11-374

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant

v.

BLUEHIPPO FUNDING, LLC; BLUEHIPPO CAPITAL, LLC;
and JOSEPH K. RENSIN
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

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RULES AND REGULATIONS

INTRODUCTION

BlueHippo marketed computers, but its business was nothing like Amazon.com or Best Buy. Instead, BlueHippo used the promise of financing to lure consumers with poor credit into paying hundreds or thousands of dollars in the hope of receiving a computer. But for the vast majority of these consumers, that hope was futile. To obtain financing from BlueHippo, a consumer was first required to make a down payment, and then follow this with 13 payments on a designated schedule. Only then would BlueHippo agree to financing and order a computer for the customer. If a customer made even one payment late, that customer lost the "opportunity" for financing, and could then get a computer only after making a full years' worth of payments. The vast majority of customers had difficulty making all the required payments and never received a computer. The only way these customers could receive anything at all for the money they had already paid was by redeeming their payments for BlueHippo's store credit merchandise (items such as printers and cameras that were listed on BlueHippo's website). Therefore, BlueHippo prominently advertised its store credit policy.

However, as defendant Rensin concedes, Brief for Appellee Joseph K. Rensin ("Rensin Br.") at 2, in direct violation of the district court's 2008 Consent Order, BlueHippo failed to disclose material terms of its store credit policy. Even though customers who attempted to obtain store credit had already paid BlueHippo

hundreds or even thousands of dollars, BlueHippo failed to tell them that they would need to pay additional fees to redeem their store credit, and that they could not use any of the money they had already paid BlueHippo to cover these undisclosed fees. Not surprisingly, 89% of BlueHippo's customers never received anything in exchange for the millions of dollars they paid BlueHippo.

The Federal Trade Commission ("FTC" or "Commission") seeks to make whole those customers who were harmed by BlueHippo's contempt. The Commission showed that the appropriate compensatory sanction was $14 million. Nothing in Rensin's brief rebuts that showing.[1]

ARGUMENT

AS A RESULT OF BLUEHIPPO'S CONTEMPT, ITS CUSTOMERS WHO WERE DECEIVED BY BLUEHIPPO'S FAILURE TO DISCLOSE AND RECEIVED NOTHING IN RETURN SHOULD BE COMPENSATED IN THE FULL AMOUNT THEY PAID

1. Under an Abuse of Discretion Standard this Court Reviews the the Relevant Issues in this Appeal *De Novo*

Rensin first asserts that the standard of review in this case is clear error because the district court's damage assessment was "wholly factual." *See* Rensin

[1] The relevant district court's decisions were rendered by the Hon. Paul A. Crotty in unreported opinions, *see* Local Rule 28.1(b), and appear in the Special Appendix at (SA.1-12), (SA. 14-16) and in the Appendix at (A.995-1006), (A.1015-17).

Br. at 24-29.[2] This argument misstates the nature of the issues on appeal, and therefore the standard of review.

Civil contempt sanctions are reviewed under an abuse of discretion standard.[3] *FTC v. Kuykendall*, 371 F.3d 745, 763 (10th Cir. 2004); *United States v. Chusid*, 372 F.3d 113, 117 (2d Cir. 2004). Under that standard, issues of fact are reviewed for clear error, but issues of law are reviewed *de novo*. *See Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144-45 (2d Cir. 2010).

The issues before this Court are solely legal because they involve "[t]he methodology a district court uses in calculating a damage award." *Kuykendall*, 371 F.3d at 763 (citation omitted); *see also FTC v. Trudeau*, 579 F.3d 754, 768 (7th Cir. 2009). Such methodology includes "the proper elements of the award or the proper scope of recovery." *Id.*[4] Specifically, in denying the Commission a

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[2] As explained in the Brief for Appellant Federal Trade Commission ("FTC Br."), although Rensin was not named as a defendant in the Consent Order, the district court properly held him liable for BlueHippo's contumacious conduct. *See* FTC Br. at 15. Rensin, who owned BlueHippo and was its Chief Executive Officer, Rensin Br. at 3, has not challenged this holding.

[3] Rensin argues that the district court should have employed a clear and convincing evidence standard of review with respect to the factual issues related to the appropriate compensatory sanction. Rensin Br. at 25 n.5. This argument has no relevance to the standard of review on appeal.

[4] Rensin provides no support for the proposition that *de novo* review of legal errors is appropriate only where the appellant is the defendant in a civil contempt action and the issue involves whether the sanctions are punitive. *See* Rensin Br. at

compensatory sanction resulting from BlueHippo's civil contempt, the district court made two legal errors. First, it ignored the law establishing a legal presumption of consumer reliance and injury where consumers are deceived by material misrepresentations that are widely disseminated (as BlueHippo's misrepresentations were). *See, e.g., Kuykendall*, 371 F.3d at 765. Second, the court was required by law, but failed, to award a compensatory sanction even after the Commission established that consumers were harmed by BlueHippo's contumacious conduct. *See Vuitton*, 592 F.2d at 130 (once it has been shown that contumacious conduct caused damages, the court must award a compensatory sanction). Thus, cases cited by Rensin applying the clear error standard, *see* Rensin Br. at 25-27, are irrelevant, and the legal issues before the Court should be reviewed *de novo*.[5]

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27. Regardless of which party is the appellant, this Court reviews legal issues *de novo*, including the methodology applied by the district court in assessing contempt sanctions. *See, e.g., Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (on appeal by plaintiff, reviewing award of contempt damages *de novo* and reversing, finding legal error in failure to award compensatory damages in amount proven by plaintiffs).

[5] Even were this Court to review the district court's decision under the clear error standard, it should find such error here. As shown in the FTC's principal brief, the district court based its decision to refuse a compensatory sanction on its mistaken belief that the Commission had "conceded" that it had failed to provide any evidence of consumer injury. D.76 at 10-11 (A.1004-05). But even Rensin

2. BlueHippo's Failure to Disclose was Material – Not "Minor" or "Secondary" – Because It Affected the Decision by Its Customers to Pay Any Money to BlueHippo

BlueHippo enticed consumers with very poor credit to enter into a transaction in which they could purchase a computer, but only if they could fulfill particularly stringent payment requirements. If the consumer failed to make the required payments (which most of them failed to do), the only way they could get anything for the money they paid BlueHippo was to use store credit, *i.e.*, to make a purchase for an item from BlueHippo's store credit online store. Yet, in violation of the Consent Order, BlueHippo failed to disclose to consumers all the terms and conditions that increased the cost of redeeming that store credit.

Indeed, Rensin concedes that BlueHippo's failure to disclose critical information about its store credit policy was "material" to consumers' decisions to enter into a contract with BlueHippo. Rensin Br. at 29. Paradoxically, however, he asserts that these material conditions were of "minor" or "secondary"

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admits that there was no such concession by the Commission regarding the failure to disclose claim. *See* Rensin Br. at 54-55. Further, Rensin admits that BlueHippo's failure to disclose was material, Rensin Br. at 29, and such a material omission affected consumers' decisions to enter into the transaction in the first place. The court thus committed clear error in refusing to recognize record evidence of consumer harm, which, as shown below, Rensin failed to rebut.

importance to consumers. *Id.*[6] However, as the district court correctly recognized, "materiality" is defined under both the Consent Order and case law as "likely to affect a person's choice of, or conduct regarding, goods or services." *See* D.76 at 6 (A.1000); D.2 at 3 (A.35); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000). Disclosures that affect a consumer's decision to purchase goods or services are not "minor" or "secondary."

The district court specifically held that BlueHippo violated the Consent Order by failing to disclose three material conditions of its store credit refund

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[6] Rensin also claims that BlueHippo's failure to disclose the terms of its store credit policy was only a secondary part of the Commission's case. *See* Rensin Br. at 29-32. In fact, however, BlueHippo's failure to disclose has been central to the Commission's contempt allegations from the beginning of these proceedings. The claim was referenced throughout its legal brief in support of the contempt motion (D.43 at 1, 13-15, 20-21, 24), in its reply brief (D.57 at 6-7, 10), and in its expert's declaration (Def. Ex. NN ¶¶ 2-5) (A.698) (quantifying damages). Indeed, the Commission highlighted the failure to disclose claim in the very beginning of the legal brief supporting the contempt motion: "Adding insult to injury, consumers desperate to get out of Contempt Defendants' money pit find that Blue Hippo's 'store credit' refund policy contains onerous conditions that were not disclosed when they placed their orders." D.43 at 1.

policy.[7] The court concluded that these undisclosed conditions were material because they increased the cost of store credit and should have been disclosed prior to receiving any payments from customers. *See* D.76 at 8 (A.1002); D.2 at 4 (A.36).[8] The court's finding of materiality demonstrates that BlueHippo's failure to disclose critical aspects of its store credit policy was likely to affect consumers' decisions to enter into a contract with BlueHippo in the first place. The materiality of this omission is particularly evident given the nature of BlueHippo's business: enticing customers with very poor credit to purchase a computer, and then conditioning that purchase on particularly stringent payment requirements that very few were able to complete.[9]

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[7] More specifically, the court found that BlueHippo failed to disclose that: (1) consumers would need to pay additional amounts for shipping and handling fees and taxes before they could receive any store credit merchandise; (2) money already paid did not cover these additional expenses (*i.e.*, consumers would have to pay those amounts by cash, check or money order); and (3) consumers could order only one item at a time and would have to pay these additional expenses for each item ordered using their store credit (thereby further increasing the cost of access to store credit). *See* D.76 at 5, 8-9 (A.999, 1002-03); FTC Ex. 22F at 6 (A.335).

[8] As the district court held: "[i]nformation concerning cost . . . is presumed material. *FTC v. Crescent Publ'g Group*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001). Since the cost of shipping, handling, and taxes increases the overall costs of merchandise, these costs are material and BlueHippo should have clearly and conspicuously disclosed this information to consumers." D.76 at 8 (A.1002).

[9] The Commission has brought other cases against companies that prey on people who have difficulty obtaining credit. *See, e.g.*, *In the Matter of New York*

Indeed, Rensin himself highlights this fact. *See* Rensin Br. at 10 (overwhelming majority of customers failed to meet BlueHippo's criteria for financing); *see also* FTC Br. at 7 and n.3 (91% of customers failed to satisfy the financing criteria during relevant period). The only way these customers (*i.e.*, those who failed to meet BlueHippo's onerous financing criteria) could obtain anything for the hundreds or thousands of dollars they had already paid BlueHippo was either to make 52 weekly, or 26 biweekly, payments toward a computer by completing the layaway plan. However, the vast majority of customers were also unable to complete these installment payments.[10] These customers would receive nothing for the money they had paid unless they were able to redeem store credit.

Because it was so likely that store credit was the only way BlueHippo's

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Jewelry Co., 74 FTC 1361, 1406-07, 1968 FTC LEXIS 53 (1968), *aff'd sub nom. Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (Commission found that a retailer who falsely advertised "discount prices" and "easy credit" to lure "customers who cannot obtain credit elsewhere" had engaged in a deceptive practice under the FTC Act).

[10] The difficulty BlueHippo's customers faced in obtaining a computer – even through layaway – is highlighted by the small number of computers BlueHippo shipped to layaway consumers in the 12-month period following entry of the Consent Order. *See* Defs. Ex. NN at ¶¶ 25-26 (A.701-02) (between April 10, 2008 and April 8, 2009 BlueHippo shipped only 1,497 computers to consumers, including consumers who placed their orders prior to entry of the Consent Order). During approximately the same period, 62,673 consumers placed orders for computers with BlueHippo. D.76 at 4 (Finding of Fact (i)) (A.998).

customers could obtain any benefit for the payments they made to BlueHippo, it was crucial that BlueHippo disclose all the material terms of its store credit policy before the customer paid anything. Further, this is what the Consent Order required. D.2 at 4 (A.36).

3. Consumers Deceived by BlueHippo's Failure to Disclose the Material Terms of Its Store Credit Refund Policy are Entitled to Full Compensation as a Matter of Law

In his answering brief, Rensin fails to show why the well-settled legal presumption of reliance and injury should not apply in this matter. He also fails to rebut the FTC's reasonable approximation of damages.

A. Rensin fails to overcome the well-settled law governing monetary relief in an FTC contempt action

Rensin argues that well-established FTC law providing a presumption of reliance and injury is inapplicable to this case. Rensin Br. at 43-45. The case law makes clear that, both in the contempt context and under Section 5 of the FTC Act, when the FTC establishes that the deception in a defendant's sales pitch is material and widespread, each of that defendant's customers who purchased the product is presumed to have actually relied on the deception, and to have been injured as a result of that deception. *See*, *e.g.*, *Kuykendall*, 371 F.3d at 765; *McGregor v. Chierico*, 206 F.3d 1378, 1387-88 (11th Cir. 2000); *FTC v. Figgie Int'l, Inc.*, 994

F.2d 595, 605-06 (9th Cir. 1993); *FTC v. Security Rare Coin*, 931 F.2d 1312, 1316 (8th Cir. 1991); *see also FTC v. Bronson Partners, LLC.*, No. 10-0878-cv, 2011 WL 3629718 at *6 (2d Cir. Aug. 19, 2011).

Once the FTC establishes reliance, and, hence, injury, it need only demonstrate a "reasonable approximation" of damages. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); *Trudeau*, 579 F.3d at 772-73; *Kuykendall*, 371 F.3d at 764; *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1353-54 (2d Cir. 1989). In this context, the FTC meets this burden by showing defendants' gross receipts. *Bronson Partners*, 2011 WL 3629718 at *6 (the baseline for calculating a defendant's unjust gains equaled its gross sales generated through widely disseminated deceptive advertising); *Kuykendall*, 371 F.3d at 764-66; *McGregor*, 206 F.3d at 1387-88; *Figgie* 994 F.2d at 605-06. The burden then shifts to the defendant to show that the FTC's calculation is inaccurate. *Bronson Partners*, 2011 WL 3629718 at *6; *Verity*, 443 F.3d at 67; *Kuykendall*, 371 F.3d at 766; *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1999).[11] Contrary to

[11] Rensin's assertion that without a liquidated damages provision in the Consent Order no damages are cognizable, *see* Rensin Br. at 39-41, ignores that district courts have the inherent authority to award civil contempt sanctions to fully compensate an injured party. *See, e.g.*, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949); *Kuykendall*, 371 F.3d at 765.

Rensin's suggestion, Rensin Br. at 43-44, this Court's precedent is entirely consistent with the governing case law requiring full compensation to injured consumers. *See, e.g., Bronson Partners*, 2011 WL 3629718 at *6-7 (total revenue received by defendants who deceptively sold products directly to consumers considered "reasonable approximation" of consumer injury).[12]

The presumption of reliance applies here because BlueHippo failed to disclose the material terms of its store credit refund policy to every customer who placed an order between April 10, 2008 and July 24, 2009. *See* D.76 at 8 (A.1002). This was a widely disseminated material deception made at the time of the sale. The district court's failure to invoke the presumption was an error of law.

Rensin provides no basis to ignore this well-established precedent. *See* Rensin Br. at 43-46. He does not dispute that the district court failed to apply – or even discuss – the presumption of reliance in this case. In fact, Rensin cites no

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[12] Although Rensin acknowledges that this Court's decision in *Verity* did not discuss the presumption of reliance, he suggests that *Verity* somehow bars the Commission from relying on *any* legal presumption to prove damages. *See* Rensin Br. at 44. This is patently incorrect. The "legal presumption" at issue in *Verity* was that, when calculating any monetary remedy, "[t]he risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." 443 F.3d at 69 (*citing Febre*, 128 F.3d at 535). The *Verity* court correctly pointed out that this presumption could only be applied once the Commission had met its initial burden of proving damages. *Verity* did not address the presumption of reliance.

precedent involving the FTC Act or contempt proceedings barring or even limiting the FTC from applying the presumption of reliance to meet its burden of showing consumer injury.

Instead, Rensin asserts that, even if it is presumed that consumers relied on BlueHippo's failure to disclose the terms of its store credit refund policy, the Commission must additionally show that consumers were injured as a result of that reliance. Rensin Br. at 46-51. This argument fails. Indeed, in every FTC case cited by Rensin that addressed the issue, Rensin Br. at 48-49, the court held that where the deception or omission was material and widespread, the presumption of reliance applied, and the amount that consumers paid, *i.e.*, the defendant's gross receipts (less any refunds), constituted the consumer injury. *See, e.g.*, *Kuykendall*, 371 F.3d at 764, 766; *McGregor*, 206 F.3d at 1387-88; *Figgie*, 994 F.2d at 605-06. Those courts logically determined that every consumers' decision to purchase the product was tainted by defendants' material deception or omission. The consumer injury – the purchase of the product without complete and accurate information – automatically follows from the reliance. In such cases, consumers to whom defendants made material deceptive statements are entitled to full refunds. *See, e.g.*, *McGregor*, 206 F.3d at 1388-89 (all payments should be returned to customers even if they received a useful product, because "the seller's

misrepresentations tainted the consumer's purchasing decisions."); *Figgie*, 994 F.2d at 606 ("The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each [product] that is not useful to them.").

Here, the district court found that, when BlueHippo sold computers, it failed to disclose material terms of its store credit policy to each and every customer. D.76 at 8 (A.1002). Thus, as in *Figgie* and *McGregor*, the appropriate measure of relief is a full refund (*i.e.*, the total amount paid by consumers). Rensin simply ignores the direct nature of the consumer injury here: since BlueHippo's failure to disclose the material terms of its store credit policy tainted the purchasing decision of every person who entered into a transaction with BlueHippo, consumer loss is equal to the full amount paid by every customer who received nothing in return.

Rensin also argues that *Figgie* requires proof that the false statements "actually caused the homeowner to purchase an unwanted product" – in other words, that *Figgie* requires a showing of individual reliance. *See* Rensin Br. at 47-48. Rensin has misread *Figgie*. In fact, *Figgie* held that "proof of individual reliance by each purchasing customer is not needed." 994 F.2d at 605; *see also Trudeau*, 579 F.3d at 773 n.15 (in calculating injury "the FTC is not required to prove individual consumer dissatisfaction because 'it would be virtually impossible

for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action'") (citations omitted); *Kuykendall*, 371 F.3d at 765 (no need to provide individual consumer injury in contempt, and holding that "[i]n cases of pervasive, persistent contempt, the use of gross receipts simply allows courts to assure those injured receive full compensation").

Rensin relies instead on *Figgie*'s response to a speculative argument: even though Figgie used deception to sell heat detectors, thereby entitling consumers to full refunds, there might be some consumers who, even after learning that their heat detectors were not as effective as smoke detectors, might nonetheless want to keep their heat detectors. 994 F.2d at 607. Of course, such consumers would be entitled to forgo restitution and keep their heat detectors. *Id.* But this discussion in *Figgie* has no application here. In *Figgie*, deceived consumers at least received a heat detector. BlueHippo's deceived customers received nothing for the money they paid. It is unfathomable that any BlueHippo customer would forgo the opportunity to obtain compensation (particularly where the company is bankrupt). In any event, nothing in *Figgie* suggests limiting restitution to a showing of individual reliance and injury.

Rensin further argues that this Court should ignore the well-established precedent from FTC cases and rely instead on a more limited presumption of

reliance discussed in private securities law cases. Rensin Br. at 46-47. In those cases, private plaintiffs were required to prove "loss causation" as an element of a violation of the antifraud provisions of Section 10(b) of the Securities and Exchange Act, *i.e.*, that each plaintiff suffered economic loss as a result of a material misrepresentation or omission made in connection with the purchase or sale of a security. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2185 (2011) (noting "elements in a private securities fraud claim"). Private plaintiffs are required to prove reliance and loss causation to ensure that they have standing to enforce the securities antifraud laws. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993). Rensin, however, ignores that in public law enforcement actions brought by the SEC to enforce Section 10(b) – the parallel to an FTC action to enforce the FTC Act – the government is not required to prove either investor reliance on a misrepresentation or "loss causation." *See, e.g., Rana Research*, 8 F.3d at 1363-64; *SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 84 (2d Cir. 1970); *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002).[13] Thus, cases involving private rights of action under the

[13] In such cases, the SEC may still obtain disgorgement of illegally obtained profits where it proves a securities law violation. *SEC v. Hasho*, 784 F. Supp. 1059, 1111 (S.D.N.Y. 1992).

securities laws are inapposite.

Finally, Rensin suggests that this Court should ignore the law set forth in FTC cases such as *McGregor* and *Kuykendall* (and as applied in *Bronson Partners*) and instead impose an increased burden on the Commission with respect to reliance and harm because BlueHippo's deceptions concerned its store credit refund policy, not the nature or quality of its computers. *See* Rensin Br. at 45-46, 48-50. But this argument is addressed above: what matters is that BlueHippo's deceptions were *material* to consumers.[14] Again, the only way the vast majority of BlueHippo's customers could receive any benefit for the payments they made was through store credit. For this reason, as the district court recognized, D.76 at 8 (A.1002), the store credit terms were material to customers entering into a transaction with BlueHippo. Moreover, disclosure of those terms was required by Consent Order. D.2 at 4 (A.36). Not surprisingly, Rensin cites no case that distinguishes between material misrepresentations about the product being sold and other material terms of the transaction, including refund policies, that increase the

[14] Rensin's effort to disconnect BlueHippo's store credit refund policy from the computers it sold is particularly hypocritical given the prominence with which BlueHippo touted the availability of store credit in its telemarketing scripts and contracts. *See, e.g.*, FTC Ex. 40 at FTC041309/BH00016 (A.454) ("You can cancel your order any time prior to shipment – and while we don't give cash refunds after 7 days – we will give you store credit that you can use on over a thousand desktops, laptops, monitors, TV's [sic] and more at BlueHippo.com."); *see also id.* at FTC041309/BH00030 (A.468).

cost of the transaction.[15]

Here, the district court held that the added costs of receiving store credit were material cost terms that affected BlueHippo's customers' decision to purchase a computer, and that pursuant to the Consent Order, BlueHippo should have disclosed at the time of the transaction. BlueHippo's customers thus were legally entitled to full compensation for the payments they made in reliance on BlueHippo's contumacious failure to disclose.

B. Rensin fails to rebut the presumption of reliance and injury

As this Court has explained, determining monetary relief in a case such as this one involves two steps. *Bronson Partners*, 2011 WL 3629718 at *6; *Verity*, 443 F.3d at 67. First, the FTC must provide the court with a reasonable approximation of the defendant's unjust gains. The defendant may then show that the figure provided by the Commission is inaccurate. Here, as explained above, with respect to step one, the Commission showed that BlueHippo violated the express command of the district court's order by failing to disclose the terms of its

[15] Courts in FTC enforcement cases have often found defendants liable for misrepresenting their refund or cancellation policies. *See e.g.*, *FTC v. Medical Billers Network, Inc.*, 543 F. Supp.2d 283, 316-18 (S.D.N.Y. 2008) (defendants' failure to disclose no refund policy prior to accepting payment from buyers violated the Telemarketing Sales Rule and FTC Act); *FTC v. QT, Inc.*, 448 F. Supp.2d 908, 967-69 (N.D. Ill. 2006) (defendants claim that they provided a 30-day refund policy for bracelet was misleading and material and thus violated the FTC Act), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

store credit policy, and that this failure was material to the consumers who made purchases without full information. The FTC also presented uncontroverted evidence showing that consumers placed 55,892 computer orders with BlueHippo without having received the required disclosures, paid BlueHippo $14,062,627.51 for those orders, but received nothing in return. Thus, contrary to Rensin's contention, Rensin Br. at 38-39, the FTC *did* prove "actual damages" resulting from BlueHippo's contumacious conduct. The Commission therefore completed step one, and the burden shifted to Rensin to show that the $14 million figure was inaccurate.[16]

Rensin failed to show that the figure was inaccurate. He could have provided evidence to show that the FTC made an error in its calculations.[17] But he

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[16] Rensin contends that the district court awarded a sanction of approximately $600,000 to compensate 677 consumers who were injured by BlueHippo's misrepresentations. Rensin Br. at 50-51. In fact, however, the court imposed this sanction not as a result of BlueHippo's failure to disclose the terms of its store credit policy, but because those 677 customers paid in full for computers and did not receive anything. The court awarded nothing to compensate those customers who made partial payments for computers but received nothing.

[17] Rensin claims that he did not profit from BlueHippo. *See* Rensin Br. at 3-4, 55-56. This has no bearing on Rensin's liability for contempt because the compensatory sanction in a civil contempt action is determined by the amount of harm caused by a defendant's contumacious conduct. It is not limited to the amount of profit that the defendant may have received. *See Trudeau*, 579 F.3d at 771. In any event, as a factual matter, Rensin fails to disclose that he is the sole owner of Edison Worldwide, a company that BlueHippo paid to provide administrative services. *See* FTC Ex. 63 at 16-21 (A.509-511); FTC Ex.22R.

did not. Indeed, he concedes that consumers paid BlueHippo $14 million and received nothing in return. *See* Rensin Br. at 54. Instead, Rensin takes a different approach. He claims to infer from certain evidence in the record that at least some of BlueHippo's customers were not deceived, *i.e.*, that they did not rely on Blue Hippo's material omission regarding its store credit policy. *See* Rensin Br. at 32-36, 53.

To show this, Rensin first claims that a few of BlueHippo's customers were not harmed by BlueHippo's contumacious conduct because they were able to take advantage of store credit without paying for shipping, handling, or taxes. To support this claim, Rensin relies on extracts from a spreadsheet containing information about store credit orders. Rensin Br. at 15-16.[18] Rensin asserts that BlueHippo charged 91 store credit customers the same "total price" for identical items. Rensin Br. at 15. He infers that these customers were not charged shipping, handling or taxes because, if those costs had been added, the total price for no two

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Resin has never disclosed those fees.

[18] The accuracy and completeness of the data in these extracts are questionable. Rensin's counsel admitted that the extracts did not contain all data about the store credit orders, and failed to identify what information was omitted. Rensin provided no expert of his own to explain the data. The FTC's expert testified that he could not confirm whether the data contained in the extracts – or Rensin's characterizations of conclusions to be drawn from that data – were accurate or complete. *See* 02/11/10 Tr. (D.74) at 181-82, 199 (A.180, 184).

orders would have been identical. But Rensin provided no direct evidence of the amounts BlueHippo actually charged its customers. Nor does he provide any explanation of the circumstances under which BlueHippo would forgo charges for shipping, handling, or taxes.[19] Indeed, the only testimony regarding the extract from the spreadsheet on which Rensin bases this argument was that of the FTC's expert, Dr. Erez Yoeli, who disagreed that the existence of some items with an identical "total price" necessarily demonstrated that shipping, handling, and taxes were not charged for those items. *See* 02/09/10 Tr. (D.73) at 143-44, 150 (A.171, 173); 02/11/10 Tr. (D.74) at 180-187 (A.180-81).

In any event, the mere fact that 91 customers (or any group of customers) out of the more than 8,000 consumers who placed store credit orders may have been able to avoid charges for shipping, handling, and taxes does not advance Rensin's cause, *see* Rensin Br. at 15-17, because it does not show that BlueHippo either had or disclosed any relevant policy as to who could escape such charges.

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[19] Indeed, there are several reasons that explain why these consumers may have been charged the same total price and which included taxes, shipping and handling charges. First, these 91 consumers may have lived in the same state (or in states with identical sales tax rates). *See* 02/09/10 Tr. (D.74) at 143-44 (A.171) (FTC expert pointing out that no information about consumers' location is provided in data). Second, BlueHippo may have charged a flat fee for shipping and handling, as opposed to actual shipping rates. By not providing any evidence relating to the geographic location of the store credit consumers or the manner in which BlueHippo charged for shipping and handling, Rensin fails to prove that his preferred explanation – that no taxes, shipping and handling were charged – is true.

Perhaps under some conditions BlueHippo allowed some customers to escape those charges. But if there were such conditions, BlueHippo's failure to disclose them would also have clearly violated the Consent Order.[20] And, although BlueHippo's contumacious conduct may not have harmed the 91 customers who may not have paid the extra charges, this does not help all the others who were not so lucky.

Rensin's second attempt to show that the FTC's figures are inaccurate fares no better than his first. He argues that, if a customer never tried to take advantage of BlueHippo's store credit policy, then that customer was not injured by BlueHippo's contumacious conduct. He claims that "the overwhelming majority of customers never tried to access the online store," *i.e.*, never sought store credit. Rensin Br. at 33-34, 53. This argument fails as a matter of fact. All the record shows is that, after the date of the Consent Order, BlueHippo customers placed 8,088 orders on its online store. But this says nothing about how many customers

[20] The *only* record evidence reflecting BlueHippo's policy regarding store credit was a response by its counsel that "[s]tore credit cannot be used for taxes or shipping and handling (store credit amount is principal paid, so store credits can only be used for principal)." *See* FTC 22F at 6 (A.335). While Rensin tries to dismiss these admissions as statements of counsel and in some way inaccurate or incomplete, s*ee* Rensin Br. at 14-15, the statement was made in response to a request made by the FTC pursuant to the Consent Order that required complete and accurate responses under penalty of perjury. *See* D.2 at 17 (A.49). If any qualifications or exceptions existed to charging such taxes and fees, they should have been included in the company's response.

wanted to redeem their store credit, but were not able to do so as a result of the additional payments that were required. There is no basis for Rensin's conclusion that the consumers who actually placed orders using their store credit were the only consumers that wanted or tried to use the credit. Rensin Br. at 18, 53. Indeed, customers who were interested in redeeming their store credit would have logged in and, for the first time, learned about the added costs of using store credit. Presumably, many of these consumers would have been dissuaded from placing an order. *See* FTC Ex.22F at 6 (A.335). Rensin tries to blame the Commission for the weakness of his evidence in support of this argument. *See* Rensin Br. at 18. However, because Rensin is the party trying to rebut the presumption of reliance, it is *his* burden – not the FTC's – to come forward with such evidence. *Kuykendall*, 371 F.3d at 766; *Trudeau*, 579 F.3d at 773. In addition, at this stage, the risk of any uncertainty falls on the wrongdoer, BlueHippo, not on the FTC. *Verity*, 443 F.3d at 69.[21]

Rensin's second argument also fails as a matter of law. Even if Rensin had provided any adequate evidence regarding the number of BlueHippo customers who never attempted to obtain store credit, such evidence would not rebut the

[21] Rensin argues that the FTC's evidence to support its contempt claims changed during the hearing below. *See, e.g.*, Rensin Br. at 12 n.3, 30. In fact, to the extent that any figures changed, those figures related only to the business of financing claim, which is not at issue in this appeal.

FTC's showing regarding the appropriate compensatory sanction because it focuses solely on post-purchase conduct. As explained above, BlueHippo's customers were harmed when they made payments to BlueHippo without receiving disclosures required by the Consent Order. The Consent Order prohibited BlueHippo from "[m]aking any representation about any refund * * * policy without disclosing clearly and conspicuously, ***prior to receiving any payment from customers*** all material terms and conditions of any refund * * * policy." D.2 at 4 (A.36) (emphasis added). This express language, consistent with FTC case law, recognizes that when, as here, consumers do not receive material cost information when deciding whether to pay for goods or services, they are injured *at the point of purchase*. *See, e.g.*, *McGregor*, 206 F.3d at 1387-88; *Figgie*, 994 F.2d at 606.

The gist of Rensin's second argument is that, because BlueHippo failed to make disclosures regarding its store credit policy, no consumer was injured unless that consumer actually attempted to seek store credit. *See* Rensin Br. at 41. But this would be like arguing in *Figgie* (where defendants made misrepresentations regarding the ability of its heat detectors to warn of house fires) that the only consumers who would be entitled to monetary relief were those whose houses burned down. But *Figgie* made clear that *all* the defendant's customers were injured at the point of purchase based on the deception and were entitled to full

refunds. 994 F.2d at 606. The mere fact that some customers may not have availed themselves of BlueHippo's store credit policy (assuming that Rensin had produced any adequate evidence as to the number of such consumers) in no way shows that these consumers were not deceived when they first agreed to make payments to BlueHippo. It is that deception that is the source of BlueHippo's contempt, and it is that deception that sets the measure of the compensatory sanction that it should pay.

Finally, what is equally telling is that Rensin failed to produce evidence of *even a single consumer* who would have agreed to pay BlueHippo anything had that consumer received full disclosure of BlueHippo's store credit refund conditions at the time of entering into the transaction. *See Kuykendall*, 371 F.3d at 766 (finding that, to rebut the FTC's reasonable approximation of harm based on gross receipts, "defendants might be able to show that some customers received full refunds of their payments or that others were wholly satisfied with their purchases and thus suffered no damages."). In contrast, the *only* evidence in the record regarding injury to consumers was from consumers who confirmed precisely what the law presumes (*i.e.*, had the store credit refund conditions been fully disclosed they would have elected not to go through with the transaction). *See* FTC Exs. 48D-H (A.490-503). Because Rensin completely failed to rebut the

Commission's showing with respect to the harm caused by BlueHippo's contempt, *i.e.*, $14 million, that is the amount that the district court should have awarded.

CONCLUSION

For the reasons set forth above and in the FTC's principal brief, this Court should reverse that portion of the district court's order denying the Commission compensatory sanctions for BlueHippo's civil contempt violation resulting from the material omission of its store credit refund policy and order compensatory sanctions in the amount of $14,062,627.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that Plaintiff-Appellant Federal Trade Commission's ("FTC") Reply Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 6520 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Corel WordPerfect word processing program used to prepare the Reply Brief.

I further certify that the FTC's Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Reply Brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 25(a) and Local Rule 25.1, on September 12, 2011, I electronically filed the foregoing Reply Brief for Appellant Federal Trade Commission with the Clerk of the Court of the United States Court of Appeals for the Second Circuit using the Court's Case Management/Electronic Case Filing (CM/ECF) system. I also certify that I will submit 6 paper copies of the Reply Brief consistent with Local Rule 31.1.

I further certify that, pursuant to Fed. R. App. P. 25(d) and Local Rule 25.1(h), on this date I served the foregoing Reply Brief by operation of the Court's CM/ECF system on all registered counsel of record in this case.

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