No. __

IN THE SUPREME COURT OF THE UNITED STATES

PUBLISHERS BUSINESS SERVICES, INC., ED DANTUMA ENTERPRISES, INC., EDWARD FRED DANTUMA, deceased, DRIES DANTUMA, DIRK DANTUMA, JEFF DANTUMA, and BRENDA SCHANG,

Applicants.

v.

UNITED STATES FEDERAL TRADE COMMISSION,

Respondent,

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES NINTH CIRCUIT COURT OF APPEALS

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for Ninth Circuit Court of Appeals:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Publishers Business Services, Inc., Ed Dantuma Enterprises, Inc., Edward Dantuma (deceased), Dries Dantuma, Dirk Dantuma, Jeff Dantuma, and Brenda Schang (collectively "PBS") respectfully request a 31-day extension of time, up to and including Friday, October 18, 2019, to file a petition for a writ of certiorari.[1] The

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[1] Publishers Business Services, Inc. and Ed Dantuma, Inc. state that no parent corporation or any publicly held corporation owns 10% or more of their stock.

Ninth Circuit entered judgment on August 31, 2018. App. A hereto. The Ninth Circuit denied PBS's timely petition for rehearing and rehearing *en banc* on June 19, 2019. *See* App. B hereto. Without an extension, a petition for a writ of certiorari would be due on September 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

1. This case presents a direct circuit split over a recurring and important question: can the Federal Trade Commission (FTC) recover monetary relief under § 13(b) of the FTC Act, whose sole remedy is a forward-looking injunction? That question has long loomed over the FTC's frequent practice of using § 13(b) to obtain monetary awards, invoking a federal court's inherent equity powers. The FTC obtains judgments worth billions of dollars annually under § 13(b) without any Congressional authorization, while ignoring the express monetary remedies Congress actually gave the FTC under § 19 of its Act. The Seventh Circuit rightly called an end to this practice two (2) weeks ago in its decision, *F.T.C. v. Credit Bureau Center, LLC*, 18-2847, 2019 WL 3940917 (7th Cir. Aug. 21, 2019). *Credit Bureau* holds that § 13(b)'s plain language, the specific and carefully calibrated monetary remedies of § 19, and this Court's instruction not to assume a statute with "elaborate enforcement provisions" implicitly authorizes other remedies, precluded implied monetary remedies under § 13(b). *Id*. at *1.

2. The Seventh Circuit's decision in *Credit Bureau* broke from virtually all other circuits, which have for decades allowed district courts to award implied monetary relief, usually disgorgement or restitution, with few constraints. *See id*. at *18 ("We recognize that this conclusion departs from the consensus view of

our sister circuits."). Before *Credit Bureau*, circuit decisions often uncritically adopted other circuit rulings with little or no attention to § 13(b)'s plain text or to the FTC Act's carefully constructed statutory scheme. Courts that did endeavor to justify monetary relief under § 13(b) invariably ended up pushing the boundaries of purported "equity powers" beyond anything resembling equity. The Ninth Circuit has been at the leading edge of this aggressive expansion of judge-made remedies under § 13(b). In direct conflict with the Seventh Circuit, the Ninth Circuit holds that implied disgorgement not only exists under § 13(b), but it includes the power to issue joint and several awards, almost always measured by customer loss, and without regard for associated expenses or what unjust enrichment a defendant actually received. *See F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 600-04 (9th Cir. 2016).

3. The case against PBS represents the extreme end of this "equity power" creep. PBS was a family-owned business that, for over five decades, sold magazines, often through telemarketing. The FTC sued PBS, its founder Ed Dantuma (now deceased), his wife, and their four children, alleging some aspects of PBS's telemarking business violated § 5(a) of the FTC Act and the Telemarketing Sales Rule.

4. The district court decided on summary judgment that PBS violated § 5(a) and then convened an evidentiary hearing on monetary relief. The FTC established nothing at the evidentiary hearing linking customer loss to the alleged violations of the FTC Act; however, it demanded $34 million in what it called "net

revenue"—gross revenue less refunds—arguing it was available within the court's inherent equity powers under § 13(b). The district court, after hearing live testimony and having the opportunity to assess credibility, found that the vast majority of customers suffered no injury from the violations and awarded the FTC $191,219 (which judgment was promptly paid). The FTC appealed, and the Ninth Circuit vacated the award, deciding that the district court had abused its discretion.

5. On remand, the FTC asked for almost $24 million, removing only the barest minimum of customers who were obviously not misled. A new district court judge adopted wholesale the FTC's proposal and entered judgment against PBS in the amount of $23,773,147.78—a 12,000% increase from the original judgment.

6. PBS appealed, asking the Ninth Circuit to revisit and reverse its case law authorizing disgorgement under § 13(b). This Court's decision in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), issued during the appeal, effectively undermined the Ninth Circuit's prior logic. *Kokesh* held that disgorgement in SEC cases was in substance a penalty and therefore had to be brought within the 5-year limitation period of 28 U.S.C. § 2462. *Kokesh*, 137 S. Ct. at 1639.

7. The implications of *Kokesh* were undeniable. Like FTC restitution or disgorgement under § 13(b), SEC disgorgement is not awarded pursuant to a specific statutory provision but instead under a district court's supposed inherent equity powers, ancillary to a SEC injunction statute. But inherent equity powers have never included the power to award *penalties*, legal relief only Congress can prescribe.

8. PBS urged the Ninth Circuit to follow *Kokesh*'s holding to its logical conclusion—federal district courts lack inherent authority to award disgorgement under § 13(b). PBS argued that if the express text and structure of § 13(b) were not enough to cause the Ninth Circuit to reverse its precedent, *Kokesh* and Separation of Powers concerns were.

9. A parallel case raised the same issue, though with vastly greater amounts at stake. The district court in *FTC v. AMG Servs., Inc.*, No. 212CV00536GMNVCF, 2016 WL 5791416 (D. Nev. Sept. 30, 2016) claimed the inherent equity power to award disgorgement under § 13(b) in the amount of over $1.3 *billion*. *Id.* at *14-15.

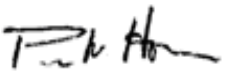
10. The Ninth Circuit heard oral argument in this case and *AMG* back-to-back on the same day. The Ninth Circuit affirmed both judgments, finding *Kokesh* did not overrule Ninth Circuit precedent permitting § 13(b) monetary relief. However, two judges in the *AMG* decision filed a concurring opinion, reasoning at length that the Ninth Circuit precedent was wrong and should be overturned *en banc*. *See FTC v. AMG Capital Management, LLC*, 910 F.3d 417, 429 (9th Cir. 2018) (O'Scannlain, J., concurring). The two judges concluded that the "text and structure of the statute unambiguously foreclose such monetary relief"—the same reasoning the Seventh Circuit eventually adopted in *Credit Bureau*. The PBS and AMG defendants petitioned for *en banc* review, but the Ninth Circuit denied both petitions on consecutive days.

11. The circuit split leaves a jarring discrepancy. Under the current law of the Seventh Circuit, the FTC could have, in this case and in *AMG*, recovered no more than injunctive relief under § 13(b). For monetary relief, the FTC would have had to satisfy the challenging reliance element and other elements Congress wrote into § 19. But in the Ninth Circuit, the FTC was awarded staggering sums having proved little more than a calculation of gross revenue. This Court's intervention is badly needed to resolve the circuit split.

12. A modest 31-day extension of time is needed to allow counsel adequate time to address these important issues and the newly created circuit split. In addition, the undersigned counsel has numerous preexisting professional responsibilities during September, including a reply brief on a motion to dismiss due September 9 in *EGI-VSR v. Coderch*, No. 15-20098-CIV-SCOLA (S.D. Fla); a reply in support of a petition for en banc review in *SEC, et al v. Stanford International Bank, et al.*, No. 17-11073 (5th Cir.); and a damages trial commencing September 23 in *Samra v. Bedoyan et al.*, No. 14-22854 CA 44 (Fla. Cir. Ct.).

WHEREFORE, for the foregoing reasons, Applicants respectfully request that the time for filing a petition for a writ of certiorari in this case be extended through and including October 18, 2019.

Respectfully submitted:



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August 30, 2019

APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 31 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. DIRK DANTUMA; DRIES DANTUMA; EDWARD FRED DANTUMA; JEFFREY DANTUMA; ED DANTUMA ENTERPRISES, INC., DBA Publishers Business Services, DBA Publishers Direct Services; PUBLISHERS BUSINESS SERVICES, INC.; BRENDA DANTUMA SCHANG, Defendants-Appellants.	No. 17-15600 D.C. No. 2:08-CV-00620-APG-GWF MEMORANDUM*

On Appeal from the United States District Court
for the District of Nevada,
Judge Andrew P. Gordon, presiding

Argued and Submitted August 15, 2018
San Francisco, California

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS,** District Judge.

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

** The Honorable Richard G. Stearns, United States District Judge for the District of Massachusetts, sitting by designation.

This case concerns a telemarketing scheme to sell magazine subscriptions. From 2004 to 2008, Publisher Business Services, Inc. ("PBS") used a collection of deceptive telemarketing scripts to sell magazine subscriptions to consumers on the pretense that PBS was conducting a "survey." In 2008, the Federal Trade Commission ("FTC") filed suit against PBS, alleging that PBS's actions violated section 5 of the FTC Act, 15 U.S.C. § 45(a), and requesting equitable relief from the district court under section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

On cross-motions for summary judgment, the district court found that PBS had violated the FTC Act, but held that a further hearing on monetary relief was required. After an evidentiary hearing, the district court entered judgment against PBS in the amount of $191,219. The FTC appealed the district court's calculation of monetary relief, but PBS did not file a cross-appeal regarding liability. We reversed the district court and remanded for further proceedings on monetary relief. *See FTC v. Publishers Bus. Servs., Inc.*, 540 F. App'x 555, 556–58 (9th Cir. 2013) ("*PBS I*").

On remand, a new district court judge awarded the FTC nearly $24 million in equitable monetary relief. PBS appeals, raising a number of arguments.

We review a district court's order granting equitable relief under the FTC Act "for abuse of discretion or the erroneous application of legal principles." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010). A district court

abuses its discretion when it fails to identify and apply "the correct legal rule to the relief requested," or if its application of the legal standard was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

1. PBS first argues that the district court lacked the authority to enter equitable monetary relief under section 13(b) of the FTC Act. This argument is foreclosed by our precedent. We have repeatedly held that section 13(b) of the FTC Act grants district courts the power to impose equitable remedies, including restitution and disgorgement of unjust gains. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598–99 (9th Cir. 2016); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159–60 (9th Cir. 2010); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Contrary to PBS's argument, *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), has not abrogated this long-standing precedent. The *Kokesh* Court itself expressly restricted its ruling to whether the SEC's power to seek equitable disgorgement was subject to a five-year statute of limitations and specifically stated that "[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." 137 S. Ct. at 1642 n.3. *Kokesh* is far from definitive enough regarding our interpretations of section 13(b) to cause us to depart from our long-standing precedent. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).

2. The district court did not abuse its discretion when it applied a presumption that consumers who bought PBS's products relied on PBS's deceptive tactics and representations. We have previously held that "proof of individual reliance by each purchasing customer is not needed" to establish liability under section 13(b). *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Rather, "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id*. at 605–06. Here, the district court did not abuse its discretion in concluding that all three factors were present.[1]

The district court also did not err in rejecting PBS's argument that evidence of "satisfied" customers who renewed their subscriptions did not rebut the presumption of reliance. We have previously held that there is "no authority" for the proposition that equitable monetary awards in the consumer protection context

[1] Contrary to PBS's argument, the district court's application of the presumption of reliance did not absolve the FTC of its responsibility to prove that the harm to the consumer was proximately caused by PBS's wrongful conduct. Nothing in the district court's ruling or reasoning runs afoul of the Supreme Court's decision in *Bank of America Corporation v. City of Miami*, 137 S. Ct. 1296 (2017). The relationship between PBS's wrongful conduct and the harm to the consumer was not attenuated or merely "foreseeable," it was direct: consumers were induced to enter into the transaction as a result of PBS's deceptive tactics and representations. Similarly, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 339–40 (2005), is inapposite because, in this case, the FTC sought relief only for those consumers who were damaged when they actually paid PBS after being induced to enter into the transaction because of PBS's deceptive tactics.

should be reduced by amounts paid by customers who were "satisfied" or obtained a benefit from the defendant's services. *See FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1196 (9th Cir. 2016). Additionally, as the district court found, the fact that a consumer later decided to renew his or her subscription "does not necessarily mean [his or her] original decision to purchase was free from the taint of [PBS's] deceptive sales practices." This conclusion makes sense. The fact that a customer was satisfied months or years after the fact does not mean that the customer did not rely on PBS's deceptive sales techniques *at the time of the original purchase*. Without other evidence, PBS's arguments to the contrary are speculative. The district court's findings on this issue were not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1263.

3. PBS also argues that the district court erred on remand by considering evidence that was submitted at the summary judgment stage of the proceedings, including declarations from PBS customers and former PBS employees. PBS did not raise this argument in the district court and, as a result, has waived the argument on appeal. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000) ("Since the district court did not have an opportunity to consider this argument, it is waived.").

Further, PBS's argument is barred by the invited error doctrine. Not only did PBS fail to argue that the district court should not consider declarations submitted at

summary judgment, its own briefing contains a number of references to the very material it claims the district court erred by considering. For instance, PBS repeatedly directed the district court to the customer declarations it now seeks to exclude, arguing that those declarations showed that very few customers were actually deceived or damaged. We have long held that a party "may not complain on review of errors below for which he is responsible." *See Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336 (9th Cir. 1985) (quoting *Hudson v. Wylie*, 242 F.2d 435, 448 (9th Cir. 1957)). Here, any error committed by the district court in considering evidence from the summary judgment record was invited by PBS's briefing, which specifically asked the district court to consider that evidence.

4. Next, PBS argues that the FTC's claims are subject to the three-year statute of limitations contained in section 19 of the FTC Act. This argument is meritless. The FTC brought its claims under section 13(b) of the FTC Act, which contains no statute of limitations. Section 19 of the FTC Act does not provide that its statute of limitations applies to actions under section 13(b). "In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period." *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993).

5. Finally, PBS attempts to argue that the district court's original summary judgment ruling regarding liability was erroneous. PBS has waived any challenge

to the district court's rulings on liability. During *PBS I*, PBS did not cross-appeal the district court's ruling that PBS was liable under the FTC Act. We have repeatedly held that we "need not and do[] not consider a new contention that could have been but was not raised on the prior appeal." *See Munoz v. Imperial Cty.*, 667 F.2d 811, 817 (9th Cir. 1982). We have also previously held that even parties who were satisfied with the district court's judgment must file a cross-appeal to preserve issues for review in subsequent appeals following a remand. *See Alioto v. Cowles Commc'ns, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980).[2] As a result, PBS waived any arguments regarding the district court's liability ruling when it failed to raise those arguments by way of a cross-appeal in *PBS I*.

In light of the above, the district court's judgment is **AFFIRMED**.

[2] Contrary to PBS's argument that it should be excused for its failure to file a protective cross-appeal because they are "disfavored," we have previously endorsed the use of protective cross-appeals. *See Alioto*, 623 F.3d at 617; *see also Warfield v. Alaniz*, 569 F.3d 1015, 1019 (9th Cir. 2009) ("A protective cross-appeal is permissible once an initial appeal is filed, raising the possibility of reversal.").

APPENDIX B

FILED

JUN 19 2019

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. DIRK DANTUMA; et al., Defendants-Appellants.	No. 17-15600 D.C. No. 2:08-cv-00620-APG-GWF District of Nevada, Las Vegas ORDER

Before: O'SCANNLAIN and BEA, Circuit Judges, and STEARNS,* District Judge.

The panel has voted to deny Appellants' petition for panel rehearing. Judge Bea votes to deny Appellants' petition for rehearing en banc, and Judges O'Scannlain and Stearns recommend that en banc rehearing be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Richard G. Stearns, United States District Judge for the District of Massachusetts, sitting by designation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express on August 30, 2019 on all counsel or parties of record on the Service List below.

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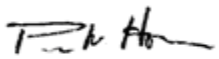

Peter W. Homer