UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. CAPRICE MARKETING LLC, a Delaware limited liability company, *et al.*, Defendants.	C 1:13-cv-06072 Judge John Z. Lee Magistrate Judge Geraldine Soat Brown

FTC's Memorandum in Support of Its *Ex Parte* Application for a Temporary Restraining Order with Ancillary Equitable Relief and an Order to Show Cause Why a Preliminary Injunction Should Not Issue

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I. Introduction

The Federal Trade Commission asks this Court to put an immediate end to an enterprise that has withdrawn funds without authorization from the bank accounts of tens of thousands of consumers already hurting financially. Defendants obtain the information necessary to make these withdrawals by purchasing it from lead brokers, and through the operation of payday loan application websites that claim to assist cash-strapped consumers in securing short-term loans. Consumers who submit applications must provide a wealth of sensitive personal information, including their Social Security numbers and bank account information, which Defendants claim is necessary for loan proceeds to be electronically deposited into consumers' accounts.

Defendants do not help consumers obtain loans. Instead, Defendants simply use consumers' information to debit $30 from their bank accounts while providing absolutely nothing in return. Defendants have made repeated withdrawals from the accounts of the same victims, without notice or permission, frequently causing consumers to incur overdraft fees and even close their bank accounts to avoid further harm.

Defendants' conduct is nothing more than theft. Indeed, many victims of this scam have had no prior contact with Defendants. Instead, Defendants purchased the financial information of these consumers from lead brokers for the sole purpose of taking money from their accounts. Regardless of how Defendants acquired their information, consumers do not authorize these debits and, in most cases, only learn of them after reviewing their bank account statements. In just a few short months, Defendants' scheme caused well in excess of $5 million in consumer injury and generated nearly 1300

complaints from victimized consumers.[1] Although Defendants took down their lead generation websites in December 2012, the unauthorized withdrawals did not stop for many of the scam's victims. While it is unclear what role, if any, Defendants played in these ongoing withdrawals, consumer information in their possession remains severely compromised and must be protected from further misuse.

These practices violate the Federal Trade Commission Act in two ways. First, Defendants deceive consumers into disclosing their banking information by falsely claiming that this information will be used to obtain loans for consumers, and that four out of five applicants are quickly approved for such loans. Second, it is an illegal and unfair practice to debit consumers' bank accounts without permission. Whether or not they visited Defendants' websites, victims of this scam did not knowingly authorize Defendants to withdraw funds from their accounts.

It has not been an easy task to determine who is responsible for this conduct. Behind the maze of websites and corporations that make up this scam are two individuals – defendants Sean C. Mulrooney and Odafe Stephen Ogaga. Each played a role in a strikingly similar scam recently prosecuted by the FTC. *See FTC v. Ideal Financial Solutions, Inc. et al.*, No. 2:13-cv-00143 (D. Nev. Jan. 28, 2013).[2] They have concealed their involvement through the use of privacy-protected websites, a mail drop located

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[1] Defendants grossed at least $5.2 million from their scam. *See* PX 1, Einikis ¶¶ 25 & 45 (over $4 million in deposits from merchant processors and over $1.2 million in deposited checks), 72 (1288 complaints in the Consumer Sentinel database regarding Defendants). Assuming they took $30 twice from each of their victims, Defendants scammed at least 86,000 consumers, a figure that is likely much higher when the fees charged by Defendants' payment processor are taken into account.

[2] PX 1, Einikis ¶¶ 7-8, Att. B (invoice and correspondence showing Mulrooney and Ogaga sold leads to Ideal Financial Solutions).

thousands of miles away from their homes, and a network of ever-changing shell companies. This subterfuge makes it clear that, if given notice of the FTC's enforcement action, Defendants will likely destroy evidence or dissipate assets that should be preserved for consumer redress.

Accordingly, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the FTC seeks an *ex parte* TRO. The requested *ex parte* relief includes an asset freeze, limited expedited discovery, and an order to show cause why a preliminary injunction should not issue against Defendants. This relief would preserve the status quo so that the Court will have the ability to return money to the tens of thousands of victims of this fraud.

II. Defendants' Fraudulent Business Practices

Defendants' scheme plays on the growing number of online payday lenders and loan matching websites that claim to provide quick cash to consumers living paycheck-to-paycheck. According to the trade group that represents online lenders, legitimate participants in this industry do not charge an application or processing fee. They earn money from the interest charged on loans they issue, or, in the case of matching services, from commissions paid by lenders.[3] In other words, Defendants' $30 fee is a clear sign of fraud.

[3] PX 2, McGreevy ¶ 7 ("[L]egitimate online lenders or lead generators never charge [application or processing fees], and no entity that did charge such a fee would qualify for membership with OLA....Entities engaged in legitimate online lending or lead generation generate revenue primarily through interest charges or commission payments. Any other fees that may be charged would arise only after a loan has been approved, and those fees would be prominently disclosed to the Consumer.").

A. Collection of Consumer Data

Defendants operated at least seven websites that purported to make short-term loans available to consumers.[4] These sites remained active from approximately March through December 2012.[5] They were nearly identical in content and appearance.[6] They prominently featured claims that led visitors to believe they could obtain a loan either directly from Defendants or through a network of lenders affiliated with them. These claims included:

- Applying takes just minutes and approval is even faster! Get up to $1,000 as fast as 1 hour!
- Wake Up Tomorrow With An **Extra $1000** In Your Bank Account!
- Don't wait hours or even days to see if you're approved for your loan: 4 out of every 5 applicants is [sic] approved on the spot!
- Once the application is completed, you will receive your approval status instantly! If approved, you will receive the funds directly into your bank account the next day![7]

The pages that displayed these claims contained no disclosures about fees of any kind for participation in Defendants' loan matching service.[8] Indeed, other versions of Defendants' websites explicitly characterized the service as free.[9]

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[4] Defendants' websites used the following domain names: (1) vantagefundingapp.com; (2) idealadvance.com; (3) loanassistanceco.com; (4) palmloanadvances.com; (5) loantreeadvances.com; (6) pacificadvances.com; and (7) yourloanfunding.com. PX 1, Einikis ¶¶ 50 – 54 (websites registered to Mulrooney and Ogaga; Mulrooney paid for website hosting).

[5] PX 1, Einikis ¶ 50.

[6] *Id.* ¶ 50, Atts. V, Y & Z.

[7] *Id.* ¶¶ 55-56, Atts. V, X, Y & Z.

[8] *Id.* ¶ 56.

[9] *Id.* ¶ 58, Att. W (site claimed that applications would be submitted to "an online

Defendants' sites required applicants to provide extensive personal and financial information, supposedly to quickly facilitate electronic transfer of loan proceeds.[10] For example, "Step 3" of the application proclaims, "You're Almost Done! Have Cash in Your Hands in as Little as 60 Minutes!" next to the question, "Where do you want us to wire your cash?"[11] A sample check showed consumers where to locate their bank routing and account numbers, which had to be submitted to complete the application.[12]

B. Purchase of Consumer Data

Many other victims of this scam never had any contact with Defendants or their websites.[13] Defendants purchased the information necessary to access these consumers' bank accounts from third parties. Between May and December 2012, Defendants paid over $500,000 in "lead costs" to two lead brokers.[14] Of course, Defendants' profits from the use of these leads far outstripped the cost of obtaining them.[15]

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database that searches over 120 lenders nationwide and connects you to your customized loan in as little as 1 hour for FREE."). *See also id.* ¶ 73, Att. FF at 9 (complaint filed by consumer notes that main section of Defendants' website promised that service was free while hiding disclosure about the $30 fee in a different section of the site).

[10] PX 4, Basden ¶ 4 (Social Security number, source of income, bank account number, and possibly driver's license number); PX 5, Broadus ¶ 3 (Social Security number, employer, bank account number); PX 7, Fennoy ¶ 3 (Social Security number, bank account number); PX 8, Holiness ¶ 4 (Social Security number, name of bank).

[11] PX 1, Einikis ¶ 59, Att. X.

[12] *Id.*

[13] *Id.* ¶ 73, Att. FF; PX 3, Agustin ¶¶ 4 & 6; PX6, Cavanaugh ¶¶ 3-5; PX 9, Kemp ¶¶ 3-4; PX 10, Lindh ¶¶ 3-4; PX 11, Nieboer ¶¶ 3-5; PX 12, Ogan ¶ 4; PX 13, Roberts ¶¶ 3-4; PX 14, Smith ¶ 7; PX 15, Starrett ¶¶ 4-5.

[14] PX 1, Einikis ¶¶ 29-30.

[15] *Id.* ¶ 66, Att. DD at 23 (invoice from lead generator to corporate defendant Nuvue Partners for 175,000 leads at a "unit price" of $0.35 per lead).

C. Defendants' False and Misleading Claims

There is no evidence that Defendants either lend money to consumers or assist consumers in search of a loan.[16] Claims on Defendants' websites touting the ease and speed with which consumers can obtain a loan are false.[17] The only purpose served by these claims is to trick consumers into disclosing their sensitive financial information and to further the illusion that Defendants ran a legitimate business.

D. Defendants' Unauthorized Billing Practices

Using information obtained from their websites and purchased from lead brokers, Defendants withdrew $30 from consumers' bank accounts through a demand draft check.[18] Clearly, Defendants did not have permission to withdraw funds from the bank accounts of consumers whose information was sold to Defendants by lead brokers. These consumers did not visit Defendants' websites or engage in business with Defendants and were therefore never in any position to provide the authorization necessary for

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[16] PX1, Einikis ¶ 73 (no indication that any of the 1288 complaining consumers actually obtained a loan).

[17] Defendants made similar misrepresentations to the bank that facilitated many of the debits to consumers' accounts. In a "Business Improvement Summary" provided to the bank in June 2012, Defendants claimed that all of their "customers" received an automated call notifying them of their enrollment in Defendants' "Funding Assistance" program. PX 1, Einikis ¶ 66, Att. BB at 3. An audio recording of the purported call claims that program members "are assigned your own personal loan specialist who will assist you with obtaining your loan." *Id.* ¶ 66, Att. CC at 4. There is no evidence these "personal loan specialists" existed or that any of Defendants' victims even received the automated calls. *Id.* ¶ 73.

[18] A demand draft is a check created by a merchant with a consumer's checking account number on it but without the consumer's signature. The merchant, or a payment processor acting on behalf of the merchant, presents the demand draft to the consumer's bank, which processes it in the same manner as a conventional check. *See, e.g.*, PX 3, Agustin Att. A; PX 4, Basden Att. B; PX 5, Broadus Atts. A & B; PX 6, Cavanaugh Att. A; PX 7, Fenoy Att. A; PX 8, Holiness Att. B; PX 10, Lindh Atts. A & B; PX 11, Nieboer, Att. B; PX 12, Ogan, Att. A;

Defendants to debit the $30 fee.[19]

Consumers who attempted to apply for a loan on Defendants' websites also did not authorize these withdrawals.[20] Defendants' sites contained a "terms and conditions" link at the bottom of their homepage.[21] Clicking this link opened several pages of legal jargon that referred to a "one-time, non-recurring charge" for applicants who chose to enroll in an "optional program."[22] This fee was mandatory, not optional. The vast majority of applicants were not aware of its existence, much less given an opportunity to authorize it.

Even consumers who partially completed but did not submit an application were charged the $30 fee. In some instances, applicants encountered a pop-up box on Defendants' websites referencing the fee. Although these consumers abandoned the application without agreeing to the fee, Defendants debited their accounts anyway.[23]

Many consumers' accounts have been debited repeatedly. Despite being unambiguously labeled as a "one-time, non-recurring charge," Defendants frequently withdrew their fee repeatedly from consumers' bank accounts.[24]

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[19] *See supra* note 13.

[20] PX 1, Einikis ¶ 73, Att. FF at 1, 3, 9, 27; PX 4, Basden ¶¶ 5, 8; PX 5, Broadus ¶¶ 3, 5; PX 7, Fennoy ¶¶ 4-5; PX 8, Holiness ¶¶ 8-9.

[21] PX 1, Einikis ¶¶ 57 & 60, Atts. V & Z.

[22] *Id.* ¶ 57, Att. V at 3.

[23] PX 4, Basden ¶¶ 5-6; PX 7, Fennoy ¶¶ 4-5.

[24] PX 1, Einikis ¶ 73, Att. FF at 5, 7; PX 4, Basden ¶ 14; PX 5, Broadus ¶¶ 4, 6, 11 & 14; PX 14, Smith ¶¶ 7 & 9 (one debit and two attempted debits); PX 15 Starrett, ¶ 5.

E. Consumer Complaints

Defendants' unauthorized withdrawals have generated nearly 1300 complaints from confused, outraged consumers, all of whom uniformly state that they did not authorize Defendants to debit their accounts.[25] In October 2012, the massive volume of complaints caused by Defendants' conduct prompted the Better Business Bureau to release a national alert.[26] Although Defendants issued refunds to some consumers who filed complaints with the BBB, they continued debiting the bank accounts of many of these consumers.[27]

Defendants outsourced their "customer service" operation to a call center located in the Philippines.[28] Consumers who attempted to contact one of Defendants' representatives encountered an exhausting nightmare of lies,[29] doublespeak,[30] and other

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[25] PX 1, Einikis ¶ 73 (review of consumer complaints by FTC investigator); PX 3-15 (consumer declarations).

[26] The BBB alert summarized the 370 complaints received by the BBB at that time as follows: "In every case, the complainants told the BBB that the businesses used electronic checks to take $30 from their accounts. Some consumers said that the companies told them the charges were payday loan application fees, even though the consumers maintain they never formally applied for loans. Other consumers said that they have no idea where the businesses got their banking information or how they were able to access their accounts." Defendants registered all seven of the websites identified in the BBB alert. These sites ultimately produced 1,083 complaints to the BBB. PX 1, Einikis ¶ 67, Att. EE.

[27] PX 3, Agustin ¶ 10, Att. C (complained and received refund); PX 4, Basden ¶¶ 12 - 14, Atts. F & H (complained, received refund, and account was debited again); PX 6, Cavanaugh ¶ 9 (complained and received refund); PX 7, Fennoy ¶¶ 9-10 (same); PX 8, Holiness ¶ 12 (same); PX 13, Roberts ¶¶ 10-11(same); PX 15, Starrett ¶¶ 9-11 (same).

[28] PX 1, Einikis ¶ 74.

[29] *See, e.g.,* PX 1, Einikis, Att. FF at 1 (representative told consumer who had never heard of Defendants or visited their websites that she had a paper loan application with the consumer's signature); PX 3, Agustin ¶ 4 (fabricated day that consumer applied for loan); PX 9, Kemp ¶ 4 (same); PX 5, Broadus ¶ 8 (consumer falsely informed that she had been approved for a $1500 loan). As noted below, the most common lies told by Defendants' concerned the status of refunds or $100 gas vouchers promised to consumers.

exasperating conduct.[31] Representatives almost invariably assured consumers that they had agreed to the $30 "application" or "processing" fee when applying for a loan on one of Defendants' websites and often refused to provide refunds.[32] Persistent consumers occasionally were offered a $100 gasoline voucher or a refund, neither of which ever materialized.[33]

Defendants' unauthorized withdrawals represent an acute hardship for many of their victims. Repeated unauthorized withdrawals often forced consumers to close their existing bank accounts in order to avoid further losses.[34] Because consumers did not expect these withdrawals, they frequently incurred overdraft charges as well as other fees

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[30] Representatives rarely provided straight answers to consumers' inquiries. Consumers who claimed to have had no prior contact with Defendants' or their websites were frequently assured that they agreed to the fee by submitting a payday loan application to one of these sites *and* told that they needed to return to these sites in order to complete the application process. *See* PX 1, Einikis ¶ 73, Att. FF at 1, 3, 5, 17, 29; PX 5, Broadus ¶ 5. Other consumers were told that they only way they could obtain a refund of the $30 fee for a loan that they did not apply for was to apply for and accept a loan from Defendants. *See* PX 10, Lindh ¶ 4; PX 9, Kemp ¶ 4.

[31] *Id.* ¶ 73, Att. FF; PX 3 Agustin, ¶ 5 (called five times a week for three months seeking a refund); PX 4, Basden ¶ 11 (called thirty times about promised refund); PX 6, Cavanaugh ¶ 5 (called several times and left messages, but only reached a representative once); PX 7, Fennoy ¶ 8 (representatives refused to identify company name); PX 9, Kemp ¶ 4 (representatives refused to explain how company had obtained her information, hung up on her); PX 10, Lindh ¶ 4 (disconnected and unanswered calls); PX 12, Ogan ¶ 5 (same); PX 13, Roberts ¶ 6 (same).

[32] PX 1, Einikis ¶ 73, Att. FF; PX 3, Agustin ¶ 4; PX 5, Broadus ¶ 5; PX 6, Cavanaugh ¶ 5; PX 8, Holiness ¶ 9; PX 9, Kemp ¶ 4; PX 12, Ogan ¶ 5; PX 15, Starrett ¶ 4.

[33] PX 1, Einikis ¶ 73, Att. FF; PX 3, Agustin ¶ 5 (offered voucher and promised refund); PX 4, Basden ¶¶ 11-12 (same); PX 5, Broadus ¶¶ 5 & 9 (same); PX 6, Cavanaugh ¶ 5 (agreed to accept gas voucher, but never received); PX 7, Fennoy ¶¶ 7-8 (promised refund); PX 9, Kemp ¶ 4 (same); PX 13, Roberts ¶ 5 (same); PX 15, Starrett ¶ 5 (agreed to accept gas voucher, but never received).

[34] PX 1, Einikis ¶ 73, Att. FF at 15 and 39; PX 3, Agustin ¶ 9; PX 4, Basden ¶ 16; PX 5, Broadus ¶ 17; PX 9, Kemp ¶ 7; PX 10, Lindh ¶ 11; PX 12, Ogan ¶ 8; PX 13, Roberts ¶ 9; PX 14, Smith ¶ 9; PX 15, Starrett ¶ 8.

and penalties.[35] Many of the victims of this scheme are on a fixed income, unemployed, or otherwise in difficult financial straits and are therefore unable to easily absorb these losses.[36] As an added insult, victims of this scam often began receiving harassing telemarketing and debt collection calls shortly after Defendants' unauthorized withdrawals.[37]

F. Return Rates

Defendants' conduct produced astounding return rates. A "return" is a transaction that has been reversed or sent back by the consumers' bank for any number of different reasons, including insufficient funds, a closed or non-existent account, or notice by the consumer that the transaction was unauthorized. Returns that deviate substantially from normative or average rates are considered a sign of fraud. [38] Defendants' returns consistently exceeded 40% in most weeks,[39] more 40 times comparable industry

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[35] PX 1, Einikis ¶ 73, Att. FF at 3, 5, 7, 13, 23, 27, 29, 31, 33, 39; PX 3, Agustin ¶ 7 ($150 total loss); PX 4, Basden ¶ 8 ($59 total loss); PX 5, Broadus ($250 total loss); PX 10, Lindh ¶ 11 ($150 total loss); PX 12, Ogan ¶ 8; ($150 total loss); PX 15, Starrett ¶ 6 ($150 total loss).

[36] PX 1, Einikis ¶ 73, Att. FF at 3 (disabled), 5 (same), 13 (same), 21 (elderly, blind, disabled), 23 (disabled), 31 (same), 33 (same).

[37] PX 3, Agustin ¶ 8 (calls from telemarketers and debt collectors); PX 5, Broadus ¶ 17 (calls from loan marketers, including threats of arrest); PX 6, Cavanaugh ¶ 8 (calls offering variety of financial services); PX 9, Kemp ¶ 6 (same); PX 10, Lindh ¶ 10 (same); PX 12, Ogan ¶ 7 (same); PX 13, Robert ¶ 8 (same).

[38] *See, e.g., FTC v. Grant Connect, LLC,* 2009 U.S. Dist. LEXIS 94201, at *19, *25-26 (D. Nev. Sept. 22, 2009); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 936 (N.D. Ill. 2006), *aff'd,* 512 F.3d 858 (7th Cir. 2008) (court considered defendants' refund rate of at least 25% in granting judgment for FTC in deceptive advertising case); *FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1289 (M.D. Fla. 2008) (high return rates for defendants' products evidence of actual knowledge of illegal activity).

[39] PX 1, Einikis ¶ 65, Att. AA (weekly returns ranged from a low of 33% to a high of 54%) and ¶ 66, Att. DD at 19 (November 9, 2012 email from Defendants' payment processor noting that "returns outweigh[] the deposits day to day").

averages.[40] Indeed, the high volume of fraud complaints filed by Bank of America customers regarding Defendants' withdrawals prompted a bank representative to contact Defendants' payment processor and request that it block all Bank of America routing numbers to protect the bank's customers.[41]

III. ARGUMENT

Defendants' conduct violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). To stop Defendants from dissipating assets or destroying evidence, the Commission asks that the Court issue an *ex parte* TRO. This order would enjoin Defendants from engaging in illegal conduct, freeze their assets, and require them to immediately turn over business records to the FTC for inspection and copying. The Court has full authority to enter the requested relief, which is strongly supported by the evidence. Courts in this district have repeatedly granted similar TROs in FTC actions.[42]

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[40] In 2011, the overall return rate for the Automated Clearing House ("ACH") network was 0.98 percent (https://www.nacha.org/node/1130). ACH is a nationwide funds transfer system that replaces paper checks with electronic payments. It is managed by a private industry trade group. In contrast to ACH, there is no single entity that monitors demand draft returns or tabulates overall return rates. Using ACH as a baseline, Defendants generated returns at 33 to 54 times normative rates.

[41] PX 1, Einikis ¶ DD at 14-17 (June 28, 2012 letter from Bank of America noting that it had processed over 1200 complaints in a two-month period regarding unauthorized transactions originated by Defendants).

[42] *See, e.g., FTC v. Freedom Cos. Mktg, Inc.*, No. 12 C 05743 (N.D. Ill. July 23, 2012) (Shadur, J.) (*ex parte* TRO with asset freeze); *FTC v. Apogee One Enters. LLC*, No 12 C 588 (N.D. Ill. Jan. 30, 2012) (Kennelly, J.) (same); *FTC v. Am. Credit Crunchers, Inc.*, No 12 C 1028 (N.D. Ill. Feb. 14, 2012) (Guzman, J.) (same); *FTC v. Yellow Page Mktg., B.V., et al.*, No. 11 C 05035 (N.D. Ill. July 26, 2011) (Leinenweber, J.) (*ex parte* TRO with asset freeze); *FTC v. Am. Tax Relief LLC, et al.*, No. 10 C 6123 (N.D. Ill. Sept. 24, 2010) (Kocoras, J.) (*ex parte* TRO with asset freeze and appointment of a receiver); *FTC v. Asia Pacific Telecom, Inc., et al.*, No. 10 C 3168 (N.D. Ill. May 25, 2010) (Hart, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. API Trade, LLC, et al.*, No. 10 C 1543 (N.D. Ill. March 10, 2010) (Guzman, J.) (*ex parte* TRO with asset freeze); *FTC v. 2145183 Ontario Inc., et al.*, No. 09 C 7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.) (*ex parte* TRO with asset freeze).

A. This Court Has the Authority to Grant the Requested Relief

The FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). Once the Commission invokes the federal court's equitable powers, the full breadth of the court's authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre,* 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *see also Amy Travel,* 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031. Injunctive relief is appropriate even if a defendant has ceased its illegal activities if there is "cognizable danger of recurrent violation," *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and the commission of past illegal conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). *See also FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000).

The Court has personal jurisdiction over Defendants under the FTC Act's nationwide service of process provision, 15 U.S.C. § 53(b), because Defendants have minimum contacts with the United States. See *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 1735276, at *4 (N.D. Ill. June 19, 2006) (Kendall, J.); *FTC v. Bay Area*

Bus. Council, Inc., No. 02 C 5762, 2003 WL 21003711, at *2 (N.D. Ill. May 1, 2003) (Darrah, J.). Moreover, under the FTC Act's venue provision, an action may be brought wherever a corporation "resides or transacts business." 15 U.S.C. § 53(b). Here, as shown by their customer service call records, Defendants have transacted business in this district.[43] In addition, venue is proper over a corporation wherever it is subject to personal jurisdiction. *See Bay Area*, 2003 WL 21003711, at *2.

B. A Temporary Restraining Order Is Appropriate and Necessary

To grant preliminary injunctive relief in an FTC Act case, the district court must: (1) determine the likelihood that the Commission will ultimately succeed on the merits, and (2) balance the equities. *World Travel*, 861 F.2d at 1029. Under this "public interest" test, "it is not necessary for the FTC to demonstrate irreparable injury." *Id.* When the court balances the equities, the public interest "must receive far greater weight" than any private concerns. *Id.*

C. Defendants Have Violated Section 5 of the FTC Act

Defendants withdraw funds from consumers' bank accounts without their knowledge or consent. To obtain some of the information necessary to access these accounts, Defendants falsely promise that they will help consumers find a payday loan, that they will use consumers' personal and financial information for this purpose, and that four out of five applicants are quickly approved for such loans. This conduct violates the FTC Act, which prohibits "unfair and deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). It is unfair because taking money without permission

[43] PX 1, Einikis ¶¶ 62-64 (call detail records show 15,867 calls from area codes within the Northern District of Illinois to Defendants' customer service telephone numbers). *See also* PX 1, Einikis ¶ 72 (46 consumer complaints from consumers with telephone numbers or addresses within the Northern District of Illinois).

imposes unavoidable costs on consumers with no countervailing benefits. And it is deceptive because Defendants blatantly misrepresent their purpose in soliciting consumers' personal financial information.

Each of the Corporate Defendants has furthered the scheme in meaningful ways. Caprice Marketing LLC has issued refunds to consumers and paid for Internet hosting in connection with Defendants' scam.[44] NuVue Partners LLC has paid for leads, customer service costs, Internet hosting, domain names, and telephone service.[45] It has also served as a conduit for scam proceeds, receiving hundreds of thousands of dollars from other corporate defendants and subsequently transferring these funds to Mulrooney and Ogaga.[46] Capital Advance LLC has opened merchant accounts, issued refunds to consumers, purchased leads, and paid for customer service costs.[47] Loan Assistance Company LLC has received millions of dollars in proceeds from Defendants' scam, issued refunds to consumers, and purchased leads.[48] ILife Funding LLC, f/k/a as Guaranteed Funding Partners LLC has received hundreds of thousands of dollars in scam proceeds and issued refunds to consumers.[49]

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[44] *Id.* ¶¶ 46 & 54, Att. U.

[45] *Id.* ¶¶ 23 (customer service and leads), 29 (leads), 30 (leads) & 33 (telephone service, website hosting, domain registration).

[46] *Id.* ¶¶ 26 ($809,844 in transfers to Ogaga), 27 (transfers to Mulrooney), 28 (cash withdrawals), 47 ($486,176 in transfers from other corporate defendants).

[47] *Id.* ¶¶ 25 (deposits from merchant processors), 29 (leads), 35 (consumer refunds) & 31 (customer service), 66 Att. DD at 1-6 (Capital Advance merchant processing agreement signed by Ogaga).

[48] *Id.* ¶¶ 25 ($3.2 million in deposits from merchant processors), 29 (leads) & 31 (customer service).

[49] *Id.* ¶¶ 45 (deposits of scam proceeds) & 46 (refunds).

1. Misrepresentation of Material Facts

An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *See FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *QT, Inc.*, 448 F. Supp. at 957. The materiality requirement is satisfied if the misrepresentation or omission involves information that is likely to affect a consumer's choice of, or conduct regarding, a product or service. *See Kraft, Inc. v. FTC,* 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied,* 507 U.S. 909 (1993). In deciding whether particular statements are deceptive, courts must look to the "overall net impression" of consumers. *See id.*

Defendants falsely claim that 1) they will help consumers find a payday loan, 2) that they will use consumers' personal and financial information for this purpose, and 3) that four out of five applicants are quickly approved for such loans. These claims are utterly false and are material to the decisions consumers make. They cause consumers to turn over sensitive personal and financial information to Defendants. Clearly, consumers would not disclose their Social Security numbers and banking information to Defendants if they knew that doing so would not advance their applications for payday loans, but instead automatically enroll them in a worthless program entitling Defendants to debit $30 from their accounts one or more times. Consumers are not only *likely* to be deceived by these misrepresentations – they actually *are* deceived. While proof of actual deception is not required to find a Section 5 violation, it is "highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

2. Unfair Billing Practices

An act or practice is unfair under Section 5 of the FTC Act if it: (1) causes or is likely to cause substantial injury to consumers; (2) the harm to consumers is not outweighed by any countervailing benefits; and (3) the harm is not reasonably avoidable by consumers. 15 U.S.C. § 45(n); *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009); *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008) (Cole, J.).

Substantial injury is clear. Defendants debited tens of thousands of consumers $30 each for a worthless service that consumers did not want and, indeed, did not receive, grossing in excess of $5 million. This harm, which does not account for the bank fees incurred by many consumers, easily satisfies the threshold for establishing substantial injury. *See FTC v. J.K. Publ'ns*, 99 F.Supp.2d 1176, 1201 (C.D. Ca. 2000) (holding that the substantial injury satisfied where "consumers were injured by a practice for which they did not bargain"); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) ("[C]onsumer injury is substantial when it is the aggregate of many small individual injuries.").

Second, injury is not reasonably avoidable by any of the three broad categories of consumers victimized by Defendants. First, consumers who did not visit Defendants' websites clearly could not avoid the unauthorized withdrawals to their accounts. Without the knowledge or consent or these consumers, Defendants acquired the information necessary to make these withdrawals from third party lead brokers. A second group of victims submitted bank account information to one of Defendants' websites, but did not complete the full application – some after being presented with a pop-up box referring to

the $30 fee. These consumers reasonably assumed that they would avoid incurring a fee by not finalizing their applications. Third, consumers debited multiple times by Defendants could not reasonably avoid these subsequent withdrawals. Defendants' unmistakably characterize their $30 fee as a "one-time, non-recurring charge." Indeed, repeated, unauthorized withdrawals caused many consumers to take the drastic step of closing their bank accounts to avoid additional losses.

Finally, Defendants' unauthorized debiting and charging does not provide a countervailing benefit to consumers. *See FTC v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009) (practice unfair and has no benefit when consumer unaware of products they "bought"). Consumers do not benefit from being debited for products or services "they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place." *FTC v. Inc21.com II*, 745 F. Supp.2d 975, 1004-05 (N.D. Ca. 2010). Here, consumers – many of whom are already in difficult financial straits – are debited for products they do not want or agree to and from which they derive no benefits.

D. Mulrooney and Ogaga are Individually Liable

An individual defendant may be held liable for injunctive relief and monetary restitution under the FTC Act if the Court finds (1) that the defendant participated directly in or had some measure of control over a corporation's deceptive practices, and (2) had actual or constructive knowledge of the practices. *See World Media Brokers*, 415 F.3d at 764; *Bay Area*, 423 F.3d at 636; *Amy Travel,* 875 F.2d at 573-74. Authority to control may be evidenced by "active involvement in the corporate affairs, including assuming the duties of a corporate officer." *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a

showing that the defendant (1) had actual knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area,* 423 F.3d at 636; *Amy Travel,* 875 F.2d at 573. An individual's "degree of participation in business affairs is probative of knowledge." *Id.* The Commission need not prove subjective intent to defraud. *See id.*

Mulrooney and Ogaga are owners, officers, or managers of all of the Corporate Defendants.[50] They are also signers on the various bank accounts used to facilitate this scam and have each received hundreds of thousands of dollars from these accounts.[51] Mulrooney registered six of Defendants' Internet domain names and Ogaga registered one.[52] Mulrooney procured hosting for these websites, obtained telephone numbers for Defendants' customer service operation, and opened a mail drop in Las Vegas used as a contact address on Defendants' websites.[53]

Mulrooney and Ogaga are individually liable for their own illegal conduct as well as that engaged in by the Corporate Defendants. The status of Mulrooney and Ogaga as owners and officers of Corporate Defendants is more than sufficient to establish their

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[50] *Id.* ¶¶ 10, 14, 20, 21, 22, 38, 40, 42 & 44, Atts. C, G, K, L, M, N, O, P & Q (corporate and bank records).

[51] *Id.* ¶¶ 20, 21, 22, 26, 27, 28, 38, 40, 42 & 44, Atts. K, L, M, N, O, P & Q (bank records). Defendants appear to have used proceeds from their scam to purchase luxury automobiles. *See id.* ¶¶ 5 (Mulrooney is the registered owner of a 2012 Maserati GranTurismo), 6 (Ogaga owns a 2011 Rolls Royce Ghost and a 2006 Ferrari 430).

[52] *Id.* ¶¶ 52-53, Atts. S & T (domain registration documents).

[53] *Id.* ¶¶ 16-17, Atts. I & J (US Postal Service forms and correspondence with mail forwarding service), 54, Att. U (website registration documents), 62. Many of these services are in the name of Mulrooney-London, Inc., a Nevada corporation formed in November 2011. Mulrooney served as its president, secretary and treasurer until the company's dissolution in June 2012. Along with Ogaga, he was also one of its two directors/trustees. *Id.* ¶ 15, Att. H.

ability to control the acts and practices of these entities. *See World Media Brokers*, 415 F.3d at 764-65; *Amy Travel*, 875 F.2d at 574. The evidence demonstrates that they participated in or controlled the unfair and deceptive practices at issue, and that they knew or should have known about this illegal conduct. Their participation in Defendants' scheme is demonstrated by their registration of Internet domains, opening of bank accounts, and procurement of other services used to facilitate the scam. Mulrooney and Ogaga should therefore each be held individually liable, jointly and severally.

E. The Corporate Defendants Have Operated as a Common Enterprise

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

The Corporate Defendants are all Delaware limited liability companies that are commonly owned and controlled by Mulrooney and Ogaga. They comingle assets and funnel monies received by payment processors to multiple corporate and personal bank accounts.[54] The Corporate Defendants also share addresses. Statements for several corporate bank accounts are mailed to two Florida locations – a home in Clearwater that belongs to Ogaga's father (the "Canterbury location") and a P.O. Box in Pompano Beach.[55]

The Corporate Defendants do not function as independent legal entities, but as interchangeable corporate shells that exist solely as conduits for Defendants' scam.[56] Accordingly, the Corporate Defendants operate as a common enterprise and area all jointly and severally liable for Defendants' violations of the FTC Act.

F. The Equities Tip in the Commission's Favor

Once the Commission has decidedly shown a likelihood of success on the merits, the Court must balance the equities, assigning "far greater weight" to the public interest than to any of defendants' private concerns. *World Travel,* 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting illegal activities and preserving assets necessary to provide effective final relief to thousands of

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[54] *Id.* ¶¶ 26-27, 47.

[55] *Id.* ¶¶ 20 (Capital Advance to Pompano Beach), 21 (Loan Assistance to Canterbury location), 22 (NuVue Partners to Pompano Beach), 37 (Caprice Marketing to Canterbury location); 38 (Caprice Marketing to Canterbury location), 39 (Capital Advance to Canterbury location), 41 (ILife Funding to Canterbury location) & 43 (NuVue Partners to Canterbury location). Similarly, statements for other corporate bank accounts at times were sent to the home of Mulrooney's parents in New Castle, Delaware. *Id.* ¶¶ 20 (Capital Advance), 37 (Caprice Marketing), 39 (Capital Advance), 41 (ILife Funding) & 43 (NuVue Partners).

[56] *See, e.g., id.* ¶ 66, Att. DD at 13 (June 26, 2012 email from payment processor to bank noting that "Capital Advance has legally changed their corporation name to Loan Assistance Company, LLC").

victims. Defendants, by contrast, have no legitimate interest in continuing to engage in illegal conduct. *See FTC v. World Wide Factors, Ltd,* 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of "no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment").

The interests of consumers whose personal financial information Defendants have misused also compel injunctive relief. Defendants shut down their lead generation websites in late 2012. Since that time, consumers have continued to complain about unauthorized $30 debits from their accounts, including consumers who were initially victimized in 2012, while the websites were still in operation, and then again in 2013. Although we do not know what role, if any, Defendants played in these ongoing debits, an injunction is required, at a minimum, to safeguard the vast quantities of sensitive consumer data collected and misused by Defendants over the course of their operation. Mulrooney and Ogaga have a history of selling such data, including to defendants in another FTC matter.[57] Injunctive relief will serve to secure that data to prevent further abuse by Defendants and additional harm to those consumers.

G. The Temporary Restraining Order Should Include an Asset Freeze and Other Ancillary Relief

The FTC requests that the Court issue a TRO that prohibits future law violations and preserves assets and documents to ensure that the Court can grant effective final relief in this case.[58] Part of the relief sought by the Commission in this case is restitution

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[57] *See FTC v. Ideal Financial Solutions, Inc. et al.*, No. 2:13-cv-00143 (D. Nev. Jan. 28, 2013). The FTC charged the *Ideal Financial* defendants with orchestrating a scheme nearly identical to the one perpetrated by Mulrooney and Ogaga. PX 1, Einikis ¶¶ 7-8.

[58] A Proposed TRO has been filed concurrently with the FTC's TRO motion.

for the victims of Defendants' fraud, which has caused millions of dollars of consumer loss. Their conduct is particularly egregious given that Defendants specifically target consumers in precarious financial condition. To preserve effective final relief for these consumers and prevent concealment or dissipation of assets, the FTC seeks an immediate freeze of Defendants' assets.

An asset freeze is appropriate once the Court determines that the Commission is likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel,* 861 F.2d at 1031 & n.9. The district court, at that juncture, has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers." *Id.* at 1031 (upholding freeze of company and individual assets). The freeze here should extend to individual assets as well because the Commission is likely to succeed in showing that the individual defendants are liable for restitution. *See id.* at 1031.[59]

[59] The proposed TRO also requires Defendants to immediately produce to the FTC any documents relating to their business practices. The only known addresses for the Corporate Defendants are two commercial mail drops and residences connected with Mulrooney and Ogaga. Courts in this district have entered orders with similar relief. *See, e.g., FTC v. American Credit Crunchers, LLC et al.*, No. 12-cv-1028 (N.D. Ill. Feb. 13, 2012) (immediate turn over of business records to court-appointed receiver) and *FTC v. Voice Touch, Inc. et al.*, No. 09-cv-2929 (N.D. Ill. May 13, 2009) (immediate turn over of business records to the FTC).

IV. CONCLUSION

For the foregoing reasons, Plaintiff Federal Trade Commission requests that this Court enter the proposed Temporary Restraining Order *Ex Parte* and issue an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

Respectfully submitted,

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