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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION, **Plaintiff,** **vs.** **MICHAEL BRUCE MONEYMAKER, a/k/a Bruce Moneymaker, Mike Smith, and Michael Bruce Millerd, individually, as an officer and director of the corporate defendants, and also doing business as Fortress Secured,** **DANIEL DE LA CRUZ, individually, as an officer and director of the corporate defendants, and also doing business as Fortress Secured,** **BELFORT CAPITAL VENTURES, INC., a corporation,**	**Case No. _____** [FILED UNDER SEAL]

DYNAMIC ONLINE SOLUTIONS, LLC, a limited liability company,

HSC LABS, INC., a corporation,

RED DUST STUDIOS, INC., a corporation,

SEASIDE VENTURES TRUST, individually and as an officer and director of the corporate defendants, and

JOHN DOE NO. 1, in his capacity as trustee of Seaside Ventures Trust,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER WITH ANCILLARY EQUITABLE RELIEF AND A PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or the "Commission") moves this Court for an *ex parte* temporary restraining order ("TRO") with ancillary equitable relief to stop Defendants from debiting the bank accounts of economically vulnerable consumers for worthless programs that consumers know nothing about, cannot afford, and, ultimately never receive. Specifically, Defendants target consumers who apply online for payday loans, thereby disclosing their bank account information, which Defendants obtain. Then, by disguising a pop-up box to look like it is part of the payday loan process, Defendants trick consumers into providing a so-called "authorization" to be charged for these programs. Significantly, Defendants do not tell unsuspecting consumers the program's name, its so-called benefits (such as a purported credit line to buy electronics), or its cost. Instead, armed with consumers' bank account numbers, they simply start taking consumers' money on a weekly or monthly basis. Thereafter, Defendants make concerted efforts to dissuade consumers from trying to get their money back and to hold their refund rate to an astonishing "45 percent or less." Defendants falsely tell complaining consumers that they authorized the charges as part of their payday loan application and, when all else fails, promise refunds that often never come. Over the last year and half, Defendants have billed consumers for at least five such programs – changing the names but not their use of illicit tactics – and, in the process, causing millions of dollars in consumer harm.

Defendants' deceptive conduct violates Section 5(a) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45(a). First, Defendants violate the Act by debiting consumer bank accounts without knowledge or consent. Second, Defendants violate the Act by disguising their so-called "authorization" as part of consumers' payday loan application and by failing to disclose to consumers that they will be charged for Defendants' programs. Third, Defendants violate the Act by misrepresenting to consumers that they authorized the charges and promising

refunds that never come.

The surreptitious means by which Defendants organize and implement their fraud makes clear that if Defendants receive notice of the FTC's TRO Motion, they will likely destroy evidence or dissipate assets that could be used to redress consumers. Indeed, Individual Defendants Michael Moneymaker ("Moneymaker") and Daniel De La Cruz ("De La Cruz") operate their scheme through a web of corporate entities, including Belfort Capital Ventures, Inc. ("Belfort"); Dynamic Online Solutions ("Dynamic");[1] HSC Labs, Inc. ("HSC") and Red Dust Studios, Inc. ("Red Dust") (collectively, the "Corporate Defendants"). They also make frequent changes to the names of their programs, scatter mail drops for their programs throughout the country,[2] and lie about the physical location of their main business premises – all in an attempt to obfuscate the nature of their long-running fraud. Moreover, Moneymaker has continued to engage in fraud after being the subject of four state enforcement proceedings – one of which involved conduct much like that alleged in the Complaint.[3]

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[1] According to corporate documents, the sole managing member of Dynamic is Seaside Ventures Trust ("Seaside").

[2] Defendants use mailing addresses for Freedom Subscription of Las Vegas, Nevada; for Illustrious Perks of Beaverton, Oregon; for Select Platinum Credit of Rocky Mount, North Carolina; and for Kryptonite Credit of Petaluma, California. The addresses for Freedom Subscription, Illustrious Perks, Select Platinum Credit, and Kryptonite Credit are all mail drops. (FTC 1, Goldstein Decl. ¶¶ 29, 52, 63, 77, 79.)

[3] *See North Dakota v. Moneymaker*, Cease and Desist Order (Feb. 5, 2009). In 2009 and 2010, three State Attorneys General obtained default judgments against Moneymaker and companies he controlled for making robocalls to telephone numbers listed on the states' and FTC's Do Not Call lists *See Arkansas v. SVM, Inc.*, No. 4:09cv00456 (E. D. Ark. filed Oct. 10, 2010) (obtaining a judgment against Moneymaker; SVM, Inc.; and Stored Value Marketing, Inc.); *Kentucky v. SVM, Inc.*, No. 99-CI-2519 (Fayette Cir. Ct., Ky. filed Nov 12, 2009) (obtaining judgment against Moneymaker; SVM, Inc.; and Fortress Secured, Inc.); *Indiana v. SVM, Inc.*, Cause No. 49D14-09-05-MI-021108 (Marion Co. Ct., Ind. filed July 21, 2009) (obtaining judgment against Moneymaker; SVM, Inc.; and Fortress Secured, Inc.)

Accordingly, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the FTC seeks an *ex parte* TRO to preserve the *status quo.* The requested *ex parte* relief includes an asset freeze; expedited discovery, including immediate access to Defendants' business premises; the appointment of a temporary receiver; and an order to show cause why a preliminary injunction should not issue against Defendants. The requested TRO is necessary to protect the public, prevent the dissipation of assets and destruction of records in order to preserve the possibility of effective relief. Courts in Nevada have granted motions for *ex parte* TROs with similar ancillary relief in numerous FTC cases.[4]

II. STATEMENT OF FACTS

A. Defendants' Unauthorized Billing Practices

Consumers encounter Defendants while searching online for a payday loan. To apply for these loans, consumers enter sensitive information, such as their name and bank account number, into a payday loan matching website. (FTC 3, Lewis Decl. ¶ 4; FTC 7, Buchanan Decl. ¶ 3; FTC 8, Climenson Decl. ¶ 3.) These websites are not lenders. Rather, they purport to transmit information provided by consumers to a variety of lenders to provide consumers with several options for payday loans. (FTC 3, Lewis Decl. ¶ 3, Exh. B.)

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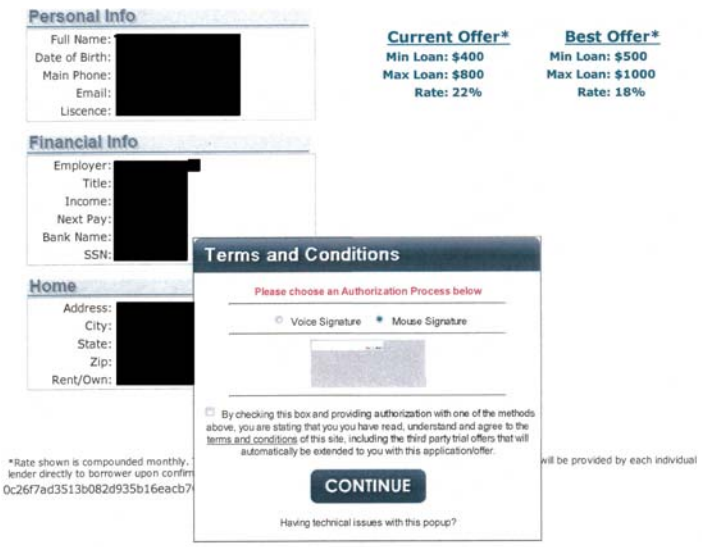
[4] *See, e.g., FTC v. Ivy Capital, Inc.*, No. 11-00283 (D. Nev. Feb. 22, 2011) (*ex parte* TRO with asset freeze, receiver, immediate access to business premises, and expedited discovery); *FTC v. Johnson*, No. 10-2203 (D. Nev. Jan. 13, 2011) (TRO with asset freeze, receiver, and expedited discovery); *FTC v. Grant Connect, LLC*, No. 09-01349 (D. Nev. July 28, 2009) (*ex parte* TRO with asset freeze, receiver, immediate access to business premises, and expedited discovery); *FTC v. Infusion Media, Inc.*, No. 09-01112 (N. Dev. June 24, 2009) (*ex parte* TRO with asset freeze, receiver, immediate access to business premises, and expedited discovery); *FTC v. ERG Ventures, LLC*, No. 06-00578 (D. Nev. Oct. 31, 2006) (*ex parte* TRO with asset freeze and immediate access to business records); *FTC v. Global Net solutions, Inc.*, No. 05-0002 (D. Nev. Jan. 3, 2005) (*ex parte* TRO with asset freeze and immediate access to business premises); *FTC v. 3rd Union Card Servs., Inc.*, No. 04-0712 (D. Nev. May 25, 2004) (TRO with asset freeze and expedited discovery).

As consumers conclude their payday loan application, they encounter a pop-up box designed to look like it is part of the payday loan process. (*See* FTC 3, Lewis Decl. ¶ 6, Exh. D; FTC 8, Climenson Decl. ¶ 4.) Unbeknownst to consumers, however, they have left the payday loan website, and the pop-up box is from Defendants. As shown below, this box does not include any reference to Defendants, a description of Defendants' programs, or the cost of any program.[5] Rather – appearing on the heels of the payday loan application and with loan information in the background – it is simply titled "Terms and Conditions." (FTC 6, Lewis Decl. ¶ 6, Exh. D.)



[5] *See* FTC 8, Climenson Decl. ¶ 4 (explaining that pop-up box appeared directing consumer to provide an authorization but made no mention of Defendants' programs); FTC 7, Buchanan Decl. ¶¶ 4-6 (explaining that pop-up box appeared over the terms of loan offers during consumer's payday loan application process and that consumer had not heard of Defendants' program until his account was debited for it).

The pop-up box contains a statement that consumers "agree to the terms and conditions of th[e] site, including the third party trial offers that will automatically be extended" to them with the "application/offer." (FTC 3, Lewis Decl. ¶ 6, Exh. D.)[6] This statement makes no mention of Defendants or their programs – or the fact that consumers' accounts will be debited immediately. Moreover, as with the "Terms and Conditions" language, Defendants' use of the word "application" reinforces the false impression that the pop-up box is related to consumers' payday loan application.

The box prominently instructs consumers to "choose an Authorization Process" by submitting either a digital signature with their mouse or a voice signature. Consumers who provide these so-called authorizations do not receive any additional disclosure about Defendants' programs. (*See* FTC 8, Climenson Decl. ¶ 4-5 (consumer provided digital signature and does not recall reference to Defendants' programs); (FTC 3, Lewis Decl. ¶¶ 7-8) (voice authorization provided in undercover investigation and no recollection of reference to Defendants' programs).)

Not surprisingly, in light of Defendants efforts to conceal their identity and disguise their pop-up box, other consumers whose accounts are debited by Defendants simply do not recall seeing Defendants' pop-up box – or, indeed, any mention of Defendants – during their payday loan application process. (FTC 4, Deorio Decl. ¶ 5 ("During the payday loan application process I did not see any advertisements for third party offers"); FTC 11, Geohegan Decl. ¶ 3 ("I do not recall seeing any advertisement or offer related to Select Platinum Credit").)[7] Consumers

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[6] A hyperlink is embedded in the "terms and conditions" language of this statement. However, having been exposed to the terms and conditions of the matching website at an earlier point in the transaction, consumers have no incentive to click on this hyperlink.

[7] In responses to some Better Business Bureau complaints, Defendants have claimed that they have voice or digital signature authorization. (FTC 1, Goldstein Decl., Exh. GGG.) In other responses, however, Defendants make no such claim, suggesting that even those consumers who

uniformly attest, however, that they do not knowingly authorize Defendants to debit their accounts.[8] Indeed – given the financial straits that drove them to seek a payday loan – these consumers also aver that they would never willingly have signed up for Defendants' programs, which cost between $8.42 to $49.99 for enrollment and between $8.42 and $19.98 on a recurring basis. (*See id.*; FTC 2, Graham Decl., Exh. C; FTC 9, Dobson Decl., Exh. A; FTC 12, Mulryan Decl., Exh. A.) Moreover, Defendants' debits overdrew hundreds of consumers' bank accounts – a fact that further underscores that their debiting practices caught consumers by surprise. (FTC 1, Goldstein Decl. ¶ 95.)

That consumers are completely unaware they are being enrolled in Defendants' programs is highlighted by the testimony of a former employee, who attests that virtually every consumer she spoke with was unaware how they were enrolled in the program for which they were charged and that not a single consumer wanted to stay enrolled in the program. (FTC 2, Graham Decl. ¶¶ 19, 24.) Indeed, this former employee recalls hearing of only one instance – over an eleven month period – in which a consumer was interested in keeping the program – an event that was

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were not tricked into providing an authorization were billed. (*See* FTC 1, Goldstein Decl., Exh. FFF.) A former employee's testimony corroborates that she had the ability to check consumers' files for their so-called authorization and, in many instances, such "authorizations" were not present. (FTC 2, Graham Decl. ¶ 23.)

[8] *See e.g.*, FTC 5, Taylor Decl. ¶ 8 (consumer did not agree to Freedom Subscription program); FTC 4, Deorio Decl. ¶¶ 3, 7 (noting that consumer was "short on cash" and describing charges for Uniguard and Freedom Subscription as "unauthorized"); FTC 6, Radinsky Decl. ¶ 3 (stating "I do not recall consenting to be charged for whatever services Freedom Subscription may provide"); FTC 11, Geohegan Decl. ¶ 3 (stating "I did not agree to any third-party offers while I was applying for a payday loan"); FTC 9, Dobson Decl. ¶ 3 (stating that consumer "did not authorize" Select Platinum Credit charges); FTC 10, Conner Decl. ¶ 5 (consumer did not authorize Select Platinum Credit charges); FTC 7, Buchanan Decl. ¶ 9 (consumer informed bank that Illustrious Perks charges were not authorized); FTC 8, Climenson Decl. ¶ 6 (stating that consumer "did not want to sign up for any third-party services"); FTC 12, Mulryan Decl. ¶ 7 (consumer did not sign up for Kryptonite Credit).

so unusual it "shocked" her colleagues at the call center. (FTC 2, Graham Decl. ¶ 24.)

Over the last year and a half, Defendants have charged consumers for at least five separate programs – Uniguard, Freedom Subscription, Illustrious Perks, Select Platinum Credit and Kryptonite Credit.[9] These programs purport to offer such benefits as a "Free Store Value Visa Card, Free Voice mail, Free Airline Tickets and a $10,000 secured credit line."[10] Significantly, other than through their highly-deceptive billing scheme, Defendants do not provide a means to purchase their so-called programs. Even the websites for the programs do not contain a click through mechanism or phone number for consumers to use to enroll. (*See* FTC 1, Goldstein Decl. ¶¶ 52-53, 57-58, 61, 77 (describing websites as containing primarily contact information for the programs).)[11]

Finally, consumers charged by Defendants do not receive any benefits from these so-called programs. To even access Defendants' websites, consumers need login credentials – something they never receive. (FTC 11, Geohegan Decl. ¶ 5 ("I never received any information explaining what this product was or could have been."); FTC 7, Buchanan Decl. ¶ 13 (consumer did not receive "Login Credentials"); FTC 15, Gushwa Decl. ¶ 11 (same).) For example, one

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[9] Although Defendants changed the names of their programs at least five times in the last year and a half and also changed the name of the corporate account holder for these programs at least twice, the bank account into which consumers' funds were deposited for at least four of Defendants' programs is the same. (FTC 5, Taylor Decl., Exh. A; FTC 11, Geohegan Decl., Exh. A; FTC 8, Climenson Decl., Exh. A; FTC 13, Little Decl., Exh. A.)

[10] *See* FTC 1, Goldstein Decl., Exhs. EEE, FFF, GGG, JJJ (attaching Defendants' responses to BBB complaints for Select Platinum Credit, Illustrious Perks, Kryptonite Credit, and Freedom Membership). A call center employee described Freedom Subscription as a "membership" that, among other things, provides access to a website that allows consumers to purchase electronics. (*See id.*, Exh. W, at 4.)

[11] The Uniguard website, the oldest of Defendants' programs, is no longer operable, and the FTC does not have evidence of how this website looked.

consumer was charged for seven months for Freedom Subscription and, at no point during that time, was he provided with any documentation related to this program or the login credentials necessary to access the program's website. (FTC 5, Taylor Decl. ¶¶ 4-6, Exh. A.) Indeed, Defendants' training materials and telemarketing scripts focus almost exclusively on how to process or avoid processing refunds while providing no instruction on product support – a fact that underscores the worthless nature of Defendants' programs. (FTC 2, Graham Decl., Exhs. B-D.)

B. Defendants' Deceptive Refund Practices

After discovering the unauthorized charges to their accounts, many consumers set out to obtain a refund – an arduous process designed by Defendants to keep the refund rate to a staggering "45% or less." (FTC 2, Graham Decl. ¶ 12, Exh. B, at 2.) Consumers, who have never been told of Defendants' programs, must first track down Defendants through contact information on the remotely-created check used to debit their account. These numbers – which differ depending on the program at issue – all connect to Defendants' Las Vegas call center.[12]

However, reaching a live representative is not easy. Some consumers who call these numbers receive an automated message stating that their call cannot be answered and instructing them to leave their contact information. (FTC 15, Gushwa Decl. ¶ 6.) Those consumers who comply never receive a return call. *Id*. Other consumers have their calls answered but are placed on indefinite hold. (FTC 8, Climenson Decl. ¶ 8.) At times, call center employees have fielded hundreds of these consumer calls a day. (FTC 2, Graham Decl. ¶ 29) (explaining that

[12] For example, the telephone number provided for Uniguard is 877-890-1250 (FTC 4, Deorio Decl. ¶ 7, Exh. A); for Freedom Subscription is 877-807-4709 (FTC 4, DeOrio Decl. ¶ 7, Exh. A); for Illustrious Perks is 877-754-3389 (FTC 15, Gushwa Decl. ¶ 5, Exh. A); for Select Platinum Credit is 877-709-2811 (FTC 9, Dobson Decl. ¶ 4, Exh. A); and for Dynamic Online Solutions is 877-325-4873 (FTC 14, LeBlanc Decl. ¶ 8, Exh. A); *see also* FTC 1, Goldstein Decl. ¶ 84-88.

from February 2010 to July 2010 employees answered, on average, 60-90 telephone calls per person per day.)[13]

Those consumers lucky enough to actually speak to a representative encounter a string of misrepresentations designed to avoid giving refunds. First, Defendants' "Standard Spiel" falsely informs consumers that they authorized the charges complained of as part of a payday loan application. (FTC 2, Graham Decl. ¶ 21, Exh. C; *see also* FTC 8, Climenson Decl. ¶ 9; FTC 1, Goldstein Decl. ¶ 51; FTC 9, Dobson Decl. ¶ 5 (consumer told that she agreed to the offer through an "affiliated website").)[14] Employees are also instructed not to offer refunds "if a customer does not ask," FTC 2, Graham Decl. ¶ 12, Exh. B, at 2, and are forbidden from informing customers when they are being charged for multiple programs. (FTC 2, Graham Decl. ¶14.)

Because consumers must first learn of the charges and track down Defendants, these instructions further reduce Defendants' refunds. Indeed, employees understand that the call center management would view a high refund rate unfavorably and that good performance hinges on keeping refund rates low. (FTC 2, Graham Decl. ¶ 25.) This institutionalized resistence to providing refunds ensures that only the most persistent consumers have their

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[13] In total, the FTC reviewed 793 unique complaints from consumers regarding Defendants' unauthorized billing scheme. (*See* FTC 1, Goldstein Decl. ¶ 91.)

[14] To persuade complaining consumers that they authorized enrollment, call center employees also directed them to a website, www.loanterms.cl, which they claimed disclosed to consumers that they would be enrolled in Defendants' programs. (FTC 2, Graham Decl. ¶ 22.) That website contains a ten-page document full of legalese titled "Terms and Conditions." Defendants bury in the middle of the document a single paragraph stating that consumers are approved for a "Risk Free Trial Offer" for Freedom Subscription and authorize Defendants to debit their bank accounts. (*Id.* at Exh. E.) Of course, even if this website were linked to Defendants' pop-up box, consumers would have to click on a hyperlink and read pages of fine print before being informed that their bank account would be charged, rendering any such disclosure ineffective.

charges refunded. (*Id.* at ¶ 20, Exh. D (explaining that consumers' accounts could be "escalated" if the consumer "became belligerent or threatened to file a complaint with the BBB or a government agency").)

Indeed, Defendants' training materials go so far as to stress that employees should provide false addresses for Defendants' programs to ensure that consumers cannot connect Defendants' newer programs to their older schemes. (FTC 2, Graham Decl. ¶ 12, Exh. B.) For example, one training document instructs employees to provide a Beaverton, Oregon address for Illustrious Perks and a Las Vegas address for Freedom Subscription and Uniguard. (FTC 2, Graham Decl. ¶ 15, Exh. C.) This same document admonishes, "IMPT! NEVER GIVE THE NV ADDRESS" to consumers calling about Illustrious Perks. *Id*. Another document instructs employees to tell consumers that they have reached a "3rd party call center" and stresses that employees should never divulge the physical location of the call center "due to threats a few customers have made." (FTC 2, Graham Decl. ¶12, Exh. B, at 4) (stating "We purposely do not EVER provide our address here" and instructing employees to give inquiring consumers the address of a nearby maildrop.)

Finally, Defendants promise refunds that never come. Some consumers accept that their money is gone and, once their promised refund does not arrive, simply abandon their claim.[15] Others begin anew the difficult process of contacting Defendants in an attempt to recover their funds. However, despite multiple attempts – and, in some instances, additional promises that their money will be returned – these consumers still do not obtain refunds and,

[15] *See* FTC 11, Geohegan Decl. ¶7 (consumer filed complaint with BBB and received correspondence from Defendants promising refund, which never came); FTC 6, Radinsky Decl. ¶¶ 5-6 (consumer promised refund but did not receive one); FTC 4, Deorio Decl. ¶¶ 9-10 (same).

eventually, stop pursuing them.[16] In fact, those consumers who press are frequently subjected to additional misrepresentations. One consumer was told – after three attempts to ascertain why his refund had not been sent – that "there had been a request to cancel" his refund. (FTC 7, Buchanan Decl. ¶¶ 18-19.) Another consumer was told that the refund had been sent to her bank and that her bank had simply not processed it. (FTC 10, Conner Decl. ¶ 6.)[17] These consumers' experiences are not atypical. Indeed, a former employee confirms that she spoke to "a large number" of consumers who claimed that they had not received their refund – an outcome anticipated by Defendants' training documents. (FTC 2, Graham Decl. ¶ 27; *id.* at ¶ 25, Exh. B, at 2) (explaining that call center employees can "expedite" a refund where the debit has cleared, the consumer has requested the refund, and the consumer "is calling in stating they did not receive their check.").)

C. Parties to the *Ex Parte* TRO

1. Michael Bruce Moneymaker

Michael Bruce Moneymaker a/k/a Bruce Michael Moneymaker, Bruce M. Moneymaker, Michael Bruce Millerd, Mike Moneymaker, and Mike Smith is the hub connecting the Corporate Defendants and programs. He is the current President, Secretary, Treasurer, and Director of Belfort, the corporate entity responsible for enrolling consumers in Uniguard, Freedom

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[16] FTC 7, Buchanan Decl. ¶¶ 14-15, 20-21, Exh. C (consumer contacted company on three occasions, received an e-mail that his account had been "escalated," and received a voice-mail message a month later promising a refund by March 8); FTC 1, Goldstein Decl. ¶ 107 (as of March 21, 2011, consumer has not received refund); FTC 9, Dobson Decl. ¶¶ 6-8 (consumer promised refund and, despite multiple requests, did not receive one); FTC 10, Conner Decl. ¶ 6 (same).

[17] Moreover, in responding to Better Business Bureau complaints, the company represents that it will issue a refund which, in some cases, leads the BBB to close the complaint as resolved. (FTC 1, Goldstein Decl. Exh. ZZ.).

Subscription, Illustrious Perks, and Select Platinum Credit. (FTC 1, Goldstein Decl. ¶ 24.) He was also previously a Director of HSC Labs and maintains an office at Red Dust, both of which are located next to Belfort and paid the salaries of Belfort employees. (FTC 1, Goldstein Decl. ¶¶ 32-33; FTC 2, Graham Decl. ¶¶ 3-5, 7.) In addition, doing business as Fortress Secured,[18] he pays for toll-free numbers used by Belfort and Dynamic, a newly-formed corporate entity associated with Kryptonite Credit program. (FTC 1, Goldstein Decl. ¶¶ 30, 83, 87-88, Exh. VV.)

2. Daniel C. De La Cruz

Daniel De La Cruz manages the Belfort call center. From January 2010 to April 2010, he maintained an office in the call center and managed its day-to-day operations – including meeting with call center management several times a week, holding meetings to discuss call center business, answering employees' questions, and listening in on telephone calls with consumers. (FTC 2, Graham Decl. ¶¶ 6-8.) After April 2010, he no longer maintained an office at the call center but continued to visit it and, according to a former employee, maintained a supervisory role. (FTC 2, Graham Decl. ¶9.) In addition, De La Cruz is copied on correspondence to the Better Business Bureau regarding consumer complaints for Defendants' programs. (FTC 1, Goldstein Decl., Exhs. III, JJJ.) De La Cruz is also the current President and Director of HSC, having replaced Moneymaker on the corporate filings in July 2009. (*Id*. at ¶ 33.)

3. Belfort Capital Ventures, Inc.

Belfort is a Nevada corporation formed in 1997 and headquartered at 8668 Spring Mountain Rd., Suite 101, Las Vegas, Nevada. (FTC 1, Goldstein Decl. ¶ 24.) Belfort runs a call

[18] Moneymaker previously controlled a Nevada corporation, Fortress Secured, Inc., which was dissolved in November 2008 and, as discussed in footnote 3, *supra*, was sued by three State Attorneys General offices.

center at the above address that fields consumers' complaints about their enrollment in Defendants' programs, cancels consumers' memberships, and processes refunds. (FTC 2, Graham Decl. ¶¶ 10-14, 24, 26.) Defendants deposit funds collected from Freedom Subscription, Illustrious Perks, and Select Platinum Credit into bank accounts held by or for the benefit of Belfort. (FTC 1, Goldstein Decl., Exh. V; FTC 11, Geohegan Decl., Exh. A; FTC 15 Gushwa Decl., Exh. A.)

4. Dynamic Online Solutions, LLC

Dynamic, a Nevada Limited Liability Company formed in August 2010, debits consumer bank accounts for Defendants' most recent scheme, Kryptonite Credit. (FTC 1, Goldstein Decl. ¶ 83, Exh. VV.) Dynamic shares the same employees as Belfort[19] and uses the same bank account as Belfort to deposit consumer funds.[20] Like Belfort, Defendants deposit funds collected from Kryptonite Credit into accounts held by Dynamic. (FTC 1, Goldstein Decl. ¶ 83, Exh. VV.) Dynamic also shares the same address, a mail drop, as Freedom Subscription and Uniguard, Belfort's programs. (FTC 1, Goldstein Decl. ¶¶ 30, 52; FTC 2, Graham ¶ 15, Exh. C.)

5. Seaside Ventures Trust

Seaside, the sole managing member of Dynamic, is located at 8550 W. Desert Inn Rd., Suite 101, Las Vegas, Nevada 89117. (FTC 1, Goldstein Decl. ¶ 30.)

6. John Doe No. 1

Defendant John Doe No. 1 is the Trustee of Seaside and holds legal title to all of

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[19] Rain Smith, who manages the Belfort call center, signs correspondence regarding charges by Dynamic for Kryptonite Credit. (FTC 13, Little Decl., Exh. B.)

[20] The bank account used by Belfort to deposit consumer funds collected from Defendants' Freedom Subscription, Illustrious Perks, and Select Platinum Credit programs is used by Dynamic to deposit consumer funds collected from the Kryptonite Credit program. *See* footnote 9, *supra*.

Seaside's assets, including ownership of Dynamic.

7. HSC Labs, Inc.

HSC is a Nevada Corporation formed in March 2008. (FTC 1, Goldstein Decl. ¶ 32.) Although HSC's Articles of Incorporation list two separate mailing addresses for the company, it is physically located next to Belfort in a building Moneymaker owns. (FTC 1, Goldstein Decl. ¶¶ 102-104; FTC 2, Graham Decl. ¶¶ 4-5.) HSC paid employees working in the Belfort call center in 2009, when the call center was first created. (FTC 2, Graham Decl. ¶ 4.)

8. Red Dust Studios, Inc.

Red Dust is a corporation with its principal place of business listed at PO Box 27740, Las Vegas, Nevada. (FTC 1, Goldstein Decl. ¶ 35, Exh. M.) Red Dust shares office space with HSC and, like HSC, paid employees working at the Belfort call center in mid-2009. (FTC 2, Graham Decl. ¶¶ 4-5.)

III. ARGUMENT

A. An *Ex Parte* Temporary Restraining Order Is Proper

As the Ninth Circuit has repeatedly held, in evaluating whether to grant preliminary relief in a government action, the Court need only consider the likelihood of success on the merits and the "balance [of] the equities." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989) (upholding injunction and holding that before entering a preliminary injunction "the district court is required: (i) to weigh [the] equities; and (ii) to consider the FTC's likelihood of ultimate success"). Moreover, because "irreparable injury must be presumed in a statutory enforcement action," the Court need only find "some chance of probable success on the merits." *World Wide Factors*, 882 F.2d at 347 (*citing United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987)); *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 936 (N.D. Cal. 2010). Here,

both factors weigh decidedly in favor of granting the requested relief.

The FTC's likelihood of success on the merits is overwhelming. As discussed below, Defendants trick consumers into providing a so-called "authorization" that appears to be related to consumers' payday loan applications and then debit their bank accounts without consumers' knowledge or consent. Thereafter, in an attempt to hold their refund rate to an astounding 45 percent or less, Defendants force consumers to navigate a laborious refund process that is full of misrepresentations designed to make them abandon their refund requests. Such practices violate Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits "unfair or deceptive acts or practices in or affecting commerce." Moreover, as discussed below, the balance of the equities favors the requested preliminary relief.

1. The FTC is Likely to Prevail on the Merits

The FTC is likely to succeed in showing that Defendants violated the FTC Act. First, Defendants violate the Act by engaging in unauthorized billing. Second, they violate the Act by deceptively disguising their so-called "authorization" as part of the payday loan process. Third, Defendants violate the Act by failing to disclose that consumers have no ability to reject so-called "offers" and avoid being charged. Finally, they violate the Act by misrepresenting to consumers seeking refunds that they authorized the charges and by promising refunds that never come.

a. The FTC is Likely to Establish That Defendants Engage in Unfair Billing

Defendants' debiting of consumer accounts without their knowledge or consent is an unfair practice in violation of the FTC Act, because (1) it causes substantial injury (2) that consumers cannot reasonably avoid and (3) that is not outweighed by countervailing benefits to consumers or competition. *See* 15 U.S.C. § 45(n); *see also FTC v. Inc21.com Corp.*, No. C-10-

00022, 2010 WL 3789103, at *22-24 (N.D. Cal. Sept. 21, 2010) (granting summary judgment and holding unauthorized billing both an unfair and deceptive practice); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000); *FTC v. Windward Mktg., Ltd.*, No. Civ.A. 1:96-CV-615F, 1997 WL 33642380 at *10, 13 (N.D. Ga. Sept. 30, 1997).

In this case, substantial injury is clear. It is well settled that "an act or practice can cause 'substantial injury' by doing a 'small harm to a large number of people.'" *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010); *Inc21.com*, 2010 WL 3789103, at *22; *see also, J.K. Publ'ns*, 99 F. Supp. 2d at 1201 ("Injury may be sufficiently substantial it if causes small harm to a large class of people."). Here, thousands of consumers were charged on a recurring basis for a product that they did not want and, indeed, did not receive. This consumer harm easily satisfies the threshold for establishing substantial injury. *See Inc21.com*, 2010 WL 3789103, at *22 (finding substantial injury where 97 percent of consumers charged by defendants "did not agree to purchase defendants' products"); *J.K. Publ'ns*, 99 F. Supp. 2d. at 1201 (holding that the substantial injury satisfied where "consumers were injured by a practice for which they did not bargain").

Second, consumers cannot avoid the harm. By failing to disclose to consumers that they are being enrolled in a program, its name, its so-called benefits, or its cost, Defendants make it impossible for consumers to avoid the charge. Indeed, consumers uniformly report that they did not authorize Defendants to charge them for their so-called programs – a fact underscored by the financial straits that caused them to apply for a payday loan and the bank fees many incurred when Defendants' debits overdrew their accounts. Indeed, a former call center employee attests that she did not speak to a single consumer over an eleven month period who knew why they were being charged. It is further corroborated by company training documents, which encourage employees to hold their refund rate to an astounding 45 percent. In such circumstances, courts

have found that the harm suffered by consumers is not reasonably avoidable. *See J.K. Publ'ns*, 99 F. Supp.2d at 1203 (holding unauthorized billing unfair where, among other things, more than 50% of consumers contacting defendants claimed they had not ordered defendants' products and defendants had significant chargeback rates). Indeed, in *Inc21*, which involved unauthorized charges on telephone bills that consumers unwittingly paid, the court held that the high percentage of customers who did not authorize or notice the charges supported a finding that consumer harm was not reasonably avoidable. *Inc21.com*, 2010 WL 3789103, at *23. In rejecting the defendants' argument that consumers could have simply disputed or refused to pay the charges, the court noted that "the burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with." *Id*. This reasoning has even greater force here, where consumers have no opportunity to reject Defendants' debits – and, indeed, it is the very act of debiting that alerts consumers to Defendants' scheme.

Finally, Defendants' unauthorized billing does not provide a countervailing benefit to consumers. Courts have long recognized that consumers do not benefit from being charged for products or services "they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place." *Inc21.com*, 2010 WL 3789103, at *23. Here, consumers – who are already cash-strapped – are charged for products and services they do not want or agree to and, to add insult to injury, do not receive.

b. The FTC is Likely to Establish That Defendants Use Deceptive Practices to Bill Consumers

Defendants tailor their business practices to disguise the so-called "authorization" for their programs as part of a payday loan application process in violation of the FTC Act. An act or practice is deceptive when "(1) 'there is a representation, omission, or practice' that (2) 'is likely to mislead consumers acting reasonably under the circumstances' and (3) 'the

representation, omission, or practice is material.'" *Inc21.com*, 688 F. Supp. 2d at 936 (*quoting FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009)); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). A statement can be considered "deceptive" even if it contains truthful disclosures, if it is "likely to mislead by virtue of the net impression it creates." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). As discussed below, Defendants' conduct easily satisfies this test.

Defendants falsely represent that the authorization for their programs is part of the payday loan application. Specifically, Defendants position their "authorization" pop-up box on the heels of the loan application, title the box "Terms and Conditions" rather than the name of their programs, omit any reference to themselves or any program, and make specific references to consumers' "application[s]." The Ninth Circuit has recognized that such implied representations are likely to deceive consumers acting reasonably under the circumstances. *See Cyberspace*, 453 F.3d at 1200-1201 (holding that a solicitation disguised to look like an invoice and refund check was likely to mislead consumers where the disclosure that depositing the check would constitute an agreement to pay for monthly internet access appeared only on the back of the check and in small font).

Moreover, consumers are not only "likely" to be deceived by Defendants' misrepresentation, they are actually deceived. Indeed, consumers who contact Defendants do not understand why Defendants have charged them. While proof of actual deception is not required to find a Section 5 violation, it is "highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *Id.* at 1201; *FTC v. Grant Connect, LLC*, No. 2:09-cv-01349, 2009 WL 3074346, at *8-9 (D. Nev. Sept. 22, 2009) (holding that "[t]he high rate of consumer complaints, chargebacks, refunds, and cancellations suggests consumers actually were deceived, and thus constitutes probative evidence that [defendants'

practices] were likely to deceive consumers acting reasonably under the circumstances").

Finally, Defendants' misrepresentation is material. A misrepresentation 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*, 453 F.3d at 1201 (citing *Cliffdale Associates Inc.*, 103 F.T.C. 110, 165) (1984)); *FTC v. EDebitPay, LLC*, No. CV-07-4880, 2011 WL 486260, at *5 (C.D. Cal. Feb. 3, 2011) ("The representations were material because they involved the essential nature of what Defendants were offering and therefore were likely to affect a person's choice regarding whether to accept the offer.") (citing *Cyberspace.com*, 453 F.3d at 1201 and *Pantron I*, 33 F.3d at 1095-96); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) ("Express claims or deliberately-made implied claims used to induce the purchase of a particular product or service are presumed to be material.") (citations omitted). Defendants' false representation that their pop-up box is part of consumers' payday loan application makes it more likely that consumers will provide the so-called "authorization." Indeed, many consumers explicitly state that they never willingly would have agreed to authorize enrollment in Defendants' programs – a fact underscored by the many consumers whose accounts are overdrawn.[21]

c. The FTC is Likely to Establish That Defendants Deceptively Omit Material Information to Bill Consumers

Defendants also fail to disclose to consumers that they automatically will be charged for Defendants' programs without any opportunity to decline such offers. Instead, Defendants' pop-up box contains a vague statement – in small font – that "third party trial offers . . . will

[21] Any argument that the net impression is cured by a paragraph buried in ten pages of legalese on either www.loanterms.cl or www.loantermsonline.com also fails. A net impression cannot be cured through small type. *See Cyberspace.com*, 453 F.3d at 1200 (explaining that small type disclosures cannot cure a misrepresentation). Furthermore, it is less than clear that all, or even most, of Defendants' victims were ever directed to either website.

automatically be extended" to consumers with the "application/offer." Such material omissions that are likely to mislead consumers are deceptive under the FTC Act. *See Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1145-46 (9th Cir. 1978) (ruling that omitting material facts clarifying an affirmative statement violates Section 5 of the FTC Act); *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005) (holding that "the omission of a material fact, without an affirmative misrepresentation, may give rise to an FTC Act violation"); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 531 (S.D.N.Y. 2000) (holding that "[a] material omission, like a material misrepresentation, that is likely to mislead consumers acting reasonably under the circumstances is a deceptive act under Section 5"). Here, Defendants' omission that consumers will be charged is likely to mislead consumers, because they reasonably believe they will have the ability to decline any "offers" that might be "extended." Defendants' omission is also material to consumers' decision of whether to provide the "authorization" requested in Defendants' pop-up box. Indeed, scores of consumers complain about Defendants' charges and state they would not have provided an "authorization" if they knew they would be charged.

d. The FTC is Likely to Establish That Defendants Engage in Deceptive Refund Practices

Defendants make at least two misrepresentations designed to limit refunds and keep their refund rate at 45 percent or less. First, Defendants falsely represent to complaining consumers that they authorized the charges as part of a payday loan application. This misrepresentation is likely to mislead consumers that they, in fact, did authorize the charges – especially since Defendants link their misrepresentation to a process consumers actually experience. Indeed, because consumers are not told of the charges, they have no recollection of rejecting them and no basis to refute Defendants' claim. Second, Defendants tell consumers that they will receive a

refund when, in many instances, the refund never comes.[22] This misrepresentation is likely to mislead consumers that they will actually receive a refund.

Both of these misrepresentations are material. First, both misrepresentations are express, and therefore materiality is presumed. *See Pantron I Corp.*, 33 F.3d at 1095-1096. Second, these misrepresentations actually affected consumers' decisions of whether to pursue a refund. When confronted with Defendants' misrepresentations, many consumers who are promised refunds but do not receive them eventually abandon their claim.

2. The Balance of Equities Favors Entering the TRO, Enjoining Defendants' Unlawful Practices

The public interest in stopping Defendants' unlawful conduct and preserving assets to enable this Court to enter effective final relief outweighs any private interest Defendants may have in continuing a business rooted in fraud. When considering preliminary relief requested by the Commission, the Ninth Circuit has stated on more than one occasion that "the public interest should receive greater weight" than a litigant's private interest. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (citing *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984)); *Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (same). Here, there is a strong public interest in favor of "preventing the continued and future fraudulent billing of unaware customers." *Inc21.com*, 688 F. Supp. 2d at 940.

Furthermore, the public interest in preserving assets for restitution to consumers is great. *See Affordable Media, LLC*, 179 F.3d at 1236 ("Obviously, the public interest in preserving the illicit proceeds of the media unit-scheme for restitution to the victims is great."). This public interest is implicated in every case in which Defendants are likely to dissipate assets, *id*., and is a

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[22] These falsehoods are repeated if consumers call back inquiring why their refund has not come.

"prime concern" when there is a likelihood that defendants have violated the FTC Act. *FTC v. Equinox Int'l Corp.*, No. CV-S-990969HBR (RLH), 1999 WL 1425373 at *10 (D. Nev. Sept. 14, 1999).

In contrast to these important public interests, Defendants have no legitimate interest in continuing their unfair and deceptive practices. As the Ninth Circuit has confirmed, "there 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.

B. Moneymaker and De La Cruz are Individually Liable and Subject to Both Injunctive and Monetary Relief

Moneymaker and De La Cruz are individually liable for both injunctive and monetary relief. Specifically, they participated in the deceptive acts described above or had the authority to control the Corporate Defendants and are thus individually liable for injunctive relief. *See FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997). They also have knowledge of the deceptive acts, are recklessly indifferent to them, or have "an awareness of a high probability of fraud along with an intentional avoidance of the truth" and are thus liable for monetary relief. *See id.* at 1171 ; *Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *FTC v. Network Svcs. Depot, Inc.*, 617 F.3d 1127, 1139 (9th Cir. 2010); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989).

Moneymaker is liable for injunctive relief, because he has the ability to control Belfort – the corporate entity that runs Defendants' Las Vegas call center and into whose bank account the unauthorized debits for Freedom Subscription, Illustrious Perks, and Select Platinum Credit are

deposited.[23] He is the President, Secretary, Treasurer, and a Director of Belfort and a signatory on at least one Belfort bank account, which he uses to pay for the phone numbers used by the call center. In similar circumstances, courts have found that such facts establish an individual's ability to control a corporate actor. *See, e.g., Publ'g Clearing House*, 104 F.3d at 1170 (defendant's role of President and authority to sign documents on behalf of the corporation "demonstrate that she had the requisite control" to be held individually liable).

De La Cruz, while not an Officer, is also liable for injunctive relief. He has the ability to control Belfort and, indeed, in exercising that control participated directly in Defendants' deceptive scheme. Specifically, De La Cruz manages the Belfort call center where, for several months, he controlled its day-to-day operations, met with call center managers, answered employees' questions, held meetings to discuss call center business, and listened in on telephone calls with consumers. These facts amply satisfy the legal test for injunctive relief. *See Amy Travel Serv.*, 875 F.2d 564 at 573 (holding that "[a]uthority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy").[24]

Moneymaker is also monetarily liable because he has knowledge of Defendants' deceptive practices, or – at a minimum – is recklessly indifferent to them. Belfort, a closely held company that Moneymaker controls, operates with many indicia of fraud. First, Belfort uses false addresses for its programs, uses a false address for its call center (the company's only

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[23] In addition, both Moneymaker and De La Cruz have served or currently serve as Officers of HSC.

[24] Similarly, Moneymaker and De La Cruz control Dynamic – the new corporate entity that debits consumers' accounts for Kryptonite Credit. Dynamic is, all but in name, indistinguishable from Belfort. For example, Dynamic shares key employees with Belfort and uses the same bank account as Belfort for depositing consumer funds. Also like Belfort, Moneymaker pays for the phone numbers used by Dynamic to field consumer calls and, indeed, uses a Belfort account to do so.

physical location), and, at times, has other companies controlled by Moneymaker or De La Cruz pay its employees. Second, Defendants' programs – the names of which change every few months – have generated hundreds of consumer complaints for unauthorized billing and have uniformly received the Better Business Bureau's worst possible rank. (FTC 1, Goldstein ¶¶ 56, 60, 63, 79.) Third, the call center systematically misleads consumers in an effort to hold Defendants' refund rate to 45 percent. Like De La Cruz, Moneymaker has been present at the call center, even leading a meeting about the firing of the call center's manager, FTC 2, Graham Decl. ¶ 6, and he supplies the call center's telephone numbers. It is inconceivable that Moneymaker, who is the President, Secretary, Treasurer, and a Director of Belfort is not aware of these practices and, at a minimum, is not recklessly indifferent to them, and thus is liable for monetary relief.

De La Cruz is also liable for the financial harm caused by the fraud because he too has knowledge of the deceptive acts discussed above. De La Cruz managed the Belfort call center for several months, listening in on calls and meeting frequently with the center's "Escalation Officer," the individual to whom all BBB complaints, government inquiries, and angry consumers are referred. He is also copied on responses to the BBB involving consumer complaints about Defendants' programs. His long-running knowledge of consumer complaints firmly establishes his knowledge of or reckless indifference to Defendants' deceptive practices. *See, e.g., Network Servs. Depot*, 617 F.3d at 1140-41 (knowledge of complaints and failure to respond sufficient to establish monetary liability).

C. The Corporate Defendants Have Operated as a Common Enterprise and are, Therefore, Jointly and Severally Liable and Subject to Injunctive Relief

Defendants Belfort, Dynamic, HSC, and Red Dust are jointly and severally liable because they have operated as a common enterprise while engaging in the unfair and deceptive

acts and practices described above. Although courts look at a variety of factors to determine whether corporate defendants have transacted business as a common enterprise, the central inquiry is whether the companies have operated at arms' length or through a "maze of interrelated companies." *See Del. Watch v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *accord J.K. Publ'ns., Inc.*, 99 F. Supp. 2d at 1202 (C.D. Cal. 2000) (finding common enterprise where corporate defendants were under common control; shared office space, employees, and officers; and conducted their businesses through a "maze of interrelated companies"); *FTC v. Wolf*, No. 94-8119, 1996 WL 812940, at *7 (S.D. Fla. Jan. 31, 1996) (factors determining common enterprise include "common control, the sharing of office space and officers, whether business is transacted through a 'maze of interrelated companies,' the commingling of corporate funds and failure to maintain separation of companies, unified advertising, and evidence 'which reveals that no real distinction existed between the Corporate Defendants'") (internal citations omitted).

Here, the Corporate Defendants have shared officers,[25] employees,[26] office space, and mail drops.[27] In addition, HSC and Red Dust have paid Belfort's call center employees. (FTC 2,Graham Decl. ¶ 4.) Taken together, these facts show that the Corporate Defendants have

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[25] Moneymaker is a current Officer for Belfort and previously served as a Director for HSC. Moreover, although the corporate records of the other two Corporate Defendants – Red Dust and Dynamic – do not identify the Individual Defendants as officers, these companies are linked to the Individual Defendants in other ways. Specifically, Moneymaker maintains an office at Red Dust, which is located next to Belfort in a building owned by Moneymaker and also pays for the phone numbers used by Dynamic to field consumer calls.

[26] For example, Rain Smith, who manages the Belfort call center, signs correspondence regarding charges by Dynamic for Kryptonite Credit.

[27] Belfort, HSC, and Red Dust are located next to each other in a building owned by Moneymaker and located at 8668 Spring Mountain Rd. in Las Vegas, Nevada. In addition, Dynamic uses the same mail drop that Belfort used for its Freedom Subscription and Uniguard programs.

operated as a common enterprise rather than as distinct and separate entities. Accordingly, they are all jointly and severally liable for Defendants' violations of Section 5.

D. An *Ex Parte* TRO, with Asset Freeze, Expedited Discovery, and Appointment of a Temporary Receiver is Necessary to Prevent Defendants from Dissipating Assets and Destroying Evidence

In light of Defendants' fraud, concealment, and recidivism, an *ex parte* TRO with an asset freeze, expedited discovery, and appointment of a receiver is necessary to prevent Defendants from dissipating assets and destroying evidence.

1. An *Ex Parte* TRO is Necessary to Ensure This Court Will be Able to Grant Effective Relief

An *ex parte* TRO is necessary because, if provided notice, Defendants are likely to dissipate assets, hide assets, and destroy evidence. *See In re Vuitton Et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979) (mandating the district court grant an *ex parte* TRO because notice would "only render fruitless further prosecution of the action"); Fed. R. Civ. P. 65(b)(1)(a) (providing for *ex parte* relief when "immediate and irreparable injury, loss, or damage will result" upon notice). Providing notice of the TRO to Defendants would, therefore, "defeat the very purpose for the TRO." *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1987). *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (holding that in cases involving "the public interest" a court's equitable powers "assume a broader and even more flexible standard" than in a case between private litigants, such that a court must rule to accord "full justice"). Courts in this district have granted the FTC *ex parte* relief in many prior, similar cases. *See, supra*, fn. 4.

Defendants' fraud, concealment, and recidivism demonstrates that they are likely to dissipate assets, hide assets, and destroy evidence upon notice of the Complaint, which would nullify this Court's ability to grant effective relief. Specifically, Defendants operate a

fraudulent scheme through a web of companies, shuffle the identities of the corporate officers of these companies, change the names of their programs, provide false addresses for their business, and lie to consumers calling to complain that they are a third-party provider. Indeed, the fact that Dynamic Online Solutions, Defendants' newest operating entity, has only a mail box for an address and only a trust listed as its managing member on state registration papers shows that Defendants are continuing and escalating the deception and concealment at the core of their business operations.

Defendants engage in these deceptive practices even after their ringleader, Defendant Moneymaker, was pursued by four different state Attorneys General, all of which obtained orders or judgments against him. Instead of stopping his deceptive practices in the face of these enforcement actions, Moneymaker has continued to engage in fraud. Moreover, as discussed further below, Moneymaker has in the past dissipated assets shortly after being pursued by other law enforcement entities. These deceptive practices strongly indicate that, if notified of this action, Defendants will dissipate assets, hide assets, and destroy evidence. Indeed, the FTC's experience shows that in similar cases defendants dissipate assets and destroy evidence upon notice of an FTC enforcement action. *See* Theisman Rule 65(b) Cert. at ¶ 13.

2. An Asset Freeze is Necessary to Prevent Defendants From Dissipating Assets

Because Defendants are likely to dissipate assets upon notice of this suit, an asset freeze is necessary to preserve the possibility of relief for the thousands of consumers Defendants have harmed. *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) (holding that an asset freeze is appropriate where there is "a likelihood of dissipation of the claimed assets, or other inability to recovery monetary damages, if relief is not granted"). *See also Affordable Media*, 179 F.3d at 1236-37 (holding that past "spiriting" of commissions established likelihood of dissipation of

assets). Here, Defendants are highly likely to dissipate assets as demonstrated by their pervasive concealment, fraud, and past behavior. Defendants conceal their involvement in the fraudulent scheme through their web of corporate fronts, use of false addresses, and lies to consumers about their location and identities. Additionally, Defendants have in the past moved assets amongst their web of interrelated corporate entities in the face of law enforcement actions. Specifically, in May 2009 Attorneys General for Indiana and Kentucky sued Defendant Moneymaker for violations of consumer protection laws. *See* Goldstein Decl. at ¶ 45. Shortly after the suits were filed – but before default judgment was entered – bank records show that Defendant Moneymaker transferred hundreds of thousands of dollars to a corporation for which he is the Director but was not a defendant in these suits. *See* Goldstein Decl. at ¶¶ 46-48. This conduct is consistent with the FTC's experience that, in cases similar to this one, recidivist defendants engaged in fraud dissipate and hide assets when pursued by law enforcement. *See* Theisman Rule 65(b) Cert. at ¶ 13. In such circumstances, courts in this district have granted asset freezes in FTC enforcement actions. *See, supra,* fn. 4.

3. Immediate Access to Business Premises and Expedited Discovery Are Necessary to Preserve Evidence

For many of the same reasons Defendants are likely to dissipate assets absent the requested relief, they also are likely to destroy evidence. Defendants' entire operation is premised on concealing their involvement through corporate nameplates and false statements. Moreover, Defendant Moneymaker's failure to abide by previous court orders demonstrates he is unlikely to produce evidence pursuant to the ordinary rules of discovery. In such circumstances it is the FTC's experience that defendants begin liquidating assets and destroying evidence as soon as they are provided notice of the FTC's action. *See* Theisman Rule 65(b) Cert. at ¶ 13. For these reasons, the FTC requests expedited discovery, including immediate access to the

Defendants' business premises to effectively discover the records in the Defendants' possession.

This Court is permitted to depart from the typical discovery procedure and provide the FTC with immediate access to the business premises as well as expedited discovery in order to provide effective relief. Fed. R. Civ. P. 1 (construing rules to "secure the just, speedy, and inexpensive determination of every action and proceeding"); Fed. R. Civ. P. 26(d) (permitting expedited discovery on motion of a party); Fed. R. Civ. P. 33(b) (permitting the Court to shorten discovery response periods); Fed. R. Civ. P. 34(b) (same); Fed. R. Civ. P. 36(a) (same); *Pantron I*, 33 F.3d at 1102 ("[T]he authority granted by section 13(b) is not limited to the power to issue an injunction; rather it includes the authority to grant any ancillary relief necessary to accomplish complete justice.") (internal citations and quotations omitted). Many courts in this district have provided this relief in similar cases. *See, supra,* fn. 4.

4. A Temporary Receiver is Necessary to Preserve Assets and Evidence

A temporary receiver is necessary to effectively freeze Corporate Defendants' assets, preserve evidence, and ensure the business ceases to prey on consumers. When a corporate defendant, through its management, has defrauded members of the public, "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 fraud's victims. *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981). As shown above, Moneymaker and De La Cruz are likely to liquidate assets, destroy evidence, and continue to injure consumers if given the opportunity. A temporary receiver is necessary, therefore, to manage the business lawfully and to preserve assets and evidence. Courts in this district routinely appoint temporary receivers in FTC enforcement actions aimed at fraudulent business enterprises. *See, supra,* fn. 4.[28]

[28] The FTC recommends that the Court appoint Robb Evans & Associates receiver over the Corporate Defendants for the reasons more fully stated in the accompanying Temporary

IV. CONCLUSION

For the foregoing reasons, the FTC requests that the Court grant its *Ex Parte* Motion for a Temporary Restraining Order With Ancillary Equitable Relief and a Preliminary Injunction pending a full hearing on the FTC's Complaint for Permanent Injunction and Other Equitable Relief.

Respectfully submitted,

Dated: 3/28/11

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Receiver Recommendation.