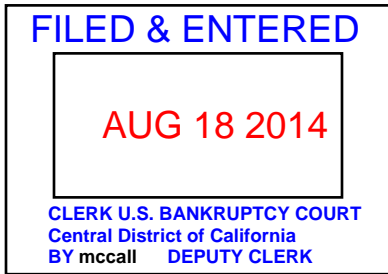


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

In re
CHARLES FRANCIS GUGLIUZZA II,
Debtor,

FEDERAL TRADE COMMISSION,
Plaintiff,
vs.
CHARLES FRANCIS GUGLIUZZA II,
Defendant.

Case No. 8:12-bk-22893-CB
Chapter 7
Adv. No. 8:13-ap-01078-CB

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Date: July 9, 2014
Time: 1:30 p.m.
Ctrm: 5D

On July 9, 2014, a hearing was held on the Federal Trade Commission's ("FTC") Motion for Summary Judgment or Summary Adjudication ("Motion") on the FTC's 11 U.S.C. § 523(a)(2)(A) cause of action against Charles Francis Gugliuzza II ("Defendant") for nondischargeability of debt.

The Court took the matter under submission.

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1 After further review of the record, the pleadings, and the Memorandum of Decision
2 and Final Judgment and Order for Permanent Injunction Against Defendant Charles
3 Gugliuzza entered in District Court case no. 8:09-cv-01324-CJC(RNBx) (together the
4 “District Court Judgment”), the Court finds that summary judgment in favor of the FTC is
5 appropriate.

6 **§ 523(a)(2)(A) Requirements for Nondischargeability**

7 A normally dischargeable debt is not dischargeable “to the extent obtained by ...
8 false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A). To
9 show that a debt is nondischargeable under § 523(a)(2)(A), a creditor must prove five
10 elements: 1) that the debtor made the representations; 2) that at the time he knew they
11 were false; 3) that he made them with the intention and purpose of deceiving the creditor;
12 4) that the creditor relied on the representations; and 5) that the creditor sustained the
13 alleged loss and damage as the proximate result of the representations that were made.
14 *In re Britton*, 950 F.2d 602, 604 (9th Cir. 1991). The creditor must prove these elements
15 by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

16 Many similarities exist between the elements required for a successful
17 § 523(a)(2)(A) action and an action under Section 5(a) of the Federal Trade Commission
18 Act (“FTC Act”) for deceptive acts or practices. Section 5(a) of the FTC Act requires a
19 showing of the following elements: 1) a representation, omission or practice; 2) that is
20 likely to mislead consumers acting reasonably under the circumstances; and 3) that the
21 representation, omission, or practice is material. *FTC v. Pantron I Corp.*, 33 F.3d 1088,
22 1095 (9th Cir. 1994). At least one court has held that the factual findings and the
23 elements required to sustain a cause of action for violation of Section 5(a) of the FTC Act
24 sufficiently establishes all elements necessary to the determination of non-
25 dischargeability under § 523(a)(2)(A). *In re Abeyta*, 387 B.R. 850, 853-54 (Bankr. D.N.M.
26 2008).

1 **Summary Judgment Standards**

2 Rule 56(c) of the Federal Rules of Civil Procedure, which applies to bankruptcy
3 adversarial proceedings pursuant to Bankruptcy Rule 7065, states that a grant of
4 summary judgment is proper if there is no genuine issue of material fact and the moving
5 party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "A party seeking
6 summary judgment always bears the initial responsibility of informing the ... court of the
7 basis for its motion, and ... [must] demonstrate the absence of a genuine issue of
8 material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to defeat a
9 motion for summary judgment, the opposing party may not simply rest on its pleading or
10 denials of the allegations. See Rule 56(e), Fed.R.Civ.P. Although the court is not
11 authorized under Rule 56 to try issues of fact, the court does have "the power to
12 penetrate the allegations of fact in the pleadings and look to any evidential source to
13 determine whether there is an issue of fact to be tried." *Repsold v. New York Life Ins.*
14 *Co.*, 216 F.2d 479, 483 (1954). "The primary purpose of a grant of summary judgment is
15 to avoid unnecessary trials when there is no genuine issue of material fact in dispute."
16 *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (1972).

17 **Collateral Estoppel Applies to Dischargeability Actions**

18 The FTC asserts that the District Court Judgment collaterally estops Defendant
19 from re-litigating the factual issues that are identical to the issues relevant to this
20 adversary proceeding.

21 The doctrine of collateral estoppel applies to dischargeability actions. *Grogan v.*
22 *Garner*, 498 U.S. 279, 284-85 n.11 (1991). Thus, when the elements of a prior claim are
23 identical to the elements required to establish an exception to discharge, it is appropriate
24 for the court to give collateral estoppel effect to those elements that "were actually
25 litigated and determined in the prior action." *Id.* at 284. Summary judgment on a non-
26 dischargeability claim may, therefore, be granted based on a prior judgment obtained

1 outside of bankruptcy provided that the prior judgment establishes all elements
2 necessary to the determination of non-dischargeability under the Bankruptcy Code.

3 In determining the preclusive effect of a prior judgment rendered by a federal
4 court, the court must apply federal principles of collateral estoppel. The Ninth Circuit in
5 *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996) stated that in order to foreclose
6 relitigation of an issue under federal collateral estoppel, three elements must be met:
7 1) the issue at stake must be identical to the one alleged in the prior litigation; 2) the
8 issue must have been actually litigated [by the party against whom preclusion is asserted]
9 in the prior litigation; and 3) the determination of the issue in the prior litigation must have
10 been a critical and necessary part of the judgment in the earlier action. *See also Clark v.*
11 *Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

12 Here, two of the three elements required for collateral estoppel are clearly present.
13 First, the issues were actually litigated in the District Court and the Defendant was a party
14 to that action. Second, the determination of the issues in the prior litigation was critical to
15 the finding of a violation of the FTC Act. The remaining requirement for collateral
16 estoppel is that the issues at stake must be identical to the ones alleged in the prior
17 litigation. Therefore, in order to grant summary judgment to the FTC, this Court needs to
18 determine whether the issues resolved in the District Court satisfy all the required
19 elements for nondischargeability under § 523(a)(2)(A).

20 **1. Did the Defendant Make the Representations?**

21 After further review of the District Court Judgment, it is obvious that the District
22 Court found representations that qualify as representations sufficient to satisfy the
23 requirements for nondischargeability under § 523(a)(2)(A). The District Court found that
24 the Defendant participated in and had authority to control the deceptive website
25 marketing of a web creation and hosting service called OnlineSupplier. *District Court's*
26 *Mem. of Decision* at 45, 48. The Defendant also saw, reviewed, and approved various
27 versions of the sign-up pages. *Id.* at 47. The District Court also found that the Defendant
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1 rejected the company's experiments in placing clearer disclosures and sending post-
2 transaction emails because they hurt conversion rates. *Id.* at 50. Furthermore,
3 Defendant's actions were not isolated. The District Court found that he had engaged in
4 sustained and continuous conduct that perpetuated the deceptive marketing of
5 OnlineSupplier for over two years. *Id.* at 57. This Court finds that the requirement under
6 § 523(a)(2)(A) that Defendant make a false representation has been met.

7 **2. Did the Defendant Know the Representations Were False?**

8 The second requirement in determining dischargeability is that the false
9 representations must have been knowingly and fraudulently made. *See Century 21*
10 *Balfour Real Estate (In re Menna)* 16 F.3d 7, 30 C.B.C.2d 1000 (1st Cir. 1994); *Longo v.*
11 *McLaren (In re McLaren)*, 3 F.3d 958, 29 C.B.C.2d 969 (6th Cir. 1993); *First Card v.*
12 *Leonard (In re Leonard)*, 29 C.B.C.2d 859, 158 B.R. 839 (Bankr. D. Colo. 1993);
13 *Comerica Bank, N.A. v. Weinhardt (In re Weinhardt)*, 156 B.R. 677 (Bankr. M.D. Fla.
14 1993); *Moodie-Yannotti v. Swan (In re Swan)*, 156 B.R. 618 (Bankr. D. Minn. 1993);
15 *Seiler v. Farley (In re Farley)*, 156 B.R. 486 (Bankr. W.D. Pa. 1993); *See also In re*
16 *Allison*, 960 F.2d 481 (5th Cir. 1992). The Ninth Circuit, in *FTC v. Network Servs. Depot*,
17 617 F.3d 1127, 1138–39 (9th Cir. 2010), found that knowledge can be established by
18 reckless indifference to the truth. Additionally, in *In re Cohn*, 54 F.3d 1108, 33 C.B.C.2d
19 849 (3rd Cir. 1995) and *In re Phillips*, 804 F.2d 930 (6th Cir. 1987), the Third and Sixth
20 Circuits respectively, found that reckless representations may be sufficient to except a
21 debt from discharge.

22 Here, the District Court found that at the very least, Defendant knew, or was
23 recklessly indifferent to the fact that the landing and billing pages were misleading.
24 *District Court's Mem. of Decision* at 49. The District Court also found that Defendant had
25 the requisite knowledge to be held individually liable for the deceptive website marketing
26 of OnlineSupplier. *Id.* at 50. Given the surrounding facts and circumstances and the
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1 District Court's specific finding that Defendant was recklessly indifferent to the misleading
2 representations of OnlineSupplier, the requirement of knowledge of falsity has been met.

3 **3. Did the Defendant Make the Representations With the Intention and**
4 **Purpose of Deceiving the Creditor?**

5 The Ninth Circuit, in *In re Kennedy* (9th Cir. 1997) 108 F.3d 1015, 1018 and *In re*
6 *Ettell*, 188 F.3d 1141, 1145 n.4 (9th Circuit 1999), found that courts may infer fraudulent
7 intent from the surrounding circumstances of a case, or from reckless conduct.

8 Alternatively, the Ninth Circuit, in *In re Anastas*, 94 F.3d 1280, 1286 (9th Cir. 1996), *In re*
9 *Houtman*, 586 F.2d 651, 656 (9th Cir. 1978) and *In re Kong*, (9th Cir. BAP 1999) 239 BR
10 815, 826, found that actual knowledge of the falsity of a statement or reckless disregard
11 for its truth, satisfies the scienter requirement for nondischargeability of a debt.

12 The Defendant was found to have known, or been recklessly indifferent to, the
13 misleading representations of OnlineSupplier on its landing and billing pages. *District*
14 *Court's Mem. of Decision* at 49. Because the Defendant knew of the misrepresentations,
15 but still rejected the company's experiments in placing clearer disclosures and sending
16 post-transaction emails, it is logical to infer fraudulent intent from the circumstances. *Id.*
17 at 50. Defendant's rejection of improved disclosure along with the District Court's specific
18 finding of reckless indifference to the misleading representations satisfies the element of
19 intent.

20 **4. Did Creditors Rely on the Representations?**

21 With respect to the fourth element for dischargeability, the evidence indicates that
22 Defendant's deceptive conduct actually misled consumers because they reasonably
23 relied on the deceptive claims. *Statement of Uncontroverted Facts and Conclusion of*
24 *Law In Support of Federal Trade Commission's Motion for Full or Partial Summary*
25 *Judgment*, 86-88, 91-98, 100-115. The FTC alleged that over 500,000 consumers
26 purchased products from OnlineSupplier. Although the District Court did not make a
27 finding regarding that number, the District Court did find that "[a] conservative floor then is
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1 that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up
2 pages.” *District Court’s Mem. of Decision* at 67. Therefore, the requirement that the
3 creditor relied on the representations has been met.

4 The issues presented and resolved in the District Court satisfy all the required
5 elements for nondischargeability under § 523(a)(2)(A). Consequently, summary
6 judgment in favor of the FTC is appropriate. All of the elements necessary for collateral
7 estoppel are present.

8 **CONCLUSION**

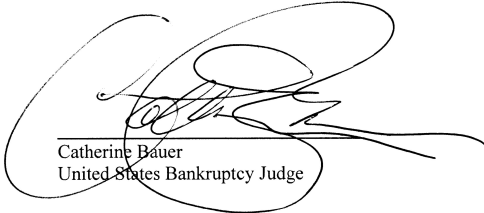
9 IT IS ORDERED:

10 The Motion is granted.

11 The FTC may submit a judgment consistent with this Order.

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23 Date: August 18, 2014


Catherine Bauer
United States Bankruptcy Judge