

1 JONATHAN E. NUECHTERLEIN
 General Counsel
 2
 3 MICHELE ARINGTON (DC Bar No.434082)
 (admitted pro hac vice)
 4 MEGAN A. BARTLEY (VA Bar No. 81840)
 (admitted pro hac vice)
 5 KIMBERLY L. NELSON (VA Bar No. 47224)
 (admitted pro hac vice)
 6 FEDERAL TRADE COMMISSION
 600 Pennsylvania Ave., NW
 7 Washington, DC 20547 (Tel. (202) 326-3197 (fax (202) 326-3197)
 8 marington@ftc.gov
 mbartley@ftc.gov
 9 knelson@ftc.gov

10 C

11
 12 HRISTINA V. TUSAN, Bar No. 192203
 FEDERAL TRADE COMMISSION
 13 10877 Wilshire Boulevard, Suite 700
 Los Angeles, CA 90024
 14 (310) 8244343 (tel.)
 (310) 8244380 (fax)
 15 ctusan@ftc.gov

16 Attorneys for Appellee
 Federal Trade Commission

17 UNITED STATES DISTRICT COURT
 18 CENTRAL DISTRICT OF CALIFORNIA

<p>19 In re CHARLES FRANCIS 20 GUGLIUZZA II, 21 Debtor.</p>	<p>Case No. 8:14-cv-1529-CJC Bankr. Case No. 8:12-bk-2893-CB Adv. No. 8:13-ap-1078-CB</p>
<p>22 CHARLES FRANCIS GUGLIUZZA 23 II, 24 Appellant, 25 v. 26 FEDERAL TRADE COMMISSION, 27 Appellee 28</p>	<p>Chapter 7 BRIEF OF APPELLEE FEDERAL TRADE COMMISSION</p>

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1 advertisements directed consumers to an OnlineSupplier website, where
2 transactions were completed online. ER 1168

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4 But the OnlineSupplier sign-up pages, which Gugliuzza reviewed and
5 approved. ER 1173, 1207-08, 1213. misrepresented the nature of the product
6 being offered to consumers. The landing page of the website (both Version I
7 created in 2005 and Version II used as of February 2007) made no mention at all of
8 a continuity program requiring the payment of a monthly subscription fee, but
9 instead offered consumers a “FREE” “Online Auction Starter Kit” that would
10 provide information on how to sell products on eBay. Consumers wishing to
11 UHFHLYH WKL V NLW ZHUH GLUHFWHG WR ILOO LQ V
12 VKLSSLQJŠWKHLU FUHGLW FDUG LQIRUPDWLRQ DQ
13 consummate the transaction. Mention of the OnlineSupplier membership program,
14 and the automatic charge of a monthly fee if consumers did not cancel within a
15 trial period, was buried in a separate “Terms and Conditions” page (a hyperlink to
16 which was placed low on the landing and billing pages) and in fine print at the
17 bottom of the billing page. Even if consumers saw this information, however,
18 these disclosures did not make it clear that the mere act of ordering the “free kit”
19 would activate the OnlineSupplier program trial subscription, obligating them to
20 pay a monthly fee if not canceled. ER 1178-85.

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28 The company immediately began to receive complaints from

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1 OnlineSupplier for over two years.” 1ER17.

2 The Court found Gugliuzza’s denials of his knowledge of wrongdoing
3 “simply not credible in light of all the evidence of consumer confusion and Mr.
4 Gugliuzza’s extensive role at the company.” ER 1211. Nor was the Court
5 persuaded by Gugliuzza’s argument that he relied on the advice of Commerce
6 Planet’s in-house counsel concerning the legality of OnlineSupplier’s webpages.
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8 The Court observed that Gugliuzza’s argument was not
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1 U.S.C. §523(a)(2)(A). The Commission moved for summary judgment, arguing
2 that the issues previously decided by this Court against Gugliuzza establish all of
3 the elements for nondischargeability and Gugliuzza is collaterally estopped from
4 relitigating them. Initially, the bankruptcy court was not convinced and denied the
5 motion without prejudice. But after the Commission filed a subsequent motion for
6 summary judgment explaining in more detail the correspondence between this
7 Court's prior decision and the required elements for nondischargeability,
8 the bankruptcy court expressed having "a much better handle" on the issue, ER 2357
9 and granted summary judgment in favor of the Commission.

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14 The bankruptcy court found that this Court's determination of Gugliuzza's
15 liability and factual findings in the FTC enforcement case established all the
16 elements of nondischargeability under Section 523(a)(2)(A). Specifically, this
17 Court's prior decision established that (1) Gugliuzza made misrepresentations to
18 consumers by participating in the deceptive website marketing of Online Supplier;
19 (2) Gugliuzza had the requisite knowledge of falsity of the misleading
20 representations concerning Online Supplier because he was at least recklessly
21 indifferent to the misleading representations; (3) Gugliuzza had the requisite
22 fraudulent intent (a "logical" inference from this Court's findings concerning
23 Gugliuzza's reckless indifference and his rejection of improved disclosures); and
24 (4) Gugliuzza's deceptive conduct actually misled consumers, who reasonably
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I. THE BANKRUPTCY COURT CORRECTLY APPLIED COLLATERAL ESTOPPEL TO PRECLUDE GUGLIUZZA FROM RELITIGATING ISSUES DECIDED IN THE PRIOR LITIGATION .

A. The Bankruptcy Court Correctly Determined that this Court's Prior Decision Establishes

1 finding that he participated in making the representations at issue. ~~argues,~~
 2 however, that the Court's findings of ~~deceptiveness~~ have no preclusive effect here
 3 because (he claims) ~~misrepresentation~~ under the FTC Act is something less than
 4 a false representation under § 523(a)(2)(A). See Br. 22-23 (insinuating that the
 5 latter requires literal falsity⁹) But the case law does not support ~~this~~ contention.
 6
 7 Indeed the Ninth Circuit has made clear that, like deception under Section 5 of the
 8 FTC Act, the failure to disclose material facts can constitute a false representation
 9 under § 523(a)(2)(A) *Apte v. Japra* (In re *Apte*), 96 F.3d 1319, 1323-24 (9th Cir.
 10 1996) (finding that, in a business transaction, there is a ~~duty~~ "disclose facts
 11 basic to the transaction," citing RESTATEMENT (SECOND) OF TORTS § 551 (1976));
 12 *Citibank (South Dakota), N.A. v. Eashai* (In re *Eashai*), 87 F.3d 1082, 8088-
 13 (9th Cir. 1996) accord *Parks v. Angelus Block Co.*, (In re *Parks*), 571 Fed.
 14 Appx. 523 525 (9th Cir. 2014) Also, ~~a~~ another court in this Circuit has
 15 explained, "false pretense under § 523(a)(2)(A) "involves an implied
 16 misrepresentation or conduct" that ~~creates~~ or foste[s] a false impression."
 17 *Griffin v. Felton* (In re *Felton*), 197 B.R. 881, 889 (D. Cal. 1996). This Court
 18 addressed and resolved ~~this~~ ~~issue~~ in determining that the marketing scheme

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 25 ⁹ Gugliuzza's wrongly contends that the Commission's initial complaint alleged a
 26 "false representation" claim that it later "dropped" in its amended complaint
 27 against Gugliuzza. See Br. 24. Both the initial and amended complaint contained
 28 the same count for deceptive practices in violation of Section 5(a) of the FTC Act;
 the variation in the heading is immaterial. Compare 1ER 1249 (initial complaint)
 with 1ER 1294 (amended complaint).

1 Gugliuzza perpetrated violated the FTC Act because misled consumers about the
2 nature of the offer failing to disclose material terms. Gugliuzza litigated that issue
3 and its resolution was essential to the Court's judgment. Therefore,
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1 corporate violations hinges on the individual's knowledge.¹² This Court found that
2 Gugliuzza was liable for monetary relief because he knew or "at the very least...
3 was recklessly indifferent to the fact that Online Supplier's webpages were
4 misleading," 1 ER 1209 based on evidence showing, among other things that
5 Gugliuzza had "ample notice" of the many thousands of complaints demonstrating
6 consumer confusion but "
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1 In response, Gugliuzza wrongly contends that the Ninth Circuit recently
2 abrogated its longstanding precedent holding that reckless indifference suffices to
3 establish knowledge under § 523(a)(2)(A). Br. 2021 (citing *Retz v. Samsco* (In re
4 *Retz*), 606 F.3d 1189, 1199 (9 Cir. 2010)). In fact, *Retz* did not address the
5 knowledge element of § 523(a)(2)(A). Instead, it addressed the issue of
6 intent under the context of a different provision of the Bankruptcy Code. See
7 discussion at pp. 21-22 *infra*. Thus, *Retz* has no applicability here. It remains the
8 law of this Circuit that a debtor's reckless disregard for the truth satisfies the
9 knowledge requirement of § 523(a)(2)(A). See *Xiang v. Milne* (RN v67J P70.004 Tw 0.239

1 misrepresentation is Online Supplier's website marketing includes

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1 determining Gugliuzza's culpability for the deceptive marketing of OnlineSupplier

2 this Court necessarily resolved factual issues that are dispositive of his intent for 4i

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1 which provides that a debtor will be denied a discharge (for all creditors
2 not just that of a particular creditor) if he “knowingly and fraudulently, or in
3 connection with the case [,] made a false oath or account, including a “false
4 statement or omission in his bankruptcy schedules. Contrary to Gugliuzza’s
5 unsupported claim that these provisions are “functionally equivalent,” there are
6 notable distinctions between § 727(a)(4)(A) and § 523(a)(2)(A) that would warrant
7 distinct standards of proof of intent. For example, total bar to discharge is more
8 “extreme penalty than denial of discharge of an individual debtor. See *Ditto v.*
9 *McCurdy*, 510 F.3d 1070, 1079th (Cir. 2007); *Rosen v. Beznec*, 996 F.2d 1527,
10 1531 (3d Cir. 1993). The two provisions also have different purposes. Section
11 727(a)(4)(A) is meant “to insure that the trustee and creditors have accurate
12 information,” *Retz*, 606 F.3d at 1196, while § 523(a)(2)(A) protects victims of
13 fraud, see *Grogan*, 498 U.S. at 287 (finding it “unlikely that Congress, in
14 fashioning the standard of proof that governs the applicability of [§ 523]”
15 have favored the interest in giving perpetrators of fraud a fresh start over the
16 interest in protecting victims of fraud”¹⁸). Particularly under these conditions
17 would be improper to assume that the court in *Retz* intended sub silentio to

18¹⁸ In addition, the elements of each claim differ. For example, a debtor may be
denied a discharge under Section 727(a)(4)(A) without any proof of harm as a
result of the debtor’s false oath or account. *Retz*, 606 F.3d at 1197 (outlining
elements of claim).

1 abrogate Anastas¹⁹

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1 the particular circumstances. *Eashaj* 87 F.3d at 1090. Section 523(a)(2)(A) also
2 requires a finding that the creditor was damaged by relying on the debtor's
3 conduct. *Slyman*, 234 F.3d at 1085. The exception to discharge, moreover, applies
4 to all losses arising from fraud and is not limited to the amount received by the
5 debtor. *Coher*, 523 U.S. at 222

8 In the FTC's enforcement action, the Court found "abundant evidence that
9 consumers were actually misled" by the deceptive marketing of Online Supplier
10 and were harmed because they reasonably relied on the deceptive claims. 1 ER
11 1194. And the Court found that Gugliuzza's conduct caused at least \$18.2 million
12 in consumer injury 1 ER 122728. These findings establish the reliance and
13 damages elements of § 523(a)(2)(A). Determinations of consumer reliance and
14 monetary harm were essential to this Court's judgment, and Gugliuzza cannot
15 relitigate them in bankruptcy

19 * * *

21 In sum, the bankruptcy court correctly concluded that the issues presented
22 and resolved by this Court's in the FTC enforcement action satisfy all the
23 requirements to except the judgment from discharge under § 523(a)(2)(A), and
24 Gugliuzza is collaterally estopped from relitigating them.²²

27 ²² Contrary to Gugliuzza's suggestion (Br. 14), a court may construe a statutory
28 exception to discharge narrowly, yet find that the elements of the exception have
been met.

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II. GUGLIUZZA FAILS TO SHOW THERE ARE ANY GENUINE ISSUES OF DISPUTED FACT PRECLUDING SUMMARY JUDGMENT .

Gugliuzza also fails to support his argument that, absent application of collateral estoppel, there are genuine issues of material fact that prevent his debt from being summarily ruled nondischargeable. The bare assertion in his brief that there are factual disputes inviting this Court to read 1,000 pages or so of submissions to the bankruptcy court (see Br. 26) do not serve to advance a claim on appeal: “[A] bare assertion does not preserve a claim.” *Tarvin v. Santa Clara Valley Transp Agency* 261 F.3d 912, 919 (9th Cir. 2001) (

1 about the misleading “free kit” offer,²⁴ and the problems with high cancellation
2 rates, refund requests, and chargeback rates,²⁵ and (3) that he rejected a measure
3 designed to ensure that consumers read Online Suppliers’ terms and conditions,
4 because “[e]very barrier we place to the order process will decrease our conversion
5 rate.”²⁶ Nor did Gugliuzza have evidentiary support for his claim that he relied on
6 the advice of counsel regarding the website’s compliance with the FTC Act. For
7 its part, the Commission presented clear evidence that Commerce Planets’ in-
8 house counsel was never asked to review the entire sign-up process, and on the rare
9 occasion when his advice regarding compliance with advertising laws was
10 solicited,
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1 summary judgment with “unsupported conjecture or conclusory statements” or
2 “mere allegations or denials.” *Hernandez v. Spacelabs Med. Inc.*, 543 F.3d 1107,
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1 one for equitable monetary relief, this Court lacks jurisdiction to address this issue.
2 See *Natural Res. Def. Council, Inc. v. Sw. Marine Ind.*, 242 F.3d 1163, 1166 (9th
3 Cir. 2001). The fact that this issue is on appeal does not change the res judicata
4 effects of this Court's final judgment. See *Collins v. D.R. Horton, Inc.*, 505 F.3d
5 874, 882-82 (9th Cir. 2007); *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir.
6 1988) ("The established rule in the federal courts is that a final judgment retains all
7 of its res judicata consequences pending decision of the appeal") (quoting 18 C.
8 Wright, A. Miller & E. Cooper FEDERAL PRACTICE AND PROCEDURE § 4433, at
9 308 (1981)). And, because bankruptcy courts have jurisdiction over matters
10 referred by the district courts, 28 U.S.C. § 157, the bankruptcy court likewise does
11 not have jurisdiction to adjudicate the same legal issue raised in a pending
12 appeal.²⁹

26 ²⁹ Even if lack of jurisdiction were not a problem, this issue would be unripe for an
27 appeal because Gugliuzza has also objected to the Commission's claim in his
28 bankruptcy case on this ground, *see* 2413-23, and the bankruptcy court has
not yet ruled on this matter.

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CONCLUSION

For the reasons stated in AN04 Tc.T8(O)-4(N)]TJ 0 Tc 0 Tw ()Tj EMC /346 0 81.-,2>

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the CM/ECF system on January 16, 2015. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by electronic filing of this document.

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