09-2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff - Appellee,
v.

DIRECT MARKETING CONCEPTS, INC., d/b/a Today's Health and Direct Fulfillment; ITV DIRECT, INC., d/b/a Direct Fulfillment; DONALD W. BARRETT; ROBERT A. MAIHOS; BP INTERNATIONAL, INC.,
Defendants - Appellants.

HEALTHY SOLUTIONS, LLC; HEALTH SOLUTIONS, INC.; ALEJANDRO GUERRERO, d/b/a Alex Guerrero; MICHAEL HOWELL; GREG GEREMESZ; TRIAD ML MARKETING, INC.; KING MEDIA, INC.; ALLEN STERN; LISA STERN; STEVEN RITCHEY,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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JURISDICTION

The Federal Trade Commission ("Commission" or "FTC"), an agency of the United States government, initiated this action in the United States District Court for the District of Massachusetts, seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. The district court's jurisdiction over this matter derived from 28 U.S.C. §§ 1331, 1337(a), and 1345; and from 15 U.S.C. § 53(b).

This Court has jurisdiction, pursuant to 28 U.S.C. § 1291, to review 1) the July 14, 2008, Opinion and Order, Add. 1;[1] 2) the August 13, 2009, Final Order and Judgment for Permanent Injunction and Other Equitable Relief Against Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., Donald W. Barrett, and Robert Maihos, Add. 72; and 3) the Final Order and Judgment for Equitable Relief Against Relief Defendant BP International, Inc., Add. 67.

The appellants filed their Notice of Appeal on August 14, 2009, and that notice was timely, pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court correctly held that appellants' infomercials, which

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[1] The following abbreviations are used in this brief:
Add. -- Addendum to the Brief of Appellants;
App. -- Joint Record Appendix;
Br. -- Brief of Appellants;
D. -- Items in the district court's docket.

touted two dietary supplements as cures for a variety of diseases, including cancer and heart disease, violated the FTC Act.

2. Whether the district court correctly held that Robert Maihos was liable for the violations of the FTC Act committed by the corporate defendants, where Maihos was an owner and officer of those corporations, and where he was intimately involved in their day-to-day operations.

3. Whether the district court correctly ordered appellants to pay $48.2 million in monetary equitable relief based on sales to consumers of the deceptively marketed dietary supplements.

STATEMENT OF THE CASE

A. Nature of the case, the course of proceedings, and the disposition below

In this appeal, defendants Direct Marketing Concepts, Inc.; ITV Direct, Inc.; Donald W. Barrett; and Robert Maihos (henceforth, these four defendants are referred to as "DMC"), challenge the July 2008 Opinion and Order, and the August 2009 Final Order and Judgment for Permanent Injunction and Other Equitable Relief that were entered against them. The Commission initiated the underlying action in June 2004. It alleged that DMC and others[2] had violated Sections 5 and 12 of the FTC Act,

[2] The complaint also named as defendants Healthy Solutions, LLC; Health Solutions, Inc.; Alejandro Guerrero; Michael Howell; Greg Geremesz; Triad ML Marketing, Inc.; King Media, Inc.; and Allen Stern. None of these defendants is involved in this appeal.

through their advertising and marketing of two dietary supplements, Coral Calcium Daily ("Coral Calcium"), and Supreme Greens with MSM ("Supreme Greens").[3] App. 42. According to the complaint, DMC' Coral Calcium infomercial claimed that the product could cure cancer, heart disease, and various degenerative and autoimmune diseases, and these claims were false or unsubstantiated. DMC's Supreme Greens infomercials claimed that Supreme Greens could also cure, *inter alia*, cancer and heart disease, and that it could also cause substantial weight loss. The Commission sought both injunctive relief, and monetary equitable relief sufficient to redress injured consumers.[4]

On July 14, 2008, the district court granted the Commission's motion for summary judgment with respect to the merits of six counts of its complaint, and concluded that the advertising for Coral Calcium and Supreme Greens was deceptive. Add. 1. The court then held four days of hearings with respect to relief, and, on August 13, 2009, it entered a Final Order and Judgment that enjoined DMC from resuming its false and misleading advertising. Add. 72. That Order also required DMC to disgorge $48.2 million, the net proceeds of its infomercial-based sales of

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[3] Section 5 of the FTC Act prohibits, *inter alia*, unfair or deceptive acts or practices, and Section 12 makes it unlawful to disseminate any false advertisement for any food, drug, device, service, or cosmetic.

[4] In addition, the Commission alleged that three "relief defendants," BP International, Inc., Lisa Stern, and Steven Ritchey, had received funds and other assets that were traceable to DMC's unlawful advertising.

Coral Calcium and Supreme Greens.

In this appeal, DMC challenges both the court's conclusion that it violated the FTC Act, and the relief that the court entered.

B. Facts and proceedings below

1. Background

a. Coral Calcium Daily

In January 2002, DMC began to market a dietary supplement known as Coral Calcium. App. 178. Coral Calcium contains a form of calcium supposedly derived from marine coral. *Id.* In late 2001, defendant Donald Barrett decided to develop an infomercial to promote Coral Calcium. To do this, he contacted Kevin Trudeau. Br. 7. Although Trudeau was an experienced infomercial host, he was also under order as a result of allegations that he had participated in deceptive infomercials for a variety of products. *See FTC v. Trudeau*, 579 F.3d 754, 757-58 (7th Cir. 2009) (detailing the numerous actions that the Commission has brought against Trudeau). Barrett paid Trudeau $25,000 to produce the infomercial. Br. 7. The infomercial was styled as a 30-minute interview, in which Trudeau elicited various claims from "guest" Robert Barefoot. After the infomercial was filmed at Trudeau's studio in December 2001, Trudeau supplied a "master" tape to Barrett. *Id.*

The infomercial included the following exchange regarding the purported disease-curing properties of coral calcium:

> Trudeau: Is there a way for us to know whether we will or won't [get cancer]?
>
> Barefoot: Yes, there is, and it's very simple. First off, we just review what you're eating. Are you getting the minerals? And if you're not, you will become acidic and you will get one of the major diseases. You can have heart disease, cancer, lupus, fibromyalgia, multiple sclerosis. Name the disease, they're all caused by acidosis. * * *
>
> Trudeau: Okay. What's a good way, in your opinion, that a person can get rid of that acidity?
>
> Barefoot: Well, they have to consume a lot more calcium. * * * [T]here are cultures all over the world that never get sick and they live to be 100, and all these cultures have one thing in common and it doesn't matter whether [it's] the Hunzas in Pakistan or the Titicaca Indians -- in China, there's a band of millions of them, or the Okinawans over in Japan * * *. They all have one thing in common. They all consume 100,000 milligrams of calcium a day. * * * They eat 100 times as much as you and I. * * *
>
> Barefoot: [W]e discovered that in Okinawa, that they were eating this coral sand called coral calcium. Well, boy, since 1982, we've been studying the coral calcium and I can tell you there are tens of millions of people, millions of testimonials. I've had 1,000 people tell me how they've cured their cancer. I've witnessed people get out of wheelchairs with multiple sclerosis just by getting on the coral.

App. 89, 91-92, 103.

The infomercial also represented that coral calcium was better absorbed than other forms of calcium:

> Barefoot: The real key with calcium is it does not want to absorb in the human body. * * * But you know, there is a substance out there where you get 100 percent absorption. * * * Today, there are tens of millions of people around the world that are taking this

substance with 100 percent absorption.

Trudeau: And this is the coral from * * * Okinawa , Japan that people add in water.

Barefoot: Yeah.

App. 94-95. The infomercial also claimed that articles in the Journal of the American Medical Association and the New England Journal of Medicine confirmed that calcium supplementation could cure cancer:

Barefoot: Then why did the Journal of the AMA this year quote the [Strang] Cancer Research Institute and said that calcium supplements reverse cancer. That's a quote form the Journal of the AMA and they quoted how much. * * * And it -- that's a quote. And it said it from, also, the New England Journal of Medicine also carried the same story with the same quote.

App. 103.

Although, during the course of the infomercial, neither Trudeau nor Barefoot mentioned by name the specific brand of coral calcium sold by DMC (*i.e.*, Coral Calcium Daily), on several occasions, an 800-number appeared on the screen. When consumers called that number, they were connected to DMC. App. 100, 106. The DMC telemarketers who answered the telephones had scripts touting the benefits of Coral Calcium. D.130, Ex. 10 at Att. 3. Among other things, the telemarketers were prompted by these scripts to tell consumers that, if they had a degenerative disease, Coral Calcium would help break down the acid associated with that disease, and when their bodies became alkaline, they would be healthy. D.130, Ex. 10 at 62-63.

From January 2002 through February 2003, DMC partnered with defendants King Media, Inc., Triad ML Marketing, Inc., and Allen Stern (who was the president of King and Triad, App. 453, 455) in connection with the marketing of Coral Calcium. Br. 9; App. 458. (King, Triad, and Stern are henceforth referred to as "Triad.") Triad was responsible for distributing the informercial to media outlets, and for fulfilling orders. Br. 9-10. DMC produced the infomercial, its telemarketers touted Coral Calcium to consumers, it received orders for the product, and forwarded those orders to Triad for fulfillment. DMC terminated its partnership with Triad at the end of February 2003. Accordingly, from March through July 2003 (when DMC stopped running the infomercial, D.130, Ex. 7 at 31-32), DMC performed all functions in connection with the advertising and marketing of Coral Calcium.

The Coral Calcium infomercial aired on local and national networks. App. 178. DMC sold a one-month's supply of Coral Calcium for a price ranging from $14.95 to $39.95. *Id.* Between early January 2002 and July 2003, total revenue from infomercial-generated sales of Coral Calcium amounted to $54,034,394.82. App. 1178. On Barrett's instruction, approximately $575,000 from the proceeds of the sales of Coral Calcium was transferred to BP International, Inc., a Nevada corporation. App. 484.

b. Supreme Greens

In April 2003, DMC entered into an agreement to market and sell a dietary

supplement known as Supreme Greens that was manufactured by Healthy Solutions, Inc. D.130, Ex. 7 at 79-80. Supreme Greens purports to contain a proprietary blend of 39 ingredients. D.130, Ex. 5 at Att. 5. These include beet root, dandelion leaf, okra, barley sprouts, dog grass, and a chemical compound known as MSM (metholsulfonylmethane). *Id.* In order to market Supreme Greens, DMC produced an infomercial, which ran on both national and local television. App. 180. This time, the infomercial featured Barrett as the "host," and Alejandro Guerrero, who was the president of Healthy Solutions (D.1 at 5; D.34, at 2), as the "guest." App. 131. Like the Coral Calcium infomercial, the Supreme Greens infomercial was presented as an interview. *Id.* In the infomercial, Guerrero is referred to as a Doctor of Oriental Medicine, although, in fact, he had no such degree. App. at 676, 1679. The infomercial touted Supreme Greens as a treatment for cancer and other diseases, and included the following exchange:

> Barrett: Dr. Guerrero claims that most chronic degenerative diseases -- such as cancer, arthritis, diabetes, even the number one killer out there, heart disease -- can and are being cured, and there are natural healing techniques being suppressed in this country. * * *
>
> Guerrero: So if we can change the body's fluids and tissues to a more alkaline base, now you have an environment that is no longer conducive for the proliferation or growth of a degenerative condition. * * *
>
> Barrett: And now here's the question: If I alkalize my body, am I going to come up with one of these chronic degenerative diseases?

Guerrero: No.

Barrett: Such as cancer, arthritis --

Guerrero: No.

Barrett: How can you say that so confidently?

Guerrero: I'm very confident in saying that, primarily because of the clinical studies we've done. I've seen it in my -- in my -- clinical practice. I've seen it every day in my clinical practice.

App. 131-132, 136-137, 139.

The infomercial also claimed that Supreme Greens would cause weight loss:

Barrett: Okay. Alex, why do so many people lose weight on the product? I know that a lot of people get on the product to either help with their diabetes or maybe their heart disease or even cancer, but they lose weight as a by-product. How come?

Guerrero: They lose weight as a by-product because, again remember, weight is the -- fat is your body's way of protecting itself from the acidic fluids. * * *

Barrett: So when you alkalize your body you don't need that fat?

Guerrero: You don't need that fat. Your body burns it actually for fuel.

Barrett: So not only will this product help people get the nutrition they need, but they can actually lose weight on this product * * *.

App. 149-150.

At several points during the infomercial, consumers were provided with an 800-number that they could call to purchase Supreme Greens. App. 146, 157. When consumers called that number, they were connected with DMC's telemarketers.

D.130, Ex. 7 at 86. DMC sold Supreme Greens at prices ranging from $33 to $50 per bottle. App. 179. The telemarketers also had scripts that instructed them how to respond if a consumer asked whether Supreme Greens would help with any particular disease. Regardless of the disease, the DMC's telemarketers were advised to tell the consumer that Supreme Greens would help. D.130, Ex. 10, Att. 5. The telemarketers were further advised to explain to consumers that Supreme Greens "works to lose weight by principles of cellular nutrition." *Id.*

Between August 2003 and June 2004, the net sales of Supreme Greens totaled $14,683,436.24. App. 1179.

2. Proceedings below

Counts 1 through 3 of the Commission's complaint alleged that DMC and Triad had violated the FTC Act through false or unsubstantiated claims that, *inter alia*, Coral Calcium could cure cancer and heart disease. App. 71-73. Counts 4 through 6 alleged that DMC had violated the FTC Act by making false or unsubstantiated claims regarding Supreme Greens, including, *inter alia*, that it would cure cancer and heart disease, and that it would cause significant weight loss.[5] App. 73-75.

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[5] There were three other counts in the Commission's complaint. Count 7 alleged that DMC violated Section 5 by representing that its infomercials were independent television programs, and Count 8 alleged that it violated Section 5 by enrolling consumers, without their consent, in a program that automatically renewed their orders each month. App. 75-76. These two counts were resolved by stipulation. Add. 44. Count 9 alleged that the relief defendants had no legitimate claim to funds they had received that resulted from the sales of Coral Calcium. App. 77.

On June 23, 2004, the court entered a preliminary injunction that put a halt to DMC's ongoing marketing of Supreme Greens. D.32. The preliminary injunction, *inter alia*, enjoined DMC from making claims that Supreme Greens, or any similar product, could cure or treat any disease unless DMC possessed competent and reliable scientific evidence substantiating the claim. Although, after entry of the preliminary injunction, DMC ceased its infomercials for Supreme Greens, it remained in the dietary supplement business. On January 19, 2006, the court concluded DMC's infomercial for a product called "Flex Protex" "appeared to violate the terms of the preliminary injunction," by making claims that the court had specifically prohibited DMC from making. D.137 at 13. The court ordered DMC to cease and desist from making such claims. *Id.*

On July 14, 2008, the district court granted, in part, the Commission's summary judgment motion. Add. 1. The court held that an advertiser violates the FTC Act if it lacks substantiation (*i.e.*, a reasonable basis) for the claims it makes. "For an advertiser to have had a 'reasonable basis' for a representation, it must have had some recognizable substantiation for the representation prior to making it in an advertisement." Add. 13. The court also held that "there is no question that the net impression of the Coral Calcium infomercial would lead a reasonable viewer to believe that it was being claimed that consumption of Coral Calcium would treat and/or prevent certain diseases, specifically including cancer, autoimmune diseases,

Parkinson's, and heart disease * * *." Add. 16. The court then concluded that "[a]t most the defendants have shown that prior to the airing of the Coral Calcium infomercial, they *inquired* into obtaining substantiation for the claims, but the record lacks evidence that the defendants received or reviewed any scientific substantiation beyond mere summaries or conclusory assurances." Add. 19. (emphasis in original). Based on this, and on expert reports from two experts presented by the Commission (DMC presented no experts or expert reports), the court held that the Commission was entitled to summary judgment as to counts 1-3 of the complaint. Add. 19-21.

The court next addressed the Supreme Greens infomercial. It held that "[t]here can be no genuine dispute that the Supreme Greens infomercial makes representations to the effect that Supreme Greens would effectively treat, cure, or prevent cancer, heart disease, diabetes, and arthritis." Add. 21. The court noted that DMC may have possessed one study of the type that could substantiate the sorts of claims that it was making for Supreme Greens. However, that study did not substantiate the claims in the infomercial because it tested a different product that had a different composition from Supreme Greens. Moreover, that study only purported to test claims regarding arthritis, and, as the court noted, could provide no support for claims regarding cancer, heart disease, etc. Add. 22-23. The court also held that DMC (which, once again, had designated no experts and had offered no expert reports) had presented nothing to counter the report from the Commission's expert, who stated that she had been

"unable to locate any published scientific literature indicating that any clinical studies had been conducted to evaluate the potential weight loss efficacy of Supreme Greens or [of] any substantially similar formula." Add. 24-25. Thus, the court held that the Commission was entitled to summary judgment with respect to counts 4-6 of the complaint.

The court held that DMC and Triad were liable for violations of the FTC Act in connection with the marketing of Coral Calcium, and that DMC was liable for violations in connection with the marketing of Supreme Greens. Add. 30-33. With respect to the liability of the individual defendants, the court held, *inter alia*, that Maihos was in a position to control the corporate defendants, and he knew, or should have known, of the corporate misrepresentations. Add. 35-36.

In November 2008, the court conducted four days of trial regarding appropriate relief. On August 13, 2009, it entered its Final Order and Judgment with respect to DMC and Triad. App. 1156. The court held that injunctive relief was necessary with respect to both DMC and Triad. App. 1168-69. As to DMC, the court concluded that its "activities in the past have shown that [it] will continue or resume misleading advertising unless restrained." App. 1168. The court noted that, after the Commission had expressed concern that DMC lacked substantiation for the claims it was making in its infomercials for Coral Calcium, it ceased marketing that product, but launched its Supreme Greens infomercials, and resumed making unsubstantiated claims.

App. 1169. Thus, with respect to Coral Calcium and Supreme Greens, or any substantially similar product, the court enjoined DMC from making the claims challenged in the complaint. Add. 75-76. The court also prohibited DMC from making any claim about the health benefits of any food, drug, cosmetic, or dietary supplement unless that claim was true, non-misleading, and substantiated by competent and reliable scientific substantiation. Add. 76-77.

In addition to injunctive relief, the court also required DMC and Triad to disgorge the net revenues from the infomercial-based sales of Coral Calcium and Supreme Greens. The court determined that DMC should disgorge $33,575,562.88, Add. 83, and that Triad should disgorge $20,458,801.95 resulting from sales of Coral Calcium, D.259.[6] The court also ordered DMC to disgorge $14,644,936.24 resulting from sales of Supreme Greens. Add. 83. Finally, the court held that BP International had no legitimate claim to the $574,274.23 it received from the proceeds of the sales of Coral Calcium. In particular, the court found that BP International was secretly created by defendant Barrett so that he could siphon off funds from Coral Calcium sales, and could avoid sharing those funds with his partner, Maihos. Accordingly, the

[6] The Commission had urged the court to hold DMC and Triad jointly and severally liable for sales of Coral Calcium that occurred during the period in which they collaborated (January 2002 through February 2003). D.219 at 31. Instead, the court made each separately liable for half of that amount (*i.e.*, $20,458,801.95). Add. 61. DMC is solely liable for monetary relief related to Coral Calcium sales that occurred after it ceased collaborating with Triad. *Id.*

court ordered that BP International disgorge all the funds that it received. App. 1181-82.[7]

DMC filed its Notice of Appeal on August 14, 2009. Triad did not appeal.

STANDARD OF REVIEW

The first two issues -- whether DMC's infomercials were deceptive, and whether Maihos was liable for monetary equitable relief as a result of DMC's violations of the FTC Act -- were resolved by the district court on a motion for summary judgment. Thus, this Court's review is *de novo*. *Pelletier v. Yellow Transp., Inc.*, 549 F.3d 578, 580 (1st Cir. 2008). The third issue -- whether the court correctly held DMC liable for $48.2 million in monetary equitable relief -- was resolved by the court after a four-day trial. This Court may overturn such an equitable remedy only if it concludes that the district court abused its discretion. *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir. 2004). This Court also reviews for abuse of discretion the evidentiary rulings that the district court made in connection with its imposition of the remedy. *Id.* at 28. A court abuses its discretion only if it fails to consider a material factor, substantially relies on an improper factor, or assesses the proper factors but clearly errs in weighing them. *Adelson v. Hananel*, 510 F.3d 43, 52 (1st Cir. 2007).

[7] The court dismissed claims against relief defendants Lisa Stern and Steven Ritchey. Add. 65; Order of Sept. 30, 2008.

SUMMARY OF ARGUMENT

DMC does not dispute that its infomercials for Coral Calcium and Supreme Greens made the health and safety claims challenged in the Commission's complaint. These included claims that both products could treat and cure cancer and heart disease. Instead, it contends that it possessed sufficient substantiation to create a genuine issue as to whether the infomercials were deceptive. But substantiation for the sorts of health and safety claims that DMC made must consist of competent and reliable scientific evidence. There was nothing competent or reliable about DMC's substantiation. With respect to its Coral Calcium claims, the only substantiation it possessed consisted of two books written by Robert Barefoot, who was the so-called guest on the infomercial. Barefoot had no particular qualifications, the books are replete with absurd claims, and they cite studies without explanation or context. In stark contrast, the Commission presented reports from two experts, who explained that there were no studies that supported any of the claims challenged by the Commission. Plainly, Barefoot's books do not create a genuine issue of fact regarding the substantiation for the Coral Calcium infomercials. (Part I.A, *infra*.)

DMC fares no better with respect to the Supreme Greens infomercials. Again, the Commission presented two experts, and again, their reports made clear that there was no scientific support for any of the claims challenged by the Commission's complaint. DMC did proffer one study. But that study was irrelevant to this case

because, at most, it supported a claim that was not challenged by the complaint. (Part I.B, *infra*.)

DMC raises a variety of other arguments in defense of its infomercials, but there is no merit to any of them. Among these is its contention that it was not required to substantiate any of the claims it made because its infomercials were merely "puffing." But puffing consists of blustering and boasting on which no consumer would rely. In contrast, DMC presents its infomercials as scientific fact -- the infomercials repeatedly refer to various studies. Unfortunately for DMC, those studies do not exist. (Part I.C, *infra*.)

The district court correctly held Robert Maihos liable for DMC's violations because he had the authority to control DMC's practices. He was a 50% owner of DMC, he was an officer of DMC, and he received 50% of its profits. He was responsible for its day-to-day operations. Indeed, the evidence shows that he was an ultimate decision-maker for DMC. It is irrelevant that Maihos did not personally prepare the scripts of, or edit, the deceptive infomercials. Maihos also had the requisite knowledge to hold him liable for monetary equitable relief resulting from DMC's violations. This knowledge may be inferred from Maihos's day-to-day involvement with DMC's operations. There is also direct evidence of his knowledge: his girlfriend, who was a registered dietician, advised him that the claims made in the Coral Calcium infomercial were "outlandish," and that he should seek scientific

support for them. His lawyer warned him about the claims in the Supreme Greens infomercials. But he ignored those warnings, relying instead on his own "good faith belief." Given the inadequacy of the substantiation for DMC's infomercials, it is highly doubtful that Maihos's belief was, in fact, in good faith. In any event, he should have known that the claims were unsubstantiated, and that is sufficient to hold him liable for monetary equitable relief. (Part II, *infra*.)

The district court held a four-day trial with respect to the relief in this case, and did not abuse its discretion when it ordered DMC to pay $48.2 million in monetary equitable relief. The remedy is properly termed rescission because it undoes the consumers' purchase transactions, and it is appropriate because DMC's products have no value for their intended purpose: they will not cure cancer, treat heart disease, etc. (Part III.A, *infra*.)

The court's monetary award has three components. First, $20.45 million resulted from Coral Calcium sales made between January 2002 and February 2003. During this period, DMC collaborated with Triad, and sales amounted to $40.9 million. Because DMC and Triad had agreed to split profits, the court split the obligation to make restitution to injured consumers. Ample evidence supports the $40.9 million amount, including testimony from Triad's accountant, and Trial Exhibit 185, a CD that contained a record of sales made during that period. DMC raises a series of evidentiary objections, none of which has any merit. In particular, it

contends the court abused its discretion when it admitted Ex. 185. But the Commission supported that exhibit with the declaration of Ilesh Sanghavi, who oversaw the creation of the records on a daily basis, and who routinely used those records. As a result of this declaration, Ex. 185 is admissible as a business record. DMC also argues that, pursuant to *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), monetary equitable relief must be limited to the profits it received. But *Verity* imposed a limit on monetary equitable relief only in the situation where consumers made their payments to a non-defendant. In this case, consumers made payments directly to Triad, and Triad was a defendant. As a result, *Verity* is irrelevant. (Part III.A, *infra*.)

The district court did not abuse its discretion when it included $13.1 million in its award of monetary equitable relief based on Coral Calcium sales during the period of March through July 2003 (the period during which DMC was no longer collaborating with Triad). DMC raises several evidentiary objections regarding the evidence supporting this part of the award. The district court rejected these objections, and this Court should affirm the district court's holdings. (Part III.B, *infra*.)

The final component of the monetary award is $14.65 million resulting from DMC's sales of Supreme Greens. DMC's only argument with respect to this component of the award is that there were many versions of the Supreme Greens

infomercial, and that, because the Commission did not demonstrate that every version violated the FTC Act, the Commission is only entitled to relief for sales that were generated by the version of the infomercial that was attached to the complaint. But DMC's records were, in its own words, subject to "substantial confusion," and this rendered it impossible to determine whether any sales of Supreme Greens were derived from any hypothetical non-deceptive version of the infomercial. Moreover, there is no evidence that DMC ever created such a version, and even if it did, the evidence shows that it quickly returned to using the original version. (Part III.C, *infra*.)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DMC VIOLATED THE FTC ACT

In this appeal, DMC does not dispute that its Coral Calcium infomercial contained the claims challenged in the Commission's complaint: that the product could cure or treat various diseases, including cancer and heart disease (Count 1); that a user would absorb 100% of the calcium contained in the product (Count 2); or that articles published in the Journal of the American Medical Association ("JAMA") and the New England Journal of Medicine ("NEJM") "prove" that calcium supplements can cure cancer (Count 3). Nor does DMC dispute that its Supreme Greens infomercials represented that the product could cure various diseases, including heart

disease and cancer (Count 4); that an overweight user would lose a significant amount of weight (Count 5); or that the product was safe for any user, including babies and pregnant women (Count 6). Instead, DMC contends that the district court erred when it granted summary judgment because, in its view, the substantiation that it possessed with respect to those claims created an issue of fact as to whether those claims were false or deceptive. Br. 26-29.

The substantiation for the sorts of health and safety claims that DMC made "must, at a minimum, consist of competent and reliable scientific evidence." *FTC v. Nat'l Urological Gp., Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008), *aff'd per curiam*, 2009 WL 4810345 (11th Cir. 2009)[8]; *see FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008)[9]; Add. 14. But the

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[8] The court in *National Urological* adopted the following definition of competent and reliable scientific evidence:

> tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

645 F. Supp. 2d at 1190, quoting the Commission's Advertising Guide for Industry regarding dietary supplements, http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm.

[9] DMC cites *FTC v. QT, Inc.*, 448 F. Supp. 2d at 959, for the proposition that whether an advertiser's "substantiation is sufficient is necessarily a question of fact that cannot be decided on summary judgment." Br. 22. That case says nothing of the sort. The court in that case resolved issues regarding advertising substantiation after a trial, not on summary judgment. The court merely stated the noncontroversial proposition that the level of substantiation that an advertiser must possess is a fact

substantiation that DMC submitted comes nowhere close to providing adequate support for the farfetched claims it made. In contrast, the expert declarations presented by the Commission make clear that there is simply no competent and reliable scientific evidence supporting DMC's claims. Thus, the court correctly held that DMC's substantiation failed to create a genuine issue of material fact. In addition, none of the other "threshold questions" raised by DMC, *see* Br. 20-23, justifies reversal.

A. The district court correctly held that, as a matter of law, DMC lacked substantiation sufficient to support the challenged claims regarding Coral Calcium

The district court correctly granted summary judgment with respect to counts 1-3 of the complaint because DMC completely lacked substantiation for the claims it made regarding Coral Calcium. In support of its motion for summary judgment, the Commission presented declarations from two experts in connection with those claims. Dr. Sowers, a professor at the University of Michigan, and a recognized expert on calcium and its relation to disease, evaluated whether there was any support for DMC's claim that Coral Calcium could cure diseases, including cancer and heart disease, and its additional claim that the cancer-curing properties of calcium

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question. But *QT* never states that, where, as here, a party has raised no genuine issue of fact, the issue may not be resolved on a motion for summary judgment. *See FTC v. Nat'l Urological Gp.*, 645 F. Supp. 2d at 1202-03 (resolving advertising substantiation issues on summary judgment).

supplements were supported by scientific research published in JAMA and NEJM. App. 516. Dr. Sowers relied upon her own extensive research, a bibliographic search that she conducted, consultation with colleagues, and 10 articles reporting the results of various studies. App. 519. She determined that, although there was some evidence that increased intake of calcium might play some role in preventing colorectal cancer, no study supported the claim that calcium could reverse or cure any form of cancer, including colorectal cancer. App. 523. With respect to heart disease, she concluded that some studies suggest that calcium supplementation may result in a small decrease in blood pressure. "The studies do not, however, remotely suggest that calcium supplementation is effective in the treatment or cure of heart disease * * *." App. 533-534. Her analysis also concluded that no scientific evidence supported a claim that calcium supplementation could treat or cure lupus, multiple sclerosis, or any other autoimmune disease, and that no research published in JAMA or NEJM proves that calcium supplementation could cure cancer. App. 535.

The Commission also submitted a declaration from Dr. Wood, a professor at Tufts University, and a recognized expert on the bioavailability of minerals, including calcium, in humans. App. 504. He evaluated the claim challenged in count 2 of the Commission's complaint: that Coral Calcium is absorbed more quickly than other forms of calcium, and that the body absorbs 100% of the calcium in Coral Calcium. To evaluate these claims, Dr. Wood relied on bibliographic searches, consultation

with colleagues, his own experience, and three reports of studies. App. 506-507. Dr. Wood located only one small study that evaluated the body's ability to absorb coral calcium. Dr. Wood explained that the study was seriously flawed, but that even if the study were accepted, it did not demonstrate that 100% of Coral Calcium is absorbed. App. 511. He also concluded that there was no support for the claim that coral calcium was absorbed up to 50 times faster than other forms of calcium. Indeed, the only study that tested calcium derived from marine coral suggested that it was absorbed no faster than other forms of calcium. App. 513.

In its brief, DMC claims that it created an issue of fact with respect to the substantiation for the claims it made in the Coral Calcium infomercial because DMC possessed the two books written by Barefoot (who was the "guest" on the Coral Calcium infomercial): *The Calcium Factor* (which was co-authored by Barefoot and Carl J. Reich), D.147, Ex. 10; and *Death by Diet*, D.147, Ex. 11. Br. 25. It is laughable to suggest that these books could somehow constitute the sort of "competent and reliable scientific evidence" that DMC should have possessed to make the sorts of health and safety claims that it made for Coral Calcium. The books refer to Barefoot as a chemist, but give no description of his educational background, or any indication that he ever graduated from college. Further, although Carl Reich is referred to as a medical doctor, his license to practice medicine was revoked nearly 30 years ago. *The Calcium Factor* at 138. DMC contends that the books "contain

numerous citations to scientific studies and journals." Br. 26. But as the district court explained, "the books are little more than a compilation of citations, with no context or explanation." Add. 17. Moreover, those studies that are mentioned in the books are cited for propositions unrelated to the claims made in the Coral Calcium infomercial. *See, e.g., The Calcium Factor* at 22 (citing a study that concluded that calcium supplementation may combat osteoporosis). Further, the books' conclusion that calcium supplementation has curative powers is based on nothing more than the authors' speculation.

In addition, the books are replete with ridiculous statements that undermine their credibility. According to the books, in many cultures, the *average* life expectancy is 135 years, *Calcium Factor* at 121; *Death by Diet* at 133; AIDS is not caused by HIV, but by the side effects of drugs, *Death by Diet* at 29; American doctors have a life expectancy of 58 years, *Calcium Factor* at 121, *Death by Diet* at 133; only albinos will contract skin cancer as a result of prolonged exposure to sunlight, *Calcium Factor* at 143; eating cheeseburgers causes Alzheimer's disease, *Calcium Factor* at 57; wearing glasses is unhealthy, *Calcium Factor* at 145; and Americans should substantially increase their consumption of sodium, *Calcium Factor* at 108. DMC creates a genuine issue of fact with respect to the adequacy of its substantiation only "if, on the evidence presented, it may reasonably be resolved in favor of either party at trial." *Cordi-Allen v. Conlon*, 494 F.3d 245, 249 (1st Cir.

2007) (internal quotation marks omitted). Given the ludicrous claims made by the books, no reader could accept the authors' unsupported theories as adequate to substantiate the claims made in the Coral Calcium infomercial. Combine this with the expert statements presented by the Commission and it is clear that the district court correctly held that DMC had failed to create a genuine issue of fact regarding the allegations that it lacked substantiation for the claims in its Coral Calcium infomercial.

Nor is DMC helped by *FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004). That case involved the liability of former baseball player Steve Garvey, who was hired by the advertiser as a celebrity spokesman merely to appear in an advertisement. The court made clear that, although Garvey was required to possess some level of substantiation for the claims he made, it was a lower level than the advertiser itself was required to possess. *Id.* at 902 n.12. DMC was the principal advertiser of Coral Calcium. Thus, a case that discussed the liability of a celebrity spokesperson is simply irrelevant.[10]

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[10] DMC contends that it "did not [itself] make any of the statements at issue" because the claims for the products were spoken by Barefoot and Guerrero. *See* Br. at 22. This, of course, is irrelevant. What is crucial is that DMC was responsible for the production and dissemination of the infomercial. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 301 (7th Cir. 1979) (holding an advertiser liable for statements made in advertising by independent testimonialists); *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 125 (D. Conn. 2008), *appeal docketed*, No. 10-878 (2d Cir. Mar. 8, 2010) (same). Indeed, if an advertiser could escape liability for false or deceptive statements in its advertisements merely by making sure that those statements originally came out of the mouth of someone else, then the FTC Act's prohibitions of false or deceptive advertising would be easy to evade.

B. The district court correctly held that, as a matter of law, DMC lacked substantiation sufficient to support the challenged claims regarding Supreme Greens

The district court also made no error when it granted summary judgment with respect to the Supreme Green complaint counts. Again, the Commission presented declarations from two experts, and DMC presented support that completely failed to substantiate the claims it made. The first expert, Dr. King, is a medical doctor, an associate professor at the Johns Hopkins University School of Medicine, and an expert in the diagnosis and management of patients with pulmonary diseases. App. 537. He evaluated two propositions that underlie the claims made in the Supreme Greens infomercial: that chronic disease occurs when the body is too acidic, and that making the body more alkaline will prevent or cure a variety of diseases, including cancer and heart disease. Dr. King stated that the body has numerous systems to regulate its pH, and that he was aware of no scientific evidence or studies supporting the claim that any chronic disease was caused by the blood being too acidic. App. 540, 541. He also stated that he was aware of no study or other evidence supporting the proposition that increasing the body's alkalinity will prevent or cure various diseases, including cancer and heart disease. App. 542.

The Commission's second expert, Dr. Cassileth, is the chief of integrative medicine service at Memorial Sloan-Kettering Cancer Center. She is an expert in the field of complementary and alternative treatments for cancer. App. 546-47. She

evaluated whether there is any support for DMC's claims (challenged in counts 4 and 5 of the complaint) that Supreme Greens is effective as a treatment or cure for various diseases, including cancer and heart disease, and that Supreme Greens will cause significant weight loss. Dr. Cassileth stated that the most scientifically valid way to determine the efficacy of Supreme Greens would be to conduct a double-blind placebo controlled study of the product itself (or a substantially similar formula). App. 554. Dr. Cassileth indicated that she had been unable to locate any such study. *Id.* She did locate and review several studies that evaluated individual ingredients of Supreme Greens, and she stated that there was no reliable evidence that any of the ingredients could prevent, treat, or cure cancer, heart disease, diabetes, or arthritis. App. 556. Dr. Cassileth also stated that she had been unable to locate any evidence that Supreme Greens was effective for promoting weight loss. App. 557.

The support that DMC presented for the claims it made in its Supreme Greens infomercials was every bit as inadequate as the support it presented for its Coral Calcium infomercials. It offered no expert or expert report. Instead, the only support it presented was a 61-page hodgepodge of items. App. 561-621. It includes only one report of a study on any of the ingredients in Supreme Greens: a preliminary study that concluded that MSM, one of the ingredients in Supreme Greens, may help lessen pain for those suffering from degenerative arthritis. But this is not relevant to DMC's claims that Supreme Greens could *cure* cancer, heart disease, diabetes, and arthritis,

which are the claims challenged by the Commission. The remainder of the material is mostly irrelevant to the efficacy claims challenged by the Commission. It does include references to studies regarding two of the other 38 ingredients in Supreme Greens (wheatgrass and grapefruit pectin). But not only are there no study reports for these studies, the references to the studies fail to give any indication as to whether the amounts of the ingredients that were tested bear any relation to the amounts of those ingredients that were included in the Supreme Greens pills.[11] In addition, the materials do not substantiate the claim that Supreme Greens is safe. There is only one reference to a study related to toxicity, that study tested only one of the 39 ingredients included in Supreme Greens, and that study apparently showed only that the ingredient (MSM) was not toxic to rats. App. 568-569. Further, there was absolutely no substantiation that was in any way related to DMC's claim that Supreme Greens could cause weight loss.

Moreover, during the infomercial, the guest, Alejandro Guerrero, claimed that,

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[11] DMC complains that the district court's opinion only discusses the MSM study and ignored the other substantiation it profferred. *See* Br. 27-28. But the court did not ignore the other substantiation, it simply recognized that the MSM study was the only substantiation presented by DMC that could constitute competent and reliable scientific evidence. Indeed, even a cursory review of the other items submitted by DMC shows that the court was correct. *See* App. 568-621, which includes, *inter alia*, a message from the surgeon general to the effect that food is necessary for good health; a two-paragraph statement from a 1936 Senate Document that claims that fruits and vegetables do not contain sufficient minerals; advertising for grapefruit pectin; and an abstract of an article that states that eating fruits and vegetables is healthy.

for an eight-year period, he had conducted a study of 200 patients suffering from a variety of terminal conditions, and that, after administering Supreme Greens, only eight of them had died. App. 139-140. DMC requested that Guerrero provide substantiation for this claim, but he never did. App. 559, 1678. Again, it is abundantly clear that the meager substantiation that DMC provided for its Supreme Greens infomercials does not create a genuine issue of material fact that it possessed a reasonable basis for the claims it made.

C. None of the other arguments raised by DMC justifies reversal of the summary judgment

DMC makes a variety of other arguments regarding its liability for the claims it made, but none justifies reversal of the district court's summary judgment. First, it observes that the court held that the claims in DMC's infomercials were *likely to mislead* consumers. Based on this, it argues that the court never held that those claims were *actually misleading*. Br. 20, citing Add. 28. But this argument is based upon a misunderstanding of the FTC Act. Section 5(a) of that act prohibits, *inter alia*, deceptive acts or practices. 15 U.S.C. § 45(a). It is well settled that a representation made in an advertisement is deceptive (*i.e.*, misleading), and therefore violates the FTC Act, if that representation is *likely to mislead* consumers. *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005); *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.3 (D.C. Cir. 2000); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095

(9th Cir. 1994); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1030 (7th Cir. 1988). If, as here, the Commission establishes that an advertising claim is likely to mislead consumers, this does not mean that the representation is not actually misleading. To the contrary, there would be no violation of the FTC Act if the claim were not misleading. Instead, "likely to mislead" merely means that the Commission can establish a violation of the FTC Act, *i.e.*, that a practice is deceptive, without showing that consumers have been misled and injured: the Commission can challenge deceptive practices in their incipiency, before injury actually occurs. *FTC v. Freecom*, 401 F.3d at 1203 ("[n]either proof of reliance nor consumer injury is necessary to establish a § 5 violation"). Thus, a representation that is likely to mislead consumers is deceptive, and the Commission can prevail without presenting a parade of injured consumers.[12]

DMC mistakenly contends that *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), supports its contention that the Commission failed to prove deception. *See*

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[12] The district court correctly held that "the FTC has shown that claims in the Coral Calcium and Supreme Greens infomercials are deceptive, that is, they are *likely* to mislead consumers." Add. 28 (emphasis in original). As DMC notes, however, the court then stated that proving that claims are likely to mislead consumers "falls short of proving that the infomercials are *actually misleading*." *Id.*; *see* Br. 20. Of course, as explained above, claims that are likely to mislead consumers are, in fact, deceptive, and to the extent the court misstated the law in its summary judgment Opinion, it corrected that misstatement in its Memorandum regarding remedies. *See* Add. 48 (holding that unsubstantiated claims are actually misleading). In any event, even if the district court did initially misstate the law, such a misstatement is irrelevant because review here is *de novo*.

Br. 20. *Pearson v. Shalala* is irrelevant. That case involved a challenge to an FDA regulation that prohibited marketers from making health claims for dietary supplements unless there was significant scientific agreement among experts regarding the accuracy of the claim. *Id.* at 651. In that case, the principal issue was whether a claim lacking scientific agreement could be barred by a regulation on the ground that it was "potentially misleading." *Id.* The court of appeals in *Pearson* therefore conducted its First Amendment analysis of such restrictions under the three-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

However, that test does not apply here because DMC's claims were actually deceptive and, as explained in *Central Hudson*, such claims are not entitled to any First Amendment protection at all. *Id.* at 563. Indeed, it is well established that an advertisement is deceptive if the advertiser lacks substantiation (*i.e.*, a reasonable basis) for the claims it makes. *FTC v. Pantron*, 33 F.3d at 1095; *Thompson Medical Co. Inc. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986); *American Home Products Corp. v. FTC*, 695 F.2d 681, 693 (3d Cir. 1982). This is so because, as the Commission explained in its Policy Statement Regarding Advertising Substantiation, consumers reasonably believe that advertisers possess substantiation for the claims they make. *In re Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd sub nom. Thompson Medical Co. Inc. v. FTC*, *supra*. DMC lacked reasonable substantiation for the claims

it made. Therefore, those claims were misleading and deceptive, not just potentially misleading.

DMC also mistakenly contends that standards of liability under the FTC Act were somehow modified by the Dietary Supplement Health and Education Act of 1994, P.L. 103-417 ("DSHEA"). *See* Br. 21 & n.5. However, DSHEA modified the Federal Food, Drug, and Cosmetic Act, and made no change whatsoever to the FTC Act. Thus, DSHEA had no impact on the standards of liability under the FTC Act.

Nor can DMC escape liability by claiming that its infomercials were merely puffing or expressions of opinion, because the infomercials contain neither. *See* Br. 23-24. "'Puffing' is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely . . .." *Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 38 (1st Cir. 2000) (internal quotation marks omitted). But a specific and measurable claim is never puffery. *Id.* Although DMC claims that the infomercials are puffery, it cites to no examples of puffery in the infomercials because there are none. In fact, the claims in both infomercials are presented as scientific fact. *See, e.g.*, Coral Calcium infomercial at App. 103 ("since 1982, we've been studying coral calcium. * * * I've witnessed people get out of wheelchairs with multiple sclerosis just by getting on the calcium"); and at *id.* ("why did the Journal of the AMA this year quote the [Strang] Cancer Research Institute and said that calcium supplements reverse cancer"); Supreme Greens infomercial at App. 139 ("I'm very

confident in saying that [if I alkalize my body I will not come up with a chronic degenerative disease] because of the clinical studies we've done"); and at App. 145-46 ("I'll give you a study that they did with grapefruit pectin * * * After 12 months the group [of pigs] that received the grapefruit pectin actually had an 88 percent decrease in arterial plaque than from when they started").

Similarly, statements in the infomercials are never presented as mere opinions. As the examples set forth above show, claims are always presented as scientific fact. Indeed, in the Coral Calcium infomercial, the "guest," Robert Barefoot is asked whether it is merely his opinion that taking calcium supplements will prevent cancer. He vehemently denies this, and explains that this claim is based research done at the Strang Cancer Research Institute. App. 110-111.

Nor is there any merit to DMC's contention that the district court "improperly ignored" the disclaimers "throughout" the infomercials. *See* Br. 28. DMC contends that there were three disclaimers in the infomercials: that the infomercials were paid advertising, that the infomercials express the opinions of the speakers, and that the products are not intended to treat or cure any disease. Br. 28. As this Court has explained:

> [d]isclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.

Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1497 (1st Cir. 1989). The transcripts of the infomercials include only one disclaimer -- that the infomercials are paid advertising. *See* App. 86, 119, 131, 164. Such a disclaimer does nothing to correct the unsubstantiated claims made in the infomercials. Moreover, even if other versions of the infomercials include the two additional disclaimers mentioned by DMC, such disclaimers are directly contradicted by repeated statements made by the "guests" (and set forth *supra*) to the effect that efficacy claims for the products are based on scientific evidence, not opinion, and that the products are intended to prevent and cure various diseases. Plainly, even if DMC did include additional disclaimers in some versions of the infomercials, this would in no way justify reversal of the district court's summary judgment.

II. THE DISTRICT COURT CORRECTLY HELD THAT ROBERT MAIHOS WAS LIABLE FOR MONETARY EQUITABLE RELIEF RESULTING FROM DMC'S LAW VIOLATIONS

The district court correctly held that DMC had failed to create a genuine issue of material fact that Maihos is liable for DMC's violations, and that he is also liable for monetary equitable relief resulting therefrom. Add. 35-36. An individual may be held liable for a corporate defendant's violations of the FTC Act if that individual "participated directly in the business entity's deceptive acts or practices, *or had the authority to control* such acts or practices." *FTC v. Freecom*, 401 F.3d at 1204

(emphasis in original); *see FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). There was ample undisputed evidence in the record demonstrating that Maihos had the authority to control DMC's acts or practices. According to Maihos's own testimony, he was a 50% owner of DMC, and served, at times, as its president and vice-president. App. 365, 370. He received 50% of DMC's profits. App. 371. He was a director of DMC. App. 378. He had the authority to, and did, sign checks and enter into contracts on behalf of DMC. App. 377. He admitted that he was responsible for the day-to-day operations of DMC. App. 444. Indeed, according to appellant Barrett, he and Maihos were the ultimate decisionmakers for DMC. D.130, Ex. 12 at Att. 3, p.7-8. Plainly, this is sufficient to hold Maihos liable for DMC's violations. *See FTC v. Publishing Clearing House*, 104 F.3d at 1170 (defendant Martin's "assumption of the role of president of PCH and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation").

Although DMC contends that Maihos should not be held liable for DMC's violations, it bases this argument on evidence that he was not a direct participant in DMC's violations. In particular, it states that "Maihos had no involvement with the actual scripting or production of" the infomercials, that "Maihos was not responsible for obtaining any substantiation * * * for the claims they made in the infomercials,"

that he "was not responsible for locating products or potential advertising," and that "he did not have any responsibility for reviewing or editing the content of advertising or for purchasing media." *See* Br. 30-31. But none of this contradicts the district court's conclusion that Maihos had the authority to control DMC's violative conduct, even if he was not a participant in that conduct. To hold Maihos liable for DMC's conduct, the Commission only needs to show that he had the authority to control that conduct. Because DMC raises no genuine issue of material fact as to that authority, the district court did not err when it granted summary judgment as to Maihos's liability for DMC's violations.[13]

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[13] DMC contends that *FTC v. QT, Inc.*, *supra*, and *United States v. Building Inspector of America, Inc.*, 894 F. Supp. 507 (D. Mass. 1995), support its argument that Maihos's status as an owner and officer of DMC, and the fact that he was involved in DMC's day-to-day operations, are not sufficient to hold him personally liable for DMC's law violations. *See* Br. 33. Those cases say nothing of the sort. In *QT*, the court held that the owner's wife, who was nominally a corporate officer, and who occasionally helped with shipping and handling when the office was short-staffed, was not liable for the corporation's deceptive advertising. 448 F. Supp. 2d at 973. Unlike Maihos, she was not routinely involved in day-to-day operations. In *Building Inspector*, the court refused to hold on summary judgment that Lawrence Finkelstone, who was an officer and a minority owner, was liable for corporate violations. However, unlike here, there was specific evidence that Finkelstone *lacked* authority to control corporate conduct: his attempts to put a halt to certain corporate violations had been stymied by the majority owner (upon whom liability was imposed). Thus, liability could not be imposed even though Finkelstone clearly knew of the violations. In *Building Inspector*, the court also refused to impose liability on the owner's spouse, who was nominally an officer, but had no involvement with those aspects of the corporations' conduct that led to law violations. 894 F. Supp. at 520. Unlike the individuals who escaped liability in *QT* and *Building Inspector*, Maihos was both an owner and officer, was intimately involved in DMC's operations, and there is no evidence that he lacked authority to control DMC's violations.

The district court also correctly held that Maihos had the requisite knowledge to hold him personally liable for monetary equitable relief. This knowledge requirement is satisfied if the Commission shows that Maihos had actual knowledge of the misrepresentations in the infomercials, reckless indifference to the misrepresentations, or an awareness of a high probability that the infomercials were deceptive along with an intentional avoidance of the truth. *See FTC v. Amy Travel Serv. Inc.*, 875 F.2d at 574. That is, the Commission must show that Maihos knew or should have known of DMC's violations. *FTC v. Freecom*, 401 F.3d at 1207. Although DMC claims that "[t]here was no evidence that Maihos had any knowledge that the claims in either infomercial were misleading," *see* Br. 32, in fact, there was ample evidence that Maihos had such knowledge but chose to ignore it. In particular, Maihos's knowledge can be inferred from the extent of his involvement in DMC's day-to-day operations because "'the degree of participation in business affairs is probative of knowledge.'" *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999), quoting *FTC v. Amy Travel*, 875 F.2d at 574. There is also direct evidence of Maihos's knowledge. Maihos received an e-mail from his girlfriend, who was a registered dietician and who had viewed the Coral Calcium infomercial. She advised him that the claims in the infomercial were "outlandish," suggested he seek scientific support for the claims, and asked how he could believe that any product could cure heart disease, diabetes, arthritis, and cancer. App. 385. Maihos ignored her advice.

Instead, he ostensibly based his faith in the infomercial on Barefoot and his books. App. 382.

Maihos also received a warning regarding the Supreme Greens infomercial. On October 3, 2003, shortly after DMC commenced the dissemination of that infomercial, Maihos received a fax from DMC's attorney. The attorney attached a copy of a transcript of a Supreme Greens infomercial that he had marked up. App. 421-436. The mark-up advised Maihos that claims regarding cancer prevention should be removed, urged Maihos to seek substantiation for certain other claims, and questioned whether several other statements were "BS." The message to Maihos in the fax was "[w]e need to talk about this." App. 421. But according to Maihos, although he recalled discussing the fax with his attorneys, he had no recollection of taking any other action in response. App. 401. Plainly, Maihos had direct evidence that DMC lacked substantiation for the claims made in its infomercials, and this is sufficient to hold him liable for monetary equitable relief.

DMC raises only one argument with respect to Maihos's knowledge: it contends that Maihos "had a good faith belief" in the claims made in the infomercials. *See* Br. 38. But how could Maihos's belief, which was apparently based on the fantastical claims made in Barefoot's books, and on the completely unsubstantiated claims made by "Dr." Guerrero, be in good faith? And how could Maihos continue to hold such a belief in the face of the warnings he received from his attorney and his

registered dietician girlfriend?

Nor does *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283 (S.D.N.Y. 2008), hold that an assertion of good faith belief precludes summary judgment. *See* Br. 38. Indeed, in that case, the court granted summary judgment with respect to defendant Taylor's individual liability even though he argued that he had a good faith belief in the truth of corporate misrepresentations. In particular, the court concluded that, based on undisputed facts, Taylor's belief could not be in good faith. *Id.* at 321.[14] In this case, it is similarly clear that, based on undisputed facts and the information available to him, if Maihos actually believed in the truth of the claims in the infomercials, this demonstrates merely that he was credulous, not that he had a good faith belief. There is no free ride under the FTC Act for the credulous.[15] Thus, DMC

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[14] In *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851 (D. Mass. 1992), which is also cited by DMC, Br. 38, the court granted summary judgment, and held the individual defendant liable with respect to all but one count of the complaint. As to that count, the court concluded that the defendant's purported good faith belief in the accuracy of the representation was sufficient to create an issue of fact with respect to knowledge. However, unlike this case, there was no indication in *Patriot Alcohol Tester* that the claim of good faith belief was undermined by undisputed evidence in the record. *See id.* at 860 n.3. In any event, nothing in that case holds that the mere invocation of a claim of good faith belief is automatically sufficient to defeat summary judgment.

[15] As *FTC v. Freecom* makes clear, an individual may be held liable for monetary equitable relief if he should have known of the corporate violations. 401 F.3d at 1207. "'[S]hould have known' import[s] a standard of reasonableness." *Amoco Production Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980). Even if Maihos actually believed in the claims made by DMC, that belief was not reasonable.

has failed to demonstrate a genuine issue of fact as to Maihos's knowledge, and the district court correctly held him personally liable for monetary equitable relief.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED DMC TO PAY $48.2 MILLION IN MONETARY EQUITABLE RELIEF

A. The district court correctly based its award of monetary equitable relief on DMC's sales

The district court correctly ordered DMC to pay $48.2 million in monetary equitable relief. This amount includes $33.6 million that resulted from deceptive sales of Coral Calcium, and $14.6 million from deceptive sales of Supreme Greens. It is well settled that, in an action brought by the Commission pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), a district court has the authority to impose monetary equitable relief. *FTC v. Pantron*, 33 F.3d at 1102; *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Seismic Entm't Prods., Inc.*, 441 F. Supp. 2d 349, 353 (D.N.H. 2006). Such relief encompasses disgorgement, rescission, and the monetary equivalent of rescission, but, as the district court noted, courts have used these terms with "some imprecision." Add. 56. No matter what the relief is called, however, it is clear that, where a defendant has made misrepresentations that are likely to deceive consumers, where those misrepresentations are widely disseminated, and where consumers purchased the

defendant's products, monetary relief in the amount of net sales is an appropriate award because it "furthers the FTC's ability to carry out its statutory purpose." *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (*en banc*); *see FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009); *McGregor v. Chierico*, 206 F.3d 1378, 1389 (11th Cir. 2000).

Although the district court referred to the monetary equitable remedy as "disgorgement," Add. 18, it also stated that "any distinction between restitution and disgorgement is largely irrelevant in this case * * *," *id.*; *see FTC v. Verity*, 443 F.3d at 67. The district court based its award on the price that consumers paid for the Coral Calcium and Supreme Greens. Add. 20-25. The court further ordered DMC to provide the Commission with the names and addresses of the consumers who purchased the two products so that the Commission could provide those consumers with refunds. Such a remedy is properly termed equitable rescission because it seeks to undo a transaction that has been tainted by misconduct (*i.e.*, DMC's misrepresentations). *See Scheurenbrand v. Wood Gundy Corp.*, 8 F.3d 1547, 1551 (11th Cir. 1993); *Arber v. Essex Wire Corp.*, 490 F.2d 414, 422 (6th Cir. 1974). Rescission is appropriate in direct seller cases such as this one (*i.e.*, the consumer buys the product directly from the defendants), where undoing the transaction and restoring the parties to the *status quo ante* will achieve complete justice. Where, as here, the product has no value for the intended purpose (*i.e.*, DMC's products cannot treat or

cure cancer, heart disease, etc.), the monetary equivalent of rescission is equal to a refund of the purchase price. *See FTC v. Trudeau*, 579 F.3d at 773 n.16; *Arber v. Essex Wire*, *supra*; *FTC v. Nat'l Urological Gp.*, 645 F. Supp. 2d at 1212.

B. The district court did not abuse its discretion when it calculated the $48.2 million monetary equitable relief

The district court did not abuse its discretion when it imposed $48.2 million in monetary equitable relief on defendants. When the Commission seeks monetary equitable relief, it must first provide the court with a reasonable approximation of the net receipts received by the defendant as a result of consumer sales that violated the FTC Act. *FTC v. Freecom*, 401 F.3d at 1206; *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); *FTC v. Seismic Entm't*, 441 F. Supp. 2d at 353. With respect to this approximation, "'the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty.'" *FTC v. Febre*, *id.*, quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). Once the Commission has provided this approximation, the burden shifts to the defendant to show that the figures are inaccurate. *FTC v. Trudeau*, 579 F.3d at 773.

The district court's monetary equitable award is composed of three parts. First, the court determined that, from January 2002 through February 2003, Coral Calcium sales made through the 800-numbers listed in the infomercial totaled $40.9 million.

Add. 60.[16] Because DMC collaborated with Triad during this period, the court made DMC liable for half of this amount -- $20.45 million. Add. 61. Second, the court held that, from March through July 2003, when DMC operated solo, net infomercial sales of Coral Calcium totaled $13.1 million. Add. 61. And third, the court found that, from August 2003 through April 2004, DMC's net infomercial sales of Supreme Greens totaled $14.65 million. Add. 62. The court also held that DMC had failed to show that these figures were unreliable or inaccurate, and that, "any difficulty in determining an exact amount is substantially due to the defendants' own record keeping." Add. 60; *see* Add. 62.

Although DMC challenges the court's calculation of each of these three components, there is no merit to any of its arguments.

1. The district court did not abuse its discretion when it imposed $20.45 million in monetary equitable relief for Coral Calcium sales made from January 2002 through February 2003

After a four-day trial, the district court found that, from January 2002 through February 2003, consumer purchases of Coral Calcium totaled $40.9 million. The court based this finding on several pieces of evidence, including the deposition testimony of Triad's vice president for operations (who was in charge of accounting), Steven Ritchey. Add. 59. Mr. Ritchey stated that, during the period that Triad and

[16] DMC also marketed Coral Calcium and Supreme Greens at stores (such as Walgreens). The court and DMC refer to such in-store sales as "retail sales." The court refers to sales made through the 800-number as "non-retail sales." *See* Add. 60.

DMC collaborated, sales of Coral Calcium amounted to $40.9 million. App. 979. The court also considered Trial Ex. 185, a CD that contained the computer records of purchases of Coral Calcium made during that period.[17] Add. 59-60; *see* App. 2174-2225 (print out of selections from Trial Ex. 185). As the court explained, Ex. 185 actually showed that net sales during the Triad period totaled more than the amount stated by Mr. Ritchey. Add. 59. However, in calculating the monetary relief, the court relied on the lower number. *Id.* In addition to the evidence mentioned in the court's opinion, there was testimony from Barrett (DMC's co-owner) that it was his "best guess" that, during the Triad period, sales of Coral Calcium totaled approximately $40 million. App. 1661.

None of the arguments raised by DMC has any merit. With respect to Mr. Ritchey's testimony, DMC notes that, at one point, he stated that he was unable to estimate the amount of Coral Calcium sales during the Triad period. *See* Br. 56, citing App. 975. But DMC ignores that, several pages later in the same deposition, after reviewing various documents, Mr. Ritchey agreed that, during the Triad period, sales totaled $40.9 million. App. 979. DMC also notes that Mr. Ritchey speculated that the $40.9 million figure may have included revenue from other products, as well as rush

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[17] The Commission provided the court with a summation of these numbers. App. 1140-41. DMC complains that the summation is not evidence. *See* Br. 54 n.20. The summation was not presented as evidence, but merely as a convenience because it adds up the thousands of entries in Ex. 185.

charges and taxes. *See* Br. 56. Of course, as explained above, such speculation is inadequate to undermine the reasonable approximation presented by the Commission because the risk of such uncertainty in a defendant's records falls on the defendant. Moreover, during the trial, when Barrett claimed not to remember whether there were other sources of revenue during the Triad period, he was impeached with his prior sworn testimony in which he stated that, during the Triad period, "very little" revenue came from other sources. App. 1523-24. And, as to DMC's contention that consumers may have paid rush charges or taxes in conjunction with their purchases of Coral Calcium, there is no reason that the monetary relief should not include these charges: they are a part of the costs that consumers paid in connection with deceptive sales.

DMC also challenges the court's reliance on Ex. 185. Again, it speculates that some of the sales in that exhibit may represent products other than Coral Calcium. *See* Br. 53. But DMC provided no evidence to back up this speculation. Moreover, it is contradicted by Barrett's deposition. *See* App. 1523-24.

DMC speculates that some of the sales listed in Ex. 185 may appear twice and thus be double counted. Br. 54. In particular, Triad worked with two separate credit card processing companies, and Ex. 185 contains a listing of the sales processed by both of those companies. DMC argues that some sales may appear in both lists. But DMC does not identify even one sale that appears twice in Ex. 185. In any event, if

a consumer's sale were processed by both of the credit processors, that consumer would presumably have sought a refund. The district court deducted refunds when it calculated monetary relief. *See* Add. 60.

DMC mistakenly contends that the district court abused its discretion when it admitted Ex. 185. *See* Br. 46-52. In particular, DMC objects that the exhibit was hearsay, and argues that the declaration of Ilesh Sanghavi (App. 754-760), which the Commission presented in support of Ex. 185, was not sufficient to overcome that objection. However, the Sanghavi declaration complies with Fed. R. Evid. 902(11), and, as a result, Ex. 185 is admissible. "The original or a duplicate of a domestic record of regularly conducted activity" is admissible:

> if accompanied by a written declaration of its custodian or other qualified person * * * certifying that the record --
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.

Fed. R. Evid. 902(11). Mr. Sanghavi's declaration complies with this rule. First, the declaration satisfies Rule 902(11)(A) because Mr. Sanghavi clearly had the relevant knowledge. Ex. 185 consists of records accounting for sales processed by Triad. Mr. Sanghavi stated that he worked as an accountant for Triad from 2000 through 2005. All the records on Ex. 185 were created within that period. Mr. Sanghavi explained

that he oversaw the creation of Triad's accounting records, and that, for most of the time he worked at Triad, he was the only person who entered information into those records. App. 754. In particular, he entered the records of all sales that Triad processed for DMC. App. 755. The declaration also satisfied Rule 902(11)(B) because Mr. Sanghavi stated that, to keep a record of DMC's sales, he entered data "almost daily" into those records, and that on a weekly basis, he used the data to calculate commissions paid to DMC and Triad. The declaration also satisfies Rule 902(11)(C) because it demonstrates that the records were maintained by Triad as a regular practice.

There is no merit to DMC's contention that Mr. Sanghavi's declaration fails to satisfy Rule 902(11) merely because Mr. Sanghavi does not certify that it was a regular practice of Triad to make Excel spreadsheets or to copy those spreadsheets onto a CD. *See* Br. 49. In fact, however, Mr. Sanghavi does state that it was his regular practice to enter data into "spreadsheets," that he recognized the format of the data, and that "when I move my mouse over the file names of the Excel files [on Ex. 185], my name shows as the author of all but one of the files * * *." App. 755-756. Plainly, this satisfies Rule 902(11). DMC's argument that Mr. Sanghavi failed to certify that it was a regular practice to make CDs is irrelevant. Rule 902(11) provides for the admission of either the original or the duplicate of a record. The CD is a duplicate of Triad's records, not the original. There is absolutely no obligation

that the Commission establish that it was a regular practice of Mr. Sanghavi (or anyone else) to prepare copies of records for use in litigation.[18]

There is also no merit to DMC's contention that Ex. 185 may not be admitted because it contains records that were not originally generated by Triad. *See* Br. 50-51. As Mr. Sanghavi explained, although Triad was responsible for processing the Coral Calcium credit card sales, it contracted with two other companies, Authorize.net and FP Video, to perform that task. App. 754-55. Triad routinely incorporated sales information it received from those companies into its records, and relied on those records to calculate the commissions it paid to itself and DMC.[19] *Id.* In fact, records are admissible pursuant to Rule 902(11) even where the declarant does not have knowledge of the original creation of the record. In *United States v. Adefehinti*, 510 F.3d 319 (D.C. Cir. 2007), the declarant was a bank employee who could certify to the bank's incorporation of records originally created by independent mortgage brokers, but was not a witness to the original creation of the records. Nonetheless, the court

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[18] DMC contends that the Commission did not explain the relevance of Ex. 185. In fact, however, Mr. Sanghavi's declaration fully explains that Ex. 185 contains a record of every sale of Coral Calcium that was made during the period that DMC collaborated with Triad. App. 755. Plainly, this is relevant to the monetary equitable relief imposed by the court, which is based on the amount of DMC's sales of Coral Calcium.

[19] Although DMC contends that Mr. Sanghavi did not explain where DMC obtained the data that he entered into the spreadsheets, *see* Br. 48 n.16, in fact, he explained that the data came from Triad's merchant processors, who were responsible for processing credit card sales for Coral Calcium, App. 754.

held that the records were admissible pursuant to Rule 902(11) because the declarant "'need not have personal knowledge of the actual creation of the document.'" *Id.* at 325, quoting *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000).

Indeed, several other courts "have held that a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record," and the other requirements of the Federal Rules of Evidence are satisfied. *Brawner v. Allstate Indemnity Co.*, 591 F.3d 984, 987 (8th Cir. 2010), and cases cited therein. It is clear from Mr. Sanghavi's declaration that Triad routinely incorporated records from Authorize.net and from FP Video, and that Triad relied on those records: Mr. Sanghavi explained that he used that data to calculate commissions that Triad paid. App. 755. Thus, the mere fact that Triad's records include business records that were generated initially by other companies but were routinely incorporated into Triad's business records does not affect the admissibility of Ex. 185.[20]

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[20] DMC is not helped by *United States v. Vigneau*, 187 F.3d 82 (1st Cir. 1999), or by *Cameron v. Otto Bock Orthopedic Ind., Inc.*, 43 F.3d 14 (1st Cir. 1994). *See* Br. 51. In *Vigneau*, the United States sought to prove that Vigneau had engaged in money laundering. It introduced Western Union money transfer records that had Vigneau's name and address on them. This Court held that these records could be used to establish that *someone* transferred money, but concluded that the records were inadmissible hearsay as to whether it was Vigneau who had actually wired the money. The problem for the United States was that it was unable to show that, when a Western Union customer fills out a form, this is part of a regularly conducted business activity, or that Western Union takes any steps to verify that customer's identity. 187 F.3d at 85; *see United States v. Vigneau*, 187 F.3d 70, 74 (1st Cir. 1999). Similarly,

DMC complains that Mr. Sanghavi's declaration is somehow inadequate because he states that he was "told" that the Commission received Ex. 185 from Triad's attorney, and because he states that he "believed" that Triad's records are on the CD. *See* Br. 48. But there is no question that Ex. 185 was received from Triad's counsel. In fact, DMC recognizes this in its brief. *See* Br. 46 ("[t]he CD Rom was provided to the FTC by Triad's counsel for purposes of litigation in this case"). Moreover, both Mr. Ritchey, Triad's vice president, and Mr. Sanghavi recalled copying the records onto the CD. App. 756, 1005. Also, the information on the CD was in the format originally created by Mr. Sanghavi. App. 755, 756. Finally, Mr. Sanghavi declared that, when he examined the CD and moved his mouse over the files in the Authorize.net folder, the information on the disk indicates that he was the creator of the files. App. 756. Accordingly, Mr. Sanghavi's declaration was adequate to support the admission of Ex. 185.[21]

Otto Bock involved records that were maintained by a business but were not created as part of a business routine. This Court held that customer complaints maintained by a business are hearsay because customers who relate their experiences are not doing so as a part of a business routine in which they are regular participants. 43 F.3d at 16. Here, unlike *Vigneau* and *Otto Beck*, the records imported by Triad were made as part of a normal business routine by companies processing Coral Calcium sales on behalf of DMC and Triad.

[21] DMC also complains that the Commission did not comply with Rule 902(11) because it did not receive Mr. Sanghavi's declaration until four days prior to the start of the trial. *See* Br. 48 n.15. In fact, DMC knew, more than a month before the trial, that the Commission intended to introduce Ex. 185 into evidence. *See* D.193, Ex. 1 (list of the Commission's proposed trial exhibits). Also, although DMC did not

Mr. Ritchey's deposition testimony and Ex. 185 both demonstrate that, during the period that DMC collaborated with Triad, consumers spent at least $40.9 million on Coral Calcium. Accordingly, the district court did not abuse its discretion when it included half of that amount as a portion of the monetary equitable relief it imposed on DMC.[22]

Finally, DMC mistakenly contends that, for two reasons, the district court should have limited its award of monetary equitable relief (for sales during the Triad period) to DMC's net profits. *See* Br. 42-45. First, it seeks to limit its liability by foisting all blame on Triad, claiming that its only function was to serve as a call

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receive Mr. Sanghavi's declaration until November 12, 2008, it was not until nine days later the the court considered the admissibility of Ex. 185. DMC had ample opportunity to consider and respond to the declaration prior to that hearing, and has not shown that it was prejudiced by the timing of its receipt of Mr. Sanghavi's declaration. *See United States v. Bledsoe*, 70 Fed. Appx. 370, 372-73 (7th Cir. 2003) (four days advance notice of Rule 902(11) declaration held sufficient because challenger did not show that he had been prejudiced).

[22] DMC asks this Court to overturn the district court's order that requires BP International to pay $574,274.23 in monetary equitable relief. As explained above, defendant Barrett surreptitiously created BP International so that he could secrete funds from his partner, Maihos. DMC is concerned that if the Commission succeeds in collecting the full amount of its judgments against DMC, Triad, and BP International, it will have collected $574,274.23 more than consumers paid for Coral Calcium. *See* Br. 44 n.12. The Commission would never collect more than the amount lost by consumers. In any event, DMC has waived any challenge to the order entered against BP International. DMC did not mention this challenge in its Statement of the Issues. *See* Br. 2-4. Indeed, its only argument regarding the BP International order is set forth in a footnote on page 44 of its brief. An argument raised only in a footnote is waived. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999).

center. *See* Br. 42. But the facts clearly show otherwise. DMC orchestrated the marketing of Coral Calcium. It was DMC's idea in the first place to sell the product, and to use an infomercial to do so. It was DMC that paid Trudeau to produce that infomercial. It was DMC that entered into a partnership with Triad, pursuant to which Triad disseminated the infomercial to broadcasters, received payments for sales, and shipped orders. *See* Br. 42; App. 1599-1608. And it was DMC that processed all orders that were received through the 800-number listed in the informercial. Plainly, DMC was responsible for sales of Coral Calcium during the Triad period.

Second, DMC argues that, because payments were initially received by Triad, the court may only require DMC to pay the net profits (approximately $6.3 million) that Triad forwarded to it. DMC contends that this argument is supported by *FTC v. Verity*, *supra*, but DMC misunderstands that case. The situation in *Verity* was quite different. In *Verity*, the defendant caused consumers to be billed for unauthorized access to internet pornography. For part of the time that the scheme operated, AT&T placed the unauthorized charges on consumers' phone bills. AT&T, which was not named as a defendant in the Commission's complaint, collected those charges, deducted amounts for the services it and other phone companies provided, and remitted what was left to Verity. During the remainder of the time period, Verity employed the services of Ebillit, Inc., which was named as a defendant. Ebillit billed consumers directly and paid providers (*i.e.*, phone companies, etc.) for their services.

The court in *Verity* distinguished those two periods. With respect to the first period, when non-defendant AT&T billed consumers for the charges, monetary equitable relief was limited to amounts actually received by Verity. 443 F.3d at 68. That is, the monetary relief could not encompass amounts paid by consumers to AT&T that never came into the hands of any defendant. However, during the second period, in which defendant Ebillit billed consumers, the court held that monetary relief could include the entire amount paid by consumers. *Id.* Because consumers paid those amounts to a defendant (*i.e.*, Ebillit), the monetary equitable relief imposed on Verity could include those amounts.

The situation that existed in this case from January 2002 through February 2003 is similar to the Ebillit period in *Verity*. Consumers paid their money directly to a defendant -- Triad. Accordingly, DMC, which procured Triad's services, could be held liable for the full amount paid by consumers. Indeed, it is well settled that when, as here, more than one defendant participates in a deceptive scheme, all the defendants may be held jointly and severally liable for the full amount of the monetary equitable relief. *See*, *e.g.*, *FTC v. Bronson Partners*, 2009 WL 4730752 *15, *appeal docketed*, No. 10-878 (2d Cir. Mar. 8, 2010) ("it is within the court's discretion to find joint and several liability when multiple defendants collaborated in the prohibited conduct"); *FTC v. Seismic Entm't*, 441 F. Supp. 2d at 354; *see also SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455 (3d Cir. 1997) ("[c]ourts have held that joint-and-several liability

is appropriate in securities cases when two or more individuals or entities collaborated or have close relationships in engaging in the illegal conduct"); *SEC v. Calvo*, 378 F.3d 1211, 1215 (11th Cir. 2004) (same). Thus, the district court could have made DMC and Triad jointly and severally liable for the entire $40.9 million that consumers paid from January 2002 through February 2003. *A fortiori*, the district court did not err when, instead of making DMC liable for the entire $40.9 million, it instead required it to pay only half that amount. *See* Add. 61.

2. The district court did not abuse its discretion when it imposed $13.1 million in monetary equitable relief for Coral Calcium sales made from March 2003 through July 2003

The district court did not abuse its discretion when it ordered DMC to pay $13.1 million in monetary equitable relief for Coral Calcium sales that occurred during the period in which DMC was no longer collaborating with Triad, March through July 2003 (the post-Triad period). The court based this portion of its order on Ex. 187 (App. 2226) and Ex. 209 (App. 2253). Ex. 209 consists of two spreadsheets from DMC's computer files. One of those spreadsheets shows DMC's sales, product by product, on a monthly basis (App. 2296-2335), and the other shows refunds (App. 2254-2295). Ex. 187 (App. 2226) summarizes the data in Ex. 209. The district court explained how it used the data in those exhibits to calculate the amount of DMC's Coral Calcium net infomercial sales during the post-Triad period, and it based the monetary relief it ordered on that amount. Add. 60.

The Commission introduced Ex. 187 and 209 at trial through the testimony of Karen Gorewitz, a DMC employee who was familiar with DMC's computerized records. App. 1227, 1260. She testified that she saw DMC's telemarketers entering orders into the computer database, App. 1261, 1263, and that the telemarketers entered the information into the database while they were still on the telephone with DMC's customers, App. 1262. She also explained that, as part of her job, she would generate "Sales by Product" reports from that database, App. 1240. She further stated that she recognized Ex. 209 as "what would have come out of the system" when she generated such a report. App. 1244, *see* App. 1248. Thus, Ex. 209 qualifies as a business record, pursuant to Fed. R. Evid. 803(6), because the information in the database that was used to generate the exhibit was entered at or near the time sales were made, was recorded by DMC telemarketers in the course of their business, and was recorded as a regular practice. Ms. Gorewitz also testified that Ex. 187 was simply a reformatted version of Ex. 209. App. 1259.

There is no merit to any of the challenges that DMC raises to the admission of Ex. 187 and Ex. 209. First, DMC complains that Ms. Gorewitz did not, herself, enter all the data into DMC's computer database. *See* Br. 59. However, under Rule 803(6), the custodian introducing a business record need not be the person who created it. *United States v. Kayne*, 90 F.3d 7, 13 (1st Cir. 1996). DMC also contends that Ms. Gorewitz testified that the dollar value of sales that appears in the exhibit was not

accurate, and that, as a result, it was impossible to determine whether those numbers included sales generated by internet or radio sales. Br. 59. However, Ms. Gorewitz actually testified that she did not know whether Ex. 209 included sales from sources other than DMC's infomercials.[23] App. 1267. Moreover, although she testified that the dollar values were not exact, she also explained that they provided a "ballpark estimate" of sales. App. 1264, *see* App. 1268. As explained above, the Commission need not provide the court with exact figures, and the risk of any imprecision falls on the wrongdoer whose conduct created the uncertainty.[24] *FTC v. Febre*, 128 F.3d at 535. In any event, Ms. Gorewitz's testimony makes clear that, regardless of any imprecision, the data in Ex. 209 were actually relied upon by DMC during the course of its business to assess sales and returns. App. 1240-41. Plainly, because DMC relied on those numbers, the district court may do so as well. Finally, although it may

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[23] In fact, Ex. 209 did include a separate column listing in-store sales, *see* App. 2268, and the court excluded such sales when calculating the monetary equitable relief it imposed on DMC, *see* Add. 60.

[24] DMC asks this Court to ignore Ex. 209 because, even if that exhibit provides evidence regarding DMC's sales, it does not show whether DMC actually received payment for those sales. *See* Br. 60. Of course, this argument goes to the weight that the district court should have given to the exhibit, not to its admissibility. In any event, as explained above, Ex. 209 provides a reasonable approximation of DMC's sales, and it is DMC's burden to show that the approximation is flawed. DMC provided no evidence that it failed to receive payments for the sales it made, evidence that would presumably have been easily accessible to it. Absent such evidence, DMC's speculation is inadequate to undermine the court's calculations of monetary equitable relief.

not have been a regular part of Ms. Gorewitz's job to *print* reports, *see* Br. 59, that is irrelevant. What is relevant is that, on a regular basis, she would "run" such reports, and that such reports, even if not actually printed, were used in the course of DMC's business. Thus, Ex. 209 is an admissible business record, and the district court did not abuse its discretion when it used that exhibit to calculate a portion of the monetary equitable relief that it imposed on DMC.[25]

3. The district court did not abuse its discretion when it imposed $14.65 million in monetary equitable relief for DMC's sales of Supreme Greens

The district court did not err when it included in the monetary equitable relief $14.65 million that DMC received from sales of Supreme Greens. The court based this portion of the relief on a report prepared by DMC's accountant, Wayne Callahan. App. 2114. This report showed that DMC's net revenues from Supreme Greens totaled $14.65 million, App. 2114-16, and DMC does not dispute this amount, *see* Br. 63.

DMC raises only one argument with respect to this portion of the court's award:

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[25] *FTC v. Verity* does not help DMC. *See* Br. 62. In that case, the Second Circuit overturned an award of monetary relief that was based on Verity's total revenues because a portion of those revenues came from legitimate sales, and the Commission had not provided the court with evidence necessary to deduct legitimate revenues from the award. 443 F.3d at 69. Here, there is no evidence whatsoever that any portion of DMC's sales were legitimate (*i.e.*, not based on deceptive infomercials). Moreover, even if consumers who purchased DMC's products in retail sales outlets did not rely on the deceptive infomercials, the district court deducted in-store sale revenue from its award. Accordingly, the flaw that undermined the relief in *Verity* is not present here.

it contends that there were multiple versions of the Supreme Greens infomercial, that the Commission only attached the original version to its complaint, that the Commission has not shown that other versions were the same as the original one, and that, as a result, the Commission should only be entitled to relief for sales that can be attributed to the original version. *See* Br. 63-66. First, this argument must be rejected because, as DMC is well aware, this is a showing that cannot possibly be made. During discovery, the Commission sought information from DMC regarding the dissemination of various versions of the Supreme Greens infomercial, and the amount of sales attributable to each version. *See* App. 1886-88. In response to these requests, DMC claimed that its records regarding this information were subject to "substantial confusion," and that, as a result, "it is impossible to determine what sales are attributable to any specific version of the Supreme Greens infomercial." *Id.* Where, as here, uncertainty regarding monetary equitable relief is created by the wrongdoer, the risk of that uncertainty falls on the wrongdoer. *SEC v. Happ*, 392 F.3d at 31; *FTC v. Febre*, 128 F.3d at 535. Even assuming that, at some point, DMC created a deception-free version of the Supreme Greens infomercial, it would be impossible, as a result of DMC's failure to maintain adequate records, to determine the revenue attributable to that infomercial. Thus, the district court did not abuse its discretion when it based its award of monetary equitable relief on DMC's net infomercial-based sales of Supreme Greens.

Second, even assuming that DMC did prepare a deception-free version of the infomercial, and even if DMC had maintained adequate records, there is no evidence that DMC actually used any version other than the original version to any substantial extent. In fact, however, there is evidence to the contrary. In his testimony, Barrett claimed that, after the Commission objected to the original Supreme Greens infomercial in October 2003, DMC "worked with the FTC" to prepare an edited version. App. 1677. But DMC meeting minutes from November 18, 2003, indicate that, as of that date, such a revision had yet to be completed.[26] Further, an e-mail from February 7, 2004, confirms that, although DMC may have tested other versions of the Supreme Greens infomercial, at least by that date, DMC was, once again, using the original version. App. 1909; *see* App. 283 (e-mail from Barrett instructing "[a]ll [m]anagers" to use "the original version Supreme Greens (SGRN)"; and D.130, Ex. 7 at 136 (Barrett's testimony explaining that "SGRN" designated the original version of the Supreme Greens infomercial). Thus, there is ample evidence that, throughout the period in which it was selling Supreme Greens, DMC used the original version of the infomercial. It offered no evidence that it ever used any version that did not violate the FTC Act. Therefore, the district court did not abuse its discretion when it included as a component of the monetary equitable relief $14.65 million based on

[26] This meeting minute also refutes DMC's claim that, after being informed by the Commission in October 2003 that its Supreme Greens was replete with deceptive statements, it "immediately" ceased running that infomercial. *See* Br. 64.

DMC's sales of Supreme Greens.

Finally, although DMC hints that it may have created a deception-free version of the Supreme Greens infomercial, *see* Br. 64, the evidence is to the contrary. In fact, the evidence shows that other versions of the infomercial were created merely to make cosmetic changes, or to generate greater sales. App. 1676; *see also* D.130, Ex. 7 at 135 (explaining that the Sci-Fi version of the infomercial was made merely by speeding up the original version so that, pursuant to a request from the Sci-Fi channel, it would fit in a 27 min. 55 sec. time slot). Although DMC claims that it created a version of the Supreme Greens infomercial that was approved by the Commission, Br. 15, 63, this is incorrect. DMC provided the Commission with a version of the Supreme Greens infomercial that omitted the health benefits claims that were challenged by complaint count 4. The Commission did not approve this version. Instead, its lawyers indicated that this version represented an improvement over the original version, and that the Commission would like to see it substituted for the original if DMC could obtain substantiation for the claims that remained (*i.e.*, the weight loss and safety claims challenged by complaint counts 5 and 6). *See* D.130, Ex. 19 at 3-4. But as the discussion in Part I.B, *supra*, shows, DMC never obtained such substantiation. Thus, even this version violated the FTC Act.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's orders holding DMC liable for violations of the FTC Act and requiring it to pay $48.2 million in monetary equitable relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2010, I electronically filed the brief of Appellee Federal Trade Commission with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that counsel for appellants, who are named below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of this Court's Order of March 4, 2010, which permitted the Commission to file a brief not exceeding 16,400 words. This brief contains 16,283 words, as counted by the WordPerfect word processing program.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14 point typeface.

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