IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("FTC" or "Commission") agrees with appellant's statement of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the district court committed clear error in finding Gugliuzza individually liable for corporate violations, based on evidence demonstrating that Gugliuzza participated in and had authority to control the website marketing of OnlineSupplier and had sufficient knowledge that OnlineSupplier's webpages were misleading.
2. Whether Section 13(b) of the FTC Act authorized the district court to award relief ancillary to an injunction, including equitable monetary relief, in order to accomplish complete justice.
3. Whether the district court committed clear error in calculating the amount of equitable monetary relief.

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

The Commission brought this action against Commerce Planet, Inc., and several of its directors and officers, including appellant Charles Gugliuzza, to halt a deceptive Internet marketing scheme that, under the guise of offering a "free" information kit on how to sell products on eBay, enrolled consumers in a costly membership program without their knowledge or consent. The Commission alleged that defendants had engaged in deceptive and unfair business practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).[1] All defendants except for Gugliuzza settled with the Commission. Following a sixteen-day bench trial, the district court found Gugliuzza liable and imposed equitable remedies under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),[2] including a permanent injunction and monetary

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[1] Section 5 of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C § 45(a).

[2] Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

equitable relief, for Gugliuzza's wrongful and knowing participation in this scheme. Gugliuzza moved for a new trial, and the court denied that motion.

B. Facts and Proceedings Below

1. The OnlineSupplier Internet Marketing Scheme

Commerce Planet marketed OnlineSupplier, a membership program that purported to give consumers the ability to operate their own Internet-based businesses. Consumers who paid for membership in the program were given website building tools for creating an online store and access to a catalogue of products that they could purchase at a discount and then resell through the online auction site eBay. 3ER:624-25. Defendants marketed OnlineSupplier on a "negative option" basis: Consumers were offered a free trial period (ranging from 7 to 14 days) to use OnlineSupplier, and consumers who failed to cancel during that period were automatically enrolled in the program and charged a recurring monthly subscription fee (ranging over time from $29.95 to $59.95). 5ER:1170; SER204-05, 217-18.[3]

[3] Following Appellant's citation convention, items contained in

Initially, Commerce Planet sold OnlineSupplier through inbound telemarketing, using advertisements that directed interested consumers to call a toll-free number. 5ER:1167-68; SER149-50. The company required its telephone sales representatives to describe the OnlineSupplier membership program, including the recurring monthly charge, and to obtain the callers' express consent to the terms of the offer before taking their payment information. SER072, 122-23. Sales of OnlineSupplier were poor, however, and the company was losing money. SER071, 225.

In May 2005, Commerce Planet's board of directors retained Gugliuzza as a consultant to identify ways to turn the company around and soon thereafter hired him to implement his recommendations, giving Gugliuzza broad control over Commerce Planet's operations, including its marketing efforts. 4ER:805-06; SER121, 143-45, 186-89. Under Gugliuzza's management, the company transitioned from selling OnlineSupplier through telemarketing to selling OnlineSupplier

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Appellant's Excerpts of Record are cited as "[vol. #]ER:[page #]"; materials in the FTC's Supplemental Excerpts of Record are cited as "SER[page #]."

through the Internet. SER121. Commerce Planet's advertisements—placed on various websites and in emails sent by affiliate marketers—now directed consumers interested in becoming "eBay resellers" to an OnlineSupplier website, where transactions were completed online. 6ER:1259-60; 5ER:1171-73; SER190-91, 197-98.

But the OnlineSupplier website (both Version I created in 2005 and Version II used as of February 2007) misrepresented the nature of the product being offered to consumers.[4] The landing page of the website made no mention at all of a continuity program requiring the payment of a monthly subscription fee. Indeed, it did not even mention the name OnlineSupplier, but instead offered consumers a "FREE" "Online Auction Starter Kit" that would provide information on how to sell products on eBay. 5ER:68-69.[5] Consumers visiting the website (Exh. Tm70, fe0

[4] Version I prominently featured the eBay logo, suggesting affiliation with that company, but Commerce Pl5

kit were directed to fill in their address and—ostensibly to pay for shipping—their credit card information, and to click on a "Ship My Kit" button to consummate the transaction.[6]

Mention of the OnlineSupplier membership program, and the automatic charge of a monthly fee if consumers did not cancel within a trial period, was buried in a separate "Terms and Conditions" page (a hyperlink to which was placed low on the landing and billing pages) and in fine print at the bottom of the billing page. Even if consumers saw this information, however, these disclosures did not spell out that the mere act of ordering the "free kit" would activate the OnlineSupplier program trial subscription, obligating them to pay a monthly fee if not canceled. For example, the Terms and Conditions page stated that

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Version II (Exh. 1271, provided on CD by appellant) in its native format, open the file named "Signup v 2.0," and follow the same sequence: preview.php@lp=167&step=1.html (landing page), preview.php@lp=167&step=2.html (billing page), preview.php@lp=167&step=3.html (upsell page), and preview.php@lp=167&step=4.html (final page).

[6] Clicking on the "Ship My Kit" button, took consumers to an upsell page advertising various other products and services, also involving a free trial offer and a membership fee (step 3 of the sign-up process identified in note 5, *supra*). But these pages provided no further clarification of the nature of the "free kit" offer.

"Online Supplier . . . provides the www.onlinesupplier.com site and various related services" and that consumers "completing the registration process" would be bo

(summary of email complaints).[9] For example, one consumer emailed Commerce Planet that:

> You offer a free kit and then you charge 29.95 fee every month . . . and you say this in very small writing at the end so no one pays any attention to it and then you say you offer no refund. . . . This is very misleading and you need to be up front with people and tell them this is a membership, not tell them in small writing at the end of something you say is free.

SER338 (Exh. 1180) at row 1113. Another consumer wrote:

> This is notice for you to refund the $29.95 you billed me [I did not authorize it] and to inform you that your method of securing payment for shipping of free kit did not CLEARLY show the fact that a letter would have to be generated to cancel any further obligations. The [OnlineSupplier] web page does not show the required verbiage except below the fold of the displayed page which would not be read by most people. Your manner of advertising is deceptive and misleading and you should take immediate steps to CLEARLY indicate during the initial offer that after 14 days an automatic billing of 29.95 would occur."

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Id. at row 1114. Commerce Planet received a flood of other similar

> on this site, including the activation of any website authorizing you to debit my credit card account for that amount which originated from your company. . . . I suspect that this practice is illegal and violates more than one fair practice or advertising laws. . . .[12]

- When I payed [sic] the 1.95 to have the kit sent to me for free I did not realize I was being given a membership trial. I thought it was that I could do a free trial if I wanted to but not that it was automatically signing me up for one. That kind of stuff should be on the front page not at the bottom in small print or in the terms. . . . I will do all I can to get you to change the webpage so that it is not so deceiving.[13]

At the same time, the company's credit card chargeback rates—already high—spiked upwards and remained inordinately high throughout 2006 and 2007. SER081-82, 116-17, 177-81, 296-301, 366-68; 5ER:1139. Although these excessive chargeback rates cost Commerce Planet over one million dollars in merchant account processor fees (SER176),[14] the company decided that "changing

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[12] *Id*. at row 902.

[13] *Id*. at row 1660.

[14] Visa, Inc., the provider of one of the credit cards accepted for purchases of OnlineSupplier, assessed these fees against Commerce Planet's merchant banks, which in turn passed the fees along to Commerce Planet. SER124.

merchant providers was a faster and easier solution than altering business practices." SER367.[15]

The transition to online sales led to a dramatic turnaround in Commerce Planet's financial condition: From the end of 2005 to the end of 2006, the company's income surged from a loss of over $6.2 million to a profit of $8.7 million. SER083-84.

Few consumers who purchased online, however, actually used the memberships for which they were charged.[16] For example, only trivial numbers of consumers ordered discounted products for resale, a key component of the OnlineSupplier membership. SER086-87. Indeed, Commerce Planet's management never even monitored how many people set up websites or bought products from the company's warehouse. SER133-34. And although the company offered customer service support, very little of the customer service department's time

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[15] Excessive chargebacks for OnlineSupplier caused Commerce Planet's U.S. merchant bank to cut it off in mid-2007, forcing it to go overseas to take advantage of more lenient chargeback thresholds. SER125-28. But OnlineSupplier's chargeback rates continued to exceed even the more lenient international standards. SER129-31.

[16] By defendants' own accounting, fewer than 20% of consumers maintained their membership for longer than three months, and only 10% did so for longer than six months. SER045.

was devoted to helping customers actually use the product. The vast majority of its time, instead, was spent fielding consumer complaints. SER058, 60-61.

2. Gugliuzza's Participation in the Deceptive Marketing of OnlineSupplier

From the time he came on board, first as titular consultant and later as president, Gugliuzza wielded considerable power at Commerce Planet and was integrally involved in making decisions that affected the company's operations, including the marketing of OnlineSupplier. SER121, 143-45, 151-52. He oversaw and regularly met with the company's department heads, who were required to submit weekly reports to him. SER046, 67, 146-47, 202-03, 311, 373-74.

Specifically, Gugliuzza had supervisory authority over Aaron Gravitz, who was responsible for marketing OnlineSupplier. SER148-50, 189. Although Gugliuzza did not come up with the design or concept of OnlineSupplier's webpages, he oversaw the transition of the customer acquisition process from inbound telemarketing to online sales, and he reviewed and approved OnlineSupplier's "Wizard" control environment,

involved in the review of the landing page and advertising materials."); SER199 (Gugliuzza and Gravitz "were in the loop together on the advertising materials"); SER159 (Gugliuzza "execute[d] landing page approvals"); SER186-87, 124.

Gugliuzza's oversight also extended to Commerce Planet's customer service department. When customer complaints about OnlineSupplier's misleading "free kit" offer and demands for refunds began pouring in, the manager of customer services notified Gugliuzza of the problem, in written weekly reports and at weekly staff meetings. SER059-63. Other senior managers brought these customer complaints to Gugliuzza's attention as well, and they apprised him of the company's worsening problem with elevated chargeback rates. SER159-69, 209-10, 239-67, 285 (Summary, ¶3), 364. Gugliuzza also received weekly reports from the company's chief financial officer, which showed a steady increase in the number of chargebacks. SER118-19; SER315-16 ("[c]hargebacks continue to grow"); SER342 ("[c]hargebacks increased to a highest ever figure").

Gugliuzza was adamant, however, that no changes be made to the OnlineSupplier website that might reduce consumer sign-ups. The

company knew from testing of the web pages that "conversions," or sales, increased when the material terms of the offer, including the automatic charge of a membership fee if consumers did not cancel, were moved off the landing page and buried on the bottom of the billing page in small, hard-to-read type. SER193-96, 206-08, 215-16, 278 (Summary, ¶ 6); 5ER:1198.[17] Thus, for example, Gugliuzza rejected a proposal from Verifi (an electronic payment risk management service) to add a

instructed Gravitz to remove a key anti-fraud measure (Address Verification Service, or "AVS") from the OnlineSupplier billing page because it hurt sales: "AVS. Get it off . . . it is lowering conversions dramatically." SER308; *see* SER210, 214.

Gugliuzza similarly disregarded concerns raised by Commerce Planet's in-house counsel, Paul Huff. When Huff questioned whether OnlineSupplier's sign-up pages were legally compliant, Gugliuzza "put his hands over his ears" and refused to talk about it. SER109-11. And, because Gugliuzza was the "final authority" on legal review of the company's marketing materials (SER187-88; *see* SER155-56), the company continued to use webpages that promised consumers a "free kit" and then enrolled them in, and billed them for, membership in the OnlineSupplier program.

Even if consumers soon canceled, the company generally made money from the transaction. Consumers who complained often did not get full refunds, and many consumers did not seek refunds but simply absorbed the loss. *E.g.*, SER226-34; SER338 (Exh. 1180, provided on CD) at rows 652, 661, 674, 1069, 1083, 1087, 1103, 1129, 1231. All told, during Gugliuzza's tenure, the company took in $36.4 million (net of

refunds) from its website sales of OnlineSupplier. 1ER:97-99; SER085, 90-93.

Moreover, Gugliuzza had a personal motivation for preserving Commerce Planet's sales practices: His plan was to increase revenues to make the company a more attractive acquisition target—a transaction that would have earned him 5 percent of the sales amount. SER068-70, 272-76 (¶ 7: "[w]e were just trying to inflate the revenue so we could sell Commerce [Planet]").

3. The FTC's Investigation

In March 2008, the FTC served a civil investigative demand on Commerce Planet, prompting Commerce Planet to revise the OnlineSupplier website. SER112, 137-38, 219-24. This new version of the sign-up pages did not mention a free auction starter kit and significantly clarified the terms of membership on the landing and billing pages. SER341 (Exhibit 1272, provided on CD). After making these changes, the company incurred a severe reduction in sales of OnlineSupplier. SER139-40.

4. The Proceedings Below

The FTC filed suit against defendants on November 10, 2009. Shortly thereafter, the FTC settled with Commerce Planet and the other individual defendants, and the court entered final judgments for permanent injunction and equitable monetary relief in the amount of $19,730,000 against each of them. 1ER:113-96. The parties agreed to suspend the judgment for monetary relief under certain conditions, including the payment of lesser amounts. *Id*.

The FTC also engaged in settlement discussions with Gugliuzza, but the parties were unable to reach a resolution. On June 29, 2011, the FTC filed an amended complaint asserting two counts against Gugliuzza for (i) deceptive practices and (ii) unfair practices, both in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). 6ER:1241-97.

The district court conducted a sixteen-day bench trial that involved over 300 exhibits and 22 witnesses. On June 22, 2012, the court issued a 69-page memorandum of decision, in which it analyzed in extensive detail the arguments and evidence presented by the parties. 1ER:36-104. The court found, based on its own examination of the landing and billing pages of the OnlineSupplier website, that those

webpages were facially misleading because they created the net impression that OnlineSupplier was a free kit containing information on how to sell products online, when, in fact, consumers were subscribing to a continuity program with a monthly subscription fee. 1ER:53-60.

The court determined that other evidence corroborated its conclusion that the OnlineSupplier webpages were facially misleading. The court found persuasive the testimony of an FTC expert witness, who concluded, based on a usability inspection of the webpages, that most customers would not know that a negative option was present or that, after they finished the check-out process, they were enrolled in a continuity program. 1ER:60-65. Gugliuzza, the court noted, introduced no expert testimony rebutting those conclusions. 1ER:66. Although Gugliuzza argued that user data revealed that the majority of consumers signed up for OnlineSupplier knowing the terms of the negative option plan, the court found otherwise. 1ER:66-68.[19]

[19] For example, although Gugliuzza cited positive testimonials from 14 consumers, the district court found that the testimonials dated from early March 2005, when OnlineSupplier was sold through inbound

The court noted that, although not required to prove actual deception, the FTC had presented "abundant evidence that consumers were actually misled by OnlineSupplier's webpages." 1ER:69. The court cited the trial testimony of "two fairly sophisticated consumers," who described their experiences with the OnlineSupplier website, their belief that the website was merely offering a free information kit, and their inability to obtain refunds from defendants after discovering the unauthorized charges. *Id*. The court also pointed to the many thousands of customer complaints received by defendants and the testimony of Commerce Planet's customer service manager, who stated that approximately 70% of the consumer complaints consisted of "free-kit-only" complaints—*i.e.*, people who thought they were just paying $1.95 in shipping for a free kit, only to discover they were being charged a monthly fee. 1ER:70-72. The court found this to be "credible and highly probative evidence that the website marketing of OnlineSupplier was misleading and deceptive." 1ER:72. The court determined that the evidence of excessive chargeback rates for OnlineSupplier further

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telemarketing, not online. 1ER:67-68; *see* 5ER: 1146-58; SER135-36, 182-83.

OnlineSupplier was a deceptive practice in violation of Section 5(a) of the FTC Act. 1ER:77.

The court also held that the website marketing of OnlineSupplier was an unfair practice under Section 5(a) because: (1) consumers who

marketing of OnlineSupplier, 1ER:80-83, and "at the very least, . . . was recklessly indifferent to the misleading representations of OnlineSupplier on its landing and billing pages," 1ER:84. The court

provide guidelines on disclosures consistent with the "net impression" test. 1ER:86-87. The court likewise rejected Gugliuzza's defense of reliance on the advice of legal counsel on both legal and factual grounds. As a matter of law, the court observed, that defense is irrelevant to the issue of knowledge. In any event, as a matter of fact, Gugliuzza did not defer to the legal advice of Commerce Planet's in-house counsel. 1ER:87-91.

Turning to the remedy, the court concluded that a permanent injunction against Gugliuzza was appropriate to prevent him from engaging in similar misleading and deceptive marketing of products and services. 1ER:91-94. The court also determined that a monetary award of equitable restitution was warranted to redress consumer injury caused by defendants' deceptive and unfair practices. The Commission had sought an award of $36.4 million, which represented the net payments from all consumers who purchased OnlineSupplier during the relevant time period, less refunds and chargebacks. The court declined to award that amount on the ground that not all consumers were in fact deceived by OnlineSupplier's webpages. 1ER:101. The Court did find, however, that the evidence "strongly

supported" the conclusion that most reasonable consumers would have been misled by OnlineSupplier's landing and billing pages. 1ER:102. The court determined that a "conservative floor" was that at least 50% of consumers who ordered OnlineSupplier were misled by the sign-up pages. *Id*. Accordingly, the Court found $18.2 million to be a reasonably conservative estimate of consumer

that he participated in or had authority to control Commerce Planet's deceptive and unfair practices. Rather, he denies that he possessed the requisite knowledge to be held liable for equitable monetary relief. But there was overwhelming evidence, including many thousands of consumer complaints regularly brought to his attention, confirming that Gugliuzza in fact knew that OnlineSupplier's webpages were misleading. Part I.A.1. Indeed, he rejected measures designed to protect consumers precisely because he understood that such measures would substantially reduce sales.

This evidence of knowledge defeats Gugliuzza's argument that he relied in good faith on the advice of counsel. First, as this Court has held, reliance on advice of counsel is not a valid defense on the question of knowledge. In any event, Gugliuzza did not seek or follow counsel's advice as to whether OnlineSupplier's webpages were legally compliant. Part I.A.2.

There is also no merit to Gugliuzza's further argument that he lacked notice that OnlineSupplier's webpage disclosures would be found legally inadequate. Among other considerations, thousands of consumer

complaints made it abundantly clear to him that these disclosures were inadequate under any reasonable standard. Part I.B.

The district court also correctly excluded an expert witness through whom Gugliuzza sought to introduce evidence of a consumer survey. That expert had no role in designing or conducting the survey, and, for whatever reason, Gugliuzza declined to produce a witness who *could* testify about the methodological choices that went into conducting that survey. Part I.C.

2. The district court followed well-established circuit precedent in awarding monetary equitable relief against Gugliuzza. That precedent confirms that Section 13(b) authorizes a court to award not only injunctions, but *complete* equitable relief, including monetary relief. Part II.A. Here, the district court properly awarded equitable restitution measured by consumer losses, which equal the ill-gotten gains of Gugliuzza and the co-defendants with whom he shares joint and several liability. In contending otherwise, Gugliuzza relies on factually inapposite cases from other circuits. Part II.B. Circuit precedent likewise precludes Gugliuzza's argument that Section 19(b) of the FTC Act, which authorizes awards of *damages* (such as

consequential damages), somehow limits the *equitable* remedies available under Section 13(b). Part II.C. Gugliuzza also has no basis for complaining about the denial of a jury trial—both because he had no entitlement to one (given the equitable nature of this proceeding) and, in any event, because he never even asked for one. Part. II.D.

Finally, the district court correctly determined the amount of equitable monetary relief. As this Court and numerous other courts have recognized, the appropriate baseline for this calculation is defendants' sales to consumers, less refunds. Gugliuzza does not challenge the court's calculation of that amount: $36.4 million. The district court halved that amount, awarding equitable restitution in the amount of $18.2 million, which the court found to be a "conservative" estimate of consumer injury, and it properly assessed that amount against Gugliuzza on the basis of joint and several liability. The evidence provides ample foundation for that relief, and Gugliuzza's contrary arguments misstate the record. Part II.E.

ARGUMENT

I. The District Court Properly Held Gugliuzza Individually Liable for Corporate Violations.

A. Gugliuzza Had the Requisite Knowledge that OnlineSupplier's WebPages Were Misleading.

Injunctive relief against an individual defendant for corporate violations of the FTC Act is appropriate when the individual participated directly in the wrongful practice or had authority to control it. *Stefanchik*, 559 F.3d at 931; *Garvey*, 383 F.3d at 900; *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997). An individual also may be liable for *monetary* redress if he knew or should have known that the corporate defendant was engaged in deceptive or unfair practices, was recklessly indifferent to the truth or falsity of the corporate defendant's representations, or was aware of a high probability of deception and intentionally avoided the truth. *Stefanchik*, 559 F.3d at 931; *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *Garvey*, 383 F.3d at 900; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994). An individual's "degree of participation in business affairs is probative of knowledge." *FTC v. Affordable Media,*

LLC

that fact sufficient to support a monetary award against him for the resulting consumer injuries. That challenge, however, is untenable.

1. The Evidence Clearly Establishes Gugliuzza's Knowledge.

Gugliuzza claims that he had no idea that, where it appeared at all, the relevant negative option disclosure appeared only below the fold on computer monitors with standard screen resolutions. This claim is implausible, and even if it *were* plausible, it could not possibly cast doubt on the relevant issue: his knowledge of consumer deception.

The evidence of Gugliuzza's knowledge was overwhelming. To begin with, he does not dispute that he was regularly made aware that Commerce Planet had received a prodigious number of consumer complaints showing that consumers were, in fact, deceived *en masse* by OnlineSupplier's sign-up pages. In their complaints, consumers explained, time and again, that OnlineSupplier's webpages had led them to believe that they were merely ordering a free kit, not that they were subscribing to a continuity program on a negative option basis. And these complaints clearly showed that whatever disclosures there were, they failed—whether by virtue of placement, size, wording, or

other aspects of the webpages—to inform consumers of the true nature of the product being offered. Indeed, many of these consumers stated specifically that they had never seen any disclosure because the relevant text appeared below the fold or in an entirely separate "Terms and Conditions" page that seemingly had no bearing on the free kit offer. *See* pp. 7-10, *supra*. Gugliuzza simply disregarded these complaints. As the district court concluded, therefore, he was—at the very least—recklessly indifferent to the fact that OnlineSupplier's sign-up pages were misleading.

Even taken at face value, Gugliuzza's argument about computer monitor resolution is riddled with factual misstatements and, as the district court found, is "simply not credible." 1ER:86. It was uncontroverted below that the negative option disclosure on OnlineSupplier's sign-up pages, where it appeared at all,[22] appeared *below the fold*

used computers with an 800x600 resolution display, he surely was aware that the negative option disclosure appeared below the fold.[23] And it was uncontroverted (as Guglizza concedes) that the disclosure likewise appeared *below the fold* on higher-resolution 1024x768 monitor displays

FREE"; and "Where do we ship your FREE KIT?" But OnlineSupplier

staff meetings, which Gugliuzza attended about twice a month. SER059-60, 63. Guardiola further testified that a frequent topic of discussion at these meetings was whether to place more prominent disclosures on OnlineSupplier's sign-up pages. SER060. Gugliuzza responded not by seeking to reduce this immense consumer confusion, but by rejecting measures designed to avoid customer confusion and by chiding the customer service department for underperforming because the refund rate was so high. *Id*

In sum, Gugliuzza cannot credibly dispute that he was "aware of a high probability" that OnlineSupplier's sign-up pages were misleading or, at the very least, was "recklessly indifferent to the truth."[25] To the contrary, Gugliuzza was acutely aware of the resulting consumer confusion and hoped to profit from it. Indeed, he specifically rejected initiatives to reduce customer confusion (including sending post-transaction emails confirming the terms of the transaction) precisely because, as he observed, those initiatives hurt sales. *See* note 18, *supra*. Although Gugliuzza continues to advance alternative explanations for

valid defense on the question of knowledge' required for individual liability." *Cyberspace.com*, 453 F.3d at 1202 (quoting *Amy Travel Serv.*, 875 F.2d at 575).[26] But even if that defense were cognizable in this context, it would still be unavailable to Gugliuzza because a businessperson may not "continue to rely on [advice of counsel] in the face of compelling evidence of consumer confusion without being recklessly indifferent to the misleading nature of their ads, or being aware of a high probability of fraud but intentionally avoiding the truth." *FTC v. Grant Connect, LLC*, No. 2:09-CV-01349-PMP-RJJ, 2011 U.S. Dist. LEXIS 123792, at *58-59 (D. Nev. Oct. 25, 2011).[27]

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[26] Gugliuzza argues that this rule has no application in a case involving truthful but potentially misleading representations (*e.g.*, by virtue of text size and placement). Br. 28. In fact, however, *Cyberspace.com* involved exactly that scenario: Defendants mailed solicitations enclosing what appeared to be a rebate or refund check; the back of the check contained small-print disclosures revealing that cashing the check would constitute agreement to pay a monthly fee for internet access; and defendants received numerous complaints from consumers indicating that they had deposited the check without realizing they had contracted for Internet services. Consequently, the relevant inquiry was whether the solicitation was "likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." 453 F.3d at 1200.

[27] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 50 (2007), on which Gugliuzza relies (Br. 28), is inapposite. The statute at issue there (the

In any event, the principal counsel at issue here—in-house Commerce Planet attorney Paul Huff—testified at trial that Gugliuzza did not, in fact, rely on his advice in any relevant respect. He explained that Gugliuzza wanted him to opine on the legality of OnlineSupplier's webpages without letting him review the entire sign-up process. SER095-98. Huff told Gugliuzza:

> [I]t's not my opinion that everything is okay. There are some changes that I think we could make in my opinion. I haven't been asked to go through and look at everything and give a real legal opinion, and even to do that, I would have to get some background in it.

Id

further testified that, on one particular occasion, Gugliuzza flatly

Finally, this advice-of-counsel argument is particularly untenable for an independent reason as well: Gugliuzza—a lawyer—*took it upon himself* to conduct the legal review of the company's marketing materials. Indeed, Gugliuzza was considered the "primary legal reviewer" and "final authority" on matters relating to OnlineSupplier's sign-up pages. SER187-88; *see* SER076-78, 153-54, 159.

B. Gugliuzza Cannot Blame His Reckless Indifference to Consumer Deception on Vague Legal Standards.

Gugliuzza's claim of a due process violation is likewise baseless. Commerce Planet violated the FTC Act because it induced consumers to sign up for the OnlineSupplier program by portraying that program as something (a "free kit") other than what it really was (an ongoing series of automated payments for services that few customers used). Even if it did not initially occur to Gugliuzza that OnlineSupplier's sign-up pages conveyed this false impression, many thousands of consumer complaints told him this was so. Gugliuzza did not need bright-line rules regarding negative option disclosures to understand that he was misleading consumers in large numbers, and that this conduct would likely be deemed unlawful under FTC Act precedents. *Cf. FTC v. Nat'l*

publication provided sufficient guidance to defendants on how to ensure that material terms of website offers are disclosed in a clear and conspicuous manner. 1ER:86-87; *see* SER185-86. That guidance is entirely consistent, moreover, with the "net impression" standard for the interpretation of advertisements, which the Commission and courts have applied for decades on a case-by-case basis. *See, e.g.*, *Cyberspace.com*, 453 F.3d at 1200 ("[a] solicitation may be likely to mislead by virtue of the net impression it creates even though the si0601on may be likely to e words "Washing

C. The District Court Properly Exercised Its Discretion in Excluding Gugliuzza's Marketing Expert.

At trial, Gugliuzza sought to qualify an expert witness, Dr. Kenneth Deal, in order to introduce evidence about a consumer survey regarding OnlineSupplier's sign-up pages. The district court properly excluded that evidence because Dr. Deal had no role in either designing or implementing the survey; instead, the survey was conducted for litigation by another firm (Kelton Research). As a result, Dr. Deal would have been unable to testify about, let alone justify, the methodological choices that went into conducting the survey. *See* SER008-10. And he thus would have been unable to establish the basic predicate for admitting the survey: a showing that the survey was conducted by a qualified expert in accordance with accepted principles of survey research. *See*

The district court thus properly ruled that if Gugliuzza wanted Dr. Deal to testify about the survey, he would have to present a representative from Kelton Research as a testifying witness. *See* 1ER:15. But Gugliuzza, for whatever reason, would not make a representative from that firm available to testify at trial (or even allow the FTC to take a complete deposition of the firm's representative).[33] For that reason alone, the district court properly deemed Dr. Deal's testimony inadmissible.

In any event, Gugliuzza could not possibly have been prejudiced by the exclusion of this testimony because there was in fact abundant reason to doubt the utility of the Kelton survey for any issue in dispute. For example, the survey did not ask respondents what representations they believed were made by the images of the webpages; it did not test whether respondents actually saw any of the supposed disclosures in

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and justifying the discretionary choices that they made, his testimony would have rested on air").

[33] Gugliuzza did not, as he states in his brief (Br. 37), offer to present testimony from Kelton's CEO regarding the methodological choices that went into conducting the survey. In fact, the pretrial hearing that Gugliuzza cites shows that, when the FTC deposed Kelton's CEO, Gugliuzza's counsel repeatedly instructed him not to answer the FTC's questions concerning the design of the survey. 1ER:111; *see* SER023-34.

the first place (without their attention being drawn to them); and it did not test whether respondents would understand those disclosures had they not been specifically directed to review them carefully. *See* SER013-14. Thus, even if Dr. Deal had been allowed to testify about the Kelton survey, this survey provided no insight into what net impression these webpages conveyed to consumers, or whether Commerce Plant adequately disclosed on those websites the material terms and conditions of the offer.

II. The District Court's Award of Equitable Monetary Relief Was Correct.

The district court properly exercised its authority under Section 13(b) of the FTC Act in awarding monetary equitable relief against Gugliuzza. Gugliuzza argues both that Section 13(b) does not authorize monetary awards and that, even if such an award is authorized, it may not exceed the amount that a defendant personally received from an unlawful scheme. Circuit precedent forecloses both arguments. There is similarly no merit to Gugliuzza's further challenge to the district court's calculation of the amount of the award.

A. The District Court Has Authority to Enter Equitable Monetary Relief.

Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). The seven courts of appeals that have addressed this issue, including this Court, have uniformly held that when the FTC proves a defendant has violated Section 5(a) of the FTC Act, the district court has broad

District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The court's equitable powers include the power to order equitable monetary relief. *E.g.*, *Pantron I*, 33 F.3d at 1102 (discussing restitution). And when, as here, an agency has taken action in the public interest, "those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398.

These equitable powers include the authority to award certain forms of relief that traditionally may have been characterized as "legal" and thus "might be conferred by a court of law." *Id.* at 399.[34] This is *not* to say, however, that such equitable relief encompass *all* remedies available at law, such as consequential damages. As discussed in Part

[34] "[W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Porter*, 328 U.S. at 399; *accord Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960) ("[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes").

II.C below, the FTC may pursue such damages awards only through other mechanisms, such as Section 19.

B. Section 13(b) Authorizes an Award of Equitable Restitution Measured by Consumers' Loss.

This Court's precedent also forecloses Gugliuzza's argument that monetary relief under Section 13(b) is limited to his ill-gotten gains. It is settled law in this Circuit that Section 13(b) authorizes courts to order restitution for consumer loss measured by the amount consumers have paid a defendant—*i.e.* "to restore his victims to the status quo"

Gugliuzza points to two decisions from other courts of appeals holding that the measure of equitable monetary relief under Section 13(b) of the FTC Act should be the benefit unjustly received by defendants rather than the consumers' loss.

money unlawfully obtained by wrongdoers that are acting in concert and are thus subject to joint and several liability. In *Washington Data* the court made precisely that point, noting that when consumers purchase directly from the defendant, the distinction between consumer loss and unjust enrichment is "of no consequence." 704 F.3d at 1326.[38]

This case therefore does not present any hard questions about what relief is available when consumer harm exceeds the gain to wrongdoers because consumers made payments directly to Commerce Planet without the involvement of a middleman. The only question remaining is whether the fact that there were multiple wrongdoers limits the measure of monetary relief. It does not. Joint and several liability is based on the equitable principle that if one defendant cannot pay the full amount of the judgment, "the other defendants, rather than an innocent plaintiff, [are] responsible for the shortfall." *McDermott v.*

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[38] In *Washington Data*, the court did not, as Gugliuzza asserts (Br. 51) reverse an award based on consumer losses, but instead affirmed the district court's monetary award measured by defendants' net revenues—in effect, the same measure of equitable restitution awarded here by the district court. In fact, the FTC did not seek restitution for consumer redress in that case; it sought disgorgement of defendants' revenues from an unlawful scheme.

jointly and severally liable"). Here, the district court correctly concluded that Gugliuzza's knowing participation in the deceptive marketing of OnlineSupplier satisfies the standard for individual liability for monetary redress. *See* Part I, *supra*. The district court thus properly held Gugliuzza jointly and severally liable for the full amount of equitable restitution, regardless of how much profit he personally derived from the scheme.

Finally, Gugliuzza cites the discussion of "equitable tracing" in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002), to support his claim that equitable restitution under the FTC Act is limited to the particular funds paid to a defendant *personally* from an unlawful scheme. But that ERISA case casts no doubt on the contrary holding in *Stefanchik*, which this Court issued seven years later.

In *Great-West*, was a private action by an insurance company against the beneficiary of an employee benefit plan to enforce a contractual subrogation clause, brought pursuant to a provision of ERISA that authorizes private suits "to enjoin any act or practice which violates . . . the terms of the plan" or "to obtain other appropriate

equitable relief." 29 U.S.C. § 1132(a)(3). The Supreme Court concluded that the relief the plaintiff sought—"in essence, to impose personal liability on [the beneficiary] for a contractual obligation to pay money"—

because "the Commission has no need to rely on common law theories of unjust enrichment, be they equitable or legal." *Bronson Partners*, 654 F.3d at 371. Instead, where the basis of the claim is a violation of the FTC Act, "the district court needs to determine only that 'the nature of the underlying remedies sought' was historically equitable." *Id.* at 371-72 (quoting *Great-West*, 534 U.S. at 213-14); *cf. Porter*, 328 U.S. at 399 (stating, with regard to restitution, that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief").

C. Section 19 of the FTC Act Does Not Limit the Remedies Available Under Section 13(b).

Section 19(b) of the FTC Act authorizes monetary relief, including "the payment of damages," 15 U.S.C § 57b(b), after the Commission has brought an administrative action. Gugliuzza argues that this provision implicitly precludes equitable monetary relief under Section 13(b)—or, at least, implies that an award of consumer redress under Section 13(b) is necessarily precluded. Br. 47 n.8, 50-52. There is no plausible basis for such a conclusion. Sections 13(b) and 19 do not limit one another.

19(e) specifically provides that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy," and adds that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e). Those saving clauses squarely foreclose Gugliuzza's effort to use Section 19 to limit a court's authority under Section 13(b). *See FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (rejecting argument that Section 19 restricts remedial authority under Section 13(b)); *Bronson Partners,* 654 F.3d at 366-67 (same); *Security Rare Coin,* 931 F.2d at 1315 (same).[41]

D. Gugliuzza Was Not Entitled to a Jury Trial.

There is no merit to Gugliuzza's cursory argument that the proceeding below somehow deprived him of a right to a jury trial. First, the Seventh Amendment does not provide a right to a jury trial in a Section 13(b) case because, as numerous courts have recognized, such cases are fundamentally equitable in nature.[42] *See Verity*, 443 F.3d at 67; *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1280, 1281 (D. Minn. 1985); *see also FTC v. Think All Publishing, L.L.C.*, 564 F. Supp. 2d 663 (E.D. Tex. 2008) ("The cases have unanimously held that the Seventh Amendment does not provide a right to a trial by jury in actions brought under Section 13(b)."). In any event, Gugliuzza never asked for a jury trial in the first place, even though the Commission's complaint against him sought restitution in exactly the form that the court ultimately awarded. *See* 6ER:1256-57; Dkt. 20 at 8-10.

waived any Seventh Amendment argument. *In re America West Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) ("[a]bsent exceptional circumstances," this Court "generally will not consider arguments raised for the first time on appeal").

E. The District Court's Calculation of the Amount of Equitable Monetary Relief Was Proper.

Gugliuzza also fails to show that the district court abused its discretion by electing to award half the measure of consumer loss sought by the Commission. Indeed, on this record, the district court could justifiably have awarded monetary relief in an amount far greater than $18.2 million, which the court found to be a "conservative" estimate of consumer injury. 1ER:102.

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restitution. *See Stefanchik*, 559 F.3d at 931; *Figgie Int'l*, 994 F.2d at 606; *Gill*, 265 F.3d at 958; *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004) (*en banc*).

Gugliuzza bore the burden of showing that this amount was an inaccurate measure of consumer harm. *FTC v. QT, Inc.*, 512 F.3d 858, 864 (7th Cir. 2008); *Bronson Partners*, 654 F.3d at 359. But the only

evidence. That evidence included, first, the testimony of FTC expert Jennifer King that "most" consumers (the "lower bound" of which the district court reasoned was 50%, 1ER:101) would not have known they were purchasing a negative option or signing up for a continuity program. The court found that Ms. King was a well-qualified expert in the field of Human Computer Interaction and that her conclusions based on a "user-centered" analysis of OnlineSupplier's webpages were "on-point and persuasive." SER:60-61.[43] Gugliuzza's attacks on Ms. King's testimony, and the district court's reliance on it, are baseless. Moreover, the district court relied not only on Ms. King's testimony, but also on the testimony of José Guardiola that at least 70% of calls to Commerce Planet's customer call center were "free kit only" complaints. Gugliuzza cannot show that the district court's reliance on these witnesses' testimony was error, much less clear error.

Gugliuzza's remaining claims of error likewise lack merit. As already noted (*supra* note 25), any argument based on the mere fact

[43] The FTC did not offer Ms. King as a damages expert to "estimate the number of consumers who were harmed" (Br. 61), nor did she need to be one for the district court to rely on her testimony in reaching a reasonable approximation of consumer injury.

that a minority of consumers actually cancelled during the free trial period (Br. 62) is irrelevant to the calculation of monetary relief, since those consumers did not pay the fees on which restitution is based. The evidence flatly contradicts Gugliuzza's claim that half of consumers used computer screens that displayed the disclosures above the fold. *See* pp. 32-33, *supra*. And, as discussed above, Gugliuzza's arguments about Commerce Planet's undisputedly excessive chargeback rates are contravened by the record. *See* pp. 36-37, *supra*.[44] In any event, the district court did not, as Gugliuzza asserts, disregard Commerce Planet's post-transaction confirmation emails to consumers: the court found that these were inconsistently used and discontinued after a brief period of time. 1ER:44; SER057, 64-66, 294 (Summary, ¶ 1). Also, post-transaction emails say nothing about whether the webpages misled consumers into signing up for OnlineSupplier in the first place. SER175.

[44] We also have already explained why Dr. Deal's testimony, if admitted, would have provided no insight into the overall impression that OnlineSupplier's webpages conveyed to consumers, or whether Commerce Plant adequately disclosed on those webpages the material terms and conditions of the offer. *See* pp. 45-46, *supra*.

Moreover, the district court was no

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the district court.

Respectfully submitted,
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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiff-Appellee states that it is unaware of any related case.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 13,080 words, 32,

CERTIFICATE FOR BRIEF IN PAPER FORMAT

Case No. 12-57064

I, Michele Arington, certify that this brief is identical to the version submitted electronically on November 20, 2013.