

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17270

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

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

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

**OPENING BRIEF OF PLAINTIFF-APPELLANT
FEDERAL TRADE COMMISSION**

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

OF COUNSEL:

FAYE CHEN BARNOUW
MARICELA SEGURA
Federal Trade Commission
Los Angeles, California

RUTHANNE M. DEUTSCH
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3677
rdeutsch@ftc.gov

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
JURISDICTION.	1
STATEMENT OF THE ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.	4
1. PBS’s Deceptive And Abusive Telemarketing Of Magazine Subscriptions.....	4
2. Defendants’ Willingness To Flout Court Orders.	12
3. Proceedings Below.	14
STANDARD OF REVIEW.....	26
SUMMARY OF ARGUMENT.....	27
ARGUMENT.....	30
I. The District Court Erred In Refusing To Afford Full Relief To Consumers Injured By Defendants’ Deceptive Practices.	30
A. The District Court Erred In Rejecting The Full Amount Of Consumer Losses As The Appropriate Measure Of Equitable Relief For PBS’s Widespread Deceptive and Abusive Practices.	31
B. Dr. Duncan’s Analysis Contradicted Well-Established Law, The District Court’s Summary Judgment Ruling, And The Facts.....	38

II. The District Court Clearly Erred In Declining To Hold All Defendants Liable For Monetary Equitable Relief. 44

A. Each Defendant Knew Or Should Have Known Of PBS’s Continuing Deceptive And Abusive Practices. 45

B. Each Individual Defendant’s Participation In PBS’s Operations Independently Satisfies The Knowledge Requirement. 48

CONCLUSION. 52

COMBINED CERTIFICATIONS

TABLE OF AUTHORITIES

CASES	PAGE
<i>American Home Prods. Corp. v. FTC</i> , 695 F.2d 681 (3d Cir. 1982).	39
<i>Anderson v. City of Bessemer</i> , 470 U.S. 564 (1985).	26
<i>FTC v. Affordable Media LLC</i> , 179 F.3d 1228 (9th Cir. 1999).	46, 48*
<i>FTC v. Amy Travel Serv. Inc.</i> , 875 F.2d 564 (7th Cir. 1989).	44, 48*
<i>FTC v. Bronson Partners, LLC</i> , 654 F.3d 359 (2d Cir. 2011).	32, 33, 37*
<i>In re Cadence Indus. Corp., Perfect Subscription Co., and Keystone Readers' Serv., Inc.</i> , 95 F.T.C. 803, 1980 FTC LEXIS 80 (1980).	13
<i>FTC v. Cyberspace.Com, LLC</i> , 453 F.3d 1196 (9th Cir. 2006).	18, 39, 40*
<i>FTC v. Direct Mktg. Concepts, Inc.</i> , 624 F.3d 1 (1st Cir. 2010).	32, 35
<i>FTC v. Febre</i> , 128 F.3d 530 (7th Cir. 1997).	32, 33, 35, 37*
<i>FTC v. Figgie Int'l, Inc.</i> , 994 F.2d 595 (9th Cir. 1993).	24, 32, 34, 36*

* Key authorities.

<i>FTC v. Freecom Communs., Inc.</i> , 401 F.3d 1192 (10th Cir. 2005).....	33
<i>FTC v. Gill</i> , 265 F.3d 944 (9th Cir. 2001).....	32*
<i>FTC v. Grant Connect LLC</i> , --- F.Supp.2d ----, 2011 WL 5149187 (D. Nev. Oct. 25, 2011).	40
<i>FTC v. Kitco of Nevada, Inc.</i> , 612 F. Supp. 1282 (D. Minn. 1985).	33
<i>FTC v. Kuykendall</i> , 371 F.3d 745 (10th Cir. 2004).....	32, 33*
<i>FTC v. Network Servs. Depot, Inc.</i> , 617 F.3d 1127 (9th Cir. 2010).....	26
<i>FTC v. Pantron I Corp.</i> , 33 F.3d 1088 (9th Cir. 1994).....	36, 37, 47*
<i>In re Perfect Film & Chemical Corp.</i> , 78 F.T.C. 990, 1971 FTC LEXIS 125 (1971).....	13
<i>FTC v. Publ'g Clearing House</i> , 104 F.3d 1168 (9th Cir. 1997).....	44
<i>FTC v. Security Rare Coin</i> , 931 F.2d 1312 (8th Cir. 1991).....	32, 33*
<i>FTC v. Standard Educ. Society</i> , 302 U.S. 112 (1937).	35
<i>FTC v. Stefanchik</i> , 559 F.3d 924 (9th Cir. 2009).....	26, 32, 34, 39, 46*
<i>FTC v. Think Achievement Corp.</i> , 312 F.3d 259 (7th Cir. 2002).....	37

<i>Giant Food Inc., v. FTC,</i> 322 F.2d 977 (D.C. Cir. 1963).....	40
<i>Las Vegas Sands, LLC v. Nehme,</i> 632 F.3d 526 (9th Cir. 2011).....	26, 27
<i>Mathews v. Chevron Corp.,</i> 362 F.3d 1172 (9th Cir. 2004).....	27
<i>Removatron Int’l Corp. v. FTC,</i> 884 F.2d 1489 (1st Cir. 1989).....	40
<i>Resort Car Rental Sys., Inc. v. FTC,</i> 518 F.2d 962 (9th Cir. 1975).....	40
<i>SEC v. First City Finance Corp., Ltd.,</i> 890 F.2d 1215 (D.C. Cir. 1989).....	35
<i>Southwest Sunsites, Inc., v. FTC,</i> 785 F.2d 1431 (9th Cir. 1986).....	48
<i>United States v. Hinkson,</i> 585 F.3d 1247 (9th Cir. 2009).....	26, 27, 51
<i>Vanderbilt Univ. v. ICOS Corp.,</i> 601 F.3d 1297 (Fed. Cir. 2010).....	44

DOCKETED CASES

<i>Johnson v. Publishers Business Services, Inc.,</i> No. 2:07-CV-01394 (E.D. Cal. June 3, 2008).....	14
--	----

FEDERAL STATUTES

Federal Trade Commission Act:

15 U.S.C. § 45(a)..... 1, 2

15 U.S.C. § 53(b)..... 1

28 U.S.C. § 1291. 1

28 U.S.C. § 1331. 1

28 U.S.C. § 1337(a)..... 1

28 U.S.C. § 1345. 1

RULES AND REGULATIONS

Fed. R. App. P. 32(a)(7)(B)..... 53

Telemarketing Sales Rule, 16 C.F.R. Part 310. 1, 2

16 C.F.R. §§ 310.2(a)(2). 19

16 C.F.R. § 310.3(a)(4). 19

16 C.F.R. § 310.4(b)(1)(i). 19

16 C.F.R. § 310.4(d). 19

16 C.F.R. § 310.6(b)(7)..... 17

JURISDICTION

The Federal Trade Commission (“Commission” or “FTC”), an independent agency of the United States government, brought suit under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), in the United States District Court for the District of Nevada. The FTC sought a permanent injunction and ancillary equitable relief as remedy for defendants’ deceptive and abusive telemarketing of magazine subscriptions – conduct that violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310 (“TSR”). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345; and 15 U.S.C. § 53(b).

This Court’s jurisdiction to review the district court’s final judgment, entered on July 25, 2011, ER.8,¹ is based on 28 U.S.C. § 1291. The Commission timely filed its Notice of Appeal on September 23, 2011. ER.1-2.

STATEMENT OF THE ISSUES PRESENTED

1) Whether the district court erred in abandoning the long-settled rule that where, as here, it is undisputed that a company has engaged in widespread deceptive and abusive practices in violation of the FTC Act, the ordinary measure of equitable monetary relief is the full amount of ill-gotten gains – gross revenues less any refunds.

2) Whether the district court clearly erred in declining to find every individual

¹ Citations to the Commission’s Excerpts of Record are designated “ER ...” Other items in the district court docket are referred to as “D...”.

defendant jointly and severally liable for monetary relief, in the face of overwhelming evidence demonstrating that each individual defendant was actively involved in and knew of the deceptive and abusive conduct.

STATEMENT OF THE CASE

This case involves a magazine subscription scam in which recidivist defendants engaged in widespread deceptive and abusive telemarketing practices. On May 14, 2008, the Commission filed its complaint for injunctive and other equitable relief. D.1. As amended, the Commission’s complaint alleged that a closely-knit family business, comprising two corporate and six individual defendants, violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), and related provisions of the TSR, 16 C.F.R. Part 310, by deceptively and abusively telemarketing magazine subscriptions. ER.411-21. The corporate defendants, jointly pursuing a common enterprise, were Publishers Business Services, Inc., and Ed Dantuma Enterprises, Inc. (“EDE”), also d/b/a Publishers Direct Services (“PDS”) and Publishers Business Services (collectively, “PBS”). Six members of the Dantuma family served as corporate officers and managers: Edward Dantuma, Dries Dantuma, Persis Dantuma, Brenda Dantuma Schang, Dirk Dantuma, and Jeff Dantuma.²

² Corporate and individual defendants are collectively referred to as “PBS.” This brief refers to each family member by his or her first name, and to the six individual defendants collectively as “the Dantumas,” or “the Dantuma family.” These references do not include Persis and Ed’s two other adult children, who were not

On June 3, 2008, the district court (per Hon. Philip M. Pro) entered a stipulated preliminary injunction enjoining all defendants from engaging, directly or indirectly, in deceptive or abusive sales and collection practices in relation to the sale of magazine subscriptions. ER.422-30. On April 7, 2010, the district court granted the Commission summary judgment on all counts, and permanently enjoined all defendants from further deceptive and abusive sales practices. ER.27-60; ER.9-26. The defendants do not contest their liability and have not filed a cross-appeal.

After an evidentiary hearing on monetary relief, the district court rejected the Commission's argument that, in accordance with well-established precedent under the FTC Act, the proper measure of monetary relief for defendants' widespread violations of the FTC Act was defendants' gross receipts (revenues less consumer refunds) – an amount the parties agree is approximately \$34.4 million. Instead, the district court limited monetary relief to less than 1% of defendants' proceeds, based on an admittedly partial analysis by PBS's expert that flatly contradicted the court's own liability ruling. ER.7. Moreover, although the district court entered a permanent injunction as to all defendants, it declined to hold all defendants jointly and severally liable for monetary relief. Only two individual defendants, Edward and Dries, were found liable for equitable monetary relief, in addition to the corporate defendants.

involved in the family business and were not named in the complaint.

STATEMENT OF FACTS

During the period at issue in this case, January 2004 through August 2008, PBS made approximately 25 million telemarketing calls. ER.37. More than 99% of the roughly 25 million consumers who received these calls made no purchase, ER.153, ¶ 14, likely recognizing PBS' tactics as a scam, before PBS was even able to finalize its sales pitch. Even so, given the sheer volume of calls made, PBS still managed to collect more than \$34 million from those consumers who did succumb to its high pressure tactics – sales and collection practices that the district court concluded were deceptive and abusive, violating both the FTC Act and the TSR. ER.59.

1. PBS's Deceptive And Abusive Telemarketing Of Magazine Subscriptions.³

PBS's scheme worked this way: its telemarketers placed cold calls to hundreds of thousands of small businesses each month. ER.29; ER.37. The calls were placed to businesses whose contact information (in the form of Dun and Bradstreet "lead cards") PBS purchased from Dirk Dantuma. ER.29; ER.399-400; *see also* ER.383 at 77:2-6. Although PBS directed its calls to the businesses' phone numbers, its victims were the individual consumers who answered the telephone, not the businesses for which they worked. ER.29. By design, PBS's telemarketers typically called busy multi-tasking

³ The description of PBS's scheme is taken primarily from the court's summary judgment ruling, a ruling which is uncontested on appeal.

workers – such as the office receptionist whose job is to field numerous calls or the store clerk responsible for greeting walk-in customers or ringing up purchases – in other words, people likely to be easily distracted and unable to listen attentively to what PBS telemarketers were saying. *See, e.g.*, ER.352-53, ¶ 10; ER.367-68, ¶ 9; ER.309, ¶¶ 2-3; ER.290-91, ¶¶ 3-5. As one former PBS telemarketer explained, “[g]enerally the younger, lower-level, busy, less inquisitive, and less assertive employees of a business were thought to be easier targets,” and “prize” business prospects were retail or service providers whose employees “were likely to pick up the phone ... were busy with their own customers, and were more likely to go along with whatever the telemarketer said.” ER.340-41, ¶ 24.

PBS telemarketers, working from a script, told whoever answered the phone that they were conducting a survey on their “personal buying habits.” ER.29. Consumers were told, “if you could help me we have a small surprise for you, nothing big but it’s nice.” *Id.* The person answering the phone was then asked a few simple questions such as “may I ask your age and what you do at ___?” *Id.* “How long have you been employed...?” *Id.* “What do you most often use, money order, credit card or check?”

Id. Consumers sometimes agreed to answer the survey questions because they thought the survey was being conducted by their employer, *see, e.g.*, ER.300, ¶ 2, or for fear of offending a potential customer, *see, e.g.*, ER.301, ¶ 3.

After thanking the consumer for helping, PBS telemarketers told the consumer that he or she would receive, “with our best wishes,” a subscription to various magazines. ER.29-30. Consumers were told that magazine advertisers had “authorized [PBS] to send the magazines . . . to assure them that their ads will be read.” ER.30. PBS telemarketers assured consumers that they would receive a “guarantee stating that everything I am promising you is correct,” and that PBS is “not going to ask you to buy any cash subscriptions or anything like that.” *Id.* They were promised that there was “no catch involved.” *Id.*

But there was a catch. Although the telemarketers reassured consumers that they were not being asked to buy anything, the telemarketers did ask consumers “to thank us in return by helping to defray the cost of getting [the magazines] out to you * * * [for] only \$2.76 a week.” *Id.* In describing these charges, the telemarketers progressively switched from weekly, to monthly, to bimonthly payment options, although never clarifying what was being paid for, or the total price. *Id.* PBS sales agents then informed the consumers that “most people I’ve talked to today have been more than happy to go along with this,” and that the magazines the consumer would receive are “quite a lot for just \$2.76 a week.” *Id.*

Thus, the telemarketers’ spiel conveyed the impression that consumers were answering a survey, that the company would send free magazines in appreciation for

the consumer's taking the time to respond to the survey, and that the consumers were merely being asked to pay a nominal fee to cover shipping and handling charges. *Id.* In short, consumers were left with the impression from this first call that they were being offered a "free gift." *See* ER.40; ER.53-54; *see also e.g.*, ER.348, ¶ 15; ER.309, ¶¶ 2-3; ER.290, ¶ 3; ER.314, ¶ 2.

After this initial conversation finished, PBS telemarketers would hand off the calls to a "supervisor." ER.30. Supervisors told the consumers that they were merely "double-check[ing]" the information already given, and, under the pretext of "reviewing" the "order" information, advised the consumer of payment terms – first describing a monthly payment, and then suggesting that consumers front-load the payments by paying \$29.90 per month (thereby paying the entire five years of weekly payments in 24 months). ER.31. Neither the initial sales pitch, nor the follow-up with the supervisor, were tape recorded. ER.397-98 at 245:24-246:2; ER.62:22-25; ER.63:1-15.

Shortly after the initial sales call, consumers would receive another call, again at work, this time from a "verifier." ER.32. Verifiers began by thanking consumers for participating in the survey and asking whether the information could be verified on tape. This initial portion of the call, in which the verifier suggests to the consumer that no new terms will be introduced, is not recorded. ER.33; *see also* ER.356-57, ¶ 9.

Speaking quickly, verifiers repeat some of the survey questions and record the answers. Consumers often wouldn't pay attention because they were busy at work and understood that they were under no obligation to purchase anything. ER.307, ¶ 2-3; ER.309, ¶ 2-3. And, even if a listener *was* trying to catch the disclosure of new terms, such information was, at best, difficult to absorb, and at worse, unintelligible. Some consumers found verifiers to be “deliberately tricky and confusing,” ER.318, ¶ 11, and “trying to lose [them] in the conversation,” ER.290-91, ¶ 5; *see also, e.g.*, ER.361-63, ¶¶ 26, 28; ER.301-02, ¶¶ 3-5.⁴

Laced within the call, verifiers would also obtain consumers' apparent consent to the sale of magazines, and would inform consumers, for the first time, that the magazine subscriptions could not be cancelled, and that the “suggested” front-loading of payments was actually a requirement. ER.54; *see also* ER.292, ¶ 8; ER.298, ¶ 6. The verification script called for use of the monthly payments to describe the payment plan, ER.33, and verifiers were instructed to avoid telling customers the total price if possible, ER.34. PBS agents informed customers that they could change the magazines

⁴ PBS verification employees spoke so quickly that, even if a listener was looking out for the disclosure of new terms, such terms were, at best, difficult to absorb, and at worst, unintelligible. During discovery, certified court reporters were unable to fully transcribe PBS verification call recordings. *See, e.g.*, ER.282, ¶ 12. These recordings are available in the record. *See, e.g.*, FTC Exh. 37 (“verification” recording of FTC witness Bobby Dales, admitted on 3/30/2011); FTC Exh. 38 (“verification” recording of FTC witness Jose Polo-Rivas, admitted on 3/31/2011).

they subscribed to, but did not inform customers of the change fee. ER.42. Some orders were processed as “verified” even when verifiers failed to fully disclose terms and even when customers stated that they did not agree to purchase magazines. ER.35. One PBS verifier, for example, made numerous incomplete recordings, and on many occasions failed to accurately inform the customer of the terms of the offer. *Id.* “In one instance, [she] continued the verification even after the customer hung up the phone.” ER.36. Contradicting defendants’ testimony that verifiers that do not follow the script were fired immediately, ER.35, this verifier was promoted to supervisor, ER.36.

Only later, when PBS sent out written confirmations, did consumers realize what they had “agreed” to. Shortly after the inaptly-named “verification” call, and for the first time in this process, PBS sent a written invoice to the customer which included the price of the subscription, the length of the subscription, the terms of the agreement, and the non-cancellation policy. ER.36; *see also* ER.295. Consumers typically responded to this mailing by either (1) ignoring the invoice, because the information differed so much from the impression left from the calls that the consumer was certain there was an error, *e.g.*, ER.315-16, ¶ 5; ER.297, ¶ 4; or (2) contacting PBS to fix the obvious error, *e.g.*, ER.292, ¶ 8; ER.302, ¶ 7; ER.310, ¶ 4. Whether consumers ignored the written materials or called to inquire, both categories of consumers soon learned

for the first time, only after speaking with PBS's "Collection Department," that PBS expected them to comply with the onerous terms contained in the written invoices, and that PBS had a recording to prove the consumer's supposed "agreement" to a non-cancellable 60-month magazine subscription contract for hundreds of dollars, most commonly \$717.60. ER.353, ¶ 16; *see also* ER.312, ¶ 10; ER.316-18, ¶¶ 6, 9; ER.302-03, ¶¶ 8-11; ER.292, ¶ 8; ER.308, ¶ 5.⁵

Dries Dantuma, in charge of collections for PBS, recognized that these tapes were "pretty effective in getting people to pay." ER.72:18-20. But some consumers, even after listening to the tapes, insisted that they had never agreed to enter into a long-term magazine subscription order or to willingly assume an obligation to pay hundreds of dollars. *See, e.g.*, ER.303, ¶ 10, ER.305, ¶ 18; ER.329-30, ¶¶ 3-4; ER.188:20-22. In one instance (which occurred *after* entry of the stipulated preliminary injunction in this case), the consumer discovered that the taped verification call purportedly finalizing an agreement with PBS occurred only after PBS had already begun to send the magazines. ER.268, ¶8.

When consumers refused to pay, PBS employees made repeated follow-up calls, disrupting and embarrassing consumers at work, making various threats, and

⁵ The Commission presented evidence that this price was significantly higher than what consumers would pay if they subscribed directly with publishers, ER.213-21, ¶ 2-8; ER.222-56, and that PBS's own wholesale costs for the magazines, or remit rates, were a tiny fraction of the costs charged to consumers. *See* ER.212, ¶ 13.

continuing to insist on payment. ER.43-44. During these calls, PBS employees falsely informed consumers that PBS had already paid the magazine publishers for the total subscription. ER.43; ER.56-57. On some occasions, PBS collectors falsely threatened to file a negative report with a credit bureau, or to take legal action. ER.36-37; ER.44; *see also* ER.322-23, ¶ 9. Evidence was presented that consumers paid PBS not because they wanted the magazines, but to put a stop to the abusive collection practices. *See, e.g.*, ER.292-93, ¶¶ 8, 10 (felt “trapped” and “sent the money to PBS because I thought that I didn’t have any alternative to paying the bill, not because I wanted the magazines or because I was satisfied with the service”); ER.261-62, ¶ 5 (“I have been thoroughly dissatisfied with my interactions with PBS. I felt like I was forced into paying something that I never agreed to and did not want.”).

In addition to the repeated, and abusive, phone calls, PBS’s elaborate collection procedures also provided for a steadily escalating series of letters to be sent out over an extended period. *See generally* ER.88-97 (collection scripts); ER.133-46 (collection letters). The seventh, signed by the fictitious “Bob Callahan,” and issued from a “Legal Department,” that did not exist, *see* ER.37; *see also* ER.387 at 156:14-25, arrived some six months after the initial sales pitch (and after repeated phone calls and six other collection letters). *See* ER.443, ¶ 20; ER.146; ER.118:20-121:2. This letter provides a “Final Settlement Offer” for a consumer to settle the account in full

at a percentage of the total price first quoted in the written materials. ER.146. It was common for collections agents to scramble to get consumers to pay something less than the full amount by offering consumers discounts if they paid the entire subscription up front, or to charge cancellation fees, or to offer to “settle” by cutting the size of the order. *See, e.g.*, ER.109:22-110:16; ER.113:12-114:5; ER.115:1-116:6; ER.327-28 (transcript of verification tape with settlement); *see also* ER.88-97.

As a result of these widespread deceptive and abusive practices – beginning with the initial pitch, followed by the “verification” call which PBS used as “proof” of an agreement that consumers never made, and continuing through harassing collection tactics – PBS extracted \$34,419,363 from consumers during the period January 1, 2004 through August 31, 2008.⁶

2. Defendants’ Willingness To Flout Court Orders.

The Dantumas sold magazine subscriptions in this deceptive and abusive manner even though they had been on notice, since at least 1971, that such practices were illegal. In the 1960s, Edward sold magazine subscriptions through a “Keystone Readers’ Service” franchise. ER.392 at 27:1-5; 28:11-22. In 1971, and again in 1980,

⁶ ER.151, ¶ 8, this number covers gross receipts (revenues less refunds) generated from accounts opened during the period at issue in this case – January 1, 2004 through August 31, 2008. The FTC had initially presented a higher figure, of \$39,280,201, *see id.*, but later agreed with PBS’s expert that revenue from accounts opened before January 1, 2004, should not be included.

the FTC specifically prohibited Keystone Readers' Service and its franchisees from engaging in deceptive sales practices, such as misrepresenting the purpose of the initial contact with the consumer and failing to disclose the total price of the subscription. ER.283-84, ¶ 24(a); ER.285-89 (*In re Perfect Film & Chemical Corp.*, 78 F.T.C. 990, 1971 FTC LEXIS 125 (1971)); *see also In re Cadence Indus. Corp., Perfect Subscription Co., and Keystone Readers' Serv., Inc.*, 95 F.T.C. 803, 1980 FTC LEXIS 80 (1980).

Despite the 1971 and 1980 FTC orders, the Dantumas continued their deceptive marketing of magazine subscriptions using the same practices, under a new business name, "Publishers Direct Services." Due to the many consumer complaints received, Attorneys General in three states brought enforcement actions against the Dantuma companies. ER.39; *see also* D.7-2 to D.7-5 (FTC TRO Vol. 3) at 456-502.

Under the consent decrees entered in these actions – for Idaho in March 1991, Wisconsin in June 1995, and Illinois in March 1998 – defendants promised, *inter alia*, to: 1) disclose all material terms of the offer, including total cost and length of subscription; 2) refrain from making false or misleading statements in telephone sales presentations; and 3) refrain from using abusive language and making threats during collection calls or in collections letters. ER.39, n.6; *see also* D.7-2 to D.7-5 (FTC TRO Vol. 3) at 456-502. But instead of cleaning up their business practices to comply

with these consent decrees, Defendants responded by creating another new corporate shell, “Publishers Business Services, Inc.,” through which they began telemarketing to consumers at their jobs rather than at home, using the same prohibited sales and collections practices, giving rise to hundreds of written complaints, and prompting the Commission to bring this case. *See* ER.37-38.⁷

3. Proceedings Below.

Initial Proceedings: The first two counts of the Commission’s complaint alleged that PBS violated Section 5 of the FTC Act because its telemarketers falsely represented in their initial calls that consumers would receive magazines as a free gift or at nominal cost (Count I), and falsely represented in subsequent communications that consumers had previously entered into contracts to purchase magazines (Count II). ER.416-17, ¶¶ 24-30.⁸ The complaint also alleged that PBS violated various provisions of the TSR by: failing to disclose in its initial contact with consumers that the purpose of the call was to sell magazines (Count III); misrepresenting the total cost

⁷ Defendants’ deceptive and abusive business practices under this new corporate shell continued to trouble law enforcement. The Florida and Texas Attorneys General investigated PBS in 2003 and 2007, respectively. ER.39. In addition, a class action complaint was filed against defendants in California in July 2007, *Johnson v. Publishers Business Services, Inc.*, Case No. 2:07-CV-01394 (E.D. Cal.). ER.39, n.6; D.7-5 (FTC TRO Vol. 3), at 503-14.

⁸ References are to the amended complaint, which differs from the original complaint only insofar as it added three individual defendants: Dries, Dirk, and Jeffrey Dantuma.

of the magazines (Count IV); misrepresenting that consumers had entered into contracts to purchase magazines (Count V); and engaging consumers in repeated phone calls with the intent to harass (Count VI). ER.418-19, ¶¶ 38-44.

As amended, the complaint named six members of the Dantuma family and the two closely-held corporations through which the Dantumas operated their magazine subscription scam during the 2004-2008 time period. ER.412-15, ¶¶ 5-12. Named individuals included the family patriarch, Edward, his wife Persis, and four of their six children: Jeff, Dirk, Dries, and Brenda. All of the Dantumas served as corporate officers and played active roles in the family business, controlling two corporations which together operated as a common enterprise. ER.9-11; ER.414, ¶ 13.

Edward founded the business, and is the sole owner and President of the principal corporation, EDE. ER.9-10. Persis managed the records and the staff who sent out collection letters and other mailings, is Vice President of EDE, and serves as the sole officer and director of Publishers Business Services, Inc., the corporate entity formed when the Dantumas changed their business strategy and began targeting consumers at their workplaces. ER.86:19-20; ER.400, ¶ 3. Jeff managed the companies' sales rooms in Altamonte Springs, Florida, and Toledo, Ohio; ran the companies' sales room in St. Paul, Minnesota, before it shut down; and supervised renewals and verifications. ER.28; *see also infra* at 48-49. Dirk was the person

responsible for procuring the “lead lists” (the Dun & Bradstreet cards which PBS’s telemarketers used to make their telemarketing calls) for PBS. ER.399-400, ¶ 2. He had previously served as the manager of the St. Paul, Minnesota sales room. *See* ER.393 at 30:22-23, 32:24-33:2. Dirk “handles the more serious customer complaints,” ER.28, and served as the companies’ liaison for law enforcement investigations of the companies’ business practices, *see* ER.394 at 35:4-8. Dirk is also responsible for making sure that the sales scripts and marketing materials ostensibly comply with the law. ER.28-29; ER.395 at 39:3-6. Brenda is in charge of the companies’ Miami sales office, as well as accounts payable and correspondence with the magazine publishers. ER.29. Finally, Dries runs the companies’ verification, collections, and customer services departments, all located in the companies’ main office at Altamonte Springs, Florida. *Id.*

The district court entered a stipulated preliminary injunction on June 3, 2008. ER.422-30. This order (in effect until the entry of permanent injunction on April 7, 2010), enjoined defendants from continuing the deceptive and abusive practices that formed the grounds for the FTC’s complaint. *Id.* As discussed in more depth below, the FTC later presented evidence to the district court that PBS’s operations continued even after this stipulated injunction was entered, demonstrating the Dantumas’ continued willingness to flout the law even as this very action was proceeding and

despite their own protestations of innocence.⁹

Summary Judgment Liability: Following the close of discovery, the Commission moved for summary judgment. D.86. In support of its motion, the FTC produced voluminous evidence, including, inter alia, hundreds of consumer complaints; over fifty sworn declarations from consumers and PBS employees; PBS marketing materials and consumer recordings; defendants' internal business documents; and deposition testimony from consumers, defendants, and PBS employees. On April 7, 2010, the district court held defendants liable on all six complaint counts, and denied PBS's motion for summary judgment. ER.59.

In its summary judgment ruling, the district court first rejected PBS's contention that it was exempt from the TSR because its telemarketing was directed to businesses. ER.46-48.¹⁰ In so doing, the district court highlighted the abusive effect of telemarketing calls made to consumers at their workplace, noting that "[s]oliciting an individual consumer while they are at work is at least as abusive, if not more so, than when they are at home." ER.48.

⁹ The district court therefore erred when, in announcing its final ruling on damages, it stated that the "preliminary injunction effectively caused Defendants to cease their telemarketing business." ER.4.

¹⁰ The "business to business" exemption, 16 C.F.R. § 310.6(b)(7), exempts from the requirements of the TSR "[t]elephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies."

Next, the court considered whether PBS's telemarketing violated the FTC Act or the TSR, recognizing that, to establish a violation of Section 5 of the FTC Act, the Commission "must show that the representation, omission, or practice is (1) 'likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.'" ER.50-51 (quoting *FTC v. Cyberspace.Com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006)). The court acknowledged that it should consider "the overall net impression the representation creates" in determining whether a given representation, omission, or practice is likely to mislead. *Id.*

At the outset, the district court ruled that PBS's initial sales pitch – encompassing the first survey call and the follow-on "verification" call – violated both the FTC Act and the TSR. ER.53-56. Even though "by the end of the verification call PBS has informed the consumer of all the terms of the agreement, " PBS's selective disclosure of terms, and false reassurances before the recording began, created a net impression that was "likely to mislead." ER.54. In other words (and directly contradicting its subsequent award on damages) the district court specifically *rejected* PBS's contention that if a verification recording contained all material terms, the consumer could not have been deceived. *See* ER.49. Just as a small print disclaimer buried at the bottom of the page cannot cleanse an otherwise deceptive advertisement, the district court concluded that the rushed recitation of terms buried within that small

portion of the transaction that was taped was insufficient to overcome the deceptive nature of PBS's overall course of dealings with the consumer.

PBS's initial and verification calls thus violated Section 5 of the FTC Act because they created the material net impression that consumers would receive magazines as a gift or for a nominal amount, with no long-term obligation, and this had "the tendency to mislead the consumer into agreeing to a long-term obligation to pay PBS hundreds of dollars." ER.55.¹¹

The court likewise had no difficulty ruling that PBS's collections practices violated both Section 5 of the FTC Act (because they used misrepresentations to induce payment); and the TSR (because PBS engaged in a pattern of abusive calling, contrary to 16 C.F.R. § 310.4(b)(1)(i)). Holding PBS liable on all counts of the FTC's complaint, the court entered a permanent injunction against all defendants, but scheduled an evidentiary hearing with respect to monetary relief. ER.59.

Evidentiary Hearing and Ruling on Damages: Over the course of a five-day hearing, both the Commission and PBS presented consumer and other witnesses who testified regarding the nature and extent of the consumer injury caused by PBS's

¹¹ The court therefore granted the FTC summary judgment on Counts I, III, and IV of its complaint. Counts III and IV correspond to TSR violations involving specific misrepresentations – failure to disclose the actual purpose of the calls, 16 C.F.R. § 310.4(d), and misrepresentation of the total cost that consumers had to pay, 16 C.F.R. §§ 310.2(a)(2) & 310.3(a)(4).

practices. The Commission argued that, in light of the Court’s prior finding of PBS’s widespread deceptive and abusive practices, the court had a duty under Ninth Circuit law to award the full amount of PBS’s ill-gotten gains as monetary equitable relief, or \$34.4 million, given PBS’s failure to rebut that measure by convincingly demonstrating the existence of satisfied customers.

The Commission presented evidence demonstrating that, as would be expected from the district court’s summary judgment ruling, consumers who succumbed to PBS’s pressuring and paid money to PBS typically provided payment only after being subjected to collection practices that the district court had concluded were deceptive and abusive – tactics that disrupted their lives and threatened their jobs. *See, e.g.*, D.222 at 6-17; *see also* ER.195-197. The vast majority of consumers, too, although “verified,” did not, in fact, pay the full amount owed, but instead refused to pay, or paid some lesser amount to settle their accounts. D.222 at 6, ¶¶ 17-18.

PBS made no attempt to demonstrate a substantial number of wholly satisfied customers sufficient to rebut the presumptive measure of equitable relief. Out of the roughly 80,000 paying customers, PBS produced, as witnesses at the hearing, only four that were purportedly “satisfied.” Even these customers, however, were unaware of how many magazines they had subscribed to (or that they had signed up for duplicative and overlapping subscriptions) and ignorant of the extent of their total

financial obligation to PBS.¹²

Other customers that PBS claimed were satisfied (because they had paid for magazines, or entered into multiple orders) were, in fact, anything but. *See, e.g.*, ER.190:17-25, ER.191:16-20, ER.192:14-21, ER.193:3-12, 20-23; ER.126:19-ER.127:14, ER.128:14-ER.129:1; ER.261-62, ¶ 5; ER.294, ¶ 14; ER.324-25, ¶ 11(b)(iii); ER.318, ¶ 11; ER.209-11, ¶¶ 7, 9. As one customer testified, she paid PBS not because she agreed to order the magazines or pay the prices, but because she “didn’t want to be charged for fraud like they told me on the phone.” ER.189:12-16. One PBS witness first insisted that he was satisfied, but then acknowledged that he did

¹² *See, e.g.*, ER.130:2-10 (never calculated full price of order); ER.131:13-25 (unaware of opening new account); ER.132:5-23 (never knew total price or length of subscriptions); ER.80:17-82:4 (unaware that total price was over \$1000 for one year’s worth of six or eight magazines); *See also* Shannon Meehan videotape deposition (admitted on 6/9/2011) (unaware of how much she paid or for how many magazines). The Commission also contested PBS’s unsupported assertion that customers with multiple accounts were not deceived simply because they were repeat customers. In addition to presenting two witnesses at trial that were repeat customers yet *not* satisfied, the FTC also presented evidence from PBS’s customer database that PBS called customers with multiple accounts repeatedly, ignoring their demands to stop calling and refusing their requests to cancel orders. *See* D.222, ¶ 25; *see also* ER.100:17-25; ER.101:1-5, 9-18; ER.102:15-25, discussing customers 222777 (24 accounts over a three year time period, an order once every 1.5 months, \$10,881 paid over a period of three years, for 440 years worth of magazines, had entries in her chart saying do not call for reorders). *See also* FTC Exh. 20 (admitted on 6/7/2011); FTC Exh. 21 (admitted on 6/7/2011); Cust. 223227, Joanna Harding, (16 accounts totaling \$6,949 over two years, nine months) ER.103:15-104:6; FTC Exh. 24 (admitted on 6/7/2011); Cust. No. 171787 (subscribed to 340 years of magazines in a 5 year, two-month period) ER.99:9-23; FTC Exh. 18 (admitted on 6/7/2011).

not know that he had been misled into prematurely renewing subscriptions. *See* ER.68:24-69:5, ER.70:4-12. Another paying customer went so far as to state that “PBS basically stole \$100 from me,” ER.447, ¶ 10, and yet another complained to the FTC (in October 2009, *after* the stipulated preliminary injunction was entered in this case), “I felt like I was being extorted. I made the payments; actually they have simply drawn it from my checking account,... [and] [t]o make the whole matter complete I don’t receive the magazines.” ER.207.

PBS’s primary argument on remedy boiled down to the assertion that, unless a consumer submitted a formal written complaint, that consumer was satisfied, even if the initial sales calls had been deceptive, and even if the collection practices were deceptive and abusive. According to PBS such “satisfied” consumers were not entitled to any relief. *See, e.g.*, D.161 at 6, ¶ 3; D.220 at 11-13. PBS’s expert, Dr. Gregory M. Duncan, calculated that the revenues PBS received from the small subset of consumers who submitted formal written complaints amounted to a mere \$61,589. ER.157, ¶ 23.

But, by defendants’ own admission, PBS’s procedures for recording complaints were inaccurate and incomplete. The Commission elicited testimony that it was part of PBS’s modus operandi to refuse to acknowledge the validity of a customer’s complaint, that PBS did not consider consumers who complain by telephone to be

“complaints,” and that PBS made no attempt to track negative comments. *See, e.g.*, ER.84:4-24; *see also* ER.208 at 87:1-25, 88:19.

PBS’s second proposed measure of equitable relief, based on Dr. Duncan’s evaluation of a sample of “verification” tapes from PBS’s sales, was equally flawed. In listening to a sample of tapes from customers who had made payments to PBS (armed and ready with headphones and a checklist), Dr. Duncan and his staff observed that 99.4% of the customers had been told all the details of the transaction during the recording. ER.162; ER.73:9-24. In Dr. Duncan’s view, these customers were “not misled.” ER.163, ¶ 35.¹³ Dr. Duncan opined that the portion of revenue corresponding to the less than 1% of customers who had *not* been informed of all the terms of the transaction during the tape – amounting to \$191,219 – could serve as an alternative measure of damages. *Id.*

Dr. Duncan conceded that, for the 99% of consumers with “complete” tapes, his analysis was, “predicated upon the assumption that the purchaser and the seller have had a meeting of the minds as to exactly what the terms of the agreement are.” ER.76:15-19. Yet he admitted that his analysis focused only on whether the terms and conditions were revealed on the sampled verification tapes, and that he “ignored

¹³ Dr. Duncan did *not*, however, link the tapes in his sample to the PBS customer database, so there was no way to replicate his results, nor to ascertain whether the customers on the surveyed calls were, in fact, satisfied. *See* ER.162, n.16.

everything else,” including the initial sales pitch, and the subsequent collection practices. ER.78:5.

Based on Dr. Duncan’s analyses, PBS claimed that the appropriate amount of monetary relief was \$61,589 (the share of revenue attributable to formal written complaints), but in any event no more than \$191,219. *See* D.220 at 17:9-15.

In response, the Commission argued that Dr. Duncan’s analysis was flawed both legally and factually. As an initial matter, the Commission noted that Dr. Duncan’s report was based on presumptions “directly contrary” to Ninth Circuit law, which recognizes that individualized proof of consumer injury is not required under the FTC Act as it “would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13 of the FTC Act].” D.221 at 6 & n.2 (quoting *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993)). The Commission also documented a series of unrealistic or unsupported assumptions made in the Duncan report – assumptions that were directly contradicted by the district court’s own findings and by record evidence. *See* D.221 at 13-17. The Commission further argued that the premise underlying Dr. Duncan’s analysis – i.e., that the taped “verification” provided consumers with a sufficiently complete description of the terms of the proposed transaction – constituted an improper attempt to relitigate issues that the court had already resolved, as it was “settled in summary

judgment that the verification recordings [were] part of the entire sales pitch that was deceptive.” ER.74:21-75:6.

On July 25, 2011, the court issued its Order Re: Equitable Damages, and rejected the Commission’s position that Ninth Circuit law required full redress. ER.3-7. In a terse opinion, the district court held that, even though the Commission had shown that PBS violated Section 5, the Commission had not established a causal link between those violations and PBS’s gross revenues. *Id.* The court rejected the FTC’s proposal for complete disgorgement of revenues received because, in the court’s view, the evidence failed to establish the “necessary link” between PBS’s widespread deceptive and abusive conduct, and the revenues PBS collected during the period covered by the complaint. *Id.* The court concluded that the Commission had failed to show that even “a significantly quantifiable number” of PBS’s sales warranted disgorgement. *Id.*

The court next posited that full reimbursement to complaining customers might provide an alternative measure of relief, but concluded that this measure was untenable, as it was “either impossible or impracticable” to locate all complaining customers. *Id.* The court, moreover, found it significant that many PBS customers had received magazines, and that most of the (small percentage) of customers on record as complaining had withheld payment. ER.6. Without further explanation,

the court ultimately adopted \$191,219, drawn from Dr. Duncan’s analysis of the verification tapes, as a “reasonable measure of equitable damages.” *Id.*

Finally, the court found, without discussion, that there was insufficient evidence to hold four of the individual defendants – Jeff, Brenda, Dirk, and Persis – liable for monetary relief. *Id.* It did, however, conclude that the record was sufficient to hold the other two individuals, Edward and Dries, as well as the two corporations, jointly and severally liable for the monetary relief awarded, and maintained the permanent injunction as to all defendants. *Id.* This appeal followed.

STANDARD OF REVIEW

“[T]his court reviews a district court’s grant of equitable relief under the FTC Act only for abuse of discretion or the erroneous application of legal principles.” *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010); *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). A court abuses its discretion when it fails to identify and apply “the correct legal rule to the relief requested,” *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc), or if its application of the correct legal standard was “(1) ‘illogical,’ (2) ‘implausible,’ or (3) without ‘support in inferences that may be drawn from the facts in the record,’” *id.* at 1262 (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 577 (1985)). A court also abuses its discretion when it bases its decision on unreasonable findings of fact. *Las*

Vegas Sands, LLC v. Nehme, 632 F.3d 526, 532 (9th Cir. 2011).

Whether individual defendants are liable for monetary equitable relief is a mixed question of law and fact which is reviewed de novo; any underlying factual findings, however, are reviewed for clear error. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004). Whether or not the district court’s findings of fact are clearly erroneous depends upon “the entire evidence” in the record. *See Hinkson*, 585 F.3d at 1260.

SUMMARY OF ARGUMENT

I. In refusing to award the full amount of consumer loss as equitable monetary relief, the district court misapplied the law and abused its discretion. PBS engaged in widespread deceptive and abusive sales practices, inducing payment through a series of material misrepresentations that the court concluded were likely to mislead its target audience and engaging in collection tactics that were uncontestedly abusive. These practices resulted in a summary judgment ruling for six counts of liability – a ruling not challenged on appeal. As a result of these practices, PBS extracted some \$34.4 million from consumers.

Under governing precedent, the full amount of consumer losses is the appropriate measure for monetary relief. The district court erred in rejecting this measure, and acted contrary to law in requiring the FTC to provide specific proof of

the “link” between PBS’s deceptive and abusive practices and particularized consumer injury. No authority requires such a showing in a public action brought to redress violations of the FTC Act. And with good reason. To do so would effectively thwart the possibility of large-scale prosecutions and undermine the ability of the Commission to protect consumers against widespread deception. Because PBS failed to demonstrate customer satisfaction in any systematic fashion sufficient to rebut the uncontested showing of widespread consumer harm, the district court erred in rejecting full consumer losses – or \$34.4 million – as the appropriate measure for equitable monetary relief. (*Part I.A*).

Nor was it “reasonable” for the district court to seize upon Dr. Duncan’s estimate of \$191,219.00 as an alternative measure. Dr. Duncan’s estimate was based on an admittedly myopic analysis, which focused only on one small portion of PBS’s deceptive and abusive practices and “ignored everything else.” Duncan reasoned that, if specific words or phrases were included on the taped portion of the inaptly-named “verification” call, then consumers were not misled.

But Dr. Duncan’s analysis fails at the threshold. Hurried incantation of specific terms at the end of a long sales pitch – especially when busy and distracted consumers are told that agents are merely confirming information already provided, and reassured that they are not finalizing any agreement – does not suffice to cure PBS’s deception.

Just as a mouseprint disclaimer buried at the bottom of the page does not cleanse an otherwise deceptive advertisement, the rapid recitation of a few words during the tiny part of the transaction that was taped did not cure PBS's deceptive conduct. On the contrary, the recording was a "pretty effective" and integral component of PBS's scam – used to entrap consumers into paying for magazines they never agreed to purchase.

In short, Dr. Duncan's analysis was unreasonable and flatly contradicted governing law because it failed to consider PBS's entire course of conduct. Dr. Duncan blinded himself to PBS's uncontestedly deceptive and abusive practices that "forced" or "trapped" consumers into relinquishing money, even when they were convinced that they had not agreed to pay.

Dr. Duncan's analysis, moreover, cannot be squared with the district court's summary judgment ruling – that the "net impression" of PBS's conduct, notwithstanding the disclosure of specific terms during the taped portion of the verification calls, was that consumers were deceived. The district court's exercise of equitable discretion does not go so far as to permit an award of monetary relief based on an analysis that contradicts the law, the district court's own liability ruling, and the facts. (*Part I.B*)

II. At summary judgment, the district court concluded that PBS had engaged in widespread violations of the FTC Act and the TSR, and that every named defendant

was liable and subject to the permanent injunction. To hold the individuals liable for monetary relief, the only additional showing that the Commission had to make, therefore, was that they knew or should have known of the violations. The district court clearly erred in finding, with no discussion, that no such showing had been made with respect to Jeff, Brenda, Dirk, and Persis.

The undisputed evidence showed that all four individuals were corporate officers, and that each had been named as a defendant in an earlier challenge to the same conduct at issue in the Commission's case, brought by the Illinois Attorney General. As corporate officers and named defendants, Jeff, Brenda, Dirk, and Persis cannot feign ignorance of PBS's deceptive and abusive practices – practices that were taking place during this very case. Their knowledge of PBS's violations is further demonstrated by the Commission's evidence detailing each one's active participation in PBS's operations – evidence which the district court failed to address.

ARGUMENT

I. The District Court Erred In Refusing To Afford Full Relief To Consumers Injured By Defendants' Deceptive Practices.

There is no dispute that PBS engaged in widespread deceptive and abusive practices. In rejecting the Commission's request for full consumer redress, and instead awarding less than 1% of consumer loss as a "reasonable measure," ER.6, the district court therefore acted in an altogether unreasonable – and unlawful – manner.

Under governing law, the rulings already made by the court – that defendants had engaged in abusive and materially deceptive practices, and that such practices were routine in all their dealings with consumers – sufficed to establish a presumption that consumer redress should consist of full refunds for these unlawfully induced transactions. The district court, however, misapplied governing law, improperly shifting the burden to the Commission to provide further proof of a “link” between PBS’s revenues and specific consumer injuries. ER.5. In so doing, and in relying on a number of legally irrelevant considerations, the district court committed reversible error.

The district court’s uncritical acceptance of Dr. Duncan’s estimate of \$191,219.00 as a “reasonable measure” of the “net revenues received by PBS as a result of its violation of Section 5 of the FTC Act,” ER.6, was likewise reversible error. The district court’s award cannot stand, as it is predicated on an analysis which is directly contrary to FTC law, irreconcilable with the district court’s own summary judgment ruling, and unsupported by the facts.

A. The District Court Erred In Rejecting The Full Amount Of Consumer Losses As The Appropriate Measure Of Equitable Relief For PBS’s Widespread Deceptive And Abusive Practices.

For large-scale and systematic violations of Section 5, such as those perpetrated by PBS, courts have routinely recognized defendants’s gross receipts (revenues less

consumer refunds) as the appropriate measure of consumer loss. *See, e.g., Stefanich*, 559 F.3d at 931; *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004) (en banc); *FTC v. Security Rare Coin*, 931 F.2d 1312, 1316 (8th Cir. 1991); *see also FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (“Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers.”). Proof of specific consumer injury is not required because a “presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant’s product.” *Figgie*, 994 F.2d at 605-06.

Where, as here, widespread violations of the FTC Act have been proven, no authority requires the Commission to itemize each and every consumer loss and trace it back to a specific act of deception in order to justify monetary equitable relief. Instead, as this Court has previously observed, if there is an “absence of proof of actual damages,” it is “proper[.]” to use the “amounts consumers paid as the basis that Defendants should be ordered to pay for their wrongdoing.” *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001) (internal quotation marks omitted). With good reason. “It would be inconsistent with the statutory purpose [of the FTC Act] for the court to require proof of subjective reliance by each individual consumer.” *Sec. Rare Coin*, 931

F.2d at 1316 (citing *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1293 (D. Minn. 1985)). For it “would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action ... government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded [consumers].” 931 F.2d at 1316; *accord Kuykendall*, 371 F.3d at 766 (“allowing a damages determination based on gross receipts ... furthers the FTC’s ability to carry out its statutory purpose.”).

Therefore, and contrary to the district court’s assertion, it was not the Commission’s burden to do anything more – beyond showing the court below had already accepted in granting summary judgment – to prove the “necessary link,” ER.5, between PBS’s pervasive deceptive and abusive conduct and harm to specific consumers. *See FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005). Rather, it was PBS’s burden to produce evidence sufficient to rebut the presumption of widespread harm that had already been established at summary judgment. *See, e.g., Febre*, 128 F.3d at 535; *Bronson Partners*, 654 F.3d at 369. But PBS made no such showing.¹⁴ Although PBS did produce a handful of purportedly satisfied customers to

¹⁴ Prior to the hearing, counsel for PBS recognized that this burden could conceivably be satisfied by a “scientific survey done in accordance with generally accepted survey - surveying principles, subject to cross examination by the FTC, *of people who made payments.*” ER.202:3-10 (emphasis added). But PBS failed to introduce any such consumer survey into evidence.

testify at the hearing, none of these witnesses were even aware of the number of magazines that they had agreed to purchase from PBS, or at what cost. *See supra* at 20-21 & n.12. Given PBS's widespread deceptive practices, moreover, the Commission "was not required to show that all consumers were deceived." *Stefanchik*, 559 F.3d at 929 (citing *Figgie*, 994 F.2d at 605-06). Because PBS did not come close to demonstrating customer satisfaction in any systematic fashion, it failed to rebut the FTC's showing of widespread consumer harm, and therefore did not undermine the Commission's corresponding entitlement to an equitable award based on gross receipts.

There was no dispute that \$34,419,363.00 represented PBS's receipts from consumers over the relevant period, less consumer refunds. Yet, from the outset, the district court was reluctant to award this full amount.¹⁵ In its cursory opinion, the district court provided no clear explanation of its reasoning in rejecting the established measure of monetary equitable relief under the FTC Act for pervasive deception and abuse. To the extent that the court's concerns can be ascertained, they appear to have

¹⁵ On the first day of the evidentiary hearing, the court noted the FTC's entitlement to an award of PBS's gross receipts, yet observed "certainly there's got to be a much tighter relationship or nexus between the deceptive practices found and the damage done." *See* ER.187:14-16. Prior to closing arguments, the court observed: "I've already indicated I don't think total disgorgement is the - the measure. If damages are to be awarded, the Court's got to find some algorithm that can be basically employed to identify a reasonable award that reflects the consumer - or is related to the consumer injury." ER.66:1-19

centered on considerations that have no proper place in this analysis.

The court suggested, for example, that the stringent showing it sought might be made if one could identify “all complaining customers.” ER.5. But such reasoning contradicts the very purpose of the FTC Act, which aims to aid not only those customers who choose (or are able) to complain, but to protect *all* consumers, including the most vulnerable. *See FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 116 (1937) (consumer protection laws “are made to protect the trusting as well as the suspicious”).¹⁶ And, the court’s further suggestion that comprehensive relief is barred by difficulties in locating individual complaining customers, ER.5, would have the perverse result of rewarding PBS for its own admitted failures in record-keeping. *See supra* at 22-23. “[T]he risk of uncertainty,” however, “should fall on the wrongdoer whose illegal conduct created the uncertainty.” *Febre*, 128 F.3d at 535 (quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)); *see also Direct Mktg. Concepts*, 624 F.3d at 18.

Nor is there any merit in the lower court’s apparent reliance on the fact that many customers received magazines, and that some customers either obtained refunds or stopped making payments. ER.6. The court below overlooked this Court’s

¹⁶ As FTC investigator Bruce Gale testified, a low percentage of complaints is “typical,” ER.105:18, for deceptive marketing cases, and “you can’t conclude just because they didn’t object that they weren’t deceived.” ER.106:22-ER.107:4.

teaching that it is “[t]he fraud in the selling, not the value of the thing sold, [that] entitles consumers . . . to full refunds.” *Figgie*, 994 F.2d at 606. And, because PBS deceptively marketed its magazines with, on average, a ten-fold mark-up, the majority of monies extracted from consumers far exceeded the costs of the magazines. *See* ER.212, ¶ 13.¹⁷ Furthermore, the existence of some customers who either received refunds or were knowledgeable enough to realize that they could stop making payments to PBS without risking adverse consequences is irrelevant to the remedy determination. By its terms, the measure of relief sought by the Commission excluded refunded payments and monies never paid. The established measure that the Commission invoked (and that PBS failed to rebut), seeks to obtain moneys that *were* paid on the basis of pervasive deception or abuse, yet were *not* refunded. The court below erred in refusing to provide such relief.

The district court relied on this Court’s ruling in *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994). Yet that case fully supports the standard urged by the Commission. There, this Court recognized that, when reimbursement to specific consumers is not feasible, a district court “may order some other remedy which

¹⁷ Nor did every customer receive magazines. *See, e.g.*, ER.207 (a complaint received from John Whyte in late October 2009 – after entry of the stipulated preliminary injunction – who “felt like I was being extorted,” and made payments but didn’t receive any magazines.)

requires [a defendant] to disgorge its unjust enrichment.” 33 F.3d at 1103, n.34.¹⁸ The *Pantron I* Court also rejected arguments based on an assertedly low number of customers who lodged written complaints or exercised their rights under a money-back guarantee. 33 F.3d at 1093, 1103. This Court concluded that an opportunity to obtain a refund was no reason to limit monetary relief, “[b]ecause even many unsatisfied customers will not take advantage of a money-back guarantee, [and] a company which has engaged in consumer fraud would be able to retain a significant portion of the proceeds simply by making a largely illusory money-back offer.” *Id.* at 1103. A fortiori, if PBS, after blatantly violating Section 5, could defend against monetary liability simply by providing refunds to those few customers willing and able to go through an arduous and time-consuming third-party complaint process,¹⁹ it would likewise render the “equitable remedial power in Section 13(b) a nullity.” *Id.*; accord *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002).

¹⁸ The Commission’s complaint sought not only restitution, but alternatively, “the disgorgement of ill-gotten monies.” ER.420. Section 13(b) of the FTC Act affords the full panoply of equitable powers – including disgorgement to the Treasury, which does not require the identification or compensation of specific victims. *See, e.g., Bronson Partners*, 654 F.3d 369-375; *Febre*, 128 F.3d at 535.

¹⁹ The FTC presented un rebutted evidence that only those customers who took the drastic step of retaining an attorney to present their complaints, or formally complained to third parties – such as the Better Business Bureau, state Attorneys General, or the Commission – were able to secure refunds.

B. Dr. Duncan’s Analysis Contradicted Well-Established Law, The District Court’s Summary Judgment Ruling, And The Facts.

Instead of following established precedent regarding the appropriate measure of relief for pervasive consumer deception and abuse under the FTC Act, the court below adopted, without explanation, defendants’ expert’s assertion that a figure representing less than one percent of sales provided a “reasonable measure of equitable damages.” ER.6. In so doing, the district court acted contrary not only to settled law, but also to that court’s own summary judgment ruling, and the facts.

As explained above, in arriving at the figure adopted by the district court, Dr. Duncan reasoned that, if a consumer received a verification call that included all the terms of the sale, and the consumer went on to make payments to PBS, then that consumer was not deceived. *See* ER.162-63, ¶¶ 33-35. By Dr. Duncan’s tally, based on a random sampling of 510 verification tapes, roughly 99% of consumers were “not misled.” ER.163, ¶ 35. But, by his own admission, Dr. Duncan “ignored everything else” except whether specific words were included in that portion of the verification call that made it onto tape. ER.78:5. He assumed that customers who listened to these words knew what amount they were paying, and for how long. ER.73:4-22. He made no effort to assess the impact of the initial sales pitch or that portion of the verification call that was not recorded, and offered no opinion as to whether people were brought through the process preceding the verification tapes in a “misleading fashion.”

ER.77:20-ER.78:3. He did not attempt to analyze the impact of PBS's uncontestedly abusive collections practices in coercing consumers to make payments even when they had not agreed to purchase magazines. ER.79:6-15. Blinding himself to PBS's undisputed deceptive and abusive practices, Dr. Duncan concluded (after assuming away the fraud) that if all the terms of the transaction were included in the verification tape, then there was no deception.

1. Dr. Duncan's analysis flouts fundamental principles of law under the FTC Act. In assessing whether words are deceptive, it is necessary to assess not just the bare words but also their context. With respect to advertising, "[t]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context. . . . The impression created by the advertising, not its literal truth or falsity, is the desideratum" *American Home Products Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) (internal quotation marks and citation omitted); *see also* cases cited at *id.*, n.9; *Cyberspace.com*, 453 F.3d at 1200; *Stefanchik*, 559 F.3d at 928.

Similarly, the net impression governs when considering whether a disclaimer or other subsequent statements can eliminate the impact of a prior deceptive statement. "Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent

meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.” *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489,1497 (1st Cir. 1989); *see also Cyberspace.com*, 453 F.3d at 1200. Thus, mouseprint disclaimers, far from curing an otherwise deceptive advertisement, can exacerbate its capacity to mislead. *See Giant Food Inc., v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963).²⁰ So too here. A rushed litany of literally true terms – buried within a difficult-to-understand call that has been prefaced by an assurance to an already-distracted customer that no attention is needed – does not cleanse the initial deceptive contact. Far from it. Here, the “verification tape” was actually an “entrapment tape,” – the lynchpin of PBS’s scam that served as a “pretty effective” device to ensnare consumers and force them to pay for magazines that they had never agreed to purchase.

Dr. Duncan’s ostrich-like approach failed to consider the overall net impression of PBS’s sales methods. By his own admission he examined only one small piece – that portion of the verification call that was recorded – and “ignored everything else.”

²⁰ As the district court itself recognized at summary judgment, *see* ER.51, ER.54, and has only recently reaffirmed, “making disclosures in fine print may not overcome an advertisement’s deceptive net impression” and a “defendant violates the [FTC] Act if its advertisement ‘induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.’” *FTC v. Grant Connect LLC*, --- F.Supp.2d ----, 2011 WL 5149187 (D. Nev. Oct. 25, 2011) (citing, inter alia, *Cyberspace.com*, 453 F.3d at 1200-01 and *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975)).

ER.78:5. But, under governing law, whether or not the recorded portion of the verification call – a tiny part of PBS’s entire course of dealings with consumers – contained specific words or phrases that were literally true, is irrelevant. Hinging a damages award on Dr. Duncan’s admittedly partial analysis was thus legal error, because the contents of the verification tape, standing alone, were simply insufficient to demonstrate whether PBS’s customers were deceived.²¹ Even the few “satisfied” customers that PBS managed to produce as witnesses were blissfully ignorant of what Dr. Duncan claimed it was “fundamental” that they know – precisely how many magazines they had agreed to purchase, and for how long. *See, supra*, at 20-21 & n.12.²²

2. The court’s award, based solely on Dr. Duncan’s flawed analysis, also flatly

²¹ And this error controls, even if Dr. Duncan were correct in assuming that all PBS consumers actually listened to PBS verifiers before receiving and paying for magazines. But his underlying assumptions were also wrong. Research staff, armed with a checklist of terms to identify, and listening attentively with earphones in a lab, are a far cry from PBS’s intended victim – a distracted consumer in a noisy workplace that has already been reassured that no new information will be provided in the call. *See, supra*, at 7-8 & n.4. Furthermore, not all magazine orders were verified. One PBS consumer testified that he did not even participate in a call that PBS considered verified. ER.124:4-13, 15-19; ER.125:15-25. Another, ER.265, ¶ 9, recounted how she didn’t even receive a verification call until *after* her magazines had already arrived.

²² Dr. Duncan’s analysis was predicated on the “fundamental tenet of economics that customers do not agree to pay more for a *known* product than it is worth to them,” ER.162-63, ¶ 34 (emphasis in original).

contradicts the court's prior summary judgment ruling – a ruling which correctly states the law and is unchallenged on appeal. In granting summary judgment, the court determined that PBS's deception was "self-evident," and specifically addressed PBS's verification calls:

Albeit true that by the end of the verification call PBS has informed the consumer of all terms of the agreement, the way in which PBS selectively discloses material terms throughout the various calls, prefaces subsequent calls by informing the consumer PBS is just confirming information, and then adding new required terms is likely to mislead.

ER.54. In reaching this conclusion, the court explicitly rejected PBS's contention that the verification recordings discredited many of the FTC's consumer declarations and showed that PBS discloses all material terms to the customer. *See* ER.49.

While the court recognized the verification tapes as part and parcel of PBS's deception when granting summary judgment, it reversed course when awarding monetary relief. It did so even though the FTC demonstrated below that Dr. Duncan's analysis was replete with assumptions which contradicted the record evidence and stood in significant tension with the court's summary judgment findings. *See generally* D.221 at 13-17. The record demonstrated, for example, that although PBS's customers knew that magazines were involved, they did not understand the terms of the product (the non-cancellable 5-year, \$720 commitment) until *after* the verification

recording and repeated dealings with PBS. *See, supra*, at 9-10.²³ Moreover, in asserting that customers who paid money to PBS did so because they agreed to the terms presented on the verification tape, Dr. Duncan entirely (and admittedly) blinded himself to the impact of PBS’s deceptive and abusive collection tactics – a central component of PBS’s operation, and grounds for three counts of liability.

When Dr. Duncan testified, the district court obtained a concession from Dr. Duncan that his analysis was “predicated upon the assumption that the purchaser and the seller have had a meeting of the minds as to exactly what the terms of the agreement are.” ER.76:15-19. Yet the court later failed to recognize that Dr. Duncan’s basic assumption could not be squared with its own summary judgment ruling. The district court’s about-face occurred notwithstanding the court’s repeated disavowals of intent to revisit, during the hearing on damages, issues already decided on summary judgment.²⁴

²³ *See also, e.g.*, ER.271-72, ¶6 (even after listening to the verification tape, the consumer still insisted she did not agree to subscribe to magazines); ER.305, ¶18 (same).

²⁴ For example, the court recognized, prior to the hearing, that it had “already addressed” the question whether consumers were “negatively affected by aggressive collection tactics,” and that the FTC need not prove this issue at the evidentiary hearing because “that very topic was addressed” at summary judgment. ER.199:20-200:8. *See also, e.g.*, ER.187:3-4 (“I don’t want to revisit the findings and the rulings made in the summary judgment”); ER.194:16-20 (“I don’t care ... what their expert says about whether people wouldn’t be deceived. I mean I’ve made findings regarding that.”)

By uncritically adopting Dr. Duncan’s myopic analysis, the district court not only misapplied the law, it directly contradicted its earlier summary judgment ruling that the verification calls could not mitigate the “self-evident” deception of PBS’s sales and collections practices. This too was reversible error. “[J]udgments based on contradictory findings cannot stand.” *Vanderbilt Univ. v. ICOS Corp.*, 601 F.3d 1297, 1310 (Fed. Cir. 2010) (Dyk, J. dissenting, and collecting authority from across the circuits).

II. The District Court Clearly Erred In Declining To Hold All Defendants Liable For Monetary Equitable Relief.

It is well settled that an individual should be held monetarily liable for a business’s deceptive practices when the Commission demonstrates, in addition to the showing needed for injunctive relief, that the individual “had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *FTC v. Publ’g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997) (internal quotation marks and citation omitted). To establish individual liability, the FTC is not required to show an intent to defraud consumers. *Id.* Proof that the individual “had or should have had knowledge or awareness of the misrepresentations” is sufficient. *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 574 (7th Cir. 1989) (internal quotation marks and citations omitted).

Defendants have not cross-appealed the district court's summary judgment ruling in which every defendant was held liable for PBS's deceptive and abusive sales and collections practices and made subject to permanent injunctive relief. At issue, therefore, is only whether the district court erred in ignoring the abundant evidence that the four remaining individual defendants had the requisite level of knowledge to make them also liable for monetary relief.

It is difficult to discern, from the district court's one sentence on this issue, *see* ER.6, whether the court's refusal to find all defendants individually liable for the full amount of monetary relief was based on a perceived factual defect, whether the court applied too stringent a legal standard, or both. But under the correct legal standard, the district court would have no choice, given the evidence before it, to rule in the Commission's favor. Ample record evidence shows that each defendant not only served as a corporate officer, but was actively and intimately involved in perpetrating the magazine scam. Accordingly, Jeff, Brenda, Dirk, and Persis had, or should have had, knowledge or awareness of PBS's deceptive and abusive practices.

A. Each Defendant Knew Or Should Have Known Of PBS's Continuing Deceptive And Abusive Practices.

It is undisputed that Jeff, Brenda, Persis, and Dirk were, for decades, each employed by and served as corporate officers of the family business. ER.28-29. Jeff, Brenda and Dirk all serve as directors of EDE. ER.410:1-2; ER.407:18-19;

ER.408:26-27. Persis is Vice President of EDE and the owner, President, and sole officer and director of PBS, Inc. ER.406:18-26; ER.401:24-402:5. Such control of a corporate entity engaged in deceptive telemarketing “establishes strong evidence” of knowledge. *FTC v. Affordable Media LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999). As corporate officers, moreover, each defendant knew, or should have known, of PBS’s deceptive and abusive practices. *Stefanchik*, 559 F.3d at 931.

PDS, the corporate predecessor of PBS, Inc., had prior to initiation of this case, already been enjoined from engaging in deceptive and abusive telemarketing of magazine subscriptions. And Jeff, Brenda, Dirk, and Persis had all been named as defendants and signed a consent order in at least one law enforcement action.²⁵ They therefore cannot colorably disavow knowledge that PBS’s continued pursuit of the same sales and collection practices was likely to violate the FTC Act and the TSR. It is undisputed that PBS was, at the time this action commenced, under order in three states to refrain from engaging in the very deceptive and abusive practices at issue here. ER.39. Yet PBS nonetheless continued to perpetrate such practices, giving rise to the FTC’s complaint and the district court’s summary judgment liability ruling.

Defendants’ willingness to knowingly engage in misconduct is further evidenced by PBS’s failure to comply with the stipulated preliminary injunction

²⁵ See ER.434; D.7-3 to D.7-4 (FTC TRO Vol. 3) at 473-93; D.7-5 (FTC TRO Vol. 3) at 494-502.

entered in this case. The district court was wrong in supposing that the stipulated preliminary injunction, entered on June 3, 2008, “effectively caused Defendants to cease their telemarketing business.” ER.4.²⁶ Rather, as Dirk Dantuma confirmed at the evidentiary hearing, it was entry of the *permanent* injunction on April 7, 2010 (and not the stipulated preliminary injunction in June 2008) that effectively shut PBS down. ER.62:15-23. Thus, contrary to the district court’s finding, PBS continued to engage in deceptive and abusive practices while this case was being litigated, and well after the stipulated preliminary injunction entered in June 2008. As corporate officers and named defendants party to the court’s order, Jeff, Brenda, Dirk, and Persis cannot plausibly feign ignorance of PBS’s failure to comply with the court’s order. Simply put, Jeff, Brenda, Dirk, and Persis could not have remained ignorant of PBS’s continued deceptive and abusive practices – practices with a known “high probability

²⁶ The Commission introduced ample evidence – both at summary judgment and before the evidentiary hearing on damages – that PBS continued to engage in the very deceptive and abusive practices that were prohibited under the preliminary injunction. The evidence presented indicated that, far from complying with the preliminary injunction, PBS was actually escalating its attempts to extract money from consumers, using the same deceptive sales pitch and abusive collection tactics, but demanding more money in total (\$897 rather than the roughly \$720 demand that was characteristic of earlier declarations), escalating efforts to obtain automatic payments, and, in some cases, making unauthorized charges. *See, e.g.*, ER.279-80, ¶ 2, 4 (Cox, initial call in September 2009); ER.277, ¶ 2, 14 (Hall, initial call in June 2009); ER.271, ¶ 1, 5 (Moerler, first contacted April 2009); ER.268, ¶ 2, 8 (B. O’Brien, initial contact March 2009); ER.205, ¶ 2, 9 (K. Gaynier, initial call Oct. 2009). *See generally* D.222, ¶ 91.

of fraud”– unless they “intentional[ly] avoid[ed] . . . the truth.” *Pantron I*, 33 F.3d at 1103.

B. Each Individual Defendant’s Participation In PBS’s Operations Independently Satisfies The Knowledge Requirement.

In addition to serving as corporate officers, Jeff, Brenda, Dirk, and Persis all participated actively in the day-to-day operations of PBS, managing key components of the scheme. This “involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability.” *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d at 574 (“the degree of participation in business affairs is probative of knowledge”); *Southwest Sunsites, Inc., v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (evidence of “managerial and policy-making responsibilities” can support a finding of individual liability). As detailed below, abundant evidence demonstrated each individual’s active participation in and resulting awareness of PBS’s deceptive practices during the 2004-2008 time period.

1. *Jeff*: Among other responsibilities, Jeff served as a top-level manager in charge of the sales and renewals departments at PBS’s Altamonte Springs headquarters; ER.381 at 11:20-22, 12:1-3; ER.396 at 106:15-17. He also managed the Toledo, Ohio sales office, ER.410:10-14, and ran the companies’ office in St. Paul, Minnesota until it closed. ER.108:14-18. Dirk, his elder brother, referred to Jeff as a “top dog” in the family business. ER.393 at 33:11.

As a manager of three PBS offices, Jeff was responsible for resolving problems that arose in those offices. ER.386 at 32:22-33:2. Together with his father and Dirk, Jeff had the authority to make changes to PBS's telemarketing scripts. ER. 258 at 128:22-25. Jeff also wrote PBS's add-on/renewal scripts, scripts which echo the misrepresentations made in the initial sales pitch. ER.122:20-22; *see also* FTC Exh. 33 (admitted on 6/8/2011).

Former employees testified as to Jeff's active involvement in the deceptive practices: he welcomed new telemarketers and, as their only training, instructed them to "read the script, and just dial and dial and dial from the time you get here until the time you leave." ER.350, ¶ 3. As to the verifiers that he supervised, it was known that Jeff "would not tolerate" verifiers who permitted customers to refuse to verify sales. ER.360-61, ¶ 22. Verifiers under Jeff's supervision were fired for "not making their numbers and generally for giving up too easily when a customer would say that they did not want their magazines." ER.364-65, ¶ 32.

2. *Brenda*: Brenda is the manager of the Miami sales offices and, as such, the supervisor of all the Miami employees. ER.83:8-16. Responsible for accounts payable and payroll, Brenda also serves as the point of contact with magazine publishers. ER.375 at 18:10-16. At her deposition, Brenda admitted to knowing that representations in PBS's sales script were false. ER.372 at 120:18-24, ER.373 at 139:7-21. Former employees testified that "Brenda made the important decisions

about how the business would operate,” in the Miami office, ER.347, ¶ 10, and that she “kept a close eye on the sales performance and sales volume of the [Miami] office.” ER.335, ¶ 8. Telemarketers were disciplined and fired, at Brenda’s direction, for not meeting sales quotas. ER.347, ¶ 11.

3. *Dirk*: Like his siblings, Dirk has worked for the companies for years, and over the course of his career, has worked in every single department. ER.389, at 10:12-15, 10:21, 12:7-11, ER.390 at 16:3-9, 17:5-16, ER.391 at 18:3-17, ER.393 at 32:15-23, 33:20-25. Dirk handled legal compliance, ER.395 at 39:3-6, and testified that he was the person responsible for “read[ing] the [TSR],” and for “consult[ing] with people to see if our scripts were in compliance.” ER.64:25-65:2. Along with Jeff and his father, Dirk had the authority to change the scripts. ER.258 at 128:22-25. Although Dirk also owns two other companies, he remained actively involved with PBS during the relevant time period. Dirk handled the escalated consumer complaints, ER.395 at 40:1-15, 40:2, 41:1-11, and served as liaison to outside counsel when PBS was threatened with legal action, responding to investigative requests, and negotiating with law enforcement officials. ER.393 at 33:20-25, ER.394 at 34:1-22. Moreover, one of Dirk’s companies, “exclusively sells Dunn [sic] & Bradstreet business lists to PBS.” ER.399-400, ¶ 2; *see also* ER.383 at 77:2-7. These lists provide the “lead cards” that PBS used to make its telemarketing calls. ER.400, ¶ 6.

4. *Persis*: Persis, in addition to her corporate officer duties, manages the

companies' books and records and is responsible for clerical functions, including oversight of the mailings that the company sends out. ER.377 at 159:7-9; ER.400, ¶ 8; ER.87:17-18; ER.85:11-14. As the President and sole corporate officer of PBS, Inc., she was the addressee of many consumer complaints. ER.403:27-404:5. Persis managed the department responsible for sending out PBS's collections letters and was aware of the purpose and contents of those letters. ER.378 at 171:15-172:9. Although at the evidentiary hearing Persis disclaimed any authority over operational matters, ER.86:21-ER.87:5, earlier she admitted to being able to authorize consumer refunds, ER.379 at 182:11-23. Nor are Persis's protestations of ignorance persuasive, given her close relationship with Edward, her husband, the founder of PBS and the family patriarch. During his deposition, Edward admitted that Persis was the person sure to know if he had completely answered all the questions. ER.384 at 220:9-11.

* * *

Whether the district court applied the wrong legal standard, or ignored the overwhelming evidence of each defendant's active participation in PBS's ongoing deceptive and abusive practices, or both, the "the entire evidence" readily demonstrates that each defendant knew or should have known of PBS's long-standing and persistent violations of the FTC Act. *Hinkson*, 585 F.3d at 1260. The district court therefore committed reversible error in not finding Jeff, Brenda, Dirk and Persis each individually liable for monetary relief.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that this Court vacate the district court's judgment on equitable monetary relief, and remand to the district court with instructions to enter an order finding all defendants jointly and severally liable for the full amount of consumer losses.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

OF COUNSEL:

s/ Ruthanne M. Deutsch

FAYE CHEN BARNOUW
MARICELA SEGURA
Federal Trade Commission
Los Angeles, California

RUTHANNE M. DEUTSCH
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3677

Dated: February 13, 2012

COMBINED CERTIFICATIONS

1. Word count – I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 12,892 words, as counted by the WordPerfect word processing program.

2. Service upon counsel -- I hereby certify that I served counsel for all parties with this brief via the CM/ECF system, on February 13, 2012. In addition, I served a paper copy of this brief on the following counsel, who is not registered in the CM/ECF system:

H. James Montalvo
Homer Bonner PA

Counsel for Appellees Brenda Dantuma Schang, Dries Dantuma, Dirk Dantuma, and Jeffrey Dantuma

1441 Brickell Ave.
1200 Four Seasons Tower
Miami, FL 33131

3. Service of Excerpts of Record – I hereby certify that I sent, by overnight express delivery, 4 paper copies of the Excerpts of Record to the Clerk of the Court, on February 13, 2012. In addition, I served paper copies to counsel for appellees, by overnight mail, addressed to:

Brian R. Reeve
Snell & Wilmer, LLP

Counsel for Appelles Publishers Business Services, Inc. and Ed Dantuma Enterprises, Inc.

3883 Howard Hughes Parkway
Suite 1100
Las Vegas, NV 89169

Jeffrey L. Willis
Snell & Wilmer, LLP

Counsel for Appelles Publishers Business Services, Inc. and Ed Dantuma Enterprises, Inc.

Suite 1500
One South Church Avenue
Tucson, AZ 85701-1630

David Richard Koch

Koch & Scow LLC

Counsel for Appellees Persis Ann Dantuma and Edward Fred Dantuma
11500 S. Eastern Ave., # 110
Henderson, NV 89052

Peter Winslow Homer and H. James Montalvo

Homer Bonner PA

*Counsel for Appellees Brenda Dantuma Schang, Dries Dantuma, Dirk
Dantuma, and Jeffrey Dantuma*
1441 Brickell Ave.
1200 Four Seasons Tower
Miami, FL 33131

s/ Ruthanne M. Deutsch

RUTHANNE M. DEUTSCH

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-appellant, Federal Trade Commission, states that it is not aware of any related cases pending before this Court.

s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Attorney
Federal Trade Commission
Washington, D.C. 20580

Dated: February 13, 2012

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s):

I, Ruthanne M. Deutsch, certify that this brief is identical to the version submitted electronically on [date] Feb 13, 2012 .

Date Feb. 15, 2012

Signature s/ Ruthanne M. Deutsch
(either manual signature or "s/" plus typed name is acceptable)