on this conference in Valencia"), 380, 381, 383. OMICS also had not obtained their permission to use their names or likenesses. *See, e.g.*, SER8 ¶¶8-11. Some demanded to be removed from advertising materials once they learned of the misuse of their identities, but in many instances, OMICS ignored or denied the demands. SER7-8 ¶¶6-10; ER286-87 ¶¶5-8.

For example, OMICS's advertisement for a 2016 conference in Philadelphia claimed that a number of reputable scientists were on the conference organizing committee. SER205 ¶12. One person who saw the ads knew three of the listed organizers and contacted them to check out the claim. Not one had agreed to attend the conference. *Id.*

Such misleading claims were not isolated occurrences: the FTC's survey of a representative sample of 100 conferences showed that nearly 60% of the conferences advertised participants who had not

agreed to serve in the advertised capacity.[17] Op. 10-11; ER168 ¶7. Tellingly, when the FTC requested documents substantiating OMICS's claims that various academics had agreed to participate in their conferences, OMICS produced *no* documents in response. SER657 (admission 19).

Conference registrants relied on OMICS's misrepresentations. Had they known that OMICS listed organizers or participants without their permission, consumers would have been unlikely to sign up. Op. 17; *see, e.g.* ER287 ¶6.

C. Injury Inflicted By OMICS's Deceptive Schemes

OMICS's records showed that, from August 2011 through July 2017, it reaped gross revenues of $50,740,100 from publication and conference fees, and paid out $609,289 in chargebacks and refunds. Op. 23; ER181-83 ¶¶21-25. OMICS thus deceptively earned $50,130,811. ER183 ¶25.

[17] The 60% calculation may understate OMICS's deception, as it did not include, for example, those who responded but did not recall. *See* ER178-81 ¶¶17-20.

D. The FTC's Enforcement Lawsuit

1. The FTC's Complaint And Preliminary Relief

The FTC sued to stop these unlawful practices, naming as defendants the three OMICS entities and their owner, Gedela. Op. 1; ER372-87. The complaint alleged that OMICS's misrepresentations violated Section 5 of the FTC Act, which outlaws "deceptive acts or practices." Op. 1; ER373-75; 15 U.S.C. § 45(a)(1). The FTC also sought a preliminary injunction to immediately stop OMICS's misconduct and protect against further harm. Op. 2; DE 9. After determining that the FTC was likely to succeed on the merits and that the public equities weighed heavily in favor of relief, the district court entered a preliminary injunction. Op. 2; DE 46.

2. The District Court's Summary Judgment Decision

Following discovery, both sides cross-moved for summary judgment. The FTC supported its motion with voluminous exhibits demonstrating OMICS's deception, including more than 15 declarations from OMICS's victims; a substantial declaration from academic-publishing industry expert Joyce Backus; declarations from various FTC staff members who gathered consumer complaints and

summarized records, analyzed OMICS's peer review data, and analyzed responses to FTC surveys; and hundreds of pages of printouts from various OMICS websites documenting its misleading statements. *See* DE 86-1. The FTC also submitted numerous documents, interrogatory responses, and admissions provided by Defendants during discovery, as well as Gedela's deposition. *Id.*

OMICS relied principally on statements in declarations from Gedela himself, an attorney declaration, and a declaration from a single consumer, Cindy Orser, who claimed to be satisfied with her experience publishing one article in an OMICS journal. OMICS offered no expert evidence and no other consumer declarations, survey, or other evidence to dispute that its claims were deceptive. OMICS likewise offered no testimony from journal editors or conference organizers to substantiate its representations.

The district court granted summary judgment in favor of the FTC and denied OMICS's motion. Op. 1. The court noted that while OMICS opposed some of the FTC's facts, it did so "predominantly through arguments of counsel," which were not evidence and could not defeat the FTC's well-supported motion. Op. 2 n.2.

Undisputed evidence showed that OMICS represented "that [its] journals follow standard peer review processes," "have high impact factors," and "are included in reputable indexing services." Op. 15-16. None of these claims were true. *Id.* Rather, "[t]he uncontroverted evidence in the record" demonstrated that OMICS "made numerous express and material misrepresentations regarding [its] journal publishing practices." Op. 16. OMICS also failed to clearly disclose publication fees in emails or on websites soliciting articles. Op. 18. Even where fees were disclosed at all, the information was "difficult to find and lack[ed] specificity." *Id.* As to conferences, OMICS "advertise[d] the attendance and participation of prominent academics and researchers without their permission or actual affiliation." Op. 17. Had consumers known this, they likely would not have signed up. Op. 17.

The district court also held that the corporate defendants constituted a common enterprise, finding that "no real distinction exists between [them]": they shared the same principal place of business in India, used common addresses in the United States, and all were owned and founded by Gedela, who "maintained control over their business practices and financial accounts." Op. 19. Furthermore, Gedela was

individually liable for both monetary and injunctive relief because undisputed evidence "conclusively establishe[d]" his "knowledge, control, and participation in Defendants' deceptive acts." Op. 20.

3. The District Court's Relief Order

The court determined that a permanent injunction was necessary to prevent OMICS "from engaging in similar misleading and deceptive activities," noting that its wrongful conduct was not "an isolated, discrete incident of deceptive publishing, but rather sustained and continuous conduct over the course of years." Op. 21. It prohibited OMICS from making similar misrepresentations in the future, required certain disclosures in any publishing or conference organizing activities, and required OMICS to obtain written consent from any individuals before claiming an association with them, among other things.

The court directed $50,130,811 in equitable monetary relief, finding that amount to reasonably approximate the amount of money consumers lost to OMICS's schemes. Op. 22-24. OMICS had not offered its own calculation of consumer harm, instead simply objecting that the award should be reduced because some customers published multiple papers and therefore could not have been confused. *See* DE 110

(OMICS's Opposition to the FTC's Motion for Summary Judgment (OMICS Opp.)) at 41. But the court rejected that argument, noting that OMICS failed "to cite to any evidence supporting [its] assertion" and likewise failed "to proffer any evidence that 'repeat' authors are substantial or identifiable." Op. 24. Defendants now appeal.

SUMMARY OF ARGUMENT

Substantial unrebutted evidence showed that OMICS violated the FTC Act by misleading researchers about its journals and conferences in multiple ways. OMICS touted a "peer review" process that in fact was a sham. Detailed consumer declarations, OMICS's own documents, and the declaration of the FTC's expert demonstrated that articles were accepted without any comments from the supposed reviewer, more than half of its published articles received no form of peer review at all, and the "review" that did happen was superficial and took place in unreasonably short periods of time (in some cases, mere days).

OMICS likewise falsely told submitters that its journals were included in reputable indices. In reality, the National Institutes of Health, which runs the two most prominent indices touted by OMICS, had asked OMICS to stop advertising an affiliation where none existed.

OMICS's impact factor claims, too, were false: OMICS conceded that the numbers it advertised were not the industry-standard Thomson Reuters factors but rather self-calculated ratios of its own devise. OMICS likewise could not substantiate its claims that it had as many as 50,000 "experts" reviewing its journals' articles. The high fees OMICS charged for publication were deceptive, too, as OMICS did not adequately inform consumers that by submitting a manuscript they were irreversibly placing themselves on the hook for a significant payment.

OMICS also failed to rebut the FTC's substantial evidence that OMICS induced consumers to spend thousands to attend conferences it falsely claimed prominent researchers would attend.

1. On appeal, OMICS tries to manufacture factual disputes by arguing that the FTC's evidence was flawed. But argument is not evidence, and OMICS points to nothing in the record that rebuts the FTC's showing of deception. It relies almost entirely on Gedela's own declarations, but those statements cannot bear the weight OMICS places upon them. They amount to little more than blanket denials of wrongdoing and contain no detailed facts or supporting evidence to

contradict the FTC's extensive proof of deception. No jury could find in OMICS's favor on the basis of those statements.

To the degree OMICS provides any actual facts, they are insufficient to preserve its case. The sole consumer declaration submitted by OMICS states that one author feels she was not deceived. In the face of the FTC's overwhelming demonstration of deceit, such a sliver of evidence is too slim to defeat summary judgment. OMICS identifies a few other factual disputes over matters such as how long it takes to conduct peer review, but they are immaterial because they cannot affect the outcome of the suit. The possible length of the peer review process is irrelevant when the evidence shows that OMICS often conducted little or no peer review at all.

OMICS is wrong that the district court improperly relied on inadmissible hearsay. OMICS made no such argument below, and it is now waived. It fails on the merits anyway because the evidence was admissible under the residual exception to the hearsay rule of Federal Rule of Evidence 807. And even if not, any error was harmless in light of ample other evidence supporting the district court's determinations.

2. The district court correctly held Gedela individually liable for both injunctive and monetary relief. He controlled and had knowledge of OMICS's illegal activities. Specifically, he founded the OMICS companies and was the sole owner and principal controller of each one. He controlled the bank accounts and websites on which many of the deceptive representations were hosted. He created the publishing and conference organizing practices challenged here and developed OMICS's business model. He has personally solicited journal submissions and he wrote OMICS's response to NIH's complaints about OMICS's misleading claims. Finally, he admits involvement in responding to consumer complaints about OMICS. The Court has found personal liability for individuals far less involved.

3. The district court properly calculated the amount of equitable monetary relief. The FTC showed that OMICS's misrepresentations were widely disseminated, and OMICS concedes that there was actual injury. The district court thus correctly presumed consumer reliance, making OMICS's net revenues an appropriate initial measure of its unjust gains. OMICS could not shoulder its burden to prove lack of deception by pointing to hypothetical repeat submitters. It was required

to show affirmative evidence of a lack of deception, not merely an inference suggesting that possibility.

STANDARD OF REVIEW

The Court reviews a district court's grant of summary judgment de novo to determine "whether, viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact and whether the lower court correctly applied the relevant substantive law." *FTC v. Network Servs. Depot*, 617 F.3d 1127, 1138 (9th Cir. 2010). The judgment may be affirmed on any ground supported by the record. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008).

"[T]he mere existence of *some* factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986). Moreover, "bald assertions or a mere scintilla of evidence in [a party's] favor are both insufficient to withstand summary judgment." *Stefanchik*, 559 F.3d at 929. Rather, the party opposing summary judgment "must show a genuine issue of material fact by presenting

affirmative evidence from which a jury could find in [the party's] favor." *Id.* (citing *Anderson*, 477 U.S. at 257). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

This Court "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *Stefanchik*, 559 F.3d at 931.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENTERED SUMMARY JUDGMENT AGAINST OMICS

The district court correctly determined that undisputed facts showed that OMICS violated the FTC Act, warranting summary judgment against all defendants. OMICS tries to concoct disputes as to certain facts, arguing that the district court wrongly "determined several material disputed facts by weighing the evidence" and deciding those facts in the FTC's favor. Br. 10. But these "disputes" are based on arguments of counsel or conclusory, unsupported statements in Gedela's own declarations, or concern isolated, immaterial issues. They could not support a finding of non-deception.

A. Undisputed Facts Showed That OMICS Misrepresented Its Journals

The district court properly determined that undisputed facts showed that OMICS misrepresented its journals in multiple ways, including as to their peer review, editors, impact factors, and indexing.

1. OMICS Undisputedly Misrepresented Its Peer Review Practices.

The district court correctly determined that undisputed evidence showed that OMICS misrepresented its journals' peer review practices. Op. 15. OMICS concedes that it claimed all its journals' articles were peer reviewed prior to publication. SER548 (admissions 61-64).

Undisputed evidence showed not only that OMICS lacked any substantiation for its peer review claims, but that those claims were outright false. In many instances, there was no peer review at all, and to the degree any took place it was clearly not within the ordinary understanding of the term:

- The FTC's expert testified as to what peer review requires, including how long it typically takes, and opined that OMICS did not employ peer review within the commonly understood meaning of that process. ER120-21 ¶12-14, 125-26 ¶¶28-29 (Backus Decl.).

- Submitters testified that in their experience peer review takes a number of weeks if not months, and that it typically involves several rounds of edits. ER279 ¶4 (Katz); SER77 ¶4 (Vagefi). Multiple submitters also testified that OMICS accepted their manuscripts for publication within several weeks, or even days, of submission. SER77 ¶4; SER304, 314, 320, 324-25, 331; ER279 ¶4 (Katz); ER299 ¶4 (Hoevet); SER226 ¶4 (Hackett).
- Many articles were published without the authors ever receiving comments from any peer-reviewers, or with comments that were "not substantive." ER299 ¶4 (Hoevet); ER279 ¶4 (Katz); SER46 ¶5 (Regan); SER77 ¶4 (Vagefi); SER226 ¶4 (Hackett).
- In 2012 and 2016, two journalists independently submitted obviously flawed articles to OMICS journals, yet each article was published without any substantive comments. SER186-88 ¶¶3-7 (Bohannon); SER248 ¶¶2-3 (Spears). One article was unintelligible and contained made up words and ungrammatical sentences yet was published without OMICS even contacting the author.

- OMICS's internal records show that more than half of submitted articles received no review *at all*.[18] SER659 (RFPs 1-2); SER662-64; SER279 ¶10 (only 49% of the listed articles had any notation documenting review).

a. Facts cannot be "disputed" by argument or conclusory statements in a declaration.

On appeal, OMICS fails to identify any facts that could show that OMICS's peer review claims were truthful. OMICS points to three items in the record, but none shows a dispute of fact.

Two of the three citations are to its own legal briefs. Br. 14 (citing to 2 R. 48, 2 R 48-49, and 2 R. 62). They create no genuine dispute of fact because statements in briefs "are not evidence," and thus "cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

OMICS likewise cannot drum up disputed facts from the third record citation, to unsupported statements and blanket denials of wrongdoing in Gedela's declarations. Gedela states that OMICS's

[18] These records represented "the only data Defendants [had]" regarding OMICS's review of manuscripts. SER662-64.

review "process" is supported by a third-party software company, ER62 ¶¶24-25, and claims that "OMICS' peer review process is not misleading or deceptive," ER62 ¶26. The first statement is irrelevant: the software OMICS used has no bearing on whether the articles it published actually were peer reviewed. *See* SER237 ¶6 (Backus Suppl. Decl.). Testimony that "offers only speculative analysis that could cut either way" or "[a]rguments based on conjuncture or speculation are insufficient." *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 425-26 (9th Cir. 2018) (cleaned up); *see also Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996).

The second statement is insufficient: Gedela provides no support or detail for his assertion. In such circumstances, a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *see also AMG*, 910 F.3d at 425-26; *Anderson*, 477 U.S. at 248.

Notably, Gedela never states in his declaration that his journals' articles actually were reviewed by anyone prior to publication; he simply repeats the general claim that OMICS journals are peer

reviewed and denies that its review process was misleading. *See* ER62 ¶26 (Gedela Decl.). Even in its brief, the most OMICS can muster is that it "did not misrepresent its peer review practices," but it provides no meat on those bare bones and nowhere states that the articles published in its journals were actually peer reviewed. Br. 13-15. Such conclusory assertions are insufficient to avoid summary judgment. *Publ'g Clearing House*, 104 F.3d at 1171.

Two recent cases demonstrate the limitations of a defendant's own statements in overcoming summary judgment. In *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016) – also a deceptive marketing case – defendant had stated in his declaration that he had no control over marketing, was not responsible for what sales personnel said, and had no authority to approve or reject the challenged advertising. 819 F.3d at 1193-94. But in light of the declaration's lack of "'detailed facts and any supporting evidence,'" and other evidence suggesting defendant's control, this Court held that the declaration was "insufficient to raise a triable issue of fact." *Id.* at 1194 (quoting *Publ'g Clearing House*, 104 F.3d at 1171). Similarly, in *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court held that a summary judgment

opponent cannot create a dispute of material fact by testifying to a version of events that is "utterly discredited by the record" such that "no reasonable jury could have believed him." 550 U.S. at 380-81. Disregarding conclusory or "utterly discredited" statements thus is appropriate at summary judgment and does not, as OMICS claims (Br. 10), constitute improper "weighing" of evidence. *Id.*

Gedela's statements can no more serve to defeat summary judgment than those in *Gordon* and *Scott*. Indeed, allowing a declaration like Gedela's to defeat summary judgment would obliterate the goals of Rule 56 and hand defendants a trump card in enforcement proceedings. They could force an expensive and burdensome trial merely by concocting some story – however farfetched or unsupported – and putting it in a declaration. This Court should not condone such a result.

b. OMICS fails to identify any disputes that could support a finding of non-deception.

Even assuming the identified issues represent genuine factual disputes, they cannot support a finding that OMICS's practices were not deceptive. "To survive summary judgment, [a defendant] must identify some specific factual disagreement that could lead a fact-finder

to conclude that [the statements were] not likely to deceive." *AMG*, 910 F.3d at 425; *see also Stefanchik*, 559 F.3d at 929.

OMICS is wrong that "there is a genuine issue of material fact as to whether the peer review process necessarily takes weeks or months." Br. 14. There is no genuine dispute because, as the district court determined, OMICS offered no evidence to support this proposition. Op. 15. And even if there were a genuine dispute over the issue, it is immaterial because it would not affect the outcome of this matter. As discussed above, OMICS has not shown that it actually conducted any peer review – no matter how long it took – of more than half of its journals' articles, or meaningful review of the rest. SER279 ¶10].

In a last-ditch effort, OMICS makes the remarkable argument that it should not be liable because it "is merely the publisher of the journals" and is not responsible for the "fact that some reviews may have been hasty, or not done to the highest possible standard." Br. 14. But OMICS conceded that it—not some other party—was the one claiming that its journals strictly followed standard peer review practices (and reaping millions of dollars as a result). *See* SER548 (admissions 61-64); ER181-83 ¶¶21-25. OMICS cannot wash its hands

of the conduct that lined its pockets. Summary judgment was proper on the peer review claims.

2. OMICS Undisputedly Misrepresented Its Editorial Board Members.

Undisputed facts also showed that OMICS misrepresented its editorial board members. OMICS concedes claiming that its publications are reviewed and edited by as many as 50,000 experts. *See* SER601 (admission 180). Indeed, Gedela repeats these same claims in his declaration, stating that "OMICS Group . . . has been supported by 50000+ Editorial board members." ER63 ¶37.

The FTC produced evidence showing that the number was false. Damningly, the list of editors OMICS itself produced in discovery showed (a) that it could identify only 14,598 individuals that it claimed as editors (not 50,000), and (b) that OMICS only had verification that 380 of these people had agreed to serve as editors. Supporting that evidence, the declaration of Robert Howland states that OMICS listed him as an editor despite that he expressly declined to serve in that role (and then refused his repeated requests to remove him from its website). ER296-97 ¶¶4-8. Similarly, the declarations of Amina Woods, a biochemist, and Eric Everett, a professor, show that both initially

agreed to serve on the editorial boards of OMICS's journals but never received any manuscripts to review; they both later came to learn that OMICS's marketing materials misrepresented their roles.[19] *See* SER3 ¶¶3-4 (Woods) (falsely claiming she was editor-in-chief); SER7 ¶¶3-4, 9 (Everett) (falsely claiming he was participating in a conference).

In response, OMICS does not point to a single piece of evidence to substantiate its 50,000 editor claim or even its 14,000 purported editor list.[20] Rather, its argument consists of nit-picking the FTC's evidence showing the claims to be false. Br. 17-19.

OMICS's failure to produce any affirmative evidence rebutting the FTC's showing of falsity is fatal to its argument of error. Once a moving party provides evidence proving a point, "a non-movant must show a genuine issue of material fact by presenting *affirmative* evidence from

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[19] The FTC submitted both declarations to the district court in support of its preliminary injunction motion, and cited them in the Table of Exhibits attached to its Motion for Summary Judgment. DE 86-1. "[A]n appellate court may affirm a lower court's grant of summary judgment on any basis supported by the record," even if it is different from that relied on by the district court. *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994).

[20] Moreover, OMICS was required to have such substantiation *before* it made these claims, which it plainly did not. *See Direct Mktg. Concepts*, 624 F.3d at 8. This alone is sufficient grounds for granting summary judgment on this claim.

which a jury could find in his favor." *Stefanchik*, 559 F.3d at 929. There, defendants sold a get-rich-quick mortgage-trading program, claiming that consumers could earn $10,000 per month while working only 5-10 hours a week. *Id.* at 926-27. The FTC produced a survey showing that only one person reported making any money from the program. *Id.* at 928. The defendants contested the survey's methodology, but did not offer any "competent affirmative evidence of their own" showing its claims were true. *Id.* at 929. Given the FTC's evidence that consumers were deceived, the "absence of significantly probative contrary evidence" doomed defendants' attempt to avoid summary judgment. *Id.* So too here: OMICS fails to present any evidence that would allow a court to rule that its editor claims were truthful.

Moreover, OMICS's attempts to dismiss the FTC's evidence fail. OMICS claims this evidence – including its *own* list of editors – is "circumstantial." Br. 19. In fact, it is direct evidence of falsity. The district court would have been on firm footing to find deception on this basis alone.

In any event, OMICS concedes that the Howland declaration supports the FTC, but claims it is "a single instance where a person was

incorrectly listed as an editor." Br. 18. Not true. OMICS overlooks, among other evidence, the Woods and Everett declarations, both of which firmly support the FTC's case of deception. SER2-4 (Woods); SER6-43 (Everett); *see also* SER78 ¶6, 89 (Vagefi); SER48, 73 (Regan). It also ignores its own inability to show that more than 380 people (much less the claimed 50,000) actually were editors.

3. OMICS Undisputedly Misrepresented Its Journals' Impact Factors.

No disputed fact undermines the FTC's showing that OMICS's claim of high "impact factors" was deceptive. The FTC's expert explained in her declaration that "impact factor" is understood in the industry as referring to a specific figure: the Thomson Reuters proprietary measure of how often a journal's articles are cited. ER122 ¶¶15-16. OMICS concedes claiming its journals have high impact factors, Br. 15, and admitted below that its journals did not have Thomson Reuters impact factors, *supra* 14. OMICS nevertheless contends that the term "impact factor" has many meanings, and that its use of the term therefore was not deceptive because it referred to OMICS's own "self-calculated ratios based on the number of citations found through a Google Scholar search." Br. 16.

OMICS presented no evidence, however, that could show that the people who submitted articles to its journals understood "impact factor" to mean anything other than the industry-standard Thomson Reuters measure. This failure is fatal to its defense. *Stefanchik*, 559 F.3d at 929. While OMICS disagrees with the FTC's expert's testimony about how the term is understood in the industry, it offers no evidence to refute it. Gedela's declaration denies that OMICS's reference to impact factors is deceptive, and states that "there are many other metrics that are followed by most of the journals and publishers," but Gedela says nothing about how "impact factor" is understood in the academic publishing field. ER63 ¶29 (Gedela Decl.). That other metrics exist, Br. 16, does not render the FTC's expert testimony a disputed fact that prevents summary judgment. *See Stefanchik*, 559 F.3d at 929. At best, OMICS has cast "some metaphysical doubt as to the material facts"; it must come forward with specific facts in its support, and that, it failed to do. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).[21]

[21] *Matushita* applied a previous version of Rule 56, but the same principles apply to the modern Rule. *See, e.g., U.S. Postal Serv. v. Ester*, 836 F.3d 1189, 1198 (9th Cir. 2016).

4. OMICS Undisputedly Made Deceptive Indexing Claims.

Uncontroverted evidence in the record showed that OMICS falsely represented that its journals were included in reputable indexing services, such as Medline and PubMed. Op. 16. OMICS admits that none of its journals currently are indexed in Medline or PubMed. ER98 (OMICS admissions 13-14); ER101 (iMedPub admissions 13-14). And it is undisputed that the National Library of Medicine refuses to index OMICS's journals because of OMICS's disreputable publishing practices. Op. 16; *see* ER127-28 ¶¶32-36; SER269-73. There are no genuine issues of material fact about these "numerous express and material misrepresentations." Op. 16.

OMICS nevertheless contends that its statements about indexing meant only that OMICS journals are included in reputable indexing sites *like* Medline and PubMed, not those specific indices. Br. 20-21. OMICS did not make this argument to the district court, and therefore waived it. *E.g.*, *In re Rains*, 428 F.3d 893, 902-03 (9th Cir. 2005). In any event, the claim is untrue. OMICS claimed, for example, on its website that "*All* the published articles of the journal are included in the following indexing sites: Index Medicus, MEDLINE, PubMed, EBSCO,

EMBASE, Scopus, *and* in DOAJ." ER 247 (emphases added); Br. 21. Beyond that, the record contains no evidence that OMICS journals are indexed in any "reputable" indexing sites, so even OMICS's characterization of its claim is false. Nor was there any evidence that consumers understood these claims in the contorted way OMICS now urges. OMICS was required to have a reasonable basis for its claims before they were made, so this lack of substantiation alone is a sufficient basis for liability.

Finally, OMICS claims that it can be found liable for deceptive conduct only if "consumers, acting reasonably, could not avoid the alleged harm," which it contends they could have done. Br. 22. That is not the correct legal standard. The FTC Act creates an avoidable harm standard for *unfair* practices, but that standard does not apply to *deceptive* conduct, the type at issue here. *See* ER384 ¶45 (count I), *Id*. ¶48 (count II), ER385 ¶51 (count III); 15 U.S.C. § 45(n) (standard for unfair practices); *see also Cyberspace.com*, 453 F.3d at 1199 n.2 (rejecting similar avoidance argument). The FTC plainly met its burden to prove the applicable elements of deceptive practices: that OMICS made material representations that were likely to mislead consumers

acting reasonably under the circumstances.[22] *Stefanchik*, 559 F.3d at 928.

B. Undisputed Facts Showed That OMICS Misrepresented Its Conferences.

The district court likewise properly determined that "the uncontroverted evidence produced by the FTC" demonstrated that OMICS "engaged in material misrepresentations regarding [its] conferences." Op. 17. That evidence included results from an FTC survey that showed 60% of a sample of 100 OMICS conferences "advertised organizers or participants who had not agreed to serve in such a capacity." (*Id.*; ER168 ¶7 [McAlvanah Decl.]; ER178-81 ¶¶17-20); testimony from an individual who learned that OMICS was falsely advertising his participation in its conferences, even after he specifically declined to participate, and even after he later asked OMICS to remove him from its website (SER7-9 ¶¶3-11 (Everett)); and testimony from attendees and potential attendees who discovered that the people OMICS claimed would be featured at its conferences in fact were not involved (ER286-87 ¶¶3-5 (Hurwitz); SER204-05 ¶¶5-9 (Adiga); SER209-10 (Potapova)).

[22] OMICS does not challenge materiality.

1. OMICS Waived Its Hearsay Arguments By Failing To Raise Them Below.

Notably, OMICS does not contend that it presented evidence showing that its conference representations were true. Instead, OMICS argues that the FTC's evidence – although uncontested – should not have been considered because it included discussion of what the witness was told by others, and thus was alleged hearsay. Br. 23-25. OMICS points to statements by researcher Julia Hurwitz, who sought to confirm that certain advertised speakers would attend an OMICS conference and was told by two speakers that in fact they had not agreed to attend (ER286-87 ¶5), and to the declaration of the FTC's economist, Dr. McAlvanah, who analyzed responses to an FTC survey about OMICS conference participants. Br. 25-26.

"In general, this Court does not consider an issue raised for the first time on appeal." *In re Rains*, 428 F.3d at 902-03. More specifically, "to preserve a hearsay objection, a party must either move to strike the affidavit or otherwise lodge an objection with the district court." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002). OMICS did neither: it did not move to strike either declaration, nor did

it develop any hearsay argument in its myriad district court briefs.[23] OMICS wrongly states, without any citation, that the court relied on the alleged hearsay "[d]espite Defendants' objections,"[24] Br. 26, but this is false: OMICS made no specific objections to any of this evidence below, and therefore waived any hearsay argument.

Indeed, OMICS's only references to "hearsay" at all were passing generalizations buried in convoluted argumentation about other issues. *See*, *e.g.*, DE 110 (OMICS Opp.) at 20 ("The FTC is largely relying on declarations containing only hearsay statements of individuals other than the declarant[.]"). These "brief, conclusory statements made with no supporting legal argument . . . are insufficient to preserve" an issue for appeal. *United States v. Alisal Water Corp.,* 431 F.3d 643, 659 (9th Cir. 2005); *see also FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010) (holding that defendants waived arguments where they "cite[d] haphazardly" to a federal statute and case law "without

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[23] OMICS took the opposite position below, arguing that "hearsay is not an appropriate objection to the contents of an affidavit" at summary judgment. DE 108 at 2.

[24] OMICS also makes the same hearsay argument with respect to statements discussing consumer complaints in the FTC's attorney declaration. *See* Br. 18 (citing Rusu declaration). The argument is waived and invalid for the same reasons as here.

engaging in any application of those sources" or attempting to sketch out a rule that supports their proposition). Indeed, this Court has held that a statement that "several of the declarations are replete with hearsay statements which are completely inadmissible" is insufficient to preserve the issue for appeal.[25] *In re Rains*, 428 F.3d at 902-03. The same logic applies here.

Even if it could, the Court should not consider OMICS's hearsay arguments on appeal because the FTC plainly would be prejudiced by being "deprived the opportunity to amend or explain [the evidence] when the record was still open." *Zabriskie v. Fed. Nat'l Mortg. Ass'n*, 912 F.3d 1192, 1198 (9th Cir. 2019); *see Bieghler v. Kleppe*, 633 F.2d 531, 533-34 (9th Cir. 1980) (holding affidavit was admissible where opposing party "did not move to strike or otherwise object" to it). Had OMICS properly raised these evidentiary objections below, and won, the FTC could have offered other evidence in its place. For example, the FTC could have obtained testimony from the declarants about whom OMICS now complains, or offered other evidence to support the same

[25] This is especially so at summary judgment, where the court may consider hearsay "so long as the underlying evidence could be provided in an admissible form at trial, such as by live testimony." *JL Beverage Co. v. Jim Beam Brands Co.*, 828 F.3d 1098, 1110 (9th Cir. 2016).

points. *See Zabriskie*, 912 F.3d at 1198; *see also Parker v. Cmty. First Bank (In re Bakersfield Westar Ambulance, Inc.)*, 123 F.3d 1243, 1248 (9th Cir. 1997).

Regardless, to the extent they contained hearsay, the exhibits were admissible.[26] Hurwitz and McAlvanah had no reason to be untruthful, nor is there is any ground to doubt the statements' authenticity or reliability. Many of the statements are corroborated by other evidence of highly similar OMICS statements and practices. They thus are admissible under the residual exception of Federal Rule of Evidence 807. Indeed, courts routinely admit similar evidence in FTC cases over hearsay objections. *See*, *e.g.*, *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993) (holding that 127 consumer complaint letters were admissible under the residual exception); *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536, 2014 U.S. Dist. LEXIS 10240, at *16 (D. Nev. Jan. 28, 2014) (admitting, under the residual exception, consumer complaints from the FTC's database, the Better Business Bureau, and state consumer protection agencies). Moreover, experts like Dr.

[26] Some statements are also admissible for other purposes. For example, what Dr. Hurwitz was told by the two individuals is relevant to show its effect on her, the listener. *See* Fed. R. Evid. 801 (c).

McAlvanah may rely on hearsay if it is of a type ordinarily relied on by experts in the field, Fed. R. Evid. 703, and they are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge."[27] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). Relying on these declarations was not improper.

2. Ample Other Evidence Shows That OMICS's Conference Claims Were Deceptive.

Finally, even if the district court's reliance on any declarations was error, it was harmless because ample other evidence supports the district court's determination that OMICS's conference claims were misleading. For example, the declarations of Srikantha Adiga and Olga Potapova, both researchers who attended OMICS conferences, describe firsthand and in detail how OMICS deceived them into paying thousands of dollars to attend the conferences and book exhibit booths.[28] SER204 ¶¶3-5 (Adiga) (paid over €3,000]; SER209 ¶¶3-5 (Potapova) (paid $1,500). Upon arriving at the conferences, however,

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[27] The criminal case cited by OMICS (Br. 26) recognized this leeway, upholding a conviction despite expert testimony involving hearsay. *See United States v. Gomez*, 725 F.3d 1121, 1129 (9th Cir. 2013).

[28] Both declarations were submitted to the district court in support of the FTC's preliminary injunction motion, and cited in its summary judgment papers. DE 86-1. This Court may rely on them. *Supra* n. 19.

they found only sparsely attended, poorly organized gatherings that did not nearly resemble what OMICS had promised. SER204-05 ¶¶6-7; SER209-10 ¶¶5-6. Other attendees were equally upset about having been duped into believing these events were legitimate academic conferences. SER205 ¶¶8-10; SER210 ¶8. According to both researchers, many of the prominent researchers OMICS had advertised as participating were not, in fact, in attendance. SER205 ¶9 ("many of the speakers never showed up"); SER210 ¶7 ("many of the presenters on the schedule never showed up"). Ms. Potapova attached numerous documents corroborating her experience. SER212-17.

OMICS offered no substantive evidence to rebut these declarations. Gedela's declaration states that "OMICS does not intend to present any conference without respectable and qualified individuals," ER252 ¶34, but he does not contest that the promised attendees and sponsors were not there. And bad intent is not required to show violations of the FTC Act. *See*, *e.g.*, *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989). This kind of non-denial denial does not rebut the FTC's showing that OMICS's claims were untruthful. Gedela's other statements about OMICS's conferences – that they "are

in fact attended and promoted by well-known academics and researchers" (¶ 32), and that "occasionally people cancel or cannot attend" (¶33) – are conclusory, unsupported, and contradicted by the record. They do not show a genuine dispute of material fact. *Scott v. Harris*, 550 U.S. at 380-81; *Gordon*, 819 F.3d at 1193-94. The undisputed evidence shows that OMICS's conference practices were deceptive through-and-through.

C. Undisputed Facts Showed That OMICS Failed To Adequately Disclose Its Publication Fees.

There is no dispute that OMICS operated multiple websites and sent emails that urged authors to submit manuscripts for publication without stating that the author was obligated to pay fees if the manuscript was accepted – much less disclose the amount of the fees OMICS would charge.[29] Nor is there any genuine dispute that consumers were, in fact, deceived by OMICS's failure to state that authors would have to pay if their manuscript was accepted. That OMICS may have mentioned fees on other websites that authors were

[29] OMICS admitted that it "sent multiple recipients" emails that did not disclose fees. *See, e.g.,* SER607-13 (admissions 235-79).

not directed to before they submitted manuscripts, Br. 7, plainly was not enough to correct the inaccurate impression OMICS created.[30]

Numerous people testified, based on their own personal knowledge, that OMICS had solicited journal articles from them; that OMICS's solicitations had not disclosed their publication fees; that after submitting articles, they had received an invoice from OMICS for $1,000 or more in fees; and that the invoice was the first they heard of any fees. *See, e.g.,* ER299-300 (Hoevet); ER279-80 (Katz); SER46-47 ¶¶5-6 (Regan); SER77 ¶8 (Vagefi). Moreover, numerous submitters testified that once they learned of these fees, they asked for their articles to be withdrawn, but OMICS refused. *See, e.g.,* ER300 (Hoevet); ER279-80 (Katz); SER47 ¶6 (Regan); SER78 ¶8 (Vagefi).

OMICS argues for the first time on appeal that authors must have known its journals charged fees for publication because some of its solicitations indicated that its journals were "open access." Br. 27-28. This argument is waived because OMICS failed to raise it below. *See In re Rains*, 428 F.3d at 902-03. But it also is wrong, and OMICS offers no

[30] OMICS concedes that its solicitations did not direct authors to pages disclosing specific fees, instead noting that authors, on their own, "could go to the website omicsonline.org" and locate a particular button to then navigate to a page about article processing charges. Br. 7, 27.

competent evidence to support it. OMICS relies on a declaration from a single author, who claims that OMICS's fees "were clearly disclosed and reasonable," and that she "never felt misled or deceived about either the fee or the process." ER70 ¶14 (Orser Decl.). The declaration does not support OMICS's theory that submitters would have understood "open access" to mean that fees were charged. Moreover, it provides no evidence as to what this author was told about fees and when. At most, the Orser declaration could document that one submitter did not feel misled, but that does not refute the far larger number of declarants who felt otherwise. The law is clear that the existence of some satisfied consumers does not constitute a bar to liability. *Stefanchik*, 559 F.3d at 929 n.12. The lone declaration relied on by OMICS cannot carry the weight placed upon it, especially given the overwhelming evidence, discussed above, of consumer deception. *See Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit" will preclude summary judgment.).

OMICS argues, also for the first time, that it is unreasonable for a consumer to assume that a journal does not charge any publication fees. Br. 31. This argument, too, is both waived (because not made below, *see*

In re Rains, 428 F.3d at 902-03) and wrong. OMICS does not dispute that under traditional publishing practices, authors do not pay publication fees. Indeed, that numerous consumers who received OMICS solicitation emails did not understand that any fees would apply, and only learned of the fees when OMICS sent them invoices, refutes OMICS's theory of reasonableness.[31] *See* su5pra 18-19.[32] The same evidence also rebuts OMICS's contention, Br. 30, that highly educated customers could not be deceived.

II. THE DISTRICT COURT PROPERLY HELD GEDELA INDIVIDUALLY LIABLE FOR HIS COMPANIES' DECEPTIVE PRACTICES

The district court rightly concluded that Gedela had the requisite knowledge and involvement in his companies' deceptive practices to be held individually liable for both injunctive and monetary relief.

Individuals are liable for injunctive relief based on corporate violations if they participated directly in the violations or had authority to control the entities. *Grant Connect*, 763 F.3d at 1101-02; *Publ'g*

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[31] The confusion thus was real, not a "mere *possibility*" Br. 34. Actual confusion is not required, *AMG*, 910 F.3d at 422, but can be highly probative. *Cyberspace.com*, 453 F.3d at 1201.

[32] OMICS again wrongly relies on the standard for unfairness, not deception.

Clearing House, 104 F.3d at 1170-71. Individuals are also liable for monetary relief if they acted with knowledge of the unlawful conduct. *Grant Connect*, 763 F.3d at 1101-02. The knowledge requirement can be met by actual knowledge, reckless indifference to the truth or falsity of the statements at issue, or awareness of a high probability of fraud with intentional avoidance of the truth. *Grant Connect*, 763 F.3d at 1101-02; *Network Servs.*, 617 F.3d at 1138-39. Gedela's role met the requirements for both types of relief.

A. Undisputed Evidence Showed That Gedela Had Control Over, Was Personally Involved In, And Had Knowledge Of The Deceptive Practices

Gedela plainly had authority to control the corporate defendants and thus was properly held liable for the injunctive relief. Assuming the role of a corporate officer, being involved in business affairs, and helping make corporate policy show control. *Publ'g Clearing House*, 104 F.3d at 1170-71. Gedela founded all three companies and is the sole owner and principal officer of each one. Br. 3, 6; ER269 ¶9. He had signatory authority over all three companies' financial accounts, was the registrant for many of their websites, and was the point of contact for their service providers. Br. 3, 5-7; ER112 (Gedela admission 22);

ER269; *see also* SER176-83. There is no dispute that Gedela was in charge of all three corporate defendants during the relevant period, and that he continues to direct and oversee OMICS's remaining operations.

Undisputed evidence also showed that Gedela knew about and participated in the unlawful conduct, or at a minimum was recklessly indifferent to the truth or falsity of his companies' statements. Gedela put in place many of the publishing and conference organizing practices challenged in this lawsuit: he developed the "open access" business model under which OMICS charges publication fees. ER61 ¶¶5-12. He determined the membership of OMICS journal editorial boards and selected their editorial management software. SER668 (lines 63:1-63:24), 672-73 (lines 188:18-189:8, lines 189:19-190:15). Indeed, in OMICS's early years, Gedela personally sent solicitation emails to consumers. *See* SER366-69. He also authored OMICS's May 2013 response to NIH's cease and desist letter, which raised many of the same problematic practices at issue in this litigation. DE36-4 at 2-3 (Gedela letter), 4-5 (NIH letter). And Gedela admits that he was

involved in responding to consumer complaints about OMICS.[33] ER112 (Gedela admission 20).

These activities alone show that Gedela was sufficiently involved in and aware of his companies' deceptive practices to hold him liable for monetary relief. It is undisputed that Gedela was at the helm of OMICS's operations throughout the relevant six year period. *See* Br. 6. And as discussed above, undisputed facts show that deception pervaded OMICS's core activities, which involved layer upon layer of misrepresentations to consumers and resulted in over $50 million flowing to OMICS.[34] The facts likewise show that Gedela vigorously defended these misrepresentations and persisted making them when they were challenged by NIH and the FTC. *See* ER127-29 ¶¶32-37; SER543 (admission 54); SER564-65 (admissions 96-99); DE 36-4 at 2-3; SER544. Individual liability is appropriate in these circumstances.

Indeed, this Court has imposed liability for monetary relief on individuals with far less of a role in a corporation's unlawful conduct.

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[33] OMICS thus is flatly wrong that "there is no evidence" showing Gedela's knowledge. Br. 2.

[34] OMICS ignores that the district court relied not only on the specific evidence cited, but also on "the evidence" "in aggregate." Op. 20.

For example, in *Cyberspace.com*, this Court affirmed the individual liability of a corporate officer for his company's deceptive marketing scheme where he "reviewed at least some" of the solicitations at issue and had been told about complaints – notwithstanding his claim that he believed the solicitations did not violate the law. 453 F.3d at 1202. Likewise, in *Publishing Clearing House*, liability for monetary restitution was upheld as to an individual who had briefly served as the company's president but did little more than file for its business license, answer phones, and sign a contract on the company's behalf. 104 F.3d 1168. And in *Network Services*, this Court held that "turn[ing] a blind eye" toward problems and continuing to disseminate the challenged claims despite awareness of complaints was enough to show reckless indifference – and thus knowledge – as a matter of law.[35] 617 F.3d at 1141. OMICS relies on *FTC v. Johnson* (Br. 38-39), but Gedela's role more closely resembles that of the CEO held liable there (not the secondary individuals). 156 F. Supp. 3d 1202, 1209 (D. Nev. 2015). Both were in charge of their companies, signed legal documents, had

[35] The Court also addressed evidence suggesting the individuals' actual knowledge, 617 F.3d at 1139-40, but separately held that the knowledge requirement was met "[e]ven assuming" they lacked actual knowledge. *Id.* at 1140.

signatory authority over accounts, and were aware of complaints. *See id.*

As discussed above, Gedela's own declarations do not raise a triable issue of fact as to his liability because they "lack[] detailed facts and any supporting evidence." *CFPB v. Gordon*, 819 F.3d at 1193-94 (cleaned up) (holding individual liable despite his own "conclusory, self-serving affidavit"); *see also Publ'g Clearing House*, 104 F.3d at 1171. If anything, his declarations confirm his central role in OMICS's business, attest that he knows how the companies operate, and endorses the deceptive practices. *See, e.g.,* ER251 ¶21 (Gedela Decl.) (describing "[m]y desire in having a publication fee once an article has been selected for publication"). Gedela does not claim that he was unaware of the misleading practices; rather, he maintains there is nothing wrong with making the challenged claims. *See* ER60-68. The district court properly held him individually liable for both types of relief.

III. THE DISTRICT COURT PROPERLY CALCULATED EQUITABLE MONETARY RELIEF

Finally, OMICS attacks the district court's award of equitable monetary relief, claiming the court used the wrong legal standard and that the award was calculated incorrectly. But OMICS had ample

opportunity to present evidence to show an alternative amount of monetary relief, and failed to do so. On abuse-of-discretion review, OMICS cannot simply ask this Court for a do over. The monetary award was a reasonable approximation of both the injury OMICS's deceptive practices caused and OMICS's unjust gains, and was well within the bounds of proper relief.

A. The District Court Used The Correct Legal Standard

The district court properly applied the two-step burden shifting framework this Court adopted in *Commerce Planet* to calculate monetary relief. Op. 22-24. OMICS argues the court applied "an incorrect legal standard," Br. 41, but OMICS misconstrues the *Commerce Planet* framework and the respective burdens it places on the FTC and OMICS. *See* Br. 41-48.

Under this framework, the FTC bears the initial burden of providing a reasonable approximation of OMICS's unjust gains. *FTC v. Commerce Planet*, 815 F.3d 593, 603 (9th Cir. 2016). Exact precision is not required; a reasonable estimate suffices. *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008). "If the FTC makes the required threshold showing, the burden then shifts to the [Defendants] to show that the

FTC's figures overstate the amount of [their] unjust gains." *Commerce Planet*, 815 F.3d at 604. "Any risk of uncertainty at this second step falls on the wrongdoer whose illegal conduct created the uncertainty." *Id.* (cleaned up). Indeed, "[a] monetary award often depends on estimation, for defendants may not keep (or may conceal) the data required to make an exact calculation." *QT*, 512 F.3d at 864.

Moreover, if the FTC shows that a defendant's misrepresentations were widely disseminated and caused actual consumer injury, it is entitled to a presumption that all purchasers relied on the misrepresentations. Op. 24; *Commerce Planet*, 815 F.3d at 604; *Figgie*, 994 F.2d at 605-06. OMICS concedes that this is the test for the presumption, and recognizes the purpose behind it: that "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]." *Figgie*, 994 F.2d at 605; *see* Br. 50.[36] When this presumption applies, it follows that net revenues are an appropriate measure of equitable relief, *i.e.*, that the proceeds from *all*

[36] *Figgie* involved Section 19 of the FTC Act and not (like this case) Section 13(b), but the Court adopted the reasoning for the presumption from Section 13(b) precedent. 994 F.2d at 604.

sales are unjust gains. *Id.* at 604 (noting that "all of the $36.4 million in net revenues represented presumptively unjust gains").

OMICS disagrees, arguing that the district court should not have used net revenues as the basis for its award and that profits provide a more appropriate measure. But this Court has flatly rejected that argument time and again. *See, e.g., Commerce Planet*, 815 F.3d 593 (9th Cir. 2016) (explaining that defendant's unjust gains are measured by its net revenues); *AMG*, 910 F.3d at 427-28 (holding that an award properly "is measured by 'the defendant's net revenues . . . not by the defendant's net profits'"); *Stefanchik*, 559 F.3d at 931 ("[C]ourts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits."); *see also FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010) (upholding $48 million in disgorgement based on "consumer loss" proven by defendants' "gross receipts").

Indeed, as the Second Circuit has noted, the argument that profits, not revenues, should be the basis for monetary relief is "equivalent to an armed robber's seeking to deduct the cost of his gun from an award of restitution, [and] could stand with the classic

patricide who claims mercy as an orphan as an illustration of the concept of chutzpah." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 n.11 (2d Cir. 2011). "[I]t is well established that defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts." *Id.* (cleaned up).

B. The FTC Met Its Burden To Show That The Requested Relief Was A Reasonable Approximation Of Harm To Consumers

The FTC satisfied its burden to reasonably approximate the amount of consumer harm. It presented evidence from OMICS's own tax returns and financial records that showed gross revenues of $50,740,100 and $609,289 in refunds, making OMICS's net revenues approximately $50,130,811.[37] ER181-83 ¶¶21-25. It was undisputed that OMICS made its misrepresentations on its public websites – which Gedela says have been viewed by 15 million consumers, ER252 ¶37 – and in numerous targeted emails and messages to consumers. This plainly satisfies the wide dissemination condition for the presumption of reliance. *See Commerce Planet*, 815 F.3d at 603-04.

[37] All revenue amounts are from the period August 25, 2011 through July 31, 2017 unless otherwise noted.

OMICS contends, however, that this presumption can show only the fact of harm, not the amount of monetary relief. Br. 43. This is wrong. Courts routinely use the presumption of reliance to calculate monetary relief awards in the amount of a defendant's net revenues – not merely to establish that injury occurred. For example, in *Commerce Planet*, this Court determined that the presumption applied, and thus that all purchasers relied on the misrepresentations in buying defendants' product. *Id.* at 604. It then proceeded to use the amount of defendant's net revenues as the presumptive measure of unjust gains. *Id.* Monetary relief awards in FTC cases calculated the same way are routinely upheld in this and other Circuits. *See, e.g., AMG*, 910 F.3d at 427-8 (upholding $1.27 billion award based on revenue from undisclosed charges);[38] *Bronson Partners*, 654 F.3d at 374-75 (upholding award for $1.9 million, the amount of defendant's revenues); *Direct Mktg. Concepts, Inc.*, 624 F.3d at 14-15 (upholding $48 million in disgorgement based on "gross receipts").

[38] In *AMG*, the court calculated unjust gains in an amount less than AMG's total net revenues only because there was a clear portion of the cost that had been fairly disclosed. 910 F.3d at 427-28. The same is not true here, where OMICS's deception infected the entire purchase.

FTC v. Inc21.com Corp., 745 F. Supp. 975 (N.D. Cal. 2010), is similar. The evidence of deception was especially "overwhelming" there, but the presumption does not depend, as OMICS suggests (Br. 43), on "virtually all" consumers being misled. And there, like here, the defendants failed to put forth "alternative calculations" or evidence showing that the FTC's calculations were inaccurate. *Id.* at 1013.

As in these cases, "the FTC was entitled to a presumption that all consumers who purchased [from Defendants] did so in reliance on the misrepresentations." 815 F.3d at 604. *All* of the $50.1 million thus "represented presumptively unjust gains," and the burden shifted to OMICS to show that this figure overstates the consumer injury. *Id.*

C. OMICS Failed To Meet Its Burden To Prove Any Reductions To The Award, Including Sales To Repeat Customers

In an attempt to reduce the monetary award, OMICS argued in the district court that the "extremely small" number of consumer complaints and the single consumer declaration it offered constituted "affirmative evidence of non-confusion" showing that "not all consumers were misled." DE 110 (OMICS Opp.) at 40-41. OMICS made no attempt to quantify the amount by which the revenue number was overstated,

nor did it request any specific reduction. OMICS's argument that "not all consumers were confused," Br. 40, thus fails to show any error.

1. The District Court Rightly Rejected OMICS's Speculation That Repeat Customers Could Not Have Been Harmed

In another effort to find fault with the award, OMICS argues that it was improper to include sales from repeat customers. According to OMICS, repeat customers could not have been deceived because they elected to buy something from OMICS again. Not only is this argument wrong as a matter of logic, it also is unsupported by any facts, and the district court properly declined to embrace it. Op. 24.

OMICS urges this Court to adopt a rule under which it would "presume that repeat customers are *not* confused, unless the FTC proves specific facts that show otherwise." Br. 46. But such an approach is foreclosed by precedent, which holds the opposite: once the FTC reasonably approximates the unjust gains, *defendants* must prove that any deductions are warranted. *Commerce Planet*, 815 F.3d at 604.

Indeed, *AMG* demonstrates that courts should not deduct sales from repeat customers unless the defendant offers concrete, affirmative evidence that such customers were not deceived. In refusing to exclude

repeat sales from the monetary award, the *AMG* Court emphasized that defendant "ha[d] not pointed to specific evidence that indicate[d] one way or another whether repeat customers were actually deceived," nor had it provided any "'reliable method of quantifying what portion of the consumers who purchased . . . did so free from deception.'" 910 F.3d at 428 (quoting *Commerce Planet*).

So too here. OMICS apparently assumes that "an author deceived by [its] failures to disclose fees would not submit another article." Op. 24. But, as noted, it offered no evidentiary basis for that assumption, and did not identify even a single repeat customer who was *not* deceived by OMICS's fee practices. Op. 24 (noting lack of "any evidence" that repeat authors are "substantial or identifiable"). The single consumer declaration OMICS offered was not from a repeat customer, but merely a one-time author. *See* ER69-70 ¶10 (Orser Decl.). This was insufficient to meet its burden. *See Commerce Planet*, 815 F.3d at 604; *AMG*, 910 F.3d at 428. It also ignored that even a consumer willing to pay OMICS's publication fees in exchange for all of the promised benefits could have been deceived by OMICS's numerous other misrepresentations about its journals' prestige and quality. The district

court properly refused to speculate about this hypothetical group of repeat customers absent evidence of their existence and non-deception. Op. 24.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 13,739 words.

October 11, 2019

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