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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 **FEDERAL TRADE COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR FULL OR PARTIAL SUMMARY JUDGMENT** Hearing date: July 9, 2014 Time: 1:30 p.m. Location: Courtroom 5D

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I. INTRODUCTION

Gugliuzza's opposition to the FTC's motion for summary judgment (DE 72) reinforces why summary judgment in favor of the FTC is appropriate. Despite the District Court's comprehensive findings on material facts at issue in this adversary proceeding, he spends more than 40 pages in his opposition and declaration attempting to re-hash those very facts. This is precisely the type of strategy that collateral estoppel is designed to prevent—turning already-tried facts by a court of competent jurisdiction on their head in hopes of gaining the opposite result on the same issues before a different court. *See Ashe v. Swenson*, 397 U.S. 436, 443-469 (1970) (collateral estoppel "stands for an extremely important principle . . . 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").

Gugliuzza's attempt to dispute the facts fails, however, because his opposition does not raise any genuine issue of material fact. Instead, it recounts a version of events flatly contradicted by the record. He relies almost entirely on his own self-serving and unsupported assertions, as well as an inadmissible expert declaration—none of which create a genuine dispute of material fact.[1] Moreover, he fails to put forward *affirmative evidence* of *specific facts* to demonstrate there is any genuine dispute. Because of this, he cannot withstand summary judgment.

Gugliuzza concedes that at most, only two elements of § 523(a)(2)(A) are in question—knowledge and intent.[2] Yet the District Court's finding that Gugliuzza was at least recklessly

[1] The FTC is separately filing an objection to the admissibility of the Declaration of Ken Deal (DE 74). *See* FTC's Evidentiary Objection to the Expert Declaration Proffered in Support of Defendant's Opposition to Motion of Federal Trade Commission for Full or Partial Summary Judgment.

[2] *See* Gugliuzza Opp. at 26-27 (DE 72). Gugliuzza also suggests that liability under the FTC Act does not meet § 523(a)(2)(A) because the FTC Act does not require participation in the deception or actual

indifferent to the truth satisfies knowledge and intent for non-dischargeability, and that finding was essential to the District Court's judgment. *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (knowledge, which can be demonstrated by reckless indifference, is required to establish individual liability under the FTC Act). Gugliuzza does not offer any contrary evidence to dispute this requisite knowledge for § 523(a)(2)(A). Further, Gugliuzza's attempt to raise an advice of counsel defense fails to create any genuine dispute regarding his intent. First, he does not establish that he can even assert the defense. Second, there is no evidence—nor does he offer any—that he sought or relied on the advice of counsel in reviewing or approving OnlineSupplier's marketing. Gugliuzza has not met his burden to come forward with specific evidence showing he is entitled to a trial on either of these issues. Nor has he raised any genuine dispute as to any material fact. Therefore, full summary judgment in favor of the FTC is proper.

II. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.

Gugliuzza has not established that there are any *genuine* issues of any *material* fact that prevents his debt from being summarily ruled non-dischargeable. Gugliuzza does not dispute the vast majority of the findings in the FTC's SUF.[3] Moreover, he does not dispute the District Court's key findings that are material to this proceeding. Instead of relying on specific evidence from the extensive trial record, he relies almost entirely on his own unsupported version of events. This is insufficient to defeat summary judgment.

misrepresentations. Gugliuzza Opp. at 25 (DE 72). This is misplaced. First, it ignores that the District Court found that Gugliuzza *in fact participated* in the deceptive marketing and that consumers were *actually misled. SUF* 125, 229; Decision 45, 48, 57. Second, those findings were essential to the District Court's judgment that Gugliuzza engaged in deceptive practices and possessed the requisite knowledge to be individually liable under the FTC Act. Decision at 44; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995) (misrepresentation or engagement in a practice likely to mislead consumers required to commit deceptive act under FTC Act); *Stefanchik*, 559 F.3d at 931 (individual liability under the FTC Act requires knowledge *and* direct participation or authority to control wrongful practice).

[3] *See* Opposition to Statement of Uncontroverted Facts (DE 75); *infra* II.C.

A. Gugliuzza's Attempt to "Dispute" Facts through Self-Serving Statements is Insufficient to Defeat Summary Judgment.

A party cannot defeat summary judgment with "unsupported conjecture or conclusory statements" or "mere allegations or denials." *Hernandez v. Spacelabs Med. Inc.,* 343 F.3d 1107, 1112 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 & n. 11 (1986); *Nissan Fire & Marine Ins. Co., v. Fritz Cos.,* 210 F.3d 1099, 1103 (9th Cir. 2000)); *Anderson*, 477 U.S. at 256-57. Self-serving affidavits "lacking detailed facts and any supporting evidence, are insufficient to create a genuine issue of material fact." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *see also Galen v. Cnty. of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007) (cannot rely on "bald assertions" that issues of material fact exist); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (no genuine issue where the only evidence presented was "uncorroborated and self-serving testimony") (citations omitted).

Rather, a party opposing summary judgment "*must set forth specific facts* showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256-57 (emphasis added); *Hernandez,* 343 F.3d at 1112 (non-moving party "must produce evidence in response"). To prevail, this must be more than "a mere scintilla of evidence" in the defendant's favor. *Stefanchik*, 559 F.3d at 929.[4] Moreover, a declaration used to support or oppose a motion must "set out facts that would be admissible in evidence." FED .R. CIV. P. 56(c)(4). Material facts are those which "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

Gugliuzza cannot overcome summary judgment because he fails to meet this standard. Instead of citing to the 16-day trial record to support his claims, Gugliuzza provides his own

[4] Discredited testimony is also insufficient. *Anderson*, 477 U.S. at 256-57 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984)).

unsupported version of the facts,[5] which serves as the entire background section of Gugliuzza's opposition.[6] His declaration recounts denial after denial of his involvement and responsibility, with no supporting evidence.[7] The little evidence he presents fails to create any genuine issue as to any material facts.[8] *See Anderson*, 477 U.S. at 256-57; *Publ'g Clearing House*, 104 F.3d at 1170.

B. Gugliuzza's Self-Serving Statements Are Unsupported or Flatly Contracted by the Record.

Notably, Gugliuzza fails to cite *any evidence* to support numerous factual assertions, including that: other individuals were responsible for marketing,[9] the sign-up pages had been approved by someone else,[10] he directed employees to make improvements to the pages,[11] he "always" relied on legal advice from in-house counsel,[12] he never held himself out as legal counsel for compliance,[13] hundreds of thousands of dollars in orders were the result of "affiliate fraud,"[14] and his efforts to reduce chargebacks were "quite successful."[15] Such unsupported

[5] *See* Gugliuzza Decl. (DE 73).

[6] *See* Gugliuzza Opp. at 1-19.

[7] *See, e.g.*, Gugliuzza Decl. ¶ 22 (denying any knowledge the webpages were deceptive or authority to control marketing); ¶ 30 (denying having any input in the webpages); ¶ 36 (denying rejecting improved disclosures); ¶ 42 (denying any attempt to defraud consumers or being willfully blind to potential for fraud); ¶ 58 (denying knowledge, reckless disregard, participation, control, and intent).

[8] His declaration sites to consulting and employment agreements, copies of OnlineSupplier webpages, a handful of emails, a complaint and documents purportedly about marketer fraud, and brief transcript excerpts. *See* Gugliuzza Decl. Exs. A-N.

[9] Gugliuzza Decl. ¶ 21.

[10] Gugliuzza Decl. ¶ 22.

[11] Gugliuzza Decl. ¶ 32.

[12] Gugliuzza Decl. ¶ 34.

[13] Gugliuzza Decl. ¶ 39.

[14] Gugliuzza Decl. ¶ 44. Gugliuzza's "evidence" does not establish that there was any such fraud or that it was responsible for the consumer complaints and chargebacks. *See* Gugliuzza Decl. Ex. J (citing to an unrelated

claims amount to nothing more than general denials and conjecture—they do not create a genuine issue of material fact. *Hernandez,* 343 F.3d at 1112; *Publ'g Clearing House*, 104 F.3d at 1170.

Moreover, these are the *same arguments* that Gugliuzza presented to the District Court. The District Court heard and considered Gugliuzza's version of events, and *rejected them* after hearing 16 days of testimony. For example, the District Court specifically found that: Gugliuzza oversaw the marketing,[16] he approved numerous sign-up pages,[17] there was no evidence Gugliuzza relied on any specific recommendations from in-house counsel,[18] he remained the final authority on legal matters,[19] his denials of any knowledge that the pages were misleading were unpersuasive;[20] the evidence "d[id] not support Gugliuzza's affiliate fraud story,"[21] and the chargeback problems were never resolved.[22]

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lawsuit that appears to pre-date any potential marketing on behalf of OnlineSupplier); Exs. K-M (citing to Commerce Planet's own statements claiming some of the advertisements were not authorized). In addition, the advertisements Gugliuzza cites as not authorized were very similar to advertisements Gugliuzza had previously approved. *Compare* Gugliuzza Decl. Ex. K (email subject line "Come to Work with EBAY Online") *with* FTC Ex. 7 (referencing email subject lines "Work Online With eBay" and "eBay Workers Needed"). Further, Commerce Planet lawyer Paul Huff testified that he never saw sufficient evidence of affiliate fraud to support Commerce Planet's claims. Ex. 65 at 19-21 (Huff Tr. Trans. 104:5-19; 105:6-13, 106:8).

[15] Gugliuzza Decl. ¶ 49. Gugliuzza makes many more factual claims that have no evidentiary support; they are not all listed here.

[16] Decision at 13 ("Mr. Gravitz reported to Mr. Gugliuzza, and Mr. Gugliuzza directed the marketing of OnlineSupplier, such as by reviewing and approving marketing agreements, approving landing and billing pages of OnlineSupplier, and reviewing weekly performance reports.); 48 (Mr. Gugliuzza continued to oversee Mr. Gravitz and to be involved in the marketing of OnlineSupplier, including reviewing and approving its sign-up pages.")

[17] Decision at 47, 49-50.

[18] Decision at 54 ("Mr. Gugliuzza did not offer evidence showing that he relied on any specific recommendations or approvals from Mr. Huff regarding OnlineSupplier's webpages.").

[19] Decision at 14 ("Mr. Gugliuzza delegated some of his legal responsibilities to Mr. Huff, but remained the final authority on legal matters.").

[20] Decision at 17, 49-52.

[21] Decision at 41-42 ("[T]here was no specific evidence linking affiliate fraud as the primary cause of consumer confusion and high chargeback rates. There was also no documentation that specific third-party marketers

Many of Gugliuzza's other unsupported claims are directly contracted by the record. For example, he claims he never held himself out as legal counsel "for all purposes."[23] Yet he signed a letter as "Legal Counsel"[24] and Commerce Planet CEO Michael Hill testified that Gugliuzza replaced Jeffrey Conrad as legal counsel.[25] Gugliuzza claims he never rejected improvements to the webpages.[26] Yet, he sent emails instructing employees to take off measures designed to affirmatively agree to the terms and conditions.[27] Gugliuzza also claims that the "only" live version of the sign-up pages the District Court reviewed was a screen shot from Gugliuzza's computer.[28] This is false. In fact, the FTC submitted complete live versions of both versions of the sign-up pages, both of which the District Court admitted through live testimony.[29]

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employed certain types of affiliate fraud . . . . There is no evidence in the record that consumers ordered OnlineSupplier directly from third-party marketing materials or that third-party marketers were responsible for the sign-up pages. While affiliate fraud undoubtedly hurt Commerce Planet, it is unclear if it hurt consumers . . . . The evidence taken as a whole does not support Mr. Gugliuzza's affiliate fraud story.").

[22] Decision at 9, 38, 40 ("OnlineSupplier also was subject to excessive credit card chargebacks in 2006 and 2007 leading to fines of more than one million dollars . . . From February 2006 to July 2007, OnlineSupplier exceeded Visa's 1% chargeback threshold for most months, reaching peaks of 5% in June 2006 and April through May 2007, 7% in June 2007, and 8% in July 2007 with certain acquiring banks . . . the chargeback problem for OnlineSupplier was never resolved.")

[23] Gugliuzza Decl. ¶ 39.

[24] *SUF* 44 (Ex. 7).

[25] Ex. 63 (Hill Tr. Trans. 139:11-140:2).

[26] Gugliuzza Decl. ¶ 33.

[27] *SUF* 242-246 (Exs. 58-59).

[28] Gugliuzza Decl. ¶ 63.

[29] *See* Ex. 62 at 2-11 (Gravitz Tr. Trans. 21:11-27:8, 109:22-111:24). Gugliuzza, on the other hand, included only a later version of the sign-up pages. *See* Gugliuzza Decl. Ex. O (dated April 2007); Decision at 7 (later version went live in February 2007).

C. Gugliuzza Has Not Demonstrated Any Genuine Dispute for the Facts He Contends Are "Disputed."

Gugliuzza claims to "dispute" 73 of the 267 facts submitted by the FTC, however, his responses show that nearly all of these are in fact *undisputed* because he fails to cite any contrary evidence or has already admitted to the fact in his answer.[30] In particular, his responses to 30 of the facts he "disputes" merely restate an immaterial part of the District Court's decision or add insignificant information that does not change the undisputed fact.[31] Another 11 facts are not disputed because Gugliuzza already admitted them in his Answer (DE 9).[32] An additional 14 facts are undisputed because he cites no evidence (other than Gugliuzza's self-serving declaration) to contradict the fact.[33] His responses to other facts contain factually inaccurate or misleading information.[34]

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[30] *See* Opposition to Statement of Uncontroverted Facts (DE 75). Under Local Rule 7056-1(c), a respondent's statement of genuine issues in response to a summary judgment motion "must identify each material fact that is disputed and *cite the particular portions* of any pleading, affidavit, deposition . . . or other document relied upon to establish the dispute and the existence of a genuine issues precluding summary judgment." L.R. 7056-1(c) (emphasis added).

[31] *See* Opposition to Statement of Uncontroverted Facts, Responses to *SUF* 24, 25, 40, 50, 51, 55, 57, 58, 64, 70, 68, 77, 78, 91, 92, 97, 98, 102, 107, 118, 119, 128, 135-137, 145, 179, 187, 249, 262.

[32] *See* Opp. to Statement of Uncontroverted Facts, Responses to *SUF* 6, 22, 23, 118, 123, 124, 126, 132, 150, 235, 267. For example, he claims to dispute that Commerce Planet operated as a holding company through subsidiaries Consumer Loyalty Group and Legacy Media, yet he admitted this exact fact in his Answer. Opp. to Statement of Uncontroverted Facts, Response to *SUF* 22; Compl. ¶¶ 9, 13; Ans. ¶¶ 9, 13. He also claims to dispute the cost of shipping and the monthly fees despite admitting these in his Answer. Opp. to Statement of Uncontroverted Facts, Responses to *SUF* 57-58; Compl. ¶ 15; Ans. ¶ 15.

[33] *See* Opp. to Statement of Uncontroverted Facts, Responses to *SUF* 59, 60, 64, 81, 86, 139, 165, 185, 186, 195, 239, 240, 261, 263; *see* L.R. 7056-1(c). The Court may consider undisputed any fact that is not properly asserted or addressed. FED. R. CIV. P. 56(e).

[34] *See* Opp. to Statement of Uncontroverted Facts, Responses to *SUF* 11, 125. Gugliuzza's characterizations of the settlements with other individual defendants is incorrect. The judgments against Gravitz and Hill were for $19.7 million, not for $192,000 and $230,000. Portions of the judgment were suspended based on the defendants' demonstrated abilities to pay. *See* Exhibits in Support of Gugliuzza Opp. at 251-253, 276-280 (DE 76-3). Further, Gugliuzza's contention that "the District Court never saw an actual live landing page" is false. The FTC submitted live versions of the sign-up pages, which it introduced through live testimony. *See* Ex. 62 at 2-11 (Gravitz Tr. Trans. 21:11-27:8, 109:22-111:24).

Gugliuzza has not met his burden to contest material facts and raises no genuine dispute. His reliance on self-serving statements and unsupported claims may create colorable issues or at best, a "mere scintilla" of evidence in his favor, but they are not enough to defeat summary judgment.

III. GUGLIUZZA'S ATTEMPT TO ASSERT AN ADVICE OF COUNSEL DEFENSE FAILS TO REBUT THAT HE ACTED WITH INTENT TO DECEIVE.

The FTC has met its initial burden by showing that Gugliuzza was at least recklessly indifferent to the fact that consumers were deceived by OnlineSupplier. Gugliuzza attempts to show that he lacked the intent to deceive required by § 523(a)(2)(A) because he relied on the advice of Commerce Planet's in-house lawyers.[35] As a preliminary matter, Gugliuzza has not established that he is entitled to assert an advice of counsel defense. The privilege, if any, belongs to Commerce Planet, not Gugliuzza. He has offered no evidence that Commerce Planet waived attorney-client privilege,[36] or that he sought or relied on any advice of counsel. Moreover, the evidence in the record directly contradicts his claims. Accordingly, he has failed to meet his evidentiary burden to establish advice of counsel as a viable defense at the summary judgment stage.

A. Gugliuzza Provides No Evidence that He Can Properly Assert an Advice of Counsel Defense.

In order to assert an advice of counsel defense, a defendant must show (1) that he fully disclosed all material facts to the attorney, (2) that he relied in good faith, and (3) that he relied on a specific course of conduct recommended by the attorney. *United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987) (citing *United States v. Conforte,* 624 F.2d 869, 877 (9th Cir.),

[35] Gugliuzza Opp. at 33-35; Gugliuzza Decl. ¶¶ 37-42.

[36] Invoking an advice of counsel defense generally requires waiving attorney-client privilege. *See Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156, 1162 (9th Cir. 1992) (party may not use the attorney-client privilege as both a sword and a shield). The burden is on the party asserting the privilege to establish all the elements of the privilege. *United States v. Munoz,* 233 F.3d 1117, 1128 (9th Cir. 2000).

cert. denied, 449 U.S. 1012 (1980); *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961) (defendant could not rely on defense where the record was silent as to whether he sought advice of counsel, laid all of the facts before counsel, and honestly and in good faith followed such advice)).[37]

Gugliuzza's claim that he relied on the advice of counsel is belied by the utter lack of evidence. *See Conforte*, 624 F.2d at 877 (defendant must show that he *actually relied* on advice). Gugliuzza cites *no instance* in which he either sought or followed the advice of one of Commerce Planet's lawyers. Instead, he again relies only on his own assertions that he sought and relied on the advice of counsel.[38] As "evidence," he only points to emails in which he instructed Paul Huff that "[y]ou will be responsible for determining if [creatives] infringe on trademarks or other legal concerns" and "[t]his is all you, Paul."[39] Yet informing someone that he is in charge is hardly evidence of seeking his legal advice, let alone that Gugliuzza ever relied on any advice.

Gugliuzza cannot establish an advice of counsel defense. First, there is ample evidence that Gugliuzza did not give access to all the facts to one of the lawyers on whose advice he claims he relied. For instance, Gugliuzza asked Huff to assure a third party that OnlineSupplier's pages were legally compliant; yet Huff did not know at the time what the OnlineSupplier pages looked like.[40] On another occasion, in response to Huff's concerns that

[37] Gugliuzza cites *In re Adeeb* for the elements of an advice of counsel defense. Gugliuzza Opp. at 33 (DE 72). In *Adeeb*, however, the court did not analyze the defense. Instead, it upheld the district court's finding that the debtor acted with intent, despite his argument that he had relied on the advice of counsel. *See First Beverly Bank v. Adeeb* (*In re Adeeb*), 787 F.2d 1339, 1343 (9th Cir. 1986).

[38] Gugliuzza Decl. ¶ 34. At the summary judgment stage, a defendant must put forward specific facts—more than mere "bald assertions"—to create a genuine issue of material fact. *Anderson*, 477 U.S. at 256-57; *Galen*, 477 F.3d at 658.

[39] Gugliuzza Decl. Ex. E, I; *see also* Ex. H.

[40] Ex. 64 (Huff Decl. ¶ 23); Ex. 65 (Huff Tr. Trans. 71:12-16).

that OnlineSupplier's advertising infringed on eBay's trademark, Gugliuzza sent Huff an email asserting that eBay had approved the use of its logo.[41] Huff only learned after the fact that eBay previously had sent a cease and desist letter several months earlier, which Gugliuzza had withheld from him.[42] Huff claims he never had access to sales figures or information about chargebacks, and was not involved in any strategy or policy meetings.[43]

Second, Gugliuzza offers no evidence that Commerce Planet attorneys ever recommended a specific course of conduct to Gugliuzza, or that he in fact followed their advice. *See Bisno*, 299 F.2d at 720. To the contrary, the evidence demonstrates that Gugliuzza disregarded their advice.[44] Finally, even if Gugliuzza could assert any reliance on counsel, the evidence demonstrates that Gugliuzza had the full picture about OnlineSupplier's marketing—including high incidence of consumer complaints,[45] excessive chargeback rates,[46] and inappropriate use of the eBay logo.[47] Thus, any reliance would not have been in good faith. *See Retz v. Samson* (*In re Retz*), 606 F.3d 1189, 1199 (9th Cir. 2010) ("advice of counsel is not a defense when the erroneous information should have been evident to the debtor") (citation omitted); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985) (citing

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[41] Ex. 64 (Huff Decl. ¶ 12, Ex. C).

[42] Ex. 64 (Huff Decl. ¶ 14).

[43] Ex. 64 (Huff Decl. ¶ 10).

[44] For example, Gugliuzza sought Huff's sign-off only after making his own changes, and told Huff he didn't want to talk about his concerns when Huff raised them. *See infra* III.B.

[45] *SUF* 175.

[46] *SUF* 202-211, 216.

[47] *SUF* 160-173.

SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972) (defendants' proven lack of good faith precluded them from relying on advice of counsel defense)).

B. The Evidence Contradicts Gugliuzza's Claim that He Sought and Relied on the Advice of Counsel.

Although Gugliuzza asserts he relied on advice from both Jeffrey Conrad and Paul Huff, he cites no evidence of ever doing so. In fact, Gugliuzza's contentions are wholly at odds with Huff's trial testimony and record evidence. Gugliuzza asserts that Conrad had set legal standards for approving advertisements, but cites no evidence to support this.[48] He also asserts that Huff "reviewed and made recommendations to improve the Online Supplier webpages."[49] Yet Huff testified that Gugliuzza sought Huff's "approval" only *after* Gugliuzza personally made changes to a sign-up page.[50] Moreover, Gugliuzza asked Huff to okay his changes without reviewing the entire sign-up process.[51]

Gugliuzza also claims that Huff was responsible for "all legal compliance."[52] According to Huff, it was "surprising" that Gugliuzza suddenly claimed in court filings that Huff was responsible for the company's marketing compliance.[53] Huff stated that he had "limited involvement in advising the Company on its disclosures" and "never had the authority to oversee the company's compliance with advertising laws or was ever really looked to for advice on disclosures in a serious way."[54] Further, Huff was "repeatedly told in no uncertain terms by

[48] *See* Gugliuzza Decl. ¶¶ 28, 30, 31(b).

[49] Gugliuzza Decl. ¶ 41.

[50] Ex. 65 (Huff Tr. Trans. 70:8-71:11).

[51] Ex. 65 (Huff Tr. Trans. 71:12-16).

[52] Gugliuzza Decl. ¶ 41.

[53] Ex. 64 (Huff Decl. ¶ 8).

[54] Ex. 64 (Huff Decl. ¶ 8).

Gugliuzza, Gravitz and Hill that [his] advice in these areas was not valued or was just another voice in the room, and in some cases it was made clear my opinion was not welcome."[55] When he did express some concerns to Gugliuzza about the landing pages, Huff testified that Gugliuzza told him he did not want to talk about it anymore and put his hands over his ears.[56]

C. The District Court's Finding of Reckless Indifference Was Necessary to Its Judgment and Satisfies Knowledge and Intent Under § 523(a)(2)(A).

Regardless of the lack of merits of Gugliuzza's advice of counsel defense, he is precluded from re-litigating that he was at least recklessly indifferent to the deceptive nature of OnlineSupplier.[57] This finding was essential to the District Court's conclusion that Gugliuzza was individually liable under the FTC Act.[58] *See FTC v. Network Servs. Depot*, 617 F.3d 1127, 1138 (9th Cir. 2010); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (FTC Act liability requires actual knowledge of an individual's deception, reckless indifference to truth or falsity, or awareness of a high probability of fraud along with an intentional avoidance of the truth). Furthermore, it satisfies knowledge and intent for purposes of § 523(a)(2)(A). *Anastas v. Amer. Savings Bank* (*In re Anastas*), 94 F.3d 1280, 1286 (9th Cir. 1996) (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); *Fogal Legware of Switz., Inc. v. Wills* (*In re Wills*), 243 B.R. 58, 64 (B.A.P. 9th Cir. 1999); *Gertsch v. Johnson & Johnson Fin.*

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[55] Ex. 64 (Huff Decl. ¶ 8).

[56] Ex. 65 (Huff Tr. Trans. 85:21-86:21).

[57] *SUF* 17, 147.

[58] Decision at 49.

Corp. (*In re Gertsch*), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999); *Advanta Nat'l Bank v. Kong* (*In re Kong*), 239 B.R. 815, 827 (B.A.P. 9th Cir. 1999).[59]

Gugliuzza argues, without support, that § 523(a)(2)(A) requires a higher standard of recklessness than the FTC Act.[60] For this proposition, he cites only one case, *Sabban*, which includes no such discussion.[61] Indeed, bankruptcy courts have *not* required any higher standard of recklessness. *Compare Kong*, 239 B.R. at 827 (equating reckless indifference with failing to examine the available source of knowledge which lay at hand and not having a reasonable ground to believe that it was in fact correct) (citing RESTATEMENT (SECOND) OF TORTS § 526 cmt. e) *with Cyberspace.Com*, 453 F.3d at 1198-99, 1202 (defendant recklessly indifferent where he reviewed deceptive checks that were designed to make it appear there was a pre-existing relationship with consumer and that automatically enrolled consumers in a monthly fee if they cashed the check and knew there were complaints); *Publ'g Clearing House,* 104 F.3d at 1171 (defendant had previously worked for similar operation that had ceased due to criminal fraud investigation and used identical scripts, and was knowingly acting under the direction of someone she knew was facing criminal charges concerning similar telemarketing activities); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1206 (C.D. Cal. 2000) (defendant actively

[59] The common practice among numerous bankruptcy courts—recognizing the difficulty of parsing out intent from knowledge—is to consider the knowledge and intent elements together. *See, e.g.*, *In re Gertsch*, 237 B.R. at 167; *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).

[60] Gugliuzza Opp. at 28-29. The alleged "loose standard" Gugliuzza cites is not drawn from any test in FTC law, but his own interpretation of fact patterns from FTC cases. This is of course not determinative of any loose or lower standard.

[61] Gugliuzza appears to cite *Sabban* in an attempt to inject an additional "purpose" prong with the intent requirement under § 523(a)(2)(A). But including "purpose" (a synonym of "intent") is just another expression of the Ninth Circuit's formulation of the § 523(a)(2)(A) elements, which require "intent to deceive." *See, e.g.*, *Citibank* (*South Dakota*), *N.A. v. Eashai* (*In re Eashai*), 87 F.3d 1082, 1086 (9th Cir. 1996) (using "intent and purpose" and "intent" interchangeably).

participated in acts crucial to the success of the scheme, including obtaining merchant bank accounts because another defendant had been rejected that were necessary to perpetuate the scheme).

Because Gugliuzza has failed offer any evidence that he sought or relied in good faith on the advice of counsel, he has not met his burden that he can assert such a defense. Therefore, he cannot avoid the preclusive effect of the District Court's findings that he was at least recklessly indifferent to the deceptive marketing. That finding establishes that he had the requisite knowledge and intent for his debt to be non-dischargeable under § 523(a)(2)(A).

IV. CONCLUSION

Gugliuzza has failed to demonstrate there is any dispute of material fact that precludes his debt from being non-dischargeable. He has not met his burden to defeat the FTC's motion or controvert the uncontroverted facts in this case. As such, summary judgment in favor of the FTC is proper. Therefore, 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 a debt procured by false representations or actual fraud and thereby excepted from Gugliuzza's discharge.

Date: June 25, 2014

Respectfully submitted,

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
Federal Trade Commission
600 Pennsylvania Ave., N.W., Mail Stop M-8102B
Washington, D.C. 20580

A true and correct copy of the foregoing document entitled: **Federal Trade Commission's Reply in Support of Its Motion for Full or Partial Summary Judgment, Bartley Declaration, and attached Exhibits** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On June 25, 2014, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

ATTORNEY FOR DEBTOR: Michael B. Reynolds (mreynolds@swlaw.com, kcollins@swlaw.com); Brett Ramsaur (bramsaur@swlaw.com, kcollins@swlaw.com)
CHAPTER 7 TRUSTEE: Richard A. Marshack (pkraus@marshackhays.com, rmarshack@ecf.epiqsystems.com)
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UNITED STATES TRUSTEE: (ustpregion16.sa.ecf@usdoj.gov)
ATTORNEY FOR FTC: Megan Bartley (mbartley@ftc.gov); Kimberly L. Nelson (knelson@ftc.gov)

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2. SERVED BY UNITED STATES MAIL:
On (*date*) _____, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

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3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on June 25, 2014, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Presiding Judge's Copy: By Overnight FedEx Delivery (sent 6/25/2014)
Honorable Catherine E. Bauer, United States Bankruptcy Court, 411 W. Fourth St., Santa Ana, CA 92701

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

6/25/2014	Megan A. Bartley	/s/ Megan A. Bartley
Date	*Printed Name*	*Signature*