No. 16-1599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee,
v.
Joseph K. Rensin,
Defendant-Appellant,

BlueHippo Funding, LLC, BlueHippo Capital, LLC,
Defendants.

On appeal from the United States District Court for the Southern District of New York, No. 1:08-cv-01819-PAC

FINAL FORM BRIEF FOR THE FEDERAL TRADE COMMISSION

JAMES A. KOHM
Associate Director

DOUGLAS V. WOLFE
Assistant Director

AMANDA C. BASTA
COLIN D.A. MACDONALD
Attorneys
BUREAU OF CONSUMER PROTECTION

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

MICHAEL D. BERGMAN
Attorney

OFFICE OF GENERAL COUNSEL
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

INTRODUCTION AND QUESTION PRESENTED

BlueHippo, a company controlled by appellant Rensin, entered into a Consent Order in 2008 that forbade it from misleading consumers about its sale of computer equipment. Rensin and his company later violated the Order and were held in contempt, in pertinent part by failing to tell customers about the potential for hidden fees.

In a prior ruling in this case, *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238 (2d Cir. 2014), this Court held that the district court had miscalculated the amount of monetary relief due to consumers for Rensin's contempt. Specifically, because consumer injury "stems from the initial misrepresentations," *id*. at 244, the court should have given the FTC the benefit of a presumption that all consumers relied on Rensin's misrepresentations when they first did business with him. The district court therefore should have calculated relief to ensure full compensation to *every* consumer from whom Rensin withheld information.

On remand, the district court recalculated the compensatory contempt award to equal the total consumer loss attributable to Rensin's misrepresentations minus offsets for money already paid back to consumers. In the rulings now on appeal, the court denied Rensin's request for discovery of customer order records that Rensin claimed would show whether certain consumers actually paid charges that Rensin failed to disclose at the point of sale. If they did not, he posited, it would

rebut the presumption of reliance. The district court held that Rensin's theory could not show any valid offsets.

The question presented is whether the district court abused its discretion or denied Rensin due process of law in denying him the requested discovery.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying claims in this case and authority to enter an injunction under 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. §§ 45(a), 53(b), and 57b. The district court had inherent authority to enforce its judgment through contempt. *In re Weiss*, 703 F.2d 653, 660 (2d Cir. 1983). The court entered its final judgment imposing compensatory contempt sanctions and a related opinion and order on April 19, 2016. D.139, D.138.[1] On May 18, 2016, Rensin filed a timely Notice of Appeal. D.140. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Initial District Court Proceedings

BlueHippo sold computers, mostly to consumers with poor credit. To attract customers, the company offered financing on an installment plan under which the consumer would make a down payment and 13 subsequent installment payments.

[1] "D.xx" refers to entries in the district court's docket; "Br." refers to Appellant's Final Form Brief; "A.xx" refers to pages in the Appendix; "PX" refers to the FTC's hearing exhibits; and "Tr." refers to deposition or hearing transcripts.

BlueHippo promised that once all the payments were made, the consumer would receive both a computer and financing for the balance due. *BlueHippo*, 762 F.3d at 240-41. Customers who missed any of the initial 13 payments could obtain a computer only by paying the balance of the purchase price through a layaway program, or they could apply previously made payments to store credits for merchandise like printers or monitors. *Id.*; A. 200-201 (PX 22C at 3-4). The vast majority of customers could not afford all 13 payments. They wound up with store credit, which was the only way they could get any value from the payments they had already made.

BlueHippo misled its customers about multiple aspects of its business. *See* 762 F.3d at 241 n.2. In 2008, the FTC sued BlueHippo Funding, LLC and BlueHippo Capital, LLC (collectively, "BlueHippo") principally alleging that its sales tactics were deceptive and violated (among other laws) Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). D.1. BlueHippo and the FTC then settled the case and entered into a Consent Order. Among other requirements, the Consent Order required BlueHippo to disclose "clearly and conspicuously, prior to receiving any payment from customers all material terms and conditions of any refund, cancellation, exchange or repurchase policy." A. 29-30 (D.2 at 3-4 ¶ I.B); *see* 762 F.3d at 245 n.6.

BlueHippo, under CEO Rensin's direction, continued to market computers using sales pitches that violated the Consent Order. In November 2009, the FTC moved to hold BlueHippo and Rensin in contempt for multiple violations of the order.[2] D.42; *see* 762 F.3d at 241 n.4. The specific violation now at issue concerns BlueHippo's failure to disclosure its store credit refund policy (the FTC also charged that BlueHippo failed to deliver promised computers).

Customers who bought a computer could receive a cash refund up to one week after the initial purchase. A. 259 (PX 40 at BH16). After that, purchasers could apply payments they had already made as store credit to buy other merchandise from BlueHippo. A. 209 (PX 22F at 5); A. 259, 273 (PX 40 at BH16, BH30). Contrary to the terms of the Consent Order, BlueHippo failed to tell consumers when they initially placed their computer order that their store credit would not cover any shipping and handling fees and taxes associated with items purchased from the online store. A. 209-210 (PX 22F at 5-6) (describing company store credit policy); A. 259, 273 (PX 40 at BH16, BH30) (no explanation of such possible additional fees during the initial telemarketing call); *see* 762 F.3d at 245-

[2] The FTC sought to hold Rensin jointly and severally liable for BlueHippo's violations pursuant to Fed. R. Civ. P. 65(d)(2) because, as BlueHippo's owner and CEO, he received actual notice of the Consent Order and acted in concert and participated in BlueHippo's conduct. *See N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 90 n.2 (2d Cir. 1998). The district court held Rensin jointly and severally liable, A. 377-378 (D.76 at 11-12), and Rensin did not challenge that decision. *See BlueHippo*, 762 F.3d at 241 n.3.

46. The company also failed to disclose that consumers could place only one store credit order at a time, subjecting purchasers of multiple items to the possibility of paying shipping and handling fees and taxes for each purchase. A. 210 (PX 22F at 6).

The record showed that when customers finally learned of the additional charges in the course of placing a store credit order, some of them abandoned the order. *See* A. 293-307 (PX 48D-H). Customers received merchandise purchased with store credits for only 750 orders (their payments are not part of the contempt judgment), and they had to make additional payments to receive that merchandise for approximately two-third of those orders. A. 189 (2/11/10 Tr. at 200); A. 370, 374 (D.76 at 4, 8) (number of unfilled store credit orders). Rensin's customers never received any merchandise at all for 55,892 orders.

To compensate consumers injured by defendants' contumacious conduct in misrepresenting their store credit policy, the FTC sought to recover approximately $14 million that BlueHippo collected from 55,892 initial customer orders in which the customer never received any merchandise — neither a computer nor merchandise from the online store using store credits.

In July 2010, the district court held BlueHippo and Rensin in contempt and imposed joint and several liability on them (BlueHippo had declared bankruptcy and was at that time in trusteeship). A. 367-378 (D.76); *see* 762 F.3d at 241 n.3.

The court nevertheless limited monetary relief to the small class of consumers who made all their installment payments and qualified for financing yet received neither a computer nor store credit merchandise. A. 376 (D.76 at 10). The court ruled that the FTC had failed to establish the amount injured consumers should receive for BlueHippo's other contumacious conduct. A. 376-377 (*Id.* at 10-11). Most particularly, the court refused to order relief for the 55,892 customers who spent an aggregate of $14,062,627.51 and received nothing from BlueHippo. A. 370 (*Id.* at 4).

B. This Court's August 2014 Opinion

The FTC appealed the district court's failure to award relief to all consumers injured by BlueHippo's misrepresentation of its store credit policy prior to an initial purchase. The FTC argued that in calculating consumer harm the court should have applied a presumption of consumer reliance on Rensin's failure to disclose material information. This Court vacated the damages award and remanded for recalculation. *BlueHippo*, 762 F.3d 238. The Court held that the FTC is "entitled to a presumption of consumer reliance upon showing that (1) the defendant made material misrepresentations or omissions that 'were of a kind usually relied upon by reasonable prudent persons;' (2) the misrepresentations or omissions were widely disseminated; and (3) consumers actually purchased the

defendants' products." *Id.* at 244 (citations omitted). The presumption, the Court stated, "further[s] the Commission's statutory purpose to protect consumers." *Id*.

The Court also explained that, if the presumption of reliance applies, "the district court must calculate damages to ensure that all of the consumers who were presumed to have relied on the defendant's misrepresentations receive 'full compensation.'" 762 F.3d at 244 (quoting *FTC v. Kuykendall*, 371 F.3d 745, 765-66 (10th Cir. 2004 (*en banc*))). Moreover, "the Consent Order affirmatively required BlueHippo to disclose all material conditions of their store credit refund policy prior to receiving any money from consumers." *Id*. at 245. Thus, had the company's store credit omissions "been revealed to consumers before they purchased computers from BlueHippo," that information "in all likelihood would have influenced their purchasing decisions." *Id.* at 246. "[W]hen an injury by misrepresentation or omission precedes a purchase," the Court held, the customer is injured "at the instant of [the] seller's misrepresentations." *Id*. at 244.

The Court remanded with instructions to the district court to determine if the presumption of reliance applies, and if so to use as the compensatory baseline BlueHippo's gross receipts for transactions in which consumers received no merchandise. BlueHippo and Rensin then would have "the opportunity to rebut the determined baseline loss calculation, allowing them to 'put forth evidence showing

that certain amounts should offset the sanctions assessed against them.'" *Id.* (citing *Kuykendall*, 371 F.3d at 766).

C. Proceedings on Remand

On remand, the district court held that the presumption of reliance applied and that Rensin and BlueHippo were jointly liable for $13,400,627.60 in compensatory contempt sanctions: the baseline of $14,062,627.51 less $661,999.91 in offsets. A. 409-416 (D.103); A. 475-483 (D.139).

Rensin conceded that the FTC met the second and third elements of the presumption — wide dissemination of misrepresentations or omissions and actual purchasing of BlueHippo's products. The district court held that the FTC had also proven the first prong — that the store credit omissions "were of a kind usually relied upon by reasonably prudent persons." A. 415 (D.103 at 7). Importantly, the court rejected Rensin's argument that the FTC could show reliance only with evidence that BlueHippo actually charged additional fees to consumers. That argument "mischaracterize[s] the nature of the injury at issue," which "occurs at the instant of a seller's misrepresentation" and "taint[s] the consumer's subsequent purchasing decisions." A. 414-415 (*Id.* at 6-7 (citing *BlueHippo*, 762 F.3d at 244)).

Amplifying that point, the court found that consumer injury occurred because "BlueHippo led financially strapped consumers to believe, when they

made their initial payment, that they were making an essentially risk-free payment," because they could either buy a computer if they made all the required payments or apply their payments to merchandise on the online store using their store credit. A. 415 (*Id*. at 7). In fact, "there was a possibility that consumers would have to make additional payments in the form of shipping, handling, or taxes if they sought to utilize the online store option." *Id*. Consumers' knowledge of that possibility before engaging in business with BlueHippo would have "affect[ed] [their] decision to begin making payments in the first place." *Id*. Indeed, the court found that the FTC had introduced evidence that consumers were deterred from making subsequent online purchases using store credit once the potential fees were disclosed. *Id*. The court found that "[e]ven if few or no consumers actually paid shipping, handling or taxes," the store credit records would not include those consumers who did not complete their orders precisely because they would have to pay the additional charges. *Id*.

Under the terms of the remand and after presuming reliance from the time of the initial consumer purchases, the court held that the compensatory baseline was thus the entire amount collected by BlueHippo from the 55,892 initial orders for which customers received nothing in return. The court then turned to offsets. Rensin proffered four categories of offset evidence: 1) orders for non-computer merchandise; 2) consumer refunds; 3) payments made to settle similar state

enforcement actions; and 4) completed online store credit orders "in which consumers were never charged" shipping, handling, or taxes. A. 417-433 (D.107).

The district court accepted offsets of $126,999.91 for consumer refunds and $535,000 used for settlement of the state cases. A. 458-460 (D.131 at 4-6); A. 478 (D.139 at 4 ¶¶ 8-9). Rensin abandoned his first claimed offset. A. 478 (D.139 at 4 ¶ 10).

The last category is the focus of this appeal. Rensin sought discovery to obtain from the BlueHippo bankruptcy trustee records of completed store credit orders. The store credit order records cover three distinct groups. First, the records cover 750 orders for which customers successfully used store credits to get merchandise; those orders are not part of the 55,892 orders which are counted in the $13,400,627.60 contempt judgment. The records also cover about 7,300 orders placed by customers who had store credit but still received nothing. This latter group consists both of consumers who placed their initial computer order before the April 2008 Consent Order and those who placed their order after the Consent Order. Only the orders placed after the Consent Order are counted in the 55,892 orders covered by the contempt judgment.

Rensin claimed that, given testimony that about one-third of the 750 store credit orders for which customers actually received merchandise paid no additional fees, it was possible that other customers who used store credits to place orders but

did not receive merchandise also did not pay any fees. He argued further that if the store credit records showed that no consumer in a given state was actually charged additional fees, then that data could be extrapolated to all consumers in that state who placed computer orders. That, in turn, allegedly would prove that "there is no possibility" that any consumer in that state would ever have to pay the additional charges and would therefore rebut the presumption of consumer reliance for every consumer in that state. In Rensin's view, all money paid by customers in such a state should be subtracted from the baseline. A. 423-425 (D.107 at 7-9). The FTC opposed the requested discovery as speculative and irrelevant to support a valid offset. A. 442-443 (D.121 at 7-8).

The court denied Rensin's request for discovery of the store credit transaction records. The court explained that "[t]he evidence presented by the FTC demonstrates that consumers who learned of the additional fees were deterred from completing their online store transactions." A. 478 (D.139 at 4 ¶ 12). Thus, "the evidence Rensin seeks to rely on is not generalizable to the entire pool of injured consumers." *Id*. As such, the discovery sought by Rensin "would not permit the Court to draw the conclusion that consumers would face no risk of being charged for the undisclosed fees." *Id.* The court concluded that evidence relating to completed online store orders was thus irrelevant to establish a valid offset. *Id.*

In a related order, the court rejected Rensin's arguments that the compensatory contempt award on remand was inconsistent with this Court's August 2014 mandate or violated his due process rights. A. 473-474 (D.138). The court found no such violations because Rensin's requested discovery was "either unnecessary or improper." A. 474 (*Id*. at 2). In particular, Rensin's request for discovery to support his theory that consumers were not charged additional fees in certain states was "speculative and irrelevant." *Id*. (citing *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004)).

STANDARD OF REVIEW

As a general matter, this Court "review[s] the district court's conclusions of law de novo and its factual findings for clear error." *BlueHippo*, 762 F.3d at 243 (citing *FTC v. Verity Int'l, Ltd*., 443 F.3d 48, 63 (2d Cir. 2006)). This case is at bottom a discovery dispute. The Court will reverse a "discovery ruling only upon a clear showing of an abuse of discretion." *Pippins v. KPMG LLP,* 759 F.3d 235, 251 (2d Cir. 2014) (quoting *Wills v. Amerada Hess Corp*., 379 F.3d 32, 51 (2d Cir. 2004)); *see United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004) (relevancy determinations overturned only where they are "arbitrary or irrational") (citation omitted). The Court likewise reviews the district court's award of civil contempt sanctions for abuse of discretion. *CBS Broad., Inc., v. FilmOn.com, Inc*., 814 F.3d

91, 100-01 (2d Cir. 2016). The Court may affirm on any basis supported in the record, whether or not the district court relied upon that ground. *Tolbert v. Smith*, 790 F.3d 427, 434 (2d Cir. 2015).

SUMMARY OF ARGUMENT

This appeal concerns the narrow question of whether Rensin was entitled to discovery that he claimed would allow him to overcome the presumption that consumers relied on his failure to tell them that they might have to pay additional fees for store credit orders.

Below, Rensin's theory was that if he could show that no consumers who live in a given state were actually charged extra fees when they placed a store credit order, then he could establish that no consumer in that state was ever charged the additional fees and thus did not rely on Rensin's failure to disclose the fee policy. That showing, Rensin postulated, would overcome the presumption of reliance for all consumers in the state who placed a computer order and all consumer losses in those states therefore should be deducted from the contempt judgment. The district court properly rejected that contention as speculative and correctly held that a small number of individual order records could not be validly generalized to consumers state-wide. The records reveal nothing about the vast majority of Rensin's customers who never placed a store credit order.

Before this Court, Rensin seemingly recognizes that he must overcome the presumption of reliance person-by-person, and he raises the newly minted claim that the records he seeks to discover would "establish *individualized* instances where the presumption does not apply because, for example, reliance was unreasonable, reliance was nonexistent, or reliance did not result in any damages to the consumer." Br. 9 (emphasis added). Having failed to raise this argument below, Rensin waived it.

Neither of Rensin's theories could possibly lead to the discovery of evidence that would overcome the presumption of reliance in any event. This Court's first decision in this case held that Rensin inflicted injury on his customers the moment they first did business with him — as the Court put it, "at the instant of [Rensin's] misrepresentations." *BlueHippo*, 762 F.3d at 244. His unlawful behavior at the outset "taint[ed] the customer's subsequent purchasing decisions." *Id*. Customer order records reflecting transactions or attempted transactions that took place long *after* a customer first decided to do business with Rensin cannot possibly prove that their reliance was unreasonable or nonexistent at the time they made their initial payment to Rensin for a computer. That is the case whether reliance is assessed on an individual or a group basis.

The fact that Rensin and BlueHippo through pure happenstance may not have always imposed additional fees does nothing to alter the customers' initial

reliance on Rensin's misrepresentations. These customers were harmed in the initial transaction through their payments to BlueHippo because all of them faced at least the undisclosed risk of additional charges, and they remained harmed because BlueHippo continued to hold the money obtained from them on false pretenses. Moreover, none of the consumers whose records are sought through discovery and whose payments are part of the contempt judgment ever received any merchandise, and Rensin's speculation that they might not have been charged if their order had been fulfilled does nothing to offset their injury now. The few hundred orders that Rensin wants in discovery for which consumers actually received merchandise and were not charged additional fees are not included in the contempt judgment calculus and are irrelevant to an individualized showing.

The district court's decision to deny the requested discovery was well within its broad discretion and plainly consistent with this Court's remand. The Court should affirm the rulings below and allow the contempt judgment for $13,400,627.60 to stand.

The court's ruling was fully consistent with Rensin's due process rights. Rensin had notice and an opportunity to be heard on his request for store credit orders. He has shown no reason why due process considerations demand more.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED DISCOVERY OF STORE CREDIT ORDERS

Rensin does not dispute that he failed to tell his customers that they might be subject to additional charges. Nor does he challenge the district court's holding that consumers must be presumed to have relied on that material misrepresentation. Nor does he contend that consumers received merchandise of value that should offset the contempt judgment (in fact, in not one of the 55,892 orders covered by the judgment did customers ever receive anything of value from Rensin).

Instead, he relies on the odd theory that delving into subsequent attempts by customers to use their store credit would somehow allow him to rebut the presumption that consumers relied on his initial failure to tell them the terms of their purchase. The order records he demands in discovery cannot rebut the presumption both because this Court's earlier opinion in this case forecloses Rensin's theory and because his theory is simply illogical. The Court should affirm the district court's exercise of its discretion in "assess[ing] the relevancy of evidence." *Perez*, 387 F.3d at 209.

A. This Court's Prior Ruling Forecloses Rensin's Claim That Analyzing Orders For Store Credit Can Overcome The Presumption Of Reliance

It is established in this case that when consumers first entered into business with Rensin, he did not inform them of material terms of their later use of store

credits. This Court held that consumers therefore were injured at the moment they first decided to do business with him. The Court explained that consumer injury "occurs at the instant of a seller's misrepresentations" and that the misrepresentation "taints the customer's subsequent purchasing decisions." *BlueHippo*, 762 F.3d at 244. Customers who placed the 55,892 orders but ultimately received nothing of value from Rensin may have chosen not to do any business with him had they known all of the pertinent terms and conditions of their transaction.

Under that holding, records of orders placed long after a consumer's initial business dealing with Rensin cannot alter the established fact of consumer reliance on his initial misrepresentation. It therefore does not matter whether some consumers attempting to use store credit were not charged additional fees at the time they placed their store credit order. Their business relationship with Rensin was tainted from the outset, and the taint extended to all subsequent dealings with him. Similarly, even if consumers ultimately learned of the previously undisclosed charges when they attempted to use store credit, that subsequently obtained knowledge cannot undo their initial reliance on Rensin's misrepresentation. *See FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014) ("disclosures

sent to consumers after their purchases" could not "cure the misrepresentations occurring during the initial sales").[3]

Rensin is thus wrong to contend that the presumption of reliance can stand only if the consumer tried to redeem her store credit and learned that she "would actually be charged the" additional fees. Br. 16-17. That claim boils down to an attempt to re-litigate the Court's earlier ruling and improperly shifts the moment of consumer harm from the initial order to the subsequent attempt to use store credit. But it is settled in this case that Rensin and BlueHippo did not tell customers up front that they could be subject to additional charges when using store credits, as required by the Consent Order. That fact was established when the district court held Rensin in contempt, and Rensin did not challenge it. *See* A. 374 (D.76 at 8); 762 F.3d at 245-46.

As the court correctly ruled, "BlueHippo led financially strapped consumers to believe, when they made their initial payment," that their payments for a computer were "essentially risk-free," when in fact "there was a possibility that consumers would have to make additional payments in the form of shipping, handling, or taxes if they sought to utilize the online store option." A. 415 (D.103

[3] For the same reason, Rensin is wrong that the evidence he sought could defeat the presumption of reliance as to consumers who were deterred from completing their store credit purchase. Br. 16. Even if such consumers learned of the store credit policy at the same time they attempted to redeem online merchandise, that subsequent disclosure could not possibly cure the initial misrepresentation.

at 7). Had consumers known of the risk, that knowledge would have "affect[ed] [their] decision to begin making payments in the first place." *Id.* The district court properly denied discovery of information that would not permit it "to draw the conclusion that consumers would face no risk of being charged for the undisclosed fees." A. 478 (D.139 at 4 ¶12).

The risk is particularly significant here given BlueHippo's target customer base of financially vulnerable consumers who were unlikely to have the wherewithal to make all the payments required to receive a computer and could only get value from their payments through store credit. As this Court observed, had the store credit refund policy been fully "revealed to consumers before they purchased computers from BlueHippo," the disclosure "in all likelihood would have influenced their purchasing decisions." 762 F.3d at 246. This is so, as the district court correctly concluded, because consumers were misled at the outset "[e]ven if few or no consumers actually paid shipping, handling or taxes." A. 415 (D.103 at 7).

B. Store Credit Order Records Could Not Overcome The Presumption Of Consumer Reliance On Rensin's Deceptions

Even if the law of this case allowed Rensin to overcome the presumption of reliance with evidence of orders placed long after the initial deception, the discovery he sought was still irrelevant. His claim — that if no consumer in a given state who completed a store-credit transaction had been charged extra fees,

then no one in the entire state could have relied on BlueHippo's failure to disclose its policy concerning those fees — fails as a matter of basic logic for three reasons.

To begin with, evidence that some customers faced no additional charges shows nothing about the behavior of any other customer. BlueHippo's policy (confirmed by Rensin's own sworn testimony) was that store credit could not be used to pay any taxes, shipping and handling fees incurred and that customers could place only one store credit order at a time, without exception. A. 210 (PX 22F at 6); A. 331-333 (PX 63 at 22-24 (11/24/09 Tr. at 88-95)). Consumers were not told of that policy when they placed their initial order and were entitled to presume that such policy did not exist. It makes no sense that Rensin's subsequent decision not to follow company policy in a few individual cases could show anything at all about other customers.

Second, Rensin's theory of discovery turns on a critical, but fundamentally wrong, jump of reasoning: that store credit transaction records showing that *some* consumers were charged no extra fees when ordering merchandise can be extrapolated to *all* consumers who were misinformed about BlueHippo's store credit policy. The district court rejected that reasoning and concluded correctly that "the evidence Rensin seeks to rely on is not generalizable to the entire pool of injured consumers." A. 478 (D.139 at 4 ¶12). Both logic and evidence demonstrate the opposite: customers would have abandoned their store credit

purchase when they learned of additional fees precisely because they relied on BlueHippo's initial implied promise of a fee-free transaction. *See* A. 478 (D.139 at 4 ¶12 (citing D.103 at 6-7)). Indeed, consumers already defrauded by BlueHippo would be especially reluctant to pay yet more money to use their store credits. Yet the records sought by Rensin would have excluded consumers who did not complete their store credit orders.

Given that limitation in the data, the store credit records Rensin requested cannot undercut the presumption of consumer reliance on the initial misrepresentation by customers who did not place such orders in a particular state. The court correctly concluded that "[e]ven if few or no consumers [who placed store credit orders] actually paid shipping, handling or taxes (as Rensin claims), that says nothing about whether those fees, when eventually disclosed, deterred cash-strapped consumers from making online purchases at all." A. 415 (D.103 at 7).

Third, Rensin's argument that his failure to charge fees to *some* customers in a state necessarily demonstrates that fees were never charged to *any* customer in that state not only flies in the face of the record evidence and consumer behavior described above, but is purely speculative. The decision not to charge any given customer could have been based on the particular item ordered, a waiver in response to a complaint, or simply error. The district court was entitled to reject

discovery that was not *likely* to lead to relevant information. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA., v. The Stroh Cos., Inc*., 265 F.3d 97, 117 (2d Cir. 2001) (affirming denial of request for additional discovery solely "based on speculation as to what potentially could be discovered") (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994)).

In addition to his argument that store credit order records would allow him to rebut the presumption of reliance for all consumers in entire states, Rensin also asserts a brand-new claim that the records would allow him to "offset the presumption of reliance by showing such reliance would have been unreasonable or non-existent . . . on an individualized basis." Br. 17. Because he made no such claim below, he may not raise it now. *In re Nortel Networks Corp. Sec. Lit.,* 539 F.3d 129, 132-33 (2d Cir. 2008). If the Court were to consider the argument, however, it fails for the reasons set forth in Argument I.A, *supra*. The happenstance that a particular consumer was not actually charged additional fees (on orders that were never sent anyway) cannot overcome the presumption of reliance.

* * * *

At bottom, Rensin contends that the district court defied this Court's mandate directing the lower court to "give the defendants the opportunity to rebut the determined baseline loss calculation, allowing them to 'put forth evidence

showing that certain amounts should offset the sanctions assessed against them.'" *Id.* at 246 (citing *Kuykendall,* 371 F.3d at 766). The district court complied fully with the mandate. It accepted two of Rensin's three proposed offsets (for refunds made and settlements of state enforcement cases). A. 474 (D.138 at 2). But Rensin can posit no legitimate offset for consumers who paid for merchandise and received nothing in exchange. Moreover, nothing in this Court's earlier opinion required the district court to permit discovery of irrelevant information. *See* A. 473-474 (D.138 at 1-2); *see also FTC v. Bronson Partners*, *LLC*, 674 F. Supp. 2d 373, 382-89 (D. Conn. 2009) (permitting offsets for consumer refunds but rejecting other claimed offsets), *aff'd*, 654 F.3d 359 (2d Cir. 2011).[4]

II. RENSIN HAD ALL THE PROCESS HE WAS DUE

Rensin's claim that he was denied due process (Br. 20-24) turns largely on the same discovery issues discussed above, and it fails for the same reasons. Rensin is also wrong to the degree he argues that the Due Process Clause entitled

[4] Rensin's reliance (Br. 18-19) on cases involving a nonmovant's request for additional discovery to oppose summary judgment is misplaced. Unlike those cases, Rensin had the opportunity to seek discovery; the district court simply ruled that his request for store credit data would not reveal relevant evidence. Rensin's cases support the district court's conclusion that discovery is properly denied when the evidence sought is irrelevant and speculative. *See, e.g.*, *Am. Home Assurance Co., v. ZIM JAMAICA*, 418 F. Supp. 2d 537, 547-48 (S.D.N.Y. 2006) (rejecting "purely speculative requests [made] with the hope that beneficial evidence will serendipitously materialize").

him to "heightened procedural protections," with "extensive fact finding," because this case involves a "complex injunction[]." Br. 20-22.

Rensin's claims are based mostly on *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994). That decision is inapposite because it involved noncompensatory *punitive* contempt sanctions, not remedial compensatory sanctions of the sort at issue here. The principal question in *Bagwell* was whether noncompensatory fines imposed without the opportunity to purge were punitive, therefore entitling the contemnor to a jury trial, *id*. at 838, a question not posed here. In *dicta*, the Court discussed procedural protections that might apply to enforcement of "complex injunctions." *Id*. at 833-34; *see FTC v. Trudeau*, 579 F.3d 754, 775 (7th Cir. 2009); *Kuykendall*, 371 F.3d at 752.

But Rensin provides no explanation how this case involves such an injunction. Nor does he cite any case that applied heightened protections in the context of compensatory civil contempt sanctions. Indeed, *Bagwell* itself articulated the general rule that "civil contempt sanctions . . . may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard," without the need for either a "jury trial [or] proof beyond a reasonable doubt." *Id*. at 827. The Court explained that it intended to "leave unaltered the longstanding authority of judges . . . to enter broad compensatory awards for all contempts through civil proceedings." *Id.* at 838.

In the wake of *Bagwell*, courts of appeals — including this one — unsurprisingly have held that a civil contempt proceeding comports with due process as long as the court provides notice and an opportunity to be heard. *See*, *e.g.*, *Jacobs v. Citibank, N.A.*, 318 F. App'x 3, at *4-5 (2d Cir. 2008) (summary order); *Kuykendall*, 371 F.3d at 754; *FTC v. Leshin,* 719 F.3d 1227, 1235 (11th Cir. 2013); *Ahearn ex rel. N.L.R.B. v. Int'l Longshore and Warehouse Union, Locals 21 and 4,* 721 F.3d 1122, 1129-30 (9th Cir. 2013); *see also Trudeau*, 579 F.3d at 776 (questioning "the feasibility and fairness of varying the process due in civil contempt cases on the 'complexity' of the injunction at issue"). This Court also has considered *Bagwell* in the closely analogous context of compensatory civil sanctions for attorney misconduct and held that such cases only require notice and an opportunity to be heard. *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 130 (2d Cir. 1998).

As the district court concluded, Rensin had all the process he was due. A. 474 (D.138 at 2). He had notice and an opportunity to be heard and to offer offsets to the compensatory baseline. Indeed, the court accepted two of the offsets he sought (he abandoned a third). *Id.* As to the fourth, for the reasons discussed above, the district court properly denied Rensin's requested discovery relating to completed store credit orders, which could not vitiate the customers' reliance on Rensin's initial misrepresentations. *Id*. Nor is there any reason to believe that the

Consent Order in this case is "complex." It sets forth a straightforward bar on misrepresenting material terms of BlueHippo's refund policy. *See* A. 29-30 (D.2 at 3-4 ¶ I.B.); *BlueHippo*, 762 F.3d at 245 and n.6. That Rensin flouted the order "is not a reason to call the injunction 'complex.'" *Trudeau*, 579 F.3d at 776; *accord CBS Broad.*, 814 F.3d at 103-04 (violation of "relatively simple" injunction amounted to civil contempt).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

JAMES A. KOHM
Associate Director

DOUGLAS V. WOLFE
Assistant Director

AMANDA C. BASTA
COLIN D. A. MACDONALD
Attorneys
BUREAU OF CONSUMER PROTECTION

December 23, 2016

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ *Michael D. Bergman*
MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3184

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Final Form Brief for Appellee Federal Trade Commission complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,030 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s *Michael D. Bergman*
MICHAEL D. BERGMAN

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2016, I served the foregoing Final Form Brief for Appellee Federal Trade Commission on all counsel of record by electronic service through the Court's CM/ECF system.

s/ *Michael D. Bergman*
MICHAEL D. BERGMAN