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4 **UNITED STATES DISTRICT COURT**
5 **CENTRAL DISTRICT OF CALIFORNIA**
6 **SOUTHERN DIVISION**
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10 **FEDERAL TRADE**
11 **COMMISSION,**
12 **Plaintiff,**

13 **v.**

14 **COMMERCE PLANET, INC., a**
15 **corporation; and**
16 **MICHAEL HILL, CHARLES**
17 **GUGLIUZZA, and AARON**
18 **GRAVITZ, individually and as**
19 **officers of COMMERCE PLANET,**
20 **INC.,**

21
22
23 **Defendants.**
24

)
) **Case No. SACV-09-01324 CJC**
) **(RNBx)**
)

) **MODIFIED FINAL JUDGMENT**
) **AND ORDER FOR PERMANENT**
) **INJUNCTION AGAINST**
) **DEFENDANT CHARLES**
) **GUGLIUZZA**
)

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26 The Federal Trade Commission (“FTC” or “Commission”) brought this action for
27 injunctive and monetary equitable relief against Commerce Planet, Inc., (“Commerce
28 Planet”) and several of its directors and officers, including Michael Hill, Aaron Gravitz

1 and Charles Gugliuzza (collectively “Defendants”), for deceptive and unfair business
2 practices. The FTC settled with all Defendants except for Mr. Gugliuzza, Commerce
3 Planet’s former president and consultant from July 2005 to November 2007. In the
4 operative First Amended Complaint, the FTC asserted two counts against Mr. Gugliuzza
5 for (1) deceptive practices and (2) unfair practices in violation of section 5(a) of the
6 Federal Trade Commission Act (the “FTC Act” or “Act”), 15 U.S.C. § 45(a). The FTC
7 requested injunctive and monetary equitable relief against Mr. Gugliuzza under section
8 13(b) of the FTC Act, 15 U.S.C. § 53(b).

9
10 The Court conducted a sixteen-day bench trial between January 31, 2012 and
11 February 28, 2012. On June 22, 2012, the Court issued a Memorandum of Decision (Dkt.
12 No. 251), by which it issued its findings of fact and conclusions of law pursuant to
13 Federal Rule of Civil Procedure 52(a). After carefully reviewing all the evidence,
14 testimony, and arguments presented by the parties’ counsel, the Court concluded that the
15 FTC had proven by a preponderance of the evidence that Mr. Gugliuzza is individually
16 liable for the deceptive and unfair marketing of OnlineSupplier in violation of section
17 5(a) of the FTC Act. The Court found that a permanent injunction against Mr. Gugliuzza
18 is appropriate because there is a cognizable danger that he will repeat the deceptive and
19 unfair marketing tactics he authorized and implemented with OnlineSupplier. The Court
20 also found that monetary equitable relief against Mr. Gugliuzza is proper in the amount
21 of \$18.2 million as restitution for his wrongful and knowing participation in the deceptive
22 marketing of OnlineSupplier. The Court further directed the FTC to file a proposed
23 permanent injunction and a proposed judgment consistent with the Court’s decision
24 within ten (10) days of the Court’s memorandum. On July 2, 2012, the FTC filed a
25 timely proposed final judgment and order for permanent injunction against Defendant.
26 On July 9, 2012, Defendant filed objections to the proposed final judgment and order for
27 permanent injunction. The FTC submitted a reply to Defendant’s objections on July 13,
28 2012. Based upon the record established in this case, and for the reasons set forth in the
Court’s Memorandum of Decision, on July 17, 2012, the Court entered its Final

1 Judgment and Order for Permanent Injunction Against Defendant Charles Gugliuzza
2 (Dkt. No. 255).

3
4 On November 14, 2012, Defendant Charles Gugliuzza filed a notice of appeal
5 (Dkt. No. 287) of the Court’s Final Judgment and Order for Permanent Injunction with
6 the Ninth Circuit Court of Appeals. On March 3, 2016, the Ninth Circuit affirmed this
7 Court’s opinion in substantial part, but held that the award of restitution against
8 Defendant Gugliuzza, if awarded beyond unjust gains he personally received, should be
9 joint and several with the settling defendants. *FTC v. Commerce Planet, Inc.*, 815 F.3d
10 593 (9th Cir. 2016). The Ninth Circuit vacated the Final Judgment and Order and
11 remanded the matter to this Court to issue an amended the Final Judgment and Order in
12 accordance with the Ninth Circuit’s opinion.

13
14 Upon remand, plaintiff Federal Trade Commission moved for entry of a Modified
15 Final Judgment and Order for Permanent Injunction incorporating the mandate of the
16 Ninth Circuit. Good cause appearing to grant plaintiff’s motion, the Court hereby enters
17 this Modified Final Judgment and Order for Permanent Injunction.

18 DEFINITIONS

19 For purposes of this Order, the following definitions shall apply:

20 1. **“Billing information”** means any data that enables any person to access a
21 consumer’s account, including but not limited to a credit card, debit card, checking,
22 savings, share or similar account, as well as phone numbers or other utility account
23 information.

24 2. **“Clear and conspicuous” or “clearly and conspicuously”** means:

25 a. In textual communications (*e.g.*, printed publications or words
26 displayed on the screen of an electronic device), the disclosure shall be of a type
27 size and location sufficiently noticeable for an ordinary consumer to read and
28 comprehend the disclosure, in print that contrasts with the background on which it
appears;

1 b. In communication disseminated orally or through audible means (*e.g.*,
2 radio or streaming audio), the disclosure shall be delivered in a volume and
3 cadence sufficient for an ordinary consumer to hear and comprehend the
4 disclosure;

5 c. In communications disseminated through video means (*e.g.*, television
6 or streaming video), the disclosure shall be in writing in a form consistent with
7 Subsection A of this definition and shall appear on the screen for a duration
8 sufficient for an ordinary consumer to read and comprehend the disclosure;

9 d. In communications made through interactive media such as the
10 Internet, online services, and software:

11 i. The disclosure shall be “unavoidable,” meaning that a disclosure must
12 be presented in such a manner that consumers viewing an
13 advertisement will be exposed to the disclosure in the course of the
14 communication without having to take affirmative actions, such as
15 scrolling down a page, clicking on a link to other pages, activating a
16 pop-up window, or entering a search term to view the disclosure;

17 ii. The disclosure shall be presented in a form consistent with Subsection
18 A of this definition in addition to any audio or video presentation of it;
19 and

20 iii. “*In close proximity*” shall mean on the same webpage, online service
21 page, or other electronic display, and proximate to the triggering
22 representation, and shall not be accessed or displayed through
23 hyperlinks, pop-ups, interstitials, or other means;

24 e. In communications that contain both audio and visual portions, the
25 disclosure shall be presented simultaneously in both the audio and visual portions
26 of the communication. *Provided however*, that in any communication
27 disseminated solely through visual or audio means, the disclosure may be made
28 through the same means in which the communication is presented.

1 limited to through mailings, email, billings, credit card charges, and
2 checking account debits;

3 G. Any material restrictions, limitations, or conditions concerning the product
4 or service; or

5 H. Any material aspect of the performance, efficacy, nature, price, or central
6 characteristics of the product or service.

7
8 **III.**

9 **REQUIRED DISCLOSURES**

10 **IT IS FURTHER ORDERED** that Defendant, directly or through any sole
11 proprietorship, partnership, limited liability company, corporation, subsidiary, branch,
12 division, or other device, and his officers, agents, servants, employees, and attorneys, and
13 all other persons who are in active concert or participation with him who receive actual
14 notice of this Order by personal service or otherwise, in connection with the advertising,
15 promoting, offering for sale, or sale of any product or service, are hereby permanently
16 restrained and enjoined from:

17 A. Asking a consumer to pay money, submit consideration, or reveal billing
18 information, unless prior to asking the consumer to pay money, submit
19 consideration, or reveal billing information, they disclose, clearly and
20 conspicuously, and in close proximity to any request for billing information:

- 21 1. The name of the seller or provider of the product or service;
22 2. A description of the product or service;
23 3. The amount of each and every charge for the product or service;

24 and

25 4. All material restrictions, limitations, or conditions applicable to
26 the purchase, receipt, or use of the product or service that is the subject of the
27 offer;

28 B. For any transaction involving a service, within 10 days after the date of the
transaction, failing to send the consumer written confirmation of the

1 transaction, either by email or first class mail, clearly and conspicuously
2 identified as such in the email subject line or on the outside of the envelope;
3 such written confirmation shall include clear and conspicuous disclosure of all
4 the information required by Subsection A of this Section and of the procedures
5 by which the consumer can cancel or obtain a refund; and

6 C. For any transaction involving a product, failing to provide written
7 confirmation of the transaction with the first product shipment that includes all
8 of the information required by Subsection A of this Section and a clear and
9 conspicuous statement of the procedures by which the consumer can cancel or
10 obtain a refund.

11 IV.

12 EXPRESS INFORMED CONSENT

13 **IT IS FURTHER ORDERED** that Defendant, directly or through any sole
14 proprietorship, partnership, limited liability company, corporation, subsidiary, branch,
15 division, or other device, and his officers, agents, servants, employees, and attorneys, and
16 all other persons in active concert or participation with him who receive actual notice of
17 this Order by personal service or otherwise, in connection with the advertising,
18 promoting, offering for sale, or sale of any product or service, are hereby permanently
19 restrained and enjoined from directly or indirectly using billing information to obtain
20 payment in connection with the marketing of any product or service, without the express
21 informed consent of the consumer, which shall be include consent to be charged for the
22 product or service using a specified billing account, and the clear and conspicuous
23 disclosure of the information identified in the Section entitled "Required Disclosures" in
24 close proximity to the consumer's express consent to purchase such products or services.
25 In connection with communications made through interactive media such as the Internet,
26 online services, and software, the consumer must indicate such assent by clicking on a
27 button that is specifically labeled to convey such assent, or by taking substantially similar
28 affirmative action authorizing the transaction.

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2 **V.**

3 **PROHIBITIONS RELATING TO REFUNDS AND CANCELLATIONS**

4 **IT IS FURTHER ORDERED** that Defendant, directly or through any sole
5 proprietorship, partnership, limited liability company, corporation, subsidiary, branch,
6 division, or other device, and his officers, agents, servants, employees, and attorneys, and
7 all other persons in active concert or participation with him who receive actual notice of
8 this Order by personal service or otherwise, in connection with the advertising,
9 promoting, offering for sale, or sale of any product or service, are hereby permanently
10 restrained and enjoined:

- 11 A. From failing to disclose, clearly and conspicuously, before consumers are
12 asked to pay money, submit consideration, or reveal billing information, all
13 material terms and conditions of any cancellation or refund policy, including
14 but not limited to informing consumers that no cancellations or refunds are
15 permitted;
- 16 B. If a policy allowing consumers to cancel or obtain a refund has been
17 disclosed to the consumer, from failing to honor any request that complies with
18 such policy; and
- 19 C. From misrepresenting, or assisting others in misrepresenting, expressly or by
20 implication, the terms and conditions of any refund or cancellation policy or
21 policies, including but not limited to, that consumers who accept an offer can
22 easily cancel to avoid the assessment of a charge.

23 **VI.**

24 **MONETARY RELIEF**

25 **IT IS FURTHER ORDERED** that:

- 26 A. Judgment is hereby entered against Defendant in the amount of \$18,200,000
27 (hereafter the “restitution amount”), which represents the consumer injury
28

1 resulting from his violations of the Federal Trade Commission Act. This sum
2 shall become immediately due and payable upon entry of this judgment. This
3 judgment shall be joint and several with the settling defendants, and any funds
4 collected from the settling defendants shall be subtracted from the judgment
5 against Defendant Gugliuzza.

6 B. All funds paid to the Commission pursuant to this Section shall be deposited
7 into a fund administered by the Commission or its agents to be used for
8 equitable relief, including consumer restitution and any attendant expenses for
9 the administration of any restitution fund.

10 C. The judgment entered pursuant to this Section VI is equitable monetary
11 relief, solely remedial in nature, and not a fine, penalty, punitive assessment, or
12 forfeiture.

13 D. Proceedings instituted under this Section are in addition to, and not in lieu
14 of, any other civil or criminal remedies that may be provided by law, including
15 any other proceedings the Commission may initiate to enforce this Order.

16 VII.

17 ORDER PROVISION REGARDING CUSTOMER INFORMATION

18 **IT IS FURTHER ORDERED** that Defendant, and his officers, agents, servants,
19 employees, and attorneys, and all other persons in active concert or participation with any
20 of them who receive actual notice of this Order by personal service or otherwise, are
21 permanently restrained and enjoined from:

22 A. Disclosing, using, or benefitting from customer information, including the
23 name, address, telephone number, email address, social security number, other
24 identifying information, or any data that enables access to a customer's account
25 (including a credit card, bank account, or other financial account), of any person
26 which any Defendant obtained in connection with activities alleged in the First
27 Amended Complaint;

28 B. Failing to dispose of such customer information in all forms in their
possession, custody, or control within 30 days after entry of this Order.

1 Disposal shall be by means that protect against unauthorized access to the
2 customer information, such as by burning, pulverizing, or shredding any papers,
3 and by erasing or destroying any electronic media, to ensure that the customer
4 information cannot practicably be read or reconstructed; and

5 C. Section VII(B) relating to the disposal of customer information shall not
6 apply to Defendant's trial or appellate counsel if the information is retained for
7 the purpose of appeal, so long as (i) such information is not available to
8 Defendant or to any company by which Defendant is employed, and (ii) such
9 information is destroyed within 30 days upon the conclusion of any appeal or
10 subsequent proceedings in this matter.

11 *Provided, however,* that customer information need not be disposed of, and may
12 be disclosed, to the extent requested by a government agency or required by a
13 law, regulation, or court order.

14 VIII.

15 ORDER ACKNOWLEDGMENTS

16 **IT IS FURTHER ORDERED** that Defendant obtains acknowledgments of
17 receipt of this Order:

18 A. Defendant, within 7 days of entry of this Order, must submit to the
19 Commission an acknowledgment of receipt of this Order sworn under
20 penalty of perjury.

21 IX.

22 RECORDKEEPING

23 **IT IS FURTHER ORDERED** that Defendant must create certain records for 20
24 years after entry of the Order, and retain each such record for 5 years. Specifically,
25 Defendant, for any business in which Defendant, individually or collectively with any
26 other Defendants, is a majority owner or directly or indirectly controls, must maintain the
27 following records:
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- 1 A. Complaints and refund requests, whether received directly or indirectly,
2 such as through a third party, and any response; and
3 B. A copy of each advertisement or other marketing material.

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5 **X.**

6 **COMPLIANCE MONITORING**

7 **IT IS FURTHER ORDERED** that, for the purpose of monitoring Defendant's
8 compliance with this Order:

- 9 A. Defendant must permit representatives of the Commission to interview any
10 employee or other person affiliated with Defendant who has agreed to such an
11 interview. The person interviewed may have counsel present.
12 B. The Commission may use all other lawful means, including posing, through
13 its representatives, as consumers, suppliers, or other individuals or entities, to
14 Defendant or any individual or entity affiliated with Defendant, without the
15 necessity of identification or prior notice. Nothing in this Order limits the
16 Commission's lawful use of compulsory process, pursuant to Section 9 and 20
17 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

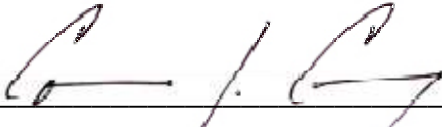
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19 **XI.**

20 **RETENTION OF JURISDICTION**

21 **IT IS FURTHER ORDERED** that this Court retains jurisdiction of this
22 matter for purposes of construction, modification, and enforcement of this Order.

23 **IT IS SO ORDERED,**

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26 DATED: August 25, 2016

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28 _____
CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE