No. 12-56665

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Federal Trade Commission,
Plaintiff-Appellee,

v.

John Beck Amazing Profits, LLC, *et al.*,
Defendants,

and

John Beck,
Defendant-Appellant.

On Appeal from the United States District Court
For the Central District of California
Hon. Jacqueline H. Nguyen
No. 2:09-cv-04719-JHN-CW

Brief of the Federal Trade Commission

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Issues Presented for Review

1. Whether Appellant's arguments regarding the correct measure of equitable monetary relief were properly raised and decided below.
2. Whether a defendant who violates the FTC Act by making false and unsubstantiated claims about a product may be held jointly and severally liable for equitable monetary relief equal to the net amount consumers paid for the product.
3. Whether genuine issues of disputed material fact precluded summary judgment.

Introduction

The district court in this case found that two infomercials marketing "John Beck's Free & Clear Real Estate System" falsely told consumers that they could quickly and easily make lots of money buying homes at government tax-sale auctions using the system. Those infomercials starred Appellant John Beck—the originator of the system—who personally stated that the system is "pretty easy," that there were millions of tax sale properties like the houses shown in the program, available in the viewer's own area, and that consumers could buy these properties for "pennies on the dollar" at tax-sale auctions and immediately sell them, rent them, or move in themselves. Hundreds of

thousands of duped consumers purchased the product, spending more than $100 million.

Mr. Beck does not dispute that he made those claims in the infomercials. He does not appeal the district court's finding that they were false and unsubstantiated. He does not dispute that they were material, or that reasonable consumers would be misled by them. He does not even dispute that he is individually liable for his own conduct.

Instead, he argues that he should be liable only for the amounts he personally received rather than jointly and severally with other defendants for the harm they caused consumers. That argument is incorrect, and it also fails because it was not properly raised in the district court. Mr. Beck raised the argument *only* in an untimely brief that the district court denied him leave to file. He also argues that he was not sufficiently involved in the infomercials to be liable at all. But there is no dispute about what Mr. Beck personally said in the infomercials, which the district court found false and unsubstantiated. As he readily admits, nobody forced him to say those things. Mr. Beck's appeal is entirely without merit and his arguments should be rejected.

Statement of the Case

A. Nature of the Case, Course of Proceedings, and Disposition Below.

This appeal arises from an action brought by the FTC against defendants to halt deceptive infomercials and other marketing practices for three "wealth creation" products, "John Beck's Free & Clear Real Estate System," "Jeff Paul's Shortcuts to Internet Millions," and "John Alexander's Real Estate Riches in 14 Days." The FTC sued the developers of these products (including Appellant John Beck), the companies through which they were marketed, and the principals of those companies, alleging violations of Section 5(a) of the Federal Trade Commission Act and the Telemarketing Sales Rule.

The district court granted summary judgment in favor of the FTC and against each of the defendants, finding, *inter alia*, that the "gurus" who created the three products (including John Beck) were liable for monetary and injunctive relief both for their own misrepresentations and for the corresponding violations of the corporate defendants.

The court ordered further briefing on the proper amount of equitable monetary relief, and the FTC and defendants both filed briefs on that issue. After briefing was complete, Appellant John Beck sought

ex parte permission to file another brief without his codefendants, arguing for the first time that he should not be held jointly and severally liable with them. The district court denied his application and did not consider his proffered brief on the merits. The court entered an injunction against defendants and ordered them to pay equitable monetary relief totaling $478,919,765, including $113,374,305 against Mr. Beck.

None of the defendants other than Mr. Beck appealed. He challenges the district court's entry of summary judgment and the amount of equitable monetary relief ordered against him, but not the denial of his *ex parte* motion.

B. Factual and Procedural History.

1. The John Beck Product and Infomercials.

Appellant John Beck is the originator of a purported "wealth-creation" product known as "John Beck's Free and Clear Real Estate System." (ER 174.)[1] The product claims to teach consumers how to buy real estate at government tax foreclosure sales by paying delinquent back taxes owed on the properties. (ER 117.)

[1] References to the Excerpts of Record filed by Mr. Beck are in the form ER __; references to the Supplemental Excerpts of Record filed by the FTC are in the form SER __.

The John Beck product was marketed through two infomercials, the first of which began airing as early as January, 2004, and the second of which began airing in 2007. (ER 426; SER 170-71.) Mr. Beck, touted as "one of this country's top government tax sale experts," is the star of both versions, which are formatted as news shows in which hosts interview Mr. Beck about his system. (ER 425; SER 5, 27.)

Mr. Beck explains that local governments can collect unpaid real estate taxes by conducting public tax sales, and that the government's right to collect these unpaid taxes almost always takes priority over any mortgages or loans on the property. (*E.g.*, SER 31, 83.) Mr. Beck claims that this means "anyone willing to come in and pay off the back taxes," which "in many cases [is] as little as a few hundred dollars," can buy homes at government tax-sale auctions "free and clear" of any mortgages.[2] (SER 31; *see also* SER 83.)

Mr. Beck discusses dozens of homes in each of the infomercials, representing that they were purchased using the techniques in his

[2] Mr. Beck personally said onscreen or immediately endorsed each of the passages quoted from the infomercials in this section. For example, from the 2007 infomercial: "[Interviewer]: Wait a second. That could be a few thousand dollars or just even a few hundred dollars. JOHN BECK: You're right." (SER 83.)

system at government tax auctions for prices ranging from a few hundred to a few thousand dollars. (SER 28, 29, 31, 33, 34, 35, 44, 45, 47, 48, 49, 60, 61, 62, 78, 79, 84, 87, 100, 103, 104, 105, 107, 108, 109, 111, 112.) Mr. Beck shows pictures of these houses, often describes them as "nice," "beautiful," or "gorgeous," and represents them as being worth much more than the purchase price. (*E.g.*, SER 32, 39, 60, 87.) In both programs Mr. Beck expressly represents that "all these properties were bought 100 percent free and clear of any monthly mortgage payments." (SER 45; *see also* SER 79-80 ("And just like all the other homes we'll look at today, it was purchased free and clear with no monthly loan payments.").)

Mr. Beck represents that there are "more than 1.8 million" or "more than 2.2 million" of "these tax foreclosure properties available right now," including in viewers' own area. (SER 89; *see also* SER 34 ("1.8 million of them available throughout just about every county in the U.S."); 62 ("1.8 million . . . listed right now").) Mr. Beck assures viewers, "I know these numbers are accurate because I track government tax foreclosure sales all across the country." (SER 89; *see also* SER 34, 62.) Mr. Beck personally promises that consumers who

purchase his product will get "up-to-date, detailed lists of tax sale properties that are currently available right in their local area." (SER 49; *see also* SER 89 (customers "will get free detailed lists of the tax foreclosure properties available in their area").)

Mr. Beck also tells viewers multiple times that his system is "pretty easy for anyone to do." (SER 35; *see also* SER 30 ("pretty easy to do if you have all the right information"); 58; 81; 105 ("Well, when you're buying real estate for pennies on the dollar, it's easy to make a lot of money.").) He expressly tells them that they do not need a lot of money to get started: "All you need is the desire to make a lot of money and the willingness to follow my system step by step to make it happen." (SER 58.) And he repeatedly asserts that homes like those shown in the infomercials can be purchased at tax sale auctions for "pennies on the dollar" or "as little as a few hundred dollars." (SER 43, 61, 83, 103, 105.) Mr. Beck claims that homes purchased at tax sale auctions can "immediately" be resold, rented "for a nice monthly income," or the purchaser can move in "and never have to worry about another monthly house payment ever again." (SER 85; *see also* SER 33, 108.)

Mr. Beck claims to have "personally bought thousands" of "these tax sale properties," including 47 within "the past 60 days" of the earlier infomercial. (SER 46.) He claims that "all three" of his children make money from tax sale properties, and that his daughter Kate makes more using his system than she could with her Master's degree. (SER 58.) In sum, Mr. Beck personally assures consumers that the John Beck product "gives you all the information you need to cash in on these government tax foreclosure properties" and "make a lot of money." (SER 89-90, 58, 105.) Mr. Beck even guarantees that customers will be successful. (SER 50, 62, 112.)

Mr. Beck's statements in the infomercials are bolstered by numerous images of homes, images of money, testimonials from individuals claiming to have made tens or hundreds of thousands of dollars in profit quickly and easily using the John Beck product, and by voiceovers emphasizing and repeating those themes. (*E.g.*, SER 11-12, 27, 36, 42, 50, 53, 57, 63, 70, 91, 102, 110, 111, 112, 122.)

Customers who purchased the John Beck product received a "kit" containing manuals, CDs, and/or DVDs authored by Mr. Beck. (SER 40, 172-74; ER 177.) The materials comprise hundreds of pages of

information, describing generally how tax sales work in nearly every state, other U.S. territories, and Canadian provinces.[3] (SER 174.) Much of this material is consumed by quotations and references to statutes from various states, cities, counties, and other municipalities. (*Id.*)

Mr. Beck's own written materials, which consumers did not receive until after they purchased the product, reveal that his representations in the infomercials are false. Although Mr. Beck says that "it's pretty easy" to "purchase" homes at tax sale properties in viewers' own local area, "free and clear" of any mortgages, and "immediately" sell, rent, or move into those homes, it turns out that while theoretically possible, acquiring ownership of tax-sale properties is extremely difficult or impossible for most of those properties. (*See* SER 174-82.)

For example, nearly half of the states permit investors to purchase only a *lien* for the amount of back taxes, secured by the subject property. (SER 175, 192-93.) This lien is not a deed and "does *not*

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[3] Mr. Beck mischaracterizes the kit as "mostly pamphlets" that "he wrote part but not all of." (Opening Br. 10.) In fact, of the nearly 600 pages of text, Mr. Beck identified only a handful—such as cover pages and lists of internet URLs—that he did not author. (ER 319-310; *see* Second Declaration of Stahl, Docket No. 6, Attach. 15, at 510-643; 660-1109 (written kit materials).)

transfer ownership of the property" to the successful bidder. (SER 175, 226 (emphasis in original).) Auctions for these liens typically take place only once a year. (SER 175.) The lien can be redeemed by the property holder or by the mortgage holder for the amount of back taxes (generally with interest) for a period ranging from six months to five years. (SER 175, 227.) When the lien is redeemed, the purchaser loses any interest in the property. In the unlikely event that the property owner or the lender does not redeem the lien, the investor must still initiate some sort of legal process such as foreclosure to acquire a deed. (SER 176, 206.) Mr. Beck's materials admit that "only a very small percentage" of property owners lose their property by failing to redeem back taxes, and that "[o]bviously it is the very exceptional situation when a valuable property is not redeemed." (SER 176, 230.) Mr. Beck admits that this generally happens only "for some very strange reason." (*Id.*)

Although the remaining states collect delinquent taxes by auctioning "tax deeds," the Beck materials make clear that it is rare or impossible to purchase homes like those featured in the infomercials for "pennies on the dollar" and "free and clear" of any mortgages. For

example, in at least nine states the "tax deed" is encumbered by a right of redemption for a period ranging from six months to three years, during which the property owner may reclaim the property. (SER 178-79, 241.) The materials explain that such deeds are not "marketable title," often do not even give the buyer the right to possess the property, and have further restrictions depending on the state. (SER 179, 242.) Moreover, in five states where the government actually does auction a marketable deed the opening bid is usually a high percentage of the fair market value of the property, not "pennies on the dollar." (SER 178.) And in four other states the opening bid at tax sale auctions is often set much higher than the back taxes owed, not the "few hundred" or "few thousand" dollars Mr. Beck claims in the infomercials. (SER 31, 83, 180-82.) Mr. Beck's own materials thus reveal that in at least 38 states his claims that viewers could easily purchase homes for pennies on the dollar at tax sale auctions, free and clear of any mortgages, were false in some or all respects. (*See* SER 182.) And they necessarily belie his claims that viewers could purchase such homes in their own area no matter where they live and that they could immediately sell, rent, or move into the properties.

Even for the few states where such purchases might theoretically be possible Mr. Beck's written materials set purchasers to an almost impossible task: finding auctions where there is (1) an affordable opening bid, (2) considerable equity in the available properties, (3) no other liens (*i.e.*, the property must *already* be "free and clear" of mortgages *before* the tax sale), and (4) no other bidders attending to drive up the price. (SER 180, 195.) Even if consumers manage to find such an "ideal" auction, other exceptions and complications can prevent them from immediately owning the properties "free and clear." (ER 180-81.)

In sum, the John Beck "kit" reveals that immediately obtaining title to a home at tax sales for "pennies on the dollar" and "free and clear" of outstanding mortgages is not easy, cannot be done quickly, cannot be done at all in most states, and that even in those states where it is possible to purchase homes at tax sales they generally cannot immediately be sold or rented, and the purchaser cannot immediately move in. (SER 182.)

Mr. Beck also admitted in discovery many of the claims he made in the infomercials were false or that he could not substantiate them.

For example, despite claiming that his system is "pretty easy," Mr. Beck admitted that "if you want to be honest about it . . . it's difficult." (ER 343.) Indeed, he admitted that purchasers must undertake a "fairly elaborate" process with several steps involving numerous government agencies before deciding to buy any home at a tax auction. (ER 316-17.) And though he claimed to have purchased "thousands of *these* tax sale properties"—while discussing *homes*—Mr. Beck admitted that he had actually purchased "less than ten" homes using his techniques during his entire 30-year career of tax-sale investing, and that he had most often purchased vacant land. (ER 35 (emphasis added), 315.)

Mr. Beck also claimed that millions of "*these* tax sale properties" are available all across the country, but in fact *all* of the homes featured in the 2005 infomercial were from a single state, Oklahoma. (*E.g.*, SER 62 (emphasis added); SER 255-56.) Moreover, the John Beck kit materials reveal that Oklahoma is one of the many states where tax auctions result in a lien on the property, not a deed. (*See* SER 175-77, 210.) So even Mr. Beck's most basic claim that the homes in the infomercials were "bought" or "purchased" at tax sale auctions—which he makes over and over—is false. (*See* SER 28, 29, 30, 31, 32, 33, 34, 35,

43, 44, 45, 47, 48, 49, 60, 61, 79, 84, 86, 87, 100, 101, 103, 104, 105, 107, 108, 109, 111, 112.) Mr. Beck knew this because, as he testified, he personally researched the homes for the 2005 infomercial and he trained others how to find similar homes in Oklahoma for the 2007 infomercial. (ER 323.)

Further, Mr. Beck could not provide any substantiation for many of his statements, like the claim that he bought 47 properties within 60 days of the 2005 commercial for a few hundred dollars or less. (ER 333.) Despite claiming that anyone could use his system to buy homes, Mr. Beck admitted that he did not know more than four people who had been able to purchase homes like those in the infomercials. (ER 136-37 & n.77; 331-32.) Nor could he substantiate whether most consumers who purchased the John Beck product made any money; in fact, almost none of them did. (ER 24-25.) Mr. Beck could not even substantiate his claim that his own daughter made more from his system than from her professional degree because he did not know—and never knew—how much she made from either source. (ER 314-315.)

As the creator of the John Beck system and author of the kit materials, Mr. Beck knew that the representations in the infomercials

were false. In his deposition he admitted that photographs of two homes featured in the 2007 infomercial were taken after "substantial repairs" had been made after the tax sale, and that the representations about another home were "flagrantly false," a fact that could be discovered with only seven or eight minutes' research "at the most." (ER 343-44.) Mr. Beck also admitted that the Oklahoma homes in the 2005 infomercial were used to convey the message that consumers could buy homes like them for the prices listed. (ER 330.) Having written the John Beck kit materials, Mr. Beck knew that was not true for consumers in at least 38 states, and was very difficult or impossible for the rest.

Mr. Beck was intimately involved in preparing the scripts for the infomercials. He "worked directly" with corporate defendants and the production company to "develop a script" for the infomercials, and the review and editing was not complete until they all were "satisfied with the result." (SER 187.) For the 2005 version, Mr. Beck gathered the facts about the properties featured, obtained photographs, reviewed the testimonials, answered the scriptwriter's questions, reviewed scripts, and spoke with codefendants Gary Hewitt and Douglas Gravink nearly every day. (ER 323, 326; Hewitt Dep., Docket No. 559 at 88-89, 92, 94.)

Mr. Beck likewise consulted with Mr. Hewitt in person, by phone, and by email for the 2007 version, reviewed draft scripts, and had the opportunity to make edits. (ER 326; SER 249-50; Hewitt Dep., Docket No. 559 at 98-99.) Mr. Beck also admitted that he had a substantial role in creating his own speaking parts in both infomercials. (ER 326.)

2. The Other Products and Defendants' Marketing Practices.

In addition to the John Beck product, the case in the district court involved two other "wealth creation" products, "Jeff Paul's Shortcuts to Internet Millions" and "John Alexander's Real Estate Riches in 14 Days." (ER 115.) All three products were marketed nationwide through infomercials promising consumers that they easily could earn substantial amounts of money in a short period of time with little investment. (ER 118-19.)

Each of the three products was priced at $39.95 plus shipping and handling. (ER 117.) Purchasers were enrolled—unknowingly—into continuity membership plans for which they were charged $39.95 per month unless they took affirmative steps to cancel. (ER 118-19.) They were then harassed by telemarketers selling expensive "coaching" services through misrepresentations that coaching would enable them

to earn more money, faster, than they could with the products alone. (ER 148-49, 152-153.)

All told, the deceptive marketing scheme for the three products reaped nearly half a billion dollars in revenue, but almost no consumers made any money from the three systems.

3. Procedural History.

The FTC brought suit in 2009 against the originators of the three products—John Beck, Jeff Paul, and John Alexander; the companies that sold and marketed the products;[4] and two individuals who owned those companies—Douglas Gravink and Gary Hewitt. The FTC's complaint alleged violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310 ("TSR"). (Complaint, D.Ct. Docket No. 1, at 29-37.)

The district court granted the FTC a preliminary injunction to halt the deceptive marketing practices and appointed a monitor to oversee the corporate defendants' operations. (ER 390.) Regarding the John Beck product, the court found that "the infomercials' net

[4] Mentoring of America, LLC; Family Products, LLC; John Beck Amazing Products, LLC; Jeff Paul, LLC; and John Alexander, LLC.

impression—that a typical consumer of the John Beck system can easily and quickly purchase high-value homes for pennies on the dollar—is false." (ER 403.) The court found that the misrepresentations were material and "likely to deceive or mislead consumers acting reasonably under the circumstances in violation of section 5(a) of the FTC Act." (ER 403.)

After extensive discovery the district court granted the FTC summary judgment against Appellant John Beck and the other defendants. (ER 114.) The court held that "the Beck infomercials violated Section 5 as a matter of law" (ER 134), and stated, "Defendants have made material misrepresentations" in the Beck infomercials "that are either false or unsubstantiated." (ER 135.) Those representations included: (1) "that consumers could 'purchase' homes and other real estate[] for 'pennies on the dollar';" (2) that they could "buy homes at tax sales in consumers' own area, regardless of where they live;" (3) that consumers could "make money 'easily' and with 'little financial investment required';" and (4) that consumers could "make money 'free and clear of all mortgages.'" (ER 135.)

The court found that Beck's own deposition testimony and the John Beck "kit materials"—written by Mr. Beck—confirmed that these representations were false. (ER 136-37.) The court found further confirmation in the testimony of consumer witnesses and a survey of people who purchased the Beck system. Those materials showed that consumers could not easily find tax sales in their area, that it is "difficult or impossible to earn substantial money . . . using the John Beck System," and that less than 0.2 percent of consumers made any profits from the system, with only two percent making any revenue at all. (ER 137-38.) And the court found that none of the defendants could substantiate the claim that most purchasers of the Beck system had made a profit.[5] (ER 138.)

Applying its authority under Section 13(b) of the FTC Act, the court issued a permanent injunction against Mr. Beck and the other

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[5] The court also found that the other two wealth creation systems violated Section 5 of the FTC Act (ER 141-47); that certain defendants illegally failed to disclose that purchasing the products enrolled consumers in negative-option continuity plans (ER 148, 152-55); that defendants made false and unsubstantiated claims about the "coaching" services (ER 148-52); that they violated the TSR by charging consumers' credit cards without their consent (ER 155-56); and that they violated the Do Not Call list by repeatedly calling consumers who had asked not to be called. (ER 156-58.)

defendants. The court held Mr. Beck "directly liable for [his] own violations of Section 5," stating that he is "personally liable for the false and unsubstantiated claims [he] made in [his] infomercials," and that he "knew that [his] claims in the infomercials regarding how easy it is to make money using [his] system are false and unsubstantiated." (ER 160-61.) In addition, the court held Mr. Beck liable for the corporate defendants' violations with respect to the John Beck product because he "participated directly in the advertising of the deceptive [product], knew that the infomercials made material misrepresentations regarding the product[], or at least [was] recklessly indifferent to the truth or falsity of the infomercials." (ER 161-62.) For the same reasons, the court held Mr. Beck liable for monetary relief with respect to the John Beck product. (ER 165.)

The court ordered additional briefing on the appropriate amount of monetary damages, and set a briefing schedule for the parties' responses, under which Mr. Beck's brief was due May 14, 2012. (ER 166.)

The FTC's brief argued that Mr. Beck should be liable for the total net revenues (gross revenues less chargebacks and refunds) from the

sale of the John Beck product, amounting to nearly $113.4 million. (Docket No. 600 at 14.) Mr. Beck submitted a timely response (together with other defendants) to the court's order. (ER 104.) Importantly, Mr. Beck did *not* argue that his liability should be limited to the amounts he personally received. (*See* ER 105-106.) Instead, Mr. Beck argued that the court should subtract an estimate of the amount consumers "actually earned" using the Beck system from net product sales revenues. (ER 105-106.) Mr. Beck's brief estimated that the amount to be deducted was $566,872, which would have resulted in a judgment against him of approximately $112.5 million. (ER 106.)

On June 1, 2012—six weeks after the court's order granting summary judgment, more than two weeks after the court's deadline for defendants' supplemental briefs, and more than nine months after the motion for summary judgment was initially filed—Mr. Beck filed an *ex parte* application (through new counsel) for leave to file a second brief in response to the court's summary judgment order, attaching his proposed brief. (ER 76-82.) For the first time, Mr. Beck argued that the court may not subject him to joint and several liability under the FTC Act, and that he could be held liable only for the amounts he personally

received from sales of the John Beck product. (ER 77-78.) Mr. Beck acknowledged that his brief addressed "facts and legal arguments that were never raised" in his prior briefs, and that other than his untimely brief, "the record . . . *is devoid of any argument pertaining to the limits on his individual liability for damages*." (ER 61, 77 (emphasis added).) Mr. Beck asserted without argument that his "interests have diverged" from the other defendants. (ER 77.)

The district court denied Mr. Beck's *ex parte* application, and his brief was not accepted by the court. (ER 40-41.) The court found that Mr. Beck "created the crisis that requires *ex parte* relief " and therefore was not entitled to such relief. (ER 40.) The court found "no persuasive argument" why Mr. Beck's asserted divergence of interests from his codefendants "could not have been easily anticipated," and further noted that the application was filed weeks after the due date. (ER 40-41.) The court concluded, "Beck's regret over his former counsel's litigation decisions is an insufficient ground for re-opening the briefing." (ER 41.) In a footnote, the court explained that it would have rejected Mr. Beck's arguments "[e]ven if it were to consider the merits." (ER 41 n.1.)

On the same day, the court issued an order and final judgment setting out the injunctive and monetary relief against Mr. Beck and the other defendants. (ER 4-39, 42-59.) The court held Mr. Beck jointly and severally liable with Douglas Gravink, Gary Hewitt, and the corporate defendants for "equitable monetary relief, including but not limited to consumer redress" in the amount of $113,374,305, comprising the net revenue for sales of the John Beck system after accounting for refunds and chargebacks, and not including revenues from coaching services or revenues from continuity memberships. (ER 31, 55-56.) The other defendants were held liable (in various configurations) for an additional $365,545,460. In total, defendants were held liable for $478,919,765 of illegally-obtained revenues.

On September 7, 2012, Mr. Beck filed a notice of appeal. (ER 7-8.) None of the other defendants appealed the district court's judgment.

Standard of Review

1. Review of Issues Not Decided Below.

"Absent exceptional circumstances," this Court "generally will not consider arguments raised for the first time on appeal." *El Paso v. America West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . .

that a federal appellate court does not consider an issue not passed upon below."). This Court has approved three such "exceptional circumstances": (1) "to prevent a miscarriage of justice"; (2) "when a change in law raises a new issue while an appeal is pending"; and (3) "when the issue is one of law and either does not depend on the factual record, or the record has been fully developed." *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987); *El Paso*, 217 F.3d at 1165. The court "will not 'reframe [an] appeal to review what would be (in effect) a different case than the one the district court decided below.'" *AlohaCare v. Hawaii*, 572 F.3d 740, 744-745 (9th Cir. 2009), quoting *Robb v. Bethel Sch. Dist. No. 403*, 308 F.3d 1047, 1052 n.4 (9th Cir. 2002).

2. Grant of Equitable Monetary Relief.

This Court "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009), quoting *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001).

3. Grant of Summary Judgment.

This Court reviews an order granting summary judgment de novo "to determine whether, viewing the evidence in the light most favorable

to the non-moving party, any genuine issue of material fact exists and whether the district court correctly applied the relevant substantive law." *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). "Once the FTC has made a prima facie case for summary judgment, the defendant cannot rely on general denials but must demonstrate with evidence that is 'significantly probative' or more than 'merely colorable' that a genuine issue of material fact exists for trial." *Id.*, quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249-50 (1986). "A non-movant's bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment." *Stefanchik*, 559 F.3d at 929.

Summary of the Argument

Mr. Beck challenges two aspects of the district court's order: (1) the amount of equitable relief ordered against him and (2) whether any genuine issue of fact material to his liability existed.

1. The district court correctly held Mr. Beck liable for the full amount consumers paid for the John Beck product. Mr. Beck argues that he should not have been held liable for the full amount because he received only a portion of the sales proceeds and therefore he cannot be

held jointly and severally liable with other defendants for amounts he did not receive.

a. Mr. Beck's argument fails at the outset because he did not properly raise it below. The courts of appeals ordinarily do not consider arguments that were not decided by the district court absent exceptional circumstances. Here, Mr. Beck's argument that the scope of his liability for monetary relief should be limited was presented only in an untimely brief that the district court denied him leave to file. Although he now tries to assert otherwise, in his rejected brief Mr. Beck admitted that he had never raised the limits of his liability before and that the record was devoid of any argument on that issue. Mr. Beck does not meet any of the exceptional circumstances this Court has held would justify addressing an issue for the first time on appeal, and Mr. Beck has not even challenged the district court's decision to reject his brief. Accordingly, the Court should adhere to its ordinary practice of declining to consider issues not decided below. Part I.A, *infra*.

b. Even if Mr. Beck had properly raised his argument for limiting his liability to the amounts he personally received it should be rejected here because it contrary to this Court's precedents.

First, Mr. Beck's liability for his own violations of the FTC Act extends to the full amount of consumer harm caused by those violations even if that amount is more than Mr. Beck personally received. Mr. Beck personally represented in the John Beck infomercials that consumers could buy homes at tax sales in their own area for "pennies on the dollar," "free and clear" of mortgages, no matter where they live, and immediately sell, rent, or move into those homes. His representations were false, they were material to consumers' decision to buy the John Beck product, and they were likely to deceive consumers. Mr. Beck's statements thus were unfair or deceptive acts under Section 5 of the FTC Act. 15 U.S.C. § 45(a)(1); *see FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Mr. Beck does not challenge any of this.

Under Section 13(b) of the FTC Act, the district court had broad authority to fashion an appropriate equitable remedy for Mr. Beck's violations of the FTC Act, including the authority to order equitable monetary relief. The court thus had discretion to order Mr. Beck to pay equitable relief equal to the harm caused by his misrepresentations—the full amount consumers paid for the product—even though Mr. Beck did not receive all of that amount.

It was also within the court's discretion to order Mr. Beck jointly and severally liable for the full amount under ordinary principles because his own conduct caused that harm. Mr. Beck cannot avoid full responsibility simply because those he collaborated with also caused the same harm. This court has regularly affirmed joint and several liability for equitable monetary relief to redress consumer harm under the FTC Act, and Mr. Beck does not cite any case to the contrary. Moreover, the Court has expressly held that consumer redress for violations of the FTC Act may exceed the defendant's unjust enrichment. *Stefanchik*, 559 F.3d at 931; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993). Part I.B.1, *infra*.

Second, Mr. Beck was properly held liable under this Court's precedents for the full amount of consumer harm caused by the corporate defendants' violations because (1) he participated directly in those violations, and (2) he had knowledge of the misrepresentations. *See Stefanchik*, 559 F.3d at 931. Because the first factor of this standard requires either direct participation or control of the corporate violations, Mr. Beck's argument that individuals in other FTC cases were sole owners or CEOs—and thus "controlled" the violations—misses the

mark. There is no question that Mr. Beck directly participated in the violations. Part I.B.2, *infra*.

Third, the Court should reject Mr. Beck's fallacious argument that he may only be ordered to disgorge the amount he personally received from sales of the John Beck product. Mr. Beck attempts to forge this argument from a mishmash of principles—largely from out-of-circuit cases—which are inaccurately presented and not applicable to this case. At bottom, the argument is contrary to this Court's express determination in *Stefanchick* that equitable monetary relief may exceed the amount the wrongdoer personally profited. Part I.B.3, *infra*.

2. Mr. Beck's argument that genuine issues of material fact should have precluded summary judgment should likewise be rejected. The district court's determination that there were no genuine fact disputes regarding Mr. Beck's personal liability was supported by the undisputed representations that Mr. Beck made in the infomercials and their clear conflict with the materials that Mr. Beck agrees are accurate and that he undisputedly authored—his own written materials show that his representations were false. That conclusion was bolstered by other

undisputed evidence confirming that consumers could not use Mr. Beck's product to easily make money as he promised they could.

In the face of this, Mr. Beck baldly asserts that his statements and others in the infomercials were "accurate." He does not attempt to explain or controvert any of the district court's discussion demonstrating that the specific representations he made were false in light of the written materials and customer experiences. His conclusory assertion is not sufficient to create a genuine fact issue.

Mr. Beck's liability for the corporate violations was similarly supported by Mr. Beck's undisputed participation in the corporations' deceptive acts and inescapable logical conclusion that he knew the representations in the John Beck infomercials were false. There can be no genuine dispute regarding Mr. Beck's knowledge because he wrote the very materials that contradict the representations in the infomercials. Mr. Beck's deposition testimony, in which he contradicted his representations in the infomercials, likewise confirms that he knew those representations were false.

Mr. Beck attempts to create fact disputes over whether he was the "mastermind" of the infomercials, the extent of his authority over the

scripts, and his ability to control the corporate defendants. But none of these issues could affect the outcome of the suit and therefore they cannot preclude the entry of summary judgment. Mr. Beck's last purported fact dispute, that he had a good faith belief that his statements were true, is not credible in light of his knowledge of his own written materials and their clear contradiction of his claims in the infomercials and his admissions to the contrary. Part II, *infra.*

Argument

I. The District Court's Award Of Equitable Monetary Relief Was Correct.

A. Mr. Beck Waived The Argument That His Liability Should Be Limited To Amounts He Personally Received From The Sales Of The John Beck Product.

The main argument that Mr. Beck asserts on appeal is that the district court erred in holding him jointly and severally liable for net sales of the John Beck product rather than for the amount that he personally received. (Opening Br. 19-34.) But Mr. Beck did not properly raise this argument before the district court, and the court did not decide it. (ER 40-41.) Rather, Mr. Beck raised it only in an untimely brief that the court denied him leave to file. (*Id.*)

Although Mr. Beck now claims he raised "the appropriate measure of equitable monetary relief" "throughout the proceedings" (Opening Br. 5), he points only to portions of his briefs arguing that the court should account for "consumers who benefitted" and "amounts actually earned" by purchasers of his system. (ER 244-45, 105-106.) Those briefs *do not* argue Mr. Beck's liability should be limited to amounts he personally received, failing to contest the FTC's argument that he should be liable for the full amount of "revenues (less refunds)" from sales of the product. (*See* Docket No. 387 at 38-39.) As Mr. Beck's untimely *ex parte* briefs candidly admit, his arguments were "never raised" to the district court and the record is otherwise "devoid of any argument pertaining to the limits on his individual liability." (ER 77, 61.) Because the district court denied his *ex parte* application, it did not rule on the merits of those arguments. (ER 40-41.)

Mr. Beck's argument does not fall under any of the exceptional circumstances under which this Court reviews issues that the district court did not decide. *See Jovanovich*, 813 F.2d at 1037. There would be no miscarriage of justice and there has been no change in law while the appeal has been pending. *See id.* Moreover, the record regarding the

amount Mr. Beck personally received from sales of his product has not been fully developed, *El Paso*, 217 F.3d at 1165. Mr. Beck never presented the district court with any evidence of that amount other than his contract with one of the corporate defendants. (*See* ER 83, 90-103.) Thus, even if Mr. Beck's argument had been decided by the district court, he failed to adduce evidence from which the Court could determine the amount of liability under his proffered standard.

Mr. Beck seeks to have the Court consider "a different case than the one decided by the district court." *AlohaCare*, 572 F.3d at 744-745. He does not challenge the district court's denial of his *ex parte* motion, and thus has waived any argument that the court should have granted that motion by failing to raise it in his opening brief. "It is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) (citation and internal quotations omitted). Mr. Beck presents no reason to depart from the Court's general rule against considering matters not decided below, and the Court should not do so.

B. The District Court Properly Held Mr. Beck Liable For Equitable Monetary Relief Equal To Revenues From Sales Of The John Beck Product.

Even if Mr. Beck had properly preserved his argument regarding joint and several liability, it should be rejected for three reasons. *First*, and most fundamentally, Mr. Beck ignores that under settled Ninth Circuit precedent he is directly liable for the full amount of consumer harm caused by his own violations of the FTC Act even if that amount is greater than the amount he personally received. *Second*, Mr. Beck is also liable for the full amount of harm caused by the corporate defendants' violations even if he did not personally receive all of the proceeds under this Court's settled precedents. *Third*, Mr. Beck's convoluted argument to the contrary is untethered from the precedents, has never been adopted by any court, and is utterly without merit.

1. Mr. Beck's own violations of the FTC Act justify his liability for the full amount of consumer harm.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(1). An act or practice is deceptive if there is (1) "a representation," that (2) "is likely to mislead consumers acting reasonably," and (3) "the representation . . . is material." *Gill*, 265 F.3d at 950.

Mr. Beck does not contest the district court's holding that the John Beck infomercials represented that consumers could buy homes at tax-sale auctions for "pennies on the dollar," that they could do so in their own area regardless of where they live, that they could make money easily and with little financial investment, and that they could make money "free and clear" of all mortgages. (ER 135.) He does not dispute—nor can he—that he made each of those representations himself in the infomercials.[6] *See supra*, pp. 5-8.

Indeed, Mr. Beck's participation was the cornerstone of the infomercials. The product bore his name and his imprimatur and he personally told consumers they could make lots of money quickly and easily using his system. "[M]y system is so complete and so effective," he said, "that if you follow it step by step, I guarantee you will be successful." (SER 112.) He personally assured them about the "millions" of properties he claimed were available, including in their own area, that they did not need a lot of money, and that they could sell, rent, or move into properties "immediately" after buying them at tax auctions.

[6] Mr. Beck's conclusory assertion that his statements "were accurate in the context of the materials he, himself, had authored" (Opening Br. 39) is not supported by any argument or evidence.

(SER 33, 34, 49, 58, 85, 89, 108.) Mr. Beck's promise to consumers was clear: "Well, when you're buying real estate for pennies on the dollar, it's easy to make a lot of money." (SER 105.)

Mr. Beck does not challenge the district court's determination that the statements in the infomercial were false or unsubstantiated, that they were material, or that they were likely to mislead consumers acting reasonably. He does not challenge the district court's holding that they violated Section 5(a) of the FTC Act as a matter of law.[7] (ER 134.) Indeed, Mr. Beck does not argue that the district court was incorrect to hold him "personally liable for the false and unsubstantiated claims [he] made in [his] infomercials." (ER 160-61.) And he does not challenge the district court's holding that "individuals may be held liable for monetary relief in their own right for their own deceptive conduct."[8] (ER 164.)

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[7] Mr. Beck's failure to challenge these aspects of the district court's order refute his argument that disputed facts should have precluded summary judgment against him. *See* Part II, *infra*.

[8] Mr. Beck incorrectly states that the FTC must meet a knowledge requirement "[t]o hold an individual liable for restitution." (Opening Br. 36, quoting *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004). That requirement applies only to individual liability *for corporate violations*—the standard applied in *Garvey*. *See* 383 F.3d at 901 (discussing individual liability "for corporate practices").

These holdings were correct. There was no dispute that Mr. Beck himself made material representations that were false and unsubstantiated and that were likely to mislead consumers acting reasonably, s*ee Gill*, 265 F.3d at 950, and thus that Mr. Beck was correctly held liable for equitable monetary relief for harm stemming from his own conduct.

The district court's award of equitable monetary relief was authorized under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which "gives the federal courts broad authority to fashion appropriate remedies for violations of the Act." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994). The court is not limited to an injunction; it also has "the authority to grant any ancillary relief necessary to accomplish complete justice," including equitable monetary relief. *Id.*, quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

The amount of monetary relief that the district court ordered was also within its discretion. "[T]he district court has the responsibility for tailoring the appropriate monetary relief." *Pantron I*, 33 F.3d at 1103. "[W]here the loss suffered is greater than the defendant's unjust enrichment," "[e]quity may require a defendant to restore his victims to

the status quo." *Stefanchik*, 559 F.3d at 931; *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.").

Mr. Beck does not challenge the district court's determination that "the amount consumers paid" for the John Beck product less refunds and chargebacks was $113,374,305. (ER 56-58.) Instead, he argues that he should be liable only for the amounts he personally received, rather than jointly and severally liable with the other defendants for the full amount.

The basic principle of joint and several liability is that "[e]ach of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Restatement 2d of Torts § 875. The policy behind joint and several liability is that if one defendant cannot pay the full amount of the judgment "the other defendants, rather than an innocent plaintiff, [is] responsible for the shortfall." *McDermott v. Amclyde*, 511 U.S. 202 (1994). "As between the innocent purchaser and the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase, equity requires

the wrongdoer to restore the victim to the status quo." *Figgie,* 994 F.2d at 607. Here, Mr. Beck is the wrongdoer. He is responsible for the full amount that consumers lost because his own violations of the FTC Act induced those consumers to make their purchases and caused that harm. That his collaborators' conduct also caused the same harm does not justify apportioning liability according to how much each defendant received.

Indeed, this Court has long applied joint and several liability where multiple defendants' conduct violated the FTC Act. *E.g.*, *Gill*, 265 F.3d at 954. Mr. Beck does not cite *any* case holding that joint violators of the FTC Act may not be held jointly and severally liable, and the FTC is not aware of any such decision. *Cf.*, *e.g.*, *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008) ("Either participation or control suffices" to hold a defendant jointly and severally liable.); *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007) (affirming order imposing joint and several liability); *FTC v. Gem Merchandising Corp.,* 87 F.3d 466, 468 (11th Cir. 1996) ("[B]ecause each defendant repeatedly participated in the wrongful acts and each defendant's acts materially contributed to

the losses suffered, all defendants were held jointly and severally liable.")

Mr. Beck's argument that joint and several liability is inappropriate because he received only a portion of the amount consumers paid is contrary to this Court's statement that "[w]e have never held that a personal financial benefit is a prerequisite for joint and several liability." *SEC v. Platforms Wireless Int'l*, 617 F.3d 1072, 1098 (9th Cir. 2010). In the specific context of the FTC Act, the Court has held that "[e]quity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment. *Stefanchik*, 559 F.3d at 931; *see also Figgie*, 994 F.2d at 606-07 (under "familiar principles of restitution . . . if the loss suffered by the victim is greater than the unjust benefit received by the defendant, the proper measure of restitution may be to restore the status quo" (citation omitted)); *Febre*, 128 F.3d at 537 ("[D]isgorgement is meant to place the deceived consumer in the same position he would have occupied had the seller not induced him to enter into the transaction."). Mr. Beck was properly held jointly and severally liable

for the full amount of harm that his own violations of the FTC Act caused, regardless of how much he received personally.

Standing alone, Mr. Beck's failure to challenge the district court's holding that he is personally liable for his own violations of the FTC Act is a sufficient basis to affirm the district court's judgment against him in its entirety.

2. Mr. Beck is also liable for participating in his codefendants' violations of the FTC Act.

The district court also correctly applied this Court's standard for holding Mr. Beck liable for the full amount of consumer harm from the John Beck product caused by the corporate defendants' violations of the FTC Act in which he participated. (ER 161-62, 164.) This Court has held that "[a]n individual will be liable for corporate violations of the FTC Act if (1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931; *see also FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

Here, Mr. Beck makes no effort to challenge the district court's holding that the corporate defendants violated the FTC Act through the misrepresentations in the John Beck infomercials. Accordingly, they were properly liable for equitable monetary relief equal to the full amount of consumer losses they caused.

Mr. Beck satisfies the first factor necessary to hold him liable for the corporate violations: He admits, as he must, that he participated directly in the misrepresentations. (Opening Br. 4, 11; ER 212.) His participation included not only his extensive on-screen parts in the infomercials, but also researching properties that would be featured, obtaining photographs of them, answering the scriptwriter's questions on the contents of the scripts, providing lists of properties purportedly available for purchase to be included in the infomercials, and reviewing draft scripts. (ER 175, 177, 323, 326; SER 249-50; Hewitt Dep., Docket No. 559 at 88-89, 92, 94, 98-99). Though Mr. Beck argues that he did not have ultimate control over the corporate defendants or over the creation of the script for the infomercials,[9] that is immaterial because

[9] Discussed *infra*, part II.

either participation *or* control—not both—is necessary to hold an individual liable for corporate violations. *Stefanchik*, 559 F.3d at 931.

With respect to the second factor, the district court determined there was no genuine issue of material fact that Mr. Beck had knowledge of the misrepresentations in the infomercials or was at least recklessly indifferent to their truth or falsity.[10] (ER 161-62.) Having satisfied both elements, Mr. Beck was properly held jointly and severally liable for the corporate defendants' violations even though he did not personally receive all the proceeds from sales of the John Beck product. *See Stefanchik*, 559 F.3d at 931.

For this reason, Mr. Beck's argument that many of the individuals found liable for corporate violations of the FTC Act were "officers or directors, sole owners, or CEOs who are directly culpable for their deceptive acts and the acts of the companies that they controlled because they singlehandedly developed the scheme, engaged in the deceptive conduct, and reaped the spoils" (Opening Br. 25-26) is beside the point. Mr. Beck's argument is, in essence, that he had less control or involvement with his corporate coconspirators than others who have

[10] Mr. Beck's argument that there were material disputed facts is fatally flawed, as discussed *infra*, part II.

been found liable for corporate violations. But the question that determines whether his liability is not whether his involvement parallels theirs. The question is whether Mr. Beck meets the standard articulated by this Court for corporate liability. He does. Nothing in the FTC Act or the case law suggests that Mr. Beck's selective grouping of facts—which would exclude countless wrongdoers—should be the standard for holding individuals liable for corporate violations. Moreover, Mr. Beck's focus on formal corporate roles ignores the reality that he was engaged in common endeavor with the corporate defendants to sell the John Beck product through deceptive infomercials and is therefore liable for the harm caused by the scheme as a whole.

3. Mr. Beck's arguments lack merit.

Mr. Beck's own admissions and this Court's precedents foreclose any serious argument against his liability for the full net amount consumers paid for the John Beck product. Mr. Beck's convoluted argument to the contrary serves more to obfuscate than illuminate the issues in this case.

Mr. Beck's overarching argument is that the district court improperly ordered joint and several liability for the amount of

consumer loss when it should have limited his liability to "unjust enrichment," by which he means the amount that he personally received. (Opening Br. 19-33.) There are several problems with this.

First, Mr. Beck argues for a false dichotomy between "consumer loss" and "unjust enrichment" in this case. Mr. Beck points to decisions from other courts of appeals holding that the measure of equitable monetary relief under Section 13(b) of the FTC Act should be the benefit unjustly received by defendants rather than the consumers' loss. *See FTC v. Verity Int'l, Ltd.*, 443 F3d 48, 67 (2d Cir. 2006); *FTC v. Washington Data Resources, Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013).

These cases are contrary to this Court's holdings in *Stefanchik*, *Figgie*, and *Gill* that equity may require defendants to restore their victims to the status quo even if the consumers' loss exceeds the defendants' gains. More importantly, however, the cases uniformly hold that there is *no distinction* between defendants' gain and consumer loss where, as here, the two are equal "because the consumer buys goods or services directly from the defendant." *Verity*, 443 F.3d at 68; *Washington Data*, 704 F.3d at 1326 (same). Thus, even if Mr. Beck were correct that the proper measure of equitable monetary relief is

defendants' unjust gain rather than consumer loss, it would be "of no consequence" because consumers purchased directly from defendants and the two amounts are the same. *Washington Data*, 704 F.3d at 1326.

Second, and relatedly, Mr. Beck attempts to argue that he should not be liable for "'money that was paid by the consumer but withheld by a middleman.'" (Opening Br. 30, quoting *FTC v. Bronson Partners*, 654 F.3d 359, 374 (2d Cir. 2011).) Mr. Beck even goes so far as to assert that consumers in this case "did not buy goods or services directly from defendant" (Opening Br. 29), but that is false.[11] Mr. Beck cannot rely on the Second Circuit's decision in *Verity* that defendants should not be required to disgorge amounts withheld by an *innocent* "middleman," *see* 443 F.3d at 541, because here the only middlemen were Mr. Beck's own culpable coconspirators.

Third, Mr. Beck offers a complicated argument that the court cannot order joint and several liability under traditional principles of equity. (Opening Br. 27-34.) According to Mr. Beck, the FTC Act only permits equitable remedies; equitable restitution must derive from a

[11] Presumably Mr. Beck means that consumers did not buy the product from him *personally*, since it is undisputed that consumers purchased the John Beck product directly from his codefendants.

constructive trust; and constructive trust requires that the sums belonging to the plaintiff "could clearly be traced to particular funds or property in the defendant's possession." (Opening Br. 27-28, quoting *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).) But Mr. Beck does not cite a single case that pulls together unrelated threads from various cases as he has done, or that actually holds an order of equitable monetary relief under the FTC Act requires equitable tracing or that such liability cannot be joint and several.

To the contrary, as the Second Circuit cogently explained in *Bronson Partners*, traditionally "a court of equity could fully resolve" matters brought before it, "awarding an injunction, over which it had exclusive jurisdiction, as well as the damages as an equitable adjunct to the primary decree." 654 F.3d at 367. Thus, a court "writing on a clean slate" would "have no cause to consider whether the district court's monetary award would traditionally have been characterized as equitable or legal." *Id.* Even under the "narrower view" adopted by the Second Circuit in *Verity*, "the basis for the monetary claim in Section 13(b) cases is seldom problematic" because it is based on the violation of a statute. *Id.* at 371. Accordingly, the FTC has "no need to rely on

common law theories of unjust enrichment." *Id.* This means, among other things, that the court need not "apply equitable tracing rules to identify specific funds in the defendant's possession that are subject to return." *Id.* at 373.

Mr. Beck argues that the Ninth Circuit has adopted his proffered rule in SEC cases, but that is incorrect. Quite the opposite, in *Platforms Wireless* the Court rejected the argument that a disgorgement order "should have been limited to the amount of proceeds that [defendants] personally received from the unlawful sales." 617 F.3d at 1097. The Court stated emphatically that "[w]e have never held that a personal financial benefit is a prerequisite for joint and several liability." *Id.* at 1098. Indeed, most courts of appeals—including this one—apply joint and several liability in SEC cases so long as the defendants collaborated on a common scheme. *E.g.*, *id.* at 1098; *SEC v. Whittemore*, 659 F.3d 1 (D.C. Cir. 2011) (collecting cases); *SEC v. Absolutefuture.com*, 393 F.3d 94, 96-97 (2d Cir. 2004). Mr. Beck would be held jointly and severally liable with his codefendants under that standard because there is no dispute that they all collaborated in the creation of the deceptive John Beck infomercials.

Mr. Beck attempts to take refuge in this Court's decision in *Hateley v. SEC*, 8 F.3d 653 (1993), (Opening Br. 32-33), but that case does not help him. In *Hateley*, the Court found it was an abuse of discretion to order a broker-dealer and its officers to disgorge all of the profits obtained through an illegal agreement where the agreement entitled them to keep only ten percent of the profits as a commission. The Court explained that requiring disgorgement of the entire proceeds was unreasonable because "the very agreement that [was] the source of their liability" obliged them to pay 90% of the profits to a third party. *Id.* at 655. Unlike *Hateley*, however, the source of Mr. Beck's liability was not his agreement with his codefendants. Rather, the source was twofold: On the one hand it was the numerous false claims that he personally made in the infomercials (for his personal liability); on the other it was his participation in the infomercials and knowledge of their falsity (for his liability for the corporations' violations).

Mr. Beck is thus more akin to the defendants in *Stefanchik*, where the court rejected the argument that "they should not be liable for the full amount of [the corporation]'s sales because [it] paid them only a percentage as a royalty." 559 F.3d at 931. To the contrary, equity may

require the wrongdoer "restore his victims to the status quo" even "where the loss suffered is greater than the defendant's unjust enrichment." *Id.*

II. No Genuine Issues Of Material Fact Precluded Summary Judgment.

The district court's determination that there were no genuine issues of material fact regarding Mr. Beck's liability is more than amply supported by the record.

A. Mr. Beck's Direct Liability.

The relevant facts for Mr. Beck's *direct* liability were (1) whether he made representations that (2) were false or unsubstantiated, and (3) that were likely to mislead consumers acting reasonably under the circumstances. The district found there were several representations that were false and unsubstantiated:[12]

1. "[T]hat consumers could 'purchase' homes and other real estates for 'pennies on the dollar.'" (ER 135.) Mr. Beck does not and cannot dispute that he made this representation or its equivalent multiple times in both infomercials. (SER 29, 31-32, 33, 43, 44, 61, 83, 86-87, 88, 100, 103, 105, 107, 108, 109.)

[12] Mr. Beck does not argue that the representations were not material or that consumers acting reasonably were likely to be misled by them.

2. "[T]hat they could do so in their own area regardless of where they live." (ER 135.) Mr. Beck likewise made this representation himself throughout both infomercials, telling consumers that there were "millions" of properties available in "nearly every county" and that they would receive lists of properties available in their own area. (SER 34, 46, 49, 62, 86, 89.)

3. "[T]hat they could make money easily and with little financial investment." (ER 135.) Again, Mr. Beck personally assured consumers that his system was "easy" and that they did not need a lot of money. (SER 35, 46, 47, 58, 81, 105).

5. "[T]hat they could make money "free and clear" of all mortgages." (ER 135.) Mr. Beck's representation that consumers could buy properties at tax auctions "free and clear" is pervasive throughout the infomercials. (*E.g.* SER 28, 31-32, 43, 45, 62, 80, 84, 85, 87, 103, 108, 112.) The representation is right in the title of his product—"John Beck's *Free and Clear* Real Estate System."

There can be no dispute that Mr. Beck made these and similar representations—nor any genuine dispute that they were false or unsubstantiated. The district court relied on Mr. Beck's own written

materials, which show that in many states consumers can purchase only "a right to collect delinquent taxes" at tax auctions, and "only in exceptional circumstances will the purchaser of a tax lien end up with title and the right to possess or sell the property." (ER 136.) The court also noted that tax sales often are held only once a year and "bidding typically starts at a very high percentage of the current fair market value." (*Id.*) These statements flatly contradict Mr. Beck's claims in the infomercials. The court also described how Mr. Beck himself confirmed the falsity of several claims he personally made in the infomercials, such as the number of homes he had purchased over the years and how much money his daughter made with the system. (ER 136-37.)

The court also had the testimony of dozens of consumer witnesses who testified that it is "difficult or impossible" to find tax sales in their area or earn substantial money using the John Beck product. (ER 137.) There was also evidence in the form of a consumer survey showing that less than two percent of the people who bought the John Beck product made any money at all, and less than 0.2 percent of them made any profits. (ER 138.) There was no contrary evidence to show that the

system was in fact easy or that that most people who purchased it could make substantial sums of money using it. (*Id.*)

In the face of this, Mr. Beck asserts without argument that the statements he "made or reviewed . . . were accurate" or "accurate in the context of the materials he, himself, had authored." (Opening Br. 39.) This is insufficient to create a genuine issue of fact.

While "[r]easonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party," evidence that is "not significantly probative" does not "present a genuine issue of material fact." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000); *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989). And only "rational or reasonable" inferences may only be drawn in favor of the nonmoving party. *United Steelworkers*, 865 F.2d at 1542. Mr. Beck's bare assertion that his statements were "accurate" is not sufficiently probative to create any genuine issue of fact precluding summary judgment. Moreover, even if there were a genuine issue as to whether his statements were false—which there is not—Mr. Beck does not offer any argument that the

district court erred in holding he could not substantiate his representations. (ER 135, 138.) This unchallenged alternative holding alone is sufficient to sustain the entry of summary judgment.

Mr. Beck also argues that he cannot be held liable unless the FTC shows that he had "actual knowledge" of misrepresentations or that he was "recklessly indifferent" to their truth or falsity. (Opening Br. 36.) As shown below, Mr. Beck fails to raise a triable issue of fact regarding the extent of his knowledge. In addition, Mr. Beck ignores that the "knowledge requirement" applies only where FTC seeks to hold an individual liable for *corporate violations* of the FTC Act. The standard for holding an individual liable for his own violations of the FTC Act is no different from the standard for holding an entity liable for its own violations; *i.e.*, that the defendant made false or unsubstantiated material representations that are likely to mislead consumers acting reasonably. *See FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999) (holding individual "personally liable as a participant and a primary violator" for his "direct misleading representations").

The FTC is unaware of any case applying a "knowledge requirement" for "individual liability" except in the context of individual

liability for corporate violations. *E.g., Stefanchik*, 559 F.3d at 931; *Amy Travel*, 875 F.2d at 573. Nor would it make sense to permit individuals to escape monetary liability under the FTC Act for their own misrepresentations simply by avoiding knowledge of whether those representations were true or not. Such a holding would permit individuals to sell the proverbial "snake oil," claiming that it cures all sorts of diseases, and to keep their ill-gotten gains simply by never learning that the snake oil does not actually work.

B. Mr. Beck's Liability For Corporate Violations.

In addition to Mr. Beck's direct liability, there was no genuine dispute of material fact regarding Mr. Beck's liability for the corporate defendants' violations. The relevant facts were whether (1) "he participated directly in the deceptive acts or had the authority to control them" and (2) "he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931.

There is no dispute that Mr. Beck directly participated in the misrepresentations in the infomercials. He admits it. (*E.g.*, Opening Br.

11.) His participation included not only making the misrepresentations himself on-screen, but also reviewing scripts of the infomercials, consulting with Hewitt and Gravink, researching the properties to be featured in the 2005 infomercial and obtaining photographs of them and other information to be shown in the infomercials, providing names of individuals for testimonials, and answering the script author's questions. (ER 175, 177, 323, 326; SER 249-50; Hewitt Dep., Docket No. 559 at 88-89, 92, 94, 98-99.)

Mr. Beck attempts to minimize his role in the infomercials, saying that he only "appeared briefly," that he only made a "few statements," and that he "act[ed] as a spokesperson." (Opening Br. 10, 18.) But that is not a reasonable inference that can be drawn in light of the infomercials themselves. The subject of the infomercials is Mr. Beck's own system, and he is presented as the authoritative source behind the representations about how tax sales work, the number of properties available, his system itself, how easy it is, the prices and value of the homes featured, and consumers' ability to immediately sell, rent, or move into properties after buying them at tax sales. He personally guarantees consumers will be successful. He personally tells consumers

that he knows what he is talking about. In short, Mr. Beck was the star of the show, and there can be no reasonable dispute that he participated in the infomercials.

Nor is there any genuine dispute that Mr. Beck "had knowledge of the misrepresentations" or was at least "recklessly indifferent" to their truth or falsity. *Stefanchik*, 559 F.3d at 931. Mr. Beck admits that he is an expert in tax foreclosure sales, and that he's "never met anybody that knew more about tax sales than I do." (ER 312.) So when he said that consumers could buy properties at tax sale auctions for pennies on the dollar no matter where they live, there can be no reasonable dispute that he knew that was not true—his own kit materials confirm it. (*See* SER 175-82.)

When he said it was "pretty easy," he knew it was difficult and could be only done with a "fairly elaborate" process—he said so in his deposition. (ER 316-17, 343.) When he showed dozens of homes saying they were bought for only a few hundred dollars he knew—he admitted it—that consumers were meant to believe they could buy similar homes no matter where they live. (ER 330.) When he said he had bought "thousands" of properties using his system he knew he had actually

purchased fewer than ten homes. (ER 315.) When he said his daughter made more using his system than she could with her degree, he knew that he had no idea how much she made from real estate, and no idea how much she made with her degree. (ER 314-315.)

In light of his own written materials and his deposition testimony, there can be no genuine dispute that Mr. Beck had knowledge that the representations made in the infomercials were false. Accordingly, Mr. Beck satisfies both the "participation" and "knowledge" factors necessary to hold him liable for the corporate defendants' violations of the FTC Act.

Nevertheless, Mr. Beck argues that issues of disputed material fact precluded summary judgment. Not so. Mr. Beck argues that he: (1) was not "the mastermind or creator of the alleged misrepresentations contained in the infomercials" (2) did not write the scripts or have final control over them; (3) did not own or control the corporate defendants; and (4) "had an honest belief in the truth of his statements." (Opening Br. 34.)

"[O]nly disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary

judgment." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012). Mr. Beck's first three contentions are irrelevant because they do not create a triable fact under the relevant law. Whether Mr. Beck was the "mastermind" or not, it does not raise a genuine issue regarding his participation in the infomercials or his knowledge of the misrepresentations. Nor does whether he wrote some or all of the scripts, whether he had final say over them, or whether he owned or controlled the corporate defendants. These purported disputes are not material to the district court's grant of summary judgment.[13] *See id.* ("The substantive law determines which facts are material.").

Mr. Beck's final contention is that he had a "good faith" or "honest belief in the truth of his statements," (Opening Br. 34, 39), but that statement is so contradicted by Mr. Beck's own admissions in the case as to be incredible. Mr. Beck makes much of the fact that "the FTC has not challenged the materials that Mr. Beck actually created," (Opening

[13] Mr. Beck argues at length (Opening Br. 37-38) that material issues precluded the district court from finding he was the "driving force" behind the infomercials and had "authority to control its key components," but the district court never made those findings. (*See* ER 114-67.) While it did use those words in a footnote to its order denying his *ex parte* motion, the language was not a part of its order and came after its summary judgment order on liability. (*See* ER 41.)

Br. 39), but it is precisely those materials and Mr. Beck's knowledge of them that foreclose any genuine issue that he knew the representations in the infomercials were false.

Mr. Beck attempts to liken himself to the defendant in *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004), but that case is inapposite. *Garvey* involved the spokesperson for a weight-loss product in which the question was whether he had a reasonable basis for his endorsement of the product. *Id.* at 901. Importantly, it was not shown that the claims at issue were false or unsubstantiated, and the district court found that the defendant had no knowledge of any material misrepresentations. *Id.* at 900-901. This Court held that the defendant had some basis for his statements because he had lost weight with the product himself and had been given literature supporting a scientific basis for its efficacy. *Id.* at 902.

The same cannot be said here. Unlike *Garvey*, Mr. Beck was no mere spokesman. As the developer of the John Beck product and an expert in it, he was in the *best* position to know whether the infomercials' claims were true. He knew they were not.

Mr. Beck has failed to demonstrate any genuine issue of material fact that should have precluded summary judgment. As explained above, even if there were a fact issue regarding Mr. Beck's knowledge of the misrepresentations, that would not negate the district court's holding that he is personally liable for his own violations of the FTC Act.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

April 18, 2013

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Ninth Circuit Rule 28-2.6 Statement

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the FTC states that there are no known related cases pending in this Court.

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I certify that the foregoing was filed using the Court's Appellate CM-ECF System on April 18, 2013. All counsel of record are registered CM-ECF users, and service will be accomplished by the EM-ECF system.

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Certificate of Compliance

I, Theodore (Jack) Metzler, certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 12,522 words.

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I, Theodore (Jack) Metzler , certify that this brief is identical to the version submitted electronically on [date] Apr 18, 2013 .

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