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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

COMMERCE PLANET, INC., a corporation,

and

MICHAEL HILL, CHARLES GUGLIUZZA, and AARON GRAVITZ, individually and as officers of COMMERCE PLANET, INC.,

Defendants.

Case No. SACV-09-01324 CJC (RNBx)

PLAINTIFF FTC'S OPPOSITION TO DEFENDANT GUGLIUZZA'S MOTIONS FOR SUMMARY JUDGMENT NO. 1 AND NO. 2

Hearing
Date: Sept. 12, 2011
Time: 1:30 p.m.
Place: Courtroom 9B,
United States Courthouse
411 West 4th Street
Santa Ana, CA

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I. INTRODUCTION

Defendant Gugliuzza's Motion for Summary Judgment No. 1 ("MSJ #1") (Dkt. #150) and Motion for Summary Judgment No. 2 ("MSJ #2") are based on immaterial and incomplete factual assertions.[1] Nearly all of Defendant's "uncontroverted facts" – which rely on cherry-picked documents and testimony, irrelevant and unreliable expert opinions, and a self-serving declaration by Defendant – are contradicted by reliable evidence.

The FTC alleges in its First Amended Complaint ("FAC") (Dkt #146) that Commerce Planet used the offer of a "free" information kit to lure consumers into providing their credit card information, which was later used to charge consumers for membership in OnlineSupplier without their knowledge or consent. Defendant argues that there is no genuine dispute of material fact that the marketing of OnlineSupplier was not unfair or deceptive. (MSJ #1 at 6–8) However, the FTC's allegations are supported by overwhelming evidence, including thousands of consumer complaints to the company, the Better Business Bureau ("BBB"), and government agencies; a high rate of chargebacks and minimal product usage; several relevant and reliable expert reports; deposition testimony by company insiders; and internal documents.

The FTC also alleges that Defendant is personally liable for harm caused by Commerce Planet's unfair and deceptive practices because (1) he had authority to control the practices, and (2) he knew or should have known that consumers were deceived by Commerce Planet's OnlineSupplier landing/sign-up pages and marketing materials. Defendant does not directly challenge the FTC's allegation that he had the ability to control the company's marketing efforts. Instead, he argues that because he relied on the opinion of other Commerce Planet insiders

[1] Defendant's two memoranda of points of authorities in support of his motions for summary judgment together exceed the page limit for a memorandum of points and authorities. *See* Civ. Local R. 11-6.

that the OnlineSupplier negative option offer was adequately disclosed, he should not be held liable for Commerce Planet's illegal conduct. (MSJ #1 at 9–15) Defendant's "good faith" argument is irrelevant as a matter of law and is contradicted by the fact that he was informed that there was a problem with the offer. Defendant was aware that customers frequently complained that they did not intend to sign up for OnlineSupplier, that the chargeback rate was high, and that the product usage rate was very low, and he was warned by a subordinate attorney that disclosure of the offer might be inadequate. In any case, the mere fact that Defendant participated in and had the ability to control Commerce Planet's marketing practices is sufficient to raise a genuine issue of material fact as to his knowledge of the company's deceptive conduct.

Defendant also contends that there is no need for injunctive relief (MSJ #2 at 5–6) and that the FTC has a limited or no ability to seek equitable monetary relief (MSJ #2 at 7–11). Defendant's arguments are based on erroneous legal precedent and ignores the overwhelming weight of the evidence generated through discovery in this matter.

The Court has observed that "the FTC's deceptive practices and unfair practices claims are inherently factual inquiries" (Dkt. #145 at 3) and that Defendant "relies on an expert opinion and deposition testimony in order to support his motions, which often raise issues of credibility reserved for the finder of fact at trial" (Dkt. #157 at 1). As detailed in this Opposition, the facts underlying Defendant's motions are in dispute, as is the credibility of Defendant and his experts. Accordingly, Defendant's motions should be denied.

II. ARGUMENT

A. Standard for Summary Judgment

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). A factual issue is "genuine" when there is

sufficient evidence that a reasonable trier of fact could resolve the issue in the non-movant's favor, and an issue is "material" when its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating either that there are no genuine material issues or that the opposing party lacks sufficient evidence to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractor Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). Once this burden has been met, the party resisting the motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Anderson*, 477 U.S. at 255.

B. There is a genuine dispute of material fact that the OnlineSupplier landing/sign-up pages were deceptive.

Defendant's claim that "the [OnlineSupplier negative option] disclosures were neither unfair nor deceptive" (MSJ #1 at 6) is contradicted by reliable evidence that consumers were deceived by the OnlineSupplier landing/sign-up pages. The evidence of deception includes thousands of consumer complaints, a long and persistent history of chargebacks, and internal Commerce Planet documents showing that consumers did not understand the terms and conditions of the OnlineSupplier negative option offer and that very few, if any, consumers who were charged for OnlineSupplier ever used the product.

1. Legal Standard for Deception

Section 5 of the FTC Act, 15 U.S.C. § 45 (2006), prohibits deceptive or unfair acts or practices in or affecting commerce. To establish that Commerce Planet engaged in a deceptive act or practice in violation of Section 5, the FTC

must satisfy three prongs: (1) that Commerce Planet made a representation or omission; (2) that the representation or omission was likely to mislead consumers acting reasonably under the circumstances; and (3) that the representation or omission was material. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). The Ninth Circuit has held that proof of actual deception is unnecessary but that "such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Evidence of actual deception includes evidence of consumer complaints, a high rate of chargebacks, and a low rate of product usage. *Id.*; *FTC v. MacGregor*, 360 Fed. Appx. 891, 894 (9th Cir. 2009). Finally, the FTC also is not required to show that every reasonable consumer would have been, or in fact was, misled. *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009).

2. The OnlineSupplier landing/sign-up pages were deceptive.

The record contains ample evidence showing that Commerce Planet's OnlineSupplier landing/sign-up pages were misleading. First, there is direct evidence of deception, including:

- Thousands of complaints submitted to government agencies and the BBB and produced from the files of Commerce Planet, many of which came from consumers who said they were not told they needed to cancel a trial membership in OnlineSupplier in order to avoid charges. (Exh. 163 (Supp. Decl. of Rick Copelan) ¶ 4; Copelan Depo. at 76:4–20; Gale Decl. 3d (Dkt. #137); Roth Depo. at 172:13–173:15)
- Testimony from the Commerce Planet customer service manager that the company received about 100 calls a day, most of which were complaints from consumers who said they agreed to the $1.95 shipping and handling charge for the Online Auction Kit but did not

realize there would be a recurring charge for OnlineSupplier. (Guardiola Depo. at 72:22–73:19)

- Testimony of Chris Seidel, former president of Commerce Planet's Consumer Loyalty Group, that few customers ever successfully used the product and that the "vast majority" of paying customers never purchased any products from the wholesale warehouse. (Seidel Depo. at 116:8–117:3, 123:10–124:11)
- Documents and testimony linking Commerce Planet's high level of chargebacks and refund demands to the lack of a clear and conspicuous disclosure of the OnlineSupplier terms and conditions. (Lynch Depo. at 65:1–65:20, 67:2–67:15, 69:10–70:24, Capoccia Depo. at 16:19–19:25, 30:17–33:13, 35:4–19; Exhs. 40, 55, 78; Roth Depo. at 64:5–65:15)
- Testimony that OnlineSupplier had little value to consumers. (Gugliuzza Depo. at 45:8–45:24; Foucar Decl. ¶ 4; Hill Depo. (Jan. 14, 2011) at 20:13–22:22, 25:17–24, 28:19–29:11; Brooks Depo. at 145:9–20; Roth Depo. at 42:16–44:4, 44:20–46:23)

In addition to this direct evidence, three expert witnesses have opined that the OnlineSupplier landing/sign-up pages are deceptive on their face. Jennifer King reviewed the OnlineSupplier landing/sign-up pages and found that "[m]ost consumers would be unaware that they had consented to a negative option and were enrolled in a continuity plan upon completion of the OnlineSupplier.com checkout process." (Exh. 356 (King Report) at 3) Molly Petullo found, *inter alia*, that "OnlineSupplier's landing/sign-up pages and marketing materials do not meet the fundamental standards of ethical internet marketers." (Exh. 392 (Petullo Rebuttal Report) at 4) Dr. Terence A. Shimp concluded that "the disclosure statement should have been placed [prior to the submit button] so as to adequately inform potential customers." (Exh. 395 (Shimp Supp. Rebuttal Report) at 3–4)

3. Defendant's "undisputed facts" do not show that consumers were aware of the negative option offer.

Defendant cites the reports of three defense experts – Dr. Kenneth R. Deal, Kenneth J. Eisner, and Stefano Vranca – for the proposition that the negative option disclosures were not deceptive or unfair. (MSJ #1 at 7–8) Even if the opinions of these experts were undisputed – which is not the case – they are not based on reliable, admissible evidence and are not the product of reliable principles and methods. Defendant's experts' opinions should not be accorded any weight.

As detailed in the FTC's Motion for Order *in Limine* to Exclude Expert Testimony of Dr. Kenneth R. Deal (Dkt. #101), the purported consumer survey evidence cited by Defendant as evidence that the OnlineSupplier landing/sign-up pages were not deceptive lacks foundation and is irrelevant to the issues in this case. The survey lacks foundation because the testifying expert, Dr. Deal, had no role in the design or execution of the survey and thus cannot testify that the survey was conducted by a qualified expert in accordance with accepted principles of survey research. The survey is irrelevant to the issues in this case because it was merely a reading test; it did not examine whether respondents would have even seen the OnlineSupplier negative option offer in the first place. Moreover, Dr. Deal has refused to draw any conclusions about actual OnlineSupplier customers from the results of the survey, instead confining his opinions to the survey respondents alone.

Mr. Eisner's expert opinions are not the product of reliable principles and methods. Many of his opinions lack foundation or are based on a selective reading of the record in this case. (*See* Exh. 356 (King Rebuttal Report) at 4–6; Exh. 392 (Petullo Rebuttal Report) at 3–6; Exh. 395 (Shimp Supp. Rebuttal Report) at 2–3, 7–8; Eisner Depo. at 54:17–57:25, 59:12–60:11, 67:4–71:6, 101:4–102:12,

225:23–226:1) Mr. Eisner's discussion of Doba.com is irrelevant. (Exh. 356 (King Rebuttal Report) at 6–7; Exh. 395 (Shimp Supp. Rebuttal Report) at 7)

Finally, Mr. Vranca's opinions concerning OnlineSupplier cancellation rates are unsubstantiated, incorrect, and irrelevant. Mr. Vranca failed to lay a foundation for or otherwise explain how he arrived at his conclusions. (*See* Becker Decl. ¶¶ 4–5) In addition, his conclusion that 46.32% of consumers cancelled their membership during the "free trial" period is incorrect. Only 25% of OnlineSupplier customers cancelled their membership during the "free trial" period. (Becker Decl. ¶¶ 7–8) In any event, even if 46.32% consumers were aware of the negative option, or became aware before the expiration of the trial period, this figure still indicates that upwards of 50% of consumers were deceived. Likewise, Mr. Vranca's conclusions concerning the percentages of customers whose memberships lasted longer than sixty or ninety days are irrelevant. Negative options do not require affirmative action by the customer, so information on the duration of membership cannot – by definition – support a claim that *any* number of customers "actively" maintained their memberships. (*See* MSJ #1 at 8) Moreover, many consumers do not regularly and carefully check their monthly charges. (*See, e.g.*, Exh. 395 (Shimp Supp. Rebuttal Report) at 6; Becker Depo. at 83:5–87:14) It cannot be inferred that merely because a customer did not cancel before sixty or ninety days that he or she was aware of the negative option offer.

C. There is a genuine dispute of material fact that Commerce Planet's practice of charging consumers without their express, informed consent was unfair.

Count II of the FAC alleges that Commerce Planet engaged in the unfair practice of assessing monthly charges against consumer's credit cards without their express, informed consent. Defendant does not specifically address Count II in his MSJ #1. Instead, he argues that "[t]here is no empirical evidence of any unfairness or deception arising from the negative option disclosures on the

OnlineSupplier website." (MSJ #1 at 7) In doing so, Defendant conflates Counts I and II, each of which is governed by a different legal standard.

1. Legal Standard for Unfairness

To establish that an act or practice is unfair, the FTC must show (1) that it causes or is likely to cause substantial injury to consumers; (2) that the injury is not reasonably avoidable by consumers themselves; and (3) that the injury is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n); *FTC v. Neovi*, 604 F.3d 1150, 1155 (9th Cir. 2010).

2. Commerce Planet's practice of charging consumers without their express, informed consent was unfair.

Here, the FTC easily satisfies each prong. As to the first prong, the challenged practice caused substantial injury. The FTC may satisfy this prong with evidence that consumers were injured "by a practice for which they did not bargain." *Id.* at 1157; *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000). Moreover, an injury may be "sufficiently substantial" if it results in a "small harm to a large number of people." *Neovi*, 604 F.3d at 1157; *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010) Here, more than 380,000 consumers were each charged the OnlineSupplier monthly membership fee of between $29.95 and $59.95 for at least one month. (Becker Decl. ¶ 8) The total estimated consumer harm exceeds $39 million. (Exh. 363 (Becker Expert Report) at 4)

As to the second prong, the victims were not able to avoid the injury. To determine unavoidability, "courts look to whether the consumers had a free and informed choice." *Neovi*, 604 F.3d at 1158. As described above, more than 380,000 consumers did not – and could not – consent to have their credit cards charged for the simple reason that they did not see the offer for OnlineSupplier's negative option continuity plan ("negative option plan"). Thus, consumers could not have reasonably avoided the charge.

Finally, as to the third prong, it is easily satisfied "when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition." *J.K. Publ'ns*, 99 F. Supp. 2d at 1201 (quoting *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114, at *32 (N.D. Ga. Sept. 30, 1997)). Commerce Planet's victims received no countervailing benefits from being forced to purchase its negative option plan without their consent. As evidenced by the complaints and the low product usage rate, many consumers were charged for a plan that they did not want.

D. There is a genuine dispute of material fact that Defendant is individually liable for equitable monetary relief.

As a threshold matter, Defendant's claim that "[t]here is no evidence showing that [he] knew of or was recklessly indifferent to purported misrepresentations or unfairness" (MSJ #1 at 10), even if true, is irrelevant: Subjective intent to deceive or actual knowledge of the deception is not necessary to prove individual liability. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). However, the record contains ample evidence to show that Defendant was, at the very least, recklessly indifferent to the deceptiveness of the OnlineSupplier landing/sign-up pages and marketing materials.

1. Standard for Individual Liability

To hold an individual liable for equitable monetary relief for violations of the FTC Act, the FTC must show (1) either that the individual participated in the violative conduct or had the authority to control the conduct, and (2) that the individual knew or should of known of the violative conduct. *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994); *Amy Travel*, 875 F.2d at 574; *see also FTC v. World Media Brokers*, 415 F.3d 758, 768 (7th Cir. 2005) (direct participation in conduct not required). The knowledge requirement is met if the defendant had actual knowledge of the misrepresentations, was

recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth. *Amy Travel*, 875 F.2d at 574; *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). Personal participation in the violative practices can demonstrate knowledge. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999). Similarly, the "degree of participation in business affairs is probative of knowledge." *Am. Standard Credit Sys.*, 874 F. Supp. at 1089. Knowledge can also be established with evidence that the defendant had been advised by counsel about problems with marketing materials. *Stefanchik*, 559 F.3d at 931.

2. Defendant participated in the violative practices.

Defendant personally reviewed and approved OnlineSupplier landing/sign-up pages – the very pages that led many consumers to unwittingly pay for services they had never agreed to. (Exh. 25 (Gravitz Decl.) ¶¶ 12–13; Hill Depo. (Jan. 14, 2011) at 95:8–97:13, 111:1–18; Gravitz Depo. at 141:15–24, 158:25–160:2; Exh. 92; Exh. 97; Exh. 109; Gugliuzza Depo. at 103:11–105:18, 164:23–165:2)

Additionally, Defendant rejected a recommendation that Commerce Planet redesign the OnlineSupplier landing/sign-up pages to obtain consumers' express consent to the OnlineSupplier terms and conditions *before* completing the transaction. (Exh. 25 (Gravitz Decl.) ¶ 13) Defendant also rejected the advice of in-house counsel that the negative option offer be made more clear and conspicuous. (Exh. 252 (Huff Decl.) ¶¶ 21, 23)

3. Defendant was heavily involved in the business affairs of the company and had authority to control its marketing.

The evidence shows that Defendant was involved in, and had the ability to control, the marketing of OnlineSupplier. Defendant was retained by the board of directors of Commerce Planet in May 2005 to review the company's operations

and offer recommendations for ways to bring the company to profitability.[2] (Exh. 173 (Hill Decl.) ¶ 15) Defendant conducted in-depth interviews of all managers and reviewed the company's books and operations, and presented the board of directors with his findings and recommendations. (*Id.* ¶ 16)

In June 2005, the board of directors hired Defendant to oversee implementation of his recommendations. (*Id.* ¶ 17) Although his position was styled as that of a "consultant," Defendant exercised broad authority over company operations: He had day-to-day management responsibility for profit and loss ("P&L") and marketing, he participated in the hiring and firing of employees, and he received reports from department heads and held regular meetings with them. (*Id.* ¶¶ 18–20; Exh. 25 (Gravitz Decl.) ¶¶ 7–8, 12) Defendant, who is an attorney, also took responsibility for reviewing contracts and marketing materials for the company's products, including the OnlineSupplier landing/sign-up pages. (Exh. 173 (Hill Decl.) ¶ 18; Exh. 25 (Gravitz Decl.) ¶¶ 7, 12) He also acted as the company's attorney in legal disputes involving the OnlineSupplier, and he oversaw the company's reorganization and rebranding in June 2006. (Exh. 173 (Hill Decl.) ¶ 20)

Defendant joined the Commerce Planet board of directors and assumed the title president in September 2006. (Exh. 18; Exh. 260) As president, he was compensated at the same level as the CEO, Michael Hill. (Gugliuzza Depo. at 87:3–9, 125:10–21; Exh. 173 (Hill Decl.) ¶ 19) Defendant managed the company's CFO and CTO as well as the presidents of Commerce Planet's wholly-owned subsidiaries. (Exh. 44 (Brooks Decl.) ¶ 2; Foucar Decl. ¶ 5; Gugliuzza Depo. at 212:17–22) He also continued to have a direct role in the marketing and sale of OnlineSupplier, including reviewing and approving or rejecting revisions

[2] The term "Commerce Planet" as used herein refers to Commerce Planet, Inc., and its predecessor, NeWave, Inc. NeWave was reorganized and renamed Commerce Planet in June 2006. (Exh. 173 (Hill Decl.) ¶¶ 9–10)

to the OnlineSupplier landing/sign-up pages. (Exh. 25 (Gravitz Decl.) ¶ 14) Defendant continued to play a role at Commerce Planet and in the marketing of OnlineSupplier for several months after he resigned his position as president. (Roth Depo. at 69:14–71:5, 167:12–25)

4. Defendant was informed that many consumers were not aware of the OnlineSupplier negative option offer.

Finally, there is substantial evidence that Defendant was informed consumers found the OnlineSupplier marketing materials and landing/sign-up pages to be misleading, including evidence of the following:

- Commerce Planet's customer service manager, Jose Guardiola, informed Defendant that large numbers of customers were complaining and requesting refunds because they had not intended to sign up for OnlineSupplier. (Exh. 301 (Guardiola Decl.) ¶¶ 4, 8–9; Guardiola Depo. at 52:23–53:22, 73:21–76:4, 136:10–138:21)
- Defendant was informed about the company's high rate of chargebacks. (Exh. 44 (Brooks Decl.) ¶¶ 10–13; Exh. 25 (Gravitz Decl.) ¶ 13) Defendant even helped prepare a document for Visa that acknowledged a link between Commerce Planet's high chargeback rate and the lack of a clear and conspicuous disclosure on the OnlineSupplier landing/sign-up pages. (*See* Exh. 44 at CP 001178)
- The BBB forwarded hundreds of complaints to Commerce Planet concerning the company's deceptive marketing practices while Defendant worked there. (Exh. 160 (Copelan Decl.) ¶ 4)

Moreover, Defendant's personal participation in the violative practices (*see supra* Section II.D.2) put him in position to know that the disclosures were facially inadequate, *see Affordable Media*, 179 F.3d at 1235, especially given Defendant's past experience in e-commerce. (*See* Gugliuzza Depo. at 95:18–20, 95:25–96:4) Likewise, Defendant's heavy involvement in all aspects of Commerce Planet's

business affairs (*see supra* Section II.D.3) gives rise to an inference of knowledge. *See Am. Standard Credit Sys.*, 874 F. Supp. at 1089.

Additionally, Defendant's actions as president of Commerce Planet were consistent with his knowledge that consumers were likely unaware of the negative option offer. When Defendant learned that the FTC was beginning to crack down on negative option schemes, he sent Mr. Huff to attend an FTC workshop on negative options with express instructions not to identify himself as being affiliated with Commerce Planet. (Exh. 252 (Huff Decl.) ¶ 16, Exhibit F ("Very important, do not register with the Commerce Planet name or any affiliated Commerce Planet connections."))

E. There is a genuine dispute of material fact as to whether this matter is moot as to Defendant.

Defendant asserts that summary judgment is appropriate on the issue of whether a permanent injunction ("PI") should issue. (MSJ #2 at 5–6) Defendant has misread the relevant cases and ignored the evidence justifying a PI in this case.

1. The law cited by Defendant does not support his argument that a permanent injunction should not issue.

To support a PI, the FTC must demonstrate some risk of recurrent violation. There must be a "cognizable danger of recurrent violations," *United States v. W.T. Grant Co*., 345 U.S. 629, 633 (1953), or "a reasonable likelihood of future violations." *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *FTC v. Magui Publishers, Inc*., 1991 U.S. Dist. LEXIS 20452, at *44 (C.D. Cal Mar. 28, 1991).

None of the cases on which Defendant relies, however, discusses the evidence necessary to demonstrate the risk of a recurrent violation. *FTC v. Braswell*, 2005 U.S. Dist. LEXIS 42976 (C.D. Cal. Sept. 27, 2005), involved a good faith defense, not a claim that the defendant had abandoned the violative conduct. *Id.* at *38. In *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd per curiam*, 2009 U.S. App. LEXIS 27388 (11th Cir.

Dec. 15, 2009), the court noted that, "[a]lthough this court may not grant injunctive relief in favor of the FTC if there is *no likelihood* that the defendants' violations will recur, 'the fact that illegal conduct has ceased does not foreclose injunctive relief.'" *Id.* at 1209 (emphasis added) (citation omitted). Finally, *FTC v. Evans Products*, 775 F.2d 1084 (9th Cir. 1985), involved a radically different issue: *preliminary* injunctive relief against a subsidiary of a corporation that had filed for bankruptcy, that had not yet been found to violate the law, and that had ceased the conduct years before the FTC's filing. *Id.* at 1088. Critically, the district court had found that the FTC was unlikely to succeed in proving FTC Act violations. *Id.* at 1085–86.

In fact, courts in cases brought under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006), have been reluctant to find injunctive relief inappropriate simply because the illegal conduct has ceased. *Affordable Media*, 179 F.3d at 1237 (injunction case does not become moot "merely because the conduct complained of was terminated, if there is a possibility of recurrence, since otherwise the defendants would be free to return to [their] old ways") (quoting *Am. Standard Credit Sys.*, 874 F. Supp. at 1087); *Am. Standard Credit Sys.*, 874 F. Supp. at 1087 (Because "Defendants have failed to show that there is no possibility that the alleged offending conduct will recur, the fact that Defendants have terminated their behavior is irrelevant."); *accord Nat'l Urological Group*, 645 F. Supp. 2d at 1209.

The burden is on the defendant to show "there is no reasonable expectation that the wrong will be repeated." *TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981). The burden of demonstrating mootness is a heavy one. *Id.* It must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*; *see Affordable Media*, 179 F.3d at 1238 (standard for the voluntary cessation exception to mootness is "whether the defendant is free to return to its illegal action at any time").

When a court evaluates the likelihood of recurrent violations, "[t]he existence of past violations may give rise to an inference that there will be future violations." *Murphy*, 626 F.2d at 655. The fact that a defendant is not currently violating the law "does not preclude an injunction." *Id.* A court should assess such factors as "the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." *Id.* A defendant's promise not to engage in violations in the future carries little or no weight. *Treves v. Servel, Inc.*, 244 F. Supp. 773, 776 (S.D.N.Y. 1965); *see TRW*, 647 F.2d at 953 ("promises to refrain from future violations, no matter how well meant, are not sufficient to establish mootness").

Further, it has "long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct." *Armster v. United States District Court for the Cent. Dist.*, 806 F.2d 1347, 1359 (9th Cir. 1986); *see also FTC v. Warner Chilcott Holdings Co. III*, 2007 U.S. Dist. LEXIS 4240, at *27–28 (D.D.C. Jan. 22, 2007) (case is not moot where defendants insist upon legality of challenged practices).

2. Permanent injunctive relief against Defendant is necessary.

Defendant's claim that a PI is unwarranted relies on disputed facts. Even if his facts were not disputed, Defendant could not satisfy his heavy burden to demonstrate that there is no danger of recurrent violation.

First, the timing of Defendant's divorce from Commerce Planet does not support Defendant's position. Although he resigned as president of Commerce Planet in early November 2007 (Gugliuzza Decl. (Dkt. #112) ¶ 18), he continued to exercise executive authority until March 2008 (Gugliuzza Depo. at 150:19–151:8; Roth Depo. at 69:14–71:5, 81:5–83:2, 173:19–174:17; Exh. 252

(Huff Decl.) ¶ 25), and he remained an active member of the Commerce Planet board of directors until May 2008 (Hill Depo. (Jan. 14) at 191:3–5), more than two months after the company received the FTC's Civil Investigative Demand. (*See* Defendant Charles Gugliuzza's Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment No. 2 (Dkt. #153) at 2) As noted above, courts routinely reject the notion that post-notice abandonment is a defense to the issuance of prospective relief. *Armster*, 806 F.2d at 1359; *Warner Chilcott Holdings*, 2007 U.S. Dist. LEXIS 4240 at *24 (courts should be wary "when abandonment seems timed to anticipate suit"). Moreover, his assertion that "this case has no merit and that I have done nothing wrong" (Gugliuzza Decl. ¶ 20) does not show that his decision to leave Commerce Planet involved any "recognition of the initial illegality of that conduct." *See Armster*, 806 F.2d at 1359; *Warner Chilcott Holdings*, 2007 U.S. Dist. LEXIS 4240 at *27–28.

Second, Defendant's assertion that there is no possibility of recurring violations is supported only by his say-so (Gugliuzza Decl. (Dkt. #112) ¶ 20), a position rejected by the courts. *See TRW*, 647 F.2d at 953; *see also Publ'g Clearing House*, 104 F.3d at 1171 ("A conclusory, self-serving affidavit . . . is insufficient to create a genuine issue of material fact."). Indeed, the evidence shows that Defendant has made a career in e-commerce, and continues to do so right up to the present. He testified at his deposition: "[Before Commerce Planet,] I had certainly worked in the ecommerce field. It was my first job out of college. So if I were going to identify with a career path, it would be ecommerce. And I'm still employed in ecommerce to this day." (Gugliuzza Depo. at 95:25–96:4)

The evidence also belies his argument that he was inexperienced when he started with Commerce Planet. (*See* Gugliuzza Decl. (Dkt. #112) ¶¶ 3–4) Far from making his "lack of experience known to the board" (*id.* ¶ 3), Defendant held himself out as experienced and knowledgeable in the e-commerce arena. On April

5, 2005, Defendant wrote the board of directors of Commerce Planet to express his interest in the job of CEO. (Exh. 3) He touted his "management expertise in team building and deployment of strategic initiatives" and boasted: "I have throughout my career been involved with entrepreneurial enterprises and have successfully launched companies, built effective management teams and have created effect[ive] marketing, advertising and branding campaigns." (*Id.*) Soon thereafter, he wrote the chair of the board of directors that he was "very excited about the opportunity and believe I can make an immediate impact within the first month." (Exh. 4) Defendant's consulting agreement with Commerce Planet even recited that he "is experienced in matters regarding e-commerce [and] direct marketing." (Exh. 11 at DCM 275)

Moreover, in late June, after delivering the assessment of Commerce Planet that was the subject of his first consulting agreement (Gugliuzza Decl. ¶ 3), he wrote the chair of the board of directors about a second consulting agreement to "train existing management and staff, restructure your current infrastructure (which is in dire need of repair) and ultimately achieve organic profitability for a company that as recent as last quarter lost more than $1,000,000.00. In addition, I would be required to provide your management team with all of my operational knowledge and business contact information within a relatively short time period. . . . I have proven that I am capable of providing the shareholders with the return on their investment that they were expecting in regards to share trading volume, share value and organic company revenues." (Exh. 9) Thus, while it may be convenient for Defendant to portray himself now as a naif in the world of internet marketing, his statements to his future employer reflect a very different level of experience.

The fact that Defendant was experienced in e-commerce before he arrived at Commerce Planet and that he continues to be involved in e-commerce – indeed that his career has consisted almost entirely of e-commerce – is significant. It means that once this case concludes, he will have the means, opportunity, and

expertise to yet again exploit this medium to deceive consumers. Whether his present job involves negative option marketing or direct consumer interface is of no moment. Absent injunctive relief, nothing keeps him from leaving his current job for one more akin to his role at Commerce Planet, which yielded approximately $3.75 million in salary, bonuses, and stock awards during his two-plus years as *de facto* chief operating officer and president. (*See infra* Section II.F.3)

In light of the requirement that Defendant demonstrate no likelihood of recurrence, the evidence that he is an experienced practitioner of online marketing, his failure to recognize the wrongful nature of his conduct, and his failure to provide more than his promise not to engage in negative option marketing mean that he cannot meet the standard for summary judgment on this issue.

F. There is a genuine dispute of material fact as to the amount of equitable monetary relief for which Defendant is liable.

Defendant argues that the FTC is not entitled to monetary relief because (1) Section 13(b) of the FTC Act contains no explicit grant of authority to seek such relief; (2) the Supreme Court's holding in *Great-West Life Ins. Co. v. Knudson*, 534 U.S. 204 (2002), limits such relief to funds that can be traced from injured consumers to Defendant; (3) nearly thirty years of Ninth Circuit precedent is not on point; and (4) the undisputed facts show that Defendant did not receive any funds paid by OnlineSupplier customers or the proceeds of such payments. (*See* MSJ #2 at 7–11) Defendant's legal argument is fatally flawed, and his factual presentation is simplistic and fails to take into account the substantial rewards he reaped from his stewardship of Commerce Planet and its subsidiaries.

1. This Court has the authority to grant equitable monetary relief in a case brought under Section 13(b) of the FTC Act.

While the broad language of Section 13(b) of the FTC Act does not include an explicit grant of authority to courts to award monetary relief, every court that

has considered the question has concluded that courts do indeed have that authority. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469–70 (11th Cir. 1996). Even the Second Circuit, which in *FTC v. Verity Int'l Ltd.*, 443 F.3d 48 (2d Cir. 2006), appeared to limit the measure of monetary relief that the FTC can seek, has now clarified unequivocally that "Section 13(b) permits a court to order ancillary equitable relief, including monetary relief." *FTC v. Bronson Partners, LLC*, 2011 U.S. App. LEXIS 17203, at *8 (2d Cir. Aug. 19, 2011). The availability of monetary relief for consumers injured by violations of the FTC Act is thus settled law in the Ninth Circuit and in every circuit that has considered the issue; to suggest otherwise is to ask the Court to reject nearly thirty years of unambiguous precedent.

2. The FTC need not satisfy any tracing requirements to obtain monetary relief under Section 13(b).

Defendant's argument that the FTC's monetary recovery pursuant to Section 13(b) is limited to funds that can be traced to Defendant is inconsistent with Ninth Circuit precedent and, since the time of Defendant's filing, has been explicitly rejected by the Second Circuit.

a. Defendant's reliance on *Great-West Life* is misplaced.

Defendant argues that court decisions that have interpreted Section 13(b) to allow for monetary relief absent tracing consumer money to the defendant are inconsistent with a Supreme Court case interpreting the private enforcement provisions of the Employee Retirement Income Security Act ("ERISA") – *Great-West Life Ins. Co. v. Knudson*. As Defendant acknowledges, the Second Circuit's decision in *Verity* is "the only circuit court decision to squarely address the impact

of *Great-West Life* on the scope of relief available under Section 13(b)." (MSJ #2 at 9) Last week, the Second Circuit revisited and clarified its position on the availability of monetary relief under the FTC Act and, in doing so, has explicitly rejected Defendant's argument. *Bronson Partners*, 2011 U.S. App. LEXIS 17203 at *14, 25–28, 34–36.

In *Bronson Partners*, the Second Circuit upheld the district court's entry of a monetary award in favor of the FTC of $1.9 million against corporate and individual defendants for violations of the FTC Act in connection with the deceptive sale of weight-loss products. *Id.* at *10. The monetary award, entered jointly and severally against the defendants, equaled the amount of full proceeds from the sale of the products in question plus statutory interest. *Id.* at *1, 8; *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 392 (D. Conn. 2009).

At issue on appeal were precisely the arguments raised by Defendant's instant motion – (1) that monetary relief is not authorized by Section 13(b) of the FTC Act, and (2) that, even if monetary relief could be awarded, it would have to be limited to the precise funds traceable from the consumer to the defendant. *Bronson Partners*, 2011 U.S. App. LEXIS 17203 at *8, 22. The court rejected the former argument based on "the well-established principle that a court sitting in equity is empowered to 'award complete relief' including relief that customarily 'might be conferred by a court of law.'" *Id.* at *15 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)).

The court also rejected the defendants' latter argument, which, like Defendant's, was based on *Great-West Life*. The court noted, "It is because Bronson fails to realize the distinction between [*Great-West Life*] and the present case that its tracing argument fails." *Id.* at *28. The court went on to distinguish between a private, equitable claim, for which only a constructive trust or equitable lien could be awarded, and an FTC Act claim, for which disgorgement could be ordered. *Id.* at *28–29. In ultimately concluding that tracing is not required for

disgorgement, the court states that (1) disgorgement is available only to government entities enforcing statutes, *id.* at *31–32, (2) courts of equity will go farther to give relief in furtherance of the public interest than when private interests are involved, *id.*, and (3) public entities seek to deter law violations not claim specific property. *Id.* at 33.

It is worth noting that *Bronson Partners* also clarifies the Second Circuit's holding in *Verity*. *Verity* involved a scheme by which fraudulent charges were placed on consumers' phone bills. *Id.* at *17. During part of the scheme, a phone company deducted its charges from the amounts paid by consumers before transferring funds to the defendants. *Id.* The court held that the monetary award be limited to funds that actually were paid to the defendants, as opposed to money that was paid by the consumer but withheld by a middleman. *Id.* at *36–37. The *Bronson* court explained that this condition was necessary to ensure that the award could properly be considered equitable disgorgement. *Id.* It clarified, though, that it did not require tracing, and that unjust gains in FTC actions should be measured by revenues not profits. *Id.* at *38–39. As discussed below, the limitations in the *Verity* case are inconsistent with precedent in the Ninth Circuit, and, given that there is no middleman in this case, wholly irrelevant.

The other cases cited by Defendant are similarly inapposite. *Fier v. Unum Life Ins. Co. of America*, 2009 U.S. Dist. LEXIS 102223 (D. Nev. Nov. 3, 2009), *aff'd*, 629 F.3d 1095 (9th Cir. 2011), *Kaufman v. Unum Ins. Co. of America*, 2011 U.S. Dist. LEXIS 78481 (D. Nev. July 18, 2011), and *Horvath v. KeyStone Health Plan East*, 333 F.3d 450 (3d Cir. 2003), all involve private claims under ERISA, as did *Great-West Life*. These cases have been rendered inapposite by the analysis in *Bronson Partners*. The court in *Serio v. Black, Davis & Shue Agency, Inc.*, 2005 U.S. Dist. LEXIS 39018 (S.D.N.Y. Jan. 11, 2006), approved the creation of a constructive trust based on the existence of a "particular agreement . . . to confer a security interest in the property at issue." *Id.* at *24. *Pereira v. Farace*, 413 F.3d

330 (2d Cir. 2005), involved the question whether a bankruptcy trustee's action to recover compensatory damages from corporate officers for breach of their fiduciary duty was legal or equitable, *id.* at 337, again an entirely different legal framework from that presented in an FTC action. Moreover, whatever implied application *Pereira* might have to an FTC action is superseded by the Second Circuit's subsequent opinion in *Verity*, which addresses the issue directly.

b. Under the law in the Ninth Circuit and the majority of circuits, the FTC is entitled to recover the full amount lost by consumers.

Defendant argues that the Ninth Circuit's decision in *FTC v. Stefanchik* does not apply to his case (MSJ #2 at 10 n.7); Defendant is wrong. Notwithstanding the factual differences between that case and the instant matter, the broad principles in *Stefanchik* are consistent with nearly thirty years of cases in the Ninth Circuit and the majority of other circuits. *Stefanchik* is not a judicial outlier; rather, it reflects the full development of Section 13(b) case law in this circuit and in a majority of those circuits that have considered it.

In *FTC v. H.N. Singer, Inc.*, the Ninth Circuit addressed for the first time the issue of whether Section 13(b)'s grant of authority to issue injunctions carried with it the right to grant other relief. The court held that Section 13(b) invoked the general equitable authority of the courts, which included not only the authority to grant injunctions, but the authority to grant other, ancillary relief, such as rescission and restitution, and, therefore, the authority to grant preliminary relief – such as an asset freeze – in aid of that authority. 668 F.2d at 1112–13.

Citing *Singer*, the Ninth Circuit held explicitly in *FTC v. Pantron I Corp.* that Section 13(b) gave courts the "authority to grant any ancillary relief necessary to accomplish complete justice," including the power to award restitution. 33 F.3d at 1102; *accord FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010); *FTC v. Americaloe, Inc.*, 2008 U.S. App. LEXIS 8319, at *3 (9th Cir. Apr. 10, 2008) (amounts consumers paid are a proper basis for restitution); *Gill*, 265

F.3d at 958 (restitution is available "to effect complete justice"; amounts consumers paid were proper basis for amount defendants should pay).

In *Stefanchik*, the Ninth Circuit affirmed an award of $17 million against two individual defendants, despite evidence that they had only received a lesser amount, as a royalty. 559 F.3d at 931. The *Stefanchik* court held that:

> [e]quity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment. Moreover, because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.

Id.; *see FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606–07 (9th Cir. 1993); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1083 n.5 (N.D. Cal. 2009) (following *Stefanchik*); *FTC v. Cyberspace.com, LLC*, 2002 U.S. Dist. LEXIS 25565, at *20 (W.D. Wash. July 10, 2002) ("The Ninth Circuit has already determined that the proper measure of consumer restitution is the amount that will restore the victims to the status quo ante, not what defendants received as profit."), *aff'd*, 453 F.3d 1196 (9th Cir. 2006).

The majority of circuits have taken the same position as the Ninth Circuit, that the appropriate measure of restitution in an FTC action is the amount paid by consumers to defendants. *FTC v. Direct Mktg. Concepts*, 624 F.3d 1, 14–15 (1st Cir. 2010); *FTC v. Freecom Communications*, 401 F.3d 1192, 1206 (10th Cir. 2005); *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1271 (S.D. Fla. 2007); *Nat'l Urological Group*, 645 F. Supp. 2d at 1212; *FTC v. Kennedy*, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008).

Similarly, most courts have held individual defendants jointly and severally liable for consumer losses. *Network Servs. Depot*, 617 F.3d at 1140–41; *FTC v. Wells*, 2010 U.S. App. LEXIS 13179, at *3 (9th Cir. June 28, 2010); *Gill*, 265 F.3d

at 958; *see FTC v. Direct Mktg. Concepts*, 648 F. Supp. 2d 202, 214 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *Transnet Wireless*, 506 F. Supp. 2d at 1271. In *FTC v. J.K. Publications*, this Court held that the "applicability of joint and several liability is entirely inconsistent with the proposition that traceability is required," adding that "adopting a traceability requirement would lead to absurd results." 2009 U.S. Dist. LEXIS 36885, at *15 (C.D. Cal. 2009).

3. There is a genuine dispute of material fact as to whether Defendant received funds that were the proceeds of sales of OnlineSupplier memberships.

Defendant also asserts that "the undisputed facts show that Defendant did not receive any amounts paid by Online Supplier customers or the proceeds of such payments." (MSJ #2 at 11) The statement is unsupported by any evidence, particularly the expert report of Stefano Vranca.[3] Mr. Vranca's report opines only that he could not trace specific dollars from the purchase of OnlineSupplier membership sales to Defendant. (Exh. 368 (Vranca Report) at 4) Thus, his analysis did not reveal the source of the compensation that Defendant received. Accordingly, his opinion does not rule out the possibility that Defendant received funds from sales of OnlineSupplier that Mr. Vranca could not trace. (Vranca Depo. at 83:11–13)

In fact, even that narrow and irrelevant opinion is unproven. For example, Mr. Vranca asserts that "there were sufficient revenues [*sic*] inflows to pay Mr. Gugliuzza from sources other than Online Supplier." (Exh. 368 (Vranca Report) at 3) But at his deposition, Mr. Vranca conceded that he had not calculated how much money Defendant actually made. (Vranca Depo. at 41:24–42:5) The statement that there were sufficient revenues from other sources to have paid Defendant's salary, expenses, and bonuses presupposes a comparison between the

[3] The FTC has moved to preclude the testimony of Mr. Vranca because (1) it is irrelevant as a matter of law; (2) he misrepresented his credentials; and (3) he is unable to identify the data upon which his opinions are based. (Motion *in Limine* to Exclude Expert and Rebuttal Testimony of Stefano Vranca (Dkt. #97))

various revenue streams on the one hand and Defendant's income on the other. Mr. Vranca made no effort to calculate the latter, so his conclusion is baseless.

The evidence instead demonstrates that Defendant profited handsomely from his stewardship of the Commerce Planet family of companies. According to a calculation by Jaime Rovelo, Commerce Planet's last CFO, Defendant received compensation during his term as president in 2006 and 2007 in the form of salary, bonuses, and stock grants of $3.445 million. (Rovelo Depo. at 183:22–186:11; Exh. 138) According to the June 28, 2005, consulting agreement, Defendant was to be paid $5,000 per week (Exh. 11), which would yield a total compensation of approximately $310,000 for the period July 1, 2005, to September 6, 2006, when he became president. Thus, his total compensation was more than $3.75 million during the time that he served as *de facto* chief operating officer and president of Commerce Planet and exercised control over the operations of the company and its subsidiaries.

III. CONCLUSION

For the reasons stated above, we respectfully request that the Court deny Defendant's MSJ #1 and MSJ #2.

Respectfully submitted,

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