FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

NEOVI, INC., DBA Neovi Data Corporation, DBA Qchex.com; G7 PRODUCTIVITY SYSTEMS, INC., DBA Qchex.com; JAMES M. DANFORTH, individually, and as an officer of Neovi, Inc. and G7 Productivity Systems, Inc.; THOMAS VILLWOCK individually, and as an officer of Neovi, Inc.,
Defendants-Appellants.

No. 09-55093

D.C. No. 3:06-cv-01952-JLS-JMA

OPINION

Appeal from the United States District Court for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted
March 4, 2010—San Diego, California

Filed May 14, 2010

Before: Michael Daly Hawkins, Sidney R. Thomas, and M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

Michael L. Mallow (argued), Los Angeles, California, for the appellants.

Lawrence DeMille-Wagman (argued), Washington, DC, for the appellee.

OPINION

McKEOWN, Circuit Judge:

The Federal Trade Commission (ªFTCº) has broad powers under the FTC Act to prevent businesses from engaging in unfair or deceptive practices. 15 U.S.C. §§ 41-58. This case

arises from a websiteÐmanaged by Neovi Data Corporation (DBA Qchex.com), G7 Productivity Systems (DBA Qchex.com), James Danforth, and Thomas Villwock (together ªQchexº)Ðthat created and delivered unverified checks at the direction of registered users. During its six-year run, fraudsters and con artists extensively abused the website.

We examine here the reach of § 5 of the Act, which empowers the FTC to prevent the use of ªunfair methods of competition in or affecting commerce . . . .º 15 U.S.C. § 45(a)(1). The key issue on appeal is whether Qchex is liable for causing substantial injury to consumers that is not reasonably avoidable or outweighed by countervailing benefits. 15 U.S.C. § 45(n). The district court granted summary judgment in favor of the FTC, finding that Qchex's profound lack of diligence, coupled with the affirmative acts of creating and delivering hundreds of thousands of unverified checksÐover 150,000 of which were from accounts later frozen for fraudÐwarranted liability under the Act. Qchex was ordered to disgorge $535,358 in revenue and permanently enjoined from operating any similar business without taking appropriate, specified measures to protect consumers. We affirm.

## BACKGROUND

### I. QCHEX.COM

From 2000 to 2006, Qchex marketed a series of software programs on a website called ªQchex.com.º The software allowed registered users to create and send checks by post or

To register for a Qchex account, users were prompted to enter a name and email address, and then to create a password. The account could be activated simply by clicking on a link that Qchex sent to the email address provided. Setup was completed after Qchex received pertinent information about the user's bank account, such as the routing and account numbers. Registered users could submit a request on the website that a check drawn from their account be created and delivered to a third party. To achieve this end, users needed only to enter the name of a payee, the check amount, and the payee's email or mailing address, depending on the preferred method of delivery. Qchex.com then converted the information into a negotiable instrument that, when printed, conformed to U.S. banking regulations. The instrument was designed to be negotiable without the user's signature, but users could choose to upload their signatures if they so desired.

If the user chose to send the check electronically, the payee would receive email instructions to sign up for an account on Qchex.com. Once registered, the payee could print the check, and a confirmation email would be sent to the ªpayor.º[3] If the user chose to send the check by post, it would be printed at a ªprint service centerº operated in the main by employees of G7 Productivity Systems, a California corporation that produced the check software, ink, and paper that was marketed by Neovi on the Qchex website.[4] G7 employees mailed the checks to the payees.

[3]Electronically delivered checks could only be printed using special ink and paper; these items were advertised and offered to the payee in the notification email.

[4]Danforth is G7's Executive Vice President, Chief Financial Officer, Secretary, and registered service agent. Villwock is a business consultant at G7 but considered by its employees to be the de facto President.

employed in any focused way to target or unearth fraud. The rest of the measures were either reactiveÐtaking place after fraud had already occurredÐor unresponsive to the chief concern that checks were being drawn against unauthorized accounts.

In 2005, after meeting with the American Banking Association and the Federal Deposit Insurance Corporation, Qchex implemented a ªmicro-depositº program called the ªQchex Validation Systemº (ªQVSº). To verify that a user's account was legitimate, Qchex made a single, nominal deposit of somewhere between three and twenty cents in the account the user provided. The user was required to check the account to determine the deposit's value. Qchex declined to deliver checks from a provided account unless the user was first able to accurately report the value of the micro-deposit. After three failed attempts, the Qchex account would be frozen.

Although it was a step in the right direction, QVS had a number of loopholes that rendered it ineffective. For example, it only applied to accounts that were newly activated. Users who had balances established before the new security system was adopted were still able to send checks by mail. Even for new users the system was easy to game. Because QVS validated just one bank account per registered user, as long as a user had legitimate access to one bank account, other accounts Ðpossibly unauthorizedÐcould be used without verification through QVS. Significantly, the new system did not apply to emailed checks at all. Whatever its failings, the QVS system was short lived. For reasons that are unclear, the payment processor that enabled Qchex to run the system terminated its contract in April 2006.

## ANALYSIS

### I. UNFAIR PRACTICE /F1 8.4 Tf 101.1 Tz .79 Tw (1Yns tha ypchEas long as a) Tj 0 -12.8 Td 0 Tw (usera) Tj

sumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.º 15 U.S.C. § 45(n).

A. Causation

The district court found that Qchex is liable for the ª[u]nfair creation and delivery of unverified checks.º Qchex urges that this charge is both ªlegallyº and ªliterallyº impossible. It claims that only users can create checks because ªwithout user input nothing, and certainly not a check, . . . could be created or delivered.º This semantic argument is meant to encompass not only the causation requirement, but also Qchex's claim that it was not given adequate notice of the charges.

[2] Qchex's challenge to causation is best captured in its statement that it did not ªobtain, input or directº the delivery of consumer information nor facilitate the theft. This spin

fore, by Qchex's lights, users cannot be said to create and deliver checks either. This circular logic leads to the absurd result that although checks have been created and delivered, no one is doing the creating or the delivering.

[3] At most, Qchex's argument shows that Qchex and the users each contributed to the creation and delivery of the checks. But, even granting this characterization, Qchex is not discharged from liability under the FTC ActĐa single viola-

over the phone and illegitimately debited their accounts for magazine subscriptions they did not realize they were purchasing. Defendant Wholesale Capital Corporation (ªWholesaleº) maintained several bank accounts used to collect on victims' invoices. See No. Civ.A. 1:96-CV-615F, 1997 WL 33642380, at *11-*12 (N.D. Ga. Sept. 30, 1997). The court noted that 40% of the drafts were returned unauthorized and that, at the very least, Wholesale was ªon notice of a high probability of fraud and/or unfairness . . . .º Id. at *13.

Although Wholesale did not itself make any misrepresentations or initiate the fraudulent scheme, the court found Wholesale liable under the FTC Act because it ªfacilitated and provided substantial assistance to [a] . . . deceptive scheme,º resulting in substantial injury to consumers. Id. at *12-*13. This conduct was enough to find Wholesale primarily liableÐas opposed to liable as an accompliceÐunder the Act. Id.

Similarly, in FTC v. Accusearch, Inc., Accusearch was held liable for maintaining a website that sold the GPS locations of individual cell phones and other confidential, personal information, even though it did not itself illegally obtain the information. No. 06-CV-105-D, 2007 WL 4356786, at *6 (D. Wyo. Sept. 28, 2007) (noting that ª[e]ach time the Defendants placed an order for phone records, they caused others to use false pretenses and other fraudulent means to obtain confidential consumer phone recordsº).

[5] These cases illustrate that businesses can cause direct consumer harm as contemplated by the FTC Act in a variety of ways. In assessing that harm, we look of course to the deceptive nature of the practice, but the absence of deceit is not dispositive. Nor is actual knowledge of the harm a requirement under the Act. Courts have long held that consumers are injured for purposes of the Act not solely through the machinations of those with ill intentions, but also through the actions of those whose practices facilitate, or contribute to, ill intentioned schemes if the injury was a predictable con-

sequence of those actions. See FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) (holding that ª[t]he honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument . . .º); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934) (holding candy retailer liable for unfair practices although manufacturer was responsible for the element of chance that made the practices unfair); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) (explaining that ª[w]ith respect to those instances where petitioner did not contribute to the [misleading act], it is settled that [o]ne who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Actº) (quotation marks and citations omitted).

Qchex had reason to believe that a vast number of checks were being drawn on unauthorized accountsÐchecks that it legitimized in the eyes of consumers. Aside from the prodigious number of complaints Qchex received, its president testified that Qchex expected the site would be used for fraudulent purposes from the beginning. Qchex nonetheless continued to create and deliver checks without proper verification. By doing so it engaged in a practice that facilitated and provided substantial assistance to a multitude of deceptive schemes.

[6] To be clear, none of this is to say that Qchex is liable under a theory of aiding and abetting. Qchex engaged in behavior that was, itself, injurious to consumers. Qchex's business practices might have served to assist others in illicit or deceptive schemes, but the liability under the FTC Act that attaches to Qchex is not mediated by the actions of those third parties. Qchex caused harm through its own deedsÐin this

case creating and delivering unverified checksÐand thus § 5 of the FTC Act easily extends to its conduct.[5]

alleged injuries. Although the district court addressed consumers' ability to avoid injury before it occurred, Qchex argues that the court did not address the consumers' ability to mitigate damage after it occurred. See Orkin Exterminating Co., 849 F.2d at 1365 (discussing both anticipatory and subsequent mitigation). Qchex maintains that even if consumers were substantially injured, they were able to take "reasonable steps to avoid loss" by communicating with their banks after the unauthorized payments were discovered.

[10] The district court sufficiently addressed both avenues of mitigation. In denying Qchex's reconsideration motion, the court wrote:

> It is likely that some consumers never noticed the unauthorized withdrawals. Even if the consumer did notice, obtaining reimbursement required a substantial investment of time, trouble, aggravation, and money. Further, Defendants' uncooperativeness only increased this outlay. Neither could consumers mitigate the period of time during which they lost access to and use of the funds taken using Defendants' fraudulent checks. Regardless of whether a bank eventually restored consumers' money, the consumer suffered unavoidable injuries that could not be fully mitigated.

Qchex has not shown that there is a material issue of fact as to whether consumer injuries were reasonably avoidable on either end of the fraudulent transactions.

D. No Substantial Consumer Benefit

[11] The FTC also met its burden of showing that consumer injury was not outweighed by countervailing benefits to consumers or to competition. The FTC offered the declaration of a law professor who has written extensively about electronic commerce, credit cards, and payment systems in

support of its claim. The FTC's expert explained that the Qchex website is of limited use to an ordinary consumer because ªall large banks,º offer the same services at a cheaper price and with greater security. He also noted the presence of other third parties in the marketplaceÐlike PayPalÐthat provide similar services. Even though Qchex's email service was relatively unique, it was considerably less convenient given that many commercial payees do not accept emailed checks. There is also a disincentive to use the email method because it is more costly to the recipient who must buy special ink, paper, and a suitable printer to accept emailed checks.

The district court found that Qchex failed to counter the FTC expert's testimony. Qchex put forward a short declaration from one of its executives purporting to do so, but the district court found that the declaration was ªthe epitome of uncorroborated and self-serving testimony,º and declined to rely on it to find a genuine issue of fact. As a result, Qchex accuses the district court of improperly weighing evidence and making findings of fact.

Specific testimony by a single declarant can create a triable issue of fact, but the district court was correct that it need not find a genuine issue of fact if, in its determination, the particular declaration was ªuncorroborated and self-serving.º See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). The district court was on sound footing concluding that Qchex put forward nothing more than a few bald, uncorroborated, and conclusory assertions rather than evidence.

II.

[12] Analogizing to securities law, the district court concluded that the appropriate measure of equitable disgorgement was Neovi's total revenue. See SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1113 (9th Cir. 2006) (explaining that ªthe district court has broad equity powers to order the disgorgement of `ill-gotten gains' obtained through the violation of federal securities laws⁰) (internal citations omitted).[8] An evidentiary hearing was unnecessary because there were no ªgenuine issues of material fact remaining in the case.⁰ Qchex argues that this conclusion was error in that ªthe FTC did not put forth admissible evidence demonstrating that Neovi realized $535,358 in `ill gotten gains.' ⁰ The district court derived this specific figure from the gross receipts on Neovi's tax return, the details of which were not disputed.[9] Qchex argues that the figure is invalid because Qchex's revenues were exceeded by developing, maintenance, and operating costs for the software and website.

Qchex's argument is puzzling. The court explicitly declined to reduce the disgorgement by the cost of developing and maintaining the Qchex system because those activities ªfacilitated and contributed to the check fraud,⁰ and because Qchex did ªnot offer evidence showing exact costs or expenses which the Court could reasonably use in its calculations.⁰ It

[8]In Wallenbrock we stressed that in making this calculation, the court has `broad discretion,' and needs only a `reasonable approximation of profits causally connected to the violation . . . . [D]isgorgement should include all gains flowing from the illegal activities.⁰ 440 F.3d at 1113-14.

[9]The district court found that the tax returns were properly authenticated based on an executive's declaration submitted in a supplemental brief. Before the district court, Qchex did not contest the authenticity of the tax returns or the veracity of the declaration. Instead, Qchex argued that the manner of authentication (as an exhibit to a supplemental reply brief) was improper. The district court did not abuse its discretion on this evidentiary point and resolution of this issue would not be aided by an evidentiary hearing. To the extent Qchex now challenges the authenticity of the tax returns, that issue is not properly before us on appeal. See In re E.R. Fegert, Inc., 887 F.2d at 957.

is unclear what facts could be uncovered at an evidentiary hearing that Qchex did not have the opportunity to present to the district court. In any case, as the FTC points out, the disputed points appear to be questions of law, not of fact.

## III. THE INJUNCTION

[13] Under the injunction order, Qchex is prohibited from ªcreating or delivering any check for a customer, unless [it] perform[s] the verification procedures identifiedº in the rest of the order. Qchex characterizes the order as a mandatory injunction, claiming that § 13(b) of the FTC Act does not expressly authorize mandatory injunctions.[10]

[14] According to the most general understanding of the distinction between mandatory and prohibitive injunctions, the district court's order is prohibitory, not mandatory. See Black's Law Dictionary 855 (9th ed. 2009) (defining ªprohibitory injunctionº as an injunction that ªforbids or restrains an act,º and ªmandatory injunctionº as an injunction that ªorders an affirmative act or mandates a specified course of conductº). The prohibition contains an exception, but this language does not convert it from a prohibitory to a mandatory injunction; Qchex is not ordered to undertake any affirmative action.

AFFIRMED.

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[10]We need not address the availability of mandatory injunctions under § 13(b) of the FTC Act.