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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 FEDERAL TRADE COMMISSION,
14 Plaintiff,
15 v.
16 COMMERCE PLANET, INC., et al,
17 Defendants.

Case No.
SACV-09-01324 CJC (RNBx)
Opposition to Defendant
Charles Gugliuzza's Motion to
Dismiss

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1 Defendant Gugliuzza's 12(b)(6) motion to dismiss misses the mark in all
2 respects: it overstates the pleading requirements for an action in Federal Court,
3 makes inappropriate factual arguments, and seeks to introduce documents that
4 consist largely of hearsay and which are, in any event, irrelevant to the issues
5 raised in the complaint. Contrary to defendant's assertions, the FTC's complaint
6 satisfies all the pleading requirements articulated by the Supreme Court in *Bell*
7 *Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*.² It contains "a short and plain
8 statement of the claim[s] showing that the pleader is entitled to relief."³ And the
9 claims set forth in the complaint are plausible and supported by detailed factual
10 allegations. For these reasons, the motion to dismiss should be denied.

11 **I. Background**

12 On November 10, 2009, plaintiff Federal Trade Commission ("FTC") filed
13 its complaint against Commerce Planet, Inc. ("Commerce Planet"), and three
14 former officers of the company for violations of Section 5(a) of the FTC Act, 15
15 U.S.C. § 45(a). On November 16, 2009, the FTC filed three stipulations for final
16 judgment and order for permanent injunction of claims for monetary relief which
17 resolved the actions against the company, former Commerce Planet Chairman
18 Michael Hill, and Aaron Gravitz, former president of Commerce Planet subsidiary
19 Legacy Media LLC. On January 19, 2010, Defendant Charles Gugliuzza filed the
20 instant motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6).

21 **II. The Standard for a Motion to Dismiss**

22 Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, a
23 complaint need only set forth a "short and plain statement" that gives a defendant
24 fair notice of plaintiff's grounds for entitlement for relief. Fed. R. Civ. P. 8(a)(2).
25

26 ¹ 550 U.S. 544, 556, 570 (2007) ("*Twombly*").

27 ² 129 S. Ct. 1937, 1949 (2009) ("*Iqbal*").

28 ³ Fed. R. Civ. Pro. 8(a).

1 *See Farmer v. Countrywide Financial Corp.*, 2009 U.S. Dist. LEXIS 49553 at *5
2 (C.D. Calif. 2009) (“ordinary pleading rules are not meant to impose a great
3 burden upon a plaintiff”)’ *citing Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S.
4 336, 346(2005). In evaluating a Rule 12(b)(6) motion, the court should “construe
5 the complaint in the light most favorable to the plaintiff, taking all . . . allegations
6 as true and drawing all reasonable inferences from the complaint in [plaintiff’s]
7 favor.” *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). *See also*
8 *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009), *citing Newcal Indus., Inc.*,
9 *v. Ikon Office Solutions*, 513 F.3d 1038, 1043 n. 2 (9th Cir. 2008).

10 The Supreme Court recently explained that “to survive a motion to dismiss,
11 a complaint must contain sufficient factual matter, accepted as true, to ‘state a
12 claim to relief that is plausible on its face.’ A claim has facial plausibility when
13 the plaintiff pleads factual content that allows the court to draw the reasonable
14 inference that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949,
15 *quoting Twombly*, 550 U.S. at 556. Determining whether a complaint states a
16 plausible claim for relief is a matter left to the reviewing court’s “judicial
17 experience and common sense.” *Id.* at 1950.

18 **III. The FTC’s complaint states a claim for monetary relief against**
19 **Defendant Gugliuzza.**

20 In his motion, Defendant Gugliuzza argues that the factual allegations
21 contained in the FTC’s complaint regarding his individual liability fail to comply
22 with the requirements of Rule 8. He argues that the FTC has “failed to allege a
23 legally cognizable theory” under which he or his employer, Commerce Planet,
24 “could be liable for any acts committed by” its subsidiaries, Consumer Loyalty
25 Group and Legacy Media, and that the FTC’s complaint has failed to allege facts
26 sufficient to establish personal liability for the alleged violations of the FTC Act.
27 (Motion to Dismiss at 5). The FTC’s complaint, however, more than suffices to
28 meet the liberal pleading requirements of Rule 8 as characterized in *Iqbal* and

1 *Twombly*.

2 Defendant's motion correctly states that "an individual may be subject to
3 injunctive relief for the corporate defendants' violations of the FTC act if the FTC
4 can prove that the individual participated directly in the acts or practices in
5 question or had the authority to control them." *See e.g., FTC v. Stefanich*, 559
6 F.3d 924 (9th Cir. 2009); and *FTC v. Publishing Clearing House, Inc.*, 104 F.3d
7 1160, 1170 (9th Cir. 1997), quoting *FTC v. American Standard Credit Systems,*
8 *Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994) ("[t]here is no dispute that Martin
9 is the president of PCH. As an officer, Martin 'may be held individually liable for
10 injunctive relief under the [Federal Trade Commission Act] for corporate practices
11 if the FTC can prove (1) that the corporation committed misrepresentations or
12 omissions of a kind usually relied on by a reasonably prudent person, resulting in
13 consumer injury, and (2) that [Martin] participated directly in the acts or practices
14 or had authority to control them.'")

15 Defendant Gugliuzza is simply wrong about the FTC's complaint. It
16 properly alleges (1) that Commerce Planet (acting through its wholly-owned
17 subsidiary) violated Section 5 of the FTC Act, and (2) that defendant Gugliuzza
18 participated directly in the violative acts or practices or had authority to control
19 them. The complaint pleads facts that are more than sufficient to support its
20 allegations. These factual allegations include:

21 (1) defendants' web sites offered consumers a "free online auction kit"

22 (Complaint ¶ 15);

23 (2) consumers who agreed to receive the free online auction kit were in fact
24 signing up for a negative option continuity plan (Complaint ¶¶ 16-18);

25 (3) consumers were signing up for a negative option continuity plan that
26 was disclosed only on defendants' Terms and Conditions page and below
27 the bottom of the screen containing the "Ship my Kit!" button (Complaint
28 ¶¶ 17-18);

1 (4) consumers could and in many cases did complete a transaction with
2 defendants without ever seeing the information that would have told them
3 that they were signing up for a negative option continuity plan (Complaint
4 ¶ 18);

5 (5) consumers did not understand that they had been enrolled in a negative
6 option continuity plan and would be billed monthly for services by
7 defendants, whether consumers used those services or not (Complaint ¶ 18);

8 (6) in many cases, consumers did not become aware that they had been
9 enrolled in a negative option continuity plan until they received a credit card
10 bill with a charge for the plan from defendants (Complaint ¶ 19);

11 (7) by placing material information about the transaction in locations on
12 their websites that consumers were not required to visit to complete the
13 transaction, defendants failed to disclose material facts about the transaction
14 (Complaint ¶ 22);

15 (8) because defendants failed to disclose that consumers were enrolling in a
16 negative option continuity plan that involved the payment of monthly
17 charges, defendants' assessment of those monthly charges was made
18 without obtaining the express, informed consent of the consumers
19 (Complaint ¶ 25);

20 (9) defendant Gugliuzza was the president of Commerce Planet (Complaint
21 ¶ 12);

22 (10) defendant Gugliuzza participated in and had the authority to control the
23 acts and practices of Commerce Planet (Complaint ¶ 12); and

24 (11) defendant Gugliuzza knew or should have known that the practices
25 alleged in the complaint were unfair or deceptive (Complaint ¶ 12).

26 The complaint alleges a plausible claim against defendant Gugliuzza for his
27 alleged violations of the FTC Act. The complaint describes in detail how the
28 defendants deceived consumers on defendants' websites by failing to disclose the

1 true nature of the transaction in which consumers were engaged. It also alleges
2 that defendant Gugliuzza was the president of the corporate defendant, that he
3 participated in and had the authority to control the acts and practices of the
4 corporate defendant, and that he knew or should have known that the alleged acts
5 were unfair or deceptive. Applying common sense, as urged by the *Iqbal* Court,
6 the factual allegations in the complaint and legal conclusions that necessarily flow
7 from them meet the pleading requirements of Fed. R. Civ. P. 8, and satisfy the
8 plausibility test in *Iqbal* and *Twombly*.

9
10 **IV. Defendant Gugliuzza's motion to dismiss is an inappropriate attempt to
challenge the factual basis of the complaint.**

11 Motions to dismiss test the sufficiency of the complaint; in evaluating them,
12 the court should consider only the pleading itself and matters of which judicial
13 notice can properly be taken. *Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981);
14 *North Star Int'l v. Arizona Corp. Commission*, 720 F.2d 578, 581 (9th Cir. 1983);
15 *Hovsepian v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 117562, at *5 (N.D. Cal. 2009);
16 *Fullmer v. JP Morgan Chase Bank, NA*, 2009 U.S. Dist. LEXIS 105999, at *4-5
17 (E.D. Cal. 2009). A motion to dismiss is not the appropriate vehicle for resolving
18 disputed evidentiary contentions.

19 Defendant raises eight challenges to the complaint that are, in essence,
20 premature attempts to litigate the factual merits of the case. (Motion to Dismiss,
21 Sect. II. C-E). The first five of these all dispute the allegations that defendants
22 failed to disclose material terms of their negative option continuity plan. (Motion
23 to Dismiss, Sect. II. C. 1-5). The sixth challenge argues that defendants' use of a
24 link to its terms and conditions is consistent with other major online retailers.
25 (Motion to Dismiss, Section II. C. 6). Defendant then argues that the complaint's
26 unfairness count should fail because consumers provided Commerce Planet with
27 express, informed consent to charge their credit cards. (Motion to Dismiss,
28 Section II. D). Finally, defendant Gugliuzza claims that injunctive relief is

1 unnecessary because he is no longer associated with Commerce Planet. (Motion
2 to Dismiss, Sect. II. E).

3 Even a cursory reading of these contentions makes it clear that they are
4 factual disputes with the allegations of the complaint, not challenges to the legal
5 sufficiency of the complaint. For example, the complaint charges that defendants
6 revealed that consumers would be enrolled in the continuity plan only on
7 defendants' "terms and conditions" pages and below the lower edge of the screen
8 on which consumers clicked the "ship my kit" button. (Complaint ¶¶ 16-18). The
9 complaint alleges that, due to these placements, consumers could and frequently
10 did complete the transaction without knowing that they had signed up for a
11 monthly membership plan that would continue to charge their credit cards month
12 after month. (Complaint ¶ 18). As a result, defendants failed to disclose or to
13 disclose adequately the key elements of their continuity plan. (Complaint ¶ 22).
14 Whether those complaint allegations are correct is a matter of evidence that will be
15 developed as the case proceeds to trial. Defendant's selective citation to
16 complaint exhibits, as if those citations established conclusively that the FTC's
17 case is implausible, is simply an attempt argue a factual record that is not yet
18 before the Court.

19 Defendant's citation to other firms' websites appears to be based on a
20 misreading of FTC law. "A practice is deceptive under the Federal Trade
21 Commission Act 'if it is likely to mislead consumers acting reasonably under the
22 circumstances . . . in a way that is material.'" *FTC v. Grant Connect, LLC*, 2009
23 U.S. Dist. LEXIS 94201, *24 (D. Nev. 2009), *citing FTC v. Cyberspace.Com,*
24 *LLC*, 453 F.3d. 1196, 1199 (9th Cir. 2006). "A solicitation may be likely to
25 mislead by virtue of the net impression it creates even though the solicitation also
26 contains truthful disclosures." *Id.* Courts presented with the argument that the
27 existence of a disclosure cures a misrepresentation or omission have expressly
28 rejected it. *See, e.g., FTC v. Gill*, 71 F.Supp. 2d (C.D. Cal., 1999) ("a disclaimer

1 does not automatically exonerate deceptive activities.”) *See also FTC v. Grant*
2 *Connect, LLC* at *24-25 (FTC is likely to prevail in showing that websites with
3 terms and conditions “included in smaller, more compact type beneath the
4 ‘submit’ button” are not clear and conspicuous and therefore violate the FTC Act.)
5 The fact that other online retailers use terms and conditions pages is irrelevant⁴ to
6 the FTC’s allegation and, in any event, is an evidentiary argument inappropriate
7 for a 12(b)(6) motion to dismiss.

8 Defendant’s further assertion that the complaint’s unfairness count must fail
9 because Commerce Planet supposedly received express, informed consent to
10 charge consumers’ credit cards is a purely factual contention. If, as the complaint
11 charges, consumers were unaware that they had been enrolled in defendants’
12 continuity plan (Complaint ¶ 18), then they cannot be said to have given express,
13 informed consent to their card being charged on a monthly basis. Thus,
14 defendants’ assessing monthly charges against their credit cards would have been
15 without the consumers’ express, informed consent and would be an unfair practice
16 under Section 5 of the FTC Act. (Complaint ¶¶ 24-26). Defendant cites complaint
17 language that consumers “authorized their credit cards to be charged” (Complaint
18 ¶ 15) out of context to argue that the complaint contradicts itself. (Motion to
19 Dismiss at 12). But the complaint language that defendant cites describes the
20 process whereby consumers requested to receive defendants’ free online auction
21 kit (Complaint ¶¶ 14-18), not to agree to the membership continuity plan. Whether
22 consumers were deceived by defendants’ concealment of the actual terms of the
23 transaction, and, therefore, had not given express, informed consent to charge their
24 credit cards is a fact question that will be resolved through discovery and
25 litigation.

26 Finally, defendant Gugliuzza argues that he is no longer affiliated with
27

28 ⁴ We argue below that the Court should reject defendant’s request to take
judicial notice of Exhibits B-E because they are irrelevant.

1 Commerce Planet and, therefore, that injunctive relief is inappropriate. (Motion to
2 Dismiss, Sect. II. E) Injunctive relief is appropriate where there is a cognizable
3 danger of recurrent violations. *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
4 1237 (9th Cir. 1999). That a defendant has no further relationship to the entity he
5 was involved with when the violations occurred is perhaps a fact to be considered,
6 but it is far from dispositive, and courts will look to see whether “subsequent
7 events [have] made it absolutely clear that the allegedly wrongful behavior cannot
8 reasonably be expected to recur.” *Id.* at 1238. Again, these are factual matters
9 that are not appropriate for resolution on a motion to dismiss; taking the facts
10 alleged as true, the Commission has stated a cause of action to hold defendant
11 Gugliuzza liable for injunctive relief.

12 **V. The exhibits that defendant requests the court to take judicial notice of**
13 **are not proper subjects for judicial notice under FRE 201(b).**

14 Defendant’s request to take judicial notice of three of Commerce Planet’s
15 SEC filings and several corporate websites should be denied because they do not
16 meet the criteria for judicial notice under Fed. R. Evid 201: that a fact be
17 “generally known within the territorial jurisdiction of the trial court,” Fed. Rule
18 Evid. 201 (b)(1), or that it be “capable of accurate and ready determination by
19 resort to sources whose accuracy cannot be questioned.” Fed. Rule Evid.
20 201(b)(2).

21 Exhibit A consists of Commerce Planet’s 2006 Form 10-K, its September
22 30, 2007, Form 10-Q, and its October 23, 2007, Form 8-K, and is offered to
23 establish facts recited in those documents. (*See* Motion to Dismiss fn. 3 & 4) In
24 *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001), the Ninth Circuit
25 distinguished between judicial notice of the fact that a public record document
26 contained a statement and judicial notice of the truth of such a statement, where
27 the facts recited in the public document are subject to dispute. *United States v.*
28 *Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) similarly rejects taking judicial

1 notice of public documents where adjudicative facts did not meet the criteria of
2 Fed. R. Evid. 201(b)(1) or (2). *See also Bryant v. Avado Brands, Inc.*, 187 F.3d
3 1271, 1278 (11th Cir. 1999) (court may take judicial notice of SEC filings for
4 purpose of determining what statement the documents contain, not to prove the
5 truth of the documents' contents); *Kramer v. Time Warner, Inc.*, 937 F.2d 767,
6 774 (2d Cir. 1991) (approving judicial notice of SEC filings in securities fraud
7 case because documents "are the very documents that are alleged to contain the
8 various misrepresentations or omissions and are relevant not to prove the truth of
9 their contents but only to determine what the documents stated"). Because
10 defendant Gugliuzza seeks to use Exhibit A to show the actual scope of his
11 involvement with Commerce Planet and the actual relationship between
12 Commerce Planet and its subsidiaries, he is offering Exhibit A for the truth of the
13 facts asserted, a purpose that this Circuit and others have rejected as inappropriate
14 for judicial notice.

15 Exhibits B through F are selected pages from the websites of other
16 companies, offered to demonstrate that Commerce Planet's use of a link to a terms
17 and conditions page is not unusual in the online marketing world. Judicial notice
18 as to these documents should be rejected because the documents are irrelevant to
19 any issue raised by the complaint. Defendant misconstrues the complaint by
20 suggesting that the FTC is alleging that the use of a terms and conditions page is
21 deceptive. Rather, the FTC's complaint alleges that Commerce Planet and its
22 executives engaged in deceptive practices in violation of 15 U.S.C. § 45 by failing
23 to disclose that their offer of a "free online auction kit" in fact included enrollment
24 in a negative option continuity plan. The complaint does not challenge the
25 defendants' use of a terms and condition page; it challenges the manner in which
26 they used that page to deceptively conceal material terms for the offer that
27 consumers believed they were accepting. It is the defendants' failure to disclose
28 material terms that is deceptive. Other companies' websites are simply irrelevant

1 to the question of whether defendants’ conduct was deceptive.⁵

2 **CONCLUSION**

3 Each of defendant Gugliuzza’s bases for his motion to dismiss should be
4 rejected. The FTC’s complaint satisfies the pleading requirements laid down by
5 the Supreme Court in *Twombly* and *Iqbal*. The remaining bases all constitute
6 attempts to try the factual merits of the case, based on inadmissible and irrelevant
7 evidence, or to twist the language of the complaint to mean something other than
8 its plain language. The FTC respectfully requests that the Court reject defendant’s
9 motion to dismiss the complaint.

10 Dated: February 1, 2009

Respectfully submitted,

11
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22 _____
23 ⁵ Even if defendant could show that Borders, Amazon, or other companies
24 were engaged in deceptive conduct, “everybody else is doing it” is not a defense to
25 an FTC enforcement action. *FTC v. Accusearch, Inc.*, 2007 U.S. Dist. LEXIS
26 74905 at 27-28 (rejecting “everyone else is doing it” defense because FTC’s
27 decision to prosecute a particular case is simply “Commission’s exercise of
28 discretion and judgment in the allocation of agency time and resources”); *see also*
FTC v. Universal-Rundle Corp., 387 U.S. 244, 249-250 (1967) (holding that even
if an entire industry was engaged in an illegal course of conduct, the Commission
had the authority to proceed against only one member of the industry); *Moog*
Industries v. FTC, 355 U.S. 411, 413 (1957) (“whether all firms in the industry
should be dealt with in a single proceeding or should receive individualized
treatment are questions that call for discretionary determination by the
[Commission]”).

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 1, 2010, I electronically filed the
3 Opposition to Defendant Charles Gugliuzza's Motion to Dismiss with the Clerk of
4 the United States Court for the Central District of California, using the Court's
5 CM/ECF system. The CM/ECF system will send an email notification of the
6 foregoing filing to the following parties and counsel of record who are registered
7 with the Court's CM/ECF system,:

8 Michael A. Piazza
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15 In accordance with the electronic filing procedures of this Court, service has been
16 effected on the aforesaid party, whose counsel of record is a registered user of
17 CM/ECF, via electronic service through the CM/ECF system.

18 I declare under penalty of perjury that the foregoing is true and correct.

19 Executed on February 1, 2010, at San Francisco, California.

20 _____
21 /s/ David M. Newman
22 David M. Newman
23
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26
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