No. _____

In The
Supreme Court of the United States

CHARLES GUGLIUZZA,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Trade Commission Act (FTC Act) empowers the Federal Trade Commission (FTC) to enjoin violations of any provision of law that the Commission enforces by seeking preliminary and permanent injunctive relief. 15 U.S.C. §53(b) (Section 13(b) of the FTC Act).

The questions presented are:

1. Whether the Ninth Circuit Court of Appeals erred in affirming a judgment under Section 13(b) of the Federal Trade Commission Act in an amount greatly exceeding disgorgement of the ill-gotten gain in the defendant's possession, even though the statute authorizes only equitable remedies and other circuits have held that restitutionary recovery must be limited to the defendant's unjust gain.

2. Whether the Ninth Circuit Court of Appeals erred in allowing under Section 13(b) the imposition of joint and several liability, which is a legal damages construct that does not center on the defendant's unjust gain, was not available in the traditional courts of equity, and has been held to be unavailable as an equitable remedy by the Second, Fourth, and Tenth Circuits.

QUESTIONS PRESENTED – Continued

3. Whether the Ninth Circuit Court of Appeals erred in concluding that there is no right to a jury trial under the Seventh Amendment even when the district court imposes a monetary award far in excess of ill-gotten gain in the defendant's possession despite the holdings to the contrary of the Second and Seventh Circuits, as well as numerous district courts.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Charles Gugliuzza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case presents a foundational question about the meaning, and limits, of equitable restitution. It arises from the Ninth Circuit's decision to uphold a judgment against Charles Gugliuzza in the amount of $18.2 million – over *six times* the amount of his purportedly ill-gotten gain of $3 million – despite the fact that the statute under which he was charged, Section 13(b) of the Federal Trade Commission Act, permits recovery of only injunctive relief. 15 U.S.C. § 53(b) (the FTC can "bring suit . . . to enjoin any [challenged] act or practice[.]"). As this Court has explained, the key difference between legal and equitable restitution is that equitable restitution "must seek not to impose personal liability on the defendant but to restore to the plaintiff particular funds or property *in the defendant's possession*." *Great-West Life & Annuity Ins Co. v. Knudson*, 534 U.S. 204, 214 (2002). Ordering Mr. Gugliuzza to "disgorge" more than $15 million that was *never in his possession* not only exceeds the scope of statutory authority, it betrays the fundamental restitutionary purpose of restoring parties to status quo ex ante. The judgment did not merely correct Mr. Gugliuzza's

unjust enrichment: it punished him to the point of financial ruin.

This case meets all of this Court's criteria for granting certiorari. First, the Ninth Circuit's decision flouts the boundary between legal and equitable monetary relief carved by this Court in *Great-West Life & Annuity Insurance Co. v. Knudson*, which limits equitable restitution awards to the amount a defendant *personally* received. 534 U.S. 204, 213-14 (2002). To this end, this case offers the Court the opportunity to clarify *Great-West* and address intractable tensions with its holding that – as the Ninth Circuit expressly recognized – are matters "the Supreme Court must resolve." (App. 16.)

Certiorari is also necessary to resolve the circuit split deepened by the Ninth Circuit's decision. The Second and Eleventh Circuits have held that, consistent with *Great-West*, district courts exercising inherent equitable jurisdiction under Section 13(b) may award only equitable restitution, defined by "the defendant's unjust enrichment[,]" not legal restitution or compensatory damages. *F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) ("The equitable remedy of restitution does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment.") (citation and internal quotation marks omitted); *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) ("Labeling the remedy 'consumer redress' . . . does not alter the basic principle that [equitable] restitution is measured by the defendant's gain."). The Ninth Circuit sought to reconcile its

decision with these cases by holding Mr. Gugliuzza liable for the unjust gains of the publicly held corporation for which he worked, Commerce Planet, under a theory of joint and several liability. But this, too, is deeply problematic: joint and several liability is a *damages construct*. Moreover, requiring Mr. Gugliuzza to personally account for a public corporation's profits tramples on the bedrock principle of corporate separateness. The lasting import of the Ninth Circuit's decision is thus a conflict with the Second and Eleventh Circuits that only this Court can resolve.

Finally, clarifying the scope of equitable restitution would benefit not only FTC jurisprudence, but the law in a range of substantive contexts. The specific question presented by this case – whether Section 13(b) of the FTC Act permits a monetary judgment exceeding a defendant's unjust gains – has been percolating through courts of appeals for years with no hope of uniform resolution. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, *Ross v. F.T.C.*, No. 13-1426, 2014 WL 2335003 (U.S. May 27, 2014). Moreover, a closely analogous issue has arisen in securities law without definitive guidance from this Court. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Pentagon Capital Mgmt. PLC v. S.E.C.*, No. 13-1142, 2014 WL 1101439 (U.S. Mar. 15, 2014), *cert. denied*, 134 S.Ct. 2896 (2014) (seeking certiorari on the question of whether a disgorgement order requiring a defendant to pay back funds never received exceeds the equitable relief authorized under Section

21(d)(5) of the Securities and Exchange Act of 1934). Analogous questions have been raised in other contexts as well, including ERISA, *see, e.g.*, *Callery v. United States Life Insurance Co. in City of New York*, 392 F.3d 401, 406 (10th Cir. 2004); the Commodities Exchange Act, *see, e.g.*, *Commodity Futures Trading Commission v. Wilshire Investment Management Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008); and even federal criminal law, *see*, *e.g.*, *United States v. Honeycutt*, 816 F.3d 362 (6th Cir. 2016) (holding, as a matter of first impression, that joint and several liability applied to forfeiture of proceeds of a drug conspiracy).[1] At bottom, these cases all grapple with the same important question: the extent of permissible ancillary equitable remedies under federal statutes authorizing only injunctive relief. This case is an ideal vehicle to clarify the law in this regard.

For the foregoing reasons and those set forth below, Mr. Gugliuzza therefore respectfully requests that the Court grant his petition for certiorari.

[1] Honeycutt filed a petition in this Court on July 29, 2016 that seeks certiorari on the question of whether the law "mandate[s] joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a . . . conspiracy," even if they did not personally receive those proceeds. Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, *Honeycutt v. U.S.*, No. 16-142, 2016 WL 4088374 (U.S. July 29, 2016).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 815 F.3d 593 (9th Cir. 2016), and is found at page 1 of the Appendix (App. 1). The denial of rehearing *en banc* by the Ninth Circuit is at App. 114. The opinion of the United States District Court for the Central District of California is published at 878 F.Supp.2d 1048 (C.D. Cal. 2012), and is found at App. 22.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Ninth Circuit that was entered on March 3, 2016. A timely petition for rehearing *en banc* was filed and was denied on May 16, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

15 U.S.C. § 53 (FTC Act Section 13(b))

(b) TEMPORARY RESTRAINING ORDERS; PRELIMINARY INJUNCTIONS

Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: . . . *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

———————♦———————

STATEMENT OF THE CASE

A. The Federal Trade Commission Act's Binary Remedial Structure

Congress deliberately created two principal mechanisms for the FTC to enforce violations of the FTC Act. First, under Section 19, the FTC may seek consumer redress consisting of, among other things, "rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages." 15 U.S.C. § 57b(b). Second, and alternatively, under Section 13(b), the FTC can "bring suit . . . to enjoin any [challenged] act or practice." *Id*. § 53(b). The key difference between the two is that, unlike Section 13(b), which authorizes only injunctive relief, Section 19 allows for the imposition of compensatory damages. Congress expressly conditioned the availability of Section 19's broader remedies, however, on the FTC's satisfaction of certain procedural safeguards, including (1) the pre-filing issuance of a cease-and-desist order against the challenged act or practice; (2) use of such order as the basis for a civil action for relief; and (3) a demonstration that "a reasonable man would have known under the circumstances [that the challenged conduct] was dishonest or fraudulent." 15 U.S.C. § 57b(a)(2).

Here, the FTC opted to proceed under Section 13(b), which did not require it to observe the pre-filing procedural safeguards required by Section 19. Not only does Section 13(b) not demand that the FTC make any pre-filing showing, it permits the FTC to proceed

"without first making a final agency determination that the challenged conduct is unlawful." FTC, A Brief Overview of the FTC's Investigative and Law Enforcement Authority, II.A.2, http://www.ftc.gov/ogc/brfovrvw.shtm (last accessed September 10, 2016). Importantly, the FTC's tradeoff for avoiding these prerequisites is a diminished maximum monetary recovery – that is, only injunctive relief, which includes disgorgement of ill-gotten gains. *See* 15 U.S.C. § 53(b).

B. Charles Gugliuzza's Brief Tenure at Commerce Planet

Commerce Planet was a publicly held corporation that provided products, services, and an online platform that consumers could use to create and operate their own personal "webstores."[2] Commerce Planet called this bundle "OnlineSupplier," and, beginning in 2004, it sold OnlineSupplier to hundreds and thousands of customers through the Internet. Commerce Planet's website offered customers the opportunity to use OnlineSupplier in a free 14-day trial. Customers who elected to continue to use Commerce Planet's services were then charged a recurring monthly fee, which continued until they cancelled this agreement. This ubiquitous sales technique is commonly referred to as a "negative option."

In Spring 2005 – well *after* Commerce Planet conceived of, implemented and generated revenue from

[2] These facts are found in the Court of Appeals decision. (App. 3-5.)

its online marketing and sales strategy – the company approached Mr. Gugliuzza to serve as a business consultant and provide a strategic evaluation. After completion of the assessment, Commerce Planet asked Mr. Gugliuzza to continue to serve as a consultant to implement his recommendations. During his sixteen months as a consultant, Mr. Gugliuzza helped Commerce Planet improve its customer service and led the creation of an overflow call-center for around-the-clock consumer support.

In 2006, at the conclusion of his consulting assignment, Commerce Planet asked Mr. Gugliuzza to be its president to continue to implement his business recommendations and strategy. Mr. Gugliuzza accepted. As president of Commerce Planet, he was not involved in day-to-day management of all aspects of the company and its subsidiaries, each of which was a separate entity with separate management and payrolls and different offices. (2ER:314-15; 3ER:663-64; 2ER:308.)

In July 2007, after only ten months as Commerce Planet's president, Mr. Gugliuzza announced his resignation. Although he continued to believe in the company and its product, he was distressed by the third-party affiliate marketing problems that he had been unable to control. (5ER:1007; 3ER:499; 3ER:496; 3ER:511-12; 3ER:502-03.)

C. Proceedings Below

In November 2009, more than two years after Mr. Gugliuzza had left Commerce Planet, the FTC sued

Commerce Planet, its founder Aaron Gravitz, its general counsel Michael Hill, and Mr. Gugliuzza, asserting claims for (1) unfair or deceptive advertising, under 15 U.S.C. § 45(a)(1) and (2), and (2) unfair acts, under 15 U.S.C. § 45(n). Every defendant in the case excep Mr. Gugliuzza settled with the FTC. (1ER:171-96; 1ER:146-70; 1ER:113-45.) Judgments against Commerce Planet and Messrs. Hill and Gravitz were entered, and the FTC agreed to suspend the judgments in exchange for payments of $100,000 by Commerce Planet, $230,000 by Mr. Hill, and $192,000 by Mr. Gravitz. (*See id*.)

The FTC's case against Mr. Gugliuzza proceeded to a bench trial in the Central District of California before District Judge Cormac Carney. The District Court found that Commerce Planet had engaged in deceptive advertising and unfair commercial acts by not disclosing the negative option with sufficient clarity. (1ER:77-78.) At trial, only two consumers testified that they felt deceived. The District Court relied primarily on the expert testimony of Jennifer King, a "social technologist" and third-year Ph.D. candidate. (1ER:60-64; 4ER:784.) King's opinion was not based on a survey of any users of Commerce Planet's webpages. Instead, she relied solely upon her own beliefs regarding a hypothetical user's interaction with the webpages. (4ER:771-72.) She testified that her usability inspection revealed that Commerce Planet's disclosures were insufficient. (1ER:61.)

The District Court held Mr. Gugliuzza personally liable starting on July 1, 2005, the date he was hired

as a consultant. (1ER:80-86.) The District Court ruled that under Section 13(b) of the FTC Act, the FTC was entitled to an award of "restitution" against Mr. Gugliuzza. The FTC sought $36.4 million (the total revenue paid by consumers to Commerce Planet excluding refunds and chargebacks), based on the testimony of its proffered expert Daniel Becker. Mr. Becker's calculation relied on an assumption that all customers were deceived, an assumption which was specifically rejected by the District Court. (1ER:101:11-12 ("not all consumers were in fact deceived by OnlineSupplier's webpages").)

After rejecting Mr. Becker's testimony, the District Court relied on a passing comment from Ms. King, who had not been designated as a damages expert, that "most" customers would have been deceived. (1ER:101:14-16.) The District Court therefore awarded the $18.2 million in restitution because "the lower bound of 'most' is 50%" and therefore $18.2 million was 50% of Commerce Planet's $36.4 million in revenue for OnlineSupplier (1ER:101:20-23.) It imposed this "restitution" liability notwithstanding that $18.2 million far exceeded the $3 million Mr. Gugliuzza received as compensation from Commerce Planet for his services as both a consultant to the company and as its president, and it was dramatically more than he personally possessed at the time of the lawsuit. (1ER:102:9-20.)[3]

[3] Mr. Gugliuzza has subsequently filed for personal bankruptcy due to the burden imposed by the $18-million judgment against him. *In re Gugliuzza*, No. 8:12-kj-22893-CB (C.D. Cal.).

On September 13, 2012, the District Court denied Mr. Gugliuzza's motion for a new trial. Mr. Gugliuzza appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court. While the Ninth Circuit acknowledged that Section 13(b) "mentions only injunctive relief," it concluded that Section 13(b) provided the authority to grant "any ancillary relief necessary to accomplish complete justice," and therefore allowed for the imposition of an award of $18.2 million against Mr. Gugliuzza, which is not only half of all the revenues ever earned by Commerce Planet, but also six times what Mr. Gugliuzza earned in total compensation from Commerce Planet. (App. 6.)

A petition for rehearing *en banc* was denied. (App. 114.)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND A CONFLICT WITH THIS COURT'S PRECEDENTS IN TERMS OF THE SCOPE OF WHAT CAN BE AWARDED AS "RESTITUTION" UNDER A FEDERAL LAW THAT AUTHORIZES ONLY INJUNCTIVE RELIEF

A. The Ninth Circuit's Ruling Conflicts with Decisions of This Court

The Ninth Circuit's expansive reading of Section 13(b)'s remedial authority conflicts with this Court's decisions regarding the nature of equitable versus legal damages. In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court explained that if a statute authorizes only injunctive relief, the plaintiff may only "seek a remedy traditionally viewed as 'equitable.'" *Id.* at 255. The petitioners in *Mertens* sought monetary relief for losses from their ERISA plan sustained as a result of an alleged breach of fiduciary duties. The question presented was whether this request was an improper attempt to obtain legal relief under a statute that provided only for equitable relief. The Court explained that remedies "traditionally viewed as equitable" included an injunction or restitution, whereas compensatory damages are "the classic form of *legal* relief," and thus were unavailable under statute. *Id.* (citation omitted) (emphasis in original). It held, accordingly, that the phrase "other appropriate equitable

relief" precluded "awards for compensatory or punitive damages." *Id.* (citation omitted).

Consistent with *Mertens*, this Court held in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), that equitable restitution is limited to what was "traditionally available in equity" – namely, "*the return of identifiable funds* (or property) belonging to the plaintiff and *held by the defendant*." *Id.* at 216 (emphases added). It explained that "not all relief falling under the rubric of restitution is available in equity[,]" but rather, "whether [a remedy] is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 212-13 (citation omitted). Further, this Court reasoned that because an "injunction is inherently an equitable remedy, . . . statutory reference to that remedy must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes." *Id*. at 211 n.1. "Without this rule of construction, a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Id*. Critically, this Court explained that equitable restitution is limited to what was "traditionally available in equity" – namely, "*the return of identifiable funds* (or property) belonging to the plaintiff and *held by the defendant*." *Id*. at 216 (emphases added).

Great-West thus made clear that unlike legal restitution, equitable restitution "must seek not to impose personal liability on the defendant, but to restore to

the plaintiff particular funds or property *in the defendant's possession*." *Id*. at 214 (emphasis added). The $18-million "restitution" award against Mr. Gugliuzza and affirmed by the Ninth Circuit runs afoul of *Great-West* in at least two ways: First, it greatly exceeds any ill-gotten gains that Mr. Gugliuzza ever received and, second, it bears no relationship to identifiable funds that Mr. Gugliuzza actually possessed at the time the FTC brought its case against him or when the Court imposed its judgment. *Id*. at 213-14. A federal court limited to what was "traditionally available in equity" could not have awarded restitution against Mr. Gugliuzza exceeding what he actually received from Commerce Planet – approximately $3 million in compensation – or what identifiable funds he possessed at the time of the award. *Id*. at 216.

Not only is the Ninth Circuit's decision contrary to *Great-West*, but the Ninth Circuit expressly rejected *Great-West*'s analysis. The Ninth Circuit concluded that although the statutory authorization of "equitable relief" in *Great-West* limited recovery to equitable restitution, the statutory authorization of "injunctive relief" in Section 13(b) purportedly does *not* include such a limitation. (App. 9.) Yet the *opposite* is true. A statutory grant of "equitable relief" is *broader* than Section 13(b)'s authorization of "injunctive relief," which only by implication authorizes equitable relief. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 318-19 (1999). If *Great-West* limits a

statute that explicitly authorizes equitable relief, it applies with even greater force where, as here, such authority is only *implied*.

The Ninth Circuit's decision not only conflicts with this Court's decisions in *Great-West* and *Mertens*, it also reflects a broader confusion among lower courts over the scope of "restitution" under federal statutes authorizing injunctive or equitable relief. This Court should grant review to resolve this uncertainty and to reconcile Ninth Circuit case law with this Court's decisions.

B. Lower Courts Are Divided as to the Extent That Monetary Relief beyond Disgorgement of a Defendant's Ill-Gotten Gains Can Be Awarded under Section 13(b)

The Ninth Circuit's ruling that Section 13(b) authorizes the court to hold Mr. Gugliuzza personally liable for the entire amount of consumers' losses (as estimated by the District Court), regardless of the amount of Mr. Gugliuzza's personal gains, also deepened a conflict among federal courts of appeals. Specifically, both the Second and Eleventh Circuits have held that a plaintiff's recovery under Section 13(b) is limited to the money "in the defendant's possession that could 'clearly be traced' to . . . 'the plaintiff.'" *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006) (citation omitted); *see also F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (holding that

Section 13 "does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment" (citation and internal quotation marks omitted)). The controlling authority in the Second and Eleventh Circuits provides that "a damages award based on consumer losses would be improper." 443 F.3d at 1326.

In *Verity*, the Second Circuit reversed a district court's order that measured the appropriate amount of restitution as "the full amount lost by consumers." 443 F.3d at 67. It held the district court's approach was error because the "appropriate measure for restitution is the benefit unjustly received by the defendants." *Id.* (citing *Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005) (stating that "restitution is measured by a defendant's unjust gain, rather than by a plaintiff's loss"). The Second Circuit stated: "Labeling the remedy 'consumer redress' or 'disgorgement,' each a restitutionary remedy, does not alter the basic principle that restitution is measured by the defendant's gain." 443 F.3d at 67. The Second Circuit explained that "in many cases in which the FTC seeks restitution, the defendant's gain will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant." *Verity*, 443 F.3d at 68. In such a scenario, it reasoned, "it is not inaccurate to say that restitution is measured by the consumer's loss." *Id.* It cautioned, however, that "it is incorrect to generalize this shorthand and apply it as a principle in cases where the two amounts differ – for example, when some middleman

not party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands." *Id*.

In *Washington Data*, the Eleventh Circuit similarly applied the principle that the "equitable remedy of restitution does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment." 704 F.3d at 1326 (citing *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345 (11th Cir. 2008)). It stated that "Section 13(b) provides 'an unqualified grant of statutory authority' to issue 'the full range of equitable remedies,' including disgorgement, which considers only the defendants' unjust gain and ignores consumer loss." *Washington Data*, 704 F.3d at 1326 (citation omitted). The court in *Washington Data* thus affirmed the judgment because it "properly measured disgorgement by Appellants' unjust gains, not consumer loss." *Id.*

The Tenth, Fourth, Third, and Eleventh Circuits have reached similar conclusions in the context of other federal statutes authorizing only injunctive relief, such as ERISA and the Commodity Exchange Act. *See, e.g.*, *Callery v. U.S. Life Ins. Co. in City of New York*, 392 F.3d 401, 406 (10th Cir. 2004) (ERISA plan participant's effort to recover full amount of a life insurance policy was compensatory relief, not equitable relief within purview of Section 502(a)(3)) ("However, restitution recoveries are based upon a defendant's gain, not on a plaintiff's loss."); *Rego v. Westvaco Corp*., 319 F.3d 140, 146 (4th Cir. 2003) ("declin[ing] to consider"

the plaintiffs' claim "appropriate equitable relief" authorized by 29 U.S.C. § 1132(a)(3) because it was "in no sense a request to be 'restored to the position [he] would have occupied if the misrepresentations . . . had never occurred'") (citation omitted); *Commodity Futures Trading Comm'n v. American Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993) (courts exercising inherent equitable power are limited by the "requirement that there be a relationship between the amount of disgorgement and the amount of ill-gotten gain"); *Wilshire Inv. Mgmt.*, 531 F.3d at 1344-45 (joining four circuits in holding that courts may not order restitution in the "amount of customer losses"; rather, "[t]he proper measurement is the amount that [defendants] wrongfully gained").

Under the approaches of all of these circuits, the award of $18.2 million against Mr. Gugliuzza would not have been measured by consumers' losses, which the District Court estimated to be at least $18 million, but would have been limited to disgorgement of his gain – at most $3 million in compensation. This analysis is both consistent with Supreme Court precedent and the plain statutory text.

The Ninth Circuit is not a complete outlier, however. The Seventh Circuit in *F.T.C. v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997), held that a "district court has authority to 'order any ancillary equitable relief necessary to effectuate the exercise of the granted powers,'" including "the power to order repayment of money for

consumer redress as restitution or recession." *Id.* (citing *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989)).

Thus, there is a clear split among the Circuits in terms of what is permissible "restitution" under Section 13(b) of the Federal Trade Commission Act.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND A CONFLICT WITH THIS COURT'S DECISIONS AS TO THE APPROPRIATE SCOPE OF JOINT AND SEVERAL LIABILITY UNDER A FEDERAL STATUTE ALLOWING ONLY INJUNCTIVE RELIEF

The Ninth Circuit further jettisoned the limits on equity jurisdiction set in *Great-West* by holding Mr. Gugliuzza "jointly and severally" liable with all of his co-defendants for Commerce Planet's unjust gains, *i.e.*, the company's revenue, which exceeded his total compensation by more than $15 million. (App. 11.) In so holding, the Ninth Circuit created a conflict among circuit courts concerning the applicability of joint and several liability in such circumstances.

The joint and several liability doctrine is a legal *damages construct* concerned with compensating a plaintiff for the total sum of his losses; by definition, it goes beyond mere return of unjust gains in a defendant's possession. *See McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984) (Posner, J.) (explaining

that joint and several liability "means that each defendant is liable to the plaintiff for the whole of the plaintiff's damages"). By design, joint and several liability doctrine is thus incompatible with the concept and underpinnings of equitable restitution, which "does not take into consideration the plaintiff's losses, but only focuses on the defendant's unjust enrichment." *Washington Data*, 704 F.3d at 1326. Characterizing a judgment as imposing "joint and several liability" cannot "alter the basic principle that [equitable] restitution" is not "the full amount lost by consumers," but rather the "benefit unjustly received by the defendants" – *i.e.*, "money . . . in the defendant's possession that could 'clearly be traced' . . . 'to the [wrongdoing].'" *Verity*, 443 F.3d at 66-67 (quoting *Great-West*, 534 U.S. at 212 and Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279 (1989)).

For this reason, the Second Circuit ruled in *Pereira v. Farace* (*Farace*), 413 F.3d 330, 333, 339-40 (2d Cir. 2005), that a judgment holding several corporate officers jointly and severally liable for restitution was a *legal* remedy rather than an equitable remedy. Citing *Great-West*, the court held that the plaintiff's claim was legal in nature because he sought funds untethered to the "defendant's unjust gain," and, further – like Mr. Gugliuzza – the defendant "never possessed the funds in question." *Id.*, 413 F.3d at 339-40 ("Like our sister circuits, we are compelled to read *Great-West* as broadly as it is written. Nor can we ignore the Supreme Court's . . . rule that a *defendant must possess*

the funds at issue for the remedy of equitable restitution to lie against him."); *see also Tull v. United States*, 481 U.S. 412, 422 (1987) ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."); *Wilshire Inv. Mgmt.*, 531 F.3d at 1345 (equitable remedies "'*must be remedial and not punitive in nature*'") (emphasis added) (citation omitted).

This Court should grant review to resolve an important conflict among the Circuits as to the permissibility of joint and several liability when a statute authorizes only injunctive relief.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND A CONSTITUTIONAL ISSUE OF NATIONAL IMPORTANCE IN TERMS OF THE AVAILABILITY OF A JURY TRIAL WHEN MONETARY RELIEF IS AWARDED

This Court has adopted a two-prong test to determine whether the Seventh Amendment right to a jury trial attaches to a civil action: First, the court compares the action to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity"; second, and "more important," it inquires whether the remedy sought "'is legal or equitable in nature.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (quoting *Tull*, 481 U.S. at 417-18).

Here, as previously explained, because the $18.2-million judgment grossly exceeded Mr. Gugliuzza's personal gains, the award constituted a legal, not equitable, remedy, under *Great-West. Great-West*, 534 U.S. at 213 (restitution is equitable only if it seeks money that "could clearly be traced to particular funds or property in the defendant's possession"). Accordingly, Mr. Gugliuzza should have been entitled to a jury trial under the Seventh Amendment. *Tull*, 481 U.S. at 417-18. The District Court's refusal to afford him such is yet another example of the FTC having its cake (recovering the full amount of consumer loss rather than just Mr. Gugliuzza's personal gains) and eating it too (avoiding a jury trial on grounds that it was purportedly seeking only "equitable" relief).

The Ninth Circuit erroneously assumed that *Great-West* did not affect the application of the Seventh Amendment, (*see* App. 15), but as other courts have recognized, the analysis of equitable remedies extends to the Seventh Amendment context. *See*, *e.g.*, *Dexia Credit Local v. Rogan*, 629 F.3d 612, 626 (7th Cir. 2010); *Braunstein v. McCabe*, 571 F.3d 108, 120-22 (1st Cir. 2009); *Farace*, 413 F.3d at 340-41, 346. Indeed, the "important" question for Seventh Amendment purposes, *see Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571 n.8 (1990), is whether the particular remedy sought is legal or equitable in nature. *See Tull*, 481 U.S. at 417 ("the Court must examine both the nature of the action and the *remedy sought*") (emphasis added). *Great-West* answers that question decisively. The Ninth Circuit expressly recognized the

tension between its ruling and *Great-West.* (App. 16.) Yet instead of attempting to reconcile the two, it punted by declaring this conflict "a matter [that] the Supreme Court must resolve." *Id.*

By sidestepping the violation of Mr. Gugliuzza's Seventh Amendment rights, the Ninth Circuit's decision also conflicts with the law in other circuits. For example, in *Farace*, the Second Circuit held that corporate defendants were entitled to a jury trial on plaintiff's claim for breach of fiduciary duties where the trial court ruled that the corporate defendants were "jointly and severally" liable to plaintiffs for restitution. 413 F.3d at 333. Emphasizing that the defendants "never possessed the funds in question and thus were not unjustly enriched," the Second Circuit concluded that, therefore, "the remedy sought against them cannot be considered equitable" under *Great-West*. *Id.* at 339. The Second Circuit held that by definition "the remedy sought was legal and thus [defendants] were entitled to a jury trial." *Id.* at 339-41.

The Seventh Circuit has similarly distinguished between legal restitution and equitable restitution and concluded that claims of legal restitution entitle a defendant to a jury trial. *See Williams Elecs. Games, Inc. v. Garrity*, 366 F.3d 569, 577-78 (7th Cir. 2004). "[W]hen restitution is sought in a law case and the plaintiff is not seeking to impress a lien on particular property," he "can still get restitution in such a case, but as a legal remedy for a legal wrong." *Id.* The plaintiff would "therefore . . . seek (legal) damages from a jury and then, [equitable] restitution from the judge." *Id*.

Numerous federal district courts have reached the same conclusion. *See*, *e.g.*, *Goettsch v. Goettsch*, 29 F.Supp.3d 1231, 1242 (N.D. Iowa 2014) (finding that plaintiffs sought *legal* restitution because the funds sought by the plaintiffs could not be "traced to particular funds in the defendants' possession," and thus defendants were entitled to a jury trial); *Sivolella v. AXA Equitable Funds Mgmt., LLC*, Nos. 11-4194 (PGS), 13-312 (PGS), 2013 WL 4096239, at *3 (D.N.J. July 3, 2013) ("claims for legal restitution are triable to a jury"), *adopted in full*, 2013 WL 4402331 (D.N.J. Aug. 15, 2013); *see also Bethea v. Merchs. Commercial Bank*, No. 11-51, 2015 WL 1577976, at *4 (D.V.I. Apr. 2, 2015); *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, No. 02 C 3293, 2005 WL 2405797, at *3 (N.D. Ill. Sept. 28, 2005); *Bona v. Barasch*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *34-35 (S.D.N.Y. Mar. 20, 2003).

In sum, because the Ninth Circuit's decision concerning the availability of a jury trial squarely conflicts with decisions from other federal courts, as well as Supreme Court precedent, this Court should grant review to resolve this additional split in authority.

IV. THIS CASE IS AN IDEAL VEHICLE TO DELINEATE THE LIMITS OF EQUITABLE RESTITUTION AND STOP THE FTC'S OVERREACH

Beyond resolving the circuit splits deepened by the Ninth Circuit's decision and reducing confusion stemming from lower courts' disparate interpretations

of *Great-West*, this case is worthy of this Court's review for two additional reasons. First, although the proper scope of equitable restitution under Section 13(b) is a question that has long been percolating in federal courts of appeals, opportunity for Supreme Court review of this issue is relatively rare. By allowing the FTC to obtain monetary remedies in an amount grossly exceeding a defendant's personal ill-gotten gains, courts have armed the FTC with a weapon that has been used to bludgeon defendants into early settlements. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, *Ross v. Federal Trade Comm'n*, No. 13-1426, 2014 WL 2335003, *32-39 (U.S. May 27, 2014). Indeed, as one commentator explained:

> Settled or stipulated verdicts are very common and the rate of injunctive relief appears high. From anecdotal notes in FTC reports it appears that defendants to FTC settlements and awards are often financially unable to fund the monetary award and must seek reductions from the FTC or bankruptcy protection. Personal liability for the principals is frequently in dispute. The mass action aspects of FTC litigation discourage rescission or counter-restitution in kind. It would be reasonable to surmise that a defendant might readily settle for an injunction and a moderate monetary award rather than face the prospect of defending a claim for a large claim for gross disgorgement in a district court that has previously agreed to follow the FTC's aggressive theory of monetary damages in equity.

Id. at *36 (citing George P. Roach, *Counter-Restitution for Monetary Remedies in Equity*, 68 Wash. & Lee L. Rev. 1271, 1315 (2011)). Because of this immense pressure, very few litigants have the resources to challenge the FTC's administrative overreach at all, let alone take the issue all the way to the Supreme Court.

Second, a ruling from this Court clarifying the permissible scope of equitable restitution under federal statutes authorizing only injunctive relief would reach beyond FTC Act jurisprudence to beneficially impact other areas of law as well. An analogous provision under the Securities and Exchange Act has resulted in at least one petition seeking certiorari on essentially the same question: whether a disgorgement order requiring the defendant to "return" funds beyond those in his possession exceeds the scope of equitable relief authorized under Section 21(d)(5) of the Securities and Exchange Act. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Pentagon Capital Mgmt. PLC v. S.E.C.*, No. 13-1142, 2014 WL 1101439 (U.S. Mar. 15, 2014), *cert. denied*, 134 S.Ct. 2896 (2014). The same issue has also arisen in the context of ERISA, *e.g.*, *Callery*, 392 F.3d at 406, and the Commodities Exchange Act, *e.g.*, *see Wilshire Inv. Mgmt.*, 531 F.3d at 1344. Moreover, some circuit courts have relied on cases permitting monetary remedies under Section 13(b) in order to expand the scope of equitable relief under other injunction-only statutes. *See United States v. RX Depot, Inc*., 438 F.3d 1052, 1054-63 (10th Cir. 2006) (relying on FTC Act cases to justify permitting monetary remedies under injunction-only

provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-307); *United States v. Universal Mgmt. Servs., Inc*., 191 F.3d 750, 760-62 (6th Cir. 1999).

In sum, the questions presented in this Petition are both exceptionally important as well as wide-reaching. This Court should accept the opportunity to clarify and harmonize federal law that this case presents.

CONCLUSION

For all these reasons, this Court should grant Mr. Gugliuzza's petition.

Respectfully submitted,

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FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

COMMERCE PLANET, INC., a corporation; Michael Hill; Aaron Gravitz, Defendants,

and

Superfly Advertising, Inc., a Delaware corporation, fka Morlex, Inc.; Superfly Advertising, Inc., an Indiana corporation, Third-party-defendants,

and

Charles Gugliuzza, Defendant-Appellant.

No. 12-57064.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 9, 2015.

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Appeal from the United States District Court for the Central District of California, Cormac J. Carney, District Judge, Presiding. D.C. No. 8:09-cv-01324-CJC-RNB.

Before: CONSUELO M. CALLAHAN, PAUL J. WATFORD, and JOHN B. OWENS, Circuit Judges.

OPINION

WATFORD, Circuit Judge:

The Federal Trade Commission (FTC) sued Commerce Planet, Inc., and three of its top officers for violating § 5(a) of the FTC Act, which prohibits unfair or deceptive business practices. 15 U.S.C. § 45(a). The company and two of the individual defendants settled with the FTC. The remaining defendant, appellant Charles Gugliuzza, elected to stand trial. After a 16-day bench trial, the district court found that Commerce Planet had violated § 5(a) and held Gugliuzza, the company's former president, personally liable for the company's unlawful conduct. The court permanently enjoined Gugliuzza from engaging in similar misconduct and ordered him to pay $18.2 million in restitution.

In a memorandum disposition filed together with this opinion, we reject Gugliuzza's challenges to the

district court's liability ruling. We address here his arguments contesting the validity of the restitution award.[1]

I

The FTC brought suit to enjoin Commerce Planet's deceptive marketing of a product called "OnlineSupplier." The company touted OnlineSupplier as a website-hosting service that would enable consumers to make money by selling products online. The company charged a membership fee for the service that ranged over time from $29.95 to $59.95 per month.

Commerce Planet sold OnlineSupplier through its website. The landing page for the website, however, said nothing about OnlineSupplier. What consumers

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[1] We have jurisdiction over this appeal despite the fact that Gugliuzza filed his notice of appeal shortly after filing a Chapter 7 bankruptcy petition. The filing of a bankruptcy petition triggers an automatic stay, which generally prohibits "the commencement or continuation" of a preexisting judicial action against the debtor, even when the debtor himself continues the case by filing a notice of appeal. 11 U.S.C. § 362(a)(1); *Parker v. Bain*, 68 F.3d 1131, 1135-36 (9th Cir.1995). However, the automatic stay does not prevent the commencement or continuation of an action by a governmental unit such as the FTC to enforce its police or regulatory power, 11 U.S.C. § 362(b)(4), which the action against Gugliuzza clearly is. *See City & County of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123-26 (9th Cir.2006). Gugliuzza's bankruptcy filing would stay any effort by the FTC to *enforce* the judgment in this case, *see* 11 U.S.C. § 362(a)(2), but it does not preclude us from reviewing the propriety of the district court's entry of judgment, *see NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 834-35 (9th Cir.1991).

saw instead was an offer for a free "Online Auction Starter Kit" that explained how they could sell products on eBay. To obtain the starter kit, consumers needed to enter their shipping address and a valid credit card number to pay for shipping and handling ($1.95 for standard delivery, $7.95 for expedited delivery). Buried in the fine print for this transaction was an advisement stating that, by ordering the free starter kit, consumers were also agreeing to purchase OnlineSupplier through what is known as a "negative option." Here, that meant consumers received OnlineSupplier at no charge during a 14-day trial period, but if they failed to take affirmative steps to cancel within that period the company automatically charged their credit cards for the recurring monthly membership fee. Many consumers did not realize that by ordering the free starter kit they had also agreed to purchase OnlineSupplier. They first learned of that fact when the monthly charges for the service began showing up on their credit card bills.

The district court found that Commerce Planet's failure to adequately disclose the negative option constituted an unfair and deceptive practice that violated § 5(a) of the FTC Act. In addition, the court held Gugliuzza personally liable for the company's unlawful conduct during the two-and-a-half-year period he exercised operational control over the company, first as a consultant and then as the company's president. Throughout that period Gugliuzza oversaw and directed the marketing of OnlineSupplier, which

included reviewing and approving the manner in which the negative option was disclosed to consumers.

In addition to enjoining future unlawful conduct, the district court ordered Gugliuzza to pay $18.2 million in restitution. The court arrived at that figure by determining that Commerce Planet's net revenues from the sale of OnlineSupplier during the relevant period totaled $36.4 million. The court credited Gugliuzza's assertion that it would be unfair to assume that *all* consumers who purchased OnlineSupplier were deceived by the company's inadequate disclosure of the negative option. But because Gugliuzza failed to offer any reliable method of determining how many consumers were *not* deceived, the court relied on testimony from one of the FTC's experts, who opined that "most" consumers would have been deceived by the manner in which the negative option was disclosed. Based on that testimony, the court estimated as a "conservative floor" that at least half the consumers who purchased OnlineSupplier were deceived by Commerce Planet's marketing practices. The court therefore reduced the restitution award to $18.2 million, one-half of the net revenues Commerce Planet received from the sale of OnlineSupplier during the relevant period.

II

Gugliuzza challenges the validity of the restitution award on two fronts. First, he contends that the

district court either lacked the authority to award restitution at all or at the very least had to limit the award to the unjust gains he personally received, which in this case totaled roughly $3 million. Second, Gugliuzza argues that even if he can be held liable for restitution exceeding his own unjust gains, the district court's $18.2 million award is nonetheless arbitrary and must be reduced.

A

The district court had the authority to award restitution under § 13(b) of the FTC Act. Section 13(b) provides in relevant part 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). Although this provision mentions only injunctive relief, we have held that it also empowers district courts to grant "any ancillary relief necessary to accomplish complete justice," including restitution. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir.1994) (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir.1982)).

We grounded this holding on the Supreme Court's decision in *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946). That case involved an action brought by the government under § 205(a) of the Emergency Price Control Act of 1942. The government sued to enjoin the defendant from charging excessive rents in violation of the Act and to obtain restitution of the excess rents already collected. The

defendant argued that § 205(a) did not authorize an award of restitution, as the statute spoke only of applications for "a permanent or temporary injunction, restraining order, or other order." *Id.* at 397, 66 S.Ct. 1086. The Court disagreed. It held that by authorizing the issuance of injunctive relief, the statute invoked the court's equity jurisdiction, which carries with it "all the inherent equitable powers of the District Court" unless the Act provided otherwise. *Id.* at 398, 66 S.Ct. 1086. Those equitable powers are comprehensive. To ensure that "complete rather than truncated justice" is done, a court sitting in equity may "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances." *Id.* That is especially true in cases involving the public interest, the Court held, such as actions brought by the government to enforce a regulatory statute. In those cases the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* Moreover, limitations on the court's equitable jurisdiction are not to be casually inferred. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.*

In light of these principles, the Court had little difficulty concluding that ordering a defendant to pay restitution fell comfortably within the scope of the broad equitable authority conferred by § 205(a). "Nothing 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." *Id.* at 399, 66 S.Ct. 1086. Indeed, ordering a defendant to return unjust gains, the Court noted, is "within the highest tradition of a court of equity." *Id.* at 402, 66 S.Ct. 1086.

Under *Porter* and our cases applying it, district courts have the power to order payment of restitution under § 13(b) of the FTC Act. The equitable jurisdiction to enjoin future violations of § 5(a) carries with it the inherent power to deprive defendants of their unjust gains from past violations, unless the Act restricts that authority. We see nothing in the Act that does.

Gugliuzza contends that § 19(b) of the FTC Act, 15 U.S.C. § 57b(b), eliminates a court's power to award restitution under § 13(b), but we have refused to read § 19(b) in that manner.[2] For one thing, § 19 itself states that the "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e); *see H.N. Singer*, 668 F.2d at 1113. For another thing, the Court in *Porter* rejected essentially the same argument Gugliuzza makes here. The defendant in that case argued that courts could not award restitution under § 205(a) of the Emergency Price Control Act

[2] Section 19(b) authorizes a court to award, in actions brought to enforce the FTC's cease-and-desist orders, "the refund of money or return of property [and] the payment of damages." 15 U.S.C. § 57b(b).

because a separate provision of the Act – § 205(e) – authorized suits by the government to recover damages. The Court held that, to the extent a court exercising its equitable jurisdiction under § 205(a) might otherwise have been able to award damages, "§ 205(e) supersedes that possibility and provides an exclusive remedy relative to damages." *Porter*, 328 U.S. at 401, 66 S.Ct. 1086. However, § 205(e) in no way eliminated a court's power under § 205(a) to award *restitution*, a remedy that "differs greatly" from the damages remedy available under § 205(e). *Id.* at 402, 66 S.Ct. 1086. We think the same can be said of the relationship between §§ 13(b) and 19(b) of the FTC Act. While § 19(b) precludes a court from awarding damages when proceeding under § 13(b), it does not eliminate the court's inherent equitable power to order payment of restitution.

Gugliuzza also contends that, even if a court may award restitution under § 13(b), any such award must be limited to the unjust gains each defendant personally received. We find no support in our case law for this proposition. Restitution does involve the return to the plaintiff of gains a defendant has unjustly received. Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (2011). But the relevant question in a case like this one – in which an individual defendant violates the FTC Act by acting in concert with a corporate entity – is whether the individual may be held personally liable for restitution of the corporation's unjust gains. The answer is yes – provided the requirements

for imposing joint and several liability are satisfied, and here they are.

We have established a two-pronged test for determining when an individual may be held personally liable for corporate violations of the FTC Act. That test requires the FTC to prove that the individual: (1) participated directly in, or had the authority to control, the unlawful acts or practices at issue; and (2) had actual knowledge of the misrepresentations involved, was recklessly indifferent to the truth or falsity of the misrepresentations, or was aware of a high probability of fraud and intentionally avoided learning the truth. *FTC v. Network Services Depot, Inc.*, 617 F.3d 1127, 1138-39 (9th Cir.2010); *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir.2009). The district court found that the FTC's proof satisfied both prongs of this test and, as explained in the accompanying memorandum disposition, those findings are adequately supported by the record.

If an individual may be held personally liable for corporate violations of the FTC Act under this test, nothing more need be shown to justify imposition of joint and several liability for the corporation's restitution obligations. Satisfaction of the test establishes the degree of collaboration between co-defendants necessary to justify joint and several liability in analogous contexts, such as actions brought by the Securities and Exchange Commission (SEC) to obtain disgorgement in securities fraud cases. *See, e.g.*, *SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191-92 (9th Cir.1998); *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir.1993). For that

reason, in actions brought by the FTC, we have repeatedly held individuals jointly and severally liable for a corporation's restitution obligations without requiring an evidentiary showing beyond the findings needed to satisfy the two-pronged test described above. *See Network Services Depot*, 617 F.3d at 1138-39; *Stefanchik*, 559 F.3d at 927, 930-32; *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir.1997); *cf. FTC v. Gill*, 265 F.3d 944, 954, 958-59 (9th Cir.2001) (joint and several liability for two individual co-defendants).

Notwithstanding the cases just cited, Gugliuzza contends that a court exercising its inherent equitable powers under § 13(b) lacks authority to impose joint and several liability because that is a form of liability only the law courts could impose. Gugliuzza is wrong. Equity courts have long exercised the power to impose joint and several liability, most notably in cases involving breach of the duties imposed by trust law. *See, e.g.*, *Jackson v. Smith*, 254 U.S. 586, 589, 41 S.Ct. 200, 65 L.Ed. 418 (1921); Restatement of Trusts § 258 cmt. a (1935); 4 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 1081, at 231-32 (5th ed.1941). We therefore see no basis for holding that courts are categorically precluded from imposing joint and several liability in actions brought under § 13(b).

Because joint and several liability is permissible, restitution awards need not be limited to the funds each defendant personally received from the wrongful conduct, as Gugliuzza urges. Defendants held jointly

and severally liable for payment of restitution are liable for the unjust gains the defendants *collectively* received, even if that amount exceeds (as it usually will) what any one defendant pocketed from the unlawful scheme. Indeed, we have previously upheld joint and several liability for payment of restitution even though the award exceeded the unjust gains any individual defendant personally received. *See Network Services Depot*, 617 F.3d at 1137-38; *Stefanchik*, 559 F.3d at 931-32; *Gill*, 265 F.3d at 954, 959. The same is true in disgorgement actions brought by the SEC, cases in which courts also exercise the broad equitable powers described in *Porter*. There, too, courts have upheld disgorgement orders imposed jointly and severally that exceeded the unjust gains any one defendant personally received. *See, e.g.*, *SEC v. Platforms Wireless International Corp.*, 617 F.3d 1072, 1098 (9th Cir.2010); *SEC v. Clark*, 915 F.2d 439, 453-54 (9th Cir.1990).

Gugliuzza's argument against joint and several liability rests primarily on *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), but we do not think that decision has any bearing on the analysis here. In *Great-West*, the Court interpreted the meaning of the phrase "other appropriate equitable relief" in § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), a provision that authorizes suits by private parties alleging violations of ERISA-imposed duties. The Court held that a plaintiff may obtain an award of restitution under that provision only if the plaintiff seeks "equitable" rather than

"legal" restitution. 534 U.S. at 213-14, 122 S.Ct. 708. "Equitable" restitution requires tracing the money or property the plaintiff seeks to recover to identifiable assets in the defendant's possession (thus permitting imposition of a constructive trust or equitable lien), whereas "legal" restitution seeks imposition of "a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213, 122 S.Ct. 708 (quoting Restatement of Restitution § 160 cmt. a (1936)).

Gugliuzza concedes (correctly) that the tracing requirements for "equitable" restitution do not apply in § 13(b) actions. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373-74 (2d Cir.2011). Adopting those tracing requirements would greatly hamper the FTC's enforcement efforts by, among other things, precluding restitution of any funds the defendant has wrongfully obtained but already managed to spend on non-traceable items. *See Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, ___ U.S. ___, 136 S.Ct. 651, 657-62, 193 L.Ed.2d 556 (2016). We have never applied that rule in § 13(b) cases.

Given Gugliuzza's concession that tracing requirements do not apply, it is far from clear what relevance he contends *Great-West* has to this case. He appears to argue (contrary to his concession) that courts proceeding under § 13(b) must make the same "fine distinction" between legal and equitable restitution required under ERISA § 502(a)(3). *Great-West*, 534 U.S. at 214, 122 S.Ct. 708. We take a different view.

The Court's holding in *Great-West* relied heavily on *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), where the Court stated that the phrase "other appropriate equitable relief" could be construed to mean one of two things: either "whatever relief a court of equity is empowered to provide in the particular case at issue," or, more narrowly, only "those categories of relief that were *typically* available in equity." *Id.* at 256, 113 S.Ct. 2063. The Court felt compelled to adopt the latter, more narrow reading because it assumed that Congress intended "equitable relief" as a limitation on the relief available under § 502(a)(3). Because equity courts could award all forms of relief – whether legal or equitable – for breach of trust, the Court thought reading the phrase "equitable relief" to mean whatever relief a court of equity could provide "would limit the relief *not at all*." *Id.* at 257, 113 S.Ct. 2063.

The interpretive constraints facing the Court in *Great-West* and *Mertens* are wholly absent here. We do not have before us a statute that limits the court to providing "equitable relief." Section 13(b) invokes a court's equity jurisdiction by authorizing issuance of injunctive relief, so absent a clear limitation expressed in the statute, Congress is deemed to have authorized issuance of "whatever relief a court of equity is empowered to provide in the particular case at issue." *Mertens*, 508 U.S. at 256, 113 S.Ct. 2063. That includes the power "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, 66 S.Ct. 1086, such

as monetary relief that would traditionally be viewed as "legal." 1 Dan B. Dobbs, Law of Remedies § 2.7, at 180 (2d ed.1993). Absent a clear textual basis for doing so, reading into § 13(b) the remedial limitations imposed in *Great-West* and *Mertens* would be particularly ill-advised, given the admonition in *Porter* that a court's inherent equitable powers "assume an even broader and more flexible character" when the government seeks to enforce a regulatory statute like § 13(b), as opposed to "when only a private controversy is at stake," as is true under § 502(a)(3). *Porter*, 328 U.S. at 398, 66 S.Ct. 1086.

Gugliuzza contends that if the district court may award what amounts to "legal" restitution as defined in *Great-West*, then the Seventh Amendment afforded him the right to have his case tried to a jury. The Supreme Court has held that the Seventh Amendment preserves the right to trial by jury in statutory actions seeking traditional legal remedies, such as compensatory damages or civil penalties. *Tull v. United States*, 481 U.S. 412, 422-23, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); *Curtis v. Loether*, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). But the Court has consistently stated that restitution is an equitable remedy for Seventh Amendment purposes, without drawing any distinction between the legal and equitable forms of that relief. *See Great-West*, 534 U.S. at 229, 122 S.Ct. 708 (Ginsburg, J., dissenting). For example, in *Teamsters v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), the Court noted that "we have characterized *damages* as equitable where they are

restitutionary," *id.* at 570, 110 S.Ct. 1339 (emphasis added), which strongly suggests that such an award is considered equitable under the Seventh Amendment even if imposed as a merely personal liability upon the defendant. That view may need to be reconsidered in light of *Great-West*'s holding, but we regard that as a matter the Supreme Court must resolve. For now at least, so long as a court limits an award under § 13(b) to restitutionary relief, the remedy is an equitable one for Seventh Amendment purposes and thus confers no right to a jury trial. *See Bronson Partners*, 654 F.3d at 374; *FTC v. Verity International, Ltd.*, 443 F.3d 48, 66-67 (2d Cir.2006).

Having said all this, we note that the judgment entered against Gugliuzza does not actually hold him jointly and severally liable for Commerce Planet's restitution obligations. The FTC asserts that it requested such relief below and that the district court's failure to provide it was a mere oversight. That seems plausible, since the district court otherwise had no basis for ordering Gugliuzza to pay $18.2 million in restitution. Nevertheless, if the failure to impose joint and several liability was indeed an oversight, we have no power to correct it ourselves. We must therefore vacate the judgment. If on remand the district court decides, in the exercise of its discretion, to hold Gugliuzza jointly and severally liable with Commerce Planet, it may reinstate the $18.2 million restitution award. Otherwise,

the award must be limited to the unjust gains Gugliuzza himself received.[3]

B

Gugliuzza also contests the amount of the restitution award, on the ground that the district court arbitrarily determined that Commerce Planet's unjust gains totaled $18.2 million. The district court did not abuse its discretion in calculating the amount of the award. The court followed, and properly applied, the two-step burden-shifting framework that other circuits have adopted for calculating restitution awards under § 13(b). *See, e.g.*, *Bronson Partners*, 654 F.3d at 368-69; *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir.2004) (en banc); *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir.1997). We have not yet had occasion to adopt that framework as the law of our circuit in § 13(b) cases, but we do so now. *Cf. Platforms Wireless*, 617 F.3d at 1096 (adopting essentially the same burden-shifting framework for SEC disgorgement cases).

Under the first step, the FTC bears the burden of proving that the amount it seeks in restitution reasonably approximates the defendant's unjust gains, since

[3] Commerce Planet and the other individual co-defendants settled with the FTC before trial for a total of $522,000. The only argument Gugliuzza makes with respect to the impact of these settlements is that any award against him should be offset by what his co-defendants have already paid. We agree that the FTC is not entitled to a double recovery. On remand the district court should ensure that Gugliuzza receives a credit for any sums the FTC has collected from the other defendants.

the purpose of such an award is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." 1 Dobbs, Law of Remedies § 4.1(1), at 552. Unjust gains in a case like this one are measured by the defendant's net revenues (typically the amount consumers paid for the product or service minus refunds and chargebacks), not by the defendant's net profits. *Bronson Partners*, 654 F.3d at 374-75; *accord FTC v. Washington Data Resources, Inc.*, 704 F.3d 1323, 1327 (11th Cir.2013) (per curiam); *Febre*, 128 F.3d at 536. Nor are unjust gains measured by the consumers' total losses; that would amount to an award of damages, a remedy available under § 19(b) but precluded under § 13(b). *See Porter*, 328 U.S. at 401-02, 66 S.Ct. 1086; *Bronson Partners*, 654 F.3d at 366-68. In many cases, however, the defendant's unjust gain "will be equal to the consumer's loss because the consumer buys goods or services directly from the defendant." *Verity*, 443 F.3d at 68. The defendant's unjust gains and consumers' losses may diverge in cases where "some middleman not party to the lawsuit takes some of the consumer's money before it reaches a defendant's hands." *Id.* But that is not a concern in this case; consumers purchased OnlineSupplier directly from Commerce Planet.

If the FTC makes the required threshold showing, the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains. Any risk of uncertainty at this second step "fall[s] on the wrongdoer whose illegal

conduct created the uncertainty." *Bronson Partners*, 654 F.3d at 368 (quoting *Verity*, 443 F.3d at 69).

The FTC carried its initial burden at step one. It presented undisputed evidence that Commerce Planet received $36.4 million in net revenues from the sale of OnlineSupplier during the relevant period. The FTC proved that Commerce Planet made material misrepresentations – by not adequately disclosing the negative option – and that the misrepresentations were widely disseminated. As a result, the FTC was entitled to a presumption that all consumers who purchased OnlineSupplier did so in reliance on the misrepresentations. *See FTC v. Figgie International, Inc.*, 994 F.2d 595, 605-06 (9th Cir.1993) (per curiam). The FTC having proved that all of the $36.4 million in net revenues represented presumptively unjust gains, the burden shifted to Gugliuzza to show that the FTC's figure overstated Commerce Planet's restitution obligations.

Gugliuzza attempted to meet his burden by asserting that not all of the consumers who purchased OnlineSupplier were deceived by Commerce Planet's misrepresentations. Had Gugliuzza offered a reliable method of quantifying what portion of the consumers who purchased OnlineSupplier did so free from deception, he might well have succeeded in showing that not all of the $36.4 million in revenues represented unjust gains. But he failed to do so. He did attempt to introduce the testimony of an expert, Dr. Kenneth Deal, who opined, based on the results of a consumer survey conducted by a third party, that not many of Commerce

Planet's consumers were actually deceived. The district court properly refused to consider that testimony because Dr. Deal did not conduct the survey himself, and neither he nor Gugliuzza could demonstrate that the survey was "conducted according to accepted principles." *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1087 (9th Cir.2005) (internal quotation marks omitted); *see Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir.1997).

Gugliuzza attempted to support his contention that not all consumers were deceived by pointing out that 45% of consumers cancelled within the trial period, which indicated that those consumers, at least, must have known about the negative option. That fact, however, sheds no light on what portion of the $36.4 million in net revenues represents unjust gains. Consumers who cancelled within the trial period may indeed not have been deceived, but the payments made by those consumers were not included in the $36.4 million figure. Consumers who cancelled during the trial period paid only shipping and handling for the free starter kit, and those fees were excluded when calculating the $36.4 million in net revenues. The consumers who paid the monthly fees that comprise the $36.4 million figure were those who did *not* cancel during the trial period. They were presumptively deceived and, absent a contrary showing by Gugliuzza, the fees they paid to Commerce Planet were properly deemed unjust gains.

Lastly, Gugliuzza challenges as arbitrary the district court's reliance on testimony from the FTC's

expert that "most" consumers were deceived by Commerce Planet's misrepresentations. Gugliuzza has no basis to complain about this aspect of the district court's ruling. The court relied on the testimony in question to *reduce* the award from $36.4 million to $18.2 million. Given Gugliuzza's failure to produce any reliable evidence demonstrating what portion of the $36.4 million in net revenues should not be deemed unjust gains, the court could simply have awarded that amount and been done with it. The district court did not abuse its discretion when it instead decided to err on the side of caution by slashing the otherwise-permissible award in half. Any error in that regard could only have benefitted Gugliuzza.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

No costs.

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

COMMERCE PLANET, INC., a corporation, and Michael Dill Charles Gugliuzza, and Aaron Gravitz individually and as officers of Commerce Planet, Inc., Defendants.

Case No.: 8:09-cv-01324-CJC(RNBx).

United States District Court,
C.D. California,
Southern Division.

June 22, 2012.

Eric D. Edmondson, David M. Newman, Kerry O'Brien, Evan Rose, Federal Trade Commission, San Francisco, CA, Raymond E. McKown, Federal Trade Commission, Los Angeles, CA, for Plaintiff.

Vatche Chorbajian, San Diego, CA, Alan A. Greenberg, Wayne R. Gross, Michael A. Piazza, Greenberg Traurig LLP, Irvine, CA, for Defendants.

MEMORANDUM OF DECISION

CORMAC J. CARNEY, District Judge.

I. INTRODUCTION

The Federal Trade Commission ("FTC") brought this action for injunctive and monetary equitable relief against Commerce Planet, Inc. ("Commerce Planet")

and several of its directors and officers, including Michael Hill, Aaron Gravitz, and Charles Gugliuzza (collectively, "Defendants"), for deceptive and unfair business practices arising from Defendants' website marketing of a web creation and hosting service called OnlineSupplier. OnlineSupplier was marketed as a free "Online Auction Starter Kit" that purported to help consumers sell products on eBay. Consumers were permitted a free trial period to use OnlineSupplier with payment of a small shipping and handling fee. If consumers did not cancel the service within the trial period, they were automatically charged a recurring monthly fee ranging from $29.95 to $59.95. The FTC alleges that during the relevant time period (July 2005 to March 2008), Defendants deceptively marketed OnlineSupplier as a free auction kit on its website without adequately disclosing the program's negative option plan, which required consumers to affirmatively cancel their membership or otherwise incur a monthly charge to their credit card. The FTC alleges that consumers unwittingly signed up for OnlineSupplier, believing they had ordered a free kit, only to discover later that they had been enrolled in OnlineSupplier's continuity program when they saw monthly charges on their credit card bill. The FTC alleges that between July 2005 and March 2008, Commerce Planet obtained over $45 million from over 500,000 consumers.

The FTC settled with all Defendants except for Mr. Gugliuzza, Commerce Planet's former president and consultant from July 2005 to November 2007. In the operative First Amended Complaint ("FAC"), the FTC

asserts two counts against Mr. Gugliuzza for (i) deceptive practices and (ii) unfair practices in violation of section 5(a) of the Federal Trade Commission Act (the "FTC Act" or "Act"), 15 U.S.C. § 45(a). The FTC requests injunctive and monetary equitable relief against Mr. Gugliuzza under section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Between January 31, 2012 and February 28, 2012, the Court conducted a sixteen-day bench trial that involved over 300 exhibits and 22 witnesses. The parties thereafter submitted extended closing briefs. The Court, by this Memorandum of Decision, issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). After carefully reviewing all the evidence, testimony, and arguments presented by the parties' counsel, the Court concludes that the FTC has proven by a preponderance of the evidence that Mr. Gugliuzza is individually liable for the deceptive and unfair marketing of OnlineSupplier in violation of section 5(a) of the FTC Act. The Court finds that a permanent injunction against Mr. Gugliuzza is appropriate because there is a cognizable danger that he will repeat the deceptive and unfair marketing tactics he authorized and implemented with OnlineSupplier. The Court also finds that monetary equitable relief against Mr. Gugliuzza is proper in the amount of $18.2 million as restitution for his wrongful and knowing participation in the deceptive marketing of OnlineSupplier.

II. BACKGROUND

Commerce Planet marketed and sold OnlineSupplier, a webhosting service that purported to provide consumers an inexpensive platform to sell products online. Commerce Planet hired Mr. Gugliuzza to provide an assessment of the company and recommend ways to improve its profitability. From July 2005 to November 2007, Mr. Gugliuzza served in various capacities as the company's consultant, president, *de facto* executive and in-house counsel, and director. Mr. Gugliuzza helped transition the company from telemarketing to internet marketing of OnlineSupplier, whereby consumers could sign up for the program from its website. Internet sign-ups of OnlineSupplier dramatically improved the company's revenue. At the same time, numerous consumers complained to the Better Business Bureau ("BBB"), the Attorney General, and to Commerce Planet regarding confusion as to the nature and cost of OnlineSupplier and demanded refunds. OnlineSupplier was also subject to excessive credit card chargebacks. In March 2008, the FTC served a civil investigative demand ("CID") on Commerce Planet, after which Commerce Planet changed its webpages for OnlineSupplier under the guidance of outside counsel knowledgeable in FTC Act compliance. Sales of OnlineSupplier thereafter plummeted. In November 2009, the FTC filed suit against Commerce Planet and three of its key officers and employees, Messrs. Hill, Gravitz, and Gugliuzza, for their alleged involvement in the deceptive and unfair marketing of OnlineSupplier during the relevant time period.

A. The Parties

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces section 5(a) of the Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices affecting commerce. The FTC is authorized to bring suit in federal court to enjoin violations of the Act and to secure an array of suitable equitable relief, including consumer redress. 15 U.S.C. § 53(b).

Commerce Planet is a Utah corporation with its headquarters in Goleta, California. (Exhs. 1175, 2043-2051.) Commerce Planet began operations as NeWave, Inc. ("NeWave"),[1] which was founded by Messrs. Gravitz and Hill at the end of 2003 and taken public in January 2004. (Gravitz, 2/1/12, 140:1-3; Hill, 2/7/12, 111:1-18; Hill 2/17/12, 72:23-25.)[2] Through NeWave's subsidiary at the time, Online Supplier, Inc., the company began marketing and selling an online web creation and hosting service called OnlineSupplier. (Exh. 31.) Effective June 2006, NeWave changed its name to Commerce Planet, Inc. (Exhs. 31, 2043-2051.) Commerce Planet began operations as a holding company and conducted its business through three wholly-owned subsidiaries: Consumer Loyalty Group, Inc. ("CLG"), Legacy Media, LLC ("Legacy Media"), and

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[1] Unless stated otherwise, Commerce Planet, Inc. and NeWave, Inc. are collectively referred to as "Commerce Planet" or the "company."

[2] Testimony from trial is cited using the last name of the witness, the date, and page number of the trial transcript.

Ivenia, LLC ("Ivenia"). (*Id.*) Mr. Hill served as the company's Chief Executive Officer from 2004 to September 2007, after which he remained as the company's Chief Strategic Officer until December 2008 when he left the company. (Hill, 2/7/12, 111:19-112:1, 112:17-18.) Mr. Gravitz, who served as the head of media at NeWave, was president of Legacy Media from 2006 until December 2008 when he left the company. (Gravitz, 2/1, 6:14-19; 2/22, 12:25-13:2.) Mr. Gugliuzza served as the company's titular consultant from July 1, 2005 to September 2006. (Gugliuzza, 2/21/12, 110:25-111:5; Exh. 1035.) From September 11, 2006 to November 5, 2007, Gugliuzza served as president of Commerce Planet. (Gugliuzza, 2/21/12, 110:21-24, 116:3-13; Exhs. 228, 259-60.) Commerce Planet was only licensed to do business in California but received customer orders nationwide and from international locations. (Exh. 31.)

During the relevant time period, Legacy Media functioned as the marketing and advertising arm of Commerce Planet and shared the same office as the parent company. (Gravitz, 2/1/12, 82:19-83:1, 163:3-6, Exh. 31.) CLG handled the customer service component of the company and also shared the same office as Commerce Planet. (Exh. 31.) Christopher Seidel, who joined NeWave in 2004 and served as the company's vice president of operations, was the president of CLG from 2006 until his departure in 2009. (Seidel, 2/14/12, 52:7-11, 67:9-16; Exhs. 318, 1292a-24.) José Guardiola served as CLG's customer service manager from August 2006 to August 2007. (Guardiola, 2/21/12, 4:19-15, 7:3-4, 35:23-24.) Paul Daniel was Commerce Planet's

Chief Financial Officer from July 2005 to May 2006. (Daniel, 2/14/12, 15:23-16:2.) David Foucar replaced Mr. Daniel as CFO from June 2006 to October 2007. (Foucar, 2/16/12, 130:19-23, 161:16-18.) Jaime Rovelo served as the company's final CFO from the end of 2007 to February 2009. (Rovelo, 2/10/12, 4:20-22, 5:20-25, 33:1-2.) The company's in-house counsel was Jeffrey Conrad from mid-2004 to the end of 2006. (Conrad, 2/8/12, 40:20-25, 86:19-24.) Paul Huff replaced Mr. Conrad as Commerce Planet's in-house counsel from 2007 until August 2008. (Huff, 2/15/12, 115:9-11; Exh. 117.) In January 2009, Commerce Planet's assets were acquired by Superfly and later purchased by Lenco Mobile, Inc. (Cruttenden, 2/28/12, 29:17-30:9, 33:13-21; Exh. 132.) Commerce Planet is currently no longer in business. (Cruttenden, 2/28/12, 24:16-17.)

B. OnlineSupplier

Commerce Planet primarily marketed and sold OnlineSupplier. (Exh. 31.) The bulk of company's revenue was generated from OnlineSupplier and associated upsell products. (Gravitz, 2/1/12, 7:16-20, 133:16-134:9; Hill 2/7/12, 159:10-18.) Messrs. Gravitz and Hill developed the concept for OnlineSupplier. (Hill, 2/7/12, 112:25-113:5.) OnlineSupplier was a website hosting service designed to enable consumers to create and manage a website to sell products on that site and on other internet sites. (Gravitz, 2/1/12, 6:20-7:3.) The service included a hosted website created by the customer; access to an inventory of products; access

to the customer service department; and an information kit consisting of a 23-page manual on how to use the service and program. (Gravitz, 2/1/12, 140:12-146:11; Exhs. 31, 2003.) Consumers signed up for OnlineSupplier initially by telephone and then later online on its webpages by entering their shipping address and credit card information. (Exh. 31.) Consumers paid for the initial handling and shipping fee of $1.95 (or $7.95 for expedited delivery) for the membership kit. (Exhs. 1270-2, 1271-2.) Consumers were permitted a free trial period ranging from 7 to 14 days to use the product and services. (Exhs. 1270-1, 1271-1.) If consumers did not cancel within the free trial period, they were automatically enrolled in the continuity program and charged a monthly membership fee ranging from $29.95 to $59.95 on their credit card. (Gravitz, 2/1, 66:25-67:5, 111:13-20; Gravitz, 2/2/12, 25:5-9, Hill, 2/17/12, 123:16-22.) Commerce Planet initially maintained its own warehouse from which goods were sold to customers. (Exh. 31.) The warehouse was discontinued in 2006, and products were subsequently offered to customers through Ingram Micro. (Seidel, 2/14/12, 100:8-101:12; Hill, 2/17/12, 115:23-117:20.) To cancel the service, customers could either call or email customer service at CLG. (Seidel, 2/14/12, 108:17-24.)

1. Marketing

When Commerce Planet began operations in 2003, it initially marketed OnlineSupplier through classified advertising, newspapers, and emails, and the program was primarily sold through inbound telemarketing

whereby consumers would call a toll-free number to sign up for the service. (Gravitz, 2/1/12, 7:4-6, 8:1-7; Hill, 2/7/12, 11:16-24.) At first, Commerce Planet charged consumers a flat fee of $58 or $98.90 for OnlineSupplier, depending on the particular package consumers purchased, and there was no free trial period or a negative option plan. (Gravitz, 2/1/12, 10:12-18.) However, the sale of OnlineSupplier was poor, and the company lost money. (*Id.* at 155:12-17; Hill, 2/17/12, 131:17-24.) The company later transitioned from telemarketing to online marketing between June and July 2005. (Gravitz, 2/1/12, 11:5-10; Seidel, 2/14/12, 56:6-16.)

2. Sign-Up Pages

Between July 2005 and March 2008, there were two versions of OnlineSupplier's sign-up pages. (Exhs. 1270, 1271.) The first working version was complete around July 2005. (Gravitz, 2/1/12, 17:15-24.) After several revisions, the final sign-up pages of the first version ("Version I") went live in October 2005. (Gravitz, 2/1/12, 21:11-19, 27:1-4; Gravitz, 2/2/12, 107:21-108:5; Hill, 2/17/12, 117:21-118:4; Exh. 1270.) Mr. Gravitz developed Version I in 2005 and 2006 with the legal advice of Jeff Conrad and Mr. Gugliuzza. (Gravitz, 2/1/12, 27:11-22; Gravitz, 2/2/12, 114:2-5.) Another version of the sign-up pages ("Version II") was used after some modifications were made to Version I in February 2007. (Gravitz, 2/1/12, 109:22-111:24; Exhs. 1271, 1198.) A third version of the sign-up pages ("Version III") was used after the FTC's CID on Commerce

Planet in March 2008. (Exh. 1272.) Version III incorporated changes under the recommendations of outside counsel, Linda Goldstein, who had expertise in FTC Act compliance. (Gravitz, 2/1/12, 127:9-132:10; Huff, 2/15/12, 93:13-95:22; Roth, 2/8/12, 17:19-18:13; Exhs. 232, 1204, 1272.) Version III did not mention a free auction starter kit and significantly clarified the terms of membership on the landing and billing pages. (Exh. 1272.) After implementing the changes in Version III, the company experienced a severe downward spike in sales of OnlineSupplier. (Roth, 2/8/12, 21:1-14.)

The internet sign-up process of OnlineSupplier involved four steps. First, through affiliate marketing, such as emails and ads, consumers were directed to OnlineSupplier's website. (Gravitz, 2/1/12, 11:5-10, 12:11-13:20, 35:9-36:3; Exhs. 1274, 1277.) The landing page of the website represented OnlineSupplier as a free "Online Auction Starter Kit" that provided information to consumers on how to sell products on eBay. (Exhs. 1270-1, 1271-1.) Consumers could obtain a free kit if they filled out their shipping address and clicked the "Ship My Kit!" button. (*Id.*) Second, upon clicking the "Ship My Kit!" button, consumers were directed to the billing page where they could select their shipping method and submit their credit card information. (Exhs. 1270-2, 1271-2.) On the bottom of the landing and billing pages, below the "Ship My Kit!" button, there was a hyperlink to the "terms and conditions," which popped up on a separate page. (Exhs. 1270, 1271.) The terms and conditions page included information about OnlineSupplier's services, fees, and legal

conditions, including the automatic charge of the monthly membership fee if consumers did not cancel within the trial period. (*Id.*) At the bottom of the billing pages, in fine print, there was also a disclosure about the negative option plan and membership fee. (Exhs. 1270-2, 1271-2.) The first draft of this disclosure was prepared by Mr. Gravitz using a competitor's site and circulated to management, including Mr. Gugliuzza, for review. (Gravitz, 2/1/12, 71:3-10.) Clicking on the "Ship My Kit!" button on the billing page completed the order for OnlineSupplier. (Exhs. 1270-2, 1271-2.) Third, after submitting their credit card information and clicking the "Ship My Kit!" button, consumers were directed to the upsell page, where they could chose additional products and services for a monthly or annual fee. (Exhs. 1270-3, 1271-3.) The products and services were pre-clicked to "Yes," but the consumer could change it to "No." (*Id.*) Fourth, upon clicking the "Submit" button on the upsell page, consumers were directed to the final confirmation page with the order information. (Exhs. 1270-4, 1271-4.) Commerce Planet experimented with sending post-transaction confirmation emails to consumers before charges to credit cards were posted, but these were inconsistently used and discontinued after a brief period of time. (Guardiola, 2/21/12, 11:20-25, 16:14-23; King, 2/3/12, 157:10-19.)

3. Consumer Complaints and Chargebacks

More than 500,000 consumers completed OnlineSupplier's sign-up process during the relevant time period. (Exh. 2061.) The transition to online sign-ups was followed by dramatic increases in company profits. From 2005 to 2006, when the company transitioned to online sign-ups, the company swung from over a 6.2 million-dollar net loss to over an 8.7 million-dollar net profit. (Foucar 2/16/12, 152:18-153:14; Exh. 2044.) At the same time, the company started to receive high volumes of telephone and written complaints from consumers who were confused over the nature of the service and terms of membership and demanded refunds. (Guardiola, 2/21/12, 31:20-32:13; Exhs. 163, 193, 1180, 1177-79, 1292a, 1293, 1295.) In numerous instances, consumers first became aware that they had been enrolled in a negative option plan when they received a credit card bill with a charge for membership to OnlineSupplier. (Gravitz, 2/1/12, 165:17-24.) OnlineSupplier also was subject to excessive credit card chargebacks in 2006 and 2007, leading to fines of more than one million dollars during this time. (Chen, 2/3/12, 5:9-23; Exhs. 1312, 1058-62, 1317-19, 1321-22.)

C. Role of Charles Gugliuzza

Mr. Gugliuzza was employed with Commerce Planet as a consultant and president from July 2005 to November 2007 and retained a seat on the company's

Board as an outside director until May 2008. (Gugliuzza, 2/21/12, 118:10-17, 122:18-20; Exh. 235.) Before joining Commerce Planet, Mr. Gugliuzza graduated from Loyola Law School and cofounded a company called eBatts with a law school friend. (Gugliuzza, 2/21/12, 102:1-20.) EBatts operated a consumer direct website that sold batteries, adapters, and chargers for laptops, cell phones, and digital cameras manufactured by Battery-Biz, the family business of his law school classmate. (*Id.*) Mr. Gugliuzza held the position of Chief Operating Officer at eBatts. (*Id.* at 103:16-17.) EBatts was financially successful and became the exclusive supplier for Duracell's camcorder and digital camera batteries. (*Id.* at 103:19-104:9.) Mr. Gugliuzza left eBatts to start his own business, American Power Supplies, a webstore that locally purchased products similar to those at eBatts and sold them directly to consumers via the internet. (*Id.* at 104:17-105:17.) Again, Mr. Gugliuzza had financial success with American Power Supplies. (*Id.* at 105:18-20.) Mr. Gugliuzza sold his interest in American Power Supplies to his business partner after selling back his interest in Battery-Biz and signing a noncompete clause with Battery-Biz. (*Id.* at 105:21-106:7.)

1. Consultant (July 2005 to September 2006)

After he sold his interest in American Power Supplies [sic], Mr. Gugliuzza sent a letter to NeWave's Board of Directors in April 2005, seeking the position

of CEO. (Exh. 3.)[3] In May 2005, NeWave's Board of Directors retained Mr. Gugliuzza as a consultant to conduct an assessment of the company and identify ways to increase profits and decrease costs. (Gugliuzza, 2/21/12, 108:7-21; Hill, 2/7/12, 115:24-116:24, 117:5-11). Mr. Gugliuzza performed consulting work through his business called Olive Tree Holdings. (*Id.* at 108:7-21; Exh. 6.) Mr. Gugliuzza conducted a one-month assessment of NeWave and submitted a 78-page report of his evaluation and recommendations to the company's Board in June 2005. (Gugliuzza, 2/21/12, 108:7-21; Exh. 6.) The report provided a detailed, comprehensive assessment of Commerce Planet and its subsidiaries, including the company's management, infrastructure, operations, finances, products and services, and marketing and advertising. Some of the core deficiencies Mr. Gugliuzza identified in the report included the discrepancy between perceived value and actual value; management's lack of experience and skill to effectively operate the company and implement change; lack of well-established channels of communication and coordination between managers; and "[a] lack of value added products and services that produce high profit margins and customer retention," among others. (Exh. 6.) Mr. Gugliuzza [sic] recommendations included a "complete overhaul" with respect to the company's existing decision making process; improvements in the

[3] Mr. Gugliuzza had been initially introduced to Commerce Planet through an investor of the company when he left eBatts. Mr. Gugliuzza met with Mr. Hill but decided not to work for NeWave and instead founded American Power Suppliers. (Gugliuzza, 2/21/12, at 106:8-21.)

channel of communication between management to clarify expectations and responsibilities for projects; and enhancements to coordination efforts between departments. (*Id.*) Specifically, with respect to marketing, Mr. Gugliuzza noted the lack of coordination between marketing and sales. (*Id.*) Mr. Gugliuzza also emphasized that because "existing management lack[ed] experience," management was "in dire need of a leader" who possessed basic management skills. (*Id.*) Mr. Gugliuzza also observed that customer retention was extremely low with an average of less than 35% after the first 45 days of billing activity. (*Id.*) He identified marketing expenditures as comprising the largest portion of NeWave's expense budget and the company's media budget to be the largest contributor to its negative net profits, aside from payroll. (*Id.*) Mr. Gugliuzza provided more specific recommendations with respect to the company's human resources, infrastructure, operations, products and services, and budgets. For example, Mr. Gugliuzza recommended that Messrs. Hill and Gravitz be replaced as the CEO and head of Media, respectively, so they could focus their attention on developing revenue generating opportunities. (*Id.*) Mr. Gugliuzza recommended that Mr. Hill remain as president and Mr. Gravitz be in charge of business development. (*Id.*)

From July 1, 2005 to September 2006, Mr. Gugliuzza held the titular position of consultant to Commerce Planet. (Gugliuzza, 2/21/12, 110:25-111:5; Exh. 1035.) Mr. Gugliuzza was also a director of the company beginning in August 2006. (Exhs. 31, 1247.) After

Mr. Gugliuzza conducted an assessment of the company, the Board of Directors hired him to implement the recommendations in his report. (Hill 2/7/12, 125:20-126:21; Gugliuzza, 2/21/12, 109:10-18; Exh. 1246.) Mr. Gugliuzza executed a "Corporate Consulting Agreement" with NeWave, dated June 28, 2005. (Exh. 1035.) The consulting agreement provided that, as a consultant, Mr. Gugliuzza, "shall assist in implementing operating strategies and procedures as prescribed by the Company's Board of Directors, and pursuant to the Consultant's Company Performance Assessment Report dated June 14, 2005" and "shall also use [] best efforts to introduce the Company to potential vendors, customers or business partners which would be beneficial to the Company's business." (*Id.*) Under the consulting agreement, Mr. Gugliuzza was paid $5000 in cash per week, with a signing and performance bonus. (*Id.*) Although the consulting agreement lasted three months, it had a renewable option under the same terms, and Mr. Gugliuzza renewed his contract until he became president in 2007. (Hill, 2/7/12, 131:5-20.)

The Board of Directors tasked Mr. Gugliuzza with the goal of reducing cost and increasing revenue. (Hill, 2/17/12, 120:6-121:7.) Although Mr. Gugliuzza held the title of consultant, the Board conferred broad, management authority upon Mr. Gugliuzza over the company's departments and daily operations, including over Mr. Gravitz, marketing, and customer service. (Hill, 2/7/12, 128:3-130:9, 137:20-138:7; Daniel, 2/14/12, 28:1-14; Gravitz, 2/2/12, 122:3-11.) Messrs. Gugliuzza and Hill comprised the company's executive staff, and by

around March 2006, they were being compensated under the same terms. (Hill, 2/7/12, 142:4-7, 150:10-20; Hill 2/17/12, 130:4-9; Exhs. 16, 1331.) Mr. Gugliuzza regularly met with and communicated with all the department heads, who were required to submit weekly reports to him. (Gugliuzza, 2/23/12 Vol. I, 57:8-11; Seidel, 2/14/12, 58:6-59:22, 61:19-24; Exhs. 1124, 1129, 1130, 1132, 1354, 1356, 1368-71, 1292a, 1293, 1295.) Mr. Gugliuzza, along with Hill, oversaw the company's migration of OnlineSupplier from telemarketing to internet sales in 2005. (Hill, 2/17/12, 122:1-4; Daniel, 2/14/12, 28:15-23.) Mr. Gugliuzza also acted as *de facto* legal counsel of NeWave and took over Mr. Conrad's role as the primary legal reviewer for the company. (Gravitz, 2/2/12, 120:6-12; Gugliuzza, 2/22/12, 119:5-14.) After Mr. Gugliuzza implemented many of the recommendations in his assessment report, the company became profitable. (Hill, 2/7/12, 143:10-24.)

2. President (September 2006 to November 2007)

Pursuant to an executive agreement, Mr. Gugliuzza became the president of the company, effective September 11, 2006. (Hill, 2/7/12, 152:21-153:10; Exhs. 259.) He signed another executive employment agreement on April 10, 2007. (Exh. 261.) Gugliuzza served as president until he stepped down on November 5, 2007. (Gugliuzza, 2/21/12, 110:21-24, 116:3-13; Exhs. 228, 259-61.) Mr. Hill remained the CEO, and David Foucar became the CFO. (Hill, 2/7/12, 151:19-152:1.) Although Mr. Gugliuzza assumed the title of president,

as a practical matter, his duties and responsibilities did not materially change. (*Id.* at 153:18-25.) Mr. Gugliuzza continued to assert operational control over the company and its subsidiaries and had oversight authority over the department heads. (Foucar, 2/16/12, 137:19-138:6.) Mr. Gravitz reported to Mr. Gugliuzza, and Mr. Gugliuzza directed the marketing of OnlineSupplier, such as by reviewing and approving marketing agreements, approving landing and billing pages of OnlineSupplier, and reviewing weekly performance reports. (Hill, 2/7/12, 155:11-20.) Mr. Seidel also continued to report to Mr. Gugliuzza. (Seidel, 2/14/12, 67:9-16, 68:16-18.) After Mr. Huff was hired in 2007, Mr. Gugliuzza delegated some of his legal responsibilities to Mr. Huff, but remained the final authority on legal matters. (Gravitz, 2/1/12, 35:1-8; Gravitz, 2/2/12, 120:14-19; Hill, 2/7/12, 141:16-142:13.)

On November 5, 2007, Mr. Gugliuzza stepped down as president, and Anthony Roth took over as the company's CEO and president. (Roth, 2/8/12, 9:1-9; Exhs. 228, 234.) Mr. Gugliuzza continued working for the company as a consultant until December 31, 2007. (Gugliuzza, 2/21/12, 116:14-17, 117:4-19; Exh. 235.) At the end of 2007, Commerce Planet repurchased from Mr. Gugliuzza his 1.8 million shares of company stock in exchange for $185,000 cash down, $90,400 in additional payment terms, and a $427,000 promissory note, pursuant to a Share Repurchase Agreement on December 26, 2007. (Roth, 2/8/12, 10:10-12:1; Exhs. 264, 265.)

Mr. Gugliuzza did not receive payment on the promissory note and received a total of $275,400 for the purchase of his company stock. (Rovelo, 2/10/12, 9:24-11:2; Exhs. 138, 264.) Mr. Gugliuzza remained on the company's Board as an outside director until May 2008. (Gugliuzza, 2/21/12, 118:10-17, 122:18-20; Exh. 1175.) From 2006 to 2007, Mr. Gugliuzza received over $3 million in compensation, bonuses, stock awards, and option awards for his services at Commerce Planet. (Rovelo, 2/10/12, 6:8-15:10, 36:18-36:7; Exhs. 138, 264, 1042.)

After leaving Commerce Planet, Mr. Gugliuzza founded a company called Grow Commerce with one partner, Jaime Stafford, the original founder of Iventa. (Gugliuzza, 2/21/12, 124:20-125:17.) Grow Commerce was founded on the assets of Iventa. Grow Commerce built, operated, and managed websites for other companies to sell products; managed fulfillment; and provided warehouse and customer service. (*Id.* at 125:18-126:5.) Grow Commerce did not engage in direct consumer sales but serviced other companies and did not include a monthly membership or negative option plan. (*Id.* at 127:25-127:13.) Mr. Gugliuzza was a principal of Grow Commerce and owned 49% of that company. (*Id.* at 126:6-10.) Grow Commerce was financially successful, and the company was sold within several months. (*Id.* at 127:14-19.) Mr. Gugliuzza then obtained an MBA degree from the University of Southern California, after which he worked for Oakley, a sunglass company, as an e-Commerce strategy manager. (*Id.* at 124:7-11, 128:20-129:3.) Mr. Gugliuzza

supported Oakley's large e-commerce account that consisted of business-to-business sales of sunglasses to such companies as Amazon and Zappos. (*Id.* at 129:4-20.) Oakley does not utilize a monthly membership or negative option plan. (*Id.*) Mr. Gugliuzza left Oakley three days before trial. (*Id.* at 129:21-130:1.)

D. Procedural History

In March 2008, the FTC served a CID on Commerce Planet. (Gravitz, 2/1/12, 48:3-6; Roth, 2/8/12, 17:19-18:13.) The FTC filed suit against Defendants on November 10, 2009. (Dkt. No. 1.) Shortly thereafter, the FTC settled with Commerce Planet, Mr. Hill, and Mr. Gravitz, and final judgments for permanent injunction and equitable monetary relief in the amount of $19,730,000 were entered against them on November 18, 2009. (Dkt. Nos. 3-5, 7-9.) The parties agreed to suspend the judgment for monetary relief under certain conditions, including the payment of $100,000 by Commerce Planet, $330,000 in cash plus interest on a $100,000 loan by Mr. Hill, and $192,000 by Mr. Gravitz. (Dkt. Nos. 7-9; Hill, 2/7/12, 183:7-11; Hill, 2/17/12, 114:14-16.)

The FTC engaged in settlement discussions with Mr. Gugliuzza, but the parties were unable to reach a resolution. (Dkt. No. 142.) After the FTC and Mr. Gugliuzza engaged in substantial discovery, the FTC filed a motion for leave to amend the Complaint, which the Court granted. (Ct. Order, Dkt. No. 145, June 27, 2011.) The FTC filed the operative FAC on June 29, 2011.

(Dkt. No. 147.) On July 18, 2011, Mr. Gugliuzza answered the FAC, asserting several affirmative defenses, including advice of counsel, reliance on professionals, good faith, and mootness. (Dkt. No. 149.) On July 27, 2011, Mr. Gugliuzza filed two motions for partial summary judgment, which the Court denied. (Ct. Order, Dkt. No. 164, Sept. 8, 2011.) The Court thereafter conducted its bench trial, and the parties submitted closing briefs. (Dkt. Nos. 242-43, 248-49.)

III. INDIVIDUAL LIABILITY

The FTC alleges that Defendants engaged in deceptive and unfair website marketing of OnlineSupplier as a free "Online Auction Starter Kit" from July 2005 to March 2008 without adequately disclosing the program's negative option plan. (FAC ¶¶ 17-24, 48-53.) The FTC also alleges that Mr. Gugliuzza participated in, controlled, or had authority to control as well as knew about or should have known about Commerce Planet's deceptive and unfair practices related to the marketing of OnlineSupplier via his various roles as the company's consultant, president, *de facto* executive, and in-house counsel from July 2005 to November 2007. (*Id.* ¶¶ 38-43.) Based on these allegations, the FTC asserts two counts against Mr. Gugliuzza for deceptive and unfair practices under section 5(a) of the FTC Act.

A. Deceptive Acts (Count I)

Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce" and empowers the FTC to prevent such acts or practices. 15 U.S.C. § 45(a)(1), (2). An act or practice is deceptive if (1) there is a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir.1994), *cert. denied*, 514 U.S. 1083, 115 S.Ct. 1794, 131 L.Ed.2d 722 (1995). District courts consider the overall, common sense "net impression" of the representation or act as a whole to determine whether it is misleading. *See FTC v. Gill*, 265 F.3d 944, 956 (9th Cir.2001) (holding that defendant failed to counter the FTC's substantial showing that he made statements and created an overall "net impression" of a misleading representation regarding the ability to remove negative information from consumers' credit report, "even if the information was accurate, complete, and not obsolete"); *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir.2009) ("Deception may be found based on the 'net impression' created by a representation."). A misleading impression is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir.2006) (citation and quotes omitted).

The FTC's theory of the case is that Defendants offered a free internet auction kit as a ruse to enroll

consumers in OnlineSupplier. Defendants thereby grossed over $45 million in two years by tricking over 470,000 consumers into unwittingly submitting their credit card information, which was used to charge them a monthly subscription fee without their informed consent. (Opening Statements, Trial Tr., 1/31/12, 5:25-6:15, 10:8-10.) At trial, the FTC attempted to show that OnlineSupplier's landing and billing pages, (Exhs. 1270, 1271), created the net impression that OnlineSupplier was a free offer, except for a small shipping and handling fee, and that although there was a disclosure of the negative option plan, consumers were unlikely to see or understand it because of the way it was placed on the sign-up pages. (Trial Tr., 1/31/12, 11:7-13.)

Mr. Gugliuzza denied liability and any wrongdoing on his part. He contended that OnlineSupplier was not a devious internet scheme, but a legitimate product that people wanted to use. (*Id.* at 20:24-21:7.) Mr. Gugliuzza argued that there was no empirical evidence of deception or unfairness arising from the negative option disclosures on OnlineSupplier's website. (Dkt. No. 187 [Def.'s Trial Brief], at 2.) Mr. Gugliuzza also argued that there was no evidence that consumers were deceived by the webpages, and any consumer confusion about OnlineSupplier resulted from third-party marketing fraud. (*Id.*; *see also* Trial Tr., 1/31/12, 22:18-23:8.)

The Court finds that the landing and billing pages of OnlineSupplier were materially misleading because

those webpages created the net impression that consumers could obtain a free auction kit, when in fact, consumers were subscribing to a continuity program with monthly subscription fees. The clear weight of the evidence simply does not support Mr. Gugliuzza's position that affiliate fraud was the primary cause of consumer confusion. That confusion was clearly caused by OnlineSupplier's misleading sign-up pages.

1. Version I Is Facially Misleading

The most compelling evidence that the website marketing of OnlineSupplier was misleading are the sign-up pages themselves. The landing and billing pages of the webpages created the net impression that OnlineSupplier was a free kit containing information on how to sell products online, rather than a continuity plan with a monthly membership fee. The central message on the landing page of Version I is that consumers will get a free kit that gives them information about how to sell products on eBay. (Exh. 1270.) When looking at the landing page, the most prominent graphic is the red boxed message on the upper left corner that states, "AS SEEN ON TV," which then leads the eye to the main message in caps "OVER $3.2 BILLION WAS MADE ON ebay LAST YEAR!" The phrase "$3.2 Billion" and "On ebay" are also in red, except that the eBay logo is in primary colors. Above this in smaller, dark blue font is the phrase "Work From Anywhere Using Your Computer!" Underneath the main headline about eBay is the message in a green banner that states "JOIN OVER 724,000 AMERICANS MAKING A

LIVING ON EBAY." (Exhs. 1270-1, 1271-1.) Below the banner, the webpage is divided into two sections. The left section contains information about an "Online Auction Starter Kit" that "provides detailed instructions to maximize profits, using little known but proven strategies." Just below this statement in Version I is the directive "GET YOUR KIT NOW FOR FREE." The word "FREE" is in red, as is the phrase "STARTER KIT." The kit is advertised to include the following benefits: (1) a step-by-step quick start guide, (2) no experience required, (3) advanced training for experienced auctioneers, (4) and up to 50% discounts on thousands of name brand products. The right section of the webpage contains a light blue box where the user may submit her shipping address. There is a countdown clock on top that ticks off the number of minutes left until the offer expires. Just below is the question "Where do we ship your FREE KIT?" The phrase "FREE KIT" is in red. The button "Ship My Kit!" appears below the spaces for filling in one's name and contact information. Below that is the message inserted in light gray that states "GET YOUR ONLINE AUCTION STARTER KIT TODAY FREE!" The price 19.95 is crossed out and next to it is the offer "NOW FREE! (limited time offer)!" Again, "FREE" is in red. Below the fold,[4] in smaller text, is the following disclaimer: "By submitting this form you are accepting and agreeing to the Privacy Policy and Terms of membership of

[4] The term "fold," originally a newspaper terminology, refers to the bottom edge of a webpage that is viewable on the computer screen without scrolling down. (*See* King, 2/3/12, 130:3-14.)

this Web Site." The phrase "Privacy Policy" and "Terms of Membership" are hyperlinked in slightly darker blue. Further below is the message: "BONUS, your kit includes a FREE 14-DAY TRIAL TO YOUR VERY OWN WEBSTORE." On the bottom left are "Success Stories," which consist of testimonials from two satisfied customers who purchased the kit.

Overall, the predominant message is that consumers can order a free kit on how to make money by selling products on eBay. This is underscored by the repetition and placement of the phrase "Free Kit," which is bolded in red, and by the use of name eBay at the center top of the webpage. Notably, there is no mention of the product's name "OnlineSupplier," on the webpage in a manner that enables viewers to associate the kit with OnlineSupplier.[5] Nor is there any information about Commerce Planet, its subsidiaries, or any information about cost or the continuity program. Rather, the net impression created by the landing page is that the kit is affiliated with eBay, and that consumers can learn how to sell products on eBay from the kit.

While the terms of the continuity program are disclosed in a separate, hyperlinked "Terms of Membership" page, this is an insufficient cue. Disclaimers do

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[5] The name OnlineSupplier appears only later on the billing page, (Exh. 1270-2), with the message, "Charges will appear as Online Supplier," which is placed under the "Ship My Kit!" button. The Court finds this insufficient to overcome the overwhelming impression that the kit is associated with eBay, as the eBay name figures prominently throughout the payment, billing, upsell, and confirmation pages.

not automatically exonerate deceptive activities. *See FTC v. Gill*, 71 F.Supp.2d 1030, 1044 (C.D.Cal.1999), *aff'd*, 265 F.3d 944 (9th Cir.2001). "A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200. There are multiple reasons why the hyperlinked "Terms of Membership" page is inadequate to overcome the net impression that OnlineSupplier was a free auction kit. First, the hyperlink is buried at the bottom and is not placed in close proximity to the "Ship My Kit!" button, making it unlikely that consumers would notice or click on the link. There is also no indication that the "Terms of Membership" are specifically in regard to a negative option plan. Second, when the viewer clicks on the hyperlink, the actual terms of membership appear on a separate pop-up page rather than being directly inserted on the landing page. Such separation suggests that the disclosure is inadequate because it appears in a different context than the claims they purport to repudiate. *See Gill*, 71 F.Supp.2d at 1044 (holding that a disclaimer in contract consumers eventually signed was inadequate to overcome deceptive representations in defendants' advertisements). Third, the information about the continuity plan, contained under numeral 4 ("Payment of Fees"), is buried with other densely packed information and legalese, which makes it unlikely that the average consumer will wade through the material and understand that she is signing up for a negative option plan.

Once the consumer clicks the "Ship My Kit!" button, she is taken to the billing page. (Exhs. 1270-2.) The eBay logo, along with the message "AS SEEN ON TV," is repeated on top, reinforcing the message that the kit is affiliated with eBay. The space for filling in one's payment information is inserted in a light blue vertical box to the right. At the top are two shipping options, regular shipping for $1.95 and expedited shipping for $7.95. Below the space for the credit card information is the "Ship My Kit!" button. At the very bottom, below the fold, in slightly darker blue font and in fine print is the disclosure regarding the negative option plan and payment terms. Although information about OnlineSupplier's negative option plan is disclosed on the webpage, fine-print disclosures may not overcome the net impression of a deceptive representation. *Cyberspace.com*, 453 F.3d at 1200-1201 (finding that disclosures in small-print on the back of a check regarding the monthly fee for internet access was insufficient to defeat the net impression that the check was a refund or rebate); *see also FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C.Cir.1985) (holding that a cigarette advertisement of tar content was deceptive despite a truthful, fine-print explanation in corner of advertisement of how tar was measured). As placed, the disclosure regarding OnlineSupplier's negative option plan is difficult to read because it is printed in the smallest text size on the page and in blue font against a slightly lighter blue background at the very end of the disclosure. The disclosure is also not placed in close proximity to the "Ship My Kit!" button and placed below the fold. It is highly probable that a

reasonable consumer using this billing page would not scroll to the bottom and would simply consummate the transaction by clicking the "Ship My Kit!" button, as the consumer is urged to do by the message at the top left: "You are ONE CLICK AWAY from receiving the most up-to-date information for making money on ebay!" Furthermore, the term "negative option" is not clearly defined in the disclosure. The disclosure also states that the consumer "may" be liable for payment of future goods and services if she fails to cancel the service, which casts ambiguity as to whether the consumer will in fact be charged a monthly fee. *See Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir.1989) ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.")

After the consumer clicks on the "Ship My Kit!" button on the payment page, she is next taken to the upsell page where various products and services are advertised. (Exh. 1270-3.) The product offers are preclicked to "Yes," and the consumer must change it to "No" to decline the offer. Each of the products and services involves a free trial offer and a monthly or annual membership fee. Again, there is no clarification that the kit is a negative option plan. Instead, the top banner states "Come Work Online Using Ebay!" and "Join Over 724,000 Americans . . . Making a Living on Ebay!," which reinforces the central message of using

the kit to make money on eBay. If the consumer clicks on the submit button, she is taken to the final confirmation page. (Exh. 1270-4.) That page contains the same message and graphics as the previous upsell page and states that the order has been completed. Even assuming that the upsell and confirmation pages included clarifying information about OnlineSupplier's negative option plan, it is not enough because the transaction would have been completed upon submitting the "Ship My Kit!" button on the billing page. *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.) ("The Federal Trade Act is violated if [an advertisement] induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract."), *cert. denied*, 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975).

2. Version II Is Facially Misleading

The sign-up pages of Version II are similarly misleading because they create the net impression that consumers are getting a free kit to sell products on eBay. The landing and billing pages of Version II are largely similar to those of Version I. (Exh. 1271.) On the landing page, the phrase "AS SEEN ON TV" and the eBay logo have been removed, although the word eBay (in red) is still included in the header, and there is a reference to a CBS news story regarding people making a living on eBay. (Exh. 1271-1.) The figure $3.2 billion is now increased to $52 billion. The phrase "GET YOUR KIT NOW FOR FREE" in Version I has been changed to "GET YOUR KIT NOW." (Exh.

1271-1.) The phrase "Just Pay S/H" has also been added next to the phrase "Free," and the trial period has been shortened from 14 to 7 days. These modifications, however, do not substantively change the net impression that consumers can order a free kit on how to sell products on eBay with payment of shipping. Again, there is no information about OnlineSupplier, Commerce Planet, or the negative option plan.[6] As in Version I, the landing page on Version II includes a hyperlink to "Terms of Membership," which pop up on a separate page. The terms and conditions page now includes information regarding the negative option plan at the very top instead of further down in the text. However, the disclosure is still inadequate for the same the [sic] reasons discussed above: the hyperlink is not placed in close proximity to the "Ship My Kit!" button; it is placed below the fold; there are no cues that the terms of membership are specifically in regard to the negative option plan; and the terms and conditions appear on a separate pop-up page.

The most significant change appears on the billing page of Version II. (Exh. 1271-2.) The name eBay has been removed altogether from the top, and "onlinesupplier.com" has been added on the right. Second, the disclosure text has been taken out of the right blue box, centered at the bottom, and written in black font. As

[6] The term "onlinesupplier.com" appears on the billing, upsell, and confirmation pages. However, it is not sufficiently prominent or associated with the kit to the extent that it is likely to overcome the impression that the kit is affiliated with eBay, which appears on the first landing page.

the defense team pointed out during trial, the shipping and handling fee, along with the monthly fee, is now in red while the remaining text is in black. Although these modifications do somewhat improve readability, the Court finds that they are inadequate to change the net impression of the landing and billing pages. As in Version I, the disclosure is not placed in close proximity to the "Ship My Kit!" button, but placed at the very bottom of the page, below the fold, so that a reasonable consumer is not likely to scroll to the bottom and see or read it. Furthermore, the main information about the negative option plan is in the smallest text size on the page and densely packed with the other text, rendering it difficult to read.

The remaining pages in Version II follow the same flow as the pages in Version I. When the consumer clicks the "Ship My Kit!" button, she is taken to the upsell page. (Exh. 1271-3.) Here, the eBay logo has been removed, and "onlinesupplier.com" has been added to the header. Version II contains an increased number of upsell offers, which, again, have been preclicked to "Yes." Clicking the submit button takes the consumer to the final confirmation page. (Exh. 1271-4.) This page also has "onlinesupplier.com" in the header. The final confirmation page includes some additional information regarding a 7-day trial membership for $1.95, when the consumer will receive the product, customer service information, and OnlineSupplier's website address. It also contains a link to the terms and conditions. But the added information does not change the net impression of OnlineSupplier, as

the transaction would already have been completed upon clicking the "Ship My Kit!" button on the billing page. *See Resort Car Rental Sys., Inc.*, 518 F.2d at 964.

In short, the sign-up pages of Version I and II are misleading because the overall, net impression from the content, layout, and design of the webpages is that consumers are ordering a free kit on how to sell goods on eBay with payment of a small shipping and handling fee, not that they are subscribing to a negative option plan. It is also apparent that the disclosure – by its placement, wording, colorization, spacing, and size of the text – was designed not be clear and conspicuous, but rather to mask information about OnlineSupplier's continuity program without entirely omitting the information. Such a method of disclosure is inadequate because it simultaneously conceals, obscures, and suppresses the very information it purports to convey. This misrepresentation is undoubtedly material because the information about a free kit goes to the cost of the product, an important factor in a consumer's decision on whether or not to purchase a product. *See Cyberspace.com*, 453 F.3d at 1200. The notion that consumers will get a free kit makes it more likely that they will unwittingly provide their credit card information, thinking they are only paying for shipping and handling, when in fact, they are obligating themselves to pay a subscription fee for the continuity program.

3. Expert Testimony

Although a facial examination of the sign-up pages sufficiently demonstrates that the website marketing of OnlineSupplier was misleading to a reasonable consumer, the Court may consider extrinsic evidence as corroborating evidence. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 318-19 (7th Cir.1992). The FTC presented additional evidence that corroborates the Court's conclusion that OnlineSupplier is facially misleading. In particular, the Court finds the expert testimony of Jennifer King to be on-point and persuasive. Ms. King is a researcher and a third-year Ph.D. candidate at the U.C. Berkeley School of Information, with a master's degree in information management and systems, a program that focuses on graduating professionals in Human Computer Interaction ("HCI"). (King, 2/3/12, 101:7-8, 107:2-9, 109:22-110:3.) At Berkeley, Ms. King studies privacy using HCI-based methods, which is the study of how humans interact with computers. (*Id.* at 101:9-18.) HCI research is an interdisciplinary study that encompasses both qualitative and quantitative methods and draws upon such fields as computer science, cognitive psychology, and social psychology, among others. (*Id.* at 103:14-17, 104:22-105:9.)

Ms. King was retained by the FTC to review OnlineSupplier's webpages and determine whether (1) customers would understand that a negative option was present when they reviewed the sign-up pages, and (2) after they finished the check-out process, whether they would understand that they were enrolled in a continuity program. (*Id.* at 113:2-10.) Here,

Ms. King applied a usability inspection method, a type of HCI qualitative-based approach that is "user-centered" – meaning that it focuses on what the user can perceive and what the user should do. (*Id.* at 103:23-104:1, 115:23-116:10.) Ms. King likened the method to a preflight checklist whereby she analyzes the webpages to see if they are consistent with certain HCI heuristics or principles of usability. (*Id.* at 114:22-115:15; 116:16-117:4.) Thus, like an airline pilot who goes through a pre-flight checklist trying to determine if the plane should fly, an expert conducting a usability inspection looks for major flaws in a website to determine whether it should be launched. (*Id.*)[7] After inspecting Version I and Version II, Ms. King concluded that she did not believe that "most people" would know, after visiting the webpages, that a negative option existed or that "most people" would know they were enrolled in a continuity program upon completing the check-out process. (*Id.* at 114:9-18.)

(i) Version I

With respect to Version I, Ms. King focused on what consumers are drawn to based on principles of usability. These principles include the fact that users typically do not scroll, tend to scan very quickly and read only 20% of what is on the page, and seek cues for what to do next on a webpage. (*Id.* at 123:19-125:6,

[7] In light of Ms. King's education and experience in the field of HCI, the Court finds her well-qualified to conduct and testify on a usability inspection of OnlineSupplier's webpages.

125:20-23.) Ms. King testified that on the landing page of Version I, the things that draw the most attention are the "AS SEEN ON TV" logo, the eBay logo, and the word "kit" used multiple times. (*Id.* at 124:7-11.) The primary call to action on the landing page is the "Ship My Kit!" button. (*Id.* at 124:13-18, 124:23.) On the billing page, the primary call to action is filling out the payment information and the "Ship My Kit!" button. (*Id.* at 127:6-18.) Ms. King testified that there is nothing on the screen to cause a typical consumer to believe that they would be signing up for a free trial and would incur monthly charges on their credit card. (*Id.* at 127:21-25.) As to the hyperlinked "Terms of Membership," Ms. King testified that she had grave concerns with the pop-up window, as a lot of factors could potentially interfere with viewing that window, such as a pop-up blocking software installed on the computer or other windows on the screen. (*Id.* at 135:12-136:4.) Ms. King also pointed out that the terms and conditions contain at least 6,000 words in giant blocks of text; the disclosure about the membership fee is buried in section 4; and the terms and conditions are written in legal language, which most people do not understand and immediately ignore. (*Id.* at 137:2-17, 138:4-9.) Ms. King testified that the "Terms of Membership" hyperlink and the adjacent "Privacy Policy" hyperlink are also terms that most people are trained to immediately tune out. (*Id.* at 136:5-19, 136:20-137:1.)

Ms. King further identified several key flaws with regard to the disclosure. First, Ms. King provided screenshots of the landing and billing pages, which

showed that the disclosure appeared below the fold, as seen on a computer screen with the resolution size of 1024 by 768 pixels (the most common resolution for computers during the time the webpages were live from 2005 and 2006) and allowing for the maximum amount of screen space. (*Id.* at 131:3-132:25, 133:1-4, 133:20-134:25; Exhs. 1324, 1325.) Ms. King explained that the placement of the disclosure below the fold violates the cardinal heuristic of usability because people do not read the entire webpage and do not tend to scroll down to look for information below the fold. (King, 2/3/12, 128:1-7, 130:5-16, 133:5-9.) Generally, what one wants people to read the least is placed at the bottom while the thing one cares about the most is placed at the top of the webpage and above the fold. (*Id.* at 128:8-12.)

In rebuttal, Gugliuzza provided evidence of a screenshot from his computer showing the disclosure on the billing page of Version I to be above the fold. (Exh. 19; *see also* Exh.2002.) But the net impression test under section 5(a) is from the perspective of a *reasonable consumer*, not that of the seller or the seller's employee. While Gugliuzza's computer may, indeed, have shown a part of the billing page disclosure to be above the fold, it is not representative of the resolution size of the typical consumer. Ms. King testified that the most common resolution size at the time Version I was live was 1024 by 768 pixels. (King, 2/3/12, 126:16-21.) Ethan Brooks, the company's Chief Technology Officer from 2006 to 2007, also confirmed that during the time that OnlineSupplier's sign-up pages were live, the

screen resolution was 1024 by 768 for approximately 50% of users, which would place the disclosure below the fold. (Brooks, 2/9/12, 100:16-101:2, 102:7-12, 113:23-114:9, 115:20-22, 116:14-21.) The defense team also pointed to hints of something more below the fold – *i.e.*, the light blue box continues downward and the graphic on the left is cut off. However, Ms. King testified that these were ineffective visual cues considering the totality of the page and the prominence of the "Ship My Kit!" button. (King, 2/7/12, 29:12-31:5; Exh. 1323.) Even assuming the disclosure were entirely above the fold for most consumers, the Court finds that its visibility is only slightly improved given its overall placement and presentation on the page.

A second flaw Ms. King observed was that the disclosure is located far away from the "Ship My Kit!" button, at the very bottom of the page, and after the hyperlinked terms of membership and "Privacy Policy." (King, 2/3/12, 128:18-22.) Ms. King testified that her research in user cognition and privacy policies demonstrates that "as soon as you put the word 'privacy policy' in front of a consumer, they completely tune out. They're one of the most unread components of a web page." (*Id.* at 128:23-129:6.) Thus, "the location of the disclosure after that privacy policy link basically signals to somebody that here is something you don't need to read; this is not relevant to your shopping experience. If it were crucial, it would have been placed up near the 'ship my kit' button." (*Id.* at 129:7-13.) Third, Ms. King testified that the visibility of the disclosure was poor given the blue-on-blue lettering, the small

and blocky text, the all-cap font (rendering it more difficult, not easier to read), and the legalese language (most people are not familiar with the term "negative option"). (*Id.* at 128:13-17, 129:21-130:2.)

Ms. King concluded that Version I did not appear to be offering for sale a membership program because (i) that messaging was absent from the entire user flow and the focus of the pages was instead on obtaining a free kit, and (ii) there was no mention of the continuity program in the area of the webpage where she believed most people would spend their viewing time. (*Id.* at 139:11-21.) Ms. King stated that she would not recommend launching Version I until the core flaws she identified were fixed. (*Id.* at 139:22-140:4.)

(ii) Version II

With regard to Version II, Ms. King similarly opined that the landing and billing pages did not contain anything that would cause a typical consumer to believe she would be signing up for a free trial in OnlineSupplier and would incur monthly charges until she affirmatively cancelled. (*Id.* at 141:5-9, 142:2-6.) The primary message of Version II's landing page is consistent with that of Version I – the focus is on the words eBay, starter kit, and free online auction. (*Id.* at 140:5-24.) The billing page does include the word OnlineSupplier for the first time, but the call to action remains "Ship My Kit!" (*Id.* at 141:15-142:1.) As to the disclosure on the billing page, Ms. King acknowledged that some changes were made to improve visibility, but

that they were inadequate because "key flaws" were not addressed – *i.e.*, the disclosure is still ensconced in a very large block of small text, printed in caps, dressed in legal language, placed at the bottom of the page away from the primary call to action ("Ship My Kit!"), and appears below the fold. (*Id.* at 142:7-25, 152:23-154:2.) Ms. King testified that because most major webpages tend to always put their legal disclosures in the footer, "people have been trained to know if you see 'terms and conditions,' privacy policy,' . . . they are things that they do not need to read to complete the task at hand." (*Id.* at 143:7-18.) As with Version I, Ms. King provided a screenshot of the landing and billing pages of Version II, using the same resolution (1024 by 768 pixels) and maximizing the display windows. (Exhs. 1323, 1326.) Neither of the screenshots shows the terms and conditions hyperlink or the disclosure to be above the fold, and Ms. King testified that most consumers would not have seen the disclosures on the billing page. (King, 2/3/12, 144:3-25, 147:9-148:7.) As in Version I, Ms. King testified that the terms and conditions are unhelpful in disclosing the materials terms of OnlineSupplier because they are only available by clicking the hyperlinked "Privacy Policy" and "Terms and Condition" – two terms that people do not tend to view. (*Id.* at 149:12-18.) The terms of membership for OnlineSupplier are also ineffective because – although the terms of the negative option plan appear at the very beginning of the 6,000-word text – the disclosure is contained in a separate pop-up window rather than directly on the billing page. (*Id.* at 148:13-149:1, 149:24-150:12.) Ms. King concluded that Version II

does not appear to be offering for a sale a membership program and that she would not have recommended launching Version II because of "severe violations of usability rules that need to be addressed." (*Id.* at 152:14-22.)

(iii) Rebuttal Testimony

Mr. Gugliuzza did not produce any expert rebutting Ms. King's usability inspection of OnlineSupplier's webpages. Rather, Mr. Gugliuzza attempted to minimize Ms. King's testimony by pointing out that she did not incorporate any analysis of empirical data in reaching her conclusions. (Def.'s Closing Brief, at 44.) For example, Mr. Gugliuzza relies on evidence that approximately 45% of the consumers who purchased OnlineSupplier cancelled within the free trial period, (Exh. 31), and that there were thousands of websites created between January 2005 and March 2007 using OnlineSupplier, (*see* Cruttenden, 2/28/12, 8:18-10:9, 12:6-8, 60:23-61:7; Exh. 2057). Mr. Gugliuzza's criticism misses the mark. There was no explanation of how an empirical analysis is relevant to a usability inspection, which focuses on what the user can perceive and do on a webpage given certain HCI principles of usability. Ms. King explained why she conducted a usability inspection, as opposed to other methods (such as a focus group), given the scope of the project and the size of OnlineSupplier's website. (*See* King, 2/3/12, 117:12-24.) The Court finds that a usability inspection, with its emphasis on user perception and comprehension of the information presented to them on a

webpage, is consonant with a "net impression" test under section 5(a) of the FTC Act, which turns on a facial examination of the relevant marketing materials.

Mr. Gugliuzza further argued that a close analysis of user data reveals that the "vast majority" of consumers signed up for OnlineSupplier knowing the terms of the negative option plan. (Def.'s Closing Brief, at 39-40.) Mr. Gugliuzza's reliance on user data is misguided and uncorroborated by the evidence in the record. Mr. Gugliuzza introduced the testimony of its accounting expert, Dr. Stefano Vranca, who submitted a rebuttal report to the consumer injury calculation of Dr. Daniel Becker, the FTC's consumer injury expert. Dr. Vranca testified that for the period from 2005 to April 2008, using the company's Microsoft Access Realtime (RT3) database, 46.32% of those who ordered OnlineSupplier cancelled within the free trial period. (Vranca, 2/28/12, 74:3-76:5; Exh. 2061.) Dr. Vranca further testified that nearly 20% of OnlineSupplier subscribers maintained their membership for more than three months and 10% of subscribers maintained their membership in excess of six months. (Vranca, 2/28/12, 84:3-22; Exhs. 2062-63.) Dr. Vranca's calculation, however, does not entirely support Mr. Gugliuzza's conclusion. As Dr. Becker pointed out, Dr. Vranca neither discussed the specific steps used to arrive at his calculation nor explained how the RT3 data was used in his rebuttal report. (*See* Becker, 2/15/12, 15:23-18:3.) Using the data from the company's RT3 system, Dr. Becker testified that both he and his assistant independently calculated a cancellation rate of 25%. (*Id.*) Even assuming

that upwards of 45% of consumers did cancel within the free trial period, there was no accounting of how consumers knew about the membership terms – *i.e.*, whether they knew from the sign-up pages, from post-transaction communications, or examination of the kit itself. (*See* Vranca, 2/28/12, 104:5-109:1, 109:18-25.) More importantly, Dr. Vranca did not account for the 55% (the majority) of the consumers who did not cancel within the trial period and the 80% to 90% of those who did not subscribe to OnlineSupplier for more than three or six months.

There is also no showing that consumers who remained OnlineSupplier members did so knowing the terms of the membership upon submitting their credit card information. As true of Joan Cirillo, (*see infra* Part III.A.4), consumers simply could not have checked or seen the membership fee on their credit card bill for several months. Mr. Gugliuzza also pointed to the fact that there were thousands of websites created between January 2005 and March 2007 using OnlineSupplier, (Cruttenden, 2/28/12, 8:18-10:9, 12:6-8, 60:23-61:7; Exh. 2057), and that fourteen consumers – including Eric and Lucia Carter – provided positive testimonials of OnlineSupplier, (Carter, 2/17/12, 28:8-19, 37:24-38:24; Exh. 2004.) But the evidence shows that the Carters and others who submitted positive testimonials did so in early March 2005, and thus likely purchased OnlineSupplier through in-bound telemarketing, not via the sign-up pages, which were

not live until July 2005. (*See* Seidel, 2/14/12, 150:20-151:20; Gravitz, 2/2/12, 108:17-109:1; Exh. 2004.)[8] More importantly, the FTC is not required to prove that all consumers were deceived. *Stefanchik*, 559 F.3d at 929; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir.1989) ("[T]he FTC need not prove that every consumer was injured."), *cert. denied*, 493 U.S. 954, 110 S.Ct. 366, 107 L.Ed.2d 352 (1989). Nor does the FTC need to prove that individual reliance of the misrepresentation by each purchasing consumer. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-606 (9th Cir.1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994). It is also not enough that there were a few satisfied customers of OnlineSupplier or that it had some utility. *See FTC v. Tashman*, 318 F.3d 1273, 1278 (11th Cir.2003) (concluding that the district court incorrectly focused on a few satisfied customers and utility of the product being sold, rather than analyzing the misrepresentations made about the product); *Amy Travel Serv., Inc.*, 875 F.2d at 572 ("The existence of some satisfied customers does not constitute a defense under the FTCA."); *accord Stefanchik*, 559 F.3d at 929 n. 12. Finally, as discussed below, there were numerous complaints of consumer confusion regarding OnlineSupplier's payment terms that undercut Mr. Gugliuzza's argument that, at best, only "an infinitesimally small

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[8] For example, Mr. Carter, who appeared on an infomercial regarding OnlineSupplier in 2005, testified that he purchased the program in 2004 (before Version I and II were live), that he did not recall if he used the webpages to sign up for the program, and that he was neither charged a shipping fee nor received a kit in the mail. (Carter, 2/17, 6:15-7:4, 33:21-25, 51:22-52:5; Exh. 1334.)

percentage" of customers ever claimed to be confused by the disclosure of the terms. (Def.'s Closing Brief, at 39-40).

4. Consumer Complaints

To establish a section 5 violation, proof of actual deception is unnecessary; it only requires a showing that misrepresentations "possess a tendency to deceive." *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir.1979); *see also Feil v. FTC*, 285 F.2d 879, 896 (9th Cir.1960) (stating that "[a]ctual deception is not necessary" for the FTC to exercise its extensive power to prevent the use of deceptive acts). Although proof of actual deception is not necessary, "such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *Cyberspace.com*, 453 F.3d at 1201.

The FTC presented abundant evidence that consumers were actually misled by OnlineSupplier's webpages. Two fairly sophisticated consumers, David Suckling and Joan Cirillo, testified that they were misled by OnlineSupplier's webpages. Mr. Suckling, a former owner of an internet company that built websites for clients, testified that he signed up for OnlineSupplier from a webpage advertising that he could obtain a free information if he just paid for shipping. (Suckling, 1/31/12, 61:6-15, 61:11-16.) His overriding impression was that he was being offered a free information kit on how to make money on eBay. (*Id.* at 62:15-17.) When he ordered the kit by submitting his address and

credit card information on the sign-up pages, he did not believe that he was going to be charged anything in addition to the shipping fee. (*Id.* at 61:25-62:8.) Mr. Suckling later discovered he was charged $49.95 when he examined his credit card bill and called customer service to request a full refund. (*Id.* at 65:4-9.) Mr. Suckling received only a partial refund for $24.95. (*Id.* at 65:1-17.) After his call with customer service, he filed a complaint with the BBB. (*Id.* at 65:18-20.) Like Mr. Suckling, Ms. Cirillo, a corporate attorney for ten years, is well-versed in computer usage. She testified that she believed that she was ordering a free kit to learn how to be a seller on eBay, only to discover that she had been charged $49.95 five times, totaling approximately $250, from November 2006 to April 2007. (Cirillo, 1/31/12, 74:3-19, 76:16-19, 82:21-24.) Ms. Cirillo also called customer service to request a refund and filed a complaint with the BBB. (*Id.* at 74:23-75:7, 88:14-22.) Ms. Cirillo did not receive any refund. (*Id.* at 90:2-6.) Mr. Suckling's and Ms. Cirillo's overall impression that they were ordering a free information kit to sell products on eBay are consistent with the Court's overall net impression of OnlineSupplier's webpages and Ms. King's usability inspection of the sign-up pages.

There is also ample evidence that Commerce Planet, through its customer service department CLG, received thousands of telephone complaints regarding OnlineSupplier and requests for refunds. José Guardiola, the customer service manager for CLG, handled customer complaints regarding billing issues on a

daily basis, either by personally taking a call or by interacting with customer service representatives on the floor. (Guardiola, 2/21/12, 7:22-8:4, 90:19-23.) The most common type of complaint Mr. Guardiola identified were "free-kit-only" complaints – *i.e.*, people thought they were just paying $1.95 in shipping for a starter kit, only to discover they were being charged a monthly fee. (*Id.* at 8:11-21.) Mr. Guardiola estimated that approximately 70% of the consumer complaints consisted of free-kit-only complaints. (*Id.* at 8:22-9.6.) For example, in Mr. Guardiola's weekly reports during July and November 2006 and March 2007, there were a total of 18,000 calls handled by customer service, out of which Mr. Guardiola estimated that between 70% to 80% of the calls related to free-kit-only complaints. (*Id.* at 31:20-32:13; Exhs. 1292a, 1293, 1295.) Mr. Guardiola conservatively estimated that CLG received about a thousand free-kit-only complaints per week and tens of thousands of such complaints during his tenure at Commerce Planet from August 2006 to August 2007. (*Id.*)

In addition to telephone complaints, thousands of written complaints regarding OnlineSupplier were submitted to the BBB, the Attorney General, and Commerce Planet via emails, mail, and website submissions. (Exhs. 163, 193, 1180, 1177-79.) The Court admitted a total of approximately 4,000 complaints consisting of over 500 BBB complaints (Exh. 163); 3,272 archived email complaints to Commerce Planet from July 2005 to March 2008 (Exh. 1180); and over 200 Consumer Sentinel FTC database complaints

(Exhs. 1177-79). (Trial Tr., 2/9/12, 97:22-98:7; Exh. 1176 [excluding declaration and categorizations].)[9] A significant number of these related to consumer confusion regarding the nature of the product and its cost. Consumers complained that they thought they had signed up for a free information kit about how to sell products on eBay with payment of shipping, rather than subscribing to a continuity program with a monthly fee. For example, on June 13, 2006, Kenneth Goolsby filed a complaint with the BBB regarding a May 2006 purchase of OnlineSupplier, stating that he "thought [he] was signing up for free ebay info w/ a shipping of $1.95" and never agreed to monthly charges. (Exh. 163-694.) On September 5, 2006, Selena Phillips similarly stated regarding her August 2006 order of OnlineSupplier: "I ordered a 'free' package that was supposed to explain everything online supplier is supposed to do. I was only told to pay the shipping and handling fee of $1.95. Never did they ask me to look over the terms or agreement or have anything checked

[9] With regard to the archived emails, (Exh. 1180), the Court admitted them as proper summaries under Federal Rule of Evidence 1006. The Court noted that the complaints were not being offered for the truth of the matter asserted, but as evidence of the consumer's confused state of mind. (Trial Tr., 2/8/12, 133:17-135:2.) All the BBB, email, Attorney General, and Consumer Sentinel complaints – totaling 4,057 complaints from 2004 to 2009 – were classified in the FTC's March 2011 Project. (Gale, 2/8/12, 99:16-100:3, 112:25-114:23.) In that classification project, FTC investigator Bruce Gale and his litigation team (consisting of six law students and one other FTC investigator) classified all the complaints into eight categories. The Court excluded the classifications as improper expert opinion. (Trial Tr., 2/9/12, 89:3-90:7, 94:17-22, 97:22-98:7.)

off that I looked at the terms or agreement." (Exh. 163-719.) Mr. Guardiola identified Mr. Goolsby's and Ms. Phillips' complaints as typical of those he encountered at CLG. (Guardiola, 2/21/12, 9:9-10:14.) On April 26, 2007, Joanna Gaul submitted a complaint to the Attorney General regarding her purchase of OnlineSupplier on January 31, 2007, stating that she "did not authorize them [Commerce Planet] to charge my card for anything but the $1.95 . . . I ordered a How To Use E-Bay book online for $1.95," but "[w]hen I received the information I discovered it wasn't about using E-bay it was about having an on line business . . . when I received my credit card bill I had been charged $49.95. I called and told them I did not authorize this charge. . . ." (Exh. 193.) On April 25, 2006, Ian Bennett sent the following email complaint to Commerce Planet regarding the lack of clear disclosure for the continuity program: "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 following web page [for OnlineSupplier] 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." (Exh. 1180.) Another consumer sent a similar email complaint on August 18, 2006: "Your business practice [is] extremely misleading and border on fraud. . . .

There is nothing what so ever on the sign up page or the terms of membership that in fact state that requesting the 'free' startup kit is in fact the same thing as account activation and/or account registration. NOTHING." (*Id.*) The Court finds the testimony of Mr. Suckling, Ms. Cirillo, and Mr. Guardiola as well as the evidence of consumer complaints credible and highly probative evidence that the website marketing of OnlineSupplier was misleading and deceptive.

5. Excessive Chargeback Rates

The FTC presented additional evidence of excessive chargeback rates for OnlineSupplier during the relevant time period, which corroborates the Court's finding that the program's sign-up pages were misleading. A "chargeback" consists of a returned sales transaction from the issuing bank to the acquiring bank sponsoring a particular merchant into the credit card payment system. (Chen, 2/2/12, 133:22-134:11, 135:7-11.) When a chargeback occurs, the funds associated with that transaction flow back to the issuer bank. (*Id.* at 135:12-16.) The average chargeback rate in the United States is 0.2% of the transaction rate. (*Id.* at 136:22-137:13.) Visa Credit Cards, one of the credit cards accepted for purchasing OnlineSupplier, identifies merchants who exceed a chargeback rate of about 1% in any given month. (*Id.* at 138:8-22, 140:18-141:4.)

Visa's business records show that OnlineSupplier was enrolled in Visa's Merchant Chargeback Monitoring Program ("MCMP") starting in 2004. (Exh. 1057.) OnlineSupplier continued to be in Visa's MCMP when the webpages of Version I and Version II were live during Mr. Gugliuzza's tenure at Commerce Planet. (Exhs. 1058-62.) OnlineSupplier was also part of Visa's Global Merchant Chargeback Monitoring Program ("GMCMP") in 2007. (Exhs. 1064-65.) From February 2006 to July 2007, OnlineSupplier exceeded Visa's 1% chargeback threshold for most months, reaching peaks of 5% in June 2006 and April through May 2007, 7% in June 2007, and 8% in July 2007 with certain acquiring banks. (Exh. 1312; *see also* Exhs. 1058-62; Exhs. 1317-19, 1321-22.) Commerce Planet incurred substantial fees in connection with OnlineSupplier chargebacks, totaling more than one million dollars between February 2006 and July 2007. (Seidel, 2/14/12, 74:24-75:20; Chen, 2/3/12, 5:9-23; Exhs. 1126, 1162, 1317, 1320.) From February 2006 to July 2007, Andrew Chen, who works at Visa's management division and is responsible for monitoring merchants with excessive chargebacks, testified that Visa monitored OnlineSupplier in all four of its risk management programs: (1) the MCMP, (2) the GMCMP, (3) the Risk Identification Service Online ("RIS"), and (4) the Merchant Fraud Performance Program. (Chen, 2/3/12, 131:3-12.) Mr. Chen opined that OnlineSupplier's performance in those programs was poor, given the extended time period during which OnlineSupplier was part of the programs and the fact that its chargeback problems never

abated, among other factors. (Chen, 2/2/12, 131:13-132:7.) Mr. Chen testified that based on his research into case logs of merchants in Visa's monitoring programs, OnlineSupplier was the only merchant that had been in all four monitoring programs. (*Id.* at 132:2-7.) Officers and employees at Commerce Planet, including Messrs. Gugliuzza, Hill, and Gravitz, all averred that OnlineSupplier's chargeback rate was a problem throughout their tenure at the company. (Gravitz, 2/1/12, 60:11-12, 60:24-61:2, 78:1-3; Gugliuzza, 2/22/12, 55:25-56:23, 60:4-6, 104:9-17; Daniel, 2/14/12, 19:9-19, 20:17-20, 24:6-9, 24:20-25:3, 26:8-11; Hill, 2/7/12, 156:13-157:3; Foucar, 2/16/12, 134:17-135:22, 160:6-9; Exh. 40.) The chargeback problem for OnlineSupplier was never resolved. (Gravitz, 2/1/12, 134:10-15.)

Mr. Chen testified that the frequent source of OnlineSupplier's excessive chargeback rates was e-commerce fraud, meaning that "consumers didn't recognize the transactions." (Chen, 2/3/12, 26:7-24.) Commerce Planet's chargeback reductions plans identify inadequate disclosure of OnlineSupplier's billing terms in their advertisement as one source of the company's chargeback problem. (*Id.* at 28:17-30:18; Exhs. 1076-77, 40.) Although Visa did not specifically link OnlineSupplier's excessive chargeback rates to deceptive website marketing during its monitoring of OnlineSupplier, Mr. Chen testified that Visa was just beginning to witness e-commerce deceptive marketing from 2004 to 2007 so that Visa did not know how to exactly identify that kind of problem until a few years

later. (Chen, 2/3/12, 28:3-14.) In 2008 and 2009, Visa identified certain features employed by continuity merchants, such as use of a free trial offer, a pay-for-shipping model, and a negative option plan, as being potentially deceptive marketing tactics. (*Id.* at 2/2/12, 156:21-157:21.) All these characteristics were marketing features of OnlineSupplier. The Court finds OnlineSupplier's history of excessive chargeback rates to be consistent with deceptive website marketing.

6. Third-Party Marketers

Mr. Gugliuzza does not dispute that at least some consumers were confused and misled into signing up for OnlineSupplier or that Commerce Planet had high chargeback rates resulting from consumers requesting that their credit card company rescind the charges on their purchase. Rather, Mr. Gugliuzza heavily relies on the defense that consumer confusion and high chargeback rates were the result of third-party affiliate marketers[10] who engaged in affiliate fraud that induced consumers to sign-up for OnlineSupplier under false pretenses. In opening statements, the defense team pinned blame on third-party marketers, who they argued violated the terms of the marketing agreement with Commerce Planet by employing such tactics as using unapproved email notifications, false promises of

[10] Affiliate marketers are publishers who generate consumer interest in the product through use of opt-in emails or advertising. (Gravitz, 2/1/12, 12:14-18.)

free gifts upon signing up for OnlineSupplier (incentivized marketing), and use of stolen credit card information and prepaid credit cards. (Trial Tr. 1/31/12, 22:18-23:3, 46:14-18.) The defense argued that once Mr. Gugliuzza discovered that affiliate fraud was occurring, he took aggressive steps to combat the problem, and that at the end of his tenure at Commerce Planet, it was mostly resolved. (*Id.* at 23:4-8.)

The Court does not find this defense to be convincing in light of the totality of evidence presented. First, there is insufficient evidence in the record that establishes that affiliate fraud was primarily responsible for consumer confusion about OnlineSupplier. Commerce Planet began to use affiliate marketers around September 2005 under various payment arrangements. (Hill, 2/17/12, 97:23-98:4.)[11] Mr. Hill testified that Commerce Planet was subject to certain third-party marketing fraud, including unapproved pages and email creatives to drive traffic, click fraud, and stolen credit cards. (*See id.* at 98:15-99:9, 100:22-102:3.) Around November 2006, Commerce Planet was also subject to incentivized marketing traffic – *i.e.*, offers for free gifts for signing up for OnlineSupplier. (Brooks, 2/9/12, 140:23-141:18; Gravitz, 2/1/12, 120:10-24; Exh.

[11] These arrangements included cost-per-click advertising in which Commerce Planet would pay the third-party marketer every time someone clicked on the marketer's ad; cost-per-thousand advertising when the company pays based on the number of impressions that the ad shows or number of emails that are sent; and cost-per-acquisition marketing that compensated the third-party marketer based on actual placement of an order. (Gravitz, 2/1/12, 13:5-20.)

40-1175) Mr. Hill testified that Mr. Gugliuzza vigorously countered the problem through nonissuance of payment, cancellation of contracts, and filing lawsuits. (Hill, 2/17/12, 102:4-103:5.) However, aside from testimony that affiliate fraud occurred, there was no specific evidence linking affiliate fraud as the primary cause of consumer confusion and high chargeback rates. There was also no documentation that specific third-party marketers employed certain types of affiliate fraud. While third-party marketers may have increased traffic to the sign-up pages by, for example, use of unapproved email creatives, consumers still had to view and utilize the sign-up pages to order OnlineSupplier. (*See* Hill, 2/17/12, 137:17-138:9.) Any confusion caused by the email creative would have been countered by representations about the product on the landing and billing pages. There is no evidence in the record that consumers ordered OnlineSupplier directly from third-party marketing materials or that third-party marketers were responsible for the sign-up pages. While affiliate fraud undoubtedly hurt Commerce Planet, it is unclear if it hurt consumers. (*See* Hill, 2/17/12, 136:12-20.) For example, in the case of contractual fraud (such as use of a prepaid debit card or click fraud),[12] Commerce Planet bore the cost, but consumers were unaffected. (*Id.* at 137:11-16.) Furthermore, the evidence shows that OnlineSupplier was consistently subject to high chargeback rates and was enrolled in Visa's MCMP in 2004, before third-party

[12] Click fraud occurs when third-party marketers simulate consumer traffic by a bot or a computer.

marketers were used. Excessive chargeback rates also predated incentivized marketing traffic, which began in November 2006. (*See* Brooks, 2/9/12, 140:23-142:2; Gravitz, 2/1/12, 120:22-24; Exh. 40.) Mr. Chen testified that affiliate fraud would not have been the sole driver of all the fraud and chargeback issues, particularly once merchants started to shut down those affiliate relationships. (Chen, 2/3/12, 94:10-17.) With respect to OnlineSupplier's ten-month history in the MCMP, Mr. Chen testified that affiliate fraud would not typically have been the driving factor for that time period. (*Id.* at 94:18-25.) Mr. Gravitz testified that the chargeback problem for OnlineSupplier was never resolved. (Gravitz, 2/1/12, 134:10-15.) The evidence taken as a whole does not support Mr. Gugliuzza's affiliate fraud story.

In short, the FTC has provided a plethora of evidence that OnlineSupplier's sign-up 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. The expert testimony of Ms. King, along with numerous free-kit-only complaints and excessive chargeback rates, provide strong corroborating evidence that the website marketing of OnlineSupplier was misleading and deceptive.

B. Unfair Acts (Count II)

The FTC has provided sufficient evidence that Commerce Planet's website marketing of Online-Supplier was also unfair under section 5(a). An act is unfair if it (1) causes substantial injury (2) not outweighed by countervailing benefits to consumers or competition, and (3) one that consumers themselves could not reasonably have avoided. 15 U.S.C. § 45(n); *see also FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir.2010); *FTC v. J.K. Publ'ns, Inc.*, 99 F.Supp.2d 1176, 1201 (C.D.Cal.2000).

1. Substantial Injury

The substantial injury prong is satisfied if the FTC offers sufficient evidence that consumers "were injured by a practice for which they did not bargain." *Neovi*, 604 F.3d at 1157 (citation and quotes omitted); *accord J.K. Publications*, 99 F.Supp.2d at 1201. "An act or practice can cause substantial injury by doing a small harm to a large number of people, or if it raises a significant risk of concrete harm." *Neovi*, 604 F.3d at 1157-58 (citation and quotes omitted). "Both the Commission and the courts have recognized that consumer injury is substantial when it is the aggregate of many small individual injuries." *Pantron I Corp.*, 33 F.3d at 1102; *see also Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir.1988) ("As the Commission noted, although the actual injury to individual customers may be small on an annual basis, this does not mean that such injury is not 'substantial.' "), *cert. denied*, 488

U.S. 1041, 109 S.Ct. 865, 102 L.Ed.2d 989 (1989). Here, the evidence shows that thousands of consumers were misled into signing up for OnlineSupplier, thinking that they were ordering a free auction kit, instead of a continuity program with an automatic monthly charge to their credit card. Although the precise dollar amount of injury cannot be calculated here, there were thousands of consumers who were misled into signing up for OnlineSupplier and incurred monthly charges ranging from $29.95 to $59.95. The FTC approximated the total amount of consumer injury to be at least $18.2 million, which the Court finds reasonable and substantial. (*See infra* Part IV.B.)

2. Countervailing Benefits

"The second prong of the test is easily satisfied when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition." *J.K. Publications*, 99 F.Supp.2d at 1201 (citations and quotes omitted). This prong is satisfied here because consumers who were misled into ordering OnlineSupplier would not have known that they had subscribed to a web hosting program; hence, they would not have utilized its product and services. Consumers also did not give their consent to enrollment in OnlineSupplier, and thus, the harm resulted from a practice for which they did not bargain. *Neovi*, 604 F.3d at 1157. Although there is evidence that some consumers did in fact set up webstores and were satisfied with OnlineSupplier, it is not enough that there were a few

satisfied customers of OnlineSupplier or that it had some utility. *See Tashman*, 318 F.3d at 1278; *Amy Travel Serv., Inc.*, 875 F.2d at 572; *Stefanchik*, 559 F.3d at 929 n. 12.[13]

3. Not Reasonably Avoidable

"In determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *Neovi*, 604 F.3d at 1158. As discussed above, OnlineSupplier's landing and billing pages created the net impression that consumers could order a free kit to learn how to sell products online. They were not adequately informed that they were signing up for a continuity program with monthly charges. Ms. King testified that most consumers would have been confused by the sign-up pages. Most consumers thus could not have reasonably avoided the monthly charge. Accordingly, the website marketing of OnlineSupplier constituted unfair practice in violation of section 5(a).

C. Individual Liability

An individual may be held liable for corporate violations of the FTC Act if the individual (1) participated directly in the wrongful practice or act or had

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[13] It is also doubtful whether any of the satisfied customers – including the fourteen customers who submitted positive testimonials – actually utilized the webpages to order OnlineSupplier. (*See supra* Part III.A.3.iii.)

authority to control it, (2) had knowledge of the wrongful practice or act, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth. *Stefanchik*, 559 F.3d at 931; *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir.2004); *Amy Travel Serv.*, 875 F.2d at 573. If the FTC proves direct participation in or authority to control the wrongful act, then the individual may be permanently enjoined from engaging in acts that violate the FTC Act. *Garvey*, 383 F.3d at 900. To hold an individual liable for monetary redress, the FTC must additionally establish knowledge. *FTC v. Affordable Media*, 179 F.3d 1228, 1234 (9th Cir.1999); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir.1997). Proof that the defendant intended to deceive consumers or acted in bad faith is unnecessary to establish a section 5(a) violation. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir.1988) ("An advertiser's good faith does not immunize it from responsibility for its misrepresentations." (citation and quotes omitted)); *Feil*, 285 F.2d at 896 ("Whether good or bad faith exists is not material, if the Commission finds that there is likelihood to deceive.")

1. Participation and Authority to Control

Authority to control may be evidenced by "active involvement in business affairs and making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel Serv.*, 875 F.2d at 573. An

individual's position as a corporate officer and/or authority to sign documents on behalf of the corporate defendant is sufficient to show requisite control. *See Publishing Clearing House*, 104 F.3d at 1170 (holding that individual's "assumption of the role of president of [the corporation] and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control over the corporation" for purposes of finding individual liability under section 5(a)); *J.K. Publications*, 99 F.Supp.2d at 1181-82 (holding a consultant liable because he had "ownership in and/or control over" the company).

The FTC has satisfied the first prong for individual liability. The evidence abundantly establishes that from June 2005 to November 2007, Mr. Gugliuzza participated in and had authority to control the deceptive website marketing of OnlineSupplier. Mr. Gugliuzza's total involvement with Commerce Planet spanned three years from May 2005 to May 2008. Mr. Gugliuzza held the title of consultant, president, and director at Commerce Planet from July 2005 to November 2007. During the relevant time period, Mr. Gugliuzza wielded considerable authority and power at the company. He served as a top executive, oversaw and directed the company's operations, and had authority to control the activities of the various department heads, including Mr. Gravitz and the company's in-house counsel. Mr. Gugliuzza was involved in making core decisions that affected the operations of Commerce Planet and its subsidiaries, including the marketing of OnlineSupplier.

(i) Role as Consultant

Although a titular consultant from July 2005 to September 2007, the evidence shows that Mr. Gugliuzza at least shared, if not supplanted, Mr. Hill's role as CEO and president. Mr. Hill testified that when Mr. Gugliuzza was hired as a consultant, his own authority was curtailed and that his responsibilities changed from overseeing the company's day-today [sic] operations to implementing Mr. Gugliuzza's recommendations. (Hill, 2/7/12, 129:14-130:6.) The Board of Directors conferred upon Mr. Gugliuzza a large portion of Mr. Hill's authority to help manage the company, which included the day-to-day oversight over marketing and supervising Mr. Gravitz. (Hill, 2/7/12, 129:14-130:6; Hill, 2/17/12, 121:9-25.) While still a consultant, Mr. Gugliuzza signed an "Executive Compensation" agreement with Commerce Planet in March 2006, which entitled him to the same terms of compensation as Mr. Hill. (Foucar, 2/16/12, 167:24-168:13; Exhs. 16, 1331.) Mr. Gugliuzza, in fact, had identified the company's "dire need of a leader" with management skills in his report, (Exh. 6), and it appears that Mr. Gugliuzza filled that role from the very beginning. (*See* Hill, 2/7/12, 137:20-138:7 (testifying that Mr. Gugliuzza "was given the authority by the Board to ultimately take over the entire operation of the company and was told to replace me").) Mr. Gugliuzza also had the power to negotiate contracts on behalf of Commerce Planet and did so in 2005 with respect to NeWave's contract with Netchemistry, a vendor for the company that hosted and managed the store-builder product software for OnlineSupplier.

(Cruttenden, 2/28/12, 5:11-17, 40:11-42:1.) Mr. Gugliuzza had the power to hire and fire and exercised that authority with respect to various employees at Commerce Planet, including Paul Daniel, whom he terminated as the company's CFO, and David Foucar whom he hired to replace Mr. Daniel in June 2006. (Hill, 2/17/12, 129:19-130:9; Gugliuzza, 2/22/12, 46:4-7; Foucar, 2/16/12, 130:24-25.)

Mr. Gugliuzza also oversaw and regularly met with department heads, who were required to submit weekly reports to him. (Hill, 2/7/12, 132:9-133:24; Gugliuzza, 2/23/12 Vol. I, 57:8-11; Exhs. 1124, 1130, 1354, 1356, 1368-71, 1292a, 1293, 1295.) Specifically, Mr. Gugliuzza had supervisory authority over Aaron Gravitz, who was responsible for marketing OnlineSupplier. (Hill, 2/7/12, 134:20-135:3; Gravitz, 2/2/12, 122:3-11.) Mr. Gravitz reported directly to Mr. Gugliuzza and met with him daily. (Hill, 2/7/12, 136:21-23, 137:13-19.) Mr. Gugliuzza also set marketing goals, budgets, and action items. (Exh. 1120.) Although Mr. Gugliuzza did not come up with the design or concept of OnlineSupplier's webpages or the use of a negative option plan, he oversaw the company's transition from telemarketing to online marketing in 2005. (Hill, 2/17/12, 122:1-4; Daniel, 2/14/12, 28:15-23.) Mr. Hill testified that Mr. Gugliuzza made the decision to transition from telemarketing to internet marketing because the cost in generating orders was much higher for the former. (Gravitz, 2/1/12, 44:19-45:12.) Mr. Gugliuzza also became involved in reviewing OnlineSupplier's sign-up pages and advertising materials. (*Id.* at 17:13-14.) Mr.

Gugliuzza testified that he saw, reviewed, and approved various versions of the sign-up pages: "I know there are versions that I had reviewed and commented on and approved to some [degree]." (Gugliuzza, 2/21/12, 179:12-20.) Mr. Gravitz testified that he submitted all marketing materials to Mr. Gugliuzza or Jeffrey Conrad and believed that he would be terminated if he ran an advertisement that was not approved by them. (Gravitz, 2/2/12, 48:25-49:17, 119:12-120:5; Exh. 108.) Mr. Gugliuzza specifically made decisions to increase the traffic to OnlineSupplier's landing pages, such as by allotting more money to media to drive consumers to landing pages. (Gravitz, 2/1/12, 64:11-23.) Mr. Gugliuzza also made the decision to incrementally increase the price of OnlineSupplier from $29.95 to $59.95 per month. (*Id.* at 66:24-67:8.) The evidence shows that Mr. Gugliuzza participated in and had authority to control the website marketing of OnlineSupplier as a consultant.

(ii) Role as President

Although Mr. Gugliuzza formally served as president of Commerce Planet from September 2006 to November 2007, the evidence shows that he had already been serving as a *de facto* executive of Commerce Planet since July 2005. As a practical matter, his responsibilities and duties did not materially change. (Hill, 2/7/12, 153:18-25.) Mr. Gugliuzza continued to have operational control over the company and its subsidiaries and had oversight over the department heads. (Foucar, 2/16/12, 137:19-138:6.) Mr. Gugliuzza

averred that as president of Commerce Planet, the "success of [the company's four subsidiaries] were important and ultimately rolled up to some degree and capacity to Commerce Planet, which [he] had responsibility for." (Gugliuzza, 2/22/12, 52:5-13.) Mr. Gugliuzza continued to oversee Mr. Gravitz and to be involved in the marketing of OnlineSupplier, including reviewing and approving its sign-up pages. (Hill, 2/7/12, 155:8-10, 155:11-20.) The evidence shows that Mr. Gugliuzza participated in and had the authority to control the website marketing of OnlineSupplier as the president of Commerce Planet.

2. Knowledge

The knowledge requirement is satisfied by establishing that "the individual had actual knowledge of the material misrepresentation, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of truth." *Garvey*, 383 F.3d at 900 (citing *Publishing Clearing House, Inc.*, 104 F.3d at 1171). "The degree of participation in business affairs is probative of knowledge." *FTC v. Am. Standard Credit Sys.*, 874 F.Supp. 1080, 1089 (C.D.Cal.1994); *see also Amy Travel Serv.*, 875 F.2d at 574; *Affordable Media*, 179 F.3d at 1235 ("The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability.").

The evidence demonstrates that, at the very least, Mr. Gugliuzza was recklessly indifferent to the misleading representations of OnlineSupplier on its landing and billing pages. From his 30-day assessment of the company in May 2005, Mr. Gugliuzza was able to acquire a fairly comprehensive understanding of the company's management, operations, technology, finances, marketing, customer service, and personnel. (Exh. 6.) His report also shows that he was familiar with OnlineSupplier and the various ways it was marketing. (*Id.*) Mr. Gugliuzza supervised Mr. Gravitz and the marketing of OnlineSupplier and oversaw the company's migration from telemarketing to online sign-ups. Mr. Gugliuzza also should have been particularly well-tuned to the activities of the marketing department, as he identified marketing expenditures to be one of the largest contributors to the company's negative net profits in his assessment report. (*Id.*) Although Mr. Gugliuzza testified that each subsidiary was a separate entity and had its own president, (Gugliuzza, 2/22/12, 50:16-51:8), the record shows that he communicated fairly extensively and regularly with the department heads, met with them, and required them to submit weekly reports to him. This is consistent with Mr. Gugliuzza's goal of improving the communication and coordination among the departments in his assessment report.

Specifically, with respect to the landing and billing pages, the evidence shows that Mr. Gugliuzza knew or at least was recklessly indifferent to the fact that they were misleading. Mr. Gugliuzza testified that he had

seen, reviewed, commented on, and approved various versions of the OnlineSupplier sign-up pages. (Gugliuzza, 2/21/12, 179:12-20, 179:21-180:22; Exh. 1026.) Mr. Seidel and Mr. Guardiola, the president and manager of CLG, respectively, reported to Mr. Gugliuzza and sent him weekly reports of the call logs in customer service that contained the cancellation rates and refund amounts. Mr. Gugliuzza had ample notice of consumer complaints, including the free-kit-only type of complaints to which Mr. Guardiola testified. (Guardiola, 2/21/12, 15:11-18, 17:7-23, 23:2-15, 27:8-21, 30:25-31:4; Exhs. 1292a, 1293-95.) Mr. Guardiola also testified that one of the primary suggested changes brought up during the weekly meetings was to enlarge the font of the disclosure. (Guardiola, 2/21/12, 16:14-19.) Mr. Guardiola testified that based on his weekly staff reports and meetings that Mr. Gugliuzza periodically attended, he believed Mr. Gugliuzza knew about the number and substance of the billing complaints received by the company. (*Id.* at 32:14-23.) Mr. Gravitz and Mr. Hill testified that when Commerce Planet received complaints, they discussed them with Mr. Gugliuzza. (Gravitz, 2/1/12, 75:25-77:6; Exh. 1027; Hill, 2/7/12, 155:21-156:12, 160:10-161:25; 163:18-164:10.) Mr. Hill and others discussed the problem of OnlineSupplier's chargeback rates with Mr. Gugliuzza. (Hill, 2/7/12, 156:13-157:9; Exhs. 186-87, 1289) Mr. Hill testified that OnlineSupplier's chargeback problems were never resolved and remained above the 1% threshold for almost the entire time that Mr. Gugliuzza worked at the company. (Hill, 2/7/12, 168:9-25.) Mr. Gugliuzza also rejected the company's experiments in

placing clearer disclosures and sending post-transaction emails because they hurt conversion rates. (Exh. 1097.) Mr. Gugliuzza's pervasive role and authority at Commerce Planet, which extended to almost every facet of the company's business and operations, also creates a strong inference that Mr. Gugliuzza had the requisite knowledge that OnlineSupplier's webpages were misleading. *American Standard Credit Systems*, 874 F.Supp. at 1089; *Amy Travel Serv.*, 875 F.2d at 574; *Affordable Media*, 179 F.3d at 1235. Accordingly, Mr. Gugliuzza had the requisite knowledge to be held individually liable for the deceptive website marketing of OnlineSupplier.

In his defense, Mr. Gugliuzza testified that it never once occurred to him during his entire tenure at Commerce Planet that people were being misled by the webpages. (Gugliuzza, 2/21/12, 182:16-21.) This is simply not credible in light of all the evidence of consumer confusion and Mr. Gugliuzza's extensive role at the company from 2005 to 2007. Mr. Gugliuzza also adamantly insisted that he did not attempt in any way to mislead consumers. (*Id.* at 100:23-24.) Commerce Planet's other officers and employees also consistently maintained that they did not believe that the company was intending to deceive consumers or to perpetuate a fraudulent internet scheme. (*See, e.g.*, Seidel, 2/14/12, 114:6-14.) However, proof that the defendant intended to deceive consumers or acted in bad faith is unnecessary to establish a section 5(a) violation. *World Travel Vacation Brokers*, 861 F.2d at 1029; *Feil*, 285 F.2d at 896. Mr. Gugliuzza further testified that he believed

OnlineSupplier's webpages gave clear and conspicuous notice of the continuity program. (Gugliuzza, 2/23/12 Vol. I, 32:23-33:1, 33:7-13, 35:13-23.) Commerce Planet's other officers and employees concurred that they believed that the landing and billing pages gave clear notice of the terms of membership. (*See, e.g.*, Gravitz, 2/2/12, 36:23-37:3; Hill, 2/17/12, 88:2-6, 114:25-115:2; Seidel, 2/14/12, 125:9-126:23.) The relevant test, however, as to whether OnlineSupplier's webpages were misleading is from the perspective of a *reasonable consumer* confronted with the webpages, not that of the company's officers or employees who already had inside knowledge of how OnlineSupplier was being marketed and sold.

Finally, Mr. Gugliuzza argues that he did not know OnlineSupplier's webpages were misleading because there is no specific statute, law, or industry standard banning the use of a negative option plan or specifying how a negative option plan should be disclosed. (*See* Def.'s Closing Brief, at 47-48; Def.'s Closing Rebuttal, at 6.) This argument is unpersuasive. Although there is no specific law or industry standard prohibiting the use of a negative option plan or a bright-line rule on how such a plan should be disclosed, the FTC's Dot.Com Disclosures on internet advertising was published in May 2000 and readily available to Commerce Planet before its sign-up pages were live. (Gravitz, 2/2/12, 118:19-119:5; Exh. 377.) The Dot.com Disclosures provided guidelines on how to make clear and conspicuous disclosures that are consistent with the

"net impression" test and principles of usability identified by Ms. King. (Exh. 377.) More importantly, the test under section 5(a) draws on well-established principles of advertising law and common sense. A bright-line rule on how precisely to disclose a negative option plan on a webpage is practically impossible, given the myriad variations of products, services, and webpages that are both extant and imaginable. Such a rule also calls for a rigid formula that undermines the very usefulness and flexibility of the law permitting it to be applied to a multitude of factual circumstances under sustained principles.

D. Advice of Counsel and Good Faith

In his Answer to the FAC, Mr. Gugliuzza asserted several affirmative defenses, including advice of counsel, reliance on professionals, and good faith. Mr. Gugliuzza alleged that the FTC's claims are barred because he relied on the advice of counsel and professionals and acted in good faith. (Answer to FAC, at 8-9; *see also* Def.'s Trial Brief, at 3.) Specifically, Mr. Gugliuzza's defense is that he relied in good-faith on the advice of Commerce Planet's two in-house counsel, Jeffrey Conrad and Paul Huff, as to whether OnlineSupplier's sign-up pages were compliant under the FTC Act. (*See* Def.'s Trial Brief, at 12.)

Neither of these affirmative defenses has merit. As a matter of law, advice of counsel and good faith are not defenses to whether the defendant had the requisite knowledge under section 5(a). "'[R]eliance 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). This is because counsel cannot sanction something that the defendant should have known was wrong. *Amy Travel Serv., Inc.*, 875 F.2d at 575 ("Obtaining the advice of counsel did not change the fact that the business was engaged in deceptive practices."). Good faith is also irrelevant to the question of knowledge. *See Feil*, 285 F.2d at 896 ("Whether good or bad faith exists is not material, if the Commission finds that there is likelihood to deceive."); *World Travel Vacation Brokers*, 861 F.2d at 1029 ("An advertiser's good faith does not immunize it from responsibility for its misrepresentations." (citation and quotes omitted)).

Furthermore, the record does not support a finding that Mr. Gugliuzza relied in good-faith on the advice of Commerce Planet's in-house counsel as to whether OnlineSupplier's webpages complied with the FTC Act. Neither Mr. Conrad nor Mr. Huff had experience or specialized knowledge in regulatory or advertising law. They also were not hired specifically to review the landing and billing pages of OnlineSupplier for compliance under the FTC Act. The evidence does not demonstrate that Mr. Gugliuzza deferred to the legal advice of Mr. Conrad or Mr. Huff. Rather, the record shows that Mr. Gugliuzza had superseding authority over both in-house counsel. For example, Mr. Conrad initially performed general business consulting for the company in January 2004 and then began reviewing

advertisements and promotional materials in mid-2004. (Conrad, 2/8/12, 39:15-40:17; Exh. 100.) Mr. Conrad, however, did not have a background in advertising law. (Conrad, 2/8/12, 41:3-9.) Mr. Conrad and Mr. Gugliuzza shared the role of reviewing legal materials, and Mr. Gugliuzza eventually replaced Mr. Conrad as legal counsel and assumed responsibility for reviewing the marketing materials. (Gravitz, 2/1/12, 15:21-16:9; Hill, 2/7/12, 139:11-140:8.) Mr. Gugliuzza also held himself out to be legal counsel of OnlineSupplier, Inc. (Hill, 2/7/12, 140:9-141:13; Exh. 177.) Mr. Gugliuzza reviewed Mr. Gravitz's work to ensure that the email creatives and OnlineSupplier's sign-up pages produced by Mr. Gravitz and his team complied with applicable laws from 2005 to 2006. (Hill, 2/17/12, 122:8-13.) Mr. Gugliuzza testified that before Mr. Huff was hired, he was doing most of the legal review for the company. (Gugliuzza, 2/22/12, 119:5-14.) In effect, Mr. Gugliuzza acted as Commerce Planet's *de facto* legal counsel.

Similarly, Mr. Huff, who had a background in business and employment litigation, did not have any experience in FTC Act compliance or advertising law before working at Commerce Planet. (Huff, 2/15/12, 47:15-48:5, 50:15-19.) Mr. Huff was hired as in-house by Commerce Planet to review contracts and for litigation, rather than for the purpose of reviewing OnlineSupplier's sign-up pages. (*Id.* at 49:1-25, 50:20-25, 53:9-16.) Mr. Gugliuzza delegated some responsibilities to Mr. Huff, but Mr. Huff reported to Mr. Gugliuzza, who had authority to overrule him on legal matters. (Gravitz, 2/1/12, 35:1-8; Gravitz, 2/2/12, 120:14-19;

Huff, 2/15/12, 54:1-8.) Mr. Gravitz continued to seek legal advice from Mr. Gugliuzza, and both Mr. Huff and Mr. Gugliuzza gave their input to Mr. Gravitz on the marketing materials for OnlineSupplier. (Gravitz, 2/1/12, 52:4-6; Gravitz, 2/2/12, 122:12-25; Exh. 2017.) Mr. Huff reviewed the sign-up pages for OnlineSupplier, (Exhs. 213, 214), but there was no procedure in place whereby Mr. Gravitz had to submit entire pages to Mr. Huff for approval before they could be placed live on the internet. (Huff, 2/15/12, 82:7-13.) Thus, although Mr. Gugliuzza at least shared the duties with Mr. Huff in reviewing OnlineSupplier's marketing materials for legal compliance, Mr. Gugliuzza had superseding authority over Mr. Huff.

Mr. Gugliuzza did not offer evidence showing that he relied on any specific recommendations or approvals from Mr. Huff regarding OnlineSupplier's webpages. The defense makes much of the fact that in early 2007, Mr. Gugliuzza directed Mr. Huff to attend a conference in Washington D.C. on the possibility of new guidelines on acceptable marketing practices for negative options. (*Id.* at 54:2-65:17; Exh. 1193.) While Mr. Huff attended the conference and changes were subsequently implemented to OnlineSupplier's landing and billing pages in February 2007, (Exh. 1198), the evidence does not show that Mr. Huff conducted a meaningful, independent review of the entire OnlineSupplier sign-up process, that he recommended changes that Mr. Gugliuzza and Mr. Gravitz adopted as reflected in Version II, or that he approved any specific changes to the sign-up pages. (Huff, 2/15/12,

73:22-86:21; Exh. 1203.)[14] Instead, Mr. Gugliuzza and Mr. Gravitz requested that Mr. Huff give his oral opinion about certain print-outs of OnlineSupplier's sign-up pages that had already incorporated some changes and included handwritten comments by Mr. Gugliuzza. (Huff, 2/15/12, 70:8-73:15; Huff, 2/16/12, 56:6-13; Exhs. 1197.) Mr. Huff testified that he informed Mr. Gugliuzza and Mr. Gravitz that the changes were improvements, but expressed ambivalence regarding his qualifications and ability to say whether the pages complied with the FTC Act without reviewing the entire sign-up process, conducting additional research, and getting assistance from outside counsel. (Huff, 2/15/12, 70:8-73:15; Huff, 2/16/12, 56:6-13; Exhs. 1197.)

Commerce Planet did not conduct a comprehensive review of the landing and billing pages until after the CID was served on the company in March 2008 and in conjunction with outside counsel, Linda Goldstein, who was experienced in the area of FTC Act compliance. (Huff, 2/15/12, 72:8-19, 93:13-95:22.) Although Commerce Planet utilized outside counsel for certain matters, including the company's use of the eBay logo, contracts with third-party marketers, and securities filings, the company did not specifically hire outside

[14] At the conference, Mr. Huff learned that there were already guidelines in place and established law requiring companies to disclose clearly and conspicuously material terms of an offer to consumers before they complete a transaction. (Huff, 2/15/12, 65:18-24.) Mr. Huff testified that he started to draft an email with recommended changes to the landing and billing pages, but he never sent the email to Mr. Gugliuzza or Mr. Gravitz. (*Id.*)

counsel to review OnlineSupplier's sign-up pages for compliance with the FTC Act until after Mr. Gugliuzza stepped down as president and the CID was served on the company. (Hill, 2/7/12, 178:18-21; Hill, 2/17/12, 92:11-93:22, Gravitz, 2/1/12, 108:10-21.) In sum, the evidence does not show that Mr. Gugliuzza relied in good faith on the advice of Mr. Conrad or Mr. Huff as to whether the sign-up pages complied with the FTC Act.

IV. REMEDIES

The FTC requests both a permanent injunction against Mr. Gugliuzza and monetary equitable relief, including restitution and disgorgement. (FAC ¶ 55 & Prayer.) Under section 13(b) of the FTC Act, the FTC "may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b); *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir.1985). "This provision gives the federal courts broad authority to fashion appropriate remedies for violations of the Act," *Pantron I Corp.*, 33 F.3d at 1102, including "any ancillary relief necessary to accomplish complete justice," *H.N. Singer*, 668 F.2d at 1113.

A. Permanent Injunction

A permanent injunction is justified if there exists "some cognizable danger of recurrent violation," *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), or "some reasonable likelihood of future violations," *CFTC v. Co Petro Marketing Group, Inc.*, 502 F.Supp. 806, 818 (C.D.Cal.1980),

aff'd, 680 F.2d 573 (9th Cir.1982). The Court examines the totality of the circumstances involved and a variety of factors in determining the likelihood of future misconduct. *Co Petro Marketing Group*, 502 F.Supp. at 818; *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir.1980). Non-exhaustive factors include the degree of scienter involved, whether the violative act was isolated or recurrent, whether the defendant's current occupation positions him to commit future violations, the degree of harm consumers suffered from the unlawful conduct, and the defendant's recognition of his own culpability and sincerity of his assurances, if any, against future violations. *Murphy*, 626 F.2d at 655; *FTC v. Magui Publishers, Inc.*, No. 89-3818, 1991 WL 90895, at *15-16, 1991 U.S. Dist. LEXIS 20452, at *44-*45 (C.D.Cal. Mar. 28, 1991).

The Court finds that a permanent injunction against Mr. Gugliuzza is appropriate under the circumstances to enjoin him from engaging in similar misleading and deceptive marketing of products and services. Here, Mr. Gugliuzza did not participate in an isolated, discrete incident of deceptive marketing, but engaged in sustained and continuous conduct that perpetuated the deceptive marketing of OnlineSupplier for over two years. Mr. Gugliuzza oversaw the migration from telemarketing to internet marketing of OnlineSupplier and served as a key leader and executive of the company. Mr. Gugliuzza supervised and had authority over Mr. Gravitz and the marketing of OnlineSupplier as well as over the company's in-house

counsel. Mr. Gugliuzza reviewed and approved the various iterations of OnlineSupplier's sign-up pages and, at the very least, was recklessly indifferent to the fact that OnlineSupplier's webpages were misleading, given the ample notice of consumer confusion regarding OnlineSupplier's membership terms. Mr. Gugliuzza assessed the financial state of the company and helped turn Commerce Planet into a profitable business, mainly through the internet marketing and sale of OnlineSupplier from 2005 to 2007. Mr. Gugliuzza did not express any recognition of his culpability, but has firmly stood behind the sign-up pages and has obdurately insisted that at no time did he ever believe consumers were misled by OnlineSupplier's billing and landing pages. (Gugliuzza, 2/21/12, 182:16-21; 2/22/12, 152:3-8.) Instead, Mr. Gugliuzza placed blame on third-party marketers and the advice of in-house counsel – defenses that the Court has found thin in evidentiary support. All these factors weigh in favor of imposing a permanent injunction against Mr. Gugliuzza.

In his Answer to the FAC, Mr. Gugliuzza asserted mootness as an affirmative defense. He alleged that "because the challenged conditions no longer exist, or have never existed . . . there is no likelihood of recurrence." (Answer to FAC, at 9.) It is uncontested that Mr. Gugliuzza is no longer involved in marketing OnlineSupplier at Commerce Planet since his departure from the company in 2007. However, as a general rule, mere voluntary cessation of the violative conduct does not render the case moot. *W.T. Grant Co.*, 345 U.S. at

632, 73 S.Ct. 894. If it did, the courts would be compelled to leave the defendant free to return to his old ways. *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *Affordable Media*, 179 F.3d at 1238 ("The reason that the defendant's conduct, in choosing to voluntarily cease some wrongdoing, is unlikely to moot the need for injunctive relief is that the defendant could simply begin the wrongful activity again.") Nevertheless, a case may be moot if "the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 633, 73 S.Ct. 894 (citation and quotes omitted); *accord TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir.1981). The burden of demonstrating mootness is "a heavy one." *W.T. Grant Co.*, 345 U.S. at 633, 73 S.Ct. 894. "[I]t must be 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *TRW, Inc.*, 647 F.2d at 953 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203, 89 S.Ct. 361).

Mr. Gugliuzza has not shown that it is "absolutely clear" that he will not repeat his wrongful activities. Since leaving Commerce Planet, Mr. Gugliuzza has founded Grow Commerce, a website servicer for businesses, and has worked for Oakley, a sunglass company, as an e-Commerce strategy manager. Mr. Gugliuzza also testified that after the completion of trial he planned to work for "Trust Commerce," a merchant processor. (Gugliuzza, 2/21/12, 130:11-131:14.)

Mr. Gugliuzza pointed out that none of his post-Commerce Planet activities have involved direct consumer marketing of a continuity program. Before joining Commerce Planet, Mr. Gugliuzza also never marketed a continuity program or was held liable for violations of the FTC Act. Mr. Gugliuzza further testified that after five years of his last contact with Commerce Planet, he "wouldn't touch a negative option with a ten-foot pole." (Gugliuzza, 2/23/12 Vol. II, 39:2-11.) While Mr. Gugliuzza has not specifically engaged in the internet marketing of a negative option plan before or after his involvement with Commerce Planet, Mr. Gugliuzza has consistently worked for an e-Commerce company engaged in the internet marketing of a product or service. He began his post-law school career co-founding a company that marketed and sold batteries to consumers online. He then founded a competitor website that marketed and sold the same products online. After leaving Commerce Planet, Mr. Gugliuzza promptly founded Grow Commerce, another website servicer, and then joined Oakley as an e-Commerce strategy manager. For all these companies, Mr. Gugliuzza was the founder and/or executive and profited considerably from the website marketing of products and services. At Commerce Planet, he earned over $3 million from 2006 to 2007. Mr. Gugliuzza also expressed plans to join another e-Commerce company at the end of trial. Given his past work experience and financial rewards, there is a reasonable likelihood that Mr. Gugliuzza will be incentivized to continue his work in e-Commerce and be

involved in the internet marketing of products or services. It is also reasonably likely that Mr. Gugliuzza will seek to serve in an executive position, given his prior leadership roles and eagerness to pursue such positions. The Court finds that Mr. Gugliuzza's involvement in e-Commerce will afford him further opportunities where he may, once again, engage in misleading and deceptive marketing of a product or service. The fact that Mr. Gugliuzza has not engaged in marketing of a negative option plan since leaving Commerce Planet (or assurances that he will not be involved in such marketing in the future) is not sufficient, as the marketing of a product or service involves various aspects – such as product description and price – that may be manipulated without resorting to a negative option plan. The Court is persuaded that under the circumstances of this case, there is a cognizable danger that Mr. Gugliuzza will engage in similar violative conduct. Permanent injunctive relief is therefore warranted against Mr. Gugliuzza.

B. Monetary Equitable Relief

Section 13(b) permits a panoply of equitable remedies, including monetary equitable relief in the form of restitution and disgorgement, as well as miscellaneous reliefs such as asset freezing, accounting, and discovery to aid in providing redress to injured consumers. *Pantron I Corp.*, 33 F.3d at 1103 & n. 34 (9th Cir.1994); *Figgie Int'l*, 994 F.2d at 606-608; *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir.1982).

1. Restitution and Disgorgement

The FTC Act is designed to protect consumers from economic injuries. *Stefanchik*, 559 F.3d at 931. To effect that purpose, courts may award restitution to redress consumer injury. *Gill*, 265 F.3d at 958 ("We have held that restitution is a form of ancillary relief available to the court in these circumstances to effect complete justice."). Restitution may be measured by the [sic] "the full amount lost by consumers rather than limiting damages to a defendant's profits." *Stefanchik*, 559 F.3d at 931 (affirming restitution of over $17 million for the full amount of consumer loss); *see also FTC v. Febre*, 128 F.3d 530, 536 (7th Cir.1997) (affirming restitution for more than $16 million against company and officer as consumer loss under section 13(b)). Consumer loss is calculated by "the amount of money paid by the consumers, less any refunds made." *FTC v. Direct Marketing Concepts, Inc.*, 648 F.Supp.2d 202, 213-14 (D.Mass.2009), *aff'd*, 624 F.3d 1 (1st Cir.2010); *see also Stefanchik*, 559 F.3d at 931; *Figgie Int'l*, 994 F.2d at 606; *Gill*, 265 F.3d at 958.

As an alternative to restitution, "[s]ection 13(b) permits a district court to order a defendant to disgorge illegally obtained funds." *Febre*, 128 F.3d at 537. Disgorgement is measured by the amount of profits causally connected to the violation. *SEC v. Happ*, 392 F.3d 12, 31 (1st Cir.2004). The purpose of disgorgement

is not to redress consumer injuries but to deprive wrongdoers of ill-gotten gains. *Febre*, 128 F.3d at 537.[15]

Irrespective of the measure used to calculate monetary equitable relief, courts apply a burden-shifting framework to determine the specific amount to award. *Direct Marketing Concepts*, 624 F.3d at 15. First, the FTC bears the initial burden of providing the district court with a reasonable approximation of the monetary relief to award. *Id.*; *Febre*, 128 F.3d at 535. A reasonable estimate, rather than an exact amount, is proper because that may be the only information available, as when defendants do not maintain data necessary to calculate the precise amount. *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir.2008) ("A court is entitled to proceed with the best available information. . . ."); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir.2006) ("Of course, the reasonableness of an approximation varies with the degree of precision possible."), *cert. denied*, 549 U.S. 1278, 127 S.Ct. 1868, 167 L.Ed.2d 317 (2007). Second, once the FTC satisfies this burden, "the defendant has an opportunity to demonstrate that the

[15] The Court notes that there appears to be some inconsistency in the use of the term restitution and disgorgement, which, at times, have been used interchangeably and/or with imprecision. *See, e.g., Figgie Int'l*, 994 F.2d at 606 ("While ordinarily the proper measure of restitution is the amount of enrichment received, if the loss suffered by the victim is greater than the unjust benefit received by the defendant, the proper measure of restitution may be to restore the status quo." (citation and quotes omitted)); *Direct Marketing Concepts*, 648 F.Supp.2d at 218 (applying the term disgorgement to mean monetary relief as measured by consumer loss). To avoid confusion, the Court uses the term "consumer redress" to mean restitution.

figures are inaccurate." *F.T.C. v. Direct Marketing Concepts*, 624 F.3d 1, 15 (1st Cir.2010); *see also QT*, 512 F.3d at 864. "Any fuzzy figures due to a defendant's uncertain bookkeeping cannot carry a defendant's burden to show inaccuracy." *Direct Marketing Concepts*, 624 F.3d at 15; *Febre*, 128 F.3d at 535 ("[T]he risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." (citation and quotes omitted)).[16]

2. Calculation of Consumer Loss

In the FAC, the FTC alleged that between July 2005 and March 2008, Commerce Planet obtained over $45 million from over 500,000 consumers. (FAC ¶ 27.) In its Closing Brief, the FTC requests a maximum amount of $36.4 million in consumer loss after adjustments or, at a minimum, $18.2 million. (Pl.'s Closing Brief, at 52.) The FTC relies on calculations performed by Dr. Daniel Becker, an expert in the field of Econometrics, who has worked for the FTC in the areas of enforcement, policy issues, and consumer protection. (Becker, 2/15/12, 7:24-12, 8:13-8, 8:19-9:11.) The FTC requested that Dr. Becker calculate the net consumer injury for consumers who enrolled in OnlineSupplier's membership program between July 2005 and March

[16] In his opening brief, Mr. Gugliuzza argued that monetary equitable relief contains a tracing element and that the evidence does not show OnlineSupplier's revenue is traceable to Mr. Gugliuzza. (Def.'s Trial Brief, at 18.) Mr. Gugliuzza proffered the same argument in his motions for partial summary judgment, which the Court rejected. (*See* Ct. Order, Dkt. No. 164, Sept. 8, 2011.)

2008. (*Id.* at 10:2-6.) The FTC also requested that Dr. Becker apply two assumptions: (i) no consumer would have joined OnlineSupplier if the nature of the membership had been fully disclosed to them, and (ii) consumers derived no benefit from their OnlineSupplier memberships. (*Id.* at 10:17-24.) Dr. Becker used Commerce Planet's RT3 database containing customer records and transactions involving OnlineSupplier. (*Id.* at 10:13-16.) Using the information from the RT3 database, Dr. Becker employed two steps to calculate the amount of consumer injury. (*Id.* at 18:3-20:10.) First, he calculated the population of injured consumers who purchased OnlineSupplier and created a subset of data that only contained consumers who signed up for the program with an order date between July 1, 2005 to March 31, 2008. Second, he calculated the net payments from the population of consumers who purchased OnlineSupplier during the relevant time period by adding up all the payments. Dr. Becker then subtracted off the refunds and chargeback amounts from the payments. (*Id.* at 18:21-24.)[17] Dr. Becker finally calculated the consumer injury for the period corresponding to Mr. Gugliuzza's tenure as consultant (July 2005 to August 2006) and his tenure as president (September 2006 to October 2007) as follows:

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[17] The total payments per month were based on the enrollment month rather than the payment month, *i.e.*, the monthly payment calculation incorporated all the payments in the month during which the consumers signed up for OnlineSupplier, irrespective of whether the payment was made in a subsequent month.

Time Period	Consumer Injury
Consultant (July 1, 2005 to August 31, 2006)	$19.1 million
President (September 1, 2006 to October 31, 2007)	$19.6 million
Total Consumer Injury	**$38.7 million**

(*Id.* at 20:11-21:4; *see also* Pl.'s Closing Brief, at 50-51.)

In its Closing Brief, the FTC provided an adjusted estimate. Mr. Gugliuzza's accounting expert, Dr. Stefano Vranca, pointed out that Dr. Becker used data from the company's RT3 database rather than from its Quickbooks database,[18] which resulted in the omission of additional chargebacks and refunds. (Vranca, 2/28/12, 95:2-20.) The FTC agreed that Dr. Becker failed to account for a number of refunds and chargebacks that were processed after March 2008 because the RT3 database was cut off at that date. According to Dr. Vranca, the refunds and chargebacks to OnlineSupplier during the relevant time period totaled approximately $7.85 million compared to Dr. Becker's figure of approximately $6 million, a difference of $1.85 million. (Pl.'s Closing Brief, at 51 (citing Vranca,

[18] The Quickbooks database was Commerce Planet's account system and system of records. All relevant financial information of the company was contained in Quickbook files. (Foucar, 2/16/12, 143:7-13, 166:4-10; Rovelo, 2/10/12, 22:22-23:13.) The company's financial data was transferred to the FTC on hard drives in a Microsoft Access RT3 format. (Exh. 31.)

2/28/12, 95:2-20, 116:6-19).) The FTC further acknowledged that Dr. Becker erroneously included in his refund amount the total payments for shipping and handling. (Pl.'s Closing Brief, at 51-52 (citing Vranca, 2/28/12, 94:16-20).) The FTC deducted a total of $2.35 million from the original estimate, applied proportionally across the time periods, and provided the following revised figures:

Time Period	Original Calculation of Consumer Injury	Adjusted Calculation of Consumer Injury
Consultant (July 1, 2005 to August 31, 2006)	$19.1 million	$18 million
President (September 1, 2006 to October 31, 2007)	$19.6 million	$18.4 million
Total Consumer Injury	**$38.7 million**	**$36.4 million**

(Pl.'s Closing Brief, at 52.)

Mr. Gugliuzza challenged the accuracy of Dr. Becker's estimate through the rebuttal testimony of Dr. Vranca. Dr. Vranca testified that the two assumptions applied by Dr. Becker – that no consumer would have joined OnlineSupplier if she had known about the terms of membership and consumers derived no benefit from the program – were unsupported. Dr. Vranca

testified that a certain percentage of consumers cancelled within the free trial period or maintained their membership in excess of three or six months, suggesting that some consumers knew about the terms of membership and yet purchased the program. (Vranca, 2/28/12, 74:3-76:5, 80:5-13, 84:3-22; Exhs. 2062-63.) Dr. Vranca also testified that consumers derived some value from the product, as evidenced by the company's expenditure in staffing the customer service center. (*Id.* at 120:10-121.15.)

Dr. Vranca's critique is flawed in several respects. The Court agrees with the FTC that, as a matter of law, the FTC need not show that all consumers were deceived, relied upon the misrepresentations, or that consumers did not derive any utility from the product. Under section 13(b) of the FTC Act, proof of injury by every individual consumer is not required to justify a restitutionary award. *Stefanchik*, 559 F.3d at 929 n. 12 (citation omitted); *Figgie Int'l*, 994 F.2d at 605 ("It is well established with regard to Section 13 of the FTC Act . . . that proof of individual reliance by each purchasing customer is not needed.") This is because, unlike a private suit for fraud, "[s]ection 13 serves a public purpose by authorizing the Commission to seek redress on behalf of injured consumers," and "[r]equiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section." *Figgie Int'l, Inc.*, 994 F.2d at 605 (citation omitted). Rather, "[a] presumption of actual reliance arises once the Commission has proved that

the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.; see also FTC v. Inc21.com Corp.*, 745 F.Supp.2d 975, 1011 (N.D.Cal.2010) ("[I]t is sufficient for the FTC to prove that misrepresentations were widely disseminated (or impacted an overwhelming number of consumers) and caused actual consumer injury."), *aff'd*, 475 Fed.Appx. 106 (9th Cir.2012). Nor does the FTC need to prove that OnlineSupplier was essentially worthless to obtain restitution. *Figgie Int'l*, 994 F.2d at 606. This is because the injury occurs from the seller's misrepresentations that "tainted the customers' purchasing decisions" – it is "[t]he fraud in the selling, not the value of the thing sold" that entitles consumers to the refund. *Id.*

Here, the FTC has proven that the representations of OnlineSupplier on its webpages as a free auction kit were materially misleading; the representations were widely disseminated on the internet; and numerous consumers ordered OnlineSupplier. Once the FTC has met this burden, it must then "show that its calculations reasonably approximated the amount of customers' net loss," and then the burden shifts to the defendant to show those figures are inaccurate. *Febre*, 128 F.3d at 535. Mr. Gugliuzza attempted to challenge Dr. Becker's figures by referencing Dr. Vranca's user data. However, Mr. Gugliuzza does not challenge the validity of the actual data used by Dr. Becker in the RT3 database. Dr. Vranca himself relied on the data in the RT3 database for many of his own calculations.

(Vranca, 2/28/12, 74:3-10, 106:21-107:3.) Nor did Dr. Vranca take issue with the accurateness of Dr. Becker's mathematical calculations. (Vranca, 2/28/12, 110:18-113:13.) Moreover, Dr. Vranca's citation of user data does not necessarily track consumers who knew of OnlineSupplier's continuity program at the time they placed their order, as they may have simply not noticed the charges to their credit card for several months or discovered the terms of membership through a post-transaction communication. (Vranca, 2/28/12, 108:12-23; *see also supra* Part III.A.3.) The FTC has shown through overwhelming evidence that thousands of consumers were misled by Online-Supplier's webpages and suffered actual injury.

Nevertheless, although the FTC need not show that all consumers were misled, not all consumers were in fact deceived by OnlineSupplier's webpages. As discussed above in detail, the Court found that a reasonable consumer would likely be deceived by Online-Supplier's webpages. Jennifer King testified that "most" consumers would not have known they were purchasing a negative option or signing up for a continuity program. (King, 2/3/12, 114:9-21.) José Guardiola testified that at least 70% of calls to the customer call center – about 1,000 calls per week – comprised free-kit-only complaints. (Guardiola, 2/21/12, 8:11-9:6, 31:20-32:13.) The FTC acknowledged that the Court may adjust their estimate of consumer injury using these approximations. Assuming that the lower bound of "most" is 50%, the FTC argued that the Court could reasonably find that the actual consumer injury was

not less than 50% of $36.4 million or $18.2 million. (Pl.'s Closing Brief, at 54-55.) The FTC's second adjusted amount is summarized as follows:

Time Period	Adjusted Calculation of Consumer Injury	50% of Adjusted Calculation of Consumer Injury
Consultant (July 1, 2005 to August 31, 2006)	$18 million	$9 million
President (September 1, 2006 to October 31, 2007)	$18.4 million	$9.2 million
Total Consumer Injury	**$36.4 million**	**$18.2 million**

The Court finds that the FTC's second adjusted amount of $18.2 million to be appropriate and reasonable. The Court takes into account the inherent difficulty of tracking and retaining consumer data regarding consumers' experience that thwarts a precise calculation of consumer injury. The Court also considers the limitation of the financial data and records maintained by Commerce Planet as to the user experience with OnlineSupplier's website and services. (*See* Brooks, 2/9/12, 117:14-18; Seidel, 2/14/12, 101:18-102:20.) The evidence strongly supports the conclusion that most reasonable consumers would have been misled by OnlineSupplier's landing and billing pages. A

conservative floor then is that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up pages, which results in a reduction of the FTC's original adjusted estimate by half. Accordingly, the Court finds $18.2 million to be a reasonably conservative estimate of consumer injury.

In response, Mr. Gugliuzza countered that the Court should not award any restitution because the consumer injury essentially amounts to zero. (Def.'s Closing Brief, at 58.) Mr. Gugliuzza relies on Dr. Vranca's expert opinion that he believed the consumer injury to be *de minimis* or zero, as estimated by applying three assumptions that defense counsel requested he adopt during his testimony: (i) if people were confused by the terms, they were primarily in the group that cancelled after getting billed once or twice within 60 days of signing up, (ii) there were some people in the zero to 60 day group who were not confused, but understood the terms and cancelled within the 60 days after being charged once or twice, and (iii) people who felt they were confused were the most likely to obtain refunds and chargebacks. (Vranca, 2/28/12, 100:16-102:23.) Based on these assumptions, and figuring in the total amount of chargebacks and refunds, Dr. Vranca opined that the amount of consumer loss would be almost nonexistent. (*Id.*) The Court finds this estimate implausible. As a preliminary matter, Dr. Vranca's assumptions are entirely unfounded and speculative. The evidence clearly establishes that there were confused consumers, such as Ms. Cirillo, who unwittingly purchased OnlineSupplier and were

charged for the program for at least several months, but did not receive a full refund. Moreover, Dr. Vranca's testimony is not competent evidence of consumer injury, as he was not retained to give such an estimate and there was no expert disclosure for such testimony. The only estimate of consumer injury the Court may properly consider, as Dr. Vranca acknowledged, is that of Dr. Becker. (*Id.* at 105:1-23, 106:13-15.) Mr. Gugliuzza's estimate of zero injury is not reasonable or credible. Accordingly, Mr. Gugliuzza is liable for restitution in the amount of $18.2 million.

V. CONCLUSION

For the foregoing reasons, the Court finds in favor of the FTC and against Mr. Gugliuzza on both counts for deceptive and unfair practices under section 5(a) of the FTC Act. The Court finds Mr. Gugliuzza individually liable for the deceptive and unfair marketing of OnlineSupplier in violation of section 5(a). The Court finds that a permanent injunction against Mr. Gugliuzza is warranted. The Court further awards the FTC restitution for consumer redress in the amount of $18.2 million. The FTC is directed to file a proposed permanent injunction and a proposed judgment consistent with the Court's decision within ten (10) days of this memorandum.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. COMMERCE PLANET, INC., a corporation; et al., Defendants, and SUPERFLY ADVERTISING, INC., a Delaware corporation, FKA Morlex, Inc.; et al., Third-party-defendants, and CHARLES GUGLIUZZA, Defendant-Appellant.	No. 12-57064 D.C. No. 8:09-cv-01324-CJC-RNB Central District of California, Santa Ana ORDER (Filed May 16, 2016)

Before: CALLAHAN, WATFORD, and OWENS, Circuit Judges.

Judges Callahan, Watford, and Owens vote to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the

matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, filed April 18, 2016, is DENIED.