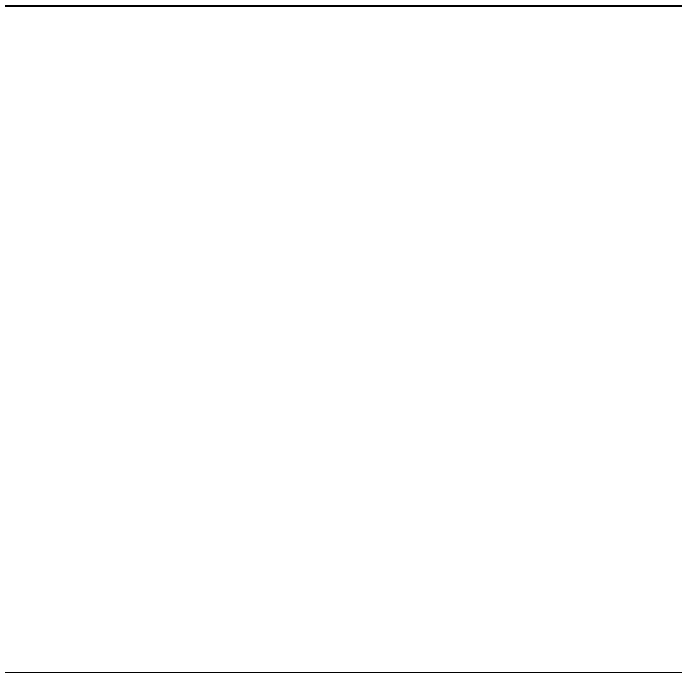


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



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

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

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

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION ..... 1

4

5 II. STATEMENT OF FACTS ..... 3

6 A. Defendants’ Unauthorized Billing Practices ..... 3

7 B. Defendants’ Deceptive Refund Practices ..... 8

8 C. Parties to the *Ex Parte* TRO ..... 11

9 1. Michael Bruce Moneymaker ..... 11

10 2. Daniel C. De La Cruz ..... 12

11 3. Belfort Capital Ventures, Inc. .... 12

12 4. Dynamic Online Solutions, LLC ..... 13

13 5. Seaside Ventures Trust ..... 13

14 6. John Doe No. 1. .... 13

15 7. HSC Labs, Inc. .... 14

16 8. Red Dust Studios, Inc. .... 14

17

18 III. ARGUMENT ..... 14

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

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

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

22 Unfair Billing ..... 15

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

24

25

1		Practices to Bill Consumers . . . . .	17
2	c.	The FTC is Likely to Establish That Defendants Deceptively	
3		Omit Material Information to Bill Consumers . . . . .	19
4	d.	The FTC is Likely to Establish That Defendants Engage in	
5		Deceptive Refund Practices . . . . .	20
6	2.	The Balance of Equities Favors Entering the TRO, Enjoining	
7		Defendants' Unlawful Practices . . . . .	21
8	B.	Moneymaker and De La Cruz are Individually Liable and Subject to Both	
9		Injunctive and Monetary Relief . . . . .	22
10	C.	The Corporate Defendants Have Operated as a Common Enterprise and are,	
11		Therefore, Jointly and Severally Liable and Subject to Injunctive Relief . . . . .	24
12	D.	An <i>Ex Parte</i> TRO, with Asset Freeze, Expedited Discovery, and Appointment	
13		of a Temporary Receiver is Necessary to Prevent Defendants from Dissipating	
14		Assets and Destroying Evidence . . . . .	26
15	1.	An <i>Ex Parte</i> TRO is Necessary to Ensure This Court Will be Able to	
16		Grant Effective Relief . . . . .	26
17	2.	An Asset Freeze is Necessary to Prevent Defendants From Dissipating	
18		Assets . . . . .	27
19	3.	Immediate Access to Business Premises and Expedited Discovery Are	
20		Necessary to Preserve Evidence . . . . .	28
21	4.	A Temporary Receiver is Necessary to Preserve Assets and Evidence . . . . .	29
22			
23	IV.	<u>CONCLUSION</u> . . . . .	30

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

Plaintiff Federal Trade Commission (“FTC” or the “Commission”) moves this Court for an *ex parte* temporary restraining order (“TRO”) with ancillary equitable relief to stop Defendants from debiting the bank accounts of economically vulnerable consumers for worthless programs that consumers know nothing about, not afford, and, ultimately never receive. Specifically, Defendants target consumers who apply online for payday loans, thereby disclosing their bank account information, which Defendants obtain. Then, by disguising a pop-up box to look like it is part of the payday loan process, Defendants trick consumers into providing a so-called “authorization” to be charged for these programs. Significantly, Defendants do not tell

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

---

<sup>1</sup> According to corporate documents, the sole managing member of Dynamic is Seaside Ventures Trust (“Seaside”).

<sup>2</sup> Defendants use mailing addresses for Freedom Subscription of Las Vegas, Nevada; for Illustrious Perks of Beaverton, Oregon; for ~~St~~ Platinum Credit of Rocky Mount, North Carolina; and for Kryptonite Credit of Petaluma, California. The addresses for Freedom



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.<sup>5</sup> 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.)



22 <sup>5</sup> 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 but 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). 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 9, Lewis Decl. ¶¶ 7-8) (voice authorization  
13 provided in undercover investigation and no recall 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, 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 Card”)).

---

21 <sup>6</sup> 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 <sup>7</sup> 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  
responses, however, Defendants make no such claim, suggesting that even those consumers who

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

---

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

<sup>8</sup> See e.g., FTC 5, Taylor Decl. ¶ 8 (consumer did not

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, Industrious Perks, Select Platinum Credit  
4 and Kryptonite Credit.<sup>9</sup> 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<sup>10</sup> line.”

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<sup>11</sup>.)

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

---

17 <sup>9</sup> 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.)

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

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

1 consumer was charged for seven months for a 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.

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. 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 <sup>12</sup> For example, the telephone number provided for Uniguard is 877-890-1250 (FTC 4, Deorio  
22 Decl. ¶ 7, Exh. A); for Freedom Subscription is 877-807-4709 (FTC 4, Deorio Decl. ¶ 7, Exh.  
23 A); for Illustrious Perks is 877-754-3389 (FTC 15, Gushwa Decl. ¶ 5, Exh. A); for Select  
24 Platinum Credit is 877-709-2811 (FTC 9, Dobson Decl. ¶ 4, Exh. A); and for Dynamic Online  
25 Solutions is 877-325-4873 (FTC 14, LeBlanc Decl. ¶ 8, Exhs. A) 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.<sup>13</sup>)

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, Exhs. 6; 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").<sup>14</sup>) 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 <sup>13</sup> In total, the FTC reviewed 793 unique complaints from consumers regarding Defendants'  
19 unauthorized billing scheme. See FTC 1, Goldstein Decl. ¶ 91.)

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

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  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

---

23 <sup>15</sup> 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.<sup>16</sup>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. ¶¶ 10-11.) 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. ¶¶ 27-28, 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 <sup>16</sup> 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  
23 promised refund and, despite multiple requests, did not receive one); FTC 10, Conner Decl. ¶ 6  
24 (same).

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

1 Subscription, Illustrious Perks, and Select Plan 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,  
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  
8           2.       Daniel C. De La Cruz

9           Daniel De La Cruz manages the Belfort call center. From January 2010 to April 2010, he  
10 maintained an office in the call center and managed its day-to-day operations – including  
11 meeting with call center management several times a week, holding meetings to discuss call  
12 center business, answering employees' questions, and listening in on telephone calls with  
13 consumers. (FTC 2, Graham Decl. ¶¶ 6-8.) After April 2010, he no longer maintained an office  
14 at the call center but continued to visit it and, according to a former employee, maintained a  
15 supervisory role. (FTC 2, Graham Decl. ¶9.) In addition, De La Cruz is copied on  
16 correspondence to the Better Business Bureau regarding consumer complaints for Defendants'  
17 programs. (FTC 1, Goldstein Decl., Exhs. III, JJJ.) De La Cruz is also the current President and  
18 Director of HSC, having replaced Moneymaker in the corporate filings in July 2009. (at ¶  
19 33.)

20           3.       Belfort Capital Ventures, Inc.

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

---

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



1 center at the above address that fields consumers' complaints about their enrollment in

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

---

21 <sup>19</sup> 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 <sup>20</sup> 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 footnote  
9, *supra*.



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

1 have found that the harm suffered by consumers is not reasonably avoidable. *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). In *Id.*, 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 authori

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

1 practices] were likely to deceive consumers acting ~~or~~ <sup>or</sup> under the circumstances”).

2 Finally, Defendants’ misrepresentation is ~~material~~ <sup>material</sup>. 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 ~~offer~~ <sup>offer</sup> 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.<sup>21</sup>

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~~ <sup>decline</sup> such offers. Instead, Defendants’ pop-  
21 up box contains a vague statement – in small font – that “third party trial offers . . . will

---

22 <sup>21</sup> Any argument that the net impression is cured by a paragraph buried in ten pages of legalese  
23 on either [www.loanterms.com](http://www.loanterms.com) or [www.loantermsonline.com](http://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. *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



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

1 “prime concern” when there is a likelihood that defendants have violated the FTC Act.  
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~~ 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, Illu

1 deposited.<sup>23</sup> 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 act.<sup>See, e.g., Publ'g Clearing House</sup>, 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.<sup>See</sup>  
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").

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

22 <sup>24</sup> 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 ~~less~~ly 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

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

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  
Dissipating Assets and Destroying Evidence

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

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

10 An *ex parte* TRO is necessary because, if provided notice, Defendants are likely to  
11 dissipate assets, hide assets, and destroy evidence. *See In re Vuitton Et Fils S.A.*, 606 F.2d 1, 5  
12 (2d Cir. 1979) (mandating the district court grant an *ex parte* TRO because notice would "only  
13 render fruitless further prosecution of the action"); Fed. R. Civ. P. 65(b)(1)(a) (providing for  
14 *ex parte* relief when "immediate and irreparable injury, loss, or damage will result" upon notice).  
15 Providing notice of the TRO to Defendants would, therefore, "defeat the very purpose for the  
16 TRO." *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1988).  
17 *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (holding that in cases involving  
18 "the public interest" a court's equitable powers "assume a broader and even more flexible  
19 standard" than in a case between private litigants, that a court must rule to accord "full  
20 justice"). Courts in this district have granted the *Ex Parte* relief in many prior, similar  
21 cases. *See, supra*, fn. 4.

22 Defendants' fraud, concealment, and recidivism demonstrates that they are likely to  
23 dissipate assets, hide assets, and destroy evidence upon notice of the Complaint, which would  
24 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

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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, 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.

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



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).

8 *I*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

---

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

1 IV. CONCLUSION

2 For the foregoing reasons, the FTC requests that the Court grant its *Ex Parte* Motion for a

[REDACTED]

[REDACTED]

[REDACTED]