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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 FEDERAL TRADE COMMISSION,
14 Plaintiff,
15 v.
16 COMMERCE PLANET, INC., et al,
17 Defendants.
18

Case No.
SACV-09-01324 CJC (RNBx)
Opposition to Defendant
Charles Gugliuzza's Motion to
Dismiss

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12 **Statutes and Rules**

13	15 U.S.C. § 45(a)	1, 3, 4, 7, 9
14	Fed. R. Civ. Pro. 8(a)	1, 5
15	Fed. R. Civ. Pro. 12(b)(6)	1, 7
16	Fed. R. Evid. 201	8

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1 Twombly.

2 Defendant’s motion correctly states that “an individual may be subject to
3 injunctive relief for the corporate defendants’ violations of the FTC act if the FTC
4 can prove that the individual participated directly in the acts or practices in
5 question or had the authority to control them.” See e.g., *FTC v. Stefanchik*, 559
6 F.3d 924 (9th Cir. 2009); and *FTC v. Publishing Clearing House, Inc.*, 104 F.3d
7 1160, 1170 (9th Cir. 1997), quoting *FTC v. American Standard Credit Systems,*
8 *Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994) (“[t]here is no dispute that Martin
9 is the president of PCH. As an officer, Martin ‘may be held individually liable for
10 injunctive relief under the [Federal Trade Commission Act] for corporate practices
11 if the FTC can prove (1) that the corporation committed misrepresentations or
12 omissions of a kind usually relied on by a reasonably prudent person, resulting in
13 consumer injury, and (2) that [Martin]”

1 (4) consumers could and in many cases did complete a transaction with
2 defendants without ever seeing the information that would have told them
3 that they were signing up for a negative option continuity plan (Complaint
4 ¶ 18);

5 (5) consumers did not understand that they had been enrolled in a negative
6 option continuity plan and would be billed monthly for services by
7 defendants, whether consumers used those services or not (Complaint ¶ 18);

8 (6) in many cases, consumers did not become aware that they had been
9 enrolled in a negative option continuity plan until they received a credit card
10 bill with a charge for the plan from defendants (Complaint ¶ 19);

11 (7) by placing material information about the transaction in locations on
12 their websites that consumers were not required to visit to complete the
13 transaction, defendants failed to disclose material facts about the transaction
14 (Complaint ¶ 22);

15 (8) because defendants failed to disclose that consumers were enrolling in a
16 negative option continuity plan that involved the payment of monthly
17 charges, defendants' assessment of those monthly charges was made
18 without obtaining the express, informed consent of the consumers
19 (Complaint ¶ 25);

20 (9) defendant Gugliuzza was the president of Commerce Planet (Complaint
21 ¶ 12);

22 (10) defendant Gugliuzza participated in and had the authority to control the
23 acts and practices of Commerce Planet (Complaint ¶ 12); and

24 (11) defendant Gugliuzza knew or should have known that the practices
25 alleged in the complaint were unfair or deceptive (Complaint ¶ 12).

26 The complaint alleges a plausible claim against defendant Gugliuzza for his
27 alleged violations of the FTC Act. The complaint describes in detail how the
28 defendants deceived consumers on defendants' websites by 000 TD(um)Tj17.6400 0.0000 TD(e

1 does not automatically exonerate deceptive activities.”) See also *FTC v. Grant*
2 *Connect, LLC* at *24-25 (FTC is likely to prevail in showing that websites with
3 terms and conditions “included in smaller, more compact type beneath the
4 ‘submit’ button” are not clear and conspicuous and therefore violate the FTC Act.)
5 The fact that other online retailers use terms and conditions pages is irrelevant⁴ to
6 the FTC’s allegation and, in any event, is an evidentiary argument inappropriate
7 for a 12(b)(6) motion to dismiss.

8 Defendant’s further assertion that the complaint’s unfairness count must fail
9 because Commerce Planet supposedly received express, informed consent to
10 charge consumers’ credit cards is a purely factual contention. If, as the complaint
11 charges, consumers were unaware that they had been enrolled in defendants’
12 continuity plan (Complaint ¶ 18), then they cannot be said to have given express,
13 informed consent to their card being charged on a monthly basis. Thus,
14 defendants’ assessing monthly charges against their credit cards would have been
15 without the consumers’ express, informed consent and would be an unfair practice
16 under Section 5 of the FTC Act. (Complaint ¶¶ 24-26). Defendant cites complaint
17 language that consumers “authorized their credit cards to be charged” (Complaint
18 ¶ 15) out of context to argue that the complaint contradicts itself. (Motion to
19 Dismiss at 12). But the complaint language that defendant cites describes the
20 process whereby consumers requested to receive defendants’ free online auction
21 kit (Complaint ¶¶ 14-18), not to agree to the membership continuity plan. Whether
22 consumers were deceived by defendants’ concealment of the actual terms of the
23 transaction, and, therefore, had not given express, informed consent to charge their
24 credit cards is a fact question that will be resolved through discovery and
25 litigation.

26 Finally, defendant Gugliuzza argues that he is no longer affiliated with
27 _____

28 ⁴ We argue below that the Court should reject defendant’s request to take
judicial notice of Exhibits B-E because they are irrelevant.

1 Commerce Planet and, therefore, that injunctive relief is inappropriate. (Motion to
2 Dismiss, Sect. II. E) Injunctive relief is appropriate where there is a cognizable
3 danger of recurrent violations. *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
4 1237 (9th Cir. 1999). That a defendant has no further relationship to the entity he
5 was involved with when the violations occurred is perhaps a fact to be considered,
6 but it is far from dispositive, and courts will look to see whether “subsequent
7 events [have] made it absolutely clear that the allegedly wrongful behavior cannot
8 reasonably be expected to recur.” *Id.* at 1238. Again, these are factual matters
9 that are not appropriate for resolution on a motion to dismiss; taking the facts
10 alleged as true, the Commission has stated a cause of action to hold defendant
11 Gugliuzza liable for injunctive relief.

12 **V. The exhibits that defendant requests the court to take judicial notice of**
13 **are not proper subjects for judicial notice under FRE 201(b).**

14 Defendant’s request to take judicial notice of three of Commerce Planet’s
15 SEC filings and several corporate websites should be denied because they do not
16 meet the criteria for judicial notice under Fed. R. Evid 201: that a fact be
17 “generally known within the territorial jurisdiction of the trial court,” Fed. Rule
18 Evid. 201 (b)(1), or that it be “capable of accurate and ready determination by
19 resort to sources whose accuracy cannot be questioned.” Fed. Rule Evid.
20 201(b)(2).

21 Exhibit A consists of Commerce Planet’s 2006 Form 10-K, its September
22 30, 2007, Form 10-Q, and its October 23, 2007, Form 8-K, and is offered to
23 establish facts recited in those documents. (See Motion to Dismiss fn. 3 & 4) In
24 *Leev. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001), the Ninth Circuit
25 distinguished between judicial notice of the fact that a public record document
26 contained a statement and judicial notice of the truth of such a statement, where
27 the facts recited in the public document are subject to dispute. *United States v.*
28 *Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) similarly rejects taking judicial

1 notice of public documents where adjudicative facts did not meet the criteria of
2 Fed. R. Evid. 201(b)(1) or (2). See also *Bryant v. Avado Brands, Inc.*, 187 F.3d
3 1271, 1278 (11th Cir. 1999) (court may take judicial notice of SEC filings for
4 purpose of determining what statement the documents contain, not to prove the
5 truth of the documents' contents); *Kramer v. Time Warner, Inc.*, 937 F.2d 767,
6 774 (2d Cir. 1991) (approving judicial notice of SEC filings in securities fraud
7 case because documents "are the very documents that are alleged to contain the
8 various misrepresentations or omissions and are relevant not to prove the truth of
9 their contents but only to determine what the documents stated"). Because
10 defendant Gugliuzza seeks to use Exhibit A to show the actual scope of his
11 involvement with Commerce Planet and the actual relationship between
12 Commerce Planet and its subsidiary, Defendant's use of Exhibit A to prove the
13 facts asserted, a purpose that this Circuit and others have rejected as inappropriate
14 for judicial notice.

15 Exhibits B through F are selected pages from the websites of other
16 companies, offered to demonstrate that Commerce Planet's use of a link to a terms
17 and conditions page is not unusual in the online marketing world. Judicial notice
18 as to these documents should be rejected because the documents are irrelevant to
19 any issue raised by the complaint. Defendant misconstrues the complaint by
20 suggesting that the FTC is alleging that the use of a terms and conditions page on
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⁵ Even if defendant could show that Borders, Amazon, or other companies were engaged in deceptive conduct, “everybody else is doing it” is not a defense to an FTC enforcement action. *FTC v. Accusearch, Inc.*, 2007 U.S. Dist. LEXIS 74905 at 27-28 (rejecting “everyone else is doing it” defense because FTC’s decision to prosecute a particular case is simply “Commission’s exercise of discretion and judgment in the allocation of agency time and resources”); see also *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-250 (1967) (holding that even if an entire industry was engaged in an illegal course of conduct, the Commission had the authority to proceed against only one member of the industry); *Moog Industries v. FTC*, 355 U.S. 411, 413 (1957) (“whether all firms in the industry shoul

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 1, 2010, I electronically filed the
3 Opposition to Defendant Charles Gugliuzza’s Motion to Dismiss with the Clerk of
4 the United States Court for the Central District of California, using the Court’s
5 CM/ECF system. The CM/ECF system will send an email notification of the
6 foregoing filing to the following parties and counsel of record who are registered
7 with the Court’s CM/ECF system,:

8 Michael A. Piazza
9 Wayne R. Gross
10 Donnal A. Bunnin
11 Greenberg Traurig, LLP
12 3161 Michelson Drive, Suite 1000
13 Irvine, CA 92612

14 Attorneys for Defendant Charles Gugliuzza

15 In accordance with the electronic filing procedures of this Court, service has been
16 effected on the aforesaid party, whose counsel of record is a registered user of
17 CM/ECF, via

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