WILLARD K. TOM
General Counsel
CHRISTOPHER KOEGEL
STEPHANIE ROSENTHAL
GREGORY A. ASHE
Attorneys for Plaintiff
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W., NJ-3158
Washington, DC 20580
(202) 326-2761 (Koegel)
(202) 326-3332 (Rosenthal)
(202) 326-3719 (Ashe)
(202) 326-3768 (facsimile)
Email: ckoegel@ftc.gov, srosenthal@ftc.gov, gashe@ftc.gov

CARLIE CHRISTENSEN (Utah Bar No. 633)
United State Attorney
JEANNETTE F. SWENT (Utah Bar No. 6043)
Assistant United States Attorney
185 South State Street, Suite #300
Salt Lake City, UT 84111
(801) 524-5682 (telephone)
(801) 524-6924 (facsimile)
Email: jeannette.swent@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL TRADE COMMISSION,	*	
	*	Case No. 2:10-cv-00225-DAK
Plaintiff,	*	
	*	PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
v.	*	
	*	
LOANPOINTE, LLC, et al.,	*	
	*	
Defendants.	*	

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I. INTRODUCTION

Defendants Eastbrook, LLC d/b/a eCash and GeteCash ("GeteCash") and LoanPointe, LLC, operating as a common enterprise under the close supervision of founder, president, and co-defendant Joe Strom (GeteCash, LoanPointe, and Strom, collectively "Defendants") have offered and extended over the Internet short-term, extremely high interest, unsecured, small principal loans – commonly referred to as "payday loans" – to consumers. Until this Court entered a preliminary injunction against Defendants banning this practice, Defendants' loan terms included a wage assignment clause that violates the FTC's Trade Regulation Rule Concerning Credit Practices ("Credit Practices Rule"), 16 C.F.R. Part 444, a rule put in place because wage assignment clauses are easily abused and can be particularly harmful to consumers. Compounding this unlawful practice, Defendants then used unfair and deceptive tactics, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, to collect on these debts. These tactics included using "spoofed" versions of Department of Treasury forms to misrepresent that Defendants, like the federal government, had the legal right to garnish wages without obtaining a court order.

These practices resulted in significant harm to consumers and their employers. Defendants unlawfully disclosed consumers' debts to their employers, resulting in embarrassment and emotional distress for these consumers. In some cases, it also jeopardized the employment of consumers. Defendants' unlawful practices also deprived consumers of their due process rights to contest Defendants' claim that they owed the alleged debts and to contest Defendants' right to garnish wages. In addition, Defendants' practices deprived consumers' employers of the efficient and undistracted effort of their employees. Consumers whose alleged debts were being collected from their employers were distracted at work by Defendants' wage garnishment efforts. And employees, usually in a human resources or payroll department, had to spend time dealing with Defendants' unlawful attempts to garnish wages without a court order.

Because of the harm from Defendants' unlawful activities, Plaintiff Federal Trade Commission ("FTC") commenced this action on March 15, 2010, to halt them. Now, the FTC moves for summary judgment against Defendants because the pleadings, discovery, and declarations show that there is no genuine issue as to any material fact; thus the FTC is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To ensure that Defendants never engage in these unlawful practices again (including following all applicable rules and regulations) and do not profit from their unlawful practices, the FTC seeks a permanent injunction and order that: (1) prohibits Defendants from using wage assignment clauses in credit contracts; (2) prohibits Defendants from making certain misrepresentations in connection with extending credit in general or collecting debts; (3) requires Defendants to disgorge their ill-gotten gains; and (4) enables the FTC to monitor Defendants' compliance with a final order.

II. STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUE EXISTS

Pursuant to Local Civil Rule 56-1(b), the FTC hereby sets forth a concise statement of material facts as to which the FTC contends no genuine issue exists.

A. The Parties

1. The Federal Trade Commission

1. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. § 41 *et seq*. The FTC enforces Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the FDCPA, 15 U.S.C. § 1692 *et seq.*, which prohibits deceptive, unfair, and abusive debt collection practices, and the Credit Practices Rule, 16 C.F.R. Part 444, which prohibits unfair and deceptive credit practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, the FDCPA, and the Credit Practices Rule, and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), 57b, 1692*l*(a). *See, e.g.*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–34 (11th Cir. 1984); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718–19 (5th Cir. 1982). (PX01 at 2 ¶¶ 4-5.)

2. The Defendants

2. Defendants operate through two interrelated companies, Eastbrook, LLC and LoanPointe, LLC, and do business under the name GeteCash. (PX01 at 3 ¶ 16.)

3. Defendant Eastbrook, LLC was formed as a Utah limited liability company on September 12, 2008. (PX14 Att. A at 10-12.) Eastbrook is headquartered at 696 North 1890 West, Provo, Utah. (*Id.* at 11.) The Utah Department of Commerce lists Ecash as a d/b/a for Eastbrook, LLC. (PX14 at 2 ¶ 7.) Eastbrook also does business as GeteCash and eCash. (PX01 at 2 ¶ 7; PX05 at 15 (admission 71, 72).)

4. Defendants have advertised and offered their payday loans to customers through Internet websites, including www.getecash.com. (PX14 at 5-6 ¶¶ 13-14, Att. N at 81-85, Att. O at 87-91.) Defendants also used P.O. Box 424, Orem, Utah as an address for GeteCash. (*Id.* Att. D at 20.) Forms sent by Defendants to consumers' employers have listed GeteCash's address as 357 South 670 West, Lindon, Utah. (PX03 at 10 (admission 41); PX14 Att. Q at 123, 124.)

5. Defendant LoanPointe, LLC was formed as a Utah limited liability company on February 17, 2009. (PX14 Att. B at 14-15.) LoanPointe lists its address on Utah state filings as 11529 North Bull River Circle, Highland, Utah. (*Id.*) Defendants also have used 357 South 670 West, Lindon, Utah as another address for LoanPointe. (PX01 at 2 ¶ 6; PX03 at 10 (admission 41).)

6. At all times material to the FTC's Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. (PX01 at 3 ¶ 13.)

7. GeteCash is the subject of numerous state cease and desist orders or other state law enforcement inquiries. (PX14 at 3-4 ¶ 11.) For example, on October 28, 2009, the California Business, Transportation and Housing Agency's Department of Corporations issued a cease and desist order against GeteCash and 14 other respondents for violating the California

Deferred Deposit Transaction Law by making payday loans without a license, failing to make required disclosures, and charging excessive fees. (PX04 at 8 (admission 24); PX05 at 8 (admission 24); PX14 Att. E at 25-28.) Defendants are also subject to cease and desist orders issued, or investigations being conducted, by the states of Colorado (PX14 Att. F at 30-31 (investigation by Colorado Department of Law for violations of the Colorado Deferred Deposit Loan Act)), Idaho (*id.* Att. G at 33-41 (cease and desist issued by Idaho Department of Finance for violations of Idaho's Credit Code and Payday Lender Act)), Kansas (*id.* Att. H at 43-45 (investigation by Kansas Office of the Bank Commissioner for violations of the Kansas Uniform Consumer Credit Code)), Minnesota (*id.* Att. I at 47-48 (investigation by Minnesota Office of the Attorney General for violations of the Minnesota payday lending laws)), North Dakota (*id.* Att. J at 50-52) (cease and desist issued by the North Dakota Commissioner of Financial Institutions for violations of the North Dakota Deferred Presentment Service Provider Act)), South Carolina (*id.* Att. K at 54-60) (investigation by South Carolina Department of Consumer Affairs for violations of the South Carolina Consumer Protection Code)), Washington (*id.* Att. L at 62-67) (investigation by Washington Department of Financial Institutions for violations of Washington Check Cashers and Sellers Act)), and West Virginia (*id.* Att. M at 69-79 (investigation by West Virginia Office of the Attorney General for violations of West Virginia's Consumer Credit and Protection Act)).

8. Defendants have acknowledged operating as a payday lender without appropriate licensure in other states. (PX13 at 3 ¶ 9, Att. E at 29 (not licensed in Idaho).)

9. Defendant Joe Strom is a manager, officer, and principal of Eastbrook and LoanPointe. (PX01 at 2 ¶ 8; PX02 at 5 (in response to interrogatory as to Defendants'

organizational structure, Defendant Eastbrook identifies Defendant Strom as the ultimate person in control); PX03 at 3-4, 10-11 (admissions 1, 2, 3, 4, 5, 6, 7, 8, 43, 44, 45, 46, 47, 48, 49); PX04 at 11-12 (admission 43, 44, 45, 46, 47); PX05 at 11-12 (admission 43, 44, 45, 46, 47); PX11 Att. B at 10-11; PX14 Att. C at 17-18, Att. D at 20.)

10. Defendant Strom is also the registered agent for both companies. (PX03 at 10 (admission 40); PX04 at 11 (admission 40); PX05 at 11 (admission 40); PX14 Att. C at 17-18.)

11. Defendant Strom had the authority to control the acts and practices of Eastbrook and LoanPointe. (PX03 at 4-5, 6-7, 8 (admissions 9, 10, 21, 22, 28); PX04 at 6, 7, 11, 12 (admission 14, 20, 43, 44, 45, 46, 47); PX05 at 6, 7 (admission 14, 20).)

12. Defendant Strom had knowledge of the acts and practices of Eastbrook and LoanPointe. (PX01 at 2 ¶ 8; PX03 at 4-6 (admissions 11, 12, 13, 14, 15, 16).)

13. Defendants LoanPointe and Eastbrook have common ownership, officers, managers, business functions, employees, and office locations (PX03 at 10-11 (admissions 41, 42, 48, 53, 54); PX04 at 11-13 (admission 41, 42, 46, 47, 51-53, 55, 56, 59, 60); PX05 at 11-13 (admission 41, 42, 57, 58).)

14. Defendants LoanPointe and Eastbrook have commingled funds. (PX03 at 11-12 (admissions 55, 56, 57).)

B. Background on Wage Assignment and Wage Garnishment

15. To understand the harm from Defendants' conduct, it is necessary to recognize the differences between: (1) wage assignment and wage garnishment, and (2) federal government wage garnishment and private wage garnishment.

1. Wage Assignment v. Wage Garnishment

16. A wage assignment is an agreement between a creditor and a debtor through which a debtor agrees to the transfer or assignment of his or her wages directly from his or her employer to the creditor. *See* Consumer Credit and the Law, CONCRED §10:5 (West 2010) (noting that "A wage assignment is a contractual arrangement between the creditor and the debtor, whereby the creditor is given the irrevocable right to receive the wages directly from the consumer's employer, usually at the creditor's option and without notice or prior hearing"). A clause permitting a wage assignment typically is included in the credit contract at the time that the creditor extends credit to the debtor. A wage assignment under such a contract operates without state judicial involvement or oversight. *Id.* (providing that "a wage assignment . . . being a purely contractual arrangement, does not require any kind of court proceeding to become effective").

17. In contrast to wage assignment, a creditor obtains the right to wage garnishment after a consumer has not paid back a debt and after a state court has issued an order permitting the garnishment. *Id.* (explaining that "wage garnishment, however, unlike wage assignment, requires a court judgment before it can be carried out, and is generally based on an order issued by the court"). Specifically, a private creditor must take a series of steps to garnish the wages of a consumer. *See, e.g.,* Utah R. Civ. P. Rule 64D.

18. Many, if not all, of these steps state law requires for wage garnishment are procedural safeguards built into the system to ensure that creditors do not mistakenly or maliciously garnish consumers' wages. First, the creditor must obtain a state court judgment requiring that the consumer pay the debt. *See, e.g., id.* 64D(a)-(b) (Utah allows for a writ prior

to judgment in certain circumstances). If the consumer does not have the assets to pay the judgment, then the creditor must ask the state court to issue an order allowing the creditor to garnish the consumer's wages. The creditor must also notify the consumer that a garnishment order has been requested and the procedures to follow if the consumer wants to contest the issuance of the garnishment order. If the court determines that wage garnishment in a specific amount is appropriate, then the court will issue a garnishment order. (PX08 at 2 ¶ 9 (in 13 years of payroll work never saw a garnishment request, other than from a government agency, that was not accompanied by a court order); PX09 at 2 ¶ 8 (in 23 years as payroll officer, never saw garnishment request without court order).) Finally, the creditor (often through the local sheriff) will serve the judgment and the garnishment order on the consumer's employer. The garnishment order requires the consumer's employer to take a specified amount out of the consumer's paycheck and send it to the creditor. *See, e.g.,* Utah Code Ann. § 70C-7-103; Utah R. Civ. P. 64D.

2. Federal Government Wage Assignment v. Private Wage Assignment

19. Congress has enacted laws that permit the federal government, the owner of many types of debts, to use a more streamlined process than private creditors to garnish the wages of debtors who owe money to the federal government. 31 C.F.R. § 285.11(a). Specifically, once the federal government has a state court judgment against a consumer, the Debt Collection Improvement Act of 1996 ("DCIA"), P.L. 104-134, Title III, Ch 10, § 31001(o)(1) codified at 31 U.S.C. § 3720D, allows the federal government to garnish a consumer's wages without having to obtain a garnishment order from a state court. Instead, federal agencies are permitted to contact a consumer's employer directly and demand that it garnish the wages of the consumer against

whom the federal government has obtained a judgment. 31 C.F.R. § 285.11(g). The consumer's employer is required to take a specified amount out of each of the consumer's paychecks and send it to the federal government. 31 U.S.C. § 3720D(f)(1); 31 C.F.R. § 285.11(i). The Treasury Department's Financial Management Service ("FMS") is responsible for collecting this non-tax debt for the federal government and contacting employers to garnish wages pursuant to the DCIA. 31 C.F.R. § 285.12. (PX01 at 3 ¶ 14.)

20. When federal agencies seek to garnish wages pursuant to the DCIA, FMS sends a package of documents to the employer that includes documents entitled: (1) "Letter to Employer & Important Notice to Employer," (2) "Wage Garnishment Order (SF-329B)," (3) "Wage Garnishment Worksheet (SF-329C)," and (4) "Employer Certification (SF-329D)." (PX07 at 1 ¶ 6, Att. A at 6-12.) The "Letter to Employer" states:

> One of your employees has been identified as owing a delinquent nontax debt to the United States. The Debt Collection Improvement Act of 1996 (DCIA) permits Federal agencies to garnish the pay of individuals who owe such debt without first obtaining a court order. Enclosed is a Wage Garnishment Order directing you to withhold a portion of the employee's pay each period and to forward those amounts to us. We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt.

(*Id.* Att. A at 6; PX01 at 3 ¶ 15.)

C. <u>Defendants' Unlawful Business Practices</u>

21. Since at least September 2008, doing business as Ecash and GeteCash and through Internet websites such as www.getecash.com, Defendants have offered consumers payday loans of $1,000 or less. (PX01 at 3 ¶ 16; PX05 at 15 (admission 70); PX14 Att. N at 81-82, Att. O at 87-88.)

22. Using the name LoanPointe, Defendants have collected on those payday loans. (PX01 at 3 ¶ 16; PX04 at 18 (admission 84); PX05 at 18 (admission 84); PX08 Att. A at 6 (garnishment package sent from Loan Pointe); PX11 Att. C at 13 (same); PX14 Att. Q at 122 (same).)

23. Defendants have offered payday loans to, and collected or attempted to collect on those loans from, consumers residing throughout the United States. (PX08 at 1 ¶ 2 (Texas); PX09 at 1 ¶ 1 (Iowa); PX11 at 1 ¶ 1 (Missouri); PX12 at 1 ¶ 1 (Idaho); PX14 at 4-5 ¶ 12 (Defendants funded 7,123 payday loans to consumers in over 41 states, territories, and the District of Columbia, and successfully garnished wages from over 300 consumers located in 39 states and the District of Columbia), Att. N at 84, Att. O at 90.)

1. Defendants' Unlawful Lending Practices

24. Defendants' payday loans[1] are short-term (often as little as two weeks), small-dollar (usually the principal of the loan is less than $1,000), unsecured, high-interest rate (sometimes as high as 1720% APR) extensions of credit. (PX08 at 2 ¶ 6, Att. A at 14 (consumer borrowed $300 at 782.14% APR); PX09 at 2 ¶ 6, Att. A at 13 (consumer borrowed $300 at 1720.71% APR); PX10 at 1 ¶ 3 (borrowed $300); PX11 at 1 ¶ 2, Att. A at 7 (borrowed $300 at an annual percentage rate of 1095%); PX12 at 1 ¶ 2, Att. A at 11 (borrowed $300 at an annual percentage rate of 1095%); PX14 Att. Q at 130 (consumer borrowed $300 at an annual

[1] The loans are commonly referred to as "payday loans" in part because the loans often come due on the borrower's next payday. To obtain a payday loan, consumers typically need only show that they have a bank account and a steady source of income, however modest, such as a job or periodic benefits checks.

percentage rate of 1720.71%); PX16 Att. A at 9 (consumer borrowed $300 at an annual percentage rate of 1095%).)

25. Defendants have required consumers who are interested in obtaining a payday loan to complete an online application via one of Defendants' websites. (PX01 at 3 ¶ 17; PX10 at 1 ¶ 3; PX11 at 1 ¶ 2; PX16 at 1 ¶ 3.)

26. The online application required consumers to check a box, identified as an electronic signature, indicating that they accept the terms of the loan. (PX01 at 3 ¶ 17; PX10 at 1 ¶ 3; PX11 Att. A at 6-7.)

27. One of the terms of the payday loan was a clause that reads: "<u>NOTICE: I agree to have my wages garnished to pay any delinquent amount on this loan.</u>" (PX01 at 3 ¶ 17; PX08 Att. A at 14; PX09 Att. A at 13; PX11 Att. A at 7; PX12 Att. A at 11; PX14 Att. Q at 130; PX16 Att. A at 10 (emphasis in original).)

28. This clause was written in very small print located near the bottom of the third of four pages of small print disclosures. (PX08 Att. A at 12-15; PX09 Att. A at 10-14; PX11 Att. A at 5-8; PX14 Att. Q at 128-31; PX16 Att. A at 7-10.)

29. Because of the small size of the print and the location of the clause, many consumers were unaware of the existence of the wage assignment clause. (PX10 at 1-2 ¶ 5 (consumer Paulette Okibe first learned of the wage assignment clause when a coworker in her employer's human resources department asked if she had consented to GeteCash garnishing her wages); PX11 at 1 ¶ 4 (consumer Brandon Burkhart, a human resource specialist with his employer, stated that, after reviewing GeteCash's loan application, he did not think GeteCash had the authority to garnish his wages); PX12 at 1 ¶ 4 (consumer Elia Ho was unaware that

GeteCash would garnish her wages until she discovered that GeteCash was in fact garnishing her wages), at 2 ¶ 6, Att. C at 17-26 (Defendants ultimately garnished almost $800 from Ms. Ho).)

30. Defendants used the wage assignment clause to garnish the wages of consumers who purportedly owed them. Defendants have acknowledged that this wage assignment clause was a major focus of their collection strategy. (PX13 Att. E at 29 (in a letter to the Idaho Department of Finance, Defendants explain that "[w]e have found that using contracted wage assignment has been useful in collecting from borrowers who refuse to pay back their loans").)

31. Defendant Strom approved and/or authorized the "Loan Note and Disclosure" form used by Defendants containing the clause. (PX03 at 8 (admission 28).)

32. Defendant Strom knew that Defendants' loan agreements contained that clause. (PX03 at 13 (admission 65).)

33. Defendants have acknowledged that the clause was a wage assignment clause. (PX13 Att. E at 29 (in a letter to the Idaho Department of Finance, Defendants explain that "[w]e have found that using contracted wage assignment has been useful in collecting from borrowers who refuse to pay back their loans").)

34. The Credit Practices Rule prohibits lenders from including wage assignment clauses in their credit contract unless the assignment: (i) is, by its terms, revocable at the will of the debtor; (ii) is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (iii) applies only to wages or other earnings already earned at the time of the assignment. 16 C.F.R. § 444.2(a)(3).

35. Defendants' wage assignment clause meets none of these requirements. (PX01 at 3 ¶ 18; PX08 Att. A at 14; PX09 Att. A at 13; PX11 Att. A at 7; PX12 Att. A at 11; PX14 Att. Q at 130; PX16 Att. at 10.)

2. Defendants' Unlawful Collection Practices

36. If a consumer did not pay his or her debt in a timely fashion, Defendants engaged in collection efforts to collect the debt. (PX01 at 3 ¶ 20.)

37. Defendants, using the name LoanPointe, have faxed to consumers' employers a wage garnishment packet. (PX04 at 8-9, 14-15 (admission 25, 26, 27, 28, 68, 69); PX05 at 8-9, 14-15 (admission 25, 26, 27, 28, 66, 67); PX08 at 1 ¶ 5, Att. A; PX09 at 1 ¶ 4, Att. A (fax tagline identifies LoanPointe); PX11 at 2 ¶ 5, Att. C at 13; PX12 at 1-2 ¶ 4, Att. A; PX14 Att. Q; PX16 Att. B at 13 (fax tagline identifies LoanPointe).)

38. Just as FMS does when it collects on non-tax debt owed to the federal government, Defendants' garnishment packet included the following: (1) a document entitled "Letter to Employer & Important Notice to Employer," (2) a document entitled "Wage Garnishment," (3) a document entitled "Wage Garnishment Worksheet," and (4) a document entitled "Employer Certification." (PX04 at 8-9 (admission 25, 26, 27, 28); PX05 at 8-9 (admission 25, 26, 27, 28); PX08 at 1 ¶ 6, Att. A at 7-11; PX09 at 1 ¶ 5, Att. A at 5-9; PX11 at 2 ¶ 5, Att. C at 14-18; PX12 at 1-2 ¶ 4, Att. A at 5-9; PX14 Att. Q at 123-27.)

39. In addition to the garnishment forms, Defendants also have sent to consumers' employers copies of consumers' loan applications. (PX04 at 8-9 (admission 25, 26, 27, 28); PX05 at 8-9 (admission 25, 26, 27, 28); PX08 at 1 ¶ 6, Att. A at 12-15; PX09 at 1 ¶ 5, Att. A at 10-14; PX11 at 2 ¶ 5, Att. C at 19-24; PX12 at 2 ¶ 4, Att. A at 10-12; PX14 Att. Q at 128-31.)

40. Defendants' wage garnishment package was nearly identical to the package that FMS sends to employers when it garnishes wages on behalf of federal agencies. (*Compare* PX08 Att. A; PX09 Att. A; PX11 Att. C; PX12 Att. A; PX14 Att. Q at 123-27 *with* PX07 Att. A.)

41. For example, the "Letter to Employer" sent by Defendants states:

> One of your employees has been identified as owing a delinquent debt to GeteCash. The Debt Collection Improvement Act of 1996 (DCIA) permits agencies to garnish the pay of individuals who owe such debt without first obtaining a court order. Enclosed is a Wage Garnishment Assignment directing you to withhold a portion of the employee's pay each pay period and to forward those amounts to GeteCash. We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt.

(PX01 at 3 ¶ 22 (Defendants admit using such a letter until informed not to do so by FMS); PX04 at 8, 17-18 (admission 22, 82); PX05 at 8, 17-18 (admission 22, 82); PX08 at 2 ¶ 8, Att. A at 7; PX09 at 2 ¶ 7, Att. A at 5; PX11 Att. C at 14; PX12 Att. A at 7; PX14 Att. Q at 123.)

42. This language is identical to the letter FMS uses, except that Defendants changed the letter from stating that "Federal agencies" do not need to get a court order to garnish wages to "agencies" (*i.e.*, debt collection agencies) do not need such an order. (*Compare* PX08 Att. A at 7; PX09 Att. A at 5; PX11 Att. C at 14; PX12 Att. A at 7; PX14 Att. Q at 123 *with* PX07 Att. A at 6.)

43. Defendant Strom knew that such a letter was being sent to employers in order to collect on debts owed by consumers to Defendants. (PX03 at 8-9 (admissions 31, 32).)

44. Defendants were not, and are not, authorized under the DCIA to garnish the pay of consumers who owed debts to Defendants without first obtaining a court order. The DCIA

grants that authority only to federal government entities. (PX01 at 4 ¶ 27; PX07 at 1 ¶ 5; *see also* PX08 at 3 ¶ 11; PX09 at 3 ¶¶ P10-11.)

45. Indeed, in a letter from Defendants to the Idaho Department of Finance, Defendants admitted that they used language representing that they could use the DCIA to garnish wages without court order. (PX13 at 3 ¶ 9, Att. E at 29.)

46. Defendants knew, before they began sending letters to employers with the DCIA language, that the DCIA did not authorize Defendants to garnish the pay of consumers without first obtaining a court order. (PX06 Att. A at 7 (admission 70, 71).)

47. Defendants have admitted that, in numerous instances, in connection with the collection of payday loans from consumers, Defendants have misrepresented to the consumers' employers, directly or indirectly, expressly or by implication, that Defendants were authorized under the DCIA to garnish the pay of consumers who owed debts to Defendants, without first obtaining a court order. (PX01 at 4 ¶¶ 26, 27.)

48. Defendants' letter also expressly stated that they had obtained the consent of consumers to contact the consumers' employers, or at least had notified consumers that their employers may be contacted and had provided consumers with an opportunity to dispute the debt. (PX08 at 2 ¶ 8, Att. A at 7; PX09 at 2 ¶ 7, Att. A at 5; PX10 at 1 ¶ 5; PX11 at 2 ¶ 5, Att. C at 14; PX12at 2 ¶ 4, Att. A at 7; PX14 Att. Q at 123.)

49. In many instances, the wage assignment clause in the original loan application is the only manner in which Defendants purportedly obtained such consent from, or provided such notice to, consumers. (PX10 at 1-2 ¶ 5; PX11 at 1-2 ¶ 4; PX12 at 1, 2 ¶¶ 3, 4; PX06 Att. A at 7-

8, 9 (admission 74, 82), Att. B at 16-17, 18 (admission 91, 99), Att. C at 25-26, 27 (admission 94, 102).)

50. Defendants' contacts exposed consumers to the embarrassment of having their debts disclosed to third parties and the risk of adverse actions by their employers. For example, consumer Paulette Okibe states she was embarrassed that her company learned she was indebted to a payday lender and was concerned that she could get fired. (PX10 at 2 ¶ 6.) Consumer Shalandria Jones states that she suffered a great deal of embarrassment and anxiety due to Defendants' contacts with her employer. (PX16 at 4 ¶ 15.) She is now concerned that such contacts may affect her standing with her employer and hurt her chances for future pay raises or promotions. (*Id.*) A consumer in Kansas, who filed an online complaint with the FTC, reported that Defendants repeatedly called her employer telling employees that she owed $300. (PX14 Att. P at 117.) The consumer reported that her boss was very upset and that she was "not sure if i [sic] will have a job." (*Id.*) Another consumer from South Carolina, who filed an online complaint with the FTC, reported that Defendants faxed all five of her company's offices with information about her debt causing her great embarrassment. (*Id.* at 107.) Moreover, the consumer reported that she was sent home for the day. (*Id.*)

D. <u>Consumer Injury</u>

51. Since commencing operations, Defendants have made at least 7,121 payday loans to consumers that included the unlawful wage assignment clause (PX15 at 3 ¶ 9, Att. C at 14) and collected from consumers a total of $3,013,044 in income from those loans. (*Id.* at 2 ¶ 6, Att. A at 6-7.) Of this amount, Defendants collected $468,020.91 from consumers through their

illegal wage garnishment activities. (PX06 Att. A at 10 (admission 93), Att. B at 28 (admission 113), Att. C at 28 (admission 113); PX15 at 2-3 ¶¶ 7-8, Att. B at 9.)

E. Defendants' Admissions of Liability

52. On November 10, 2010, the FTC served Defendants with the FTC's second set of requests for admissions. (PX06 at 2 ¶¶ 2 - 4.) To date, Defendants have failed to respond to any of these requests. (*Id.*) Accordingly, each admission is deemed admitted pursuant to Federal Rule of Civil Procedure 36(a)(3) and summary judgment may be granted based on matters deemed admitted. Fed. R. Civ. P. 36(b); *see United States v. Palmer*, 2010 U.S. Dist. LEXIS 92259, at *7-8 (D. Utah Sept. 2, 2010) (unpublished); *Walston v. UPS*, 2008 U.S. Dist. LEXIS 99947, at *5 n.11 (D. Utah Dec. 10, 2008) (unpublished).

53. In particular, by operation of Rule 36(a)(3), Defendants have admitted that they violated:

a. Section 5 of the FTC Act, 15 U.S.C. § 45, by:

i. misrepresenting that the DCIA authorized Defendants to garnish the pay of consumers without first obtaining a court order (PX06 Att. A at 7 (admission 72), Att. B at 16 (admission 89), Att. C at 25 (admission 92));

ii. misrepresenting that, before sending a garnishment request to employers, Defendants had notified consumers of Defendants' intent to garnish consumers' wages and provided consumers with an opportunity to dispute the debt (*id.* Att. A at 8 (admission 79, 80), Att. B at 17 (admission 96, 97), Att. C at 26 (admission 99, 100)); and

iii. unfairly disclosing to employers and co-workers of consumers the existence, and sometimes the amount, of debts purportedly owed by consumers to Defendants, without first having obtained the prior consent of consumers (*id.* Att. A at 9 (admission 83), Att. B at 18 (admission 100), Att. C at 27 (admission 103));

b. Section 807 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692e, by:

i. falsely representing that the DCIA authorized Defendants to garnish the pay of consumers without first obtaining a court order (*id.* Att. A at 9 (admission 85), Att. B at 18 (admission 102), Att. C at 27 (admission 105)); and

ii. falsely representing that Defendants had notified consumers of Defendants' intent to garnish consumers' wages and provided consumers with an opportunity to dispute the debt (*id.* Att. A at 9-10 (admission 87, 88), Att. B at 18-19 (admission 104, 105), Att. C at 27-28 (admission 107, 108));

c. Section 805(b) of the FDCPA, 15 U.S.C. § 1692c(b) by disclosing to employers and co-workers of consumers the existence, and sometimes the amount, of debts purportedly owed by consumers to Defendants, without first having obtained the prior consent of consumers (*id.* Att. A at 10 (admission 90), Att. B at 19 (admission 107), Att. C at 28 (admission 110)); and

d. Section 444.2(a)(3) of the Credit Practices Rule, 16 C.F.R. § 444.2(a)(3). (*Id.* Att. A at 10 (admission 92), Att. B at 19 (admission 109), Att. C at 28 (admission 112).)

54. Further, by operation of Rule 36(a)(3), Defendants have admitted they are liable for violating Section 5 of the FTC Act, the FDCPA, and the Credit Practices Rule, as alleged in Counts I, II, III, IV, V, VI, and VII of the FTC's complaint. (*Id.* Att. A at 7, 9-10 (admission 73, 81, 84, 86, 89, 91, 92), Att. B at 16-19 (admission 90, 98, 101, 103, 106, 108, 109), Att. C at 25-28 (admission 93, 101, 104, 106, 109, 111, 112).)

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT IN FAVOR OF THE FTC AND AGAINST DEFENDANTS

The FTC is entitled to summary judgment against Defendants because the uncontroverted evidence clearly shows that: (1) Defendants engaged in deceptive and unfair acts or practices prohibited by Section 5 of the FTC Act, the FDCPA, and the Credit Practices Rule; (2) individual defendant Strom participated in and had the authority to control, and did participate in and control, all aspects of Defendants' operations; and (3) Strom knew or should have known about Defendants' unlawful business practices.

A. The Standard For Granting Summary Judgment

Summary judgment is appropriate where the admissible evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" if a rational trier of fact could find in favor of the nonmoving party on the evidence presented. *Id.* In reviewing the factual record, all reasonable inferences must be drawn in favor of the non-moving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 248-52.

B. This Court Has Jurisdiction and Venue Requirements over this Action

This Court has jurisdiction in cases brought under the FTC Act, the FDCPA, and the Credit Practices Rule. 15 U.S.C. §§ 45, 53(b), 57b, and 1692*l*; 28 U.S.C. § 1331. (Dkt. No. 14 at 2 (Finding 2); PX01 at 2 ¶ 2.)[2] As discussed above, Defendants' nationwide unlawful lending and collection activities affected the passage of property or messages from one state to another. Such transactions are "in or affecting commerce," as required by the FTC Act. *Ford Motor Co. v. FTC*, 120 F.2d 175, 183 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941). (PX01 at 3 ¶13.) Venue is proper because the conduct at issue occurred in this District at Defendants' locations near Provo, Utah. 28 U.S.C. § 1391(b)-(c). (PX01 at 2 ¶ 3.)

C. The Undisputed Facts Demonstrate that Defendants Have Violated Section 5 of the FTC Act

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 unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and

[2] In addition, the Court has subject matter jurisdiction because this is a civil action arising under an Act of Congress regulating commerce, 28 U.S.C. § 1337(a), and an agency of the United States is plaintiff, 28 U.S.C. § 1345.

not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). *See also FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009). The FTC meets the first prong (substantial injury) by establishing, among other things, that consumers were injured by a practice for which they did not bargain. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988). Injury may be sufficiently substantial if it causes a small harm to a large class of people, *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114 at *29-31 (N.D. Ga. Sep. 30, 1997) (unpublished), or severe harm to a limited number of people. *In re Int'l Harvester*, 104 F.T.C. 949, 1064 (1984).[3]

An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. *Pantron I*, 33 F.3d at 1095; *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied* 507 U.S. 909 (1993); *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir.1986). Express and deliberate claims are presumed material.[4] *FTC v. SlimAmerica,* 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995); *In re Thompson Med. Co.*, 104 F.T.C. 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987).

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[3] *See also* FTC Unfairness Policy Statement, Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Senate Committee on Commerce, Science, and Transportation (Dec. 17, 1980), appended to *Int'l Harvester*, 104 F.T.C. at 1070.

[4] The FTC need not prove that Defendants' misrepresentations were made with an intent to defraud or deceive consumers or were made in bad faith. *See*, *e.g.*, *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000). A showing of intent, however, is powerful evidence that the alleged claim in fact was conveyed to consumers. *See, e.g.*, *In re Telebrands Corp.*, 140 F.T.C. 278, 304 (2005); *In re Novartis Corp.*, 127 F.T.C. 580, 683 (1999).

The FTC need not prove that each consumer relied on Defendants' deceptive claims to establish a violation of Section 5 of the FTC Act. *SlimAmerica*, 77 F. Supp. 2d at 1275. "Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (citations omitted). Rather, a "presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.* at 605-6; *see also SlimAmerica*, 77 F. Supp. 2d at 1275. In other words, the presumption arises when a defendant's representations induce some action on the part of the consumer – a purchase of goods or services or, as here, the garnishment of wages by an employer.

1. Count I: Defendants Have Misrepresented to Consumers' Employers That Defendants Were Authorized under the DCIA to Garnish the Pay of Consumers Who Owed Debts to Defendants, Without First Obtaining a Court Order

As discussed, there is no dispute that, until at least October 2009, Defendants sent garnishment request letters to consumers' employers that stated expressly that Defendants were authorized under the DCIA to garnish the pay of consumers who owe debts to Defendants, without first obtaining a court order. The representation is false because the DCIA applies only to federal agencies, not private debt collection agencies like Defendants. Indeed, Defendants admit that they knew the DCIA did not apply to them. Accordingly, the uncontroverted evidence demonstrates that Defendants violated Section 5 of the FTC Act as alleged in Count I of the Complaint.

2. Count II: Defendants Have Misrepresented to Consumers' Employers That, Before Sending a Garnishment Request to the Employers, Defendants Had Notified Consumers of Their Intent to Garnish and Have Provided Consumers with the Opportunity to Dispute the Debt That Is the Subject of the Garnishment

As discussed, there is no dispute that Defendants' garnishment request letters to consumers' employers stated expressly that Defendants had notified consumers of Defendants' intent to garnish and had given consumers the opportunity to object. In most instances, however, the only method by which Defendants purportedly provided this notice was through the wage assignment clause in the original loan application. But the fact that the original lending document contained a wage assignment clause does not put consumers on notice that Defendants would attempt to garnish their wages. Neither does it give consumers the opportunity to object. Indeed, it would have been impossible to dispute the debt at the time the loan was originated. Further, the wage assignment clause is written in very small print and located near the bottom of the third of four pages of small print disclosures. Because of the small size of the print and the location of the clause, many consumers were not aware of the existence of the clause until after Defendants attempted to garnish their wages. Accordingly, the uncontroverted evidence demonstrates that Defendants violated Section 5 of the FTC Act as alleged in Count II of the Complaint.

3. Count III: Defendants Have Communicated with Consumers' Employers and Co-workers without Consumers' Knowledge or Consent, Disclosing the Existence and, Sometimes, the Amount of Consumers' Purported Debt to Employers and Co-workers

As discussed, Defendants communicated with consumers' employers and co-workers without consumers' knowledge or consent. This is an unfair act or practice in violation of

Section 5 of the FTC Act. Defendants' core collection practice was to send garnishment packets directly to consumers' employers, where they were often handled by consumers' co-workers. This practice caused substantial economic harm to consumers and their employers. Consumers' and co-workers' work was interrupted to deal with Defendants' purported wage garnishment orders, and consumers risked losing their jobs because of the interference caused by Defendants' activities. Consumers also suffered harm in the form of humiliation caused by the disclosure of their debts, especially those arising from expensive, short-term credit, to employers and coworkers. Because Defendants often sent the garnishment packets without any advance notice to consumers, consumers could not have reasonably avoided these harms. No countervailing benefit to consumers or to competition occured as a result of Defendants' tactics. Accordingly, Defendants' practice is unfair and in violation of Section 5 of the FTC Act, as alleged in Count III of the Complaint.

D. The Undisputed Facts Demonstrate that Defendants Have Violated the FDCPA

In 1977, Congress enacted the Fair Debt Collection Practices Act in response to national concern over "the use of abusive, deceptive and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The FDCPA sets forth a nonexclusive list of unlawful debt collection practices and provides for public enforcement by the FTC. Although Defendants have engaged in numerous violations of several provisions of the FDCPA, a single violation of a single provision is sufficient to establish liability. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *see* 15 U.S.C. § 1692k(a) (establishing liability for "any debt collector who fails to comply with any provision of this subchapter").

As discussed, Defendants have operated as a common enterprise, lending under the names "ECash" and "GeteCash" and collecting under the name "LoanPointe." By collecting as "LoanPointe," Defendants have used a name to indicate that a third person other than the creditor (*i.e.*, eCash or GeteCash) is collecting or attempting to collect their payday loan debts. A creditor brings itself within the FDCPA's coverage if "in the process of collecting [its] own debts, [it] uses any name other than [its] own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6); *Catencamp v. Cendant Timeshare Resort Group - Consumer Finance, Inc.*, 471 F.3d 780, 781 (7th Cir. 2006). Thus, the FDCPA applies to Defendants.

1. Counts IV and V: Defendants Made False or Misleading Representations in Violation of Section 807 of the FDCPA

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 activities that violate its strictures, but provides that prohibited conduct is not limited to that set forth in these examples. *Id.*

As discussed above, Defendants falsely represented to employers that they are authorized under the DCIA to garnish the pay of consumers who owe debts to Defendants, without first obtaining a court order. As further discussed above, Defendants also falsely represented that before sending a garnishment request to consumers' employers, Defendants had notified consumers of that action and had provided consumers with the opportunity to dispute the debt that is the subject of the garnishment. Defendants' misrepresentations not only constitute deceptive acts and practices in violation of Section 5 of the FTC Act, they also constitute false and misleading collection practices in violation of Section 807 of the FDCPA, 15 U.S.C. § 1692e, as alleged in Counts IV and V.

2. Count VI: Defendants Engaged in Prohibited Communications with Third Parties in Violation of Section 805 of the FDCPA

Section 805(b) of the FDCPA bars debt collectors from communicating with third parties 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 employer or co-workers. *See, e.g., Padilla v. Payco Gen. Am. Credits, Inc.*, 161 F. Supp. 2d 264, 274 (S.D.N.Y. 2001); *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557, 559 (D. Conn. 1993); *West v. Costen*, 558 F. Supp. 564, 575 (W.D. Va. 1983) ("Like other sections of the FDCPA, [Section 805(b)'s] prohibition against certain third party contacts by debt collectors is designed to protect a consumer's reputation and privacy, as well as to prevent loss of jobs resulting from a debt collector's communication with a consumer's employer concerning the collection of a debt"). As discussed above, Defendants communicated with consumers' employers and co-workers without consumers' knowledge or consent. Thus, Defendants' communications about a consumer's debt with third-parties, including employers and co-workers, without the consent of the consumer violates Section 805(b) of the FDCPA, 15 U.S.C. § 1692c(b), as alleged in Count VI of the Complaint.

E. **The Undisputed Facts Demonstrate that Defendants Have Violated the Credit Practices Rule**

In 1984, the FTC promulgated the Credit Practices Rule, 16 C.F.R. Part 444, to address certain unfair creditor collection remedies. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 962 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). One of these practices was the use of wage assignment clauses. In promulgating the Credit Practices Rule, the FTC determined that wage assignments occur without the procedural safeguards of a court hearing and deprive debtors of an opportunity to assert defenses and counterclaims. The FTC also found that the use of wage assignments interferes with employment relationships and disrupts family finances. Thus, wage assignments were found to be particularly harmful because they cause injury to consumers who may have valid reasons for nonpayment. *Id.* at 974-75.

Section 444.2(a)(3) of the Credit Practices Rule generally prohibits lenders from including wage assignment clauses in their credit contracts. Such clauses can be included only if the assignment: (i) is, by its terms, revocable at the will of the debtor; (ii) is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (iii) applies only to wages or other earnings already earned at the time of the assignment. 16 C.F.R. § 444.2(a)(3). As discussed above, Defendants admit that their loan application contains a wage assignment clause. Further, as also discussed above, their wage assignment clause meets none of the requirements of the Credit Practices Rule.

Defendants have asserted, however, that their wage assignment clause was revocable because consumers could attempt to instruct their employers to not allow the garnishment.

(PX02 at 1-2.) Even though some employers may have stopped garnishments at the request of consumers, the Credit Practices Rule requires a wage assignment clause to be revocable at will "by its terms." Defendants' interpretation renders these words in the Rule pointless. *Cf. Accusearch*, 570 F.3d at 1198 ("Under a long-standing canon of statutory interpretation, one should avoid construing a statute so as to render statutory language superfluous"). A review of Defendants' clause clearly demonstrates that "by its terms" it is *not* "revocable at the will of the debtor." Accordingly, Defendants have violated Section 444.2(a)(3) of the Credit Practices Rule, 16 C.F.R. § 444.2(a)(3), as alleged in Count VII of the Complaint.

F. The Corporate Defendants Are Liable for Injunctive Relief and Equitable Monetary Relief

In an action filed pursuant to Section 13(b) of the FTC Act, if the Court finds that a corporate defendant has violated any provision of law the FTC enforces, the Court has the authority to exercise its full panoply of equitable powers against that defendant, including issuing permanent injunctive relief and ordering monetary relief, such as restitution and disgorgement of unjust enrichment. *Pantron I*, 33 F.3d at 1102; *Amy Travel*, 875 F.2d at 573; *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *Sec. Rare Coin & Bullion*, 931 F.2d at 1314-15. As demonstrated above, it is uncontroverted that Defendants Eastbrook and LoanPointe committed numerous violations of Section 5 of the FTC Act, the FDCPA, and the Credit Practices Rule.

"When one or more corporate entities operate as a common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd* 312 F.3d 259 (7th Cir. 2002). Courts have found a common enterprise where companies share common control, office space, employees, interrelated funds, and other factors. *See, e.g. FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). Where the same individuals transact business through a "maze of interrelated companies," all of them may be held liable as a joint enterprise. *See id.* (quoting *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964)).

Defendants have operated as a common enterprise in the payday lending and debt collection business. As discussed above, defendant Strom has controlled and continues to control both Eastbrook and LoanPointe. Both entities have shared common ownership and office locations. They have also shared funds and financial records. In short, the corporate defendants have shared ownership and control, office space and addresses, and employees, making the entire operation a common enterprise. Accordingly, the corporate Defendants are liable for injunctive relief and, jointly and severally, for monetary relief.

G. Defendant Joe Strom Is Liable for Injunctive and Monetary Relief

In addition to the corporate defendants, individual defendant Joe Strom is liable for injunctive and monetary relief for law violations committed by Eastbrook and LoanPointe. To obtain an injunction against an individual, the FTC must show that the individual either had the authority to control the unlawful activities or participated directly in them. *Freecom*,401 F.3d at 1205 ("Once the FTC presented evidence defendants violated § 5, it only had to show [the individual] had the authority to control [corporate] defendants to establish its case for injunctive relief against him"); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1231 (9th Cir. 1999); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *Amy Travel*, 875 F.2d at 574. In general, an individual's status as a corporate officer gives rise to a presumption of liability to control a small, closely held corporation. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973). More particularly, assuming the duties of a corporate officer is probative of an individual's participation or authority. *Amy Travel*, 875 F.2d at 573; *Five-Star Auto Club*, 97 F. Supp. 2d at 538.

An individual may be held liable for monetary redress for corporate practices if the individual had, or should have had, knowledge or awareness of the corporate defendants' misrepresentations. *Freecom*, 401 F.3d at 1207 (sufficient for the FTC to show the individual had or should have had knowledge or awareness of corporate violations); *Affordable Media*, 179 F.3d at 1231; *Gem Merch.*, 87 F.3d at 470; *Amy Travel*, 875 F.2d at 574. This knowledge element, however, need not rise to the level of subjective intent to defraud consumers. *Freecom*, 401 F.3d at 1207; *Affordable Media*, 179 F.3d at 1234; *Amy Travel*, 875 F.2d 574. Instead, the FTC need only demonstrate that the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such representations, or an awareness of a high probability of fraud coupled with the intentional avoidance of the truth. *Affordable Media*, 179 F.2d at 1234; *Amy Travel*, 875 F.2d at 574. Participation in corporate affairs is probative of knowledge. *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d 564.

Here, the uncontroverted evidence demonstrates that defendant Strom had and has the authority to control the corporations' activities and did, in fact, participate in their activities. The uncontroverted evidence also shows that defendant Strom had knowledge of the companies' wrongful acts. Accordingly, he is liable for both injunctive and monetary relief.

H. Defendants' Good Faith Does Not Insulate Them from Either Liability or the Requested Relief for Violating the Credit Practices Rule

Defendants' Amended Answer asserts as an affirmative defense that they did not know their wage assignment clause violated federal law. (PX01 at 6 ¶ 53.) In their response to the FTC's interrogatory requests, however, Defendants clarify that the defense is limited to the issue of whether their wage assignment clause itself violated the Credit Practices Rule; Defendants do not even attempt to argue that their asserted good faith excuses their violations of the FTC Act or the FDCPA. (PX02 at 1-3.) In particular, they assert that they thought that they "were acting within the bounds of the law" (*id.* at 1); that they "had never heard of any law governing wage assignments, much less making them illegal" (*id.* at 2); that they "took the wording for our procedure from the public website of another lender. Because it was used publicly, [they] thought it legal" (*id.*); and that a lawyer advised them it was legal. (*Id.*)

The truth or falsity of these statements is immaterial to the issue of whether Defendants are liable for violating the Credit Practices Rule. The law is well-established that good faith is not a defense to liability under the FTC Act, in part because the FTC need not prove intent.[5] *See, e.g.*, *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *Freecom*, 401 F.3d at 1202 ("Because the primary purpose of § 5 is to protect the consumer public rather than to punish the wrongdoer, the intent to deceive consumers is not an element of a § 5 violation"); *Removatron Int'l*, 884 F.2d at 1495; *World Travel Vacation Brokers*, 861 F.2d at 1029 ("To be actionable under Section 5, these misrepresentations or practices need not be made with an intent

[5] Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), states that a violation of any rule promulgated by the FTC, including the Credit Practices Rule, constitutes a violation of Section 5 of the FTC Act.

to deceive"); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977) ("An advertiser's good faith does not immunize it from responsibility for its misrepresentations"); *FTC v. Hope Now Modifications*, 2009 U.S. Dist. LEXIS 102596, at *3 (D.N.J. Nov. 4, 2009) (unpublished) ("Good faith is not a defense to liability under Section 5(a) of the FTC Act"); *FTC v. CEO Group, Inc.*, 2007 U.S. Dist. LEXIS 10619 at *4 (S.D. Fla. Feb. 15, 2007) (unpublished); *Five-Star Auto Club*, 97 F. Supp. 2d at 526 (not necessary to prove intent to deceive or bad faith in order to establish a Section 5 violation); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998) ("the subjective good faith of the advertiser is not a valid defense to an enforcement action brought under [FTC Act] section 5"); *In re Nat'l Credit Mgmt. Group, Inc.*, 21 F. Supp. 2d 424, 441 (D.N.J. 1998) (good faith not a defense to making a misrepresentation); *FTC v. NCH, Inc.*, 1995 U.S. Dist. LEXIS 21098 at *20-21 (D. Nev. May 25, 1995) (unpublished) ("As a matter of law, a defendant's good faith is not a defense to liability for a violation of 15 U.S.C. § 45(a)"); *FTC v. Communidyne, Inc.*, 1993 U.S. Dist. LEXIS 18708 (N.D. Ill. Dec. 3, 1993) (unpublished) ("[t]here is no scienter or reliance requirement [under § 5(a)], as would be required to prove fraud"); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992). Similarly, reliance on others, including counsel, is no defense to FTC Act liability. *Cyberspace.com*, 453 F.3d at 1202; *Amy Travel*, 875 F.2d at 575; *Hope Now Modifications*, 2009 U.S. Dist. LEXIS 102596 at *3 ("reliance on counsel is not a valid defense to liability under the FTC Act"); *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 322 (S.D.N.Y. 2008); *FTC v. Sharp*, 782 F. Supp. 1445, 1451 (D. Nev. 1991). Thus, the fact that Defendants were unaware of the existence of the Credit Practices Rule or that their wage assignment clause violated that rule is immaterial on the issue of liability.

At best, good faith may be relevant when offered against the scope of injunctive, but not monetary, relief. *See FTC v. Magazine Solutions, LLC*, 2009 U.S. Dist. LEXIS 23708, at *3 (W.D. Pa. Mar. 20, 2009) (unpublished); *CEO Group*, 2007 U.S. Dist. LEXIS 10619, at *4; *FTC v. Hang-Up Art Enter.*, 1995 U.S. Dist. LEXIS 21444, at *10-11 (C.D. Cal. Sep. 27, 1995) (unpublished). In order to obtain a permanent injunction against a defendant, the FTC must show that "there exists some cognizable danger of recurrent violation." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). To determine whether violations are likely to recur, courts look to two factors: (1) the deliberateness and seriousness of the present violation, and (2) the violator's past record with respect to unfair advertising practices. *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982). Good faith on the part of a defendant could be relevant to the first factor. *Hang-Up Art. Enter.*, 1995 U.S. Dist. LEXIS 21444 at *10-11.

Here, a judicial finding that Defendants were ignorant of the Credit Practices Rule does nothing to negate the need for permanent injunctive relief. As discussed, Defendants admit that the use of the wage assignment clause was deliberate. The fact that they did not know the use of such clause was illegal does not lessen the deliberateness or seriousness of the illegal conduct. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1612 (2010) ("Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law"). Importantly, payday lending is Defendants' chosen line of business. They should have done more diligence in understanding the law. Indeed, the information on how creditors can comply with relevant laws, including the Credit Practices Rule, is publically available on the FTC's website and could have been found with a simple Internet search. *See, e.g.,* http://business.ftc.gov/documents/bus04-complying-credit-practices-rule. Defendants' argument demonstrates negligence, not good faith.

Neither does their reliance on counsel argument, even if the Court were to accept it, help them. Their statement that "a lawyer we had hired advised me that an agreement between a lender and a borrower to repay a loan by deductions from his or her pay checks [sic] was proper if the borrower agreed" (PX02 at 2) does not address the nature of their Credit Practices Rule violation. As discussed above, the Credit Practices Rule does not categorically outlaw wage assignment clauses that are voluntarily entered into between borrowers and lenders. As long as the clause meets the requirements of Section 444.2(a)(3) of the Credit Practices Rule, 16 C.F.R. § 444.2(a)(3), the clause is legal. As discussed, Defendants' clause meets none of the requirements.

In short, Defendants' statements of good faith, far from excusing the need for permanent injunctive relief, actually reinforce the need for such relief to ensure that consumers are not harmed in the future. Even if the Court accepts Defendants' good faith defense, as noted above, that defense extends only to injunctive relief related to their violations of the Credit Practices Rule. It does not extend to monetary relief for those violations (including disgorgement of ill-gotten gains). Further, permanent injunctive relief is still necessary to address Defendants' violations of Section 5 of the FTC Act and the FDCPA. Accordingly, the Court should grant summary judgment and enter the proposed order discussed below.

IV. THE SCOPE OF THE PROPOSED FINAL ORDER IS APPROPRIATE IN LIGHT OF DEFENDANTS' CONDUCT

The scope of the proposed injunctive provisions and monetary relief provided in the proposed final order is appropriate in light of Defendants' past conduct and the likelihood of recurrence absent such relief.

A. The Proposed Injunctive Provisions

Section 13(b) of the FTC Act expressly authorizes courts to grant a permanent injunction against violations of any provisions of law enforced by the FTC. 15 U.S.C. § 53(b); *Gem Merch.*, 87 F.3d at 468; *H.N. Singer*, 668 F.2d at 1113; *FTC v. Accusearch Inc.*, 2007 U.S. Dist. LEXIS 74905, at*25 (D. Wyo. Sept. 28, 2007). This "unqualified grant of statutory authority . . . carries with it the full range of equitable remedies," and includes the authority to grant any ancillary relief necessary to accomplish complete justice. *Gem Merch.*, 87 F.3d at 468; *Amy Travel*, 875 F.2d at 571-572.

A permanent injunction is justified when there is a "cognizable danger of recurrent violation, or some reasonable likelihood of future violations." *W.T. Grant*, 345 U.S. at 633. Prior illegal conduct is highly suggestive of the likelihood of future violations. *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *see also SEC v. Am. Bd. of Trade*, 751 F.2d 529, 537-38 (2d Cir. 1984); *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

Further, "a court's power to grant injunctive relief survives the discontinuance of the illegal conduct." *W.T. Grant*, 345 U.S. at 633; *Accusearch*, 570 F.3d at 1201; *Freecom*, 401 F.3d at 1204. After being confronted by officials from FMS, Defendants claim to have discontinued sending garnishment request letters to consumers' employers that misrepresented

Defendants' ability to use the DCIA to garnish wages. (*See* PX02 at 3.) Even if the Court were to determine this to be true, however, injunctive relief is still necessary. Voluntary cessation of activity, especially in light of potential law enforcement scrutiny or action, does not obviate the need for permanent injunctive relief. *See Affordable Media*, 179 F.3d at 1237. An action for an injunction does not become moot merely because a defendant voluntarily ceases the complained of conduct if there is a possibility of recurrence, since otherwise the defendant would be free to return to his old ways. *Id*. Further, "[v]oluntary cessation of challenged conduct moots a case . . . only if it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (internal quotation marks omitted); *see also Accusearch*, 570 F.3d at 1202 (injunctive relief appropriate where defendant "had the capacity to engag[e] in similar unfair acts or practices in the future") (internal quotation marks omitted).

A permanent injunction is warranted here. Defendants displayed a cavalier disregard for the law in their online lending and collection practices throughout the country. They are subject to numerous state cease and desist orders or investigations. Their ignorance of the laws relating to credit practices (even though they operate as a lender) coupled with their everyone-else-is-doing-it-so-why-can't-we attitude[6] demonstrates a likelihood of future violations. Further, by their own admission they knowingly misrepresented their ability to use the DCIA to garnish consumers' wages from unsuspecting employers. Had FMS not contacted them in October 2009, Defendants likely would still be using their deceptive letter. Therefore, to protect the

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[6] In their interrogatory response explaining their good faith defense, Defendants explain "[w]e took the wording for our procedure from the public website of another lender. Because it was used publicly, we thought it legal." (PX02 at 2.)

public from Defendants' further violations of the FTC Act, the FDCPA, and the Credit Practices Rule, a permanent injunction extending to their activities throughout the United States is necessary and appropriate.

1. Ban on the Use of Wage Assignment Clauses

Section I of the proposed final order permanently bans Defendants from using wage assignment clauses or assisting others who do.[7] As the FTC found when promulgating the Credit Practices Rule, the use of wage assignment clauses is particularly harmful to consumers. Although the Credit Practices Rule does provide for use of such clauses in certain limited contexts, Defendants have demonstrated an inability to use the clauses legally. A permanent ban, therefore, is necessary and appropriate here to protect consumers from future harm.[8]

2. Further Prohibited Business Activities

The proposed order also would prohibit Defendants from engaging in certain business activities relating to future extensions of credit or collection of debts. Section II would prohibit

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[7] Courts have endorsed permanent bans in numerous judgments involving the FTC, *see, e.g.*, *FTC v. Dinamica Financiera LLC*, 2010 U.S. Dist. LEXIS 88000, at *59 (C.D. Cal. Aug. 19, 2010) (unpublished) (ban on mortgage loan modification and foreclosure relief services); *FTC v. Check Investors*, 2005 U.S. Dist. LEXIS 37199 (D.N.J. Jul. 18, 2005) (unpublished), *aff'd*, 502 F.3d 159 (3d Cir. 2007) (ban on check collection activities); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (ban on marketing employment goods and services); *FTC v. Micom Corp.*, 1997 U.S. Dist. LEXIS 3404, at *10-11 (S.D.N.Y. Mar. 12, 1997) (unpublished) (ban on marketing or selling permit application preparation services); *Wilcox*, 926 F. Supp. at 1103 (ban on direct mail marketing); *FTC v. NCH, Inc.*, 1995 U.S. Dist. LEXIS 21096, at *8-9 (D. Nev. Sep. 6, 1995) (unpublished) (ban on telephone premium promotions), *aff'd*, 106 F.3d 407 (9th Cir. 1997); *FTC v. Publishing Clearing House, Inc.*, 1995 U.S. Dist. LEXIS 19659, at *10-11 (D. Nev. May 12, 1995) (unpublished) (ban on telephone premium promotions), *aff'd* 104 F.3d 1168 (9th Cir. 1997).

[8] Defendants would not be precluded from ever attempting to garnish the wages of non-paying consumers. Nothing in the proposed order would prohibit Defendants from going into state court to seek an appropriate writ of garnishment.

Defendants from making false or deceptive representations in connection with the extension of credit to consumers. Section II would also require Defendants to comply with the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and its implementing Regulation Z, 12 C.F.R. Part 226, fundamental laws governing the extensions of credit to consumers. Section III would prohibit Defendants from violating the Credit Practices Rule. Section IV would prohibit Defendants from engaging in specific deceptive or unfair collection practices, such as (1) making false or deceptive representations in connection with the collection of debts, and (2) contacting consumers' employers unless they are seeking location information or pursuant to a valid court order of garnishment. Section VI would prohibit Defendants from violating the FDCPA.

In effect, the proposed injunctive provisions would simply prohibit Defendants from engaging in practices that already are unlawful under Section 5 of the FTC Act, the FDCPA, and the Credit Practices Rule. These injunctive provisions bear a reasonable relation to Defendants' unlawful practices, yet are framed broadly enough to prevent Defendants from engaging in the same or similar illegal practices in the future. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the [FTC] Act, respondents must expect some reasonable fencing in."); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (reasonable fencing-in provisions serve to "close all roads to the prohibited goal, so that [the FTC's] order may not be by-passed with impunity").

3. Monitoring Provisions

The proposed order also contains various provisions courts have imposed in orders obtained in other FTC actions designed to ensure enforceability: a provision permitting the FTC to monitor Defendants' compliance with the order through access to their business premises to inspect records and interview employees, or by posing as consumers to monitor representations, or through procedures prescribed by the Federal Rules of Civil Procedure (Section IX); a provision requiring Defendants to notify the FTC of any changes in their employment or residence status (Section X); a provision requiring maintenance of records (Section XI); and an order distribution requirement (Section XII).

It is well settled that these types of monitoring provisions are proper to ensure compliance with the ban requirement and the other permanent injunctive provisions discussed above. *See, e.g., FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202 , 213 (D. Mass. 2009) ("Courts have also included monitoring provisions in final orders in FTC cases to ensure compliance with permanent injunctions"); *Think Achievement*, 144 F. Supp. 2d at 1018 ("Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction"); *SlimAmerica*, 77 F. Supp. 2d at 1276 (holding that record-keeping and monitoring provisions were appropriate to permit the FTC to police the defendants' compliance with the order); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753-54 (N.D. Ill. 1992) (indicating that monitoring by the FTC may be necessary to ensure adequate compliance); *see also Dinamica Financiera*, 2010 U.S. Dist. LEXIS 88000, at *65-73 (order containing similar monitoring provisions).

B. <u>The Proposed Monetary Relief</u>

Section VIII of the proposed order contains a provision for monetary relief against Defendants. Specifically, the FTC seeks a judgment against Defendants, jointly and severally, in the amount of $3,013,044.[9]

Section 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant monetary relief. *Freecom*, 401 F.3d 1202, n.6. The FTC seeks an order requiring Defendants to disgorge their ill-gotten gains to prevent unjust enrichment from law violations and to deter future law violations. As such, disgorgement is an important tool under Section 13(b) in enabling the FTC to enforce consumer protection laws. *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997); *see also SEC v. Cavanaugh*, 445 F.3d 105, 116-17 (2d. Cir. 2006) (discussing history of disgorgement as remedy in equity); *United States v. Maxxon, Inc.*, 465 F.3d 1164 (10th Cir. 2006) (noting that disgorgement is remedial not punitive).

Disgorgement should include "all gains flowing from the illegal activities." *FTC v. Neovi, Inc.*, 2009 U.S. Dist. LEXIS 649, at *29-30 (S.D. Cal. Jan. 7, 2009) (unpublished) (*citing SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006)). Expenses are not deducted because to do so would be unjust. *Wallenbrock*, 440 F.3d at 1114. Instead, total revenue is the appropriate measure of disgorgement.[10] *Neovi*, 2009 U.S. Dist. LEXIS 649 at

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[9] Section V of the order would prohibit Defendants from attempting to recollect monies already obtained from consumers but disgorged by the proposed order. Disgorgement would lose its deterrent effect if Defendants could, even using legal means, recollect those monies.

[10] Whether or not any consumer is entitled to redress is immaterial for, once a violation has been established, "the district court possesses the equitable power to grant disgorgement without (continued...)

*29-30. In calculating total revenue, the Court has "broad discretion," and needs only a "reasonable approximation." *Id.* The burden then shifts to Defendants "to show that those figures were inaccurate." *Febre*, 128 F.3d at 535 (holding that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty").

As discussed, Defendants' revenues from their illegal payday lending and collections practices were $3,013,044. This, then, is the appropriate amount of disgorgement. Further, Defendants are jointly and severally liable for this amount. *Windward Mktg.*, 1997 U.S. Dist. LEXIS 17114 at *44 (holding individuals and corporations jointly and severally liable for violations of the FTC Act).

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[10] (...continued)
inquiring whether, or to what extent, identifiable private parties have been damaged by. . . fraud." *SEC v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985).

V. CONCLUSION

For the reasons set forth above, the FTC respectfully requests that the Court enter the proposed Preliminary Injunction to halt Defendants' violations of the FTC Act, the FDCPA, and the Credit Practices Rule.

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Respectfully submitted,

WILLARD K. TOM
General Counsel

/s/Gregory A. Ashe
CHRISTOPHER KOEGEL
STEPHANIE ROSENTHAL
GREGORY A. ASHE
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-3158
Washington, DC 20580
(202) 326-2761 (Koegel)
(202) 326-3332 (Rosenthal)
(202) 326-3719 (Ashe)
(202) 326-3768 (facsimile)
Email: ckoegel@ftc.gov, gashe@ftc.gov,
srosenthal@ftc.gov

CARLIE CHRISTENSEN (Utah Bar No. 633)
United State Attorney
JEANNETTE F. SWENT (Utah Bar No. 6043)
Assistant United States Attorney
185 South State Street, Suite #300
Salt Lake City, UT 84111
(801) 524-5682 (telephone)
(801) 524-6924 (facsimile)
Email: jeannette.swent@usdoj.gov

:

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION