

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

**OPPOSITION OF FEDERAL TRADE COMMISSION
TO PETITION FOR REHEARING AND REHEARING EN BANC**

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INTRODUCTION AND SUMMARY

PBS's petition for rehearing asks the Court to cast aside decades of settled law, all on the basis of an argument PBS waived below. The petition does not nearly meet the exacting standard for rehearing.

The main issue presented is whether the district court lacked authority to grant equitable monetary relief to victimized consumers. Panel rehearing is plainly inappropriate because a long line of unbroken precedent holds squarely that the court had that authority. *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982). Indeed, just this year, the Court sitting *en banc* recognized as much. *See FTC v. AT&T Mobility, LLC*, 883 F.3d 848, 864 (9th Cir. 2018) (*en banc*).

Rehearing *en banc* is equally inappropriate. First, PBS waived the claim that the district court could not order equitable monetary relief by failing to raise it at the proper time. Second, even if the issue had been preserved, it would not merit further review. There is no good reason to jettison decades of settled law, with which seven other circuits agree and which is firmly rooted in Supreme Court precedent. PBS

claims that the Supreme Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1637 (2017), undermines all those decisions. It does not. *Kokesh* expressly declined to address whether courts may direct equitable monetary relief. *Id.* at 1642 n.3. The decision was confined to the application of a statute of limitations – and even there to the way that statute applied to the specifics of a judgment obtained by the SEC. The panel thus correctly held that *Kokesh* “has not abrogated [the Court’s] long-standing precedent.” Op. 3.

None of PBS’s other arguments presents any issue meriting rehearing. The petition should be denied.

BACKGROUND

1. PBS operated a magazine-subscription scheme that duped consumers into paying hundreds of dollars for long-term magazine subscriptions. Doc. 151 at 27-32 [ER41-46].¹ PBS made deceptive calls to approximately 25 million consumers, reaping approximately \$24 million from first-time customers. *Id.* at 2, 11 [ER16, 25]; Doc. 322 at 9 [ER10].

¹ PBS refers collectively to Publishers Business Services, Inc., Ed Dantuma Enterprises, Inc., and the individual defendants. “Doc.” refers to documents as they appear on the consecutively numbered district court docket. “ER” refers to appellants’ Excerpts of Record.

In 2008, the FTC sued PBS and six members of the Dantuma family under Section 13(b) of the FTC Act, which authorizes the district courts to grant “a permanent injunction” to redress the violation of “any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b). The complaint alleged that PBS’s telemarketing scheme violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310.² The district court granted summary judgment in favor of the Commission and permanently enjoined PBS and several of the Dantumas from their unlawful behavior. It also awarded \$191,219 in equitable monetary relief.

At no point during the initial proceeding did PBS challenge the court’s authority to grant monetary relief. Quite to the contrary, PBS directly acknowledged the district court’s “discretion under Section 13(b) ‘to grant *any* ancillary relief necessary to accomplish complete justice,’” including monetary relief. Defs.’ Answering Br. 29, *FTC v. Publishers Bus. Servs., Inc.*, 540 F. App’x 555 (9th Cir. Apr. 13, 2012)

² The FTC also sued 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, but it requested no separate increment of monetary relief for those violations.

(No. 11-17270) (quoting *Pantron I*, 33 F.3d at 1102), ECF No. 22; see also Defs.’ Answering Br. 35.

2. The FTC appealed, arguing that the district court had improperly determined the amount of equitable monetary relief and erred in failing to enter a permanent injunction as to other members of the Dantuma family. PBS did not cross-appeal. In its merits brief on the FTC’s appeal of the amount of monetary relief, PBS did not argue that monetary relief was unavailable under Section 13(b).

This Court affirmed in part and vacated in part. *FTC v. Publishers Bus. Servs., Inc.*, 540 F. App’x 555, 556-57 (9th Cir. 2013) [ER118-125]. The Court held that the district court improperly calculated equitable monetary relief by “focus[ing] on the defendants’ gain rather than the loss to the consumers,” explaining that under longstanding Circuit precedent “the FTC Act permits restitution measured by the loss to consumers.” *Id.* at 557.³ It remanded for recalculation of the monetary relief award, instructing the district court

³ The Court also held that the district court erred in failing to find three of the individual defendants personally liable; the Court affirmed the finding of no liability as to the remaining individual. ER124.

on remand to “base its calculation on the injury to the consumers, not on the net revenues received by [PBS].” *Id.* at 558. ER123.

3. On remand, the FTC sought approximately \$23.7 million in equitable monetary relief, the total amount paid by first-time customers for deceptively marketed magazine subscriptions. In response, PBS for the first time contested the court’s authority to award monetary relief. Doc. 322 at 4 [ER5-6]. Pointing to PBS’s failure to appeal the district court’s original judgment, which ordered PBS to pay monetary restitution, the district court held that PBS could not raise that same issue on remand. Doc. 322 at 5 [ER6].⁴ The court held that, in any event, controlling Circuit precedent foreclosed such a challenge. Doc. 322 at 4-5 (citing *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) and *FTC v. Stefanichik*, 559 F.3d 924, 931 (9th Cir. 2009)). It awarded the FTC equitable monetary relief in the requested amount of \$23.7 million.

4. PBS appealed. Its main argument was that the *Kokesh* decision effectively overruled this Court’s decisions authorizing the award of equitable monetary relief under Section 13(b). In an

⁴ The decision on remand appears at *FTC v. Publishers Bus. Servs., Inc.*, 2017 WL 451953 (D. Nev. Feb. 1, 2017).

unpublished decision, the panel ruled that *Kokesh* said no such thing. The panel pointed out that the Supreme Court itself had rejected the proposition that its opinion “should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings.” Op. 3 (quoting *Kokesh*, 137 S. Ct. at 1642 n.3), ECF No. 50. Thus, “[t]he *Kokesh* Court itself expressly restricted its ruling to whether the SEC’s power to seek equitable disgorgement was subject to a five-year statute of limitations.” Op. 3. Indeed, the Court ruled, the question whether courts may impose equitable monetary relief was neither presented nor answered in *Kokesh*.⁵ Op. 3. The court also rejected PBS’s other arguments, finding them either waived or meritless.

ARGUMENT

This case does not warrant further review. Panel rehearing is appropriate only where the panel has “overlooked or misapprehended” a point of law or fact. Fed. R. App. P. 40(a)(2). The panel did neither here; it adhered faithfully to the consistent binding precedent of this

⁵ The panel also rejected petitioners’ contention that the FTC’s claims were subject to the three-year statute of limitations prescribed by Section 19 of the FTC Act, 15 U.S.C. § 57b, noting that Section 19 does not apply to actions under Section 13(b). Op. 6.

Circuit. *En banc* rehearing is subject to the even stricter standard that a panel decision must conflict with Circuit or Supreme Court precedent, or where the decision involves a question of exceptional importance – k such as a legal question that has divided the circuits. Fed. R. App. P. 35(a). PBS fails to satisfy these stringent criteria.

I. PBS Waived Its *Kokesh* Argument, Which Is Wrong In Any Event

PBS’s main argument is that, in light of *Kokesh*, the Court should reconsider its precedents holding that equitable monetary relief is available under Section 13(b). Panel rehearing is plainly unwarranted at the outset because Circuit law clearly recognizes the availability of equitable monetary relief and *Kokesh* expressly declined to address the matter. Op. 3 (citing *Kokesh*, 137 S. Ct. at 1642 n.3).

En banc review is also unwarranted. First, as the district court held, PBS waived the *Kokesh* claim by failing to raise it appropriately below. Indeed, in the initial proceedings before the district court, PBS itself told the court that monetary relief was “well within the District Court’s discretion.” Defs.’ Answering Br. 35, *Publishers Bus. Servs.*, 540 F. App’x 555 (No. 11-17270); *see also id.* at 29 (“[A] court has discretion under Section 13(b) ‘to grant *any* ancillary relief necessary to

accomplish complete justice.”) (citation omitted). Then, after the court ordered PBS to pay restitution, it opted not to appeal that judgment. As a result, the only issue properly before the district court on remand (and thus before this Court on appeal) was the *amount* of equitable monetary relief – not whether such relief was available in the first place. As the panel noted, “even parties who were satisfied with the district court’s judgment must file a cross-appeal to preserve issues for review in subsequent appeals following a remand.” Op. 7 (citing *Alioto v. Cowles Commc’ns, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980)). It is now too late for PBS to raise the issue.

PBS cannot shrug off the consequences of its decision to not cross-appeal the district court’s initial ruling on the ground that a party cannot appeal a judgment entirely in its favor. Pet. 11-12. The judgment was not “entirely” in PBS’s favor. The district court ruled that “the Commission has the authority to seek” monetary relief under Section 13(b) and it awarded monetary relief. PBS may have been satisfied with that judgment, but it was adverse to PBS. And the FTC also appealed the ruling, putting PBS on notice that the amount could increase substantially.

Nor can PBS escape its strategic choice on the theory there are no “bright-line” rules respecting the need to file a cross-appeal. Pet. 12-13. It contends that “an appellate court has broad power to make such dispositions as justice requires.” Pet. 13 (quoting *Lee v. Burlington N. Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001)). PBS, however, has not shown any reason why justice would be served by granting it a dispensation from generally applicable procedural rules. Contrary to its claim, PBS was not prejudiced by a change in binding precedent after its cross-appeal was due. It relies on the fact that *Kokesh* was decided after the initial appeal and judgment to excuse its failure to raise the issue earlier, but *Kokesh* by its express terms did not change the well-established case law that equitable monetary relief is available under Section 13(b).

In any event, *en banc* review is inappropriate because this Court’s precedents holding that equitable monetary relief is available under Section 13(b) are firmly rooted in Supreme Court precedent and consistent with the holding of every other circuit that has considered the issue. In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), the Court held that where Congress has authorized a court to issue an

injunction – as it did in Section 13(b) – “all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction,” including the authority to award monetary relief. *Id.* at 398. The Court later emphasized that when Congress grants a court the power to issue an injunction, it “must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.” *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Those decisions remain good law. Just three years ago, the Court, citing *Porter*, reaffirmed that “[w]hen federal law is at issue and the public interest is involved, a federal court’s equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.” *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (cleaned up). The Court noted that a court of equity may “accord full justice” to all parties. *Id.*

Porter and *Mitchell* form the foundation of this Court’s long-established holding that equitable monetary relief is available under

Section 13(b). *See, e.g., Commerce Planet*, 815 F.3d at 598-99.⁶ The same is true for every one of the eight other courts of appeals to have considered the issue. *See FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014); *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. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *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); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989).⁷

⁶ *See also 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); *Pantron I*, 33 F.3d at 1102; *H.N. Singer*, 668 F.2d at 1112-13.

⁷ This Court and four others have similarly recognized the authority of district courts to direct equitable monetary relief under comparable provisions of other statutes. *See, e.g., United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 225-226 (3d Cir. 2005) (Food, Drug, and Cosmetics Act); *United States v. Universal Mgmt. Servs., Corp.*, 191 F.3d 750, 761-62 (6th Cir. 1999) (same); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (Securities Exchange Act); *CFTC v. Co Petro Mktg. Grp., Inc.*, 680 F.2d 573, 583-584 (9th Cir. 1982) (Commodity Exchange Act); *ICC v. B & T Transp. Co.*, 613 F.2d 1182, 1184-1186 (1st Cir. 1980) (Motor Carrier Act).

PBS ignores *Porter* and *Mitchell* entirely and is unable to explain how *Kokesh* overruled those decisions. This is unsurprising because the Supreme Court in *Kokesh* did not even address those decisions.

The question presented in *Kokesh* was whether 28 U.S.C. § 2462, the general five-year statute of limitations for “penalties,” applies to disgorgement “as it is applied in SEC enforcement proceedings.” *Kokesh*, 137 S. Ct. at 1644. Disgorgement, the Court explained, is a specific type of restitution, measured by the defendant’s unlawful gain. *Id.* at 1640. The Court noted that “in many cases, SEC disgorgement is not compensatory,” because disgorged funds are paid to the U.S. Treasury rather than to victims as remediation for their losses. *Id.* at 1644. The Court held that this type of disgorgement was a “penalty” for purposes of the statute of limitations. *Id.* at 1644-45.

But the Court’s holding was expressly limited to the narrow issue of the application of the statute of limitations. The opinion cautioned that:

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.

Id. at 1642 n.3. Thus, far from overruling *Porter* and *Mitchell*, neither of which it mentioned, the Court explicitly declined to address the issue those cases resolved long ago.

Unable to rely on the *Kokesh* opinion to support its argument, PBS turns instead to comments made by various individual justices at oral argument of the case. Such general musings from the bench hardly provide grounds for the Court to abandon decades of precedent; that is particularly so when the Court's unanimous opinion expressly disavows the individual justices' statements.

Even without the Court's explicit limitation on the scope of its decision, *Kokesh* would not support PBS's reliance on it. First, *Kokesh* concerned the application of a statute of limitations, an issue not presented in this case.⁸ Moreover, the remedy before the Court in *Kokesh* is different from the remedy at issue here. *Kokesh* involved disgorgement, with the disgorged funds dispersed to the Treasury, coupled with civil penalties in the amount of the defendants' gross pecuniary gain. The Court determined that such a remedy serves

⁸ The Commission filed its complaint in May 2008 seeking equitable monetary relief to consumers for the period between January 2004 and August 2008, well within Section 2462's five-year statute of limitations. *See* Doc. 151 at 11-13, 32-33 [ER25-27, 46-47].

deterrent purposes and not compensatory ones. *Kokesh*, 137 S. Ct. at 1644.

The remedy at issue here is different. The FTC does not seek retribution or deterrence, but remediation of consumers' economic injuries caused by PBS's deceptive practices. The FTC fully intends to distribute to defrauded consumers the money it is able to collect from PBS. As the Supreme Court recognized in *Mitchell*, a "public remedy" granting equitable monetary relief is not "rendered punitive" when "the measure of relief is compensatory." *Mitchell*, 361 U.S. at 293.

Furthermore, Congress has twice ratified the FTC's authority to obtain equitable monetary relief under Section 13(b). A decade after courts first recognized the availability of equitable monetary relief under Section 13(b), Congress expanded the statute's venue and service-of-process provisions. *See* FTC Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat. 1691 (Aug. 26, 1994). Even as it amended Section 13(b), Congress let stand the many decisions then on the books recognizing the availability of monetary relief under the statute. Indeed, the Senate Report accompanying the legislation recognized that

Section 13(b) authorizes the FTC to “go into court * * * to obtain consumer redress.” S. Rep. No. 103-130, at 15-16 (1993).

Congress again endorsed the established judicial understanding of Section 13(b) when it enacted the U.S. Safe Web Act of 2006, Pub. L. 109-455, 120 Stat. 3372 (Dec. 22, 2006) (codified in scattered sections of 15 U.S.C.). There, the legislature expanded the FTC’s authority to address unfair or deceptive acts or practices in foreign commerce and provided that “[a]ll remedies available to the Commission with respect to unfair and deceptive acts or practice shall be available for acts and practices [in foreign commerce] * * * including restitution to domestic or foreign victims.” 15 U.S.C. § 45(a)(4)(B).

It is impossible to say that Congress intended the FTC to lack ability to seek remedial equitable relief for consumers. Where, as here, the interpretation of a statute “has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly

discerned.” *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982)

(cleaned up).⁹

II. PBS’s Remaining Arguments In Support of Rehearing Are Meritless

PBS raises two additional arguments, neither of which justifies further review.

1. First, it contends that the panel decision conflicts with the Supreme Court’s decision in *Bank of America v. City of Miami*, 137 S. Ct. 1296 (2017). Pet. 14-15. The claim is that, contrary to the holding in *Bank of America*, the panel did not require the FTC to prove that the harm to consumers was “proximately caused” by and had a “direct relationship” to PBS’s wrongful conduct. Instead, the argument goes, the district court presumed that consumers relied on the deceptive messages conveyed by PBS’s telemarketers rather than requiring the

⁹ The panel here heard another Section 13(b) case on the same day. In that case, but not in this one, two of the judges issued a concurring opinion in which they acknowledge the controlling Circuit precedent, but express the view that compensatory monetary relief under Section 13(b) is a penalty and therefore not equitable relief available under the statutory authorization of a permanent injunction. *See FTC v. AMG Capital Mgmt., LLC*, 2018 WL 6273036 at *8-14 (9th Cir. Dec. 3, 2018). For all the reasons discussed herein, we disagree with that view.

FTC to prove that every single consumer actually relied on the messages. Pet. 15. There is no conflict.

Bank of America addressed whether a plaintiff challenging a housing practice under the Fair Housing Act can demonstrate that the practice proximately caused injury by showing that the injury was foreseeable. The Supreme Court held that foreseeability was insufficient because “there must be some direct relation between the injury asserted and the injurious conduct alleged” and the harm must not be “too remote from defendant’s unlawful conduct. 137 S. Ct. at 1305-06.

No such question is presented here, and there accordingly is no conflict between the panel opinion and *Bank of America*. The FTC did not contend that it need prove only foreseeable consumer injury. As the panel correctly recognized, consumer harm was *directly* attributable to PBS’s misrepresentations, and PBS does has not contended to the contrary. The district court invoked an evidentiary presumption, long-established in the law, that consumers who received a deceptive solicitation relied on it. *See Commerce Planet*, 815 F.3d at 604 (citing *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993)). But that

presumption has nothing to do with the type of causation of harm at issue in *Bank of America*.

2. Finally, PBS contends that the panel overlooked procedural errors by the district court. Those claims, which present routine charges of ordinary error, are far too trivial to justify rehearing of this matter. And even if they presented a more serious matter they would provide no ground for rehearing because, as the panel correctly concluded, PBS waived it below. The claim that the district court improperly relied on declarations that had been excluded is difficult to follow. PBS points to nothing in the record showing that the district court excluded declarations. References to the matter in PBS's initial brief similarly fail to show that the district court excluded consumer declarations. PBS's Initial Br. 12, 42 (citing ER 256-57, 264-71), ECF No. 13. To the contrary, those citations show that the district court *received* consumer declarations. At most, in-court proceedings cited by PBS show that the district court did not want to hear live testimony from consumers who had not lost money on PBS's scam. But the court did not address exclusion.

PBS knew full well that on remand the entire record would be available for the court to consider. If PBS objected to the court's consideration of the record, it should have filed an appropriate motion. But it did not do so. It certainly knew how to object; indeed, in July 2016, PBS filed a motion in limine seeking to exclude the report of the Commission's expert, Alan Castel. Doc. 315. There is no reason why PBS could not have raised other issues regarding the evidentiary record at that point.¹⁰

¹⁰ Given PBS's failure to demonstrate any error by the district court in its treatment of consumer declarations, the court need not reach PBS's argument regarding invited error.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing and for rehearing *en banc* should be denied.

Respectfully submitted,

December 20, 2018

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Certificate of Service

I certify that I served the foregoing Opposition of Federal Trade Commission to Petition for Rehearing and Rehearing En Banc using the Court's Appellate CM/ECF System on December 20, 2018. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

December 20, 2018

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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 opposition is 3,809 words, excluding the portions exempted by Fed. R. App. P. 32(f). The opposition's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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