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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: CHARLES FRANCIS GUGLIUZZA II, Debtor.	Case No. 8:18-cv-01590-CJC Bankr. Case No. 8:12-bk-22893-CB Adv. No. 8:13-ap-1078-CB Chapter 7
CHARLES FRANCIS GUGLIUZZA II, Appellant, v. FEDERAL TRADE COMMISSION, Appellee.	**BRIEF OF APPELLEE FEDERAL TRADE COMMISSION**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Gugliuzza succeeded in escaping through bankruptcy an $18.2 million judgment this Court issued against him for his violations of the FTC Act. Gugliuzza now wants the FTC to pay for its efforts to protect that judgment, seeking an award of $1.8 million in attorney's fees and $11,000 in costs. The bankruptcy court denied Gugliuzza's motion because the FTC's position in this litigation was substantially justified. That was a proper exercise of the court's discretion.

The Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, strictly circumscribes the conditions under which fees and costs may be awarded against the government. With respect to fees, Gugliuzza relied below on three EAJA provisions, two of which pertain to "prevailing parties" and one of which to a party that does not prevail. Although Gugliuzza frankly admits before this Court that he is a prevailing party, he has abandoned his arguments under the provisions allowing "prevailing party" fee awards.

Instead, he now relies exclusively on a provision that allows a *losing* party to qualify for a fee award where the winning government agency makes an "excessive demand." 28 U.S.C. § 2412(d)(1)(D). But that provision plainly does not apply to Gugliuzza because he is the *winning* party. The plain requirements of the statute also are not satisfied because the government did not obtain a judgment

marketing scheme called "OnlineSupplier." Their website promoted a free "Online Auction Starter Kit" that purportedly would show consumers how to turn a profit buying and selling products on auction websites. The website concealed, however, that consumers who ordered the kit were automatically enrolled in a "membership" plan that placed fees of up to $60 per month on their credit cards. *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1057 (C.D. Cal. 2012) ("Enforcement Ruling"). Gugliuzza exercised broad control over this deceptive scheme. *Id*. at 1057, 1059-61.

Over 500,000 consumers ordered the advertised "free" kit. *Id.* at 1054. Thousands of them later complained to Commerce Planet that they neither knew about nor agreed to an automatic billing program; they demanded that the company refund the unauthorized charges. Numerous consumers asked their credit card issuers to reverse these charges, and thousands submitted complaints to Better Business Bureaus and state and federal consumer protection agencies. *Id.* at 1073-75. Gugliuzza knew of these consumer complaints and the high rates of credit card charge reversals, but he personally rejected any effort to provide clearer disclosures, which would have reduced consumer sign-ups. *Id.* at 1059, 1072-76, 1082.

B. The FTC's $18.2 Million Judgment

In 2009, the FTC sued Gugliuzza, Commerce Planet, and two other officers

of the company for engaging in deceptive and unfair practices, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Gugliuzza's co-defendants settled by agreeing to the entry of stipulated injunctions and payment of monetary judgments. Gugliuzza chose to litigate. *Commerce Planet*, 878 F. Supp. 2d at 1062.

In 2012, after a sixteen-day bench trial, this Court found Gugliuzza individually liable for consumer harm and entered both an injunction and an $18.2 million equitable monetary judgment against him. Specifically, the Court held that (1) Gugliuzza made material misrepresentations on the website; (2) he "knew or at least was recklessly indifferent to the fact that" the OnlineSupplier website was misleading; (3) consumers actually and reasonably relied on Gugliuzza's misrepresentations; and (4) Gugliuzza's deceptive marketing was the direct cause of consumer injury in the amount of at least $18.2 million. *Id*. at 1048, 1080-83. The Court thus entered judgment against Gugliuzza in that amount for the FTC to use to provide restitution to victims of the fraud.

The Ninth Circuit affirmed on appeal. *FTC v. Commerce Planet, Inc.*, 642 F. App'x 680 (9th Cir. 2016) (affirming liability finding); *FTC v. Commerce Planet, Inc*., 815 F.3d 593 (9th Cir. 2016) (affirming restitution award).[1]

[1] The court of appeals remanded for verification of the basis for Gugliuzza's individual liability for the monetary judgment. *Commerce Planet*, 815 F.3d. at 602-03. On remand, this Court clarified that Gugliuzza's liability to pay restitution was joint and several with that of his co-defendants, and that his liability must be offset

C.

fraud exception and that the holdings in the Enforcement Ruling were necessary in determining Gugliuzza's liability. Doc. 80 at 3-7 [SER003-007].[2] Under the doctrine of collateral estoppel, the court held, the parties had already litigated each element of the fraud exception, and Gugliuzza therefore was precluded from litigating them again.

On appeal, this Court affirmed the bankruptcy court's holding that the Enforcement Ruling satisfied four of the five elements of the fraud exception. *FTC v. Gugliuzza* (*In re Gugliuzza*), 527 B.R. 370, 375-78 (Bankr. C.D. Cal. 2015).[3] In particular, the Court found that the Enforcement Ruling precluded relitigation in the bankruptcy case on the questions whether: (a) Gugliuzza engaged in "misrepresentation, fraudulent omission or deceptive conduct" (*id*. at 375); (b) he knew his statements were false or deceptive (*id.* at 375-76); (c) consumers "justifiably relied" on them (*id.* at 377-78); and (d) Gugliuzza's misconduct was the "proximate cause" of the consumer losses (*id.* at 378). The Court reversed the decision, however, on the remaining factor—intent to deceive—and remanded to the bankruptcy court for additional findings. It recognized that "intent under

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[2] "Doc." refers to the bankruptcy court's docket number. "SER" refers to the FTC's supplemental excerpts of record, filed herewith. "ER" refers to appellant's excerpts of record.

[3] Gugliuzza appealed, but the Ninth Circuit dismissed the case for lack of jurisdiction, holding that the judgment was not final for purposes of appeal, given the remand to the bankruptcy court for further fact-finding. *Gugliuzza v. FTC* (*In re Gugliuzza*), 852 F.3d 884 (9th Cir. 2017).

notification emails discontinued). The FTC also presented evidence to the bankruptcy court that Gugliuzza was repeatedly informed of the alarming numbers of consumer complaints about the deceptive "free kit" offer and the surging credit card chargeback rates—but he largely ignored these red flags. *See* Guardiola Decl. ¶¶ 21, 23, 26-27, 29, 31 [SER054-056]; Seidel Decl. ¶¶ 14-16, 19-21 [SER046-048]; Foucar Decl. ¶¶ 15-19 [SER041-042].

The FTC's evidence also countered Gugliuzza's argument that he relied on the advice of counsel, who allegedly approved the deceptive advertising at issue. For instance, one of these attorneys testified that, contrary to Gugliuzza's claim, he was never asked to review the entire sign-up process for OnlineSupplier to determine if it complied with the FTC Act. Huff Decl. ¶¶ 16, 34 [SER030, 035]. When the attorney told Gugliuzza that he would need to see the OnlineSupplier sign-up page in context in order to assess whether the disclosures were adequate, Gugliuzza ignored his request. *Id*. ¶ 25 [SER032]. The attorney concluded that "Gugliuzza did not want my honest assessment of the legal exposure to the company regarding compliance with relevant laws and regulations." *Id*. ¶ 19 [SER031].

In accordance with the bankruptcy court's procedures, the FTC presented its direct testimony in written form. The court then heard oral cross-examination testimony on March 21, March 22, and April 17, 2018. The court also heard oral

however, is subject to *de novo* review." *Id*.

ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY DECLINED TO AWARD A

904 (9th Cir. 2001).[7] "The function of § 2412(d)(1)(D) is merely to permit *non-prevailing parties* to recover fees." *American Wrecking Corp. v. Secretary of Labor*, 364 F.3d 321, 328 (D.C. Cir. 2004) (emphasis added); *accord United States v. Funds Representing Proceeds of Drug Trafficking*, 20 F. App'x 638 (9th Cir. 2001). In this case, the FTC did not obtain a favorable judgment—*Gugliuzza did*. *See* Doc. 270 at 2 [ER 27] (judgment entered "[i]n favor of Debtor on the FTC's complaint to determine non-dischargeability of debt"). Because the FTC was the losing party, (d)(1)(D) does not apply here, and Gugliuzza cannot obtain fees under it. The only EAJA provisions that could have made him eligible for fees are those related to prevailing parties, but he has abandoned reliance on those provisions (and did not meet the criteria anyway).

Gugliuzza argues (Br. 13-14) that it would undermine EAJA's purpose to "eliminate … the financial disincentive to challenge unreasonable government action" to allow fee-shifting under (d)(1)(D) when the government obtains a minimal recovery, but to disallow it when the government gets zero. Nonsense. If the government is the losing party (*i.e.*, it gets zero), the prevailing party may seek fees under §§ 2412(b) or (d)(1)(A). As the prevailing party here, Gugliuzza had

[7] Gugliuzza wrongly asserts (Br. 12-13), that the Court there "held that the government need not obtain a judgment as a prerequisite to" application of (d)(1)(D). Not so. The Court held that a settlement order in the government's favor was a "judgment" "obtained" by the government, and (d)(1)(D) thus applied. *One 1997 Toyota Land Cruiser*, 248 F.3d. at 904.

agencies may be imposed only to the extent allowed by law." Fed. R. Civ. P. 54(d)(1).

Here, the "extent allowed by law" is defined by EAJA. The United States enjoys sovereign immunity, except to the extent it waives that immunity, which it has done to a limited extent in EAJA. That statute gives a court full discretion whether or not to award costs, stating that costs "*may* be awarded to the prevailing party." 28 U.S.C. § 2412(a)(1) (emphasis added). There is no presumption under EAJA in favor of costs to the prevailing party. *See Pacheco v. Secretary of Health and Human Services*, 29 F.3d 633, at *1 n.1 (9th Cir. 1994) ("the award of costs under the EAJA is permissive, not mandatory"); *Neal & Co., Inc. v. United States*, 121 F.3d 683, 687 (Fed. Cir. 1997) (EAJA "envisions that the trial court may choose to award costs or not in its full discretion").

Gugliuzza gets no help from Federal Rule of Bankruptcy Procedure 7054, which likewise specifies that a bankruptcy court "may" award costs and also expressly makes Rule 54(d) inapplicable to adversary bankruptcy proceedings. Fed. R. Bankr. P. 7054(a) ("Rule 54(a)-(c)"—but not (d)—"applies in adversary proceedings"); 7054(b)(1) (court "may" award costs to the prevailing party); *Hosseini v. Key Bank, N.A.* (*In re Hosseini*), 504 B.R. 558 (2014) (distinguishing bankruptcy rule's "permissive nature" from Fed. R. Civ. P. 54(d)(1)).

It therefore is clear that the bankruptcy court had discretion to decline to

award costs to Gugliuzza, and he provides no basis to conclude that the court abused that discretion. This case presented close and difficult issues—as demonstrated, for example, by the FTC's initial win on summary judgment (Doc. 80 [SER001-007]) and the bankruptcy court's struggle on remand to reconcile the evidence of Gugliuzza's pervasive misconduct with his denials of intent to deceive. *See* Apr. 26, 2018 Tr. at 25-27 [SER112-114]. This case also presented issues of substantial public importance, with potential implications for judgments in other FTC consumer protection actions.[12] A court acts within its discretion when it denies costs in an "important" case involving "close and complex issues" and where the plaintiff's claims were "not without merit." *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 593 (9th Cir. 2000). And even if, as Gugliuzza claims (Br. 10), one of those factors alone might not be enough to overcome Rule 54(d)'s presumption in favor of costs to the prevailing party, Rule 54 does not apply here for the reasons stated above, and there is no such presumption under EAJA.

Moreover, as with Gugliuzza's request for attorney's fees, Gugliuzza failed

[12] Gugliuzza dismissively characterizes the bankruptcy court's decision to deny costs and fees as motivated by Gugliuzza's "perceived ingratitude." Br. 9. It is

to adequately substantiate many of the specific costs that he sought to recover. See Doc. 277 at 17-19 [ER 242-44]. Among other problems, Gugliuzza's documentation failed in many instances to demonstrate that items on his list were taxable under local bankruptcy rules that place particular limits on cost awards.[13] Accordingly, if this Court determines that the denial of costs was error, it should not simply accept his calculation but should remand to the bankruptcy court to assess the amount of costs.

[13] *See* LBR 7054-1(d) (items taxable as costs listed in Court Manual); U.S. Bankr. Ct., C.D. Cal., *Court Manual* § 2.8. at 2-47 to 2-50 (rev. June 2018) (listing specific items taxable as costs), available at https://www.cacb.uscourts.gov/court-manual; *see also In re Hosseini*, 504 B.R. at 566 (rejecting costs for printing orders, stipulations, briefs and exhibit lists because they did not qualify as taxable document preparation costs in the Court Manual).

CONCLUSION

For the reasons stated above, the Court should affirm the bankruptcy court's order denying Gugliuzza's motion for costs and fees.

Date: December 10, 2018

Respectfully submitted,

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