

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 11 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

OMICS GROUP INC., DBA OMICS
Publishing Group; et al.,

Defendants-Appellants.

No. 19-15738

D.C. No.

2:16-cv-02022-GMN-VCF

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted June 10, 2020
San Francisco, California

Before: MILLER and HUNSAKER, Circuit Judges, and RAYES,** District Judge.
Partial Dissent by Judge HUNSAKER

OMICS Group Inc., Conference Series LLC, iMedPub LLC (collectively
OMICS) and Srinubabu Gedela (collectively Defendants) appeal the district court's
grant of summary judgment for the Federal Trade Commission (FTC). We review

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Douglas L. Rayes, United States District Judge for the
District of Arizona, sitting by designation.

summary judgment orders de novo, viewing the evidence in the light most favorable to the non-moving party to determine whether genuine issues of material fact exist and whether the district court correctly applied the law. *FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009). We review the district court's award of equitable monetary relief for abuse of discretion. *Id.* at 931.

Violation of the Federal Trade Commission Act. The record contains ample evidence of Defendants' deception regarding its journals' peer review practices, publishing fees, impact factors (a common rating metric for journals in the academic publishing industry), and editorial board membership. OMICS also made false representations regarding the attendees and organizers of its academic conferences when marketing these events. OMICS's misrepresentations were material and their net impression was likely to, and did in fact, deceive ordinary consumers. *See id.* at 928–29. Defendants made only general denials in response to the FTC's overwhelming evidence against them, and they did not present contrary evidence sufficient to create any genuine disputes of material fact as to their liability. Thus, we affirm the district court's grant of summary judgment to the FTC concluding that Defendants violated Section 5(a) of the FTC Act. 15 U.S.C. § 45(a). *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

Gedela's Personal Liability. The district court properly concluded that Gedela is personally liable for OMICS's violations because he had authority over OMICS and either had knowledge of the companies' misrepresentations or was recklessly indifferent to their truth or falsity. *Stefanchik*, 559 F.3d at 931. It is undisputed that Gedela was the sole owner and CEO of OMICS. Gedela also admitted that he responded to complaints about OMICS's operations and received weekly updates from management about all business operations.

Equitable Monetary Relief.¹ The FTC provided a reasonable approximation of Defendants' unjust gains in light of Defendants' overall and pervasive fraudulent business practices. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016). Specifically as relates to Defendants' conference activities, raised by the dissent, the FTC presented evidence that the majority of Defendants' conferences were not as Defendants represented them in their marketing materials. Although the individual conferences were discrete events, they were part of a single scheme of deceptive business practices carried out by Defendants. And because the conference

¹ The Supreme Court recently granted certiorari in two cases presenting the question whether monetary restitution is an available remedy under Section 13(b) of the FTC Act. *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019), *cert. granted*, -- S. Ct. --- (July 9, 2020) (No. 19-825); *AMG Capital Mgmt., LLC v. FTC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, -- S. Ct. --- (July 9, 2020) (No. 19-508). Because Defendants did not challenge the FTC's authority to request monetary relief under the FTC Act, this argument is forfeited. *See Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014) ("Arguments not raised clearly and distinctly in the opening brief are waived." (internal quotation marks and citation omitted)).

marketing was widely disseminated, the FTC is entitled to a rebuttable presumption that all conference consumers were deceived. *Commerce Planet*, 815 F.3d at 604; *see also FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993) (per curiam). Moreover, where the FTC provides a reasonable approximation of unjust gains, any risk of uncertainty in the calculation “‘fall[s] on the wrongdoer whose illegal conduct created the uncertainty.’” *Commerce Planet*, 815 F.3d at 604 (quoting *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011)). Thus, it was Defendants’ burden to show the FTC overstated the amount of their unjust gains by including all conference-related revenue. *See Commerce Planet*, 815 F.3d at 604. Defendants’ general denials of any wrongdoing—in the absence of affirmative evidence showing a lack of deception in some conference marketing or that the FTC overcalculated conference-related revenues—failed to meet this burden. Therefore, we hold that the FTC reasonably approximated OMICS’s unjust gains with respect to the entirety of its deceptive business practices.²

AFFIRMED.

² Defendants’ contention that the district court relied on inadmissible hearsay was not sufficiently argued to the district court and is waived on appeal. *See Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002).

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FTC v. OMICS, 19-15738
HUNSAKER, J., dissenting in part:

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I agree with the majority on all issues except the amount of equitable monetary relief. Because I do not believe the FTC met its initial burden to reasonably approximate Defendants' unjust gains attributable to their conference activities, I would remand for the district court to conduct further proceedings on this limited issue.

The purpose of imposing monetary relief for FTC Act violations is “to prevent the defendant’s unjust enrichment by recapturing the gains the defendant secured in a transaction.” *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016) (quoting 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1), at 552 (2d ed. 1993)). In seeking such relief, the FTC bears the initial burden of proving a reasonable approximation of the defendant’s unjust gains. *Id.* After the FTC makes this showing, “the burden then shifts to the defendant to show that the FTC’s figures overstate the amount of . . . unjust gains.” *Id.* at 604. Only if the burden shifts to the defendant does the risk of uncertainty in calculating the unjust gains “fall on the wrongdoer whose illegal conduct created the uncertainty.” *Id.* (quoting *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011)).

Here, the FTC’s calculation of Defendants’ unjust gains assumes that every dollar OMICS collected in its business enterprise resulted from deceptive conduct. I agree that the record supports this approach with respect to OMICS’s publications-

related revenue. As the court states, the evidence shows that fraudulent conduct pervaded these activities. However, the FTC's own evidence does not establish that all conference-related revenue was obtained through deception. The FTC's expert evaluated a random sample of OMICS's conference listings to determine the frequency of misrepresentations, and calculated that "60 out of 100 conference advertisements contained a misrepresentation in which at least one individual stated that they had not agreed to serve on the organizing committee or participate in the conference." The expert further extrapolated that in a sample of 1,407 conferences, 49.7% to 69.7% had deceptive marketing. This evidence suggests that a significant percentage of OMICS's conference listings may not have contained misrepresentations. Thus, even assuming the conference materials were widely disseminated, the presumption of universal deception does not apply. *See id*; *see also FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605–06 (9th Cir. 1993) (per curiam). Unlike *Commerce Planet*, where only one product was at issue, OMICS's conferences are more analogous to separate "products" because the relevant characteristics that were represented in Defendants' marketing—the organizers and participants—differed from event to event.

The FTC contends, and the court agrees, that Defendants should bear the risk of any uncertainty in the monetary calculation related to the conference activities. At oral argument, the FTC argued that any overcalculation is due to OMICS's failure

to produce documentation that would have allowed the FTC to decipher the amount of revenue attributable to individual conferences. I disagree. The FTC has not met its initial burden to shift the risk of uncertainty to Defendants. Although the evidence of record does not distinguish between journal revenues and conference revenues for the entire period, the conference revenues from 2016 to 2017 are provided separately. Therefore, given that the FTC's own evidence indicates that only approximately 60% of the conferences were deceptively marketed and the conference revenues were reported separately for part of the charging period, the FTC did not reasonably approximate unjust gains when it included 100% of conference revenues. Accordingly, the burden to prove that the FTC overestimated such gains and any risk of uncertainty in making such calculation has not yet shifted to Defendants. *See id.* at 603–04. For this reason, I respectfully dissent on this point and would remand for the district court to conduct further proceedings to determine whether the FTC can meet its initial burden.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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