14-16485

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

INFUSION MEDIA, INC., et al.,
Defendants,

and

JONATHAN EBORN,
Defendant -Appellant.

On Appeal from the United States District Court
for the District of Nevada
No. 2:09-cv-01112-GMN-VCF
Hon. Gloria M. Navarro

ANSWERING BRIEF OF FEDERAL TRADE COMMISSION

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INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") charged Jonathan Eborn with perpetrating a deceptive work-at-home scheme. To settle these charges, Eborn stipulated to entry of a $29 million judgment. The parties and the district court agreed to suspend almost all of that judgment on the basis of sworn financial statements that Eborn provided purporting to show his inability to pay the full amount. The agreement provided that if these financial statements contained any material misrepresentations or omissions, Eborn would become liable for the entire judgment. Unfortunately, Eborn's sworn statements were in fact untrue.

Eborn's uncontested bank records, other documentary evidence, and sworn testimony from Eborn and other witnesses demonstrate that Eborn made numerous material misrepresentations and omissions on his sworn financial statements. These deceptions and omissions allowed Eborn to hide at least $369,547.80 from the FTC and his victims. Based on this evidence, the FTC asked the district court to terminate the suspended judgment and to state the remaining balance of the full amount.

After reviewing the evidence, the district court held that Eborn failed to disclose $61,519 in cash, his control over two companies, and at least $274,828.80 in income or assets he received or had earned from third parties. He also misrepresented the value of his real and personal property. Based on these

ISSUES PRESENTED FOR REVIEW

The FTC agreed to, and the district court approved, the 2010 Final Order premised on Eborn's submitting truthful, accurate, and complete financial statements. The 2010 Final Order suspended the vast majority of a $29 million monetary judgment against Eborn, but provided that suspension would end, and the full amount of judgment would be reinstated, if he made any material misrepresentation or omission in his Financial Statements. In fact, Eborn's financial statements were materially inaccurate and incomplete, and in the order on review the district court reinstated the full amount of the judgment against him. The questions presented are:

1) Whether the district court committed clear error when it found that Eborn misrepresented and omitted material information on his Financial Statements; and

2) Whether the district court's Order finding Eborn liable for the full monetary judgment, considered along with the factual record, complied with Fed. R. Civ. P. 52(a).

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refers to exhibits to the FTC's motion. "Def. Ex." refers to exhibits to defendant's opposition. "Tr." refers to page numbers in deposition transcripts included as exhibits to the FTC's motion. "ECF pg." refers to page numbers specified by the ECF header.

STATEMENT OF THE CASE

1. The Underlying Proceeding and Settlement

On June 22, 2009, the FTC filed a complaint against five corporate and four individual defendants (including Infusion Media and Eborn) charging each with deceiving consumers by marketing work-at-home kits on false premises. That deceit, the complaint alleged, violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a); Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693e(a); and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b). ER309-313 [D.1]. On June 24, 2009, the district court issued an amended Temporary Restraining Order ("TRO"), together with an asset freeze that prohibited the defendants from disposing of any of their assets. SER83-86 [D.14 § IV]. On September 10, 2009, the court entered a stipulated Preliminary Injunction ("PI") that maintained the asset freeze. SER74-77 [D.35 § IV].

On October 4, 2010, Eborn and his co-defendants agreed to the entry of a final order imposing injunctive relief and joint and several equitable monetary relief in the amount of $29,497,320.57. ER304; SER41 [D.74 § VI].[2] The order

[2] Eborn also agreed that all "facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any . . . subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money

suspended the overwhelming portion of the monetary judgment against Eborn, conditioned on his submission of truthful, accurate and complete financial statements to the Commission. 3ER-506, SER49-50 [D.74 § VIII]. The Final Order stated, in relevant part, that:

> [t]he Commission's agreement to and the Court's approval of this Order are expressly premised upon the truthfulness, accuracy, and completeness of Defendants' Financial Statements, all of which Defendants assert are truthful, accurate, and complete. Defendants and the Commission stipulate that Defendants' Financial Statements provide the basis for the monetary judgment in Section VI of this Order and that the Commission has relied on the truthfulness, accuracy, and completeness of Defendants' Financial Statements.
>
> ER305, SER49 [D.74 § VIII.A].

The Final Order also contained an enforcement mechanism provided, in relevant part, that:

> [i]f, upon motion by the Commission, the Court finds that any Defendant(s) has (1) materially misstated in Defendants' Financial Statements the value of any asset, (2) made any material misrepresentation or omitted material information concerning his or her financial condition by failing to disclose any asset that should have been disclosed in Defendants' Financial Statements, or (3) made any other material misstatement or omission in Defendants' Financial Statements, the Court shall terminate as 2.dH2 <</MCID 4 >>BDC -15.966 -1.145 T
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this Order . . .

ER30506, SER4950 [D.74 § VIII.B]. Under that agreement, Eborn escaped the significant liability he incurred by virtue of his deceptive actions. Instead, he received a suspended judgment that conditionally excused him from paying the overwhelming majority of the monetary relief – conditioned on his submission of accurate financial statements that documented his inability to pay the full judgment. Eborn submitted two financial statements to the Commission, one on July 13, 2009 ("the 2009 Financial Statement") and one on June 6, 2010 ("the 2010 Financial Statement") (collectively, "Financial Statements"). ER30-44 [D.134 (Ex. 2)]; ER69-83 [D.133-5 (Ex. 1)].

Through March 25, 2014, when the FTC asked the district court to reinstate the full judgment, defendants collectively had paid $2,525,394.07 to the FTC (somewhat more than $300,000 from Eborn personally), leaving an unsatisfied judgment of $26,971,926.50. ER5 [D.157 at 2].

2. Eborn's Material Misrepresentations and Omissions in his Financial Statements

A. Eborn Failed to Disclose Over $61,000 in Cash

In both his 2009 and 2010 Financial Statements, Eborn swore that he possessed only $42,400 in cash. ER34 [D.134 (Ex. 2)] item 12]; ER73 [D.133-5

though he admitted he never repaid these "loans," ER-112 [D.133-7 (Ex. 3) at Tr. 46-47], Eborn did not report them on his 2010 Financial Statement as he was required to do. ER-40 [D.134 (Ex. 2) item 26]. Further, he provided no substantiation that the deposits derived from loans, ER-112 [D.133-7 (Ex. 3) at Tr. 47-49]; ER-40 [D.134 (Ex. 3) item 26], and he could not remember from whom he allegedly borrowed any of this money. ER-107-08 [D.133-7 (Ex. 3) at Tr. 25-28, 31-32].[3] Eborn never asserted or provided evidence that the

disclosed employment, which can be accounted for separately in his bank statements. ER 171, 176, 177, 180, 188, 202, 206, 209, 216, 218, 226 [D.133-9 (Ex. 5) at 6, 11, 12, 15, 23, 40, 41, 44, 51, 53, 61], and because his sources of income at the time denied paying him in cash. ER 250 [D.133-11 (Ex. 6) at Tr. 100]; ER 265-66 [D.133-12 (Ex. 7) at Tr. 11-13]; ER 288 [D.133-13 (Ex. 8) at Tr. 1

i. Eborn was a Corporate Officer at Augusta Capital

Eborn reported that he was the

Augusta Capital and that he "primarily" did the work there. ER 141-142 [D.133-7 (Ex. 3) at Tr. 192-93]. Befitting that role, Augusta Capital paid him far more like a corporate officer than an employee. Eborn received nearly 45% of known Augusta Capital receipts. No other person or entity received more than 12.6%; Mannion, the purported owner, received less than 1%. ER 56-57, 60-66 [D.133-4 (Van Wazer Decl.) ¶¶ 8-10, Exhs. A, B].

ii. Eborn was a Corporate Officer at Link Media

On his 2010 Financial Statement, Eborn claimed to be an "Account Executive" with Link Media, a company that brokered customer leads. ER 32 [D.134 (Ex. 2) item 7;] ER 123 [D.133-7 (Ex. 3) at Tr. 94-95]. In fact, Eborn was a principal at that company. At his deposition, Eborn admitted he did not oversee any accounts at Link Media. Id. (claiming to be a part-time "consultant" with no "day-to-day responsibilities"). As with Augusta Capital, his corporate status was reflected by his significant compensation: Eborn received 30% of Link Media's profits. Clint Arnell, Link Media's putative owner, received just 10%. ER 124 [D.133-7 (Ex. 3) at Tr. 98-99]; ER 248 [D.133-11 (Ex. 6) at Tr. 44].

The compensation scheme reflected their actual roles at the company. Arnell simply engaged in the same functional role at Link Media as he had done as Eborn's employee at Infusion Media. Eborn again acted as principal, providing the necessary industry contacts and advising Arnell on how to develop business

ER120,

money was paid after the June 2010 Financial Statement, Eborn had already earned this income based on his work at Augusta Capital beginning in December 2009, and it therefore should have been disclosed in his Financial Statement. ER132 [D.134 (Ex. 2) item 7]; ER145 [D.133-7 (Ex. 3) at Tr. 214-215]. Eborn admitted that Augusta Capital paid out his accrued salary upon his request or when he needed the money, and that he did not request any payments until immediately after he signed the 2010 Statement. ER145-146 [D.133-7 (Ex. 3) at Tr. 214-215, 218-19]. Eborn also received a $5,000 check on May 18, 2010, from Pagani, an entity controlled by Mannion. He did not disclose that check, however, when he submitted his Financial Statement on June 6, 2010, but waited until four days after that submission to deposit the check. ER175 [D.133-13 (Ex. 8) at Tr. 23-24]; ER204 [D.133-9 (Ex. 5) at 39].

Instead of reporting the $140,500 payments from Augusta Capital, Eborn falsely reported earning $44,300 from Augusta Capital between January 1 and June 6, 2010 (the date he signed the 2010 Statement). ER132 [D.134 (Ex. 2) item 7.] He reported that income even though at that point he had not yet received any money from Augusta Capital. ER145 [D.133-7 (Ex. 3) at Tr. 214-16]. Eborn testified that he did not know how he "would have come up with that" amount or "what was in [his] mind when [he] wrote that" figure. ER145 [D.133-7 (Ex. 3) at Tr. 215-16].

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12 (Ex. 7) at Tr. 43-45, 104-107, 109-11]; ER297 [D.133-17 (Ex. 12) ¶ 18]; see generally SER31 [D.133-1 at ECF pg. 17 (Appendix: Chart 3)]. Eborn stated that he needed this money from PDR because he and his wife "had grown accustomed to a certain lifestyle and it took a while to start living within our means." ER137 [D.133-7 (Ex. 3) at Tr. 169].

Although Eborn characterized these transfers as "loans," the evidence reflects that they were not. To the contrary, the evidence showed that he received these payments upon request and without documentation. ER127-128, 131-134 [D.133-7 (Ex. 3) at Tr. 130-31, 134, 146, 150, 153-157]; ER261 [D.133-12 (Ex. 7) at Tr. 45-47]; ER297-298 [D.133-17 (Ex. 12) ¶ 20]. Eborn has never repaid any of the money advanced to him. ER298 [D.133-17 (Ex. 12) ¶ 21]; ER137-138 [D.133-7 (Ex. 3) at Tr. 172-73].

After all the money had been transferred to him, Eborn

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bogus and that the money is actually Eborn's that he parked with PDR.

Moreover, even in attempting to report these payments as a "loan," Eborn significantly underreported the amounts he received. He reported receipt of only $119,000 from PDR, not $251,700 that he actually received by June 2010 (or the $292,628.83 he had received by August 2010).

D. Eborn's Real and Personal Property

Eborn's Financial Statements inaccurately reflected the value of his real and personal property

i. Eborn Falsely Represented the Value of his Primary Residence

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Eborn on his Financial Statements, the FTC moved on March 25, 2014, to hold Eborn liable for the full amount of the unsatisfied monetary judgment of $26,971,926.50. ER45-53 [D.133, D.133-1]. The district court heard argument on May 27, 2014. D.154.

On June 4, 2014, the court issued an order and judgment holding Eborn liable for $26,971,926.50. ER4-6 [D.156, D.157]. The court first recognized that the 2010 Final Order "suspended a portion of the monetary judgment against" Eborn based on, among other things, his submission of "true, accurate, and complete financial statements." ER4 [D.157 at 1]. It next held that Eborn had "made material misrepresentations and omitted material information from his financial statements," including (1) "failing to report at least $65,519 in cash"; (2) "misrepresenting his control over" Augusta Capital and Link Media; (3) "failing to accurately report his income or his assets parked with" Augusta Capital and PDR, "thus hiding at least $274,828.80"; and (4) "misrepresenting his real and personal property, including his failure to accurately report his residence and his acquisition of over $33,100 in personal property." ER5 [D.157 at 2].

The court next recognized that the 2010 Final Order "states that if any Defendant made any material misrepresentations or omissions on their financial statements," "without further adjudication," the court "shall enter a modified judgment holding the offending Defendant liable to the Commission in the amount

SUMMARY OF ARGUMENT

The FTC agreed to excuse the bulk of a substantial monetary judgment against Eborn in favor of a lesser judgment geared toward Eborn's ability to pay. That agreement was expressly contingent, however, on the essential element of Eborn's honesty about his financial resources. If the FTC had known that Eborn had access to more money, it would have insisted that he bear a greater proportion of the judgment against him. Yet Eborn's bank records and other evidence show that immediately after disclosing his finances, he suddenly had access to substantial amounts of money that he did not disclose to the FTC.

The district court properly found that Eborn's Financial Statements misrepresented or omitted numerous significant material information, totaling at least $369,547.80 in assets and income that could have been used to satisfy the underlying judgment against him. The court's order applying the plain terms of the 2010 Final Order to hold Eborn liable for the remaining balance of the judgment should be affirmed. S0 Tdtr

Eborn’s challenge to the sufficiency of the di

(unpublished) (attached as SER 89-91), aff'd sub. nom. FTC v. Americaloe, Inc., 273 F. App'x 621 (9th Cir. 2008).

B. The District Court Properly Found that Eborn Made Material Misrepresentations and Omissions in His Financial Statements

entitled to rely on Eborn's own earlier testimony. Eborn has shown no clear error in the court's holding.

b) $38,319. Between September 2009 and November 2010, Eborn deposited an additional $38,319 in cash. See supra at 8 n.4. At his deposition, Eborn again claimed that he received this money as "loans" or "gifts," but again – notwithstanding the large amount of money involved – he could not identify the source of any of these funds. ER110-112 [D.133-7 (Ex. 3) at Tr. 37-38, 40-42, 45-47]; see also ER19 [D.147 (Def. Ex. 1)] ¶¶ 13-14]. He did not report any such "loans" on his 2010 Statement. See ER40 [D.134 (Ex. 2) item 26] (listing only PDR "loan"). He also did not list this cash as "income" on his 2010 Statement or provide any evidence that he received this money from his employment. That evidence firmly supports the district court's judgment that Eborn made material misrepresentations by failing to report the cash.

Eborn suggested that some of the $38,319 "might have come from" the disclosed cash. ER112 [D.133-7 (Ex. 3) at Tr. 45]; see also ER20-21 [D.147 (Ex. 1) ¶¶ 19-20] (stating he "believe[d] that some of" his cash deposits were part of the $42,400 he disclosed). But the district court was not required to credit that equivocal, uncorroborated, and self-serving

Eborn's newly minted claim that he did not believe he was required to list any loans and gifts received after the TRO was entered, Br. at 23 (citing ER20 [D.147 (Def. Ex. 1) ¶ 15]), runs directly counter to the affirmations in his two Financial Statements. There, he swore that he was providing true and complete information, including loans and all cash he currently possessed (whether or not that cash was obtained through a gift). ER34, 40, 44, 73, 79, 83 [D.133-5 (Ex. 1), D.134 (Ex. 2), items 12, 26, affirmation]. Eborn asserts that "loans and gifts … were not required to be reported," Br. 23, but his only support for that plainly incorrect contention is his own declaration – and it cannot be squared with the plain terms of the Financial Statement form.

Eborn's further contention that the district court failed to hold that his omission of cash holdings affected the FTC's decision to settle its case, Br. at 23, is inconsequential. The 2010 Final Order, agreed to by Eborn, expressly states that the FTC "has relied on the truthfulness, accuracy, and completeness of [Eborn's] Financial Statements" in agreeing to the order (as did the district court in approving the order). ER305 [D.74 § VIII.A]. This is particularly true where the amount of undisclosed cash is nearly one and a half times the cash he disclosed a

When the district court found that Eborn had "fail[ed] to report at least

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a. Eborn Misrepresented Principal Position at Augusta Capital

As shown above, *supra* at 10-11, Eborn falsely claimed on his Financial Statements that he was a "Retail Accounts Manager" at Augusta Capital. ER [illegible] [D.134 (Ex. 2) item 7.] In reality, he was no officer and principal there. Indeed, Augusta Capital had no retail accounts to manage. ER 283-84 [D.134 (Ex. 8) at Tr. 59-62]. Instead, Eborn's true position there is supported by direct documentary evidence, including a fo/8ocumtfoc8ocumrte2(d,)6(t)-9(i)9(s)12(se)12()12(d)8(ie)4(g)-E

Capital, received only a negligible amount. ER56-57, 60-66 [D.133-4 (Van Wazer Decl.) ¶¶ 8-10, Exs. A, B]. Eborn does not contest those figures, and the district court committed no clear error in basing its finding that he controlled the company in part on the significant compensation he received.

While Eborn has denied his officer or ownership role at Augusta Capital, Br. at 24-25; see also ER141 [D.133-7 (Ex. 3) at Tr. 189-192], ER21 [D.147 (Def. Ex. 1) ¶ 22], he acknowledged that others would have believed he was a principal or owner because he was "so actively involved" with the business. He also admitted that he "primarily" did the work. ER141-42 [D.133-7 (Ex. 3) at Tr. 192-93]. Other than his own self-serving testimony, Eborn relies on the bare testimony of Pace Mannion, the putative President of Augusta Capital. But Mannion admitted he "didn't set [Augusta Capital] up," did not know who did, and could not remember when it began operations. Further, Mannion's credibility is substantially undermined by his admission that he had not even read documents that he signed identifying Eborn as a corporate officer or that other documents he signed were "mistakes." ER275-76, 282-83 [D.133-13 (Ex. 8) at Tr. 23, 27, 55, 57]. In any event, Mannion acknowledged Eborn's central role in the firm,

[D.133-11 (Ex. 6) at Tr. 41].[13] Eborn offers no good explanation for his executive level compensation. The district court could properly conclude that Eborn earned an amount commensurate with his officer position at the company.

Eborn claims that the district court ignored contrary evidence that he was not a principal or owner at Link Media. Br. at 11, 23-24 (citing ER21 [D.147 (Def. Ex. 1) ¶ 23]; ER27 [D.147 (Def. Ex. 2) ¶¶ 4-5]. The district court could properly discount these conclusory declarations in light of Eborn's and Arnell's testimony evincing Eborn's central role at the firm. That testimony showed that Eborn was in charge and Arnell was his apprentice. Arnell worked for Eborn at Infusion Media as a lead broker and continued in that same role at Link Media. Eborn got Arnell started in the business, provided essential industry contacts, and taught Arnell industry practices and how to run the company successfully. ER123-124 [D.133-7 (Ex. 3) at Tr. 93, 97-98]; ER242-243, 246-247 [D.133-11 (Ex. 6) at Tr. 20-22, 36-40]. Because Eborn was paid and acted like a principal at Link Media, the district court committed no clear error in concluding that Eborn misrepresented his control over the company.

[13] McLain Miller, Infusion Media's other principal, also received 30% of the profits from Link Media. ER124 [D.133-7 (Ex. 3) at Tr. 99].

3. Eborn Failed to Disclose Significant Income He Earned from Augusta Capital and Payments

amounts. Indeed, even though he attempts once again to describe the money as a "loan," he acknowledges that he underreported the "loan" from PDR on his 2010 Statement. ER200 [.147 (Def. Ex. 1) ¶ 16].

compare SER 31 [D.133-1 at PDF pg. 17 (Appendix: Chart 3)] with ER 297 [D.133-17 (Ex. 12) ¶ 18].

The last two payments excluded from the note (totaling $40,928.83) are particularly telling. They were made in August 2010, just a few weeks before the note was signed. Those payments were made in very specific amounts down to the penny (without any corresponding bill payments by Eborn for similar specific amounts as reflected in his bank statements, ER 166-236 [D.133-9, D.133-10]), in contrast to all the other PDR payments which were made in whole dollar figures. Such activity is consistent with Eborn cashing out the remaining funds that PDR was holding for him. The money also was provided to Eborn just prior to the time that he was liquidating his assets before settling with the FTC. Finally, one of the payments was made with a post-dated check. ER 211 [D.133-9 (Ex. 5) at 46]. All of those facts are inconsistent with a loan to Eborn, but fully consistent with the return of parked funds.

Eborn is not saved by the bare testimony of Jeff Benson, PDR's principal, who claimed that these payments were loans. Br. at 28 (citing ER 297-99 [D.133-17 (Ex. 12) ¶¶ 17-28]).

representing both Eborn and Miller. SER 17-22 [D.133-23 (Ex. 17)]; SER 23-24 [D.133-24 (Ex. 18)]; ER 261 [D.133-12 (Ex. 7) at 45-46]; ER 130-131, 138 [D.133-7 (Ex. 3) at Tr. 144-48, 173]; SER 3 [D.133-1 at ECF pg. 17 (Appendix Chart 3)] Even if half of the identified $45,000 (or $22,500) from PDR to Eborn's and

misrepresentation. And if, as discussed above, the final two payments should have been disclosed, Eborn's underreporting of transfers from PDR balloons to $173,628.83. Adding the $173,628.83 in unreported payments from PDR to the $101,200 in unreported payments from Augusta Capital and Pagani, yields the $274,828.80 that the district court found that Eborn failed to accurately report. ER5 [D.157 at 2]. Eborn has failed to show a clear error in that finding.[16]

4. Eborn Materially Misrepresented the Value of His Real and Personal Property

Eborn also materially misrepresented the value of his real and personal property on his 2010 Statement.

[16] The FTC argued below Eborn also misrepresented his average monthly income on his Financial Statements. Eborn claimed just $9,100 in monthly income on his June 2010 Financial Statement. ER43 [D.134 (Ex. 2) item 32]. He argues that he overstated his income because his actual average monthly income was $7,916. Br. at 14 (citing ER21 [D.147 (Def. Ex. 1) ¶ 21]. In fact, if the average monthly payments that he received from PDR from January through June 2010 and the average monthly income he earned from Augusta Capital through June 2010 are included, Eborn should have reported an average monthly income of $42,483, more than four times the amount he disclosed. The district court, however, did not rule on that issue and the FTC did not seek a cross-appeal.

a. Eborn Misrepresented the Value of his Sandy, Utah Home

In 2010, Eborn reported on his Financial Statement that he lived in Sandy, Utah; in fact, he had moved to Draper, Utah without reporting the move. ER30, 37-38, 69, 76-77 [D.134 (Ex. 2), D.133-5 (Ex. 1) (items 1 & 20-22]; ER114-115, 126 [D.133-7 (Ex. 3) at Tr. 56-58, 126-28]; SER4-11 [D.133-19 (Ex. 14)]. The failure to report the move was significant because if Eborn had been living in the Sandy house, he would have been protected from collection efforts by the FTC by a $40,000 state law homestead exemption. If, as in fact the case, the Sandy house was not his primary residence, he would be entitled to only a $10,000 exemption from judgment. See Utah Stat. § 78B-5-503(2)(b)(2010). The FTC calculated Eborn's contribution to the settlement on the basis of all of his collectible assets, and by failing to report the change of address, Eborn effectively reduced the amount of his collectible assets by $30,000. Had the FTC known the Sandy house could have generated a larger judgment payment, it may have required Eborn to pay a larger amount toward the judgment.

Eborn asserts that he listed the Sandy, Utah home as his "current address" on the 2010 Financial Statement "because he did not o7 -2.12(2(he)4(c)(Th)-xae)4(p)8(e)

The primary personal residence homestead exemption primarily turns on whether a person "reside[s]" in a property, Utah Stat. § 78B-5-503(1)(c)(2010), and not whether he owns it. Eborn's admission that he was living in Draper, Utah at the time he submitted his 2010 Statement suffices by itself to show a violation of his disclosure obligations.[17]

Eborn's further argument that he was unaware of the homestead exemption, Br. at 29, misses the point. Even if that were true, Eborn's knowledge of the exemption is irrelevant. The 2010 Final Order authorizes restatement of the full judgment amount upon any material misrepresentation. The Order contains no scienter requirement.

Eborn is also wrong that his misrepresentation was immaterial because even the non-primary residence exemption would have protected Eborn's equity in the

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just as likely that the house value was closer (or more than) the $465,000 that Eborn claimed on his 2009 Statement. ER77 [D.-53 (Ex. 1) item 22]. Eborn had every incentive to underreport the home value, particularly on his 2010 Statement.

property especially given that he disclosed several items of personal property worth substantially less on his 2010 Statement. ER37 [D.134 (Ex. 2) item 20]

For the same reason, his claim that he had no duty to report the property (Br. at 30)

* * *

This case emphasizes the importance of defendants in FTC enforcement actions providing complete, accurate, and truthful financial information. Only if they do so can the agency assess accurately whether to settle charges and how much to settle them for. The district court properly relied upon the FTC's substantial evidence – uncontested bank statements, other documentary evidence, and sworn deposition testimony – showing that Eborn made numerous material misrepresentations and omissions on his Financial Statements. He represented the cash he possessed, the businesses he controlled, the income he earned, the payments he received, and the real and personal property he owned. In so doing, Eborn hid at least $369,547.80. This is more than Eborn actually turned over to the FTC in partial satisfaction of the judgment.

The missing information would have been directly relevant to how much Eborn could have contributed toward the settlement. If Eborn had disclosed all his assets, income and information explicitly requested on his Financial Statements, the FTC could have, and likely would have, required him to have contributed more than he did. These material misstatements and omissions – taken individually or collectively – were sufficient to terminate the suspended monetary judgment in the 2010 Final Order and justifies the district court's entry of the modified judgment against Eborn.

II. RULE 52(a)(1) DOES NOT APPLY TO THIS CASE, BUT IF IT DID, THE DISTRICT COURT'S ORDER COMPLIED WITH THE RULE BECAUSE THE ORDER PERMITS APPELLATE REVIEW

Eborn contends that the district court's order was insufficiently detailed to comply with Fed. R. Civ. P. 52(a)(1). Br. at 34-37. The claim lacks merit. If the district court was required to make any factual findings at all, its findings comply with Rule 52 because, in conjunction with the evidentiary record, they are sufficient for this Court to conduct appellate review.

As an initial matter, Rule 52(a)(1) does not apply in this case. That rule is limited to "an action tried on the facts without a jury." See, e.g., United States v. Smith, 443 F. App'x 194, 197 (7th Cir. 2011) ("Rule 52 . . . applies only to bench trials in civil cases."); see also Lont v. Aerospace Corp., 765 F.2d 1440, 1443-44 (9th Cir. 1985) (applying rule to bench trial); Swanson v. Levy, 509 F.2d 859, 860-61 (9th Cir. 1975) (same). This matter is not such an action. To the contrary, the district court resolved the FTC's post-judgment motion to terminate the suspend monetary judgment. Indeed, the FTC and Eborn agreed that the full judgment can be re-imposed "upon motion by the Commission" and "without further adjudication" by the district court. ER305-06 [D.74 at 1-3]. This matter therefore is not "an action tried on the facts."

The rule most applicable to this proceeding is Fed. R. Civ. P. 52(a)(3), which provides that a "court is not required to state findings or conclusions" in ruling on motions, including for summary judgment or to dismiss, "or, unless the rules provide otherwise, on any other motion." Under Rule 52(a)(3), this Court has frequently affirmed district court orders (and denied requests for remand) that did not provide any findings in resolving a wide range of motions, including motions for summary judgment and to dismiss. See, e.g., Ins. Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc., 201 F.3d 1111, 1116 (9th Cir. 2000) (affirming summary judgment limiting carrier's liability to $50 for theft of cargo worth $257,285.34); Underwager v. Channel 9 Australia, 69 F.3d 361, 366 n.4 (9th Cir. 1995) (affirming summary judgment against public figure plaintiff in defamation suit); see also Cusano v. Klein, 485 F. App'x 175, 178 (9th Cir. 2012) (no findings necessary to decide motion for reconsideration); Barton v. U.S. District Court for Cent. Dist. of California, 410 F.3d 1104, 1109 (9th Cir. 2005) (no findings necessary to decide motion to compel discovery); Societe de Conditionnement en Aluminum v. Hunter Eng'g Co., 655 F.2d 938, 942 (9th Cir. 1981) (no findings necessary to decide motion to dismiss for lack of subject matter jurisdiction); see generally Wright & Miller, 9C Fed. Prac. & Proc. Civ. § 2575 (3d ed. 2014); but see Holly D. v. Calif. Inst. of Tech., 339 F3d 1158, 1180-81 (9th Cir. 2003) (noting that where district court issued multiple inconsistent orders, the court must "stat[e]

disposition, a "terse" ruling is sufficient, even in a complex case. GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000).[30]

This Court has held that a failure to comply with Rule 52(a) does not

improper because the lower court had failed to make any record of that expert's role or his conclusions. Nor did the district court create a "record of the hearing or conference" at which the expert participated. 362 F.3d at 1212-1215. Given the presence of serious doubt about the validity of the district court's judgment and the completeness of the record, this Court found the district court's findings inadequate. The Court pointed out that where "the findings are supported by the record," remand is unnecessary. Id. at 1215 (citing Unt, 765 F.2d at 1445).

That is the case here. The entire record relied upon by the district court – exhibits submitted by the FTC and two by Eborn – is fully available for review. In

Finally, Eborn claims that the district court "did not define or apply a legal standard" of materiality. Br. at 19. The court had no duty to do so. "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent." Black's Law Dictionary (9th ed. 2009); see also Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1137 (9th Cir. 2000) (same) (citing Restatement (Second) of Contracts § 162 (1979)). Applying that definition to this case, omitted information is material if its disclosure would have been considered by the FTC "as having significantly altered the 'total mix' of information made available" to it in its settlement discussions with Eborn. See TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (discussing materiality standard under the Securities Exchange Act of 1934).[22]

The four categories of information misrepresented or omitted by Eborn are plainly material under that standard. The FTC agreed to conditionally excuse him

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court's order and record fully reflect the basis for its decision and the court did not fail to make any required legal findings.

[22] The 2010 Final Order defined "Material" to mean "likely to affect a person's choice of, or conduct regarding, goods or services." SER 36 [D.74 at 5]. This definition was plainly directed to the injunctive provisions in the order that prohibited defendants from making any "Material" misrepresentations about the products or services offered or from failing to disclose "Material" terms of an offer. See, e.g., SER 38-40 [D.74 §§ II, III]. However, it is entirely consistent with the materiality of representations made on financial statements to the FTC that would be "likely to affect" the FTC's decision regarding whether to settle an enforcement action and the terms of that settlement.

from paying the vast portion of the $29 million judgment as long as it was able to collect an amount of money geared to Eborn's ability to pay. Eborn's assets are obviously material to the Commission's determination of the appropriate amount. Indeed, the Commission agreed to a payment from Eborn of about $300,000, and

CERTIFICATE OF SERVICE

I certify that on February 9, 2015, I electronically filed the foregoing Brief of the Appellee Federal Trade Commission and Supplemental Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Case Files ("ECF") system. I certify further that all participants in this appeal are registered Appellate ECF system users and were served by the Appellate ECF system on February 9, 2015.

s/ Michael D. Bergman
MICHAEL D. BERGMAN