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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION

In re CHARLES FRANCIS GUGLIUZZA II, Debtor.	Case No. 8:12-bk-22893-CB Chapter 7
FEDERAL TRADE COMMISSION, Plaintiff, v. **CHARLES FRANCIS GUGLIUZZA II,** Defendant.	Adv. No. 8:13-ap-01078-CB **MEMORANDUM OF LAW IN SUPPORT OF MOTION OF FEDERAL TRADE COMMISSION FOR FULL OR PARTIAL SUMMARY JUDGMENT** Hearing date: July 1, 2014 Time: 2:30 p.m. Location: Courtroom 5D

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I. INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") moves this Court to enter summary judgment and find Charles Francis Gugliuzza II's ("Gugliuzza") $18.2 million debt non-dischargeable.[1] After a sixteen-day trial—including 22 witnesses, over 300 exhibits, and two and a half days of testimony by Gugliuzza—Judge Carney concluded that Gugliuzza perpetrated a deceptive scheme that misrepresented a costly membership program as a "free" service associated with eBay. Based on Gugliuzza's extensive role in implementing the deceptive marketing strategy and his knowledge of the high number of complaints, cancellations, refund requests, and chargebacks it generated, Judge Carney concluded that he knew of the fraud and was personally liable for $18.2 million in consumer harm.

Because the District Court decided against Gugliuzza based on the same issues and facts involved in this action, he is precluded him from re-litigating them here. Under Section 523(a)(2)(A), any debt obtained by false pretenses, a false representation, or actual fraud is not dischargeable. 11 U.S.C. § 523(a)(2)(A). As the District Court's findings, based on overwhelming evidence, demonstrate, the $18.2 million judgment against Gugliuzza arose out of his deceptive acts. As such, Gugliuzza's debt is legally excepted from discharge.

[1] In the alternative, the FTC moves for partial summary judgment on each element of 11 U.S.C. § 523(a)(2)(A) the Court determines warrant summary judgment.

The FTC has standing as a judgment creditor to assert a claim for non-dischargeability and can recover money on behalf of defrauded consumers. *FTC v. Abeyta* (*In re Abeyta*), 387 B.R. 850 (Bankr. D.N.M. 2008); *FTC v. Lederman* (*In re Lederman*), SV 94-22688 AG, 1995 WL 792072, at *5 (Bankr. C.D. Cal. June 26, 1995); *FTC v. Austin* (*In re Austin*), 138 B.R. 898, 903-04 (N.D. Ill. 1992); *FTC v. Black* (*In re Black*), 95 B.R. 819, 823 (Bankr. M.D. Fla. 1989) ("FTC is the *only* party that can be considered a creditor on a claim arising from a violation of [Section] 5(a) of the [FTC] Act").

II. THE DISTRICT COURT ACTION

The FTC filed suit against Gugliuzza, Commerce Planet, and its other directors and officers in November 2009 alleging violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *SUF* 9.[2] Shortly after the FTC filed its complaint, the defendants, with the exception of Gugliuzza, settled. *SUF* 11. The Court entered final judgments against Commerce Planet and each individual defendant. *SUF* 12. The FTC then filed an amended complaint against Gugliuzza. *SUF* 13.

In June 2012, after a sixteen-day bench trial, the District Court found that Gugliuzza engaged in deceptive advertising that misled consumers in violation of the FTC Act. *SUF* 14. Further, the District Court found that Gugliuzza's knowledge and participation in the scheme made him personally liable for $18.2 million, the amount of consumer harm. *SUF* 15-16. In July 2012, the District Court entered a Final Judgment and Order against Gugliuzza. *SUF* 3. Gugliuzza moved for a new trial, which the District Court denied in September 2012. *SUF* 17.

A. The District Court's Findings

The District Court made extensive findings regarding Gugliuzza's role in the deceptive marketing scheme. Specifically, the District Court found that: (1) he made material misrepresentations that misled consumers; (2) Gugliuzza knew or was at least recklessly indifferent to the fact that his statements were deceptive; (3) consumers reasonably relied on his misrepresentations; and (4) Gugliuzza's deceptive marketing was the direct cause of consumer injury.

[2] References to *SUF* are to the enumerated facts contained in the FTC's separate Statement of Uncontroverted Facts and Conclusions of Law in Support of Federal Trade Commission's Motion for Full or Partial Summary Judgment.

1. Gugliuzza Misled Consumers.

OnlineSupplier was a membership program that purportedly instructed consumers how to sell products online. *SUF* 52, 54, 58. Commerce Planet[3] charged consumers a monthly membership fee of $29.95 to $59.95. *SUF* 58. Before Gugliuzza joined the company, it attempted to market OnlineSupplier mostly through print advertising and telemarketing, with little success. *SUF* 24, 61-62. Commerce Planet hired Gugliuzza to turn around its flagging sales and revamp its marketing strategy. *SUF* 26-29, 39, 230, 237. Under Gugliuzza's direction, the company scrapped its old model and turned completely to internet and email marketing. *SUF* 234-235. Gugliuzza oversaw this transition, reviewed and approved advertising materials, sought to increase consumer traffic to sign-up pages, and set the prices for the monthly continuity program. *SUF* 146, 232-233, 235-236. He also supervised the launch of the first sign-up pages, which went live in October 2005. *SUF* 63, 145, 150.

a. Gugliuzza Deceptively Marketed a "FREE" Kit Affiliated with eBay.

Gugliuzza reviewed and approved sign-up pages and email marketing that advertised OnlineSupplier as a "FREE" kit associated with eBay. *SUF* 84, 135-136, 146. The District Court found that the pages' "predominant message is that consumers can order a free kit on how to make money by selling products on eBay." *SUF* 91. The pages repeatedly claimed that the kit was "FREE." *SUF* 89-93. For example, the landing page read "GET YOUR KIT NOW FOR FREE" and "Where do we ship your FREE KIT?" *SUF* 89, 93. The purported price of $19.95 was crossed out, followed by "NOW FREE! (limited time offer)!" *SUF* 90. A banner on the top of the page featured the eBay logo and urged consumers to "Join Over 724,000

[3] Commerce Planet used the name NeWave until 2006. *SUF* 20. This memo refers to the company simply as Commerce Planet.

Americans…Making a Living on eBay" and "Come Work Online Using Ebay!" *SUF* 107-108 (ellipses in original).

b. Gugliuzza Concealed that Consumers Were Actually Subscribing to a $30 to $60 Monthly Membership that Had Nothing to Do with eBay.

Even if consumers who ordered the "FREE" kit read the sign-up pages closely, they would not have seen that Commerce Planet would automatically charge them up to $59.95 per month unless they cancelled within fourteen days. *SUF* 58, 94-98. The only way to see the actual cost was if they clicked on a small hyperlink and then opened and read a separate "Terms of Membership" page, or scrolled to the bottom of the billing page and read the fine print. *SUF* 94-104. Even then, the fine print terms did not make clear that Commerce Planet would charge consumers. *SUF* 98, 100-101. Rather, the fourth paragraph of the "Terms of Membership" page stated "*if*" consumers were subscribing to a service that required a fee, they "agreed to pay all fees." *SUF* 98. The fine print at the bottom of the billing page stated that consumers "*may be liable* for payment of future goods and services" and that "this transaction involves a negative option," but did not define or explain what that meant. *SUF* 101.[4]

Further, consumers were unlikely even to realize they were ordering a program called OnlineSupplier. The marketing Gugliuzza approved hid any references to its name and did not mention Commerce Planet. *SUF* 109-110. Instead, the advertising prominently featured the eBay trademark and logo. *SUF* 105, 107-108, 135-136.

Commerce Planet made minor changes to its sign-up pages in February 2007, which the District Court found equally misleading. *SUF* 111-114. There were still no clear disclosures

[4] The District Court also found that the thousands of complaints and requests for refunds, many of which expressed consumer expectations that the kit would be free, provided "credible and highly probative evidence" that the marketing was deceptive, and cited expert testimony that consumers would not have seen the fine print disclosures. *SUF* 87, 186, 252-262.

explaining the cost or terms. *SUF* 114. Any mention of the monthly charges appeared "in the smallest text size on the page," "at the very bottom," and was "densely packed with the other text," making it difficult to read. *SUF* 115. Further, despite adding "onlinesupplier.com" to the billing page, the main sign-up page still proclaimed "Over $52 BILLION Was Made on eBay Last Year!"—leading the District Court to conclude that the kit still appeared to be associated with eBay. *SUF* 113.[5]

2. Gugliuzza Knew the Marketing Was Misleading and that Consumers Were Deceived.

Although Gugliuzza argued that it "never" occurred to him that consumers were misled, the District Court flatly rejected this assertion, finding it "simply not credible." *SUF* 250-251. Instead, citing his "pervasive role and authority," which "extended to almost every facet of the company's business and operations," the District Court found that Gugliuzza knew that the marketing was deceptive. *SUF* 132. The District Court found that Gugliuzza "authorized and implemented" the marketing campaign that deceived consumers. *SUF* 84. He directly supervised the marketing department, and admitted reviewing and approving the marketing materials. *SUF* 136, 148. He knew Commerce Planet billed consumers between $29.95 and $59.95 per month for membership in OnlineSupplier, but still approved marketing touting it as "FREE." *SUF* 84, 89-90, 146. Acting as legal counsel, he reviewed the materials for legal compliance, including the fine print disclosures that the District Court found inadequate. *SUF* 145, 150-151. Moreover, he halted proposed changes that would have resulted in clearer disclosures to consumers. *SUF* 241.

[5] Notably, Commerce Planet did not add the disclaimer that eBay insisted on to avoid misleading consumers about an affiliation with eBay. eBay demanded a "prominent enough" disclosure so that consumers would "clearly and immediately" see it; Commerce Planet put an abbreviated version at the very bottom of the page. *SUF* 170, 172.

In addition, Gugliuzza had "ample notice" that the marketing he approved generated tens of thousands of complaints. *SUF* 175.[6] He received weekly reports detailing the high rates at which consumers cancelled and requested refunds. *SUF* 174, 196. Gugliuzza was also aware that OnlineSupplier generated an excessive chargeback rate, indicating that consumers disputed the charges to their credit card company. *SUF* 202-203.[7] From February 2006 to July 2007, those rates exceeded the permissible 1 percent threshold (far above the national average rate of 0.2 percent). *SUF* 70. The District Court conclude that OnlineSupplier's excessive chargeback rates demonstrated consumers did not recognizes the charges and further indicated deceptive marketing. *SUF* 219. The District Court found that although Gugliuzza acknowledged that the high chargeback rate was a problem, the problem went unresolved. *SUF* 202-203, 249. Nor did Gugliuzza direct the marketing department to make any changes. *See SUF* 229-233, 234-238, 241.

3. Gugliuzza Intended to Deceive Consumers.

The District Court's findings also demonstrate that Gugliuzza intended to deceive consumers. Indeed, when he joined Commerce Planet, Gugliuzza was fully aware that it sold a product with little value for consumers. *SUF* 32, 34. Gugliuzza knew that Commerce Planet would not make a profit by marketing the product it actually sold—instead, it had to mask what it was selling. Gugliuzza approved and implemented a marketing campaign that did just that. *SUF* 84, 94-98, 100-104, 135-136, 229-233, 234-238. Moreover, he took steps to keep

[6] Commerce Planet's customer service manager testified that "tens of thousands" was a "conservative" estimate and only reflects the complaint volume for one year of Gugliuzza's two-year tenure. *SUF* 186.

[7] A chargeback generally consists of a returned credit card sales transaction. *SUF* 66. Courts may use a history of high chargeback rates as an indicator of a defendant's knowledge of deceptive activity. *See FTC v. MacGregor*, 360 Fed. App'x. 891, 894-95 (9th Cir. 2009).

OnlineSupplier's marketing deceptive: he opposed attempts to improve disclosures because they hurt sales. *SUF* 241.

The District Court found that the entire marketing campaign was designed to obscure that consumers were actually subscribing to a monthly membership program. *SUF* 94-98, 100-104. The "placement, wording, colorization, spacing, and size of the text," all indicated that the sign-up pages were designed to mislead. *SUF* 102. Gugliuzza was integral not just to disseminating the misleading statements to consumers, but he knew the statements were false, and perpetuated the scheme in the face of repeated complaints, refund requests, and warnings that consumers were deceived. *SUF* 46, 132, 135, 175, 196, 202-203, 229.

4. Consumers Reasonably Relied on Gugliuzza's Deceptive Marketing.

Finding it unlikely that most consumers would scroll to the bottom of the page to read fine print, or open and read a separate lengthy "Terms of Membership" page that was full of legalese, the District Court found that consumers reasonably relied on the representations that the kit was free. *SUF* 121. Consumer testimony confirmed this. *SUF* 259-260. Even "sophisticated" consumers experienced in using the Internet did not know they were signing up for a continuity program. *SUF* 259. Complaints echoed this understanding, making it the most common type of complaint Commerce Planet received. *SUF* 186-187, 262. The District Court found the repeated "free" claims reinforced the message that consumers were ordering a product that was, in fact, free. *SUF* 92. Moreover, the District Court found that these misrepresentations were "undoubtedly" material because advertising a product as "free" goes to the heart of a consumer's purchasing decision. *SUF* 124.

5. Gugliuzza's Deceptive Marketing Harmed Consumers.

The District Court found that OnlineSupplier's misleading advertising "clearly caused" consumer confusion. *SUF* 254. Thousands of consumers complained that they had been tricked by the deceptive sign-up pages. *SUF* 252, 257-258. Despite the fact that many consumers disputed charges on their credit card or contacted Commerce Planet for refunds, many never received a full refund. *SUF* 264. Using a conservative estimate that 50 percent of consumers who ordered the kit were misled by the sign-up pages, the District Court found that Gugliuzza's deceptive marketing caused $18.2 million in consumer injury. *SUF* 265-267.

B. Additional Evidence Demonstrates Gugliuzza's Knowledge and Intent.

In addition to the evidence cited by the District Court, there is ample evidence that demonstrates Gugliuzza knew the marketing to consumers was deceptive and that he intended to deceive consumers.

First, even before Gugliuzza helped launch the deceptive marketing and turn around Commerce Planet's flagging sales, he knew the product was essentially worthless. He reported that Commerce Planet's own managers described OnlineSupplier as "crap in a box." *SUF* 222. He admitted that he had a "clear understanding" of what OnlineSupplier was, and even signed up for it as part of his review of the company. *SUF* 220, 224. Gugliuzza knew that Commerce Planet's lack of profits was primarily due to the fact that consumers "quickly" sought to cancel after they "realize that they have been billed a considerable sum of money for little actual returned value." *SUF* 33. His experience with customer service was so poor that he concluded, "I understand why [the] typical customer cancels the program within a few weeks." *SUF* 35-36. Gugliuzza joined the company not to improve what Commerce Planet sold, but to increase its

profits. *SUF* 231-239. He stood to benefit personally from the company's success and hoped to make it profitable enough to sell. *SUF* 239-240.

Second, Gugliuzza acknowledged that the OnlineSupplier marketing was deceptive. In a January 2007 email, he wrote: "**I know everyone thinks we sell an eBay success kit, but we don't[.]** [W]e sell a webstore called online supplier. **To entice them to order we offer them a free eBay success kit**." *SUF* 159. Yet he repeatedly approved using the eBay logo prominently in OnlineSupplier's marketing. *SUF* 141, 159-165. He pushed to use the eBay name in Online Supplier's marketing, even after one of Commerce Planet's attorneys advised against it and eBay warned that it was misleading to consumers and infringed on its trademark. *SUF* 160-172.

Third, Gugliuzza admitted that he knew nearly half of consumers who signed up for OnlineSupplier cancelled, and testified that he "would expect" such a high cancellation rate for a product like OnlineSupplier. *SUF* 197-200. He also knew that consumers demanded tens of thousands of dollars' worth of refunds per week. *SUF* 201. He attended regular meetings where employees highlighted the high volume of complaints, in which consumers routinely complained that they had been billed for what they thought was free. *SUF* 179-183. He knew that consumers reported being charged even *after* they requested to cancel. *SUF* 191. He also knew that consumers complained directly to eBay about OnlineSupplier charges. *SUF* 191.

Fourth, Gugliuzza was acutely aware of OnlineSupplier's high number of chargebacks. *SUF* 202-216. Gugliuzza received internal reports detailing excessive chargeback rates, and Commerce Planet employees repeatedly notified him that "[c]hargebacks continue to grow," "[w]e need to decrease our chargeback percentage," "[w]e are having merchant account problems . . . we have been put on the Mastercard watch list because our chargeback percentage was 1.5% last month." *SUF* 206, 207. Moreover, he received warning letters from Visa

repeatedly flagging OnlineSupplier as exceeding its one percent threshold for chargebacks. *SUF* 211-213. In a May 2007 email, a Commerce Planet employee alerted Gugliuzza and others that OnlineSupplier's chargeback rates were so high that Visa assessed fines of $494,000 for just three months of activity. *SUF* 211. In August 2007, an employee alerted Gugliuzza that the company suffered $40,000 in chargebacks and fees, writing "[w]e have never had this many chargebacks go through [this payment processor] before." *SUF* 215.

According to Visa's Director of International Risk Management, OnlineSupplier's excessive chargebacks were "highly unusual." *SUF* 82. From June 2004 to July 2007, OnlineSupplier generated chargeback rates far above Visa's one percent threshold—as high as **36.58 percent**. *SUF* 77. Unlike the vast majority of merchants who take corrective action after receiving Visa's initial warnings, Commerce Planet did not; Visa kept OnlineSupplier in its chargeback monitoring program for ***ten months***. *SUF* 79. Gugliuzza admitted that there were meetings to discuss how to respond to problems with chargebacks. *SUF* 216. Instead of fixing the root of the chargeback problems, Gugliuzza proposed switching how Commerce Planet processed payments, "hop[ing] for the best that Visa doesn't follow with the $100 chargeback fees." *SUF* 214.

Finally, Gugliuzza consistently blocked efforts to improve disclosures. When employees suggested proposals to comply with FTC law, he rejected them. *SUF* 154-155, 242-246. When another attorney raised concerns about the legality of the advertising, Gugliuzza "put his hands over his ears." *SUF* 154-155. When an outside firm recommended adding a checkbox to require consumers to affirmatively consent to terms and conditions, Gugliuzza rejected it. *SUF* 241-246. Instead, he firmly warned employees "not [to] change anything without my prior approval" and to "not add any additional barriers to the signup process." *SUF* 245-246. Only after learning

that the FTC sued another company with an advertising model that closely tracked OnlineSupplier's[8]—and after repeated warnings from eBay threatening legal action for the "inappropriate" and "misleading" use of its trademark—did Gugliuzza approve minor changes to OnlineSupplier's advertising. *SUF* 111, 156-158, 166-170. Even then, they were modest revisions that did little to improve the false statements to consumers. *SUF* 111-116.

Gugliuzza's efforts reveal that not only was he aware of the misleading nature of OnlineSupplier's marketing, but that he took every possible step to make the scheme as deceptive as possible.

III. LAW AND ARGUMENT

A. Summary Judgment Standard.

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A party may seek full or partial summary judgment on all claims or *any part of a claim* for which there is no issue of material fact. FED. R. CIV. P. 56(a); *see also Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998); *Cheng v. Comm'r Internal Revenue Serv.*, 878 F.2d 306, 309 (9th Cir. 1989); *Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089, 1092 (C.D. Cal. 2013). The preclusive effect of a prior judgment is a proper basis for summary judgment. *See, e.g., Khaligh v. Hadaegh* (*In re Khaligh*), 338 B.R. 817, 821, 832 (B.A.P. 9th Cir. 2006) *aff'd*, 506 F.3d 956

[8] An email from Commerce Planet's CEO to Gugliuzza contained this description of the company's model: "the defendants' Web site offered consumers a free CD containing computer software if they agreed to pay a shipping and handling fee of $1.99 to $2.99 . . . Before they completed the transaction, they checked a box saying they agreed to the 'terms of use' . . . . . Buried in the seventh paragraph . . . . [i]t states that consumers must send back two of the four 'free' CDs within 10 days or they will be charged a fee of $39 or $49. It also states that consumers will be enrolled in a software continuity program . . . . The FTC charged the defendants with unfair and deceptive practices that violate the FTC Act." *SUF* 157.

(9th Cir. 2007); *BDK, Inc. v. Escape Enters.*, 106 F. App'x 535, 538 (9th Cir. 2004) (affirming summary judgment on collateral estoppel grounds); *Miller v. Cnty. of Santa Cruz*, 39 F.3d 1030, 1038 (9th Cir. 1994) (same).

Summary judgment serves as a "threshold inquiry" to determine whether there is a need for a trial—"whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported summary judgment" motion. *Id.* at 247-48. Material facts depend on the substantive law, and are "those which might affect the outcome of the suit." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005); *Anderson*, 477 U.S. at 248.

The Court views the evidence in the light most favorable to the non-moving party, *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). However, to withstand summary judgment, the non-moving party "cannot rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256-57; *Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) ("bald assertions" that issues of material fact exist are insufficient). "Conclusory, self-serving affidavit[s] lacking detailed facts and any supporting evidence" do not create a genuine issue of material fact. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997).

B. The FTC is Entitled to Summary Judgment.

A review of the District Court's decision and the trial record demonstrates that there is no genuine dispute of material fact that Gugliuzza's debt was obtained by false pretenses or false representations. Therefore, it is non-dischargeable under § 523(a)(2)(A). Because the District

Court necessarily decided the same issues that are determinative of non-dischargeability—and found against him on each one—he is precluded from re-litigating them. Further, even without the preclusive effect of the District Court's judgment, there is extensive uncontroverted evidence that establishes that Gugliuzza's debt is excepted from discharge.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 469 (1970); *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999) (citing *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988)); *Berr v. FDIC* (*In re Berr*), 172 B.R. 299, 306 (B.A.P. 9th Cir. 1994) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)).[9] Federal principles of collateral estoppel apply in discharge proceedings under § 523(a)(2)(A). *Grogan v. Garner*, 498 U.S. 279, 284-85 n.11 (1991); *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996). A party is collaterally estopped from relitigating issues decided in a prior action where: (1) the first proceeding ended with a final judgment on the merits; (2) the party against whom collateral estoppel is asserted was a party in the first proceeding; and (3) the issues necessarily decided in the previous proceeding are identical to the those sought to be relitigated. *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005), *abrogated by Taylor v. Sturgell*, 553 U.S. 880 (2008); *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000); *Trevino*, 99 F.3d at 923.

[9] Further, once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995) *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996) (citing *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993)).

1. The District Court Entered a Final Judgment on the Merits Against Gugliuzza.

The District Court's decision is a final judgment that has preclusive effect in this Court. *See Robi*, 838 F.2d at 327 (final judgment "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect") (citing Restatement (Second) of Judgments § 13 (1982)). Gugliuzza's appeal to the Ninth Circuit does not alter the finality of that judgment or its preclusive effect. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882-83 (9th Cir. 2007); *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) ("The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal . . . .") (citing Wright et al., Federal Practice and Procedure § 4433 at 308 (1981)); *accord Muse v. Day* (*In re Day*), 409 B.R. 337, 343 (Bankr. D. Md. 2009); *FTC v. Porcelli* (*In re Porcelli*), 325 B.R. 868, 872 (Bankr. M.D. Fla. 2005). In weighing the risk of having a decision based on collateral estoppel of a prior judgment that is later reversed, the Ninth Circuit found "the benefits of giving a judgment preclusive effect pending appeal outweigh any risks of a later reversal of that judgment." *Horton*, 505 F.3d at 883 (citing *Tripati*, 857 F.2d at 367).[10]

[10] Moreover, given the settled law in the Ninth Circuit on the issues Gugliuzza is challenging and the District Court's extensive factual findings, reviewed only for clear error, Gugliuzza's appeal faces a small likelihood of success. Indeed, as the District Court recognized, the Ninth Circuit has repeatedly rejected the same challenge Gugliuzza is making to courts' authority to grant restitution under the FTC Act. *See* Ex. 5 at 9 (Order Denying Defendant's Motion for a New Trial); *see also Stefanchik*, 559 F.3d at 931; *FTC v. Inc21.com Corp.*, 475 F. App'x 106, 108 (9th Cir. 2012); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993); Ex. 61 at 56-63 (II.B) (Brief of Plaintiff-Appellee FTC, *FTC v. Gugliuzza*, No. 12-57064 (9th Cir. Nov. 18, 2013)). The District Court's factual findings are reviewed under a "significantly deferential" standard, which the appeals court will accept unless it is "left with the definite and firm conviction that a mistake has been committed." *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004) (citing *N. Queen Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002)).

2. Gugliuzza Was the Sole Defendant in the Enforcement Action.

Gugliuzza was a party to the prior action, and fully and fairly litigated it. The other defendants in the case all settled and entered into stipulated orders with the FTC. *SUF* 4. Gugliuzza was the only remaining defendant, and the District Court's findings apply only to him. *SUF* 4.

3. The Issues Decided by the District Court Are the Same as Those to Determine Non-Dischargeability Under § 523(a)(2)(A).

The facts that led the District Court to conclude that Gugliuzza engaged in deceptive conduct and was individually liable for monetary relief are the same facts that establish his debt is non-dischargeable. *Keating*, 186 F.3d at 1116 (issues are identical where there is significant overlap between the evidence and application of same rule of law); *Kourtis*, 419 F.3d at 994-95; Restatement (Second) of Judgments § 27 (1982) (factors include whether trial preparation and discovery could have encompassed issues in the later action).[11]

To be excepted from discharge under Section 523(a)(2)(A), a debt must be the product of (1) a misrepresentation, fraudulent omission, or deceptive conduct by the debtor; (2) a debtor who knew of the falsity or deceptiveness of his conduct; (3) an intent to deceive; (4) justifiable reliance on the debtor's conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's conduct. *Turtle Rock Meadows Homeowners Ass'n v. Slyman* (*In re Slyman*), 234 F.3d 1081, 1085 (9th Cir. 2000). Section 523(a)(2)(A) "bars the discharge of *all* liability arising from fraud." *Cohen v. De La Cruz*, 523 U.S. 213, 222 (1998).

[11] Indeed, the FTC's filings accentuate this point. The District Court record is the same record the FTC is relying upon to prove Gugliuzza's debt is non-dischargeable. The exhibits accompanying the FTC's Motion for Summary Judgment are almost exclusively exhibits admitted by the District Court. Should there be a trial on any element of non-dischargeability, it will undoubtedly involve the same individuals who testified in the District Court trial.

In finding that Gugliuzza violated Section 5(a) of the FTC Act and was individually liable for consumer harm under Section 13(b), the District Court was required to consider and *necessarily decided* each of these issues. *See FTC v. Hewitt* (*In re Hewitt*), No. 12-20324, Adv. No. 13-01044, slip op. at 19 (Bankr. C.D. Cal., July 25, 2013); *Abeyta*, 387 B.R. at 854-55; *Porcelli*, 325 B.R. at 874; *Lederman*, 1995 WL 792072, at *5-6. Therefore each element of § 523(a)(2)(A) is an issue of ultimate fact that the District Court already decided in making its judgment that Gugliuzza violated the FTC Act.

a. Misrepresentation, Fraudulent Omission, or Deceptive Conduct.

A misrepresentation, fraudulent omission, or deceptive conduct by the debtor satisfies the first element of § 523(a)(2)(A). *Slyman*, 234 F.3d at 1085; *Citibank* (*South Dakota*), *N.A. v. Eashai* (*In re Eashai*), 87 F.3d 1082, 1088-89 (9th Cir. 1996) (debtor's silence or omission of a material fact is sufficient for a false representation under § 523(a)(2)(A)) (citing *Cooke v. Howarter* (*In re Howarter*), 114 B.R. 682 (9th Cir. B.A.P 1990)); *Tallant v. Kaufman* (*In re Tallant*), 218 B.R. 58, 63-66 (9th Cir. B.A.P. 1998) (attorney's failure to disclose information he had a duty to disclose is a false representation under § 523(a)(2)(A)). The District Court found Gugliuzza engaged in deceptive conduct and made misrepresentations to consumers.

i. The District Court Necessarily Found Gugliuzza Made Misrepresentations.

To find that Gugliuzza violated the FTC Act, the District Court had to find that Gugliuzza made a misrepresentation or omission, or engaged in a practice that was likely to mislead consumers acting reasonably under the circumstances. *Stefanchik*, 559 F.3d at 928 (citing *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2000)); *Pantron I*, 33 F.3d at 1095.[12] The District Court

[12] Under FTC law, a representation must also be material. To determine materiality, courts assess whether the representation "involves information that is important to consumers

found in perpetrating the deceptive marketing scheme, Gugliuzza made misrepresentations to consumers in violation of the FTC Act. *SUF* 86-88, 91-98, 100-105, 107-115. Because that finding was essential to the District Court's judgment, Gugliuzza is precluded from re-litigating it.

ii. The District Court Cited Overwhelming Evidence of Gugliuzza's Misrepresentations.

In finding that Gugliuzza's conduct was deceptive, the District Court cited a litany of evidence that the statements made to consumers were not true. For example, the District Court found that the OnlineSupplier marketing falsely represented the kit as "free" and affiliated with eBay. *SUF* 86-88, 91-98, 100-105, 107-115. The District Court examined the so-called fine print "disclaimers" that purportedly disclosed the monthly membership fees to consumers and concluded that they did not remedy the false impression that consumers would receive a free kit. *SUF* 96-98, 100-104, 115.

b. Knowledge of Falsity or Deceptiveness.

A debtor's reckless indifference to the truth establishes knowledge for § 523(a)(2)(A). *Advanta Nat'l Bank v. Kong* (*In re Kong*), 239 B.R. 815, 827 (B.A.P. 9th Cir. 1999) ("reckless indifference to the actual facts, without examining the available source of knowledge which lay at hand, and with no reasonable ground to believe that it was in fact correct is sufficient to establish the knowledge element"); *Gertsch v. Johnson & Johnson Fin. Corp.* (*In re Gertsch*), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999); *Abeyta*, 387 B.R. at 854-55.[13] Recklessness,

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and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201 (noting information about monthly fees is material) (citations omitted). Misleading statements are not cured by fine print disclaimers. *Id.*

[13] The reckless indifference standard for proving knowledge stems from common law fraud, on which § 523(a)(2)(A) is based. *Field v. Mans*, 516 U.S. 59, 69 (1995); *Kong*, 239 B.R. 815, 827 ("fraud is proved if it is shown that a false representation has been made without belief

characterized by a conscious indifference to the consequences, is distinguishable from negligence, or "mere thoughtlessness or inadvertence." Keeton, et al., Keeton on Torts, 213 (5th ed. 1984). The District Court found that Gugliuzza was at least recklessly indifferent to the fact that the marketing to consumers was deceptive.

i. The District Court Necessarily Found Gugliuzza Was at Least Recklessly Indifferent to His Deception.

To find Gugliuzza individually liable for consumer harm under the FTC Act, the District Court had to find that Gugliuzza *knew* the marketing to consumers was deceptive, i.e., he had actual knowledge, was recklessly indifferent to its truth or falsity, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth. *See FTC v. Network Servs. Depot*, 617 F.3d 1127, 1138 (9th Cir. 2010); *Cyberspace.com*, 453 F.3d at 1202. This requires, at a bare minimum, finding that an individual was recklessly indifferent to the truth of the statements he made. *See, e.g.*, *Stefanchik*, 559 F.3d at 931 (9th Cir. 2009) (defendant was "at least recklessly indifferent"); *Publ'g Clearing House*, 104 F.3d at 1171 (same); *Cyberspace.com*, 453 F.3d at 1202 (defendant knew or "at the very least was recklessly indifferent to the truth"); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1207 (C.D. Cal. 2000) (defendant was "at a minimum, recklessly indifferent").[14] The District Court concluded that Gugliuzza knew or "*at*

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in its truth or recklessly, careless of whether it is true or false") (citing Restatement (Second) of Torts § 526, cmt. e); *Gertsch*, 237 B.R. at 167 (citing *Houtman*, 68 F.2d at 656); *see also* Restatement (Second) of Torts § 526, cmt. e.

[14] Reckless indifference often hinges on whether a defendant "(1) had some level of participation in the development, review, creation or editing of the deceptive marketing scheme, (2) disseminated the deceptive advertisements, and (3) was aware of complaints or problems surrounding the marketed product or the advertisements." *FTC v. Ross*, 897 F. Supp. 2d 369, 385 (D. Md. 2012) (summarizing FTC cases), *aff'd*, 743 F.3d 886 (4th Cir. 2014); *see also Network Servs.*, 617 F.3d at 1140-41 (defendant failed, among other things, to investigate numerous consumer complaints); *Cyberspace.com*, 453 F.3d at 1202 (defendant reviewed solicitations and discussed complaints with employees); *FTC v. Grant Connect, LLC*, 827 F.

the very least" was recklessly indifferent to the fact that OnlineSupplier's marketing was deceptive. *SUF* 147. Because this was essential to the District Court's determination that he was individually liable, this finding is preclusive.

ii. The District Court Cited Overwhelming Evidence of Gugliuzza's Reckless Indifference and Knowledge.

The District Court found resounding evidence that established Gugliuzza knew the marketing was deceptive. In particular, it found that Gugliuzza approved marketing materials touting OnlineSupplier as "FREE." *SUF* 84-86, 91-92, 132, 135-136. Based on its review of consumer complaints and high chargeback rates, the District Court found Gugliuzza had "ample notice" that tens of thousands of consumers complained that they thought they were ordering a free kit associated with eBay, not a costly membership program. *SUF* 175, 186-187, 196, 202, 218-219. These facts, coupled with Gugliuzza's "broad authority" over the marketing, led the District Court to conclude he knew or was recklessly indifferent to the fact the marketing was deceptive. *SUF* 147.

c. Intent to Deceive.

Reckless indifference to deceptive conduct also establishes a debtor's intent to deceive for § 523(a)(2)(A). *Anastas v. Amer. Savings Bank* (*In re Anastas*), 94 F.3d 1280, 1286 (9th Cir. 1996) ("reckless disregard for the truth of a representation satisfies the element that the debtor has made an intentionally false representation") (citing *Houtman v. Mann* (*In re Houtman*), 568 F.2d 651, 656 (9th Cir. 1978)); *accord Household Credit Servs., Inc. v. Ettell* (*In re Ettell*), 188 F.3d 1141, 1145 n.4 (9th Cir. 1999) (reckless conduct is sufficient to establish fraudulent intent in the Ninth Circuit); *Fogal Legware of Switz., Inc. v. Wills* (*In re Wills*), 243 B.R. 58, 64 (B.A.P. 9th Cir. 1999) (citing *Garcia v. Coombs* (*In re Coombs*), 193 B.R. 557, 564 (Bankr. S.D. Cal.

Supp. 2d 1199, 1223 (D. Nev. 2011) (defendants had notice that deceptive offers generated high cancellation, refund, and chargeback rates).

1996)); *Abeyta*, 387 B.R. at 854-55. Therefore, the inquiry for courts is "whether the debtor *either* intentionally *or* with recklessness as to its truth or falsity, made the representation." *Anastas*, 94 F.3d at 1286 (emphasis added); *accord Wright v. Lubinko*, 515 F.2d 260, 263 (9th Cir. 1975) (citations omitted). Knowledge of a false representation also bears heavily on whether there was an intent to deceive. *Cal. State Emps. Union Credit Union v. Nelson* (*In re Nelson*), 561 F.2d 1342, 1347 (9th Cir. 1977).[15] The District Court found that Gugliuzza was at least recklessly indifferent to the truth of his statements to consumers.

i. The District Court Necessarily Found Gugliuzza Was at Least Recklessly Indifferent to His Deception.

To be individually liable for consumer harm under the FTC Act, a defendant must be *at least* recklessly indifferent to the deceptive nature of their representations. *See Network Servs.*, 617 F.3d at 1138; *Cyberspace.com*, 453 F.3d at 1202; *supra* III.3.b.i.[16] The District Court unequivocally concluded that Gugliuzza was at least recklessly indifferent to the fact that OnlineSupplier's marketing was deceptive. *SUF* 147. This finding was necessary to hold him individually liable for consumer harm. Thus, Gugliuzza is precluded from re-litigating that he was recklessly indifferent.

[15] In *Nelson*, the court found that based on evidence that defendant knew or should have known statements were false, it was "practically inevitable" that he intended to deceive. *See also Lederman*, 1995 WL 792072, at *6 ("false representations, coupled with knowledge of falsity or reckless disregard, establish intent to deceive" for Section 523(a)(2)(A)).

[16] The requisite indifference or avoidance of the truth for FTC Act liability is not a light standard. *See, e.g.*, *Network Servs.*, 617 F.3d at 1140-41 (defendant failed to undertake "even modest" due diligence in the face of "numerous warning signs," failed to investigate consumer complaints, and deliberately created a "Chinese wall" to avoid details about the business operation); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1005-06 (N.D. Cal. 2010) (defendants received numerous warnings from third parties about unauthorized sales and knew their best-selling products were "very broken"), *aff'd*, 475 F. App'x 106 (9th Cir. 2012); *Grant Connect*, 827 F. Supp. 2d at 1223 (defendants' knowledge of consumer confusion and nature of deceptive ads rendered defendants recklessly indifferent or aware of high probability of fraud but intentionally avoiding the truth); *J.K. Publn's*, 99 F. Supp. 2d at 1206 (defendant had "ample opportunity" to discover the fraud and intentionally avoided doing so).

ii. The District Court Cited Overwhelming Evidence of Gugliuzza's Reckless Indifference and Intent.

Finding that Gugliuzza was at least recklessly indifferent, the District Court summarized evidence showing that Gugliuzza's role was not limited to "an isolated, discrete incident of deceptive marketing," but rather "sustained and continuous conduct that perpetuated the deceptive marketing of OnlineSupplier for over two years." *SUF* 229. The District Court relied on a plethora of facts to come to this conclusion. For example, Gugliuzza sought to maximize sales and minimize any disclosure about what Commerce Planet actually sold, *SUF* 94-98, 232-233, 237-238, and worked to market aggressively OnlineSupplier despite knowing it was a flawed product that many consumers did not want or understand. *SUF* 27-34. Instead of trying to improve the marketing, he rejected attempts to make fine print disclosures clearer and opposed requiring consumers to click a box agreeing to the terms and conditions. *SUF* 241. Gugliuzza's extensive involvement in every aspect of the sign-up pages, from conception to implementation, demonstrates that he intended to deceive consumers.

d. Justifiable Reliance on the Debtor's Misrepresentations.

Section 523(a)(2)(A) requires a justifiable reliance on the debtor's misrepresentations omissions, or deceptive conduct. *Slyman,* 234 F.3d at 1085. This is a lower standard than reasonable reliance, because it "turns on a person's knowledge under the particular circumstances." *Eashai*, 87 F.3d at 1090; *Field,* 516 U.S. at 70-71 (unlike reasonable reliance, justifiable reliance depends on qualities and characteristics of the particular person); *see also Missouri ex rel. Nixon v. Audley* (*In re Audley*), 268 B.R. 279, 284 (Bankr. D. Kan. 2001) (prior finding that customers relied on statements and were motivated to buy product because misrepresentations satisfied justifiable reliance). Reliance is justifiable even if it was possible to determine that the representation was false. *In re Apte,* 180 B.R. 223, 229 (B.A.P. 9th Cir.

1995), *aff'd*, 96 F.3d 1319 (9th Cir. 1996) (citing *In re Kirsh*, 973 F.2d at 1458 (citing *Restatement* (*Second*) *of Torts* § 540 (1977))). The District Court found that consumers relied on Gugliuzza's deceptive statements.

i. The District Court Necessarily Found that Consumers Relied on Gugliuzza's Misrepresentations.

To find that Gugliuzza violated and was individually liable under the FTC Act, the District Court had to find that Gugliuzza's deceptive conduct would mislead reasonable consumers and that consumer injury resulted. *See Stefanchik*, 559 F.3d at 928; *Cyberspace.com*, 453 F.3d at 1200; *Network Servs.*, 617 F.3d at 1138 (citing *Pub'l Clearing House*, 104 F.3d at 1170).[17] Indeed, the District Court found "abundant evidence that consumers were actually misled" by OnlineSupplier's advertising and that they were harmed because they reasonably relied on the deceptive claims. *SUF* 125-131, 254-255, 264-266. These findings were essential the District Court's judgment that he violated Section 5(a) and that his actions made him liable for consumer harm. Therefore, Gugliuzza cannot re-litigate the finding that consumers relied on his deceptive statements.

ii. The District Court Cited Overwhelming Evidence of Consumer Reliance.

In finding consumers relied on Gugliuzza's misrepresentations, the District Court reviewed expert and consumer testimony, which established that most consumers never saw the fine print at the bottom of the sign-up pages or the reference to the monthly fee buried in the lengthy "Terms of Membership." *SUF* 120-123. The District Court also found there was no

[17] Courts assess whether a statement is likely to mislead based on the net impression of the representation. For instance, even if an advertisement contains truthful disclosures, it may still be deceptive. *Cyberspace.com*, 453 F.3d at 1200. Moreover, the fact that consumers are unaware of charges they supposedly agreed to indicates a practice is likely to mislead. *Inc21.com*, 475 F. App'x at 110.

question these terms were material to consumers. *SUF* 124. Based on the repeated "FREE" claims and the deceptive placement of material terms on the page, the District Court found consumers reasonably relied on Gugliuzza's misrepresentations. *SUF* 126, 131.

e. Damage Proximately Caused by the Debtor's Misrepresentations.

Section 523(a)(2)(A) requires a finding that the creditor was damaged by relying on the debtor's conduct. *Slyman*, 234 F.3d at 1085.[18] Section 523(a)(2)(A) excepts from discharge "all losses caused to those defrauded regardless of whether the total loss 'exceeds the value obtained by the debtor.'" *In re Palombo*, 456 B.R. 48, 64 (Bankr. C.D. Cal. 2011) (citing *Cohen*, 523 U.S. at 222-23). The District Court found that consumers suffered harm because of Gugliuzza's deceptive marketing.

i. The District Court Necessarily Found Gugliuzza's Misrepresentations Caused Consumer Harm.

To find that Gugliuzza was individually liable for consumer harm under the FTC Act, the District Court had to find that his misrepresentations caused consumers harm. *Network Servs.*, 617 F.3d at 1138 (citing *Pub'l Clearing House*, 104 F.3d at 1170). In fact, the District Court found that Gugliuzza's conduct caused *at least* $18.2 million in consumer injury. *SUF* 265-267.[19] Thus, Gugliuzza is precluded from litigating that his deceptive acts caused consumers harm.

[18] The FTC meets the definition of a "creditor" under 11 U.S.C. § 523(c)(1) because it has a right to receive payment on the debt in question. *See Austin*, 138 B.R. at 903.

[19] The District Court calculated the amount of harm based on the amount of consumer loss. *See Stefanchik*, 559 F.3d at 931 (affirming restitution award based on full amount lost by consumers); *Gill*, 265 F.3d at 958 (district court properly used amounts consumers paid as the basis for the amount Defendants should be ordered to pay); *Figgie*, 994 F.2d at 606-07.

ii. The District Court Cited Overwhelming Evidence of Consumer Harm.

In assessing the extent of consumer harm, the District Court found that hundreds of thousands of consumers ordered what they thought was a free kit, only to be charged unexpectedly for OnlineSupplier. *SUF* 186-187, 252-255, 257-264. Many did not realize that Commerce Planet was billing them until they noticed charges on their credit card statements. *SUF* 187, 259-261. Even consumers who demanded their money back did not always receive full refunds. *SUF* 264. Consumers purchased OnlineSupplier relying on Gugliuzza's deception, thinking they were paying shipping and handling for a free kit, and were harmed because they were then charged unexpectedly. *SUF* 118-131, 252-264. Using a "conservative floor," the District Court estimated that half of those who signed up were misled by the deceptive sign-up pages. *SUF* 265-266.

4. The Evidence Independently Establishes that Gugliuzza's Debt is Non-Dischargeable.

Even without the District Court's findings, there is more than sufficient uncontroverted evidence to establish that Gugliuzza's conduct satisfies each element of § 523(a)(2)(A).[20] Notably, knowledge and intent for § 523(a)(2)(A) may be established through circumstantial evidence or inferred from a debtor's course of conduct. *Tallant*, 218 B.R. at 66; *Retz v. Samson* (*In re Retz*), 606 F.3d 1189, 1198 (9th Cir. 2010); *Abeyta*, 387 B.R. at 853.[21]

[20] Gugliuzza cannot now contest facts that support issues on which he litigated and lost in the District Court. *See Kamilche*, 53 F.3d at 1063 ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue. . . is subsumed in that issue and precluded by the effect of the prior judgment") (citing 1B Moore's Federal Practice ¶ 0.443[2]); Restatement (Second) of Judgments § 27 (if a party "did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact").

[21] For example, courts look to whether a debtor's conduct carries "badges of fraud," or was designed to induce others to act. *See, e.g.*, *Emmett Valley Assocs. v. Woodfield* (*In re*

First and foremost, Gugliuzza knew the truth about OnlineSupplier. *SUF* 159, 220, 222-226. He knew the "FREE" claim was false and the prominent use of eBay was misleading, yet pushed employees to continue making these claims. *SUF* 141, 159, 232-236. He promoted prominently featuring the eBay name and logo despite repeated warnings that it was misleading and infringed on eBay's trademark. *SUF* 160-171.

Gugliuzza was integral to turning Commerce Planet from an unsuccessful company with a bleak future into a "profitable" one with booming sales. *SUF* 24, 50, 231-239. He knew from the beginning that Commerce Planet profited from marketing a worthless service to consumers and that the only way to increase sales was to falsely entice consumers to purchase it. *SUF* 220-228.

Moreover, he repeatedly turned a blind eye to the red flags indicating that the OnlineSupplier marketing was deceiving consumers. *SUF* 174-219. He did nothing to make OnlineSupplier's cost or terms clear to consumers, and actively opposed making the advertising *less* deceptive. *SUF* 243-247.

Gugliuzza's conduct reveals that he knowingly perpetrated a scheme riddled with false statements and hidden information in order to deceive consumers. His actions more than meet the standards of § 523(a)(2)(A). The evidence demonstrates that his $18.2 million debt, obtained through his deceptive acts, is non-dischargeable under § 523(a)(2)(A).

Woodfield), 978 F.2d 516, 518 (9th Cir. 1992); *Retz*, 606 F.3d at 1195-99 (debtor exhibited "pattern of falsity" including omitting valuable assets on bankruptcy schedules); *La Trattoria, Inc. v. Lansford* (*In re Lansford*), 822 F.2d 902, 904 (9th Cir. 1987) (debtor made multiple misrepresentations in financial statements, including listing nonexistent accounts); *Duncan v. Fidelity Nat'l Title Co.* (*In re Duncan*), 2011 WL 3300162, at *2 (B.A.P. 9th Cir. Feb. 4, 2011) (savvy real estate investor's assertions that she did not intentionally omit material facts on mortgage applications "defie[d] credulity"); *Malenbaum, et al. v. Young* (*In re Young*), 208 B.R. 189, 201 (Bankr. S.D. Cal. 1997) (inferring phrase "Note Secured by Deed of Trust" on investment document was intended to deceive investors), *abrogated by Cohen*, 523 U.S. 213.

IV. CONCLUSION

The District Court's findings and the extensive trial record underlying those findings demonstrate that the FTC's Judgment against Gugliuzza is a debt procured by false pretenses, false representations, or actual fraud for the purposes of § 523(a)(2)(A). Accordingly, the FTC respectfully requests that this Court: (1) grant the FTC's motion for summary judgment with respect to Count I of the Complaint; and (2) enter an order finding the FTC's Judgment against Gugliuzza in the amount of $18,200,000 (plus post-judgment interest) is excepted from Gugliuzza's discharge, should a discharge be granted in his bankruptcy case. Alternatively, the FTC requests that the Court enter partial summary judgment with findings on each element of § 523(a)(2)(A) the Court determines is satisfied.

Dated: May 20, 2014

Respectfully submitted,

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