No. 17-15600

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

PUBLISHERS BUSINESS SERVICES, INC., *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:08-cv-00620-APG
Hon. Andrew P. Gordon

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. § 53(b). This Court's jurisdiction to review the district court's final judgment, entered on February 2, 2017, is based on 28 U.S.C. § 1291. Defendants timely filed their Notice of Appeal on March 31, 2017.

QUESTIONS PRESENTED

The district court granted the FTC's motion for summary judgment in 2010 and entered a monetary judgment in favor of the FTC in 2011. The FTC appealed the district court's calculation of monetary relief. Defendants did not appeal from any aspect of the judgment. This Court remanded for recalculation of the monetary remedy, which the district court did in the order on review.

The questions presented are:

1. Whether, having failed to appeal from any aspect of a summary decision finding them liable for deceptive magazine subscription sales and abusive collections practices, defendants may use their appeal from the recalculated judgment on remand as a new opportunity to challenge the scope of the district court's authority

to grant equitable monetary relief and to argue that the district court improperly granted summary decision.

2. Whether the district court properly applied the established framework for calculating equitable monetary relief.

STATEMENT OF THE CASE

This is an appeal after remand from an earlier decision of this Court. In that decision, the Court addressed an FTC appeal from a judgment for equitable monetary relief in a magazine subscription sales scheme. This Court agreed with the FTC and held that the district court had improperly calculated the amount of equitable monetary relief. The district court had awarded only $191,219 in monetary relief in a $34 million scam. The court also limited personal liability for monetary relief to two of the six named individual defendants. The FTC appealed the monetary remedy; the defendants – now appellants – did not appeal any aspect of the judgment, including the finding of liability. This Court remanded for a recalculation of equitable monetary relief after finding that the district court had failed to calculate relief on the basis of consumer losses. The Court also held that the district court abused its discretion in finding three of the individual defendants not personally liable.

On remand, the parties agreed that consumers made total payments of approximately $24 million to PBS for first-time orders and that consumers received $265,244 in refunds.[1] The FTC argued that the court should order relief equal to the difference – $23.77 million. PBS did not dispute the accuracy of those calculations. Instead, on remand, it challenged for the first time the district court's underlying authority to grant monetary relief. In the decision on review, the district court found that defendants had waived that argument. The court entered judgment on remand in the amount the Commission had requested.

A. PBS's Deceptive and Abusive Telemarketing of Magazine Subscriptions

Publishers Business Services, Inc. and Ed Dantuma Enterprises, Inc. (collectively with individual defendants, PBS) operated a magazine-subscription scheme that duped consumers into paying hundreds of dollars for long-term magazine subscriptions. Doc. 151 at 27–32 [ER41-

[1] On remand, the FTC requested monetary relief only for first-time orders and not renewals or additions. This reduced the consumer loss from $34 million to about $24 million.

46].[2] From telephone banks in Ohio and Florida, PBS made "cold calls" calls to approximately 25 million consumers between January 2004 and August 2008. *Id.* at 2, 11 [ER16, 25]. The parties agree that those calls generated approximately $24 million in revenues from first-time customers. Doc. 322 at 9 [ER10].

PBS's scheme worked this way: telemarketers called consumers at work, pretending to be conducting a survey. *See* Doc. 151 at 3, 14 [ER17, 28]. They told consumers that they were "contact[ing] a few business people" to survey their "personal buying habits" and promised "a small surprise" for anyone who was willing to participate. Doc. 151 at 3-4 [ER17-18]. They led consumers through a series of questions about their employment, age, and purchasing habits, "just for [their] advertisers['] information." *Id.*

Using this ruse, the telemarketers thanked consumers and told them: "[W]ith our best wishes you will receive the next 60 issues" of various magazines. Doc. 151 at 3–4 [ER17-18]. The telemarketers told consumers there was "no catch involved," explaining that advertisers

[2] "Doc." refers to documents as they appear on the consecutively numbered district court docket. "ER" refers to appellants' Excerpts of Record.

"had authorized [PBS] to send the magazines * * * to assure them that their ads will be read." Doc. 151 at 4 [ER18]. They promised they would not ask consumers "to buy any cash subscriptions or anything like that." *Id.*

In return, the telemarketers asked consumers only to "thank [PBS] * * * by helping defray the cost of getting [the magazines] out to [them]." *Id.* Referring to the payment confusingly as a weekly, monthly, and then bimonthly price, all without disclosing the total price, the telemarketers described the obligation as "such a small amount" for "quite a lot" of magazines, leaving consumers with the impression they were being asked for nominal shipping and handling fees. *Id.* The telemarketers thus tricked consumers to articulate words of apparent consent to entering noncancellable, long-term contracts for magazine subscriptions.[3]

[3] PBS reiterates its claim that consumers could cancel up until PBS submitted the order to the magazine publisher. *See* Br. 6. But PBS did not inform consumers they had a right to cancel unless the customer lived in a "buyer's right to cancel state." Doc. 151 at 10. [ER24]. Their communications stated or implied that they were obliged to pay the full contract amount. *See* Doc. 97-2 [SER59]. PBS also reiterates its claim that customers were offered a discount if they agreed to pay in six months. See Br. 7. But PBS fails to disclose that it used that offer to overcome consumers' objections to receiving invoices for long-term, non-

Shortly after the initial sales call, consumers received a call from a PBS "verifier" who thanked them for participating in the survey and asked for their consent to verify their information on tape. The verifiers spoke quickly – so quickly that even certified court reporters who later heard the tapes were unable to transcribe recorded portions of the calls. Doc. 97-2 at 5, ¶ 12 [SER57]. The verifiers avoided telling consumers the total price, or described it so that consumers came away with the impression it would be a nominal amount. Doc. 151 at 6-8, 15 [ER20-22, 29].

After they had fallen for the scheme, consumers received invoices for magazine subscriptions, sometimes for hundreds of dollars. The invoices listed, *for the first time*, "the price of the subscription, the length of the subscription, the terms of the agreement, and the non-cancellation policy." Doc. 151 at 10 [ER24]. Consumers who refused to pay received threatening calls at work and an escalating series of dunning letters from fictitious PBS personnel threatening, for example, to "move forward reviewing our rights * * * for all monies due plus

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cancellable subscriptions. Many customers who felt trapped by the "verification" recording agreed to the discount (which PBS collectors referred to as "settlements") as a way to mitigate what they viewed as an unavoidable loss. *See* Doc. 140 at 24, Fact 45 [SER53].

interest[]and costs." Doc. 151 at 11 [ER25] (internal quotation marks and citation omitted). Consumers who were still "delinquent" after about six months received a dunning letter from PBS's "legal department." *Id.* In fact, PBS had no legal department. *Id.*

PBS's deceptive magazine subscription scheme was lucrative. In just over four years – January 2004 through August 2008 – it yielded an undisputed $34+ million in gross revenue. Doc. 219 at 9 ¶ 66 [SER21]; Doc. 222 at 34 ¶ 9 [SER19]. An undisputed $24 million of that sum came from consumers' initial orders; the other $10 million was generated by renewals or additions to existing subscriptions. Doc. 322 at 9 [ER10]. The parties also agreed that PBS issued refunds of $265,244.25. Doc. 151 at 13 [ER27].

B. Proceedings Below

Initial Proceedings (*PBS I*). On May 14, 2008, the FTC sued PBS and six members of the Dantuma family, alleging that their magazine subscription scheme violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310

(TSR).[4] The FTC brought its complaint under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes the district courts to grant permanent injunctions with respect to "any provision of law enforced by the Federal Trade Commission." The FTC also relied on its authority under Section 19(a)(1) of the FTC Act, 15 U.S.C. § 57b(a)(1), with respect to PBS's violations of the TSR. Under that provision, the court may "grant such relief as the court finds necessary to redress injury to consumers," including, but not limited to, "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification."

In its first decision in this case (*PBS I*), the district court granted the Commission summary judgment on all counts of the complaint and permanently enjoined all the defendants from further deceptive and abusive sales practices.[5] Doc. 151 [ER15-48].

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[4] PBS stipulated to a preliminary injunction after the FTC filed. *See* Doc. 25 [SER68]. But PBS is not correct in stating that the preliminary injunction "effectively ended PBS's operations." Br. 9. It continued to make telemarketing and collections calls to consumers. *See* Doc. 154-2 [SER31-39; Doc. 155 [SER28-30]. It was still collecting payments as late as March 2011 – more than one year after the district court granted summary judgment. *See* Doc. 241 at 38 [SER10].

[5] The decision is reported as *FTC v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205 (D. Nev. 2010).

The court ruled that the overall net impression of PBS's course of communications with consumers was deceptive. Doc. 151 at 29-30 [ER43-44]. Applying established principles for identifying deception, the court concluded that there was no dispute of material fact that "the way in which PBS selectively disclose[d] the material terms throughout the various calls, preface[d] subsequent calls by informing the consumer PBS [was] just confirming information, and then add[ed] new required terms [was] likely to mislead." Doc. 151 at 28 [ER42]. The court concluded that PBS was "in violation of Section 5 of the FTC Act and the TSR with respect to its initial and verification calls." Doc. 151 at 30 [ER44]. The court further concluded that PBS's collection practices violated both Section 5 and the TSR because PBS used misrepresentation to induce consumers to pay and engaged in a pattern of abusive calls, in violation of 16 C.F.R. § 310.4(b)(1). Doc. 151 at 30-32 [ER44-46].

Although the court granted judgment to the Commission on liability, it called for further proceedings on monetary relief. The court noted that the FTC had requested restitution in the full amount of the purchase price or payment less any refunds, which totaled $34.4 million between January 1, 2004 and August 31, 2008. Because the parties had focused their briefs on the merits rather than on relief, the court ruled that an evidentiary hearing was warranted to "fully evaluate the appropriate monetary relief, if any, to award." Doc. 151 at 33 [ER47].

Ruling on Monetary Relief (*PBS II*) Doc. 248 [ER126-130]. The court conducted an evidentiary hearing over five days in March and June 2011. The FTC argued that the district court's prior finding of PBS's widespread deceptive and abusive practices, coupled with PBS's failure to establish the existence of satisfied customers, justified a monetary award equal to PBS's gross revenues – *i.e.*, $34.4 million. The district court acknowledged that restitution is a form of "ancillary equitable damages relief" that is available to effect complete justice under Section 13(b) of the FTC Act, Doc. 248 at 3 [ER128], but concluded that "[c]omplete disgorgement of [PBS's] entire gross revenues" was not appropriate "unless [the] FTC proves that such gross revenue is a 'reasonable approximation' of [PBS's] gains from violations of [the FTC Act]." *Id*. The district court then ruled that the FTC "[had] not establish[ed] the necessary link between [PBS's] acts in violation of

Section 5 and [its] entire gross revenues between January 1, 2004[,] and August 31, 2008." *Id.*

The district court also concluded that, while reimbursement to consumers who had complained about PBS "might provide a reasonable approximation of revenues received [by PBS] in violation of Section 5," it would be impossible or impracticable to locate those consumers. Doc. 248 at 3-4 [ER128-129]. Noting that consumers had actually received the magazines and that many of the complaining consumers did not yield to PBS's collection efforts, the court ultimately concluded that $191,219 – an amount proposed by PBS's expert and a fraction of the revenues generated by the scheme – was an appropriate amount of "equitable damages." Doc. 248 at 4 [ER129].

The district court further concluded that all six Dantuma family members were bound by the permanent injunction, but only two had sufficient knowledge to be liable along with PBS for the monetary judgment. *Id.*

Notably, PBS did not contest the FTC's calculations or challenge the court's authority to grant monetary relief at any point during the *PBS II* proceedings.

First Appeal (*PBS III*). The FTC appealed the calculation of monetary relief. It argued that monetary relief should have been measured by PBS's gross receipts and that all six of the Dantumas should have been held jointly and severally liable. PBS did not appeal any aspect of the district court's orders, including its grant of summary judgment in favor of the FTC against and permanent injunction against PBS and all six members of the Dantuma family.

This Court affirmed in part and vacated in part. *FTC v. Publishers Bus. Servs., Inc.*, 540 F. Appx. 555 (9th Cir. 2013) [ER118-125]. The Court held that the district court had committed legal error "when it focused on the defendants' gain rather than the loss to the consumers," explaining that under Ninth Circuit jurisprudence "the FTC Act permits restitution measured by the loss to consumers." ER120. The Court further ruled that the district court was wrong in restricting the monetary award due to the potential difficulty of locating and reimbursing particular consumers who had been injured. It explained instead that "[a]ttributing damages to individual consumers and returning value to them is not required for a [Section] 13(b) disgorgement remedy." ER121.

The Court found further error in the district court's having based its monetary judgment on PBS's expert, who assumed "that most consumers heard all of the terms of the subscription so that they were not misled." ER122. That assumption was flawed, the Court explained, because the violation consisted not only of "the failure to disclose all pertinent terms," but also of "the misrepresentations that launched the process" and the "net effect" of PBS's tactics. *Id*. The Court also identified yet another flaw in the analysis – the expert's assumption that the magazine subscriptions had value. Relying on longstanding precedent,[6] the Court held that because PBS's misrepresentations had tainted consumers' purchasing decisions, the value of the magazines was irrelevant and should not have reduced the monetary award. ER 122-123. Finally, the Court rejected PBS's attempt to apply any of the limitations of Section 19 of the FTC Act, as Section 13(b) "contains no such limitation" and "permits awards that may even be 'greater than the defendant's unjust enrichment.'" ER121 (quoting *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)).

[6] *See*, *e.g.*, *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (finding in similar magazine subscription sales scheme no need to offset gross receipts "by the value of the magazines the consumers received").

The Court thus vacated the district court's calculation of "damages" and instructed the district court on remand to "base its calculation on the injury to the consumers, not on the net revenues received by [PBS]." ER123. The Court clarified that the district court, was not *required* to accept calculations proposed by the FTC and that it could consider along with other arguments PBS's contention that customers who had renewed or added to their subscription orders "necessarily knew the actual terms of the transaction at the time of renewal." *Id.*

Finally, the Court held that the district court had abused its discretion in failing to find three of the individual defendants – Dirk, Brenda, and Jeff Dantuma – personally liable.[7] ER124. It affirmed the district court's order of no personal liability with respect to a fourth defendant, Persis Dantuma. ER124-125.

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[7] PBS reiterates its claim that starting in 2001 Dirk Dantama had "no formal status with the company other than as an occasional consultant" (Br. 4), but it conceals his key role as the provider of lists of phone numbers for PBS's telemarketers and the person chiefly responsible for responding to inquiries from state investigators. Doc. 93 at 13-15, 56-57 [SER62-66].

On November 29, 2013, this Court denied PBS's petition for rehearing en banc. The Supreme Court denied PBS's petition for certiorari.

Remand Proceedings (*PBS IV*). On remand,[8] the parties exchanged expert reports and briefed their respective positions on the proper amount of equitable monetary relief.[9] This time, the FTC excluded from its figure renewals and add-on orders, responding to this Court's observation that add-on and renewal customers may have known about the actual terms of the transaction at the time they renewed or added on to their order. But the FTC included those same customers' initial subscriptions on the ground that all first-time orders were tainted by deception. Doc. 322 [ER2-14]. The parties did not dispute that first-time orders totaled $23.7 million.

Although PBS did not dispute the calculation of initial purchases, it contested for the first time on remand the court's authority to award

[8] The decision on remand appears at *FTC v. Publishers Bus. Servs., Inc.*, 2017 WL 451953 (D. Nev. Feb. 1, 2017). The matter was transferred to Judge Gordon upon Judge Pro's retirement.

[9] The FTC submitted an expert report prepared by Dr. Marc A. Luppino and PBS submitted a report prepared by Dr. Armando Levy, both economists. The FTC submitted reply expert reports from Dr. Luppino and Dr. Alan D. Castel, a cognitive psychologist.

any monetary relief. Doc. 322 at 4 [ER5]. It also contested the Commission's showing of widespread deception. Doc. 322 at 4-5 [ER5-6]. PBS offered instead three different sets of calculations that it argued were a more accurate reflection of consumer injury. *See* Doc. 322 at 10-13 [ER11-14].

The district court rejected PBS's contention that the court lacked authority to grant monetary relief. PBS had waived that argument, the court held, because it did not appeal the court's prior order entering a monetary judgment against them. Doc. 322 at 5 [ER6]. The court pointed out that PBS had not even raised that issue in opposition to the FTC's appeal. *Id.* The court further held that controlling Circuit precedent would foreclose a challenge to the court's authority. Doc. 322 at 4-5 (citing *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), and *Stefanchik*, 559 F.3d at 931). [ER5-6].

As for PBS's claim that the FTC was not entitled to a presumption of consumer reliance, the court held that the unappealed summary judgment order established the widespread nature of the misleading practices, including 25 million "cold calls" and PBS's use of materially misleading scripts. *See* Doc. 322 at 6 [ER7]. Any deviations from the scripts – which defendants had previously argued were "rare" – made them more misleading, not less. Doc. 322 at 6 [ER7]. Consequently, the court held, the FTC was entitled to a presumption of consumer reliance; it did not need proof of individual reliance by each purchasing consumer. Doc. 322 at 5-6 [ER6-7].

The only remaining question was whether PBS had presented sufficient evidence to rebut the presumption of reliance. On that point, defendants argued that they had rebutted the presumption through evidence showing that a small number of customers was "satisfied" with their subscriptions. Doc. 322 at 7 [ER8]. The court found it "questionable," however, whether evidence of ultimate satisfaction could serve to rebut the presumption. The court explained that "[t]he injury to a consumer occurs at the instant of a seller's misrepresentations, which taint the consumer's subsequent purchasing decisions." *Id.* Thus simply because some customers said they were satisfied with the magazines after receiving them does not necessarily mean that the customers would have purchased the magazines in the first place but for the initial deception. In fact, the court noted, PBS's witnesses "appeared to be confused about, or unaware of, the terms of the transaction." Doc. 322 at 8 & n.2 [ER9].

Next, the district court recalculated the monetary relief. The court applied the two-step, burden-shifting framework required by the remand order and this Court's guidance in *Commerce Planet*. Doc. 322 at 8 [ER9]. It determined that the Commission satisfied its initial burden by producing evidence of the amount consumers paid for the magazines less refunds and chargebacks, a figure that PBS did not dispute.[10] Doc. 322 at 9 [ER10]. The Court then agreed with the Commission's calculation of monetary relief, which excluded revenues from renewal and add-on orders, *id.*, and awarded the Commission \$23.7 million, representing PBS's undisputed gross revenues (\$24,038,392) from first-time orders less \$265,244 in chargebacks and refunds. Doc. 322 at 9 [ER10].

In light of this Court's remand order, the court rejected PBS's argument that the initial order for any customer who later renewed or

[10] PBS is mistaken in stating that on remand the FTC offered the report of an expert who had been barred from testifying in the earlier proceedings. *See* Br. 14. The FTC offered, and the Court accepted, its witness, Dr. Luppino, as a lay witness in *PBS II* because his testimony was limited to calculations from PBS's own database. *See* Doc. 232 [SER17]; *see also* Doc. 216 at 7 [SER24].

expanded their order should also be removed from the restitution amount. Doc. 322 at 9 [ER10]. The district court explained that this Court was not suggesting that the renewal and add-on customers "necessarily knew the terms at the time of the original purchase." *Id.* Nor was it suggesting that PBS's "misleading tactics did not taint the initial purchase decision for these customers." *Id.* To the contrary, the court explained, the remand order "noted that [PBS] violated Section 5 'by the misrepresentations that launched the process, among other reasons.'" *Id.* The district court then concluded that the FTC's calculation, which included the *first-time* orders for renewal and add-on customers, "reasonably approximate[d]" PBS's unjust gains. *Id.*

Having determined that the FTC "met its burden of showing that all first-time orders were tainted by * * * Section 5 violations," the district court considered next whether the FTC had overstated PBS's unjust gains. Doc. 322 at 10 [ER11]. The court then discussed at length each of the three alternatives proposed by defendants' expert, Dr. Levy. The court rejected his first proposal – $465,000 – because (contrary to this Court's remand order) it "assum[ed] that consumers valued the magazines they received and discount[ed] consumer injury

* * * based on the magazines' value." *Id.* The court also rejected other aspects of Dr. Levy's methodology, including: his failure to provide any basis for assuming that 67.5 percent of PBS customers who were unhappy called to cancel or complained to a third party; his decision to exclude entirely any complaints unaccompanied by a request to cancel; and his failure to explore whether PBS's practices – such as telling consumers the subscriptions could not be canceled – themselves contributed to a lower cancellation rate. Doc. 322 at 10-11 [ER11-12].

The district court also rejected Dr. Levy's second proposal – that the amount of relief be capped at defendants' profits of $698,446 – because it directly violated this Court's remand order. Doc. 322 at 11 [ER12]. Finally, the district court rejected Dr. Levy's third proposed calculation (for $1.15 million) because it assumed, contrary to the evidence and Dr. Levy's own testimony, that misled customers would necessarily seek to cancel before making any payment. Doc. 322 at 12 [ER13].

After examining all the rebuttal evidence, the district court ruled that defendants had failed to controvert the FTC's approximation of the amount of unjust gains. It granted the FTC's motion for judgment of $23.7 million in equitable monetary relief. *Id.*

SUMMARY OF THE ARGUMENT

Seven years ago, the district court granted summary decision against PBS and its owners. The FTC appealed, but PBS chose not to cross-appeal, despite having extra time under FRAP 4(a)(3) to consider the consequences of the FTC's appeal. PBS was willing to pay the district court's small monetary award and to live under the constraints of the permanent injunction. The FTC won a reversal that has now resulted in a much larger judgment. In the wake of the new judgment, PBS now regrets its decision not to appeal. It wishes to go back in time and raise at this point the arguments that it could have raised had it challenged the underlying judgment. PBS thus now challenges – for the very first time in this litigation – the district court's authority to grant monetary relief in the first place. It also challenges the underlying grant of summary judgment in the district court's very first decision.

1. PBS's tardy requests violate the cross-appeal rule, under which an argument is waived on a second appeal if a party could have raised it on a cross-appeal the first time but opted not to. The judicial process is

best served by requiring parties to raise their challenges to adverse judgments at the first appropriate time, thus serving the need for repose and finality. Any other rule would invite chaos as litigants change their strategies as their interests change in long-running cases like this one, resurrecting arguments resolved long before.

2. Even if PBS had properly appealed, its challenge to the district court's authority to grant equitable monetary relief is meritless. This Court, like every other appellate court to have considered the question, has established that Section 13(b) of the Federal Trade Commission Act gives district courts the equitable authority award appropriate monetary relief.

3. PBS is plainly wrong that Congress restricted the scope of equitable remedies when it enacted Section 19 of the FTC Act, 15 U.S.C. 57b. Congress itself specified explicitly to the contrary: the statute states directly that Section 19 does not affect any other remedies available under the FTC Act.

Nor did the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), upend the decades of consistent law on the availability of equitable remedies under the FTC Act. That case involved application of a statute of limitations to the Securities and Exchange Commission, and the Court expressly cautioned that its decision did not address the scope of equitable remedies.

4. The district court properly granted summary judgment. The evidence, including the declarations of customers and PBS's own former employees, showed that the overall net impression conveyed by PBS's sales pitch was deceptive and that the deception was material to consumers' decisions to do business with PBS. In response, PBS relied on unsupported assertions that its representations would not mislead consumers acting reasonably. PBS's response to the Commission's demonstration of abusive collections practices was similarly insubstantial, consisting of bare assertions that its threatening phone calls were against company policy.

5. PBS is also incorrect that the district court's decision on remand committed procedural and substantive errors. In fact, the district court properly considered the Commission's request for equitable monetary relief under this Court's long-established two-part burden-shifting framework. The district court correctly accepted the determination on summary decision that PBS's deceptive

representations were widespread. PBS did not rebut that presumption with evidence showing that some segment of consumers were in fact not deceived and should be removed from the calculation. The district court rightly identified methodological deficiencies in the analyses of PBS's expert witnesses and correctly concluded that PBS had failed to controvert the Commission's determination of the unjust gains. PBS is wrong that *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), overturned the use of presumptions in the calculation of equitable remedies under the FTC Act. The case involved the question whether a demonstration of "foreseeability" satisfies the standard of proximate cause; it had nothing to do with evidentiary presumptions and burden-shifting regimes.

Finally, PBS is incorrect that the three-year limitation period in Section 19(d) of the FTC Act applies to the monetary relief in this case. The entire judgment was justified by PBS's violations of Section 5 of the FTC Act, which is not subject to Section 19's limitation. Moreover, violations of the Telemarketing Sales Rule violate both Section 19 and Section 5. The Commission therefore could seek monetary relief under Section 13(b), without regard to Section 19.

STANDARD OF REVIEW

"[T]his [C]ourt reviews a district court's grant of equitable relief under the FTC Act only for abuse of discretion or the erroneous application of legal principles." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010); *see also FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). A court abuses its discretion when it fails to identify and apply "the correct legal rule to the relief requested," or if its application of the legal standard was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

ARGUMENT

I. PBS WAIVED ITS CHALLENGES TO THE DISTRICT COURT'S SUMMARY GRANT OF EQUITABLE MONETARY RELIEF BUT THE CLAIM IS MERITLESS IN ANY EVENT

PBS's principal arguments are that (1) Section 13(b) of the FTC Act does not allow a district court to award equitable monetary relief and (2) the court improperly granted summary judgment to the FTC in its initial order in this case. Br. 18-26. As explained below, PBS waived those claims by failing to raise them in the first appeal of this case. PBS's attack on Section 13(b) would fail in any event because it runs headlong into an unbroken line of rulings of this Court, eight other courts of appeals, and innumerable district courts, issued over more than 30 years, conclusively establishing that Section 13(b) permits a district court to award equitable monetary relief. PBS identifies no evidence in the record that would have made summary judgment inappropriate.

A. PBS Waived Its Challenges To Monetary Relief And Summary Decision

The district court held on summary decision that "the Commission has the authority to seek" monetary relief under Section 13(b) and it summarily awarded that relief. Doc. 152 at 2 [SER41]; Doc. 151 at 32-33 [ER46-47]. PBS could have challenged those rulings by cross-appeal when this case was before the Court on the FTC's appeal, but it chose not to. Now, the challenge is too late.

Where litigants "rais[e] a new issue [on remand] that they did not raise in their [first] appeal," the Court "need not and do[es] not consider a new contention that could have been but was not raised on the prior appeal." *Munoz v. Imperial Cty.*, 667 F.2d 811, 817 (9th Cir. 1982) (citations omitted); *accord United States v. Arreguin*, 735 F.3d 1168, 1178 (9th Cir. 2013) (on second appeal after remand, holding an issue waived that was not raised "during the initial district court proceedings, nor in its brief on the first appeal"); *Nw. Indiana. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (it is not appropriate to consider argument on second appeal following remand that could have been raised in initial appeal); *cf. Bethea v. Levi Strauss & Co.*, 916 F.2d 453 (8th Cir. 1990) (on remand of age discrimination case after employer had obtained partial reversal, district court lacked jurisdiction to award additional equitable relief to employee who had not preserved expansion of his rights by cross-appealing employer's appeal). The same principles apply even in criminal cases, *see*, *e.g.*, *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1482 (11th Cir. 1989), and to constitutional issues that litigants have failed to pursue. *See Nw. Indiana Tel. Co.*, 872 F.2d at 470.

Having failed to preserve its argument by raising it by cross-appeal the first time, PBS may not now turn the clock back and get a second bite of the apple. A cross-appeal is required when a litigant seeks – as PBS does now – to decrease its monetary liability or raise an issue affecting a legal right that may affect monetary recovery. *See Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001); *see also Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008); *El Paso*

Nat. Gas Co. v. Neztsosie, 526 U.S. 473, 480 (1999); *United States v. Am. Ry. Express Co.,* 265 U.S. 425, 435 (1924). Thus, under the cross-appeal rule, a litigant who *can* appeal an adverse ruling, but chooses not to, waives the challenge and may not raise the matter in a subsequent appeal. *See*, *e.g.*, *Hartman v. Duffy*, 19 F.3d 1459, 1464-65 (D.C. Cir. 1994) (collecting cases); *see also* 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3904 (West 2d ed. 2017). As the D.C. Circuit has explained, barring arguments not raised on a first appeal "prevents the bizarre result that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir. 2007) (citations and quotation marks omitted).

Indeed, PBS did not simply fail to raise the issue, it affirmatively argued to this Court that "it was well within the District Court's discretion to choose a monetary remedy rooted in the facts of this case." No. 11-17270, ECF No. 22 at 35. PBS similarly acknowledged that "a court has discretion under Section 13(b) to 'grant *any* ancillary relief necessary to accomplish complete justice,'" not just injunctive relief. *Id.* at 29 (citation omitted).

Thus, beyond mere waiver, PBS's argument about Section 13(b) should be barred under principles of judicial estoppel, which forbid parties from engaging in just this sort of procedural fencing. PBS admits that it chose not to appeal the district court's original judgment – and supported the court's right to impose the judgment – because it found the compensation figure favorable. Br. 45-46. Now, by contrast, after the FTC obtained a higher judgment less to PBS's liking, PBS's interests have changed and it takes the opposite position.

Judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (citation and internal quotation marks omitted). The doctrine "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000); *accord* 18B Charles A. Wright *et al.*, Federal Practice and Procedure § 4477, p. 782 (2d ed. 2017) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."). Thus, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation and quotation marks omitted).

PBS attempts to turn its waiver into an excuse by contending that the Dantuma family members did not appeal because they "wanted to move on with their lives" and had "no idea they would be facing a $24 million Judgment four years later." Br. 46. To begin with, the assertion is untrue on its face. The FTC had sought $34 million and it appealed the district court's initial judgment for a much lower amount; the Dantumas thus knew that a larger (perhaps much larger) amount might be imposed in the future if the FTC prevailed. That is why Federal Rule of Appellate Procedure 4(a)(3) gives a would-be cross-appellant 14 extra days to assess the effect of its opponent's appeal before it must file its own.[11]

[11] Even if 14 days is not enough time to arrive at a considered decision, a would-be cross-appellant may simply file a cross-appeal and withdraw it later.

Moreover, under the cross-appeal rule discussed above, a litigant like PBS who loses in district court must cross-appeal to preserve arguments against a judgment "even though [it] may have been satisfied" with the judgment. *Bethea*, 916 F.2d at 456. Where a party "did not receive all that [it] requested" in the lower court – which PBS did not, since it lost summary judgment and was subjected to a permanent injunction and monetary relief – it can preserve a challenge to the judgment only by filing its own appeal. *Id.* Indeed, "[i]t will be the unusual case where an appellee that fails to file a notice of appeal can challenge unfavorable aspects of a judgment." *Bryant v. Tech. Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981).[12]

Nor can defendants justify their decision to forgo a cross-appeal by dismissing it as "conditional." Br. 45. A true conditional cross-appeal is brought by a party who has succeeded below but wants to preserve its

[12] In similar circumstances, courts find relief unwarranted under Rule 60(b)(6) of the Federal Rules of Civil Procedures where the movant has made a deliberate choice not to appeal. *See, e.g.*, *Ackermann v. United States*, 340 U.S. 193, 198-99 (1950) (Rule 60(b)(6) is not an avenue for relief from a judgment for a litigant who has made a "free, calculated, and deliberate" choice not to appeal); *Cruickshank & Co. v. Dutchess Shipping Co., Ltd.*, 805 F.2d 465, 468 (2d Cir. 1986) ("Failure to assess the risks and potential gains of taking an appeal is not an extraordinary circumstance that would justify relief under Rule 60(b)(6).").

rights on an issue that might expand its own rights or lessen its adversary's rights if the appellate court vacates or modifies the judgment on related issues. *See*, *e.g.*, *Hartman v. Duffy*, 19 F.3d at 1465-66 (D.C. Cir. 1994); *Spence v. Miles Laboratories, Inc.*, 37 F.3d 1185 (6th Cir. 1994). But PBS did not succeed below; the district court's liability rulings were *adverse* to PBS and the Dantumas: they imposed a permanent injunction binding on all of them and monetary relief on some of them. They may have been willing to live with that judgment, *see* Br. 46, but having decided not to cross-appeal, they may not switch course years later. *See*, *e.g.*, *Lee v. Burlington Northern*, 245 F.3d at 1107 (noting that the court has "required a cross-appeal if an issue affects a legal right that may have impact on damage recovery"); *Turpen v. City of Corvallis*, 26 F.3d 978, 979 (9th Cir. 1994) (declining to address the issues that would expand a litigant's rights on appeal because that litigant did not file a cross-appeal).

PBS further contends that courts disfavor "conditional" cross-appeals. Br. 45. Even if an appeal here could be considered conditional, PBS cites no case disapproving of conditional cross-appeals in circumstances analogous to those present here. At most it has shown that the Federal Circuit disfavors cross-appeals brought solely for making an argument in support of the judgment. *See*, *e.g.*, *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1348 n.1 (Fed. Cir. 2003). But that would not have been the type of appeal at issue here. The Supreme Court, this Court, and other courts of appeals routinely consider conditional cross-appeals. *See*, *e.g.*, *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975) ("The risk that [a would-be cross-appellant] might become aggrieved upon reversal on the direct appeal is sufficient [to justify conditional cross-appeal].).

PBS raises a series of passing additional arguments, all of which lack merit. The scope of Section 13(b) equitable remedies is not an unwaivable "jurisdictional" issue. Br. 28 n.4. PBS's cited case, *United States v. Bennett*, 147 F.3d 912 (9th Cir. 1998), involved the subject matter jurisdiction of the district court, not the scope of statutory remedies. Nothing in this Court's decision in *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 543 (9th Cir. 2013), stands for the proposition that a litigant may belatedly raise an argument as long as it is "purely legal." Br. 28 n.4. *Wang* involved an "intervening change in law" with a direct bearing on the outcome of that case. Here, for the reasons described at pp. 37-39 *infra*, there has been no such change.

B. PBS's Challenge To The Authority Of The District Courts To Grant Equitable Monetary Relief Is Meritless

Even if PBS could challenge the district court's equitable authority, its argument is meritless. As mentioned above, this Court and every other court of appeals to have considered the issue has held that Section 13(b) authorizes equitable monetary relief. *See FTC v. Commerce Planet, Inc.*, 815 F.3d at 598-99; *FTC v. Pantron I*, 33 F.3d 1088, 1102 (9th Cir. 1994); *see also FTC v. H.N. Singer*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *FTC v. Grant Connect LLC*, 763 F.3d 1094, 1101-02 (9th Cir 2014); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1160-61 (9th Cir. 2010).[13]

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[13] *See also FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996); *see also FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir. 1982) (explaining that broader equitable relief is available under Section 13(b) than enumerated); *United States v. Universal*

Section 13(b) grants authority to district courts to "issue[] a permanent injunction." 15 U.S.C. § 53(b). The Supreme Court established 70 years ago that Congress's grant of such power triggers the court's equitable jurisdiction and all of its equitable authority – including the power to direct equitable monetary relief. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In cases brought by the government to vindicate the public interest, the court's equitable powers are especially broad and flexible and include the authority to order the full range of equitable remedies, including restitution and disgorgement. *Id.* As established in the unbroken line cases cited above, this Court and others have applied *Porter* time after time and without exception have upheld the authority of the district courts under Section 13(b) to award monetary relief, including restitution and other equitable monetary remedies.

Contrary to PBS's assertion (Br. 27), Congress did not restrict these remedies when it enacted Section 19 of the FTC Act, 15 U.S.C. § 57b. As this Court and others have ruled without exception, Section

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Mgmt. Servs., Corp., 191 F.3d 750, 761-62 (6th Cir. 1999) (equitable monetary relief is available under similar injunction provision in Federal Food, Drug, and Cosmetic Act).

19 does not limit the Commission's ability to invoke the district courts inherent equitable authority under Section 13(b). *See*, *e.g.*, *Commerce Planet*, 815 F.3d at 598; *H.N. Singer*, 668 F.2d at 1113; *accord*, *FTC v. Bronson Partners, LLC*, 654 F.3d at 366-67. Quite the contrary, Section 19(e) states explicitly that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e).[14] Indeed, in expanding the scope of Section 5 to foreign commerce, Congress explicitly also extended "[a]ll remedies available to the Commission with regard to unfair and deceptive acts or practices," specifically "including restitution." 15 U.S.C. § 45(a)(4)(B). Because relief under Section 13(b) is distinct from relief under Section

[14] PBS is also wrong in suggesting that the Commission brought its case under Section 13(b) instead of Section 19 because there was no evidence of scienter and reliance. Br. 30-31. Section 19(a)(2), 15 U.S.C. 57b(a)(2), in fact requires scienter. But that provision applies to actions for monetary relief brought following issuance of an FTC administrative cease and desist order. *See*, *e.g.*, *FTC v. Figgie Int'l*, 994 F.2d 595 (9th Cir. 1993). In the present case, the Commission alleged violations of the TSR under a *different* part of Section 19: Section 19(a)(1). *See* Doc. 1 at 6-8 [SER71-73]. Section 19(a)(1) does not require a showing of scienter or reliance. *See* 15 U.S.C. § 57b(a)(1). Moreover, the Commission did not seek an extra increment of monetary relief for PBS's TSR violations, *see* p. __ *infra*, so those violations have no bearing on the monetary relief issues presented here.

19, PBS has no basis for asserting that the Commission's Section 13(b) claims are limited by Section 19(b). Br. 60-61.

Finally, PBS is wrong in suggesting that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017), overruled the seven decades' worth of decisions discussed above. *Kokesh* stands for no such thing. Rather, *Kokesh* addressed whether 28 U.S.C. § 2462, the general five-year statute of limitations for "penalties," applies to a monetary judgment under the Securities Exchange Act, where, among other factors, the disgorged funds are sometimes dispersed to the Treasury. 137 S. Ct. at 1639, 1643-44. The Court held that the statute of limitations applied – but pointedly *disclaimed* the reading that PBS now advances: that courts issuing equitable remedies may not award monetary relief:

> Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.

Kokesh, 137 S. Ct. at 1642 n.3. That clear statement by itself settles the matter against PBS.

Even without that explicit disclaimer, however, *Kokesh* does not support PBS's reading of it. For starters, the opinion concerned the application of a statute of limitations. The question whether courts may impose equitable monetary relief was neither presented nor answered. Furthermore, the case concerned the Securities and Exchange Commission, not the Federal Trade Commission. No lower court considering *Kokesh* has read it to call into question awards of equitable monetary relief under any statute.[15]

But even if *Kokesh* applies beyond the statutory scheme at issue there, it has no practical application here. The Commission filed its Section 13(b) complaint in May 2008, seeking equitable monetary relief for consumers for the period beginning in January 2004 and ending in August 2008. *See* Doc. 151 at 11-13, 32-33 [ER25-27, 46-47]. Thus the entire judgment falls within Section 2462's five-year statute of limitations.

C. The District Court Properly Granted Summary Judgment In Favor Of The FTC

For the same reasons discussed in Section I.A, PBS has also waived its challenge to the district court's grant of summary judgment.

[15] *See FTC v. J. Williams Enterprises, LLC,* 2017 WL 4776669 at * 1-2 (M.D. Fla. Oct. 23, 2017); *CFTC v. Reisinger*, 2017 WL 4164197 at *4-5 (N.D. Ill. Sept. 19, 2017); *SEC v. Jammin Java, Corp*., 2017 WL 4286180 at *3-4 (C.D. Cal. Sept. 14, 2017); *FTC v. DIRECTTV, Inc*., 2017 WL 3453376 (N.D. Cal. Aug. 12, 2017).

Br. 44-59. PBS could have raised that argument, too, on the first appeal, but it chose not to.

The challenge is meritless in any event. The district court plainly acted properly when it granted summary judgment to the FTC. It articulated the correct standard for liability – whether the Commission had "show[n] [that] the representation, omission, or practice is (1) 'likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.'" Doc. 151 at 24-25 (quoting *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006)) [ER38-39]. It then noted that under well-established law, the FTC need show only that "the *overall net impression*" of the representation is likely to mislead. Doc. 151 at 25 (emphasis added) [ER39]. The court then applied this standard to the evidence amassed by the parties.

The Commission submitted voluminous evidence, including hundreds of consumer complaints, more than 45 declarations from consumers, declarations from five former PBS employees, admissions made by defendants in their pleadings and discovery responses, telemarketing scripts, other internal business documents, recordings of "verification" calls with consumers, and the deposition testimony of consumers, PBS employees, and the Dantuma defendants themselves. *See* Doc. 149 (FTC exhibit list) [SER42-51]. The evidence showed conclusively that the net impression of PBS's sales pitch to consumers was misleading.

PBS argued in response that its representations to consumers were nothing more than "non-material" commentary that is not regulated by the FTC and "thus not regulated by the FTC Act," Doc. 151 at 23 [ER37], and "would not mislead a customer acting reasonably." Doc. 151 at 19 [ER33]. Notably, PBS did not provide a shred of evidence to rebut the assertions made by former employees. Doc. 151 at 29 [ER43].

The court viewed all of this evidence in the light most favorable to PBS, Doc. 151 at 20, 27 [ER34, 41], and held that the material facts were undisputed, the pitch was misleading to consumers acting reasonably under the circumstances in a way that was material, and the FTC was entitled to judgment as a matter of law.

Specifically, the court ruled that the undisputed facts showed that PBS's sales pitch – encompassing the initial "survey" call and the follow-on verification – violated both the FTC Act and the TSR. Doc.

151 at 30 [ER44]. There was no dispute that: PBS told consumers that it was conducting a survey (in fact, it was not); that consumers would receive a "small surprise" for their participation (in fact, the surprise was selling magazine subscriptions); that "no catch [was] involved" (in fact, the call was part of a carefully orchestrated series of falsehoods); that consumers' information was being collected for PBS's advertisers (in fact, PBS provided no information to magazine advertisers); and that consumers needed only to defray the cost of sending the magazines (in fact, the cost was as much as $720). *See* Doc. 151 at 27-28 [ER41-42]; ER155. Every one of those falsehoods and other representations created the "overall net impression" that the offer was either free or for a nominal amount and without a long-term obligation. Doc. 151 at 27-32 [ER41-46].

PBS now claims that the district court improperly overlooked "a thousand positive customer ratings from the First Payment Coupons, statistically few complaints, and a small amount of 'charge backs' or refunds * * *." Br. 48. But PBS could show error only if the facts it now relies on were material to the question whether the sales pitch was deceptive. In fact, "evidence" of customer satisfaction is not material to a charge of deception. As this Court has ruled, "[t]he existence of some satisfied customers does not constitute a defense under the FTC [Act]." *Stefanchik*, 559 F.3d at 929 n.12 (quoting *Amy Travel*, 875 F.2d at 572).[16]

PBS also claimed that few consumers demanded credit-card chargebacks and refunds. Br. 48. Any success in maintaining low chargeback and refund rates would be no surprise given PBS's aggressive and abusive collections practices. As the district court described, this included verbal threats of lawsuits, garnishments, and adverse reports to credit bureaus. *See* Doc. 151 at 30-32 [ER44-46]. In any event, such evidence does not show that PBS's sales pitch was free of deception. There are many reasons why consumers cannot or do not complain or demand chargebacks and refunds. Indeed, consumers may not even know they have been deceived. Courts thus routinely reject

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[16] PBS is wrong about the First Payment Coupons regardless. In fact, many of the consumers whom PBS classified as "satisfied" were actually dissatisfied. As the district court observed, many consumers who checked a preprinted box describing the telemarketer's manner (the form allowed consumers to choose only one of three positive choices, "excellent, good, fair") also added handwritten and highly negative comments about the sales pitch. Doc. 151 at 10, 12 [ER24, 26]. Indeed, on 23 out of 84 of the coupons, consumers complained that they were called at work, that the representative spoke too fast, or that the terms of the offer were not clear. *Id.* [ER26].

the argument that such evidence provides a defense to charges of deceptive practices. *See*, *e.g.*, *Amy Travel,* 875 F.2d at 572; *FTC v. Partners In Health Care Ass'n, Inc.*, 189 F. Supp. 3d 1356, 1367 (S.D. Fla. 2016). Again, a purported factual dispute about the issue would not demonstrate that the district court wrongly determined that PBS's sales pitch was misleading.

Finally, PBS is wrong that summary decision was improper in the absence of an empirical survey evidence of dissatisfied consumers. Br. 58. The FTC does not need empirical survey evidence to prove a violation of Section 5. *See*, *e.g.*, *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985); *Kraft, Inc. v. FTC*, 970 F.2d 311, 319, 321 (7th Cir. 1992). And in this case empirical survey evidence would add nothing because PBS does not deny that it told consumers a series of falsehoods on the phone. It merely claims that it eventually revealed the truth in the invoice that consumers received at the end. Br. 48. Such a course of conduct enjoys no protection from the prohibitions of Section 5 if the net impression of the pitch is misleading, which it plainly was here. The district court was amply justified in concluding that "no question of material fact remain[ed] that * * * the net impression of the representations [was] likely to mislead in a way that is material." Doc. 151 at 30 [ER44].

Turning to PBS's collections practices, the district court properly found that they violated both Section 5 (because PBS used misrepresentations to induce payment) and the TSR (because PBS engaged in a pattern of abusive calling, contrary to 16 C.F.R. § 310.4(b)(1)(i)). *See* Doc. 151 at 30-32 [ER44-46]. As the district court observed on summary decision, PBS did not even attempt to controvert the Commission's showing that it made repeated and threatening phone calls besides the "bare assertion that repeated and threatening phone calls are against company policy * * *. Doc. 151 at 31 [ER45]. No disputed issues of material fact precluded summary judgment on the Commission's allegations of abusive collections.

In short, the district court was eminently correct in concluding that even viewing the facts in the light most favorable to PBS, no question of material fact remained that PBS's communications with consumers violated Section 5 and the TSR. Doc. 151 at 32 [ER46]. "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment."

Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989). A party opposing summary judgment must come forward with "specific facts showing that there is a genuine issue for trial." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *FTC v. Gill,* 265 F.3d 944, 954 (9th Cir. 2001). PBS utterly failed to make such a showing here.

II. PBS'S ALLEGATIONS OF ERROR ON REMAND ARE MERITLESS

A. The District Court on Remand Properly Found A Presumption of Consumer Reliance On PBS's Misrepresentations

This Court assesses a district court's award of equitable monetary relief under a two-part burden-shifting framework for calculating restitution awards. *See Commerce Planet*, 815 F.3d at 603; *FTC v. Febre*, 128 F.3d 530, 535 (9th Cir. 1997). First, the FTC must show that the harm to consumers "reasonably approximates the defendant's unjust gains" from their unlawful scheme. *Commerce Planet*, 815 F.3d at 603. If the FTC makes that showing, the burden then shifts to defendants to prove that the FTC's calculation is inaccurate. *Id.* at 604. After the burden shifts, "[a]ny risk of uncertainty * * * 'fall[s] on the wrongdoer whose illegal conduct created the uncertainty.'" *Id.* (quoting

Bronson Partners, 654 F.3d at 368); *see also Kuykendall*, 371 F.3d at 766.

With respect to the first part of that framework, the harm to consumers will equal the total proceeds of the scheme if the FTC shows that the defendants made misrepresentations that were material to consumers' decisions and that those misrepresentations were widely disseminated. This showing creates a "presumption" that consumers who paid defendants did so in reliance on the misrepresentations. *Commerce Planet*, 815 F.3d at 604.

Applying that approach, the district court concluded on summary decision that uncontroverted evidence demonstrated that PBS's misrepresentations to consumers were widely disseminated. *See supra* pp. 9-10. Then, after remand, the court found nothing to rebut that earlier conclusion and held that the FTC was thus entitled to a presumption of actual reliance. Doc. 322 at 6 [ER7]. It then shifted the burden to PBS to prove the absence of reliance. *Id*.

PBS takes no issue with the district court's assessment of the factual record. Instead, it argues for the first time on appeal that the burden-shifting/presumption regime which has guided the courts of appeals in FTC cases for decades was effectively reversed by the Supreme Court's decision in *Bank of America Corp. v. City of Miami*. Br. 32-33. Not so.

Bank of America involved lawsuits by the City of Miami against banks for violating federal anti-discrimination laws in their lending practices. The city claimed that it had been harmed because the banks' discriminatory lending practices had caused urban blight that led to decreased property values, increased demand for city services, and lower tax revenue. The Court held that the statute allowed cities to file suit against the banks practices. To prove damages, however, the Court required cities to show "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 1306 (citation and quotation marks omitted). Although the city's damages were foreseeable, that without more was not sufficient to demonstrate "proximate cause," the standard for damages under the Fair Housing Act. *Id.*

PBS asserts that *Bank of America* forbids the FTC from relying on presumptions of consumer reliance on deceptive sales pitches. Br. 33. Nothing in the case supports that argument.

Bank of America had nothing to do with evidentiary presumptions or with evidence. It concerned a question of causation – specifically, whether "foreseeable" injury satisfies the "proximate cause" standard of tort law. No such issue is presented here. The FTC does not claim that it need prove only that consumer injury is merely foreseeable; rather, if consumers relied on PBS's deceitful representations, then that deceit is the *direct* cause of the harm. As described above, where deceptions are widespread and of the type that consumers ordinarily rely on (such as those at issue here), courts will presume that consumers did in fact rely on them. The evidentiary presumption is wholly distinct from the question of what constitutes the proximate cause of an injury.

Presumption regimes are commonplace in the law, *see*, *e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988), and spare the judicial system and plaintiffs from having to present individualized causation in cases (like securities fraud or consumer deception) involving huge numbers of affected people. Thus, to the degree PBS claims that *Bank of America* requires the FTC to trace each and every consumer loss back to a specific act of deception, nothing in the case even hints at such an outcome. There is no reason to believe that the Supreme Court intended to establish a plainly unworkable approach – and one that would collide not only with its own approach in *Levinson*, but also with every appellate decision to have addressed the issue. *See*, *e.g.*, *Commerce Planet*, 815 F.3d at 603-04; *Bronson Partners*, 654 F.3d at 375; *Direct Mktg. Concepts*, 624 F.3d at 15; *Stefanchik*, 559 F.3d at 931; *Kuykendall*, 371 F.3d at 765; *Security Rare Coin*, 931 F.2d at 1315-16.

Moreover, because this case involves a presumption of reliance, PBS had the opportunity to rebut the presumption. That, too, is entirely different from a foreseeability causation standard, which provides no such rebuttal. Here, PBS failed to come forward with evidence that any consumers were not deceived. *See* Doc. 322 at 7-8 [ER8-9]. Nothing in *Bank of America* can cure that deficiency.

PBS's reliance on *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), is similarly misplaced. In *Dura*, a private class action, the Supreme Court held that allegations of an inflated purchase price for securities are not sufficient to establish loss causation because, under the relevant statutory provisions, private plaintiffs must show both that the price of the securities they purchased was higher than it would have been without the misrepresentation and that "the defendant's misrepresentation * * * *proximately caused* the plaintiff's economic loss," rather than some intervening event. 544 U.S. at 346 (emphasis added). As in *Bank of America*, the question was what causation a private damages plaintiff had to prove, not what kinds of evidence would be required.

B. The Remand Court Properly Declined To Apply A Three-Year Limitations Period

There is no merit to PBS's contention that the court on remand was required to apply the three-year limitations period in Section 19(d) in calculating the amount of monetary relief.[17] Br. 60-61. To begin with, this issue is a red herring. Section 19(d) could apply only to violations of the TSR. But the Complaint also alleged – and the district court found – separate violations of Section 5 outside of the TSR, which, for the reasons shown at pp. 22-23, *supra*, are not subject to the limitations period of Section 19(d). The Section 5 violations themselves justify all of the monetary relief awarded by the district court; the

[17] PBS's brief refers to Section 19(b) of the FTC Act. Br. 60. We assume that PBS intended to refer to the limitations period in Section 19(d), 15 U.S.C. § 57b(d).

> No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates * * *.

Commission did not seek additional amounts for the TSR violations. It therefore is immaterial whether recovery for the TSR violations would be limited by Section 19(d); either way, there would be no effect on the monetary relief. Even if PBS had shown an error in the district court's consideration of the TSR violations, it would be harmless.

But there was no error in any event. Because TSR violations are also unfair or deceptive acts or practices, they separately violate not only Section 19, but also Section 5. *See* 15 U.S.C. §§ 57a(d)(3), 6102(c).[18] The Commission therefore was entitled to invoke the district court's full equitable authority under Section 13(b) to grant relief, wholly apart from the remedies available under Section 19. As the Commission explained in its opening brief on remand:

> Section 13(b) also gives the Court the power to grant restitution based on each of Defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), including counts one and two (Section 5(a) violations), *as well as counts three through six (violations of the TSR, which, pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), are also Section 5(a) violations).*

[18] Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), provides that any violation of an FTC rule prohibiting deceptive or abusive telemarketing acts or practices "shall be treated as a violation of a rule under Section 57a "regarding unfair or deceptive acts or practices * * *.

Doc. 312 at 13 [SER6]. Thus, contrary to PBS's contention (Br. 60), there was no error in the award of equitable monetary relief for PBS's conduct prior to May 14, 2005. *See*, *e.g.*, *FTC v. Inc.21.com Corp.*, 745 F. Supp. 975, 1012 (N.D. Cal. 2010), *aff'd*, 475 F. App'x 106 (9th Cir. 2012) (Section 19's three-year statute of limitations does not apply to action brought under Section 13(b) for statutory and rule violations).

To the extent PBS is arguing more generally that the limitations period in Section 19 applies to violations of Section 5 (Br. 27-31), that argument is both waived and wrong for the reasons discussed above. *See supra* pp. 22-23.

C. PBS Cannot Demonstrate Prejudice In The Admission of Expert Testimony On Remand Or Its Consideration of Consumer Declarations

PBS further asserts that the district court on remand abused its discretion by allowing the FTC to re-submit expert testimony that the court had excluded earlier in the original relief phase of the proceeding. Br. 1, 14. These assertions are baseless.

First, the FTC did not offer *any* expert testimony at the first hearing on monetary relief so it could not have later offered expert testimony that was rejected the first time. Dr. Marc Luppino, the FTC economist testified as a *fact witness* at the original hearing on relief. *See* Doc. 312 at 6 [SER10]. His testimony in those proceedings merely established the numbers of consumers who cancelled their magazine orders at different points in time after their initial purchases. He simply did the math, using PBS's own database as the source of the figures. *See* Doc. 236 at 109-110 [SER14-15]. As the district court reminded counsel, the FTC was not asking him to express an expert opinion or conclusion. *See* Doc. 216 at 7-9 [SER24-26]. PBS is correct that the FTC later qualified Dr. Luppino as an expert in the proceedings on remand to make a somewhat more complicated calculation taking this Court's remand order into account. But there is no basis for dismissing that as error, let alone prejudicial error. The parties (and PBS's expert, Dr. Levy) agreed that $24 million in gross revenues for first-time orders was not in dispute and was mathematically correct. ER10; ER85 at ¶ 5. PBS does not dispute the accuracy of Dr. Luppino's analysis. Moreover, it has identified no error – let alone prejudicial error – in the FTC using Dr. Luppino as a fact witness in the first hearing on relief and then qualifying him as an expert in the second.

Finally, PBS alleges a host of errors in the remand court's treatment of consumer and former PBS employee declarations. These allegations are all unfounded:

First, PBS contends that the district court on remand ignored evidence of PBS's satisfied customers. Br. 39-42. That is wrong. The district court gave that evidence careful consideration, but determined that it did not rebut the earlier, unappealed finding of widespread deception. *See* Doc. 322 at 7-8 [ER8-9].

Second, PBS also claims (Br. 42-43) that the district court on remand impermissibly relied on former employee declarations. PBS then cites certain portions of the transcript of the earlier hearings on monetary relief (ER256-57, 264-71) to suggest that the district court at that point excluded former employee statements. But the cited excerpts do not address the status of former employee declarations at all. The cited colloquy addresses the different question of whether the district court would hear testimony from consumer witnesses who ultimately paid PBS no money. Ultimately, the district court on remand reviewed all the evidence, which included the testimony of former employees, to determine whether the FTC was entitled to a presumption of reliance.

See Doc. 322 at 6 [ER7]. The court next considered PBS's evidence of "satisfied" customers, among other things, to decide whether PBS rebutted that presumption, and determined that it did not. Doc. 322 at 7-8 [ER8-9]. That was a proper application of the analytical framework adopted by this Court in *Commerce Planet*. There were no procedural errors – let alone prejudicial errors – that warrant reversal.

CONCLUSION

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

Respectfully submitted,

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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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Certificate of Service

I certify that the foregoing brief was filed using the Court's Appellate CM/ECF System on October 30, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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Certificate of Compliance

I certify that the foregoing complies with the length limits prescribed by Ninth Circuit Rule 32-1. The brief is 11, 279 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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