UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CWB SERVICES, LLC, et al.,

Defendants.

CASE NO. ____________

PLAINTIFF'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE, APPOINTMENT OF RECEIVER, AND OTHER EQUITABLE RELIEF, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

(FILED UNDER SEAL)

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I. INTRODUCTION

Plaintiff, the Federal Trade Commission ("FTC") brings this action to halt Defendants' deceptive and unfair online payday lending scheme, which is replete with unlawful practices. First, using consumer data purchased from third parties, Defendants have falsely represented that consumers agreed to their online payday loans, and then automatically debited finance charges from consumers' bank accounts without their consent. Second, Defendants have misrepresented the cost of their loans—even to those consumers who actually agreed to the loans in the first place. Instead of charging consumers the amount they disclosed (the principal plus a one-time finance charge), Defendants have extracted finance charges every two weeks indefinitely, without applying any of the payments to the principal. Third, Defendants have consistently violated statutory requirements relating to the disclosure of loan terms and recurring electronic fund transfers.

These practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); the Truth in Lending Act ("TILA") and its implementing Regulation Z, 12 C.F.R. § 1026; and the Electronic Fund Transfer Act ("EFTA") and its implementing Regulation E, 12 C.F.R. § 1005.10. Defendants' tactics serve the single purpose of bilking cash-strapped consumers out of as much money as possible. Over just one eleven-month period, Defendants issued $28 million in payday "loans" to consumers, and, in return, extracted more than $46.5 million. PX35 ¶ 126.[1]

Since mid-2011, the FTC has received more than 300 complaints about Defendants' unauthorized loan practices alone. In addition, hundreds of consumers have reported being subjected to abuse and harassment from debt collectors attempting to collect on Defendants'

[1] Plaintiff's Exhibits are designated as PX01 through PX35. A Table of Exhibits is attached.

loans, including threats of lawsuit or arrest, disclosure of debts to third parties, and other egregious collection practices.

To immediately halt Defendants' illegal practices, the FTC seeks issuance of an *ex parte* temporary restraining order ("TRO") with an order to show cause why a preliminary injunction should not issue. The proposed TRO would enjoin Defendants' illegal practices, freeze Defendants' assets, appoint a temporary receiver over the corporate entities, provide Plaintiff and the receiver with immediate access to Defendants' business premises, and authorize limited expedited discovery. These measures are necessary to prevent continued harm to consumers, protect against the dissipation of assets and destruction of evidence, and preserve the Court's ability to provide effective final relief.

II. STATEMENT OF FACTS

Since 2011, Defendants have operated their unlawful common enterprise through a maze of interconnected business entities in an attempt to avoid scrutiny by, among other things, dispersing consumer complaints across several ostensibly separate businesses. These entities (collectively, "Corporate Defendants") are controlled by two individual defendants, Timothy A. Coppinger and Frampton T. ("Ted") Rowland, III (the "Individual Defendants").

A. Defendants

1. Coppinger Operating Entities

CWB Services, LLC provides online payday lenders, including those named as corporate defendants here, with day-to-day operational services, including consumer communications, ACH processing services, collection-processing services, and investor management services. PX35 ¶¶ 58, 61-64. CWB has communicated with consumers on behalf

of these lenders by various means, including telephone, fax, U.S. mail, and e-mail. *See, e.g*, PX01 ¶ 12; PX07, Att. 3 at 18-19; PX14 ¶ 8; PX35 ¶¶ 16, 18, 20-22, 54. CWB is controlled by Defendant Timothy Coppinger, the company's President, Treasurer, and Secretary. PX35 ¶¶ 13-21, Atts. B-G at 46-73. Until April or May 2014, CWB operated from 2114 Central Avenue, Suite 400 in Kansas City, Missouri. *See, e.g.*, PX35 ¶¶ 20, 24-25, Atts. G-H at 71-76. In or about April 2014, CWB moved its operations to 6700 Squibb Road, Suite 200 in Mission, Kansas. PX35 ¶ 25.

Orion Services, LLC, a Kansas limited liability company also controlled by Coppinger, has taken over CWB's operations and employees in recent months.[2] In an apparent effort to avoid scrutiny, CWB has operated under three names in as many years; all while keeping the same ownership, location, employees, and business operations: Clearwater Bay Marketing, CWB, and Orion. PX35 ¶¶ 13, 20, 24, Atts. B at 47-48, G at 72-73, K at 93.[3] For ease of reference, Plaintiff will generally refer to Coppinger's operating entities as "CWB."

2. Lending Entities

As described above, CWB has provided operational services for dozens of online payday lenders. Many of the lenders have the same owners, and operate under a variety of names in an effort to make their companies' dealings difficult to track.

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[2] Orion Services, LLC was organized by Coppinger as a Kansas limited liability company on August 26, 2013, and registered as a foreign limited liability company in Missouri in January 2014. PX35 ¶ 23, Att. J at 86-91.

[3] In 2014, Orion affiliated with Sokaogon Finance, Inc., purportedly controlled by the Sokaogon Chippewa Community of Mole Lake, Wisconsin, to service payday loans under various trade names such as Blue Pine Lending, White Pine Lending, and Red Pine Lending. PX06, Att. D at 19-20; PX27, Atts. E-F at 30-32; PX33 ¶ 5. But Orion continues to extract payments from consumers who were trapped in loans issued by the Rowland or Coppinger Lending Entities. PX35 ¶ 121 (showing payments on Vandelier loans in Orion bank account). *See also* PX01, Att. A at 5 (identifying Orion in an email to a consumer as the service provider for Vandelier).

Coppinger is a principal of three of these lenders: **Sandpoint Capital, LLC**; **Basseterre Capital, LLC**; and **Namakan Capital, LLC** (collectively, the "Coppinger Lending Entities"), all of which were incorporated offshore in the Island of Nevis in the Caribbean. PX35 ¶ 27, 29, 32, Atts. L at 97-110, M at 115-26, O at 130-47.[4] In June 2013, a company called MD Financial—to whom Coppinger wired large sums—registered the names of the Coppinger Lending Entities in Delaware and separately in Utah. PX35 ¶ 103-04, 107, Atts. HHH at 607, 610-11, III at 616, 621-22. That same month, new iterations of the entities—still under Coppinger's control—were incorporated in Delaware as **Sandpoint, LLC**; **Basseterre Capital, LLC**; and **Namakan Capital, LLC**. PX35 ¶¶ 28, 31, 33, Atts. N at 128, P at 151. Despite their far-flung corporate identities, the Coppinger Lending Entities all operated out of CWB's physical location. *See, e.g.*, PX35, Atts. L at 96, M at 113. Based on bank records obtained during the FTC's investigation, Sandpoint and Namakan continue to extract payments from consumers, although they appear to have stopped issuing loans.[5] PX35 ¶ 121 at 37-38.

At least five of the lenders for which CWB provides operational services are controlled by Rowland: **Vandelier Group LLC**; **St. Armands Group LLC**; **Anasazi Group LLC**; **Longboat Group LLC, also d/b/a Cutter Group**; and **Oread Group LLC, also d/b/a Mass Street Group** ("Mass Street"). Rowland is also a principal of a related operations entity, **Anasazi Services LLC** (collectively, the "Rowland Lending Entities").

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[4] Stephen Coppinger, Tim Coppinger's brother, is identified as Namakan's sole member and has sole signatory authority on two of its bank accounts. However, Timothy Coppinger participated in and had the ability to control its practices. PX35 ¶ 30. For example, he was a signatory on Namakan's primary bank account through which consumer funds flowed, and he registered and paid for Namakan's domain name and other third-party services. *Id.* ¶¶ 18-20, 22.

[5] In July of this year, the Coppinger Lending Entities' registered agent in Delaware resigned with no apparent replacement. In accordance with Delaware law, these entities can be served process through the Delaware Secretary of State. Del. Code tit. 6 § 18-104(d).

Anasazi Services was incorporated in Missouri in January 2011; the remaining entities were incorporated in Delaware between January and July 2011.[6] PX35 ¶¶ 35-42, Atts. R-W at 167-255. The entities all operate from the same suite at 7301 Mission Road in Prairie Village, Kansas. PX35 ¶ 35. Like the Coppinger Lending Entities, the Rowland Entities wired large sums to MD Financial, which in turn registered trade names in the names of the Rowland Lending Entities in Delaware and Utah in June 2014. PX35 ¶¶ 103-04, 107, Atts. HHH at 606, 608-09, 612-13, III at 615, 618, 620, 623, 625. The Rowland Lending Entities also continue to extract payments from consumers, although they appear to have stopped issuing loans. PX01, ¶ 11; PX35 ¶ 121 at 37-38.

3. Individual Defendants

Coppinger is the owner and principal of Defendants CWB, Orion, and the Coppinger Lending Entities, and is a signatory on all but one of these entities' known bank accounts. PX35 ¶ 14, 27, 29, 32, 111, Atts. C at 50-51, D at 56-58, L at 95-96, 110, M at 113, O at 133, 147, 149; KKK at 658-61. He has also identified himself as an owner or sole officer of these entities in corporate operating agreements, bank applications, third-party service provider applications, and state filings. *Id.* He controls P.O. Boxes that receive consumer correspondence, payments, and complaints for CWB, Orion, and the Coppinger and Rowland Lending Entities. *Id.* ¶¶ 21-22, Atts. H-I at 75-84. Coppinger has also purchased third-party services for the companies, including telecommunications services and domain registration. *Id.* ¶¶ 16-20, Atts. E-G at 60-

[6] In June of this year, the Rowland Lending Entities lost their good standing in Delaware due to an apparent failure to pay taxes. Their tax delinquency, however, does not terminate their existence or ability to be served. Del. Code tit. 6 § 18-1108(a) (LLC certificate of formation not cancelled until LLC fails to pay taxes for three years).

73. Coppinger has received substantial funds from the enterprise, some of which have been funneled to other unrelated businesses in which he has interests. *Id.* ¶¶ 129-40.

Rowland is the principal of the Rowland Lending Entities, and the sole signatory on all of the entities' known bank accounts, including those receiving consumer funds. PX35 ¶¶ 35-42, 109, 112-13, Atts. R-W at 167-255, LLL at 673-76. He has identified himself as an owner, sole officer, managing partner or managing member in the Rowland Lending Entities' operating agreements, bank applications, and payment processing applications.[7] PX35 ¶¶ 35-42, 89-93, Atts. R-W at 167-255, BBB-EEE at 544-79. Rowland has reaped substantial profits from the operation, and has transferred large portions to unrelated shell corporations, for which he has sole signatory authority, including Canyon Road Holdings LLC and Cerrillos Road Holdings LLC.[8] PX35 ¶¶ 118-20.

B. Defendants' Unlawful Business Practices

1. Defendants Issue Unauthorized Payday Loans to Consumers

Since at least June 2011, Defendants have issued unauthorized payday loans to consumers and debited money from their bank accounts without permission. Even before discovery, the Court has strong evidence of this unlawful conduct, including 26 sworn declarations from consumers, over 300 consumer complaints about unauthorized loans in the

[7] The Operating Agreements for the Rowland Lending Entities provide that DNA Investments, LLC, a Delaware company organized by David Harbour, is to receive 66.7% of the profits. *See, e.g.*, PX35 ¶ 34, Att. S at 173.

[8] Canyon Road Holdings was organized in Kansas on January 26, 2011; Rowland organized Cerrillos Road Holdings in Delaware on September 15, 2011. Rowland is the sole signatory on both of the entities' known bank accounts. PX35 ¶¶ 43-44, Atts. X-Y at 257-89. As with the Rowland Lending Entities, the Operating Agreements for these companies provide that DNA Investment receives 2/3 of the profits. *Id.* at 261, 277.

FTC's Consumer Sentinel Network, and additional consumer complaints received from state consumer protection agencies.[9] PX01-PX26; PX34 ¶ 8; PX35 ¶ 8.

The trouble often begins after a consumer submits personal financial data online. As background, many consumers who apply for online payday loans do so through one of a multitude of third-party websites that collect consumer applications (or "leads") and sell them to "lead brokers" or "lead generators." PX35 ¶¶ 52-53. The lead brokers, in turn, auction off the consumer data—including social security numbers and bank account information—to the highest bidder. *Id.*[10] After bidding on the "leads," payday lenders can use this data to make loan offers to consumers. *Id.*

Like other payday lenders, Defendants bid on the leads. Once armed with consumers' sensitive financial data, however, Defendants not only make loan offers to consumers, but also issue phony "loans" to consumers who never consented to–and may not have even received–an offer from Defendants. *Id.* ¶¶ 53-54, 59. Some consumers attest that they never even *applied* for a payday loan. PX07 ¶ 7 (never applied for payday loan); PX08 ¶ 2 (applied for loan to consolidate $7,000 in credit card debt); PX23 ¶ 7 (no idea how they got his information); PX12 ¶ 2 (filled out online form trying to get credit report); PX14 ¶ 3 (no interest in borrowing the small amount Defendants deposited into her account). Others received loans from Defendants that they *expressly denied*. PX11 ¶ 2 (declined telephone offer); PX12 ¶ 3 (same). In some cases, consumers had taken out an online payday loan in the past months or years, but were not

[9] The number of consumer complaints represents only the "tip of the iceberg" when it comes to consumer harm. *See, e.g.*, *United States v. Brien*, 617 F.2d 299, 308 (1st Cir. 1980); *United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983).

[10] It appears that Defendants use software and purchase leads from a company called eData Solutions, Inc., which is or has been under the control of an individual named Joel Tucker. PX35 ¶¶ 45-50, 54-58, Atts. Z at 291-92, BB at

currently seeking a loan, suggesting that Defendants purchase "aged leads" from previous applications. PX02 ¶¶ 3-4; PX06 ¶ 3; PX09 ¶ 4; PX11 ¶ 2; PX16 ¶ 2; PX19 ¶ 2; PX20 ¶¶ 2-3; PX24 ¶ 4. In some cases, consumers had applied for a payday loan through a third-party website, but had never received, or consented to, an offer from Defendants, and may have already accepted an offer from another lender. PX01 ¶ 2 (online application to third-party website was denied or otherwise unavailable); PX03 ¶¶ 2-3 (accepted different loan offer); PX04 ¶¶ 2-3 (same); PX25 ¶ 2 (same). Most consumers had never heard of Defendants before noticing the unauthorized activity on their bank statements. PX01-PX26.

To create the impression that a "loan" has been consummated, Defendants have generated bogus loan agreements populated with consumer data purchased from a lead broker. The loan documents purport to show that the consumer agreed to the loan and authorized the lender to make automatic withdrawals from their bank account. Then, after making a one-time deposit of the "principal" (usually $150 to $300) to the consumer's bank account, Defendants proceed to debit "finance charges" (usually $60 to $90) every two weeks indefinitely, without any of the payments reducing the principal of the purported loan.

CWB has also sent some consumers e-mails with attached "Account Summar[ies]" purporting to show that consumers authorized and agreed to Defendants' loans. *See, e.g.*, PX01, Att. A at 6; PX07, Ex. 2 at 15-16; PX08, Att. C at 26. Defendants continue the charade by telling consumers who call or e-mail with complaints about the unauthorized transactions that they authorized and are bound by the loan's terms. For example, in response to one consumer's complaint that she had expressly declined the loan offer, CWB (on behalf of Anasazi Group) sent

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an e-mail stating that "when you applied for and agreed to the terms of the loan, it would have behooved you to read the complete contract you agreed to with The Anasazi Group." *See, e.g.*, PX12, Att. A at 6-7.[11] *See also* PX07; PX12; PX14; PX15.

Many consumers have paid finance charges on loans to which they never agreed. *See, e.g.*, PX01; PX04; PX08; PX14; PX15; PX22. Others have not contested the recurring debits right away, thinking that the biweekly debits will pay off the so-called loan. *See* PX17; PX21; PX27. Instead, Defendants continue to debit their accounts every two weeks indefinitely unless the consumers take affirmative action to make them stop. *See, e.g.*, PX35, Att. LL at 349 (fine print of loan terms providing for indefinite withdrawals absent consumer action). *See also* PX27 ¶ 8 (statement of CWB representative); PX29 ¶ 8 (same).

If consumers report these unauthorized debits to their banks, Defendants have often provided consumers' banks with phony loan agreements that purport to prove the consumers' authorization of the loan (so-called "proofs of authorization."). *See* PX35 ¶¶ 77-82 and Atts. LL-YY at 343-536. After complaining to their banks, many consumers later discover that their banks sided with the lenders after receiving the forged loan authorizations.[12] PX08; PX10; PX14; PX15; PX18.

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[11] The consumer's response was to state in part that "[i]t would behoove you and your company to accept when a customer refuses a loan and not just deposit the funds anyway to attempt to collect interest." *Id.* at 6.

[12] In certain instances, consumers' banks reversed the unauthorized debits or otherwise credited consumers' accounts. *See, e.g.*, PX16 (bank reversed debit and then consumer paid debt collector). But some of these consumers were so concerned about future unauthorized activity that they closed their accounts. Others were subjected to threats and harassment from debt collectors trying to collect on the unauthorized loans. And all of them spent time and energy contesting the charges and trying to discern how their data was compromised. *See, e.g., FTC v. Direct Bens. Grp., LLC*, No. 6:11-cv-1186-Orl, 2013 WL 3771322 (M.D. Fla. July 18, 2013) (obtaining reimbursement for unauthorized charges requires substantial investment of "time, trouble, aggravation, and money" causing consumers to suffer unavoidable injury) (internal citations omitted).

Many consumers have resorted to closing their bank accounts to stop Defendants' unauthorized debits. *See, e.g.*, PX02 ¶ 7; PX04 ¶ 9; PX09 ¶ 9; PX11 ¶ 7; PX14 ¶ 17; PX17 ¶ 7; PX21 ¶ 6; PX24 ¶ 8; PX26 ¶ 5. Although this may have been a short-term fix, in many instances, Defendants' response has been to sell or assign the unauthorized debt to third-party debt buyers or debt-collectors. *See, e.g.*, PX02; PX04; PX10; PX19. In numerous instances, consumers followed up with CWB to complain about the unauthorized loan only to learn that the "debt" had been purchased by a debt broker, FTPIC, LLC, and then sold again to third-party debt collectors.[13] As a result, many consumers have been subjected to months or even years of abuse and harassment from debt collectors attempting to collect on loans the consumer never agreed to in the first place. *See, e.g.*, PX15 ¶ 20 (collectors claimed to be calling from a California court and told business associate they were coming to pick up consumer for committing fraudulent activities); PX 24 ¶ 9 (phony debt disclosed to employer); PX12 ¶ 18 (received threatening calls a year and a half after the unauthorized loan). Some consumers who never authorized the loans have made payments to debt collectors just to stop the incessant calls and threats to their homes, cell phones, employers, and family members. PX05; PX10; PX15; PX16; PX17; PX19; PX20.

Sworn consumer statements and hundreds of consumer complaints about Defendants' unauthorized loans are corroborated through a variety of other sources. For example, many of Defendants' supposed customers took the unusual step of requesting that their banks reverse *deposits* to their accounts, which they would not have done if they had authorized the "loans." *See, e.g.*, PX10, Att. A at 4; PX23, Att. B at 19; PX25 ¶ 5; PX35, Att. PP at 431. *See also* PX35, Att. II at 335 (bank noting that lender serviced by CWB was experiencing numerous reversal

[13] It appears that, like eData Solutions, FTPIC is or was under Joel Tucker's control. PX35 ¶¶ 45, 48-50, 83-84. FTPIC may also operate under the names BMG or Bahamas Marketing Group. *Id.*

requests by their customers for the credits to their accounts), Att. JJ at 338 (same bank noting 84 instances in a five-day period where CWB-serviced lender's credits were immediately followed by reversing debits for the same amount).

In addition, discrepancies among Defendants' so-called "proofs of authorization" raise serious concerns about their accuracy. In at least one instance, a consumer who had actually authorized the loan complained to her bank that Mass Street was debiting her account after she had paid more than the cost of the loan. In response, her bank provided her with a copy of the supposed Loan Disclosure it received from Defendants as "proof of authorization" for the debits. But the Loan Note and Disclosure provided to the consumer's bank was *different* than the Loan Note and Disclosure that the consumer received when she took out the loan. *Compare* PX28, Att. A at 5-6 *with* Att. B at 13.

In other instances, consumers received multiple payday loans serviced by CWB on the same day, all for the same loan amount with the same due date. For example, one consumer complained to her bank about three unauthorized deposits of $250 each to her account from three different payday lenders: Defendant Sandpoint Capital, Tower Lending, and the Seven Group. PX35 ¶ 80. CWB provided operational services—including addressing requests for "proofs of authorization"—for each of these lending entities. *Id.*, Atts. QQ-RR at 433-60. In the "proofs of authorization" for each of the three loans, Defendants provided three purportedly separate loan applications bearing the same "Loan ID" number, as well as supposed loan notes in the names of three different lenders with the same date and principal amount, raising serious doubts about the validity of the supposed proofs of authorization. *Id.* at 436-37, 439-40, 445-46, 448-49, 452-53.

E-mails with Defendants' banks also show that, even though Defendants claim in their loan documents they will contact consumers to verify their approval of the loan, *see, e.g.*, PX14, Att. B at 9, Defendants often skip this step. The e-mails suggest that CWB engaged in the practice of "auto-funding" the loans it serviced, meaning the lender deposited the principal to consumers' bank accounts without confirming whether consumers had actually consented to the loan. PX35 ¶ 68, Att. II at 335-36. After receiving calls from consumers about unauthorized loans from online payday lenders serviced by CWB, a bank employee expressed concern about "recent complaints for other CWB processed entities" and CWB's "confirmation process." *Id.* ¶ 67, Att. HH at 333 (noting the numerous requests for reversal of credits to consumers' accounts was "NOT standard for the industry").

The rates at which the Rowland and Coppinger Lending Entities' ACH debits were returned in any given month (meaning that attempts to debit consumers' accounts were unsuccessful) also corroborate consumer evidence that they were issuing unauthorized loans. For example, the Rowland Lending Entities' monthly total return rates often exceeded 45%, and reached as high as 58%. PX35 ¶ 75. *See also id.* ¶ 76, Att. KK at 340 (64% return rate in April 2013 for Tower Lending, whose operations were run by CWB). These total return rates are exponentially higher than the 1.43% overall total return rate for all debits processed through the ACH network in 2013. PX32 ¶ 22. According to NACHA, whose primary responsibility is to develop and maintain rules and guidelines for the ACH Network, "any rate substantially above the national average should trigger questions regarding the Originator's or Third-Party Sender's practices" and "can be indicative of problematic origination practices," including the originator

"debit[ing] the consumer without having obtained the consumer's authorization for the transaction." *Id* ¶¶ 21, 27.[14]

2. Defendants Deceive Consumers about the Costs of Their Loans

Defendants' egregious practices are not limited to making unauthorized loans to unwitting consumers; they also deceive consumers about the costs of the loan. In particular, Defendants represent to consumers that the total payment for satisfying the payday loan is the amount of the principal borrowed plus a one-time finance charge, and that they will withdraw that amount on the due date. *See, e.g.*, PX28 ¶ 2. But instead of debiting the disclosed amount, Defendants withdraw biweekly finance charges indefinitely from consumers' accounts.

Defendants' "Loan Note and Disclosure" ("Loan Disclosure") states that the consumer's "**Total of Payments**" means "[t]he amount you will have paid after you have made the scheduled payment," and consists of the sum of a stated "**FINANCE CHARGE**" and the "**Amount Financed**." *See, e.g.*, PX35 ¶ 60, Att. DD at 310-315. It also states the "**ANNUAL PERCENTAGE RATE**" ("APR") for the loan. *Id*. These statements appear in bold and prominent text in a box set apart from the rest of the text of the Loan Disclosure (known as a "TILA box"). *Id.*

For example, the following excerpt from a Vandelier Loan Disclosure states prominently in the TILA box that the "amount you will have paid after you have made the scheduled payment" is $390, the $300 principal plus a finance charge of $90:

[14] The total return rate for CWB-serviced Tower Lending was 64.4% for the month of April 2013. PX35 ¶ 76, Att. KK at 340-41.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. (e) **782.14%**	FINANCE CHARGE The dollar amount the credit will cost you. **$90**	Amount Financed The amount of credit provided to you on your behalf. **$300**	Total of Payments The amount you will have paid after you have made the scheduled payment. **$390**

PX14, Att. B at 10. However, in small print and less prominent text, Defendants include additional, confusing disclosures that conflict with the box reprinted above, including:

> Your Payment Schedule will be: 1 payment of $390 due on 5/25/2012, if you decline* the option of refinancing your loan. If refinancing is accepted you will pay the finance charge of $90 only, on 5/25/2012. You will accrue new finance charges with every refinance of your loan. You have the option of paying down the loan. This means your account will be debited the finance charge plus $50.00 pay down. **This does not mean your loan will automatically pay down.**
>
> *To decline the option of refinancing you must sign the Account Summary page and fax it back to our office at least three business days before your loan is due.
>
> Security: The loan is unsecured.
> Prepayment: If you prepay your loan in advance, you will not receive a refund of any Finance Charge.
> (e) The Annual Percentage Rate is estimated based on the anticipated date the proceeds will be deposited to or paid on your account, which is 5/11/2012. See below and your other contract documents for any additional information about prepayment, nonpayment and default.

Id. (Emphasis in original.)

These disclaimers use condensed text, confusing language, and extraneous information and, at times, contradict the earlier, more prominent disclosures. For example, Defendants bury the asterisk explaining how consumers can "decline" the refinancing of the loan in the middle of the paragraph. Notably, Defendants do not place an asterisk next to the prominent "**Total of Payments**" disclosure to alert the consumer that the actual total of payments will be higher than the stated amount unless they take affirmative action. In this example, despite the statement in

the TILA box that the total cost of the consumer's loan would be $390 (the amount borrowed plus a one-time finance charge), the lender debited seven payments of $90 each, for a total of $630. *Id.* ¶ 17.[15] Many consumers paid far more than the stated "Total of Payments." *See, e.g.*, PX01 ¶ 11 ($1,620 on loan with $390 stated total of payments); PX04 ¶ 7 ($1,350 on loan with $390 stated total of payments); PX08 ¶ 6 ($1,800 on loan with $325 stated total of payments); PX27 ¶ 9 ($1,260 for a loan with $390 stated total of payments); PX28 ¶5 ($1,950 for a loan with $325 stated total of payments).

3. Defendants Require Consumers to Preauthorize Bank Debits

An integral component of Defendants' scheme to siphon money from consumers' bank accounts indefinitely is requiring all borrowers to make payments through automatic withdrawals from their bank accounts. For example, Defendants' Loan Disclosures state in part that "[o]n or after the day your loan comes due you authorize us to effect this payment by one or more ACH debit entries to your Account at the Bank." PX14, Att. B at 10. In addition, Defendants' Authorization Agreement For Preauthorized Payment requires consumers to agree to "authorize us . . . to initiate one or more ACH debit entries (for example, at our option, one debit entry may be for the principal of the loan and another for the finance charge) to your Deposit Account indicated below for the payments that come due each pay period and/or each due date concerning every refinance, with regard to the loan for which you are applying." *Id.* at 12. Credit is

[15] An earlier version of Defendants' Loan Disclosure contains slightly different—but still inaccurate and no less confusing—fine print under the TILA box. For example, in one example, the fine print under the TILA Box states: "Your Payment Schedule will be: 1 payment of $325 due on 2/15/2012 if you do not accept the option of refinancing your loan. If refinancing is accepted, you will pay the finance charge only on 2/15/2012. You will accrue new finance charges with every refinance. Security: The loan is unsecured. Prepayment: If you prepay your loan in advance, you will NOT receive a refund of any Finance Charge. (e) The Annual Percentage Rate is estimated based on the anticipated date the proceeds will be deposited to or paid on your account, which is 2/7/2012. See below and your other contract documents for any additional information about prepayment, nonpayment, and default." PX28, Att. A at 5-6.

"condition[ed]" on the consumer's agreement to preauthorize electronic fund transfers because the Loan Disclosure states that "[t]his Application will be deemed incomplete and will not be processed if not signed below" and the "Authorization Agreement for Preauthorized Payment" provides that "ALL documents must be completed in their entirety for approval." *Id.* at 11-12.

4. Defendants Fail to Provide Consumers with Required Disclosures

Defendants frequently fail to provide consumers with the requisite Loan Disclosure setting forth the terms of the loans. *See, e.g.*, PX01; PX04-PX13; PX15; PX17-24; PX26. Others receive e-mails from CWB with links to the loan documents or attached PDFs containing just an "Account Summary," but ignore them because they are from unknown senders, are unable to open them, or are in spam folders. PX02 ¶ 2; PX07 ¶ 5; PX27 ¶ 5. In all of these instances, Defendants fail to provide consumers with clear and conspicuous disclosures of the loans' terms before consummating the loan.

III. LEGAL ARGUMENT

A. This Court Has the Authority to Grant the Requested Relief

Section 13(b) of the FTC Act provides that "the Commission may seek, and after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). The Eighth Circuit has held that this provision empowers courts with "broad remedial discretion" to grant temporary and preliminary relief, as well as any ancillary relief necessary to "accomplish complete justice." *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (citing *FTC v. World Wide Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). Courts in this

Circuit have repeatedly exercised this authority to grant temporary restraining orders with ancillary equitable relief similar to that requested here.[16]

B. The FTC Meets the Two-Part Standard for a Temporary Restraining Order and Preliminary Injunction Under Section 13(b) of the FTC Act

The FTC may obtain preliminary relief under Section 13(b) "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. . . ." 15 U.S.C. § 53(b). *See World Wide Travel Vacation Brokers*, 861 F.2d at 1028-29. In considering the first prong, the likelihood of ultimate success, "the district court need only find some chance of probable success on the merits." *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). In balancing the equities, "the public interest should receive greater weight" than private equities. *FTC v. Bus. Card Experts, Inc.*, No. 06-4671, 2007 WL 1266636, at *5 (D. Minn. Apr. 27, 2007). Unlike private litigants, the Commission need not prove irreparable injury because "[h]arm to the public interest is presumed." *World Wide Factors*, 882 F.2d at 346.[17]

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[16] *See, e.g.*, *FTC v. Real Wealth, Inc.*, No. 10-0060-cv-W-FJG (W.D. Mo. Jan. 26, 2010) (TRO with asset freeze, access to business records, expedited discovery); *FTC v. Grant Search, Inc.*, No. 2:02-cv-04174-NKL (W.D. Mo. Aug. 15, 2002) (*ex parte* TRO with asset freeze); *FTC v. Bus. Card Experts, Inc.*, No. 0:06-cv-04671-PJS (D. Minn. Nov. 29, 2006) (*ex parte* TRO with receiver, asset freeze, immediate access, and expedited discovery); *FTC v. Neiswonger*, No. 4:96-cv-02225-SNL (E.D. Mo. July 17, 2006) (*ex parte* TRO with asset freeze, receiver, and expedited discovery); *FTC v. Kruchten*, No. 01-523 ADM/RLE (D. Minn. Mar. 26, 2001) (*ex parte* TRO with asset freeze, temporary receiver, and expedited discovery); *FTC v. TG Morgan*, No. 4:91-cv-638-DEM (D. Minn. Aug. 26, 1991) (*ex parte* TRO with asset freeze and immediate access); *FTC v. Sec. Rare Coin & Bullion Corp.*, No. 3:86-cv-1067 (D. Minn. Dec. 29, 1986) (*ex parte* TRO with asset freeze); *FTC v. Kitco*, No. 4-83-467 (D. Minn. June 10, 1983) (TRO with asset freeze). *See also FTC v. Affiliate Strategies, Inc.*, No. 5:09-cv-04104-JAR-KGS (D. Kan. July 24, 2009) (TRO with immediate access to business premises, asset freeze, temporary receiver, and expedited discovery); *FTC v. Skybiz.com, Inc.*, No. 01-cv-396-K(E), 2001 WL 34134696 (N.D. Okla. June 6, 2001) (*ex parte* TRO with immediate access to business premises, asset freeze, temporary receiver, and expedited discovery).

[17] Although not required to do so, the FTC also meets the Eighth Circuit's four-part test for private litigants to obtain injunctive relief. *See, e.g., Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). Without the requested relief, the public will suffer irreparable harm from Defendants' continuation of the unlawful scheme and the possible destruction of evidence and dissipation of assets.

1. The FTC Has Demonstrated a Likelihood of Success in Proving Defendants' Deceptive Practices Have Violated the FTC Act

Section 5 of the FTC Act prohibits deceptive and unfair acts and practices in commerce. 15 U.S.C. § 45(a)(1). An act or practice is "deceptive" under Section 5 if it is likely to mislead consumers acting reasonably under the circumstances about a material fact. *FTC v. Real Wealth, Inc.,* 10-0060-CV-W-FJG, 2011 WL 1930401, at *2 (W.D. Mo. May 17, 2011) (*citing FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006)). A representation, omission, or practice is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201. Express and deliberate claims are presumed material. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994); *FTC v. Payday Fin. LLC*, 989 F. Supp. 2d 799, 816 (D.S.D. 2013).

The FTC need not prove that consumers actually relied on the misrepresentations; rather, "the FTC need merely show that the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants' products." *Sec. Rare Coin*, 931 F.2d at 1316 (noting that proof of subjective reliance would "thwart and frustrate the public purposes of FTC action . . . to deter unfair and deceptive trade practices"). A representation is likely to mislead consumers acting reasonably if the express or implied representation is false. *Real Wealth*, 2011 WL 1930401, at *3.

To decide whether Defendants acted deceptively in violation of Section 5(a), the Court must determine the net impression of their practices on consumers. *FTC v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1106 (D. Kan. 2011). The net impression of a representation may

still be deceptive even if it contains some truthful disclaimers or disclosures. *Real Wealth*, 2011 WL 1930401, at *3 (internal citations omitted). Defendants here engage in illegal deceptive acts by misrepresenting that consumers authorized their payday loans and misrepresenting the most fundamental of the loans' terms.

a. Defendants Have Misrepresented that Consumers Authorized the Payday Loans

Defendants' deception begins with unauthorized deposits to, and withdrawals from, consumers' bank accounts that appear on consumers' bank account statements. A charge on an account communicates that the accountholder legitimately owes the debt. *See, e.g.*, *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 64 (2d. Cir 2006) (affirming district court's finding that charges on bills were misrepresentations that the consumer legitimately owed those charges); *FTC v. Inc21.com Corp*., 745 F. Supp. 2d 975, 1000-01 (N.D. Cal. 2010) (holding that charges on telephone bills represented that consumers authorized purchases and owed payment).

Defendants' misrepresentations continue in express statements to consumers in e-mails and in telephone conversations that they authorized the loans. Some consumers receive e-mails addressed to a "Valued Customer" attaching an "Account Summary" containing information about the loan. If consumers contact Defendants to question the loans in e-mails or phone calls, Defendants often respond that the consumer authorized the loan. *See supra* Section I(B)(1). Finally, some consumers receive copies of bogus loan agreements from Defendants that purport to show that they consented to the loan. *Id.*

Misrepresentations that consumers authorized these loans are material. Indeed, they are the very basis for Defendants' ability to debit consumers' accounts indefinitely. Furthermore, these misrepresentations mislead consumers acting reasonably. Many of Defendants' victims

applied online for payday loans. Therefore, they recall inputting financial information and may have had to agreeing to certain terms and conditions. Once they see money deposited into their account, they may reasonably conclude that they unwittingly authorized the loan, and are now bound by its terms. Indeed, these consumers could reasonably question why a company would *deposit* money to their accounts unless the loans were legitimate. For example, one consumer believed that "because Vandelier had deposited money to my account, I was obligated to pay it back and was bound by Vandelier's terms." PX1 ¶ 6. Defendants' deceptive emails and phone conversations buttress consumers' net impression that they have authorized the loans, and may intimidate consumers into paying under the terms of the loan to avoid the aggravation of a lengthy dispute. PX15 ¶ 11.[18]

Defendants also deceive third parties about whether consumers authorized the loan. Misrepresentations to third parties violate the FTC Act if those misrepresentations directly harm consumers. *See Payday Fin.*, 989 F. Supp. 2d at 817 (D.S.D. 2013) (finding that misrepresentations to consumers' employers violated the FTC Act); *FTC v. LoanPointe, LLC*, No. 2:10-cv-225DAK, 2011 WL 4348304, at *5 (D. Utah Sep. 16, 2011), *aff'd* 525 F. App'x 696 (10th Cir. 2013). Here, when consumers report unauthorized transactions to their banks, Defendants have sent bogus "proofs of authorization" to those banks. In several instances, after receiving purported "proofs of authorization" from Defendants, consumers' banks have refused to reverse the unauthorized transactions. *See, e.g.*, PX08, Att. F at 32-33 (after investigation, bank takes back credits it had originally given the consumer); PX10, Att. A at 4 (after

[18] Although the Commission does not need to show actual reliance, *Sec. Rare Coin*, 931 F.2d at 1316, the evidence confirms that these misrepresentations are effective. If a significant number of consumers did not mistakenly believe that they had authorized the loans, Defendants' auto-funding would not have been profitable.

investigation, bank decides not to reverse $300 deposit); PX15 ¶ 8, Att. D at 15; (after investigation, bank decides not to reverse debits); PX14 ¶ 15 (similar). Defendants also sell or assign the supposed "debts" to third-party debt buyers or debt collectors. As a result, many consumers (as well as their families and employers) are harassed for months about a loan they never authorized, and some pay the debt collectors just to be left alone. *See, e.g.*, PX05; PX10; PX15; PX16; PX17, PX19; PX20.

b. Defendants Have Misrepresented the Terms of the Loans

Defendants not only deceive consumers about whether they authorized the loans, but also about the loan's material terms. Defendants' Loan Disclosures include TILA disclosure boxes trumpeting consumers' "Total of Payments" as a one-time payment: a finance charge for a certain amount, usually $60 or $90, plus the amount borrowed. In contrast to this representation, however, Defendants withdraw finance charges every two weeks, until the consumer stops them, without any payments going towards the principal. As a result, some consumers have paid far more than the stated "Total of Payments."[19] *See, e.g.*, PX28 ¶ 5 ($1,950 for a loan with $325 stated total of payments).

A district court recently held in an FTC action that disclosures virtually identical to those here violated the FTC Act's prohibition on deception as a matter of law and were, on their face, likely to mislead borrowers. *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN, 2014 WL 2927148, at *9-10 (D. Nev. May 28, 2014) (granting summary judgment in FTC's favor). In *AMG*, the defendants' loan documents included a TILA box that, like here, represented that

[19] Representations regarding the cost of a product are "undoubtedly material," because cost is "an important factor in a consumer's decision on whether or not to purchase a product." *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1068 (C.D. Cal. 2012). And express claims are presumed material. *Payday Fin.*, 989 F. Supp. 2d at 816.

borrowers' total payments would be a one-time payment of the amount borrowed plus a stated finance charge, and disclosed the APR and finance charge based on that single payment. There, as here, those disclosures were false. Explaining its finding that the *AMG* disclosures were deceptive on their face, the court explained that "the large prominent print in the TILA Box implies that borrowers will incur one finance charge while the fine print creates a process under which multiple finance charges will be automatically incurred unless borrowers take affirmative action." *Id.* at *9.

The *AMG* defendants used virtually the same confusingly worded fine print as Defendants to provide that the loan would not be paid down unless the consumers contacted the lenders and indicated that their payments should go to the principal.[20] The court in *AMG* observed that "the material terms in the fine print are arranged in the document in such a way that the existence of the automatic renewal and the process for declining renewal are hidden from borrowers." *Id.* at 10.

Any attempts by Defendants to qualify their representations regarding the terms of the loan fail. The key inquiry is the overall net impression of Defendants' practices. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200-01 (9th Cir. 2006). Under Section 5, "[d]isclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989). Moreover, Defendants

[20] The only significant difference between the Defendants' disclosures and those in *AMG* is that the *AMG* disclosures provided that, even absent consumer action, the loan would pay down eventually, usually in increments of $50.

cannot use their inaccurate TILA disclosures to lure in consumers and then provide truthful information later in the document. *See, e.g.*, *Cyberspace.com*, 453 F.3d at 1200-01; *AMG*, 2014 WL 2927148 at *9; *Commerce Planet*, 878 F. Supp. 2d at 1065.

Defendants here left consumers with a net impression that their loans would cost the borrowed amount plus a one-time finance charge. Any disclaimers to the contrary are neither "prominent [nor] unambiguous." *See Removatron*, 884 F.2d at 1497. Indeed, nowhere in their barrage of jargon do Defendants disclose the most crucial information: absent affirmative, post-contract action by the consumer, finance charges are assessed every two weeks indefinitely, causing consumers to pay in excess of the disclosed total of payments.[21]

2. The FTC Has Demonstrated a Likelihood of Success in Proving Defendants' Unfair Practices Have Violated the FTC Act

Defendants' unauthorized debits from consumers' bank accounts also violate Section 5's prohibition on unfairness. A practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and not outweighed by countervailing benefits. 15 U.S.C. § 45(n); *Payday Fin.*, 989 F. Supp. 2d at 816. Here, Defendants' practices cause substantial injury because Defendants take money from consumers' accounts without their authorization. That injury is not reasonably avoidable because consumers cannot foresee that an unknown third party will make unauthorized debits from their bank accounts. *See Inc21.com*, 745 F. Supp. 2d at 1004 (consumers who had not authorized defendants' transactions had no

[21] Consumers who never authorized the loans are also harmed by Defendants' deceptive loan terms. The total cost of the loan is material for consumers in deciding whether to incur the time and aggravation necessary to challenge the unauthorized loan. A consumer who thinks they will lose no more than one $90 finance charge is less likely to challenge the unauthorized loan than a consumer who understands that finance charges will continue indefinitely unless the consumer takes action. Many consumers allowed Defendants' unauthorized debits to continue because they thought each payment would be applied to pay back the "principal" that was deposited to their account without permission. *See, e.g.*, PX01 ¶¶ 6-7; PX21 ¶ 5; PX14 ¶ 9.

reason to scrutinize their bills for fraudulent charges). Moreover, when consumers complain to their banks to make the debits stop, their efforts are often thwarted by Defendants' provision of bogus "proofs of authorization" to the consumer's bank. *See, e.g.*, PX08; PX14; PX15; PX28. It would strain credulity to identify even a single benefit to consumers or competition of unauthorized withdrawals from consumers' bank accounts. *See, e.g.*, *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000).

3. The FTC Has Demonstrated a Likelihood of Success in Proving Defendants Have Violated TILA

Defendants' deceptive loan disclosures also run afoul of TILA and its implementing Regulation Z. Congress enacted TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 725 (8th Cir. 2013) (*quoting* 15 U.S.C. § 1601(a)). Thus, lenders offering closed-end credit must disclose clearly and conspicuously their loans' finance charge, payment schedule, total of payments, and APR.[22] 15 U.S.C. §§ 1631(a) and 1638(b)(1); 12 C.F.R. §§ 1026.18, 1026.17(a), 1026.17(b), 1026(17)(c)(1). TILA's provisions, as well as Regulation Z, "are remedial legislation, to be construed broadly in favor of consumers." *Rand Corp. v. Moua*, 559 F.3d 842, 845 (8th Cir. 2009). *See also Rubio v. Capital One Bank*, 613 F.3d 1195, 1199, 1202 (9th Cir. 2010) (holding that TILA requires "absolute compliance by creditors" and that "any misleading ambiguity . . . should be resolved in favor of the consumer.") (internal citations omitted).

[22] Defendants extend "closed," as opposed to "open," end credit because they do not make additional credit available as consumers repay outstanding balances. 12 C.F.R. §§ 1026.2(a)(10), (20).

To the extent Defendants provide disclosures at all before issuing the loan, those disclosures violate TILA because they do not reflect the finance charge, payment schedule, total of payments, and APR as they exist when consumers accept the loan. *See* 12 C.F.R. § 226.17(c) (disclosures must reflect "the terms of the legal obligation between the parties"); *id.* at Supp. I § 17(c) (staff commentary) ("The disclosures shall reflect the credit terms to which the parties are legally bound *as of the outset of the transaction*.") (emphasis added). Rather, Defendants base their disclosures on the assumption that consumers will elect to pay down their loans, contact Defendants, and execute new agreements. Defendants' practice of disclosing one set of loan terms and enrolling consumers in a materially different repayment plan violates TILA. *AMG*, 2014 WL 2927148, at *12.

Second, the disclosures are confusing and misleading, in violation of TILA's requirement that they be clear and conspicuous. Indeed, the *AMG* court found that virtually identical disclosures violated TILA because they were, at the very least, ambiguous and, therefore, "necessarily not clearly and conspicuously disclosed." *Id.* ("[A] reasonable borrower could think the information prominently displayed in the TILA box accurately reflected his or her legal obligations without needing to undertake any additional action…").

4. The FTC Has Demonstrated a Likelihood of Success in Proving Defendants Have Violated EFTA

EFTA and Regulation E require that consumers authorize electronic funds transfers in writing, and that the authorized party provide a copy of the authorization to the consumer. 15

U.S.C. § 1693e(a); 12 C.F.R. § 1005.10(b). In violation of this provision, on many occasions, Defendants debit consumers' accounts without their authorization.[23]

EFTA and Regulation E also prohibit "condition[ing] the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers." 15 U.S.C. § 1693k(1); 12 C.F.R § 1005.10(e). Defendants' loan documents plainly violate this provision because they require consumers to authorize automatic withdrawals from their bank accounts at regular two-week intervals in order to complete the application. *See, e.g.*, *Payday Fin.*, 989 F. Supp. 2d at 812 (granting summary judgment on FTC's EFTA claim because "[n]o provision of any of the Defendants' loan agreements . . . expressly states that the consumer does not need to authorize EFT at all to receive a loan or provides a means by which a consumer can obtain a loan without initially agreeing to EFT").[24]

5. The Equities Weigh Heavily in Favor of the Requested Relief

The public interest in halting Defendants' unlawful conduct and preserving assets to redress consumers far outweighs any interest Defendants may have in continuing to engage in deceptive and unfair practices. In balancing public and private interests, "public equities receive far greater weight." *World Travel Vacation Brokers*, 861 F.2d at 1030; *see also FTC v. Nat'l Tea Co.*, 603 F.2d 694, 697 n.4 (8th Cir. 1979) ("In light of the [FTC Act's] purpose to protect the public-at-large, rather than individual private competitors, courts must properly emphasize the public equities."). This principle is especially important in the context of enforcement of

[23] As a logical corollary, Defendants cannot provide copies of the requisite authorizations if they do not exist.

[24] The court also held that the right to revoke electronic fund transfer authorization later "does not allow a lender who conditions the initial extension of credit on such payments to avoid liability." *Id.* at 812 (*quoting O'Donovan v. Cash Call, Inc.*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D. Cal. June 24, 2009)).

consumer protection laws. *FTC v. Mallett*, 818 F. Supp. 2d 142, 149 (D.D.C. 2011) ("The public interest in ensuring the enforcement of federal consumer protection laws is strong. . . .").

Here, there is great public interest in protecting consumers from Defendants' deceptive and unfair practices, effectively enforcing the law, and preserving Defendants' assets for final relief. In addition, Defendants' conduct indicates that they will likely continue to deceive the public. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) ("[P]ast illegal conduct is highly suggestive of the likelihood of future violations.").

In contrast, the private equities in this case are not compelling. "[T]here is no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment." *World Wide Factors*, 882 F.2d at 347 (internal citations omitted); *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("[T]he public interest in preserving the illicit proceeds . . . for restitution to the victims is great."); *CFTC v. British Am. Commodity Options, Corp.*, 560 F.2d 135, 143 (2d. Cir. 1977) (no obligation to protect ill-gotten profits or unlawful business interests).

C. Defendants' Liability

1. Corporate Defendants Operate as a Common Enterprise and are Jointly and Severally Liable for Law Violations

Because the Corporate Defendants operate as a common enterprise, they are jointly and severally liable for the consumer injury they caused. "[W]here the same individuals transact business through a 'maze of interrelated companies,' the whole enterprise may be held liable for FTCA violations." *Payday Fin.*, 989 F. Supp. 2d at 809 (*quoting J.K. Publ'ns*, 99 F. Supp. 2d at 1202). Entities constitute a common enterprise "when they exhibit either vertical or horizontal

commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1143 (9th Cir. 2010) (finding common enterprise where defendants participated in and benefited from a "common venture" and "shared business scheme"). In determining whether entities operate as a common enterprise, courts generally consider whether the businesses have common control, share office space, have interrelated funds, or other factors. *See, e.g.*, *J.K. Publ'ns*, 99 F. Supp. 2d at 1202; *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1216 (D. Nev. 2011); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008), aff'd 356 F. App'x 358 (11th Cir. 2009). No one factor is dispositive and not all factors need to be present to justify a finding of common enterprise. *FTC v. Kennedy*, 574 F. Supp. 2d 714 (S.D. Tex. 2008). Rather, "'the pattern and frame-work of the whole enterprise must be taken into consideration.'" *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (internal citations omitted).

Here, the Corporate Defendants exhibit all the hallmarks of a common enterprise. They have common ownership because corporate filings, bank documents, and other records identify either Coppinger or Rowland as the owner or principal of each of the Corporate Defendants. *See supra* Section II(A). In addition, Coppinger and Rowland have signatory authority on virtually all of the Corporate Defendants' bank accounts. Defendants also operate through a maze of corporate entities and blur the lines of corporate separateness. The Corporate Defendants have shared office space, as well as P.O. boxes, telephone numbers, fax numbers, and e-mail addresses. *See supra* Section II(A).

Corporate Defendants have also participated in a shared business scheme.[25] For example, after Defendants purchase consumer "leads," the terms and format of the loan documents for the Lending Entities are nearly identical, including the deceptive TILA disclosures and the requirement that consumers preauthorize electronic debits. PX35 ¶ 60, Att. DD at 310-15. No matter which lender's name is on the loan documents, all contacts with consumers are handled by CWB. And although consumers had to use separate telephone numbers, e-mail addresses, and fax numbers to complain about the Lending Entities serviced by CWB, all communications are addressed by CWB from the same call center. *See Grant Connect* 827 F. Supp. 2d at 1217-18 (noting that use of different phone numbers at same call center can support finding of common enterprise).

Corporate Defendants have also commingled their finances and have interdependent economic interests. CWB is paid a percentage of the Rowland and Coppinger Lending Entities' profits, PX35 ¶¶ 110, 115-17, making its "potential profits interdependent on the success" of the loans. *See Grant Connect*, 827 F. Supp. 2d at 1218. Banking records also show regular, substantial transfers among Defendants, another hallmark of common enterprise. *Id.* Each of the Lending Entities extracted consumer funds through automatic debits processed by often the third-party payment processor and then transferred large portions of the funds to CWB, Anasazi Services, or both. PX35 ¶¶ 61, 114-117. For example, an analysis of bank records for an eleven-month period shows more than $6 million transferred from the Rowland Lending Entities to Anasazi Services, and more than $2 million transferred from Anasazi Services to CWB. *Id.* ¶

[25] The BBB of Kansas City is monitoring a group of entities under the umbrella "Vandelier Group," including Vandelier, Anasazi Group, Mass Street, St. Armands, CWB, and Orion. According to Mr. Reese's declaration, these entities are referred to collectively because the BBB received consumer complaints that identified them as the same company or as different entities with the same contact information. PX31 ¶ 10.

115. That same analysis shows regular transfers of consumer funds from Basseterre, Sandpoint, and Namakan to CWB. *Id.* ¶ 116.

Finally, bank documents confirm that CWB has addressed payment-processing issues on behalf of the lending entities it services, including responding to requests for proofs of authorization. *See Id.* ¶ 61, 78-80; *Grant Connect*, 827 F. Supp. 2d at 1217 (holding that the use of each other's contact information and communication on one another's behalf regarding payment processing was evidence of "coordinated activity" supporting a finding of common enterprise). For all of these reasons, the Corporate Defendants are jointly and severally liable as a common enterprise.

2. The Individual Defendants Are Liable for Injunctive and Monetary Relief

Coppinger and Rowland's direction of this scheme makes them liable for both injunctive and monetary relief. An individual defendant may be held liable for injunctive relief for corporate practices if: (1) the individual participated directly in the challenged conduct or (2) had the authority to control it. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996). Authority to control the company can be evidenced by "active involvement with business matters and corporate policy including assumption of officer duties." *FTC v. Kitco*, 612 F. Supp. 1282, 1292 (D. Minn. 1985). Notably, authority to sign documents is sufficient to establish authority to control the acts and practices of a company. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997), as amended (Apr. 11, 1997). *See also FTC v. Natural Solution, Inc.*, No. CV 06-06112-JFW, 2007 WL 8315533, at *7 (C.D. Cal. Aug. 7, 2007) (finding authority to control where individual had signatory authority on all the corporate defendant's bank accounts).

To obtain monetary relief from an individual defendant for corporate practices, the FTC must show that the individual had or should have had knowledge of the illicit conduct, showed reckless indifference to the truth or falsity of a representation, or had an awareness of a high probability of fraud with an intentional avoidance of the truth. *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *Kitco*, 612 F. Supp. at 1235. Participation in corporate affairs is probative of knowledge. *Affordable Media, LLC*, 179 F.3d at 1235; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 564 (7th Cir. 1989). The FTC is not required to prove subjective intent to defraud. *See, e.g.*, *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005) (citing *Amy Travel*, 875 F.2d at 573-74). Where a common enterprise is present, an individual defendant's liability for monetary relief is joint and several with all entities participating in the enterprise. *See Nat'l Urological Grp.*, 645 F. Supp. 2d at 1213-14.

Here, the Individual Defendants satisfy the standards for both injunctive and monetary relief. Most significantly, each is a principal and owner of one or more of the Corporate Defendants and participated in their corporate affairs. *See supra* Section II. In addition, with the exception of Namakan bank accounts controlled by Coppinger's brother Steve, either Coppinger or Rowland has bank signatory authority for each Corporate Defendant's known bank accounts. *See supra* Section II(A). This demonstrates the "requisite control" and is probative of both Individual Defendants' participation and knowledge. *Publ'g Clearing House*, 104 F.3d at 1170; *Amy Travel*, 875 F.2d at 574. In addition, the evidence shows that Coppinger personally arranged for third party services for the Corporate Defendants, including telecommunications services and domain registrations. Rowland personally signed applications for payment processing agreements. PX35, Att. BBB-EEE at 544-79.

Both Individual Defendants also had ample knowledge of the corporate entities' unlawful activity. As the sole signatories on almost all of the corporate accounts, they knew that banks were processing a large number of returns, and that the corporate entities were commingling funds. Through his control of the P.O. Box, Coppinger received Better Business Bureau ("BBB") complaints and money orders from consumers attempting to return the principal of the bogus loans. *Id.* ¶¶ 21-22, Atts. H-I at 75-84. And Rowland received and cashed those money orders into lender accounts. *Id.* According to the BBB, 195 complaints were filed against Vandelier, Anasazi, Mass Street, St. Armands, CWB, and Orion in the last three years. Defendants have responded to just two of them, neither of which are resolved. PX31 ¶10-11. Based on their failure to respond to complaints, a pattern of complaints (most involving unauthorized loans), and complaint volume, the BBB has given the companies an "F" rating. PX31 ¶16.[26]

Coppinger and Rowland have also both had long associations with the Corporate Defendants lasting through name changes, location changes, civil penalties and cease and desist orders by several states, and the receipt of hundreds of consumer complaints alleging unlawful practices.[27] *FTC v. Loewen*, 2013 WL 5816420, at *6 (W.D. Wash. Oct. 29, 2013) (holding that

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[26] The BBB has also issued a scam report about Namakan, warning consumers that the business collects "devastating amounts of money" from consumers' accounts and that consumers should not do business with it. PX31 ¶ 12.

[27] Since 2012, California, Connecticut, Oregon, Pennsylvania, and Washington have issued cease and desist orders and/or assessed civil penalities against Defendants for violating state laws by issuing loans without licenses or charging usurious interest rates. *See, e.g.*, *In the Matter of Namakan Capital*, State of Connecticut Dept. of Banking, Order to Cease and Desist and Order Imposing Civil Penalty (May 16, 2013); *In the Matter of Vandelier Group and CWB Services*, Washington State Dept. of Financial Institutions, Division of Consumer Services, No. C-13-1319-13-SD03 (2013). Washington State's Department of Financial Institutions also issued a consumer alert about St. Armands in September 2013, noting that consumers had complained that "without permission, St. Armands electronically deposited funds into their accounts and later withdrew funds." *See* Consumer Alert, St. Armands, available at http://dfi.wa.gov/consumers/alerts/st-armands htm.

repeated changes of business name suggest individual defendants' knowledge of the business's illegal activities). Moreover, after a bank employee participated in a call with a consumer and a CWB representative, the bank employee reported that the CWB representative did not seem surprised that the customer was questioning the loan's authorization, suggesting that such inquiries are common. PX35 ¶ 65, Att. GG at 329-30. Because the Individual Defendants participated in the wrongful acts, had the ability to control the corporate entities, and were aware of their wrongful acts, they should be held liable for the Corporate Defendants' unlawful practices.

D. The Scope of the Proposed Preliminary Relief is Appropriate and Necessary to Preserve Effective Final Relief

As part of the permanent relief sought in this case, the FTC seeks restitution for the consumer victims of Defendants' scheme. To preserve the possibility of such relief, the FTC seeks an *ex parte* TRO that would require Defendants to immediately cease their unlawful practices; freeze Defendants' assets; appoint a temporary receiver; allow limited expedited discovery; and require Defendants to preserve documents. Under Section 13(b) of the FTC Act, this Court is empowered with "broad remedial discretion" to grant ancillary relief. *Sec. Rare Coin*, 931 F.2d at 1314-16 ("Section 13(b) does not limit the full exercise of the district court's inherent equitable power."). Courts in this Circuit have regularly granted temporary restraining orders with the relief requested here, including on an *ex parte* basis. *See supra* Section III(A) at n.16.

1. Conduct Relief

The proposed TRO is narrowly tailored to prevent ongoing consumer injury by prohibiting Defendants from misrepresenting a loan's material terms and from collecting or attempting to collect on any loan for which they did not obtain the consumer's informed, express consent. This relief is appropriate because it will ensure that consumers will not continue to be harmed by—and Defendants will not continue to profit from—unlawful conduct. *See, e.g.*, *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal. 2010) (preliminarily enjoining collection of charges to which consumers did not consent). The proposed order further prohibits Defendants from violating the FTC Act, TILA, or EFTA. These provisions do no more than require Defendants to comply with the law. *Kitco*, 612 F. Supp. at 1296-97 (holding that an "order prohibiting misrepresentations. . . does not unduly harm the defendants. . . .but simply ensures that they will conduct their business in a manner which does not violate Section 5 of the FTC Act.").

2. Asset Freeze

An asset freeze is essential to ensure that funds necessary to redress Defendants' consumer victims do not disappear during the course of this action. *World Travel Vacation Brokers*, 861 F.2d at 1031 (holding that district courts have a "duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers."). Courts in this Circuit have repeatedly ordered asset freezes to preserve the possibility of consumer redress. *See, e.g.*, *Real Wealth*, No. 10-0060-cv-W-FJG; *Grant Search,* No. 2:02-cv-04174-NKL; *Neiswonger*, No. 4:96-cv-02225-SNLJ; *Kruchten*, No. 01-523 ADM/RLE; *Kitco*, No. 4-83-467.[28]

[28] Where, as here, individual defendants control the deceptive activity and have actual or constructive knowledge of

As discussed above, Defendants have operated a pervasive and deceptive scheme and have generated significant revenues from unlawful activity. A review of November 2012 through September 2013 bank statements shows that Defendants took $46.5 million from consumers in that period alone. PX35 ¶ 126. Courts have observed, and experience has shown, that Defendants who engage in deceptive practices or other serious law violations are likely to waste assets prior to resolution of the action. *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). *See generally* Unruh Decl.

In addition, bank records reveal that Defendants' accounts receiving large disbursements of consumer funds are emptied out with alarming speed and frequency. For example, in just one sample month in April 2013, the Rowland Lending Entities took in more than $4.2 million, approximately $4 million of which consisted of consumer payments. PX35 ¶¶ 118-20. That same month, approximately $5 million was transferred out of the same account, with approximately $2.6 million used to fund new consumer loans, and approximately $1.4 million transferred to shell companies Canyon Road Holdings and Cerrillos Road Holdings, for which Rowland is the sole signatory. *Id.* Once the funds reached those accounts, they were transferred again to an array of entities and individuals, including $159,500 that Rowland transferred to his personal bank account.[29] *Id.*

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the deceptive practices, freezing individual assets is appropriate. *See, e.g., Real Wealth*, No. 10-0060-cv-W-FJG

[29] In July 2013, Defendants also transferred more than $700,000 to an account in the name of MD Financial, LLC, a company that registered fictitious names for dozens of online payday lenders – including the Coppinger and Rowland Lending Entities – in two separate states (Utah and Delaware) in June and July 2013. Defendants appear to have paid MD Financial to act as a middleman to obtain payment processing, in an apparent attempt to further conceal their identities. In July 2013, MD Financial received close to $3 million from online lenders in an account he had opened in June 2013; that same month, nearly all the funds were transferred to a payment processor, leaving less than $3,000 in the account. By August, that same bank account was emptied, and a month later it was closed. PX35 ¶¶ 98-107.

There is also substantial evidence that Coppinger uses large amounts of the enterprise's corporate funds for non-business purposes such as personal American Express payments, hundreds of thousands of dollars in life insurance premiums, tens of thousands of dollars in cash withdrawals, monthly payments on a luxury vehicle, thousands of dollars at Las Vegas casinos, and close to $20,000 a year in country club fees. PX35 ¶¶ 129-35. In less than a year, Coppinger also transferred close to $250,000 to businesses unrelated to the scheme in which he has a personal interest. *Id.* ¶¶ 137-40. And when Missouri Bank closed many of Defendants' corporate accounts in October 2013, Coppinger transferred $570,000 to his personal bank accounts. *Id.* ¶ 136.

3. Appointment of Temporary Receiver, Immediate Access to Defendants' Business Premises, and Limited Expedited Discovery

The appointment of a receiver is also necessary to prevent irreparable injury.[30] The Court has broad discretion in appointing a receiver, a common remedy in FTC and other civil law enforcement actions. *See, e.g.*, *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-34 (11th Cir. 1984). In determining whether to appoint a receiver, courts consider several factors, including the "[validity of the] claim by the party seeking the appointment; the probability that fraudulent conduct has occurred or will occur to frustrate that claim; imminent danger that property will be concealed, lost, or diminished in value; inadequacy of legal remedies; lack of a less drastic equitable remedy; and likelihood that appointing the receiver will do more good than harm." *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-17 (8th Cir. 1993).

[30] Plaintiff has identified a potential candidate in the pleading entitled "Plaintiff's Suggestion of Temporary Receiver," filed simultaneously with this memorandum.

Where, as here, corporate defendants have used deception to obtain money from consumers, courts have held that "it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will be subject to diversion and waste" to the detriment of the victims. *SEC v. First Fin. Grp.*, 645 F.2d 429, 438 (5th Cir. 1981); *accord SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963). A receiver is also necessary to secure Defendants' business locations, perform standard functions such as ensuring corporate compliance with any order, trace and secure assets, and take possession of computers, documents, and other evidence of Defendants' illegal practices. Thus, courts have appointed receivers in FTC cases alleging deceptive conduct. *See, e.g.*, *Bus. Card Experts*, No. 0:06-cv-04671; *Neiswonger*, No. 4:96-cv-02225-SNLJ; *Kruchten*, No. 01-523 ADM/RLE; *Affiliate Strategies*, No. 5:09-cv-04104; *Skybiz.com*, No. 01-cv-396-K(E).

The proposed TRO also grants the receiver and the FTC immediate access to Corporate Defendants' business locations to locate and preserve assets and evidence, and to identify any potential additional defendants. Similarly, the TRO would allow the FTC to engage in limited expedited discovery to discover the nature and location of assets and documents. District courts may depart from normal discovery procedures, particularly in a case involving the public interest. Fed. R. Civ. P. 26(d), 30(a)(2), 33(a), and 34(b).[31]

4. The Proposed TRO Should Be Entered *Ex Parte*

The requested preliminary relief should be issued without notice to maintain the status quo in order to preserve the Court's ability to effectuate final relief. Fed. R. Civ. P. 65(b)

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[31] *See, e.g.*, *Real Wealth*, No. 10-0060-cv-W-FJG; *Neiswonger*, No. 4:96-cv-02225-SNLJ; *Kruchten*, No. 01-523 ADM/RLE (allowing for limited expedited discovery). *See also Fed. Express Corp. v. Fed. Expresso, Inc.*, 1997 WL 736530, at *2 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases, such as those involving requests for preliminary injunctions") (*quoting* commentary to Fed. R. Civ. P. 26(d)).

permits entry of an *ex parte* order upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. In such cases, *ex parte* relief is "indispensable" because "it is the sole method of preserving a state of affairs in which the court can provide effective final relief." *In re Vuitton et Fils S.A.*, 606 F.2d 1, 4 (2d Cir. 1979) (internal citations omitted). Mindful of this problem, courts across jurisdictions have regularly granted the FTC's request for *ex parte* temporary restraining orders in Section 13(b) cases.[32] *See, e.g.*, *Grant Search*, No. 2:02-cv-04174-NKL.

In the FTC's experience, upon discovery of impending legal action, defendants engaged in unlawful schemes have withdrawn funds and moved or destroyed records. Unruh Decl. ¶¶ 17-19. As in those matters, the record here supports *ex parte* relief. Unruh Decl. ¶ 20. Specifically, Defendants' deceptive conduct shows a willingness to flout the law. Also militating in favor of *ex parte* relief, the record shows that, once Defendants take possession of consumer funds, those funds quickly exit company accounts, and, in many instances, are diverted to personal use. *See supra* Section III(D)(2). Moreover, Defendants have taken affirmative steps to conceal themselves from law enforcement, including issuing loans under a number of lender names, incorporating entities in an offshore jurisdiction without identifying the owner or physical location, declining to respond to BBB complaints, using a straw man to set up ACH processing on their behalf, and using CWB, an elusive entity that has changed names several times, to communicate with consumers. *See supra* Sections II(A) and III(C).

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[32] *See supra* Section III.A. In addition, Congress has observed with approval the use of *ex parte* relief under the FTC Act: "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 130, 103rd Cong., 2d Sess. 15-16, *reprinted in* 1994 U.S. Code Cong. & Admin. News 1776, 1790-91.

IV. CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court enter the proposed TRO to halt Defendants' illegal practices and preserve the possibility of relief for consumers.

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel

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/s/ Rebecca M. Unruh

Rebecca M. Unruh, DC Bar #488731
Matthew J. Wilshire, DC Bar #483702
Lisa A. Rothfarb, MD Bar (no number)
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop CC-10232
Washington, D.C. 20580
202-326-3565 (Unruh)
202-326-2976 (Wilshire)
202-326-2602 (Rothfarb)
202-326-3768 (facsimile)
E-mail: runruh@ftc.gov
E-mail: mwilshire@ftc.gov
E-mail: lrothfarb@ftc.gov

TAMMY DICKINSON
United States Attorney

Dated: September 8, 2014

/s/ Charles M. Thomas

Charles M. Thomas, MO Bar #28522
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East Ninth Street, Room 5510
Kansas City, MO 64106
Telephone: (816) 426-3130
Facsimile: (816) 426-3165
E-mail: charles.thomas@usdoj.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION