

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE COMMON Ø v JON SHANK individually and as an officer and director of Ringier Corporation Ø COMMON a Wington corporation doing business as Stefanik Organization Ø	Ü Y b	Nb 07330 DC Nb COL182HM ØNYON
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Appeal from the United States District Court
for the Western District of Wington
Richard S. Murray, District Judge, Residing

Appeal and Shittled
January 22, 2009 Seattle, Wington

Filed March 13, 2009

Before: **Thomas M. Railey***, Senior Circuit Judge,
Richard C. Elman and **Michael D. Smith, Jr.**, Circuit Judges

Opinion by Judge Railey

*The Honorable Thomas M. Railey, Senior United States Circuit
Judge for the Fifth Circuit, sitting by designation

FC v. SHANK

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OPINION

BRIEF Senior Circuit Judge

What did in this case under the district court correctly granted summary judgment to the Federal Trade Commission ("FTC") in this suit brought against John Sefadik and Ringier Corporation under the Federal Trade Commission Act and the Franchising Sales Rule. The FTC alleged that the defendants made false and deceptive claims while making a program purporting to teach purchasers how to become wealthy by buying and selling privately held mortgages. Concluding that the defendants failed to meet the FTC's evidentiary burden of deceptive claims with evidence to create a triable issue of fact, we affirm the district court's judgment.

I.

John Sefadik is the author of a book entitled *How to Make Money*. The purpose of the book, as well as related video and audio tapes, course materials, and work sheets, was to present Sefadik's method for making substantial amounts of money by visiting very few houses in one's spare time. Sefadik's method called for a person to search local real estate records, locate holders of privately held mortgages, or "paper," and then either purchase the paper or broker deals with companies interested in purchasing the paper. Sefadik touted his method in direct mail marketing materials as "[t]he easiest way to make \$1000++ every 30 days . . . guaranteed."

In 2002 Sefadik organized the Ringier Corporation as a Wyoming state corporation with himself as the president, director, and sole shareholder. Ringier in turn holds the copyrights to Sefadik's book and other material that comprise the "Sefadik Program." Sefadik also entered into a moral agreement with Justin Kelly of Atlas Marketing Inc. for

Alas to market the Sefadik Rogam had a customer service. According to Alas' president, Scott Christensen, Alas' side business was to sell products and services for Sefadik and Binger under the name "The Sefadik Organization". Alas printed the Sefadik Rogam through direct mail, telemarketing and a website, and it paid Sefadik and Binger a royalty of 15% to 22% of the sales.

Alas used direct mail to generate interest in Sefadik's book which sold for a minimal amount. Many of the materials included Sefadik's picture and signature and claimed that purchasers could easily make \$10,000 or more per month by using his method. Those who purchased the book were then targeted for telemarketing calls and urged to purchase more services and instruction in the form of printed material, videos, seminars, and "coaching" services. The telemarketers assured potential purchasers that by using the Sefadik method they could make \$3,000 to \$5,000 per day by working only five to ten hours per week and that privately held meetings were easily found. They also told purchasers that a personal coach would be available to answer questions and provide assistance. The cost to individual purchasers for the print (and) Telemarketing Organi-

(*FR), 16 CER § 303(a)(2)(iii) and (a)(4), by making these misleading representations:

In support of a motion for summary judgment, the EC introduced evidence tending to show that, contrary to Stefadik's marketing claims, it was in fact very difficult for individuals to access wealth using the Stefadik method and that the claims of making substantial amounts of money in one's spare time were deceptive and misleading. The EC's evidence included depositions from individual consumers who purchased the program to find that the method was extremely time consuming and yielded little, if any, profit. The EC also introduced the following survey results from a marketing expert showing that only a small percentage of consumers were able to make deals using Stefadik's method; a deposition from former Stefadik coach who advised that few consumers make money using the program and that Stefadik had been informed that the telemarketers were misleading consumers; and evidence from Bringer's company database that also showed a lack of results by consumers.

In opposing summary judgment, Stefadik and Bringer challenged the EC's method of compiling the survey data but did not offer any consumer depositions, contrary survey information, or other evidence showing that the followers of the Stefadik method actually amassed substantial wealth as claimed in the marketing material. The district court concluded that the EC's consumer depositions and survey, as well as the defendants' marketing and advertising materials, were sufficient to show that the defendants made false and unsubstantiated earnings claims that led consumers to believe they could earn large amounts of money in the spare business with little or no effort. The court concluded that the marketing claims were also deceptive because the evidence showed that the coaches lacked basic knowledge of the real estate industry and were unable to help the consumers with questions. The court determined that Bringer and Stefadik

we jointly and severally liable under the FC At and the ER for misrepresentations in making the program. In addition to ordering injunctive relief, the court determined that the damages amounted to \$17,753,300 and entered judgment for that amount.

II.

Sefadik and Binger challenge the district court's grant of summary judgment on both liability and damages. Our standard of review is a familiar one. We review the district court's grant of summary judgment. ² We view the evidence in a light most favorable to the moving party and decide whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. ³

A party moving for summary judgment must initially identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." ⁴ "Once the moving party meets its initial burden, the burden shifts to the nonmoving party to set forth by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." ⁵

A.

[1] Section 5 of the FC At prohibits a "unfair

² 58 F.3d 774, 778 (9th Cir. 2000).

³ 25 F.3d 984, 984 (9th Cir. 2000).

⁴ 47 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1988).

or deceptive acts or practices in or affecting commerce” “An act or practice is deceptive if ‘first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.’” Deception may be found based on the “net impression” created by a representation. (11)

Stefadik and Binger conted that the EC failed to met its burden of proof on summary judgment. They challenge the survey results of the EC’s expert and assert that opinions from their own experts created a fact issue for trial. We disagree with these contentions.

The EC’s summary judgment evidence included various examples of the Stefadik advertising and telemarketing materials. The evidence gave the net impression that by working only five to ten hours per week, a consumer easily could earn \$9000 per month using Stefadik’s method to handle deals in the paper business. Consumers were promised that satellite paper was easily discovered and that they would have access to computer personal codes to guide them in the business. However, the EC submitted depositions from multiple individuals who agreed that, upon purchasing Stefadik’s program they discovered it was virtually impossible to locate privately held mortgages that could be resold within the short time period promised by the marketing materials and that the codes Stefadik provided to assist them were of little help.

The EC’s survey results, which were compiled by a marketing expert from American University, were consistent with the individual depositions. The survey was sent to a random sample of 1,000 consumers. Out of 300 responses indicating

ing experts find that the EC's survey was biased and unreliable. We find no fat issue created, however:

[2] In order to avoid summary judgment, a nonparty must show a genuine issue of material fact by presenting sufficient evidence that a jury could find in his favor. *Amannat's* bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment. *Id.* ⁹ The Stedalik and Bringer contest the methodology of the EC's survey and assert that issues of fact exist, but they do not contest the truth or validity of the individual responses reported in the survey. They do not present affirmative evidence of their own, either in the form of survey results, contrary consumer declarations, sworn affidavits, or testimony, to identify consumers who were able to make substantial amounts of money using the Stedalik method as claimed in the marketing materials.

[3] Stedalik asserts in his proposed brief that he conducted his own survey of fifty consumers, which purportedly provides a more accurate picture of his program than the EC's survey. He cites no record evidence in support of his argument, however, and his bald assertion is unavailing.¹¹ The EC was not required to show that all consumers were deceived. *Id.*¹² but it offered substantial evidence that the marketing claim used to

⁹ 47 US 22, 25, 106 S. Ct. 205, 214 (1991).

¹⁰ 47 F.3d 62, 68 (9th Cir. 2005); *id.* 101 F.3d 1103, 1170 (9th Cir. 1999) ("Once the EC has met a prima facie case for summary judgment, the defendant cannot rely on general denials, she must produce significant positive evidence that demonstrates that there is a genuine issue of material fact for trial.");

¹¹ 47 F.3d at 68.

¹² 94 F.2d 35, 65-66 (9th Cir. 1939); *id.* 85 F.2d 54, 52 (7th Cir. 1939) ("The EC need not prove that every consumer was injured. The existence of some satisfied consumers does not constitute a defense under the FTA").

sell Stefadik's program as deceptive and misleading to an overwhelming number of consumers. Given the volume of evidence showing that very few people may have used the Stefadik program, and the advertising materials and telemarketing pitches, or were satisfied with their personal codes, and the absence of significantly positive contrary evidence from Stefadik and Binger, we can conclude that the district court correctly granted summary judgment on the FCAt claim because the marketing materials made misrepresentations in a manner likely to mislead reasonable consumers.¹³

[4] The same conclusion holds true for the district court's finding that the defendants violated the TSR. Congress directed the FTC to create rules banning deceptive telemarketing ads and practices.¹⁴ In response to this directive, the TSR prohibits "any seller or telemarketer" from misrepresenting "[a]ny material aspect of the performance, efficacy, nature, or other characteristics of goods or services that are the subject of a sales offer."¹⁵ It further prohibits both sellers and telemarketers from "[t]aking a false or misleading statement to induce any person to pay for goods or services . . ."¹⁶ As we concluded above, the representations made about the Stefadik program were materially misleading insofar as they misrepresented consumers' earning potential and the availability of codes, and those representations made via telemarketing were thus subject to enforcement as violations of both the TSR and the FCAt.¹⁷

[5] Binger and Stefadik contend that they are not liable for telemarketing claims under the FCAt, which is an inapplicable

¹³ 43 Fed. Cl. 121.

¹⁴ 15 USC § 607(a)(1).

¹⁵ 16 CFR § 303.3(a)(3)(iii).

¹⁶ 16 CFR § 303.3(a)(4).

¹⁷ 15 USC § 607(b) (permitting the FTC to enforce violations of the TSRs though they were violations of the FCAt).

dent legal entity based in Salt Lake City, Utah. They assert that they made no telemarketing calls, and that Alas and Ily were solely responsible for the telemarketing scripts and the actions of the sales representatives. Was not persuaded. As noted above, the TR applies to “any seller or telemarketer.”¹⁸ A “seller” is defined as “any person who, in connection with a telemarketing transaction, provides, offers to provide, or attempts to provide goods or services to the customer in exchange for consideration.”¹⁹ Here, it is undisputed that Sefadik, on behalf of Ringier, entered into an agreement with Ily and Alas for Alas to conduct the telemarketing and sales of the Sefadik Program. The record shows that Sefadik retained authority to review and approve all marketing in Fall and take the Skism w to out. Soud tot see side through the Sogam Sefadik’s counsel for

Stefanik's picture and signature appeared on many of the marketing materials, which was subject to Stefanik's review and approval. Furthermore, Stefanik acknowledged that consumers often perceived Atlas and his company as one seamless operation. The lines between Atlas and Bringer were blurred to such an extent that Atlas's conduct and representations had at least the apparent imprimatur of Bringer.²¹

[7] Stefanik contends that the FC failed to prove he is liable in his individual capacity. An individual will be liable for corporate violations of the FC Act if (1) he participated directly in the deceptive acts and had the ability to control them and (2) he had knowledge of the misrepresentation, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud and acted with an intentional avoidance of the truth.²² The evidence shows that Stefanik controlled all the business activity of Bringer as the owner, sole shareholder, director, and manager of the company. He also had the ability both individually and through counsel to control the marketing activity and representations about his product. He was also at least recklessly indifferent to the truth or falsity of the sales claims. There is evidence that Stefanik was advised by his counsel after reviewing the telemarketing scripts that he needed to substantiate the sales claims. He was also informed by Ann Shaffer and other codes that the sales representatives were misleading consumers. The district court correctly determined that Stefanik should be personally liable.

C.

[8] *Wrest turn to Stefanik and Bringer's contention*

²¹ 24 F.3d at 523 (“The misrepresentations [the agents] made were at least within the apparent scope of their authority and part of the inducement by which we made sales that inured to the benefit of the corporate entity.” (internal quotation and citation omitted)).

²² 24 F.3d at 122.

its key components, and they had fitted significantly from the sales induced by actual representations. We conclude that the district court did not abuse its discretion by holding the defendants liable for the full amount of loss incurred by consumers.

The district court's judgment is **AFFIRMED**.