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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**FEDERAL TRADE COMMISSION,  
Plaintiff,**

**vs.**

**COMMERCE PLANET, INC., a  
corporation, and MICHAEL HILL,  
CHARLES GUGLIUZZA, and AARON  
GRAVITZ, individually and as officers  
of COMMERCE PLANET, INC.,  
Defendants.**

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

**MEMORANDUM OF DECISION**

**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

1 OnlineSupplier. OnlineSupplier was marketed as a free “Online Auction Starter Kit” that  
2 purported to help consumers sell products on eBay. Consumers were permitted a free  
3 trial period to use OnlineSupplier with payment of a small shipping and handling fee. If  
4 consumers did not cancel the service within the trial period, they were automatically  
5 charged a recurring monthly fee ranging from \$29.95 to \$59.95. The FTC alleges that  
6 during the relevant time period (July 2005 to March 2008), Defendants deceptively  
7 marketed OnlineSupplier as a free auction kit on its website without adequately  
8 disclosing the program’s negative option plan, which required consumers to affirmatively  
9 cancel their membership or otherwise incur a monthly charge to their credit card. The  
10 FTC alleges that consumers unwittingly signed up for OnlineSupplier, believing they had  
11 ordered a free kit, only to discover later that they had been enrolled in OnlineSupplier’s  
12 continuity program when they saw monthly charges on their credit card bill. The FTC  
13 alleges that between July 2005 and March 2008, Commerce Planet obtained over \$45  
14 million from over 500,000 consumers.

15  
16 The FTC settled with all Defendants except for Mr. Gugliuzza, Commerce Planet’s  
17 former president and consultant from July 2005 to November 2007. In the operative First  
18 Amended Complaint (“FAC”), the FTC asserts two counts against Mr. Gugliuzza for (i)  
19 deceptive practices and (ii) unfair practices in violation of section 5(a) of the Federal  
20 Trade Commission Act (the “FTC Act” or “Act”), 15 U.S.C. § 45(a). The FTC requests  
21 injunctive and monetary equitable relief against Mr. Gugliuzza under section 13(b) of the  
22 FTC Act, 15 U.S.C. § 53(b). Between January 31, 2012 and February 28, 2012, the  
23 Court conducted a sixteen-day bench trial that involved over 300 exhibits and 22  
24 witnesses. The parties thereafter submitted extended closing briefs. The Court, by this  
25 Memorandum of Decision, issues its findings of fact and conclusions of law pursuant to  
26 Federal Rule of Civil Procedure 52(a). After carefully reviewing all the evidence,  
27 testimony, and arguments presented by the parties’ counsel, the Court concludes that the  
28 FTC has proven by a preponderance of the evidence that Mr. Gugliuzza is individually

1 liable for the deceptive and unfair marketing of OnlineSupplier in violation of section  
2 5(a) of the FTC Act. The Court finds that a permanent injunction against Mr. Gugliuzza  
3 is appropriate because there is a cognizable danger that he will repeat the deceptive and  
4 unfair marketing tactics he authorized and implemented with OnlineSupplier. The Court  
5 also finds that monetary equitable relief against Mr. Gugliuzza is proper in the amount of  
6 \$18.2 million as restitution for his wrongful and knowing participation in the deceptive  
7 marketing of OnlineSupplier.

## 8

## 9 **II. BACKGROUND**

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

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1           **B. OnlineSupplier**

2

3           Commerce Planet primarily marketed and sold OnlineSupplier. (Exh. 31.) The

4 bulk of company's revenue was generated from OnlineSupplier and associated upsell

5 products. (Gravitz, 2/1/12, 7:16–20, 133:16–134:9; Hill 2/7/12, 159:10–18.) Messrs.

6 Gravitz and Hill developed the concept for OnlineSupplier. (Hill, 2/7/12, 112:25–113:5.)

7 OnlineSupplier was a website hosting service designed to enable consumers to create and

8 manage a website to sell products on that site and on other internet sites. (Gravitz,

9 2/1/12, 6:20–7:3.) The service included a hosted website created by the customer; access

10 to an inventory of products; access to the customer service department; and an

11 information kit consisting of a 23-page manual on how to use the service and program.

12 (Gravitz, 2/1/12, 140:12–146:11; Exhs. 31, 2003.) Consumers signed up for

13 OnlineSupplier initially by telephone and then later online on its webpages by entering

14 their shipping address and credit card information. (Exh. 31.) Consumers paid for the

15 initial handling and shipping fee of \$1.95 (or \$7.95 for expedited delivery) for the

16 membership kit. (Exhs. 1270-2, 1271-2.) Consumers were permitted a free trial period

17 ranging from 7 to 14 days to use the product and services. (Exhs. 1270-1, 1271-1.) If

18 consumers did not cancel within the free trial period, they were automatically enrolled in

19 the continuity program and charged a monthly membership fee ranging from \$29.95 to

20 \$59.95 on their credit card. (Gravitz, 2/1, 66:25–67:5, 111:13–20; Gravitz, 2/2/12, 25:5–

21 9, Hill, 2/17/12, 123:16–22.) Commerce Planet initially maintained its own warehouse

22 from which goods were sold to customers. (Exh. 31.) The warehouse was discontinued

23 in 2006, and products were subsequently offered to customers through Ingram Micro.

24 (Seidel, 2/14/12, 100:8–101:12; Hill, 2/17/12, 115:23–117:20.) To cancel the service,

25 customers could either call or email customer service at CLG. (Seidel, 2/14/12, 108:17–

26 24.)

1                   **1. Marketing**

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3                   When Commerce Planet began operations in 2003, it initially marketed  
4 OnlineSupplier through classified advertising, newspapers, and emails, and the program  
5 was primarily sold through inbound telemarketing whereby consumers would call a toll-  
6 free number to sign up for the service. (Gravitz, 2/1/12, 7:4–6, 8:1–7; Hill, 2/7/12,  
7 11:16–24.) At first, Commerce Planet charged consumers a flat fee of \$58 or \$98.90 for  
8 OnlineSupplier, depending on the particular package consumers purchased, and there was  
9 no free trial period or a negative option plan. (Gravitz, 2/1/12, 10:12–18.) However, the  
10 sale of OnlineSupplier was poor, and the company lost money. (*Id.* at 155:12–17; Hill,  
11 2/17/12, 131:17–24.) The company later transitioned from telemarketing to online  
12 marketing between June and July 2005. (Gravitz, 2/1/12, 11:5–10; Seidel, 2/14/12, 56:6–  
13 16.)

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15                   **2. Sign-Up Pages**

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17                   Between July 2005 and March 2008, there were two versions of OnlineSupplier’s  
18 sign-up pages. (Exhs. 1270, 1271.) The first working version was complete around July  
19 2005. (Gravitz, 2/1/12, 17:15–24.) After several revisions, the final sign-up pages of the  
20 first version (“Version I”) went live in October 2005. (Gravitz, 2/1/12, 21:11–19, 27:1–  
21 4; Gravitz, 2/2/12, 107:21–108:5; Hill, 2/17/12, 117:21–118:4; Exh. 1270.) Mr. Gravitz  
22 developed Version I in 2005 and 2006 with the legal advice of Jeff Conrad and Mr.  
23 Gugliuzza. (Gravitz, 2/1/12, 27:11–22; Gravitz, 2/2/12, 114:2–5.) Another version of the  
24 sign-up pages (“Version II”) was used after some modifications were made to Version I  
25 in February 2007. (Gravitz, 2/1/12, 109:22–111:24; Exhs. 1271, 1198.) A third version  
26 of the sign-up pages (“Version III”) was used after the FTC’s CID on Commerce Planet  
27 in March 2008. (Exh. 1272.) Version III incorporated changes under the  
28 recommendations of outside counsel, Linda Goldstein, who had expertise in FTC Act

1 compliance. (Gravitz, 2/1/12, 127:9–132:10; Huff, 2/15/12, 93:13–95:22; Roth, 2/8/12,  
2 17:19–18:13; Exhs. 232, 1204, 1272.) Version III did not mention a free auction starter  
3 kit and significantly clarified the terms of membership on the landing and billing pages.  
4 (Exh. 1272.) After implementing the changes in Version III, the company experienced a  
5 severe downward spike in sales of OnlineSupplier.

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1 3.) The products and services were pre-clicked to “Yes,” but the consumer could change  
2 it to “No.” (*Id.*) Fourth, upon clicking the “Submit” button on the upsell page,  
3 consumers were directed to the final confirmation page with the order information.  
4 (Exhs. 1270-4, 1271-4.) Commerce Planet experimented with sending post-transaction  
5 confirmation emails to consumers before charges to credit cards were posted, but these  
6 were inconsistently used and discontinued after a brief period of time. (Guardiola,  
7 2/21/12, 11:20–25, 16:14–23; King, 2/3/12, 157:10–19.)

### 8 9 **3. Consumer Complaints and Chargebacks**

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

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1 conduct an assessment of the company and identify ways to increase profits and decrease  
2 costs. (Gugliuzza, 2/21/12, 108:7–21; Hill, 2/7/12, 115:24–116:24, 117:5–11). Mr.  
3 Gugliuzza performed consulting work through his business called Olive Tree Holdings.  
4 (*Id.* at 108:7–21; Exh. 6.) Mr. Gugliuzza conducted a one-month assessment of NeWave  
5 and submitted a 78-page report of his evaluation and recommendations to the company’s  
6 Board in June 2005. (Gugliuzza, 2/21/12, 108:7–21; Exh. 6.) The report provided a  
7 detailed, comprehensive assessment of Commerce Planet and its subsidiaries, including  
8 the company’s management, infrastructure, operations, finances, products and services,  
9 and marketing and advertising. Some of the core deficiencies Mr. Gugliuzza identified in  
10 the report included the discrepancy between perceived value and actual value;  
11 management’s lack of experience and skill to effectively operate the company and  
12 implement change; lack of well-established channels of communication and coordination  
13 between managers; and “[a] lack of value added products and services that produce high  
14 profit margins and customer retention,” among others. (Exh. 6.) Mr. Gugliuzza  
15 recommendations included a “complete overhaul” with respect to the company’s existing  
16 decision making process; improvements in the channel of communication between  
17 management to clarify expectations and responsibilities for projects; and enhancements to  
18 coordination efforts between departments. (*Id.*) Specifically, with respect to marketing,  
19 Mr. Gugliuzza noted the lack of coordination between marketing and sales. (*Id.*) Mr.  
20 Gugliuzza also emphasized that because “existing management lack[ed] experience,”  
21 management was “in dire need of a leader” who possessed basic management skills. (*Id.*)  
22 Mr. Gugliuzza also observed that customer retention was extremely low with an average  
23 of less than 35% after the first 45 days of billing activity. (*Id.*) He identified marketing  
24 expenditures as comprising the largest portion of NeWave’s expense budget and the  
25 company’s media budget to be the largest contributor to its negative net profits, aside  
26 from payroll. (*Id.*) Mr. Gugliuzza provided more specific recommendations with respect  
27 to the company’s human resources, infrastructure, operations, products and services, and  
28 budgets. For example, Mr. Gugliuzza recommended that Messrs. Hill and Gravitz be

1 replaced as the CEO and head of Media, respectively, so they could focus their attention  
2 on developing revenue gene

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1 company's executive staff, and by around March 2006, they were being compensated  
2 under the same terms. (Hill, 2/7/12, 142:4-7, 150:10-20; Hill 2/17/12, 130:4-9; Exhs.  
3 16, 1331.) Mr. Gugliuzza regularly met with and communicated with all the department  
4 heads, who were required to submit weekly reports to him. (Gugliuzza, 2/23/12 Vol. I,  
5 57:8-11; Seidel, 2/14/12, 58:6-59:22, 61:19-24; Exhs. 1124, 1129, 1130, 1132, 1354,  
6 1356, 1368-71, 1292a, 1293, 1295.) Mr. Gugliuzza, along with Hill, oversaw the  
7 company's migration of OnlineSupplier from telemarketing to internet sales in 2005.  
8 (Hill, 2/17/12, 122:1-4; Daniel, 2/14/12, 28:15-23.) Mr. Gugliuzza also acted as *de facto*  
9 legal counsel of NeWave and took over Mr. Conrad's role as the primary legal reviewer  
10 for the company. (Gravitz, 2/2/12, 120:6-12; Gugliuzza, 2/22/12, 119:5-14.) After Mr.  
11 Gugliuzza implemented many of the recommendations in his assessment report, the  
12 company became profitable. (Hill, 2/7/12, 143:10-24.)

## 13 14 **2. President (September 2006 to November 2007)**

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16 Pursuant to an executive agreement, Mr. Gugliuzza became the president of the  
17 company, effective September 11, 2006. (Hill, 2/7/12, 152:21-153:10; Exhs. 259.) He  
18 signed another executive employment agreement on April 10, 2007. (Exh. 261.)  
19 Gugliuzza served as president until he stepped down on November 5, 2007. (Gugliuzza,  
20 2/21/12, 110:21-24, 116:3-13; Exhs. 228, 259-61.) Mr. Hill remained the CEO, and  
21 David Foucar became the CFO. (Hill, 2/7/12, 151:19-152:1.) Although Mr. Gugliuzza  
22 assumed the title of president, as a practical matter, his duties and responsibilities did not  
23 materially change. (*Id.* at 153:18-25.) Mr. Gugliuzza continued to assert operational  
24 control over the company and its subsidiaries and had oversight authority over the  
25 department heads. (Foucar, 2/16/12, 137:19-138:6.) Mr. Gravitz reported to Mr.  
26 Gugliuzza, and Mr. Gugliuzza directed the marketing of OnlineSupplier, such as by  
27 reviewing and approving marketing agreements, approving landing and billing pages of  
28 OnlineSupplier, and reviewing weekly performance reports. (Hill, 2/7/12, 155:11-20.)

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1 that company. (*Id.*

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1 or act as a whole to determine whether it is misleading. *See FTC v. Gill*, 265 F.3d 944,  
2 956 (9th Cir. 2001) (holding that defendant failed to counter the FTC’s substantial  
3 showing that he made statements and created an overall “net impression” of a misleading  
4 representation regarding the ability to remove negative information from consumers’  
5 credit report, “even if the information was accurate, complete, and not obsolete”); *FTC v.*  
6 *Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (“Deception may be found based on the  
7 ‘net impression’ created by a representation.”). A misleading impression is material if it  
8 “involves information that is important to consumers and, hence, likely to affect their  
9 choice of, or conduct regarding, a product.”

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1 any consumer confusion about OnlineSupplier

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1 Auction Starter Kit” that “provides detailed instructions to maximize profits, using little  
2 known but proven strategies.” Just below this statement in Version I is the directive  
3 “GET YOUR KIT NOW FOR FREE.” The word “FREE” is in red, as is the phrase  
4 “STARTER KIT.” The kit is advertised to include the following benefits: (1) a step-by-  
5 step quick start guide, (2) no experience required, (3) advanced training for experienced  
6 auctioneers, (4) and up to 50% discounts on thousands of name brand products. The right  
7 section of the webpage contains a light blue box where the user may submit her shipping  
8 address. There is a countdown clock on top that ticks off the number of minutes left until  
9 the offer expires. Just below is the question “Where do we ship your FREE KIT?” The  
10 phrase “FREE KIT” is in red. The button “Ship My Kit!” appears below the spaces for  
11 filling in one’s name and contact information. Below that is the message inserted in light  
12 gray that states “GET YOUR ONLINE AUCTION STARTER KIT TODAY FREE!”  
13 The price 19.95 is crossed out and next to it is the offer “NOW FREE! (limited time  
14 offer)!” Again, “FREE” is in red. Below the fold,<sup>4</sup> in smaller text, is the following  
15 disclaimer: “By submitting this form you are accepting and agreeing to the Privacy  
16 Policy and Terms of membership of this Web Site.” The phrase “Privacy Policy” and  
17 “Terms of Membership” are hyperlinked in slightly darker blue. Further below is the  
18 message: “BONUS, your kit includes a FREE 14-DAY TRIAL TO YOUR VERY OWN  
19 WEBSTORE.” On the bottom left are “Success Stories,” which consist of testimonials  
20 from two satisfied customers who purchased the kit.

21  
22 Overall, the predominant message is that consumers can order a free kit on how to  
23 make money by selling products on eBay. This is underscored by the repetition and  
24 placement of the phrase “Free Kit,” which is bolded in red,  
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1 with OnlineSupplier.<sup>5</sup> Nor is there any information about Commerce Planet, its  
2 subsidiaries, or any information about cost or the continuity program. Rather, the net  
3 impression created by the landing page is that the kit is affiliated with eBay, and that  
4 consumers can learn how to sell products on eBay from the kit.

5  
6 While the terms of the continuity program are disclosed in a separate, hyperlinked  
7 “Terms of Membership” page, this is an insufficient cue. Disclaimers do not  
8 automatically exonerate deceptive activities. *See*

1 the average consumer will wade through the material and understand that she is signing  
2 up for a negative option plan.

3  
4       Once the consumer clicks the “Ship My Kit!” button, she is taken to the billing  
5 page. (Exhs. 1270-2.) The eBay logo, along with the message “AS SEEN ON TV,” is  
6 repeated on top, reinforcing the message that the kit is affiliated with eBay. The space  
7 for filling in one’s payment information is inserted in a light blue vertical box to the right.  
8 At the top are two shipping options, regular shipping for \$1.95 and expedited shipping for  
9 \$7.95. Below the space for the credit card information is the “Ship My Kit!” button. At  
10 the very bottom, below the fold, in slightly darker blue font and in fine print is the  
11 disclosure regarding the negative option plan

1 disclosure also states that the consumer “may” be liable for payment of future goods and  
2 services if she fails to cancel the service, which casts ambiguity as to whether the

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## 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







1 computer science, cognitive psychology, and social psychology, among others. (*Id.* at  
2 103:14–17, 104:22–105:9.)

3  
4 Ms. King was retained by the FTC to review OnlineSupplier’s webpages and  
5 determine whether (1) customers would understand that a negative option was present  
6 when they reviewed the sign-up pages, and (2) after they finished the check-out process,  
7 whether they would understand that they were enrolled in a continuity program. (*Id.* at  
8 113:2–10.) Here, Ms. King applied a usability inspection method, a type of HCI  
9 qualitative-based approach that is “user-centered”—meaning that it focuses on what the  
10 user can perceive and what the user should do. (*Id.* at 103:23–104:1, 115:23–116:10.)  
11 Ms. King likened the method to a preflight checklist whereby she analyzes the webpages  
12 to see if they are consistent with certain HCI heuristics or principles of usability. (*Id.* at  
13 114:22–115:15; 116:16–117:4.) Thus, like an airline pilot who goes through a pre-flight  
14 checklist trying to determine if the plane should fly, an expert conducting a usability  
15 inspection looks for major flaws in a website to determine whether it should be launched.  
16 (*Id.*)<sup>7</sup> After inspecting Version I and Version II, Ms. King concluded that she did not  
17 believe that “most people” would know, after visiting the webpages, that a negative  
18 option existed or that “most people” would know they were enrolled in a continuity  
19 program upon completing the check-out process. (*Id.* at 114:9–18.)

20  
21 **(i) Version I**

22  
23 With respect to Version I, Ms. King focused on what consumers are drawn to  
24 based on principles of usability. These principles include the fact that users typically do  
25 not scroll, tend to scan very quickly and read only 20% of what is on the page, and seek  
26 cues for what to do next on a webpage. (*Id.* at 123:19–125:6, 125:20–23.) Ms. King  
27

28 <sup>7</sup> 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.

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

19 Ms. King further identified several key flaws with regard to the disclosure. First,  
20 Ms. King provided screenshots of the landing and billing pages, which showed that the  
21 disclosure appeared below the fold, as seen on a computer screen with the resolution size  
22 of 1024 by 768 pixels (the most common resolution for computers during the time the  
23 webpages were live from 2005 and 2006) and allowing for the maximum amount of  
24 screen space. (*Id.* at 131:3–132:25, 133:1–4, 133:20–134:25; Exhs. 1324, 1325.) Ms.  
25 King explained that the placement of the disclosure below the fold violates the cardinal  
26 heuristic of usability because people do not read the entire webpage and do not tend to  
27 scroll down to look for information below the fold. (King, 2/3/12, 128:1–7, 130:5–16,  
28 133:5–9.) Generally, what one wants people to read the least is placed at the bottom

1 while the thing one cares about the most is placed at the top of the webpage and above  
2 the fold. (*Id.* at 128:8–12.)

3  
4 In rebuttal, Gugliuzza provided evidence of a screenshot from his computer  
5 showing the disclosure on the billing page of Version I to be above the fold. (Exh. 19;  
6 *see also* Exh. 2002.) But the net impression test under section 5(a) is from the  
7 perspective of a *reasonable consumer*, not that of the seller or the seller’s employee.  
8 While Gugliuzza’s computer may, indeed, have shown a part of the billing page  
9 disclosure to be above the fold, it is not representative of the resolution size of the typical  
10 consumer. Ms. King testified that the most common resolution size at the time Version I  
11 was live was 1024 by 768 pixels. (King, 2/3/12, 126:16–21.) Ethan Brooks, the  
12 company’s Chief Technology Officer from 2006 to 2007, also confirmed that during the  
13 time that OnlineSupplier’s sign-up pages were live, the screen resolution was 1024 by  
14 768 for approximately 50% of users, which would place the disclosure below the fold.  
15 (Brooks, 2/9/12, 100:16–101:2, 102:7–12, 113:23–114:9, 115:20–22, 116:14–21.) The  
16 defense team also pointed to hints of something more below the fold—*i.e.*, the light blue  
17 box continues downward and the graphic on the left is cut off. However, Ms. King  
18 testified that these were ineffective visual cues considering the totality of the page and the  
19 prominence of the “Ship My Kit!” button. (King, 2/7/12, 29:12–31:5; Exh. 1323.) Even  
20 assuming the disclosure were entirely above the fold for most consumers, the Court finds  
21 that its visibility is only slightly improved given its overall placement and presentation on  
22 the page.

23  
24 A second flaw Ms. King observed was that the disclosure is located far away from  
25 the “Ship My Kit!” button, at the very bottom of the page, and after the hyperlinked terms  
26 of membership and “Privacy Policy.” (King, 2/3/12, 128:18–22.) Ms. King testified that  
27 her research in user cognition and privacy policies demonstrates that “as soon as you put  
28 the word ‘privacy policy’ in front of a consumer, they completely tune out. They’re one

1 of the most unread components of a web page.” (*Id.* at 128:23–129:6.) Thus, “the  
2 location of the disclosure after that privacy policy link basically signals to somebody that  
3 here is something you don’t need to read; this is not relevant to your shopping  
4 experience. If it were crucial, it would have been placed up near the ‘ship my kit’  
5 button.” (*Id.* at 129:7–13.) Third, Ms. King testified that the visibility of the disclosure  
6 was poor given the blue-on-blue lettering, the small and blocky text, the all-cap font  
7 (rendering it more difficult, not easier to read), and the legalese language (most people  
8 are not familiar with the term “negative option”). (*Id.* at 128:13–17, 129:21–130:2.)  
9

10 Ms. King concluded that Version I did not appear to be offering for sale a  
11 membership program because (i) that messaging was absent from the entire user flow and  
12 the focus of the pages was instead on obtaining a free kit, and (ii) there was no mention  
13 of the continuity program in the area of the webpage where she believed most people  
14 would spend their viewing time. (*Id.* at 139:11–21.) Ms. King stated that she would not  
15 recommend launching Version I until the core flaws she identified were fixed. (*Id.* at  
16 139:22–140:4.)

17  
18 **(ii) Version II**  
19

20 With regard to Version II, Ms. King similarly opined that the landing and billing  
21 pages did not contain anything that would cause a typical consumer to believe she would  
22 be signing up for a free trial in OnlineSupplier and would incur monthly charges until she  
23 affirmatively cancelled. (*Id.* at 141:5–9, 142:2–6.) The primary message of Version II’s  
24 landing page is consistent with that of Vers  
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1 “key flaws” were not addressed—*i.e.*, the disclosure is still ensconced in a very large

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**(iii) Rebuttal Testimony**

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3 Mr. Gugliuzza did not produce any expert rebutting Ms. King’s usability  
4 inspection of OnlineSupplier’s webpages. Rather, Mr. Gugliuzza attempted to minimize  
5 Ms. King’s testimony by pointing out that she did not incorporate any analysis of  
6 empirical data in reaching her conclusions. (Def.’s Closing Brief, at 44.) For example,  
7 Mr. Gugliuzza relies on evidence that approximately 45% of the consumers who  
8 purchased OnlineSupplier cancelled within the free trial period, (Exh. 31), and that there  
9 were thousands of websites created between January 2005 and March 2007 using  
10 OnlineSupplier, (*see* Cruttenden, 2/28/12, 8:18–10:9, 12:6–8, 60:23–61:7; Exh. 2057).  
11 Mr. Gugliuzza’s criticism misses the mark. There was no explanation of how an  
12 empirical analysis is relevant to a usability inspection, which focuses on what the user  
13 can perceive and do on a webpage given certain HCI principles of usability. Ms. King  
14 explained why she conducted a usability inspection, as opposed to other methods (such as  
15 a focus group), given the scope of the project and the size of OnlineSupplier’s website.  
16 (*See* King, 2/3/12, 117:12–24.) The Court finds that a usability inspection, with its  
17 emphasis on user perception and comprehension of the information presented to them on  
18 a webpage, is consonant with a “net impression” test under section 5(a) of the FTC Act,  
19 which turns on a facial examination of the relevant marketing materials.

20  
21 Mr. Gugliuzza further argued that a close analysis of user data reveals that the  
22 “vast majority” of consumers signed up for OnlineSupplier knowing the terms of the  
23 negative option plan. (Def.’s Closing Brief, at 39–40.) Mr. Gugliuzza’s reliance on user  
24 data is misguided and uncorroborated by the evidence in the record. Mr. Gugliuzza  
25 introduced the testimony of its accounting expert, Dr. Stefano Vranca, who submitted a  
26 rebuttal report to the consumer injury calculation of Dr. Daniel Becker, the FTC’s  
27 consumer injury expert. Dr. Vranca testified that for the period from 2005 to April 2008,  
28 using the company’s Microsoft Access Realtime (RT3) database, 46.32% of those who

1 ordered OnlineSupplier cancelled within the free trial period. (Vranca, 2/28/12, 74:3–  
2 76:5; Exh. 2061.) Dr. Vranca further testified that nearly 20% of OnlineSupplier  
3 subscribers maintained their membership for more than three months and 10% of  
4 subscribers maintained their membership in excess of six months. (Vranca, 2/28/12,  
5 84:3–22; Exhs. 2062–63.) Dr. Vranca’s calculation, however, does not entirely support  
6 Mr. Gugliuzza’s conclusion. As Dr. Becker pointed out, Dr. Vranca neither discussed the  
7 specific steps used to arrive at his calculation nor explained how the RT3 data was used  
8 in his rebuttal report. (See Becker, 2/15/12, 15:23–18:3.) Using the data from the  
9 company’s RT3 system, Dr. Becker testified that both he and his assistant independently  
10 calculated a cancellation rate of 25%. (*Id.*) Even assuming that upwards of 45% of  
11 consumers did cancel within the free trial period, there was no accounting of how  
12 consumers knew about the membership terms—*i.e.*, whether they knew from the sign-up  
13 pages, from post-transaction communications, or examination of the kit itself. (See  
14 Vranca, 2/28/12, 104:5–109:1, 109:18–25.) More importantly, Dr. Vranca did not  
15 account for the 55% (the majority) of the consumers who did not cancel within the trial  
16 period and the 80% to 90% of those who did not subscribe to OnlineSupplier for more  
17 than three or six months.

18  
19       There is also no showing that consumers who remained OnlineSupplier members  
20 did so knowing the terms of the membership upon submitting their credit card  
21 information. As true of Joan Cirillo, (*see infra* Part III.A.4), consumers simply could not  
22 have checked or seen the membership fee on their credit card bill for several months. Mr.  
23 Gugliuzza also pointed to the fact that there were thousands of websites created between  
24 January 2005 and March 2007 using OnlineSupplier, (Cruttenden, 2/28/12, 8:18–10:9,  
25 12:6–8, 60:23–61:7; Exh. 2057), and that fourteen consumers—including Eric and Lucia  
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1 OnlineSupplier through in-bound telemarketing, not via the sign-up pages, which were  
2 not live until July 2005. (*See* Seidel, 2/14/12, 150:20–151:20; Gravitz, 2/2/12, 108:17–  
3 109:1; Exh. 2004.)<sup>8</sup> More importantly, the J183982.03 6792 ISQQrequire-712t17–  
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1 impression of OnlineSupplier's webpages and Ms. King's usability inspection of the  
2 sign-up pages.

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4 There is also ample evidence that Commerce Planet, through its customer service  
5 department CLG, received thousands of telephone complaints regarding OnlineSupplier  
6 and requests for refunds. José Guardiola, the customer service manager for CLG,  
7 handled customer complaints regarding billing issues on a daily basis, either by  
8 personally taking a call or by interacting with customer service representatives on the  
9 floor. (Guardiola, 2/21/12, 7:22–8:4, 90:19–23.) The most common type of complaint  
10 Mr. Guardiola identified were “free-kit-only” complaints—*i.e.*, people thought they were  
11 just paying \$1.95 in shipping for a starter kit, only to discover they were being charged a  
12 monthly fee. (*Id.* at 8:11–21.) Mr. Guardiola estimated that approximately 70% of the  
13 consumer complaints consisted of free-kit-only complaints. (*Id.* at 8:22–9.6.) For  
14 example, in Mr. Guardiola's weekly reports during July and November 2006 and March  
15 2007, there were a total of 18,000 calls handled by customer service, out of which Mr.  
16 Guardiola estimated that between 70% to 80% of the calls related to free-kit-only  
17 complaints. (*Id.* at 31:20–32:13; Exhs. 1292a, 1293, 1295.) Mr. Guardiola  
18 conservatively estimated that CLG received about a thousand free-kit-only complaints  
19 per week and tens of thousands of such complaints during his tenure at Commerce Planet  
20 from August 2006 to August 2007. (*Id.*)

21  
22 In addition to telephone complaints, thousands of written complaints regarding  
23 OnlineSupplier were submitted to the BBB, the Attorney General, and Commerce Planet  
24 via emails, mail, and website submissions. (Exhs. 163, 193, 1180, 1177–79.) The Court  
25 admitted a total of approximately 4,000 complaints consisting of over 500 BBB  
26 complaints (Exh. 163); 3,272 archived email complaints to Commerce Planet from July  
27 2005 to March 2008 (Exh. 1180); and over 200 Consumer Sentinel FTC database  
28 complaints (Exhs. 1177–79). (Trial Tr., 2/9/12, 97:22–98:7; Exh. 1176 [excluding

1 declaration and categorizations].)<sup>9</sup> A significant number of these related to consumer  
2 confusion regarding the nature of the product and its cost. Consumers complained that  
3 they thought they had signed up for a free information kit about how to sell products on  
4 eBay with payment of shipping, rather than subscribing to a continuity program with a  
5 monthly fee. For example, on June 13, 2006, Kenneth Goolsby filed a complaint with the  
6 BBB regarding a May 2006 purchase of OnlineSupplier, stating that he “thought [he] was  
7 signing up for free ebay info w/ a shipping of \$1.95” and never agreed to monthly  
8 charges. (Exh. 163-694.) On September 5, 2006, Selena Phillips similarly stated  
9 regarding her August 2006 order of OnlineSupplier: “I ordered a ‘free’ package that was  
10 supposed to explain everything online supplier is supposed to do. I was only told to pay  
11 the shipping and handling fee of \$1.95. Never did they ask me to look over the terms or  
12 agreement or have anything checked off that I looked at the terms or agreement.” (Exh.  
13 163-719.) Mr. Guardiola identified Mr. Goolsby’s and Ms. Phillips’ complaints as  
14 typical of those he encountered at CLG. (Guardiola, 2/21/12, 9:9–10:14.) On April 26,  
15 2007, Joanna Gaul submitted a complaint to the Attorney General regarding her purchase  
16 of OnlineSupplier on January 31, 2007, stating that she “did not authorize them  
17 [Commerce Planet] to charge my card for anything but the \$1.95. . . I ordered a How To  
18 Use E-Bay book online for \$1.95,” but “[w]hen I received the information I discovered it  
19 wasn’t about using E-bay it was about having an on line business. . . when I received my  
20 credit card bill I had been charged \$49.95. I called and told them I did not authorize this  
21 charge . . . .” (Exh. 193.) On April 25, 2006, Ian Bennett sent the following email  
22 complaint to Commerce Planet regarding the lack of clear disclosure for the continuity  
23

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24 <sup>9</sup> With regard to the archived emails, (Exh. 1180), the Court admitted them as proper summaries under  
25 Federal Rule of Evidence 1006. The Court noted that the complaints were not being offered for the truth  
26 of the matter asserted, but as evidence of the consumer’s confused state of mind. (Trial Tr., 2/8/12,  
27 133:17–135:2.) All the BBB, email, Attorney General, and Consumer Sentinel complaints—totaling  
28 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.)

1 program: “This is notice for you to refund the \$29.95 you billed me [I did not authorize  
2 it] and to inform you that your method of securing payment for shipping of free kit did  
3 not CLEARLY show the fact that a letter would have to be generated to cancel any  
4 further obligations. . . . The following web page [for OnlineSupplier] does not show the  
5 required verbiage except below the fold of the displayed page which would not be read  
6 by most people. . . . Your manner of advertising is deceptive and misleading and you  
7 should take immediate steps to CLEARLY indicate during the initial offer that after 14  
8 days an automatic billing of 29.95 would occur.” (Exh. 1180.) Another consumer sent a  
9 similar email complaint on August 18, 2006: “Your business practice [is] extremely  
10 misleading and border on fraud. . . . There is nothing what so ever on the sign up page or  
11 the terms of membership that in fact state that requesting the ‘free’ startup kit is in fact  
12 the same thing as account activation and/or account registration. NOTHING.” (*Id.*) The  
13 Court finds the testimony of Mr. Suckling, Ms. Cirillo, and Mr. Guardiola as well as the  
14 evidence of consumer complaints credible and highly probative evidence that the website  
15 marketing of OnlineSupplier was misleading and deceptive.

## 16

### 17 **5. Excessive Chargeback Rates**

## 18

19 The FTC presented additional evidence of excessive chargeback rates for  
20 OnlineSupplier during the relevant time period, which corroborates the Court’s finding  
21 that the program’s sign-up pages were misleading. A “chargeback” consists of a returned  
22 sales transaction from the issuing bank to the acquiring bank sponsoring a particular  
23 merchant into the credit card payment system. (Chen, 2/2/12, 133:22–134:11, 135:7–11.)  
24 When a chargeback occurs, the funds associated with that transaction flow back to the  
25 issuer bank. (*Id.* at 135:12–16.) The average chargeback rate in the United States is  
26 0.2% of the transaction rate. (*Id.* at 136:22–137:13.) Visa Credit Cards, one of the credit  
27 cards accepted for purchasing OnlineSupplier, identifies merchants who exceed a  
28 chargeback rate of about 1% in any given month. (*Id.* at 138:8–22, 140:18–141:4.)

1 Visa's business records show that OnlineSupplier was enrolled in Visa's Merchant  
2 Chargeback Monitoring Program ("MCMP") starting in 2004. (Exh. 1057.)  
3 OnlineSupplier continued to be in Visa's

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1 The chargeback problem for OnlineSupplier was never resolved. (Gravitz, 2/1/12,  
2 134:10–15.)

3

4 Mr. Chen testified that the frequent source of OnlineSupplier’s excessive chargebacks was  
5 identify inadequate disclosure of OnlineSupplier’s billing terms in their advertisements.

6 40.) Although Visa did not spec

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1 (Gravitz, 2/1/12, 134:10–15.) The evidence taken as a whole does not support Mr.  
2 Gugliuzza’s affiliate fraud story.

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4 In short, the FTC has provided a plethora of evidence that OnlineSupplier’s sign-  
5 up pages were misleading because they conveyed the net impression that consumers  
6 could order a free auction kit with payment of a small shipping and handling fee, when in  
7 fact, they were subscribing to a negative option plan. The expert testimony of Ms. King,  
8 along with numerous free-kit-only complaints and excessive chargeback rates, provide  
9 strong corroborating evidence that the website marketing of OnlineSupplier was  
10 misleading and deceptive.

## 11 12 **B. Unfair Acts (Count II)**

13  
14 The FTC has provided sufficient evidence that Commerce Planet’s website  
15 marketing of OnlineSupplier was also unfair under section 5(a). An act is unfair if it (1)  
16 causes substantial injury (2) not outweighed by countervailing benefits to consumers or  
17 competition, and (3) one that consumers themselves could not reasonably have avoided.  
18 15 U.S.C. § 45(n); *see also FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010); *FTC*  
19 *v. J.K. Publ’ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

### 20 21 **1. Substantial Injury**

22  
23 The substantial injury prong is satisfied if the FTC offers sufficient evidence that  
24 consumers “were injured by a practice for which they did not bargain.” *Neovi*, 604 F.3d  
25 at 1157 (citation and quotes omitted); *accord J.K. Publications*, 99 F. Supp. 2d at 1201.  
26 “An act or practice can cause substantial injury by doing a small harm to a large number  
27 of people, or if it raises a significant risk of concrete harm.” *Neovi*, 604 F.3d at 1157–58  
28 (citation and quotes omitted). “Both the Commission and the courts have recognized that

1 consumer injury is substantial when it is the aggregate of many small individual injuries.”  
2 *Pantron I Corp*, 33 F.3d at 1102; *see also Orkin Exterminating Co. v. FTC*, 849 F.2d  
3 1354, 1365 (11th Cir. 1988) (“As the Commission noted, although the actual injury to  
4 individual customers may be small on an annual basis, this does not mean that such injury  
5 is not ‘substantial.’ ”), *cert. denied*

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

### 3 4 **3. Not Reasonably Avoidable**

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

### 15 16 **C. Individual Liability**

17  
18 An individual may be held liable for corporate violations of the FTC Act if the  
19 individual (1) participated directly in the wrongful practice or act or had authority to  
20 control it, (2) had knowledge of the wrongful practice or act, was recklessly indifferent to  
21 the truth or falsity of the misrepresentation, or was aware of a high probability of fraud  
22 along with an intentional avoidance of the truth. *Stefanchik*, 559 F.3d at 931; *FTC v.*  
23 *Garvey*, 383 F.3d 891, 900 (9th Cir. 2004); *Amy Travel Serv.*, 875 F.2d at 573. If the  
24 FTC proves direct participation in or auth

1 *Garvey*, 383 F.3d at 900. To hold an individual liable for monetary redress, the FTC  
2 must additionally establish knowledge. *FTC v. Affordable Media*, 179 F.3d 1228, 1234  
3 (9th Cir. 1999); *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir.  
4 1997). Proof that the defendant intended to deceive consumers or acted in bad faith is  
5 unnecessary to establish a section 5(a) violation. *FTC v. World Travel Vacation Brokers,*  
6 *Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (“An advertiser’s good faith does not immunize  
7 it from responsibility for its misrepresentations.” (citation and quotes omitted)); *Feil*, 285  
8 F.2d at 896 (“Whether good or bad faith exists is not material, if the Commission finds  
9 that there is likelihood to deceive.”)

### 10 11 **1. Participation and Authority to Control**

12  
13 Authority to control may be evidenced by “active involvement in business affairs  
14 and making of corporate policy, including assuming the duties of a corporate officer.”  
15 *Amy Travel Serv.*, 875 F.2d at 573. An individual’s position as a corporate officer and/or  
16 authority to sign documents on behalf of the corporate defendant is sufficient to show  
17 requisite control. *See Publishing Clearing House*, 104 F.3d at 1170 (holding that  
18 individual’s “assumption of the role of president of [the corporation] and her authority to  
19 sign documents on behalf of the corporation demonstrate that she had the requisite  
20 control over the corporation” for purposes of finding individual liability under section  
21 5(a)); *J.K. Publications*, 99 F. Supp. 2d at 1181–82 (holdi



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

7  
8 Mr. Gugliuzza also oversaw and regularly met with department heads, who were  
9 required to submit weekly reports to him. (Hill, 2/7/12, 132:9–133:24; Gugliuzza,  
10 2/23/12 Vol. I, 57:8–11; Exhs. 1124, 1130, 1354, 1356, 1368–71, 1292a, 1293, 1295.)  
11 Specifically, Mr. Gugliuzza had supervisory authority over Aaron Gravitz, who was  
12 responsible for marketing OnlineSupplier. (Hill, 2/7/12, 134:20–135:3; Gravitz, 2/2/12,  
13 122:3–11.) Mr. Gravitz reported directly to Mr. Gugliuzza and met with him daily. (Hill,  
14 2/7/12, 136:21–23, 137:13–19.) Mr. Gugliuzza also set marketing goals, budgets, and  
15 action items. (Exh. 1120.) Although Mr. Gugliuzza did not come up with the design or  
16 concept of OnlineSupplier’s webpages or the use of a negative option plan, he oversaw  
17 the company’s transition from telemarketing to online marketing in 2005. (Hill, 2/17/12,  
18 122:1–4; Daniel, 2/14/12, 28:15–23.) Mr. Hill testified that Mr. Gugliuzza made the  
19 decision to transition from telemarketing to internet marketing because the cost in  
20 generating orders was much higher for the former. (Gravitz, 2/1/12, 44:19–45:12.) Mr.  
21 Gugliuzza also became involved in reviewing OnlineSupplier’s sign-up pages and  
22 advertising materials. (*Id.* at 17:13–14.) Mr. Gugliuzza testified that he saw, reviewed,  
23 and approved various versions of the sign-up pages: “I know there are versions that I had  
24 reviewed and commented on and approved to some [degree].” (Gugliuzza, 2/21/12,  
25 179:12–20.) Mr. Gravitz testified that he submitted all marketing materials to Mr.  
26 Gugliuzza or Jeffrey Conrad and believed that he would be terminated if he ran an  
27 advertisement that was not approved by them. (Gravitz, 2/2/12, 48:25–49:17, 119:12–  
28 120:5; Exh. 108.) Mr. Gugliuzza specifically made decisions to increase the traffic to

1 OnlineSupplier’s landing pages, such as by allotting more money to media to drive  
2 consumers to landing pages. (Gravitz, 2/1/12, 64:11–23.) Mr. Gugliuzza also made the  
3 decision to incrementally increase the price of OnlineSupplier from \$29.95 to \$59.95 per  
4 month. (*Id.* at 66:24–67:8.) The evidence shows that Mr. Gugliuzza participated in and  
5 had authority to control the website marketing of OnlineSupplier as a consultant.

6  
7 **(ii) Role as President**  
8

9 Although Mr. Gugliuzza formally served as president of Commerce Planet from  
10 September 2006 to November 2007, the evidence shows that he had already been serving  
11 as a *de facto* executive of Commerce Planet since July 2005. As a practical matter, his  
12 responsibilities and duties did not materially change. (Hill, 2/7/12, 153:18–25.) Mr.  
13 Gugliuzza continued to have operational control over the company and its subsidiaries  
14 and had oversight over the department heads. (Foucar, 2/16/12, 137:19–138:6.) Mr.  
15 Gugliuzza averred that as president of Commerce Planet, the “success of [the company’s  
16 four subsidiaries] were important and ultimately rolled up to some degree and capacity to  
17 Commerce Planet, which [he] had responsibility for.” (Gugliuzza, 2/22/12, 52:5–13.)  
18 Mr. Gugliuzza continued to oversee Mr. Gravitz and to be involved in the marketing of  
19 OnlineSupplier, including reviewing and approving its sign-up pages. (Hill, 2/7/12,  
20 155:8–10, 155:11–20.) The evidence shows that Mr. Gugliuzza participated in and had  
21 the authority to control the website marketing of OnlineSupplier as the president of  
22 Commerce Planet.

23  
24 **2. Knowledge**  
25

26 The knowledge requirement is satisfied by establishing that “the individual had  
27 actual knowledge of the material misrepresentation, was recklessly indifferent to the truth  
28 or falsity of a misrepresentation, or had an awareness of a high probability of fraud along



1 with an intentional avoidance of truth.” *Garvey*, 383 F.3d at 900 (citing *Publishing*  
2 *Clearing House, Inc.*, 104 F.3d at 1171). “The degree of participation in business affairs  
3 is probative of knowledge.” *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1089  
4 (C.D. Cal. 1994); *see also Amy Travel Serv.*, 875 F.2d at 574; *Affordable Media*, 179  
5 F.3d at 1235 (“The extent of an individual’s involvement in a fraudulent scheme alone is  
6 sufficient to establish the requisite knowledge for personal restitutionary liability.”).

7  
8         The evidence demonstrates that, at the very least, Mr. Gugliuzza was recklessly  
9 indifferent to the misleading representations of OnlineSupplier on its landing and billing  
10 pages. From his 30-day assessment of the company in May 2005, Mr. Gugliuzza was  
11 able to acq



1 In his defense, Mr. Gugliuzza testified that it never once occurred to him during his  
2 entire tenure at Commerce Planet that people were being misled by the webpages.  
3 (Gugliuzza, 2/21/12, 182:16–21.) This is simply not credible in light of all the evidence  
4 of consumer confusion and Mr. Gugliuzza’s extensive role at the company from 2005 to  
5 2007. Mr. Gugliuzza also adamantly insisted that he did not attempt in any way to  
6 mislead consumers. (*Id.* at 100:23–24.) Commerce Planet’s other officers and  
7 employees also consistently maintained that they did not believe that the company was  
8 intending to deceive consumers or to perpetuate a fraudulent internet scheme. (*See, e.g.*,  
9 Seidel, 2/14/12, 114:6–14.) However, proof that the defendant intended to deceive  
10 consumers or acted in bad faith is unnecessary to establish a section 5(a) violation.  
11 *World Travel Vacation Brokers*, 861 F.2d at 1029; *Feil*, 285 F.2d at 896. Mr. Gugliuzza  
12 further testified that he believed OnlineSupplier’s webpages gave clear and conspicuous  
13 notice of the continuity program. (Gugliuzza, 2/23/12 Vol. I, 32:23–33:1, 33:7–13,  
14 35:13–23.) Commerce Planet’s other officers and employees concurred that they  
15 believed that the landing and billing pages gave clear notice of the terms of membership.  
16 (*See, e.g.*, Gravitz, 2/2/12, 36:23–37:3; Hill, 2/17/12, 88:2–6, 114:25–115:2; Seidel,  
17 2/14/12, 125:9–126:23.) The relevant test, however, as to whether OnlineSupplier’s  
18 webpages were misleading is from the perspective of a *reasonable consumer* confronted  
19 with the webpages, not that of the company’s officers or employees who already had  
20 inside knowledge of how OnlineSupplier was being marketed and sold.

21  
22 Finally, Mr. Gugliuzza argues that he did not know OnlineSupplier’s webpages  
23 were misleading because there is no specific statute, law, or industry standard banning  
24 the use of a negative option plan or specifying how a negative option plan should be  
25 disclosed. (*See* Def.’s Closing Brief, at 47–48; Def.’s Closing Rebuttal, at 6.) This  
26 argument is unpersuasive. Although there is no specific law or industry standard  
27 prohibiting the use of a negative option plan or a bright-line rule on how such a plan  
28 should be disclosed, the FTC’s Dot.Com Disclosures on internet advertising was

1 published in May 2000 and readily available to Commerce Planet before its sign-up  
2 pages were live. (Gravitz, 2/2/12, 118:19–119:5; Exh. 377.) The Dot.com Disclosures  
3 provided guidelines on how to make clear and conspicuous disclosures that are consistent  
4 with the “net impression” test and principles of usability identified by Ms. King. (Exh.  
5 377.) More importantly, the test under section 5(a) draws on well-established principles  
6 of advertising law and common sense. A bright-line rule on how precisely to disclose a  
7 negative option plan on a webpage is practically impossible, given the myriad variations  
8 of products, services, and webpages that are both extant and imaginable. Such a rule also  
9 calls for a rigid formula that undermines the very usefulness and flexibility of the law  
10 permitting it to be applied to a multitude of factual circumstances under sustained  
11 principles.

#### 12 13 **D. Advice of Counsel and Good Faith**

14  
15 In his Answer to the FAC, Mr. Gugliuzza asserted several affirmative defenses,  
16 including advice of counsel, reliance on professionals, and good faith. Mr. Gugliuzza  
17 alleged that the FTC’s claims are barred because he relied on the advice of counsel and  
18 professionals and acted in good faith. (Answer to FAC, at 8–9; *see also* Def.’s Trial  
19 Brief, at 3.) Specifically, Mr. Gugliuzza’s defense is that he relied in good-faith on the  
20 advice of Commerce Planet’s two in-house counsel, Jeffrey Conrad and Paul Huff, as to  
21 whether OnlineSupplier’s sign-up pages were compliant under the FTC Act. (*See* Def.’s  
22 Trial Brief, at 12.)

23  
24 Neither of these affirmative defenses has merit. As a matter of law, advice of  
25 counsel and good faith are not defenses to whether the defendant had the requisite  
26 knowledge under section 5(a). “ ‘[R]eliance on advice of counsel [is] not a valid defense  
27 on the question of knowledge’ required for individual liability.” *Cyberspace.com*, 453  
28 F.3d at 1202 (quoting *Amy Travel Serv.*, 875 F.2d at 575). This is because counsel



1 Gugliuzza testified that before Mr. Huff was hired, he was doing most of the legal review  
2 for the company. (Gugliuzza, 2/22/12, 119:5–14.) In effect, Mr. Gugliuzza acted as  
3 Commerce Planet’s *de facto* legal counsel.  
4

5 Similarly, Mr. Huff, who had a background in business and employment litigation,  
6 did not have any experience in FTC Act compliance or advertisting law before working at  
7 Commerce Planet. (Huff, 2/15/12, 47:15–48:5, 50:15–19.) Mr. Huff was hired as in-  
8 house by Commerce Planet to review contracts and for litigation, rather than for the  
9 purpose of reviewing OnlineSupplier’s sign-up pages. (*Id.* at 49:1–25, 50:20–25, 53:9–  
10 16.) Mr. Gugliuzza delegated some responsibilities to Mr. Huff, but Mr. Huff reported to  
11 Mr. Gugliuzza, who had authority to overrule him on legal matters. (Gravitz, 2/1/12,  
12 35:1–8; Gravitz, 2/2/12, 120:14–19; Huff, 2/15/12, 54:1–8.) Mr. Gravitz continued to  
13 seek legal advice from Mr. Gugliuzza, and both Mr. Huff and Mr. Gugliuzza gave their  
14 input to Mr. Gravitz on the marketing materials for OnlineSupplier. (Gravitz, 2/1/12,  
15 52:4–6; Gravitz, 2/2/12, 122:12–25; Exh. 2017.) Mr. Huff reviewed the sign-up pages  
16 for OnlineSupplier, (Exhs. 213, 214), but there was no procedure in place whereby Mr.  
17 Gravitz had to submit entire pages to Mr. Huff for approval before they could be placed  
18 live on the internet. (Huff, 2/15/12, 82:7–13.) Thus, although Mr. Gugliuzza at least  
19 shared the duties with Mr. Huff in reviewing OnlineSupplier’s marketing materials for  
20 legal compliance, Mr. Gugliuzza had superseding authority over Mr. Huff.  
21

22 Mr. Gugliuzza did not offer evidence showing that he relied on any specific  
23 recommendations or approvals from Mr. Huff regarding OnlineSupplier’s webpages.  
24 The defense makes much of the fact that in early 2007, Mr. Gugliuzza directed Mr. Huff  
25 to attend a conference in Washington D.C. on the possibility of new guidelines on  
26 acceptable marketing practices for negative options. (*Id.* at 54:2–65:17; Exh. 1193.)  
27 While Mr. Huff attended the conference and changes were subsequently implemented to  
28 OnlineSupplier’s landing and billing pages in February 2007, (Exh. 1198), the evidence



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1 against future violations. *Murphy*, 626 F.2d at 655; *FTC v. Magui Publishers, Inc.*, No.  
2 89-3818, 1991 U.S. Dist. LEXIS 20452, at \*44–\*45 (C.D. Cal. Mar. 28, 1991).

3  
4 The Court finds that a permanent injunction against Mr. Gugliuzza is appropriate  
5 under the circumstances to enjoin him from engaging in similar misleading and deceptive  
6 marketing of products and services. Here, Mr. Gugliuzza did not participate in an  
7 isolated, discrete incident of deceptive marketing, but engaged in sustained and  
8 continuous conduct that perpetuated the deceptive marketing of OnlineSupplier for over  
9 two years. Mr. Gugliuzza oversaw the migration from telemarketing to internet  
10 marketing of OnlineSupplier and served as a key leader and executive of the company.  
11 Mr. Gugliuzza supervised and had authority over Mr. Gravitz and the marketing of  
12 OnlineSupplier as well as over the company’s in-house counsel. Mr. Gugliuzza reviewed  
13 and approved the various iterations of OnlineSupplier’s sign-up pages and, at the very  
14 least, was recklessly indifferent to the fact that OnlineSupplier’s webpages were  
15 misleading, given the ample notice of consumer confusion regarding OnlineSupplier’s  
16 membership terms. Mr. Gugliuzza assessed the financial state of the company and  
17 helped turn Commerce Planet into a profitable business, mainly through the internet  
18 marketing and sale of OnlineSupplier from 2005 to 2007. Mr. Gugliuzza did not express  
19 any recognition of his culpability, but has firmly stood behind the sign-up pages and has  
20 obdurately insisted that at no time did he ever believe consumers were misled by  
21 OnlineSupplier’s billing and landing pages. (Gugliuzza, 2/21/12, 182:16–21; 2/22/12,  
22 152:3–8.) Instead, Mr. Gugliuzza placed blame on third-party marketers and the advice  
23 of in-house counsel—defenses that the Court has found thin in evidentiary support. All  
24 these factors weigh in favor of imposing a permanent injunction against Mr. Gugliuzza.

25  
26 In his Answer to the FAC, Mr. Gugliuzza asserted mootness as an affirmative  
27 defense. He alleged that “because the challenged conditions no longer exist, or have  
28 never existed . . . there is no likelihood of recurrence.” (Answer to FAC, at 9.) It is

1 uncontested that Mr. Gugliuzza is no longer involved in marketing OnlineSupplier at  
2 Commerce Planet since his departure from the company in 2007. However, as a general  
3 rule, mere voluntary cessation of the violative conduct does not render the case moot. *W.*  
4 *T. Grant Co.*, 345 U.S. at 632. If it did, the courts would be compelled to leave the  
5 defendant free to return to his old ways. *United States v. Concentrated Phosphate Export*  
6 *Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *Affordable Media*, 179 F.3d at 1238 (“The reason  
7 that the defendant’s conduct, in choosing to voluntarily cease some wrongdoing, is  
8 unlikely to moot the need for injunctive relief is that the defendant could simply begin the  
9 wrongful activity again.”) Nevertheless, a case may be moot if “the defendant can  
10 demonstrate that there is no reasonable expectation that the wrong will be repeated.” *W.*  
11 *T. Grant Co.*, 345 U.S. at 633 (citation and quotes omitted); *accord TRW, Inc. v. FTC*,  
12 647 F.2d 942, 953 (9th Cir. 1981). The burden of demonstrating mootness is “a heavy  
13 one.” *W. T. Grant Co.*, 345 U.S. at 633. “[I]t must be ‘absolutely clear that the allegedly  
14 wrongful behavior could not reasonably be expected to recur.’ ” *TRW, Inc.*, 647 F.2d at  
15 953 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203).

16  
17 Mr. Gugliuzza has not shown that it is “absolutely clear” that he will not repeat his  
18 wrongful activities. Since leaving Commerce Planet, Mr. Gugliuzza has founded Grow  
19 Commerce, a website servicer for businesses, and has worked for Oakley, a sunglass  
20 company, as an e-Commerce stra

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1           **B. Monetary Equitable Relief**

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3           Section 13(b) permits a panoply of equitable remedies, including monetary

4 equitable relief in the form of restitution and disgorgement, as well as miscellaneous

5 reliefs such as asset freezing, accounting, and discovery to aid in providing redress to

6 injured consumers. *Pantron I Corp.*, 33 F.3d at 1103 & n.34 (9th Cir. 1994); ~~TD.07TD-0~~ *Figgie In*

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1 392 F.3d 12, 31 (1st Cir. 2004). The purpose of disgorgement is not to redress consumer  
2 injuries but to deprive wrongdoers of ill-gotten gains. *Febre*, 128 F.3d at 537.<sup>15</sup>

3  
4 Irrespective of the measure used to calculate monetary equitable relief, courts  
5 apply a burden-shifting framework to determine the specific amount to award. *Direct*  
6 *Marketing Concepts*, 624 F.3d at 15. First, the FTC bears the initial burden of providing  
7 the district court with a reasonable approximation of the monetary relief to award. *Id.*;  
8 *Febre*, 128 F.3d at 535. A reasonable estimate, rather than an exact amount, is proper









1 n.12 (citation omitted); *Figgie Int'l*, 994 F.2d at 605 (“It is well established with regard to  
2 Section 13 of the FTC Act . . . that proof of individual reliance by each purchasing  
3 customer is not needed.”) This is because, unlike a private suit for fraud, “[s]ection 13  
4 serves a public purpose by authorizing the Commission to seek redress on behalf of  
5 injured consumers,” and “[r]equiring proof of subjective reliance by each individual  
6 consumer would thwart effective prosecutions of large consumer redress actions and  
7 frustrate the statutory goals of the section.” *Figgie Int'l, Inc.*, 994 F.2d at 605 (citation  
8 omitted). Rather, “[a] presumption of actual reliance arises once the Commission has  
9 proved that the defendant made material misrepresentations, that they were widely  
10 disseminated, and that consumers purchased the defendant’s product.” *Id.*; *see also FTC*  
11 *v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1011 (N.D. Cal. 2010) (“[I]t is sufficient for the  
12 FTC to prove that misrepresentations were widely disseminated (or impacted an  
13 overwhelming number of consumers) and caused actual consumer injury.”), *aff’d*, No.  
14 11-15330, slip op. (9th Cir. Mar. 30, 2012). Nor does the FTC need to prove that  
15 OnlineSupplier was essentially worthless to obtain restitution. *Figgie Int'l*, 994 F.2d at  
16 606. This is because the injury occurs from the seller’s misrepresentations that “tainted  
17 the customers’ purchasing decisions”—it is “[t]he fraud in the selling, not the value of the  
18 thing sold” that entitles consumers to the refund. *Id.*

19  
20 Here, the FTC has proven that the representations of OnlineSupplier on its  
21 webpages as a free auction kit were materially misleading; the representations were  
22 widely disseminated on the internet; and numerous consumers ordered OnlineSupplier.  
23 Once the FTC has met this burden, it must then “show that its calculations reasonably  
24 approximated the amount of customers’ net loss,” and then the burden shifts to the  
25 defendant to show those figures are inaccurate. *Febre*, 128 F.3d at 535. Mr. Gugliuzza  
26 attempted to challenge Dr. Becker’s figures by referencing Dr. Vranca’s user data.  
27 However, Mr. Gugliuzza does not challenge the validity of the actual data used by Dr.  
28 Becker in the RT3 database. Dr. Vranca himself relied on the data in the RT3 database

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

10  
11         Nevertheless, although the FTC need not show that all consumers were misled, not  
12 all consumers were in fact deceived by OnlineSupplier’s webpages. As discussed above  
13 in detail, the Court found that a reasonable consumer would likely be deceived by  
14 OnlineSupplier’s webpages. Jennifer King testified that “most” consumers would not  
15 have known they were purchasing a negative option or signing up for a continuity  
16 program. (King, 2/3/12, 114:9–21.) José Guardiola testified that at least 70% of calls to  
17 the customer call center—about 1,000 calls per week—comprised free-kit-only  
18 complaints. (Guardiola, 2/21/12, 8:11–9:6, 31:20–32:13.) The FTC acknowledged that  
19 the Court may adjust their estimate of consumer injury usiprise.0 T their estimate of gatiNlls pls

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1 group who were not confused, but understood the terms and cancelled within the 60 days  
2 after being charged once or twice, and (iii) people who felt they were confused were the  
3 most likely to obtain refunds and chargebacks. (Vranca, 2/28/12, 100:16–102:23.) Based  
4 on these assumptions, and figuring in the total amount of chargebacks and refunds, Dr.  
5 Vranca opined that the amount of consumer loss would be almost nonexistent. (*Id.*) The  
6 Court finds this estimate implausible. As a preliminary matter, Dr. Vranca’s assumptions  
7 are entirely unfounded and speculative. The evidence clearly establishes that there were  
8 confused consumers, such as Ms. Cirillo, who unwittingly purchased OnlineSupplier and  
9 were charged for the program for at least several months, but did not receive a full  
10 refund. Moreover, Dr. Vranca’s testimony is not competent evidence of consumer injury,  
11 as he was not retained to give such an estimate and there was no expert disclosure for  
12 such testimony. The only estimate of consumer injury the Court may properly consider,  
13 as Dr. Vranca acknowledged, is that of Dr. Becker. (*Id.* at 105:1–23, 106:13–15.) Mr.  
14 Gugliuzza’s estimate of zero injury is not reasonable or credible. Accordingly, Mr.  
15 Gugliuzza is liable for restitution in the amount of \$18.2 million.

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1 **V. CONCLUSION**

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

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13 DATED: June 22, 2012



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15 CORMAC J. CARNEY  
16 UNITED STATES DISTRICT JUDGE  
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