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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 vs.

18 AMERICAN FINANCIAL BENEFITS CENTER,
19 a corporation, also d/b/a AFB and AF STUDENT
20 SERVICES;

21 AMERITECH FINANCIAL, a corporation;

22 FINANCIAL EDUCATION BENEFITS CENTER,
23 a corporation; and

24 BRANDON DEMOND FRERE, individually and
25 as an officer of AMERICAN FINANCIAL
26 BENEFITS CENTER, AMERITECH
27 FINANCIAL, and FINANCIAL EDUCATION
28 BENEFITS CENTER,

Defendants.

Case No. 18-cv-00806-SBA

Related Case: 4:17-cv-04817-SBA

**FEDERAL TRADE COMMISSION'S
REPLY IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

Date: May 9, 2018

Time: 1:00 p.m.

Location: Courtroom 210
1301 Clay Street, 2nd Floor
Oakland, CA 94612

Judge: Hon. Sandra Brown
Armstrong

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1 **I. INTRODUCTION**

2 Plaintiff has put forth evidence laying bare Defendants’ scheme. Defendants continue to
3 profit by misrepresenting that consumers qualify for plans that will permanently lower their
4 monthly loan payments and/or lead to loan forgiveness, and that consumers’ monthly payments
5 to Defendants will be applied towards consumers’ student loan balances. Plaintiff requests the
6 Court stop the continuing harm to consumers by granting its motion for preliminary injunction.¹

7 **II. A PRELIMINARY INJUNCTION IS NEEDED TO PREVENT ONGOING HARM**

8 Injunctive relief is needed to prevent ongoing harm during the pendency of litigation.²
9 Defendants would like the Court to believe that any possible wrongdoing is in their past. This
10 contention is belied by evidence showing ongoing bad conduct by Defendants. Moreover, even
11 if Defendants had ceased past illegal practices, voluntary cessation of past bad behavior is not
12 sufficient to avoid a preliminary injunction.

13 **A. Defendants Continue to Violate the FTC Act and the TSR**

14 Much of Defendants’ argument hinges on claims that they have improved their practices.
15 However, evidence shows that Defendants continue to (1) misrepresent their services and fees to
16 consumers, (2) mislead consumers regarding the appropriate family size to list on income-driven
17 repayment (“IDR”) program applications, and (3) benefit from their past deception.

18 **1. Defendants Continue to Misrepresent Their Services and Fees**

19 Defendants continue to misrepresent their services and fees in order to induce consumers
20 to enroll in their programs.³ When Defendants first discuss “program” payments with
21 consumers, Defendants lump together the document preparation fee, the membership enrollment
22

23 ¹ Declarations are cited by the last name of the declarant and the paragraph of the declaration, or
24 by reference to the specific attachment. The declaration of Kelly Ortiz submitted with this Reply
is referenced as “Ortiz II.”

25 ² While Plaintiff believes that the Court has the necessary information to rule based on the
26 evidence submitted, if the Court would like to hear witness testimony at the PI hearing, Plaintiff
suggests that limiting each side to two witnesses would allow sufficient testimony without overly
taxing the Court’s time.

27 ³ One client who enrolled with Defendants *earlier this month* was given the impression that
28 Defendants would pass along his payments to his loan servicer and was surprised to learn that he
was enrolled in a “financial education” membership program. Belnap ¶¶ 9-10, 12.

1 fee, the monthly “financial benefits” membership fee, and the escrow account management fee,
 2 along with the consumer’s projected student loan payment.⁴ Only later in the lengthy enrollment
 3 calls do the sales agents break down these fees (if they do so at all).⁵

4 Indeed, Defendants’ *own* evidence demonstrates that they fail to disclose the FEBC
 5 program to consumers. Neither of the scripts that Defendants provided to the Court includes
 6 language explaining the FEBC program or treating the FEBC program as an “optional upsell.”⁶
 7 In the call recordings and transcripts selected by Defendants as examples of their fulsome
 8 disclosures, sales representatives consistently fail to provide consumers with details about the
 9 FEBC program.⁷ Defendants have also never advertised their “financial education” benefits
 10 program in their mailers and do not mention the program on their website.⁸ Consumers are not
 11 expecting to be enrolled in such a program when they call for student loan assistance.

12 2. Defendants Continue to Mislead Consumers Regarding Family Size

13 The FTC has shown that Defendants have misled consumers about who may be included
 14 in their “family size” on IDR program applications.⁹ Defendants have continued this practice.¹⁰
 15 An unknown numbers of consumers may be unwittingly enrolled in an IDR program for which
 16 they do not qualify. This Court should take action to stop Defendants from improperly enrolling
 17

18 ⁴ Vorhis Ex. 14 at 15:10-19:4, Ex. 16 at 10:25-14:25, Ex. 18 at 25:3-26:15; *see* Ortiz II Atts. I, J
 19 at 19:10-13 (trainer instructs trainee: “It’s not *our* program, it’s *the* program.”).

20 ⁵ *See, e.g.*, Vorhis Ex. 16 (Sales agent provides consumer with combined payment amounts at
 page 12 of the transcript, but does not break this down into its components until page 44.).

21 ⁶ In Cutter Ex. 3, “FEBC” is mentioned first at page 10 of 12. In Cutter Ex. 4, “FEBC” is
 22 mentioned first at page 3 of 3. Neither script includes a description of the program. Until
 recently, the FEBC website represented that it provided benefits through New Benefits. Ortiz II
 23 Att. N. But, since August 2017, FEBC has enrolled only 6 people. Vasquez ¶¶ 2, 4, Att. A.

24 ⁷ Vorhis Ex. 14 at 17:20-18:2, 43:9-24 (Consumer is told that monthly FEBC program fee goes
 to “Ameritech Financial”; discussion of the program late in the call is limited to a reference to
 25 “the membership benefits portion of our company.”), Ex. 16 at 12:17-13:16, 44:11-45:5 (Sales
 agent lumps FEBC monthly fee into “program” costs; there is no substantive discussion of the
 26 program.), Ex. 30 at 10:16-11:4 (FEBC program referenced as a free perk: “part of our service,
 you also get a, a, an account that’s basically set up with LifeLock identity theft protection . . .”).

27 ⁸ Bussewitz Att. A; Holmes Att. A; Ortiz II ¶ 7, Att. D, Ortiz Atts. O-Q, S; Stiner Atts. F- H, QQ.

28 ⁹ PI Mot. at 7-8; *see infra* 12 n.57.

¹⁰ Belnap ¶ 7 (declaration of consumer enrolled with Defendants on April 2, 2018).

1 more consumers.¹¹

2 Defendants cannot be trusted to provide consumers with accurate information about the
3 family size definition.¹² Although Defendants contend that their sales representatives read only
4 what is in the sales scripts, the evidence shows otherwise. Defendants' former employees reveal
5 that Defendants trained and encouraged sales agents to manipulate clients into providing an
6 inflated family size.¹³ Defendants' own evidence demonstrates this practice. In a compliance
7 audit cited by Defendants in their Opposition, the sales agent was congratulated because he
8 apparently "[g]ave good examples" of family size, even though Defendants' script does not
9 provide any examples.¹⁴ This audit supports the ample evidence showing that Defendants' sales
10 representatives routinely embellished the script and told consumers that they could include
11 *nearly anyone* as a family member in their IDR program applications.¹⁵

12 **3. Defendants Continue to Collect Funds From Deceived Consumers**

13 Defendants continue to receive monthly payments for their "financial education" program
14 from consumers enrolled in the past by AFBC and FEBC. As Plaintiff demonstrated in its
15 Motion for Preliminary Injunction ("PI Motion"), Defendants induce unknowing consumers to
16 enroll in these "financial education" programs and continue to charge consumers monthly for the
17 life of their loans.¹⁶ Defendants thus continue to collect money from consumers who they misled
18 months or years ago. Without the requested receiver – with authority to assess whether and to
19

20 ¹¹ "[S]tudent loan servicers questioned the family size figures for some of Ameritech's clients
and were denying applications right and left." Kinney ¶ 10.

21 ¹² Even sales representatives who Defendants laud in their Opposition mislead consumers
22 regarding family size. Vorhis Exs. 13 and 14 show a call between sales agent Michael Becerra
23 and a consumer. Ortiz II Atts. E and F include an enrollment call between a consumer and
24 "Michael," the sales agent. The sales agent's voice on this recording sounds to be the same as
that in Vorhis Ex. 13. The sales agent states: "So, for example, me and my wife, we live alone
and we do not have any children, but I claim a family size of nine because I donate to afterschool
programs to help my cousins out." Ortiz II Att. F at 11:2-12:5; *see* Ortiz II Att. H at 8:10-11:16.

25 ¹³ Ortiz II Att. J at 7:23-8:9 (in a recorded training session, the trainer instructs the trainee to
26 "[j]ust say yes" in a situation where a consumer asks if they can count a certain person in their
family size); Cretcher ¶ 7; Stalick ¶¶ 6-8; Zaorski ¶ 6; Hamilton ¶¶ 10-11; Martinez ¶¶ 8-9.

27 ¹⁴ *Compare* Gangnath Ex. 1 at 1, *with* Cutter Ex. 3 at 2, *and* Cutter Ex. 4 at 2.

28 ¹⁵ Gangnath Ex. 1 at 1; *see infra* 12 n.57; Ortiz II Att. F at 11:2-12:5.

¹⁶ PI Mot. at 10-12.

1 what extent these charges are appropriate – Defendants will continue to reap unjust rewards.

2 **B. Voluntary Cessation Is Not Sufficient to Avoid a Preliminary Injunction**

3 A preliminary injunction would be necessary even if Defendants had in fact ceased their
4 unlawful practices. To avoid injunctive relief, Defendants “must show that subsequent events
5 have made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected
6 to recur.”¹⁷ *See Affordable Media*, 179 F.3d at 1238 (internal quotations and alteration omitted).
7 Their Opposition falls far short of this “stringent” burden. *See id.* Voluntary cessation “is
8 unlikely to moot the need for injunctive relief [because] the defendant could simply begin the
9 wrongful activity again.” *Id.* True to that principle, Defendants here could reinstate their
10 allegedly abandoned – and presumably more lucrative – practices virtually overnight.¹⁸

11 On top of that, Defendants made the bulk of their claimed improvements to their
12 marketing only after learning of the FTC’s investigation. “As such, any cessation on the part of
13 [Defendants] can hardly be considered ‘voluntary.’” *See FTC v. Sage Seminars, Inc.*, 1995-2
14 Trade Cas. (CCH) ¶ 71,256, 1995 U.S. Dist. LEXIS 21043, at *16 (N.D. Cal. 1995).¹⁹

15 Defendants’ past conduct also weighs heavily against them. As the Ninth Circuit has
16 observed, “An inference arises from illegal past conduct that future violations may occur.” *SEC*
17 *v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978); *see also SEC v. Mgmt. Dynamics*,

19 ¹⁷ Contrary to Defendants’ assertion (*see Opp.* at 22), the FTC proceeds here under the second
20 proviso of Section 13(b). 15 U.S.C. § 53(b). Cases brought under this proviso are not subject to
21 the conditions set forth in the first proviso of Section 13(b) for the issuance of a preliminary
22 injunction in aid of administrative proceedings. *FTC v. H.N. Singer*, 668 F.2d 1107, 1111 (9th
23 Cir. 1982). In such cases, “it is actually well-settled ‘that an action for an injunction does not
24 become moot merely because the conduct complained of was terminated, *if there is a possibility*
25 *of recurrence*, since otherwise the defendant[s] would be free to return to [their] old ways.’”
26 *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1237 (9th Cir. 1999) (emphasis original)
27 (quoting *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)).

28 ¹⁸ Indeed, there is some limited evidence that Defendants have explored ways to continue their
violative practices. Kinney ¶ 14. There is also some evidence indicating that Defendants
maintain offices outside of the United States. Martin ¶ 8; Ortiz Att. X at 2. Without a receiver,
Defendants might be able to continue bad practices through their foreign outposts.

¹⁹ *FTC v. Your Magazine Provider, Inc.*, No. CV 08-64-M-DWM, 2009 WL 10677698 (D. Mont.
2009), did not weigh “prior corrective actions,” *see id.* at *2–4 (FTC failed to show likelihood to
succeed on merits), and the facts relating to the alleged no-cancellation policy are irrelevant here.

1 *Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) (“[T]he commission of past illegal conduct is highly
2 suggestive of the likelihood of future violations.”).

3 **III. PLAINTIFF HAS MET THE STANDARD FOR A PRELIMINARY INJUNCTION**

4 The parties agree that, to obtain a preliminary injunction, the FTC must show a likelihood
5 of success on the merits and that the equities weigh in favor of granting the relief requested.²⁰
6 Plaintiff has met this threshold. Moreover, the relief requested by Plaintiff is appropriate given
7 the allegations and supporting evidence. Finally, none of Defendants’ baseless arguments about
8 the timing of this action impacts the Court’s ability to order the requested relief.

9 **A. Plaintiff Is Likely to Succeed on the Merits**

10 **1. Defendants’ Misrepresentations Violate the FTC Act and the TSR**

11 Plaintiff is likely to prevail on the merits in showing that Defendants have made repeated
12 material misrepresentations to consumers. Plaintiff has submitted compelling evidence showing
13 that Defendants have deceived consumers regarding at least two aspects of their business: (1)
14 that consumers qualify for plans that will permanently lower their monthly loan payments and/or
15 lead to loan forgiveness; and (2) that consumers’ monthly payments to Defendants will be
16 applied towards consumers’ student loan balances.²¹ These misrepresentations violate the FTC
17 Act’s bar on “deceptive acts or practices in or affecting commerce” and the Telemarketing Sales
18 Rule’s (“TSR”) provisions prohibiting debt relief sellers or telemarketers from misrepresenting
19 any material aspect of their services. 15 U.S.C. § 45(a); 16 C.F.R. §§ 310.3(a)(2)(vii), (x).

20 Defendants dismiss the overwhelming evidence of wrongdoing by arguing that the FTC
21 has shown merely that “a few” customers were deceived, not that it was happening “on the
22 whole.”²² However, the FTC’s evidence shows pervasive problems with Defendants’ print ads,
23

24 ²⁰ PI Mot. at 16; Opp. at 16.

25 ²¹ Cretcher ¶¶ 8-10 (“The cost for our program was approximately \$50 a month . . . Consumers
26 thought that this fee was for not having to make their student loan payments.”); Zaorski ¶¶ 8-9
27 (“Nor did the script clearly state to clients whether any of their money went to loan payments.”);
28 Martin ¶ 5 (“We were encouraged to hide in the jargon, the fact that none of the payment was
actually going to the loan servicer.”).

²² See Opp. at 21.

1 sales calls, treatment of family size, and disclosure of FEBC fees.²³ Defendants’ own evidence
 2 undermines their position – they admit that **10% of their customers request refunds**.²⁴ Given
 3 that many consumers do not learn of Defendants’ misrepresentations for months or years, one
 4 can presume that even more consumers would be displeased if they were made aware of
 5 Defendants’ scheme. Defendants’ figures also indicate that over 20,000 of their consumers have
 6 not been enrolled in any government loan program.²⁵ This is more than half of the clients the
 7 Corporate Defendants have worked with over their lifetimes.

8 **a) Defendants’ Disclaimers Are Insufficient**

9 Defendants do not cure their misrepresentations with the supposed disclaimers in their
 10 contracts, on their website, or during the “verification” portion of their enrollment calls. Each of
 11 these methods is legally insufficient.²⁶ Moreover, as demonstrated by the hundreds of
 12 complaints from consumers who believed Defendants’ misrepresentations, Defendants’ late
 13 disclaimers are ineffective.²⁷ *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir.
 14 2006) (Proof that representation actually deceived consumers is “highly probative to show that a
 15 practice is likely to mislead consumers acting reasonably under the circumstances.”).

16 **(1) Buried and Unclear Contract Disclaimers**

17 During the enrollment calls, Defendants email consumers lengthy contracts and pressure
 18 them to sign the documents electronically.²⁸ It is not plausible that consumers are able to read
 19 the fine print while being rushed through the document during a call.²⁹ Even if consumers were

20 ²³ PI Mot. at 5-12; Ortiz II Atts. A, C (providing additional and new consumer complaints).

21 ²⁴ Novak ¶ 8; *see also United States v. Brien*, 617 F.2d 299, 307-08 (1st Cir. 1983) (where
 22 misleading sales techniques are at issue, actual consumer complaints represent only the “tip of
 the iceberg” when it comes to consumer deception).

23 ²⁵ *See infra*, Section III.B.

24 ²⁶ In *FTC v. Sterling Precious Metals, LLC*, 894 F. Supp. 2d 1378 (S.D. Fla. 2012), the court
 25 focused on admissions by consumer witnesses indicating that they understood the allegedly
 undisclosed investment risks. *Id.* at 1383. This fact-specific analysis does not apply here.

26 ²⁷ Ortiz ¶ 48, Atts. EE-HH; Ortiz II Atts. A, C; Stiner Att. A.

27 ²⁸ Defendants repeatedly cite the same contract language to show that consumers understood that
 they needed to pay their loan servicers directly. Opp. at 7, 11, 12 n.52. This language is buried
 in the agreements. *See, e.g.*, Cutter Ex. 5 at 27; Archibald Att. B at 32.

28 ²⁹ *See, e.g.*, Cutter Exh. 3 at 12 (“[T]he software will advance you to the next area where you’ll
 need to apply your initials . . .”).

1 able to read the agreement, providing fine print disclosures after the initial deception (via the
 2 mailer and the sales call) is not sufficient to cure the FTC Act violation. *See Resort Car Rental*
 3 *Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044
 4 (C.D. Cal. 1999) (disclaimer in a contract that “consumers eventually sign” is insufficient as “the
 5 disclaimer is not included in the representations”), *aff’d*, 265 F.3d 944 (9th Cir. 2001); *FTC v.*
 6 *Alliance Document Prep.*, No. 17-7048, slip op. at *10-11 (C.D. Cal. Nov. 2, 2017).

7 Further, the fine print that Defendants rely on is confusing and unclear.³⁰ Nowhere does
 8 it say that the consumer needs to continue to pay their loan servicer. It simply states: “I AM
 9 RESPONSIBLE FOR MAKING MY PAYMENTS.” However, consumers *did* believe they
 10 were making their loan payments when they paid Defendants;³¹ this contract language, even if
 11 read, would not have alerted them otherwise.

12 (2) Ineffective Website Disclaimers

13 Defendants also point to their website disclosures to relieve them of culpability.³² Yet,
 14 Defendants admit that their mailers, not their website, are their primary source of consumers.³³
 15 For the vast majority of Defendants’ time in business, their mailers gave only a phone number,
 16 and did not provide the company name or website,³⁴ preventing consumers from visiting
 17 Defendants’ website prior to their initial enrollment call.

18
 19
 20 ³⁰ Defendants repeatedly cite excerpted disclaimer language; the full sentences state:
 21 **“I HEREBY ACKNOWLEDGE THAT I HAVE NOT BEEN ADVISED BY AMERITECH**
 22 **FINANCIAL, ANY OF ITS AGENTS, AND/OR AFFILIATES TO FOREGO A**
 23 **STUDENT LOAN PAYMENT IN EXCHANGE FOR THE GOOD FAITH PAYMENT**
 24 **AND FEDERAL STUDENT LOAN CONSOLIDATION PROGRAM. DURING THIS**
 25 **PROCESS, I AM RESPONSIBLE FOR MAKING MY PAYMENTS, AND FAILURE TO**
 26 **DO SO COULD DISQUALIFY ME/US FROM OBTAINING THE SERVICE THAT WAS**
 27 **AGREED UPON.”** Cutter Ex. 5 at 27 (emphasis in original).

28 ³¹ *See, e.g.*, Belnap ¶ 10; Carbonneau ¶ 5; Emerson ¶ 10; Olds ¶¶ 4-5; Sills ¶ 2, 4.

³² Defendants accuse Plaintiff of offering “inaccurate” evidence regarding a pop-up disclaimer
 on the Ameritech website. This is simply false. Ortiz Att. O is a video capture of the website
 and does indeed show the pop-up disclaimer on the website.

³³ Cutter ¶ 4.

³⁴ Cutter ¶¶ 4, 15 (Defendants added their name to their mailers in December 2017.), Ex. 1; Ortiz
 II ¶ 7, Att. D.

1 in retrieving funds from consumers' escrow accounts. A former employee stated that in 2017
 2 Defendant Frere asked her to participate in a "GCS Project," which aimed to enable Defendants
 3 to withdraw \$500,000 from consumers' Global Client Solutions escrow accounts.⁴¹ Defendant
 4 Frere instructed her and others to persuade 1,200 of Defendants' clients to sign a form stating
 5 that Ameritech had completed the promised work on their student loans, even if Defendants had
 6 performed no work on the consumer's file. She estimated that for 75% of these consumers,
 7 Ameritech had not completed work on the consumer's file.

8 **B. The Equities Weigh in Favor of a Preliminary Injunction**

9 The equities in this case weigh heavily in favor of preliminary injunctive relief.
 10 Defendants argue that the requested relief should be denied because of the possible impact on
 11 consumers.⁴² The FTC has no interest in leaving consumers, who have already been deceived by
 12 Defendants, without assistance. If Defendants' business can operate lawfully, a neutral receiver
 13 will not halt its activity.⁴³ However, if a receiver determines that Defendants' activities are
 14 unlawful, the Court should not let them continue. *CFTC v. British Am. Commodity Options*
 15 *Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) ("A court of equity is under no duty 'to protect
 16 illegitimate profits or advance business which is conducted [illegally].'" (quoting *FTC v.*
 17 *Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)). In that case, there would be numerous
 18 options to mitigate any potential disruption to consumers.⁴⁴

19 In any event, the extent to which Defendants are actually helping their clients is
 20 questionable. Defendants boast that Ameritech and AFBC have "helped" 39,068 borrowers, yet,
 21 only 19,048 clients have been enrolled in an IDR program.⁴⁵ It is unclear how Defendants
 22 "helped" the remaining 20,020 borrowers. And out of AFBC and Ameritech's 23,082 *current*

23 ⁴¹ The incident is discussed in the declaration of Danielle Kinney at paragraphs 5-8. Defendants
 24 terminated Ms. Kinney when she refused to cooperate with this project. *Id.* at ¶ 13.

25 ⁴² *Opp.* at 21-22.

26 ⁴³ *See infra*, Section III.C.

27 ⁴⁴ The FTC's proposed receiver has extensive experience with student loan debt relief
 28 companies. Notice of Proposed Receiver, Atts. A-B (Dkt. 23-1, 23-2). The Court could
 expressly instruct the receiver to contact current clients, suggest that they may need to contact
 their loan servicers directly, and provide them with information on how to do so.

⁴⁵ Knickerbocker ¶ 9

1 clients,⁴⁶ **over 41% have loans currently in forbearance.**⁴⁷ Defendants have not explained
 2 why such a high percentage of their clients' loans are in forbearance, or provided details about
 3 how long their clients' loans are generally left in forbearance. Some consumers are already in an
 4 IDR program when they call Defendants, and Defendants still enroll them in the "program."⁴⁸

5 C. The Requested Relief Is Appropriate

6 Defendants overstate the relief requested by Plaintiff. Plaintiff's Proposed PI Order
 7 requires that Defendants refrain from misrepresenting their services to consumers, comply with
 8 the TSR, preserve records, and disclose new business activity. Defendants have stated that they
 9 are already preserving their records. Disclosing new business activity should not cause undue
 10 burden. Compliance with the law is not an unreasonable encumbrance.

11 Plaintiff also asks the Court to appoint a neutral receiver as the Court's agent to assume
 12 control of Corporate Defendants, secure their assets, and assess and report on "whether the
 13 business[es] can be operated lawfully and profitably."⁴⁹ During the receiver's assessment, and
 14 afterwards if he determines that the businesses can be operated legally, the Corporate Defendants
 15 may continue to operate, including working on consumer files and paying employees.

16 It is crucial to the receiver's work that he be able to take control of Corporate
 17 Defendants' assets. This is not a "freeze." The receiver would have the ability to continue
 18 company operations. The receiver would also ensure that Corporate Defendants' funds, which
 19 may be needed to provide consumer redress, are not dissipated in the course of litigation.

20 ⁴⁶ Defendants indicate that there are 15,707 active clients enrolled in an IDR program, and an
 21 additional 7,375 active clients in forbearance during program enrollment. Knickerbocker ¶¶ 9,
 22 14(a). Defendants' Opposition states that they have 25,141 active clients, but it does not appear
 23 that this is supported by the underlying declaration. Opp. at 5.

24 ⁴⁷ It appears that 9,564 of Defendants' current clients are in forbearance. Defendants indicate
 25 that Ameritech and AFBC had 7,375 active clients in forbearance during the process of program
 26 enrollment. Knickerbocker ¶ 14(a). It appears that an additional 2,189 active clients are in
 27 forbearance during recertification for an IDR program (Defendants state that there are 15,707
 28 active clients successfully enrolled in an IDR plan, but only 13,518 active clients who are
actively enrolled in an IDR plan; the FTC deduces that the remaining 2,189 clients were at one
 time enrolled in an IDR program but are in forbearance pending recertification). *Id.* ¶ 9.

⁴⁸ Vorhis Ex. 14 at 10:24-11:3, 19:20-21 (consumer is already enrolled in an IDR program, yet
 the sales agent says that she "would benefit from--by being in the program," and enrolls her).

⁴⁹ Notice of Proposed Receiver Att. A at 3 (Dkt. 23-1); Proposed PI Order at 10-11 (Dkt. 22-1).

1 Plaintiff has shown that Defendant Frere has already spent large amounts of company assets for
 2 personal purposes, funneled money to family members and family businesses, and transferred
 3 millions of dollars into foreign accounts.⁵⁰ While Defendants complain that this information is
 4 “stale,” they neither provide updated information nor explain how expenses such as over \$19,000
 5 to a cruise line or over \$73,000 on custom wine tanks from a company owned by family
 6 members are related to their business.⁵¹ There is also reason to believe that Frere transferred
 7 over \$3.164 million from Corporate Defendants’ accounts to his personal account; Defendants
 8 do not rebut this.⁵² Provided the allegations against Defendants, there are sufficient indications
 9 of dissipation of assets for the Court to appoint a receiver with authority over Defendants’ assets.

10 **D. Defendants’ Timeliness Argument Is Without Merit**

11 Defendants argue, without legal support, that the Court should not order an injunction
 12 because such a request is “untimely.” Aside from the legal deficiencies of this assertion, the
 13 facts show that the FTC has conducted a diligent investigation. Defendants acknowledge that the
 14 FTC has been in “constant dialogue with the Companies for the last eight months.”⁵³ Plaintiff
 15 provided Defendants opportunities to explain their practices to staff, the then-Acting Director of
 16 the Bureau of Consumer Protection, and the FTC Commissioners.⁵⁴ In an effort to immediately
 17 curb consumer harm and preserve judicial resources, Plaintiff offered to enter into a Stipulated
 18 Preliminary Injunction.⁵⁵ Defendants waited until the last hour to reject this compromise.⁵⁶

19 _____
 20 ⁵⁰ PI Mot. at 23 nn.114-116, 24 nn.117 & 118, 25 n.120.

21 ⁵¹ George Att. H at 8 (two charges totaling \$19,673 to “PG Cruise Line – Dublin”); George ¶ 14,
 22 Att. G (showing payments of \$73,408 to Sonoma Stainless); Ortiz ¶ 15, Att. J (Andre Frere and
 23 Gloria Frere are officers); <http://sonomastainless.com/>.

24 ⁵² PI Mot. at 23 n.114.

25 ⁵³ Opp. at 24. Defendants also complain that a letter their counsel sent to the FTC went
 26 unanswered. The FTC received over 2.68 million pieces of correspondence last year and cannot
 27 write unique responses to each inquiry. Clark ¶ 3. The FTC has received numerous letters from
 28 Defendants’ counsel, and he has received form responses from the FTC in the past. *Id.* ¶¶ 4-5.

⁵⁴ Defendants met with then-Acting Director of the Bureau of Consumer Protection, Thomas
 Pahl, on October 19, 2017. Amended Complaint ¶ 30, *AFBC v. FTC*, No. 17-cv-04817 (N.D.
 Cal. Nov. 2, 2017) (Dkt 19). Defendants met with Acting Chairman Maureen Ohlhausen and
 Commissioner Terrell McSweeney on January 17, 2018. Ortiz II Att. K at 1.

⁵⁵ Ortiz II Att. L at 1-2, 64.

⁵⁶ Ortiz II Att. M.

1 Defendants took every opportunity to delay the FTC’s impending enforcement action and cannot
2 now claim that those few extra months have rendered the FTC’s evidence outdated.

3 **IV. DEFENDANTS OMIT AND OBSCURE KEY INFORMATION**

4 In their Opposition, Defendants omit and obscure information that is key to a full
5 understanding of their practices. In this section, Plaintiff highlights some of the crucial gaps.

6 **A. Defendants Ignore Their Misrepresentations Regarding Family Size**

7 Defendants largely ignore the voluminous evidence showing that their representatives
8 mislead consumers regarding who may be included in the family size reported to the government
9 on IDR applications. This is not a surprise, as the evidence lays out Defendants’ concerted and
10 egregious effort to manipulate consumers to overstate their family size.⁵⁷ Defendants train their
11 sales agents to give consumers inaccurate information.⁵⁸ Defendants do not claim to have
12 changed this practice.⁵⁹ The evidence shows that even when sales representatives rattle off the
13 scripted family size definition, the representatives then go on to use misleading examples and
14 inaccurate statements to persuade consumers that it is appropriate to inflate their family size.⁶⁰
15 When a consumer wavers, the sales representatives call in supervisors to finish the job.⁶¹

16 The data corroborates this point: Defendants’ clients’ applications provide family sizes
17 *significantly higher* than those provided by the general pool of borrowers who apply for IDR
18 programs. According to Defendants, the *average* family size for consumers enrolled in AFBC
19 and Ameritech programs over the last four years was: 6.03 (2015); 6.57 (2016); 5.05 (2017); and
20 4.3 (2018).⁶² In stark contrast, the average family size for all borrowers repaying loans under
21 ICR or IBR programs ranged between 2.11 and 2.47 as of November 11, 2016.⁶³

22
23 ⁵⁷ Belnap ¶ 7; Cretcher ¶ 7; Kinney ¶ 9; Ortiz II Atts. F at 11:2-12:5, H at 8:10-11:16, J at 7:23-
24 8:9 (training exercise); Stalick ¶¶ 6-8; Zaorski ¶ 6; Carbonneau ¶ 4; Hamilton ¶¶ 10-11, Att. A at
25 6; Martinez ¶¶ 8-9; Ortiz Atts. JJ at 12:15-13:1, LL at 11:9-14:10, 19:1-20:20, 25:2-6, XX at
26 9:13-10:23, 12:18 -13:21; Stiner Atts. L at L-18:4-19:5, DD at 18:12-20; Vildasol ¶ 5.

27 ⁵⁸ See *supra*, 3 n.13.

28 ⁵⁹ Defendants make only two passing references to “family size.” Opp. at 7.

⁶⁰ See *supra*, 12 n.57; Gangnath Ex. 1.

⁶¹ Stalick ¶¶ 5, 8.

⁶² Knickerbocker ¶ 11. Conspicuously absent are these figures for years prior to 2015.

⁶³ Foss at 8, ¶ 51(f).

1 **B. Defendants Advertise Primarily Through Deceptive Mailers**

2 Defendants claim they no longer contact potential clients via mailers.⁶⁴ This is
3 surprising, given that consumer complaints as recent as January 2018 indicate that Defendants
4 were scraping consumers' Facebook accounts to find pictures to use on personalized mailers.⁶⁵

5 Defendants do not mention how they currently contact prospective clients.⁶⁶ Defendants
6 do not provide any evidence indicating that their current methods of contacting consumers are
7 less deceptive than their previous mailers, or that they now advertise that Defendants also sell a
8 "financial education" program. Defendants merely assert that they have changed their practices,
9 and hope that the Court accepts this excuse.⁶⁷

10 **C. Defendants' Use of Scripts and Compliance Processes Are Flawed**

11 Defendants point to disclosures in their scripts and their claimed compliance processes to
12 show that they inform consumers about their services and fees. Defendants' scripts are largely
13 irrelevant in light of evidence showing that Defendants encouraged sales representatives to
14 obscure details about "the program" after a perfunctory reading of the materials.⁶⁸ Plaintiffs have
15 provided numerous examples where Defendants' sales agents added commentary outside the
16 script to mislead consumers.⁶⁹ Likewise, compliance audits are only useful if the auditors
17 accurately review calls and if Defendants correct any misstatements with deceived consumers.
18 Plaintiff has produced evidence of numerous calls with misstatements, and Defendants have not
19 claimed that these misrepresentations were caught by compliance auditors. In fact, even the
20

21 ⁶⁴ Opp. at 13.

22 ⁶⁵ Holmes ¶¶ 2-8 ("I felt scared that a random company had gone through my Facebook account.
23 [I]t made me feel like I was being stalked."), Att. A; Bussewitz ¶¶ 2-3, Att. A ("I was upset that a
24 company used my private photo without my permission."); Ortiz II Att. A at 16-17, 23.

25 ⁶⁶ This is important information given that mailers have been Defendants' primary method of
26 contacting consumers. Cutter ¶ 4.

27 ⁶⁷ Defendants state that they "almost immediately made the one requested change and included
28 the company's name on the mailer." Opp. at 13. However, in Defendants' December 29, 2016
letter to the FTC, the attached mailers *did* include the company name. Although Defendants sent
this version to the FTC in December 2016, it appears that mailers with Defendants' names
included were not actually sent out for another year. Vorhis Ex. 3 at 15-20; Cutter ¶ 15.

⁶⁸ See *supra*, 3 n.13.

⁶⁹ See *supra*, 12 n.57.

1 compliance audits that Defendants provided in their Opposition are problematic.⁷⁰ Further,
 2 Defendants have provided no evidence that, when they identify a misstatement by their sales
 3 representatives, they take corrective action to inform the consumer.

4 **D. Defendants Use Loan Servicers as Scapegoats**

5 Defendants want to make this a case about loan servicers. However, the focus of this
 6 case is *Defendants'* actions and misrepresentations, not the loan servicers' practices. Defendants
 7 add to borrowers' confusion by deceiving them about their loan payments. And it is Defendants,
 8 who charge unknowing consumers for a membership unrelated to their loans.

9 **E. Plaintiffs' Declarants Provide Valuable and Credible Evidence**

10 Defendants attempt to dismiss the FTC's voluminous evidence and numerous
 11 declarations as "misleading." While the declarations are credible and persuasive on their face,
 12 some of the attacks on the FTC's declarants warrant a brief discussion.

13 **1. The Better Business Bureau**

14 In his declaration, Daniel Stiner details the BBB's in-depth investigation into Defendants'
 15 business practices. The only defense that Defendants can mount to this compelling evidence is
 16 that "the Companies have primarily been based out of the Oakland BBB, and maintained an A
 17 rating (AFBC and FEBC) and a B+ rating (Ameritech)" Defendants' attacks do not
 18 diminish the hundreds of consumer complaints received by the BBB. Also, Defendants omit that
 19 *they applied for and sought to keep* accreditation with the Sacramento BBB.⁷¹ Finally, evidence
 20 shows that Defendants required consumers to withdraw BBB complaints in exchange for
 21 receiving a refund, which could have kept their rating artificially high.⁷²

22
 23 ⁷⁰ Defendants submitted a compliance audit with a "100%" score. Gangnath Ex. 2. Plaintiff
 24 identified the underlying call, submitted as Ortiz II Atts. G and H. The sales agent successfully
 25 encourages the consumer to double her family size from 2 to 4, by saying "you can state up to
 26 14," giving the consumer "options" for payments based on family sizes, and saying "giving gifts
 and like helping with bills every once in a while" is sufficient. Ortiz Att. H at 8:10-11:16. The
 sales agent references the FEBC program in passing, but does not make clear that the consumer
 is paying a monthly fee for a separate benefits program. *Id.* at 15:8-14, 16:14-15, 33:1-7.

27 ⁷¹ Stiner ¶¶ 28, 35, 49, 51-52, 56.

28 ⁷² *Id.* ¶¶ 22-23, Att. G. There is also evidence of false positive reviews submitted to the BBB.
 Ortiz ¶ 5, Att. B.

1 **2. Great Lakes**

2 Defendants offer no evidence negating Mr. Lee’s significant experience in and
3 understanding of the student loan industry. Nor do Defendants offer any credible attacks on the
4 authenticity of the consumer complaints attached to Mr. Lee’s declaration.⁷³

5 **3. Consumer and Former Employee Declarants**

6 The declarations of Defendants’ former employees and consumers tell a consistent story
7 – one where Defendants intentionally hide their fees, misrepresent their services, and inflate
8 family sizes, among other things.⁷⁴ Consumer call recordings and complaints submitted to the
9 Court also support the declarants’ descriptions of Defendants’ practices. The fact that the
10 company terminated some of the employee declarants does not make them less credible.⁷⁵
11 Defendants in fact have an incentive to terminate some employees to make a show of
12 compliance, while still reaping the benefits of those terminated employees’ sales.

13 Defendants largely rely on the electronically-signed agreements to impugn consumer
14 declarants.⁷⁶ For most of these declarants, Defendants merely point to the signed contract to
15 show they were duly informed about Defendants’ services. As explained above, these contract
16 disclosures are insufficient to cure Defendants’ misrepresentations.⁷⁷

17 **V. CONCLUSION**

18 The FTC respectfully requests the proposed Preliminary Injunction be issued to protect
19 the public from further harm and help ensure effective relief for those already harmed.⁷⁸
20

21 _____
22 ⁷³ Lee ¶¶ 1, 5, Atts. A-C.

23 ⁷⁴ Indeed, declarations from additional former employees also paint the same picture. *See*
24 Cretcher Decl., Kinney Decl., Martin Decl., Stalick Decl., Zaorski Decl.

25 ⁷⁵ Some former employees acknowledge they were terminated by Defendants. Dowdell Att A. at
26 2; Hamilton ¶ 3; Kinney ¶ 13. Further, Defendants provide extremely thin support for statements
27 regarding two former employees. *See* Farey ¶¶ 5-6.

28 ⁷⁶ Plaintiff withdraws the declaration submitted by Lenora Bowles in this matter. Plaintiff has
been unable to reach Ms. Bowles and has reason to believe that she is unavailable.

⁷⁷ *See supra*, Section III.A.1.a.(1).

⁷⁸ In the event the Court does not enter the Proposed PI Order, the FTC requests that the Court
consider lesser relief, such as appointing a receiver over FEBC only and requiring a letter to be
sent to Defendants’ clients advising them of the details of their enrollment.

