No. 13-

IN THE

Supreme Court of the United States

PUBLISHERS BUSINESS SERVICES, INC.; ED DANTUMA ENTERPRISES, INC., DBA PUBLISHERS BUSINESS SERVICES, DBA PUBLISHERS DIRECT SERVICES; PERSIS ANN DANTUMA; EDWARD FRED DANTUMA; BRENDA DANTUMA SCHANG; DRIES DANTUMA; DIRK DANTUMA; JEFFREY DANTUMA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A district court "applie[s] an incorrect legal standard when it focuse[s] on the defendants' gain rather than the loss to the customers" in awarding monetary relief under § 13(b) of the Federal Trade Commission ("FTC") Act. So held the Ninth Circuit in this FTC enforcement action, reversing a carefully reasoned monetary award issued by a Nevada district court after five days of evidentiary hearings. The Second Circuit held exactly the opposite in *F.T.C. v. Verity*, 443 F.3d 48 (2d Cir. 2006): "the focus of the district court's restitution calculation should be on the defendants-appellants' unjust gains" and not "the full amount lost by consumers." *Id.* at 67-68. *Verity*'s holding followed this Court's analysis of equitable relief in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216, 122 S. Ct. 708, 716 (2002). The Ninth Circuit has gone in the opposite direction, turning the broad equitable relief purportedly implied by § 13(b) into a strict formula for awarding money damages. The conflict raises an important and recurring question about the meaning of equitable jurisdiction under § 13(b).

The questions presented are:

1. Does this Court's analysis of equitable jurisdiction in *Great-West* apply to § 13(b) of the FTC Act (15 U.S.C. § 53(b)) so that relief is limited to typical equitable remedies, or does § 13(b) allow district courts to award the FTC virtually unlimited legal relief including damages for alleged customer loss?

2. Does a district court abuse discretion under § 13(b) by conforming monetary awards to the unique facts of the case and typical equitable remedies, such as a defendant's unjust gain from alleged violations of the FTC Act?

LIST OF PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. FTC, Plaintiff-Appellant, Respondent on Review

2. Publishers Business Services, Inc. ("PBS"), Defendant-Appellee, Petitioner on Review

3. Ed Dantuma Enterprises Inc., Defendant-Appellee, Petitioner on Review

4. Edward Dantuma, Defendant-Appellee, Petitioner on Review

5. Persis Dantuma, Defendant-Appellee, Petitioner on Review

6. Dries Dantuma, Defendant-Appellee, Petitioner on Review

7. Dirk Dantuma, Defendant-Appellee, Petitioner on Review

8. Jeff Dantuma, Defendant-Appellee, Petitioner on Review

9. Brenda Schang, Defendant-Appellee, Petitioner on Review

CORPORATE DISCLOSURE STATEMENT

No parent corporation or publicly held company owns 10% or more of the stock in Petitioners Publishers Business Services, Inc. or Ed Dantuma Enterprises, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES iii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF CONTENTS..... v

TABLE OF APPENDICES vii

TABLE OF CITED AUTHORITIES viii

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION..... 6

I. CONFLICT AND CONFUSION DIVIDES THE CIRCUITS OVER MONETARY RELIEF UNDER § 13(b)..... 6

II. THE CIRCUIT COURTS ARE SPLIT ON THE MEANING OF EQUITABLE RELIEF UNDER § 13(b) 8

TABLE OF CONTENTS

Page

III. THE DECISION OF THE COURT OF APPEALS CONTRAVENES THE DECISIONS OF THIS COURT 16

IV. THE QUESTION OF WHETHER THE FTC MAY RECOVER DAMAGES UNDER § 13(b) IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT 21

CONCLUSION 23

TABLE OF APPENDICES

Page

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 29, 2013 . . . . . 1a

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 19, 2013 . . . . . 2a

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED JULY 25, 2011 . . . . . 9a

APPENDIX D — RELEVANT STATUTORY PROVISIONS 15a

TABLE OF CITED AUTHORITIES

Page

Cases

American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 76 S. Ct. 600, 100 L. Ed. 953 (1956) 9

C.F.T.C. v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339 (11th Cir. 2008). 13, 16

Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed.2d 260 (1974). 10

Ellett Bros., Inc. v. U.S. Fid. & Guar. Co., 275 F.3d 384 (4th Cir. 2001). 13

F.T.C. v. AMREP Corp., 705 F. Supp. 119 (S.D.N.Y. 1988). 9, 22

F.T.C. v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011) 12, 14, 16

F.T.C. v. Direct Mktg. Concepts, Inc., 624 F.3d 1 (1st Cir. 2010) 13

F.T.C. v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989). 10

F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993) 9, 22

Page

F.T.C. v. Gem Merch. Corp.,
87 F.3d 466 (11th Cir. 1996). 16

F.T.C. v. Gratz,
253 U.S. 421, 432, 40 S. Ct. 572, 64 L. Ed.
993 (1920). 8

F.T.C. v. H. N. Singer, Inc.,
668 F.2d 1107 (9th Cir. 1982). 10

F.T.C. v. Inc21.com Corp.,
475 F. App'x 106 (9th Cir. 2012) 15

F.T.C. v. Int'l Diamond Corp.,
C-82-0878 WAI (JSB), 1983 WL 1911
(N.D. Cal. Nov. 8, 1983) 9

F.T.C. v. LoanPointe, LLC,
525 F. App'x 696 (10th Cir. 2013) 12

F.T.C. v. Magazine Solutions, LLC,
432 F. App'x 155 (3d Cir. 2011) 13

F.T.C. v. Publishers Bus. Servs., Inc.,
821 F. Supp. 2d 1205 (D. Nev. 2010) 3

F.T.C. v. QT, Inc.,
512 F.3d 858 (7th Cir. 2008) 14

F.T.C. v. Stefanchik,
559 F.3d 924 (9th Cir. 2009) 5, 14, 15

Page

F.T.C. v. Trudeau,
662 F.3d 947 (7th Cir. 2011). 14

F.T.C. v. Verity,
443 F.3d 48 (2d Cir. 2006) . . . . . *passim*

F.T.C. v. Washington Data Res., Inc.,
704 F.3d 1323 (11th Cir. 2013). 12

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204, 122 S. Ct. 708 (2002) . . . . . *passim*

Heater v. F.T.C.,
503 F.2d 321 (9th Cir. 1974). 9

Lamie v. U.S. Tr.,
540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024
(2004) 20

Livingston v. Woodworth,
15 How. 546, 14 L. Ed. 809 (1854). 15

Louisiana Public Svc. Comm'n v. FCC,
476 U.S. 355 (1986). 8

Mertens v. Hewitt Associates,
508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161
(1993) . . . . . *passim*

Porter v. Warner Holding Co.,
328 U.S. 395, 66 S. Ct. 1086 (1946). . . . . *passim*

Page

Reich v. Continental Casualty Co.,
33 F.3d 754 (7th Cir. 1994). 11

Russello v. United States,
464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17
(1983) 20

S.E.C. v. Blatt,
583 F.2d 1325 (5th Cir. 1978). 13

S.E.C. v. Blavin,
760 F.2d 706 (6th Cir. 1985). 13

S.E.C. v. First City Fin. Corp., Ltd.,
890 F.2d 1215 (D.C. Cir. 1989). 13

Stevens v. Gladding,
17 How. 447, 15 L. Ed. 155 (1855) 15

Teamsters v. Terry,
494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed.2d
519 (1990). 10

Tull v. United States,
481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed.2d
365 (1987) 15

United States v. Burke,
504 U.S. 229, 112 S. Ct. 1867, 119 L. Ed.2d
34 (1992). 11

Page

Statutes and Other Authorities

15 U.S.C. § 45 . . . . . .8, 9

15 U.S.C. § 45(a) 3, 4, 22

15 U.S.C. § 53 . . . . . .1, 9, 15

15 U.S.C. § 53(a)-1 13

15 U.S.C. § 53(b) . . . . . *passim*

15 U.S.C. § 57b(a)(2) 9, 22

15 U.S.C. § 57b . . . . . *passim*

15 U.S.C. § 57b(b) . . . . . *passim*

15 U.S.C. § 57b(d) 22

28 U.S.C. § 1254(1) 1

The Price Control Act, 205(e) 17, 18

Title VII 10

D. Dobbs, Remedies § 1.1 (1973) 10

Henderson, The Federal Trade Commission 71 (1924) 9

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unpublished but available at 2013 WL 5273302 and reproduced at App. 2-8a. The opinion of the district court awarding monetary relief is unpublished but available at 2011 WL 7462205 and reproduced at App. 9-14a.

JURISDICTION

The court of appeals issued a memorandum opinion on September 19, 2013 reversing in part and affirming in part the district court's award of monetary relief. App. 2a. The court of appeals denied a petition for rehearing *en banc* on November 29, 2013. App. 1a. The jurisdiction of this Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of § 13 of the FTC Act, 15 U.S.C. § 53, and § 19, 15 U.S.C. § 57b, are set forth at App. 15-22a, *infra*.

STATEMENT OF THE CASE

This case involves a conflict among the circuits over whether § 13(b)'s injunctive relief provisions allow district courts to award the FTC damages for supposed consumer loss, a remedy this Court has repeatedly found issues from a court of law, not equity. The most pronounced division is between the Ninth Circuit, which in this case not only endorsed legal damages as an appropriate remedy under § 13(b) but made them mandatory, and the Second, Third,

and Eleventh Circuits, which have followed this Court's precedent on equitable jurisdiction in construing § 13(b) as allowing uniquely equitable monetary relief. At stake in this conflict are not only workable, consistent standards for § 13(b) monetary relief, but the long tradition of deference accorded district courts in fashioning that relief. Overarching the conflict is a larger question of the power of a government agency to transform a district court's equitable jurisdiction into a vehicle for virtually unlimited legal relief. The need for this Court's review is pressing, as the FTC seeks to solidify, through court decisions like the one in this case, its ability to use § 13(b) to recover damages for alleged consumer loss in nearly every enforcement action across the country.

PBS was a family-owned business that sold subscriptions for mainstream magazines such as *Rolling Stone*, *US News & World Report*, as well as specialty magazines. Sales came from PBS's web site, unsolicited customer calls, and from PBS's own employees. Most sales came from telemarketing. About 1% of calls led to sales. No money was collected up front, and customers had ten days to cancel. For customers who did not cancel, PBS entered sales orders with magazine publishers or fulfillment houses. PBS paid its publishers about $65,000 to $70,000 a month on average for the magazines it sold. PBS had an in-house collections department for customers who did not timely pay. More than half of PBS's customers never paid. From 2004 to September 2008, about 100,000 of PBS's customers did pay, generating revenue of $34.4 million. Between 2004 and 2009, however, PBS had a net loss of $(521,244).

The FTC brought an enforcement action in the United States District Court for the District of Nevada in May 2008 alleging PBS engaged in supposedly deceptive sales practices prohibited by § 5(a) of the FTC Act (15 U.S.C. § 45(a)). The district court entered summary judgment on liability, finding that although "PBS ha[d] informed the consumer of all the terms of the agreement," certain practices had the "net impression" of deceiving customers in violation of § 5(a). The district court made no finding of monetary relief. For that, the district court ruled, the FTC "must establish 'proof of injury caused by those [§ 5] practices.'" *See F.T.C. v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1225-27 (D. Nev. 2010) (citations omitted).

Five days of evidentiary hearings followed in 2011. The FTC posited only one theory of monetary relief—total disgorgement of PBS's $34.4 million in gross revenue. The FTC's main witnesses were an investigator and only two customers. The investigator testified he had been asked to analyze only "the extreme" PBS accounts and conceded many customers were satisfied with PBS. The two customers conceded they voluntarily paid PBS knowing what the terms were.

PBS undertook to show the vast majority of paying customers in fact wanted the magazines and knew the terms. Four customers testified to this, and PBS's expert showed these customers were typical. Repeat customers accounted for 53% of PBS's total revenue, and a review of hundreds of verification calls demonstrated that over 99% of customers had full disclosure of what they were getting and how much they were paying.

Several individual Defendants also appeared. Jeff Dantuma, a paraplegic, was excused for medical reasons without ever being called. Brenda Schang testified to working for a PBS branch office about twice a week remotely from her central Florida home. Dirk Dantuma testified he left PBS in about 2001 and has since had no formal status with the company other than as an occasional consultant to his father. Persis, married to Ed since 1952, testified she was strictly in "clerical" and her main job was to balance the checkbook.

With much of Petitioners' evidence unrebutted, the district court found the FTC "failed to establish that all, or even a significantly quantifiable number of sales or collections warrant wholesale disgorgement." App. 12a. The link between the § 5(a) violations and payments to PBS was largely missing, the district court held, and issued a monetary award in the amount of $191,219, one of the three options proposed by PBS's expert. App. 12-13a. The district court further found "insufficient evidence" to hold Defendants Brenda Schang, Persis, Dirk and Jeff Dantuma individually liable for monetary relief. App. 13a. PBS promptly paid the judgment in full.

The FTC appealed, contending the district court supposedly abused discretion in not imposing against every defendant an award in "the full amount of ill-gotten gains," which the FTC claimed was PBS's total gross revenue of $34.4 million. The Ninth Circuit reversed the monetary award, finding the district court abused its discretion in awarding § 13(b) relief based "on the defendants' gain rather than the loss to the consumers." App. 4a. The decision declared this an "incorrect legal standard," effectively making customer loss the only measure of relief possible under § 13(b). *Id.*

In reaching this conclusion, the circuit court expressly acknowledged conflict with the Second Circuit's opinion in *Verity*. App. 4a. *Verity* had reasoned that "because the availability of restitution under § 13(b) of the FTC Act, to the extent it exists, derives from the district court's equitable jurisdiction, it follows that the district court may award only equitable restitution." *Verity*, 443 F.3d at 67. The Second Circuit had relied on this Court's decision in *Great-West* to conclude that equitable restitution comprises only the defendant's gain and not customer losses. *Id.* at 66-67. The Ninth Circuit found *Verity*'s reasoning to be in conflict with its own decisions, which have allowed for legal relief under § 13(b). App. 4a (citing *F.T.C. v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009)).

The Ninth Circuit also faulted the district court for relying on Petitioners' expert. That the majority of consumers knew all the terms and were not misled at the time of purchase was not, according to the Ninth Circuit, an appropriate consideration. Nor was it appropriate, the Ninth Circuit held, for the district court to credit the fact that many consumers received value for their magazine subscriptions. App. 6-7a. The Ninth Circuit separately reversed the district court rulings in favor of Brenda Schang, and Dirk and Jeff Dantuma. These defendants supposedly "had knowledge, and … some degree of control or direct participation in the misrepresentations," the circuit court decided, and cited a single pre-hearing declaration from Dirk Dantuma as supposed evidence of their knowledge and purported control. Though Dirk had testified live and at length at the evidentiary hearing, the district court's findings to the contrary were deemed an "abuse of discretion." App. 7-8a.

REASONS FOR GRANTING THE PETITION

I. CONFLICT AND CONFUSION DIVIDES THE CIRCUITS OVER MONETARY RELIEF UNDER § 13(b)

The decision below conflicts with at least three circuit courts that have addressed the availability of monetary relief under § 13(b), a statute prescribing the sole remedy of a preliminary (or permanent) injunction. These decisions, the most prominent of which is *Verity*, entrenched § 13(b) monetary awards in equitable principles. Relief could only reach property that the evidence showed was in the defendant's possession or that represented the defendant's gain or unjust enrichment from purportedly unlawful conduct. The decision below rejects that these principles even matter. Instead, the Ninth Circuit has endorsed the FTC's ability to get straight money damages, measured by customer losses, based on nothing more than a district court's supposed *implied* authority in § 13(b) to issue "ancillary" relief.

This result is impossible to square with decisions from this Court addressing the equitable powers of district courts. *Great-West*, for example, held that "the imposition of personal liability for the benefits … conferred upon [the defendants]" qualified as *legal* relief. This fact defeated a claim seeking legal restitution under an ERISA statute that, similar to § 13(b), permitted only injunctive and other equitable relief. *See Great West*, 534 U.S. at 214.

The Ninth Circuit neglected this distinction. Ninth Circuit decisions had, even before this case, recognized the supposed ability of the FTC to recover legal restitution

under § 13(b), even as *Verity* and decisions from other circuit courts strived to keep § 13(b) remedies in line with traditional equitable powers. The decision below is a pronounced step beyond that authority. Legal monetary relief under § 13(b) is not merely permissible, the Ninth Circuit held, it is the only remedy—so much so that the district court's decision in this case to award quintessentially *equitable* relief based on defendant gain has been declared an abuse of discretion.

The impact of this decision is great. It not only engrafts remedies of customer redress and damages onto § 13(b)—remedies Congress explicitly provided for in a different section of the FTC Act, § 19(b)—it makes those remedies mandatory. And by making them mandatory, the decision below strips a district court's discretion to do equity based on the circumstances as it finds them, the very thing courts had used to justify § 13(b) monetary relief in the first place.

This Court now has the opportunity to provide a rational interpretation of § 13(b) and to reaffirm or clarify principles of equitable jurisdiction in the context of FTC enforcement actions. This Court has addressed these principles in other contexts, and the Second Circuit, with other circuits' approval, has employed that reasoning to interpret § 13(b). If the decision below is left uncorrected, division in the circuits will grow as the FTC seeks, without Congressional approval, to make § 13(b) awards imposing liability for money damages the *de facto* rule in almost every enforcement action.

II. THE CIRCUIT COURTS ARE SPLIT ON THE MEANING OF EQUITABLE RELIEF UNDER § 13(b)

A federal agency like the FTC "literally has no power to act…unless and until Congress confers power upon it." *See Louisiana Public Svc. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Section 13(b) of the Act confers upon the FTC the power to obtain only one type of relief: "Whenever … any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission….the Commission…may bring suit in a district court of the United States to enjoin any such act or practice…" 15 U.S.C. § 53(b). The statute authorizes only preliminary injuctions and temporary restraining orders, forms of immediate or emergency relief designed to stop purported violations happening at the moment. An exception allows that "the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id.*

Section 13(b) clearly omits monetary relief and consumer redress from its terms, but the FTC Act does not. Section 19(b) permits "such relief as the court finds necessary to redress injury to consumers," including "the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b). The subsection also restricts "the imposition of any exemplary or punitive damages." *Id.*[1] Section 19, however, carries with it claim

1. Before § 19(b), the FTC did not have authority to recover *any* monetary relief, as the Act limited the FTC's authority to enjoining, under § 5, future violations. *See F.T.C. v. Gratz*, 253 U.S. 421, 432, 40 S. Ct. 572, 576, 64 L. Ed. 993 (1920) (finding "[t]he [§ 5] proceeding is not punitive. The complaint is not made with a view to subjecting

restrictions and proof elements § 13 does not, including a three-year limitations period (§ 13 has none), the pre-suit requirement of "a final cease and desist order" (§ 13 allows a restraining order to issue before the filing of a complaint), and scienter elements that the alleged acts were ones "which a reasonable man would have known under the circumstances w[ere] dishonest or fraudulent" (§ 13 will enjoin any violation of § 5, which "does not require proof of such facts with respect to the defendant's state of mind"). *See* 15 U.S.C. § 57b(a)(2), (d); *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 86, 76 S.Ct. 600, 605, 100 L.Ed. 953 (1956) (addressing § 5's state of mind requirements); *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 603 (9th Cir. 1993) (finding § 19 "requires proof of the extra element that a reasonable person would have known under the circumstances that the practice was dishonest or fraudulent"); *F.T.C. v. AMREP Corp.*, 705 F. Supp. 119, 127 (S.D.N.Y. 1988) (discussing § 19 elements). So while § 19(b) has the varied and comprehensive remedies § 13(b) lacks, including money damages and customer redress, the claims are harder to prove.

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the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged….") (Brandeis, J., dissenting); *Heater v. F.T.C.*, 503 F.2d 321, 326 (9th Cir. 1974) ("The act does not expressly confer any general power, of the kind possessed by a court of equity, to compel restitution, or otherwise to so mold the decree as to do substantial justice under the circumstances. Of course, no damages can be awarded, or mandatory order entered") (quoting Henderson, The Federal Trade Commission 71 (1924)); *F.T.C. v. Int'l Diamond Corp.*, C-82-0878 WAI (JSB), 1983 WL 1911 (N.D. Cal. Nov. 8, 1983) (noting "[i]n 1975, Congress broadened significantly the Commission's enforcement powers by authorizing civil actions for consumer redress under Section 19b")).

Courts nonetheless have inferred in § 13(b)'s injunctive relief provisions a broader "power to issue whatever ancillary equitable relief is necessary to the effective exercise of the granted power." *See, e.g. F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (affirming an award of recission); *see Verity*, 443 F.3d at 66 (collecting cases that "have concluded that § 13(b) of the FTC Act allows restitution or other ancillary equitable relief"); *F.T.C. v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (finding in relation to § 13(b) that "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction") (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 1089 (1946)).

But having inherent authority to issue traditional *equitable* relief has not meant district courts can issue *legal* relief—and especially not damages. That was the issue in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). An ERISA statute provided for injunctive relief or "other appropriate equitable relief [] to redress such violations or [] to enforce any provisions of . . . the terms of the plan." The question was whether this language could allow an award of "compensatory *damages* —monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." This was not possible in part because, the Court found, "[m]oney damages are, of course, the classic form of *legal* relief." *See id*. at 255 (citing *Curtis v. Loether,* 415 U.S. 189, 196, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260 (1974); *Teamsters v. Terry,* 494 U.S. 558, 570–571, 110 S.Ct. 1339, 1347–1348, 108 L.Ed.2d 519 (1990); D. Dobbs, Remedies § 1.1, p. 3 (1973)). The Court had interpreted similar "other equitable relief" language from Title VII to

preclude "awards for compensatory or punitive damages." *Mertens*, 508 U.S. at 255 (citing *United States v. Burke,* 504 U.S. 229, 238, 112 S.Ct. 1867, 1873, 119 L.Ed.2d 34 (1992)). And though it was true in the days of the divided bench that courts of equity had the power at common law to issue money damages against a trustee, giving the phrase "'equitable relief' the expansive meaning 'all relief available for breach of trust,'" would make the word "equitable" superfluous. "Equitable relief," therefore, meant "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis added, citations omitted).

Great-West interpreted the same ERISA statute, only this time on a purported claim of restitution that the petitioners argued, unsuccessfully, was available "as a form of equitable relief." *Great-W*est, 534 U.S. at 212. This Court explained, "not all relief falling under the rubric of restitution is available in equity." The distinction "depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 212-13 (quoting *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994)). For "restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." The petitioners had no equitable restitution claim in *Great-West* because what they sought, despite efforts to couch their claim in "equitable" terms, was a straightforward judgment of liability against the defendant for loss. *Great-West*, 534 U.S. at 213-14, 218.

In *Verity*, the Second Circuit adopted *Great-West*'s analysis for FTC enforcement actions. The court found that "because the availability of restitution under § 13(b) of the FTC Act, to the extent it exists, derives from the district court's equitable jurisdiction, it follows that the district court may award only equitable restitution." Restitution in "the full amount lost by consumers" is legal relief, the court reasoned, and disallowed by § 13(b). Restitution measured by "the benefit unjustly received by the defendants" is equitable relief, and therefore "[t]he appropriate measure for restitution" under § 13(b). *Verity*, 443 F.3d at 67. The Second Circuit later reaffirmed *Verity*'s holding that a district court "may grant only remedies that were uniquely equitable at the time of the divided bench," so that "the district court is prohibited in a Section 13(b) action from awarding legal remedies such as damages or legal restitution." *See F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011).

At least two other circuit courts have followed *Verity*'s approach that relief under § 13(b) should conform to a district court's traditional equitable jurisdiction and not take the form of legal relief. *See F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (agreeing with *Verity* that "a damages award based on consumer losses would be improper. The equitable remedy of restitution … only focuses on the defendant's unjust enrichment") (citation omitted); *F.T.C. v. LoanPointe, LLC*, 525 F. App'x 696, 698-99 (10th Cir. 2013) (finding "a district court's authority to award disgorgement under § 13(b) falls within its general equitable jurisdiction…," though "government agencies are not required to return disgorged profits to the victims of a scheme, nor are victims' losses necessarily the best measure of the

amount that should be disgorged") (unpublished); *see also C.F.T.C .v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345 (11th Cir. 2008) (citing *Verity* and concluding, under the Commodity Exchange Act's injunctive relief statute, § 13a-1, "that the district court abused its discretion in awarding the full amount of customer losses. The proper measurement is the amount that Appellants wrongfully gained by their misrepresentations").

Four other circuits have employed the same reasoning in other contexts and with respect to other government agencies. *See Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001) (holding "[r]estitution and disgorgement require payment of the defendant's ill-gotten gain, not compensation of the plaintiff's loss") (citation omitted); *S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (finding that "disgorgement primarily serves to prevent unjust enrichment, [and] the court may exercise its equitable power only over property causally related to the wrongdoing"); *S.E.C. v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985) (finding "[t]he purpose of disgorgement is to force a defendant to give up the amount by which he was unjustly enriched….") (internal quotes, citation omitted); *S.E.C. v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (same).

Other circuits have taken a hybrid approach, in which "[b]oth gross receipts and net customer loss are appropriate measures." *F.T.C. v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *F.T.C. v. Magazine Solutions, LLC*, 432 F. App'x 155, 158 (3d Cir. 2011) (affirming an award "calculating restitution as total net revenue" and finding it "well within [the district court's] discretion" to have "subtracted the wholesale cost of the

magazines Martinelli provided to consumers from his total revenue"); *F.T.C. v. Trudeau*, 662 F.3d 947, 951 (7th Cir. 2011) (interpreting *Verity* as having "created a narrow middleman exception to the usual rule that consumer loss may be the proper measure of damages in a section 13(b) action"); *F.T.C. v. QT, Inc.*, 512 F.3d 858, 863-64 (7th Cir. 2008) (stating "[d]isgorging profits is an appropriate remedy").

The district court in this case cited *Verity* and endeavored to award monetary relief based on "the extent of net revenues received by PBS as a result of its violation of Section 5 of the FTC Act," (App. 12-13a), a formula most circuit decisions agree is correct, or at least permissible, under § 13(b), *see supra*. By reversing this standard and calling it an abuse of discretion, the Ninth Circuit has taken a position squarely against virtually every other circuit. The court below singled out *Verity* as conflicting with Ninth Circuit authority. Where *Verity* holds that "the baseline for an equitable monetary award under the FTC Act is the defendant's unjust benefits, not the consumers' losses," the decision finds, the Ninth Circuit has "held that the FTC Act permits restitution measured by the loss to consumers." App. 4a (citing *Stefanchik*, 559 F.3d at 931).

But the division runs much deeper. The Second Circuit's § 13(b) decisions understand *Great-West*'s "admonition to examine carefully 'the basis for [restitution] claims and the nature of the underlying remedies sought' [to be] equally applicable to actions seeking 'restitution' under Section 13(b) of the FTC Act." *See Bronson*, 654 F.3d at 371. The Ninth Circuit, however, has never recognized a connection between *Great-West* and § 13(b) awards. To the contrary, as the decision below shows, the Ninth Circuit believes

§ 13(b) relief need not have any basis at all in equitable jurisdiction.

A striking example is the Ninth Circuit's analysis of the contrasts between § 19 and § 13, in which § 19(b)'s express provisions for consumer redress and legal relief are found not to restrict but to liberate completely the remedies supposedly inferable under § 13(b). Pointing to § 19(b)'s express restriction of punitive and exemplary damages, the court below reasoned that "§ 13(b), which contains no such limitation … permits awards that may even be 'greater than the defendant's unjust enrichment.'" App. 4-5a (quoting *Stefanchik,* 559 F.3d at 931). An earlier Ninth Circuit decision had made this point explicit: "The defendants have not shown that the restitution ordered by the district court constitutes a 'punitive' remedy. Even if they could make that showing, § 13(b) would not preclude the remedy…." *F.T.C. v. Inc21.com Corp.*, 475 F. App'x 106, 109 (9th Cir. 2012).

In the Ninth Circuit's view, a district court's purported inherent authority under § 13(b) is so expansive and unlimited as to invite an award of damages of almost any kind. That includes not only "legal restitution, measured by the loss to consumers," *see* App. 4a; *Inc21.com,* 475 F. App'x at 108-09, but punitive and exemplary damages as well, forms of relief this Court has "long recognized, courts of equity would not—absent some express statutory authorization—enforce…" *Mertens*, 508 U.S. at 270 (White, J., dissenting) (citing *Tull v. United States,* 481 U.S. 412, 422, and n. 7, 107 S.Ct. 1831, 1838, and n. 7, 95 L.Ed.2d 365 (1987); *Stevens v. Gladding,* 17 How. 447, 454–455, 15 L.Ed. 155 (1855); *Livingston v. Woodworth,* 15 How. 546, 559–560, 14 L.Ed. 809 (1854)). No other circuit supports this view.

The circuits are moving in different directions, as the result below puts in stark relief. What equitable jurisdiction under § 13(b) means in the Ninth Circuit—the ability to award almost any legal relief including damages above and beyond a defendant's unjust gain and any relief prescribed in § 19(b)—is radically different than what it means in any other circuit. This is especially the case in those circuits that have made efforts to reconcile this Court's statements on equitable jurisdiction with the purported inherent powers courts have inferred in § 13(b). The obvious and growing conflict alone warrants this Court's review.

III. THE DECISION OF THE COURT OF APPEALS CONTRAVENES THE DECISIONS OF THIS COURT

The decision below drives these conflicts to the extreme. Legal relief under § 13(b) is not only permitted, the Ninth Circuit has held, but mandatory. Even circuits that found § 13(b) *permits* relief based on customer loss have not gone so far as the Ninth Circuit in requiring it and, moreover, deeming equitable relief based on defendant unjust gain an "abuse of discretion." This misunderstands, and completely overthrows, the rationale courts have followed in permitting monetary awards under § 13(b).

That rationale comes from this Court's decision in *Porter*. *See Bronson*, 654 F.3d at 365; *Wilshire*, 531 F.3d at 1343-44; *F.T.C. v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (citing *Porter* as authority to award § 13(b) monetary relief). *Porter* considered a wartime statute, the Emergency Price Control Act of 1942, which authorized

the district court to enjoin the collection of excessive rents. The statute allowed "a permanent or temporary injunction, restraining order, or other order." The question was whether a district court could, in addition to enjoining rent collection, order the "restitution of rents" illegally collected. *See Porter*, 328 U.S. at 396-97.

This Court found the words "other order" contemplated a remedy other than an injunction or restraining order and therefore included the equitable remedy of restitution, "a remedy entered in the exercise of the district court's equitable discretion." *See id.* at 399 (emphasis added). The *Porter* Court also considered the broader impact authorization of injunctive relief under the statute had on district court powers. "Such a jurisdiction is an equitable one," this Court determined. "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." Because the "public interest" was involved, moreover, "those equitable powers assume an even broader and more flexible character. . . . Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.'" *Id.* at 398 (citation omitted). *Porter* stressed, "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* (emphasis added).

The *Porter* Court was nonetheless careful to draw a line between law and equity, much as this Court later did in *Mertens* and *Great-West*. The Price Control Act had separately provided for (in § 205(e)) an award of damages, similar to § 19(b) in the FTC Act. A district court "acts

as a court of law rather than as a court of equity" when awarding damages, this Court reasoned, and found no conflict, "with the exception of damages," between § 205(e) and "the jurisdiction of equity courts." *Id*. at 402 (emphasis added). Conversely, "[r]estitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under s 205(e)." *Id*.

Nothing in *Porter* supports the decision below. The exceedingly "broad and flexible character" of a district court's equitable powers, if it is to be read into § 13(b), is impossible to square with a holding that the district court "applie[s] an incorrect legal standard when it focuse[s] on the defendants' gain rather than the loss to the customers." App. 4a. As this Court has observed, a "decree compelling one to disgorge profits, rents or property" (i.e., the defendant's gain) is "within the highest tradition of a court of equity." *Porter*, 328 U.S. at 398, 402. An award based on customer loss is legal relief. *See Great-West*, 534 U.S. at 213; *see also* 534 U.S. at 229 (finding it a "[r]estitutionary remed[y]" that "Great–West sued to recover an amount representing the Knudsons' unjust gain, rather than Great–West's loss") (Ginsburg, J., dissenting). A court of equity could hardly apply an "incorrect legal standard" (App. 4a) by choosing to award a quintessentially *equitable* remedy rather than a legal one. That conclusion is even more soundly confirmed where a federal Act provides for damages, as the Price Control Act did and § 19(b) does. The damages provision "supersedes that possibility [of a court of equity awarding damages] and provides an exclusive remedy relative to damages." *Porter*, 328 U.S. at 401 (emphasis added). So even if there were instances in the days before law

and equity merged where a court of equity could grant damages (as *Porter* hypothesized, *see id.*), the "exclusive" method for the FTC to recover damages is set forth in § 19(b). *Porter*, if not *Great-West*, precludes the very legal relief the decision below mandates.

Moreover, if *Porter* is in fact the basis for § 13(b) monetary relief, then the extremely "broad and flexible" power to exercise "equitable discretion," and "to mould each decree to the necessities of the particular case"—the principles on which *Porter* is based—must get the same respect. *See Porter*, 328 U.S. at 398. The decision below showed no respect to the district court. Five days of evidentiary hearings, credibility determinations, and conclusions about basic fairness resulted in a reversal for an alleged abuse of discretion. The reversal came primarily for not awarding the precise legal relief the circuit court prefers. But it also included a host of factors the district court found important—customers who never paid for subscriptions, a majority of informed, pleased customers who did pay, unrebutted evidence the vast majority of customers understood the terms of the deal, and woefully insufficient evidence to hold four individual defendants personally liable. The Ninth Circuit summarily dismissed all of these factors, unique to the case and carefully considered by the district court, as irrelevant, unsupported, and examples of abusing discretion. App. 5-7a.

What the Ninth Circuit was doing was legislating. The decision simply strips out of § 13(b) the broad equitable discretion courts had, following *Porter*, used to justify monetary relief and replaces it with a strict formula for awarding damages—relief this Court has repeatedly

found comes from a court of law. *See Mertens*, 508 U.S. at 255; *Porter*, 328 U.S. at 402. Added to this revision is a whole set of specific factors district courts are supposedly allowed, or not allowed, to consider in awarding that legal relief. Such a ruling has more in common with an Act of Congress than a review, for abuse of discretion, of a district court's exercise of broad equitable powers under § 13(b). Congress is more than capable of providing for the legal damages commanded by the decision below—and Congress has already done so under § 19(b). It is well established courts cannot supplant Congress in that role. *See, e.g., Lamie v. U.S. Tr.*, 540 U.S. 526, 538, 124 S. Ct. 1023, 1032, 157 L. Ed. 2d 1024 (2004) (rejecting an argument that "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope'" and finding, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted") (citations omitted); *Great-West*, 534 U.S. at 221 (holding "[w]e will not attempt to adjust the 'carefully crafted and detailed enforcement scheme' embodied in the text that Congress has adopted") (citation omitted); *see also Mertens*, 508 U.S. at 254 (finding, in ERISA, that the "statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly'") (citation omitted); *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983) (finding that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted).

The decision below represents a dramatic rewriting of § 13(b) in a way that has nothing to do with the traditional equitable powers of district courts. Review by this Court to correct such a substantial judicial grant of power to the FTC is warranted.

IV. THE QUESTION OF WHETHER THE FTC MAY RECOVER DAMAGES UNDER § 13(b) IS OF SWEEPING SCOPE AND IMPORTANCE WARRANTING REVIEW BY THIS COURT

The FTC presented only one theory of relief in this case: a joint and several award against every Petitioner in the amount of PBS's total gross revenue, $34.4 million. The FTC held firm to this damages theory even after the district court advised the parties during the evidentiary hearings that this was not an appropriate case for a total gross revenue award. In appealing the monetary award that resulted (unsurprisingly, since the FTC failed to rebut Petitioners' evidence of monetary relief alternatives with anything other than $34.4 million) and prevailing in the Ninth Circuit, the FTC has made clear its agenda. It wants the best of both worlds under the FTC Act—both the ability to bring injunctive relief enforcement actions under § 13(b) to take advantage of the lighter proof elements, *and* the ability to recover legal damages for supposed consumer loss without having to meet § 19(b)'s more demanding procedural and proof requirements. And the FTC wants the ability to do this in virtually every case nationwide.

The decision below, purporting to make legal relief mandatory, is a decisive step toward making that mash-up of the FTC Act a reality. It is not supported by any

other circuit decision or decision of this Court speaking to a district court's equitable jurisdiction. It is, rather, a substantial revision of the FTC Act that wastes away district court discretion and any real meaning "equitable jurisdiction" has had.

Much is sacrificed in the process. The Ninth Circuit gave the district court few meaningful standards to guide it going forward, beyond the erroneous directive to award consumer loss and to disregard proof that most of PBS's revenue came not from § 5(a) violations but informed consumers who wanted the magazines they ordered. The FTC Act affords Petitioners more protection than this. FTC actions for damages and consumer redress require cease and desist orders, proof of intent to defraud, and prompt action (within three years). *See* 15 U.S.C. § 57b(a)(2), (d); *Figgie*, 994 F.2d at 603; *AMREP Corp.*, 705 F. Supp. at 127. To allow the FTC to get all of this relief and more under the purported rubric of "equitable jurisdiction" in § 13(b) is to render § 19 meaningless. The FTC would scarcely undertake to satisfy § 19's harder requirements to get *less* relief. And it makes possible exactly the kind of excessive and punitive awards—an obvious example being a $34.4 million joint and several liability judgment against individual defendants like Petitioners who received a small fraction of that—which § 19 expressly forbids. *See* 15 U.S.C. § 57b(b) (restricting "the imposition of any exemplary or punitive damages").

This Court's review is needed to restore the enforcement scheme Congress clearly intended under the FTC Act. Unless the Court grants *certiorari*, the FTC will continue its march toward unlimited damage awards in virtually every § 13(b) enforcement action, with little

discretion on the part of district courts to decide what is indeed fair and equitable.

CONCLUSION

The Court should grant the petition.

Respectfully submitted:

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 29, 2013

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17270

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

PUBLISHERS BUSINESS SERVICES, INC., *et al.*, Defendants-Appellees,
Defendant-Appellant.

D.C. No. 2:08-cv-006201-PMP-GWF
District of Nevada

ORDER

Before: CLIFTON and BEA, Circuit Judges, and KORMAN, Senior District Judge.*

The full court has been advised of the Petition for Rehearing *En Banc* and no judge of the court has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35. The Petition for Rehearing *En Banc* is DENIED.

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* The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 19, 2013

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17270

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

PUBLISHERS BUSINESS SERVICES, INC.; ED DANTUMA ENTERPRISES, INC., DBA Publishers Business Services, DBA Publishers Direct Services; PERSIS ANN DANTUMA; EDWARD FRED DANTUMA; BRENDA DANTUMA SCHANG; DRIES DANTUMA; DIRK DANTUMA; JEFFREY DANTUMA,

Defendants-Appellees.

D.C. No. 2:08-cv-00620-PMP-GWF

On Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued May 15, 2013
Submitted September 19, 2013

Appendix B

San Francisco, California

Before: CLIFTON and BEA, Circuit Judges, and KORMAN, Senior District Judge.**

MEMORANDUM

The Federal Trade Commission ("FTC") sued Publishers Business Services, Inc.; Ed Dantuma Enterprises, Inc. (referred to collectively as "PBS"); and six of its individual corporate officers and managers, all of whom are members of the same family, alleging widespread deceptive and abusive telemarketing practices. The district court granted the FTC's motion for summary judgment and entered a permanent injunction. *FTC v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1227-28 (D. Nev. 2010). After an evidentiary hearing, the district court awarded the FTC equitable damages of $191,219.00. *See FTC v. Publishers Bus. Servs.*, No. 08-CV-00620, 2011 WL 7462205, at *2 (D. Nev. July 25, 2011). Moreover, the district court held that only two individual defendants were liable for monetary relief, though each was subject to the permanent injunction. *Id.* Only the FTC appeals, arguing that damages should have been measured by defendants' total gross receipts within the relevant time period ($34.4 million) and that all individual defendants should have been held jointly and severally liable for monetary relief.

** The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

Appendix B

We "review[] a district court's grant of equitable relief under the FTC Act only for abuse of discretion or [for] the erroneous application of legal principles." *FTC v. Network Servs. Depot, Inc.,* 617 F.3d 1127, 1141 (9th Cir. 2010). We hold that the district court abused its discretion with respect to the amount of the award and the individual liability of three of the defendants. We vacate and remand for further proceedings.

I. The Measure of Damages

The district court applied an incorrect legal standard when it focused on the defendants' gain rather than the loss to the consumers. "[C]ourts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits." *FTC v. Stefanchik,* 559 F.3d 924, 931 (9th Cir. 2009).

In rejecting this calculation, the district court relied on two cases: *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), and *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595 (9th Cir. 1993) (*per curiam*). This was improper. In *Verity,* the Second Circuit held that the baseline for an equitable monetary award under the FTC Act is the defendant's unjust benefits, not the consumers' losses. We have, however, held that the FTC Act permits restitution measured by the loss to consumers. *See Stefanchik,* 559 F.3d at 931-32 (9th Cir. 2009).

Figgie, 994 F.2d at 595, is also distinguishable. In *Figgie,* as here, the violation arose under § 5 of the FTC Act. The remedy in that case, however, was governed by § 19(b) of the FTC Act, which explicitly limits recoverable

monies to those necessary to provide "redress...to consumers" and prohibits the imposition of other types of damages. *Id.* at 607 (quoting 15 U.S.C. § 57b(b)). In this case, recovery is authorized under § 13(b), which contains no such limitation and which permits awards that may even be "greater than the defendant's unjust enrichment." *Stefanchik,* 559 F.3d at 931; *accord FTC v. Gem Merch. Corp.,* 87 F.3d 466, 469-70 (11th Cir. 1996) (noting that § 13(b) does not have the same limitations as § 19 and distinguishing *Figgie* on that basis); *Febre,* 128 F.3d at 537 (7th Cir. 1997) (same).

In addition to its reliance on *Verity* and *Figgie,* the district court also erred when it relied on the fact that, while consumer refunds might be an appropriate remedy, "the evidence adduced demonstrates that it is either impossible or impracticable to locate and reimburse those individual customers." *Publishers Bus. Servs.,* 2011 WL 7462205 at *2 (citing *FTC v. Pantron I Corp.,* 33 F.3d 1088 (9th Cir. 1994)). Attributing damages to individual consumers and returning value to them is not required for a § 13(b) disgorgement remedy and *Pantron I* so held. We there held that, if it is "impossible or impracticable to locate and reimburse all of the consumers who have been injured by [the defendant's] misrepresentations, [the district court] may order some other remedy which requires [the defendant] to disgorge its unjust enrichment. Such an alternative remedy should provide direct benefits to consumers to the extent possible, however." *Pantron I,* 33 F.3d at 1103 n.34; *see also Gem Merch. Corp.,* 87 F.3d at 470 ("[B]ecause it is not always possible to distribute the money to the victims of defendant's wrongdoing, a court may order the funds paid to the United States Treasury.").

The district court also erred when it relied on the damage calculation contained in PBS's expert report by Dr. Gregory Duncan. That report was premised first on the assumption that most consumers heard all the terms of the subscription so that they were not misled by the telemarketing solicitation. The fraud, however, was not simply the failure to disclose all pertinent terms. Instead, the defendants were found in violation of § 5 by the misrepresentations that launched the process, among other reasons. Indeed, in granting summary judgment, the district court held that, "[a]lbeit true that by the end of the verification call PBS has informed the consumer of all the terms of the agreement," the net effect of PBS's sales tactics was misleading. *Publishers Bus. Servs.,* 821 F. Supp. 2d at 1224. Thus, the deception was "self-evident." *Id.* at 1225.

Dr. Duncan's calculation was also premised on the assumption that the subscriptions were not valueless. This assumption is not relevant, even if true. "Courts have previously rejected the contention 'that restitution is available only when the goods purchased are essentially worthless.'" *Figgie,* 994 F.2d at 606 (quoting *FTC v. Int'l Diamond Corp.,* No. 82-0878, 1983 WL 1851, at *5 (N.D. Cal. July 12, 1983)); *see also FTC v. Kuykendall,* 371 F.3d 745, 766 (10th Cir. 2004) (holding, in similar magazine subscription sales scheme, no need to offset gross receipts "by the value of the magazines the consumers received"). This is particularly true where the injury to consumers arises out of misrepresentations made in the sales process, which lead to a "tainted purchasing decision." *Figgie,* 994 F.2d at 606. "The fraud in the selling, not in the value

of the thing sold, is what entitles consumers . . . to full refunds." *Id.*

The district court's calculation of damages is vacated. On remand, the district court should base its calculation on the injury to the consumers, not on the net revenues received by defendants. That does not mean that the district court must accept the calculation proposed by the FTC. PBS has argued, for example, that a customer who renewed subscriptions necessarily knew the actual terms of the transaction at the time of renewal. A similar argument was made regarding customers who added on to a subscription order. The district court may consider these and other arguments in determining the appropriate amount of damages to be awarded.

II. **Individual Liability**

To be individually liable for equitable restitution under the FTC Act, the individual must have "participated directly in the deceptive acts or had the authority to control them," *Stefanchik,* 559 F.3d at 931 (emphasis omitted), and "had *knowledge* that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." *FTC v. Network Servs. Depot, Inc.,* 617 F.3d 1127, 1138 (9th Cir. 2010) (emphasis in *Network Services Depot*). The FTC may establish knowledge by showing that an individual "had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an

awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* at 1138 (citation omitted) (alteration in *Network Services Depot*).

The district court's finding that Dirk, Brenda and Jeff Dantuma were not individually liable was an abuse of discretion. They had knowledge, and, by virtue of their individual roles, had some degree of either control or direct participation in the misrepresentations. Indeed, by way of example, Dirk filed a sworn declaration stating that he was "familiar with the business operations, policies and procedures of [Ed Dantuma Enterprises] and Publishers Business Services," and specifically attested to PBS's alleged efforts to "comply with the [Telemarketing Sales Rule], the FTC Act, and debt collection laws."

On the other hand, the FTC did not present any evidence beyond Persis Dantuma's corporate titles as to her knowledge and declined even to cross-examine her at the hearing on damages. Under these circumstances, it was not an abuse of discretion to hold that she was not individually liable and the district court's order is affirmed as to her.

We therefore remand this case for further proceedings. On remand, the district court is directed to recalculate the damage award, and to hold Dirk, Brenda, and Jeff Dantuma individually liable, in addition to Edward and Dries Dantuma.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, FILED JULY 25, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

PUBLISHERS BUSINESS SERVICES, INC., a corporation; ED DANTUMA ENTERPRISES, INC., a corporation, also dba PUBLISHERS DIRECT SERVICES and PUBLISHERS BUSINESS SERVICES; PERSIS DANTUMA; EDWARD DANTUMA; BRENDA DANTUMA SCHANG; DRIES DANTUMA; DIRK DANTUMA; and JEFFREY DANTUMA, individually and as officers or managers of publishers Business Services, Inc., or Ed Dantuma Enterprises, Inc.,

Defendants.

ORDER RE: EQUITABLE DAMAGES

Plaintiff FTC commenced this action on May 14, 2008, by filing a Complaint for Injunctive and other Equitable Relief (Doc. # 1). FTC amended its Complaint

(Doc. #62) on February 5, 2009. Named as Defendants are Publishers Business Services, Inc., a corporation; Ed Dantuma Enterprises, Inc., a corporation, also dba Publishers Direct Services and Publishers Business Services; Persis Dantuma; Edward Dantuma; Brenda Dantuma Schang; Dries Dantuma; Dirk Dantuma; and Jeffrey Dantuma, individually and as officers, directors, or manager of Publishers Business Services, Inc., or Ed Dantuma Enterprises, Inc.

FTC alleges that between January 1, 2004 and August 31, 2008, Defendants garnered $34,419,363.00 in gross revenues through consistent, widespread, deceptive, and abusive sales and collection practices relating to telemarketing sales of magazine subscriptions. Pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), FTC sought a permanent injunction to prevent future violations of the FTC Act and the Telemarketing Sales Rule ("TSR") by Defendants. FTC also sought restitution, the refund of monies paid, and the disgorgement of profits to redress injury to consumers resulting from Defendants' alleged violations of the FTC Act and the TSR.

On June 3, 2008, the Court approved the Stipulation reached by the parties for a Preliminary Injunction enjoining Defendants from, directly or indirectly, engaging in deceptive or abusive sales and collection practices in relation to the sale of magazine subscriptions. This Preliminary Injunction effectively caused Defendants to cease their telemarketing business.

Appendix C

Following the completion of discovery in this action, the Court entered Orders granting FTC's Motion for Summary Judgment (Doc. #151) and for Permanent Injunction (Doc. #152) on April 7, 2010. The Orders contained a detailed statement of the allegations of the parties and the Court's findings, and need not be repeated here. In its Order on Summary Judgment (Doc. #151) the Court further ordered an evidentiary hearing on the issue of equitable damages to be awarded, if any.

Considerable disagreement ensued between the parties concerning the scope of permissible additional discovery, and evidence to be presented at the hearing on damages. As a result, the evidentiary hearing on equitable damages did not commence until March 30, 2011, and after an interruption due to scheduling issues, was completed June 9, 2011. (See documents #233, #234, #243, #244, and #245).

Restitution is a form of ancillary equitable damages relief available to effect complete justice under Section 13(b) of the FTC Act for violation of Section 5 of the Act and the TSR. *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001); *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). Complete disgorgement of Defendants entire gross revenues between January 1, 2004 and August 31, 2008 is not appropriate, however, unless FTC proves that such gross revenue is a "reasonable approximation" of Defendants' gains from violations of Section 5 of the FTC Act. *FTC v. Verity. Intern , Ltd.*, 443 F.3d 48, 67 (2nd Cir. 2006); *FTC v. Figgie Intern., Inc.*, 994 F.2d 595, 607 (9th Cir. 1993).

Appendix C

The Court finds that FTC has not proved that relief in the form of restitution by complete disgorgement of profits is necessary to redress injury to the consuming public demonstrated in this case.

The evidence adduced during five days of testimony did not establish the necessary link between Defendants acts in violation of Section 5, and PBS's entire gross revenues between January 1, 2004 and August 31, 2008. Instead, a preponderance of the evidence shows that although Defendants' conduct in violation of Section 5 of the FTC Act warranted issuance of the Permanent Injunction in this case, FTC has failed to establish that all, or even a significantly quantifiable number of sales or collections warrant wholesale disgorgement.

Additionally, although full reimbursement to all complaining customers might provide a reasonable approximation of revenues received by Defendants in violation of Section 5, the evidence adduced demonstrates that it is either impossible or impracticable to locate and reimburse those individual customers. *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1944).

In granting Summary Judgment and issuing the Permanent Injunction in this case, the Court found Defendants' sales process violated Section 5 of the FTC Act. The Court did not find, however, that Defendants' customers did not receive the magazines ordered, nor did it find that most of the complaining customers ever paid any money to Defendants. Indeed, the record before the Court strongly suggests that most customers who

complained of misrepresentation by Defendants elected to withhold payment even after Defendants collection efforts.

The Court concludes disgorgement here is warranted only to the extent of net revenues received by PBS as a result of its violation of Section 5 of the FTC Act. After considering all of the evidence presented, the Court finds that the analysis provided by Defendants expert, Dr. Gregory Duncan, that $191,219.00 is a reasonable measure of equitable damages to which Plaintiff FTC is entitled to recover on behalf of Publishers customers. Not all Defendants in this action are, however, jointly and severely liable for payment of equitable damages.

With respect to the knowledge of individual Defendants of deceptive acts or practices in violation of Section 5, the Court finds insufficient evidence to hold Defendant's Persis Dantuma, Brenda Dantuma Schang, Dirk Dantuma and Jeffrey Dantuma individually liable for equitable monetary relief in this case. The record is sufficient, however, show that in addition the corporate Defendants, and individual Defendants' Edward Dantuma and Dries Dantuma had actual knowledge or were recklessly indifferent to the alleged violations of Section 5.

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IT IS THEREFORE ORDERED that Defendants' Publishers Business Services, Inc., a corporation; Ed Dantuma Enterprises, Inc., a corporation, also dba Publishers Direct Services and Publishers Business Services; Edward Dantuma; and Dries Dantuma shall pay to Plaintiff Federal Trade Commission (FTC) the sum of $191,219.00 as and for equitable damages.

IT IS FURTHER ORDERED that Clerk of Court shall forthwith enter **JUDGMENT** accordingly.

DATED: July 25, 2011.

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

APPENDIX D — RELEVANT STATUTORY PROVISIONS

15 U.S.C.A. § 53

§ 53. False advertisements; injunctions and restraining orders

Currentness

(a) Power of Commission; jurisdiction of courts

Whenever the Commission has reason to believe--

> (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12 [15 USCS § 52], and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5 [15 USCS § 45], and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5 [15 USCS § 45], would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of

the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court

of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Service of process; proof of service

Any process of the Commission under this section may be served by any person duly authorized by the Commission--

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Exception of periodical publications.

Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals--

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

> (2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

15 U.S.C.A. § 57b

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

Currentness

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a) [15 USCS § 45(a)]), then the Commission may commence a civil action against such person, partnership,

or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1) [15 USCS § 45(a)(1)]) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnership, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 5(b) [15 USCS § 45(b)] has become final under section 5(g) [15 USCS § 45(g)] with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) [15 USCS § 45(b)] with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1) [15 USCS § 45(g)(1)], in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

Appendix D

(d) Time for bringing of actions

No action may be brought brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) [15 USCS § 45(b)] which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.