No. 9:2019-cv-80001

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JOSEPH K. RENSIN,
Defendant-Appellant,

v.

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee.

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida
Adv. No. 17-01185-EPK

BRIEF OF THE FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission believes that oral argument is unnecessary to this case. It involves no legal issues that have not been settled in this Court. The facts and legal issues are fully set out in the bankruptcy court's exhaustive opinion, and in the parties' appellate briefs.

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INTRODUCTION

Joseph Rensin and his company, BlueHippo, operated a nationwide marketing scam, preying on consumers with poor credit who wanted to buy a computer. The Federal Trade Commission brought suit against BlueHippo, resulting in a 2008 consent order that required BlueHippo and Rensin to disclose all material terms of their sales. Yet Rensin and BlueHippo continued deceiving consumers for over a year after that order, bilking tens of thousands of consumers out of millions of dollars. They both were held in contempt after the court found that they had violated the clear terms of the consent order, and were ultimately subject to $13.4 million in compensatory contempt sanctions to be distributed to defrauded consumers.

Rensin failed to pay any portion of the contempt judgment, and the FTC filed another contempt action against him. In the midst of that proceeding, Rensin filed for bankruptcy, where he now seeks to discharge his $13.4 million judgment debt. After a full trial, at which Rensin himself testified, the bankruptcy court determined that two exceptions to discharge applied: the fraud exception, Section (a)(2)(A), and the exception for willful and malicious injury, Section (a)(6).

Rensin's intent and knowledge were the only disputed elements at trial, and the bankruptcy court found that the FTC had proved both of them. The court determined that Rensin "acted with the intent to deceive"; had "full knowledge of,

and personally authorized" the deceptive practices at issue; and fully intended the outcome of the fraudulent scheme. In short, "he himself was responsible for the fraud," having "orchestrated the entire affair" and caused the "entire harm brought to bear on BlueHippo's customers." The court rejected Rensin's trial testimony claiming he did not know about the deceptive practices, finding it inconsistent with both ample other evidence demonstrating his knowledge and Rensin's own prior testimony, and "a brazen attempt to avoid judgment against him in this case."

This Court should affirm the bankruptcy court's judgment. The facts established all elements of both discharge exceptions, including the requisite intent. Rensin is not the "honest but unfortunate debtor" to whom the Bankruptcy Code was designed to give relief; to the contrary, he is a "malefic debtor" who "may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct." *SEC v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1282 (11th Cir. 1998) (cleaned up).

QUESTION PRESENTED

Did the bankruptcy court clearly err when it determined, after trial and on a full record, that Rensin had the requisite knowledge and intent to render his debt to the FTC nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6)?

STANDARD OF REVIEW

This Court reviews a bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *Englander v. Mills (In re Englander)*, 95 F.3d 1028, 1030 (11th Cir. 1996). If the bankruptcy court's assessment of the evidence is plausible in light of the entire record, the reviewing court may not reverse, even if it may have weighed the evidence differently. *Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane)*, 485 B.R. 460, 468 (S.D. Fla. 2013), *aff'd*, 755 F.3d 1285 (11th Cir. 2014). Particular deference is due to credibility determinations, especially regarding intent. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 305 (11th Cir. 1994).

STATEMENT OF THE CASE

A. Rensin's Deceptive Scheme

Rensin was the founder, chief executive officer, and sole owner of BlueHippo Funding, LLC and BlueHippo Capital, LLC (collectively, "BlueHippo").[1] Parties' Joint Pretrial Stipulation ("Stip."), ECF 66 ¶ 1 [ER-118]; ECF 94 (Trial Tr.) at 40:13-15 [ER-123]. Under Rensin's management and control, BlueHippo marketed computers to consumers with poor credit while misleading

[1] Documents filed in the nondischargeability proceeding below (Case No. 17-01185) are cited as [ECF __] and documents filed in the underlying district court action, *FTC v. BlueHippo Funding, LLC, et al.*, Case No. 1:08-CV-01819 (S.D.N.Y.), as [D. Ct. ECF __]. For the court's convenience, we attach a paginated compilation of record excerpts drawn from the designated record in this appeal and refer to citations therein as [ER__]. Plaintiff's trial exhibits are [PX__].

them about material terms and conditions of their purchases.[2] 7/27/10 Order ("Contempt Order"), ECF 1-2, D. Ct. ECF 76 at 5-10 [ER-101-06].

In 2008, the FTC sued Blue Hippo to halt the deceptive practices. D. Ct. ECF 1 [ER-162-178]. BlueHippo did not contest the charges but instead agreed to a consent order that required it to cease its unlawful practices and pay equitable monetary relief for consumer injury. 4/10/08 Stipulated Final Judgment and Order of Permanent Injunction ("Consent Order"), ECF 1-3, D. Ct. ECF 2 [ER-001-96]. Under the Consent Order, BlueHippo and its officers and agents – including Rensin – were required to disclose to consumers, before they made any payment, "all material terms and conditions of any refund, cancellation, exchange or repurchase policy." *Id.*; Stip. ¶ 18 [ER-120]. Rensin knew about the consent order, including this requirement: he signed an acknowledgement when it was entered, later testified to his knowledge, and admitted so directly in his answer to the FTC's adversary complaint. *Id.*; Trial Tr. 66:11-19 [ER-131]; PX 43A (Rensin's signed acknowledgement) at 6 [ER-257]; PX 63 (2009 Rensin Dep.) at 128-29 [ER-268-69]; PX 95 (2017 Rensin Dep.) at 29:2-4 [ER-292]; ECF 6 (Rensin's Answer) at ¶ 52 [ER-180].

[2] BlueHippo also sold other electronic products, but for simplicity we refer to all products sold as "computers." Stip. ¶¶ 18-19, 24 [ER-120].

B. Rensin And BlueHippo's Violations Of The Consent Order

Despite their knowledge of its requirements, Rensin and BlueHippo ignored the Consent Order and continued deceptively marketing computers to cash-strapped customers. As relevant here, BlueHippo promised consumers a risk-free deal: make 13 consecutive payments and qualify for a financed computer, or – worst case – cancel and receive store credit to use at BlueHippo's online store.[3] But neither Rensin nor BlueHippo told consumers either that using the store credit would cost them *additional* money for shipping, handling, and taxes, or that they could only order one item at a time and would have to pay the additional charges with each purchase. Stip. ¶ 25 [ER-120].

These undisclosed terms (the bankruptcy court referred to them as "the extra terms") proved to be an effective impediment to consumers' use of the promised store credit. During the 15-month period at issue,[4] about 55,000 consumers paid over $14 million to BlueHippo but never received *any* merchandise in return. Stip. ¶ 27 [ER-121]; Trial Tr. 85:2-9 [ER-138].

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[3] Consumers also could opt to participate in a layaway program, under which they would continue to make payments and receive a computer only after completion of all payments. Trial Tr. 45:22-46:15; 60:13-61:8 [ER-126-29].

[4] This period begins on April 10, 2008 (the day after the consent order was entered) and ends July 24, 2009 (the last date for which BlueHippo had produced evidence to the FTC before its contempt motion). ECF 1 ¶ 38 [ER-169]; 12/13/18 Memorandum Opinion ("Op."), ECF 112 at 2 [ER-225].

C. The Contempt Proceedings And The $13.4 Million Judgment Against Rensin

When the FTC learned of these practices, it brought contempt proceedings against both Rensin and BlueHippo in the Southern District of New York.[5] Stip. ¶¶ 11-12 [ER-119]; D. Ct. ECF 42. Rensin did not challenge his liability, but stipulated that he could be held in contempt if BlueHippo was held in contempt. Stip. ¶ 12 [ER-119].

The district court found that the failure to disclose the terms regarding store credit was a clear violation of the Consent Order and held both parties in contempt. Contempt Order at 8-12 [ER-104-08]. The court ultimately entered a compensatory contempt judgment against both Rensin and BlueHippo for $13.4 million, payable to the FTC, to provide restitution to consumers deceived by the

[5] During this time, Rensin and BlueHippo were embroiled in over a dozen other legal proceedings, including class actions, enforcement actions by state attorneys general, and other suits. PX 99 (Campbell Dep.) 76:3-23 [ER-314].

scheme.[6] 4/19/16 Order, ECF 1-1, D. Ct. ECF 139 ("Contempt Sanctions Order") at ¶¶ 14-15 [ER-113].

After Rensin failed to pay any portion of the contempt judgment, the FTC brought a second contempt action against him. D. Ct. ECF 146, 147. Rensin filed for bankruptcy in the midst of that proceeding (Case No. 17-11834). The district court again found Rensin in contempt, but stayed its order pending resolution of the bankruptcy. D. Ct. ECF 173. Rensin's appeals from the district court's rulings are currently pending in the Second Circuit.

D. The Bankruptcy Proceeding

The FTC filed this adversary proceeding in Rensin's bankruptcy case to establish that the judgment debt was nondischargeable, asserting that it was:

- "for money . . . obtained by false pretenses, a false representation, or actual fraud," and thus excepted from discharge under 11 U.S.C. § 523(a)(2)(A) ("the fraud exception"); and

[6] The district court initially limited monetary relief to the small subset of consumers who made all their installment payments and qualified for financing yet did not receive a computer, but the Second Circuit overturned that ruling. *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 242-46 (2d Cir. 2014). On remand, the court awarded a compensatory sanction for all consumers who made payments to BlueHippo in reliance on its misrepresentations yet received no merchandise in return. The court reached the $13.4 contempt judgment figure by calculating BlueHippo's revenues from these deceptive sales (approximately $14 million) then subtracting the amount that BlueHippo and Rensin paid in refunds and settlements of litigation brought by several states. Stip. ¶ 27 [ER-121].

- "for willful and malicious injury by a debtor to another entity or to the property of another entity," and thus excepted from discharge under 11 U.S.C. § 523(a)(6) ("the willful and malicious injury exception").

Rensin did not dispute most of the facts relevant to the elements of these two discharge exceptions. Stip. [ER-118-21]; Plaintiff's Proposed Findings of Fact and Conclusions of Law ("FTC Post-Trial Brief"), ECF 106, at 11 ¶ 4 [ER-215] (noting all non-intent elements were satisfied by stipulated facts). The only remaining issues were Rensin's knowledge and intent pertaining to the conduct that gave rise to the judgment debt. ECF 68 (Rensin's Objections to FTC Trial Exhibits) at 1 [ER-202] (identifying intent as only issue for trial). The district court had not ruled specifically on knowledge and intent in the contempt proceedings, since Rensin had stipulated that he would be in contempt if BlueHippo was held in contempt. ECF 62 at 8-10 [ER-198-200]. The bankruptcy court thus determined that it would need to hold a trial to render factual findings on those issues. *Id*.

1. The nondischargeability trial

The trial evidence included hundreds of pages of admitted deposition testimony from Rensin himself, BlueHippo employees, and the company's inside and outside counsel. This evidence showed that Rensin was deeply involved in every aspect of BlueHippo's business. He formulated company strategy and made high-level business decisions. Trial Tr. 42:13-20 [ER-125]; PX 63 (2009 Rensin

Dep.) 35:6-36:11, 37:19-24 [ER-260-61]; PX 99 (Campbell Dep.) 15:13-23 [ER-307]. He also oversaw and frequently interacted with the department heads, who worked in the same building. Trial Tr. 85:10-86:2 [ER-138-39]; PX 63 (2009 Rensin Dep.) 13:11-15:23 [ER-259]; PX 64 (Ford Dep.) 11:19-13:23 [ER-271]. In particular, he met weekly with the marketing team and the person who managed the company's advertising, marketing, and telemarketing scripts. PX 64 (Ford Dep.) 12:1-13:23, 14:5-15, 15:24-16:10 [ER-271-72]. He also regularly reviewed, advised on, and made decisions about BlueHippo advertisements and telemarketing scripts. Trial Tr. 86:14-17, 87:1-9, 88:5-9, 89:14-21 [ER-139-42]; PX 63 (2009 Rensin Dep.) 62:22-63:5, 64:11-65:10 [ER-263-64]; PX 64 (Ford Dep.) 26:24-27:20, 50:12-20 [ER-273, 275]; PX 99 (Campbell Dep.) 31:7-10 [ER-309]. He worked near the telemarketers and would often hear them reading the scripts to customers. PX 95 (2017 Rensin Dep.) 46:1-47:6 [ER-293]; Trial Tr. 101:4-16 [ER-143].

The evidence further showed that Rensin's detailed involvement extended to BlueHippo's store credit policy, including the undisclosed terms. Rensin testified that he and two other people created the policy. Trial Tr. 74:11-15 [ER-136]; PX 95 (2017 Rensin Dep.) 114:21-115:1 [ER-297]. He likewise was involved in all decisions to change the company's refund policy. PX 63 (2009 Rensin Dep.) 40:11-41:12 [ER-261-62].

Rensin was the only in-person witness at trial. His trial testimony, however, contradicted his prior sworn testimony in numerous ways. For example, in addition to his statements described above documenting his knowledge of the undisclosed terms, Rensin's sworn declaration submitted in the contempt proceeding had indicated that he knew about the undisclosed store credit terms at all times and stated that they had been "a requirement since the inception of the Online Store." PX 93 (2009 Rensin Decl.) ¶¶ 1, 11 [ER-287, 289]. He likewise had described under oath at deposition the rationales behind the undisclosed terms' implementation, explaining "why we did what we did." PX 63 (2009 Rensin Dep.) 88:16-92:20, 95:8-16 [ER-265-67]. Contrary to all of this, at trial Rensin testified that he did not know of the undisclosed store credit terms until after the end of the relevant time period. Trial Tr. 102:12-109:2, 118:3-11, 127:9-17 [ER-144-52, 156].

Rensin also contradicted his previous testimony regarding reliance on BlueHippo's counsel. He previously had claimed that he relied on the advice of BlueHippo's counsel regarding the undisclosed terms – which he could have done only if he knew about the terms and received advice about them.[7] PX 95 (2017 Rensin Dep.) 95:6-96:14, 98:20-100:17, 102:21-103:9 [ER-294-96]; PX 63 (2009 Rensin Dep.) 88:16-92:20, 95:8-16 [ER-265, 267]. When four of BlueHippo's

[7] *See* FTC Post-Trial Brief at 17 ¶ 32 [ER-221] (elements of advice of counsel defense).

attorneys were deposed, however, none of them recalled knowing about the undisclosed terms at all during the relevant period – much less giving advice about them. PX 99 (Campbell Dep.) 26:12-27:11, 32:5-35:1, 35:18-37:15, 71:8-72:4 [ER-308-10, 313]; PX 97 (Friedman Dep.) 80:11-83:1 [ER-299-300]; PX 104 (Burcham Dep.) 63:12-65:23 [ER-316-17]; PX 98 (Goldstein Dep.) 38:9-13, 53:1-25, 66:6-13, 95:9-23 [ER-302-05]. Rensin then changed his story. His new account, flatly inconsistent with the former one, was that he had delegated all legal compliance with the Consent Order to BlueHippo's in-house counsel, Andrew Campbell, who Rensin now claimed had created the undisclosed terms without Rensin's knowledge. Trial Tr. 107:24-108:12, 118:12-119:9, 127:18-128:6 [ER-149-50, 152-53, 156-57]. Rensin was unable to credibly explain these inconsistencies, but admitted that his 2009 testimony was more likely to be accurate than his later testimony, given its proximity to the events in question. Trial Tr. 78:6-21 [ER-137].

2. The bankruptcy court's decision

The bankruptcy court ruled that the judgment debt was nondischargeable under both asserted exceptions. In a 20-page opinion, the court made detailed factual findings regarding Rensin's knowledge and intent, including that Rensin had full knowledge of the undisclosed terms from the beginning and intended to deceive consumers by failing to disclose them:

- Rensin was "the captain of the ship, with not only direct oversight but regular operational involvement in every aspect of the business relevant to this fraud," Op. 7 [ER-230];
- Rensin exercised "complete control" over BlueHippo, Op. 8-9 [ER-231-32];
- Rensin "knew of the extra terms from their inception," Op. 13 [ER-236], "personally participated in" their implementation, and "had full knowledge of, and personally authorized, the withholding of the extra terms from customers," Op. 7 [ER-230];
- Rensin had "full knowledge" that BlueHippo was reaping millions of dollars from the fraud, at a time when it "was otherwise cash strapped," *id.*;
- At the time, Rensin "well knew BlueHippo would never deliver a product because of the extra terms that were hidden from customers prior to their making payments," *id.*, and "well knew that BlueHippo's customers would be harmed," Op. 19-20 [ER-242-43];
- In undertaking all of these actions, Rensin "intended exactly the outcome BlueHippo obtained from implementing the extra terms," and "acted with the intent to deceive," Op. 13 [ER-236].

All these determinations were grounded in the trial record, including testimony from BlueHippo attorneys, BlueHippo documents and correspondence, stipulated facts, and Rensin's testimony from four separate occasions – including live at trial.

The court expressly rejected much of Rensin's trial testimony – including that he did not know of the undisclosed terms – as not credible, given its many inconsistencies with Rensin's own prior testimony and other credible evidence. Op. 8-9 [ER-231-32] (testimony not credible and inconsistent with prior litigation positions), 10 [ER-233] (testimony "was in direct contradiction to his own prior testimony"), 13 [ER-236] (testimony "was not credible as it is inconsistent with his prior testimony and statements under oath, and is conveniently changed in light of [this] litigation"). The court likewise discredited Rensin's attempt to cast blame on BlueHippo's in-house counsel, noting that Rensin's testimony was not credible and that other testimony "directly contradicts [it]." Op. 10 [ER-233].

In light of the overwhelming evidence of Rensin's full participation in the fraud and his wrongful intent, the court concluded that the FTC had proven all elements required under both asserted exceptions. It entered its judgment excepting the debt from discharge on December 14, 2018. ECF 113 [ER-244]. This appeal followed.

SUMMARY OF ARGUMENT

The question before the bankruptcy court was whether Rensin had the requisite intent for his debt to be excepted from discharge under the fraud and willful and malicious injury exceptions. The court correctly determined that he did.

Rensin's sole claim of legal error is wrong. He claims the bankruptcy court improperly "imputed" to him the acts of others because he was the CEO of the company, but the court did nothing of the sort. In reality, it determined that Rensin's *own bad acts* gave rise to the debt. Rensin not only knew about and was personally involved in the deceptive scheme, but was "at the helm of" it.

Rensin's other arguments boil down to an attempt to relitigate the facts. But he cannot come close to showing clear error in any of the court's factual findings, which were based on a full trial record and depended heavily on the court's assessment of Rensin's credibility. The facts show Rensin's knowledge of the undisclosed store credit terms and his intent to deceive consumers into paying BlueHippo millions of dollars for essentially nothing in return. The court properly rejected Rensin's spurious argument that he relied on in-house counsel to ensure compliance – the latest iteration of his ever-changing advice of counsel defense, which lacks any factual basis.

ARGUMENT

THE BANKRUPTCY COURT CORRECTLY DETERMINED THAT RENSIN'S DEBT TO THE FTC IS NOT DISCHARGEABLE.

The bankruptcy court excepted Rensin's debt from discharge under Sections (a)(2)(A) and (a)(6), two statutory exceptions that ensure that the Code's protections are reserved for "honest but unfortunate debtor[s]" and are not abused

to shelter wrongdoing.[8] *See Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998); *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

For Section (a)(2)(A) to apply, a debt must be for money "obtained by false pretenses, a false representation, or actual fraud." To show false representation or actual fraud, a creditor must prove: that (1) "the debtor made a false representation," (2) with intent "to deceive the creditor"; (3) "the creditor relied on the misrepresentation"; (4) "the reliance was justified"; and (5) "the creditor sustained a loss as a result of the misrepresentation." *In re Bilzerian*, 153 F.3d at 1281. False pretenses requires lesser proof: a creditor may prove *either* intent to deceive *or* a reckless indifference for the truth, and implied misrepresentations, rather than false representations, may suffice. *Taylor v. Wood (In re Wood)*, 245 F. App'x 916, 918 (11th Cir. 2007) ("'Silence or concealment as to a material fact can constitute false pretenses.'"). "[A] debtor who knowingly makes a misrepresentation is presumed to have intent to deceive." *City Fed. Sav. Bank v. Seaborne (In re Seaborne)*, 106 B.R. 711, 714 (Bankr. M.D. Fla. 1989).

For Section (a)(6) to apply, the underlying conduct must be both (1) willful, i.e., an act undertaken with an intent to cause injury or an intentional act

[8] "The general policy that exceptions to discharge are to be construed strictly against the creditor and liberally in favor of the debtor likewise applies to honest debtors only." *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 680 (11th Cir. 1993).

undertaken where injury is at least substantially certain to result; and (2) malicious, i.e., wrongful and without just cause. *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1165 (11th Cir. 1995); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (finding negligent or reckless medical malpractice not "willful").

Debtors rarely admit to having bad intent or knowledge of falsity. Thus, in applying both exceptions, "[a] bankruptcy court may look to the totality of the circumstances, including the recklessness of a debtor's behavior, to infer . . . intent to deceive." *In re Miller*, 39 F.3d at 305; *Ershowsky v. Freedman (In re Freedman)*, 431 B.R. 245, 256-57 (Bankr. S.D. Fla. 2010) (determining fraudulent intent based on totality of circumstances), *aff'd*, 427 F. App'x 813 (11th Cir. 2011). Moreover, "intent may be inferred despite the debtor's avowal to the contrary."[9] *McMillan v. Firestone (In re Firestone)*, 26 B.R. 706, 717 (Bankr. S.D. Fla. 1982); *see also Kane v. Stewart Tilghman Fox & Bianchi PA (In re Kane)*, 755 F.3d 1285, 1288 (11th Cir. 2014) (deferring to bankruptcy court's factual findings where it had "expressly disbelieved" debtors' testimony).

Rensin does not contest that the conduct was deceptive, but challenges only the bankruptcy court's finding under both exceptions that he intended the

[9] Indeed, even at summary judgment, "[a] party's self-serving and unsupported claim that [he] lacked the requisite intent is not sufficient" to prove that the exception does not apply "where the evidence otherwise supports a finding of fraud." *Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 643 (5th Cir. 2000).

deception. If the court properly concluded that he had the requisite knowledge and intent, then the debt is not dischargeable. As shown below, the court correctly denied discharge because it determined that Rensin was *personally culpable*: he knew about the deceptive terms and acted with an intent to deceive consumers, warranting application of both exceptions. Ample record evidence supports this result.

A. The Bankruptcy Court Properly Applied Both Exceptions Based On Rensin's Personal Knowledge, Involvement, And Intent

The key question before the bankruptcy court was whether Rensin knew about the deceptive practices and intended to deceive consumers. At trial, the evidence showed that Rensin was "the captain of the ship," standing "at the helm of" the operation, with "regular operational involvement in every aspect of the business relevant to this fraud." Op. 7-9, 13 [ER-230-32, 236]. In particular, Rensin "was one of the people involved in creating the store credit refund policy," Op. 9 [ER-232], and "had full knowledge of, and personally authorized, the withholding of the extra terms from customers," Op. 7 [ER-230]. The court determined that he "knew of the extra terms from their inception," examining the testimony Rensin had given closest in time to the conduct at issue and, importantly, before he had a motive to lie. Op. 7-10, 13 [ER-230-33, 236]. The court also found that Rensin knew those terms were not disclosed to consumers, because he

regularly read and saw the customer service scripts that omitted them. Op. 8 [ER-231]. The sheer magnitude of the money brought in by the deceptive practices – over $14 million – and the company's tight cash flow gave Rensin ample motive to deceive consumers into paying BlueHippo money with the intent of never providing anything in return. Op. 5, 13 [ER-228, 236]. The court thus properly concluded that Rensin "personally participated in" the underlying fraud, acting with "full knowledge" of the falsity of what consumers were being told and with "intent to deceive" consumers out of their money. Op. 7, 13 [ER-230, 236].

1. The bankruptcy court did not improperly "impute" liability to Rensin under either exception.

Rensin tries to avoid the bankruptcy court's factual and legal determinations on the ground that the district court in New York had already determined that his liability was "derivative only." Br. 26, 30, 36. His liability, he contends, was only vicarious, resting purely on the actions of others. In effect, his claim is that the question whether he had knowledge and intent under the bankruptcy law had already been resolved in his favor when the district court imposed the debt on him.

In reality, the district court did not determine that Rensin lacked intent because it did not need to; Rensin stipulated to liability for his company's contempt. Stip. ¶ 12 [ER-119]. The debt was "derivative" in the sense that Rensin agreed that if the company was liable, so was he, but the district court was not presented with the question whether Rensin would have been in contempt due to

his own actions. The bankruptcy court therefore needed to make the determination of intent in the first instance. That is why a bankruptcy court has broad power to "look behind" a stipulation or judgment to determine the "true nature of the debt" for dischargeability purposes. *Archer v. Warner*, 538 U.S. 314, 320-22 (2003) (cleaned up). If Rensin were correct, any corporate officer who stipulated to responsibility for a judgment against the corporation would have an automatic dischargeability trump card in subsequent bankruptcy proceedings.

Indeed, the bankruptcy court expressly *declined* to impute liability: it denied the FTC's motion for summary judgment on the question of Rensin's intent and instead held a trial on the issue precisely because the facts regarding Rensin's personal culpability for the deceptive practices had not been litigated in the earlier contempt proceeding. Op. 7 [ER-230] (noting "the issues relating to Mr. Rensin's personal knowledge and involvement remained to be tried here"); *see also* Order Denying FTC's Motion For Summary Judgment, ECF 62 [ER-191]. After considering a full trial record, the bankruptcy court found Rensin was not an innocent bystander but "was at the helm of and guided BlueHippo in its every action in connection with this fraud." Op. 13 [ER-236].

Because the court determined that Rensin was a direct participant in the fraud, liable for the debt because of his own bad acts, Rensin's authorities

involving imputed liability are inapposite.[10] He relies principally on *Hoffend v. Villa (In re Villa)*, 261 F.3d 1148 (11th Cir. 2001). There, an investor sought to apply the fraud discharge exception based *solely* on the debtor's official position as a control person of the corporation, but the court held that liability under the securities laws for another person's fraud "is not *in itself* sufficient to render the debt nondischargeable under § 523(a)(2)(A)." *Id*. at 1154 (emphasis added). As the court acknowledged, there was no determination that the officer was personally involved, had knowledge, or had any fraudulent intent. *Id.* Here, by contrast, involvement, knowledge, and intent are precisely what the bankruptcy court found.

The same goes for *RecoverEdge, L.P. v. Pentecost*, 44 F. 3d 1284 (5th Cir. 1995). There, a jury had specifically found in a separate action that the debtor was not part of the alleged conspiracy, and – importantly – the party seeking nondischargeability had not asserted *any* fraudulent conduct by the debtor outside of the conspiracy. *Id*. at 1296 ("Carpenter was not found jointly and severally liable for fraud, and any argument that he participated in a scheme to defraud would be precluded by the jury's verdict in Carpenter's favor."). Here, by contrast, the FTC alleged precisely such conduct, which was the focus of the trial. Op. 7-10, 13, 19 [ER-230-33, 236, 242] (summarizing Rensin's involvement); *see also* FTC

[10] The bankruptcy court rejected these same arguments at summary judgment, observing that they were "red herrings" because "[t]he FTC alleges that Mr. Rensin himself was the bad actor." ECF 50 (Tr. of 12/1/17 SJ hearing) at 10 [ER-190].

Post-Trial Br. at 5-6, ¶¶ 17-27 [ER-209-10] (summarizing evidence showing Rensin's knowledge of and involvement in wrongdoing); FTC Complaint, ECF 1, ¶¶ 7-8, 34, 40, 51-68, 76-81 [ER-163, 168-69, 172-75] (alleging Rensin's participation in and knowledge of the fraud and intent to deceive). Rensin's remaining cases (mostly out-of-circuit bankruptcy court decisions) are unavailing for the same reasons. *See* Br. at 31 & n.10.

2. That others carried out aspects of Rensin's deceptive scheme does not bar application of the two exceptions.

Rensin seems to suggest, Br. 30, that holding a debtor responsible for actions that *he did not personally undertake* necessarily amounts to vicarious liability. As many courts have recognized, however, a judgment debt arising from fraudulent, or willful and malicious, acts committed by someone other than the debtor may be nondischargeable *where the debtor participated* in the misconduct. Holding a debtor responsible for his own involvement in an injurious scheme is not vicarious liability.

With respect to the fraud exception, nothing in the statutory language of Section (a)(2)(A) "requires the debtor to make the false representation or to personally and directly engage in the fraudulent conduct." *FTC v. Lanier (In re Lanier)*, 589 B.R. 901, 909 (Bankr. M.D. Fla. 2017); *see also FTC v. Ettus (In re Ettus)*, 596 B.R. 405, 411-12 (Bankr. S.D. Fla. 2018) (holding debt nondischargeable as to debtor even though fraudulent statements were made by

telemarketers). All that is required is "that the basis of the debt be 'obtained by' the requisite fraudulent conduct without regard to [who] was the direct actor." *In re Lanier*, 589 B.R. at 909. Indeed, requiring otherwise "impermissibly imputes language into the statute that is not present." *Id.*

The principle that acts "can be attributed to a debtor who did not actually perform them, if the debtor was an 'active and knowing participant' in a scheme or conspiracy through which a third-party malefactor performed the acts," *Blackmon v. Evans (In re Evans)*, 410 B.R. 317, 321 (Bankr. M.D. Fla. 2009), can apply to Section (a)(6) as well. For example, in *Ford Motor Credit Co. v. Owens*, 807 F.2d 1556 (11th Cir. 1987), the Eleventh Circuit held that a company's president was personally liable to the creditor, and the debt was not dischargeable in bankruptcy under Section (a)(6), because he participated in the wrongful conversion of its property. *Id.* at 1559-60. And in *Bairstow v. Sullivan (In re Sullivan)*, 198 B.R. 417 (Bankr. D. Mass. 1996), the court applied a similar rationale to find willful and malicious injury. It held that, where the debtor knew his workers were trespassing on and damaging his neighbor's land "but did nothing about it," that qualified as "deliberate and intentional conduct within the scope of section 523(a)(6)."[11] *Id.* at 424.

[11] Rensin wrongly cites *In re Sullivan* for the opposite proposition, Br. 31 n.10, when in fact it applies Section (a)(6) to hold the debt nondischargeable based in part on injury inflicted by others. 198 B.R. at 424.

In re Firestone, 26 B.R. 706 (Bankr. S.D. Fla. 1982), likewise looked to conduct by others in determining the debtor's intent. There, the debtor did not directly make most of the fraudulent misrepresentations, but solely owned the company, controlled its business operations, and had been held liable for judgments against the company.[12] *Id*. at 714-18. The court inferred both knowledge and intent to deceive because, in the circumstances, it "strain[ed] credulity" to think that the misrepresentations "were not all authorized or directed from top levels in the company." *Id.* at 714.

So too here. Rensin's extensive involvement in BlueHippo's affairs and his central role in developing the company's business model – which depended on taking consumers' money without telling them about the restrictive store credit terms – made it obvious that he not only knew about but "orchestrated the entire affair." Op. 7-13 [ER-230-36]. The bankruptcy court properly held Rensin responsible based on his own participation in the deceptive scheme even though others executed his plans.

B. Rensin Fails To Show Clear Error In The Bankruptcy Court's Factual Findings.

Rensin's next arguments quibble with the bankruptcy court's factual findings, but none amounts to error – much less clear error.

[12] The debtor had personally met with one of the plaintiffs, but three others "had no direct contact" with him. *Id.* at 714.

1. The bankruptcy court properly determined that Rensin acted with knowledge of falsity and an intent to deceive.

Contrary to Rensin's claim that "**no** competent substantial evidence" supports the court's intent findings, Br. 27, the court relied on significant and persuasive evidence showing knowledge and intent – including Rensin's own testimony given on four separate occasions. That testimony, testimony from others at BlueHippo regarding his role in creating the store credit policy and his involvement in every relevant aspect of BlueHippo's business, and the undisputed facts strongly support the court's findings that Rensin knew about and intended the deception.

With respect to Rensin's knowledge, for example, he testified at deposition in 2009 that the undisclosed terms were company "policy," agreeing that "customers cannot apply [store credit] to taxes for an item they may choose to order" and would have to pay extra money for taxes, shipping, and handling, and that "a customer [could] only place one order at a time." PX 63 (2009 Rensin Dep.) 88:24-89:4, 95:8-16 [ER-265, 267]. Rensin likewise testified as to other details about the undisclosed terms, including that they "ha[d] been in effect since the store credit website was put in place [in 2006]" and explaining "why we did what we did" with respect to the undisclosed terms. *Id.* at 88:24-89:07, 92:9-20 [ER-265-66]. Considering the timing and the manner of this testimony, the court

deemed it more credible than Rensin's subsequent contradictory and self-serving trial testimony. Op. 9, 13 [ER-233, 236].

In-house lawyer Campbell's testimony further supported the court's determination that Rensin knew about the undisclosed terms. Campbell testified that decisions about refund policies "would have been a decision made by Joe Rensin" and that decisions about new business models "would have been Joe Rensin." PX 99 (Campbell Dep.) 36:7-15, 15:16-23 [ER-310, 307]. Campbell did not recall knowing about the undisclosed terms himself during this period, and did not recall being involved in their creation. *Id.* at 68:16-24, 69:22-70:10, 71:16-24 [ER-312-13]. He did, however, testify that he "would not have asked BlueHippo not to disclose a material term of the sales process" with regard to the policy that store credit could not be used for taxes, shipping, or handling. *Id.* at 71:8-13 [ER-313]. In-house attorney Burcham likewise testified to his view that this policy "would most certainly be a material term that a consumer would be entitled to know." PX 104 (Burcham Dep.) 65:20-23 [ER-317].

With respect to Rensin's intent, the court drew a permissible inference from a substantial factual record that Blue Hippo's deceptive practices had to have been intentional on Rensin's part. *See In re Miller*, 39 F.3d at 305. Its customers were poor and lacked credit. Rensin admitted that "[m]ost of BlueHippo's customers have poor credit histories" and that it targeted "consumers who could neither pay

the full purchase price in a lump sum nor qualify for credit." PX 93 (2009 Rensin Decl.) ¶¶ 8-9 [ER-288-89]; Op. 2 [ER-225]; Stip. ¶ 19 [ER-120] ("BlueHippo marketed computers . . . 'for everyone-regardless of their credit history'"). Extracting "very substantial revenues" – over $14 million – from such a disadvantaged customer base by withholding the undisclosed terms from consumers by itself indicated a deliberate scheme to deceive. Op. 7 [ER-230]; Trial Tr. 274:15-276:10 [ER-159-61]. Indeed, at the conclusion of trial, the court aptly summarized the crux of Rensin's scheme:

> [If these customers] sent money to a company that they can only get the value of by sending *more* money to the company, it seems to me that's a built-in deterrent for them to be able to get the money back . . . it seems like *it's designed* to permit the company to retain 14 million dollars . . . *for nothing*.

Trial Tr. 275:14-276:10 [ER-160-61] (emphases added).

Rensin also had a strong motive "to obtain funds from unknowing customers with the intent of never providing [them] anything in return." Op. 5 [ER-228]. At the time of the deceptive practices, the company was embroiled in multiple legal proceedings. *See* n. 5, *supra*. Those cases, investigations, and settlements had drained the company's cash reserves and put severe pressure on Rensin to generate substantial immediate income without a corresponding increase in expenses. That situation provided "important" additional context to the bankruptcy court's finding of intent. Op. 5 [ER-228].

Rensin's ongoing pattern of wrongdoing reinforces the bankruptcy court's determination that he "acted with the intent to deceive." Op. 13 [ER-231]. *See Sears v. United States (In re Sears)*, 533 F. App'x 941, 945 (11th Cir. 2013) (affirming that intent to deceive could be inferred from volume and pattern of misrepresentations). Rensin repeatedly broke promises to consumers, and admitted to having stopped delivery of paid-for computers in order to pay legal settlements. Trial Tr. 62:24-63:23 [ER-129-30]; PX 89 [ER-276] (noting that company's "cash shortage" from legal settlements "led to a shipping slowdown"). Further demonstrating his disregard for the binding Consent Order, mere weeks after BlueHippo was held in contempt for violating its record turnover provision, Rensin told his attorneys that he wanted to continue to violate that provision, stating, "We won't respond any more to the FTC, they are just looking to use it all against us." PX 89 [ER-276]; *see also* Trial Tr. 69:16-70:3 [ER-132]. At trial Rensin attempted to brush off these comments as mere "frustration," Trial Tr. 70:4-71:13 [ER-133-34], but other evidence revealed that this sort of disregard for legal obligations was a regular feature of his dealings with others. *See, e.g.*, PX 89 [ER-276] (admitting failure to deliver promised computers).

The bankruptcy court's inference of knowledge and intent was further strongly supported by its finding that Rensin's trial testimony lacked credibility. Rensin's dishonesty at trial, especially concerning his false testimony on reliance

of counsel (discussed further below), by itself betrays intent. Otherwise, there would not have been any need to fabricate. And "[b]ecause a determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor, deference to the bankruptcy court's factual findings is particularly appropriate." *In re Miller*, 39 F.3d at 304-05 (internal quotations omitted).

While Rensin tries to downplay the importance of his own trial testimony, Br. 48, it is hardly surprising that the bankruptcy court determined that he acted with intent after observing firsthand his demeanor and credibility. *See In re Ettus*, 596 B.R. at 411-12 (emphasizing importance of debtor's demeanor and credibility in determining intent). This is especially so given his trial testimony's numerous contradictions with previous testimony. *See infra* at 12-13. Indeed, Eleventh Circuit precedent supports deferring to a bankruptcy court's factual findings where that court "expressly disbelieved" a debtor's trial testimony as a "patently self-serving," "after-the-fact attempt to explain away" bad facts. *In re Kane*, 755 F.3d at 1288, 1295. The same holds true here, where the court determined that Rensin's contradictory trial testimony was "a brazen attempt to avoid judgment against him in this case." Op. 10 [ER-233].

2. The bankruptcy court considered and properly rejected Rensin's purported evidence of "good faith."

Rensin claims to be blameless because he relied in good faith on others, including lawyers. The bankruptcy court properly found otherwise as a matter of fact, and its determination was sound.

With respect to advice of counsel, as discussed above, the bankruptcy court determined that Rensin in fact *knew about the undisclosed terms* during the relevant period – rebutting his claim that he had *not* known of them but had relied on others to determine their legality, Br. 53. No evidence demonstrated, or even suggested, that Rensin or anyone at BlueHippo sought or received advice of counsel regarding the undisclosed terms during the relevant time. As shown below, the lawyers themselves disclaimed having given such advice. Indeed, Rensin conceded at trial, and admits in his brief, that he personally never sought advice of counsel regarding the undisclosed terms. Trial Tr. 108:3-5 [ER-150] ("I didn't seek advice"); Br. 16. He likewise admitted that he did not "actually know if any advice was given to BlueHippo regarding the disclosures of those terms." Trial Tr. 109:12-24 [ER-151]. And when questioned whether he was involved in "providing information to BlueHippo's lawyers to seek advice about the disclosure of those terms," he testified that he "wasn't involved in any of that." Trial Tr. 109:17-24 [ER-151].

Rensin's argument that he *generally* relied on in-house counsel to review and approve all advertisements, Br. 51-54, is insufficient to rebut the ample evidence demonstrating that no BlueHippo attorney (including in-house counsel) knew about the undisclosed terms before July 2, 2009, when they were communicated to outside counsel and the FTC.[13] If no attorney knew of the terms, then no advice of counsel regarding those terms could have been given – as Rensin concedes. Br. 52 ("Rensin needed to establish that BlueHippo's counsel . . . had knowledge of all material facts").

Indeed, four of BlueHippo's inside and outside attorneys provided testimony and *not one* remembered seeking or giving advice about those terms, nor did any of them possess any documents reflecting such advice. PX 97 (Friedman Dep.) 80:11-83:1 [ER-299-300]; PX 98 (Goldstein Dep.) 38:9-13, 53:1-25, 66:6-13, 95:9-23 [ER-302-05]; PX 99 (Campbell Dep.) 26:12-27:11, 32:5-35:1, 35:18-37:15, 71:8-72:4 [ER-308-10, 313]; PX 104 (Burcham Dep.) 63:12-65:23 [ER-316-17]. And if BlueHippo's in-house lawyers did not know of the undisclosed terms before July 2, 2009, their approval of various advertising that omitted them (Br. 50) is unsurprising – and cannot show good faith by Rensin, who, as discussed above, knew about the terms all along.

[13] Rensin does not contend that the supposed advice of counsel occurred between July 2, 2009 and July 24, 2009 (the end of the relevant period), so this fact forecloses that defense.

Numerous documents corroborate the bankruptcy court's findings and refute Rensin's claim that he relied on advice of counsel given before then. In the weeks leading up to July 2, 2009, BlueHippo's lawyers – including outside counsel as well as in-house attorney Campbell – were preparing a submission to the FTC that described BlueHippo's store credit policy. As of the morning of July 2, 2009, that draft report described the store credit policy generally but made no mention of the undisclosed terms. *See* PX 92 (draft report) at FIMGBH00007353 [ER-286]. This was consistent with the company's previous submissions to the FTC, which also discussed the store credit policy but not the undisclosed terms. For example, a January 2007 white paper stated, "Consumers who cancel receive 100% of their payments in the form of a store credit, which may be used to purchase any item from BlueHippo's web store" (PX 90 at 10 [ER-280]), and an April 2009 compliance report similarly stated, "BlueHippo discloses . . . that cancelling [sic] consumers will receive store credit which may be used at BlueHippo.com" (PX 43 at 3 [ER-253]).

Then, on July 2, 2009 (just 22 days before the end of the relevant time period), while outside counsel was working on the draft FTC submission, Campbell forwarded a document that included a description of the undisclosed terms. PX 91 (July 2, 2009 email and attachment) [ER-281-83]. Outside counsel immediately incorporated the newly revealed terms into the draft, and submitted

the report to the FTC that same day. PX 22F (July 2, 2009 letter to FTC) at 6 [ER-249]. This evidence shows that the attorneys on whose advice Rensin supposedly relied learned of the undisclosed terms only at the very end of the relevant time period. They therefore could not have given advice negating Rensin's intent to deceive during the preceding 14 months.

To Rensin, the July 2, 2009 email is "unrebutted evidence" showing Campbell's knowledge of the undisclosed terms during the relevant period. Br. 53. But Campbell testified that he did not recall knowing about the undisclosed terms before then, and did not recall giving or receiving any legal advice about them. PX 99 (Campbell Dep.) 32:5-35:1, 35:18-37:15, 71:8-72:4 [ER-309-11, 313]. Indeed, he did not even know who prepared the attachment to the July 2, 2009 email. *Id.* at 68:4-70:2 [ER-312-13]. At best, that email shows that Campbell knew of the undisclosed terms during a small sliver of time at the tail end of the relevant period. It does not nearly amount to evidence that Campbell provided, or even could have provided, advice to Rensin concerning the undisclosed terms in any way that negates his intent during the vast bulk of the time.

Finally (and as discussed above), both of BlueHippo's inside counsel testified that after learning of the undisclosed terms, they believed the terms were material – indicating that if they had known about them, they would have so advised. Campbell testified that he did not recall the undisclosed terms being part

of the refund policy, and stated, "I would not have asked BlueHippo not to disclose a material term of the sales process with regard to this aspect of the refund policy." PX 99 (Campbell Dep.) 71:8-16 [ER-313]. Burcham likewise testified that "at the time, [he] didn't know" about the undisclosed terms, but that the additional charges involved "would most certainly be a material term that a consumer would be entitled to know, in my personal opinion." PX 104 (Burcham Dep.) 64:6-65:23 [ER-316-17]. Both lawyers' testimony supported the idea that Rensin, not the lawyers, was the architect of the undisclosed terms and that in fact the lawyers did not learn of these terms until July 2, 2009. The court determined that it "[did] not find credible Mr. Rensin's testimony that the company's in-house counsel was responsible for the extra terms and hid them from Mr. Rensin." Op. 10 [ER-233].

With such overwhelming evidence weighing against Rensin's advice of counsel arguments, and only his own discredited testimony in support, the court was correct to reject that defense. *Id.*

The few cases Rensin relies on do not hold otherwise. *First Beverly Bank v. Adeeb (In re Adeeb),* 787 F.2d 1339 (9th Cir. 1986), refused to consider the advice-of-counsel defense because the debtor lacked the required good faith. And *Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004), did not involve bankruptcy at all but rather "aiding and abetting" liability for another's violation of securities laws. In any event, nothing alerted Howard, the corporate officer defendant, that the

disclosure documents – which had been drafted by the company's outside counsel – were inaccurate or that Howard should take steps to ensure their accuracy. *Id.* at 1144-45. By contrast, here it is undisputed that Rensin knew that he and his company were subject to a consent order requiring them to adhere to certain practices. In these circumstances, Rensin could not in good faith bury his head in the sand and "delegate" all matters of compliance to in-house counsel while raking in millions.

Rensin likewise fails to cite any authorities that would support his expansive formulation of the advice-of-counsel defense (Br. 52-53), which would allow corporate executives to evade responsibility merely by claiming they delegated legal compliance, wholesale, to their in-house counsel. As counsel for the FTC argued at trial, "Mr. Rensin is not trying to raise an advice of counsel defense, he's trying to raise an *existence* of counsel defense." Trial Tr. 256:2-4 (emphasis added) [ER-158]. The court rightly rejected the theory.

The bankruptcy court also properly rejected Rensin's even more generalized "good faith reliance on . . . professional staff" argument. Br. 54. Tellingly, Rensin cites no authorities that have recognized such a defense. In any event, as discussed above, the bankruptcy court did not believe Rensin when he claimed he relied on Blue Hippo's other employees. Op. 10 [ER-233]. That credibility determination should control here, as "generally [a reviewing court] will not disturb a bankruptcy

court's credibility determinations." *In re Kane*, 755 F.3d at 1288; *In re Miller*, 39 F.3d at 305.

3. The bankruptcy court correctly determined that the debt was for "willful and malicious injury."

The bankruptcy court determined that Rensin's judgment debt derived from a course of conduct that was both willful and malicious. That holding "is a factual finding that [a court] review[s] only for clear error." *In re Kane*, 755 F.3d at 1293. As with his other factual arguments, Rensin has shown no error at all, let alone clear error.

As discussed above, the evidence showed that Rensin knew important information was being withheld from consumers, acted intentionally in failing to disclose that information to consumers, and knew that harm was substantially certain to result. The bankruptcy court found "no doubt that Mr. Rensin knew, and in fact intended, the financial impact of these actions." Op. 19 [ER-242]. Indeed, the scheme was designed to ensure that BlueHippo would not have to provide anything of value in return for its victims' money. *Id.*

All the while, Rensin knew about the Consent Order, and knew it required disclosure, prior to payment, of all material terms. Rensin testified that he received a copy of the Consent Order shortly after it was entered and he signed an acknowledgement confirming his receipt. Trial Tr. 66:11-19, 122:24-123:13 [ER-131, 154-55]; PX 43A at 6 [ER-257]; PX 63 (2009 Rensin Dep.) 128:7-16 [ER-

268]; PX 95 (2017 Rensin Dep.) 29:2-4 [ER-292]; ECF 6 (Rensin's Answer) at ¶ 52 [ER-180]. That Consent Order defined "what is 'just' or 'unjust' conduct as between the parties" and "what actions will cross the line into injury to others." *Williams v. Int'l Brotherhood of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 512 (5th Cir. 2003) (quoting *Buffalo Gyn Womenservices Inc. v. Behn (In re Behn)*, 242 B.R. 229, 238 (Bankr. W.D.N.Y. 1999)). Violation of that order therefore "satisfies the definition of 'willful and malicious' within 11 U.S.C. § 523(a)(6)." *PRP Wine Int'l v. Allison (In re Allison)*, 176 B.R. 60, 64 (Bankr. S.D. Fla. 1994); *see also McDowell v. Stein*, 415 B.R. 584, 597-600 (S.D. Fla. 2009) (damages for debtor's violation of court directive "satisfies willful and malicious" requirements).

Rensin's conduct likewise was malicious, i.e., wrongful and without just cause. As discussed above, the court determined Rensin was "at the helm" of an operation that targeted poor consumers, deceiving them into paying millions of dollars when he knew full well that most of them would never get what they paid for. Op. 13 [ER-236]. As the bankruptcy court put it, Rensin "used BlueHippo to create a series of transactions aimed at defrauding consumers for the purpose of filling the coffers of BlueHippo. There was nothing defensible about his actions." Op. 19 [ER-242]. This was not a minor revenue stream or mere "additional revenue" (as Rensin characterizes it, Br. 49): BlueHippo's entire business model

was based on this fundamental deceit, and the concept that additional charges would deter cash poor consumers from using their store credits at all. As the bankruptcy court observed, "[t]he scheme depended on BlueHippo taking customers' money and giving them nothing. In effect, Mr. Rensin caused BlueHippo to steal from its own customers." Op. 19 [ER-242].

In re Kane confirms that the bankruptcy court had sufficient basis for applying the willful and malicious injury exception here. 755 F.3d at 1288-95. There, plaintiffs likewise sought to except a judgment debt from discharge under Section (a)(6), claiming that the debtors had acted intentionally in negotiating a secret settlement that cut them out of their rightful attorneys' fees. *Id.* Despite debtors' trial testimony that they did not control allocation of the settlement amount and lacked bad intent, the bankruptcy court held the debt nondischargeable, "expressly disbeliev[ing]" the debtors' testimony. *Id.* at 1288. The Eleventh Circuit ultimately affirmed. In light of the fact that the secret settlement "allocate[d] zero dollars" to plaintiffs' portion of the litigation while enriching themselves by millions, the appeals court held that malice could be implied. *Id.* at 1294-95.

Likewise, here the bankruptcy court correctly found Rensin's conduct to have been willful and malicious because he acted intentionally in implementing the store credit policy and failing to disclose the undisclosed terms, in circumstances

where he knew customers were certain or substantially certain to be harmed, with no excuse for his wrongful acts. Op. 18-20 [ER-241-43].

Ample evidence supported these conclusions. The court appropriately considered the undisputed fact, discussed above, that customers who placed 55,892 orders with BlueHippo during the relevant period "neither received merchandise nor redeemed store credit" in return for the more than $14 million that they paid, Stip. ¶ 27 [ER-121] – in other words, they received *nothing* for their money while Rensin's company pocketed millions. That the targeted customers were poor and lacked credit – making them especially vulnerable to Rensin's scheme, as Rensin well knew (PX 93 (2009 Rensin Decl.) ¶ 8-9 [ER-288-89]) – further informed the court's analysis.

Rensin's claim that there is "no evidence" that the deceptive practices "yielded [BlueHippo] any actual benefit whatsoever," Br. 47, is a fantasy. To begin, it is contrary to the district court's preclusive determination that the undisclosed terms were material to consumers' purchasing decisions because "the cost of shipping, handling, and taxes increases the overall cost of the merchandise."[14] Contempt Order at 8 [ER-104]; *see also* Contempt Sanctions

[14] "A bankruptcy court may rely on collateral estoppel to reach conclusions about certain facts, foreclose relitigation of those facts, and then consider those facts as 'evidence of nondischargeability.'" *Thomas v. Loveless (In re Thomas)*, 288 F. App'x 547, 548 (11th Cir. 2008).

Order at 3-5 [ER-111-13]; *FTC v. BlueHippo*, 762 F.3d at 246 ("This information, if it had been revealed to consumers before they purchased computers from BlueHippo, in all likelihood would have influenced their purchasing decisions."). Moreover, significant trial evidence confirmed that concealing the undisclosed terms was critical to BlueHippo's value proposition to consumers, which it pitched as a risk-free deal: make a series of payments and get a computer, or cancel anytime and "'we will give you store credit that you can use on over a thousand desktops, laptops, monitors, TV's and more at BlueHippo.com.'" Stip. ¶ 24 (quoting advertisement) [ER-120]. Disclosing the additional payments required to redeem store credit would have made BlueHippo's proposition far less appealing to these consumers. Indeed, as discussed above, both of BlueHippo's in-house attorneys admitted that the undisclosed terms would have been material to consumers' purchasing decisions. PX 99 (Campbell Dep.) 71:8-16 [ER-313]; PX 104 (Burcham Dep.) 65:15-23 [ER-317]. Rightly so: consumers who have poor credit and little money are unlikely to walk away from hundreds of dollars of store credit they already paid for. Yet undisputed facts showed that the scheme successfully prevented over 55,000 customers from redeeming their store credit. Stip. ¶ 27 [ER-121]; *see also* Contempt Order at 4 [ER-100].

It is difficult to imagine a more fitting example of the wrongful conduct that Section (a)(6) was designed to address. The bankruptcy court did not clearly err in determining Rensin's conduct was willful and malicious.

C. The Bankruptcy Court Properly Understood The Nature Of The Contempt Judgment Debt.

Finally, Rensin argues that the bankruptcy court "improperly characterized the Debt as being monies BlueHippo received without providing value in return." Br. 38; 37-41. The charge is baseless.

The nature of the judgment debt was a fact determined by the district court in the course of the contempt proceedings, and in multiple orders the court clearly explained that the entire basis for the debt was money collected from consumers for which they received no benefit. The final sanctions order stated, for example, that "[t]he Court found that . . . 55,892 consumers paid BlueHippo $14,062,627.51 in connection with orders for computers *and received no merchandise from BlueHippo*." Contempt Sanctions Order ¶ 3 (emphasis added) [ER-111]. The order holding Blue Hippo and Rensin in contempt found as fact that "BlueHippo *failed to provide either merchandise or store credit* for 55,892 of those 62,673 orders" for which consumers paid $14,062,627.51. Contempt Order at 4 (emphasis added) [ER-100]. Indeed, the FTC and Rensin stipulated that there were "55,892 orders in which the customers *neither received merchandise nor redeemed store credit*, totaling $14,062,627.51." Stip. ¶ 27 (emphasis added) [ER-121].

Rensin's further claim that the district court "found that BlueHippo's failure to deliver merchandise or store credit resulted in $609,856 in damages – not $13.4 million," Br. 40, ignores the critical fact that on appeal, the Second Circuit specifically vacated and remanded that part of the district court's order because it failed to account for the harm to consumers who relied on BlueHippo's deceptive promises of store credit to consumers who did not qualify for computers. *FTC v. BlueHippo*, 762 F.3d at 246. On remand, the district court made the determinations of consumer harm that are the basis for the $13.4 million judgment debt and to which the parties stipulated below. Stip. ¶ 27 [ER-121]. The bankruptcy court thus properly recognized Rensin's assertions as improper "attempts to re-argue the amount of the damages" when "this matter has already been finally determined on remand to the district court consistent with the ruling of the Second Circuit[.]" Op. 12-13 [ER-235-36].

At bottom, Rensin confuses the nature of the wrongful conduct (selling something without disclosing material terms that effectively disabled consumers from obtaining merchandise) with the measure of the *injury* to consumers (the money taken from deceived consumers). Both are relevant to the bankruptcy court's application of the two discharge exceptions. And it is abundantly clear from the bankruptcy court's opinion that it understood the nature of the wrongful conduct and injury found by the district court and adhered to those prior

determinations. Op. 4 (accurately describing these facts and noting that Rensin's contradictory arguments are foreclosed by ¶ 27 of the parties' stipulation and the district court's orders) [ER-227]. Rensin's arguments to the contrary are untrue.

CONCLUSION

The judgment of the bankruptcy court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the form and length specifications of Federal Rule of Bankruptcy Procedure 8015. Excluding the sections specified in that rule, the brief contains **9,522** words.

/s/ Mariel Goetz
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CERTIFICATE OF SERVICE

I certify that on May 13, 2019, I served the foregoing Brief of the Federal Trade Commission on counsel of record by electronic service through the Court's CM-ECF system.

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