IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17270

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

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

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

# REPLY BRIEF OF PLAINTIFF-APPELLANT FEDERAL TRADE COMMISSION


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## INTRODUCTION

This appeal concerns the appropriate remedy for undisputed violations of the FTC Act, 15 U.S.C. § 45(a) and the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR"). Between January 2004 and August 2008, PBS made roughly 25 million deceptive sales calls to consumers throughout the country – calls promising free gifts when PBS's actual goal was to get consumers to pay hundreds of dollars for years of magazines.[1] The district court recognized, in granting summary judgment as to liability, that PBS engaged in these material deceptions and that they were widely disseminated to consumers who purchased PBS's products. As the Commission demonstrated in its opening brief, those rulings themselves trigger a presumption that any resulting payments to PBS were the product of unlawful deception, and warrant disgorgement of the full amount that PBS obtained. The fraud here was in the selling.

In response, PBS does not dispute that these violations occurred. Instead, it attempts to avoid the logical implications of the district court's liability ruling and seeks (as did its expert) to focus on selective bits and pieces of PBS's sales practices and "ignore everything else." PBS misses the forest for the trees, refusing to

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

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

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

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

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

Finally, in contesting individual liability, PBS again avoids the elephant in the room – that PBS's initial sales pitch undisputedly violated both the FTC Act and the TSR. Under the proper standard, Brenda, Jeff, Dirk, and Persis cannot plausibly disclaim knowledge of PBS's deceptive sales practices, and the evidence below establishes that they too should be compelled to pay redress.

## ARGUMENT

### I. The District Court's Failure to Apply the Presumption of Reliance Was Legal Error.

The unstated, but necessary, premise of the district court's order is that the FTC had to prove particularized customer injury, beyond a reasonable approximation of unjust gains based on net revenues (gross revenues less refunds). This is reversible legal error. *See FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1205-07 (10th Cir. 2005).

PBS engaged in widespread violations, with the deception of the initial sales call only reinforced by PBS's subsequent collections practices. Consumers exposed

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

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

citations omitted).[2] As the FTC argued in its opening brief, and defendants fail to address, the FTC is not required to prove particularized injury because "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." *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (internal quotation omitted); *see also* FTC Br. at 33-34.

Throughout their briefs, PBS attempts to balkanize their various business practices and, in particular, focus the Court's attention chiefly on their collection efforts. *See, e.g,* PBS Br. 42-43; Dantuma Br. at 8. This ploy is an apparent tactic to avoid the heart of the Commission's case, which is that defendants used a variety of deceptive and otherwise unlawful practices to convince consumers that they were responsible for paying for hundreds of dollars worth of magazines, even when they protested ever having agreed to do so. When consumer transactions are based on unlawful deception, proper redress in a case like this is the refund of all of the money consumers were deceptively induced to part with, regardless of whether they ultimately make payments because of coercive collection practices, or "voluntarily," on the basis of an "agreement" they were deceived into making. PBS's tactic on

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

appeal is unavailing because, like its expert below, PBS ignores how the business, as a whole, operated as a "bait and switch," scheme in which consumers were deceived into thinking that they got an extraordinary deal on the magazines they were to receive.[3]

Here, the principal – and pervasive – deception was in the initial pitches made to unsuspecting consumers called at their workplaces.[4] Defendants did not call and announce their intent to offer magazines for sale.[5] Instead, they launched into an elaborate ruse, beginning with conducting a bogus survey, then expressing the desire to "thank" consumers with a "gift" of magazines, and only then mentioning small fees to help "defray the cost of getting them out to you." ER.29-30. Consumers were thus,

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

[4] Contrary to PBS's suggestion, PBS Br. at 4, n.2, the record demonstrates that PBS's deceptive calls were targeted at individual consumers, easily distracted at their work place – not the businesses they worked for. The district court rejected PBS's defense based on the business-to-business exception of the TSR, recognizing that targeting consumers in their workplace was "at least as abusive, if not more so," than calling them at home. ER.48; *see also* ER.29. Moreover, although PBS refers in passing to purported purchases made by PBS employees and in response to Internet advertisements, PBS Br. at 8, PBS made no attempt to quantify revenue attributable to such purported sales.

[5] This in itself was a violation of the TSR. *See* note 6, *infra*.

from the outset, given a fundamentally distorted view of the proposed transaction, and told that they were receiving the boon of an extraordinarily generous gift in exchange for providing information on their "personal buying habits," with only negligible shipping and handling fees as costs. ER.29. This was the deception at the core of PBS's business model, and the district court concluded, at summary judgment, that it violated both the FTC Act and the TSR.[6]

The primary question, then, with regard to PBS's subsequent communications is whether they fully dispelled the initial deception, such that consumers' overall "net impression" would be a non-deceptive view of the proposed transaction. Nothing PBS presented comes close to meeting that standard. On the contrary, as the district court found, the subsequent communications themselves constituted further violations of the FTC Act and the TSR. PBS's attempts to rewrite history notwithstanding,[7] PBS's

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

[7] PBS's statement of facts does disservice to the district court's summary judgment rulings and repeatedly mischaracterizes the record. For example, the "discount" PBS describes was offered to people who were delinquent on payments in an effort to collect some money from protesting customers, not to people who PBS called "[b]efore the first payment was due." PBS Br. at 7 (misrepresenting SER.77-78); and in describing the model behavior required under PBS's Collection

verification and collections practices only compounded the harm caused by its initial nationwide wave of deceptive calls.

Although PBS tacitly admits that its verifications process was deceiving, it refuses to acknowledge that the "verification" recordings were an integral part of PBS's collection machine. As a PBS collections manager admitted, the "verification tape" was a critical element of PBS's entire scam, serving as a "pretty effective" device to ensnare consumers and force them to pay for magazines that they had never agreed to purchase. ER.72:18-20.[8] Under PBS's collections guidelines, if a consumer denied placing an order, PBS collectors were not allowed to cancel the sale. Indeed, they had to play the verification recording as a means of coercing the consumer to pay up. FTC SER.9:18-12:10; ER.88-97. PBS also fails to mention that PBS collectors were trained to believe (falsely) that all PBS customers had already had the full offer presented to them three times, justifying their insistence that consumers who said they hadn't agreed to PBS's onerous terms were wrong. FTC SER.7:12-8:16.

Regarding collection practices generally, PBS again misrepresents the record

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Guidelines, PBS Br. at 10-11, PBS ignores abundant evidence that the guidelines were not followed and the district court's conclusions to that effect. *See* ER.44-45, 59; FTC Br. at 10-12.

[8] In its opening brief, FTC Br. at 10, the Commission mistakenly attributed this statement to Dries Dantuma. It comes from Dan Fosmire, PBS's collections manager.

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

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

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

as it did at the evidentiary hearing, to relitigate its underlying liability; suggesting that consumers were not harmed by its collections practices. But PBS ignores the district court's recognition, prior to the evidentiary hearing, that the FTC need not prove that consumers were "negatively affected by these aggressive collections tactics," because "that very topic was addressed" at summary judgment. ER.199:20-200:8.[10]

Ultimately, there is no denying that PBS engaged in over 25 million deceptive sales calls, resulting in violations of both Section 5 of the FTC Act and the TSR. Equally true is that this initial widespread and deceptive contact resulted in consumer purchases totaling more than $34 million. Nothing PBS presented at the evidentiary hearing sufficed to rebut the showing that the FTC was, therefore, presumptively entitled to net revenues (revenues less refunds) as a reasonable approximation of consumer loss. *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 369 (2d Cir. 2011). Because the presumptive measure of damages is "based upon what consumers lost ... the consumer will not receive anything greater than what was originally paid for the programs." *FTC v. Febre*, 128 F.3d 530, 536-37 (7th Cir. 1997). Here, it is undisputed that this figure is $34,419,630.00.

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

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

## II. Defendants' Failed to Meet Their Burden of Rebutting the Presumptive Measure of Relief.

After this reasonable approximation has been established, any "claims that individual transactions were atypical and resulted in a lower-than-expected gain to the wrongdoer are properly considered at stage two of the analysis, where the burden of proof rests with the defendant." *Bronson Partners*, 654 F.3d at 369 (emphasis omitted). Because the presumptive measure was established, the district court erred in holding that it was the FTC's burden to prove that the customers deceived by PBS were harmed. ER.5. On the contrary, it was PBS's burden to prove that, notwithstanding the deceptive and abusive sales practices that infected every sale, consumers were nonetheless satisfied. Thus, PBS could offset the presumptive amount of monetary relief only by putting forth evidence of consumers who were "wholly satisfied with their purchases and thus suffered no damages." *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004) (en banc).

PBS made no such showing. Defense counsel acknowledged, before the evidentiary hearing, that a scientific survey of paying customers – subject to cross-examination by the Commission – might rebut the presumption that consumers exposed to PBS's deceptive practices were injured. ER.202:3-11. But PBS failed to present anything so robust at trial. Instead, PBS relied upon an expert report which

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

Nor did any other evidence offered by PBS rebut the presumption. Because *every* transaction was tainted by PBS's deceptive practices, payment does not prove customer satisfaction. It proves the effectiveness of the deception. Nor does a purported absence of consumer complaints prove lack of deception (much less satisfaction) particularly where, as here, PBS's own records were woefully inadequate in tracking consumer complaints. *See* FTC Br. at 22-23.[12] In short, PBS failed entirely to demonstrate that *any* paying customer – even the four purportedly "satisfied" customers who testified at the hearing – was "wholly satisfied," *i.e.*, would willingly agree to the payments incurred, if fully apprised of the actual terms and conditions offered by PBS. And testimony elicited by the FTC demonstrated the opposite. *See* FTC Br. at 20-21 & n.12.

PBS rails against this standard, but it comes directly from this Court's seminal decision in *Figgie*. There, the Court clarified that there would be no need for full

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

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

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

## III. The District Court's Equitable Discretion Extends Only To "Permissible Choices."

Because PBS failed to rebut the presumption of reliance, net revenues was the appropriate measure of relief.[13] And, even assuming that the district court had equitable discretion to award some lesser amount of ancillary monetary relief, such discretion does not permit the court to adopt a measure of relief that cannot be squared with its own prior rulings, is legally baseless, and is not supported by the facts. As PBS acknowledges, the district court's equitable discretion is not limitless, but is bounded by the range of "'permissible choices the court could have made.'" PBS Br. at 27 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009)).[14] The district court's award of $191,219, based on wholesale adoption of Dr.

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[13] PBS selectively cites the first panel decision in *Trudeau* to suggest that the court endorsed the propriety of net profits as a measure of relief. PBS Br. at 34 (citing 579 F.3d at 771-72). But that court also recognized that consumer loss is a "common measure," and often "more appropriate." 579 F.3d at 771-72. On remand, the district court in fact awarded the presumptive measure – gross revenues less refunds – an award that was affirmed by the Seventh Circuit. *See FTC v. Trudeau*, 662 F.3d 947, 951 (7th Cir. 2011).

[14] PBS attempts to finesse the lack of foundation for the district court's remedial holding by arguing that its decision may be affirmed on any ground "suspected by the record." PBS Br. at 27 (misquoting *Lee v. United States*, 809 F.2d 1406, 1408 (9th Cir. 1987)); Dantuma Br. at 23 (same). Even putting aside this misarticulation of the standard, the record here does not *support* affirmance. On the contrary, it directly contradicts the district court's award, which turns on Dr. Duncan's unsupported opinion.

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

As the FTC demonstrated in its opening brief, Dr. Duncan's opinion was based on assumptions and reasoning that were fundamentally at odds with FTC law, the facts, and the district court's summary judgment ruling. *See* FTC Br. at 38-43. Although PBS now insists that Dr. Duncan's analysis did not attempt to reexamine findings already made at summary judgment, *see* PBS Br. at 56, 59, in the same breath, PBS admits that Dr. Duncan sought to determine "whether customers were misled into making payments," PBS Br. at 57. And PBS likewise acknowledges that Dr. Duncan ignored PBS's undisputed violations of the FTC Act and the TSR and assumed away the deception. *See* PBS Br. at 59 (recognizing that Duncan sought to determine, "*notwithstanding those violations*, whether customers knew what they were getting and what they were paying.") (emphasis added).

Simply put, Dr. Duncan's results did not, and could not, measure what consumers actually knew. At most, Dr. Duncan's results stood for the proposition that researchers, armed with earphones and a checklist, and listening attentively in a lab, would hear the terms recited in that cherry-picked portion of the verification call that PBS elected to tape. But this Court has already rejected similar analyses as a basis for proving the fully informed consumer choice needed to demonstrate lack of deception. In *FTC v. Cyberspace.com, LLC*, the Court recognized that defendant's

consumer research study (which was arguably more robust than Dr. Duncan's, because it at least involved interviews of real consumers) stood "only for the proposition that most consumers can understand the fine print on the back of the solicitation when that language is specifically brought to their attention." 453 F.3d 1196, 1201 (9th Cir. 2006). The Court found important that the survey "did not probe whether the notices were sufficiently conspicuous to draw the survey subjects' attention in the first place." *Id.* So too here. Dr. Duncan's study does not come close to proving whether PBS's targeted audience – distracted employees in a busy workplace – even heard, much less understood and agreed to, the terms recited on the tape. Moreover, the analysis is inherently circular. Dr. Duncan starts by assuming what he claims to prove (and was already disproved at summary judgment): 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; *see also* FTC Br. at 41-44. Because Dr. Duncan failed to prove that consumers made fully informed choices, his report cannot support the district court's decision to restrict monetary relief so severely. *Cf. Polar Bear Prod. Inc. v. Timex Corp.*, 384 F.3d 700, 713 (9th Cir. 2004) (en banc) (vacating a jury award for damages in a copyright action where the requisite causal nexus between infringement and profits was not established).

And, as the Commission argued below, Dr. Duncan's analysis is at odds with

the district court's prior liability ruling – namely, that the net impact of PBS's sales practices, including the verification calls, was "self-evident" deception. ER.54; *see also* ER.74:21-75:6.[15] The district court's discretion does not extend so far as to allow an award of relief that cannot be squared with its prior liability findings. Just as irreconcilable jury verdicts cannot stand, *see generally Zhang v. American Gem Seafoods, Inc*., 339 F.3d 1020 (9th Cir. 2003), so too, an award of relief that contradicts a prior liability finding must be overturned.[16]

The district court may have had equitable discretion to award something less

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

[16] The suggestion by the individual defendants that the district court, sua sponte and sub silentio, modified or overruled its order on summary judgment, defies credulity. *See* Dantuma Br at 35-37. District courts have authority to modify or rescind orders only for good cause, i.e., "manifest error." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001). Here, the district court did not purport to modify its summary judgment order, which stands as the law of the case. *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986). Moreover, the court insisted, throughout the proceedings, that it would not reconsider its liability findings.

than full consumer losses, so long as there was a principled basis, supported by record evidence, for so doing.[17] Ample precedent reveals alternative measures of relief that reviewing courts have deemed permissible, but any of them would yield an award vastly in excess of that yielded by Dr. Duncan's faulty analysis. Thus, for example, in *FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996), the court affirmed a Section 13(b) remedy other than net revenues. *Gem Merchandising* also involved deceptive telemarketing of a potentially useful product – there defendants falsely promised prizes to induce sales of medical alert systems. *Id.* Recognizing the defendants' poor record-keeping, the court ordered $100 to be paid to each of 5,000 consumers, as feasible, with any excess be deposited in the Treasury. *Id.* at 469-70.

Another alternative might be to deduct the value of the merchandise received by PBS's customers (at wholesale, so as to ensure that PBS retained no mark-up as a result of its deceptive practices). The Third Circuit affirmed this form of relief in

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[17] PBS errs in arguing that the FTC adopted an all-or-nothing approach below. Although the Commission has maintained its position that full consumer losses are the appropriate measure of relief, it nonetheless provided the district court with alternative measures with at least some rational basis in the record. Accepting, arguendo, PBS's theory that customers who chose to open more than one account were not deceived, revenue attributable to one-time only customers was $15,190,797.27. *See* D.222 at 8. The FTC also presented estimates of the percentage of paying consumers by length of time it took to receive the first payment (as an indicator of exposure to abusive collections practices). *See* D.222 at 10-12; *see also* ER.196-97 & FTC SER.15 (FTC Exhibits 13 and 15, which, contrary to PBS's assertion, were never deemed faulty or unreliable by the district court).

a very similar magazine subscription scam. *See FTC v. Magazine Solutions*, *LLC*, 2011 WL 2439916,*2 (3d Cir. 2011); *but see Kuykendall*, 371 F.3d at 766-67 (rejecting defendants' arguments that the value of magazines should be offset). If the district court had adopted such an approach, the measure of relief awarded would have been roughly $30 million – more than 150 times the remedy below – because of the tremendous mark-ups PBS charged its customers. *See* FTC Br. at 10 & n.5.[18] And, even that relief would give PBS the benefit of the doubt that all of PBS's victims actually received the magazines they paid for, although there is evidence to the contrary. *See* ER.207.

In its litany of cases, moreover, PBS fails to mention that courts have endorsed the presumptive amount of net revenues as equitable relief in similar magazine subscription scams and other cases where the focus was on deceptive and abusive sales practices (including violations of the TSR) and not necessarily on misrepresentations regarding the nature of the product. *See, e.g., FTC v. Kuykendall*, 371 F.3d 745; *McGregor v. Chierico*, 206 F.3d 1378. "Bait and switch" sales tactics, such as those employed by PBS, have long been recognized as being inherently deceptive, whether or not they misrepresent the nature of the product. The Supreme

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

Court expressly denounced this type of deception as "contrary to decent business standards" and "evil," over seventy years ago, in the context of door-to-door encyclopedia sales:

> The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose-leaf supplements alone sell for $69.50, when in reality both books and supplement regularly sell for $69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they were given an encyclopedia and that they paid only for the loose-leaf supplement.

*See FTC v. Standard Educ. Society,* 302 U.S. 112, 116-17 (1937); *see also Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970).

PBS therefore errs in contending that, because its deception did not misrepresent the true nature of its product,[19] it should necessarily escape the full measure of relief. As this Court made clear in *Figgie*, "liability ... is premised not on the fact that Figgie sold heat detectors, but on the dishonest or fraudulent practices it used to sell them." 994 F.2d at 604. Because PBS's revenues are the result of deceptive practices, they should be disgorged.

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[19] Such a suggestion, moreover, again elides the facts of this case. PBS *did* misrepresent the nature of its product – first promising consumers a free gift, but then roping them into long-term obligations to pay for unwanted magazines.

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

## IV. Based on the "Entire Evidence," the District Court Clearly Erred By Failing To Hold All Individual Defendants Liable for Monetary Relief.

To establish monetary equitable relief against the officers and employees who managed PBS, beyond the showing already made to obtain injunctive relief (not contested here), the FTC needed only to further establish that each of the "defendants had or should have had knowledge ... of the misrepresentations ...." *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). Proof of subjective intent to defraud is not required, and indeed "would be inconsistent with the policies behind the FTC Act." *Id.* Thus, in *Figgie* this Court recognized (in applying the arguably more rigorous knowledge standard when affirming an award of redress under § 19 of the FTC Act), that, "the issue of law is what a reasonable person would have known, not what Figgie's executive knew." 994 F.2d at 603.

Here, consideration of the "entire evidence" in the record, *see Hinkson*, 585 F.3d at 1260, beyond the selective excerpts of testimony presented by defendants, shows that the district court clearly erred in refusing to hold Brenda, Jeff, Dirk, and Persis each liable for monetary relief.[20]

As an initial matter, PBS's prior entanglements with law enforcement,[21] as well as defendants' persistent engagement in misrepresentations even *after* entry of the stipulated preliminary injunction in this case – unlawful conduct that the district court clearly erred in ignoring, and which defendants do not even try to deny – demonstrate that all of the defendants were recklessly indifferent to the truth as the defendants continued to engage in deceptive practices.[22] In addition to this demonstrated

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[20] Deposition excerpts, including testimony from the individual defendants admitting their participation in and knowledge of PBS's violations of the FTC Act and the TSR, were accepted as evidence prior to the close of trial. *See* FTC SER.4:18-6:7.

[21] *See* FTC Br. at 46 & n.25. In *FTC v. Magui Publishers, Inc.*, 1993 WL 430102, *4 (9th Cir. 1993), this Court recognized that the knowledge prong for individual liability could be supported, in part, by the defendant's entry into an earlier consent judgment settling similar charges.

[22] *See* FTC Br. at 46-47 & n.26, noting ample evidence of continued violations *after* entry of the stipulated preliminary injunction, and the district court's clear error in concluding that the preliminary injunction "effectively caused Defendants to cease their telemarketing business." ER.4. *See also* FTC SER.3:19-25. Defendants effectively concede, at various points in their brief, that PBS's deceptive practices did not halt until the permanent injunction issued in April 2010, nearly two years after entry of the stipulated preliminary injunction.

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

In contesting individual liability, defendants once again attempt to avoid the undeniable reality that PBS made 25 million calls that violated both the FTC Act and the TSR, contending that the Commission has no warrant for describing PBS's acts of deception as "widespread and pervasive." Dantuma Br. at 8. Focusing only on PBS's collection practices, defendants suggest that if an individual was not involved specifically in collections, then he or she could not be individually liable for PBS violations. This argument is without merit. As noted above, the success of PBS's collections efforts is inextricably linked to its deceptive sales practices.

Further, the individual defendants do not, and cannot, argue that they were unaware of the nature of PBS's deceptive sales calls. It is undisputed that Brenda and Dirk had actual knowledge of PBS's misrepresentations. Brenda admitted, at her deposition, to knowing that representations in PBS's sales scripts were false. *See, e.g.*, ER.372 at 120:18-24, ER.373 at 139:7-21. And the court below, in describing PBS's deceptive collections practices, expressly noted Dirk Dantuma's own admission that "PBS representatives do not inform consumers that in some cases the entire five year subscription has not been pre-paid." ER.56. Nor did PBS rebut the

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

Moreover, Brenda and Jeff both were in charge of PBS sales offices (Brenda, the Miami office, and Jeff, offices in St. Paul, Toledo, and Altamonte Springs), responsible for making the important decisions and supervising employees. *See* FTC Br. at 48-50. During the relevant time period, Dirk was ostensibly responsible for reviewing sales scripts to ensure compliance with the FTC Act and the TSR – a task that he was responsible for, no matter how badly he performed it. He also handled the escalated consumer complaints, and served as PBS's liaison to investigating authorities.[24] Removing any doubt as to his involvement with PBS during the period

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

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

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

Nor does the mere fact that Brenda, Jeff, and Dirk were not always present in PBS's boiler rooms defeat a finding of knowledge sufficient to establish individual liability. In *FTC v. Bay Area Business Council*, for example, a defendant's stay in Canada did not "diminish the evidence that he knew about the corporations' deceptive practices" in the United States. 423 F.3d 627, 637 (7th Cir. 2005). That Brenda and Jeff often managed sales remotely, and that Dirk was not on premises when he reviewed scripts, handled complaints, and served as PBS's liaison with law enforcement, does not negate each of their direct involvement with and awareness of PBS's deceptive practices. Knowledge, not physical presence, is the determining factor.

In short, Brenda, Jeff, and Dirk all had the requisite knowledge to be held individually liable, because they were all intimately involved in and aware of the multiple misrepresentations that PBS made in its initial contacts with consumers, and had actual knowledge of PBS's violations of the FTC Act and the TSR.[25]

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

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

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

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

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

## CONCLUSION

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

Respectfully submitted,

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## 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 6,791 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 May 11, 2012.

3. Service of Excerpts of Record – I hereby certify that I sent, by overnight express delivery, 4 paper copies of the Supplemental Excerpts of Record to the Clerk of the Court, on May 11, 2012. In addition, I served paper copies to counsel for appellees, by overnight mail, addressed to:

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# CERTIFICATE FOR BRIEF IN PAPER FORMAT

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

9th Circuit Case Number(s): 11-17270

I, Ruthanne M. Deutsch , certify that this brief is identical to the version submitted electronically on [date] May 11, 2012 .

Date May 14, 2012

Signature s/Ruthanne M. Deutsch

(either manual signature or "s/" plus typed name is acceptable)