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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

against Gugliuzza. And even if the statute could apply, Gugliuzza would not merit fees because the FTC acted reasonably when it sought to except the entire $18.2 million judgment from discharge.

Gugliuzza fares no better in claiming entitlement to an award of costs. EAJA governs an award of costs against the government; Federal Rule of Civil Procedure 54(d)(1) does not. Under EAJA, a court has broad discretion to award costs: costs "*may* be awarded to the prevailing party." 28 U.S.C. § 2412(a)(1) (emphasis added). The bankruptcy court properly exercised this broad discretion in denying fees in a case that involved close and difficult issues and presented issues of substantial public importance.

STATEMENT OF THE ISSUES

1. Whether the bankruptcy court abused its discretion in declining to award attorney's fees to Gugliuzza—the prevailing party below—under a provision of EAJA, 28 U.S.C. § 2412(d)(1)(D), that authorizes fee awards to a *non-prevailing party*.

2. Whether the bankruptcy court abused its discretion in declining to award costs to Gugliuzza under the EAJA, 28 U.S.C. § 2412(a)(1).

STATEMENT OF THE CASE

A. Gugliuzza's Deceptive Marketing Scheme

Gugliuzza and his company, Commerce Planet, Inc., ran a deceptive Internet

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

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

B. The FTC's $18.2 Million Judgment

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

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

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

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

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

C. The Initial Bankruptcy Proceeding and Appeal

Gugliuzza filed a Chapter 7 bankruptcy petition and sought discharge of the FTC's judgment against him. The FTC opposed that attempt, initiating an adversary proceeding on the ground that Gugliuzza's judgment debt was excepted from discharge under the Bankruptcy Code's fraud exception, which bars discharge of debts "to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A).

The FTC moved for summary judgment on the ground that the Enforcement Ruling had already resolved each of the factors necessary to prove that a debt falls within the fraud exception: (1) "misrepresentation, fraudulent omission or deceptive conduct by the debtor"; (2) "knowledge of the falsity or deceptiveness of his statement or conduct"; (3) "an intent to deceive"; (4) "justifiable reliance by the creditor on the debtor's statement or conduct"; and (5) "damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman* (*In re Slyman*), 234 F.3d 1081, 1085 (9th Cir. 2000).

The bankruptcy court granted the FTC's motion, concluding that the Enforcement Ruling established all of those elements. The bankruptcy court held that the same legal standards that governed the underlying case also govern the

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by any amounts collected from them. Dkt. No. 331, at 9-10 (Aug. 25, 2016), *FTC v. Commerce Planet, Inc.*, No. 8:09-cv-1324-CJC (C.D. Cal.).

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

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

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

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

Section 523(a)(2)(A) may generally be inferred from a reckless indifference finding"—such as Gugliuzza's reckless indifference to consumer deception—"if the totality of the circumstances allow." *Id.* at 377. But it reasoned that, because Section 5(a) of the FTC Act does not require a showing of intent, the prior litigation had not conclusively resolved the question whether Gugliuzza intended to deceive consumers. *Id.* at 376-77.

D. The Remand to the Bankruptcy Court

On remand, the bankruptcy court held a trial limited to the issue of Gugliuzza's intent. The FTC presented considerable circumstantial evidence that Gugliuzza intended to deceive consumers.[4] It showed, for example, that at Gugliuzza's direction, disclosures on the website informing consumers of the membership plan were placed where consumers likely would not see them. Several of Gugliuzza's colleagues testified that Gugliuzza rejected recommended changes to the website that would have informed consumers of the true nature of the transaction, such as more prominent disclosures and check boxes—because those changes hurt sales. Gravitz Decl. ¶¶ 12, 39, 41 [SER011, 018] (prominence of disclosures); Seidel Decl. ¶ 18 [SER047-048] (check box for consumers to agree to terms and conditions); Guardiola Decl. ¶ 22 [SER054] (use of pre-billing

[4] The FTC also relied on law of the case as to facts conclusively determined in the Enforcement Ruling—*e.g.*, regarding the deceptiveness of Gugliuzza's conduct and his knowledge—that were relevant to Gugliuzza's intent. *See* Doc. 210 at 18-20 [SER0075-077].

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

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

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

testimony from Gugliuzza, called as an adverse witness by the FTC. At various points in the proceeding, Gugliuzza moved for judgment on partial findings, but the bankruptcy court deferred the matter until the FTC rested its case. On April 26, 2018, the court ruled from the bench in favor of Gugliuzza. It agreed that the FTC's evidence demonstrated that "a lot of things were done improperly," including "some very sketchy stuff." The court also determined that Gugliuzza "did ignore things that should not have been ignored." Apr. 26, 2018 Tr. at 25:20-21, 26:2, 26:12 [SER112-113]. Ultimately, however, it was not convinced that Gugliuzza intended to deceive consumers. The bankruptcy court entered judgment for Gugliuzza on June 29, 2018. Doc. 270 [ER 26-27].

E. The Order on Appeal

Not satisfied with his escape from an $18.2 million judgment, Gugliuzza moved under the Equal Access to Justice Act for an award of $1.8 million in attorney's fees and $11,000 in costs. ER 29, 83-85. He argued that the government—*i.e.*, the taxpayers—should foot his litigation bill under four EAJA provisions:

(1) 28 U.S.C. § 2412(a)(1), which provides that costs "may be awarded to the prevailing party" in an action brought by United States;

(2) § 2412(b), which permits the award of attorney's fees against the United States "to the same extent that any other party would be liable under the common

law." Gugliuzza claimed that the FTC had acted in bad faith by continuing the bankruptcy adversary action after remand without proof that he intended to deceive, and thus that fees were justified;

(3) § 2412(d)(1)(A), which requires an award of fees in favor of a prevailing party when the position of the government was not "substantially justified"; and

(4) § 2412(d)(1)(D), which allows a party that loses its case and is subject to a judgment in favor of the government to collect fees where "the demand by the United States is substantially in excess of the judgment finally obtained by the United States."

On August 8, 2018, after briefing by the parties and a hearing, the bankruptcy court denied the motion, explaining that "the FTC had every reason to keep going on this," even though "in the end … the witnesses, they couldn't get there" to convince the court of Gugliuzza's intent to deceive. Aug. 8, 2018 Tr. 20:16-25, 21:1 [ER 289-290]. Gugliuzza now appeals, but as described in greater detail below, with regard to attorney's fees, he pursues only one of his three theories.

STANDARD OF REVIEW

The bankruptcy court's decision to deny attorney's fees and costs under the EAJA is reviewed for abuse of discretion. *See United States v. 2.6 Acres of Land*, 251 F.3d 809, 811 (9th Cir.2001). "The court's interpretation of the EAJA,

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

ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY DECLINED TO AWARD ATTORNEY'S FEES TO GUGLIUZZA.

The "American rule" requires litigants to bear their own attorney's fees. But in the Equal Access to Justice Act, Congress determined that in some limited circumstances, the federal government may be required to pick up the tab. If the party opposing the government is a "prevailing party" in the litigation, EAJA allows fee-shifting if (1) a fee award would be warranted "under the common law" and is not "expressly prohibited by statute," 28 U.S.C. § 2412(b);[5] or (2) "the court finds that the position of the United States" was not "substantially justified," § 2412(d)(1)(A). If the government brings a case and wins, so the private litigant is not a prevailing party, but the judgment demanded by the government was "substantially" and "unreasonabl[y]" "in excess of the judgment finally obtained by the United States," EAJA permits the non-prevailing party to recover fees "related to defending against the excessive demand." § 2412(d)(1)(D).[6] Because EAJA waives the sovereign immunity of the United States, it "must be construed strictly" against waiver and "not enlarge[d] … beyond what the language

[5] This provision makes the common-law "bad faith" exception to the American Rule applicable to the government, unless another statute prohibits it. *See Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1279 (9th Cir. 1996).

[6] A court nonetheless may deny fee-shifting where "special circumstances make an award unjust." 28 U.S.C. §§ 2412(d)(1)(A) & (D).

requires." *Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010) (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)).

There is no question that Gugliuzza is the prevailing party in this bankruptcy proceeding, as he himself recognizes. *See* Br. 8. On appeal, however, he has abandoned his arguments that he merits an award of attorney's fees under the two EAJA provisions, §§ 2412(b) and (d)(1)(A), that permit an award of fees to the prevailing party. *See* Br. 5-6. The argument would have been futile in any event. As the bankruptcy court found—and Gugliuzza does not challenge—the FTC was substantially justified (and proceeded in good faith) in asserting that the fraud exception precluded discharge of Gugliuzza's $18.2 million judgment debt. *See* Aug. 8, 2018 Tr. 20-21 [ER 289-90].

Instead, the only theory Gugliuzza now pursues is under § 2412(d)(1)(D). He can get no relief there, however, because that provision is inapplicable on its face. Congress limited "excessive demand" fee awards under (d)(1)(D) to cases where the party seeking fees is *not* a prevailing party and the government "obtained" a "judgment." Neither condition is satisfied here.

As the Ninth Circuit has explained, Section (d)(1)(D) applies only when the government won the litigation—if only nominally—by obtaining "favorable judicial action." *United States v. One 1997 Toyota Land Cruiser*, 248 F.3d 899,

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

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

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

recourse to these provisions; he failed, however, to satisfy the criteria for fee awards under them. The non-prevailing-party section of the statute does not serve as a catch-all for winning parties who cannot show the government's position to have been unjustified. Rather, the concerns that underlie EAJA "are not so compelling that they outweigh a … presumption in favor of construing waivers of sovereign immunity narrowly." *W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 989 (9th Cir. 2010). This is "particularly" the case when "the plain meaning of the statutory text is so clear." *Id*.

But even if (d)(1)(D) could apply where the government is the losing party, Gugliuzza still would not be entitled to an "excessive demand" fee award here because the FTC's demand was not "unreasonable … under the facts and circumstances of the case." § 2412(d)(1)(D). Indeed, there was no "demand" at all in the adversary proceeding. The purpose of that proceeding was to determine whether the FTC would be enjoined from collecting on its enforcement action judgment after Gugliuzza was granted a discharge in his Chapter 7 case.[8] The adversary proceeding did not seek to determine what the *amount* of the excepted judgment debt should be (whether $0 or $18.2 million),[9] The bankruptcy court's

[8] Absent exception, a bankruptcy discharge "operates as an injunction" prohibiting the collection of a debt. *See* 11 U.S.C. § 524(a)(2)-(3).

[9] Indeed, the adversary proceeding could not have revisited that issue—$18.2 million was the total consumer loss established in the Enforcement Ruling, and

finding that the FTC nondischargeability claim was substantially justified—which Gugliuzza does not challenge on appeal—leads inevitably to the conclusion that the FTC acted reasonably when it asked that Gugliuzza not be excused from the entire $18.2 million judgment against him. That judgment either was properly excepted from discharge or it wasn't; unlike in many cases, there was no intermediate sum the FTC could have claimed was excepted from discharge instead.

In addition to these fatal deficiencies, the $1.8 million dollars sought by Gugliuzza is unreasonable and unsupported. As the FTC showed below (Doc. 277 at 15-17 [ER 240-42]), Gugliuzza seeks reimbursement for expenses that are not attributable to this adversary proceeding.[10] He also improperly seeks fees related to proceedings in which did not prevail (such as his unsuccessful appeal to the Ninth Circuit regarding collateral estoppel, which was dismissed for lack of jurisdiction). *See* Doc. 275 at 49-62 [ER 131-44]. And his claim is based on an hourly rate *four times* the $125 per hour maximum allowed by the statute (*see* Doc. 275 at 13, ¶ 3

Gugliuzza was collaterally estopped from relitigating that amount. *See In re Gugliuzza*, 527 B.R. at 378.

[10] For example, over 300 of the attorney hours claimed in Gugliuzza's motion appear related to Gugliuzza's objection to the FTC's proof of claim in the underlying bankruptcy proceeding or other matters pertaining to the administration of the trustee estate. *See, e.g.*, Doc. 275 at 22, 25, 29-33 [ER 104, 107, 111-15].

[ER 95]) without adequate justification for such an exorbitant amount.[11]

The bankruptcy court found that Gugliuzza did not merit a fee award at all and therefore did not examine the particulars of his fee request. Accordingly, if this Court finds that the denial of fees was error, it should not simply accept Gugliuzza's calculation of the fee, but should remand to the bankruptcy court for a determination of these matters in the first instance. *See, e.g., Love v. Reilly*, 924 F.2d 1492, 1496-97 (9th Cir. 1991) (remanding to the district court for findings "as to the availability of attorneys in the area with similar skills who would take the case at the statutory rate").

II. THE BANKRUPTCY COURT PROPERLY DECLINED TO AWARD COSTS TO GUGLIUZZA.

Gugliuzza wrongly claims that he is "entitled" to an award of costs and that the bankruptcy court therefore had no discretion to deny them. *See* Br. 8-9. The claim rests largely on Federal Rule of Civil Procedure 54(d)(1), which states that costs "should" be awarded to a prevailing party. Even if the Rule applied here, its plain terms create at best a presumption of fees and not an entitlement. But the rule does not apply in any event: it states that "costs against the United States … and its

[11] Gugliuzza cites his counsel's "specialized experience" in bankruptcy, fraud, trial and appellate practice (Br. 14), but mere specialization in a field of law is not a "special factor" under the statute. *See Pirus v. Bowen*, 869 F.2d 536, 541-42 (9th Cir. 1989) ("It is not enough … that the attorney possess distinctive knowledge and skills."). Moreover, fee enhancement is available only if there is a "limited availability of qualified attorneys for the proceedings involved" at the statutory rate. 28 U.S.C. § 2412(d)(2)(A). Gugliuzza made no such showing.

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

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

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

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

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

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

[12] Gugliuzza dismissively characterizes the bankruptcy court's decision to deny costs and fees as motivated by Gugliuzza's "perceived ingratitude." Br. 9. It is evident, however, that the court meant that Gugliuzza should consider himself "fortunate" because the case could well have gone the other way. Aug. 8, 2018 Tr. 21:7 [ER 290]. Gugliuzza's insinuation that the FTC has no intention of providing redress to consumers (Br. 9) is also specious. The FTC was reasonably attempting to make greater headway in its collection efforts before hiring a claims agent to run a redress program.

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

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

CONCLUSION

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

Date: December 10, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the CM/ECF system on December 10, 2018. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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