Eric G. Benson (Bar No. 10414)
Z. Ryan Pahnke (Bar No. 11146)
RAY QUINNEY & NEBEKER P.C.
35 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Fax: (801) 532-7543
EBenson@rqn.com
RPahnke@rqn.com

Leonard L. Gordon (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
VENABLE LLP
1270 Avenue of the Americas
24th Floor
New York, NY 10020
Telephone: (212) 370-6277
Fax: (212) 307-5598
LLGordon@venable.com
EKelly@venable.com

Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP
600 Massachusetts Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 344-4000
Fax: (202) 344-8300
SRFreeland@venable.com
MMGardner@venable.com
MAMunoz@venable.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL TRADE COMMISSION, and UTAH DIVISION OF CONSUMER PROTECTION, Plaintiffs, vs. ZURIXX, LLC; CARLSON DEVELOPMENT GROUP, LLC; CJ SEMINAR HOLDINGS, LLC; ZURIXX FINANCIAL, LLC; CRISTOPHER A. CANNON; JAMES M. CARLSON; and JEFFREY D. SPANGLER, Defendants.	**DEFENDANTS' MOTION TO CERTIFY FOR APPEAL, UNDER 28 U.S.C. § 1292(B), MEMORANDUM DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No. 2:19-cv-00713 Judge Dale Kimball Magistrate Judge Evelyn J. Furse

INTRODUCTION

Defendants respectfully move this Court to issue an order clarifying that the Court's February 26, 2020 Memorandum Decision and Order Denying Defendants' Partial Motion to Dismiss (ECF No. 112) ("Order") involves a controlling question of law as to which substantial grounds for differences of opinion exist, and that immediate appeal of the Order will materially advance termination of this litigation, so that Defendants may petition the Tenth Circuit for permission to seek interlocutory appeal. Specifically, the Court should certify for interlocutory appeal under 28 U.S.C. § 1292(b) that portion of the Order holding that the FTC may seek equitable monetary relief for alleged violations of the FTC Act under Section 13(b) of the FTC Act. First, the Order involves a controlling question of law: Whether the FTC may obtain monetary relief under Section 13(b) of the FTC Act. Second, there are substantial grounds for difference of opinion on this question—indeed, a circuit split has emerged that is currently being litigated in the Supreme Court. Third, immediate appeal may materially advance the ultimate termination of the litigation because whether the FTC can obtain monetary relief will largely determine the outcome of this litigation. 28 U.S.C. § 1292(b); *see also Anderson Living Tr. v. WPX Energy Prod., LLC*, 904 F.3d 1135, 1139 (10th Cir. 2018). Accordingly, the Court should revise the Order and continue to stay these proceedings pending appellate review.

Whether the FTC can obtain monetary relief is a controlling question of law on which the circuits are split, the Supreme Court is engaged, and which will dictate how, and perhaps whether, this matter proceeds. The motion should be granted.

BACKGROUND

Plaintiffs FTC and the Utah Division of Consumer Protection filed their complaint on October 1, 2019, seeking a permanent injunction, consumer redress in the form of equitable

monetary relief, and civil penalties. Complaint (ECF No. 1) at 34–36. On the same day, Plaintiffs sought and obtained an *Ex Parte* Temporary Restraining Order appointing a monitor. ECF No. 4. Defendants filed their Partial Motion to Dismiss on November 19, 2019, arguing, *inter alia*, that the Complaint fails to state a claim for equitable monetary relief under Section 13(b) of the FTC Act because a plain reading of the statute demonstrates that the FTC is not entitled to monetary relief. ECF No. 62. On February 26, 2020, this Court issued the Order denying Defendants' Partial Motion to Dismiss, holding that the FTC is entitled to seek equitable monetary relief under Section 13(b). ECF No. 112. Defendants now seek to immediately appeal that finding.

ARGUMENT

I. THE COURT'S ORDER RESTS ON A CONTROLLING QUESTION OF LAW.

The Order decided a controlling question of law in this case—whether the FTC is entitled to obtain equitable monetary relief under Section 13(b) of the FTC Act. Order at 5–12 ("Section 13(b) of the FTC Act provides for equitable monetary relief."). Under Section 1292(b), a controlling question of law is one that is:

> (1) serious to the conduct of the litigation, either practically or legally; (2) could affect the ability of the district court to render a binding decision or materially affect the outcome of the litigation in the district court; or (3) might save time for the district court, and time and expense for the litigants.

Roberts v. C.R. England, Inc., No. 2:12-CV-00302-RJS-BCW, 2018 WL 2386056, at *2 (D. Utah Apr. 24, 2018) (cleaned up) (quoting *Kell v. Crowther*, No. 2:07-cv-00359-CW, 2018 WL 813449, at *1 (D. Utah Feb. 9, 2018)). Examples of controlling questions of law include those that, if erroneously resolved, would constitute reversible error on final appeal, *Pack v. Investools, Inc.*, No. 2:09-CV-1042-TS, 2011 WL 2161098, at *2 (D. Utah June 1, 2011) (citing *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P.*, 297 F. Supp. 2d 90, 95–96 (D.D.C. 2003)), those that "could have

precedential value for a large number of cases," *In re Suntrust Banks, Inc. ERISA Litig.*, 1:08-CV-3384-RWS, 2011 WL 13824, at *2 (N.D. Ga. Jan. 3, 2011), and those involving questions of statutory interpretation. *See Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000); *Kenney v. Helix TCS, Inc.*, No. 17-CV-01755-CMA-KMT, 2018 WL 510276, at *2 (D. Colo. Jan. 23, 2018) (granting certification on denial of motion to defendant who asserted that plaintiff was not entitled to relief under statute). A "controlling" question is one that resolution on appeal "could materially affect the outcome of the litigation in the district court." *United States ex rel. Blyn v. Triumph Grp., Inc.*, No. 2:12-CV-922-DAK, 2016 WL 3546244, at *2 (D. Utah June 23, 2016) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982)).

As an initial matter, the Order presents a controlling question of law because it involves a pure question of statutory interpretation. In this action, the FTC seeks two types of relief from Defendants—equitable monetary relief and a permanent injunction. *See* Complaint, Prayer for Relief at 35–36. The FTC bases its right to obtain equitable monetary relief under Section 13(b) on the statute's language granting the FTC the right to seek injunctive relief:

> . . . *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

15 U.S.C. § 53(b). As shown above, however, the plain language of the statute does not grant the FTC the right to obtain monetary relief from a defendant. Instead, the FTC's contention that its right to obtain millions of dollars from the Defendants is implied from Section 13(b), rather than expressly authorized by the plain language of the statute.

Utilizing traditional methods of statutory interpretation and reading Section 13(b) in context of the FTC Act, including Section 19 of the FTC Act, Congress contemplated, yet chose not to provide, the FTC with the authority to seek equitable monetary relief under Section 13(b).

Defendants' Partial Motion to Dismiss (ECF No. 62) at 5–7. The Order, however, relied on Tenth Circuit case law—*FTC v. Freecom Communications, Inc.*, 401 F.3d 1192 (10th Cir. 2005), and *FTC v. LoanPointe, LLC*, 525 F. App'x 696 (10th Cir. 2013) (unpublished)—cases in which the Tenth Circuit was not presented with the opportunity to directly address whether the FTC is entitled to obtain equitable monetary relief—to hold that Section 13(b) authorizes the FTC to obtain equitable monetary relief for purported violations of the FTC Act. Accordingly, the Order addresses a controlling question of law because it interprets "the meaning of a statutory . . . provision." *Ahrenholz*, 219 F.3d at 676; *see also Boim v. Qurianic Literacy Inst. and Holy Land Fndtn. For Relief and Dev.*, 291 F.3d 1000, 1007–08 (7th Cir. 2002).

Moreover, the issue presented in the Order is controlling due to its significant national import and precedential value. *See In re Suntrust Banks, Inc. ERISA Litig.*, 2011 WL 13824, at *2. Whether the FTC is entitled to obtain equitable monetary relief for purported violations of the FTC Act under Section 13(b) is currently hotly contested in courts across the country, including before the Supreme Court. *See, e.g.*, *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019), *petition for cert. filed*, No. 19-825 (U.S. Dec. 19, 2019); *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429–37 (9th Cir. 2018), *petition for cert. filed*, No. 19-508 (U.S. Oct. 18, 2019); *FTC v. Dantuma*, 748 F. App'x 735 (9th Cir. 2018), *petition for cert. filed sub nom.*, *Publishers Business Servs. Inc. v. FTC*, No. 19-507 (U.S. Oct. 18, 2019); Reply Brief for Appellants, *FTC v. AbbVie Inc.*, No. 18-2758, Dkt. No. 003113361920 (3d Cir. filed July 23, 2018); Appellants' Opening Brief, *FTC v. Hoyal & Associates, Inc.*, No. 19-35668, Dkt. No. 19 (9th Cir. filed Feb. 21, 2019).

Significantly, the Tenth Circuit has never thoroughly analyzed whether the FTC is entitled to obtain equitable monetary relief pursuant to Section 13(b). Indeed, in *Freecom*, the issue presented to the Tenth Circuit was whether the district court's award of attorney's fees and costs in

favor of the defendant under the Equal Access to Justice Act should stand. 401 F.3d at 1200. In response, the defendant-appellee conceded that the FTC was entitled to consumer redress under Section 13(b) in certain cases. *See* Brief of the Appellee Mark O. Haroldsen, *FTC v. Haroldsen*, No. 03-4063 (10th Cir. Aug. 11, 2003), at 36–37, n.17 (attached hereto as Exhibit 1 for the Court's convenience). The Tenth Circuit then reversed the award of attorneys' fees, and, in a footnote, briefly recognized the parties' concession without analyzing—as a matter of text, context, or purpose—whether Section 13(b) actually entitles the FTC to obtain monetary relief. *Freecom Commc'ns, Inc.,* 401 F.3d at 1202 n.6. Similarly, the Tenth Circuit's unpublished opinion in *LoanPointe* also summarily relies on the *Freecom* decision without meaningfully construing the language of the statute. 525 F. App'x at 699 (citing *Freecom Commc'ns,* 401 F.3d at 1202 n.6). In fact, during the district court proceedings in that case, the defendants in *LoanPointe* "admit[ted] that the court ha[d] broad equitable authority to grant injunctive and ancillary relief, including monetary relief in the form of either restitution or disgorgement[,]" thereby conceding the issue. *FTC v. LoanPointe, LLC,* No. 2:10-CV-225-DAK, 2011 WL 4348304, at *11 (D. Utah Sept. 16, 2011), *aff'd,* 525 F. App'x 696 (10th Cir. 2013). The Tenth Circuit's abbreviated recognition of this conceded issue stands in stark contrast to the Seventh Circuit's decision in *Federal Trade Commission v. Credit Bureau Center, LLC*. Accordingly, should this Court certify the Order for interlocutory appeal, the Tenth Circuit's decision would have important implications for the FTC's pursuit of cases under Section 13(b) in federal court, the FTC's primary vehicle for pursuing enforcement actions, and would provide binding direction to district courts within the Tenth Circuit.

Finally, the Order's determination, or a determination by the Tenth Circuit, of whether the FTC may seek monetary relief in this case will control the contours of the remainder of the proceedings in this action. "A question may be controlling even though its resolution does not

determine who will prevail on the merits." *Brickman v. Facebook, Inc.*, No. 16-CV-00751-TEH, 2017 WL 1508719, at *2 (N.D. Cal. Apr. 27, 2017). For these reasons, the Order presents a controlling question of law.

II. SUBSTANTIAL GROUND FOR DISAGREEMENT EXISTS ON THE LEGAL QUESTIONS ADDRESSED IN THE COURT'S ORDER.

Substantial disagreement exists as to whether the FTC is entitled to equitable monetary relief pursuant to Section 13(b). "[S]ubstantial ground for disagreement" exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Roberts*, 2018 WL 2386056, at *2 (quoting *Kell*, 2018 WL 813449, at *2). When considering a motion to certify an interlocutory order, courts should adjust "the level of uncertainty required to find a substantial ground for difference of opinion . . . to meet the importance of the question in the context of the specific case." *Brickman*, 2017 WL 1508719, at *3. The current circuit split on the issue of whether the FTC may obtain monetary relief under Section 13(b), the previously unchallenged nature of this issue in the Tenth Circuit, and the several cases before the Supreme Court raising the same question demonstrate that there is substantial ground for disagreement here, and thus, certification is warranted.

First, there is a circuit split on this issue. The Solicitor General, on behalf of the FTC, acknowledged as much: "[t]he question whether Section 13(b) of the FTC Act authorizes district courts to award equitable monetary relief has divided the courts of appeals and would ordinarily warrant th[e Supreme] Court's review." Brief for the Respondent, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, *petition for cert. filed* (U.S. Oct. 18, 2019), at 1. Namely, six circuits outside the Tenth Circuit have held that Section 13(b) empowers the FTC to seek monetary relief. *See FTC v.*

Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners*, LLC, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014), *cert. denied*, 574 U.S. 819 (2014); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 624 (2017); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Several of these circuits, however, conducted only a brief analysis to determine that Section 13(b) authorizes courts to exercise their "full equitable power," including awarding monetary relief. *See Direct Mktg. Concepts, Inc.*, 624 F.3d at 15; *Security Rare Coin & Bullion Corp.*, 931 F.2d at 1314–15; *Gem Merch. Corp.*, 87 F.3d at 470.

In contrast, the Seventh Circuit in *Federal Trade Commission v. Credit Bureau Center, LLC* held that "section 13(b) does **not** authorize restitutionary relief." 937 F.3d at 767 (emphasis added). In so holding, the court overturned its own precedent—precedent that was predicated on since-abrogated Supreme Court precedent favoring judicially-implied remedies. *See id.* at 776–77. The Seventh Circuit reasoned that, "[r]ather than presuming that Congress authorizes the judiciary to supplement express statutory remedies, the [Supreme] Court now recognizes that 'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* at 782 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015)). Applying these principles, the Seventh Circuit thoroughly analyzed the text and structure of the FTC Act and determined that "[r]eading an implied restitution remedy into section 13(b) makes the other provisions largely pointless." *Id.* at 774.

Second, as discussed above in Section I, this is a novel and difficult question that the Tenth Circuit has never directly and fully addressed. The Tenth Circuit has only stated in dicta that Section 13(b) authorizes equitable monetary relief. *See LoanPointe*, 525 F. App'x at 699; *Freecom*,

401 F.3d at 1202, n.6. Such dicta cannot preclude the Tenth Circuit from fully analyzing this important issue. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?"). Now that the Defendants have directly challenged the FTC's right to obtain monetary relief, this case presents the Tenth Circuit with its first opportunity to thoroughly analyze and definitively rule on this issue.

Third, proceedings in the Supreme Court demonstrate that there is an intra-governmental disagreement regarding Section 13(b) precedent. The Supreme Court recently heard oral argument in the *Liu v. SEC* matter to determine "[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that such disgorgement is a penalty." Petition for a Writ of Certiorari, *Liu v. SEC*, *cert. granted*, No. 18-1501, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019).

The Solicitor General, on behalf of the FTC, has asked the Court to stay consideration of the petitions for certiorari in *AMG Capital Management* and *Publishers Business Services* pending the outcome in *Liu* because of the significant "overlap" between the resolution of the SEC's right to seek disgorgement as contested in *Liu* and whether the FTC can seek monetary relief as contested in *AMG*. *See* Brief for the Respondent, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508, *petition for cert. filed* (U.S. Oct. 18, 2019), at 4; Brief for the Respondent, *Publishers Business Servs. Inc. v. FTC*, No. 19-507, *petition for cert. filed* (U.S. Oct. 18, 2019), at 4.

In contrast, the FTC took the rare step of representing itself in the Supreme Court by filing a petition for writ of certiorari in *Credit Bureau Center*, urging the Supreme Court to not wait until *Liu* is resolved to address whether Section 13(b) authorizes the FTC to seek monetary relief. Petition for a Writ of Certiorari, *FTC v. Credit Bureau Ctr., LLC*, No. 19-825 (U.S. Dec. 19, 2019),

at 1, n.1. The FTC's decision to do so suggests that the FTC and Solicitor General do not agree on the impact of *Liu* and perhaps the powers provided by Congress to the FTC under Section 13(b).

Because there is "a dearth of precedent within the controlling jurisdiction[,] . . . conflicting decisions in other circuits[,]" and an intragovernmental disagreement regarding the issue, substantial grounds for differences in opinion exist. *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003). This satisfies the second requirement under § 1292(b).

III. <u>AN INTERLOCUTORY APPEAL WILL MATERIALLY ADVANCE THE TERMINATION OF THIS LITIGATION.</u>

Whether, under Section 13(b) of the FTC Act, the FTC may obtain the hundreds of millions of dollars in equitable monetary relief that it seeks is a threshold issue that will dictate the course of this litigation for discovery, settlement, and trial. Thus, an interlocutory appeal will materially advance the termination of this litigation and reflects the "primary purpose of § 1292(b)[,]" which is to avoid unnecessary litigation. *Roberts*, 2018 WL 2386056, at *3. This factor is satisfied if "reversal" of the Order would "sav[e] the parties from needless expense[,]" "conserve[e] judicial resources[,]" *Molock v. Whole Foods Market Grp., Inc.*, 317 F. Supp. 3d 1, 6 (D.D.C. 2018), or aid in the resolution of this case, either in court or otherwise. *Nat'l Ass'n of African-Am. Owned Media v. Charter Commc'ns, Inc.*, No. CV 16-609-GW(FFMX), 2016 WL 10647193, at *6 (C.D. Cal. Dec. 12, 2016); *see McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (An interlocutory appeal "materially advance[s]" the disposition of a case when "resolution of a controlling legal question would serve to avoid a trial or *otherwise substantially shorten the litigation*." (emphasis added and citations omitted)). Moreover, certification is appropriate even where resolution of the certified question would not terminate the litigation, as "[a] resolution of

some, but not all of the claims in a case is sufficient to advance materially the litigation." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)

Here, clarity from the Tenth Circuit on the issue of monetary relief during the infancy of this litigation could obviate the need for voluminous and expensive discovery regarding the amount and calculations of relief the FTC can seek, expert discovery on monetary relief calculations, corresponding depositions, summary judgment briefing, and trial preparation on the issue. Indeed, Defendants have already spent extensive time and money thus far in this litigation. Proceeding without guidance as to what relief the FTC is entitled to obtain will only continue to waste and diminish Defendants' resources. Guidance from the Tenth Circuit could also facilitate settlement. In these circumstances, deferring these issues until the case is litigated to conclusion is wasteful and will prolong the resolution of the case. Therefore, the Court should find that Defendants have satisfied the final criterion of Section 1292(b).[1]

CONCLUSION

For these reasons, Defendants respectfully request an order stating that the Order involves a "controlling question of law" as to which there is "substantial ground for difference of opinion," and that immediate appeal "may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), and further order that this case be stayed pending appeal.

[1] "Because part of the purpose of granting the interlocutory appeal is to avoid protracted and expensive litigation," this court should also conclude that the stay of this case should continue "pending the decision by the Tenth Circuit." *United States ex rel. Blyn, Inc.*, 2016 WL 3546244, at *3; *see Kenney*, 2018 WL 722458, at *3 ("proceeding with discovery may be wasteful, and thus may be a burden to Defendant, if the Tenth Circuit reverses this Court's Order Denying Defendant's Motion to Dismiss."). Accordingly, Defendants incorporate by reference their arguments as to why discovery in this case should continue to be stayed as discussed in Defendants' Supplemental Brief In Support of Its Motion to Stay Discovery (ECF No. 107), which Magistrate Judge Furse granted in part. *See* ECF No. 108.

DATED this 11th day of March, 2020.

Respectfully Submitted,

By: */s/ Z. Ryan Pahnke*

Eric G. Benson (Bar No. 10414)
Z. Ryan Pahnke (Bar No. 11146)
RAY QUINNEY & NEBEKER P.C.

Leonard L. Gordon (*pro hac vice*)
Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP

Attorneys for Defendants

#1522714

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION TO CERTIFY FOR APPEAL, UNDER 28 U.S.C. § 1292(B), MEMORANDUM DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS** to be served on the following by email:

Attorneys for Plaintiff Federal Trade Commission
FEDERAL TRADE COMMISSION
Amanda R. Grier (agrier@ftc.gov)
Collot Guerard (cguerard@ftc.gov)
Joshua A. Doan (jdoan@ftc.gov)
Miry Kim (mkim@ftc.gov)

Attorneys for Plaintiff Utah Division of Consumer Protection
UTAH DIVISION OF CONSUMER PROTECTION
Assistant Attorney General's Office
Thomas M. Melton (tmelton@agutah.gov)
Douglas E. DeVore, II (dedevore@agutah.gov)
Kevin M. McLean (kmclean@agutah.gov)
Robert G. Wing (rwing@agutah.gov)

Monitor & Attorneys for Monitor
HOLLAND & HART LLP
David K. Broadbent (dbroadbent@hollandhart.com)
Chelsea J. Davis (cjdavis@hollandhart.com)
Cory A. Talbot (catalbot@hollandhart.com)
Doyle S. Byers (dsbyers@hollandhart.com)
Engels Tejeda (ejtejeda@hollandhart.com)

/s/ Z. Ryan Pahnke

EXHIBIT 1

2003 WL 24167027 (C.A.10) (Appellate Brief)
United States Court of Appeals,
Tenth Circuit.

FEDERAL TRADE COMMISSION, Plaintiff - Appellant,

v.

Mark O. HAROLDSEN Defendant - Appellee.

No. 03-4063.
August 11, 2003.

District Court No. 2: 96CV 0492S
Appeal from the United States District Court for the Central District of Utah - Judge David Sam

Brief of the Appellee Mark O. Haroldsen

Evan A. Schmutz, Wm. Kelly Nash, Hill, Johnson & Schmutz, L.C., Jamestown Square, Suite 200, 3319 North University Avenue, Provo, Utah 84604, Telephone: (801) 375-6600.

***i** TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
PRIOR OR RELATED APPEALS	1
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
I. NATURE OF THE CASE	2
II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.	5
STATEMENT OF RELEVANT FACTS	12
I. FACTS REGARDING THE FTC'S CLAIMS AGAINST MR. HAROLDSEN	12
II. ABSENCE OF FACTS CONCERNING THE FTC'S CLAIMS AGAINST MR. HAROLDSEN	24
III. FACTS REGARDING MR. HAROLDSEN'S CLAIM FOR ATTORNEY'S FEES AND EXPENSES	27
SUMMARY OF THE ARGUMENT	27
STANDARD OF REVIEW	30
ARGUMENT	30
I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEYS' FEES TO MR. HAROLDSEN, WHERE COUNTS I THROUGH VIII WERE WITHOUT COLOR AND THE FTC PURSUED SUCH FOR IMPROPER PURPOSES	30
***ii** A. Since the District Court Found Counts I Through VIII Were Without Color, Mr. Haroldsen Is Entitled To Attorneys' Fees Under the EAJA	33
1. The District Court Found the FTC Failed to Introduce Evidence of Any Deceptive Representation Alleged In the Amended Complaint	34
2. The District Court Found the FTC Failed to Introduce Credible Evidence of Consumer Injury	36
3. The District Court Found the FTC Failed to Introduce Evidence That Mr. Haroldsen Had Authority to Control Corporate Defendants, That He Participated in Any Violation, or That He Knew or Should Have Known of Any Violations of the FTCA	37
4. The District Court Found Counts I Through VIII Were Pursued Without Merit	42
B. Since the District Court Found Counts I Through VIII Were Asserted For Improper Purposes, Mr. Haroldsen Was Entitled to Attorneys' Fees	43
1. The District Court Found Counts I Through VIII Were Pursued Vexatiously	45
2. The District Court Found Counts I Through VIII Were Pursued Oppressively	46
3. The District Court Found Counts I Through VIII Were Pursued Wantonly	47
4. The District Court Found Counts I Through VIII Were Pursued in Bad Faith	48
***iii** C. The District Court's Attorneys' Fees Award Was Supported by the FTC's Failure to Comply with the District Court's Order to Participate in a Settlement Conference	49

D. The District Court Did Not Abuse Its Discretion By Awarding Attorneys' Fees Based Upon the Discovery Cutoff Date of July 2, 2001 50
II. IN AWARDING ATTORNEYS' FEES TO MR. HAROLDSEN, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISREGARDING THE ARGUMENT OF COUNSEL AND OTHERWISE INADMISSIBLE EVIDENCE CONCERNING THE UNTRIED COUNTS IX THROUGH XVI 51
CONCLUSION 55
ORAL ARGUMENT STATEMENT 56
CERTIFICATE OF COMPLIANCE 56
CERTIFICATE OF SERVICE 57

***iv** TABLE OF AUTHORITIES

Cases

Adler v. Royal Cruise Line, Ltd., 1996 WL 438799, 11 (N.D. Cal.) 33
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 31, 43
Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *reissued,* 96 F.T.C. 380 (1980) 33
Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995) 53
Coelho v. Park Ridge Oldsmobile, Inc., 2001 U.S. Dist. Lexis 14652 *11 (N.D. Ill.) 53
Coro v. FTC, 338 F.2d 149 (1t Cir. 1964) 39
Duran v. Clover Club Foods Co., 616 F. Supp. 790 (D. Colo. 1985) 53
Excel Electronics & Photo Corp. v. Aetna Casualty & Surety Co., 1991 U.S. Dist. Lexis 17161, *18-19 (S.D.N.Y.) 53
FDIC v. Schuchmann, 319 F.3d 1247 (10th Cir. 2003) 31
FTC v. American Standard Credit System, Inc., 874 F. Supp. 1080 (C.D. Cal. 1994) 39
FTC v. Austin Galleries of Illinois, Inc., 1988-2 Trade Cas. (CCH) ,, 68,341 (N.D. Ill. 1988) 53
FTC v. Communidyne, 1994 WL 163713 (N.D. Ill.) 38
FTC v. Febre, 1996 WL 556957, 3 (N.D. Ill.) 31
***v** *FTC v. Kitco,* 612 F. Supp. 1282 (D.C. Minn 1985) 39
FTC v. Nat'l Business Consultants, Inc., 781 F. Supp. 1136 (E.D. La. 1991) 37
FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994) 33
FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. 851(D. Mass 1992) 33
FTC v. Renaissance Fine Arts, Ltd., 1995-2 Trade Cas. (CCH) ,, 71,086 (N.D. Ohio Aug.10, 1995) 37
FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) 53
FTC v. Sharp, 782 F. Supp. 1445, 1449 (D. Nev. 1991) 38
FTC v. Standard Educ. Co., 86 F.2d 692 (2d Cir. 1938) 38
FTC v. Verity Int'l Ltd., 194 F. Supp. 2d270 (S.D.N.Y. 2002) 53
Hatley v. Lockhart, 990 F.2d 1070 (8th Cir. 1993) 44
Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984) 32
Lobato v. Pay Less Drug Stores, 261 F.2d 406 (10th Cir. 1958) 38
Maritime Mgmt., Inc. v. United States, 242 F.3d 1326 (11th Cir. 2002) 32
Martinez v. Roscoe, 100 F.3d 121 (10 Cir. 1996) 30
Martinez v. Secretary of Health & Human Srvcs., 815 F.2d 1381 (10th Cir. 1987) 43
Solomon Trading, 1994 W.L. 421478 38
***vi** *Standard Oil of Calif,* 84 F.T.C. 140 (1974) 33
Sterling Energy, Ltd. v. Friendly Nat'l Bank, 744F.2d 1433 (10th Cir. 1984) 31, 43
United States v. ACB Sales & Service, Inc., 590 F. Supp. 561 (D. Ariz. 1984) 38
United States v. Dantzler Lumber & Export Co., 833 F. Supp. 927(C.I.T. 1993) 49

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

United States v. McCall, 235 F.2d 1211 (10th cir. 2000) 43
Vaughan v. Atkinson, 369 U.S. 527 (1962) 31
Williams v. Chater, 87 F.3d 702 (5th Cir. 1996) 44
Zobrist v. Coal-X, Inc., 708 F.2d 1511 (10th Cir. 1983) 33
Statutes
Equal Access to Justice Act, 28 U.S.C. §2412(b).. passim
Federal Rules of Civil Procedure, Rule 9(b) .... passim
Federal Trade Commission Act, 15 U.S.C. § 5(a)... 5, 6
Other Authorities
FTC Policy Statement on Deception, Letter from James C. Miller, Oct. 14, 1983 33

1** ***PRIOR OR RELATED APPEALS

There are no prior or related appeals.

ISSUES PRESENTED FOR REVIEW

1. Did the district court properly award attorneys' fees and expenses to Appellee Mark Haroldsen ("“Mr. Haroldsen‘') pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(b) ("“EAJA‘'), where (i) Mr. Haroldsen prevailed in Appellant Federal Trade Commission's ("“FTC‘') case against him, (ii) the FTC failed to present any evidence the Corporate Defendants engaged in deceptive acts or practices (i.e., through material representations or omissions likely to mislead reasonable consumers), (iii) the FTC failed to present any evidence of Mr. Haroldsen's authority, knowledge, control or wrongdoing (or that he should have known of any violative conduct), (iv) the FTC failed to produce any evidence of consumer injury, (v) the FTC disregarded the district court's orders,(vi) from at least July 2, 2001, the FTC knew that it did not have evidence to support its claims against Mr. Haroldsen, and (vii) despite all of the foregoing, the FTC prosecuted unmeritorious claims against Mr. Haroldsen through trial in a wanton, oppressive, vexatious and bad faith manner and on threats that it would prove liability and consumer relief in the amount of approximately $150,000,000.

***2** *STATEMENT OF THE CASE*

I. NATURE OF THE CASE.

This case arises out of the FTC's investigation of the sales practices of a group of related companies in which Defendant Mark Haroldsen had an indirect ownership interest. [1] The companies were comprised of Freecom Communications, Inc. ("“FCI‘'), Financial Freedom Report, Inc. ("“FFRI‘'), Silent SalesForce, Inc. ("“SSFI‘'), Eleva, Inc. ("“Eleva‘'), American Home Business Association, Inc. ("“AHBA‘') and FFR Marketing, Inc. ("“FFRM‘'). The companies were engaged in various aspects of the production, sale and/or support of home business opportunities through seminar marketing and secondary sales.

FCI was the first of these companies to be formed. In 1990, Robert V. Brazell ("“Brazell‘') became the CEO and assumed sole management and control of FCI. (Tr. 10/25/01 p. 42). [2] At that time, Mr. Haroldsen retired from day-to-day involvement with the company. He remained as one of three directors of FCI, but did not participate in management. (D.259, Findings 9, 21)(FTC Appx. p. 47, 50). ***3** In June 1993, Don S. Gull ("“Gull‘') was hired as President of FCI and, at that time, Brazell was serving as CEO. (Tr. 10/25/01 p. 5). In the summer of 1995, Brazell designed the structure and directed the incorporation of Eleva, SSFI, FFRI, FFRM and AHBA, which conducted different operating divisions of the former FCI. (D.245, Uncontroverted Fact 8; Tr. 10/25/01 pp. 153-155).

Mr. Haroldsen was appointed a director of Eleva and SSFI, but did not attend board meetings, was never an officer or employee and was not involved in the day-to-day management of either company. Mr. Haroldsen was never an officer, employee or

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

director of FFRI, FFRM or AHBA and was not involved in the day-to-day management of any of these companies. (D.259, Findings 34, 48, 51, 54; Tr. 10/24/01 p. 122; Tr. 10/25/01 pp. 20, 165)(FTC Appx. p. 53, 55-57). Notably, FFRI was the entity against which the vast majority of alleged deceptive representations were asserted in the Amended Complaint. (D. 104).

In August 1993, the FTC notified FCI that it was initiating an investigation into FCI's sales and refund practices. The investigation was initiated by a small number of consumer complaints, mostly regarding the consumers' difficulty in obtaining timely shipment of products, placement of orders and refunds. (Tr. 10/25/01 p.120). The problems were understandable given FCI's dramatic and exponential growth. Between 1992 and 1994, FCI sales grew from $4 million to ***4** $100 million. (D.259, Finding 10)(FTC Appx. p. 48). With such growth came an enormous increase in the administrative complexities and difficulties of managing the company and providing customer service. When the FTC notified FCI of its concerns, FCI reacted immediately to address such.

FCI responded by hiring additional and qualified managers, increasing its customer service staff, installing a new phone system, purchasing a robust relational data base, adding 50 new work stations, and acquiring a new warehouse, assembly and shipping facility. (D.259, Findings 11 and 12)(FTC Appx. p. 48). FCI also funded and implemented a quality assurance program, which effectively ensured that products and services would be marketed in a legal and appropriate manner. (D.259, Finding 15)(FTC Appx. p. 49).

SSFI was careful to use accurate information concerning income realized by customers of the vending machine sold by seminar speakers. Initially, SSFI utilized information based upon Harold Bowman's experience. (D.259, Finding 32) (FTC Appx. p. 52). Mr. Bowman was responsible for seminar events and home business opportunities. (Tr. 10/23/01 p.29). Thereafter, SSFI conducted a survey of its own to determine customer satisfaction. The survey was performed under the direction of Joseph Larkin. (D.259, Finding 36)(FTC Appx. p. 53). The survey demonstrated an overwhelmingly high level of customer satisfaction with SSFI and ***5** the vending machine business opportunity. (D.259, Finding 39; Tr.Ex. D-2)(FTC Appx. p. 53). The survey demonstrated that customers' average income was approximately $33 per month for a single machine. Following the survey, SSFI required seminar speakers to use income figures from the survey in their presentations. (D.259, Finding 46)(FTC Appx. p. 54).

Mr. Haroldsen had an ongoing financial stake in the operations of the companies, but had no day-to-day involvement or control of operations, or the activities of the sales presenters and had no knowledge of any alleged deceptive practices. (D.259, Finding 54, 55)(FTC Appx. p. 57).

Despite the foregoing and despite the passage of three years after the start of its investigation, the FTC continued its pursuit of Mr. Haroldsen and the companies by filing suit in June 1996. Nevertheless, the Corporate Defendants did not make any material representations as alleged in the Amended Complaint. (D.259, Finding 56)(FTC Appx. p. 57).

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On June 4, 1996, the FTC filed a Complaint seeking injunctive and equitable relief against Defendants FCI, FFRI, SSFI, Eleva, AHBA and FFRM (""Corporate Defendants'') for alleged ""deceptive acts or practices prohibited by Section 5(a)'' of the Federal Trade Commission Act (""FTCA'') in connection with the sale of ***6** home based business opportunities. [3] (D.1.) The Complaint also named, as individual defendants, Brazell, Gull, Mr. Haroldsen and Kelly Haroldsen, alleging they ""formulated, directed, controlled, and/or participated'' in the alleged acts and practices of the Corporate Defendants, and Annette S. Brazell and Dana P. Gull, as relief defendants, alleging they received fraudulently transferred assets.

Defendants responded by filing a Motion to Dismiss for, *inter alia,* the FTC's failure to plead its case with particularity. (D.23). On February 11, 1997, the Court issued a Memorandum Decision stating, ""the core of the FTC's claims lie in fraud and the FTC should be put to the [particularity] requirements of Rule 9(b).'' (D.101). The Court permitted the FTC to file a First

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Amended Complaint ("“Amended Complaint‘’) on March 18, 1997.[4] (D.104)(FTC Appx. p. 1). The Amended Complaint asserted additional counts sounding in fraud, many of which were pleaded in a conclusory and non-specific fashion, and without particularity.[5]

After filing the Amended Complaint, and as a result of the hardships ***7** imposed by litigation with the government, each of the Corporate Defendants, except AHBA, were driven out of business. Some, including Eleva, went into bankruptcy (D. 161); others simply closed their doors and terminated all their employees. (D.270, „12). Forced into financial ruin, the Corporate Defendants each entered into Consent Judgments. (D. 199) (defendant AHBA), (D.244) (defendants FCI, FFRI, FFRM and SSFI). Under the pressure and financial hardship of the litigation, each of the individual defendants, other than Mr. Haroldsen, entered into Consent Judgments to buy peace with the FTC. *See* (D.145) (defendants Gull and Dana Gull); (D. 174) (defendants Brazell and Annette Brazell); and (D. 183) (defendant Kelly Haroldsen). The Consent Judgments imposed extensive injunctive relief, but did not require the payment of any money by the settling defendants.

After three years of investigation and five years of litigation, during which the FTC had ample opportunity to conduct discovery, a trial was scheduled on October 22, 2001. A discovery cut-off was established as July 2, 2001. The remaining defendant was Mr. Haroldsen. (D.206, D.207). On October 3, 2001, as a result of the parties' failure to complete a tentative settlement after the FTC had rejected its lead trial counsel's recommendation that the FTC accept a settlement of $325,000, the district court ordered, *sua sponte,* a mandatory settlement conference ***8** on October 11, 2001. (D.229). "“[A]ll parties and counsel with *final decision-making authority‘’* were ordered to appear and participate. (D.229). (Emphasis added.) The FTC disobeyed the order by appearing without a party having "“final decision-making authority.‘’ The FTC failed to notify the district court that it would not have a party present, and failed to come prepared to participate in the settlement conference. (D.291 - Findings and Conclusions Re: Attorney's Fees, Findings 14-16)(FTC Appx. p. 121-22).

On October 16, 2001, Mr. Haroldsen filed a motion for dismissal of Counts IX through XVI and a motion in limine, based upon the FTC's failure to plead certain claims with particularity. (D.236-237, D.239-242). On October 18, 2001, the district court entered its Order Re: Motion for Dismissal of Counts IX Through XVI and Motion in Limine ("“Order in Limine‘’), granting Mr. Haroldsen's Motion in Limine, thus enforcing the district court's 1997 Memorandum Decision (D. 101) and limiting the FTC from introducing or referring to any evidence not relating to those deceptive acts alleged in Counts I through VIII. (D. 247)(FTC Appx. p. 39). The Order in Limine found, *inter alia,* that Counts IX through XVI were not alleged with particularity as required by Rule 9(b) and the district court's 1997 Memorandum Decision, and that such allegations failed to identify (i) the specific time or date of the representations, (ii) the identity of the declarant, (iii) the place of ***9** the representation, and (v) the consequence of the representation. The district court further found such Counts failed to even identify or plead an actual representation. (D.247, Findings 4-5)(FTC Appx. p. 41).

In its opening statement at trial, the FTC informed the district court that it would prove Mr. Haroldsen was personally liable for consumer redress in the amount of $147 million. To do so, the FTC called only four consumers to the stand (out of hundreds of thousands). Of those four, only two had knowledge relevant to the claims at trial and those two witnesses did *not* present any testimony in support of the FTC's claims. See testimony of Anspach and Ohannesian. (Tr. 10/22/01 p.16)(FTC Appx. p. 142); (Tr. 10/22/01 p. 21)(FTC Appx. p. 78); (Tr. 10/22/01 pp. 26, 36-37)(FTC Appx. p. 79).

Mindful of the FTC's burden to prove a material representation likely to mislead a reasonable consumer, the district court not surprisingly concluded, *inter alia,* that the FTC's consumer witnesses "“offered no competent or relevant testimony in support of the FTC's claims.‘’ (D.291, Finding 19; *see also* D.291, Finding 20; D.259, Findings 42, 52-56)(FTC Appx. p. 54, 56-57, 122). This is the sum total of consumer evidence presented at trial by the FTC. The lack of ***10** evidence is in direct contrast to the FTC's pretrial representations and threats.[6] For the remainder of its case, the FTC failed to introduce any evidence in support of its claims against Mr. Haroldsen. (D.259, Findings 42, 53, 54, 55, 56)(FTC Appx. p. 54, 56-57). At the close of the FTC's case, Mr. Haroldsen presented a Motion for Judgment on Partial Findings, which the district court granted. In regard thereto, the district court entered specific findings from the bench, and on February 1, 2002, the court entered supplemental findings of fact and conclusions of law. (D.259)(FTC Appx. p. 45).

Based in part on the foregoing findings, on February 12, 2002, the district court entered Judgment for Mr. Haroldsen. (D.260) (FTC Appx. p. 61). On February 26, 2002, the FTC filed a motion to amend the judgment and the findings. (D.261)(FTC Appx. p. 62). Pursuant to Mr. Haroldsen's stipulation, the district ***11** court entered an Amended Judgment on March 11, 2002. (D.264) (FTC Appx. p. 66). On April 1, 2002, Mr. Haroldsen filed his Bill of Costs. (D.266)(FTC Appx. p. 67). On April 11, 2002, Mr. Haroldsen filed a motion for attorneys' fees and expenses pursuant to EAJA, 28 U.S.C. § 2412(b) and (d). (D.269)(FTC Appx. p. 71). The district court granted Mr. Haroldsen's motion at a hearing on September 12, 2002, and on January 23, 2003 entered findings of fact and conclusions of law regarding the same. (D.291)(FTC Appx. p. 116-131).

The district court awarded Mr. Haroldsen attorneys' fees of $155,978.50, expenses and costs since July 2, 2001 of $15,135.17, taxable costs prior to July 2, 2001 of $10,665.56, and expert witness fees since July 2, 2001 of $8,470.87. Notably, the basis for recovering expenses is the same as for attorneys' fees under the EAJA. It is from the foregoing award of fees and expenses totaling $190,250.10 that the FTC appeals. [7]

12** ***STATEMENT OF RELEVANT FACTS

I. FACTS REGARDING THE FTC'S CLAIMS AGAINST MR. HAROLDSEN.

The FTC tried Counts I through VIII, having been precluded by the Court's Order in Limine from introducing evidence on the remaining Counts IX through XVI of the Amended Complaint. (D.247)(FTC Appx. p. 39). Counts I through VIII allege deceptive representations and sales practices of the Corporate Defendants (i.e., primarily FFRI) through seminar speakers at specific dates, mostly in May 1996, [8] promotional mailers distributed in October 1993 and June 1996, magazines published in September 1993 and through an infomercial. The alleged deceptive practices concerned income claims from the operation of home business opportunities (primarily vending machines) and the home business industry generally. (D.104)(FTC Appx. p. 1-44). The FTC was required to prove that the alleged representations were made, that they were material, and that they were likely to deceive a reasonable consumer.

The FTC began the trial by calling four consumer witnesses to the stand. ***13** The first, Wendy Ellsworth, did not attend any of the seminars identified in Counts I through VIII, and could not recall the name or date of the infomercial she viewed. (Tr. 10/22/01 p. 6, 10)(FTC Appx. p. 140). Based on that fact, the district court excluded the witness because she had no information relevant to the allegations of the Amended Complaint. (Tr. 10/22/01 p. 10)(FTC Appx. p. 140). The FTC contended that Ellsworth's testimony was relevant concerning the ""viability of the business opportunity.‘‘ However, the district court ruled that her testimony would not be relevant given that she was only one of more than 200,000 consumers who had tested or used the business opportunity and there was no foundation that her perception of viability would be relevant to the use of the business opportunity products in the hands of the other 200,000 consumers. (Tr. 10/22/01 pp. 6-7).

Ronald Anspach testified that he had attended a seminar in Kalamazoo, Michigan in the mid 1990s (Tr. 10/22/01 p.12) and had listened to a presentation on a business opportunity having to do with Homespan, which provided a fax based sales program for distressed merchandise (Tr. 10/22/01 p. 13). Anspach could not recall that any specific income claims were stated by the speaker or that any general income claims were stated in connection with the Homespan business opportunity. Anspach could only recall the speaker saying: ""people have made good sums of money being involved in a home based business.‘‘ After the seminar, his only ***14** expectation was that he would be able to ""make some money doing it.‘‘ (Tr. 10/22/01 p.16)(FTC Appx. p. 142).

Notably, Michael Ohannesian testified that he had attended a seminar in Kalamazoo in early June 1996. Although he received an advertising flier in the mail concerning the seminar, Ohannesian did not recall the statements contained therein, but testified that he was ""not stupid‘‘ and did not accept the statements in the flier as true. (Tr. 10/22/01 p. 21)(FTC Appx. p. 78). Ohannesian recalled the speaker stating vending machines could make $80 per month, but could not recall any specifics about how that number was presented or what must be done to achieve such results (Tr. 10/22/01 p. 36); however, with respect to income

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

potential, Ohannesian reasonably ""figured that was a bunch of crap'' and calculated his own estimate of $50 per month. (Tr. 10/22/01 p. 26)(FTC Appx. p. 79). Based thereon, Ohannesian purchased some vending machines and placed them all in commercial locations. His best machine made $45 a month. (Tr. 10/22/01 pp. 36-37).

Finally, while laying a foundation for Jeanine Weathers testimony, the FTC stipulated that she did *not* attend any of the seminars alleged in the Amended Complaint and, without presenting any argument as to the relevance or admissibility of her testimony, the FTC simply offered to make a proffer of evidence. (Tr. 10/22/01 p. 39)(FTC Appx. p. 150). While the district court made no ruling to ***15** exclude Weathers' previous limited testimony, the Court did not affirmatively accept the FTC's proffer through counsel and no further evidence was introduced. Nevertheless, even according to the proffer, Weathers attended two seminars, the first at a location she could not remember and the second in Salt Lake City, Utah where the speaker represented that a single headed vending machine could earn $70 to $80 a month. After she had difficulty placing the machines, Weathers asked for and obtained a full refund of the money she had paid. (Tr. 10/22/01 pp. 41-42)(FTC Appx. p. 152-53). [9]

Joe Larkin, a vice president SSFI, testified concerning a customer satisfaction survey which he designed and performed for SSFI. (Tr. 10/23/01 pp. 30-31, Exhibit D2). [10] The survey was conducted by telephone and utilized both outbound and inbound calling. (Tr. 10/23/01 pp. 32-33). Larkin's attempt was ***16** ""not to defraud, not to hype the numbers, it was to give the most accurate representation that we could...'' (Tr. 10/23/01 p. 36). The customer satisfaction survey was started in late spring 1996 and was completed in July or August 1996. (Tr. 10/23/01 p. 50). The 1996 survey demonstrated that customers of the vending machines were making as high as $200 per month, per machine. (Tr. 10/23/01 p. 35). The average income from each machine was in the range of $32 per month. (Tr. 10/23/01 p. 58, Exhibit D81). The survey overwhelmingly demonstrated a high level of satisfaction among customers of vending machines. (D.259, Finding 39; Ex. D2)(FTC Appx. p. 53). Mr. Larkin testified that the vending machines were legitimate business products. (Tr. 10/23/01 p. 49). [11]

Gary Buehner testified that he was the person who started the vending machine business, which was ultimately acquired by SSFI, and that he operated the business from 1984 through 1989. Buehner testified that while he ran the business, he had placed vending machines at thirteen Village Inn locations which averaged at least $80 per month. (Tr. 10/23/01 p. 92)(FTC Appx. p. 163).

Guy Scribner testified that Brazell was in control over the companies. (Tr. 0/23/01 p. 155). Scribner was never a director or officer of any of the Corporate ***17** Defendants and did not attend any director's meetings. He did not attend manager meetings, and did not have any official position or role with the Corporate Defendants. He does not know how much of Mr. Haroldsen's time was devoted to actual involvement with any of the companies. (Tr. 10/23/01 pp. 156-57). Scribner testified that Mr. Haroldsen was not involved with any of the companies on a day-to-day basis. (Tr. 10/23/01 p. 159).

On the third day of trial, the FTC called Lynn Brotherson who testified that she had begun working for FCI in January 1995 as the director of the speaker compliance program. As part of her job, she reviewed tapes of seminar speakers and evaluated the speakers for compliance. (Tr. 10/24/01 p. 7). Later, she worked for FFRI as the quality assurance manager over seminar activities. (Tr. 10/24/01 p. 9). In this position, she reviewed speaker presentations for accuracy of success stories. (Tr. 10/24/01 p. 10). Prior to Larkin's completion of the customer satisfaction survey, speakers were permitted to use an average income figure for vending machine sales of $80 per month because that number was believed to be an accurate representation of what could be expected. After the survey was completed in 1996, the speakers were required to state that the average sales from single machines was $33 per month. (Tr. 10/24/01 pp. 18-19) (FTC Appx. p. 178). The speakers complied with such requirement. (Tr. 10/24/01 p. 39). As quality ***18** assurance manager, Brotherson treated her responsibilities as a serious and important function within the company, and never at any time did anyone attempt to influence her to overlook or encourage speaker misstatements. (Tr. 10/24/01 pp. 37-38). Brotherson conducted her job responsibilities with integrity and honesty. (Tr. 10/24/01 p. 38). The company provided adequate resources to completely staff the quality assurance office. (Tr. 10/24/01 p. 46). Mr. Haroldsen did not have any role in Brotherson's discharge of her duties as the quality assurance officer. He had no actual control over her activities and she had no interaction with Mr. Haroldsen in her job responsibilities. (Tr. 10/24/01 p. 47). Seminar directors were

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

required to provide written and verbal disclaimers at all seminars, before and at the end of each presentation. (Tr. 10/24/01 pp. 53-54).

Steve Schone was called as a witness on the third day of trial. Schone was employed as the product employment director of FFRI, the seminar company. (Tr. 10/24/01 p. 79)(FTC Appx. p. 180). Schone attended weekly marketing meetings for the company and testified that Mr. Haroldsen attended only eight to twelve such meetings over the course of approximately one and a half years. (Tr. 10/24/01 p. 80)(FTC Appx. p. 181). Mr. Haroldsen's attendance was infrequent and sporadic, at best.

Roger Hendrix testified that he was employed as senior vice president of ***19** sales for FCI in July 1995. A few weeks later, FCI was split into the Corporate Defendants and Hendrix took simultaneous positions as CEO of FFRI and CEO of FFRM from August 1995 until December 1995. (Tr. 10/24/01 p. 89)(FTC Appx. p. 184). During that period, Hendrix testified that Mr. Haroldsen was a director of FFRI for a time, but did not attend any board meetings. (Tr. 10/24/01 p. 92). At the beginning of Hendrix' employment with FCI, Mr. Haroldsen attended some meetings with Brazell and Hendrix where the financial health of the company was the main topic of conversation and, to a lesser extent, regulatory issues were discussed. (Tr. 10/24/01 p. 94)(FTC Appx. p. 186). Hendrix could not recall whether issues relative to speaker presentations were discussed in Mr. Haroldsen's presence. (Tr. 10/24/01 p. 100). Mr. Haroldsen's interest in the company at these meetings was to discuss its financial health and review financial statements. (Tr. 10/24/01 p. 114, 120). Hendrix attended shareholder meetings for the companies, which were also attended by Brazell and Mr. Haroldsen. In these meetings, the topics of conversation covered sales levels and client service and did not include speaker presentations or issues. (Tr. 10/24/01 p. 118). Mr. Haroldsen's financial concerns were entirely appropriate for a majority shareholder. (Tr. 10/24/01 p. 123). Hendrix could not testify that Mr. Haroldsen was ever a party to any discussion concerning or that he had knowledge of reports of speaker ***20** misrepresentation, or that he had any authority or control over speakers. (Tr. 10/24/01, 88-129). Mr. Haroldsen never attempted to exercise any influence over Hendrix in the performance of his executive job responsibilities. (Tr. 10/24/01 p. 122).

Don Gull was the president and COO of FCI from May or June 1993 and later became an employee of SSFI from July 1995 until early 1996. (Tr. 10/25/01 p. 5). Gull was aware of the experience of an employee of the company, Harold Bowman, who had placed vending machines in *inferior* locations and was making an average of $50 to $60 a month from each of those machines. On that basis, Gull, concluded, as president of SSFI, that $80 a month would be a reasonable average for top notch locations. (Tr. 10/25/01 pp. 13-14, 23)(FTC Appx. p. 193). This conclusion led to the use of that figure by speakers representing the potential of vending machines. Gull recalls a meeting in late summer 1993, wherein the company discussed ""speakers taking license about things they were representing about products.‘' No specifics were given as to the nature of the ""license‘' taken. Mr. Haroldsen was present at the meeting and gave the speakers a firm warning for them to stay within guidelines and not to make up claims that could not be backed up. (Tr. 10/25/01 pp. 14-15)(FTC Appx. p. 193-94). There may have been another meeting at Mr. Haroldsen's house where the same sort of general warnings were ***21** given to speakers. (Tr. 10/25/01 pp. 15-16)(FTC Appx. p. 194-95). This was part of the ongoing effort by the Corporate Defendants to require honesty and accuracy in their sales activities. (D.259, Findings 15, 16; Tr. 10/25/01 pp. 127-28)(FTC Appx. p. 49). SSFI tried to do the best it could to meet its consumer demands and responsibilities. (Tr. 10/25/01 p. 17) (FTC Appx. p. 195). SSFI had hundreds of thousands of customers and it was difficult to keep up-to-date records of them all. But the company never tried to scam anyone. Its difficulties were strictly operational. (Tr. 10/25/01 pp. 18-19). Mr. Haroldsen was not involved in the day-to-day operations of SSFI. (Tr. 10/25/01 p. 20). In order to respond to the explosive growth the company experienced, it upgraded the computer system and hired very good people. Gull thought the vending business was a good, solid business. The vending machines were well made and the company was constantly improving the machines. (Tr. 10/25/01 p. 24). Gull never made or participated in a material misrepresentation to any customer of SSFI. He does not know of any instance when Mr. Haroldsen made or participated in a material misrepresentation to any customer of SSFI. (Tr. 10/25/01 p. 27).

Rob Brazell was the CEO of FCI. He was involved in the operations of the Corporate Defendants. He was originally hired as vice president of FCI in 1989, with the understanding that he would become the chief executive officer of the ***22** company. Approximately six months after his hire, Brazell became the CEO of FCI. (Tr. 10/25/01 p. 42). Mr. Haroldsen hired Brazell to become the CEO so he (Mr. Haroldsen) could be relieved of the responsibility to run the company. (Tr. 10/25/01 p. 104)

(FTC Appx. p. 205). Mr. Haroldsen wanted to hire Brazell and retire, and that is what happened. (Tr. 10/25/01 p. 106). After 1993, Mr. Haroldsen was not involved in the corporate organization of FCI. (Tr. 10/25/01 p. 107). Under Brazell's management, between 1992 and 1994, FCI grew from 20 employees to 500 employees and from $4 million a year in sales to $100 million. (Tr. 10/25/01 pp. 108-09)(FTC Appx. p. 206). During this same period, the company increased its seminar attendance from approximately 600 per week to about 13,000 per week. (Tr. 10/25/01 p. 112). To handle such dramatic growth, the company hired a qualified person as manager of client care, doubled the staff in client care, put in a new phone system, purchased a new relational data base, added nearly 50 new work stations and acquired and staffed a new warehouse, assembly and shipping facility. (Tr. 10/25/01 p. 113). Brazell was responsible for all day-to-day decisions and supervised all officers and staff of the company. Mr. Haroldsen was not involved in the day-to-day operations of the company. (Tr. 10/25/01 p. 114). In June 1993, Brazell was aware of only three types of complaints concerning misrepresentations, and none of them had to do with earning claims or the ***23** allegations of the Amended Complaint. (Tr. 10/25/01 pp. 117-18). At the time the FTC commenced its investigation, Brazell believed that the only concerns about the company's operations were caused by the significant increase in demand on the company's resources, which was causing difficulty in the timely shipment of products and refunds. (Tr. 10/25/01 p. 120). Brazell's intention and effort was to provide good products and good services, and to sell them in an honest manner. As of August 1993, Brazell believed that programs were in place to insure compliance with those standards. (Tr. 10/25/01 p. 124). On August 30, 1993, Brazell wrote a memo to the employees of the Corporate Defendants which, among other things, identified goals for the company, including the goal of ensuring ""absolute accuracy or representation of every product we market.'' (Tr. 10/25/01 pp. 127-28). In October 1993, FCI commissioned a customer satisfaction survey, which demonstrated that 81% of the company's customers were satisfied or somewhat satisfied. (Tr. 10/25/01 p. 138). Mr. Haroldsen was only interested in the monthly financial statement and weekly cash reports. (Tr. 10/25/01 pp. 143-44). At all times during Brazell's tenure as CEO of FCI, no one ever usurped from him the responsibilities and authority of that position. (Tr. 10/25/01 p. 162). Mr. Haroldsen did not have any responsibility to be involved in the day-to-day management of speakers and seminars. (Tr. 10/25/01 p. 165).

***24** The final witness called by the FTC was Sam Burggraaf, who was the Human Resources Director at FCI from January 1994 until March 1995. (Tr. 10/25/01 pp. 173-74). Thereafter, he became employed with AHBA and became its CEO. Burgraff stated that while Mr. Haroldsen attempted to tell Burggraaf what to do, Burggraaf had the actual authority to ignore him when he disagreed. (Tr. 10/25/01 p. 201). Burggraaf had no involvement in the sale of home business products through seminars. (Tr. 10/25/01 p. 206). While Burggraaf was the CEO of AHBA, he formed a corporation set up to compete with AHBA. Burggraaf threatened to sue FFRI and its CEO, Ted Broman. (Tr. 10/25/01 p. 214). Burggraaf was terminated from his employment with AHBA. (Tr. 10/25/01 p. 215).

II. ABSENCE OF FACTS CONCERNING THE FTC'S CLAIMS AGAINST MR. HAROLDSEN.

The Amended Complaint sets forth eight Counts regarding alleged deceptive trade practices for which the FTC was permitted to introduce evidence. In summary, the FTC alleges specific statements, attributed to various Corporate Defendants. None of the allegations are asserted against Mr. Haroldsen directly. The alleged representations were made at specific, though unidentified, seminars and by specific speakers.

The FTC did *not* introduce any evidence to establish that any of the alleged ***25** representations were made, were material, were misleading or deceptive. In fact, the FTC made no attempt to introduce such evidence. Of the four consumer witnesses called by the FTC, two had not attended any of the seminars alleged in the Amended Complaint and none of the four could testify as to any of the representations made in Counts I through VIII. The FTC did not call *any* of the alleged seminar speakers to testify that the alleged representations had been made, were material, were misleading or deceptive and the FTC did not introduce evidence from any person who heard the alleged representations. Although the FTC asserted pretrial that it had hundreds of witnesses who would provide direct evidence that the alleged material representations had been made, no attempt was made during trial to introduce any evidence to prove such.

Based on the lack of evidence, the district court found that the FTC failed to introduce evidence that any Corporate Defendant engaged in deceptive acts. (D.259, Finding 52, 56)(FTC Appx. p. 56-57).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

The Amended Complaint asserts each of its allegations against specific corporate defendants (however, none were asserted against FFRM or Eleva). However, in its Brief, the FTC attempts to apply such allegations to the defendants as a group. The district court's findings preclude such a general application of conduct by one party to other defendants because they are separate legal entities, ***26** acting independently of one another. (*See* D.259, Findings 4-5, 30-31)(FTC Appx. p. 47, 52).

The FTC failed to introduce any evidence that attributed any alleged deceptive representation to Mr. Haroldsen, or his participation in, knowledge of or acquiescence in any alleged deceptive representation. Moreover, the FTC failed to introduce any evidence suggesting Mr. Haroldsen had control over any persons shown to have made any alleged deceptive representation. Based upon the lack of any such evidence, the district court found Mr. Haroldsen did not participate or engage in any deceptive acts (D.259, Findings 42, 53)(FTC Appx. p. 54, 56) and did not have authority, control or knowledge of Corporate Defendants' alleged deceptive practices. (D.259, Findings *54-55)(FTC* Appx. p. 57).

The FTC proceeded to trial against Mr. Haroldsen with the burden of proving that he was personally liable for violations of the FTCA. The burden required the FTC to prove at least one of the Corporate Defendants had engaged in deceptive sales practices and then prove Mr. Haroldsen's derivative personal liability by showing evidence of his knowledge or participation therein, or his control of the entity in violation of the FTCA. The FTC failed to introduce evidence to prove any of the requisite elements of liability.

***27 III. FACTS REGARDING PROCEEDINGS ON MR. HAROLDSEN'S CLAIM FOR ATTORNEYS' FEES AND EXPENSES.**

On April 1, 2002, Mr. Haroldsen filed his Bill of Costs, requesting $13,626.39. (D.266)(FTC Appx. p. 67). On April 11, 2002, he filed his Motion for Attorney's Fees and Expenses pursuant to §2412(b). (D.269)(FTC Appx. p. 71). The district court granted Mr. Haroldsen's motion for fees and expenses and, on January 22, 2003, entered its Findings of Fact and Conclusions of Law Re: Attorneys' Fees and Expenses Under EAJA. (D.291)(FTC Appx. p. 116). The findings contain 32 separate paragraphs of detailed findings in support of its conclusion that Mr. Haroldsen was entitled to an award of fees and expenses. (D.291, Finding 5-8, 10, 12-16, 18, 20, 23-25)(FTC Appx. pp. 117-26).

SUMMARY OF THE ARGUMENT

The district court exercised its sound discretion in awarding attorneys' fees and expenses to Mr. Haroldsen, based upon the detailed and well supported findings of the district court. Each of the FTC's claims which were presented at trial (Counts I through VIII) were dismissed at the close of its case in chief because the FTC failed to introduce any evidence supporting the claims. The claims that were not tried (Counts IX through XVI) were properly adjudicated in part through the district court's Order in Limine (D.247). Neither the Order in Limine, nor the judgment were challenged by appeal.

***28** The FTC failed to introduce any evidence that a material representation, omission or practice, likely to mislead a reasonable consumer, was made by any of the defendants. Four consumers were called to testify out of more than 200,000 consumers of the Corporate Defendants products. Two had no relevant information. Two offered no testimony to support the FTC's claims. The FTC failed to call any of the alleged speakers to testify and, thus, failed to introduce evidence that any of the alleged deceptive representations were made. Similarly, the FTC failed to introduce any evidence of consumer injury. There was no testimony or documentary evidence offered to show any alleged monetary loss by a consumer. The Corporate Defendants' surveys taken in 1993 and 1996 demonstrated that there was overwhelming customer satisfaction.

The FTC failed to introduce any evidence for its claim that Mr. Haroldsen had authority to control any Corporate Defendant, or that he participated in, knew about or should have known about any alleged deceptive practice. In order to be held liable for the acts of a corporation, the FTC must first establish the fact of a corporate violation, and then must show that an individual

had derivative liability through the exercise of control over the corporation, participation in the violation, or knowledge thereof. The FTC failed to introduce any evidence that Mr. Haroldsen could be liable on any such grounds. He was not an officer or ***29** employee, did not participate in day-to-day management, had no knowledge of or participation in any deceptive acts, and could not be held liable for any corporate act, even if the FTC had demonstrated the existence of corporate liability.

The district court was correctly awarded fees and expenses under the §2412(b) on the alternative grounds recognized under EAJA. The district court properly found that the FTC's conduct in this litigation was undertaken in bad faith, vexatious, oppressive and wanton from at least July 2, 2001, when discovery was cut-off. By that date, the FTC knew that it did not have evidence to support its claims, and knew that its claims were without color and merit. The district court made detailed and voluminous findings to support its decision. The findings set forth a basis under the law for each of the alternative grounds found by the district court to be present in this case. The FTC disobeyed a district court order to participate in a mandatory settlement conference. The FTC exercised the power and authority of the U.S. government to leverage Mr. Haroldsen for the purpose of extracting an exorbitant and unfounded settlement. The FTC's maintenance of the litigation in knowing absence of any evidence to support the claims was vexatious and wanton. Under these circumstances, the district court's decision to award fees and expenses must be affirmed, giving deference to the court's exercise of sound discretion.

***30** The district court acted properly in establishing July 2, 2001 as the date after which fees and expenses would be awarded. July 2, 2001 was the discovery cut off date. By that time, the FTC knew or should have known that it did not have evidence to support its case. Only two depositions remained to be taken, and neither had information relevant to the FTC's claims.

The district court's Order in Limine properly applied the law of this and other Circuits in requiring the FTC to allege fraud with particularity.

STANDARD OF REVIEW

Mr. Haroldsen agrees with the standard of review stated by the FTC. Additionally, it should be noted that this Court will ""review the district court's determination whether the parties have complied with its orders under the clearly erroneous standard, mindful that the district court is in the best position to make that determination.'' *Martinez v. Roscoe,* 100 F.3d 121, 123 (10th Cir. 1996).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AWARDING ATTORNEYS' FEES TO MR. HAROLDSEN, WHERE COUNTS I THROUGH VIII WERE WITHOUT COLOR AND THE FTC PURSUED SUCH FOR IMPROPER PURPOSES.

Exercising its discretion and pursuant to detailed findings of fact and conclusions of law, the district court properly awarded attorneys' fees and costs to ***31** Mr. Haroldsen under the bad faith exception to the ""American Rule' [12] pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(b) (the ""EAJA''). The EAJA directs that

a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency... of the United States ... in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law....

Section 2412(b) makes the United States liable for attorneys' fees and expenses where its actions were ""wanton, vexatious, oppressive, frivolous, or groundless.'' *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258-59 (1975). The *Alyeska* standard has been followed by courts in all districts and constitutes the settled interpretation of the scope and reach of §2412(b). *See also* *Vaughan v. Atkinson,* 369 U.S. 527 (1962) (fees may be awarded under the common law, in the absence of statute or contract, when a party has acted in bad faith, vexatiously, ***32** wantonly or for oppressive reasons). [13]

In its recent pronouncement in *FDIC v. Schuchmann,* this Court reiterated the applicability of the bad faith exception, where clear evidence demonstrates claims are asserted ""without color'' (i.e., unmeritorious, frivolous, etc.) and for ""improper reasons'' (i.e., bad faith, vexatious, oppressive, wanton, improper motive, bad intent, harassment, delay, etc.). Of course, to withstand a challenge that it abused its discretion, the district court is required to enter findings of fact in support of the foregoing relevant conclusions. *Id.* at 1250-53 (citations omitted).

As discussed *infra,* the district court's specific legal conclusions and underlying factual determinations establish its exercise of sound discretion in awarding attorneys' fees to Mr. Haroldsen. [14]

***33** *A.* Since the District Court Found Counts I Through VIII Were Without Color, Mr. Haroldsen Is Entitled To Attorneys' Fees Under the EAJA.

To establish any of its claims, the FTC needed to prove that (i) there was a representation, omission or practice, (ii) which was likely to deceive consumers acting reasonably under the circumstances, and (iii) which was material. *See* *FTC v. Pantron I Corp.,* 33 F.3d 1088, 1095 (9th Cir. 1994). [15] An overriding principle to be applied in considering injury/damage issues in deception cases is that, ""[t]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.'' *Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (3d Cir. 1976), *cert denied,* 430 U.S. 983 (1977). *Accord* *Standard Oil of Calif,* 84 F.T.C. 1401, 1471 (1974), *aff'd as modified,* ***34** 577 F.2d 653 (9th Cir. 1978), *reissued,* 96 F.T.C. 380 (1980). The district court properly found that the FTC failed to introduce credible evidence of any of the foregoing elements.

1. *The District Court Found the FTC Failed to Introduce Evidence of Any Deceptive Representation Alleged In the Amended Complaint.*

The FTC failed to introduce evidence that any material representation likely to mislead a reasonable consumer was made. Out of more than 200,000 consumers, the FTC called only four to the stand. Ms. Ellsworth was excluded because she had no evidence relevant to the FTC's claims. (Tr. 10/22/01, p. 10). Ms. Weathers was withdrawn. (Tr. 10/22/01 p. 39). Messrs. Ohannisian and Anspach provided vague non-probative testimony. Mr. Ohannisian, who attended a seminar identified in Counts I through VIII, testified only that he heard a vague reference to $80 per month (Tr. 10/22/01 p. 36), but ""figured that was a bunch of crap'' and used his own estimate of expected income as the basis for his decision to buy. (Tr. 10/22/01 p. 26). Mr. Anspach did *not* even attend one of the alleged seminars. However, the district court allowed him to testify concerning representations made by a speaker selling ""Homespan'' business opportunities. Anspach could *not* recall any specific income claims being made. The only representation Anspach heard was: ""people have made good sums of money being ***35** involved in a home based business.'' (Tr. 10/22/01 p. 16). Such vague, imprecise and immaterial evidence cannot establish the elements of an actionable claim under the FTCA.

None of these witnesses testified to a specific representation being made. None of them testified such representation was misleading or deceptive, in fact, or likely to mislead or deceive. None of them testified such representation was material to their decision to purchase a product. To the contrary, the foregoing evidence establishes no actionable representation was made.

Ironically, Mr. Ohannisian disregarded, as immaterial, even the vague representation he was able to recall. It was neither material to his decision nor likely to deceive a reasonable consumer. His decision was based upon independent considerations, including his own estimate of profitability.

Despite the FTC's arguments to the contrary, the trial pleadings, evidence and the district court's findings and conclusions based thereon clearly demonstrate that the district court both understood and correctly applied the law in determining the FTC presented no evidence as to the elements of its case against Mr. Haroldsen. [16]

36 2. *The District Court Found the FTC Failed to Introduce Credible Evidence of Consumer Injury.

Even if the FTC had introduced evidence of a deceptive representation, it utterly failed to present evidence of the existence of consumer injury caused thereby. In fact, the evidence established that consumers were *not* injured. The FTC failed to call a single witness who could testify that he had been injured. The testimony of the four consumer witnesses called at trial was dispositive. None of the four consumers testified that he/she lost money on the purchase, and none attempted to provide any evidence of lost profits expected therefrom. In fact, there were no such losses. Much more probative was the unrebutted testimony of Larkin and Brazell concerning surveys taken by the Defendant Corporations. Brazell testified that an October 1993 survey demonstrated 81% customer satisfaction. (Tr. 10/25/01 p. 138). Larkin testified that he conducted a survey of SSFI customers of vending machines in 1996. The 1996 survey overwhelmingly showed a high level of satisfaction among customers. (D.259, Finding 39; Ex. D2)(FTC Appx. p. 54-55). ***37** The vending machines were legitimate business products (Tr. 10/23/01 p. 49) and the vast majority of the customers were satisfied.

In the absence of any evidence of a single consumer having been injured, the evidence of strong consumer satisfaction strongly supports the district court's finding that there was no evidence of consumer injury. Thus, the district court simply and properly concluded the FTC is not entitled to recover damages, under the auspices of a consumer redress or any other theory, where there was no injury. [17]

3. *The District Court Found the FTC Failed to Introduce Evidence That Mr. Haroldsen Had Authority to Control Corporate Defendants, That He Participated in Any Violation, or That He Knew or Should Have Known of Any Violations of the FTCA.*

To establish personal liability, the FTC needed to prove Mr. Haroldsen " "actively'' and ""materially'' participated in the alleged acts or knowingly controlled ***38** and permitted the alleged acts and practices. [18] *FTC v. Sharp,* 782 F. Supp. 1445, 1449 (D. Nev. 1991). *See* *United States v. ACB Sales & Service, Inc.,* 590 F. Supp. 561, 575 (D. Ariz. 1984) (individual liability ""must rest upon the principles of liability under the common law of tort and agency.... a corporate director may be held liable only for violations in which he materially participates''). A corporate officer, director or majority shareholder cannot be held vicariously liable for the corporation by virtue of his office. *Lobato v. Pay Less Drug Stores,* 261 F.2d 406, 408-9 (10 Cir. 1958). To establish personal liability for corporate conduct, personal participation, control and knowledge must be proven. In *FTC v. Standard Educ. Co.,* 86 F.2d 692 (2d Cir. 1936), *rev'd on other grounds,* 302 U.S. 112 (1937), the court held: ""[t]o hold one personally liable for unfair trade practices of a corporation, it is not enough that he be a director or officer of the infringing corporation; he must be shown to have had such connection with wrong as would have made him an accomplice were it a crime, or a joint tort-feasor, were ***39** the corporation an individual.'' [19]

The evidence demonstrated and the district court found that Mr. Haroldsen was *not* involved in day-to-day corporate activities. (D.259, Findings 9, 21, 25, 34, 48, 49, 54)(FTC Appx. pp. 47, 50, 51, 53, 55, 57). He was *never* a shareholder, employee, or officer, *never* had direct control over the alleged activities, and *did not participate* in a single allegedly deceptive act. (D.259, Findings 41, 42, 53)(FTC Appx. pp. 54, 56). Mr. Haroldsen's role as a director was limited to one or two companies and he did

not actively participate in board meetings. (D.259, Findings 27, 51, 54)(FTC Appx. pp. 51, 56, 57). The testimony at trial not only proved Mr. Haroldsen had no involvement, participation or control, it proved that people other ***40** than Mr. Haroldsen were in actual and legal control. As CEO, Brazell had active management control of FCI beginning in 1990. (D.259, Finding 7)(FTC Appx. p. 47). Brazell was making all day-to-day management decisions through 1995. (D.259, Finding 20)(FTC Appx. p. 50). Responsibility for day-to-day involvement with and management of speaker and seminar activities resided in Lynn Brotherson (D.259, Findings 23, 44, 49)(FTC Appx. pp. 50, 54, 55-56). Brazell was responsible to formulate and implement policy concerning speakers. (D.259, Finding 24)(FTC Appx. pp. 50-51). Gull was CEO of SSFI and had day-to-day decision making control of that company. (D.259, Finding 34)(FTC Appx. p. 51).

Further, Mr. Haroldsen had no knowledge of and, therefore, could not encourage or acquiesce in the alleged deceitful representations of others. (D.259, Findings 26-27, 33, 42, 48-49, 51)(FTC Appx. pp. 51, 52-53, 54, *55-56,* 56). This evidence overwhelmingly rebuts the scant, unreliable and/or inadmissible evidence referenced in the FTC Brief. The FTC relies, albeit incorrectly, on two witnesses to support its claim that evidence existed to show knowledge on control by Mr. Haroldsen.

Notwithstanding the FTC's reliance on Guy Scribner for this issue, Scribner stated that *Brazell* was in control of the companies. (Tr. 10/23/01 p. 155). With ***41** respect to Mr. Haroldsen's involvement, Scribner has no basis to testify. Scribner was never a director or officer of any Corporate Defendant and did not attend director meetings. He did not attend management meetings and had no position or role with any Corporate Defendant. He had no way of knowing how much time Mr. Haroldsen devoted to actual involvement with any Corporate Defendant. (Tr. 10/23/01, pp. 156-57). Scribner admitted that Mr. Haroldsen was *not* involved with any of the Corporate Defendants on a day-to-day basis. (Tr. 10/23/01 p. 159).

Sam Burggraaf worked for a time as AHBA's director of human resources. (Tr. 10/25/01 pp. 173-74). While his responsibilities were accordingly administrative in nature, he believed that AHBA's employees "“danced‘’ to Mr. Haroldsen's tune. Overlooking the obvious ambiguity of that statement, Burggraaf's testimony was properly disregarded by the district court because it was limited to the circumstances of one Corporate Defendant (AHBA), which had absolutely no involvement with the supervision of seminars or speakers. (Tr. 10/25/01 p. 206). Further, Burggraaf gave no testimony to suggest that he even spoke with Mr. Haroldsen about speaker representations, observed Mr. Haroldsen participate in any conversation or meeting about speaker representations or in any way became involved in such issues. Moreover, Burggraaf demonstrated obvious bias against Mr. Haroldsen in his testimony. (Tr. 10/25/01 pp. 214-15). Finally, ***42** Burggraaf testified he had the actual authority to ignore Mr. Haroldsen if he so elected. (Tr. 10/25/01 p. 201). The district court was correct in concluding the FTC failed to introduce any credible evidence to show authority, control, knowledge or participation on the part of Mr. Haroldsen. (D.259, Finding 55)(FTC Appx. p. 57).

4. *The District Court Found Counts I Through VIII Were Pursued Without Merit.*

Having properly found the FTC's evidence to be wholly without merit to support any element of its claims, and that the FTC, in fact, failed to introduce any evidence of corporate or individual wrongdoing (D.291, Findings 22-23)(FTC Appx. p. 50), the district court entered findings establishing the absence of merit or "“color‘’ in the FTC's claims.

For example, "“the FTC utterly failed to introduce sufficient probative evidence in support of its allegations.‘’ (D.291, Finding 20)(FTC Appx. p. 123). "“Plaintiff failed to introduce any evidence that Mr. Haroldsen participated in any way in the making of a material misrepresentation ....‘’ (D.259, Finding 42)(FTC Appx. p. 54). "“The FTC failed to introduce any evidence that Mr. Haroldsen engaged in deceptive acts and practices ....‘’ (D.259, Finding 53)(FTC Appx. p. 56). "“The FTC failed to introduce any evidence that Mr. Haroldsen had the ***43** authority to control the acts and practices of the defendant corporations ....‘’ (D.259, Finding 54)(FTC Appx. p. 57). [20]

The foregoing findings conclusively demonstrate that the district court properly found the FTC had pursued its claims without merit and without color.

B. Since the District Court Found Counts I Through VIII Were Asserted For Improper Purposes, Mr. Haroldsen Was Entitled to Attorneys' Fees.

Section 2412(b) makes the United States liable for attorneys' fees and expenses where its actions were ""wanton, vexatious, oppressive, frivolous, or groundless.'' *Alyeska Pipeline,* 421 U.S. at 258-59. *See also Martinez v. Secretary of Health & Human Srvcs.,* 815 F.2d 1381, 1382 (10th Cir. 1987) (allowing recovery of attorneys' fees' when a losing party has ""acted in bad faith, vexatiously, wantonly, or for oppressive reasons.''); *U.S. v. McCall,* 235 F.3d 1211, 1216 (10th Cir. 2000), *citing Sterling Energy,* 744 F.2d at 1435; *FDIC v. Schuchmann,* 319 F.3d 1247 (10th Cir. 2003).

***44** In appealing the district court's award of attorneys' fees, the FTC relies *solely* on a challenge of the district court's determination that the FTC acted in ""bad faith.'' It is significant that the FTC *does not challenge* the district court's alternative findings and conclusions that the FTC also acted, *inter alia,* wantonly, vexatiously and oppressively. By failing to raise a challenge to these alternative grounds for the district court's award of fees and expenses, the FTC has waived its right to assert a challenge. [21]

As set forth in Mr. Haroldsen's Reply Memorandum in Support of Defendant's Motion for Attorneys' Fees and Expenses, the district court was well advised of and understood these alternative grounds for an award of fees and expenses and the definitions of such grounds. (D.281 pp. 7-10 and n.4). In granting the Motion, the district court implicitly considered and adopted the unopposed definitions advance by Mr. Haroldsen, which are also properly to be considered in interpreting its various findings and conclusions herein. [22] Though ***45** discussed separately by counsel herein, it should be noted that each of the following grounds relied upon by the district court for finding any improper purpose is support for its finding of other improper purposes as well.

1. *The District Court Found Counts I Through VIII Were Pursued Vexatiously.*

The district court found that the FTC had engaged in ""the maintenance of ***46** vexatious litigation.'' (D.291, Finding 23.f)(FTC Appx. p. 125). Further, by finding the FTC's maintenance of this action was malicious and " "without probable cause'' (D.291, Finding 23.c)(FTC Appx. p. 125), the district court made a specific finding that the FTC's conduct was of the specific type that is characterized under the law as ""vexatious.'' The FTC cannot reasonably contend the district court did not exercise sound discretion in doing so. *See, supra,* at n.22.

2. *The District Court Found Counts I Through VIII Were Pursued Oppressively.*

The district court's finding that the FTC pursued this litigation in an oppressive manner was based on its determination that the FTC wrongfully used the might, power and authority of the U.S. government to force Mr. Haroldsen to engage in costly litigation when the FTC knew its claims were without merit. (D.291, Finding 23.e)(FTC Appx. p. 125). The district court also found the FTC's action, coupled with its might and power, were improperly used to gain leverage in demanding an exorbitant settlement. (D.291, Finding 23.c)(FTC Appx. p. 125).

The district court's settlement activities were in bad faith and conducted in the spirit of oppression. Despite its knowledge that the claims were without merit, the FTC made an exorbitant payment demand of $10 million as a condition of settlement. It threatened Mr. Haroldsen with the spectre of a $150 million judgment ***47** based on the testimony of hundreds of consumers. (D.291, Findings 6-7)(FTC Appx. p. 118). Of course, the records shows the FTC had no real intent or ability to produce the threatened witnesses and, therefor, its demand can only be seen as oppressive. (D.291, Findings 8, 12, 19)(FTC Appx. pp. 119, 120, 122-23). The district court exercised sound discretion in finding oppressive conduct by the FTC.

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

3. *The District Court Found Counts I Through VIII Were Pursued Wantonly.*

The declaration of Mr. Haroldsen dramatically describes the effect on his life and finances wreaked by the FTC's wanton disregard(D.282)(Appx. pp. 57-59). The FTC was both heedless of Mr. Haroldsen's rights and interests and motivated by an improper intent to harm him and further its own pecuniary interests. The record shows the FTC was motivated by a personal vendetta against Mr. Haroldsen. This is seen in the fact that every other defendant, corporate or individual, was permitted to settle without payment of a single dime. Mr. Haroldsen was threatened with financial destruction at trial and continued costly litigation unless he paid tribute of $10 million. (D.291, Findings 7, 9, 10)(FTC Appx. pp. 118, 119). In short, payment was demanded, not because of the merits of the FTC's claims (i.e., or any need for consumer redress), but simply because it believed Mr. Haroldsen had the financial means from which the FTC could extract ***48** a payment.

This wanton attitude continued even after the FTC's lead counsel informed the district court that a settlement payment of $325,000 was reasonable and he would recommend and strongly encourage the FTC to approve such without making a counteroffer. (D.291, Finding 13)(FTC Appx. pp. 120-21). Considering the FTC's threats and its decision to maintain this action through trial in the absence of any evidence to support its claims, the district court exercised sound discretion in finding the FTC's conduct was wanton.

4. *The District Court Found Counts I Through VIII Were Pursued in Bad Faith.*

While the "“bad faith‘' exception to the American Rule allows an award of fees and expenses to a prevailing party for all of the foregoing reasons, bad faith conduct is also a separate basis for such an award under the exception. Here, the FTC acted in bad faith as was found by the district court. (D.291, Finding 23.b)(FTC Appx. pp. 124-25). The term "“bad faith‘' implies "“the conscious doing of a wrong because of dishonest purpose or moral obliquity... it [is] a state of mind affirmatively operating with furtive design or ill will.‘' *See supra,* n.22. The FTC's dishonesty is readily shown in its threat to bring hundreds of consumers to trial to testify. Its furtive design and ill will is apparent in the nature of its settlement ***49** negotiations.

In fact, it is for this reason, *inter alia,* the district court sanctioned the FTC for its conduct. (D.291, Findings 13-16)(FTC Appx. pp. 120-22). Moreover, the FTC's conduct as described in each of the foregoing section constitutes bad faith under the exception to the American Rule. The district court did not abuse its discretion in awarding fees and expenses to Mr. Haroldsen.

C. The District Court's Attorneys' Fees Award Was Supported by the FTC's Failure to Comply with the District Court's Order to Participate in a Settlement Conference.

The government's failure to comply with a court's order and its dilatory failure to participate in settlement efforts have been found to support an award of fees under EAJA. *United States v. Dantzler Lumber & Export Co.,* 833 F. Supp. 927, 931-32 (C.I.T. 1993). In this action, the district court ordered counsel and the parties "“with final decision making authority‘' to appear at a mandatory settlement conference to be held on October 11, 2001. Wilfully and contemptuously disregarding the district court's order, the FTC refused to attend. Counsel for the FTC attended and expressed apologies, offered no reasonable excuse and admitted that he did not have decision making authority (i.e., he acknowledged the FTC did not even make a person with decision making authority available by telephone). ***50** (D.291, Finding 15)(FTC Appx. pp. 121-22).

As a result, Mr. Haroldsen incurred considerable expense and he and his counsel were forced to waste valuable trial preparation time, including the better part of October 11, 2002 waiting for the FTC's counsel to try and get an FTC official with decision making authority on the telephone. At the conclusion of the conference, the Court entered a ruling expressing displeasure at the FTC's misconduct and finding the FTC's actions were in disregard of the court order. (D.291, Finding 16)(FTC Appx. p. 122).

WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.

D. The District Court Did Not Abuse Its Discretion By Awarding Attorneys' Fees Based Upon the Discovery Cutoff Date of July 2, 2001.

The district court found that by "“at least July 2, 2001, the FTC or its counsel should have been aware that it lacked sufficient evidence to support its claims against Mr. Haroldsen ....‘’ (D.291, Finding 12)(FTC Appx. p. 120). In support, the district court found that the FTC knew it had not contacted any consumer witnesses who had relevant information to support its claims, and that no such witnesses were going to appear at trial. The FTC did not issue any subpoenas for the attendance of any such consumers. *Id.* Despite this knowledge, the FTC continued to threaten Mr. Haroldsen with the prospect of facing a $150 million ***51** judgment at trial, based on the strength of these phantom consumer witnesses.

As the district court correctly applied the law and did not abuse its discretion in entering findings of fact and conclusions of law and in granting Mr. Haroldsen's Motion for Attorneys' Fees and Expenses (D.269-271, D.277, D.281-283, D.286, D.289-293; Proceedings Tr. 9/19/02), the decision of the district court should be affirmed on appeal.

II. IN AWARDING ATTORNEYS' FEES TO MR. HAROLDSEN, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISREGARDING THE ARGUMENT OF COUNSEL AND OTHERWISE INADMISSIBLE EVIDENCE CONCERNING THE UNTRIED COUNTS IX THROUGH XVI.

The FTC summarily contends the district court "“abused its discretion by ignoring uncontested evidence establishing *the prima facia* elements of the Commission's case against Haroldsen‘’. (FTC Brief p. 33). In doing so, the FTC references factual allegations (i.e., admittedly never introduced at trial), which it argues were "“disallowed by the court‘’ as a result of the district court's October 23, 2001 Order Re: Motion for Dismissal of Counts IX through XVI and Motion in Limine ("“Order in Limine‘’). (D.247)(FTC Appx. pp. 39-44). (FTC Briefp. 33, ***52** n. 10).[23] Although it failed to challenge the district court's Order in Limine on appeal, the FTC nevertheless *suggests* that by reason of the Court's February 11, 1997 Order granting Defendants' Motion to Dismiss (D. 101) and/or the Court's subsequent Order in Limine (D.247), the district court ignored evidence relating to Counts I through VIII, which if considered would have shown the FTC did not act in bad faith in proceeding against Mr. Haroldsen. This argument is without factual or legal merit and should be summarily disregarded by this Court.

First, to the extent the FTC is attempting to indirectly reargue the application of the pleading requirments of Rule 9(b) to the FTC's claims herein, such is without merit. As correctly determined by the district court, " “the core of the FTC's claims lie in fraud and the FTC should be put to the requirements of Rule 9(b)‘’. (D. 101). This ruling is in accord with other published federal decisions. In ***53** *FTC v. Security Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1315 (8th Cir. 1991), a case cited by the FTC, the Eighth Circuit Court of Appeals acknowledged the application of Rule 9(b) to the FTCA.[24] Citing *FTC v. Verity Int'l Ltd.,* 194 F. Supp. 2d 270 (S.D.N.Y. 2002), the FTC even admits that "“[a] few district court decisions do apply Rule 9(b) to Commission cases ....‘’ (FTC Brief p. 33, n. 10). *See also FTC v. Austin Galleries of Illinois, Inc.,* 1988-2 Trade Cas. (CCH) „ 68,341 at 59,922-23 (N.D. Ill. 1988) (applying Rule 9(b) to the FTCA).[25] The district court neither abused its discretion, nor misapplied the law in requiring the FTC to plead its misrepresentation claims with particularity.

Second, the Order in Limine excluded evidence only relating to Counts IX through XVI (i.e., the non-particularly pled claims). Clearly, such evidence is ***54** immaterial and irrelevant to the FTC's obligation to present evidence in support of each of Counts I through VIII, upon which the FTC proceeded to trial. As correctly observed by the district court, it is fundamental that the FTC have independent, admissible evidence to support each Count in the Amended Complaint. The district court did not in any way limit or restrict the FTC with regard to the introduction of evidence relating to Counts I through VIII. Though refusing to introduce such, the FTC simply and utterly failed to present any such evidence, thus providing a sound basis for the district court's award of attorneys' fees and expenses. Having clearly waived its right to challenge the propriety of the district court's Order in Limine by failing to appeal the same, the FTC should *not* now be permitted to introduce (i.e., through proffer

or otherwise) factual allegations relating to untried claims in order to buttress its otherwise unsuppported argument of good faith on appeal relating to Counts I through VIII.

Third, the factual allegations now proffered in support of the FTC's appeal are simply not admissible evidence and should be disregarded as unreliable. No attempt was made to introduce these factual allegations at trial relating to Counts I through VIII. Such allegations were irrelevant and immaterial to the district court proceeding, were not proffered, were not subject to cross examination, and are inapplicable at this stage given the nature of this appeal.

***55** As the district court correctly applied the law and did not abuse its discretion in rejecting the foregoing arguments, by entering findings of fact and conclusions of law, and by granting Mr. Haroldsen's Motion for Attorneys' Fees and Expenses (D.269-271, D.277, D.281-283, D.286, D.289-293; Proceedings Tr. 9/19/02), the district court did not abuse its discretion and its decision should be affirmed on appeal.

CONCLUSION

For the foregoing reasons, Mr. Haroldsen respectfully requests this Court to affirm the district court's award of attorneys' fees and expenses and to award Mr. Haroldsen his attorneys' fees and expenses on appeal.

Footnotes

1 The shares of the companies were actually owned by Mr. Haroldsen's family trust.

2 Items in the record are referred to by their district court docket number ("“D.xx‘'). Transcript cites ("“Tr.‘') are referred to by their date. Items included in the Haroldsen's Appendix also have an "“Appx.‘' cite. Items included in the FTC's Appendix also have an "“FTC Appx.‘' cite.

3 Notably, the FTC did not seek administrative enforcement prior to the Complaint, and no Defendants had been subject to any agency order.

4 The Amended Complaint sought to (1) permanently enjoin all Defendants from violating § 5 of the FTCA, (2) obtain redress for consumers, and (3) obtain rescission, restitution, disgorgement of profits and other equitable relief.

5 *See* Pretrial Order, „2.b. for a summary of Counts I through VIII. (D.245)(FTC Appx. p. 46-56).

6 In its post trial rulings, the district court found that during the course of discovery, the FTC represented in its pleadings and in verbal discussion with counsel that hundreds of consumers were willing and prepared to testify that defendants, including Mr. Haroldsen, had engaged in deceptive sales practices and that the consumers had been injured as result. (D.291, Finding 6)(FTC Appx. p. 118). In the fall of 1998, counsel for the FTC and Mr. Haroldsen met to discuss the possibility for settlement. During this meeting, the FTC demanded $10 million for settlement, and threatened that it would prove $150 million in damages. The FTC represented that it had hundreds of consumers ready to testify, *both* as to defendants' deceptive practices *and* consumer injuries. (D.291, Finding 7)(FTC Appx. p. 118).

7 The FTC chose not to appeal the district court's final judgment dismissing the FTC's claims. The FTC contends that "“the Commission's reasonable decision not to appeal the court's final judgment has no bearing on the attorney's fee issue before this Court.‘' (FTC Brief p.17, n.5). Such wishful thinking ignores the very significant impact of the judgment and Supplemental Findings (D.259)(FTC Appx. p. 45), which establish the FTC's complete failure to present any evidence in support of Counts I through VIII. The FTC's resort to declarations and documents in the record of this case which it failed to introduce at trial is merely an attempt to circumvent the reasoned and detailed findings entered by the district court in support of the *unappealed judgment. See* FTC Brief pp. 4-5.

8 The Amended Complaint alleges such occurred at seminars held on the following dates: July, 1993; February 24, 1994; March 5, 1995; August 25, 1995; May 15, 1996; May 23, 1996; May 27, 1996; May 28, 1996; May 30, 1996; May 31, 1996; and August 28, 1996.

9 Despite the FTC's boasted threat of bringing hundreds of consumer witnesses to trial, the four that were actually called presented no probative evidence in support of the FTC's claims and represent only a scant .002% of the total consumers who purchased home business opportunities.

10 Larkin had performed a survey two years earlier which did not pertain in any way to the vending machine business opportunity, or to any act or practice alleged in the Amended Complaint. (Tr. 10/23/01 at 18-19, 42). It is this irrelevant survey that the FTC refers to in

its Brief. *See* FTC Brief p. 12. Notably, in its statement of facts, the FTC completely ignores Larkin's 1996 survey and FCI's survey conducted in October 1993, which both showed 81% customer satisfaction. (D.259, Finding 19)(FTC Appx. p. 50).

11 Given the absence of any relevant consumer testimony to the contrary, Larkin's testimony and the 1996 survey was seen as unrebutted proof that no consumers were deceived.

12 Under the ""American Rule'', each party bears the financial burden of litigating a civil claim. Under the bad faith exception, a court may award attorneys' fees when a party's opponent acts ""in bad faith, vexatiously, wantonly or for oppressive reasons.'' *FDIC v. Schuchmann,* 319 F.3d 1247 (10th Cir. 2003), *citing Sterling Energy, Ltd. v. Friendly Nat'l Bank,* 744 F.2d 1433, 1435 (10t Cir. 1984).

13 Recovery of attorneys' fees under the Act may be based upon the government's actions which led to the lawsuit as well as the government's conduct during the course of the litigation. *Lauritzen v. Lehman,* 736 F.2d 550, 559 (9th Cir. 1984). The Act also allows a trial court to use its inherent power to assess attorneys' fees when the government has acted in bad faith. *Maritime Mgmt., Inc. v. United States,* 242 F.3d 1326, 1333 (11th Cir. 2002).

14 Unquestionably, Mr. Haroldsen was the ""prevailing party.'' The FTC has not appealed that determination. The FTC similarly did not file an appeal regarding (i) the Court's February 11, 1997 Order granting Defendants' Motion to Dismiss (D.101), (ii) the Court's October 23, 2001 Order Re: Motion for Dismissal of Counts IX through XVI and Motion in Limine (D.247), (iii) the Court's October 30, 2001 Order granting Mr. Haroldsen's Motion for Judgment on Partial Findings (Tr. 10/30/01; D.259), (iv) the Court's February 12, 2002 Judgment (D.260) and (v) the Court's March 13, 2002 Amended Judgment (D. 264).

15 A material representation is one that ""involves information that is important to consumers and, hence, is likely to affect their choice of, or conduct regarding, a product.'' *FTC v. Patriot Alcohol Testers, Inc.,* 798 F. Supp. 851, 855 (D. Mass 1992). The use of hypotheticals make for an entertaining presentation, but they remain *nothing more than* possible outcomes and are of little significance to even the least sophisticated purchaser's decision. Testimonials are a traditional part of advertising. All advertising suggests, through the pictorial depiction of success and happiness or testimonials of how well a product may work, that the consumer should buy the product. This is *not* actionable deceit. An action would not lie against the U.S. armed forces when persons enlist and find that they do not become ""all that they can be.'' *See also* *Zobrist v. Coal-X, Inc.,* 708 F.2d 1511 (10th Cir. 1983), *Adler v. Royal Cruise Line, Ltd.,* 1996 WL 438799, 11 (N.D. Cal.) and FTC Policy Statement on Deception, Letter from James C. Miller, Oct. 14, 1983.

16 The FTC asserts the district court misunderstood the necessary elements of Mr. Haroldsen's alleged liability. Implying that the district court improperly relied upon the absence of consumer injury as the sole basis for its findings, the FTC now contends it offered ample evidence that Corporate Defendants made material representations likely to deceive consumers. (FTC Brief p. 32). Such is not the case. Clearly, the absence of any testimonial evidence that an alleged representation, omission or practice occurred, that such was ""material'', that such was ""likely to mislead'', that such was ""reasonably'' believe to be actionable, or that such resulted in actual injury, is directly relevant to the establishment of the elements of the FTC's claims.

17 Assuming *arguendo,* that injury occurred, authorities acknowledge that where the customer's only injury was less profit than he may have hoped for, and *not* loss of investment or purchase price, consumer redress is *inappropriate* because it applies only to refund a customer his purchase price, not the diminution of reasonably expected profits. *See FTC v. Renaissance Fine Arts, Ltd.,* 1995-2 Trade Cas. (CCH) ,, 71,086 at 75,194 (N.D. Ohio Aug.10, 1995) (generally restitution in redress cases is the price of product, less refunds paid); *FTC v. Nat'l Business Consultants, Inc.,* 781 F. Supp. 1136, 1143 (E.D. La.1991); *F.T.C. v. Febre,* 1996 WL 556957, 3 (N.D. Ill.).

18 To establish liability against Mr. Haroldsen, the FTC was required to first establish liability against a particular corporation. *See generally Solomon Trading,* 1994 W.L. 421478 at 4. ""A corporate officer may not be liable under the FTC Act unless the corporations' liability is first established.'' *FTC v. Communidyne,* 1994 WL 163713 at 11 (N.D. Ill.). An individual's liability, if any, is strictly derivative, and then only if all elements of individual liability are established.

19 *See* *Federal Trade Comm'n. v. American Standard Credit System, Inc.,* 874 F. Supp. 1080, 1089 (C.D. Cal. 1994) (controlling acts and practices of corporation; administering day-to-day operations; formulating, reviewing, approving, implementing and disseminating company marketing policies and procedures); *and* *FTC v. Kitco,* 612 F. Supp. 1282, 1293 (D.C. Minn. 1985) (hired sales representatives and provided them with contract forms and brochures, provided sales agents with bogus contracts, placed ads for the company, financed printing of deceptive brochure, spoke with potential purchasers who called company with questions about investment); *Coro v. Federal Trade Comm'n,* 338 F.2d 149 (1st Cir. 1964) (the president, chairman of the board and largest stockholder, who had " "overall corporate responsibility'' and ""responsibility for the acts and practices of the corporation'' and ""made the decision'' to pursue business that gave rise to the FTC claim, not personally liable where ""there [was] no showing of [defendant's] active or even actual personal participation in the unlawful practices of the corporation under his overall management and control.'').

20 By way of further example, ""[t]he claims... were not supported by credible evidence, were not substantially justified and were maintained ... without reasonable or probable cause or excuse.'' (D.291, Finding 23.a)(FTC Appx. p. 124). ""[T]he evidence, or lack of it, demonstrates that this action was maintained maliciously and without probable cause because the FTC's allegations could not be reasonably supported by the evidence.'' (D.291, Finding 23.c)(FTC Appx. p. 125).

21 *Hatley v. Lockhart,* 990 F.2d 1070, 1073 (8th Cir. 1993) (""We have generally held that a party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue''); *see also* *Williams v. Chater,* 87 F.3d 702, 706 (5th Cir. 1996) (failure to raise any issues related to the underlying judgment deemed waived).

22 The following specific definitions were furnished to the district court to assist in resolving this matter:

Bad Faith: [Term] ""bad faith'' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Vexatious: Without reasonable or probable cause or excuse.

Vexatious Proceeding: Proceeding instituted maliciously and without probable cause.... When the party bringing proceeding is not acting *bona fide,* and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. Such a proceeding is often described as ""frivolous and vexatious,'' and the court may dismiss it on that ground.

Wanton: Reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregardful of the rights or safety of others or of consequences.... In its ordinarily accepted sense connotes perverseness exhibited by deliberate and uncalled for conduct, recklessness, disregardful of rights and an unjustifiable course of action.

Oppressive: An act of cruelty, severity, unlawful exaction, or excessive use of authority. An act of subjecting to cruel and unjust hardship; an act of domination.

23 In reviewing the procedural history of this matter, the FTC refers in its brief to the district court's February 11, 1997 Order granting Defendants' Motion to Dismiss and to the FTC's failed argument that " "Rule 9(b) did not apply because the Commission need not prove the elements of fraud in order to establish a violation of Section 5 of the FTC Act.'' (FTC Brief pp. 5-6). The FTC correctly notes that the district court held that ""the core of the FTC's claims lie in fraud and the FTC should be put to the requirements of Rule 9(b)'' and permitted the FTC to file an Amended Complaint on March 18, 1997. (D. 101). The legal and factual analyses underlying the Court's foregoing ruling are set forth in Defendants' moving pleadings and the district court's February 11, 1997 Order, which are incorporated by this reference. (D.23, D.35, D.43, D.101).

24 Ironically, though the FTC claims it is aware of no appellate rulings applying Rule 9(b) to FTCA cases (FTC Brief p. 34, n. 10.), the Eighth Circuit decision in *Security Rare Coin,* cited in the FTC's brief, provides support for the district court's ruling.

25 Notably, federal courts have routinely applied the heightened pleading standard of Fed. R. Civ. P. 9(b) to allegations of violation of state consumer protection acts, and similar statutes. *See Coelho v. Park Ridge Oldsmobile, Inc.,* 2001 U.S. Dist. Lexis 14652, * 11 (Illinois Consumer Fraud Act), *Burton v. R.J. Reynolds Tobacco Co.,* 884 F. Supp. 1515, 1524 (1995) (Kansas Consumer Protection Act), *Excel Electronics & Photo Corp. v. Aetna Casualty & Surety Co.,* 1991 U.S. Dist. Lexis 17161, *18-19 (S.D.N.Y. 1991) (New York General Business Law § 349, barring, *inter alia,* deceptive acts or practices directed at the consuming public), and *Duran v. Clover Club Foods Co.,* 616 F. Supp. 790, 792-93 (D. Colo. 1985).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.