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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re CHARLES FRANCIS GUGLIUZZA II, Debtor.	Case No. 8:14-cv-1529-CJC Bankr. Case No. 8:12-bk-22893-CB Adv. No. 8:13-ap-1078-CB Chapter 7
CHARLES FRANCIS GUGLIUZZA II, Appellant, v. FEDERAL TRADE COMMISSION, Appellee.	**BRIEF OF APPELLEE FEDERAL TRADE COMMISSION**

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INTRODUCTION

The purpose of the Bankruptcy Code is to "provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life" by obtaining a discharge of certain debts. *Grogan v. Garner*, 498 U.S. 279, 286 (1991).[1] Discharge of a debt, however, is reserved for the "honest but unfortunate debtor." *Id*. at 287. One of the limitations on discharge is 11 U.S.C § 523(a)(2)(A), which provides that a debt for money or property obtained by "false pretenses, a false representation, or actual fraud" is not dischargeable.

The judgment this Court previously entered against Charles Gugliuzza for the harm his deceptive conduct caused is just such a nondischargeable debt. In that litigation, this Court decided against Gugliuzza on the same issues and facts that are dispositive of nondischargeability under § 523(a)(2)(A), including: whether Gugliuzza engaged in deceptive conduct (he did); whether Gugliuzza had culpable knowledge of deception (he did); and whether consumers incurred injury as a result (they did—losses of $18.2 million). The bankruptcy court correctly ruled that, because Gugliuzza already litigated and lost these issues in the Federal Trade Commission's enforcement action, he is precluded from relitigating those facts

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[1] A bankruptcy discharge voids a monetary judgment entered against the debtor and operates as an injunction prohibiting pre-petition creditors of the debtor from taking any form of collection action on the discharged debts. 11 U.S.C. § 524.

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here.

On appeal, Gugliuzza offers up unsupported arguments that the FTC Act standards for deception and knowledge (which includes reckless indifference) are lesser than the standards for deception and knowledge (which also includes reckless indifference) under § 523(a)(2)(A). But the case law—and, importantly, this Court's specific findings about the basis for its judgment against Gugliuzza—give lie to this contention. Nor is there merit to Gugliuzza's argument that findings central to this Court's determination of Gugliuzza's liability were unnecessary—mere surplusage—because other findings *might* have sufficed, and thus should be denied preclusive effect. Not coincidentally, these supposedly gratuitous findings include factual determinations that directly contradict Gugliuzza's denials in opposing summary judgment below (such as his assertion that he merely relied in good faith on the advice of counsel). Gugliuzza's arguments do not comport with principles of collateral estoppel.

STATEMENT OF THE ISSUES

Whether the bankruptcy court correctly ruled that collateral estoppel applies to this Court's findings in the prior FTC action against Gugliuzza regarding the same issues and facts that are dispositive of each element of nondischargeability under § 523(a)(2)(A), warranting summary judgment for the Commission.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

The Commission filed suit in November 2009 against Commerce Planet, Inc., and several of its directors and officers, including Gugliuzza, to halt a deceptive Internet marketing scheme that, under the guise of offering a "free" information kit on how to sell products on eBay, enrolled consumers in a costly membership program without their knowledge or consent. The Commission alleged that defendants had engaged in deceptive and unfair business practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Shortly after the Commission filed its complaint, all defendants except for Gugliuzza settled with the Commission, and the Court entered final judgment against the settling defendants. In June 2011, the Commission filed an amended complaint to conform the complaint to evidence obtained in discovery, adding greater detail about the deceptive scheme and Gugliuzza's involvement in it. The amended complaint alleged the same FTC Act violations as the original complaint.

This Court found Gugliuzza liable and imposed equitable remedies under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), including a permanent injunction and restitution for consumer loss, for Gugliuzza's wrongful and knowing participation in this scheme. The Court entered final judgment on July 17, 2012, and on September 13, 2012, denied Gugliuzza's motion for a new trial.

Gugliuzza's appeal of this judgment is pending.

Gugliuzza filed a motion to stay execution of the judgment, which the Court granted subject to Gugliuzza's posting of a reduced supersedeas bond. Gugliuzza opted not to post the bond but instead filed a petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Central District of California, seeking to discharge the judgment.[2] In February 2013, the Commission initiated an adversary proceeding in the bankruptcy court seeking a determination that this Court's judgment is excepted from discharge under 11 U.S.C. § 523(a)(2)(A). On August 18, 2014, the bankruptcy court granted summary judgment in favor of the Commission, ruling that the issues adjudicated by this Court satisfy all the required elements for nondischargeability. The bankruptcy court entered judgment in favor of the Commission on September 2, 2014.[3] Gugliuzza now appeals that judgment.

[2] Rather than pay the reduced supersedeas bond, Gugliuzza paid almost $170,000 to bankruptcy advisors between the entry of this Court's judgment and the filing his bankruptcy petition. *See* SER 19 (FTC's Supplemental Excerpts of Record). (Gugliuzza's Amended Statement of Financial Affairs, at p. 19, item no. 9). Although Gugliuzza here complains about the effect of bankruptcy on his personal assets, as a result of this pre-petition bankruptcy advice, it should have been evident to him that the filing of a bankruptcy petition would require him to do the very thing that led to his supposed hardship: turn over all non-exempt assets and funds to the Trustee for liquidation.

[3] Gugliuzza has not otherwise received a discharge from the bankruptcy court in his main Chapter 7 case. *See* 11 U.S.C. § 362(c)(2).

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B. Facts and Proceedings Below

1. Gugliuzza's Participation in the Deceptive Internet Marketing of OnlineSupplier[4]

OnlineSupplier was a membership program that purported to give consumers the ability to operate their own Internet-based business. Consumers who paid for membership in the program were given website building tools for creating an online store and access to a catalogue of products that they could purchase and then resell on eBay. Commerce Planet marketed Online Supplier on a "negative option" basis: Consumers were given a free trial period, and consumers who failed to cancel during that period were automatically enrolled in the program and charged a recurring monthly subscription fee (ranging over time from $29.95 to $59.95). 1ER 1166.

Initially, Commerce Planet sold OnlineSupplier through print advertising and inbound telemarketing, but sales of OnlineSupplier were poor, and the company was losing money. 1ER 1167. In mid-2005, the company hired Gugliuzza to turn around its flagging sales and revamp its marketing strategy. 1ER 1170-74, 1206-08. Gugliuzza oversaw the migration from telemarketing to Internet marketing of OnlineSupplier and served as a key leader of the company. 1ER 1163, 1173, 1207, 1217. Under Gulgiuzza's management, the company's

[4] The facts recounted in this section are established in the Court's June 22, 2012, memorandum of decision in the FTC's enforcement action against Gugliuzza.

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advertisements now directed consumers to an OnlineSupplier website, where transactions were completed online. 1ER 1168.

But the OnlineSupplier sign-up pages—which Gugliuzza reviewed and approved, 1ER 1173, 1207-08, 1213—misrepresented the nature of the product being offered to consumers. The landing page of the website (both Version I created in 2005 and Version II used as of February 2007) made no mention at all of a continuity program requiring the payment of a monthly subscription fee, but instead offered consumers a "FREE" "Online Auction Starter Kit" that would provide information on how to sell products on eBay. Consumers wishing to receive this kit were directed to fill in their address and—ostensibly to pay for shipping—their credit card information, and to click on a "Ship My Kit" button to consummate the transaction. Mention of the OnlineSupplier membership program, and the automatic charge of a monthly fee if consumers did not cancel within a trial period, was buried in a separate "Terms and Conditions" page (a hyperlink to which was placed low on the landing and billing pages) and in fine print at the bottom of the billing page. Even if consumers saw this information, however, these disclosures did not make it clear that the mere act of ordering the "free kit" would activate the OnlineSupplier program trial subscription, obligating them to pay a monthly fee if not canceled. 1ER 1178-85.

The company immediately began to receive complaints from

consumers—approximately a thousand every week—stating that they had not seen or agreed to the terms of the OnlineSupplier continuity program and demanding refunds of the unauthorized charges to their accounts. 1ER 1195-97. At the same time, the company's credit card chargeback rates spiked upwards and remained inordinately high throughout 2006 and 2007. 1ER 1197-98. Commerce Planet's managers notified Gugliuzza of these consumer complaints, in written weekly reports and weekly staff meetings, and kept him apprised of the company's worsening problem with elevated chargeback rates. 1ER 1210. Gugliuzza, however, rejected initiatives to provide clearer disclosures about the terms of the offer because that would reduce consumer sign-ups. *Id.* This deceptive marketing was extremely profitable for the company, as numerous consumers unwittingly signed up for and were billed membership fees for a continuity program that they did not want. 1ER 1217, 1227-28.

2. The District Court's Decision

After conducting a sixteen-day bench trial that involved over 300 exhibits and 22 witnesses, this Court concluded that the Internet marketing of OnlineSupplier was deceptive and unfair under Section 5 of the FTC Act,[5] and that Gugliuzza was individually liable for his wrongful and knowing participation in

[5] The discussion below focuses on the Court's findings regarding the deception claim, because that is the claim relevant to the analysis of nondischargeability under 11 U.S.C. § 523(a)(2)(A).

this scheme. The Court found, based on its own examination of the landing and billing pages of the OnlineSupplier website, that those webpages were facially misleading because they created the impression that OnlineSupplier was a free kit containing information on how to sell products online, when, in fact, consumers were subscribing to a continuity program with a monthly subscription fee. 1ER 1178-86. The Court's finding of deceptiveness was corroborated by the testimony of an FTC expert witness, who conducted a usability inspection of the webpages. 1ER 1185-90. In addition, the Court found that the FTC had presented "abundant evidence that consumers were actually misled by OnlineSupplier's webpages." 1ER 1194-97.

The Court held that Gugliuzza was individually liable for consumer injury caused by the deceptive marketing of OnlineSupplier because the evidence demonstrated that Guglizza participated in and had authority to control the website marketing of OnlineSupplier, 1ER 1205-08, and "knew or at least was recklessly indifferent to" the fact that OnlineSupplier's webpages were misleading, 1ER 1209. Indeed, Gugliuzza "had rejected the company's experiments in placing clearer disclosures and sending post-transaction emails because they hurt conversion rates." 1ER 1210. The Court found, moreover, that Gugliuzza "did not participate in an isolated, discrete incident of deceptive marketing, but engaged in sustained and continuous conduct that perpetrated the deceptive marketing of

OnlineSupplier for over two years." 1ER1217.

The Court found Gugliuzza's denials of his knowledge of wrongdoing "simply not credible in light of all the evidence of consumer confusion and Mr. Gugliuzza's extensive role at the company." 1ER 1211. Nor was the Court persuaded by Gugliuzza's argument that he relied on the advice of Commerce Planet's in-house counsel concerning the legality of OnlineSupplier's webpages. The Court observed that Gugliuzza's argument was not relevant to the issue of his knowledge. 1ER 1212-13. Moreover, the Court found that the evidence did not support Gugliuzza's claim that he relied in good faith on the advice of counsel. 1ER 1213-16.[6]

The Court determined that equitable monetary relief was warranted to redress consumer injury caused by this deceptive scheme and entered judgment against Gugliuzza in the amount of $18.2 million, which the Court found was a "conservative" estimate of consumer injury. 1ER 1227-28.

3. The Bankruptcy Court's Ruling

After Gugliuzza filed his bankruptcy petition seeking discharge of this judgment, the Commission filed an adversary complaint in the bankruptcy court, alleging that the judgment is a debt arising from "false pretenses, a false representation, or actual fraud" and excepted from Gugliuzza's discharge under 11

[6] The Court also rejected Gugliuzza's effort to shift blame for the deceptive marketing of OnlineSupplier to third-party marketers. 1ER 1299-1202, 1217.

U.S.C. § 523(a)(2)(A). The Commission moved for summary judgment, arguing that the issues previously decided by this Court against Gugliuzza establish all of the elements for nondischargeability, and Gugliuzza is collaterally estopped from relitigating them. Initially, the bankruptcy court was not convinced and denied the motion without prejudice. But after the Commission filed a subsequent motion for summary judgment, explaining in more detail the correspondence between this Court's prior decision and the required elements for nondischargeability, the bankruptcy court expressed having "a much better handle" on the issue, 1ER 2357, and granted summary judgment in favor of the Commission.

The bankruptcy court found that this Court's determination of Gugliuzza's liability and factual findings in the FTC enforcement case established all the elements of nondischargeability under Section 523(a)(2)(A). Specifically, this Court's prior decision established that: (1) Gugliuzza made misrepresentations to consumers by participating in the deceptive website marketing of OnlineSupplier; (2) Gugliuzza had the requisite knowledge of falsity of the misleading representations concerning OnlineSupplier because he was at least recklessly indifferent to the misleading representations; (3) Gugliuzza had the requisite fraudulent intent (a "logical" inference from this Court's findings concerning Gugliuzza's reckless indifference and his rejection of improved disclosures); and (4) Gugliuzza's deceptive conduct actually misled consumers, who reasonably

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relied on the deceptive claims, thereby causing harm to them in the amount of $18.2 million. The Court concluded that, because the issues at stake in the bankruptcy proceeding were identical to the issues decided in the prior litigation, Gugliuzza actually litigated these issues, and the determination of these issues was a critical and necessary part of the prior litigation, collateral estoppel applied, and the FTC was entitled to summary judgment. 1ER 28-34.

STANDARD OF REVIEW

The Court reviews the bankruptcy court's factual findings for clear error, and its conclusions of law *de novo*. *Cox v. Lansdown* (*In re Cox*), 904 F.2d 1399, 1401 (9th Cir. 1990). A more deferential standard of review applies to a bankruptcy court's decision on dischargeability. "Because the right to a discharge is a matter generally left to the sound discretion of the bankruptcy judge, we disturb this determination only if we find a gross abuse of discretion." *Id*. (quoting *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir.1984)).

ARGUMENT

Under Section 523(a)(2)(A) of the Bankruptcy Code, a debt is not dischargeable if it was obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C § 523(a)(2)(A). This provision applies where: (1) the debtor engaged in "misrepresentation, fraudulent omission or deceptive conduct"; (2) the debtor had "knowledge of the falsity or deceptiveness of his statement or

1 conduct"; (3) the debtor had an "intent to deceive"; (4) the creditor justifiably
2 relied on the representations or conduct; and (5) the creditor was damaged as a
3 result of the debtor's representations or conduct.[7] *Turtle Rock Meadows*
4 *Homeowners Ass'n v. Slyman* (*In re Slyman*), 234 F.3d 1081, 1085 (9th Cir. 2000).
5 The inquiries into the second and third elements typically converge because
6 findings concerning the debtor's knowledge of misrepresentation often suffice to
7 demonstrate the requisite intent. *See Anastas v. Am. Sav. Bank* (*In re Anastas*), 94
8 F.3d 1280, 1286 (9th Cir. 1996); *accord Household Credit Servs., Inc. v. Ettell* (*In*
9 *re Ettell*), 188 F.3d 1141, 1145 n.4 (9th Cir. 1999).
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11 The nondischargeability inquiry required the bankruptcy court to examine
12 the same issues as this Court analyzed in determining Gugliuzza's liability for
13 deceptive conduct under the FTC Act. As the bankruptcy court correctly found, all
14 of the elements for collateral estoppel are met: the issues at stake in the bankruptcy
15 proceeding are identical to the issues this Court previously decided against
16 Gugliuzza; Gugliuzza actually litigated these issues (which he does not dispute
17 here); and these issues were necessarily decided in that case. *See Trevino v. Gates*,
18 99 F.3d 911, 923 (9th Cir. 1996). Gugliuzza fails to show otherwise.
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[7] As Gugliuzza concedes (Br. 14), in this case, the relevant inquiry under elements 4 and 5 is whether consumers justifiably relied on and were injured by his conduct.

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I. THE BANKRUPTCY COURT CORRECTLY APPLIED COLLATERAL ESTOPPEL TO PRECLUDE GUGLIUZZA FROM RELITIGATING ISSUES DECIDED IN THE PRIOR LITIGATION.

A. The Bankruptcy Court Correctly Determined that this Court's Prior Decision Establishes that Gugliuzza Made Misrepresentations.

In the FTC's enforcement action, this Court conclusively decided the first element of § 523(a)(2)(A) nondischargeability: whether Gugliuzza engaged in "misrepresentation, fraudulent omission or deceptive conduct." *In re* Slyman, 234 F.3d at 1085. Two central issues in the FTC Act litigation were whether the OnlineSupplier website contained misrepresentations and whether Gugliuzza participated in those misrepresentations.[8] This Court decided both questions in the affirmative, finding that: (1) the website misrepresented the nature of the offer, conveying the misleading impression that consumers were merely sending away for a free kit, while failing to disclose—indeed, "mask[ing] information" (1ER 1185)—that consumers were actually subscribing to a costly membership program; and (2) Gugliuzza—the individual who oversaw the marketing of OnlineSupplier, reviewed and approved the webpages, and specifically rejected clearer disclosures—participated in making these misrepresentations. *See* p. 7, *supra*.

In this appeal, Gugliuzza does not dispute the preclusive effect of Court's

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[8] To find that Gugliuzza violated the FTC Act, the Court had to find that there was a material representation, omission, or practice likely to mislead consumers acting reasonably under the circumstances, *see FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009); and that Gugliuzza directly participated in or had authority to control the wrongful practice, *id.* at 931.

1 finding that he participated in making the representations at issue. He argues,
2 however, that the Court's findings of deceptiveness have no preclusive effect here
3 because (he claims) a misrepresentation under the FTC Act is something less than
4 a false representation under § 523(a)(2)(A). *See* Br. 22-23 (insinuating that the
5 latter requires literal falsity).[9] But the case law does not support this contention.
6 Indeed, the Ninth Circuit has made clear that, like deception under Section 5 of the
7 FTC Act, the failure to disclose material facts can constitute a false representation
8 under § 523(a)(2)(A). *Apte v. Japra* (*In re Apte*), 96 F.3d 1319, 1323-24 (9th Cir.
9 1996) (finding that, in a business transaction, there is a duty to disclose "facts
10 basic to the transaction," citing RESTATEMENT (SECOND) OF TORTS § 551 (1976));
11 *Citibank* (*South Dakota*), *N.A. v. Eashai* (*In re Eashai*), 87 F.3d 1082, 1088-89
12 (9th Cir. 1996); *accord Parks v. Angelus Block Co., Inc.* (*In re Parks*), 571 Fed.
13 Appx. 523, 525 (9th Cir. 2014). Also, as another court in this Circuit has
14 explained, "false pretense" under § 523(a)(2)(A) "involves an implied
15 misrepresentation or conduct" that "create[s] or foster[s] a false impression."
16 *Griffin v. Felton* (*In re Felton*), 197 B.R. 881, 889 (N.D. Cal. 1996). This Court
17 addressed and resolved this very issue in determining that the marketing scheme

[9] Gugliuzza's wrongly contends that the Commission's initial complaint alleged a "false representation" claim that it later "dropped" in its amended complaint against Gugliuzza. *See* Br. 24. Both the initial and amended complaint contained the same count for deceptive practices in violation of Section 5(a) of the FTC Act; the variation in the heading is immaterial. *Compare* 1ER 1249 (initial complaint) *with* 1ER 1294 (amended complaint).

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Gugliuzza perpetrated violated the FTC Act because it misled consumers about the nature of the offer, failing to disclose material terms. Guglizza litigated that issue, and its resolution was essential to the Court's judgment. Therefore, Gugliuzza is precluded from relitigating it here.

B. The Bankruptcy Court Correctly Determined that this Court's Prior Decision Establishes that Gugliuzza Possessed Sufficient Knowledge of Consumer Deception.

Gugliuzza is also precluded from relitigating this Court's findings that resolve the second element of nondischargeability: Gugliuzza's knowledge that OnlineSupplier's marketing was deceptive. It is settled law that a debtor's "reckless disregard for the truth of a representation" (or "reckless indifference") establishes knowledge under § 523(a)(2)(A). *Houtman v. Mann* (*In re Houtman*), 568 F.2d 651, 656 (9th Cir. 1978);[10] *accord Runnion v. Pedrazzini* (*In re Pedrazzini*), 644 F.2d 756, 757-58 (9th Cir. 1981); *Advanta Nat'l Bank v. Kong* (*In re Kong*), 239 B.R. 815, 826-27 (B.A.P. 9th Cir. 1999); *Gertsch v. Johnson & Johnson Fin. Corp.* (*In re Gertsch*), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999).[11] The issue of Gugliuzza's knowledge was central to the FTC's enforcement action because an individual's liability under the FTC Act for monetary relief for

[10] *Houtman* also held that collateral estoppel did not apply in § 523 proceedings. This aspect of *Houtman* was overruled by *Grogan*, 498 U.S. at 284.

[11] "The Ninth Circuit uses the phrase 'reckless indifference to his actual circumstances,' interchangeably with 'reckless disregard for the truth of a representation.' " *Kong*, 239 B.R. at 826.

corporate violations hinges on the individual's knowledge.[12] This Court found that Gugliuzza was liable for monetary relief because he knew or "at the very least … was recklessly indifferent to" the fact that OnlineSupplier's webpages were misleading, 1ER 1209, based on evidence showing, among other things that Gugliuzza had "ample notice" of the many thousands of complaints demonstrating consumer confusion but "rejected … clearer disclosures" on the webpages "because they hurt conversion rates," 1ER 1210. As courts in other bankruptcy proceedings have recognized, such a determination of reckless indifference under the FTC Act is dispositive of the defendant's knowledge under § 523(a)(2)(A). *See FTC v. Abeyta* (*In re Abeyta*), 387 B.R. 846, 854-55 (Bankr. D.N.M. 2008); *FTC v. Porcelli* (*In re Porcelli*), 325 B.R. 868 (Bankr. M.D. Fla. 2005); *FTC v. Lederman* (*In re Lederman*), No. SV 94-22688 AG, 1995 WL 792072, at *5-6 (Bankr. C.D. Cal. June 26, 1995); *FTC v. Austin* (*In re Austin*), 138 B.R. 898, 907-08 (N.D. Ill. 1992).[13]

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[12] Under Section 5 of the FTC Act, an individual may be liable for equitable monetary relief for corporate violations if he had actual knowledge, was recklessly indifferent to its truth or falsity, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth. *FTC v. Network Servs. Depot*, 617 F.3d 1127, 1138 (9th Cir. 2010); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006).

[13] The cases that Gugliuzza cites (Br. 12-13, 20) do not support his argument that the elements of § 523(a)(2)(A) and an FTC Act violation lack sufficient identity. *Phalon v. Varasso* (*In re Varrasso*), 194 B.R. 537 (Bankr. D. Mass. 1996), did not address the requirements for individual liable for monetary relief (as distinct from injunctive relief) under the FTC Act, and is thus inapposite. *Harb v. Toscano* (*In*

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In response, Gugliuzza wrongly contends that the Ninth Circuit recently abrogated its longstanding precedent holding that reckless indifference suffices to establish knowledge under § 523(a)(2)(A). Br. 20-21(citing *Retz v. Samson* (*In re Retz*), 606 F.3d 1189, 1199 (9th Cir. 2010)). In fact, *Retz* did not address the *knowledge* element of § 523(a)(2)(A). Instead, it addressed the issue of *intent*—and in the context of a different provision of the Bankruptcy Code. *See* discussion at pp. 21-23, *infra*. Thus, *Retz* has no applicability here. It remains the law of this Circuit that a debtor's reckless disregard for the truth satisfies the knowledge requirement of § 523(a)(2)(A). *See Xiang v. Milnes* (*In re Milnes*), Bankr. No. 10-33136DM, Adv. No. 10-3191DM, 2011 WL 3207372, at *6 (Bankr. N.D. Cal. July 26, 2011).

Nor is there merit to Gugliuzza's unsupported argument that, because

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re Toscano), 23 B.R. 736 (Bankr. D. Mass 1982), and *Morgan v. Kanak* (*In re Kanak*), 85 B.R. 483 (Bankr. N.D. Ill. 1988), focused on differing standards of proof; however, such difference standards no longer exists, following the Supreme Court's decision in *Grogan*, 498 U.S. at 286-288, holding that (as under the FTC Act) the standard of proof under § 523(a)(2)(A) is preponderance of the evidence. Nor is Guglizza's argument helped by cases noting that violations of state consumer protection laws can be based on "conduct other than fraud" (which is true for the FTC Act as well, *e.g.*, unfair practices or unfair competition). But this says nothing about the elements of a claim for deceptive conduct, which also may be asserted under these statutes. The relevant inquiry is whether the prior court actually addressed the issue and made sufficient factual findings on the matter. *Compare In re Cohen*, 370 B.R. 26 (Bankr. D.N.H. 2007) (collateral estoppel inappropriate where there were no factual findings), *with Stoehr v. Mohamed*, 244 F.3d 206, 209 (1st Cir. 2001) (affirming summary judgment for nondischargeability where court in prior action made specific findings).

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individual liability for monetary relief under the FTC Act may also be established by evidence of the defendant's "awareness of a high probability of fraud along with an intentional avoidance of the truth," this somehow demonstrates that the "reckless indifference" standard this Court found was met actually means something less than recklessness. To the contrary, both aspects of the test for FTC Act individual liability fit squarely within the category of conduct that qualifies as reckless—not merely negligent—misrepresentation culpable under § 523(a)(2)(A). *See Kong*, 239 B.R. at 826-27 (discussing standard for recklessness).[14]

Gugliuzza's further contention that this Court's findings concerning Gugliuzza's reckless indifference were unnecessary (Br. 24) is also untenable. Again, the issue of Gugliuzza's knowledge was critical to a determination of his liability for monetary relief. Accordingly, the Court's determination that Gugliuzza possessed such knowledge because he was at least recklessly indifferent to the

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[14] In *Austin*, the court explained the distinction as follows:

> A person commits negligent misrepresentation when he or she supplies false information without exercising reasonable care or competence in obtaining or communicating the information…. Reckless misrepresentation, on the other hand, occurs when a person asserts false information as if it were true in spite of the fact that he or she recognizes a possibility, more or less great, that the information may be false.

138 B.R. at 907 (citing RESTATEMENT (SECOND) OF TORTS § 552 and § 526, cmt. e (1977). This Court's factual findings regarding Gugliuzza's participation and knowledge make it abundantly clear that Gugliuzza's "reckless indifference" was indeed reckless, not merely negligent, misrepresentation. *See*, *e.g.*, 1ER 1195-99, 1204-10.

1 misrepresentations in OnlineSupplier's website marketing precludes Gugliuzza
2 from relitigating that issue here.
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4 **C. The Bankruptcy Court Correctly Determined that this Court's Prior**
5 **Decision Establishes Gugliuzza's Intent.**
6 Because intent can be difficult to prove directly, courts properly infer intent
7 from the surrounding circumstances. *Ettell*, 188 F.3d at 1145; *Cowen v. Kennedy*
8 (*In re Kennedy*), 108 F.3d 1015, 1018 (9th Cir. 1997). Facts establishing a
9 debtor's knowledge, for example, often serve to establish intent. In particular, the
10 Ninth Circuit has held that, for purposes of § 523(a)(2)(A), "reckless disregard for
11 the truth of a representation satisfies the element that the debtor has made an
12 intentionally false representation." *Anastas*, 94 F.3d at 1286; *accord Ettell*, 188
13 F.3d at 1145 n.4 ("*Anastas* … made clear that reckless conduct could be sufficient
14 to establish fraudulent intent"); *Kong*, 239 B.R. at 826 ("the recklessness standard
15 … serves as a substitute for fraudulent intent for purposes of § 523(a)(2)(A)");
16 *Abeyta*, 387 B.R. at 854-55 ("[i]ntent to deceive … may be demonstrated by a
17 Defendant's reckless disregard").[15]
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19 Although intent is not an element of liability under the FTC Act, in
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[15] *See also Cal. State Emps. Credit Union v. Nelson* (*In re Nelson*), 561 F.2d 1342, 1347 (9th Cir. 1977) (finding that, based on evidence that defendant knew or should have known statements were false, it was "practically inevitable" that he intended to deceive); *Lederman*, 1995 WL 792072, at *6 ("[f]alse representations, coupled with knowledge of falsity or reckless disregard, establish intent to deceive").

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determining Gugliuzza's culpability for the deceptive marketing of OnlineSupplier, this Court necessarily resolved factual issues that are dispositive of his intent for purposes of § 523(a)(2)(A). The bankruptcy court reasonably concluded that there was sufficient indicia that Gugliuzza had fraudulent intent, based on this Court's findings that Gugliuzza knew of or was at least recklessly indifferent to the fact that OnlineSupplier's webpages were misleading, and Gugliuzza rejected clearer disclosures because such measures hurt sales. 1ER 33. This assessment is buttressed by other facts found by this Court, including that Gugliuzza approved webpages "designed not to be clear and conspicuous, but rather to mask information about OnlineSupplier's continuity program," 1ER 1185; Gugliuzza's participation was not "an isolated, discrete incident of deceptive marketing," but rather "sustained and continuous conduct that perpetuated the deceptive marketing of OnlineSupplier for over two years," 1ER 1217; and this deceptive marketing was very profitable, *id.*[16]

Moreover, because Gugliuzza argued in the prior FTC action (as he does here) that he relied in good faith on the advice of Commerce Planet's in-house counsel about the legality of the website marketing, this Court necessarily addressed that issue as well. It found that the evidence did *not* support Gugliuzza's contention that he deferred to the legal advice of counsel. Instead, it showed that

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[16] *See Austin*, 138 B.R. at 914 (inferring intent from profit motive).

1 Gugliuzza (himself a lawyer) assumed responsibility for reviewing the marketing
2 materials. 1ER 1213-14. Furthermore, this Court found, Commerce Planet's in-
3 house counsel was never asked to conduct a review of the entire sign-up process,
4 notwithstanding that he told Gugliuzza that he would not feel comfortable giving
5 advice on whether the webpages complied with the FTC Act without conducting
6 such a review. 1ER 1215.[17] Gugliuzza is precluded from relitigating these facts,
7 which amply support the bankruptcy court's conclusion that the issues presented
8 and resolved in the prior litigation fully resolve the issue of Gugliuzza's intent.
9 *See Trone v. Smith* (*In re Westgate California Corp*.), 642 F.2d 1174, 1176 (9th
10 Cir. 1981) (rejecting argument that collateral estoppel did not apply to court's prior
11 findings that might be deemed "evidentiary" rather than "ultimate" facts because
12 "a more functional approach … is appropriate").
13 Gugliuzza concedes (Br. 17) that, under the rule articulated in *Anastas*, 94
14 F.3d at 1286, and its progeny, a debtor's reckless indifference is enough to
15 demonstrate the intent required by § 523(a)(2)(A). He argues, however that the
16 Ninth Circuit backed away from this rule in *Retz*, 606 F.3d at 1199. But *Retz*
17 involved a different provision of the Bankruptcy Code: 11 U.S.C. § 727(a)(4)(A),
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26 [17] To negate fraudulent intent, a defendant must show that he fully disclosed all
27 material facts to the attorney, and that he relied in good faith on a "specific course
of conduct" recommended by the attorney. *United States v. Ibarra-Alcarez*, 830
28 F.2d 968, 973 (9th Cir. 1987). This Court's findings amply demonstrate that such
a defense is not available to Gugliuzza.

which provides that a debtor will be denied a discharge (for all creditors' claims, not just that of a particular creditor) if he "knowingly and fraudulently, or in connection with the case [,] made a false oath or account," including a "false statement or omission" in his bankruptcy schedules. Contrary to Gugliuzza's unsupported claim that these provisions are "functionally equivalent," there are notable distinctions between § 727(a)(4)(A) and § 523(a)(2)(A) that would warrant distinct standards of proof of intent. For example, a total bar to discharge is a more "extreme penalty" than denial of discharge of an individual debt. *See Ditto v. McCurdy*, 510 F.3d 1070, 1079 (9th Cir. 2007); *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993). The two provisions also have different purposes. Section 727(a)(4)(A) is meant "to insure that the trustee and creditors have accurate information," *Retz*, 606 F.3d at 1196, while § 523(a)(2)(A) protects victims of fraud, *see Grogan*, 498 U.S. at 287 (finding it "unlikely that Congress, in fashioning the standard of proof that governs the applicability of [§ 523], would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud").[18] Particularly under these conditions, it would be improper to assume that the court in *Retz* intended *sub silentio* to

[18] In addition, the elements of each claim differ. For example, a debtor may be denied a discharge under Section 727(a)(4)(A) without any proof of harm as a result of the debtor's false oath or account. *See Retz*, 606 F.3d at 1197 (outlining elements of claim).

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abrogate *Anastas*.[19]

In any event, here, the bankruptcy court did not base its decision solely on Gugliuzza's reckless indifference, but on the surrounding circumstances, as established in the prior litigation.[20] Contrary to Gugliuzza's unsupported argument, no principle of collateral estoppel prohibited the bankruptcy court from drawing an inference from these factual findings. Gugliuzza's further argument that, the bankruptcy court was required to draw all inference from the evidence in his favor (as the party opposing summary judgment) fails to apprehend that the bankruptcy court was not weighing and drawing inferences from the evidence. *This* Court already determined what inferences should be drawn from the evidence—introduced over 16 days of trial—and made factual findings based on that evidence. It was entirely appropriate for the bankruptcy court to decide, in the exercise of its judgment, that these established facts, considered together, demonstrate intent, satisfying that element of nondischargeability.

Gugliuzza fares no better in arguing that, because this Court observed that reliance on the advice of counsel is not a valid defense on the question of knowledge under the FTC Act, the issues in these two proceedings lack sufficient

[19] *Retz* also undermines Gugliuzza's reliance on advice of counsel argument, holding that "advice of counsel is not a defense when the erroneous information should have been evident to the debtor." 606 F.3d at 1199.

[20] As already discussed, there is no merit to Gugliuzza's additional argument (Br. 18) that the "reckless indifference" standard under the FTC Act is a lower standard than the standard applied in the bankruptcy context. *See* p. 18, *supra*.

identity, and collateral estoppel does not apply. This argument ignores that the Court went on to address and decide on factual grounds Guglizza's reliance on the advice of counsel defense. *See* p. 9, *supra*. And Gugliuzza's further contention that this Court's findings on that issue lack preclusive effect because they were superfluous is contrary to the "established rule" that:

> [E]ven though the court rests its judgment alternatively upon two or more grounds, the judgment concludes each adjudicated issue that is necessary to support any of the grounds upon which the judgment is rested.

Westgate California Corp., 642 F.2d at 1176 (quoting 1B J. Moore, FEDERAL PRACTICE ¶ 0.441(2) (2d ed. 1974).[21]

Thus, the bankruptcy court committed no error in finding that the issues this Court decided establish Gugliuzza's intent for purposes of § 523(a)(2)(A), and Gugliuzza is collaterally estopped from relitigating them.

D. The Bankruptcy Court Correctly Determined that this Court's Prior Decision Establishes that Consumers Justifiably Relied On and Were Damaged by Gugliuzza's Conduct

Section 523(a)(2)(A) requires justifiable reliance on the debtor's misrepresentations, omissions, or deceptive conduct. *Slyman,* 234 F.3d at 1085. This is a lower standard than reasonable reliance—the standard for liability under the FTC Act (*see* note 8, *supra*), because it "turns on a person's knowledge under

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[21] *See also Mast v. Long*, 84 Fed. Appx. 786, 787 (9*th* Cir. 2003) ("[t]he fact that the district court in the first action gave an alternative reason for its holding does not prevent the application of claim preclusion").

the particular circumstances." *Eashai*, 87 F.3d at 1090. Section 523(a)(2)(A) also requires a finding that the creditor was damaged by relying on the debtor's conduct. *Slyman,* 234 F.3d at 1085. The exception to discharge, moreover, applies to *all* losses arising from fraud, and is not limited to the amount received by the debtor. *Cohen*, 523 U.S. at 222.

In the FTC's enforcement action, this Court found "abundant evidence that consumers were actually misled" by the deceptive marketing of OnlineSupplier and were harmed because they reasonably relied on the deceptive claims. 1ER 1194. And the Court found that Gugliuzza's conduct caused at least $18.2 million in consumer injury. 1ER 1227-28. These findings establish the reliance and damages elements of § 523(a)(2)(A). Determinations of consumer reliance and monetary harm were essential to this Court's judgment, and Gugliuzza cannot relitigate them in bankruptcy.

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In sum, the bankruptcy court correctly concluded that the issues presented and resolved by this Court's in the FTC enforcement action satisfy all the requirements to except the judgment from discharge under § 523(a)(2)(A), and Gugliuzza is collaterally estopped from relitigating them.[22]

[22] Contrary to Gugliuzza's suggestion (Br. 14), a court may construe a statutory exception to discharge narrowly, yet find that the elements of the exception have been met.

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II. GUGLIUZZA FAILS TO SHOW THERE ARE ANY GENUINE ISSUES OF DISPUTED FACT PRECLUDING SUMMARY JUDGMENT.

Gugliuzza also fails to support his argument that, absent application of collateral estoppel, there are genuine issues of material fact that prevent his debt from being summarily ruled nondischargeable. The bare assertion in his brief that there are factual disputes (inviting this Court to read 1,000 pages or so of his submissions to the bankruptcy court, *see* Br. 26) do not serve to advance a claim on appeal: "[A] bare assertion does not preserve a claim." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000) (en banc)); *see Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("[j]udges are not like pigs, hunting for truffles buried in briefs," quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)).

Moreover, Gugliuzza, in his submissions below, did not demonstrate any material dispute with regard to key facts established in the FTC's enforcement action, including: (1) that he reviewed and approved OnlineSupplier's sign-up pages and marketing materials;[23] (2) that he was aware of the consumer complaints

[23] *See* 1ER 614-16 (Gugliuzza's Response to FTC's Statement of Uncontroverted Facts, ¶¶ 135-36, 141-45).

about the misleading "free kit" offer,[24] and the problems with high cancellation rates, refund requests, and chargeback rates;[25] and (3) that he rejected measures designed to ensure that consumers had read OnlineSupplier's terms and conditions, because "[e]very barrier we place to the order process will decrease our conversion rate."[26] Nor did Gugliuzza have evidentiary support for his claim that he relied on the advice of counsel regarding the website's compliance with the FTC Act. For its part, the Commission presented clear evidence that Commerce Planet's in-house counsel was never asked to review the entire sign-up process, and on the rare occasion when his advice regarding compliance with advertising laws was solicited, Gugliuzza told him "in no uncertain terms" that his "advice in these areas was not valued" and "was not welcome."[27]

Instead of offering concrete evidence, Gugliuzza opposed summary judgment based almost entirely on his affidavit recounting a version of events flatly contradicted by the record. 1ER 231-60. However, a party cannot defeat

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[24] *See* 1ER 612, 632, 635 (Gugliuzza's Response to FTC's Statement of Uncontroverted Facts, ¶¶ 132, 180-81, 192-94); 1ER 1942-45 (Ex. 42 to FTC's Motion for Summary Judgment).

[25] *See* 1ER 636-38 (Gugliuzza's Response to FTC's Statement of Uncontroverted Facts, ¶¶ 196-201, 204).

[26] *See* 1ER262-63 (Gugliuzza's Response to FTC's Statement of Uncontroverted Facts, ¶¶ 243-45); 1ER 2069-72 (Ex. 58 to FTC's Motion for Summary Judgment).

[27] *See* 1ER 70-79 (Huff Decl. ¶¶ 8, 23, Ex. 64 to FTC's Reply in Support of Motion for Summary Judgment).

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summary judgment with “unsupported conjecture or conclusory statements” or “mere allegations or denials.” *Hernandez v. Spacelabs Med. Inc.,* 343 F.3d 1107, 1112 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986)). Such self-serving affidavits “lacking detailed facts and any supporting evidence … are insufficient to create a genuine issue of material fact.” *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997).

Furthermore, this Court should reject outright Gugliuzza’s improper attempt to relitigate the monetary amount of the judgment. Contrary to Gugliuzza’s claim (Br. 27), this Court’s judgment is *not* for an amount “up to” 18.2 million, nor is it conditioned on the FTC’s first identifying consumers to redress.[28] The judgment plainly states: “[j]udgment is entered against Defendant *in the amount of* $18,200,000,” which sum is “immediately due and payable.” 1ER 1239 (emphasis added). Gugliuzza’s continued attempt to characterize the judgment as an award for damages, rather than for equitable monetary relief allowed under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), repeats an argument this Court previously addressed and rejected in denying Gugliuzza’s motion for a new trial. 1ER 1350. Moreover, because Gugliuzza is presently appealing this judgment to the Ninth Circuit on the very ground that it is an improper award for damages, rather than

[28] Gugliuzza seems to presume that the FTC has no intention of providing redress to consumers. The FTC, however, is simply attempting to make greater headway in its collection efforts before hiring a claims agent to run a redress program.

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one for equitable monetary relief, this Court lacks jurisdiction to address this issue. *See Natural Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The fact that this issue is on appeal does not change the res judicata effects of this Court's final judgment. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882-82 (9th Cir. 2007); *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988) ("The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal….") (quoting 18 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4433, at 308 (1981)). And, because bankruptcy courts have jurisdiction over matters referred by the district courts, 28 U.S.C. § 157, the bankruptcy court likewise does not have jurisdiction to adjudicate this same legal issue raised in a pending appeal.[29]

[29] Even if lack of jurisdiction were not a problem, this issue would be unripe for an appeal because Gugliuzza has also objected to the Commission's claim in his bankruptcy case on this ground, *see* 2ER 2413-23, and the bankruptcy court has not yet ruled on this matter.

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CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the bankruptcy court.

Date: January 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the CM/ECF system on January 16, 2015. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michele Arington
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