No. 04-602

In the Supreme Court of the United States

ROBERT NAMER, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether money owed to the Federal Trade Commission (FTC) pursuant to a civil judgment for violations of the Federal Trade Commission Act and the FTC's Franchise Rule is a "debt" for purposes of the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3301 *et seq*.

2. Whether the Federal Debt Collection Procedures Act of 1990 authorizes a district court on its own motion to join as defendants persons who participate in fraudulent transfers.

3. Whether the district court abused its discretion in joining additional defendants as a remedy for their participation in fraudulent transfers by the original defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-16b) is reported at 376 F.3d 317. The opinions of the district court (Pet. App. 1c-5c, 1d-7d) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2004. A petition for rehearing was denied on August 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 5(a)(1) of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Congress has authorized the Federal Trade Commission (FTC) to

enforce that prohibition and to prescribe rules that "define with specificity acts or practices which are unfair or deceptive." 15 U.S.C. 45(a)(2), 57a(a)(1)(B).

In 1978, the FTC promulgated the Franchise Rule, which prohibits franchisors from engaging in certain unfair or deceptive acts "[i]n connection with the advertising, offering, licensing, contracting, sale, or other promotion * * * of any franchise." 16 C.F.R. 436.1. The Franchise Rule makes it an unfair or deceptive act or practice to fail to disclose specified financial information regarding the franchise being offered for sale. 16 C.F.R. 436.1(a)(1)-(24). The Rule also makes it an unfair or deceptive act or practice to make representations about specific levels of sales, income, or profit of existing or prospective franchise outlets without having a reasonable basis for such representations and without making supporting materials available for review by the prospective franchisee. 16 C.F.R. 436.1(b)-(e).

No private right of action exists to seek judicial redress for violations of Section 5. *Moore* v. *New York Cotton Exch.*, 270 U.S. 593, 603 (1929); *Red Diamond Supply, Inc*. v. *Liquid Carbonic Corp.*, 637 F.2d 1001, 1008 n.13 (5th Cir.), cert. denied, 454 U.S. 827 (1981); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). Nor is private judicial relief available for violations of the Franchise Rule. See *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001) (regulation may not create private right of action in absence of legislative authorization). Instead, the federal government has exclusive authority to seek judicial relief.

When a violation of the FTC Act takes the form of false or misleading advertising, Section 13 of the Act authorizes the FTC to seek preliminary and permanent injunctive relief. 15 U.S.C. 53; see 15 U.S.C. 52(b), 55(a) (making dissemination of false advertising an unfair or deceptive practice and defining false advertising to mean advertising "which is misleading in a material respect"). Under Section 13, the district court may exercise "the full range of equitable remedies traditionally available to it." *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982). In addition, when any person violates any rule respecting unfair or deceptive acts or practices, Section 19 of the FTC Act authorizes the FTC to bring a civil action against the violator and vests district courts with jurisdiction "to grant such relief as the court finds necessary to redress injury to consumers or other persons * * * resulting from the rule violation." 15 U.S.C. 57b(a)(1) and (b).

2. In April 1989, the FTC commenced a civil action against petitioners Robert Namer and National Business Consultants, Inc. (NBC), for violations of Section 5 of the FTC Act and the Franchise Rule. At the time that the complaint was filed, Namer was engaged in the sale of business franchises on a national basis. The FTC alleged that Namer had made numerous material misrepresentations to potential franchisees, had made unsupported earnings claims, had failed to provide required supporting documentation, and had failed to make required disclosures within time limits set by the Franchise Rule. C.A. R.E. Tab 2, at 3-7. The FTC sought injunctive relief against further violations and monetary relief to redress the losses suffered by consumers who were injured by petitioners' illegal acts. The FTC sought relief under both Section 13 and Section 19 of the FTC Act, 15 U.S.C. 53, 57b. C.A. R.E. Tab 2, at 1, 8.

Following a trial, the district court found that Namer and NBC had committed numerous knowing violations of Section 5 of the FTC Act and the Franchise Rule. See C.A. R.E. Tab 3, at 1-21. Specifically, the court found that Namer and NBC offered bogus references to prospective clients, falsely told prospective clients that they would have exclusive territorial rights, and repeatedly misinformed prospective consultants that they would not have to market or sell their services because NBC would refer clients to them. *Id.* at 7-9, 12-13. Moreover, Namer and NBC required consultants to pay a "performance deposit" of as much as $7500 with the promise that the deposit would be refunded when the consultants earned $50,000, but failed to disclose that "very few ever obtained a partial refund of their performance deposits, and that fewer still ever obtained a full refund because few associate consultants ever realized $50,000 in annual earnings for NBC." *Id.* at 4, 10. Based on its findings, the district court entered a permanent injunction restraining Namer and NBC from further violations of Section 5 and the Franchise Rule. C.A. R.E. Tab 7.

Following further proceedings on FTC's request for monetary relief, the court found that franchisees had paid Namer and NBC performance deposits or bonds ranging from $750 to $7500; that they had done so in reasonable reliance on Namer's misrepresentations and omissions; and that they were entitled to "be put in the same position with respect to such deposits that they would have been in had their reasonable expectations been fulfilled, i.e., a full refund of the 'performance deposits.'" C.A. R.E. Tab 4, at 9-13. Based on these findings, the district court entered a judgment rendering Namer and NBC "liable jointly and severally unto the plaintiff, Federal Trade Commission, in the sum of $3,019,377.00, representing the relief/damages awarded for consumer redress, plus pre-judgment interest from date of judicial demand and attorneys' fees and costs." *Id*. Tab 5, at 5889. The sums owed under the judgment for interest, attorneys' fees and costs were not fixed in the judgment itself, but were specified by the district court in a subsequent order. See R. 7320-7323 (order entered Dec. 17, 1992) ($875,619.34 in prejudgment interest, $163,650.23 in postjudgment interest, $239,624 in attorney's fees, and $31,858.19 in costs).

3. To collect the judgment, the FTC relied on the provisions of the Federal Debt Collection Procedures Act of 1990 (FDCPA or Act), 28 U.S.C. 3001 *et seq*. The FDCPA provides a comprehensive set of civil procedures "for the United States * * * to recover a judgment on a debt." 28 U.S.C. 3001(a)(1). Except as otherwise provided by the FDCPA, the Federal Rules of Civil Procedure apply to all actions and proceedings under that Act. 28 U.S.C. 3003(f).

The Act's procedures apply only to "debts." 28 U.S.C. 3001(c). The Act defines "debt" to include "an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States." 28 U.S.C. 3002(3)(B).

The FDCPA's purpose is to provide the United States with a uniform set of federal procedures for recovering debts and to relieve the government from having to "resort[] to the non-uniform [debt collection] procedures provided by the states." *United States* v.

Phillips, 303 F.3d 548, 551 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003). Toward that end, the Act establishes a panoply of federal pre-judgment and post-judgment remedies. See 28 U.S.C. 3101-3105 (pre-judgment remedies); 28 U.S.C. 3201-3206 (post-judgment remedies). In addition, the Act provides procedures relating to fraudulent transfers. 28 U.S.C. 3301-3308. A transfer made or obligation incurred by a debtor is fraudulent for purposes of the FDCPA if the debtor makes the transfer or incurs the obligation "with actual intent to hinder, delay, or defraud a creditor." 28 U.S.C. 3304(b)(1)(A). When a fraudulent transfer occurs, the United States may obtain avoidance of the transfer, a remedy against the transferred asset or other property of the transferee, or "any other relief the circumstances may require." 28 U.S.C. 3306(a)(3).

4. The FTC commenced its efforts to collect the judgment debt soon after the district court entered its final judgment. Over the following 12 years, Namer made repeated efforts to frustrate the FTC's collection efforts. Thus far, the FTC has been able to collect only approximately $150,000 under the judgment, leaving more than 95% of the amount awarded by the district court unpaid. As a matter of discretion, the FTC has disbursed substantially all of the collected money to Namer's former franchisees. The FTC has yet to receive any reimbursement under the judgment for its own costs and attorneys' fees, which amount to almost $300,000.

In July 2002, the FTC filed a motion under Federal Rule of Civil Procedure 69(a) to conduct a judgment debtor examination to discover whether Namer had any further assets that could be used to satisfy the judgment. The examination disclosed that Namer had entered into evasive financial arrangements with petitioners Namer, Inc., America First Communications, Voice of America, and Friends of Robert Namer, all of which were controlled by Namer and his family members. C.A. R.E. Tab 12, at 9095-9097. Based on the evidence presented during the examination, the district court found that Namer "has made use of Namer, Inc., America First Communications, Inc., and Voice of America for the calculated purpose of frustrating the Federal Trade Commission from enforcing the judgment in its favor." *Id.* at 9098. The court further found that Namer has "purposefully transferr[ed] income and assets to Namer, Inc., America First Communications, Inc., [and] Voice of America, Inc.," and has "incurr[ed] debt and ma[de] loans to Friends of Robert Namer calculated to hinder, delay and avoid collection of the judgment against him." *Ibid.* Accordingly, the court ordered those petitioners to show cause "why they should not be named as parties to this matter and cast as judgment debtors." *Id.* at 9099.

In April 2003, the district court issued an order formally providing for the joinder of Namer, Inc., America First Communications, Voice of America, and Friends of Robert Namer as defendants and judgment debtors. C.A. R.E. Tab 18, at 8990. The court entered an amended judgment that formally added the new defendants as judgment debtors. C.A. R.E. Tab 19, at 8987. The court rejected petitioners' argument that the judgment was not a "debt" under the FDCPA and therefore could not be enforced through the Act's procedures. C.A. R.E. Tab 18, at 8992-8993.

5. The court of appeals affirmed. Pet. App. 2b. The court of appeals agreed with the district court that the judgment constitutes a "debt" under the FDCPA. *Id.* at

7b-10b. The court noted that the Act's definition of "debt" encompasses "an amount that is owing to the United States." *Id.* at 9b (quoting 28 U.S.C. 3002(3)(B)). The court held that the judgment constituted an amount owed to the United States because "[t]he terms of the judgment render [petitioners] jointly and severally liable to the FTC, not to private individuals, for the entire amount of the judgment," making "the United States, not any individual or group of individuals, * * * the formal owner of the judgment." *Ibid.* The court added that the government's entitlement to costs and attorneys' fees also made the government a beneficial owner of the judgment, and that while a portion of the judgment "may ultimately be paid by the government to the defrauded franchisees, nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply." *Ibid.*

The court of appeals rejected petitioners' argument that the judgment would not constitute a "debt" under the test adopted by the First Circuit in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997). In *Bongiorno*, the First Circuit held that "a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it." *Id.* at 1037. While the Fifth Circuit declined to adopt that test, it pointed out that petitioners' argument "fails even if considered under this rubric," because the FTC "is the formal owner of the entire debt and beneficial owner of that portion of the judgment representing costs and attorneys fees." Pet. App. 8b n.2.

The court of appeals also rejected petitioners' contention that the FDCPA did not authorize a district court to join additional defendants on its own motion.

Pet. App. 10b-11b. The court relied on 28 U.S.C. 3013, which expressly authorizes a district court, "on its own initiative," to "extend[] or modify[] the use of any enforcement procedure under [the Act]." The court of appeals reasoned that this provision granted the district court broad remedial discretion and that, in the circumstances before it, the district court did not abuse that discretion by acting on its own initiative to join petitioners as defendants. Pet. App. 10b-13b.

ARGUMENT

Petitioner Namer enlisted the aid of four other petitioners in an ongoing effort to avoid satisfying the multi-million dollar judgment against him arising out of his violations of the Federal Trade Commission Act and the FTC's Franchise Rule. The decision below holds that the district court had the authority under the Federal Debt Collection Procedure Act (FDCPA) to join those petitioners as defendants and judgment debtors because of their participation in fraudulent transfers of Namer's assets. That holding is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ certiorari should therefore be denied.

1. a. Petitioners contend (Pet. 18-20) that the judgment in this case does not create a "debt" to the United States within the meaning of the FDCPA and that the district court therefore lacked authority to use the FDCPA's enforcement procedures. That contention is without merit. The FDCPA defines a "debt" as "an amount that is owing to the United States," 28 U.S.C. 3002(3)(A), and, as the court of appeals explained, the judgment in this case satisfies that definition for two reasons. First, because the terms of the judgment

render petitioner liable to the United States, not to the victims of Namer's fraud, the United States is the "formal" owner of the entire judgment debt. Pet. App. 9b. Second, because a portion of the judgment is intended to compensate the government for its costs and attorneys' fees, *id.* at 8b n.2, the United States is also a "beneficial" owner of the judgment debt. *Id.* at 9b. And, as the court explained, "nothing in the statutory text requires that the government be the exclusive beneficiary of the judgment for the statute to apply." *Ibid.*

Petitioners assert (Pet. 19) that the entire amount of the judgment is intended to compensate Namer's defrauded franchisees. But even if that were so, that would not affect the court of appeals' first ground for holding that the judgment creates a debt owing to the United States—that the United States is the formal owner of the entire debt. In any event, petitioners' assertion that the entire judgment is intended to provide relief to Namer's victims is incorrect. By its express terms, the judgment encompasses "attorneys' fees and costs" to compensate the government for its litigation costs. C.A. R.E. Tab 5, at 5889. It therefore is not the case that "any amounts collected under the judgment must be paid over to private parties" (Pet. 2). To the contrary, the government itself has a direct financial stake in the proceeds of the judgment.

Petitioners mistakenly suggest (Pet. 26) that the obligation to reimburse the FTC for attorneys' fees and costs does not arise from the judgment, but instead from a subsequent order of the district court. While a post-judgment order fixed the specific amount owed under the judgment for attorneys' fees and costs, the original judgment created the obligation to pay that sum. C.A.

R.E. Tab 5. In any event, the scope of the district court's judgment is a factbound question of no recurring importance and therefore does not warrant review.

b. Petitioners err in contending (Pet. 16) that review is warranted because the decision below conflicts with the First Circuit's decision in *United States* v. *Bongiorno*, 106 F.3d 1027 (1997). In *Bongiorno*, the First Circuit held that the United States could not use the FDCPA to collect an award of criminal restitution on behalf of a private victim because the debt was "not owed to the United States in an economically meaningful sense." *Id*. at 1039. The First Circuit reasoned that "a debt cannot be eligible for inclusion under the FDCPA if the United States is neither the formal owner nor the direct beneficiary of it." *Id*. at 1037.

The court of appeals in this case viewed *Bongiorno*'s reference to "economic meaningfulness" as "entail[ing] a more narrow use of debt than the statute contemplates." Pet. App. 8b. But its resolution of this case did not depend on that conclusion. To the contrary, in holding that the judgment in this case created a debt to the United States, the court relied on the very grounds that the First Circuit identified as legitimate—that the United States is the formal owner of the judgment debt and that it is a direct beneficiary of it. Compare *id*. at 9b, with 106 F.3d at 1037. Thus, the Fifth Circuit and the First Circuit both agree that the FDCPA applies in a case like this one. While it is possible that a case might arise in the future in which the Fifth Circuit would conclude that the FDCPA applies even though the

First Circuit would not, that possibility is not a reason to grant review in this case.*

2. Petitioners argue briefly (Pet. 27-28) that, even if the judgment in this case constitutes a "debt" under the FDCPA, the Act did not authorize the district court to join the participants in Namer's fraudulent transfers as defendants and judgment debtors. Petitioners concede that 28 U.S.C. 3012 authorizes defendants to be added on the motion of the United States, but argue that the district court had no authority to do so on its own initiative. As the court of appeals pointed out, however, 28 U.S.C. 3013 vests a district court with unqualified authority to "extend[] or modify[] the use of any enforcement procedure" under the Act and to do so "at any time on its own initiative."

Petitioners argue that Section 3013 does not expressly authorize the joinder remedy adopted by the district court. That argument ignores the breadth of the authority granted by the provision. Section 3013 authorizes district courts to extend or modify "*any* enforcement procedure" established by the Act, a grant of authority that necessarily includes modifying the procedure for adding defendants set forth in Section 3012.

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* In *NLRB* v. *E.D.P. Medical Computer Systems, Inc.*, 6 F.3d 951, 955 (1993), the Second Circuit held that a backpay award issued under the National Labor Relations Act is a debt to the United States because the NLRB acts in the public interest when it collects that award. In *Bongiorno*, the First Circuit disagreed with the Second Circuit's analysis. 106 F.3d at 1037-1038. Because the court of appeals in this case did not rely on the Second Circuit's public-interest rationale, see Pet. App. 9b n.5, this case does not present the question that divides the First and Second Circuits.

Even if petitioners had more substantial grounds for arguing that Section 3013 does not authorize the joinder of defendants on a district court's own initiative, that issue would not warrant review by this Court. Petitioners do not cite any other case in which a district court's authority to join additional defendants on its own initiative under Section 3013 has been at issue. Thus, petitioner has failed to show that the issue is one of recurring or general significance.

3. Finally, petitioners argue (Pet. 28-29) that, under the circumstances of this case, the district court should not have joined the participants in Namer's fraudulent transfers as defendants and judgment debtors. Given the role played by the remaining petitioners in Namer's efforts to evade enforcement of the judgment, and given the extent to which those petitioners are subject to the control of Namer and his family members, the district court had ample grounds for obligating all of the petitioners to share responsibility for satisfying the judgment. See C.A. R.E. Tab 12, at 9094-9099. In any event, the question whether the district court properly exercised its discretion in joining the remaining petitioners as defendants is factbound and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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