UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

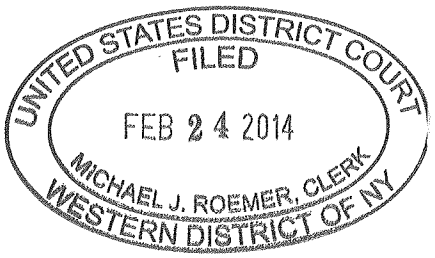
FEDERAL CHECK PROCESSING, INC., *et al.*,

Defendants, and

EMPOWERED RACING LLC,

Relief Defendant.

Case No.: 14 CV 0122S



MEMORANDUM IN SUPPORT OF PLAINTIFF'S *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER WITH AN 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 a debt collection operation that uses threats and intimidation to extract payments from consumers. Defendants use deception, abuse, and harassment to carry out their scheme, which has been victimizing consumers since at least 2009. They have continued to disregard the law despite entering into an Assurance of Discontinuance with the State of New York in February 2013. Defendants' strong-arm tactics violate Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and multiple provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p.

Defendants' primary tactic is to telephone consumers and falsely represent that the collectors are investigators or check processors, and that a complaint has been filed against the consumers for check fraud or another criminal act. Defendants then threaten consumers with dire consequences, such as arrest or other legal action, if they do not make immediate payments. Also, Defendants regularly have failed to identify themselves as debt collectors, have failed to provide consumers with basic information about themselves or the purported debts, and have failed to provide consumers with the information necessary—and required by law—to confirm or dispute purported debts.

To put an immediate stop to Defendants' illegal conduct, the FTC seeks, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), 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 their assets, appoint a receiver over the corporate entities, allow the FTC immediate access to the Defendants' business premises to inspect and copy documents, and impose other relief. These measures are necessary

to prevent continued consumer injury, dissipation of assets, and the destruction of evidence, thereby preserving this Court's ability to provide effective final relief.

II. THE PARTIES

A. Federal Trade Commission

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-51. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, and the FDCPA, 15 U.S.C. §§1692-1692p, which prohibits unfair, deceptive, and abusive debt collection practices. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 814(a) of the FDCPA, 15 U.S.C. §1692*l*(a), authorize the FTC, through its own attorneys, to initiate federal court proceedings to enjoin violations of the FTC Act and the FDCPA and to secure such equitable relief as may be appropriate in each case, including consumer redress and disgorgement of ill-gotten gains. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365-67 (2d Cir. 2011).

B. Defendants

Defendants operate as a common enterprise of thirteen companies and their two principals that collects and processes purported debts from consumers. In order of incorporation dates, the Corporate Defendants are: Federal Recoveries, LLC (PX11 at 68 ¶18, Att. A.); Federal Processing, Inc. (*Id.* at 69-70 ¶24, Att. F.); Federal Check Processing, Inc. (*Id.* at Att. J.); US Check Processing, Inc., a/k/a U.S. Check Processing (*Id.* at 71 ¶31, Att. M.) ; Check Processing, Inc. (*Id.* at 72 ¶34, Att. P.); United Check Processing, Inc. (*Id.* at 72-73 ¶36, Att. R.); Federal Processing Services, Inc. (*Id.* at 73 ¶40, Att. V.); State Check Processing, Inc. (*Id.* at 74 ¶43, Att.

Y.); Flowing Streams, F.S., Inc. (*Id.* at 75 ¶46, Att. BB);[1] Central Check Processing, Inc. (*Id.* at 76 ¶49, Att. EE.); American Check Procesing, Inc., a/k/a American Check Processing (*Id.* at 76-77 ¶52, Att. HH.); Central Processing Services, Inc. (*Id.* at 77-78 ¶55, Att. KK.); and Nationwide Check Processing, Inc., a/k/a National Processing Services (*Id.* at 78 ¶57, Att. MM.). Nationwide Check Processing—which was incorporated in Colorado on June 5, 2013—was formed after the Individual Defendants entered into an Assurance of Discontinuance ("AOD") with the State of New York in February 2013. (*Id.* at 86-87 ¶86, Att. BBB.)

The Individual Defendants are: (1) Mark Briandi; and (2) William Moses.

Mark Briandi has orchestrated the Defendants' debt collection scheme from the outset. Corporate documents identify Briandi as the "founding member" of Federal Recoveries, the first company established in the common enterprise. (*Id.* at 68 ¶18, Att. A.) Briandi is a signatory on all of the enterprises' corporate bank accounts, which includes the accounts of Federal Recoveries (*Id.* at 69 ¶21, Att. D), Federal Processing (*Id.* at 70 ¶26, Att. H), Check Processing (*Id.* at 72 ¶35, Att. Q), United Check Processing (*Id.* at 73 ¶38, Att.T), and Flowing Streams. (*Id.* at 75 ¶ 47, Att. CC.) Briandi has withdrawn over $1.2 million in "equity draws" from the corporate bank accounts. (*Id.* at 86 ¶¶83-84, Att. ZZ.) Briandi listed himself as Director and 50% owner of Federal Processing when completing a merchant application for a payment processing account. (*Id.* at 70 ¶25, Att. G.) Briandi is listed as the subscriber on telephone service accounts for telephone lines used by Federal Recoveries (*Id.* at 69 ¶20, Att. C), State Check Processing (*Id.* at 74-75 ¶44, Att. C), American Check Processing (*Id.* at 77 ¶53, Att. C), Federal Processing Services (*Id.* at 74 ¶41, Att. C) and US Check Processing. (*Id.* at 72 ¶33, Att. C.) Briandi also is listed as the registrant on internet registry accounts for domain names

[1] Since its incorporation in January 2013, Flowing Streams has acted as a debt-purchasing company for the Defendants' enterprise. (PX03 at 25-26 ¶¶8-11; PX11 at 75 ¶47, Att. CC.)

connected to Federal Recoveries (*Id.* at 69 ¶¶22-23, Att. E), Federal Processing (*Id.* at 70 ¶27, Att. I), Federal Check Processing (*Id.* at 71 ¶30, Att. L), United Check Processing (*Id.* at 73 ¶39, Att. U), Federal Processing Services (*Id.* at 74 ¶42, Att. X), State Check Processing (*Id.* at 75 ¶45, Att. AA), Flowing Streams (*Id.* at 75 ¶48, Att. DD), Central Check Processing (*Id.* at 76 ¶51, Att. GG), American Check Processing (*Id.* at 77 ¶54, Att. JJ), and Nationwide Check Processing (*Id.* at 79 ¶60, Att. OO). A letter faxed to the South Carolina Department of Consumer Affairs on behalf of Nationwide Check Processing in response to a consumer complaint lists the fax as from "Mark Brandi." (*Id.* at 78-79, ¶59.) The FTC has received nine complaints specifically naming Briandi as the individual who contacted consumers on behalf of the various Corporate Defendants. (*Id.* at 82-83 ¶70, Att. SS.)

William Moses is a signatory on all of the business and corporate checking accounts used by the enterprise. (*Id.* at 69 ¶21, Att. D; *Id.*at 70 ¶26, Att. H; *Id.*at 72 ¶35, Att. Q; *Id.* at 73 ¶38, Att. T; *Id.* at 75 ¶ 47, Att. CC.) He has withdrawn over $1.1 million in "equity draws" from the various corporate bank accounts. (*Id.* at 86 ¶¶83-84, Att. ZZ.) Moses has held himself out as an officer—with controlling authority—of Federal Recoveries, Federal Check Processing, Federal Processing Service, Federal Processing, US Check Processing, and United Check Processing. (*Id.* at 86-87 ¶¶86-88, Att. BBB at 319.) The FTC has received twelve complaints specifically naming Moses as the individual who contacted consumers on behalf of the various Corporate Defendants. (*Id.* at 82 ¶69, Att. RR.)

The Relief Defendant is **Empowered Racing, LLC**. Empowered Racing is a New York limited liability company formed on January 11, 2013. (*Id.* at 79 ¶61, Att. PP.) Empowered Racing has received at least $92,000 in transfers from the Corporate Defendants' bank accounts, which do not appear to have been payment for products or services. (*Id.* at 84 ¶82, Att. YY.)

Many of the addresses listed for the Corporate Defendants—on corporate papers, bank statements, and in communications to consumers—are addresses at commercial mail receiving entities. (*Id.* at 65 ¶6.) Defendants operate out of at least one physical location in East Amherst, New York. (*Id.* at 85 ¶¶80-81, Atts. XX and PP; *Id.* at 88 ¶91, Att. BBB.)

Although operating out of one location, Defendants' unlawful enterprise is extensive. Consumers have filed more than 500 complaints with the FTC since 2009 against the various entities linked to Defendants. (*Id.* at 80 ¶66.) Further, consumers have filed at least seven private legal actions against Defendant entities for violations of the FDCPA and state fair debt collection laws.[2] (*Id.* at 88, ¶92, Att. DDD.) Since May 2010, Defendants have collected and processed at least $9 million from consumers nationwide. (*Id.* at 84 ¶74.)

As noted above, the Defendants entered into an Assurance of Discontinuance ("AOD") with the State of New York on February 3, 2013. (*Id.* at 86-87 ¶86, Att. BBB.) The AOD included findings that:

> the Briandi/Moses debt collection companies repeatedly and persistently violated the FDCPA, including the following: (i) improperly calling consumers at their places of employment; (ii) improperly accusing consumers of violation of the penal law and threatening consumers with arrest; (iii) falsely representing that a lawsuit had been, or would be filed; (iv) improperly disclosing consumer debts to third parties; (v) improperly threatening to seize a consumer's property, freeze bank accounts and garnish wages; (vi) and improperly sending verification of employment forms to consumers' employers.

(*Id.* at 87 ¶87, Att. BBB.) The AOD required Briandi and Moses to dissolve Federal Check Processing and US Check Processing within 45 days of executing the AOD. (*Id.* at 87 ¶89, Att. CCC.) Not only have Briandi and Moses failed to dissolve these entities, Defendants have

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[2] Consumers also may have filed civil lawsuits in state courts as well but, because some state courts do not make their dockets accessible through a central, searchable database such as PACER, an accurate count of the state court lawsuits is not available.

continued to employ a myriad of unlawful tactics while operating their debt collection enterprise. Since Briandi and Moses signed the AOD on February 3, 2013, the FTC has received over 60 complaints from consumers against the Corporate Defendants. (*Id.* at 87 ¶90.) The only change that Defendants made in their operation was to form a new corporation in Colorado—Nationwide Check Processing—in order to evade detection. (*Id.* at 78 ¶57, Att. MM.) Recently, in an effort to conceal their continued New York presence, Defendants have informed consumers that Nationwide Check's mailing address is located in Erie, Pennsylvania. (PX13 at 374 ¶6.) This address is also a commercial mail receiving entity. (PX11 at 85 ¶78.)

III. DEFENDANTS' DECEPTIVE AND ABUSIVE COLLECTION PRACTICES

Defendants buy debt portfolios from third-party brokers and collect consumer debts nationwide on their own behalf. Defendants obfuscate that they are debt collectors and instead make a series of misrepresentations aimed at convincing consumers that they have committed check fraud or another crime. If consumers fail to pay immediately, Defendants falsely claim that they will face devastating consequences.

Defendants' illegal collection tactics fall into four main categories: (1) using false and misleading representations to collect debts; (2) engaging in prohibited communications with third parties such as a consumer's friends or family; (3) failing to make required disclosures; and (4) failing to provide consumers with required validation notices. These practices violate Section 5 of the FTC Act and multiple provisions of the FDCPA.

A. Defendants Use False, Deceptive, or Misleading Representations to Collect Payments from Consumers

Section 5 of the FTC Act prohibits "unfair or deceptive practices in or affecting commerce." 15 U.S.C. § 45. An act or practice is deceptive under Section 5(a) if it involves a material representation, omission, or practice that is likely to mislead consumers acting

reasonably under the circumstances. *FTC v. Verity Int'l, Ltd.* ("*Verity II*"), 443 F.3d 48, 63 (2d Cir. 2006); *FTC v. Navestad*, No. 09-CV-6329T, 2012 WL 1014818 at *4 (W.D.N.Y. Mar. 23, 2012). "A representation is material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Navestad*, 2012 WL 1014818 at *4.

In considering whether a claim is misleading, the Court must consider the "overall impression" created by the representation. *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("[T]he Court must consider the misrepresentations at issue, by viewing [them] as a whole without emphasizing isolated words or phrases apart from their context.") (citations omitted). The FTC need not prove that Defendants' misrepresentations were made with an intent to defraud or deceive, or were made in bad faith. *Verity II*, 443 F.3d at 63; *Five-Star Auto Club*, 97 F. Supp. 2d at 526.

Similarly, Section 807 of the FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. Section 807 lists examples of actions that violate this prohibition, but provides that prohibited actions are not limited to the examples. In determining whether a practice or statement is deceptive, courts use the "least sophisticated consumer" standard to ensure that the FDCPA "protects all consumers, the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

Defendants make six core misrepresentations in order to collect or attempt to collect purported debts. Specifically, Defendants misrepresent that: (1) consumers have committed check fraud or another criminal act; (2) Defendants are going to have consumers arrested or

imprisoned; (3) Defendants are affiliated with government entities, including law enforcement agencies; (4) Defendants have filed or will file legal action against consumers; (5) Defendants are going to garnish consumers' wages; and (6) consumers owe the debt in instances where Defendants lack a reasonable basis for making such a claim.

These misrepresentations begin with the first telephone communication from Defendants. Defendants' collectors often emphasize the company names to suggest a government affiliation or a national presence ("Federal," "US," "State," "American," "Nationwide," or "United"). (PX01 at 1 ¶3; PX03 at 24 ¶2; PX05 at 31 ¶ 2; PX07 at 43 ¶3; PX08 at 48 ¶ 5; PX09 at 51-52 ¶4; PX10 at 60 ¶2; PX12 at 374-75 ¶10; PX14 at 383 ¶¶3-4; PX15 at 389 ¶6, 390 ¶11.) The defendants rarely inform the consumers that they are debt collectors. Rather, Defendants assert that they are check processors or investigators, and that the consumers have committed check fraud or another criminal act. (PX01 at 3 ¶3, Att. C at 17; PX02 at 20 ¶ 3, 21 ¶5; PX03 at 24 ¶4; PX04 at 28 ¶3; PX05 at 31 ¶4; PX07 at 43 ¶3, 44 ¶5; PX09 at 51-52 ¶4; PX10 at 60 ¶2; PX12 at 373 ¶4, 374 ¶10; PX14 at 383-84 ¶¶4-5, 384 ¶10, Att. A; PX15 at 388-89 ¶5.) For example, Defendants left a series of voice mails for one consumer in which the Defendants claimed to be "investigators" or from the "fraud division," and that they were trying to reach the consumer about a "bad check," "formal complaint" in which the consumer was named as the "primary respondent," or "allegation of pending check fraud." (PX01 at Att. B. at 10, Att. C at 17; PX13 Att. A at 380-81; PX14 at Att. A (audio voicemail recordings).)

With this deceptive backdrop, Defendants threaten dire consequences if consumers do not make immediate payments. For example, Defendants have threatened to have consumers arrested or imprisoned (PX01 at 2 ¶¶6-8; PX04 at 29 ¶6; PX05 at 32 ¶7; PX06 at 36 ¶15; PX07 at 43 ¶3; PX08 at 47 ¶4; PX12 at 373 ¶4, 374-75 ¶10; PX14 at 383-84 ¶5; PX15 at 388-89 ¶5,

389 ¶6, 390 ¶13, 394-95 ¶37), file a lawsuit against consumers, (PX04 at 28 ¶3; PX05 at 32 ¶7; PX09 at 51 ¶ 3), file charges against consumers, (PX02 at 21 ¶ 5; PX03 at 25 ¶ 5), and garnish consumers' wages. (PX09 at 51-52, ¶4; PX15 at 393 ¶26.) To enforce the sense of urgency, defendants often have stated that the only way for the consumer to avoid these consequences is to pay the debt immediately. (PX01 at 2, ¶8; PX02 at 21 ¶5; PX03 at 24, ¶4; PX04 at 28 ¶3; PX05 at 31 ¶4; PX06 at 34 ¶2; PX07 at 43 ¶3; PX08 at 47, ¶4; PX09 at 51 ¶3; PX12 at 373 ¶4, 374-75 ¶10; PX15 at 388-89 ¶5, 394-95 ¶37, 396-97 ¶¶47-49.) If a consumer agrees to pay, Defendants take the consumer's billing information and usually charge the credit card or bank account in the name of Federal Processing or Federal Recoveries. (PX11 at 68 ¶14, PX15 at 395 ¶40, Att. A at 399-400.)

Defendants have employed various methods to make these alarming misrepresentations seem legitimate. In at least one instance, Defendants' representative specifically stated that he was a federal officer. (PX09 at 51 ¶2.) Defendants also frequently have referenced a court system or police department local to the consumer. (PX02 at 21 ¶¶5-6; PX03 at 25 ¶5; PX04 at 28 ¶3; PX08 at 48 ¶7; PX13 at 374 ¶3; PX14 at 383 ¶10, Att. A; PX15 at 392 ¶25.) For example, Defendants told one consumer who lives in Travis County, Texas that they were going to have the Travis County police come to his home and arrest him. (PX04 at 28 ¶3.) In another instance, Defendants "terrified" a consumer who lives in Summit County, Ohio by threatening that, if she did not make an immediate payment, criminal charges would be filed against her in Summit County court. (PX03 at 25 ¶5.) Even when Defendants have not claimed an explicit government affiliation, consumers have believed they were speaking with the government because of the Defendants' corporate names and allegations of criminal wrongdoing. (PX07 at 44 ¶5; PX08 at 48 ¶5; PX09 at 51-52, ¶4; PX12 at 375 ¶12; PX15 at 389 ¶6; 392 ¶25; 397 ¶48.) As one

consumer declared, "[t]he representative's emphasis on 'U.S. or United States' along with her description of the company as a clearinghouse for bad checks made me think that her company was a branch of the federal government. As a result, I was genuinely fearful that my son would be arrested for writing bad checks." (PX07 at 44 ¶5.)

There is, however, no evidence that Defendants sue consumers to collect debts or have any intention of doing so. The FTC is not aware of any consumers, including those who refused to pay Defendants and those who paid only a portion of the amount demanded, who were sued by Defendants, the original creditors, or anyone else to collect the debts. (PX02 at 23 ¶14; PX04 at 30 ¶11; PX09 at 56 ¶19; PX08 at 49 ¶9; PX12 at 376 ¶18.) A search of LexisNexis' CourtLink and other databases found no evidence that Defendants obtained judgments or liens against any consumers. (PX11 at 68 ¶15.) Further, Defendants do not have any authority to arrest consumers or impose other criminal sanctions for failure to pay alleged private debts.

When faced with these threats, consumers desperately have sought more information about the details of the alleged check fraud. (PX01 at 1-2 ¶¶5-7; PX03 at 21-22 ¶¶7-9; PX04 at 29 ¶6; PX06 at 34-35 ¶6; PX09 at 51 ¶3.) In response, Defendants routinely have refused to discuss the bases for the allegations and have berated consumers for their attempts to verify the debt. (PX01 at 2, ¶7; PX04 at 29 ¶6; PX06 at 34-35 ¶6; PX10 at 60 ¶4; PX12 at 375 ¶11; PX15 at 393 ¶31, 394 ¶36.) For example, when a consumer asked for more information regarding the creditor to which she allegedly owed $1,300, Defendants' representative screamed at her and refused to give her any information. (PX06 at 34-35 ¶6.) At times, Defendants have stated that consumers previously bounced a check when paying a debt, or have asserted that consumers had insufficient funds when a payday lender attempted to cash a check or debit funds from a bank account. (PX04 at 28 ¶8; PX12 at 374 ¶9; PX15 at 390 ¶12.)

Often, when consumers have asked about the origins of the purported debt, defendants have provided false or insufficient information. For example, some consumers have contacted the purported original creditor or their bank who informed them that the debt already had been satisfied. (PX02 at 22-23 ¶12; PX15 at 395 ¶41.) Other consumers have provided Defendants with information calling into question the legitimacy of the purported debt. (PX05 at 32 ¶7; PX09 at 52-53 ¶¶7-8; PX12 at 373-74 ¶5; PX15 at 393 ¶30.) For example, when one consumer informed Defendants' representative that she had proof from her bank that she had paid off her debt, the representative hung up on her but continued collection attempts soon thereafter. (PX15 at 395 ¶41.) In another instance, Defendants attempted to collect a debt from a consumer even after she explained that the loan had been paid off with the proceeds of a second mortgage and that mortgage had been satisfied when she and her husband sold their home. (PX05 at 31 ¶3.) In each of these instances, Defendants have continued to represent that the consumers owe the debt even though they have no reasonable basis to make these claims. (PX05 at 31 ¶3, 32 ¶¶8-10; PX09 at 53-55 ¶¶9-15; PX12 at 374 ¶7; PX15 at 395-96 ¶¶41-45.)

Thus, Defendants violate Section 5 of the FTC Act, as alleged in Counts I and II of the Complaint. In addition, as alleged in Count III of the Complaint, Defendants violate Section 807 of the FDCPA. As set forth in the Complaint, these violations contravene multiple subsections of Section 807, including: (a) subsection one, 15 U.S.C. §1692e(1), which prohibits the false representation or implication that the debt collector is affiliated with the United States or any State; (b) subsection two, 15 U.S.C. §1692e(2), which prohibits the false representation of the character, amount, or legal status of a debt; (c) subsection four, 15 U.S.C. §1692e(4), which prohibits the representation or implication that nonpayment of a debt will result in the arrest or imprisonment of a person or the seizure, garnishment, or attachment of a person's property or

wages, when such action is not lawful or when Defendants have no intention of taking such action; (d) subsection five, 15 U.S.C. §1692e(5), which prohibits the threat to take action that is not lawful or that is not intended to be taken; and (e) subsection ten, 15 U.S.C. §1692e(10), which prohibits the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

B. Defendants Fail To Make Required Disclosures That They Are a Debt Collector and That They Are Contacting Consumers To Collect on a Debt

Section 807(11) of the FDCPA requires debt collectors to disclose in their initial communication with consumers "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," and "to disclose in subsequent communications that the communication is from a debt collector." 15 U.S.C. § 1692e (11).[3] Courts in this District have determined that voice mail messages are communications under the FDCPA. *See, e.g. Ostrander*, 2009 WL 909646 at *6. Therefore, voice mail messages also must contain the required disclosures. *Id.*

Defendants routinely fail to make the required disclosures. Rarely, if ever, in their initial communication do Defendants make a meaningful disclosure of their identity, that they are debt collectors, or that they are calling in an attempt to collect a debt. Instead, Defendants deceptively identify themselves generically as investigators or check processors. (PX01 at 3, ¶3, Att. B at 10, Att. C at 17; PX02 at 20 ¶ 3; PX07 at 44 ¶5; PX14 at 383 ¶10, Att. A.) Nor do Defendants make required disclosures in subsequent communications. (PX01 at 3 ¶10, Att. C; PX03 at 26 ¶ 14; PX14 at Att. A.)

Thus, Defendants violate Section 807(11) of the FDCPA, as alleged in Count III of the

[3] This disclosure is often referred to as a mini-Miranda warning. *See Ostrander v. Accelerated Receivables*, 07-CV-827C, 2009 WL 909646 at *4 (W.D.N.Y. Mar. 31, 2009).

Complaint.

C. Defendants Engage in Prohibited Communications with Third Parties

Section 805(b) of the FDCPA bars debt collectors from communicating with third parties—such as a consumer's friends, coworkers, or non-spouse family members—other than for the purpose of obtaining a consumer's home or workplace address or telephone number, unless the consumer consents to the third-party communication or the communication is reasonably necessary to effectuate a post-judgment judicial remedy. 15 U.S.C. § 1692c(b). Prohibited third-party communications include contacts with a debtor's family members such as parents, grandparents, aunts, uncles, siblings, and children, as well as a debtor's employer or co-workers. *See, e.g. Bonafede v. Advanced Credit Solutions, LLC*, No. 10-cv-956S, 2012 WL 400789 (W.D.N.Y. Feb. 7, 2012) (contact with consumer's mother and brother); *Engler v. Atl. Res. Mgmt., LLC*, No. 10-CV-968S, 2012 WL 464728 (W.D.N.Y. Feb. 13, 2013) (contact with work supervisor); *Twarozek v. Midpoint Resolution Grp., LLC*, No. 09-cv-731S, 2011 WL 344096 (W.D.N.Y. Aug. 8, 2011) (contact with consumer's daughter).

Here, Defendants routinely contact third parties about consumers' alleged debts for improper purposes, often disclosing the debt in the process. First, Defendants regularly contact consumers' family members and acquaintances and regularly make false threats of legal action against the consumers. (PX09 at 55 ¶15 (Defendants contacted consumer's son and told him consumer was going to be put in jail); PX04 at 29-30 ¶¶7-8 (Defendants contacted consumer's parents and wife's coworker and told them he would go to jail for fraud); PX10 at 61 ¶7 (Defendants telephoned consumer's parents and sister and threatened to file criminal charges for check fraud against the consumer); PX07 at 43-44 ¶¶3-8 (Defendants contacted the mother of an injured Iraq war veteran and threatened to have her son arrested if the debt was not paid); PX06

at 36 ¶15 (Defendants contacted consumer's aunt and threatened that the consumer was in legal trouble and would be arrested); PX08 at 49-50 ¶11 (Defendants told consumer's brother, sister-in-law, and parents of his children's friends that consumer was "a deadbeat" and encouraged them not to associate with him); PX12 at 374 ¶6 (Defendants called consumer's brother); PX12 at 375-76 ¶15 (Defendants contacted consumer's mother and sister); PX15 at 388 ¶4 (Defendants left message with consumer's mother); PX14 at 383-84 ¶¶5-6 (Defendants contacted consumer's mother and stepmother and told them the consumer had committed check fraud); PX15 at 390-91 ¶¶11-16 (Defendants contacted consumer's mother and threatened to arrest the consumer if the mother did not make an immediate payment with a pre-paid credit card); PX15 at 394 ¶33.) Second, Defendants contact consumers' employers. (PX10 at 61 ¶7 (Defendants informed consumer's boss that they would file federal check fraud charges against the consumer if she did not pay her debt); PX06 at 36 ¶12 (Defendants contacted consumer's former employer and informed a former co-worker that the consumer was in legal trouble); PX05 at 32 ¶¶8-9 (Defendants told consumer's supervisor that if the debt was not paid, they would send the sheriff to the consumer's workplace to serve legal papers); PX09 at 54 ¶¶11-12 (Defendants told consumer's supervisor that the consumer was "in serious trouble" and that Defendants would need to garnish his wages), at 55 ¶14 (Defendants told consumer's production manager that the consumer was going to jail.) In at least one instance, Defendants faxed a "verification of employment" letter to a consumer's employer. (PX11 at 368.) Thus, Defendants violate Section 805(b) of the FDCPA, as alleged in Count IV.

D. Defendants Fail To Provide Consumers with Required Validation Notices

Section 809(a) of the FDCPA requires that unless provided in the initial communication with the consumer, a debt collector must, within five days of the initial communication, provide

the consumer with a written notice containing the amount of the debt and the name of the creditor, along with a statement that the collector will assume the debt to be valid unless the consumer disputes the debt within 30 days, as well as a statement that the debt collector will send a verification of the debt or a copy of the judgment if the consumer timely disputes the debt in writing. 15 U.S.C. § 1692g. This provision is intended to minimize instances of mistaken identity of a debtor or mistakes over the amount or existence of a debt. *See* S. Rep. No. 95-382, 95th Cong., 1st Sess. at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696. Consumers who do not receive the statutorily-required notice may never learn of their right to dispute or request verification of the alleged debt or its amount, age, or existence.

Here, Defendants do not provide the required notices to consumers. In one instance, Defendant's representative told a consumer "it is not Nationwide Check Processing's policy to send out letters." (PX02 at 19-20, ¶4.) Even in instances when the consumers disputed or questioned their alleged debts, Defendants have refused to provide verification to consumers. (PX01 at 1-2, ¶¶4-8 (Defendants refused to give consumer any written proof of the debt); PX09 at 52-53 ¶8; at 6 ¶18 (Defendants refused to provide written verification of the debt); PX08 at 48 ¶6 (Defendants never sent validation notice to consumer); PX03 at 26 ¶ 14 (consumer never received any validation notice); PX05 at 33 ¶7, 34 ¶12 (Defendants would not provide validation notice to consumer who repeatedly informed them that the debt had been paid); PX15 at 393 ¶31 (Defendants cursed at consumer when he asked for verification of the debt); PX02 at 19-20 ¶4; PX12 at 373-74 ¶5, 376 ¶17; PX15 at 394 ¶36.) Even when a consumer pays the full amount requested by Defendants, Defendants have failed to provide the consumer with the details of the debt. For example, one consumer paid the full amount requested by Defendants but, despite repeated requests, she never received a letter stating the total amount of the debt. (PX06 at 37

¶¶16-17.) Months later, a negative entry appeared on the consumer's credit report relating to the same debt but the creditor listed was a different debt collection company. (*Id.* at ¶18.) Defendants told another consumer paying on behalf of her son that they would not send her verification of the debt, but that they would send receipt of her payment. (PX07 at 44-45 ¶¶8-9.) Defendants never sent the receipt. (*Id.*) Because Defendants routinely fail to provide validation notices, Defendants violate Section 809(a) of the FDCPA, as alleged in Count V of the Complaint.

IV. A TEMPORARY RESTRAINING ORDER SHOULD ISSUE AGAINST THE DEFENDANTS

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

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek, and the Court to issue, temporary, preliminary, and permanent injunctions. The second proviso of Section 13(b), under which the FTC brings this action, provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).[4] Proper cases include actions involving "any violation of a provision of a statute administered by the FTC." *FTC v. Minuteman Press*, 53 F.Supp.2d 248, 260 (E.D.N.Y. 1998) (internal quotation marks omitted); *FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). Incident to its authority to issue permanent injunctive relief, this Court has the "broad equitable authority to 'grant any ancillary relief necessary to accomplish complete justice.'"

[4] This action is not brought pursuant to the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary injunctive relief before or during the pendency of an administrative proceeding. Because the FTC brings this case pursuant to the second proviso of Section 13(b), its complaint is not subject to the procedural and notice requirements in the first proviso. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that routine fraud cases may be brought under the second proviso of Section 13(b), without being conditioned on the first proviso requirement that the FTC issue an administrative proceeding); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) ("Congress did not limit the court's powers under the [second and] final proviso of § 13(b) and as a result this Court's inherent equitable powers may be employed to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief.").

Five-Star Auto Club, Inc., 97 F. Supp. 2d at 533 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). This ancillary relief can include a temporary restraining order, an asset freeze, expedited discovery, and other necessary remedies. *See, e.g., id.*; *FTC v. Strano*, 528 Fed. Appx. 47, 49 (2d Cir. June 20, 2013) (summary order) (holding that district court's imposition of an asset freeze was not an abuse of discretion); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (holding that Section 13(b) "gives the federal courts broad authority to fashion appropriate remedies for violations of the [FTC] Act"); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (holding that under section 13(b) "the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."). Temporary restraining orders with asset freezes and other ancillary relief have been granted in the Second Circuit, including by this Court. *See, e.g., FTC v. Navestad*, 09-CV-6329T, 2012 WL 1014818 (W.D.N.Y. July 1, 2009) (granting *ex parte* TRO, asset freeze, and temporary receiver); *CFTC v. Atwood & James, Ltd.*, No. 09 CV 6032 (W.D.N.Y. Jan. 23, 2009) (granting *ex parte* TRO, accounting, temporary receiver, and expedited discovery); *FTC v. Guzzetta d/b/a Smart Data Sys.*, No. 01-2335 (E.D.N.Y. April 17, 2001) (granting *ex parte* TRO, asset freeze); *FTC v. Five-Star Auto Club, Inc.*, No. 99-1693 (S.D.N.Y. Mar. 8, 1999) (granting *ex parte* TRO, asset freeze, and temporary receiver).

B. The FTC Meets the Standard for Granting a Government Agency's Request for Preliminary Injunctive Relief

The FTC may obtain a preliminary injunction "[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). Unlike private litigants, the FTC need not prove irreparable injury because its existence is presumed in a statutory enforcement action. *FTC v.*

Verity Int'l ("*Verity I*"), 124 F. Supp. 2d 193, 199 (S.D.N.Y. 2000); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991); *see also SEC v. Unifund SAL*, 910 F.2d 1028, 1035-36 (2d Cir. 1990) (finding that where a federal agency seeks to enforce a federal statute, irreparable injury is presumed and need not be proven). Moreover, in balancing the equities, the public interest should receive greater weight than private interests. *FTC v. Lancaster Colony Corp.*, 434 F.Supp. 1088, 1096 (S.D.N.Y. 1977) ("The equities to be weighed are not the usual equities of private litigation but public equities."); *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989). As set forth in this memorandum, the FTC has amply demonstrated that it will ultimately succeed on the merits of its claims and that the balance of equities favors injunctive relief.[5]

1. The FTC Has Demonstrated a Likelihood of Ultimate Success on the Merits

The FTC meets its burden to show likelihood of ultimate success if "it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits." *Verity I*, 124 F. Supp. 2d at 199; *Lancaster Colony Corp., Inc.*, 434 F. Supp. at 1090. In considering an application for a TRO or preliminary injunction, the Court has the discretion to consider hearsay evidence. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (finding that hearsay may be considered by a district court in determining whether to issue a preliminary injunction). As set forth in Section III above, the FTC has presented ample evidence that it is likely to succeed on the merits of its claims that Defendants violated Section 5 of the FTC Act and multiple provisions of the FDCPA.

[5] Although not required to do so, the FTC also meets the Second Circuit's four-part test for private litigants to obtain injunctive relief. As stated above, irreparable injury exists simply because a federal statute is violated. *Univ. Health*, 938 F.2d at 1218. Vulnerable consumers will continue to be injured by Defendants' deceptive and abusive collection practices. Moreover, the public interest in ensuring the enforcement of federal consumer protection laws is strong. *FTC v. Mallett*, 818 F. Supp. 2d 142, 149 (D.D.C. 2011). Without the requested relief, the public will suffer irreparable harm from the continuation of Defendants' scheme and the likely destruction of evidence and dissipation of assets.

2. The Equities Weigh in Favor of Granting Injunctive Relief

Once the FTC establishes the likelihood of its ultimate success on the merits, preliminary injunctive relief is warranted if the Court, weighing the equities, finds that relief is in the public interest. Although there is "some disagreement among circuits" about whether *any* weight should be given to private hardship, *Verity I*, 124 F. Supp. 2d at 199 n.38, in any case public equities must be given far greater weight. *See, e.g.*, *Lancaster Colony Corp.*, 434 F. Supp. at 1096 ("The equities to be weighed . . . are not the usual equities of private litigation but public equities."); *Univ. Health, Inc.*, 938 F.2d at 1225 ("While it is proper to consider private equities in deciding whether to enjoin a particular transaction, we must afford such concerns little weight, lest we undermine section 13(b)'s purpose of protecting the 'public-at-large, rather than individual private competitors.'") (quoting *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 697 n.4 (8th Cir. 1979).

The evidence demonstrates that the public equities—protection of consumers from Defendants' deceptive and abusive debt collection practices, effective enforcement of the law, and the preservation of Defendants' assets for final relief—weigh heavily in favor of granting the requested injunctive relief. Granting such relief is also necessary because Defendants' conduct indicates that they will likely continue to deceive the public. *Five-Star Auto Club*, 97 F. Supp. 2d at 536 ("[P]ast illegal conduct is highly suggestive of the likelihood of future violations.").

By contrast, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden. *See FTC v. Cuban Exch., Inc.*, No. 12 CV 5890(NGG)(RML), 2012 WL 6800794 at *2 (E.D.N.Y. Dec. 19, 2012) ("A preliminary injunction would not work any undue hardship on the defendants, as they do not have the right to persist in conduct that violates federal law."). Because Defendants "can have no vested interest in business activity

found to be illegal," the balance of equities tips decidedly toward granting the relief. *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (quoting *United States v. Ellis Research Lab.*, 300 F.2d 550, 554 (7th Cir. 1962)). Therefore, the public equities supporting the proposed injunctive relief outweigh any burden imposed by the relief on Defendants. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 697 (1978).

C. Defendants Are a Common Enterprise and Jointly and Severally Liable for the Law Violations

When determining whether a common enterprise exists, courts in the Second Circuit consider whether "the same individuals were transacting an integrated business through a maze of interrelated companies . . . ." *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964). Factors that indicate a common enterprise include whether the nominally distinct entities "(1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing." *FTC v. Consumer Health Benefits Ass'n*, No. 10 Civ. 3551(ILG)(RLM), 2012 WL 1890242, at *5 (E.D.N.Y. May 23, 2012) (citations omitted). Defendants found to be in a common enterprise are jointly and severally liable for the injury their violations of the FTC Act causes. *Id.* at *5

Here, the corporate defendants operate as a common enterprise to collect purported debts from consumers. There is substantial evidence of the entities' intertwinement. The corporate defendants share common ownership, office locations, and mailing addresses. (PX11 at 68 ¶18; 69-70 ¶¶19-20, 23-24; 70-71 ¶¶25-28; 71 ¶¶30-32; 72-73 ¶¶34-36; 74 ¶¶42-43; 75-77 ¶¶45-49, 52; 78 ¶57; 79 ¶¶60, 62.) Bank records demonstrate routine commingling of funds, with checks written to one corporate entity deposited in the banking account of a separate corporate entity. (PX11 at 69 ¶21; 84 at ¶76, Att. TT; 84 ¶77, Att. UU; 85 ¶78 Att. VV; 85 ¶79, Att. WW; 85 ¶80, Att. XX.) Defendants have referenced multiple company names when telephoning the same

consumer. (PX01 at 1 ¶3, 3 ¶10; PX14 at 383 ¶10, Att. A.) In addition, some consumers have received letters from Defendants that reference multiple company names. For example, one consumer received an emailed letter on US Check Processing letterhead that was signed by a person identifying himself as an account manager for United Check Processing. (PX10 at 61 ¶5, Att. A.) Another consumer received a letter that was on US Check Processing letterhead that directed the consumer to remit payment to United Check Processing and was signed by a person identifying himself as an account manager for Federal Check Processing. (PX09 at 52 ¶7.) The name of the account manager—Gary Marshall—was the same on both of these letters. *Id.* When one consumer agreed to make a payment to Federal Check Processing, Federal Recoveries appeared on her account next to the deduction. (PX15 at 395 ¶40, Att. A.) This evidence suggests that not only are Defendants a common enterprise, but that each corporate identity they use is merely a shell, created only to shield Defendants from scrutiny by giving the impression that each entity is distinct from the rest.

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

In addition to the Corporate Defendants, Individual Defendants Briandi and Moses are liable for injunctive and monetary relief for law violations committed by the Corporate Defendants. Individual defendants "may be liable for corporate acts or practices if they (1) participated in the acts or had authority to control the corporate defendant and (2) know of the acts or practices." *Med. Billers Network, Inc.*, 543 F. Supp. 2d. at 320. "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Id.* (quoting *Amy Travel*, 875 F.2d at 575); *Five-Star Auto Club, Inc.*, 97 F. Supp. 2d at 535 ("Assuming the duties of a corporate officer establishes authority to control."); *Consumer Health Benefits*, 2012 WL 1890242, at *5

("[A]n individual's status as a corporate officer on behalf of a corporate defendant can be probative of control."). Even where an individual is not officially designated as a corporate officer, courts consider "the control that a person actually exercises over given activities." *FTC v. Windward Mktg., Inc.*, No. Civ.A 1:96-CV-615F, 1997 WL 33642380 at *5 (N.D. Ga. Sept. 30, 1997) (holding that defendant did not need to be an officer or even an employee to control corporate activities). Bank signatory authority or acquiring services on behalf of a corporation also evidences authority to control. *See FTC v. USA Fin., LLC*, 415 Fed. Appx. 970, 974-75 (11th Cir. Feb. 25, 2011) (per curium) (manager's authority to sign checks and an application for telephone service on behalf of corporation evidenced authority to control corporate acts); *see also FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270, 278 (D. Conn. 2013) (finding that non-owner individual defendants can have authority to control).

The requisite knowledge for an individual to be held liable for corporate practices need not rise to the level of subjective intent to defraud consumers. *Med. Billers Network*, 543 F. Supp. 2d at 283 ("[T]he FTC is not required to show that the defendant *intended* to defraud consumers in order to hold that individual personally liable.") (quoting *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)). Instead, the FTC need only demonstrate that the individual "had actual knowledge of material representations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* (quoting *Amy Travel*, 875 F.2d at 574); *Consumer Health Benefits*, 2012 WL 1890242, at *5. The extent to which an individual participated in business affairs is probative of knowledge. *Med. Billers Network*, 543 F. Supp. 2d at 283; *Consumer Health Benefits*, 2012 WL 1890242, at *5 ("The degree of participation in a corporate defendant's affairs can be probative of knowledge.").

As discussed above, the individual defendants are the principals and sole officers of the corporate defendants. They have signatory authority over the Corporate Defendants' bank accounts and their telephone and utility service. They have each withdrawn over $1.1 million from the corporate bank accounts. Consumer complaints report that the Individual Defendants have personally called consumers and employed unlawful tactics in attempting to collect on debts. And both Individual Defendants signed the Assurance of Discontinuance with the Attorney General of New York. Hence, there can be little doubt that the Individual Defendants had authority to control, and direct knowledge of, Defendants' wrongful acts. Accordingly, they should be enjoined from violating the FTC Act and the FDCPA and held liable for consumer redress or other monetary relief in connection with Defendants' activities. Thus, preliminary relief is appropriate against them.

V. THE SCOPE OF THE PROPOSED *EX PARTE* TRO IS APPROPRIATE IN LIGHT OF DEFENDANTS' CONDUCT

As the evidence has shown, the FTC is likely to succeed in proving that Defendants are engaging in deceptive and unfair practices in violation of the FTC Act and the FDCPA, and that the balance of equities strongly favors the public. Preliminary injunctive relief is thus justified.

A. Conduct Relief

To prevent ongoing consumer injury, the proposed TRO prohibits Defendants from making future misrepresentations concerning the collection of debts. The proposed order also prohibits Defendants from engaging in any conduct that violates the FTC Act or the FDCPA, including but not limited to: communicating with third parties regarding consumers' debts, failing to disclose that the caller is a debt collector attempting to collect a debt, and failing to provide validation notices regarding consumers' debts.

As discussed above, this Court has broad equitable authority under Section 13(b) of the

FTC Act to grant ancillary relief necessary to accomplish complete justice. *Five-Star Auto Club, Inc.*, 97 F. Supp. 2d at 533. These requested prohibitions do no more than order the Defendants to comply with the FTC Act and the FDCPA.

B. An Asset Preservation Order Is Necessary To Preserve the Possibility of Final Effective Relief

When a district court determines that the FTC is likely to prevail in a final determination on the merits, it has a "duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers." *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988). The Second Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress. *See FTC v. Strano*, 528 Fed. Appx. 47, 49 & 50-51 (2d Cir. June 20, 2013) (summary order); *Smith v. SEC*, 653 F.3d 121, 127 (2d Cir. 2011) (noting the propriety of an asset freeze "to ensure 'that any funds that may become due can be collected.'") (quoting *Unifund SAL*, 910 F.2d at1041.[6]

A freeze of the Defendants' assets is appropriate here to preserve the status quo, ensure that funds do not disappear during the course of this action, and preserve Defendants' assets for final relief. Defendants have taken in gross deposits at least $9 million in revenue since 2009. (PX11 at 84 ¶74.) Defendants diverted at least $2.3 million of corporate assets—labeled "equity draws" in the bank records—to the Individual Defendants. (PX11 at 86 ¶¶83-84.) A temporary asset freeze is required to preserve the Court's ability to order consumer redress or disgorgement of profits.

Without an asset freeze, the dissipation and misuse of assets is likely. Defendants who

[6] Courts in this District and throughout the Second Circuit have frozen defendants' assets in FTC enforcement actions. *See, e.g.*, *FTC v. Navestad*, 09-CV-6329T (W.D.N.Y. July 1, 2009) (granting *ex parte* TRO, asset freeze, and temporary receiver); *FTC v. Guzzetta d/b/a Smart Data Sys.*, No. 01-2335 (E.D.N.Y. April 17, 2001) (granting *ex parte* TRO, asset freeze); *FTC v. Five-Star Auto Club, Inc.*, No. 99-1693 (S.D.N.Y. Mar. 8, 1999) (granting *ex parte* TRO, asset freeze, and temporary receiver).

have engaged in fraudulent practices are likely to waste assets before resolution of the action. *See SEC v. Spongetech Delivery Sys., Inc.*, No. 10-CV-2031 (DLI)(JMA), 2011 WL 887940, at *5 (S.D.N.Y. 2011) ("A freeze is particularly warranted where the defendant's alleged conduct involves fraud."); *SEC v. Manor Nursing Ctrs. Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) ("Because of the fraudulent nature of appellants' violations, the court could not be assured that appellants would not waste their assets prior to refunding public investors' money."). In the FTC's experience, defendants engaged in similarly unlawful practices secreted assets and destroyed documents upon learning of an impending law enforcement action. (Decl. Pl.'s Counsel Supp. Pl. Mot. TRO ¶14.)

As discussed above, the evidence here demonstrates that Defendants' enterprise is permeated by deception and unlawful activity. Moreover, Defendants have made continuing efforts to evade liability for their illegal conduct. As noted, the FTC's consumer complaints against Defendants indicate that Defendants have actively sought to conceal their identities as the people and businesses orchestrating the unlawful activities by constantly changing the business names they use when contacting consumers. (PX11 at 80-82 ¶68.) With the most recent consumer-facing entity, Defendants incorporated in Colorado in an attempt to evade attention from the Attorney General of New York for continuing violations of the AOD. (*Id.* at 78 ¶¶57-58, Att. MM, 79 ¶59, Att. NN.) Under this new guise, Defendants have continued their unlawful practices, despite state authorities having alerted them to the illegality of their conduct.

Defendants have shown a propensity for disregarding the law as well as binding agreements with law enforcement agencies. Therefore, an asset freeze is required to preserve the funds derived from Defendants' unlawful activities so that the Court can retain its ability to fashion meaningful relief later.

C. A Receiver Is Necessary To Protect the Public and Injured Consumers

The appointment of a receiver is necessary to prevent irreparably injury. In determining the appropriateness of appointing a receiver, courts consider factors including: the defendant's fraudulent conduct; the inadequacy of legal remedies; the danger that property will be lost or squandered; a comparison of the harm to the plaintiff and the harm to the parties opposing the receivership; the plaintiff's probable success on the merits; the possibility or irreparable injury; and whether the interests of plaintiff and others would be well served by a receiver. *See State of N.Y. by Vacco v. Fin. Servs. Network, USA*, 930 F. Supp. 865, 871 (W.D.N.Y. 1996); *see also In the Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994) (observing in context of IRS action that receivership "is an especially appropriate remedy in cases involving fraud and the possible dissipation of assets").

A receiver is necessary here because, as shown above, Defendants' business is permeated by fraud. Moreover, Defendants have been recalcitrant in the face of the AOD—a binding agreement to comply with the law that they entered into with the State of New York. A receiver would be able to secure multiple locations, perform standard functions such as ensuring corporate compliance with any order, tracing and securing assets, and taking possession of computers, documents, and other evidence of Defendants' illegal practices. The FTC has identified three candidates in the pleading entitled "Plaintiff's Recommendation for Temporary Receiver," filed simultaneously with this memorandum.

D. Preservation of Records

The proposed order contains a provision directing Defendants to preserve records, including electronic records, and evidence. It is appropriate to enjoin Defendants charged with deception from destroying evidence and doing so would place no significant burden on them.

See Unifund SAL, 910 F.2d at 1040 n.11 (characterizing such orders as "innocuous").

E. Expedited Discovery

The FTC seeks leave of Court for limited discovery to locate and identify documents and assets. District courts are authorized to depart from normal procedures and fashion discovery to meet needs in particular cases. Federal Rules of Civil Procedure 26(d), 33(a), and 34(b) authorize the Court to alter the standard provisions, including applicable time frames, that govern depositions and production of documents. This type of discovery order reflects the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Fed. Express Corp. v. Fed. Expresso, Inc.*, No. Civ.A. 97CV1219RSPGJD, 1997 WL 736530, at *2 (N.D.N.Y. Nov. 24, 1997) (noting that expedited discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction") (quoting commentary to Fed. R. Civ. P. 26(d)).

Here, this type of expedited discovery is necessary for the purpose of locating assets, locating documents, and ensure compliance with an order of this Court. The request for expedited discovery is limited to this purpose, and is necessary to prevent irreparable harm in the form of the dissipation or concealment of assets or documents.

F. The Temporary Restraining Order Should Be Issued *Ex Parte* To Preserve the Court's Ability To Fashion Meaningful Relief

The substantial risk of asset dissipation and document destruction in this case, coupled with Defendants' ongoing and deliberate statutory violations, justifies *ex parte* relief without notice. Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. *Ex parte* orders are proper in cases where "notice to the defendant would render fruitless further prosecution of the action." *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir.

1984); *In re Vuitton et Fils, S.A.*, 606 F.2d 1, 4-5 (2d Cir. 1979). Mindful of this problem, courts have regularly granted the FTC's request for *ex parte* temporary restraining orders in Section 13(b) cases.[7]

As discussed above, Defendants' business operations are permeated by, and reliant upon, unlawful practices. The FTC's past experiences have shown that, upon discovery of impending legal action, defendants engaged in fraudulent schemes, withdrew funds from bank accounts, and destroyed records. (Decl. Pl.'s Counsel Supp. Pl. Mot. TRO ¶14.) Defendants' conduct—including moving large sums from the Corporate Defendants' coffers to the Individual Defendants' accounts—and the continuing noncompliance of Defendants' illegal scheme even after entering into the AOD provide ample evidence that it is highly likely that Defendants would conceal or dissipate assets absent *ex parte* relief. Thus, this case fits squarely into the narrow category of situations where *ex parte* relief is appropriate to make possible full and effective final relief, and it is in the interest of justice to waive the notice requirement of Local Rule 65(b).

VI. CONCLUSION

For the foregoing reasons, the FTC's Motion for an *Ex Parte* TRO, with other relief, should be granted.

[7] Indeed, Congress has looked favorably on the availability 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.

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Respectfully submitted,

KATHERINE M. WORTHMAN
COLIN HECTOR
Attorneys for Plaintiff
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, DC 20589
Telephone: (202) 326-2929;
Facsimile: (202) 326-3629