UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FEDERAL TRADE COMMISSION, **Plaintiff,** **vs.** **COMMERCE PLANET, INC., a corporation, and MICHAEL HILL, CHARLES GUGLIUZZA, and AARON GRAVITZ, individually and as officers of COMMERCE PLANET, INC.,** **Defendants.**	**Case No.: 8:09-cv-01324-CJC(RNBx)** **ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL AND DEFERRING DECISION ON AMOUNT OF BOND**

I. INTRODUCTION

The Federal Trade Commission ("FTC") brought this action for injunctive and monetary equitable relief against Commerce Planet, Inc. ("Commerce Planet") and several of its directors and officers, including Michael Hill, Aaron Gravitz, and Charles Gugliuzza (collectively, "Defendants"), for deceptive and unfair business practices arising from Defendants' website marketing of a web creation and hosting service called

OnlineSupplier. The FTC settled with all Defendants except for Mr. Gugliuzza, Commerce Planet's former president and consultant from July 2005 to November 2007. The FTC asserted two counts against Mr. Gugliuzza under the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a). The Court conducted a sixteen-day bench trial that involved over 300 exhibits and 22 witnesses. The Court concluded that Mr. Gugliuzza engaged in deceptive and unfair practices in violation of FTCA section 5(a). The Court imposed remedies under FTCA section 13(b), including an injunction and monetary equitable relief in the amount of $18.2 million for his wrongful and knowing participation in the deceptive marketing of OnlineSupplier. The $18.2 million reflected a conservative estimate of the harm to consumers. Mr. Gugliuzza now moves for a new trial, or in the alternative, a stay of judgment pending appeal. Before the Court are Mr. Gugliuzza's motions for a new trial and stay of judgment. For the following reasons, Mr. Gugliuzza's motion for a new trial is **DENIED**. The Court defers on the decision to set the amount of bond required to stay the judgment.[1]

II. BACKGROUND

Commerce Planet marketed and sold OnlineSupplier, a webhosting service that purported to provide consumers an inexpensive platform to sell products online. Commerce Planet hired Mr. Gugliuzza to provide an assessment of the company and recommend ways to improve its profitability. (Dkt. No. 251 [Bench Memo.], at 3.) From July 2005 to November 2007, Mr. Gugliuzza served in various capacities as the company's consultant, president, *de facto* executive and in-house counsel, and director. (*Id.*) Mr. Gugliuzza helped transition the company from telemarketing to internet marketing of OnlineSupplier, whereby consumers could sign up for the program from its

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15. Accordingly, the hearing set for September 17, 2012, at 1:30 p.m. is hereby vacated and off calendar.

website. (*Id*.) Internet sign-ups for OnlineSupplier dramatically improved the company's revenue. (*Id*.) At the same time, numerous consumers complained to the Better Business Bureau ("BBB"), the Attorney General, and to Commerce Planet regarding confusion as to the nature and cost of OnlineSupplier and demanded refunds. (*Id*.) OnlineSupplier was also subject to excessive credit card chargebacks. (*Id*.) In March 2008, the FTC served a civil investigative demand ("CID") on Commerce Planet, after which Commerce Planet changed its webpages for OnlineSupplier under the guidance of outside counsel knowledgeable in FTCA compliance. (*Id*.) Sales of OnlineSupplier thereafter plummeted. (*Id*.) In November 2009, the FTC filed suit against Commerce Planet and three of its key officers and employees, Hill, Gravitz, and Gugliuzza, for their alleged involvement in the deceptive and unfair marketing of OnlineSupplier during the relevant time period. (*Id*.)

In its Complaint, the FTC argued that Defendants offered a free internet auction kit as a ruse to enroll consumers in OnlineSupplier. (*Id*. at 17.) Defendants deceptively marketed OnlineSupplier as a free auction kit on its website without adequately disclosing the program's negative option plan, which required consumers to affirmatively cancel their membership or otherwise incur a monthly charge to their credit card. (*Id*. at 2.) The FTC alleged that consumers unwittingly signed up for OnlineSupplier, believing they had ordered a free kit, only to discover later that they had been enrolled in OnlineSupplier's continuity program when they saw monthly charges on their credit card bill. (*Id*.) It further alleged that between July 2005 and March 2008, Commerce Planet obtained over $45 million from over 500,000 consumers. (*Id*.)

At trial, the Court examined two versions of the landing and billing pages of the OnlineSupplier webpage. It ultimately held that both versions were facially misleading, because they created the net impression that OnlineSupplier was a free kit containing

information on how to sell products online, rather than a continuity plan with a monthly membership fee. (*Id*. at 18.) The Court stated, with respect to Version I of the webpage:

> Overall, the predominant message is that consumers can order a free kit on how to make money by selling products on eBay…. Notably, there is no mention of the product's name "OnlineSupplier," on the webpage in a manner that enables viewers to associate the kit with OnlineSupplier. Nor is there any information about Commerce Planet, its subsidiaries, or any information about cost or the continuity program. Rather, the net impression created by the landing page is that the kit is affiliated with eBay, and that consumers can learn how to sell products on eBay from the kit.

(*Id*. at 19–20.)

The terms of the continuity program were disclosed in a separate, hyperlinked "Terms of Membership" page. (*Id*. at 20.) Also, once a customer reached the billing page, at the very bottom, below the fold, in slightly darker blue font and in fine print was the disclosure regarding the negative option plan and payment terms. (*Id*. at 21.) The term "negative option" was not clearly defined in the disclosure. (*Id*.) Moreover, the disclosure stated that the consumer "may" be liable for payment of future goods and services if she fails to cancel the service, which cast ambiguity as to whether the consumer would in fact be charged a monthly fee. (*Id*. at 21–22.)

Version II of the webpage made some changes to the disclosure, but ultimately suffered from the same problems as Version I. The most significant change appeared on the billing page. The disclosure text was centered at the bottom, and written in black font. (*Id*. at 24). Moreover, the shipping and handling fee, along with the monthly fee, were now in red while the remaining text was in black. The Court held that these

changes did not cure the problems with the webpage. The disclosure remained at the very bottom of the page, below the fold, so that a reasonable consumer would not be likely to scroll to the bottom and see or read it. (*Id.*) Furthermore, the main information about the negative option plan was in the smallest text size on the page and densely packed with the other text, rendering it difficult to read. (*Id.*)

There was substantial evidence presented at trial that Commerce Planet, through its customer service department CLG, received thousands of telephone complaints regarding OnlineSupplier and requests for refunds. (*Id.* at 35.) In addition to telephone complaints, thousands of written complaints regarding OnlineSupplier were submitted to the BBB, the Attorney General, and Commerce Planet via emails, mail, and website submissions. (*Id.*) The Court admitted a total of approximately 4,000 complaints consisting of over 500 BBB complaints; 3,272 archived email complaints to Commerce Planet from July 2005 to March 2008; and over 200 Consumer Sentinel FTC database complaints. (*Id.*)

At trial, the FTC presented expert evidence from Jennifer King, a third-year Ph.D. candidate at the U.C. Berkeley School of Information. (*Id.* at 26.) Ms. King applied a usability inspection method, a type of qualitative-based approach that is "user-centered"—meaning that it focuses on what the user can perceive and what the user should do. (*Id.*) She testified that, after inspecting the two versions of OnlineSupplier's webpage, she did not believe that "most people" would know that a negative option existed or that "most people" would know they were enrolled in a continuity program upon completing the check-out process. (*Id.* at 25-26) Mr. Gugliuzza did not produce any expert rebutting Ms. King's usability inspection of OnlineSupplier's webpages. (*Id.* at 31.) Rather, he attempted to minimize Ms. King's testimony by pointing out that she did not incorporate any analysis of empirical data in reaching her conclusions. (*Id.*)

Following the sixteen-day trial, the Court held that Mr. Gugliuzza was individually liable for corporate violations of the FTCA, during his time as a consultant and president, because he participated in and had authority to control the website marketing of OnlineSupplier. (*Id*. at 48.) Although a titular consultant from July 2005 to September 2007, the evidence showed that Mr. Gugliuzza at least shared, if not supplanted, Mr. Hill's role as CEO and president. (*Id*. at 46.) Mr. Gugliuzza received the same salary as Mr. Hill, had the authority to negotiate contracts on behalf of Commerce Planet, had the power to hire and fire, made the decision to transition from telemarking to internet marketing, and oversaw and regularly met with department heads. (*Id*. at 46–47.) Mr. Gugliuzza also testified that he saw, reviewed, and approved various versions of the sign-up pages. (*Id*. at 47.) Mr. Gugliuzza formally served as president of Commerce Planet from September 2006 to November 2007; however, because he had been serving as a *de facto* executive of Commerce Planet since July 2005, his responsibilities and duties did not materially change. (*Id*. at 48.)

To calculate consumer loss, the FTC relied on the testimony of Dr. Daniel Becker, an expert in the field of Econometrics. (*Id*. 62.) Dr. Becker testified that, based on his calculations, the total consumer injury during Mr. Gugliuzza's tenure was $38.7 million. (*Id*. at 63.) The FTC later revised this figure after Mr. Gugliuzza's accounting expert, Dr. Stefano Vranca, pointed out that Dr. Becker failed to omit all the chargebacks and refunds. (*Id*.) Dr. Becker also erroneously included in his refund calculation the total payments for shipping and handling. (*Id*.) Based on this, the FTC revised its calculation of consumer injury to a maximum of $36.4 million. (*Id*. at 64.)

The Court found that the FTC's maximum calculation was still too high. This figure assumed that all consumers were misled, when the evidence showed that not all consumers were in fact deceived by the webpages. (*Id*. at 66.) However, the Court noted that the evidence strongly supported the conclusion that *most* reasonable consumers

would have been misled by OnlineSupplier's landing and billing pages. (*Id*. at 67.) Therefore, a conservative floor was that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up pages, resulting in a reduction of the FTC's original adjusted estimate by half. (*Id*.) Accordingly, the Court found $18.2 million to be a reasonably conservative estimate of consumer injury, and the proper award to the FTC as restitution for consumer redress. (*Id*.) The Court also found that a permanent injunction against Mr. Gugliuzza to enjoin him from engaging in similar misleading and deceptive marking of products and services was warranted. (*Id*. at 57.) The Court was persuaded that there was a cognizable danger that Mr. Gugliuzza would engage in similar violative conduct in the future. (*Id*. at 59.)

III. ANALYSIS

A. Motion For a New Trial

Mr. Gugliuzza provides numerous arguments as to why he is entitled to a new trial. Specifically, he argues that: (1) the Court does not have the authority to grant monetary relief under FTCA section 13(b); (2) the amount awarded grossly exceeds what the FTC may recover as equitable restitution; (3) the award is grossly excessive punishment in violation of his due process rights; (4) the award will permit double recovery to the FTC; (5) the Court improperly allowed the FTC to amend its Complaint on June 27, 2011; (6) the Court improperly allowed the FTC to advance a new theory of damages in its Closing Brief; (7) the Court improperly excluded Mr. Gugliuzza's expert, Dr. Kenneth R. Deal; (8) the finding that Mr. Gugliuzza either knew or was recklessly indifferent to the misleading nature of the OnlineSupplier webpages was erroneous. These arguments are without merit.

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1. Improper Monetary Award

Mr. Gugliuzza argues that the award of monetary relief is improper because FTCA section 13(b) only provides for injunctive relief. (Defendant's Motion for New Trial [Def.'s Mot.], at 3.) However, that the plain language of the statute only allows for injunctive relief does not preclude the possibility of monetary relief. The Ninth Circuit has long held that monetary relief is available as ancillary relief to a permanent injunction action brought under section 13(b). *See F.T.C. v. Inc21.com Corp.*, 475 F. App'x 106, 108 (9th Cir. 2012) ("Contrary to the defendants' arguments, § 13(b) authorizes monetary relief.") (citing *FTC v. Stefanchchik*, 559 F.3d 924, 931–32 (9th Cir. 2009)); *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) ("[T]he authority granted by section 13(b) is not limited to the power to issue an injunction; rather, it includes the authority to grant any ancillary relief necessary to accomplish complete justice."); *F.T.C. v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) ("We hold that Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference."). Based on this authority, the Court properly awarded equitable monetary relief under FTCA section 13(b).

2. Exceeds Equitable Restitution

Mr. Gugliuzza argues that the award exceeds the amount the FTC may recover as equitable restitution because section 13(b) requires that the monetary award be limited to Mr. Gugliuzza's improper gains. (Def.'s Mot. at 5–6.) The Court addressed this issue in detail in its September 8, 2011 denial of Mr. Gugliuzza's motion for summary judgment. The Court stated:

> [Tracing is not required] for monetary relief under Section 13(b) of the FTCA. As a matter of law, courts have authority to grant monetary relief under Section 13(b) of the FTCA without a tracing requirement. *Pantron I Corp.*, 33 F.3d at 1102. The power to grant injunctive relief under Section 13(b) includes the "authority to grant any ancillary relief necessary to accomplish justice," including restitution to injured consumers. *Id.*, quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *see also FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1141 (9th Cir. 2010). Consumer restitution under Section 13(b) may be measured by the loss suffered, rather than the defendant's illgotten gains. *Stefanchik*, 559 F.3d at 931. The Ninth Circuit has held that because the purpose of the FTCA is to protect consumers from economic injuries, the court may award restitution in the amount paid by consumers to defendants, rather than limiting damages to the defendant's profits.

(Dkt. No. 164, at 6–7.)

Following the Court's September 8, 2011 order on the motion for summary judgment, the Ninth Circuit has twice rejected the argument Mr. Gugliuzza sets forth, and affirmed that "district courts have 'broad authority' under the Federal Trade Commission Act to grant any relief necessary to accomplish complete justice in direct FTCA actions, including the power to order restitution to consumers." *F.T.C. v. EDebitPay, LLC*, No. 11-55431, 2012 WL 3667396, at *4 (9th Cir. Aug. 28, 2012), citing *Stefanchik*, 559 F.3d at 931; *see Inc21.com*, 475 F. App'x at 108 ("Circuit precedent also forecloses the defendants' argument that § 13(b) is limited to *equitable* restitution, measured by the gain to the defendants, rather than legal restitution, measured by the loss to consumers."). The facts of *Inc21.com* are very similar to this case. In *Inc21.com*, the Ninth Circuit affirmed a district court's award of $38 million against defendants who charged consumers

through local phone bills for online services they never agreed to purchase. *Inc21.com*, 475 F. App'x at 107–08. The district court found the defendants in violation of FTCA section 5, and imposed remedies under FTCA section 13(b). *Id*. at 108. The Ninth Circuit rejected the defendants' argument that section 13(b) limits restitution to the measure of gain by defendants, and held that it permits restitution measured by the loss to consumers. *Id*.

The Ninth Circuit's holding in *Inc21.com* reflects the purpose of the FTCA, which is to protect consumers from economic injuries. *Stefanchik*, 559 F.3d at 931. Without the authority to award the full amount of consumer loss, it would be very difficult to obtain any restitution for consumers harmed by violations of the FTCA. In fact, Mr. Gugliuzza presented evidence that "no Online Supplier revenue can be traced to Mr. Gugliuzza or any other particular recipient," even though he personally made $3 million in compensation from Commerce Planet between 2006 and 2007. (Dkt. No. 152 at 16; Bench Memo. at 14.) The deceptive and unfair marketing tactics he authorized and implemented resulted in at least $18.2 million in harm to consumers. If the FTCA did not allow the Court the power to award such restitution, Mr. Gugliuzza likely would not be liable for any of the harm he caused to consumers.

Quite frankly, the Court finds Mr. Gugliuzza's reading of the FTCA troubling, as it would create perverse incentives for those who violate the FTCA. Under his reading, Mr. Gugliuzza, and other FTCA violators, could potentially avoid paying restitution if they structure their compensation in a certain way, or spend their profits in a way making them difficult to trace. The amount of restitution should depend on how much consumers were harmed, not on how the violator structured his compensation and spent his profits.

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3. Excessive Punishment

Mr. Gugliuzza argues that the award is grossly excessive punishment in violation of his due process rights. (*See* Def.'s Mot. at 12.) The due process clause places limits on the award of punitive damages. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Punitive damages, "which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citations omitted).

However, the award against Mr. Gugliuzza is monetary equitable relief, and is in no way punitive. The Court was quite explicit that the award is "solely remedial in nature, and not a fine, penalty, punitive assessment, or forfeiture." (Dkt. No. 255 at 10.) The award is based entirely on a "reasonably conservative estimate of consumer injury." (*Id.* at 67.) In its Memorandum of Decision, the Court provided a detailed summary of its calculation of the award. (*See* Bench Memo. at 62–68.) The Court did not consider any evidence outside of the loss to consumers in that calculation. The monetary equitable relief awarded by the Court was not in any way intended to be punitive. It was restitutionary in nature and meant to address the actual harm and injury that Mr. Gugliuzza caused consumers. There is nothing punitive in holding Mr. Gugliuzza fully accountable for that loss. Indeed, it is justice to do so.

4. Double Recovery

Mr. Gugliuzza argues that the award will permit double recovery by the FTC because it has already been awarded a $19.7 million judgment against Commerce Planet, Mr. Gravitz, and Mr. Hill. (Def.'s Mot. at 18.) He also argues that the FTC would obtain

double recovery because it reached a settlement agreement with those same parties to suspend the judgment in exchange for $522,000. (*Id.*)

The Court's award does not permit double recovery by the FTC. The award against Mr. Gugliuzza reflects the amount of harm his violations caused to consumers. The amount the FTC will collect from him and other defendants is a separate issue. If, in the future, it appears that the FTC is close to recovering the full amount of harm to consumers, Mr. Gugliuzza may petition the Court for a motion to deem the judgment against him satisfied. This, of course, is unlikely. The $19.7 million judgment against Commerce Planet, Mr. Gravitz, and Mr. Hill was suspended on the condition that they pay a total of $522,000. This is a small fraction of the harm suffered by consumers. Moreover, as Mr. Gugliuzza has often argued, he is unable to pay the entire $18.2 million judgment against him. It is therefore highly unlikely that the FTC will recover any amount approaching the actual harm to consumers.

5. Amendment to Complaint

Mr. Gugliuzza argues that he suffered undue prejudice as the result of the FTC's June 27, 2011 amendment to its Complaint because the amendment subjected him to new liability without the ability to "conduct the requisite discovery; retain a corporate governance expert; investigate appropriate affirmative defense; and develop legal arguments to avail himself of pre-trial motion practice." (Def.'s Mot. at 17.) As a result, he faces an additional $9 million in liability for the period when he served as a consultant to Commerce Planet.

The Court considered and rejected similar arguments by Mr. Gugliuzza when it permitted the FTC to amend its Complaint. The Court held:

> Contrary to Mr. Gugliuzza's assertion, the proposed amendments are not an unfair expansion of his liability because it was clear throughout discovery that the FTC was investigating his conduct in connection with Commerce Planet starting in July 2005. (*See, e.g.*, Reply Exs. 1, 2, 3, 9, 11.) Mr. Gugliuzza and his counsel participated in that discovery, so Mr. Gugliuzza has not shown any reason that he needs additional discovery in order to respond to the new allegations in the First Amended Complaint.

(Dkt. No. 145 at 2–3.) The Court maintains that Mr. Gugliuzza was not unduly prejudiced by the FTC's amendment to its Complaint. Mr. Gugliuzza had prior notice that the period when he served as a consultant was at issue, and had plenty of time to conduct discovery and prepare a defense for that period. Moreover, one of the major issues at trial, whether the landing pages were deceptive, was unaffected by the amendment. The landing page during Mr. Gugliuzza's period as a consultant was also in place while he served as president. Therefore, he should have conducted discovery and prepared a defense on this issue, regardless of whether he faced liability for the consultancy period.

6. Damages Argument

Mr. Gugliuzza argues that the FTC improperly presented a novel theory of damages in its Closing Brief. (Def.'s Mot. at 19.) He asserts that before the trial, the FTC represented that it would seek an award for the full amount of consumer loss; however, in its Closing Brief, it argued for a new theory of 50% of net consumer payments. (*Id.*) Additionally, he argues that the theory was improperly based on the testimony of Ms. King in violation of Federal Rule of Civil Procedure 26. (*Id.* at 19–21.)

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First, the Court did not award damages in this case; it awarded equitable monetary relief based on the actual harm Mr. Gugliuzza caused to consumers. Regardless, in its closing brief, the FTC advanced a revised *calculation* of consumer loss, not a revised *theory* of consumer loss. Originally, it argued that the full amount of consumer loss was equal to the net consumer payments. Based on the evidence produced at trial, it realized that this amount was too high because not all consumers were deceived. Accordingly, it revised its calculation of consumer loss to one more reflective of the evidence. Specifically, it argued that the true consumer loss was roughly 50% of the net consumer payments. This was proper.

Moreover, the FTC did not violate Federal Rule of Civil Procedure 26 by partially basing its revised calculation on Ms. King's testimony. Ms. King is an expert in human-computer interaction, an area which she properly testified to. She did not provide testimony as to damages. The Court used her testimony to determine how many customers were actually deceived by Commerce Planet's webpages. This figure was then used to determine a conservative estimate of what percentage of net consumer payments were attributable to that deceit. Based on Ms. King's testimony of the number of deceived consumers, the Court held that a conservative estimate of consumer loss was 50% of net consumer payments. (Dkt. No. 251 at 67.)

7. Exclusion of Expert

Mr. Gugliuzza argues that the Court erroneously excluded his expert, Dr. Kenneth R. Deal, and that the exclusion was prejudicial. (Def.'s Mot. at 23–24.) The Court's exclusion of Dr. Deal was not erroneous. His opinions were based upon his review of a consumer survey conducted by Kelton Research. The Court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony [of an expert] is scientifically valid and of whether that reasoning or methodology properly can

be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93 (1993). Dr. Deal did not conduct the survey himself, and was therefore unfamiliar with the methodological choices that went into conducting it. As a result, the Court held that Mr. Gugliuzza was required to disclose a Kelton representative as a testifying witness if he wanted Dr. Deal to testify about the survey. Mr. Gugliuzza failed to do so. Accordingly, the exclusion was proper.

8. Erroneous Finding

Finally, Mr. Gugliuzza argues that a new trial is proper because the finding that he either knew or was recklessly indifferent to the misleading nature of the OnlineSupplier webpages was clearly erroneous. (Def.'s Mot. at 24.) This argument has no merit because the Court had sufficient evidence on which to base its finding. Specifically, the Court based its decision on the following evidence: (1) Mr. Gugliuzza testified that he had seen, reviewed, commented on, and approved various versions of the OnlineSupplier sign-up pages. (Gugliuzza, 2/21/12, 179:12–20, 179:21–180:22; Exh. 1026.); (2) Mr. Seidel and Mr. Guardiola, the president and manager of CLG, respectively, reported to Mr. Gugliuzza and sent him weekly reports of the call logs in customer service that contained the cancellation rates and refund amounts. Mr. Gugliuzza had ample notice of consumer complaints, including the free-kit-only type of complaints to which Mr. Guardiola testified. (Guardiola, 2/21/12, 15:11–18, 17:7–23, 23:2–15, 27:8–21, 30:25–31:4; Exhs. 1292a, 1293–95.); (3) Mr. Guardiola also testified that one of the primary suggested changes brought up during the weekly meetings was to enlarge the font of the disclosure. (Guardiola, 2/21/12, 16:14–19.); (4) Mr. Guardiola testified that based on his weekly staff reports and meetings that Mr. Gugliuzza periodically attended, he believed Mr. Gugliuzza knew about the number and substance of the billing complaints received by the company. (*Id.* at 32:14–23.); (5) Mr. Gravitz and Mr. Hill testified that when Commerce Planet received complaints, they discussed them with Mr. Gugliuzza.

(Gravitz, 2/1/12, 75:25–77:6; Exh. 1027; Hill, 2/7/12, 155:21–156:12, 160:10–161:25; 163:18–164:10.); (6) Mr. Hill and others discussed the problem of OnlineSupplier's chargeback rates with Mr. Gugliuzza. (Hill, 2/7/12, 156:13–157:9; Exhs. 186–87, 1289.); (7) Mr. Hill testified that OnlineSupplier's chargeback problems were never resolved and remained above the 1% threshold for almost the entire time that Mr. Gugliuzza worked at the company. (Hill, 2/7/12, 168:9–25.); and (8) Mr. Gugliuzza also rejected the company's experiments in placing clearer disclosures and sending post-transaction emails because they hurt conversion rates. (Exh. 1097.) (*See* Dkt. No. 251 at 49–50.)

The Court has already considered and rejected the evidence Mr. Gugliuzza cites in his Motion. He presents no new facts or law in support of his argument. Accordingly, the Court had more than sufficient evidence to find that Mr. Gugliuzza was recklessly indifferent to the misleading representations of OnlineSupplier on its landing and billing pages.

B. Motion to Stay the Judgment

Mr. Gugliuzza also asks that the Court stay the judgment pending appeal pursuant to Federal Rule of Civil Procedure 62(d). (*See* Dkt. No. 260.) Though Mr. Gugliuzza has not yet filed his appeal, he has submitted a declaration stating that he intends to do so if necessary. (*Id.*, Gugliuzza Decl. ¶ 5.) Generally, enforcement of a final judgment is not stayed during the pendency of an appeal. Fed. R. Civ. P. 62(a). However, if a party files a supersedeas bond, it is entitled to a stay of enforcement as a matter of right. Fed. R. Civ. P. 62(d). A supersedeas bond ensures that the appellee will be able to collect the judgment should the court of appeals affirm the judgment. *See Rachel v. Banana Republic*, 831 F.2d 1503, 1505 n.1 (9th Cir. 1987). "[W]hen setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors." *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986).

Rule 62(d) is silent as to the amount of the supersedeas bond required to issue a stay. The predecessor to Rule 62(d) is Civil Rule 73(d), which provided that the bond should include "the whole amount of the judgment remaining unsatisfied… unless the court after notice and hearing and for good cause shown fixes a different amount…." "Although Rule 62(d) lacks similar language to its predecessor, 'it has been read consistently with the earlier rule.' " *Cotton ex rel. McClure v. City of Eureka, Cal.*, No. C 08-04386 SBA, 2012 WL 909669, at *24 (N.D. Cal. Mar. 16, 2012) (quoting *Poplar Grove Planting & Ref. Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). Accordingly, "[d]istrict courts…have inherent discretionary authority in setting supersedeas bonds." *Rachel*, 831 F.2d at 1505 n.1 (citing *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986)). When a party asks a court to "depart from the usual requirement of a full security supersedeas bond, the burden is on the moving party to show reasons for the departure from the normal practice." *U.S. ex rel. Technica, LLC v. Carolina Cas. Ins. Co.*, 08-CV-01673-H KSC, 2012 WL 1229885, at *13 (S.D. Cal. Apr. 12, 2012) (citing *Poplar Grove*, 600 F.2d at 1191).

Courts have waived or allowed for reduced supersedeas bonds where the defendant has shown that she cannot post the full bond, and enforcement of the judgment would leave her insolvent. *See, e.g.*, *United States v. Owen*, No. CIV.A. 99-2805, 2000 WL 1876358 (E.D. La. Dec. 26, 2000) (waiving the bond requirement and requiring that a defendant not dispose of any assets, save those necessary for living, where posting a full bond would have resulted in insolvency); *Jack Frost Laboratories, Inc. v. Physicians & Nurses Mfg. Corp.*, No. 92 CIV. 9264 (MGC), 1996 WL 709574 (S.D.N.Y. Dec. 10, 1996) (reducing a $750,000 bond to $500,000 where it would have been extremely difficult for the defendant to post the full bond, and any such requirement might push it into bankruptcy); *Hurley v. Atl. City Police Dept.*, 944 F. Supp. 371, 378–79 (D.N.J. 1996) (waiving the bond requirement because there was a strong likelihood that enforcement of the judgment would push defendant into bankruptcy); *Int'l Distribution*

Centers, Inc. v. Walsh Trucking Co., Inc., 62 B.R. 723, 732 (S.D.N.Y. 1986) (requiring that five defendants each post a bond in the amount of $10,000 in security for a $38 million judgment, where a full bond would have been wholly impracticable); *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986) (affirming the district court's decision to not require a full supersedeas bond where the defendant provided evidence that he was financially unable to post a full bond and execution on the $2.1 million judgment would place him in insolvency); *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973) (allowing a reduced bond where execution of the $1.45 million judgment would have placed the individual defendants in insolvency).

Mr. Gugliuzza has provided the Court with a sworn declaration stating that he will be forced into bankruptcy if the FTC executes the judgment. (Gugliuzza Decl. ¶ 9.) Moreover, he does not have the financial ability to post a bond for the full amount of the judgment, $18.2 million. (*Id*. ¶ 8.) Mr. Gugliuzza has provided the Court with a copy of the financial disclosure he submitted to the FTC in May 2011, as well as a declaration explaining his current financial condition. (Dkt. No. 273.) He has represented that his financial situation has deteriorated since the May 2011 disclosure. (*Id*. ¶¶ 6–9.) Based on this evidence, the Court believes that Mr. Gugliuzza cannot post a full bond for the $18.2 million judgment, and enforcement of the judgment would leave him insolvent. Therefore, the Court is willing to stay the judgment pending appeal based on a reduced bond.

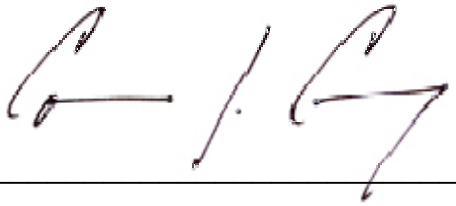
However, the Court believes that the bond proposed by Mr. Gugliuzza is wholly inadequate. (*See id*. at 10.) Before the Court makes its final decision on the amount of the bond, the FTC must be given the opportunity to examine Mr. Gugliuzza's *in camera* declaration, and submit its position on what it believes to be the proper bond amount. Therefore, the Court directs Mr. Gugliuzza to provide a copy of his *in camera*

declaration, along with his May 2011 financial disclosure, to the FTC. The FTC will have seven (7) days following receipt of the documents to submit its position to the Court explaining what it believes is the proper bond amount.

III. CONCLUSION

For the foregoing reasons, Mr. Gugliuzza's motion for a new trial is **DENIED**. The FTC shall have seven (7) days upon receipt of Mr. Gugliuzza's *in camera* declaration and exhibit to submit its position to the Court on the proper bond amount.

DATED: September 13, 2012



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE