IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2402

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,
v.
MAGAZINE SOLUTIONS, LLC, UNITED PUBLISHERS' SERVICES, INC.
AND JOSEPH MARTINELLI
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Pennsylvania
No. 2:07-CV-00692-DWA

RESPONSE BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

Appellee, the Federal Trade Commission ("FTC" or "Commission") believes this case is readily resolved under well-established precedent. This Court, however, has not yet had occasion to issue a published decision reviewing a district court's finding of liability under Section 5 of the FTC Act. The Commission, therefore, respectfully requests oral argument.

STATEMENT OF JURISDICTION

The FTC, an agency of the United States government, brought suit against Joseph R. Martinelli ("Martinelli"), United Publishing Services, Inc., and Magazine Solutions, LLC ("Martinelli's companies")[1] and two associates of Martinelli not party to this appeal, in the United States District Court for the Western District of Pennsylvania. The FTC sought a permanent injunction and ancillary equitable relief as remedy for Martinelli's deceptive telemarketing of a coupon offer program–conduct that violated Section 5 of the FTC Act, and which also ran afoul of various provisions of the Telemarketing Sales Rule ("TSR"). The district court exercised jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. § 53(b).

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[1] The short-hand reference "Martinelli" will be used when it is unnecessary to distinguish between Martinelli and his companies.

Judgment was entered for the Commission on March 15, 2010. A.35-36.[2] On April 15, 2010, the district court granted the FTC's motion to clarify the judgment and denied defendants' motion to amend. A.37-39. Notice of appeal was timely filed on May 13, 2010. A.1. This Court's has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court clearly erred—when the record was replete with examples of consumers who failed to receive *any* value from coupons and no evidence was adduced of a single customer who was able to redeem coupons in an amount sufficient to cover even the cost of magazine subscriptions—in finding that Martinelli violated Section 5 of the FTC Act by falsely representing to consumers that participation in the Read-N-Save program would allow them to obtain valuable coupons worth over $1,000 in savings.

2. Whether the district court abused its discretion in awarding the FTC equitable restitution from Martinelli and his companies in the amount of $4,782,011—representing net revenues calculated as receipts directly attributable to false representations about the promised valuable coupons, less the wholesale cost of

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[2] Items in the district court's docket are referred to as "D.xx." Items in the Appendix are referred to as "A.xx." Appellants' opening brief is cited as "Br." Volume I of the Appendix has overlapping pagination with Volume II for pages 1 through 39. Unless otherwise noted, all references to these pages are for Volume I.

magazines and refunds paid to customers—when governing precedent confirms a district court's equitable discretion to award restitution of gross revenues generated from the misconduct.

STATEMENT OF THE CASE

A. Nature of the Case

This is a deceptive marketing case. On May 23, 2007, the Commission filed its complaint for injunctive and other equitable relief alleging that Martinelli and his co-defendants violated Section 5 of the FTC Act, 15 U.S.C. § 45, and related provisions of the TSR, 16 C.F.R. Part 310, by deceptively marketing the Read-N-Save program, a purported coupon savings program wherein thousands of consumers, particularly new mothers, were persuaded to sign up for magazines by Martinelli's false promises of valuable savings coupons worth over $1,000. A.3518-36

On June 20, 2007, the district court (per Donetta W. Ambrose, C.J.) preliminarily enjoined defendants from soliciting new customers. D.35. On August 16, 2007, the court extended the preliminary injunction to bar Martinelli from collecting payments from existing consumers in fifteen states unless they obtained the written agreements required by state law. A.3575-78.

On January 16, 2008, the district court found Martinelli and his companies in contempt of its August 16, 2007 Order, because they had continued to collect

payments from consumers without obtaining the written agreements required by law, and ordered compensatory and injunctive relief. A.3568-74. On that same day, the court granted the FTC's motion for an asset preservation order, after finding that Martinelli had improperly dissipated corporate assets by using corporate funds for personal expenditures. A.3564-67.

On December 1, 2008, the district court granted partial summary judgment for the Commission on five counts of the seven-count Complaint. A.3544-54. Martinelli does not challenge these rulings. In assessing liability, the court found that Martinelli's companies operated as a common enterprise and were therefore jointly liable for any conduct that violated the FTC Act or the TSR. A.3555. The district court likewise concluded that Martinelli was individually liable for the actions of his companies, based upon undisputed evidence of his knowledge, authority and control. A.3555-56.

A three-day bench trial was held on the remaining liability issues and on remedy. On March 15, 2010, the district court entered detailed findings of fact, conclusions of law, and a final order of judgment in favor of the FTC, permanently enjoining Martinelli and his companies from engaging in any further telemarketing programs involving the sale of magazines or marketing of coupons, and awarding restitution of $4,782,011. A.3-36. As Martinelli had already been found personally

liable for all corporate violations, the district court concluded that he was jointly and severally liable, along with his companies, for the entire amount of restitution ordered. A.31 (¶¶ 169-70). The district court denied Martinelli's motion to amend the judgment, and, with minor clarifications not relevant to this appeal, entered final judgment on April 15, 2010. A.37-39.

B. Facts and proceedings below

1. Background

Between April 2002 and March 2007, Martinelli and his companies engaged in a deceptive telemarketing scheme, promising consumers they would receive at least $1,000 in valuable shopping coupons if they agreed to purchase a magazine subscription service. *E.g.* A.2333-2589. Consumers were pitched in a series of three staged calls, made primarily to new mothers or families with young children. A.3065-66. All three calls emphasized that participating consumers would receive $1,000 worth of valuable coupons for savings on brand name household items. A.1612-15. Written materials sent to consumers promised that these coupons savings would more than compensate for the cost of magazines. *See, e.g.*, A.1641; A.1882. Martinelli prepared these marketing materials. *See, e.g.*, A.3069-70, 3089, 3138-39, 3152, 3159, 3165-66.

In the first call, telemarketers read from the "Qualification Script," A.3070,

telling consumers: "[n]ow don't get worried ... I'm not selling anything today," and announcing that they have been selected to participate in Magazine Solutions' "special Read-N-Save Program," for which, if the consumer qualifies, he or she will receive $1000 in coupons that are good "from A to Z," A.1612. Consumers are told, "I am sure you could use ... the extra money," and are assured that there is no "catch." *Id.* Telemarketers then ask consumers to participate in a "survey," asking a series of questions about employment and financial status, before advising consumers that they will "call you in several days and let you know ... if you are eligible ... to receive the $1,000 in shopping coupons." *Id.*[3] Although magazine subscriptions are mentioned fleetingly during the middle of the conversation, *id.*, many consumers did not realize that anything was being sold during this first call as, "[n]o mention is made that the purpose of the call is to sell magazines." A.3550.[4]

In the second call, Martinelli's telemarketers read from an "Advertising Script,"

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[3] Although appellants suggest that one purpose of the qualification call is to see whether the consumer had any reading interests, Br. at 6, there is nothing in the actual qualification card that telemarketers filled out indicating that interest in reading was a qualification, nor was it stated in the instructions to the telemarketers. *Compare* A.2593 *with* A.1924.

[4] The district court found that Martinelli violated the disclosure requirements under the TSR, 16 C.F.R. § 310.4(d)(2), because "[a]t no time before this substantive information about the coupons is given do the Defendants disclose that they are selling magazines." A.3550-51.

A.3081, informing potential customers that they are "eligible," and have been "carefully selected from thousands of residents nationwide to participate in our Read-N-Save program," A.1613. Consumers are told that if they agree to let Read-N-Save send them magazines, at a cost of "$2.99 each week payable monthly for the next 60 months," the program will "promise to validate your $1,000 grocery coupon book," with coupons that are "good for everything from A to Z," and can be used "EVERYWHERE you shop, as often as you like." *Id.* Consumers are told that coupons can be redeemed through a certificate book, which "will never expire," and that "you can't lose with coupons you choose." *Id.*

In the third call, telemarketers read from the "Closing Script." A.3089. Consumers are once again promised that "if they agree to let Read-N-Save America send [the magazines] . . . for just $2.99 each week payable monthly for the next 60 months . . . we will promise to validate your $1000 coupon book," with coupons "good for everything from A to Z" that can be used "EVERYWHERE you shop, as often as you like." A.1614. Consumers agreeing to electronic payment are informed that the telemarketer has been authorized to "give you an additional . . . $800 in coupon certificates... This now brings your total rewards to $1800." *Id.* The total value of the coupon book is touted as greater than the total subscription cost for the magazines, provided all coupons are redeemed, and consumers are urged to "start

using the coupons as soon as you get them, the savings are wonderful!" A.1615.

Over the course of this last call, program costs are described in a variety of ways, and with different billing intervals. A.1614-15. In granting partial summary judgment, the district court held, in a ruling not challenged on appeal, that "[t]here can be no doubt" that these differing descriptions, "made over the phone without benefit to the consumer of any written materials to review," "are neither clear nor conspicuous," and therefore violated the TSR provision requiring full and truthful disclosure of the total cost of goods before requesting payment information, 16 C.F.R. § 310.3(a)(1)(i). A.3551-52.

At the end of the closing call—during the only tape-recorded portion of any call—telemarketers discuss the terms of payment, and state that the value of the coupon books is $1800 or $1200 (depending on whether the consumer gave payment information). A.1615.

After the tape recording was completed, consumers typically were mailed a "Welcome Package" containing a "Mail Order Agreement," ("MOA"), a gift form, an envelope, a reader's guide detailing the magazines, and a sample coupon book. A.9 (¶ 31); A.2905-06; *see also, e.g.*, A.1868-87 (sample materials provided in interrogatory responses); A.1616-57 (materials received by Laura Biel, whose trial testimony regarding these materials appears at A.19-26 (Vol. II)). Martinelli refers

to the MOA as a "nonsignature agreement." Consumers do not sign the MOA to enroll in the Read-N-Save program. A.3151; 3167-68.

Written materials provided to consumers, like the phone scripts, were replete with promises of valuable coupons for savings of $1,000 or more. "[T]he MOA contained a pictorial flow chart explaining that customers are to fill in $1800 worth of certificates, mail those certificates to a redemption center, receive the chosen coupons and redeem the coupons for groceries and household items – representing that '$1800 in savings equals your favorite magazines plus more than $1000 to spend on your family." A.9 (¶ 32 (quoting A.1882)); A.1641. Similar language regarding the coupons and their value is contained in letters that Martinelli sent to consumers, *See, e.g.*, A.2980. Indeed, even after customers complained or tried to cancel, responses to complaints persisted in stating that customers could experience "incredible savings" through coupon redemption. *See, e.g.*, A.2656. The coupon book sent by Martinelli's companies contains "Certification Certificates," which require the consumer's signature to "activate" the coupon book, and state that the coupon books have a "**guaranteed** redemption value of $1800" with a promise that the coupons "will pay for your magazine service with over $1,000 of extra money for you." A.9 (¶¶ 33, 34); *see also* A.1672; A.2365-66 and A.2373.

Consumers' interest in the Read-N-Save program derived from the coupons

that they believed would be valuable. *See, e.g.*,A.2366-67, 2369; A.2395-96, 2397; A.2412, 2414-15; A.2495; A.2335-38; A.16, 42 (Vol. II). The only reason consumers agreed to enroll in Martinelli's Read-N-Save program was that they hoped to receive the savings promised by such coupons; they did not enroll because of a desire to receive magazines, A.10 (¶ 35).[5]

The coupon process proved cumbersome and unreliable. Martinelli and his companies received hundreds of consumer complaints about the coupon offer program, both directly, and through consumer protection agencies, from consumers:

- who received no coupons because they did not receive the coupon ordering book or the current ordering book and therefore could not order coupons, *e.g.*, A.2735; A.2395-96; A.2479; A.2495-96; A.2538;

- who complained that the process for ordering coupons was time consuming and not what the consumer had expected, or the coupons offered were not as expected, *e.g.*, A.2736; A.2366, 2368-69; A.2491; A.2559;

- who stated that they completed the coupon order form, sent away for coupons, but received no coupons, *e.g.*, A.2735; A.2366-67; A.2412, 2413-15; A.2536-37; A.2576; and

- who stated that they received expired, soon to expire, duplicate, or

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[5] Indeed, many customers billed by Martinelli were under the impression that they "will never have to pay anything," believed that the "magazine will pay for itself." A.488; *see also e.g.*, A.563 (customer believed she would receive coupons simply for participating in a survey); or were billed even though they did not agree to join the program; *see, e.g.* A.530-31; A.580.

unrequested coupons clipped from the Sunday paper, *e.g.*, A.2367; A.2488-89; A.2535-38.

Some consumers, once they received the actual coupon ordering book, discovered the limited value of the coupons available to redeem, and realized the steps necessary to obtain the coupons, did not think it was worth their time, effort or the expense to actually order coupons. *See, e.g.*, A.2469; A.2491; A.10 (¶¶ 36-38). Many consumers, like Laura Biel and April Rogers who testified at trial, enrolled in the program to obtain brand name coupons for savings on specific products, upon demand, and were dismayed to learn that the coupon redemption program that they had paid handsomely for provided no such savings, and also required significant effort and expense to redeem. *See* A.10-11 (¶¶ 36-42)

In addition to complaining directly to the source, consumers also filed complaints about the Read-N-Save program with various consumer protection agencies, including the Better Business Bureau of Western Pennsylvania ("BBB"), and Attorney General Offices in Pennsylvania and North Carolina. Echoing familiar refrains, consumers complained that:

- they never received any coupons or coupon vouchers, *e.g.,* A.463; A.488; A.500; A.517; A.563; A.1484, 1500; A.2636;
- they received coupons that were not the ones they ordered or that had already expired, *e.g.*, A.692; A.754-55; A.777; A.876; A.2622; and

- the coupon redemption process was unduly complicated or was otherwise not what they had expected, *e.g.*, A.694 (coupons cut out of the Sunday newspaper); A.476 (little value; threw them out); A.481(coupons were for ridiculously expensive items); A.498-99 (not happy with coupon program); A.504 (far too complex to use); A.505 (coupons not working; received too close to expiration date).

Although Martinelli testified that consumer complaints were unfounded and that he had few problems or complaints with his coupon provider, *see, e.g.,* A.13-15 (¶¶ 57-58, 62); A.300-01, this testimony was expressly discredited by the district court, particularly in light of a 1997 lawsuit by the Commonwealth of Pennsylvania, chronicling the scores of complaints about the coupon program, and the unexpected difficulties that consumers had in obtaining coupons, *if* they were able to obtain them at all. *See* A.14-15 (¶ 62); A.1700-53 (complaint); *see also* A.1754-83 (consent order in same).

Unsurprisingly, many customers, upon discovering that the program did not deliver on its promise of valuable coupons, tried to cancel. Over one-third of customers who were sent the MOA were able to cancel before receiving any magazines. A.18-19. Others, however, were not so lucky. And, even though Martinelli and his colleagues knew that the MOA, a "nonsignature agreement," was not legally enforceable, they nonetheless harassed and threatened customers to coerce continued payment, jeopardized consumers' credit ratings, and threatened to initiate

legal action when they had no intention of so doing. *See* A.3544-48; *see also*, *e.g.*, A.528; A.853; A.854-55; A.2403-20; A.2428-32; A.2512-15; A.2554-57; A.2558-62; A.2563-74; A.1575-77. Form letters sent to customers who tried to cancel or refused to pay warn: "Please be advised that we cannot cancel your contract.... This conversation was recorded with your permission and became your ELECTRONIC SIGNATURE." *See, e.g.*, A.2385; A.2408. Other letters threaten to report consumers' delinquent status to credit bureaus, and Martinelli did, in fact, besmirch the credit reports of consumers who refused to pay. *See, e.g.*, A.2410, A.2558-62; A.2575-77. At summary judgment, the court below ruled that these actions, too, violated the FTC Act and the TSR. A.3544; A.3547-49.

Ultimately, Martinelli charged most customers a total of $777, typically billed two months at a time at $25.90, for a total of 30 payments. *See, e.g.*, A.1881; A.3155-56. Accounting for amounts refunded as a result of the earlier contempt finding, Martinelli and his companies received $5,541,344 from consumers enrolled in the Read-N-Save program between 2003 and 2007, the period covered by the Commission's complaint. A.17 (¶ 76). Costs to Martinelli for the magazines, during this same time period, amounted to $759,333. A.17 (¶ 77).

2. Course of the Proceedings Below

On May 23, 2007, the Commission filed a seven-count complaint alleging that Martinelli and his co-defendants violated the FTC Act and related provisions of the TSR, by inducing new mothers and others to subscribe to magazines through their false representations that consumers would save $1,000 or more in household purchases with the program's valuable coupons. A.3522-28. The complaint further alleged that when consumers, after discovering that the promised coupons were not valuable, tried to cancel their memberships or stop payment, Martinelli extracted further payments by falsely claiming a binding agreement where none existed, often following up with empty threats of legal action that they knew to be groundless. A.3528-29.

Specifically, Counts I through III alleged that Martinelli and his co-defendants violated Section 5 of the FTC Act, 15 U.S.C. § 45(a), by falsely representing: (I) that consumers would receive valuable coupons worth at least $1,000; (II) that consumers were legally obligated to pay for services; and (III) an intent to initiate legal action to collect payment. The remaining four counts alleged violations of the TSR: (IV) failure to promptly disclose that the purpose of calls was to sell goods and services, 16 C.F.R. § 310.4(d)(2); (V) failure to clearly and conspicuously disclose the total cost of purchase, § 310.3(a)(1)(i); (VI) making false or misleading statements to

induce payment for goods or services, § 310.3(a)(4); and (VII) misrepresenting material aspects of the nature and terms of their cancellation policy, § 310.3(a)(2)(iv). A.3518-36; *see also* A.5-6. The only count here at issue is Count I—alleging violations of the FTC Act based on misrepresentations that consumers participating in Martinelli's Read-N-Save program can receive valuable coupons.

On June 20, 2007, the district court held a preliminary injunction hearing wherein Martinelli agreed to entry of a preliminary injunction prohibiting misrepresentations connected to future sales that violated the FTC Act or the TSR. A.3539; A.3575. On August 16, 2007, the court further enjoined Martinelli from collecting monies from existing customers in any state where a telephone solicitation statute was in place, absent proof that consumers had signed the written agreement required by state law. In extending the preliminary injunction, the court found that defendants had produced "no defense" to the FTC's claim that their collections violated "numerous state solicitation statutes which, on the whole, invalidate any telephone solicitation sale not confirmed by a written agreement containing the consumer's signature," and that there was "no evidence that Magazine Solutions has any written agreements containing the consumer's signature." A.3576.

Martinelli, however, failed to comply with this court order. On January 16, 2008, the district court found that the Commission had "established by clear and

convincing evidence that the Defendants have violated the August 16th Order by collecting payment and attempting to collect payment from consumers without first obtaining a written agreement signed by consumers agreeing to the Defendants' program. Indeed the Defendants admit as much." A.3569. Accordingly, the court found Martinelli and his companies liable for their contempt, and further ruled that the Commission was entitled to compensatory relief on behalf of consumers whose money was taken in violation of the preliminary injunction, as well as injunctive relief to ensure compliance with the August 16th Order. *Id.* Consumer refunds totaling $24,458.00 were eventually paid out as a result of this ruling. A.17 (¶ 75).

The same day that Martinelli and his co-defendants were found in contempt, the district court, after reviewing the FTC's evidence on dissipation of corporate assets, ordered the defendants to preserve corporate assets to "preserve the Court's authority to grant effective final equitable monetary relief for consumers." A.3564. Noting that Martinelli had "made numerous arguments regarding loans that [he] made to Magazine Solution," but "failed to provide any documentation in support of [his] assertions," the court agreed with the FTC that "payments from corporate accounts for child support, tuition, haircuts and music lessons are not legitimate expenses paid in the ordinary course of business." A.3564.

Partial Summary Judgment: Much of this case was resolved on summary judgment; none of the district court's summary judgment rulings have been directly challenged on appeal. On December 1, 2008, the district court granted summary judgment for the FTC on Count II (misrepresenting that consumers are legally obligated to pay, in violation of Section 5 of the FTC Act); Count III (misrepresenting that they intended to initiate legal action, in violation of Section 5 of the FTC Act); Count IV (failing to disclose the purpose of the call, in violation of the TSR); Count V (failing to disclose the total cost of the product or service, in violation of the TSR), and Count VI (misrepresentations designed to induce payment in violation of the TSR, except for that part of Count VI related to the coupon program). A.5.

The district court also determined that Martinelli's companies–Magazine Solutions and United Publishers–operated as a common enterprise and were jointly liable for any violations. A.3555; A.5 (¶ 15). This determination was based on the FTC's undisputed evidence that Magazine Solutions and United Publishers were both owned by Martinelli, run by the same people, shared the same office space and employees, did business under each other's names, shared the same customer base, and intermingled funds. A.3555.

The district court further ruled that "Martinelli should be held personally liable for any and all injuries caused by the Corporate Defendants," as he was the "owner

and sole officer of United Publisher[s] and the only member of Magazine Solutions, and as the individual who formulated, directed, controlled and/or had the authority to control their acts and practices." A.3556. "[S]ignificantly, Martinelli d[id] not dispute his individual liability for the injuries caused by United Publishers and/or Magazine Solutions." *Id.*[6]

The district court reserved judgment on Count I. Although ample evidence supported the Commission's contention that Martinelli and his companies misrepresented the value of the coupons available through the Read-N-Save program, the court noted at least some evidence suggesting that consumers' failure to obtain coupons might be based on something other than deception. The court declined, therefore, to find as a matter of law "at this juncture" that the representations regarding the value of the coupons were deceptive. A.3543-44. The court likewise found that genuine issues of material fact prevented the entry of summary judgment on Count VII, misrepresentations about the cancellation policy. A.3555. Deferring its ruling on final remedy, the court maintained the preliminary injunction. A.3563.

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[6] The district court also held James Rushnock individually liable for Counts II and III (misrepresentations regarding existence of a binding contract and threat of legal action) but reserved judgment on the individual liability of Barbara DeRiggi, Martinelli's other associate.

Trial and Final Judgment: Over the course of a three-day bench trial, the district court heard testimony on the remaining liability issues and on remedy. Witnesses for the FTC included two consumers who personally recounted their dashed expectations with the Read-N-Save program, as well as Darlene Westfall, of the Pennsylvania Attorney General's Office, and Warren King, President of the BBB, both of whom testified regarding the many consumer complaints their agencies had received about Martinelli's operation. A.102-17 (Westfall); A.163-81 (King).

All told, the court received "overwhelming documentary evidence indicating that the Defendants misrepresented the value of the coupons to their consumers." A.11-12 (¶ 44). Warren King testified that, as of April 2007, Magazine Solutions ranked 7th among the companies with the most complaints filed out of the roughly 25,000 companies for which the BBB maintained records. A.171. Earlier testimony revealed that the written complaints received by the BBB, the FTC, and other consumer protection agencies were merely the tip of an iceberg, as generally "one percent or less of consumers who are injured by a practice actually take the trouble to file a written complaint." Tr. from Prelim. Inj. Hr'g of 6/20/2007, at 56 (testimony of FTC Investigator Loretta Kraus).

The district court found that Martinelli "did explicitly represent to consumers that they will receive coupons worth over $1,000." A.6 (¶ 21). Sales scripts of the

three unsolicited calls demonstrated that "the Defendants are not selling a magazine program, but a coupon program that will pay for some magazine subscriptions as a side benefit." A.7 (¶ 23). The court chronicled the many express representations promising consumers that the Read-N-Save program would provide access to discount coupons worth $1,000 or more. *See* A.7-10 (¶¶ 24 - 34). The court further found that consumers relied upon these representations in signing up for the program, and that "consumers subscribe to the [Read-N-Save] program in order to obtain the coupons—which are represented to yield more money than the cost of the magazines." A.6 (¶ 21).

Evidence was presented from many consumers who discovered that the promise of valuable coupons was false. At trial, Laura Biel, a new mother living in a rural area, testified that she enrolled in the Read-N-Save program due to her interest in savings on specific brand-name baby products (the only ones available at the stores near her house), and was "extremely disappointed" to discover that coupons were not available for the products she wanted, even though she had enrolled based on the promise that they were. A.10 (¶¶ 36-37); A.16-29 (Vol. II). Biel was not interested in the magazines, and never attempted to redeem the coupon certificates because the coupons did not cover the products she needed. A.10 (¶¶ 36-38); A.14-37 (Vol. II).

April Rogers, the second consumer to testify at trial, "also found the

Defendants' representations about the value of the coupons to be enticing," A.10 (¶ 39). Like Biel, Rogers was a new mother and was "particular about the products she bought." A.11(¶ 39). Upon receiving the coupon vouchers, she realized that the coupons would be made available only for general categories of things, such as "cleaners" or "baby items," but not for the specific brand name items that she had been promised. A.11(¶ 40); A.40-44 (Vol. II). Rogers nonetheless repeatedly tried to redeem the coupons, even though the coupons did not cover the promised products, and even when she had to pay unexpected fees to redeem the vouchers. A.11 (¶¶ 41-42); A.44-48 (Vol. II). Despite her repeated attempts to redeem the vouchers, and despite repeated complaints to Martinelli's companies, Rogers never received any coupons. A.11 (¶¶ 42-43); A.47-48 (Vol. II).

Warren King from the BBB related the strikingly similar experience of Tabitha Scoggins, whose complaint was characterized as "fairly typical," A.170. Scoggins engaged in "fruitless" attempts to redeem coupons, and also complained that "Defendants failed to disclose that to redeem the coupon vouchers, she would have to pay a service and a shipping fee," which the district court found to "obviously ... undercut the 'value of the coupons." A.12 (¶ 45); *see also* A.2610-14. When coupons were received at all, they were not as requested— *e.g*, Scoggins requested coupons for batteries, but received coupons for hearing-aid batteries even though Martinelli's

companies knew she did not need them. A.169; A.2610.

Darlene Westfall, from the Pennsylvania Attorney General's office, likewise testified about consumer complaints about how Martinelli's Read-N-Save program did not live up to their expectations, their surprise at the steps needed to redeem coupons, and that, if and when they did receive coupons, the coupons were sometimes already expired or not as ordered. A.105; *see also* A.1248-1609 (53 consumer complaints received by the Pennsylvania Attorney General's Office). According to Westfall, the complainants said that they were told the coupons would pay for the magazines, and were surprised to learn of the difficulties in redeeming coupons. A.105-06. Some consumers complained that they never received coupons at all, while others claimed coupons had expired by the time they received them. *Id.*

In its findings of fact, the district court highlighted the experience of other consumers as well, a mere sampling of the hundreds of complaints in the record, including consumers who: received coupons, but could not use them because they were "no good," A.12 (¶ 48); opted not to redeem coupons because the redemption process proved "too cumbersome," *id.* (¶ 49); did not receive the vouchers needed to redeem coupons, A.12-13 (¶ 50); after agreeing to the program, "realized that the coupons were of little to no value * * * and complained that they did not cover the cost of the magazines much less save * * * additional money," A.13 (¶ 51); found "that the

actual coupons did not correlate at all with the sample list of coupons that Defendants represented that they had" and that the coupons were "not useful and had no value," A.13 (¶ 52); and who sent in vouchers, but whose envelopes were returned with no coupons, A.12 (¶ 55). The court also found the exhibit containing the more than 100 complaints received by the BBB to be "replete with examples of customers who did not receive the value of the coupons promised to them." A.13 (¶ 56).

Other consumer complaints, not explicitly referenced in the district court's opinion, told the same story. See, e.g., A.2333-2589 (consumer declarations submitted by the FTC); A.2615-2724) (complaints received by the North Carolina Attorney General's Office). The court readily found, therefore, that the "clear evidence of record indicates that customers did have valid complaints about not receiving coupons, about misrepresentations regarding the types of coupons actually available, and about even the availability of coupons." A.14 (¶ 60).

The trial court, moreover, found Martinelli's "handling of the coupon provider portion of their program to be particularly egregious." A.14 (¶ 61). Martinelli and his companies marketed their coupon offer program for almost a year during a period when their coupon provider, Coupon Connection of America ("CCOA"), was out of business. A.15-16 (¶¶ 63-68); *see also* A.194-95. Martinelli did not switch to another coupon company–Grocery Savers–until nearly a year after CCOA filed for bankruptcy,

and only those customers who complained about difficulties in receiving coupons were informed of this change. A.15-16 (¶¶ 63 - 68). The district court found that the defendants were "unable to identify a single consumer who received *any* coupons at all between July of 2005 and July of 2006." A.16 (¶ 69).

Martinelli and his co-defendants, in fact, failed to identify "a single customer who was able to redeem coupons in an amount sufficient to cover the cost of the magazine subscriptions during any period of time relevant to this litigation." A.16 (¶ 70). And the district court found the record to be "replete with examples of consumers who failed to receive *any* value from the coupons much less the savings as represented by the Defendants." *Id.* (¶ 71).

The "blame the victim" explanation offered by Martinelli and his co-defendants, although initially sufficient to withstand summary judgment, was roundly rejected after trial. The district court explicitly found "lack[ing in] credibility," testimony "that customers' failure to obtain coupons stemmed from such things as incorrect addresses or failure to apply proper postage or to otherwise follow directions * * *, in light of the overwhelming number of complaints." A.14 (¶ 59).

In the face of this extensive evidence, and applying well-established precedent, the district court concluded that the FTC had established liability for deceptive acts or practices under Section 5 of the FTC Act, 15 U.S.C. § 45. A.27 (¶¶ 148-49).

Specifically, the district court found that the advertising scripts and written materials provided to customers expressly represented that consumers would receive valuable coupons as a result of participating in the Read-N-Save program. A.6 (¶ 21); A.8-10 (¶¶ 29-34). These promises of "valuable" coupons, the district court concluded, were "likely to mislead consumers acting reasonably under the circumstances," A.28 (¶ 152), because Martinelli's customers "did not receive valuable coupons or valuable coupon certificates as a result of participating in the Defendants' Read-N-Save program [and] the Defendants misrepresented the value of the coupons the consumers would receive." A.16 (¶ 72). The court likewise concluded that the FTC had established that the representations regarding the "valuable nature of the coupons" were material, A.28-29 (¶ 155), noting that a misrepresentation is material "[i]f consumers are likely to have chosen differently but for the deception." A.28 (¶154 (citing *FTC v. Southwest Sunsites, Inc.*, 105 F.T.C. 7, 149 (1985), *aff'd* 785 F.2d 1431 (9th Cir.))). The representations were material because "[c]onsumers agreed to enroll in the [Read-N-Save] program because they wanted to receive the savings the coupons offered. They did not enroll because of a desire to receive magazines." A.10 (¶ 35).[7]

[7] The district court ultimately determined that the misrepresentations regarding the cancellation policy were not material, because, of the 19,572 customers who were sent the MOA between 2002 and the time of trial, 7,413, or more than one-third, cancelled within the appropriate cancellation period (3 or 7 days) or before the magazine subscriptions was placed. A.18-19 (¶¶ 84, 89-90).

In determining the appropriate equitable remedy, the court first ordered permanent injunctive relief prohibiting Martinelli and his companies from engaging in any further telemarketing programs involving the sale of magazines or the marketing of coupons, and requiring remedial measures related to the other liability findings. A.33 (¶¶ 178-79). A permanent injunction was warranted, in the court's view, due to "the cognizable danger of recurrent violations or some reasonable likelihood of future violations,"A.32 (¶ 175), as Martinelli and his companies had "been sued by numerous states for similar conduct in the past, but declined to change their business practices," *id.* (¶ 176).

The court awarded restitution of $4,782,011, representing only the *total net revenue* received by Martinelli and his companies that was fully attributable to the misrepresentations made regarding valuable coupons. A.33 (¶ 181-82). In determining this amount, the district court exercised its equitable discretion and declined to award, as the FTC had urged, the full amount of gross revenues attributable to the misrepresentations, less the refunds already provided as a result of the court's contempt finding. Instead, the court netted out the wholesale cost of magazine subscriptions, $759,333. A.17 (¶¶ 77-78); A.33 (¶ 181).[8] No further relief

[8] Appellants urged the district court to reduce the award of monetary relief below, repeatedly arguing that the "court had broad equitable powers in fashioning the appropriate relief in this case," D.228 at 35; *accord* D.234 at 5-6 (court has

was granted, as the award encompassed any relief that would have been provided under the other counts. A.33-34 (¶ 183).

In later denying Martinelli's post-judgment plea to limit the amount of restitution for which he would be personally liable, the district court noted that "Martinelli's W-2's did not necessarily reflect the money he derived from [his companies]," and that Martinelli "used the corporate ledgers as his own personal bank accounts, using corporate funds to satisfy personal obligations." A.39.

STANDARD OF REVIEW

This Court applies a deferential standard of review to the district court's finding of fact, after trial, reversing only for clear error. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 201 (3d Cir. 2005). A trial court's findings of fact based on live witness testimony, moreover, are accorded special deference. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948). Questions of law are reviewed de novo. *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005).

An abuse of discretion standard applies to the district court's choice of the appropriate form and amount of ancillary equitable monetary relief. *Id.* at 229-30.

"broad equitable powers in fashioning the appropriate relief ... and court [should] award relief consistent with the actual damages established at trial") and D.241 at 3 ("courts may order a wide range of ancillary relief for a violation of the FTC Act").

Reversal under the abuse of discretion standard is possible only when the district court's action was "arbitrary, fanciful or clearly unreasonable." *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir. 2001). This Court "will not disturb a district court's exercise of discretion unless no reasonable person would adopt the district court's view." *Id.* (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The district court did not err in finding Martinelli and his companies liable under Section 5 of the FTC Act for falsely promising consumers that the " Read-N-Save program" would provide them with coupons of substantial value. Appellants cannot evade the clear evidence that: 1) Martinelli's Read-N-Save program represented to consumers that participation in the program would entitle them to over $1,000 of valuable coupons; 2) this representation was likely to mislead, because no such valuable coupons were available, and 3) the misrepresentation was material, as consumers signed up for the program in order to receive valuable coupons.

Overwhelming evidence demonstrates that Martinelli's Read-N-Save program convinced consumers to sign up for magazine subscriptions in which they otherwise had little interest by falsely promising that any subscription costs would be more than compensated for by coupons worth over $1,000 of savings on household necessities. Hundreds of consumer complaints confirmed that, after enrollment, consumers rapidly

discovered that the Read-N-Save program did not deliver its promised savings, and that the coupons available were worth less than those freely available in the Sunday paper. A large share of customers canceled their memberships right away (if they were not thwarted from doing so by Martinelli's false threats of legal action). Others never bothered to try to redeem the coupons after discovering how cumbersome the process was and that the coupons were not as valuable as promised. Still others made redemption efforts but without success, because the coupons, *if and when* they arrived, were frequently expired, did not conform to the requests made, or were otherwise worthless. *Part I.A.*

Martinelli's efforts to draw this Court's attention to isolated pieces of individual evidence are unconvincing on their own terms, and in any event insufficient to demonstrate clear error on appeal, as a reviewing court may not overturn a ruling based on its own reweighing of the evidence. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1943). Martinelli's blame the victim approach is likewise unavailing. As the district court found, consumers' failure to redeem coupons, far from proving that the promised savings existed, demonstrate the falsity of Martinelli's promises that valuable coupons were available through the Read-N-Save program. The notion that consumers did not receive coupons because they did not try hard enough, moreover, was expressly rejected by the district court. *Part 1.B.*

II. Martinelli's assertion that the district court lacks authority to grant equitable monetary relief was not raised below, and is therefore waived. Indeed, Martinelli is arguably estopped from making that argument, as it is inconsistent with his successful argument below that the district court should exercise its equitable discretion to award restitution in an amount less than gross revenues. In any event, Martinelli's statutory argument is wrong. Governing circuit precedent confirms that courts have the full range of equitable authority to grant restitution up to the amount of gross revenues under statutes such as the FTC Act. Moreover, every circuit to have considered the question has confirmed that Section 13(b) of the FTC Act affords district courts the authority to award ancillary equitable relief. As this precedent establishes the district court's authority to award *gross* revenues as restitution, a fortiori, the district court's award of *net* revenues—wherein Martinelli and his companies are not being asked to repay the costs of magazines to consumers, even though ample evidence suggests that consumers did not want the magazines and precedent would support such an award—lies comfortably within its equitable discretion. *Part II.A.*

Finally, the district court correctly rejected Martinelli's attempt to evade individual liability for the full amount of restitution. Martinelli did not contest his liability for the actions of his companies and does not challenge the permanent injunction entered against him. Martinelli simply seeks to pay less money. But the

long-recognized standards for establishing individual liability for monetary relief under the FTC Act are more than satisfied here. Moreover, any argument that Martinelli should pay only monies "actually received," is spurious, as the district court expressly found that Martinelli treated corporate funds as his own, and acted well within its equitable discretion, and in accord with governing precedent, in finding Martinelli to be liable for the full amount of restitution. *Part II.B.*

ARGUMENT

I. The district court did not err in finding Martinelli and his companies liable under the FTC Act for false representations about valuable coupons.

Conceding liability on all other complaint counts on which the Commission prevailed, on appeal Martinelli challenges his liability only on Count I—misrepresentations regarding the value of the coupons available through the Read-N-Save program. But Martinelli fails to refute the district court's amply-supported findings that he expressly represented to consumers that valuable coupons were available; that this representation was likely to mislead because valuable coupons were not, in fact, available; and that the representation was material because it induced consumers to enroll in his Read-N-Save program. Martinelli instead miscasts the record and mounts a piecemeal attack on selective pieces of evidence; an attack that is woefully insufficient to overturn the district court's finding of liability.

A. Overwhelming evidence supports the district court's finding of liability under the FTC Act.

Under Section 5(a) of the FTC Act, "deceptive acts or practices in or affecting commerce, are * * * unlawful." 15 U.S.C. § 45(a)(1). To establish liability for deception, the Commission was required to show that Martinelli made "(1) a representation, omission, or practice, that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3), [that] the representation, omission, or practice is material." *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *see also Cliffdale Associates, Inc.*,103 F.T.C. 110, 163-64 (1984); Federal Trade Commission Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. at 167 *et seq.*

Whether a trade practice is likely to mislead consumers is "an impressionistic determination more closely akin to a finding of fact than to a conclusion of law." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). Deceptiveness is determined by looking at the overall, common sense, net impression on a reasonable consumer. *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982).[9]

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[9] As the Tenth Circuit has noted, "reference to the 'reasonable consumer' in the context of Section 5 may be misleading," because "[u]nlike the abiding faith which the law has in the 'reasonable man,' it has very little faith indeed in the intellectual acuity of the 'ordinary purchaser' who is the object of the advertising

Implied claims, like express claims, can violate the FTC Act's prohibition against deceptive trade practices. *See, e.g., FTC v. Figgie Int'l., Inc.*, 994 F.2d 595, 604 (9th Cir. 1993). To support liability, a misrepresentation need not be made in bad faith or with intent to deceive. *Verity*, 443 F.3d at 63; *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005). The FTC is not required to show actual deception, but "evidence that some consumers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead." *Id.*; *accord FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

The district court correctly applied these legal principles to the facts adduced at trial in finding Martinelli liable for misrepresenting the value of the coupons obtainable through the Read-N-Save program. Both the telemarketing scripts used during the sales calls and the written materials later provided to consumers were replete with express representations that consumers could obtain coupons worth at least $1,000 in savings, *see, e.g.*, A.1612-15; A.1641; A.1882. Indeed, Martinelli does not refute the district court's finding that the "scripts reveal[ed that] the Defendants are not selling a magazine program, but a coupon program that will pay for some magazine subscriptions as a side benefit." A.7 (¶ 23).

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campaign." *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n. 5 (10th Cir. 2005) (internal citations omitted).

Two consumers testified at trial that Martinelli's sales practices led them to believe that they would be able to obtain valuable savings coupons as a result of signing up for the Read-N-Save program. A.10-11(¶¶ 36-43). This testimony was buttressed by the hundreds of consumer complaints in evidence. *See, e.g.*, A.444-1609; A.2333-2589; A.2610-2724.[10] Nowhere in Martinelli's brief does he contest that, on countless occasions, his Read-N-Save program represented to consumers that they would be able to obtain valuable coupons as a result of participating in the program. Although Martinelli devotes much space to arguing against a strawman—that many representations referred to coupon certificates, and not actual coupons, *e.g.*, Br. at 17-19, this is a distinction without a difference. As the district court found, Martinelli's customers "did not receive valuable coupons *or valuable coupon certificates* as a result of participating in the Defendants' Read-N-Save

[10] Before the district court, Martinelli repeatedly argued that the consumer complaints and sworn declarations were unreliable. The district court, however, denied Martinelli's motions in limine, *e.g.,* D.205, D.206, D.213, concluding that the consumer declarations and complaints were reliable and "particularly probative," in light of Martinelli's own poor record-keeping. D.205 at 4. Martinelli also insisted that consumer accounts were controverted by the tape recorded portions of the last part of the closing call. Any argument that the verification tapes somehow cleanse the earlier deception is, however, without merit. It is well established that the "law is violated if the first contact ... is secured by deception ... even though the true facts are made known to the buyer before he enters into the contract of purchase." *Resort Car Rental System Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (citing *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961)).

program [and] the Defendants misrepresented the value of the coupons the consumers would receive." A.16 (¶ 72) (emphasis added).

Nor does Martinelli attempt to address the district court's findings on the materiality of these promises, *i.e.*, that consumers were induced to enroll in the Read-N-Save program because they wanted to receive valuable coupons, not because of a desire to receive magazines. A.10 (¶ 35); *see also* A.28-29 (¶ 155). Martinelli likewise does not seriously dispute the findings that the representations regarding the value of the coupons were likely to mislead, A.28 (¶ 152). He does not even try to contend that valuable coupons were ever available to consumers. Nor could he. The district court expressly found, and Martinelli does not refute, that "the record is replete with examples of consumers who failed to receive *any* value from the coupons much less the savings as represented by the Defendants," A.16 (¶ 71); that Martinelli and his co-defendants could not identify "a single consumer who received *any* coupons at all between July of 2005 and July of 2006," A.16 (¶ 69); and that there was no evidence of even "a single customer who was able to redeem coupons in an amount sufficient to cover the cost of the magazine subscriptions during any period of time relevant to this litigation," A.16 (¶ 70).[11]

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[11] Although Martinelli submitted declarations from three customers who were satisfied with the magazine portion of the Read-N-Save program; see, e.g., A.2604-06, and A.2607-09 Martinelli produced *no* proof of any customer who was

B. In asking this Court to reweigh the evidence, Martinelli miscasts the record and ignores the standard of review.

Refusing to directly confront the district court's liability findings, Martinelli instead asks this Court to reweigh the evidence and make new assessments of credibility, *see, e.g.*, Br. at 19-22. Ultimately, Martinelli's challenge to the district court's finding on liability reduces to an argument that the number of complaints was "woefully insufficient," to prove that the representations concerning the value of the coupons were material and likely to mislead consumers. *Id.* at 23.

In making this argument, Martinelli mischaracterizes the record, misunderstands the law, and ignores the standard of review. First, Martinelli's nitpicking of individual consumer complaints ignores critical pieces of evidence, including the trial testimony of April Rogers, who, like the other witness, Laura Biel, was a new mother who enrolled in the Read-N-Save program in order to receive particular baby-care products. A.11(¶ 39). Despite not being able to order coupons for the products she really wanted, and despite unexpected costs, she nonetheless made repeated attempts to redeem the vouchers. Rogers complained many times to Martinelli's companies, but

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satisfied with the coupon portion of the program. And, even if he had been able to identify a handful of satisfied customers, that would have been insufficient to forestall liability, as "[t]he existence of some satisfied customers does not constitute a defense under the FTC [Act]. *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989)

she never received any coupons. A.11 (¶¶ 41-43); A.47-48 (Vol. II). Tabitha Scoggins is yet another of the countless consumers that Martinelli neglects to mention; one whose experience was described as "fairly typical" of the scores of complaints received by the BBB. A.170. Scoggins, too, engaged in "fruitless" attempts to redeem coupons, and also complained of undisclosed redemption costs, which the district court found to "obviously ... undercut the 'value of the coupons." A.12 (¶ 45); *see also* A.2610-14. If and when Scoggins received coupons at all, they were for unrequested items that Scoggins had no use for. A.169; A.2610.

Martinelli's self-serving culling of the record cannot trump the district court's express findings, based on the "overwhelming number of complaints," that "the clear evidence of record indicates that customers did have valid complaints about not receiving coupons, about misrepresentations regarding the types of coupons actually available, and about even the availability of coupons." A.14 (¶¶ 59-60).

Second, in arguing that the number of complaints is "woefully insufficient" to establish liability, Br. at 23, Martinelli not only mischaracterizes the record (erroneously suggesting that the only complaints the district court relied upon were the handful cited in the district court's opinion, Br. at 20-21) but also misunderstands the FTC's burden. To prove deception, the FTC need not produce evidence of actual harm, but only demonstrate that the representation is material and likely to deceive a

consumer acting reasonably under the circumstances. *Bay Area Bus. Council, Inc.*, 423 F.3d at 635. Martinelli does not credibly refute the district court's finding that the representation of valuable coupons was likely to mislead because, in fact, no such valuable coupons were available. Instead, he points the fingers at others, arguing that "[i]ncorrect addresses, bankruptcy of the coupon provider, and the consumer's failure to comply with the program were the cause of the majority of the problems." Br. at 24. The court below explicitly rejected these arguments. Martinelli's suggestion that consumers did not receive coupons only because they did not try hard enough, although initially sufficient to forestall summary judgment on Count I, A.3543-44, was, after trial, expressly discredited by the district court. A.15 (¶ 59). And the district court found "particularly egregious" Martinelli's handling of the coupon provider portion of his program, A.14 (¶ 60), because Martinelli continued to market coupon offers "after July of 2005 through a company that had gone bankrupt." This marketing proceeded apace despite the fact Martinelli was on notice about problems with the coupon redemption process, given the many consumer complaints he had received. A.15 (¶ 65). Indeed, the district court expressly discredited Martinelli's statement that CCOA "worked well" until 2005. *Compare* Br. at 10 *with* A.12-13 (¶ 62). The court also noted that, when Martinelli finally switched to a new company, existing customers were not advised of the change unless and until they called in to

complain. A.16 (¶¶ 67-68). Contrary to Martinelli's suggestion, Br. at 24, the district court did not err in relying on these facts to support its finding that Martinelli's representations about the availability of valuable coupons were likely to mislead.[12]

Martinelli's assertion that "glaringly absent from the district court record is any evidence a consumer attempted to obtain $1000 worth of coupons," Br. at 22, is misleading and irrelevant.[13] Over one-third of customers cancelled their memberships shortly after receiving the papers; these consumers, obviously, never tried to redeem their coupons. Abundant evidence demonstrates that many consumers who did not cancel, like Laura Biel whose testimony at trial was credited by the district court, did not try to redeem coupons simply because it was not worth the effort. See, *supra*, at 10-12; A.10 (¶¶ 36-38). Any failure to redeem coupons, far from proving that the

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[12] It is unnecessary to show that any particular consumer actually relied on or was injured by the unlawful conduct. See *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000). A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated and that consumers purchased the defendant's product. *Id.* Here, however, the district court's finding that consumers relied upon Martinelli's false promises of valuable coupons is amply supported by abundant evidence.

[13] Martinelli's implication that the coupon program wasn't deceptive because consumers could— if only in theory— obtain the amount of coupons that was represented if they tried hard enough also fails because Martinelli expressly and unequivocally promised consumers "you will receive $1000 . . . in shopping coupons." A. 1612.

promised savings existed, itself demonstrates the falsity of Martinelli's promises.

Finally, under the extremely deferential clear error standard, Martinelli's one-sided and partial presentation of evidence provides no grounds for reversal. It is not the role of this Court to reweigh the evidence on appeal. *See Yellow Cab*, 338 U.S. at 342. Martinelli has failed to justify reversal because a court's "[f]actual findings may only be overturned if they are completely devoid of a credible evidentiary basis or bear no rational relationship to the supporting data." *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210 (3d Cir. 2006) (quotation marks and citation omitted). The district court's findings that Martinelli violated the FTC Act are well-grounded in the record, and should be affirmed.

II. The district court did not abuse its discretion in awarding restitution of net revenues, payable jointly and severally by Martinelli and his companies.

On the question of remedy, as well, Martinelli and his companies mount only a partial challenge, not contesting the permanent injunction entered by the district court. Martinelli takes issue only with the district court's award of ancillary equitable relief, raising a series of meritless challenges. First, in an argument that was waived and is in any event wrong, Martinelli contends that the district court, although sitting in equity, lacked authority to award restitution. This Court should decline to consider this argument; and otherwise, reject it. Second, Martinelli contends that, even if the

district court had authority to award restitution, it exceeded its equitable discretion in awarding "almost all" revenues and finding Martinelli liable for the full amount awarded. But precedent confirms that the district court would have acted within its discretion in awarding *gross* revenues as restitution; the district court's limitation of the award to *net* revenues is therefore unassailable. Nor is there any basis to disturb the district court's choice to make Martinelli jointly and severally liable for the full amount of restitution, as it too is in accord with governing precedent and fully supported by the record.

A. Martinelli's newly-minted argument—that the district court lacked authority to order restitution as ancillary equitable relief under Section 13(b) of the FTC Act—is waived, estopped, and wrong.

"It is well established that failure to raise an issue in the district court constitutes a waiver of the argument," unless certain "extraordinary circumstances" exist to conclude otherwise. *Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283, 1298 (3d Cir.1991); *accord Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006). Martinelli never once argued below that the district court lacked statutory authority to award ancillary equitable relief.[14] On the contrary, at every opportunity

[14] Tellingly, Martinelli fails to comply with this Court's local rule requiring opening briefs to include, "in the statement of the issues presented for review required by FRAP, 28(a)(5), a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon." L.A.R. 28.1(a)(1).

Martinelli recognized the district court's wide-ranging discretion to shape ancillary equitable relief, and urged the court to exercise this discretion by lessening the amount of restitution. *See supra,* 26-27, n.8. Martinelli prevailed in these arguments, insofar as the district court ultimately awarded net rather than gross revenues, netting out the wholesale cost of magazine subscriptions and reducing the sum awarded by $759,333. A.17 (¶¶ 77-78); A.33 (¶ 181).

Martinelli's success in arguing for a reduction of monetary relief below presents "extraordinary circumstances," that, far from excusing waiver, may even warrant judicial estoppel. Having benefitted from his argument that the district court has "broad equitable powers in fashioning the appropriate relief," and should "award relief consistent with the actual damages established at trial," D.234 at 5-6, Martinelli may not now take the inconsistent position that the district court entirely lacks authority to award monetary relief. *See G-I Holdings, Inc. v. Reliance Ins. Co.,* 586 F.3d 247, 262 (3d Cir. 2009); *New Hampshire v. Maine*, 532 U.S. 742, 750-51(2001).

Even if it were properly before the Court, Martinelli's present argument that district courts may not award monetary equitable relief as an ancillary remedy for violations of the FTC Act is, in any event, meritless and foreclosed by governing precedent. When, as here, the Commission brings an action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and establishes a violation of the FTC Act (*i.e.*, that

the defendant has committed an unfair or deceptive act or practice), the court has authority to grant not just injunctive relief, but also monetary equitable relief. Indeed, the six courts of appeals that have addressed the issue have all agreed that Section 13(b) grants a district court this authority. *See, e.g., FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *Amy Travel Service*, 875 F.2d at 571 (7th Cir. 1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Pantron I Corp*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Freecom Communications*, 401 F.3d at 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). And district courts in all of the other circuits have reached the same conclusion. *See, e.g., FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *In re Nat'l Credit Mgmt. Gp., LLC*, 21 F. Supp. 2d 424, 462 (D.N.J. 1998); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008); *FTC v. Solar Michigan, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,339, p. 59, 915-16 (E.D. Mich. 1988).

As the Supreme Court recognized decades ago, "the comprehensiveness of [a district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding*

Co., Inc., 328 U.S. 395, 397-98 (1946). Subsequently, in *Mitchell v. Robert DeMario Jewelry, Inc.* the Court reaffirmed its holding in *Porter v. Warner,* clarifying that it would have reached the same result even if the statute at issue in *Porter* had only provided for entry of injunctive relief (in response to an argument that the monetary relief allowed in *Porter* was authorized by a different part of the statute, not the general injunctive provision). 361 U.S. 288, 291 (1960). The Court reiterated that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92.

Although this Court has never had occasion to hold that Section 13(b) authorizes entry of monetary equitable relief, in *Lane Labs* it confronted the very same issue in the context of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 et seq. ("FDCA"). 427 F.3d at 220. There, this Court held that, even though the FDCA did not specifically authorize monetary relief, the district court could grant such relief based upon the statutory provision that authorized entry of injunctions. *Id.* at 229-30.[15] In reaching this decision, this Court cited, *inter alia*, *Porter*, and *Mitchell, id.* at

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[15] The statutory provision at issue in *Lane Labs* authorized district courts "to restrain violations" of the FDCA, 21 U.S.C. § 332(a), while Section 13(b) authorizes courts to "issue a permanent injunction" in "proper cases." 15 U.S.C. §

223-227, and also noted the many other courts to have similarly recognized "a court's power to order restitution or disgorgement under several different statutes that granted open-ended enforcement powers," including, notably, *Gem Merchandising,* a case recognizing such authority under the FTC Act, *id.* at 225.

That Congress provided in Section 19 a means by which the Commission can also obtain consumer redress on the basis of trade regulation rule violations or an administrative adjudication is not a "clear and valid legislative command" depriving courts of their full equitable powers. *Lane Labs*, 427 F.3d at 224. Other courts to have considered the question have repeatedly refused to graft the limitations of Section 19 onto Section 13(b)'s equitable powers. *See, e.g., FTC. v. H.N. Singer*, 668 F.2d 1107, 1113 (9th Cir. 1982); *Gem Merchandising*, 87 F.3d at 469-70; *Sec. Rare Coin & Bullion Corp.*, 931 F.2d at 1315. With good reason. Section 19 was enacted to *enhance* the Commission's authority against rule violators and targets of administrative proceedings, not to tie the Commission's hands in district court actions under Section 13(b).[16] And Congress expressly provided that "[r]emedies provided

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53(b)(2).

[16] Section 19(a) establishes liability for the remedies articulated in Section 19(b) in two different situations: when a defendant has violated a Commission rule, 15 U.S.C. § 57b(a)(1), or when a defendant has been found in administrative proceedings to have violated the FTC Act's prohibitions against unfair or deceptive trade practices and a cease-and-desist order has been issued against the

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." Section 19(e), 15 U.S.C. § 57b(e).

Martinelli's proposed construction, that Section 19 voids or otherwise limits the Commission's ability to obtain relief under Section 13(b), also ignores Congress' explicit approval of the Commission's ability to obtain consumer redress in court via Section 13(b). Eleven years after the first appellate decision affirmed monetary equitable relief under Section 13(b) (*FTC v. H.N. Singer*, decided in 1982), Congress explicitly recognized and approved of courts' ability to grant monetary equitable relief. In 1994, Congress amended the FTC Act, and expanded the venue and service of process provisions of Section 13(b) so that the Commission could bring a single lawsuit against all defendants involved in an illegal transaction, even if they are not all present in the same district. Pub. L. No. 103-312, § 10 (1994). The Senate Report that accompanied the legislation recognized that, under Section 13(b), "[t]he FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. 103-130, at 15-16 (1993).

If Congress had been dissatisfied with the Commission's use of Section 13(b)

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defendant, 15 U.S.C. § 57b(a)(2).

to obtain consumer redress, it would, presumably, have limited Section 13(b). Instead, it expanded the reach of the section. This provides a clear indication that it is Martinelli, not the federal courts, that has misinterpreted Section 13(b). "Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (quotation marks and citations omitted).[17]

B. Martinelli is liable for the full amount of restitution awarded by the district court.

Under governing precedent and traditional equitable principles, the district court had discretion to award *gross* revenues as restitution. The award of *net* revenues was therefore well within the court's equitable discretion and Martinelli's arguments that additional operating costs of perpetrating the fraud should have been deducted from the award defy equitable principles. Nor did the district court abuse its discretion in

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[17] Notably, Martinelli's primary, and almost exclusive, support for his argument that district courts lack authority to award monetary equitable relief under Section 13(b) is a single law review article that predates these legislative actions. *See* Br. at 27-32 (citing Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U. L. Rev. 1139 (1992)). But that article's arguments, which have never been endorsed by any court, have now been proven wrong by Congress' reauthorization and amendment of the FTC Act.

finding Martinelli—sole owner and principal of his companies, who does not deny his actual knowledge of the underlying deceptive conduct, and who treated corporate funds as his own—liable for the monetary equitable relief rewarded, jointly and severally with his companies.

1. The district court's award of net revenues as restitution was comfortably within its equitable discretion.

Martinelli himself recognizes that "it is not disputed that that [sic] a court in equity can order restitution, when it is ordered as ancillary relief to the proscribed injunctive remedy," and argues simply that the district court's award "should be closely scrutinized." Br. at 34. The district court's award of net revenues in this case easily withstands scrutiny—this Court, in *Lane Labs*, confirmed that an award of equitable restitution in the amount of gross revenues was fully consistent with equitable principles. 427 F.3d at 231. Other circuits, in construing the FTC Act, have likewise ruled that an award of restitution in the amount of gross revenues lies comfortably within the district court's equitable discretion. This is because "[a] major purpose of the Federal Trade Commission Act is to protect consumers from economic injuries. Courts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers. *See, e.g., Gem Merchandising*, 87 F.3d 466 (affirming an award of damages as calculated by consumers' losses and an order of disgorgement to the Treasury); *Amy Travel*, 875 F.2d at 570 (affirming restitution award of $6,629,100, the

amount consumers paid for travel certificates);" *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (affirming an award of restitution calculated as consumer loss); *see also Direct Marketing*, 624 F.3d at 15 (upholding a restitution award of gross receipts).[18] Martinelli's argument that the award is unwarranted because Read-N-Save customers "received value in the nature of magazine subscriptions," and should not be allowed to "receive a valuable product without payment for same," Br., at 36, is therefore without merit, as it is the "fraud in the selling, not the value of the thing sold, [that] entitles consumers * * * to full refunds." *Figgie Int'l, Inc.*. 994 F.2d at 606. And Martinelli does not even attempt to rebut the district court's findings that consumers did not value the magazine subscription component of the program. A.6 (¶ 21).

The court below would thus have been amply justified in awarding full refunds to consumers, without any reduction for the supposed value of magazines. In fact, however, the district court *did* reduce the amount awarded by the cost of the magazines, a fact Martinelli fails to acknowledge. The district court was thus quite

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[18] Martinelli's argument that restitution is unavailable because damages could be sought at law, Br. at 36-37, is also waived. In any event, it is incorrect, as it apparently seeks to engraft a requirement for injunctive relief onto the entirely separate question of the propriety of equitable monetary relief. "If the facts justify a substantive claim of restitution to prevent unjust enrichment, the existence of other remedies like damages is no impediment to restitutionary relief." Dan B. Dobbs, *Law of Remedies: Damages-Equity-Restitution*, Second Edition, Hornbook Series (1993), at 370.

conservative in setting the amount of monetary relief and its award of net revenues easily withstands abuse of discretion review.[19]

Nor is the district court's award of equitable monetary relief punitive. *See* Br. at 36-37. Restitution "is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct *at others' expense*." *United States v. Newman*, 144 F.3d 531, 538 (7th Cir.1998) (citing 1 George E. Palmer, *The Law of Restitution* § 1.1, at 5 (1978)) (emphasis added).

Martinelli's reliance on *CFTC v. American Metals Exchange Corp.*, 991 F.2d 71(3d Cir. 1993) is unavailing. Unlike the situation in *American Metals*, in this case there is no question that consumers' losses and Martinelli's illegal receipts are one and the same. *American Metals* concerned the propriety of a disgorgement remedy for violations of the Commodity Exchange Act (another general relief statute where this Court authorized equitable monetary relief). *Id.* At issue was the precise amount of disgorgement. No evidence had been presented on defendant's profits from the underlying fraud, but there was evidence that, due to market fluctuations, investor losses were possibly "twenty times or more the amount of [the defendant's] unlawful

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[19] In the Commission's view, the district court erred by netting out the costs of magazines, but it has not cross-appealed on that issue.

gains." *Id.* at 78. The district court nonetheless awarded an amount equal to investor losses as restitution and this Court remanded for a hearing on the appropriate amount of remedy because "[t]he court should not have presumed without holding a hearing that the illegal profits could not have been assessed." *Id.* The Second Circuit's decision in *Verity* is also inapposite, as the *Verity* court was concerned with situations where the defendant's gain would not be equal to the consumer's loss "when some middleman not party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands." 443 F.3d at 68. No third-party middlemen are present in this case.

Thus, Martinelli's suggestion that disgorgement of unjust gains would yield a different remedy than the measure of consumer loss is unfounded. Where, as here, a wrongdoer obtains funds through misconduct, rescission, restitution, and disgorgement provide identical remedies. *See* Dobbs at 369-70; *see also FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202, 219 (D.Mass. 2009), aff'd 624 F.3d 1. Contrary to Martinelli's insistence, Br. at 40, in fraud cases such as this, disgorgement of revenues *is* the correct measure of damages for equitable restitution.[20]

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[20] In challenging the district court's award of net revenues, Martinelli relies extensively on a law review article that itself recognizes the propriety of an award of gross revenues as restitution when, as here, the remedy results from fraud. *See,* G. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1,

Nor did the district court abuse its discretion by awarding monetary relief in the amount of net revenues, as opposed to net profits. If gross revenues are warranted as remedy, a fortiori, net revenues are appropriate, and net profits unduly circumscribed. Indeed, it is inherently *inequitable* to allow a malfeasant to deduct the costs of perpetrating the fraud. As one district court has observed, when funds are obtained by fraud, "no credit" should be provided "for operational or other business expenses incurred, because to do so would be tantamount to allowing a bank robber to deduct the price of the getaway car." *SEC v. Interlink Data Network of Los Angeles, Inc.,* 1993 WL 603274, *13, n. 118 (C.D. Cal. 1993).[21]

61(2007).

[21] Martinelli's assertions of de minimis net profits, moreover, are unsupported in the record, self-serving, and inherently suspect, given the demonstrated permeability between Martinelli's corporate accounts and his personal expenditures that necessitated the asset preservation order earlier in this case. *See* A.39; A.3564-65. In arguing that net profits are low, for example, Martinelli asserts (without citation to the record) that he made loans to his companies totaling more than $2 million which have never been repaid. *See* Br. at 47. The district court, however, expressly found that Martinelli had failed to produce any evidence of such loans. *See* A.3564. Moreover, in analyzing the tax returns, Martinelli's own accountant testified that the companies' balance of outstanding unpaid loans, in 2007, was only $9,398. A.318.

2. The district court did not err in finding Martinelli individually liable for the full amount of equitable monetary relief

Finally, Martinelli argues that he should not be found personally liable for equitable monetary relief. *See* Br. at 47-52. Tellingly, Martinelli does not challenge the district court's finding that he is individually liable for violations of the FTC Act and bound to comply with the district court's permanent injunction. See Br. at 48. Instead, Martinelli argues that, because the monies did not go directly to him, but rather to his companies, he should not be held liable in equity for their repayment to consumers, Br. at 48-49, that to hold him liable for the entire amount of restitution is unjust and punitive, Br. 49-50, and that the district court inappropriately pierced the corporate veil in holding him liable, Br. 50-52.

Martinelli's arguments are misguided; his individual liability is by no means lessened simply because he carried out the deceptive practices through his companies. Having found that Martinelli had direct control over the activities of his companies, and that he was aware of the illegal practices undertaken as part of the Read-N-Save program, the district court acted in accord with a well-established body of precedent and properly held Martinelli individually liable for the full amount of monetary equitable relief.[22]

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[22] As Martinelli has been found directly liable for violating the FTC Act, his suggestion that the Commission must pierce the corporate veil to establish his

As other circuit courts and district courts in this circuit have repeatedly concluded, an individual is monetarily liable for a business's deceptive practices if the Commission demonstrates, in addition to the showing needed to subject the individual to injunctive relief,[23] that he "had or should have had knowledge or awareness of the misrepresentations." *Amy Travel*, 875 F.2d at 574 (internal quotation marks and citations omitted). The "degree of participation in business affairs is probative of knowledge," and "the knowledge requirement may be fulfilled by showing that the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth". *Id; accord, e.g., Bay Area Bus. Council,*, 423 F.3d at 635-36; *Freecom Communications*, 401 F.3d at 1207; *Pantron I*, 33 F.3d at 1103; *Gem Merchandising*, 87 F.3d at 470; *FTC v. Chinery*, 2007 WL 1959270 (D.N.J. Jul. 5, 2007); *In re National Credit Management Group, L.L.C.*,

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liability for monetary relief is a red herring. "Piercing the corporate veil" is a device for establishing derivative liability, *e.g.*, to make shareholders, for whom there is no direct finding of liability vicariously liable for corporate wrongs. *See e.g., In re Owens Corning*, 419 F.3d 195, 205-06 (3d Cir. 2005); *United States v. Bestfoods*, 524 U.S. 51, 64 (1998).

[23] Martinelli does not challenge the Commission's demonstration on those points – *i.e.*, that he participated directly in his companies' deceptive acts or practices, or had the authority to control them. *See, e.g., FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.1997).

21 F. Supp. 2d 424, 462 (D.N.J. 1998).

Indeed, this Court has repeatedly upheld the imposition of joint and several liability on companies engaged in unlawful practices and their principals, under comparable circumstances. *See, e.g.*, *Lane Labs,* 427 F.3d 219 (affirming award of restitution entered jointly and severally against corporate defendant and principal); *FTC v. Check Investors, Inc.*, 502 F.3d 159, 165 (3d Cir. 2007) (affirming award where corporations and corporate principles were found jointly and severally liable for restitution of over $10 million).[24]

Martinelli asserts, albeit in a footnote, that the record does not support the district court's finding that he was individually liable for monetary relief. *See* Br. at 51-52, n.5. Misreading cases, Martinelli suggests that "scienter" or "intent to deceive" is required to hold him personally liable for restitution. *Id.*[25] But it is well-established

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[24] *See also SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (noting the "well settled principle" that joint and several liability for equitable disgorgement is appropriate "where two or more individuals or entities have close relationships in engaging in illegal conduct."); *SEC v. AbsoluteFuture.com,* 393 F.3d 94 (2d Cir. 2004) (same); *see also Hodgson v. Baltimore Regional Joint Bd.,* 462 F.2d 180 (4th Cir. 1972) (court acted within its "general equitable powers" in imposing joint and several liability on union and employer for equitable remedy of backpay).

[25] Martinelli cites *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004) for the proposition that there is "a scienter requirement for personal liability." Br. at 51, n.5. But *Garvey* said no such thing, and applied the very standards recited above, albeit to a very different set of facts. 383 F.3d at 900. In *Garvey*, the defendant was a celebrity endorser of a deceptively advertised product, not a principal of the

that the Commission need not prove subjective intent to defraud in order to establish individual liability for monetary relief. *See, e.g., Bay Area Bus. Council,* 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74.

Under the appropriate legal standards, the district court plainly did not err in holding Martinelli liable for monetary relief. Tellingly, Martinelli fails to dispute that he had the "actual knowledge of the material misrepresentations," 875 F.2d at 574, required to establish his liability for monetary relief. With good reason. Martinelli prepared the marketing materials, *e.g.*, A.3069-70, 3089, 3138-39, 3152, 3159, 3165-66, and was personally responsible for answering every single complaint, A.3039. His disavowals of knowledge of the many problems with the coupon program were expressly discredited by the district court. *See, e.g.*, A.14-15 (¶¶ 59, 62).

The grant of equitable monetary relief against Martinelli is particularly appropriate, moreover, in light of the record demonstrating his repeated manipulation of the corporate form to his own personal advantage. In denying Martinelli's motion to amend the judgment, the district court expressly found Martinelli's tax returns

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business, and "had no actual knowledge of any material misrepresentations" regarding the product at issue. 383 F.3d at 901. The court therefore went on to consider the other bases for establishing individual liability for monetary relief—reckless indifference to the truth or awareness that fraud was highly probable and intentional avoidance of the truth. *Id.* at 902. Such an inquiry is not necessary here, where Martinelli's actual knowledge of the material misrepresentations is amply supported on the record.

untrustworthy, and that Martinelli "used the corporate ledgers as his own personal bank accounts, using corporate funds to satisfy personal obligations." A.39.[26] In light of these findings, and in conformity with general equitable principles, the district court did not abuse its discretion in holding Martinelli individually liable, jointly and severally with the companies he controlled, for the equitable relief rewarded as a result of his violations of the FTC Act.

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[26] Martinelli cannot convincingly argue that he never received the funds at issue, and his reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), is accordingly inapposite. Further, *Great West* involved a private action under ERISA, and was dependent upon specific statutory limits set forth in ERISA, *see id.* at 209, limits that have no application in a case brought under the FTC Act.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the district court's judgment be affirmed.

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COMBINED CERTIFICATIONS

1. Bar membership – Because this brief is filed on behalf of an administrative agency of the United States, there is no bar membership requirement.

2. Word count – I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 13,891 words, as counted by the WordPerfect word processing program.

3. Service upon counsel -- I hereby certify that, in addition to the service accomplished by the CM/ECF system, on December 16, 2010, I served a copy of the brief on appellants by overnight mail addressed to:

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4. Identical compliance of briefs – I certify that the text of the electronic brief, which was submitted to this Court, is identical to the paper copies that were served on this Court and on appellants.

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