

SEALED



1 Willard K. Tom
General Counsel

2 Robin L. Moore
3 Benjamin J. Theisman
4 600 Pennsylvania Avenue, NW
5 Mailstop M-8102B
6 Washington, DC 20580
7 Telephone: (202) 326-2167, -2223
8 Fax: (202) 326-2558
9 Email: rmoore@ftc.gov, btheisman@ftc.gov

10 Blaine T. Welsh
11 Assistant United States Attorney
12 Nevada Bar No. 4790
13 333 Las Vegas Blvd. South, Suite 5000
14 Las Vegas, NV 89101
15 Telephone: (702) 388-6336
16 Fax: (702) 388-6787
17 Email: blaine.welsh@usdoj.gov

18 Attorneys for Plaintiff
19 Federal Trade Commission

20 UNITED STATES DISTRICT COURT
21 DISTRICT OF NEVADA

22 **FEDERAL TRADE COMMISSION,**

23 **Plaintiff,**

24 **vs.**

25 **MICHAEL BRUCE MONEYSMAKER, a/k/a
Bruce Money maker, Mike Smith, and Michael
Bruce Millerd, individually, as an officer and
director of the corporate defendants, and also
doing business as Fortress Secured,**

**DANIEL DE LA CRUZ, individually, as an
officer and director of the corporate
defendants, and also doing business as Fortress
Secured,**

**BELFORT CAPITAL VENTURES, INC., a
corporation,**

2:11-cv-00461-RLH -RJJ

[FILED UNDER SEAL]

1 **DYNAMIC ONLINE SOLUTIONS, LLC, a**
2 **limited liability company,**
3 **HSC LABS, INC., a corporation,**
4 **RED DUST STUDIOS, INC., a corporation,**
5 **SEASIDE VENTURES TRUST, individually**
6 **and as an officer and director of the corporate**
7 **defendants, and**
8 **JOHN DOE NO. 1, in his capacity as trustee of**
9 **Seaside Ventures Trust,**
10 **Defendants.**

11 **PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS *EX PARTE* MOTION FOR A**
12 **TEMPORARY RESTRAINING ORDER WITH ANCILLARY EQUITABLE RELIEF**
13 **AND A PRELIMINARY INJUNCTION**
14
15
16
17
18
19
20
21
22
23
24
25

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I. INTRODUCTION 1

II. STATEMENT OF FACTS 3

 A. Defendants’ Unauthorized Billing Practices 3

 B. Defendants’ Deceptive Refund Practices 8

 C. Parties to the *Ex Parte* TRO 11

 1. Michael Bruce Moneymaker 11

 2. Daniel C. De La Cruz 12

 3. Belfort Capital Ventures, Inc. 12

 4. Dynamic Online Solutions, LLC 13

 5. Seaside Ventures Trust 13

 6. John Doe No. 1 13

 7. HSC Labs, Inc. 14

 8. Red Dust Studios, Inc. 14

III. ARGUMENT 14

 A. An *Ex Parte* Temporary Restraining Order Is Proper 14

 1. The FTC is Likely to Prevail on the Merits 15

 a. The FTC is Likely to Establish That Defendants Engage in
 Unfair Billing 15

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Practices to Bill Consumers 17

c. The FTC is Likely to Establish That Defendants Deceptively
Omit Material Information to Bill Consumers 19

d. The FTC is Likely to Establish That Defendants Engage in
Deceptive Refund Practices 20

2. The Balance of Equities Favors Entering the TRO, Enjoining
Defendants’ Unlawful Practices 21

B. Moneymaker and De La Cruz are Individually Liable and Subject to Both
Injunctive and Monetary Relief 22

C. The Corporate Defendants Have Operated as a Common Enterprise and are,
Therefore, Jointly and Severally Liable and Subject to Injunctive Relief 24

D. An *Ex Parte* TRO, with Asset Freeze, Expedited Discovery, and Appointment
of a Temporary Receiver is Necessary to Prevent Defendants from Dissipating
Assets and Destroying Evidence 26

1. An *Ex Parte* TRO is Necessary to Ensure This Court Will be Able to
Grant Effective Relief 26

2. An Asset Freeze is Necessary to Prevent Defendants From Dissipating
Assets 27

3. Immediate Access to Business Premises and Expedited Discovery Are
Necessary to Preserve Evidence 28

4. A Temporary Receiver is Necessary to Preserve Assets and Evidence .. 29

IV. CONCLUSION 30

1 **I. INTRODUCTION**

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

19 Defendants’ deceptive conduct violates Section 5(a) of the Federal Trade Commission
20 Act (the “FTC Act”), 15 U.S.C. § 45(a). First, Defendants violate the Act by debiting consumer
21 bank accounts without knowledge or consent. Second, Defendants violate the Act by disguising
22 their so-called “authorization” as part of consumers’ payday loan application and by failing to
23 disclose to consumers that they will be charged for Defendants’ programs. Third, Defendants
24 violate the Act by misrepresenting to consumers that they authorized the charges and promising
25

1 refunds that never come.

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

14
15 ¹ According to corporate documents, the sole managing member of Dynamic is Seaside
16 Ventures Trust ("Seaside").

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

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

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

9 **II. STATEMENT OF FACTS**

10 **A. Defendants' Unauthorized Billing Practices**

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

17
18 ⁴ See, e.g., *FTC v. Ivy Capital, Inc.*, No. 11-00283 (D. Nev. Feb. 22, 2011) (*ex parte* TRO with
19 asset freeze, receiver, immediate access to business premises, and expedited discovery); *FTC v.*
20 *Johnson*, No. 10-2203 (D. Nev. Jan. 13, 2011) (TRO with asset freeze, receiver, and expedited
21 discovery); *FTC v. Grant Connect, LLC*, No. 09-01349 (D. Nev. July 28, 2009) (*ex parte* TRO
22 with asset freeze, receiver, immediate access to business premises, and expedited discovery);
23 *FTC v. Infusion Media, Inc.*, No. 09-01112 (N. Dev. June 24, 2009) (*ex parte* TRO with asset
24 freeze, receiver, immediate access to business premises, and expedited discovery); *FTC v. ERG*
Ventures, LLC, No. 06-00578 (D. Nev. Oct. 31, 2006) (*ex parte* TRO with asset freeze and
immediate access to business records); *FTC v. Global Net solutions, Inc.*, No. 05-0002 (D. Nev.
Jan. 3, 2005) (*ex parte* TRO with asset freeze and immediate access to business premises); *FTC*
v. 3rd Union Card Servs., Inc., No. 04-0712 (D. Nev. May 25, 2004) (TRO with asset freeze and
expedited discovery).

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

Personal Info

Full Name: [REDACTED]
 Date of Birth: [REDACTED]
 Main Phone: [REDACTED]
 Email: [REDACTED]
 License: [REDACTED]

Current Offer*

Min Loan: \$400
 Max Loan: \$800
 Rate: 22%

Best Offer*

Min Loan: \$500
 Max Loan: \$1000
 Rate: 18%

Financial Info

Employer: [REDACTED]
 Title: [REDACTED]
 Income: [REDACTED]
 Next Pay: [REDACTED]
 Bank Name: [REDACTED]
 SSN: [REDACTED]

Home

Address: [REDACTED]
 City: [REDACTED]
 State: [REDACTED]
 Zip: [REDACTED]
 Rent/Own: [REDACTED]

Terms and Conditions

Please choose an Authorization Process below

Voice Signature Mouse Signature

By checking this box and providing authorization with one of the methods above, you are stating that you have read, understand and agree to the terms and conditions of this site, including the third party trial offers that will automatically be extended to you with this application offer.

Rate shown is compounded monthly. Lender directly to borrower upon confer 0c26f7ad3513b082d935b16eacb7

will be provided by each individual

CONTINUE

Having technical issues with this popup?

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

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

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

14 Not surprisingly, in light of Defendants efforts to conceal their identity and disguise their
15 pop-up box, other consumers whose accounts are debited by Defendants simply do not recall
16 seeing Defendants’ pop-up box – or, indeed, any mention of Defendants – during their payday
17 loan application process. (FTC 4, Deorio Decl. ¶ 5 (“During the payday loan application process
18 I did not see any advertisements for third party offers”); FTC 11, Geohegan Decl. ¶ 3 (“I do not
19 recall seeing any advertisement or offer related to Select Platinum Credit”).)⁷ Consumers
20

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

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

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

9 That consumers are completely unaware they are being enrolled in Defendants’ programs
10 is highlighted by the testimony of a former employee, who attests that virtually every consumer
11 she spoke with was unaware how they were enrolled in the program for which they were charged
12 and that not a single consumer wanted to stay enrolled in the program. (FTC 2, Graham Decl. ¶¶
13 19, 24.) Indeed, this former employee recalls hearing of only one instance – over an eleven
14 month period – in which a consumer was interested in keeping the program – an event that was

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

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

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

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

11 Finally, consumers charged by Defendants do not receive any benefits from these so-
12 called programs. To even access Defendants’ websites, consumers need login credentials –
13 something they never receive. (FTC 11, Geohegan Decl. ¶ 5 (“I never received any information
14 explaining what this product was or could have been.”); FTC 7, Buchanan Decl. ¶ 13 (consumer
15 did not receive “Login Credentials”); FTC 15, Gushwa Decl. ¶ 11 (same).) For example, one
16

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

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

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

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

8 **B. Defendants' Deceptive Refund Practices**

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

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

21
22 ¹² For example, the telephone number provided for Uniguard is 877-890-1250 (FTC 4, Deorio
23 Decl. ¶ 7, Exh. A); for Freedom Subscription is 877-807-4709 (FTC 4, Deorio Decl. ¶ 7, Exh.
24 A); for Illustrious Perks is 877-754-3389 (FTC 15, Gushwa Decl. ¶ 5, Exh. A); for Select
25 Platinum Credit is 877-709-2811 (FTC 9, Dobson Decl. ¶ 4, Exh. A); and for Dynamic Online
Solutions is 877-325-4873 (FTC 14, LeBlanc Decl. ¶ 8, Exh. A); *see also* FTC 1, Goldstein
Decl. ¶ 84-88.

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

3 Those consumers lucky enough to actually speak to a representative encounter a string of
4 misrepresentations designed to avoid giving refunds. First, Defendants' "Standard Spiel" falsely
5 informs consumers that they authorized the charges complained of as part of a payday loan
6 application. (FTC 2, Graham Decl. ¶ 21, Exh. C; *see also* FTC 8, Climenson Decl. ¶ 9; FTC 1,
7 Goldstein Decl. ¶ 51; FTC 9, Dobson Decl. ¶ 5 (consumer told that she agreed to the offer
8 through an "affiliated website").¹⁴ Employees are also instructed not to offer refunds "if a
9 customer does not ask," FTC 2, Graham Decl. ¶ 12, Exh. B, at 2, and are forbidden from
10 informing customers when they are being charged for multiple programs. (FTC 2, Graham Decl.
11 ¶14.)

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

17
18 ¹³ In total, the FTC reviewed 793 unique complaints from consumers regarding Defendants'
unauthorized billing scheme. (*See* FTC 1, Goldstein Decl. ¶ 91.)

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

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

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

16 Finally, Defendants promise refunds that never come. Some consumers accept that
17 their money is gone and, once their promised refund does not arrive, simply abandon their
18 claim.¹⁵ Others begin anew the difficult process of contacting Defendants in an attempt to
19 recover their funds. However, despite multiple attempts – and, in some instances, additional
20 promises that their money will be returned – these consumers still do not obtain refunds and,
21
22

23 ¹⁵ See FTC 11, Geohegan Decl. ¶7 (consumer filed complaint with BBB and received
24 correspondence from Defendants promising refund, which never came); FTC 6, Radinsky Decl.
25 ¶¶ 5-6 (consumer promised refund but did not receive one); FTC 4, Deorio Decl. ¶¶ 9-10 (same).

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

12 C. Parties to the *Ex Parte* TRO

13 1. Michael Bruce Moneymaker

14 Michael Bruce Moneymaker a/k/a Bruce Michael Moneymaker, Bruce M. Moneymaker,
15 Michael Bruce Millerd, Mike Moneymaker, and Mike Smith is the hub connecting the Corporate
16 Defendants and programs. He is the current President, Secretary, Treasurer, and Director of
17 Belfort, the corporate entity responsible for enrolling consumers in Uniguard, Freedom
18

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

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

1 Subscription, Illustrious Perks, and Select Platinum Credit. (FTC 1, Goldstein Decl. ¶ 24.) He
2 was also previously a Director of HSC Labs and maintains an office at Red Dust, both of which
3 are located next to Belfort and paid the salaries of Belfort employees. (FTC 1, Goldstein Decl.
4 ¶¶ 32-33; FTC 2, Graham Decl. ¶¶ 3-5, 7.) In addition, doing business as Fortress Secured,¹⁸ he
5 pays for toll-free numbers used by Belfort and Dynamic, a newly-formed corporate entity
6 associated with Kryptonite Credit program. (FTC 1, Goldstein Decl. ¶¶ 30, 83, 87-88, Exh. VV.)

7 2. **Daniel C. De La Cruz**

8 Daniel De La Cruz manages the Belfort call center. From January 2010 to April 2010, he
9 maintained an office in the call center and managed its day-to-day operations – including
10 meeting with call center management several times a week, holding meetings to discuss call
11 center business, answering employees' questions, and listening in on telephone calls with
12 consumers. (FTC 2, Graham Decl. ¶¶ 6-8.) After April 2010, he no longer maintained an office
13 at the call center but continued to visit it and, according to a former employee, maintained a
14 supervisory role. (FTC 2, Graham Decl. ¶9.) In addition, De La Cruz is copied on
15 correspondence to the Better Business Bureau regarding consumer complaints for Defendants'
16 programs. (FTC 1, Goldstein Decl., Exhs. III, JJJ.) De La Cruz is also the current President and
17 Director of HSC, having replaced Moneymaker on the corporate filings in July 2009. (*Id.* at ¶
18 33.)

19 3. **Belfort Capital Ventures, Inc.**

20 Belfort is a Nevada corporation formed in 1997 and headquartered at 8668 Spring
21 Mountain Rd., Suite 101, Las Vegas, Nevada. (FTC 1, Goldstein Decl. ¶ 24.) Belfort runs a call
22

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

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

7 **4. Dynamic Online Solutions, LLC**

8 Dynamic, a Nevada Limited Liability Company formed in August 2010, debits consumer
9 bank accounts for Defendants' most recent scheme, Kryptonite Credit. (FTC 1, Goldstein Decl.
10 ¶ 83, Exh. VV.) Dynamic shares the same employees as Belfort¹⁹ and uses the same bank
11 account as Belfort to deposit consumer funds.²⁰ Like Belfort, Defendants deposit funds collected
12 from Kryptonite Credit into accounts held by Dynamic. (FTC 1, Goldstein Decl. ¶ 83, Exh.
13 VV.) Dynamic also shares the same address, a mail drop, as Freedom Subscription and
14 Uniguard, Belfort's programs. (FTC 1, Goldstein Decl. ¶¶ 30, 52; FTC 2, Graham ¶ 15, Exh. C.)

15 **5. Seaside Ventures Trust**

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

18 **6. John Doe No. 1**

19 Defendant John Doe No. 1 is the Trustee of Seaside and holds legal title to all of
20

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

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

1 Seaside's assets, including ownership of Dynamic.

2 **7. HSC Labs, Inc.**

3 HSC is a Nevada Corporation formed in March 2008. (FTC 1, Goldstein Decl. ¶ 32.)
4 Although HSC's Articles of Incorporation list two separate mailing addresses for the company, it
5 is physically located next to Belfort in a building Moneymaker owns. (FTC 1, Goldstein Decl.
6 ¶¶ 102-104; FTC 2, Graham Decl. ¶¶ 4-5.) HSC paid employees working in the Belfort call
7 center in 2009, when the call center was first created. (FTC 2, Graham Decl. ¶ 4.)

8 **8. Red Dust Studios, Inc.**

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

13 **III. ARGUMENT**

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

15 As the Ninth Circuit has repeatedly held, in evaluating whether to grant preliminary relief
16 in a government action, the Court need only consider the likelihood of success on the merits and
17 the "balance [of] the equities." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir.
18 1999); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989) (upholding
19 injunction and holding that before entering a preliminary injunction "the district court is
20 required: (i) to weigh [the] equities; and (ii) to consider the FTC's likelihood of ultimate
21 success"). Moreover, because "irreparable injury must be presumed in a statutory enforcement
22 action," the Court need only find "some chance of probable success on the merits." *World Wide*
23 *Factors*, 882 F.2d at 347 (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172,
24 176 (9th Cir. 1987)); *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 936 (N.D. Cal. 2010). Here,

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

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

11 **1. The FTC is Likely to Prevail on the Merits**

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

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

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

1 00022, 2010 WL 3789103, at *22-24 (N.D. Cal. Sept. 21, 2010) (granting summary judgment
2 and holding unauthorized billing both an unfair and deceptive practice); *FTC v. J.K. Publ'ns,*
3 *Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000); *FTC v. Windward Mktg., Ltd.*, No. Civ.A.
4 1:96-CV-615F, 1997 WL 33642380 at *10, 13 (N.D. Ga. Sept. 30, 1997).

5 In this case, substantial injury is clear. It is well settled that “an act or practice can cause
6 ‘substantial injury’ by doing a ‘small harm to a large number of people.’” *FTC v. Neovi, Inc.*,
7 604 F.3d 1150, 1157 (9th Cir. 2010); *Inc21.com*, 2010 WL 3789103, at *22; *see also, J.K.*
8 *Publ'ns*, 99 F. Supp. 2d at 1201 (“Injury may be sufficiently substantial it if causes small harm
9 to a large class of people.”). Here, thousands of consumers were charged on a recurring basis for
10 a product that they did not want and, indeed, did not receive. This consumer harm easily
11 satisfies the threshold for establishing substantial injury. *See Inc21.com*, 2010 WL 3789103, at
12 *22 (finding substantial injury where 97 percent of consumers charged by defendants “did not
13 agree to purchase defendants’ products”); *J.K. Publ'ns*, 99 F. Supp. 2d. at 1201 (holding that the
14 substantial injury satisfied where “consumers were injured by a practice for which they did not
15 bargain”).

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

1 have found that the harm suffered by consumers is not reasonably avoidable. *See J.K. Publ'ns*,
2 99 F. Supp.2d at 1203 (holding unauthorized billing unfair where, among other things, more than
3 50% of consumers contacting defendants claimed they had not ordered defendants' products and
4 defendants had significant chargeback rates). Indeed, in *Inc21*, which involved unauthorized
5 charges on telephone bills that consumers unwittingly paid, the court held that the high
6 percentage of customers who did not authorize or notice the charges supported a finding that
7 consumer harm was not reasonably avoidable. *Inc21.com*, 2010 WL 3789103, at *23. In
8 rejecting the defendants' argument that consumers could have simply disputed or refused to pay
9 the charges, the court noted that "the burden should not be placed on defrauded customers to
10 avoid charges that were never authorized to begin with." *Id.* This reasoning has even greater
11 force here, where consumers have no opportunity to reject Defendants' debits – and, indeed, it is
12 the very act of debiting that alerts consumers to Defendants' scheme.

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

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

21 Defendants tailor their business practices to disguise the so-called "authorization" for
22 their programs as part of a payday loan application process in violation of the FTC Act. An act
23 or practice is deceptive when "(1) 'there is a representation, omission, or practice' that (2) 'is
24 likely to mislead consumers acting reasonably under the circumstances' and (3) 'the
25

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

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

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

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

2 Finally, Defendants’ misrepresentation is material. A misrepresentation is material “if it
3 ‘involves information that is important to consumers and, hence, likely to affect their choice of,
4 or conduct regarding, a product.” *Cyberspace*, 453 F.3d at 1201 (citing *Cliffdale Associates Inc.*,
5 103 F.T.C. 110, 165) (1984)); *FTC v. EDebitPay, LLC*, No. CV-07-4880, 2011 WL 486260, at
6 *5 (C.D. Cal. Feb. 3, 2011) (“The representations were material because they involved the
7 essential nature of what Defendants were offering and therefore were likely to affect a person’s
8 choice regarding whether to accept the offer.”) (citing *Cyberspace.com*, 453 F.3d at 1201 and
9 *Pantron I*, 33 F.3d at 1095-96); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995)
10 (“Express claims or deliberately-made implied claims used to induce the purchase of a particular
11 product or service are presumed to be material.”) (citations omitted). Defendants’ false
12 representation that their pop-up box is part of consumers’ payday loan application makes it more
13 likely that consumers will provide the so-called “authorization.” Indeed, many consumers
14 explicitly state that they never willingly would have agreed to authorize enrollment in
15 Defendants’ programs – a fact underscored by the many consumers whose accounts are
16 overdrawn.²¹

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

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

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

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

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

17 Defendants make at least two misrepresentations designed to limit refunds and keep their
18 refund rate at 45 percent or less. First, Defendants falsely represent to complaining consumers
19 that they authorized the charges as part of a payday loan application. This misrepresentation is
20 likely to mislead consumers that they, in fact, did authorize the charges – especially since
21 Defendants link their misrepresentation to a process consumers actually experience. Indeed,
22 because consumers are not told of the charges, they have no recollection of rejecting them and
23 no basis to refute Defendants’ claim. Second, Defendants tell consumers that they will receive a
24
25

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

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

8 **2. The Balance of Equities Favors Entering the TRO, Enjoining** 9 **Defendants' Unlawful Practices**

10 The public interest in stopping Defendants' unlawful conduct and preserving assets to
11 enable this Court to enter effective final relief outweighs any private interest Defendants may
12 have in continuing a business rooted in fraud. When considering preliminary relief requested by
13 the Commission, the Ninth Circuit has stated on more than one occasion that "the public interest
14 should receive greater weight" than a litigant's private interest. *FTC v. World Wide Factors,*
15 *Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (citing *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156,
16 1165 (9th Cir. 1984)); *Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (same).
17 Here, there is a strong public interest in favor of "preventing the continued and future fraudulent
18 billing of unaware customers." *Inc21.com*, 688 F. Supp. 2d at 940.

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

23
24 ²² These falsehoods are repeated if consumers call back inquiring why their refund has not
25 come.

1 “prime concern” when there is a likelihood that defendants have violated the FTC Act. *FTC v.*
2 *Equinox Int’l Corp.*, No. CV-S-990969HBR (RLH), 1999 WL 1425373 at *10 (D. Nev. Sept. 14,
3 1999).

4 In contrast to these important public interests, Defendants have no legitimate interest in
5 continuing their unfair and deceptive practices. As the Ninth Circuit has confirmed, “there is no
6 oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from
7 fraudulent representation or preserve their assets from dissipation or concealment.” *World Wide*
8 *Factors*, 882 F.2d at 347.

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

11 Moneymaker and De La Cruz are individually liable for both injunctive and monetary
12 relief. Specifically, they participated in the deceptive acts described above or had the authority
13 to control the Corporate Defendants and are thus individually liable for injunctive relief. *See*
14 *FTC v. Publ’g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997). They also have knowledge
15 of the deceptive acts, are recklessly indifferent to them, or have “an awareness of a high
16 probability of fraud along with an intentional avoidance of the truth” and are thus liable for
17 monetary relief. *See id.* at 1171 ; *Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *FTC v. Network*
18 *Svcs. Depot, Inc.*, 617 F.3d 1127, 1139 (9th Cir. 2010); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d
19 564, 573-74 (7th Cir. 1989).

20 Moneymaker is liable for injunctive relief, because he has the ability to control Belfort –
21 the corporate entity that runs Defendants’ Las Vegas call center and into whose bank account the
22 unauthorized debits for Freedom Subscription, Illustrious Perks, and Select Platinum Credit are
23
24
25

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

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

15 Moneymaker is also monetarily liable because he has knowledge of Defendants'
16 deceptive practices, or – at a minimum – is recklessly indifferent to them. Belfort, a closely held
17 company that Moneymaker controls, operates with many indicia of fraud. First, Belfort uses
18 false addresses for its programs, uses a false address for its call center (the company's only
19

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

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

1 physical location), and, at times, has other companies controlled by Moneymaker or De La Cruz
2 pay its employees. Second, Defendants' programs – the names of which change every few
3 months – have generated hundreds of consumer complaints for unauthorized billing and have
4 uniformly received the Better Business Bureau's worst possible rank. (FTC 1, Goldstein ¶¶ 56,
5 60, 63, 79.) Third, the call center systematically misleads consumers in an effort to hold
6 Defendants' refund rate to 45 percent. Like De La Cruz, Moneymaker has been present at the
7 call center, even leading a meeting about the firing of the call center's manager, FTC 2, Graham
8 Decl. ¶ 6, and he supplies the call center's telephone numbers. It is inconceivable that
9 Moneymaker, who is the President, Secretary, Treasurer, and a Director of Belfort is not aware
10 of these practices and, at a minimum, is not recklessly indifferent to them, and thus is liable for
11 monetary relief.

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

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

23 Defendants Belfort, Dynamic, HSC, and Red Dust are jointly and severally liable
24 because they have operated as a common enterprise while engaging in the unfair and deceptive
25

1 acts and practices described above. Although courts look at a variety of factors to determine
2 whether corporate defendants have transacted business as a common enterprise, the central
3 inquiry is whether the companies have operated at arms' length or through a "maze of
4 interrelated companies." *See Del. Watch v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *accord J.K.*
5 *Publ'ns., Inc.*, 99 F. Supp. 2d at 1202 (C.D. Cal. 2000) (finding common enterprise where
6 corporate defendants were under common control; shared office space, employees, and officers;
7 and conducted their businesses through a "maze of interrelated companies"); *FTC v. Wolf*, No.
8 94-8119, 1996 WL 812940, at *7 (S.D. Fla. Jan. 31, 1996) (factors determining common
9 enterprise include "common control, the sharing of office space and officers, whether business is
10 transacted through a 'maze of interrelated companies,' the commingling of corporate funds and
11 failure to maintain separation of companies, unified advertising, and evidence 'which reveals
12 that no real distinction existed between the Corporate Defendants'" (internal citations omitted).

13 Here, the Corporate Defendants have shared officers,²⁵ employees,²⁶ office space, and
14 mail drops.²⁷ In addition, HSC and Red Dust have paid Belfort's call center employees. (FTC
15 2, Graham Decl. ¶ 4.) Taken together, these facts show that the Corporate Defendants have
16

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

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

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

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

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

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

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

11 An *ex parte* TRO is necessary because, if provided notice, Defendants are likely to
12 dissipate assets, hide assets, and destroy evidence. *See In re Vuitton Et Fils S.A.*, 606 F.2d 1, 5
13 (2d Cir. 1979) (mandating the district court grant an *ex parte* TRO because notice would "only
14 render fruitless further prosecution of the action"); Fed. R. Civ. P. 65(b)(1)(a) (providing for *ex*
15 *parte* relief when "immediate and irreparable injury, loss, or damage will result" upon notice).
16 Providing notice of the TRO to Defendants would, therefore, "defeat the very purpose for the
17 TRO." *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1987). *See*
18 *also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (holding that in cases involving
19 "the public interest" a court's equitable powers "assume a broader and even more flexible
20 standard" than in a case between private litigants, such that a court must rule to accord "full
21 justice"). Courts in this district have granted the FTC *ex parte* relief in many prior, similar
22 cases. *See, supra*, fn. 4.

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

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

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

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

19 Because Defendants are likely to dissipate assets upon notice of this suit, an asset freeze
20 is necessary to preserve the possibility of relief for the thousands of consumers Defendants have
21 harmed. *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) (holding that an asset freeze
22 is appropriate where there is "a likelihood of dissipation of the claimed assets, or other inability
23 to recovery monetary damages, if relief is not granted"). *See also Affordable Media*, 179 F.3d at
24 1236-37 (holding that past "spiriting" of commissions established likelihood of dissipation of

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

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

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

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

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

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

13 A temporary receiver is necessary to effectively freeze Corporate Defendants' assets,
14 preserve evidence, and ensure the business ceases to prey on consumers. When a corporate
15 defendant, through its management, has defrauded members of the public, "it is likely that, in the
16 absence of the appointment of a receiver to maintain the *status quo*, the corporate assets will be
17 subject to diversion and waste" to the detriment of the fraud's victims. *SEC v. First Fin. Group*,
18 645 F.2d 429, 438 (5th Cir. 1981). As shown above, Moneymaker and De La Cruz are likely to
19 liquidate assets, destroy evidence, and continue to injure consumers if given the opportunity. A
20 temporary receiver is necessary, therefore, to manage the business lawfully and to preserve
21 assets and evidence. Courts in this district routinely appoint temporary receivers in FTC
22 enforcement actions aimed at fraudulent business enterprises. *See, supra*, fn. 4.²⁸


23
24 ²⁸ The FTC recommends that the Court appoint Robb Evans & Associates receiver over the
25 Corporate Defendants for the reasons more fully stated in the accompanying Temporary

1 **IV. CONCLUSION**

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

6 Respectfully submitted,

7 Dated: 3/28/11
8 _____



9 ROBIN L. MOORE
10 BENJAMIN J. THEISMAN
11 600 Pennsylvania Avenue, NW, M-8102B
12 Washington, DC 20580
13 Telephone: (202) 326-2167, -2223

14 Attorneys for Plaintiff
15 FEDERAL TRADE COMMISSION
16
17
18
19
20
21
22
23

24 _____
Receiver Recommendation.