

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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)**

**ORDER DENYING DEFENDANT’S  
MOTION FOR A NEW TRIAL AND  
DEFERRING DECISION ON  
AMOUNT OF BOND**

**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. The FTC settled with all Defendants except for Mr. Gugliuzza,  
2 Commerce Planet's former president and consultant from July 2005 to November 2007.  
3 The FTC asserted two counts against Mr. Gugliuzza under the Federal Trade  
4 Commission Act ("FTCA"), 15 U.S.C. § 45(a). The Court conducted a sixteen-day  
5 bench trial that involved over 300 exhibits and 22 witnesses. The Court concluded that  
6 Mr. Gugliuzza engaged in deceptive and unfair practices in violation of FTCA section  
7 5(a). The Court imposed remedies under FTCA section 13(b), including an injunction  
8 and monetary equitable relief in the amount of \$18.2 million for his wrongful and  
9 knowing participation in the deceptive marketing of OnlineSupplier. The \$18.2 million  
10 reflected a conservative estimate of the harm to consumers. Mr. Gugliuzza now moves  
11 for a new trial, or in the alternative, a stay of judgment pending appeal. Before the Court  
12 are Mr. Gugliuzza's motions for a new trial and stay of judgment. For the following  
13 reasons, Mr. Gugliuzza's motion for a new trial is **DENIED**. The Court defers on the  
14 decision to set the amount of bond required to stay the judgment.<sup>1</sup>

## 15 16 **II. BACKGROUND**

17  
18 Commerce Planet marketed and sold OnlineSupplier, a webhosting service that  
19 purported to provide consumers an inexpensive platform to sell products online.  
20 Commerce Planet hired Mr. Gugliuzza to provide an assessment of the company and  
21 recommend ways to improve its profitability. (Dkt. No. 251 [Bench Memo.], at 3.) From  
22 July 2005 to November 2007, Mr. Gugliuzza served in various capacities as the  
23 company's consultant, president, *de facto* executive and in-house counsel, and director.  
24 (*Id.*) Mr. Gugliuzza helped transition the company from telemarketing to internet  
25 marketing of OnlineSupplier, whereby consumers could sign up for the program from its  
26

---

27  
28 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate  
for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15. Accordingly, the hearing  
set for September 17, 2012, at 1:30 p.m. is hereby vacated and off calendar.

1 website. (*Id.*) Internet sign-ups for OnlineSupplier dramatically improved the  
2 company's revenue. (*Id.*) At the same time, numerous consumers complained to the  
3 Better Business Bureau ("BBB"), the Attorney General, and to Commerce Planet  
4 regarding confusion as to the nature and cost of OnlineSupplier and demanded refunds.  
5 (*Id.*) OnlineSupplier was also subject to excessive credit card chargebacks. (*Id.*) In  
6 March 2008, the FTC served a civil investigative demand ("CID") on Commerce Planet,  
7 after which Commerce Planet changed its webpages for OnlineSupplier under the

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



1 changes did not cure the problems with the webpage. The disclosure remained at the  
2 very bottom of the page, below the fold, so that a reasonable consumer would not be  
3 likely to scroll to the bottom and see or read it. (*Id.*) Furthermore, the main information  
4 about the negative option plan was in the smallest text size on the page and densely  
5 packed with the other text, rendering it difficult to read. (*Id.*)

6  
7         There was substantial evidence presented at trial that Commerce Planet, through its  
8 customer service department CLG, received thousands of telephone complaints regarding  
9 OnlineSupplier and requests for refunds. (*Id.* at 35.) In addition to telephone complaints,  
10 thousands of written complaints regarding OnlineSupplier were submitted to the BBB,  
11 the Attorney General, and Commerce Planet via emails, mail, and website submissions.  
12 (*Id.*) The Court admitted a total of approximately 4,000 complaints consisting of over  
13 500 BBB complaints; 3,272 archived email complaints to Commerce Planet from July

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

1 would have been misled by OnlineSupplier's landing and billing pages. (*Id.* at 67.)  
2 Therefore, a conservative floor was that at least 50% of consumers who ordered  
3 OnlineSupplier were misled by the sign-up pages, resulting in a reduction of the FTC's  
4 original adjusted estimate by half. (*Id.*) Accordingly, the Court found \$18.2 million to  
5 be a reasonably conservative estimate of consumer injury, and the proper award to the  
6 FTC as restitution for consumer redress. (*Id.*) The Court also found that a permanent  
7 injunction against Mr. Gugliuzza to enjoin him from engaging in similar misleading and  
8 deceptive marking of products and services was warranted. (*Id.* at 57.) The Court was  
9 persuaded that there was a cognizable danger that Mr. Gugliuzza would engage in similar  
10 violative conduct in the future. (*Id.* at 59.)

### 11 12 **III. ANALYSIS**

#### 13 14 **A. Motion For a New Trial**

15  
16 Mr. Gugliuzza provides numerous arguments as to why he is entitled to a new trial.  
17 Specifically, he argues that: (1) the Court does not have the authority to grant monetary  
18 relief under FTCA section 13(b); (2) the amount awarded grossly exceeds what the FTC  
19 may recover as equitable restitution; (3) the award is grossly excessive punishment in  
20 violation of his due process rights; (4) the award will permit double recovery to the FTC;  
21 (5) the Court improperly allowed the FTC to amend its Complaint on June 27, 2011; (6)  
22 the Court improperly allowed the FTC to advance a new theory of damages in its Closing  
23 Brief; (7) the Court improperly excluded Mr. Gugliuzza's expert, Dr. Kenneth R. Deal;  
24 (8) the finding that Mr. Gugliuzza either knew or was re8re8re265z1d1.7167 i(th)]TJ1 0 TDo,p0

1           **1. Improper Monetary Award**

2  
3           Mr. Gugliuzza argues that the award of monetary relief is improper because FTCA  
4 section 13(b) only provides for injunctive relief. (Defendant’s Motion for New Trial  
5 [Def.’s Mot.], at 3.) However, that the plain language of the statute only allows for  
6 injunctive relief does not preclude the possibility of monetary relief. The Ninth Circuit  
7 has long held that monetary relief is available as ancillary relief to a permanent injunction  
8 action brought under section 13(b). *See F.T.C. v. Inc21.com Corp.*, 475 F. App’x 106,  
9 108 (9th Cir. 2012) (“Contrary to the defendants’ arguments, § 13(b) authorizes monetary  
10 relief.”) (citing *FTC v. Stefanchik*, 559 F.3d 924, 931–32 (9th Cir. 2009)); *F.T.C. v.*  
11 *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (“[T]he authority granted by section  
12 13(b) is not limited to the power to issue an injunction; rather, it includes the authority to  
13 grant any ancillary relief necessary to accomplish complete justice.”); *F.T.C. v. H. N.*  
14 *Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (“We hold that Congress, when it gave  
15 the district court authority to grant a permanent injunction against violations of any  
16 provisions of law enforced by the Commission, also gave the district court authority to  
17 grant any ancillary relief necessary to accomplish complete justice because it did not  
18 limit that traditional equitable power explicitly or by necessary and inescapable  
19 inference.”). Based on this authority, the Court properly awarded equitable monetary  
20 relief under FTCA section 13(b).

21  
22           **2. Exceeds Equitable Restitution**

23  
24           Mr. Gugliuzza argues that the award exceeds the amount the FTC may recover as  
25 equitable restitution because section 13(b) requires that the monetary award be limited to  
26 Mr. Gugliuzza’s improper gains. (Def.’s Mot. at 5–6.) The Court addressed this issue in  
27 detail in its September 8, 2011 denial of Mr. Gugliuzza’s motion for summary judgment.  
28 The Court stated:



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

1 through local phone bills for online services they never agreed to purchase. *Inc21.com*,  
2 475 F. App'x at 107–08. The district court found the defendants in violation of FTCA  
3 section 5, and imposed remedies under FTCA section 13(b). *Id.* at 108. The Ninth  
4 Circuit rejected the defendants' argument that section 13(b) limits restitution to the  
5 measure of gain by defendants, and held that it permits restitution measured by the loss to  
6 consumers. *Id.*

7  
8 The Ninth Circuit's holding in *Inc21.com* reflects the purpose of the FTCA, which  
9 is to protect consumers from economic injuries. *Stefanchik*, 559 F.3d at 931. Without  
10 the authority to award the full amount of consumer loss, it would be very difficult to  
11 obtain any restitution for consumers harmed by violations of the FTCA. In fact, Mr.  
12 Gugliuzza presented evidence that “no Online Supplier revenue can be traced to Mr.  
13 Gugliuzza or any other particular recipient,” even though he personally made \$3 million  
14 in compensation from Commerce Planet between 2006 and 2007. (Dkt. No. 152 at 16;  
15 Bench Memo. at 14.) The deceptive and unfair marketing tactics he authorized and  
16 implemented resulted in at least \$18.2 million in harm to consumers. If the FTCA did not  
17 allow the Court the power to award such restitution, Mr. Gugliuzza likely would not be  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1           **3. Excessive Punishment**

2  
3           Mr. Gugliuzza argues that the award is grossly excessive punishment in violation  
4 of his due process rights. (See Def.’s Mot. at 12.) The due process clause places limits  
5 on the award of punitive damages. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559  
6 (1996). Punitive damages, “which have been described as ‘quasi-criminal,’ operate as  
7 ‘private fines’ intended to punish the defendant and to deter future wrongdoing.” *Cooper*  
8 *Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citations  
9 omitted).

10  
11           However, the award against Mr. Gugliuzza is monetary equitable relief, and is in  
12 no way punitive. The Court was quite explicit that the award is “solely remedial in  
13 nature, and not a fine, penalty, punitive assessment, or forfeiture.” (Dkt. No. 255 at 10.)  
14 The award is based entirely on a “reasonably c

1 double recovery because it reached a settlement agreement with those same parties to  
2 suspend the judgment in exchange for \$522,000. (*Id.*)

3  
4 The Court's award does not permit double recovery by the FTC. The award  
5 against Mr. Gugliuzza reflects the amount of harm his violations caused to consumers.  
6 The amount the FTC will collect from him and other defendants is a separate issue. If, in  
7 the future, it appears that the FTC is close to recovering the full amount of harm to  
8 consumers, Mr. Gugliuzza may petition the Court for a motion to deem the judgment  
9 against him satisfied. This, of course, is unlikely. The \$19.7 million judgment against  
10 Commerce Planet, Mr. Gravitz, and Mr. Hill was suspended on the condition that they  
11 pay a total of \$522,000. This is a small fraction of the harm suffered by consumers.  
12 Moreover, as Mr. Gugliuzza has often argued,

1 Contrary to Mr. Gugliuzza's assertion, the proposed amendments are not an unfair  
2 expansion of his liability because it was clear throughout discovery that the FTC  
3 was investigating his conduct in connection with Commerce Planet starting in July  
4 2005. (*See, e.g.*, Reply Exs. 1, 2, 3, 9, 11.) Mr. Gugliuzza and his counsel  
5 participated in that discovery, so Mr. Gugliuzza has not shown any reason that he  
6 needs additional discovery in order to respond to the new allegations in the First  
7 Amended Complaint.

8  
9 (Dkt. No. 145 at 2–3.) The Court maintains that Mr. Gugliuzza was not unduly  
10 prejudiced by the FTC's amendment to its Complaint. Mr. Gugliuzza had prior notice  
11 that the period when he served as a consultant was at issue, and had plenty of time to  
12 conduct discovery and prepare a defense for that period. Moreover, one of the major  
13 issues at trial, whether the landing pages were deceptive, was unaffected by the  
14 amendment. The landing page during Mr. Gugliuzza's period as a consultant was also in  
15 place while he served as president. Therefore, he should have conducted discovery and  
16 prepared a defense on this issue, regardless of whether he faced liability for the  
17 consultancy period.

## 18 19 **6. Damages Argument**

20  
21 Mr. Gugliuzza argues that the FTC improperly presented a novel theory of  
22 damages in its Closing Brief. (Def.'s Mot. at 19.) He asserts that before the trial, the  
23 FTC represented that it would seek an award for the full amount of consumer loss;  
24 however, in its Closing Brief, it argued for a new theory of 50% of net consumer  
25 payments. (*Id.*) Additionally, he argues that the theory was improperly based on the  
26 testimony of Ms. King in violation of Federal Rule of Civil Procedure 26. (*Id.* at 19–21.)

27  
28 ///

1 First, the Court did not award damages in this case; it awarded equitable monetary  
2 relief based on the actual harm Mr. Gugliuzza caused to consumers. Regardless, in its  
3 closing brief, the FTC advanced a revised *calculation* of consumer loss, not a revised  
4 *theory* of consumer loss. Originally, it argued that the full amount of consumer loss was  
5 equal to the net consumer payments. Based on the evidence produced at trial, it realized  
6 that this amount was too high because not all consumers were deceived. Accordingly, it  
7 revised its calculation of consumer loss to one more reflective of the evidence.  
8 Specifically, it argued that the true consumer loss was roughly 50% of the net consumer  
9 payments. This was proper.

10  
11 Moreover, the FTC did not violate Federal Rule of Civil Procedure 26 by partially  
12 basing its revised calculation on Ms. King’s testimony. Ms. King is an expert in human-  
13 computer interaction, an area which she properly testified to. She did not provide  
14 testimony as to damages. The Court used her testimony to determine how many  
15 customers were actually deceived by Commerce Planet’s webpages. This figure was then  
16 used to determine a conservative estimate of what percentage of net consumer payments  
17 were attributable to that deceit. Based on Ms. King’s testimony of the number of  
18 deceived consumers, the Court held that a conservative estimate of consumer loss was  
19 50% of net consumer payments. (Dkt. No. 251 at 67.)

## 20 21 **7. Exclusion of Expert**

22  
23 Mr. Gugliuzza argues that the Court erroneously excluded his expert, Dr. Kenneth  
24 R. Deal, and that the exclusion was prejudicial. (Def.’s Mot. at 23–24.) The Court’s  
25 exclusion of Dr. Deal was not erroneous. His opinions were based upon his review of a  
26 consumer survey conducted by Kelton Research. The Court must make a “preliminary  
27 assessment of whether the reasoning or methodology underlying the testimony [of an  
28 expert] is scientifically valid and of whether that reasoning or methodology properly can



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21



1 Rule 62(d) is silent as to the amount of the supersedeas bond required to issue a  
2 stay. The predecessor to Rule 62(d) is Civil Rule 73(d), which provided that the bond  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

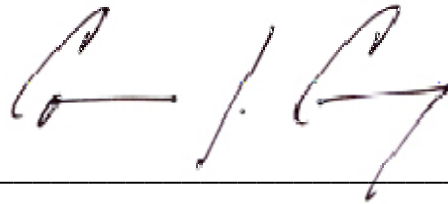
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 declaration, along with his May 2011 financial disclosure, to the FTC. The FTC will  
2 have seven (7) days following receipt of the documents to submit its position to the Court  
3 explaining what it believes is the proper bond amount.  
4

5 **III. CONCLUSION**  
6

7 For the foregoing reasons, Mr. Gugliuzza's motion for a new trial is **DENIED**.  
8 The FTC shall have seven (7) days upon receipt of Mr. Gugliuzza's *in camera*  
9 declaration and exhibit to submit its position to the Court on the proper bond amount.  
10

11 DATED: September 13, 2012



---

12  
13 CORMAC J. CARNEY  
14 UNITED STATES DISTRICT JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28