14-16485

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

INFUSION MEDIA, INC., *et al.*,
Defendants,

and

JONATHAN EBORN,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nevada
No. 2:09-cv-01112-GMN-VCF
Hon. Gloria M. Navarro

ANSWERING BRIEF OF FEDERAL TRADE COMMISSION

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INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") charged Jonathan Eborn with perpetrating a deceptive work-at-home scheme. To settle these charges, Eborn stipulated to entry of a $29 million judgment. The parties and the district court agreed to suspend almost all of that judgment on the basis of sworn financial statements that Eborn provided purporting to show his inability to pay the full amount. The agreement provided that if these financial statements contained any material misrepresentations or omissions, Eborn would become liable for the entire judgment. Unfortunately, Eborn's sworn statements were in fact untrue.

Eborn's uncontested bank records, other documentary evidence, and sworn testimony from Eborn and other witnesses demonstrate that Eborn made numerous material misrepresentations and omissions on his sworn financial statements. These deceptions and omissions allowed Eborn to hide at least $369,547.80 from the FTC and his victims. Based on this evidence, the FTC asked the district court to terminate the suspended judgment and reinstate the remaining balance of the full amount.

After reviewing the evidence, the district court held that Eborn failed to disclose $61,519 in cash, his control over two companies, and at least $274,828.80 in income or assets he received or had earned from third parties. He also misrepresented the value of his real and personal property. Based on these

material misrepresentations and omissions, the district court entered judgment against Eborn for $26,971,926.50 under the terms of his agreement with the FTC.

Eborn's challenges on appeal are meritless and fail to show clear error by the district court. He does not contest bank records demonstrating that he had cash holdings well above the amounts he disclosed. He fails to rebut evidence showing that he served as, and was compensated like, an officer at two companies. He fails to rebut the FTC's showing that he earned $96,200 in undisclosed income from one company, and did not report at least $132,700 in payments from another. And he fails to rebut evidence that he misrepresented the value of his real and personal property.

STATEMENT OF JURISDICTION

The FTC agrees with appellant's statement of jurisdiction (Br. at 1), except as follows:

The FTC's original action resulted in the court's entry of a Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, dated October 4, 2010 (hereinafter, the "Final Order" or "consent decree."). ER302-07, SER32-73 [D.74].[1]

[1] "Br." refers to appellant's Opening Brief. "ER" refers to appellant's Excerpts of Record. "SER" refers to the FTC's Supplemental Excerpts of Record, filed herewith. "D.xxx" refers to the district court docket's document number. "Ex."

ISSUES PRESENTED FOR REVIEW

The FTC agreed to, and the district court approved, the 2010 Final Order premised on Eborn's submitting truthful, accurate, and complete financial statements. The 2010 Final Order suspended the vast majority of a $29 million monetary judgment against Eborn, but provided that suspension would end, and the full amount of judgment would be reinstated, if he made any material misrepresentation or omission in his Financial Statements. In fact, Eborn's financial statements were materially inaccurate and incomplete, and in the order on review the district court reinstated the full amount of the judgment against him. The questions presented are:

1) Whether the district court committed clear error when it found that Eborn misrepresented and omitted material information on his Financial Statements; and

2) Whether the district court's Order finding Eborn liable for the full monetary judgment, considered along with the factual record, complied with Fed. R. Civ. P. 52(a).

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refers to exhibits to the FTC's motion. "Def. Ex." refers to exhibits to defendant's opposition. "Tr." refers to page numbers in deposition transcripts included as exhibits to the FTC's motion. "ECF pg." refers to page numbers specified by the ECF header.

STATEMENT OF THE CASE

1. The Underlying Proceeding and Settlement

On June 22, 2009, the FTC filed a complaint against five corporate and four individual defendants (including Infusion Media and Eborn) charging each with deceiving consumers by marketing work-at-home kits on false premises. That deceit, the complaint alleged, violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b). ER309-313 [D.1]. On June 24, 2009, the district court issued an amended Temporary Restraining Order ("TRO"), together with an asset freeze that prohibited the defendants from disposing of any of their assets. SER83-86 [D.14 § IV]. On September 10, 2009, the court entered a stipulated Preliminary Injunction ("PI") that maintained the asset freeze. SER74-77 [D.35 § IV].

On October 4, 2010, Eborn and his co-defendants agreed to the entry of a final order imposing injunctive relief and joint and several equitable monetary relief in the amount of $29,497,320.57. ER304; SER41 [D.74 § VI].[2] The order

[2] Eborn also agreed that all "facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any . . . subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money

suspended the overwhelming portion of the monetary judgment against Eborn, conditioned on his submission of truthful, accurate and complete financial statements to the Commission. ER305-06, SER49-50 [D.74 § VIII]. The Final Order stated, in relevant part, that**:**

> [t]he Commission's agreement to and the Court's approval of this Order are expressly premised upon the truthfulness, accuracy, and completeness of Defendants' Financial Statements, all of which Defendants assert are truthful, accurate, and complete. Defendants and the Commission stipulate that Defendants' Financial Statements provide the basis for the monetary judgment in Section VI of this Order and that the Commission has relied on the truthfulness, accuracy, and completeness of Defendants' Financial Statements.
>
> ER305, SER49 [D.74 § VIII.A].

The Final Order also contained an enforcement mechanism. It provided, in relevant part, that:

> [i]f, upon motion by the Commission, the Court finds that any Defendant(s) has (1) materially misstated in Defendants' Financial Statements, the value of any asset, (2) made any material misrepresentation or omitted material information concerning his or her financial condition by failing to disclose any asset that should have been disclosed in Defendants' Financial Statements, or (3) made any other material misstatement or omission in Defendants' Financial Statements, the Court shall terminate, as to the offending Defendant(s), the suspension of the monetary judgment entered in Section VI.A. The Court, without further adjudication, shall enter a modified judgment holding the offending Defendant(s) liable to the Commission in the amount of $29,497,320.57 for consumer redress, less any amounts turned over to the FTC pursuant to Section VI of

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judgment pursuant to this Order . . . ." SER46 [D.74 § VI.J].

this Order . . . .

ER305-06, SER49-50 [D.74 § VIII.B]. Under that agreement, Eborn escaped the significant liability he incurred by virtue of his deceptive actions. Instead, he received a suspended judgment that conditionally excused him from paying the overwhelming majority of the monetary relief – conditioned on his submission of accurate financial statements that documented his inability to pay the full judgment. Eborn submitted two financial statements to the Commission: one on July 13, 2009 ("the 2009 Financial Statement") and one on June 6, 2010 ("the 2010 Financial Statement") (collectively, "Financial Statements"). ER30-44 [D.134 (Ex. 2)]; ER69-83 [D.133-5 (Ex. 1)].

Through March 25, 2014, when the FTC asked the district court to reinstate the full judgment, defendants collectively had paid $2,525,394.07 to the FTC (somewhat more than $300,000 from Eborn personally), leaving an unsatisfied judgment of $26,971,926.50. ER5 [D.157 at 2].

2. Eborn's Material Misrepresentations and Omissions in his Financial Statements

A. Eborn Failed to Disclose Over $61,000 in Cash

In both his 2009 and 2010 Financial Statements, Eborn swore that he possessed only $42,400 in cash. ER34 [D.134 (Ex. 2)] item 12]; ER73 [D.133-5

(Ex. 1)] item 12]. The Commission's subsequent investigation showed, however, that he had failed to disclose an additional $61,519. Eborn's bank statements revealed $23,200 deposited (and mostly dissipated) soon after the TRO and asset freeze were entered on June 24, 2009, and within a week of his signing the 2009 Statement. The bank statements revealed another $38,319 deposited between September 2009 and November 2010, about one month after entry of the 2010 Final Order. All of these deposits (except for the last two) were made shortly after Eborn signed each Financial Statement.

i. July 2009 Bank Statements Showed $23,200 in Cash

Immediately after submitting his 2009 Financial Statement, Eborn deposited $23,200 in cash in three installments over eight days in a newly opened bank account. ER156, 162, 164, 165 [D.133-8 (Ex. 4) at 3, 9, 11, 12]; *see also* SER29 [D.133-1 at ECF pg. 15 (Appendix: Chart 1)]. Within a month, the account was closed, and Eborn withdrew the remaining funds and deposited them into a new account at another bank. ER169 [D.133-9 (Ex. 5) at 4]. He did not disclose any of that money in his Financial Statements.

At his sworn deposition taken by the FTC, Eborn denied that the $42,400 in cash that he disclosed on his Financial Statements included the $23,200 revealed in his bank statements. ER109 [D.133-7 (Ex. 3) at Tr. 36]. Instead, he testified that he borrowed the $23,200. ER107 [D.133-7 (Ex. 3) at Tr. 25, 28]. However, even

though he admitted he never repaid these "loans," ER112 [D.133-7 (Ex. 3) at Tr. 46-47], Eborn did not report them on his 2010 Financial Statement as he was required to do. ER40 [D.134 (Ex. 2)] item 26]. Further, he provided no substantiation that the deposits derived from loans, ER112-13 [D.133-7 (Ex. 3) at Tr. 47-49]; ER40 [D.134 (Ex. 3) item 26], and he could not remember from whom he allegedly borrowed any of this money. ER107-08 [D.133-7 (Ex. 3) at Tr. 25-28, 31-32].[3] Eborn never asserted or provided evidence that the $23,200 came from income, and his purported employer at the time denied paying him in cash. ER32 [D.134 (Ex. 2) item 7]; ER250 [D.133-11 (Ex. 6) at Tr. 100].

ii. Bank Statements Showed an Additional $38,319 in Cash

Eborn deposited an additional $38,319 in cash from September 2009 through November 2010 (soon after the district court entered the Final Order and the asset freeze was lifted). That money was not disclosed in his Financial Statements.[4]

As with the $23,200 discussed above, the cash did not derive from any of his

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[3] The only loan Eborn listed on his 2010 Statement was one purportedly made by PDR, ER40 [D.134 (Ex. 2) item 26], discussed at pages 14-16 below.

[4] These cash deposits consisted of: (1) $7,000 on September 11, 2009 (ER176) [D.133-9 (Ex. 5) at 11]; (2) $6,100 on July 28, 2010 (ER210) [D.133-9 (Ex. 5) at 45]; (3) $8,000 on August 9, 2010 (ER212) [D.133-9 (Ex. 5) at 47]; (4) $9,200 on August 17, 2010 (ER215) [D.133-9 (Ex. 5) at 50]; (5) $5,250 on November 8, 2010 (ER222) [D.133-10 (Ex. 5) at 57]; and (6) $2,769 on November 23, 2010 (ER 225) [D.133-10 (Ex. 5) at 60]. *See generally* SER29 [D.133-1 at ECF pg. 15 (Appendix: Chart 1)].

disclosed employment, which can be accounted for separately in his bank statements, ER171, 176, 177, 180, 188, 205, 206, 209, 216, 218, 226 [D.133-9 (Ex. 5) at 6, 11, 12, 15, 23, 40, 41, 44, 51, 53, 61], and because his sources of income at the time denied paying him in cash. ER250 [D.133-11 (Ex. 6) at Tr. 100]; ER265-66 [D.133-12 (Ex. 7) at Tr. 112-13]; ER288 [D.133-13 (Ex. 8) at Tr. 103-04].

Eborn testified that these deposits also might have resulted from loans or gifts. ER110, 112 [D.133-7 (Ex. 3) at Tr. 37-38, 45]; ER19 [D.147 (Def. Ex. 1) ¶14]. However, no such loans were disclosed on the 2010 Statement, as required. ER40 [D.134 (Ex. 2) item 26]. Nor could Eborn identify anyone who loaned or gave him this cash. ER110, 112 [D.133-7 (Ex. 3) at Tr. 37-38, 45-47]. Eborn also failed to establish that any of these later deposits came from the $42,400 disclosed on his Financial Statements. At most, he testified that these deposits "might have come from" the disclosed cash, ER112 [D.133-7 (Ex. 3) at Tr. 45], and that he "believe[d]" that "some" of his deposits were "part of the $42,400 cash" that he disclosed. ER20 [D.147 (Def. Ex. 1) ¶ 19].

B. Eborn's Executive Positions at and Control Over Augusta Capital and Link Media

Although Eborn was required to disclose all of his employment, the evidence showed that he did not truthfully disclose his officer positions at two companies.

i. Eborn was a Corporate Officer at Augusta Capital

Eborn reported that he was the "Retail Accounts Manager" at Augusta Capital Group, Inc. ("Augusta Capital"). ER32 [D.134 (Ex. 2) item 7]. Documentary and testimonial evidence showed that he in fact was an officer and principal at the company.

It was implausible that Eborn was a "Retail Accounts Manager" for the simple reason that Augusta Capital had no "retail accounts" for Eborn to manage. The company engaged in no retail business. ER283-84 [D.133-13 (Ex. 8) at Tr. 59-62]. Moreover, corporate documents contradicted any role as an account manager. A January 18, 2010, corporate resolution listed Eborn as the "Vice President" and corporate "Secretary" of the company. ER291 [D.133-14 (Ex. 9)]. Augusta Capital used that resolution to open a bank account, and Eborn represented himself as a corporate officer to the bank. ER141 [D.133-7 (Ex. 3) at Tr. 189-190]. Eborn was similarly listed as an "owner" of Augusta Capital in its application for employee health insurance. ER293 [D.133-15 (Ex. 10)].

Indeed, the putative owner of Augusta Capital, Pace Mannion (who provided the payment processing services used by Infusion Media) testified that "almost all" of Augusta Capital's business deals came through Eborn, ER280 [D.133-13 (Ex. 8) at Tr. 41], and that Eborn "spent a lot of time on building" the business. ER286 [D.133-13 (Ex. 8) at Tr. 93]. Eborn himself testified about his "active role" at

Augusta Capital and that he "primarily" did the work there. ER141-142 [D.133-7 (Ex. 3) at Tr. 192-93]. Befitting that role, Augusta Capital paid him far more like a corporate officer than an employee. Eborn received nearly 45% of known Augusta Capital receipts. No other person or entity received more than 12.6%; Mannion, the purported owner, received less than 1%. ER56-57, 60-66 [D.133-4 (Van Wazer Decl.) ¶¶ 8-10, Exhs. A, B].

ii. Eborn was a Corporate Officer at Link Media

On his 2010 Financial Statement, Eborn claimed to be an "Account Executive" with Link Media, a company that brokered customer leads. ER32 [D.134 (Ex. 2) item 7]; ER123 [D.133-7 (Ex. 3) at Tr. 94-95]. In fact, Eborn was a principal at that company. At his deposition, Eborn admitted he did not oversee any accounts at Link Media. *Id.* (claiming to be a part-time "consultant" with no "day-to-day responsibilities"). As with Augusta Capital, his corporate status was reflected by his significant compensation: Eborn received 30% of Link Media's profits. Clint Arnell, Link Media's putative owner, received just 10%. ER124 [D.133-7 (Ex. 3) at Tr. 98-99]; ER248 [D.133-11 (Ex. 6) at Tr. 44].

The compensation scheme reflected their actual roles at the company. Arnell simply engaged in the same functional role at Link Media as he had done as Eborn's employee at Infusion Media. Eborn again acted as principal, providing the necessary industry contacts and advising Arnell on how to develop business.

ER120, 123-124 [D.133-7 (Ex. 3) at Tr. 77-78, 93, 97-98]; ER242-243, 245-247 [D.133-11 (Ex. 6) at Tr. 20-22, 31-32, 36-39].

C. Eborn Did Not Disclose the Amounts and Nature of Payments He Received from Augusta Capital and PDR

Eborn received at least $274,828.80 from Augusta Capital, Pagani Corp., and PDR (Infusion Media's payroll company) that he failed to report to the FTC.

i. Eborn Received Significant Payments from Augusta Capital and a Related Entity

Eborn underreported significant income he earned from Augusta Capital and a payment he received from a related entity, Pagani Corporation ("Pagani"), in 2010. Augusta Capital (of which, as described above, Eborn was an officer and a principal) paid Eborn $140,500 from June through November 2010, beginning immediately after Eborn signed the 2010 Financial Statement.[5] Although the

[5] These payments consisted of a $10,000 check dated June 9, 2010, just three days after Eborn signed the 2010 Statement (ER205) [D.133-9 (Ex. 5) at 40]; a $25,000 check dated June 28, 2010 (ER206) [D.133-9 (Ex. 5) at 41]; a $20,000 check apparently postdated as July 24, 2010 (ER209) [D.133-9 (Ex. 5) at 44]; a $20,000 check dated August 18, 2010 (ER216) [D.133-9 (Ex. 5) at 51]; a $50,000 cashier's check dated October 12, 2010 (ER218) [D.133-10] (Ex. 5) at 53]; ER286 [D.133-13 (Ex. 8) at Tr. 94-96]; ER147-148 [D.133-7 (Ex. 3) at Tr. 224-26]; ER56-57, 61-66 [D.133-4 (Van Wazer Decl.) ¶¶ 9-10, Ex. B)]; and two checks totaling $15,500 dated November 30, 2010 (ER226) [D.133-10 (Ex. 5) at 61]. *See generally* ER56, 58-60 [D.133-4 (Van Wazer Decl.) ¶8, Ex. A]; SER30 [D.113-1 at ECF pg. 16 (Appendix Chart 2)].

money was paid after the June 2010 Financial Statement, Eborn had already earned this income based on his work at Augusta Capital beginning in December 2009, and it therefore should have been disclosed in his Financial Statement. ER32 [D.134 (Ex. 2) item 7]; ER145 [D.133-7 (Ex. 3) at Tr. 214-215]. Eborn admitted that Augusta Capital paid out his accrued salary upon his request only when he needed the money, and that he did not request any payments until immediately after he signed the 2010 Statement. ER145-146 [D.133-7 (Ex. 3) at Tr. 214-215, 218-19]. Eborn also received a $5,000 check on May 18, 2010, from Pagani, an entity controlled by Mannion. He did not disclose that check, however, when he submitted his Financial Statement on June 6, 2010, but waited until four days after that submission to deposit the check. ER275 [D.133-13 (Ex. 8) at Tr. 23-24]; ER204 [D.133-9 (Ex. 5) at 39].

Instead of reporting the $140,500 payments from Augusta Capital, Eborn falsely reported earning $44,300 from Augusta Capital between January 1 and June 6, 2010 (the date he signed the 2010 Statement). ER32 [D.134 (Ex. 2) item 7]. He reported that income even though at that point he had not yet received any money from Augusta Capital. ER145 [D.133-7 (Ex. 3) at Tr. 214-16]. Eborn testified that he did not know how he "would have come up with that" amount or "what was in [his] mind when [he] wrote that" figure. ER145 [D.133-7 (Ex. 3) at Tr. 215-16]. He could not explain why he underreported the amount he was owed from Augusta

Capital by at least $96,200 or why he did not report the $5,000 he received from Pagani.

ii. Eborn Inaccurately Reported Significant Payments from PDR

Eborn disclosed on his 2010 Financial Statement that he received a $119,000 loan from "P.D.R.B." or "PDR Billing," an affiliate of Infusion Media's former payroll company PDR. ER40 [D.134 (Ex. 2) item 26]. The evidence showed that the amount of the payment from PDR was far greater and that the payment was not a loan.

Between July 2009 (soon after the TRO was entered) and August 2010 (two months before entry of the 2010 Final Order), Eborn received from PDR a dozen payments ranging from $13,100 to $44,400 and totaling $292,628.83. He had received $251,700 by the time he submitted his 2010 Statement – not the $119,000 he reported. The money from PDR included payments made directly to Eborn's attorneys, to the owner of a seven-bedroom house Eborn moved into, for a $13,100 piano, to a third-party business Eborn attempted to start, and several deposits made directly to Eborn's bank account. ER181, 184, 192, 194, 196, 199, 211, 215 [D.133-9 (Ex. 5) at 16, 19, 27, 29, 31, 34, 46, 50]; SER17-22 [(D.133-23) (Ex. 17)]; SER23-24 [D.133-24 (Ex. 18)]; SER25-27 [D.133-25 (Ex. 19)]; ER130-138 [D.133-7 (Ex. 3) at Tr. 142-169, 175-76]; ER260-61, 263-265 [D.133-

12 (Ex. 7) at Tr. 43-45, 104-107, 109-11]; ER297 [D.133-17 (Ex. 12) ¶ 18]; see generally SER31 [D.133-1 at ECF pg. 17 (Appendix: Chart 3)]. Eborn stated that he needed this money from PDR because he and his wife had "grown accustomed to a certain lifestyle and it took a while to start living within our means." ER137 [D.133-7 (Ex. 3) at Tr. 169].

Although Eborn characterized these transfers as "loans," the evidence reflects that they were not. To the contrary, the evidence showed that he received these payments upon request and without documentation. ER127-128, 131-134 [D.133-7 (Ex. 3) at Tr. 130-31, 134, 146, 150, 153-157]; ER261 [D.133-12 (Ex. 7) at Tr. 45-47]; ER297-298 [D.133-17 (Ex. 12) ¶ 20]. Eborn has never repaid any of the money advanced to him. ER298 [D.133-17 (Ex. 12) ¶ 26); ER137-138 [D.133-7 (Ex. 3) at Tr. 172-73].

After all the money had been transferred to him, Eborn signed an unsecured "promissory note" with PDR for $196,700 on August 30, 2010. SER1-3 [D.133-18 (Ex. 13)]. However, the note was created *after* all of the transfers were made, PDR has made no attempt to collect on it, and it failed to include four payments totaling $95,928.83 made to Eborn (including the final two payments made less than three weeks before Eborn signed the note). ER137-138 [D.133-7 (Ex. 3) at Tr. 171-173]; ER297-298 [D.133-17 (Ex. 12) ¶¶ 18, 24, 26]; SER31 [D.133-1 at ECF pg. 17 (Appendix: Chart 3)]. Those factors strongly suggest that this note is

bogus and that the money is actually Eborn's that he parked with PDR.

Moreover, even in attempting to report these payments as a "loan," Eborn significantly underreported the amounts he received. He reported receipt of only $119,000 from PDR, not $251,700 that he actually received by June 2010 (or the $292,628.83 he had received by August 2010).

D. Eborn's Real and Personal Property

Eborn's Financial Statements inaccurately reflected the value of his real and personal property.

i. Eborn Falsely Represented the Value of his Primary Residence

In his 2010 Financial Statement, Eborn reported that he lived in Sandy, Utah. ER30, 37, 38 [D.134 (Ex. 2) items 1 & 20-22]. In reality, he had moved to Draper, Utah in October 2009. ER114-115, 126 [D.133-7 (Ex. 3) at Tr. 56-58, 126-28]; SER4-11 [D.133-19 (Ex. 14)].[6] The change in residence was significant because of the operation of Utah's homestead exemption, which protects a portion of the value of residential property from monetary judgment. *See* Utah Stat. § 78B-5-503(2)(b) (2010) (setting $40,000 homestead exemption per household).

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[6] The Final Order (entered in October 2010) required Eborn to report any change in residence. SER59 [D.74 § XV.A]. In an April 1, 2011, compliance report to the Commission, Eborn continued to report that he resided in the Sandy, Utah home. SER12-14 [D.133-21 (Ex. 15)]. He did not inform the FTC of his move to Draper until July 2011. SER15-16 [D.133-22 (Ex. 16)].

The exemption would have protected $40,000 against FTC collection efforts if Eborn had lived in the Sandy home, but it protected only $10,000 because Eborn in fact lived elsewhere and the Sandy home became his non-primary residence. *Id.*; *see also Houghton v. Miller*, 118 P.3d 293, 296 (Utah Ct. App. 2005) ("[O]ccupancy is a requirement for the [primary personal residence] exemption."). By failing to report his move, and thus the reclassification of the Sandy house from a primary to non-primary residence, Eborn effectively underreported the value of the Sandy, Utah house by $30,000.

ii. Eborn Did Not Report $33,100 of Personal Property

Eborn also omitted $33,100 of personal property from his 2010 Statement. The Financial Statements required him to list all personal property regardless of value. ER36-37 [D.134 (Ex. 2) item 20]. Eborn purchased $20,000 worth of home furnishings when he moved to Draper, Utah in October 2009, SER11.001-.004 [D.133-19 (Ex. 14) addendum]; ER117 [D.133-7 (Ex. 3) at Tr. 67], but failed to disclose them on his 2010 Statement. *See* ER36-37 [D.134 (Ex. 2) item 20] (omitting furnishings). He likewise failed to disclose a $13,100 piano he acquired after he signed the 2009 Statement but before signing the 2010 Statement. SER25-27 [D.133-25 (Ex. 19)]; ER36-37 [D.134 (Ex. 2) item 20] (omitting piano).

3. The District Court's Order on Review

Based on the numerous material misrepresentations and omissions made by

Eborn on his Financial Statements, the FTC moved on March 25, 2014, to hold Eborn liable for the full amount of the unsatisfied monetary judgment of $26,971,926.50. ER45-53 [D.133, D.133-1]. The district court heard argument on May 27, 2014. D.154.

On June 4, 2014, the court issued an order and judgment holding Eborn liable for $26,971,926.50. ER4-6 [D.156, D.157]. The court first recognized that the 2010 Final Order "suspended a portion of the monetary judgment against" Eborn based on, among other things, his submission of "true, accurate, and complete financial statements." ER4 [D.157 at 1]. It next held that Eborn had "made material misrepresentations on and omitted material information from his financial statements," including (1) "failing to report at least $61,519 in cash"; (2) "misrepresenting his control over" Augusta Capital and Link Media; (3) "failing to accurately report his income or his assets parked with" Augusta Capital and PDR, "thus hiding at least $274,828.80"; and (4) "misrepresenting his real and personal property, including his failure to accurately report his residence and his acquisition of over $33,100 in personal property." ER5 [D.157 at 2].

The court next recognized that the 2010 Final Order "states that if any Defendant made any material misrepresentations or omissions on their financial statements," "without further adjudication" the court "shall enter a modified judgment holding the offending Defendant liable to the Commission in the amount

of $29,497,320.57 for consumer redress, less any amounts turned over to the" FTC. As defendants had already turned over $2,525,394.07 to the FTC, the court entered a judgment against Eborn for $26,971,926.50 (with interest). *Id.*

Eborn now appeals from that judgment. ER1-3 [D.169].

STANDARD OF REVIEW

The district court's findings of fact are reviewed for clear error. *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004); Fed. R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous."). The clear error standard is "significantly deferential," and the trial court's findings should be accepted unless there is a "definite and firm conviction that a mistake has been committed." *Garvey*, 383 F.3d at 900 (citing *N. Queen Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002)).[7] The district court's decision may be affirmed by any ground supported by the record. *Cigna Prop. and Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998).

[7] Eborn concedes that clear error is the proper standard of review for factual findings. Br. at 2, 18, 31. He asserts, however, that the evidence supports his case and that the FTC had failed to prove its case by a preponderance of the evidence. *E.g.*, Br. at 35. As shown, the FTC supported each material misrepresentation and omission found by the district court with evidence satisfying the preponderance standard. In any event, on appeal, this Court is not to determine whether it would have made the findings the trial court did, but whether such findings were clearly erroneous. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (citation omitted); *Garvey*, 383 F.3d at 900.

SUMMARY OF ARGUMENT

The FTC agreed to excuse the bulk of a substantial monetary judgment against Eborn in favor of a lesser judgment geared toward Eborn's ability to pay. That agreement was expressly contingent, however, on the essential element of Eborn's honesty about his financial resources. If the FTC had known that Eborn had access to more money, it would have insisted that he bear a greater proportion of the judgment against him. Yet Eborn's bank records and other evidence show that immediately after disclosing his finances, he suddenly had access to substantial amounts of money that he did not disclose to the FTC.

The district court properly found that Eborn's Financial Statements misrepresented or omitted numerous significant material information, hiding at least $369,547.80 in assets and income that could have been used to satisfy the underlying judgment against him. The court's order applying the plain terms of the 2010 Final Order to hold Eborn liable for the remaining balance of the judgment should be affirmed. (Part I.A.).

Evidence showed that Eborn deceived the FTC and the district court in numerous ways – any one of which would justify entering the modified judgment. First, Eborn's bank statements prove that he failed to disclose at least $61,519 in cash, shown by significant cash deposits largely made just after Eborn provided incorrect financial information to the FTC. He now claims that the money came

from loans or gifts, but he provided no substantiation that he was lent or given this money, and he did not disclose any such loans on his Financial Statements as he would have been required to do. His self-serving explanations come far too late to be credited. (Part I.B.i).

Second, evidence showed that Eborn misrepresented his role at two companies – Augusta Capital and Link Media – falsely claiming that he was a low-level employee rather than a corporate officer. Corporate documents signed by Eborn listing him as an officer show otherwise. Given the closely held nature of those companies, and his actual positions there, the FTC would have had a significant interest in determining if there were additional corporate assets or funds attributable to him that he could have applied to the settlement. (Part I.B.ii.).

Third, Eborn failed to disclose $96,200 in deferred compensation from Augusta Capital and at least $132,700 in payments from PDR. He again claims that the PDR payments were a "loan," but the evidence utterly fails to support that assertion. (Part I.B.iii.).

Fourth, Eborn failed to report accurately the value of his real and personal assets. By misrepresenting his residence, he effectively led the FTC to believe that, if the Commission sold his house to satisfy the judgment, it would be able to recover $30,000 less than it actually could have recovered. He also omitted from his financial statements personal property worth at least $33,100. (Part I.B.iv.).

Eborn's challenge to the sufficiency of the district court's findings fails. The court's findings that Eborn misrepresented four specific categories of material misrepresentations and omissions, along with the considerable evidence that supports those findings, satisfy Fed. R. Civ. P. 52 because they permit adequate appellate review. Further, Eborn's misrepresentations and omissions were plainly material, as the amount of undisclosed assets exceeded the amount Eborn contributed towards the judgment. Had the FTC known of those large sums, it would have demanded a greater contribution before agreeing to suspend the vast majority of the monetary judgment. (Part II).

ARGUMENT

I. EBORN HAS SHOWN NO CLEAR ERROR IN THE DISTRICT COURT'S FINDING THAT HIS NUMEROUS MATERIAL MISREPRESENTATIONS AND OMISSIONS IN HIS FINANCIAL STATEMENTS JUSTIFIED ENTERING THE MODIFIED JUDGMENT

The district court properly found that Eborn made material deceptions and omissions on his Financial Statements. Under the plain terms of the Final Order, the court correctly imposed on Eborn the full amount of the remaining judgment. Those findings were not clearly erroneous and should be affirmed.

A. The Plain Terms of the 2010 Final Order Require Reinstatement of the Suspended Judgment For Material Misrepresentations and Omissions

The 2010 Final Order unambiguously states that the full judgment shall be entered against Eborn, "without further adjudication," if he made any material misrepresentations or omissions on his Financial Statements. ER305-06 [D.74 at § VIII.B]. This is because "[t]he Commission's agreement to and the Court's approval of" the consent order were "expressly premised upon the truthfulness, accuracy, and completeness of" those statements. Eborn and the FTC "stipulate[d]" that Eborn's "Financial Statements provide[d] the basis for the monetary judgment," and the Commission expressly "relied on the truthfulness, accuracy, and completeness of" those Statements. ER305-06 [D.74 at § VIII.A].

The Final Order dictates that *any* misrepresentation or omission regarding "any asset" is sufficient to justify re-imposition of the entire judgment. ER305-06 [D.74 at § VIII.B]. Here, the evidence firmly shows Eborn made no fewer than four types of misrepresentations and omissions in his Financial Statements. Any one of them would be enough to justify re-imposition of the entire judgment. *Cf. FTC v. Seasilver USA, Inc.*, No. 2:03-cv-0676-RLH-LRL (D. Nev. July 27, 2006) (denying motion for reconsideration of order reinstating full suspended $120,000,000 judgment after defendants defaulted on payment obligations)

(unpublished) (attached as SER89-91), *aff'd sub. nom. FTC v. Americaloe, Inc.*, 273 F. App'x 621 (9th Cir. 2008).

B. The District Court Properly Found that Eborn Made Material Misrepresentations and Omissions in His Financial Statements Sufficient to Trigger the Modified Judgment

1. Eborn Failed to Disclose $61,519 in Cash

Eborn swore to the FTC in 2009 and 2010 that he had $42,400 in cash on hand. As documented by his own bank statements and corroborated by his deposition testimony, Eborn failed to report at least $61,519 in additional cash that he deposited in bank accounts between July 2009 (shortly after he signed the 2009 Financial Statement) and November 2010. *See supra* at 6-9. The district court properly held that Eborn failed to report the cash.

a. $23,200. Eborn's bank statements document $23,200 in cash deposits in three installments made within two weeks after he signed the 2009 Financial Statement. ER156, 162, 164, 165 [D.133-8 (Ex. 4) at 3, 9, 11, 12]; SER29 [D.133-1 at ECF pg. 15 (Appendix: Chart 1)]. At his deposition, Eborn denied that the $23,200 was part of the $42,400 he identified on his Financial Statements. ER109 [D.133-7 (Ex. 3) at Tr. 36]. Although Eborn claimed at his deposition that he received the $23,200 as loans, he was unable to recall from whom he borrowed this money or the source of the money notwithstanding the large size of these transactions. He also admitted that he had not repaid any of this money. ER107-

08, 112 [D.133-7 (Ex. 3) at Tr. 25-28, 31-32, 46-47]. In his 2010 Financial Statement, Eborn disclosed no such loans, as he would have been required to do. ER40 [D.134 (Ex. 2)] item 26].[8] That evidence firmly supports the district court's determination that Eborn's financial statements were not truthful.

Nearly a year after his deposition (and nearly five years after he deposited the money), Eborn filed a declaration in support of his opposition to the FTC's motion with a sudden new "recollection" that the $23,200 in cash deposits were in fact part of the $42,400 in cash he disclosed. ER19 [D.147 (Def. Ex. 1) ¶ 11]. The district court was not required to credit that contradictory, self-serving, and uncorroborated *post hoc* explanation.[9] *See, e.g.*, *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997) (affirming district court's refusal to credit "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence"); *FTC v. MacGregor*, 360 F. App'x 891, 893 (9th Cir. 2009) (same). Instead, in finding that Eborn had failed to disclose the money, the court was

[8] While Eborn claimed for the first time in his declaration before the district court that he received some of the $23,200 in cash as "gifts" (and not just loans), ER19 [D.147 (Def. Ex. 1) ¶ 14], he still failed to identify the person who provided the money as an alleged gift.

[9] This is particularly true where his new "recollection" potentially constituted both perjury (since it contradicted his prior sworn deposition testimony) and contempt (as Eborn admitted that he spent part of the $42,400 for personal expenses without leave of the district court in violation of the asset freeze imposed by the TRO and PI). ER109 [D.133-7 (Ex. 3) at Tr. 36]; SER84-86 [D.14 (TRO) § IV]; SER75-77 [D.35 (PI) § IV].

entitled to rely on Eborn's own earlier testimony. Eborn has shown no clear error in the court's holding.

b) $38,319. Between September 2009 and November 2010, Eborn deposited an additional $38,319 in cash. *See supra* at 8 n.4. At his deposition, Eborn again claimed that he received this money as "loans" or "gifts," but again – notwithstanding the large amount of money involved – he could not identify the source of any of these funds. ER110-12 [D.133-7 (Ex. 3) at Tr. 37-38, 40-42, 45-47]; *see also* ER19 [D.147 (Def. Ex. 1)] ¶¶ 13-14]. He did not report any such "loans" on his 2010 Statement. *See* ER40 [D.134 (Ex. 2) item 26] (listing only PDR "loan"). He also did not list this cash as "income" on his 2010 Statement or provide any evidence that he received this money from his employment. That evidence firmly supports the district court's judgment that Eborn made material misrepresentations by failing to report the cash.

Eborn suggested that some of the $38,319 "might have come from" the disclosed cash. ER112 [D.133-7 (Ex. 3) at Tr. 45]; *see also* ER20-21 [D.147 (Ex. 1) ¶¶ 19-20] (stating he "believe[d] that some of" his cash deposits were part of the $42,400 he disclosed). But the district court was not required to credit that equivocal, uncorroborated, and self-serving testimony. *See Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 1054, 1061 (9th Cir. 2002); *Publ'g Clearing House*, 104 F.3d at 1170-71.

Eborn's newly minted claim that he did not believe he was required to list any loans and gifts received after the TRO was entered, Br. at 23 (citing ER20 [D.147 (Def. Ex. 1) ¶ 15]), runs directly counter to the affirmations in his two Financial Statements. There, he swore that he was providing true and complete information, including loans and all cash he currently possessed (whether or not that cash was obtained through a gift). ER34, 40, 44, 73, 79, 83, 87 [D.133-5 (Ex. 1), D.134 (Ex. 2), items 12, 26, affirmation]. Eborn asserts that "loans and gifts … were not required to be reported," Br. 23, but his only support for that plainly incorrect contention is his own declaration – and it cannot be squared with the plain terms of the Financial Statement form.

Eborn's further contention that the district court failed to hold that his omission of cash holdings affected the FTC's decision to settle its case, Br. at 23, is inconsequential. The 2010 Final Order, agreed to by Eborn, expressly states that the FTC "has relied on the truthfulness, accuracy, and completeness of [Eborn's] Financial Statements" in agreeing to the order (as did the district court in approving the order). ER305 [D.74 § VIII.A]. This is particularly true where the amount of undisclosed cash is nearly one and a half times the cash he disclosed.[10]

[10] Eborn contends that "[t]he FTC never attempted to source this money." Br. at 7. But the FTC had no duty to do so. Eborn, by contrast, had a duty to disclose *all* of his cash holdings, without regard to their source.

When the district court found that Eborn had "fail[ed] to report at least $61,519 in cash," the court could properly disregard as entirely implausible Eborn's uncorroborated and inconsistent testimony that the $61,519 in cash that he deposited came from loans or gifts, or "might have come from" the cash he disclosed. Eborn has not nearly met his burden to show that the court committed clear error in reaching that determination.[11]

2. Eborn Misrepresented His Control Over Augusta Capital and Link Media

The district court properly found that Eborn materially misstated his positions at Augusta Capital and Link Media. Given his control over these closely held corporations, *see, e.g.*, ER291 [D.133-14 (Ex. 9]; ER293 [D.133-15 (Ex. 10)]; ER56-57, 60-66 [D.133-4 (Van Wazer Decl. ¶¶ 8-10, Exs. A, B]; ER124 [D.133-7 (Ex. 3) at Tr. 98-99]; ER248 [D.133-11 (Ex. 6) at Tr. 44], had the FTC known Eborn's true positions there, it would have had a significant interest in determining whether there were corporate assets or resources attributable to him that he could have used to make a greater contribution toward the settlement.

[11] At the very least, even accepting Eborn's argument that at least a portion of the $61,519 in deposits came from the $42,400 he disclosed as "cash on hand," ER20 [D.147 (Def. Ex. 1) ¶ 19], Eborn still underreported his cash holdings by at least $19,119 (the difference between his actual and reported cash holdings) – an amount that itself would still constitute a material omission.

a. Eborn Misrepresented Principal Position at Augusta Capital

As shown above, *supra* at 10-11, Eborn falsely claimed on his Financial Statements that he was a "Retail Accounts Manager" at Augusta Capital. ER32 [D.134 (Ex. 2) item 7]. In reality, he was an officer and principal there. Indeed, Augusta Capital had no retail accounts to manage. ER283-84 [D.133-13 (Ex. 8) at Tr. 59-62]. Instead, Eborn's true position there is supported by direct documentary evidence, including a formal corporate resolution used to open up a bank account listing Eborn as an officer of the corporation, ER291 [D.133-14 (Ex. 9], and a corporate letter seeking employee health insurance identifying Eborn as an "owner" of the company. ER293 [D.133-15 (Ex. 10)]. Eborn does not challenge the authenticity of those documents; indeed, he admitted that he represented to the bank that he was an officer of Augusta Capital when it opened up the account there. ER141 [D.133-7 (Ex. 3) at Tr.189-90]. The documents themselves are therefore conclusive on the matter. *See Publ'g Clearing House,* 104 F.3d at 1170-71 (dismissing argument (based on unsupported and conclusory affidavit) by person listed as company president on corporate documents that she did not control company).

The corporate documents were corroborated by Eborn's pay: he received nearly 45% of the company's gross receipts. No other person or entity received more than 12.6%; indeed, Pace Mannion, the putative President of Augusta

Capital, received only a negligible amount. ER56-57, 60-66 [D.133-4 (Van Wazer Decl.) ¶¶ 8-10, Exs. A, B]. Eborn does not contest those figures, and the district court committed no clear error in basing its finding that he controlled the company in part on the significant compensation he received.

While Eborn has denied his officer or ownership role at Augusta Capital, Br. at 24-25; *see also* ER141 [D.133-7 (Ex. 3) at Tr. 189-192], ER21 [D.147 (Def. Ex. 1) ¶ 22], he acknowledged that others would have believed he was a principal or owner because he was "so actively involved" with the business. He also admitted that he "primarily" did the work. ER141-42 [D.133-7 (Ex. 3) at Tr. 192-93]. Other than his own self-serving testimony, Eborn relies on the bare testimony of Pace Mannion, the putative President of Augusta Capital. But Mannion admitted he "didn't set [Augusta Capital] up," did not know who did, and could not remember when it began operations. Further, Mannion's credibility is substantially undermined by his admission that he had not even read documents that he signed identifying Eborn as a corporate officer or that other documents he signed were "mistakes." ER275-76, 282-83 [D.133-13 (Ex. 8) at Tr. 23, 27, 55, 57]. In any event, Mannion acknowledged Eborn's central role in the firm,

testifying that "almost all" of Augusta Capital's business deals "came through [Eborn]." ER280 [D.133-13 (Ex. 8) at Tr. 41].[12]

Eborn's testimony that he did not control Augusta Capital is scarcely believable on its own. It loses any remaining credibility because it collides with the corporate records. The district court could properly reject Mannion's conclusory and unsubstantiated testimony as simply not credible. *Villiarimo,* 281 F.3d at 1061; *Publ'g Clearing House,* 104 F.3d at 1170-71. The court's conclusion that Eborn controlled Augusta Capital was not clear error.

b. Eborn Misrepresented Principal Position at Link Media

Substantial evidence supports the district court's finding that Eborn controlled and was a principal at Link Media, and not an "Account Executive" as he claimed on his 2010 Financial Statement. As shown above, *supra* at 11-12, Eborn failed to show that he managed any accounts there. ER32 [D.134 (Ex. 2) item 7]; ER123 [D.133-7 (Ex. 3) at Tr. 95]. And, as befitting a principal and not an account manager, the evidence showed that he took home 30% of Link Media's profits. The putative owner, Clint Arnell – a former Eborn employee at Infusion Media – received only 10%. ER124 [D.133-7 (Ex. 3) at Tr. 98-99]; ER248

[12] Eborn himself testified that Mannion had only limited involvement in Augusta Capital. Mannion worked only limited hours and "wasn't terribly actively engaged" in the business, Eborn said. ER142 [D.133-7 (Ex. 3) at Tr. 193].

[D.133-11 (Ex. 6) at Tr. 44].[13] Eborn offers no good explanation for his executive-level compensation. The district court could properly conclude that Eborn earned an amount commensurate with his officer position at the company.

Eborn claims that the district court ignored contrary evidence that he was not a principal or owner at Link Media. Br. at 11, 23-24 (citing ER21 [D.147 (Def. Ex. 1) ¶ 23]; ER27 [D.147 (Def. Ex. 2) ¶¶ 5-6]. The district court could properly discount these conclusory declarations in light of Eborn's and Arnell's testimony evincing Eborn's central role at the firm. That testimony showed that Eborn was in charge and Arnell was his apprentice. Arnell worked for Eborn at Infusion Media as a lead broker and continued in that same role at Link Media. Eborn got Arnell started in the business, provided essential industry contacts, and taught Arnell industry practices and how to run the company successfully. ER123-124 [D.133-7 (Ex. 3) at Tr. 93, 97-98]; ER242-243, 246-247 [D.133-11 (Ex. 6) at Tr. 20-22, 36-40]. Because Eborn was paid and acted like a principal at Link Media, the district court committed no clear error concluding that Eborn misrepresented his control over the company.

[13] McLain Miller, Infusion Media's other principal, also received 30% of the profits from Link Media. ER124 [D.133-7 (Ex. 3) at Tr. 99].

3. Eborn Failed to Disclose Significant Income He Earned from Augusta Capital and Payments He Received from PDR

Substantial evidence also supports the district court's ruling that Eborn's 2010 Financial Statement failed to accurately and completely report significant income he was owed at Augusta Capital and payments he received from PDR, thereby hiding at least $274,828.80.

a. Eborn Failed to Disclose Income He Earned from Augusta Capital but Later Received

Eborn's 2010 Financial Statement falsely "disclosed" receiving $44,300 in income from Augusta Capital between January 1 and June 6, 2010. ER032 [D.134 (Ex. 2) item 7]. In fact, he had received no payments from Augusta Capital at that time. Yet three days after Eborn filed the 2010 Statement, he began to receive a stream of payments from Augusta that ultimately totaled $140,500. ER205, 206, 209, 216, 218, 226 [D.133-9, D.133-10 (Ex. 5) at 40, 41, 44, 51, 53, 61]; ER56-57, 60-66 [D.133-4 (Van Wazer Decl.) ¶¶ 8-10 & Ex. A, B)]; ER286, 288 [D.133-13 (Ex. 8) at Tr. 93-96, 101-103]; ER146-148 [D.133-7 (Ex. 3) at Tr. 218-227]. *See supra* at 12-14. Eborn does not contest the amount or timing of those payments.

Eborn provided no logical explanation why he did not get paid until only a few days after he submitted his June 2010 Statement when he had been working at Augusta Capital since December 2009. He testified that Augusta Capital made the payments to him upon his request when he needed the money. ER145-146 [D.133-

7 (Ex. 3) at Tr. 214-215, 218-19]. That testimony indicates that Eborn controlled the timing of payments made to him – in other words, that he had already earned that money or it was otherwise controlled by him. In that case, Eborn should have disclosed on his 2010 Statement his rights to the full $140,500. The Financial Statement form asked for details on money "owed" or held in a "trust or escrow." ER35-36, ER41 [D.134 (Ex. 2) items 17, 29]. Eborn similarly failed to disclose a $5,000 check from Pagani (a related entity controlled by Pace Mannion) that he received in May 2010 but deposited just four days after submitting the 2010 Statement. ER275 [D.133-13 (Ex. 8) at Tr. 23-24]; ER204 [D.133-9 (Ex. 5) at 39.]

At his deposition, Eborn could not explain why he reported the $44,300 he disclosed instead of the $140,500 he was about to receive. Instead, he testified that he did not know "what was in [his] mind" or "where [he] would have come up with" that amount. ER145 [D.133-7 (Ex. 3) at Tr. 215-216]. The evidence firmly supports the district court's determination that Eborn "fail[ed] to accurately report his income or his assets parked with" Augusta Capital. Eborn can show no clear error in that finding.

He claims – based on his self-serving declaration submitted nearly a year later – that he accurately disclosed the $44,300 "out of an abundance of caution" as "projected income." Br. at 26 (citing ER21 [D.147 (Def. Ex. 1) ¶ 21]. But Eborn admits that the $44,300 figure was false. He had not received that money as of

June 6, 2010, *see* ER145 [D.133-7 (Ex. 3) at Tr. 214-215], and the evidence showed that he had control over payments totaling $140,500 he began receiving shortly afterwards.

Eborn also claims that approximately $50,000 of the payments from Augusta Capital was a loan. Br. at 26-27; *see* ER147-148 [D.133-7 (Ex. 3) at Tr. 224-227]; ER21 [D.147 (Def. Ex. 2) ¶ 22]. Yet again, Eborn disclosed no such loan as required, and neither Eborn nor Mannion could provide any documentation of a loan. ER286 [D.133-13 (Ex. 8) at Tr. 95-96]. Further, contrary to Eborn's assertion (Br. at 27), Mannion acknowledged that Eborn has not repaid any of the money. *Id*. There is no good reason to credit Eborn's claims. On that record, Eborn has not nearly met his burden to show clear error.

b. <u>Eborn Failed to Report Significant Payments from PDR and Misrepresented the Nature of those Payments</u>

Eborn failed to disclose on his Financial Statements significant payments he received from PDR, Infusion Media's former payroll company. Eborn disclosed $119,000 as a "loan" from PDR. ER40 [D.134 (Ex. 2) item 26]. In fact, as shown above, *supra* at 14-16, Eborn ultimately received $292,628.83 from PDR – more than twice the amount reported – in a dozen large transfers between July 2009 and August 2010, including $251,700 he had already received when he submitted his 2010 Statement. Eborn does not contest that he received the payments or their

amounts. Indeed, even though he attempts once again to describe the money as a "loan," he acknowledges that he underreported that "loan" from PDR on his 2010 Statement. ER20 [D.147 (Def. Ex. 1) ¶ 16]. By themselves, those admissions are sufficient to show that Eborn made material misrepresentations to the FTC.

Moreover, Eborn's claim that those payments were "loans" is not credible. He received these payments on request, no questions asked, and without any contemporaneous loan agreement to document them. He has never repaid any of the money.[14] ER127-128, 131-134, 137-138 [D.133-7 (Ex. 3) at Tr. 130-134, 146, 150, 153-157, 172-73]; ER261 [D.133-12 (Ex. 7) at Tr. 45-47]; ER297-298 [D.133-17 (Ex. 12) ¶¶ 20, 26]; ER137-138 [D.133-7 (Ex. 3) at Tr. 172-73]. On August 30, 2010, *after* PDR had transferred the money to Eborn, Eborn and PDR signed a promissory note for $196,700. SER1-3 [D.133-18 (Ex. 13)]. The surrounding circumstances, however, strongly suggest that this note lacks substance. Not only was the note executed after the fact, but PDR has never attempted to collect on it. Moreover, the note does not cover the full amount of the payments to Eborn. *See supra* at 15-16; ER298 (D.133-17) (Ex. 12) ¶ 26];

[14] Contrary to Eborn's assertion, Br. at 27-28, the FTC did not allege a money-laundering scheme by Eborn through PDR. Rather, the FTC was only required to (and did) show that Eborn failed to report significant payments he received from PDR as required on the 2010 Statement.

compare SER31 [D.133-1 at PDF pg. 17 (Appendix: Chart 3)] *with* ER297 [D.133-17 (Ex. 12) ¶ 18].

The last two payments excluded from the note (totaling $40,928.83) are particularly telling. They were made in August 2010, just a few weeks before the note was signed. Those payments were made in very specific amounts down to the penny (without any corresponding bill payments by Eborn for similar specific amounts as reflected in his bank statements, ER166-236 [D.133-9, D.133-10]), in contrast to all the other PDR payments which were made in whole dollar figures. Such activity is consistent with Eborn cashing out the remaining funds that PDR was holding for him. The money also was provided to Eborn just prior to the time that he was liquidating his assets before settling with the FTC. Finally, one of the payments was made with a post-dated check. ER211 [D.133-9 (Ex. 5) at 46]. All of those factors are inconsistent with a loan to Eborn, but fully consistent with the return of parked funds.

Eborn is not saved by the bare testimony of Jeff Benson, PDR's principal, who claimed that these payments were loans. Br. at 28-29 (citing ER297-99 [D.133-17 (Ex. 12) ¶¶ 17-28]). Benson's uncorroborated testimony is not credible for the reasons set forth above: the payments were not documented as a loan when they were made, Eborn has not repaid any of the loan, and PDR has never attempted to collect on the loan.

Further, contrary to Eborn's assertion, the type of loan PDR allegedly made to him was not "commonplace." Br. at 28 (citing ER298 [D.133-17 (Ex. 12) ¶ 21). To the contrary, Mr. Benson testified that loans made by PDR typically consisted of payday and cash advance loans. He also testified that PDR occasionally made loans to individual principals or owners of its business clients. ER256-257 [D.133-12 (Ex. 7) at Tr. 11-14]. Eborn, however, was not a business client when the payments were made (Infusion Media having been shut down by the TRO). The only other loans Benson testified making to non-clients consisted of a loan to his business partner's brother and a loan to a business owner whose business secured the loan. ER259 [D.133-12 (Ex. 7) at Tr. 21-22]. Here the alleged loans to Eborn were unsecured,[15] and lacked family or current business ties.

Eborn's other *post hoc* attempt to explain the $95,928.83 discrepancy between the $292,628.83 PDR paid him and the $196,700.00 "promissory note" similarly fails. He argues that the difference was due to payments from PDR for the legal defense of Eborn's co-defendant, McLain Miller, that were deducted from the amount owed by Eborn. Br. at 13, 28-29 (citing ER20 [D.147 (Def. Ex. 1) ¶ 17] and ER27 [D.147 (Def. Ex. 2) ¶ 4]. But at most the bank statements reflecting the PDR payments show that $45,000 was paid directly to the attorneys

[15] The TRO and PI precluded Eborn and Miller from encumbering any of their assets. SER83-86 [D.14 (TRO) § IV]; SER74-77 [D.35 (PI) § IV].

representing both Eborn and Miller. SER17-22 [D.133-23 (Ex. 17)]; SER23-24 [D.133-24 (Ex. 18)]; ER261 [D.133-12 (Ex. 7) at 45-46]; ER130-131, 138 [D.133-7 (Ex. 3) at Tr. 144-48, 173]; SER31 [D.133-1 at ECF pg. 17 (Appendix: Chart 3)]. Even if half of the identified $45,000 (or $22,500) from PDR to Eborn's and Miller's attorneys were meant for Miller's defense and not for Eborn's, the bank statements still reflect a $72,428.83 shortfall between payments attributable to him from PDR ($292,628.83 less the $22,500) and the $196,700.00 promissory note. This significant discrepancy further evinces the bogus nature of the note.

The burden was on Eborn to show that he did not receive the additional money from PDR than what is reflected in the promissory note. *See, e.g.*, *Publ'g Clearing House*, 104 F.3d at 1171 (defendant failed to rebut FTC's showing that she controlled defendant corporation); *MacGregor*, 360 F. App'x at 893-94 (defendants failed to rebut FTC's showing that third party call centers acting in defendants' names committed law violations). He failed to meet that burden. The evidence strongly supports the district court's alternative finding that these payments represented money Eborn parked with PDR and hid from the FTC.

To be sure, on his 2010 Financial Statement, Eborn disclosed a loan from PDR of $119,000. ER40 [D.134 (Ex. 2) item 26]. At that point, however, Eborn had already received $251,700 from PDR. He therefore indisputably underreported his "loan" by at least $132,700. That, in itself, constitutes a material

misrepresentation. And if, as discussed above, the final two payments should have been disclosed, Eborn's underreporting of transfers from PDR balloons to $173,628.83. Adding the $173,628.83 in unreported payments from PDR to the $101,200 in unreported payments from Augusta Capital and Pagani, yields the $274,828.80 that the district court found that Eborn failed to accurately report. ER5 [D.157 at 2]. Eborn has failed to show a clear error in that finding.[16]

4. Eborn Materially Misrepresented the Value of His Real and Personal Property

Eborn also materially misrepresented the value of his real and personal property on his 2010 Statement.

[16] The FTC argued below Eborn also misrepresented his average monthly income on his Financial Statements. Eborn claimed just $9,100 in monthly income on his June 2010 Financial Statement. ER43 [D.134 (Ex. 2) item 32]. He argues that he overstated his income because his actual average monthly income was $7,916. Br. at 14 (citing ER21 [D.147 (Def. Ex. 1) ¶ 21]. In fact, if the average monthly payments that he received from PDR from January through June 2010 and the average monthly income he earned from Augusta Capital through June 2010 are included, Eborn should have reported an average monthly income of $42,483, more than four times the amount he disclosed. The district court, however, did not rule on that issue and the FTC did not seek a cross-appeal.

a. Eborn Misrepresented the Value of his Sandy, Utah Home

In 2010, Eborn reported on his Financial Statement that he lived in Sandy, Utah; in fact, he had moved to Draper, Utah without reporting the move. ER30, 37-38, 69, 76-77 [D.134 (Ex. 2), D.133-5 (Ex. 1), items 1 & 20-22]; ER114-115, 126 [D.133-7 (Ex. 3) at Tr. 56-58, 126-28]; SER4-11 [D.133-19 (Ex. 14)]. The failure to report the move was significant because if Eborn had been living in the Sandy house, he would have been protected from collection efforts by the FTC by a $40,000 state law homestead exemption. If, as was in fact the case, the Sandy house was not his primary residence, he would be entitled to only a $10,000 exemption from judgment. *See* Utah Stat. § 78B-5-503(2)(b) (2010). The FTC calculated Eborn's contribution to the settlement on the basis of all of his collectible assets, and by failing to report the change of address, Eborn effectively reduced the amount of his collectible assets by $30,000. Had the FTC known the Sandy house could have generated a larger judgment payment, it may have required Eborn to pay a larger amount toward the judgment.

Eborn asserts that he listed the Sandy, Utah home as his "current address" on the 2010 Financial Statement "because he did not own the Draper, Utah, home," Br. at 14, and because he planned to "move back" to Sandy, Utah. ER22 [D.147 (Def. Ex. 1) ¶ 26]. Neither excuse stands. The financial disclosure form required Eborn to report his current address; it contains no exception for rental property.

The primary personal residence homestead exemption similarly turns on whether a person "reside[s]" in a property, Utah Stat. § 78B-5-503(1)(c) (2010), and not whether he owns it. Eborn's admission that he was living in Draper, Utah at the time he submitted his 2010 Statement suffices by itself to show a violation of his disclosure obligations.[17]

Eborn's further argument that he was unaware of the homestead exemption, Br. at 29, misses the point. Even if that were true, Eborn's knowledge of the exemption is irrelevant. The 2010 Final Order authorizes reinstatement of the full judgment amount upon any material misrepresentation. The Order contains no scienter requirement.

Eborn is also wrong that his misrepresentation was immaterial because even the non-primary residence exemption would have protected Eborn's equity in the Sandy house, which he claims was $3,000 in 2010. Br. at 14, 29-30 (citing ER38 [(D.134 (Ex. 2) item 22]). Eborn provides no reason to trust his claim that the Sandy, Utah house dropped in value by $46,000 between the submission of his 2009 and 2010 Statements (and soon before he settled with the Commission). *Compare* ER38 [D.134 (Ex. 2) item 22] *with* ER77 [D.133-5 (Ex. 1) item 22]. It is

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[17] "Reside" means "to live in a particular place." Merriam-Webster Online Dictionary (2015), *available at* http://www.merriam-webster.com/dictionary/reside (last visited Feb. 7, 2015); *see also Houghton*, 118 P.3d at 296 ("reside" for purposes of this provision is determined by the "occupancy" of the person).

just as likely that the house value was closer (or more than) the $465,000 that Eborn claimed on his 2009 Statement. ER77 [D.133-5 (Ex. 1) item 22]. Eborn had every incentive to underreport the home value, particularly on his 2010 Statement. In any event, this omission was material as it was included in the Financial Statements upon which the FTC relied in agreeing to the 2010 Final Order that contingently excused Eborn from the full judgment amount. Eborn's misrepresentation would likely have discouraged the FTC from pursuing the home as an asset because it would have significantly reduced the value of the house that the agency could have expected to receive in a judgment sale by $30,000.[18]

b. Eborn Misrepresented the Value of his Personal Property

Finally, as shown above, *supra* at 17, Eborn also failed to disclose on his 2010 Statement several valuable pieces of personal property collectively worth over $33,000, including a $13,100 piano and $20,000 in household furniture. SER11.001-.004 [D.133-20 (Ex. 14) addendum]; ER117 [D.133-7 (Ex. 3) at Tr. 67]; SE25-27 [D.133-25 (Ex. 19)]; ER36-37 [D.134 (Ex. 2) item 20] (omitting property from his 2010 Statement). Eborn has no excuse for failing to report this

[18] This was so unless waived by Eborn during the execution process. *See* Utah Stat. § 78B-5-503(5)(b) (2010) ("The proceeds of any sale, to the amount of the exemption existing at the time of the sale, is exempt from levy, execution, or other process for one year after the receipt of the proceeds by the person entitled to the exemption").

property especially given that he disclosed on his 2010 Statement several items of personal property worth substantially less. ER37 [D.134 (Ex. 2) item 20].

For the same reason, his claim that he had no duty to report the property (Br. at 30) rings hollow. Eborn attempts to excuse his failure by asserting that the property was purchased with loan proceeds. He also claims that he believed personal property was exempt from the TRO as reflected by the Receiver purportedly allowing him to remove his personal items from Infusion Media's offices after the TRO. Br. at 14-15, 30 (citing ER21-22 [D.147 (Def. Ex. 1) ¶ 24]. But the Financial Statements required disclosure of *all* personal property, whether or not it was purchased with borrowed funds. And Eborn disclosed no such loans in any event. Further, his interpretation of the TRO or reliance on the Receiver's purported actions are irrelevant as the issue is whether he failed to disclose his personal property on his Financial Statements.[19]

[19] Such an interpretation is also not credible because Eborn was represented by counsel at the time and understood that other personal property, such as his cash, was supposed to be frozen. ER109 [D.133-7 (Ex. 3) at Tr. 35]. In any event, his personal property was subject to the asset freeze in the TRO and the PI, and the Receiver was only charged with taking control over the corporate defendants' assets – not personal property – after the TRO was entered. SER84-88 [D.14 (TRO) §§ IV, XII, XIII]; SER75-82 [D.35 (PI) §§ IV, XIII, XIV].

* * *

This case emphasizes the importance of defendants in FTC enforcement actions providing complete, accurate, and truthful financial information. Only if they do so can the agency assess accurately whether to settle charges and how much to settle them for. The district court properly relied upon the FTC's substantial evidence – uncontested bank statements, other documentary evidence, and sworn deposition testimony – showing that Eborn made numerous material misrepresentations and omissions on his Financial Statements. He misrepresented the cash he possessed, the businesses he controlled, the income he earned, the payments he received, and the real and personal property he owned. In so doing, Eborn hid at least $369,547.80. This is more than Eborn actually turned over to the FTC in partial satisfaction of the judgment.

The missing information would have been directly relevant to how much Eborn could have contributed toward the settlement. If Eborn had disclosed all his assets, income and information explicitly requested on his Financial Statements, the FTC could have, and likely would have, required him to have contributed more than he did. These material misstatements and omissions – taken individually or collectively – were sufficient to terminate the suspended monetary judgment in the 2010 Final Order and justifies the district court's entry of the full modified judgment against Eborn.

II. RULE 52(a)(1) DOES NOT APPLY TO THIS CASE, BUT IF IT DID, THE DISTRICT COURT'S ORDER COMPLIED WITH THE RULE BECAUSE THE ORDER PERMITS APPELLATE REVIEW

Eborn contends that the district court's order was insufficiently detailed to comply with Fed. R. Civ. P. 52(a)(1). Br. at 31-34. The claim lacks merit. If the district court was required to make any factual findings at all, its findings comply with Rule 52 because, in conjunction with the evidentiary record, they are sufficient for this Court to conduct appellate review.

As an initial matter, Rule 52(a)(1) does not apply in this case. That rule is limited to "an action tried on the facts without a jury." *See, e.g., United States v. Smith*, 443 F. App'x 194, 197 (7th Cir. 2011) ("Rule 52 . . . applies only to bench trials in civil cases."); *see also Unt v. Aerospace Corp.*, 765 F.2d 1440, 1443-44 (9th Cir. 1985) (applying rule to bench trial); *Swanson v. Levy*, 509 F.2d 859, 860-61 (9th Cir. 1975) (same). This matter is not such an action. To the contrary, the district court resolved the FTC's post-judgment motion to terminate the suspended monetary judgment. Indeed, the FTC and Eborn agreed that the full judgment can be re-imposed "upon motion by the Commission" and "without further adjudication" by the district court. ER305-06 [D.74 at 18-19]. This matter therefore is not "an action tried on the facts."

The rule most applicable to this proceeding is Fed. R. Civ. P. 52(a)(3), which provides that a "court is not required to state findings or conclusions" in ruling on motions, including for summary judgment or to dismiss, "or, unless these rules provide otherwise, on any other motion." Under Rule 52(a)(3), this Court has frequently affirmed district court orders (and denied requests for remand) that did not provide *any* findings in resolving a wide range of motions, including motions for summary judgment and to dismiss. *See, e.g., Ins. Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.*, 201 F.3d 1111, 1116 (9th Cir. 2000) (affirming summary judgment limiting carrier's liability to $50 for theft of cargo worth $257,285.34); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 n.4 (9th Cir. 1995) (affirming summary judgment against public figure plaintiff in defamation suit); *see also Cusano v. Klein*, 485 F. App'x 175, 178 (9th Cir. 2012) (no findings necessary to decide motion for reconsideration); *Barton v. U.S. District Court for Cent. Dist. of California*, 410 F.3d 1104, 1109 (9th Cir. 2005) (no findings necessary to decide motion to compel discovery); *Societe de Conditionnement en Aluminum v. Hunter Eng'g Co.*, 655 F.2d 938, 942 (9th Cir. 1981) (no findings necessary to decide motion to dismiss for lack of subject matter jurisdiction); *see generally* Wright & Miller, 9C Fed. Prac. & Proc. Civ. § 2575 (3d ed. 2014); *but see Holly D. v. Calif. Inst. of Tech.*, 339 F.3d 1158, 1180-81 (9th Cir. 2003) (noting that where district court issued multiple inconsistent orders, the court must "stat[e]

its reasons somewhere in the record when its 'underlying holdings would otherwise be ambiguous or inascertainable.'")

In any event, Eborn's argument fails even if Rule 52(a)(1) applies. That rule requires a district court to "find the facts specially." Fed. R. Civ. P. 52(a)(1). The district court did just that. The district court expressly found that Eborn made material misrepresentations and omissions on his Financial Statements in four specific ways. First, the court concluded that Eborn "fail[ed] to report at least $61,519 in cash[.]" ER5 [D.157 at 2]. This finding, supported by the record as shown at pages 6-9 above, clearly shows that the court accepted the FTC's evidence that Eborn made a series of cash deposits that reflected cash that he possessed but failed to disclose on his Financial Statements, and necessarily rejected Eborn's contention that he disclosed this money.

Second, the district court found that Eborn "misrepresent[ed] his control over other businesses[.]" ER5 [D.157 at 2]. Here, based on the record as shown at pages 9-12 above, the court unambiguously concluded that Eborn failed to disclose his actual principal or ownership positions at Augusta Capital and Link Media where he likely would have had access to additional corporate funds or assets that he could have used to provide a greater contribution toward the settlement.

Third, the district court found that Eborn "fail[ed] to accurately report his income or his assets parked with third parties, thus hiding at least $274,828.80[.]"

ER5 [D.157 at 2]. The court clearly accepted the FTC's evidence (and rejected Eborn's counter-submissions) that Eborn failed to disclose at least $96,200 from Augusta Capital, $5,000 from Pagani, and $173,628.80 he received from PDR beyond the $119,000 "loan" he disclosed. *See supra* at 12-16.

Fourth, the district court found that Eborn "misrepresent[ed] his real and personal property, including his failure to accurately report his residence and his acquisition of over $33,100 in personal property." ER5 [D.157 at 2]. In so doing, the court accepted the FTC's evidence (and rejected Eborn's objections) that Eborn misrepresented his residence at the Sandy, Utah house and failed to disclose valuable personal property. *See supra* at 16-17. The order and record thus provide a complete roadmap of the grounds upon which the district court based its decision.

Contrary to Eborn's contentions, Br. at 34, the district court was not required to explain its reasons for rejecting certain evidence proffered by Eborn. The order and record clearly reflect both that the district court agreed with the FTC's arguments and evidence and that it rejected Eborn's version of events. The grounds for the court's holding are sufficiently clear from the order and record. This Court has established that where the record supports the district court's

disposition, a "terse" ruling is sufficient, even in a complex case. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000).[20]

This Court has held that "a failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings," and that it may "affirm if the findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision or if there can be no genuine dispute about the omitted findings." *Enforma Natural Prods.*, 362 F.3d at 1212, 1216 (citations omitted). In short, remand is only required where the "reasons for the district court's decision are not otherwise clear from the record." *Holly D.*, 339 F.3d at 1180 (citation omitted); *see also Unt*, 765 F.2d at 1444-45 (conclusory findngs are sufficient where "the record . . . clearly reflects the basis for the trial court's determinations."); *Swanson*, 509 F.2d at 861 (same). No remand is necessary where the lower court's findings are "explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached

[20] The district court's adoption of the Commission's proposed order does not constitute error. While this Court generally disapproves of such a practice, *see, e.g., Lumbermen's Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18 (9th Cir. 1980), even the "verbatim adoption of a prevailing party's proposed findings is not automatically objectionable if the findings are supported by the record," *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1215 (9th Cir. 2004) (citing *Unt*, 765 F.2d at 1445), which they are in this case.

its decision." *Enforma Natural Prods.*, 362 F.3d at 1216 (citing *Unt*, 765 F.2d at 1444). Here, the district court's order provided adequate details and its reasons are sufficiently clear from the record to enable this Court to understand the basis for its decision and to engage in meaningful appellate review.

The cases cited by Eborn do not mandate a different result. Br. at 32-34. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982), held that remand is required "[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law." But Eborn claims no legal error, only factual ones.

Lumbermen's, supra, a product liability case, involved complex factual questions of the design and manufacture of equipment. This Court reversed as insufficient the district court's two sentence findings regarding the complex questions of causation and negligence. 645 F.2d at 18-19. Here, in contrast, the district court's findings that Eborn misrepresented or omitted material information in four specific categories along with the factual record provided sufficient details to understand the basis for the court's decision.

Finally, in *Enforma Natural Prods.*, this Court vacated the district court's judgment and remanded for further findings on grounds not applicable here. The district court appeared to have relied improperly on a court-appointed expert. The appellate court could not discern whether or not reliance on the expert was

improper because the lower court had failed to make any record of that expert's role or his conclusions. Nor did the district court create a "record of the hearing or conference" at which the expert participated. 362 F.3d at 1212-1215. Given the presence of serious doubt about the validity of the district court's judgment and the completeness of the record, this Court found the district court's findings inadequate. The Court pointed out that where "the findings are supported by the record," remand is unnecessary. *Id.* at 1215 (*citing Unt*, 765 F.2d at 1445).

That is the case here. The entire record relied upon by the district court – 19 exhibits submitted by the FTC and two by Eborn – is fully available for review. In contrast to the single conclusory finding in *Enforma Natural Prods*., here the district court's findings provided sufficient details that, along with the fully reviewable record, show that the court accepted the FTC's arguments and evidence and rejected Eborn's submissions.[21]

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[21] Likewise, both of Eborn's cases from the Federal Circuit are distinguishable. Br. at 32-33. In *Baxter Healthcare Corp. v. Spectramed, Inc*., 49 F.3d 1575, 1582 (Fed. Cir. 1995), the Court noted that remand might be appropriate where the district court "offered no explanation as to how it arrived" at its decision, whereas here the order and record adequately show the grounds for the district court's decision. Indeed, the *Baxter* court did not remand the case, but held that it would itself "examine the record to determine whether the facts support the judgment" because an appellate court "review[s] judgments, not opinions." *Id.* The court in *Grayco, Inc. v. Binks Mfg. Co*., 60 F.3d 785, 791 (Fed. Cir. 1995), remanded both because the district court made only one conclusory finding and failed to engage in any infringement claim construction as required; here, in contrast, the district

Finally, Eborn claims that the district court "did not define or apply a legal standard" of materiality. Br. at 19. The court had no duty to do so. "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent." Black's Law Dictionary (9th ed. 2009); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1137 (9th Cir. 2000) (same) (citing Restatement (Second) of Contracts § 162 (1979)). Applying that definition to this case, omitted information is material if its disclosure would have been considered by the FTC "as having significantly altered the 'total mix' of information made available" to it in its settlement discussions with Eborn. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (discussing materiality standard under the Securities Exchange Act of 1934).[22]

The four categories of information misrepresented or omitted by Eborn are plainly material under that standard. The FTC agreed to conditionally excuse him

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court's order and record fully reflect the basis for its decision and the court did not fail to make any required legal findings.

[22] The 2010 Final Order defined "Material" to mean "likely to affect a person's choice of, or conduct regarding, goods or services." SER36 [D.74 at 5]. This definition was plainly directed to the injunctive provisions in the order that prohibited defendants from making any "Material" misrepresentations about the products or services it offered or from failing to disclose "Material" terms of an offer. *See, e.g.*, SER38-40 [D.74 §§ II, III]. However, it is entirely consistent with the materiality of representations made on financial statements to the FTC that would be "likely to affect" the FTC's decision regarding whether to settle an enforcement action and the terms of that settlement.

from paying the vast portion of the $29 million judgment as long as it was able to collect an amount of money geared to Eborn's ability to pay. Eborn's assets are obviously material to the Commission's determination of the appropriate amount. Indeed, the Commission agreed to a payment from Eborn of about $300,000, and the amount of money hidden by Eborn exceeded that amount. It cannot be doubted that had the Commission known of Eborn's hidden assets, it would have insisted on a higher contribution from him. That is the essence of materiality.

Eborn's attempts to trivialize those misstatements and omissions are meritless. He claims that he made only "minor accounting" mistakes, or erred in the "manner" in which he disclosed information. Br. at 17-18. The record plainly belies those claims as set forth at length above.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, no other known cases in this Court are deemed related to this appeal.

Date: February 9, 2015

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. 32 (a)(7)(B), because it contains 13,030 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010.

s/ *Michael D. Bergman*
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CERTIFICATE OF SERVICE

I certify that on February 9, 2015, I electronically filed the foregoing Brief of the Appellee Federal Trade Commission and Supplemental Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate Electronic Case Files ("ECF") system. I certify further that all participants in this appeal are registered Appellate ECF system users and were served by the Appellate ECF system on February 9, 2015.

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