IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-57064

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CHARLES GUGLIUZZA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. 8:09-cv-01324-CJC-RNB
Hon. Cormac J. Carney

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("FTC" or "Commission") agrees with appellant's statement of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the district court committed clear error in finding Gugliuzza individually liable for corporate violations, based on evidence demonstrating that Gugliuzza participated in and had authority to control the website marketing of OnlineSupplier and had sufficient knowledge that OnlineSupplier's webpages were misleading.
2. Whether Section 13(b) of the FTC Act authorized the district court to award relief ancillary to an injunction, including equitable monetary relief, in order to accomplish complete justice.
3. Whether the district court committed clear error in calculating the amount of equitable monetary relief.

STATEMENT OF THE CASE

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

The Commission brought this action against Commerce Planet, Inc., and several of its directors and officers, including appellant Charles 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).[1] All defendants except for Gugliuzza settled with the Commission. Following a sixteen-day bench trial, the district court found Gugliuzza liable and imposed equitable remedies under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),[2] including a permanent injunction and monetary

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[1] Section 5 of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C § 45(a).

[2] Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

equitable relief, for Gugliuzza's wrongful and knowing participation in this scheme. Gugliuzza moved for a new trial, and the court denied that motion.

B. Facts and Proceedings Below

1. The OnlineSupplier Internet Marketing Scheme

Commerce Planet marketed OnlineSupplier, a membership program that purported to give consumers the ability to operate their own Internet-based businesses. 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 at a discount and then resell through the online auction site eBay. 3ER:624-25. Defendants marketed OnlineSupplier on a "negative option" basis: Consumers were offered a free trial period (ranging from 7 to 14 days) to use OnlineSupplier, 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). 5ER:1170; SER204-05, 217-18.[3]

[3] Following Appellant's citation convention, items contained in

Initially, Commerce Planet sold OnlineSupplier through inbound telemarketing, using advertisements that directed interested consumers to call a toll-free number. 5ER:1167-68; SER149-50. The company required its telephone sales representatives to describe the OnlineSupplier membership program, including the recurring monthly charge, and to obtain the callers' express consent to the terms of the offer before taking their payment information. SER072, 122-23. Sales of OnlineSupplier were poor, however, and the company was losing money. SER071, 225.

In May 2005, Commerce Planet's board of directors retained Gugliuzza as a consultant to identify ways to turn the company around and soon thereafter hired him to implement his recommendations, giving Gugliuzza broad control over Commerce Planet's operations, including its marketing efforts. 4ER:805-06; SER121, 143-45, 186-89. Under Gugliuzza's management, the company transitioned from selling OnlineSupplier through telemarketing to selling OnlineSupplier

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Appellant's Excerpts of Record are cited as "[vol. #]ER:[page #]"; materials in the FTC's Supplemental Excerpts of Record are cited as "SER[page #]."

through the Internet. SER121. Commerce Planet's advertisements—placed on various websites and in emails sent by affiliate marketers—now directed consumers interested in becoming "eBay resellers" to an OnlineSupplier website, where transactions were completed online. 6ER:1259-60; 5ER:1171-73; SER190-91, 197-98.

But the OnlineSupplier website (both Version I created in 2005 and Version II used as of February 2007) misrepresented the nature of the product being offered to consumers.[4] The landing page of the website made no mention at all of a continuity program requiring the payment of a monthly subscription fee. Indeed, it did not even mention the name OnlineSupplier, but instead offered consumers a "FREE" "Online Auction Starter Kit" that would provide information on how to sell products on eBay. 5ER:68-69.[5] Consumers wishing to receive this

[4] Version I prominently featured the eBay logo, suggesting affiliation with that company, but Commerce Planet removed the logo after eBay threatened to sue it. 5ER:1195; SER051-53.

[5] To view Version I (Exh. 1270, provided to the Court on CD by appellant) in its native format, open the file named "Signup v 1.0," then click on each step of the sign-up process in sequence: preview.php@lp=7&step=1.html (landing page), preview.php@lp=7&step=2 (billing page), preview.php@lp=7&step=3 (upsell page), and preview.php@lp=7&step=4 (final page). To view

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.[6]

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 spell out 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. For example, the Terms and Conditions page stated that

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Version II (Exh. 1271, provided on CD by appellant) in its native format, open the file named "Signup v 2.0," and follow the same sequence: preview.php@lp=167&step=1.html (landing page), preview.php@lp=167&step=2.html (billing page), preview.php@lp=167&step=3.html (upsell page), and preview.php@lp=167&step=4.html (final page).

[6] Clicking on the "Ship My Kit" button, took consumers to an upsell page advertising various other products and services, also involving a free trial offer and a membership fee (step 3 of the sign-up process identified in note 5, *supra*). But these pages provided no further clarification of the nature of the "free kit" offer.

"Online Supplier . . . provides the www.onlinesupplier.com site and various related services" and that consumers "completing the registration process" would be bound by these terms (including the payment of a monthly fee), without disclosing that consumers who ordered the "free kit" were thereby registering for OnlineSupplier's services. 5ER:68-69.[7] And the fine-print disclosures at the bottom of the billing page ambiguously stated that consumers "may" be liable for future goods and services.[8]

Commerce Planet immediately began to receive complaints from consumers—more than a thousand every week—stating that they had not seen or agreed to the terms of the OnlineSupplier continuity program and demanding refunds. SER054-56, 58, 62-63, 236-38 (BBB complaints); SER268-71 (attorney general complaints); SER338

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[7] To view the Terms and Conditions page for Version I (Exh. 1270) in its native format, open the file named "Signup v 1.0," click on the folder "onlinesupplier," then click on "popup_terms.php.html." To view the Terms and Conditions page for Version I (Exh. 1271), open the file named "Signup v 2.0,"and follow the same steps.

[8] The billing page is step 2 of the sign-up process identified in note 5, *supra*.

(summary of email complaints).[9] For example, one consumer emailed Commerce Planet that:

> You offer a free kit and then you charge 29.95 fee every month . . . and you say this in very small writing at the end so no one pays any attention to it and then you say you offer no refund. . . . This is very misleading and you need to be up front with people and tell them this is a membership, not tell them in small writing at the end of something you say is free.

SER338 (Exh. 1180) at row 1113. Another consumer wrote:

> This is notice for you to refund the $29.95 you billed me [I did not authorize it] and to inform you that your method of securing payment for shipping of free kit did not CLEARLY show the fact that a letter would have to be generated to cancel any further obligations. The [OnlineSupplier] web page does not show the required verbiage except below the fold of the displayed page which would not be read by most people. Your manner of advertising is deceptive and misleading and you should take immediate steps to CLEARLY indicate during the initial offer that after 14 days an automatic billing of 29.95 would occur."

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[9] SER338 (Exhibit 1180), provided to the Court on CD as part of the FTC's Supplemental Excerpts of Record, is an Excel spreadsheet prepared by the FTC summarizing email complaints received by Commerce Planet. The district court admitted it pursuant to Fed. R. Evid. 1006, as evidence of consumer confusion about the nature of Commerce Planet's offer. 1ER:71 (note 9).

Id. at row 1114. Commerce Planet received a flood of other similar complaints, including:

- I feel that the way the offer was set up was very misleading because when I asked for the info and it said all you have to do is pay the $1.95 for shipping then you fill out the form and it says ship my information. I came to find out after a charge of $39.95 was deducted out of my account and calling the company about this I was told that this information was under terms and conditions, to which I didn't even see, because it is below the info where I filled out my application and was unable to see it. I feel that if there is a catch to an offer next time you should put it in the actual offer, not in terms and conditions.[10]

- On 10/11/05, I requested free info about online supplier. I activated NOTHING. On 10/31/05, my credit card was billed $29.95 for a service I have not authorized. I want this charge credited to my account IMMEDIATELY! I NEVER ACTIVATED A TRIAL PERIOD! I paid a shipping charge for free information.[11]

- Your ad offers a FREE Kit and your \"Terms of Membership\" states that, 4. Payment of Fees. If you subscribe to a service on this site that requires payment of a fee, you agree to pay all fees associated with such service, including the activation fee and the monthly web hosting fee of $29.95. . . . I have not \"subscribed\" to any service

[10] SER338 (Exh. 1180) at row 1816.

[11] *Id.* at row 570.

> on this site, including the activation of any website authorizing you to debit my credit card account for that amount which originated from your company. . . . I suspect that this practice is illegal and violates more than one fair practice or advertising laws. . . .[12]

- When I payed [sic] the 1.95 to have the kit sent to me for free I did not realize I was being given a membership trial. I thought it was that I could do a free trial if I wanted to but not that it was automatically signing me up for one. That kind of stuff should be on the front page not at the bottom in small print or in the terms. . . . I will do all I can to get you to change the webpage so that it is not so deceiving.[13]

At the same time, the company's credit card chargeback rates—already high—spiked upwards and remained inordinately high throughout 2006 and 2007. SER081-82, 116-17, 177-81, 296-301, 366-68; 5ER:1139. Although these excessive chargeback rates cost Commerce Planet over one million dollars in merchant account processor fees (SER176),[14] the company decided that "changing

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[12] *Id*. at row 902.

[13] *Id*. at row 1660.

[14] Visa, Inc., the provider of one of the credit cards accepted for purchases of OnlineSupplier, assessed these fees against Commerce Planet's merchant banks, which in turn passed the fees along to Commerce Planet. SER124.

merchant providers was a faster and easier solution than altering business practices." SER367.[15]

The transition to online sales led to a dramatic turnaround in Commerce Planet's financial condition: From the end of 2005 to the end of 2006, the company's income surged from a loss of over $6.2 million to a profit of $8.7 million. SER083-84.

Few consumers who purchased online, however, actually used the memberships for which they were charged.[16] For example, only trivial numbers of consumers ordered discounted products for resale, a key component of the OnlineSupplier membership. SER086-87. Indeed, Commerce Planet's management never even monitored how many people set up websites or bought products from the company's warehouse. SER133-34. And although the company offered customer service support, very little of the customer service department's time

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[15] Excessive chargebacks for OnlineSupplier caused Commerce Planet's U.S. merchant bank to cut it off in mid-2007, forcing it to go overseas to take advantage of more lenient chargeback thresholds. SER125-28. But OnlineSupplier's chargeback rates continued to exceed even the more lenient international standards. SER129-31.

[16] By defendants' own accounting, fewer than 20% of consumers maintained their membership for longer than three months, and only 10% did so for longer than six months. SER045.

was devoted to helping customers actually use the product. The vast majority of its time, instead, was spent fielding consumer complaints. SER058, 60-61.

2. Gugliuzza's Participation in the Deceptive Marketing of OnlineSupplier

From the time he came on board, first as titular consultant and later as president, Gugliuzza wielded considerable power at Commerce Planet and was integrally involved in making decisions that affected the company's operations, including the marketing of OnlineSupplier. SER121, 143-45, 151-52. He oversaw and regularly met with the company's department heads, who were required to submit weekly reports to him. SER046, 67, 146-47, 202-03, 311, 373-74.

Specifically, Gugliuzza had supervisory authority over Aaron Gravitz, who was responsible for marketing OnlineSupplier. SER148-50, 189. Although Gugliuzza did not come up with the design or concept of OnlineSupplier's webpages, he oversaw the transition of the customer acquisition process from inbound telemarketing to online sales, and he reviewed and approved OnlineSupplier's sign-up pages and marketing materials. SER192 ("When Charlie started work with us, he became

involved in the review of the landing page and advertising materials."); SER199 (Gugliuzza and Gravitz "were in the loop together on the advertising materials"); SER159 (Gugliuzza "execute[d] landing page approvals"); SER186-87, 124.

Gugliuzza's oversight also extended to Commerce Planet's customer service department. When customer complaints about OnlineSupplier's misleading "free kit" offer and demands for refunds began pouring in, the manager of customer services notified Gugliuzza of the problem, in written weekly reports and at weekly staff meetings. SER059-63. Other senior managers brought these customer complaints to Gugliuzza's attention as well, and they apprised him of the company's worsening problem with elevated chargeback rates. SER159-69, 209-10, 239-67, 285 (Summary, ¶3), 364. Gugliuzza also received weekly reports from the company's chief financial officer, which showed a steady increase in the number of chargebacks. SER118-19; SER315-16 ("[c]hargebacks continue to grow"); SER342 ("[c]hargebacks increased to a highest ever figure").

Gugliuzza was adamant, however, that no changes be made to the OnlineSupplier website that might reduce consumer sign-ups. The

company knew from testing of the web pages that "conversions," or sales, increased when the material terms of the offer, including the automatic charge of a membership fee if consumers did not cancel, were moved off the landing page and buried on the bottom of the billing page in small, hard-to-read type. SER193-96, 206-08, 215-16, 278 (Summary, ¶ 6); 5ER:1198.[17] Thus, for example, Gugliuzza rejected a proposal from Verifi (an electronic payment risk management service) to add a checkbox to the OnlineSupplier billing page that would have required consumers to affirm that they had read the terms and conditions, because "[e]very barrier we place to the order process will decrease our conversion rate." SER302 (adding, "[d]o not change anything without my prior approval"); SER281 ("[w]e split test this a few weeks ago and saw a significant decrease in conversion"); SER211-13.[18] And Gugliuzza

[17] Low conversions would have hurt the company's ability to find affiliate marketers willing to carry their advertisements. SER205-06, 289 (Summary, ¶ 5).

[18] Gugliuzza opposed "add[ing] any additional barriers to the sign-up process," noting that the company's experiment in sending post-transaction emails confirming the terms of the transaction "were a disaster to our cancellation numbers." SER302. Consequently, Commerce Planet sent such email notifications for only a short time. SER060, 64-65, 294 (Summary, ¶ 1).

instructed Gravitz to remove a key anti-fraud measure (Address Verification Service, or "AVS") from the OnlineSupplier billing page because it hurt sales: "AVS. Get it off . . . it is lowering conversions dramatically." SER308; *see* SER210, 214.

Gugliuzza similarly disregarded concerns raised by Commerce Planet's in-house counsel, Paul Huff. When Huff questioned whether OnlineSupplier's sign-up pages were legally compliant, Gugliuzza "put his hands over his ears" and refused to talk about it. SER109-11. And, because Gugliuzza was the "final authority" on legal review of the company's marketing materials (SER187-88; *see* SER155-56), the company continued to use webpages that promised consumers a "free kit" and then enrolled them in, and billed them for, membership in the OnlineSupplier program.

Even if consumers soon canceled, the company generally made money from the transaction. Consumers who complained often did not get full refunds, and many consumers did not seek refunds but simply absorbed the loss. *E.g.*, SER226-34; SER338 (Exh. 1180, provided on CD) at rows 652, 661, 674, 1069, 1083, 1087, 1103, 1129, 1231. All told, during Gugliuzza's tenure, the company took in $36.4 million (net of

refunds) from its website sales of OnlineSupplier. 1ER:97-99; SER085, 90-93.

Moreover, Gugliuzza had a personal motivation for preserving Commerce Planet's sales practices: His plan was to increase revenues to make the company a more attractive acquisition target—a transaction that would have earned him 5 percent of the sales amount. SER068-70, 272-76 (¶ 7: "[w]e were just trying to inflate the revenue so we could sell Commerce [Planet]").

3. The FTC's Investigation

In March 2008, the FTC served a civil investigative demand on Commerce Planet, prompting Commerce Planet to revise the OnlineSupplier website. SER112, 137-38, 219-24. This new version of the sign-up pages did not mention a free auction starter kit and significantly clarified the terms of membership on the landing and billing pages. SER341 (Exhibit 1272, provided on CD). After making these changes, the company incurred a severe reduction in sales of OnlineSupplier. SER139-40.

4. The Proceedings Below

The FTC filed suit against defendants on November 10, 2009. Shortly thereafter, the FTC settled with Commerce Planet and the other individual defendants, and the court entered final judgments for permanent injunction and equitable monetary relief in the amount of $19,730,000 against each of them. 1ER:113-96. The parties agreed to suspend the judgment for monetary relief under certain conditions, including the payment of lesser amounts. *Id*.

The FTC also engaged in settlement discussions with Gugliuzza, but the parties were unable to reach a resolution. On June 29, 2011, the FTC filed an amended complaint asserting two counts against Gugliuzza for (i) deceptive practices and (ii) unfair practices, both in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). 6ER:1241-97.

The district court conducted a sixteen-day bench trial that involved over 300 exhibits and 22 witnesses. On June 22, 2012, the court issued a 69-page memorandum of decision, in which it analyzed in extensive detail the arguments and evidence presented by the parties. 1ER:36-104. 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 net 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:53-60.

The court determined that other evidence corroborated its conclusion that the OnlineSupplier webpages were facially misleading. The court found persuasive the testimony of an FTC expert witness, who concluded, based on a usability inspection of the webpages, that most customers would not know that a negative option was present or that, after they finished the check-out process, they were enrolled in a continuity program. 1ER:60-65. Gugliuzza, the court noted, introduced no expert testimony rebutting those conclusions. 1ER:66. Although Gugliuzza argued that user data revealed that the majority of consumers signed up for OnlineSupplier knowing the terms of the negative option plan, the court found otherwise. 1ER:66-68.[19]

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[19] For example, although Gugliuzza cited positive testimonials from 14 consumers, the district court found that the testimonials dated from early March 2005, when OnlineSupplier was sold through inbound

The court noted that, although not required to prove actual deception, the FTC had presented "abundant evidence that consumers were actually misled by OnlineSupplier's webpages." 1ER:69. The court cited the trial testimony of "two fairly sophisticated consumers," who described their experiences with the OnlineSupplier website, their belief that the website was merely offering a free information kit, and their inability to obtain refunds from defendants after discovering the unauthorized charges. *Id*. The court also pointed to the many thousands of customer complaints received by defendants and the testimony of Commerce Planet's customer service manager, who stated that approximately 70% of the consumer complaints consisted of "free-kit-only" complaints—*i.e.*, people who thought they were just paying $1.95 in shipping for a free kit, only to discover they were being charged a monthly fee. 1ER:70-72. The court found this to be "credible and highly probative evidence that the website marketing of OnlineSupplier was misleading and deceptive." 1ER:72. The court determined that the evidence of excessive chargeback rates for OnlineSupplier further

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telemarketing, not online. 1ER:67-68; *see* 5ER: 1146-58; SER135-36, 182-83.

corroborated its conclusion that the program's sign-up pages were misleading. 1ER:72-74.

The court then addressed Gugliuzza's argument that consumer confusion and high chargeback rates were the result of fraud by third-party affiliate marketers. The court found that, although there was evidence of affiliate fraud that hurt Commerce Planet (for example, "click fraud" that simulated consumer traffic to OnlineSupplier's sign-up pages), there was no evidence specifically linking affiliate fraud as the primary cause of consumer confusion and high chargeback rates. Indeed, the evidence demonstrated otherwise. 1ER:74-77.

"In short," stated the court, "the FTC has provided a plethora of evidence that OnlineSupplier's signup pages were misleading because they conveyed the net impression that consumers could order a free auction kit with payment of a small shipping and handling fee, when in fact, they were subscribing to a negative option plan." 1ER:77.[20] Based on this evidence, the court held that the website marketing of

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[20] *See FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) ("Deception may be found based on the 'net impression' created by a representation.").

OnlineSupplier was a deceptive practice in violation of Section 5(a) of the FTC Act. 1ER:77.

The court also held that the website marketing of OnlineSupplier was an unfair practice under Section 5(a) because: (1) consumers who were misled into signing up for Online Supplier incurred substantial financial injury; (2) evidence that there were some satisfied customers or that OnlineSupplier had some utility did not offset the harm to consumers misled into ordering OnlineSupplier; and (3) consumers, who were not adequately informed that they were signing up for a continuity program, could not have reasonably avoided the monthly charge. 1ER:77-79.[21]

The Court held that Gugliuzza was individually liable for the corporate violations of the FTC Act because the evidence demonstrated that, during his time both as a consultant and company president, Guglizza participated in and had authority to control the website

[21] An act or practice is "unfair" under the FTC Act if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C § 45(n); *see FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010).

marketing of OnlineSupplier, 1ER:80-83, and "at the very least, . . . was recklessly indifferent to the misleading representations of OnlineSupplier on its landing and billing pages," 1ER:84. The court found that Gugliuzza reviewed, commented on, and approved the OnlineSupplier sign-up pages, and it further found that he was regularly made aware of the excessive chargeback rates and voluminous consumer complaints (which were predominantly "free kit only" complaints). 1ER:84-85. Also, the court stated, Gugliuzza's "pervasive role and authority," which "extended to almost every facet of the company's business and operations," created a "strong inference" that Gugliuzza knew that OnlineSupplier's webpages were misleading. 1ER:85.

The court dismissed as "simply not credible" Gugliuzza's trial testimony that he was unaware that the webpages were misleading. 1ER:86. Although Gugliuzza had argued that there was no specific law or industry standard specifying how a negative option plan should be disclosed, the court followed established precedent in concluding that rigid guidelines are unnecessary to establish liability in this area. It added that, in any event, an FTC publication (*Dot.com Disclosures*) did

provide guidelines on disclosures consistent with the "net impression" test. 1ER:86-87. The court likewise rejected Gugliuzza's defense of reliance on the advice of legal counsel on both legal and factual grounds. As a matter of law, the court observed, that defense is irrelevant to the issue of knowledge. In any event, as a matter of fact, Gugliuzza did not defer to the legal advice of Commerce Planet's in-house counsel. 1ER:87-91.

Turning to the remedy, the court concluded that a permanent injunction against Gugliuzza was appropriate to prevent him from engaging in similar misleading and deceptive marketing of products and services. 1ER:91-94. The court also determined that a monetary award of equitable restitution was warranted to redress consumer injury caused by defendants' deceptive and unfair practices. The Commission had sought an award of $36.4 million, which represented the net payments from all consumers who purchased OnlineSupplier during the relevant time period, less refunds and chargebacks. The court declined to award that amount on the ground that not all consumers were in fact deceived by OnlineSupplier's webpages. 1ER:101. The Court did find, however, that the evidence "strongly

supported" the conclusion that most reasonable consumers would have been misled by OnlineSupplier's landing and billing pages. 1ER:102. The court determined that a "conservative floor" was that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up pages. *Id*. Accordingly, the Court found $18.2 million to be a reasonably conservative estimate of consumer injury and the proper award as restitution for consumer redress. *Id*. It assessed that amount against Gugliuzza on the basis of joint and several liability.

Gugliuzza moved for a new trial, principally challenging the imposition of monetary relief against him. The district court denied the motion, finding that, in accordance with settled Circuit precedent, Section 13(b) of the FTC authorizes the monetary award. 1ER:1-19.

STANDARD OF REVIEW

1. Findings of fact and conclusions of law: Following a bench trial, the trial judge's findings of fact are reviewed for clear error. *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004) (citing *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088, (9th Cir. 2002)). The standard is "significantly deferential," and the trial court's findings should be accepted unless there is a "definite and firm conviction that a mistake

has been committed." *Garvey*, 383 F.3d at 900 (citing *N. Queen Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002)). The trial court's conclusions of law following a bench trial are reviewed *de novo*. *Garvey*, 383 F.3d at 900 (citing *Brown v. United States*, 329 F.3d 664, 671 (9th Cir. 2003)).

2. Admission of expert testimony: A trial court's decision to admit expert testimony is reviewed for abuse of discretion; an appellate court should give "deference" to a trial court and may reverse only if the trial court's determination was "manifestly erroneous." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997); *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 879 (9th Cir. 2000).

3. Equitable monetary and injunctive relief: This Court "review[s] the district court's grant of equitable monetary relief for an abuse of discretion." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (quoting *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001)).

SUMMARY OF ARGUMENT

1. Gugliuzza does not dispute that Commerce Planet's website marketing of OnlineSupplier violated the FTC Act, nor does he dispute

that he participated in or had authority to control Commerce Planet's deceptive and unfair practices. Rather, he denies that he possessed the requisite knowledge to be held liable for equitable monetary relief. But there was overwhelming evidence, including many thousands of consumer complaints regularly brought to his attention, confirming that Gugliuzza in fact knew that OnlineSupplier's webpages were misleading. Part I.A.1. Indeed, he rejected measures designed to protect consumers precisely because he understood that such measures would substantially reduce sales.

This evidence of knowledge defeats Gugliuzza's argument that he relied in good faith on the advice of counsel. First, as this Court has held, reliance on advice of counsel is not a valid defense on the question of knowledge. In any event, Gugliuzza did not seek or follow counsel's advice as to whether OnlineSupplier's webpages were legally compliant. Part I.A.2.

There is also no merit to Gugliuzza's further argument that he lacked notice that OnlineSupplier's webpage disclosures would be found legally inadequate. Among other considerations, thousands of consumer

complaints made it abundantly clear to him that these disclosures were inadequate under any reasonable standard. Part I.B.

The district court also correctly excluded an expert witness through whom Gugliuzza sought to introduce evidence of a consumer survey. That expert had no role in designing or conducting the survey, and, for whatever reason, Gugliuzza declined to produce a witness who *could* testify about the methodological choices that went into conducting that survey. Part I.C.

2. The district court followed well-established circuit precedent in awarding monetary equitable relief against Gugliuzza. That precedent confirms that Section 13(b) authorizes a court to award not only injunctions, but *complete* equitable relief, including monetary relief. Part II.A. Here, the district court properly awarded equitable restitution measured by consumer losses, which equal the ill-gotten gains of Gugliuzza and the co-defendants with whom he shares joint and several liability. In contending otherwise, Gugliuzza relies on factually inapposite cases from other circuits. Part II.B. Circuit precedent likewise precludes Gugliuzza's argument that Section 19(b) of the FTC Act, which authorizes awards of *damages* (such as

consequential damages), somehow limits the *equitable* remedies available under Section 13(b). Part II.C. Gugliuzza also has no basis for complaining about the denial of a jury trial—both because he had no entitlement to one (given the equitable nature of this proceeding) and, in any event, because he never even asked for one. Part. II.D.

Finally, the district court correctly determined the amount of equitable monetary relief. As this Court and numerous other courts have recognized, the appropriate baseline for this calculation is defendants' sales to consumers, less refunds. Gugliuzza does not challenge the court's calculation of that amount: $36.4 million. The district court halved that amount, awarding equitable restitution in the amount of $18.2 million, which the court found to be a "conservative" estimate of consumer injury, and it properly assessed that amount against Gugliuzza on the basis of joint and several liability. The evidence provides ample foundation for that relief, and Gugliuzza's contrary arguments misstate the record. Part II.E.

ARGUMENT

I. The District Court Properly Held Gugliuzza Individually Liable for Corporate Violations.

A. Gugliuzza Had the Requisite Knowledge that OnlineSupplier's WebPages Were Misleading.

Injunctive relief against an individual defendant for corporate violations of the FTC Act is appropriate when the individual participated directly in the wrongful practice or had authority to control it. *Stefanchik*, 559 F.3d at 931; *Garvey*, 383 F.3d at 900; *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997). An individual also may be liable for *monetary* redress if he knew or should have known that the corporate defendant was engaged in deceptive or unfair practices, was recklessly indifferent to the truth or falsity of the corporate defendant's representations, or was aware of a high probability of deception and intentionally avoided the truth. *Stefanchik*, 559 F.3d at 931; *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *Garvey*, 383 F.3d at 900; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994). An individual's "degree of participation in business affairs is probative of knowledge." *FTC v. Affordable Media,*

LLC, 179 F.3d 1228, 1235 (9th Cir. 1999) (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989)).

Gugliuzza does not substantively dispute that he participated in or had authority to control the challenged practices. Nor could he. From the time Gugliuzza came on board as a consultant, he assumed principal responsibility for managing the company. He immediately displaced the role of then-president Michael Hill, who was tasked with carrying out Gugliuzza's recommendations; he conducted day-to-day oversight over marketing; and he supervised Aaron Gravitz, who designed the content of Commerce Planet's website. SER066, 144-45, 148-52, 157-59. Gugliuzza also assumed responsibility for legal review of the company's marketing materials; indeed, he was the "final authority" on legal review of the OnlineSupplier sign-up pages. SER153-56, 159, 187-88. *See* pp. 12-15, *supra*.

Significantly, Gugliuzza also does not challenge on appeal the district court's finding that Commerce Planet's website marketing was deceptive and unfair, in violation of the FTC Act. Instead, he challenges only the district court's conclusion that he had culpable *knowledge* of

that fact sufficient to support a monetary award against him for the resulting consumer injuries. That challenge, however, is untenable.

1. The Evidence Clearly Establishes Gugliuzza's Knowledge.

Gugliuzza claims that he had no idea that, where it appeared at all, the relevant negative option disclosure appeared only below the fold on computer monitors with standard screen resolutions. This claim is implausible, and even if it *were* plausible, it could not possibly cast doubt on the relevant issue: his knowledge of consumer deception.

The evidence of Gugliuzza's knowledge was overwhelming. To begin with, he does not dispute that he was regularly made aware that Commerce Planet had received a prodigious number of consumer complaints showing that consumers were, in fact, deceived *en masse* by OnlineSupplier's sign-up pages. In their complaints, consumers explained, time and again, that OnlineSupplier's webpages had led them to believe that they were merely ordering a free kit, not that they were subscribing to a continuity program on a negative option basis. And these complaints clearly showed that whatever disclosures there were, they failed—whether by virtue of placement, size, wording, or

other aspects of the webpages—to inform consumers of the true nature of the product being offered. Indeed, many of these consumers stated specifically that they had never seen any disclosure because the relevant text appeared below the fold or in an entirely separate "Terms and Conditions" page that seemingly had no bearing on the free kit offer. *See* pp. 7-10, *supra*. Gugliuzza simply disregarded these complaints. As the district court concluded, therefore, he was—at the very least—recklessly indifferent to the fact that OnlineSupplier's sign-up pages were misleading.

Even taken at face value, Gugliuzza's argument about computer monitor resolution is riddled with factual misstatements and, as the district court found, is "simply not credible." 1ER:86. It was uncontroverted below that the negative option disclosure on OnlineSupplier's sign-up pages, where it appeared at all,[22] appeared *below the fold* on an 800x600 (low-resolution) monitor display—the resolution for which the webpages were designed. 4ER:726-27. Thus, if, as Gugliuzza asserts (Br. 11, 25), he and others at Commerce Planet

[22] Again, OnlineSupplier's landing pages contained no such disclosure. *See* p. 5, *supra*.

used computers with an 800x600 resolution display, he surely was aware that the negative option disclosure appeared below the fold.[23] And it was uncontroverted (as Guglizza concedes) that the disclosure likewise appeared *below the fold* on higher-resolution 1024x768 monitor displays—the most commonly used resolution at that time. 4ER:724; SER170-72.[24]

Furthermore, as Gugliuzza could tell from looking at them on any monitor, OnlineSupplier's landing and billing pages were facially misleading because their predominant message was that consumers were ordering a "free kit" and nothing more. That message was driven home by the prominent, repeated text and graphics proclaiming: "GET YOUR ONLINE AUCTION STARTER KIT TODAY FREE!"; "NOW

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[23] Gugliuzza's contention that all the webpage content was visible on an 800x600 monitor without scrolling down (Br. 11) is contradicted by the very testimony that he cites. 4ER:727 (with 800x600 resolution, the disclosure "would have to appear below the fold"). Also, the evidence does not, as Gugliuzza asserts, reveal the monitor resolution used by "all" Commerce Planet employees, but merely that some Commerce Planet employees used high-resolution monitors. 4ER:731.

[24] Gugliuzza's further contention that *less content* is visible on a higher-resolution (1024x768) monitor than on a lower-resolution (800x600) monitor has it exactly backwards. In any event, the undisputed evidence shows that, for *both* resolution displays, the negative option disclosure appeared below the fold. SER173-74.

FREE"; and "Where do we ship your FREE KIT?" But OnlineSupplier was not "a free kit"; it was a commitment to pay substantial sums over time. Moreover, as Gugliuzza and anyone else could see, there was *no* express mention of OnlineSupplier's continuity program anywhere on the landing page. And while the billing page did contain a negative option disclosure (again, below the fold), that disclosure was itself ambiguous because it noted only that a consumer "may" be liable for payment of future goods and services. 1ER:57; *see* p. 7, *supra*.

There is likewise no merit to Gugliuzza's argument that he had no basis for attributing significance to the enormous number of consumer complaints and chargebacks because (he says) he did not know what "normal" or "acceptable" levels were. Commerce Planet received thousands of consumer complaints each week, and the vast majority —70% or more—were from consumers complaining that they had merely ordered a free starter kit for $1.95 and had not requested an OnlineSupplier membership. SER54-55, 62-63; *see* pp. 7-10, *supra*. The manager of Commerce Planet's customer services department, José Guardiola, also testified that he reported these customer complaints and cancellation requests to Gugliuzza in weekly reports and at weekly

staff meetings, which Gugliuzza attended about twice a month. SER059-60, 63. Guardiola further testified that a frequent topic of discussion at these meetings was whether to place more prominent disclosures on OnlineSupplier's sign-up pages. SER060. Gugliuzza responded not by seeking to reduce this immense consumer confusion, but by rejecting measures designed to avoid customer confusion and by chiding the customer service department for underperforming because the refund rate was so high. *Id.*; *see* pp. 13-15, *supra.*

Indeed, Gugliuzza himself admitted that he was fully aware of the company's problems with excessive chargebacks and high cancellation rates for OnlineSupplier. 2ER:324; SER047-50. As the district court recognized, this evidence, in conjunction with the evidence of consumer complaints, confirms that Gugliuzza knew that an unusually high percentage of consumers never knowingly consented to OnlineSupplier's membership fees. *See FTC v. Wells*, 385 Fed. Appx. 712, 713 (9th Cir. 2010) (defendant's knowledge demonstrated by evidence that he received "reports of fraud and notice of charge-backs at 10 to 20 times the rates generally permitted for credit card and direct deposit transactions").

In sum, Gugliuzza cannot credibly dispute that he was "aware of a high probability" that OnlineSupplier's sign-up pages were misleading or, at the very least, was "recklessly indifferent to the truth."[25] To the contrary, Gugliuzza was acutely aware of the resulting consumer confusion and hoped to profit from it. Indeed, he specifically rejected initiatives to reduce customer confusion (including sending post-transaction emails confirming the terms of the transaction) precisely because, as he observed, those initiatives hurt sales. *See* note 18, *supra*. Although Gugliuzza continues to advance alternative explanations for the company's high chargeback rates (in particular, third-party affiliate

[25] *Stefanchik*, 559 F.3d at 931; *Cyberspace.com*, 453 F.3d at 1202 (evidence that the defendant reviewed the marketing materials and was apprised of consumer complaints was "sufficient, as a matter of law," to demonstrate the requisite knowledge). Gugliuzza misses the mark in relying (Br. 34) on the percentage of consumers who canceled during the free trial period and the existence of some satisfied customers. As noted above, Gugliuzza does not contest the district court's conclusion that defendants' practices were in fact deceptive, limiting his arguments to the state of his knowledge and the award of monetary relief. The fact that some consumers may not have been misled says nothing about his knowledge of the many who were, and the award of monetary relief is based on payments made by consumers who did not cancel during the free trial period. (Gugliuzza's 45% figure is also disputed: the FTC's calculations using defendants' own data showed a cancellation rate of 25%, not 45%. SER087-90.)

fraud), the district court reasonably found that those explanations lack record support. 1ER:74-77; *see* SER073-74 (testimony that contractual fraud by affiliate marketers did not harm consumers). For example, though Commerce Planet may have had high numbers of chargebacks when it sold OnlineSupplier through inbound telemarketing, it experienced a "spike" in chargeback rates after it shifted to online sales, and the practices challenged here were the principal reason. SER367 ("[t]his spike was the result of our marketing practices"); *see* p. 10, *supra*. Moreover, even after addressing all of the alleged external causes of its chargeback problems, including affiliate fraud, Commerce Planet continued to be plagued by excessive chargebacks. SER129-32, 369-72.

Thus, there was no clear error, and the district court's findings should be affirmed.

2. The District Court Properly Rejected Gugliuzza's Reliance on Advice of Counsel.

The extensive evidence of Gugliuzza's knowledge also subverts his advice-of-counsel defense. To begin with, as this Court held in a strikingly similar FTC case, "'reliance on advice of counsel [is] not a

valid defense on the question of knowledge' required for individual liability." *Cyberspace.com*, 453 F.3d at 1202 (quoting *Amy Travel Serv.*, 875 F.2d at 575).[26] But even if that defense were cognizable in this context, it would still be unavailable to Gugliuzza because a businessperson may not "continue to rely on [advice of counsel] in the face of compelling evidence of consumer confusion without being recklessly indifferent to the misleading nature of their ads, or being aware of a high probability of fraud but intentionally avoiding the truth." *FTC v. Grant Connect, LLC*, No. 2:09-CV-01349-PMP-RJJ, 2011 U.S. Dist. LEXIS 123792, at *58-59 (D. Nev. Oct. 25, 2011).[27]

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[26] Gugliuzza argues that this rule has no application in a case involving truthful but potentially misleading representations (*e.g.*, by virtue of text size and placement). Br. 28. In fact, however, *Cyberspace.com* involved exactly that scenario: Defendants mailed solicitations enclosing what appeared to be a rebate or refund check; the back of the check contained small-print disclosures revealing that cashing the check would constitute agreement to pay a monthly fee for internet access; and defendants received numerous complaints from consumers indicating that they had deposited the check without realizing they had contracted for Internet services. Consequently, the relevant inquiry was whether the solicitation was "likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." 453 F.3d at 1200.

[27] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 50 (2007), on which Gugliuzza relies (Br. 28), is inapposite. The statute at issue there (the

In any event, the principal counsel at issue here—in-house Commerce Planet attorney Paul Huff—testified at trial that Gugliuzza did not, in fact, rely on his advice in any relevant respect. He explained that Gugliuzza wanted him to opine on the legality of OnlineSupplier's webpages without letting him review the entire sign-up process. SER095-98. Huff told Gugliuzza:

> [I]t's not my opinion that everything is okay. There are some changes that I think we could make in my opinion. I haven't been asked to go through and look at everything and give a real legal opinion, and even to do that, I would have to get some background in it.

Id. at 85. Indeed, Huff's recommendations for improved disclosures were often disregarded entirely. *Id.* at SER79-80, 98-108, 339-40.[28] Huff

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Fair Credit Reporting Act) required, as a condition for an award of statutory and punitive damages, a "willful" failure to comply with specific statutory requirements (in that case, the obligation to provide consumers with notice that use of their credit reports led to an "adverse action"); liability thus turned on defendants' understanding of what activities gave rise to those statutory obligations. That inquiry is distinct from the standard of knowledge that applies under the FTC Act, which instead focuses on an individual defendant's awareness of (or reckless indifference to) consumer deception, not his understanding of particular statutory directives.

[28] For instance, when Huff advised Commerce Planet that it needed to make changes to its Internet sales process in order to comply with federal regulations regarding continuity billing—changes that included

further testified that, on one particular occasion, Gugliuzza flatly refused to entertain Huff's questions regarding the legality of OnlineSupplier's sign-up pages but "put his hands over his ears" and refused to talk about it. SER109-11.[29] Although Gugliuzza also contends that he followed advice from Huff's predecessor, Jeffrey Conrad, Conrad testified that he did not even recall looking at the sign-up pages. SER141-42. And the FTC-oriented law firm whose advice Gugliuzza claims to have followed was hired to advise only on Commerce Planet's *privacy policy*, not on whether OnlineSupplier's sign-up pages complied with the FTC Act. SER094, 200-01.[30]

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improving the disclosure of the terms and conditions of the OnlineSupplier free-to-pay offer on the sign-up pages—defendant Hill told Huff, "We didn't really want your advice on these things. We have been in the industry long enough. We know what is going on in the industry and, frankly we don't really need it." SER113-15.

[29] Although Gugliuzza directed Huff to attend an FTC seminar and prepare a compliance policy, it is evident that Gugliuzza's purpose was simply to create a paper trail in case the FTC pursued a law enforcement action against Commerce Planet. SER075 (Gugliuzza told Huff that "companies that didn't have them were more likely to be in trouble, so I was directed to create a policy").

[30] Although Gugliuzza refers to Huff's use of other outside counsel (Br. 30), the evidence shows that the firm in question was retained in connection with eBay's threatened lawsuit, not to advise on compliance with the FTC Act. 3ER:587-91.

Finally, this advice-of-counsel argument is particularly untenable for an independent reason as well: Gugliuzza—a lawyer—*took it upon himself* to conduct the legal review of the company's marketing materials. Indeed, Gugliuzza was considered the "primary legal reviewer" and "final authority" on matters relating to OnlineSupplier's sign-up pages. SER187-88; *see* SER076-78, 153-54, 159.

B. Gugliuzza Cannot Blame His Reckless Indifference to Consumer Deception on Vague Legal Standards.

Gugliuzza's claim of a due process violation is likewise baseless. Commerce Planet violated the FTC Act because it induced consumers to sign up for the OnlineSupplier program by portraying that program as something (a "free kit") other than what it really was (an ongoing series of automated payments for services that few customers used). Even if it did not initially occur to Gugliuzza that OnlineSupplier's sign-up pages conveyed this false impression, many thousands of consumer complaints told him this was so. Gugliuzza did not need bright-line rules regarding negative option disclosures to understand that he was misleading consumers in large numbers, and that this conduct would likely be deemed unlawful under FTC Act precedents. *Cf. FTC v. Nat'l*

Urological Group, Inc., 645 F. Supp. 2d 1167, 1186-87 (11th Cir. 2009) (noting that the fact that a statute may require the exercise of judgment because the standards are context-specific does not render it impermissibly vague).

Moreover, the FTC did provide guidance on how the FTC Act applies in the context of online marketing, in its publication *Dot.Com Disclosures: Information about Online Advertising* (May 2000). 5ER:1056-1138. That publication placed online advertisers on notice that "[d]isclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction . . . , must be clear and conspicuous," and that, in assessing the message conveyed by their ads, advertisers "should consider the ad as a whole, including the text, product name, and depictions." 5:ER:1060, 1063.[31] As the district court found, this

[31] The FTC's publication advises advertisers, among other things, to "[p]lace disclosures near, and when possible, on the same screen as the triggering claim" (such as defendants' claim of a "free" offer, *see* SER184), "[u]se text or visual cues to encourage consumers to scroll down a Web page when it is necessary to view a disclosure," and "assume that consumers don't read an entire Web site." 5:ER:1060, 1064. Notably, the publication specifies that "[a] scroll bar on the side of

publication provided sufficient guidance to defendants on how to ensure that material terms of website offers are disclosed in a clear and conspicuous manner. 1ER:86-87; *see* SER185-86. That guidance is entirely consistent, moreover, with the "net impression" standard for the interpretation of advertisements, which the Commission and courts have applied for decades on a case-by-case basis. *See*, *e.g.*, *Cyberspace.com*, 453 F.3d at 1200 ("[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures"); *Floersheim v. FTC*, 411 F.2d 874, 876-78 (9th Cir. 1969) (affirming the FTC's determination that the prominent repetition of the words "Washington, D.C." on debt collector's forms created the misleading impression that the forms were a demand from the government, even though they contained small print disclosures informing recipients that this was not the case).

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a computer screen is not a sufficiently effective visual cue" (contrary to Gugliuzza's contention, Br. 21). 5:ER:1066.

C. The District Court Properly Exercised Its Discretion in Excluding Gugliuzza's Marketing Expert.

At trial, Gugliuzza sought to qualify an expert witness, Dr. Kenneth Deal, in order to introduce evidence about a consumer survey regarding OnlineSupplier's sign-up pages. The district court properly excluded that evidence because Dr. Deal had no role in either designing or implementing the survey; instead, the survey was conducted for litigation by another firm (Kelton Research). As a result, Dr. Deal would have been unable to testify about, let alone justify, the methodological choices that went into conducting the survey. *See* SER008-10. And he thus would have been unable to establish the basic predicate for admitting the survey: a showing that the survey was conducted by a qualified expert in accordance with accepted principles of survey research. *See M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1087 (9th Cir. 2005) (affirming exclusion of survey on those grounds).[32]

[32] Only one of the cases cited by Gugliuzza addresses the circumstances present here, and that case actually supports the district court's decision to exclude Dr. Deal. *See Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 615 (7th Cir. 2002) (affirming district court's exclusion of an expert whose testimony was based on a hydrogeologic model prepared by others because "without their testimony explaining

The district court thus properly ruled that if Gugliuzza wanted Dr. Deal to testify about the survey, he would have to present a representative from Kelton Research as a testifying witness. *See* 1ER:15. But Gugliuzza, for whatever reason, would not make a representative from that firm available to testify at trial (or even allow the FTC to take a complete deposition of the firm's representative).[33] For that reason alone, the district court properly deemed Dr. Deal's testimony inadmissible.

In any event, Gugliuzza could not possibly have been prejudiced by the exclusion of this testimony because there was in fact abundant reason to doubt the utility of the Kelton survey for any issue in dispute. For example, the survey did not ask respondents what representations they believed were made by the images of the webpages; it did not test whether respondents actually saw any of the supposed disclosures in

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and justifying the discretionary choices that they made, his testimony would have rested on air").

[33] Gugliuzza did not, as he states in his brief (Br. 37), offer to present testimony from Kelton's CEO regarding the methodological choices that went into conducting the survey. In fact, the pretrial hearing that Gugliuzza cites shows that, when the FTC deposed Kelton's CEO, Gugliuzza's counsel repeatedly instructed him not to answer the FTC's questions concerning the design of the survey. 1ER:111; *see* SER023-34.

the first place (without their attention being drawn to them); and it did not test whether respondents would understand those disclosures had they not been specifically directed to review them carefully. *See* SER013-14. Thus, even if Dr. Deal had been allowed to testify about the Kelton survey, this survey provided no insight into what net impression these webpages conveyed to consumers, or whether Commerce Plant adequately disclosed on those websites the material terms and conditions of the offer.

II. The District Court's Award of Equitable Monetary Relief Was Correct.

The district court properly exercised its authority under Section 13(b) of the FTC Act in awarding monetary equitable relief against Gugliuzza. Gugliuzza argues both that Section 13(b) does not authorize monetary awards and that, even if such an award is authorized, it may not exceed the amount that a defendant personally received from an unlawful scheme. Circuit precedent forecloses both arguments. There is similarly no merit to Gugliuzza's further challenge to the district court's calculation of the amount of the award.

A. The District Court Has Authority to Enter Equitable Monetary Relief.

Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). The seven courts of appeals that have addressed this issue, including this Court, have uniformly held that when the FTC proves a defendant has violated Section 5(a) of the FTC Act, the district court has broad authority under Section 13(b) to order not just injunctive relief, but also ancillary equitable remedies including equitable monetary relief. *See, e.g.*, *Pantron I*, 33 F.3d at 1102; *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *Amy Travel Serv.*, 875 F.2d at 571.

By granting the authority to enter a permanent injunction Congress has invoked the court's equitable jurisdiction. "Unless otherwise provided by statute, all the inherent equitable powers of the

District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The court's equitable powers include the power to order equitable monetary relief. *E.g.*, *Pantron I*, 33 F.3d at 1102 (discussing restitution). And when, as here, an agency has taken action in the public interest, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398.

These equitable powers include the authority to award certain forms of relief that traditionally may have been characterized as "legal" and thus "might be conferred by a court of law." *Id.* at 399.[34] This is *not* to say, however, that such equitable relief encompass *all* remedies available at law, such as consequential damages. As discussed in Part

[34] "[W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399; *accord Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) ("[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes").

II.C below, the FTC may pursue such damages awards only through other mechanisms, such as Section 19.

B. Section 13(b) Authorizes an Award of Equitable Restitution Measured by Consumers' Loss.

This Court's precedent also forecloses Gugliuzza's argument that monetary relief under Section 13(b) is limited to his ill-gotten gains. It is settled law in this Circuit that Section 13(b) authorizes courts to order restitution for consumer loss measured by the amount consumers have paid a defendant—*i.e.* "to restore his victims to the status quo" even "where the loss suffered is greater than the defendant's unjust enrichment." *Stefanchik*, 559 F.3d at 931;[35] *see also FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993) (proper measure of restitution may be "to restore the status quo").[36]

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[35] In *Stefanchik*, this Court affirmed an award of $17 million against an individual defendant, despite evidence that he had received only a portion of that amount as a royalty. 559 F.3d at 931. Although Gugliuzza seeks to distinguish his position at Commerce Planet from that of Stefanchik (Br. 53), the district court found—and Gugliuzza does not dispute on appeal—that Gugliuzza (like Stefanchik) participated in and had authority to control key aspects of the deceptive scheme during the entire relevant time period.

[36] Although *Figgie* was a case brought under Section 19, not Section 13(b), the court found that full redress for consumer losses was

Gugliuzza points to two decisions from other courts of appeals holding that the measure of equitable monetary relief under Section 13(b) of the FTC Act should be the benefit unjustly received by defendants rather than the consumers' loss. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006); *FTC v.Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). Those cases are inapposite. *Verity* held only that equitable relief can be smaller than consumer losses where a blameless intermediary keeps a portion of the payments from consumers before those payments reach the wrongdoers.[37] But that proposition has no application in cases like this one, where there is no intermediary and the money spent by consumers is exactly equal to the

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supported by equitable principles: "As between the innocent purchaser and the wrongdoer . . . *equity* requires the wrongdoer to restore the victim to the status quo." 994 F.2d at 607 (emphasis added). *See also Direct Mktg. Concepts*, 624 F.3d at 14-15 ("consumer loss, as represented by the Defendants' gross receipts, would appear to an appropriate measure of damages"); *FTC v. Febre*,128 F.3d 530, 536 (7th Cir. 1997) ("[c]ourts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers").

[37] As the Second Circuit explained in *Bronson Partners*, "The only limitation that *Verity* placed on the district court's remedial authority was the requirement that any 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." 654 F.3d at 374.

money unlawfully obtained by wrongdoers that are acting in concert and are thus subject to joint and several liability. In *Washington Data* the court made precisely that point, noting that when consumers purchase directly from the defendant, the distinction between consumer loss and unjust enrichment is "of no consequence." 704 F.3d at 1326.[38]

This case therefore does not present any hard questions about what relief is available when consumer harm exceeds the gain to wrongdoers because consumers made payments directly to Commerce Planet without the involvement of a middleman. The only question remaining is whether the fact that there were multiple wrongdoers limits the measure of monetary relief. It does not. Joint and several liability is based on the equitable principle that if one defendant cannot pay the full amount of the judgment, "the other defendants, rather than an innocent plaintiff, [are] responsible for the shortfall." *McDermott v.*

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[38] In *Washington Data,* the court did not, as Gugliuzza asserts (Br. 51) reverse an award based on consumer losses, but instead affirmed the district court's monetary award measured by defendants' net revenues—in effect, the same measure of equitable restitution awarded here by the district court. In fact, the FTC did not seek restitution for consumer redress in that case; it sought disgorgement of defendants' revenues from an unlawful scheme.

Amclyde, 511 U.S. 202, 221 (1994); *see also SEC v. Whittemore*, 659 F.3d 1, 9 (D.C. Cir. 2011) (court's "broad equitable power to fashion appropriate remedies" for federal securities law violations includes the authority to subject offending parties to joint and several liability). Equitable restitution is likewise premised on the policy that, "[as] between the innocent purchaser and the wrongdoer . . . equity requires the wrongdoer to restore the victim to the status quo." *Figgie,* 994 F.2d at 607; *cf. SEC v. Platforms Wireless Int'l*, 617 F.3d 1072,1098 (9th Cir. 2010) ("[w]e have never held that a personal financial benefit is a prerequisite for joint and several liability").

Indeed, this Court and others have long applied joint and several liability where multiple defendants' conduct violated the FTC Act, without regard to whether the amount of redress exceeds the proceeds received personally by any given one of the joint tortfeasors. *E.g.*, *FTC v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001); *FTC v. Check Investors, Inc.*, 502 F.3d 159 (3d Cir. 2007) (affirming order imposing joint and several liability); *Gem Merch. Corp.,* 87 F.3d at 468 ("because each defendant repeatedly participated in the wrongful acts and each defendant's acts materially contributed to the losses suffered, all defendants were held

jointly and severally liable"). Here, the district court correctly concluded that Gugliuzza's knowing participation in the deceptive marketing of OnlineSupplier satisfies the standard for individual liability for monetary redress. *See* Part I, *supra.* The district court thus properly held Gugliuzza jointly and severally liable for the full amount of equitable restitution, regardless of how much profit he personally derived from the scheme.

Finally, Gugliuzza cites the discussion of "equitable tracing" in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002), to support his claim that equitable restitution under the FTC Act is limited to the particular funds paid to a defendant *personally* from an unlawful scheme. But that ERISA case casts no doubt on the contrary holding in *Stefanchik*, which this Court issued seven years later.

In *Great-West*, was a private action by an insurance company against the beneficiary of an employee benefit plan to enforce a contractual subrogation clause, brought pursuant to a provision of ERISA that authorizes private suits "to enjoin any act or practice which violates . . . the terms of the plan" or "to obtain other appropriate

equitable relief." 29 U.S.C. § 1132(a)(3). The Supreme Court concluded that the relief the plaintiff sought—"in essence, to impose personal liability on [the beneficiary] for a contractual obligation to pay money"—was legal, not equitable, restitution, and the action therefore was not authorized under ERISA. 534 U.S. at 210, 221. In so ruling, the Court drew a distinction between the plaintiff's claim sounding in breach of contract, a legal action, and an action for equitable restitution, "ordinarily in the form of a constructive trust or equitable lien," which seeks "to restore to the plaintiff particular funds or property in the defendant's possession." *Id*. at 213-14.

The Court in *Great-West* did not, however, purport to address the remedies available to public agencies under the FTC Act or announce a change in the well-established underpinnings of decades of FTC consumer protection law. Instead, it emphasized that ERISA is "a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system," and the Court thus was "especially reluctant to tamper with [the] enforcement scheme embodied in the statute by extending remedies *not specifically authorized by its text*." 534 U.S. at 209 (emphasis added,

internal quotation marks and citations omitted). By contrast, as already discussed, in a government action for injunctive relief to protect the public interest, the court is authorized to exercise "all [its] inherent equitable powers" "*unless otherwise provided by statute*." *Porter*, 328 U.S. at 398 (emphasis added). Indeed, as the Supreme Court explained in one of the very cases that Gugliuzza cites, "courts of equity will go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Grupo Mexicano de Desarollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 (1999) (internal quotations omitted).[39]

Furthermore, as the Second Circuit has explained, *Great-West*'s discussion of the tracing requirement in "a private, equitable claim sounding in unjust enrichment" has no application in an FTC Act case

[39] For similar reasons, neither *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1075 (9th Cir. 2005), nor *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), supports application of a tracing requirement to equitable monetary relief awarded under Section 13(b). *See* Br. 46, 56. Both cases involved private claims for breach of fiduciary duty (Peralta's under ERISA, Pereira's under state common law) and involved very different legal frameworks than an FTC law enforcement action brought under 13(b).

because "the Commission has no need to rely on common law theories of unjust enrichment, be they equitable or legal." *Bronson Partners*, 654 F.3d at 371. Instead, where the basis of the claim is a violation of the FTC Act, "the district court needs to determine only that 'the nature of the underlying remedies sought' was historically equitable." *Id.* at 371-72 (quoting *Great-West*, 534 U.S. at 213-14); *cf. Porter*, 328 U.S. at 399 (stating, with regard to restitution, that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief").

C. Section 19 of the FTC Act Does Not Limit the Remedies Available Under Section 13(b).

Section 19(b) of the FTC Act authorizes monetary relief, including "the payment of damages," 15 U.S.C § 57b(b), after the Commission has brought an administrative action. Gugliuzza argues that this provision implicitly precludes equitable monetary relief under Section 13(b)—or, at least, implies that an award of consumer redress under Section 13(b) is necessarily precluded. Br. 47 n.8, 50-52. There is no plausible basis for such a conclusion. Sections 13(b) and 19 do not limit one another.

Rather, the FTC Act gives the Commission a choice of enforcement mechanisms when it identifies unlawful conduct within its authority. Section 13(b) allows the FTC to challenge the illegal conduct directly in federal district court, whereas Section 5(b) (aided by Section 19) allows the FTC to challenge the conduct administratively.[40]

Although overlapping in part, the relief available under the two sections is distinct. As explained above, Section 13(b) invokes the full extent of the court's equitable powers. Section 19(b), on the other hand, authorizes legal remedies in addition to equitable remedies. 15 U.S.C. § 57b(b) (authorizing, *inter alia*, "damages," though not "punitive or exemplary damages"). For example, that provision enables the FTC to seek consequential damages not available under Section 13(b).

Moreover, when Congress enacted Section 19, it sought to *expand* the remedies available for violation of an administrative order or FTC rule, not to contract the remedies under Section 13(b). Indeed, Section

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[40] The FTC ordinarily uses its administrative enforcement authority in cases involving violations of the antitrust laws and in complex consumer protection cases. It ordinarily pursues cases (like this one) that involve straightforward deceptive or unfair conduct in district court.

19(e) specifically provides that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy," and adds that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e). Those saving clauses squarely foreclose Gugliuzza's effort to use Section 19 to limit a court's authority under Section 13(b). *See FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (rejecting argument that Section 19 restricts remedial authority under Section 13(b)); *Bronson Partners,* 654 F.3d at 366-67 (same); *Security Rare Coin*, 931 F.2d at 1315 (same).[41]

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[41] Indeed, Congress later recognized the authority to order equitable monetary relief under Section 13(b) when it expanded the venue and service-of-process provisions of that section. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10. The Senate Report accompanying the Act recognized, when describing FTC testimony, that Section 13(b) authorizes the FTC to "go into court ex parte to obtain an order freezing assets" and "to obtain consumer redress." S. Rep. No. 103-130 at 15-16 (Aug. 24, 1993). *See generally United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (where the interpretation of a statute "has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned") (internal quotation marks omitted).

D. Gugliuzza Was Not Entitled to a Jury Trial.

There is no merit to Gugliuzza's cursory argument that the proceeding below somehow deprived him of a right to a jury trial. First, the Seventh Amendment does not provide a right to a jury trial in a Section 13(b) case because, as numerous courts have recognized, such cases are fundamentally equitable in nature.[42] *See Verity*, 443 F.3d at 67; *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1280, 1281 (D. Minn. 1985); *see also FTC v. Think All Publishing, L.L.C.*, 564 F. Supp. 2d 663 (E.D. Tex. 2008) ("The cases have unanimously held that the Seventh Amendment does not provide a right to a trial by jury in actions brought under Section 13(b)."). In any event, Gugliuzza never asked for a jury trial in the first place, even though the Commission's complaint against him sought restitution in exactly the form that the court ultimately awarded. *See* 6ER:1256-57; Dkt. 20 at 8-10. Accordingly, Gugliuzza has

[42] The Seventh Amendment protects the right to a jury trial in "suits at common law." U.S. Const. amend. VII. "[I]t has been assumed for decades that a suit for an injunction, whether by the Government or a private party, was the antithesis of a suit 'at common law' in which the Seventh Amendment requires that the right to trial by jury 'shall be preserved.'" *SEC v. Commonwealth Chem. Sec., Inc.* 574 F.2d 90. 95 (2d Cir. 1978).

waived any Seventh Amendment argument. *In re America West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) ("[a]bsent exceptional circumstances," this Court "generally will not consider arguments raised for the first time on appeal").

E. The District Court's Calculation of the Amount of Equitable Monetary Relief Was Proper.

Gugliuzza also fails to show that the district court abused its discretion by electing to award half the measure of consumer loss sought by the Commission. Indeed, on this record, the district court could justifiably have awarded monetary relief in an amount far greater than $18.2 million, which the court found to be a "conservative" estimate of consumer injury. 1ER:102.

Gugliuzza does not dispute the Commission's calculation of Consumer Planet's total revenues from website sales of OnlineSupplier during the relevant time period, the amount that has been refunded to consumers, and the amount of losses that remain unrecovered: $36.4 million. Given the district court's conclusion that "a reasonable consumer would likely be deceived by OnlineSupplier's webpages" (1ER:101), this amount provided an appropriate baseline for equitable

restitution. *See Stefanchik,* 559 F.3d at 931; *Figgie Int'l*, 994 F.2d at 606; *Gill,* 265 F.3d at 958; *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004) (*en banc*).

Gugliuzza bore the burden of showing that this amount was an inaccurate measure of consumer harm. *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008); *Bronson Partners*, 654 F.3d at 359. But the only alternative calculation that Gugliuzza advanced was a calculation of *zero* consumer injury—a measure patently unsupported by the evidence. *See* Op. 67-68. Having failed to provide a reasonable alternative calculation of consumer injury, Gugliuzza cannot now be heard to protest the district court's calculation of a reasonable approximation of consumer harm. *See Febre*,128 F. 3d at 535 ("'the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty'") (quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)); *QT, Inc.*, 512 F.3d at 864 ("[a] court is entitled to proceed with the best available information").

Contrary to Gugliuzza's contention, the district court's calculation of $18.2 million was no mere "guess" but was firmly grounded in the

evidence. That evidence included, first, the testimony of FTC expert Jennifer King that "most" consumers (the "lower bound" of which the district court reasoned was 50%, 1ER:101) would not have known they were purchasing a negative option or signing up for a continuity program. The court found that Ms. King was a well-qualified expert in the field of Human Computer Interaction and that her conclusions based on a "user-centered" analysis of OnlineSupplier's webpages were "on-point and persuasive." SER:60-61.[43] Gugliuzza's attacks on Ms. King's testimony, and the district court's reliance on it, are baseless. Moreover, the district court relied not only on Ms. King's testimony, but also on the testimony of José Guardiola that at least 70% of calls to Commerce Planet's customer call center were "free kit only" complaints. Gugliuzza cannot show that the district court's reliance on these witnesses' testimony was error, much less clear error.

Gugliuzza's remaining claims of error likewise lack merit. As already noted (*supra* note 25), any argument based on the mere fact

[43] The FTC did not offer Ms. King as a damages expert to "estimate the number of consumers who were harmed" (Br. 61), nor did she need to be one for the district court to rely on her testimony in reaching a reasonable approximation of consumer injury.

that a minority of consumers actually cancelled during the free trial period (Br. 62) is irrelevant to the calculation of monetary relief, since those consumers did not pay the fees on which restitution is based. The evidence flatly contradicts Gugliuzza's claim that half of consumers used computer screens that displayed the disclosures above the fold. *See* pp. 32-33, *supra*. And, as discussed above, Gugliuzza's arguments about Commerce Planet's undisputedly excessive chargeback rates are contravened by the record. *See* pp. 36-37, *supra*.[44] In any event, the district court did not, as Gugliuzza asserts, disregard Commerce Planet's post-transaction confirmation emails to consumers: the court found that these were inconsistently used and discontinued after a brief period of time. 1ER:44; SER057, 64-66, 294 (Summary, ¶ 1). Also, post-transaction emails say nothing about whether the webpages misled consumers into signing up for OnlineSupplier in the first place. SER175.

[44] We also have already explained why Dr. Deal's testimony, if admitted, would have provided no insight into the overall impression that OnlineSupplier's webpages conveyed to consumers, or whether Commerce Plant adequately disclosed on those webpages the material terms and conditions of the offer. *See* pp. 45-46, *supra*.

Moreover, the district court was not required to subtract from its judgment the amounts that the FTC collects from the other defendants. The judgment against Gugliuzza reflects the amount of injury that the Court found was caused by the unlawful conduct. There is no basis for subtracting from the judgment amounts received from the other defendants, particularly given that it is highly unlikely that the FTC will recover any amount approaching the actual harm to consumers. That said, the district court did note that, if, in the future, it appears that the FTC is close to recovering the full amount, Gugliuzza could petition the court to deem the judgment against him satisfied. 1ER:11-12.

Lastly, there is no basis for Gugliuzza's contention that an award of equitable restitution under Section 13(b) requires the identification or compensation of specific victims (and the return to Gugliuzza of funds not claimed). To the contrary, an award under Section 13(b) properly

> ensure[s] that defendants are not unjustly enriched by retaining some of their unlawful proceeds by virtue of the fact that they cannot identify all the consumers entitled to restitution and cannot distribute all the equitable relief ordered to be paid.

Febre, 128 F.3d at 537. Thus, if it is "impossible or impracticable to locate and reimburse all of the consumers who have been injured by [the defendant's] misrepresentations, [the district court] may order some other remedy which requires [the defendant] to disgorge its unjust enrichment." *Pantron I*, 33 F.3d 1103; *see also FTC v. Publishers Bus. Servs., Inc.*, __ Fed. Appx. __, 2013 WL 5273302 (9th Cir. Sept. 19, 2013) (same).[45]

[45] As the district court noted, courts in these cases often have used the terms restitution and disgorgement interchangeably. 1ER:96 (note 15). The rationale for this rule is the same, regardless of which term is used.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the district court.

Respectfully submitted,
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Dated: November 18, 2013

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiff-Appellee states that it is unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 13,080 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

s/ Michele Arington
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2013 I filed and served the foregoing with the Court's appellate CM-ECF system. I further certify that all but one participant in the case are registered CM/ECF users and that service will be accomplished on the following individual by mail:

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

Case No. 12-57064

I, Michele Arington, certify that this brief is identical to the version submitted electronically on November 20, 2013.

Dated: November 25, 2013

s/ Michele Arington
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