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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORIGINAL

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NEOVI, INC., d/b/a NEOVI DATA
CORPORATION and QCHEX.COM, et al.,

Defendants.

CIVIL NO. ~~06CV 1952~~ R JMA

MEMORANDUM OF
POINTS AND
AUTHORITIES IN
SUPPORT OF PLAINTIFF'S
MOTION FOR
TEMPORARY
RESTRAINING ORDER
WITH OTHER EQUITABLE
RELIEF AND ORDER TO
SHOW CAUSE

RM

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6 *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999) 26

7 *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) 25, 32-33

8 *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985) 25

9 *FTC v. The Crescent Publ'g Group, Inc.*, 129 F.Supp. 2d 311 (S.D.N.Y. 2001) 28, 30

10 *FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996) 26

11 *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982) 3, 25-26

12 *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) 28, 30-32

13 *FTC v. Marvin Wolf*, 1996 U.S. Dist. LEXIS 1760,

14 1997-1 Trade Cas. (CCH) ¶ 71,713 (S.D. Fla. 1996) 32

15 *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) 25, 28, 33

16 *FTC v. Publishing Clearing House*, 104 F.3d 1168 (9th Cir. 1997) 32-33

17 *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991) 25

18 *FTC v. Thomsen-King & Co.*, 109 F.2d 516 (7th Cir. 1940) 34

19 *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114,

20 (N.D. Ga. Sept. 30, 1997) 28, 30

21 *FTC v. Warner Communc'ns, Inc.*, 742 F.2d 1156 (9th Cir. 1984) 26

22 *FTC v. World Travel Vacation Brokers, Inc.* 861 F.2d 1020 (7th Cir. 1988) 26

23 *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344 (9th Cir. 1989) 25-26, 34

24 *Orkin Exterminating v. FTC*, 849 F.2d 1354 (11th Cir. 1988) 30

25 *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) 25

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1 *SEC v. R.J. Allen & Assoc., Inc.*, 386 F. Supp. 866 (S.D. Fla. 1974) 34
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6 *FTC v. Enternet Media, Inc.*, CV-05-7777 CAS (AJWx) (C.D. Cal. 2005) 26
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 8 *FTC v. Maxtheater, Inc.*, 05-CV-0069-LRS (E.D. Was. 2005) 26
 9 *FTC v. Membership Servs., Inc.*, 01-CV-1868 JM(POR) (S.D. Cal. 2001) 26
 10 *FTC v. Optin Global, Inc.*, CV-05-1502 CS (N.D. Cal. 2005) 26
 11 *FTC v. 9125-8954 Quebec Inc.*; C05-0265 TSZ (W.D. Wash. 2005) 26
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13 **STATUTES**

14 Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*
 15 15 U.S.C. § 45(a) 1, 3-4, 27, 35
 16 15 U.S.C. § 45(n) 1, 27
 17 15 U.S.C. § 53(b) 3-4, 6, 26
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 19 28 U.S.C. § 1331 4
 20 28 U.S.C. § 1337(a) 4
 21 28 U.S.C. § 1345 4
 22 28 U.S.C. § 1391 4
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1 **I. INTRODUCTION**

2 Defendants offer online check printing services to the public via their website
3 www.qchex.com. Defendants did not and still do not require a customer requesting those
4 services to demonstrate that he or she has authority to write checks on an identified bank account.
5 As a result of Defendants' failure to verify their customers' authority to write checks drawn on
6 identified accounts, Defendants have created and delivered numerous bogus checks for fraud
7 operators. As described in greater detail below, this pattern of conduct harms both the persons
8 whose bank accounts have been used without their authorization, and those persons who have
9 received the fraudulent checks as payment.

10 Prior to September 2005, Qchex offered their services without even the pretense of
11 verifying their customers' authority to write checks on identified bank accounts before
12 Defendants created and delivered checks for them. Anyone could open a Qchex account with
13 any bank account number and Qchex would create and deliver checks for them. Indeed, the
14 name and address the Qchex customer entered did not need to match the name and address on the
15 bank account. Since approximately September 5, 2005, Defendants have implemented and
16 subsequently abandoned a series of purported verification procedures, presumably to rectify the
17 inadequacies in their business model. However, as discussed below, their efforts have been
18 ineffective and poorly implemented, and individuals and businesses continue to be harmed by
19 Defendants' business practices.

20 By creating and delivering checks without taking steps to verify that the customers have
21 authority to write checks on the bank accounts provided to Qchex, Defendants have engaged and
22 continue to engage in "unfair" acts or practices that violate Section 5 of the Federal Trade
23 Commission Act ("FTC Act"), 15 U.S.C. § 45(a) and (n). As discussed below, these unfair
24 practices cause or are likely to cause substantial consumer injury, that injury is not outweighed by
25 countervailing benefits, and it is not reasonably avoidable by consumers. In order to halt
26

1 immediately these unfair practices and to remedy effectively the substantial harm these unfair
2 practices cause, the Federal Trade Commission (“Commission” or “FTC”) seeks temporary,
3 preliminary, and permanent injunctive relief, as well as other equitable remedies, including
4 restitution and disgorgement, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). In its
5 proposed Temporary Restraining Order (“TRO”) filed herewith, the Commission asks this Court
6 to order Defendants, among other things, to stop engaging in their unfair practices.

7 Defendants have received notice of the harm caused by the Qchex website from banks,
8 individuals, businesses, the Federal Deposit Insurance Corporation (“FDIC”), and the FTC.
9 Nevertheless, Defendants have persisted in their course of conduct, even after being notified
10 repeatedly and from numerous quarters of the substantial injury it causes. Because Defendants
11 have demonstrated that they are unwilling to modify their business practices to incorporate
12 safeguards to stop the harm, Plaintiff respectfully requests that the Court issue a TRO that,
13 among other things, would immediately halt Defendants’ unfair practices. In support of this
14 motion, Plaintiff has filed nineteen exhibits demonstrating Defendants’ law violations and their
15 failure to remedy them despite repeated notice.¹

16 **II. PARTIES, JURISDICTION, AND VENUE**

17 **A. Parties**

18 **1. Plaintiff**

19 Plaintiff, the Federal Trade Commission, is an independent agency of the United States
20 Government created by statute. 15 U.S.C. § 41 *et seq.* The Commission is charged, *inter alia*,

21
22 ¹ The evidence cited in this memorandum references the nineteen exhibits filed herewith
23 titled *Exhibits in Support of Plaintiff’s Motion for Temporary Restraining Order and Other*
24 *Equitable Relief* (PX1-PX19). Cites to the information in these exhibits include, in the following
25 order: (a) exhibit number; (b) paragraph number within the exhibit; (c) letter of relevant
26 attachment, if any; and (d) page number. (For example: PX1 ¶5, Att. A, pp. 3-4). For privacy
reasons, sensitive personal and financial information or other confidential information contained
in the declarations (or attachments thereto) has been redacted. Some additional sensitive
information was redacted after the declarants signed their declarations.

1 with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or
2 deceptive acts or practices in or affecting commerce. The Commission is authorized to initiate
3 federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to
4 secure such other equitable relief as may be appropriate. 15 U.S.C. § 53(b); *FTC v. H.N. Singer,*
5 *Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982).

6 2. Defendants

7 Defendants Neovi, Inc., d/b/a Neovi Data Corporation and Qchex.com, G7 Productivity
8 Systems, Inc. d/b/a Qchex.com, James M. Danforth, and Thomas Villwock (also referred to
9 collectively as “Qchex” or “Defendants”) operate their business through two corporate entities,
10 Neovi, Inc. and G7 Productivity Systems. As discussed below, G7 and Neovi are very closely
11 related and operate as a common enterprise.

12 Defendant **Neovi, Inc.** (“Neovi”) is a California corporation with its current principal
13 place of business located at 10946 Willow Court, #100, San Diego, California 92127.² It has
14 used and continues to use the address 10710 Thornmint Road, San Diego, California 92127.³
15 Neovi does business under the name Neovi Data Corp. and Qchex.com.⁴ Since 2000, Neovi has
16 offered check writing services to the public on Qchex.com.⁵

21 ² PX15 ¶39, Att. R, pp.1995-96, 2003-04, Att. S, pp. 2008-11 (corp. filings); PX14 ¶23,
Att. C, p. 863 (address on Qchex.com).

22 ³ PX15 ¶39, Att. R, pp. 2000, 2002, 2006 (corp. filings), ¶42 (domain name
23 registrations); PX9 ¶9, Att. D, p. 331 (company business cards).

24 ⁴ PX15 ¶39, Att. S, pp. 2006-11 (fictitious business name filings).

25 ⁵ PX15 ¶39, Att. R pp. 1996 (art. of incorp.); PX9 ¶10, Att. E, pp. 336, 341 (FDIC
26 presentation).

1 Defendant **G7 Productivity Systems** (“G7”), is a California corporation with its principal
2 place of business located at 10946 Willow Court, #100, San Diego, California 92127.⁶ It also
3 uses and has used the address 10710 Thornmint Road, San Diego, California 92127.⁷ Since
4 2000, G7 has offered, in concert with Neovi, check writing services to the public on Qchex.com.⁸

5 Defendant **James M. Danforth** is an officer of Neovi and an officer and agent of G7.⁹
6 Defendant **Thomas Villwock** is the Chief Executive Officer and a director of Neovi.¹⁰

7 **B. Jurisdiction and Venue**

8 The Court has subject matter jurisdiction over the allegations pursuant to 15 U.S.C.
9 §§ 45(a), 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. Venue in the United States District
10 Court for the Southern District of California is proper under 15 U.S.C. §§ 53(b), and 28 U.S.C.
11 § 1391(b) and (c). Neovi and G7’s principal place of business is located in this district at 10946
12 Willow Court, #100, San Diego, CA 92127.¹¹ They have used the address at 10710 Thornmint
13 Road, San Diego, CA 92127,¹² but as of June of 2006 that property appears to be vacant.¹³

14
15
16 ⁶ PX15 ¶39, Att. R, pp. 1993-94 (corp. filings); PX10 ¶5, Att. B, p. 344 (G7 products at Willow Street address).

17
18 ⁷ PX15 ¶39, Att. R, pp. 1998, 2001, 2004 (corp. filings), ¶42 (domain name registrations).

19
20 ⁸ PX15 ¶60, Att. KK, p. 2169 (Qchex advertised on G7ps.com as an “online service” of G7); ¶63, Att. MM, p. 2188 (same); ¶65, Att. OO, pp. 2199-2200; ¶66, Att. PP, pp. 2201-09; ¶67, Att. QQ, pp. 2210-12.

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22 ⁹ PX15 ¶39, Att. R, pp. 1998, 2001, 2004 (corp. filings).

23
24 ¹⁰ PX15 ¶39, Att. R, pp. 2003, 2005 (corp. filings).

25
26 ¹¹ *See supra* notes 2 & 6.

¹² *See supra* notes 3 & 7.

¹³ PX10 ¶4, Att. A, pp. 359-60.

1 Defendants Danforth and Villwock are principals of Neovi and G7 and they transact or have
2 transacted business in this District.¹⁴

3 **III. STATEMENT OF FACTS**

4 Defendants offer an online check creation and delivery service to members of the public
5 without verifying that the persons who request the creation and delivery of the checks have
6 authority to draw checks on the specified bank accounts. Such conduct has caused harm and
7 continues to harm individuals and businesses through the United States.¹⁵

8 **A. Defendants' Unfair Business Practices**

9 **1. How the Qchex Website Works**

10 Qchex creates checks for its customers through its website at *www.qchex.com* and sends
11 the checks to third parties.¹⁶ To use the Qchex website, a customer establishes a Qchex account
12 by entering his or her purported name and email address, and creating a password for the Qchex
13 account.¹⁷ Initially, to identify a bank account to Qchex, a Qchex customer must enter: the
14 purported name and address of the purported payer; the purported name, address, and telephone
15 number of the bank purportedly holding the account; the bank routing number and bank account
16 number from which checks will be written; and a starting check number.¹⁸ To then create a
17 check on the Qchex website, the customer provides the name and address of the payee and the
18

19 ¹⁴ See *supra* notes 9-10.

20 ¹⁵ See, e.g., PX1-PX8, PX16 (Declarations of individuals and businesses); PX13 ¶¶5-11
21 (summary of FTC complaints).

22 ¹⁶ PX15 ¶45, Att. U, pp. 2021-22, 2030-31, 2035; PX14 ¶4, Att. A, pp. 499-509, 529.

23 ¹⁷ PX15 ¶¶5-6, Att. A, pp. 1866-68; PX14 ¶¶11-12, Att. B, pp. 730-33, ¶72, Att. P, pp.
24 1264-65.

25 ¹⁸ PX15 ¶7, Att. A, pp. 1868-73; PX14 ¶17, Att. B, pp. 786-805, ¶77, Att. P, pp. 1299-
26 1317.

