UN

I. FINDINGS OF FACT

A. Underlying Action

1. The Commission commenced this action on December 12, 2006 by filing its Complaint for Injunction and Other Equitable Relief pursuant to Section 5, 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45, 53(b), and 57b. The Commission charged that these Defendants and others engaged in deceptive acts in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310, in connection with the sale of debt consolidation services.

2. Prior to the settlement in this action, Express, through its employees, secured and serviced or administered the services provided for in debt consolidation contracts that named Defendant Leshin, Leshin, P.A., or non-party corporation DMCCI, as the contracting party. (Leshin Test. 02/17/09).

3. DMCCI is wholly owned by RLL holding Company. Defendant Leshin is RLL's sole shareholder and director. Defendant Ferdon was president of DMCCI. (PCX 3 at 110). (Pl.'s Mot. Ex. 7 at 14-15). The only two directors of DMCCI, Matt Wiley and Michael Bradford (Pl.'s Mot. Ex. 6 at 00006), are Express employees. DMCCI has no employees. Leshin controls and supervises the actions of, the directors and officers of DMCCI. *Id.*; (*see also* Pl.'s Mot. Ex. 6. at 00001.)

B. The Stipulated Injunction

4. The underlying action was resolved by the Order entered on May 5, 2008. (D.E. 321.) Defendants Leshin, Ferdon and Express Consolidation, Inc. signed the Order before it was entered and acknowledged receipt of the Order after it was entered by the Court. In May 2008,

Leshin signed the acknowledgment of receiving the Order on behalf of the shareholders of DMCCI. (Pl's Mot. Ex. 7 at 10.)

5. In the Order, the Defendants agreed that they would not offer, enter into, or accept the transfer of contracts for debt consolidation services in any state where they are not in compliance with that state's legal requirements for a debt consolidation services business. (Permanent Injunction at ¶ VI.)

6. The Order appointed Gerald Wald as Temporary Monitor to oversee certain aspects of the Defendants' business and financial accounts, as well as implement a procedure to notify certain of Defendants' "existing clients" of their future options regarding their debt consolidation services. (Order at ¶¶VII - XI.)

7. The Order provided mechanisms for dealing with the debt consolidation contracts of the existing clients of Leshin, Leshin, P.A., and DMCCI. (Order ¶¶ IX, X and XII.)

8. The Order defined "existing clients" to mean "persons who (i) have signed an agreement for debt consolidation services with Randall L. Leshin, Randall L. Leshin, P.A. (including contrac

transfer, in compliance with the legal requirements imposed by the states in which the consumer resided. (Order ¶¶ Va t(evi)T[e2000 0.000 TD(ine)Tj14.6400 0.0066(¶ V)Tj17.0400 0.0000 TD(a)Tj38.(

[2] There is nothing in paragraph XII exempting the transfers to Express from paragraph VI.D's prohibition on accepting transfers of contracts for debt consolidation services when the Defendants are not, at the time of the transfer, in compliance with legal requirements imposed by the state in which the person resides. Therefore, The Court reads paragraph VI.D to be a limitation on the obligation to transfer DMCCI's contracts to Express in paragraph XII.

[3] Express would have been timely "qualified to provide debt management services" in (1) a state that issues licenses for debt consolidation services, if it had the license within 60 days of the Order's entry, or an unambiguous statement from the state that it could conduct such business while its application was pending, or in (2) a state that does not issue licenses, if Express fulfilled that state's legal requirements, including registration, reporting, audit, insurance, or account requirements within 30 days. (Order, Definition S.)

12. In the states where Express was not timely qualified, the Monitor was to give an existing client a notice with two options: (1) cancel the contract, or (2) agree to a contract with a debt consolidation services provider identified by the FTC. (*See Id.*, at ¶ IX.C.,("C Notice").)

13. In states where Express was timely qualified, the Monitor was to give notice of three options to the client: (1) cancel the contract, (2) agree to a contract with a debt consolidation services provider identified by the FTC, or (3) agree to a new contract with Express. (*See Id.*, ¶ IX.D., at 31-32 ("D Notice").)

14.

a. Express was not qualified in California or Minnesota because it was undisputed that Express did not have the license required by California or the registration required by Minnesota within the timetable set by the Order; [4]

b. Express was not qualified in Nevada because it had obtained neither a license nor a registration under the Nevada statutes on debt adjusting and credit services. (*See* Pl. Mot. Ex. 2 at 311-317);

c. Express was not qualified in Texas because it lacked the accreditation required by state law. *Id.*, p.349; and

d. Express was not qualified in Florida, Georgia, Kentucky, Ohio, or Tennessee because each of these states requires that providers of debt management services have certain insurance coverag

[4] Although Defendants initially contested California, by the July 22 hearing, California officials had denied Express's license application and ordered Defendants to cease conducting business there. (*See* Pl.'s Mot. Ex. 10B, "Desist and Refrain Order.") In light of these actions, at the July 22 hearing, Defendants conceded that existing clients in California should receive the C Notice. (*See* D.E. 366-3 at 354.)

With respect to Minnesota, Defendants did not contest that Express did not have the registration required by Minnesota law, but argued that Minnesota was among several states in which D Notices should be sent because the contracts with existing clients were executed in advance of passage of state laws. This Court rejected defendants' position for Minnesota and the other nine states with respect to which defendants made this argument. (*See* Omnibus Order, D.E. 339, at 7 ¶ 3.)

[5] Express produced an e-mail stating that Zurich Insurance had bound a new policy, with what Defendants alleged to be sufficient coverage, effective July 18, 2008. (Pl.'s Mot. Ex. 1, at 177-78; Ex. 2 at 272-275.) However, in order to be timely qualified, Express needed such insurance in place by June 4, 2008. (Order, Definition S(1).) Thus, the Court determined that after acquired policy was untimely. (Pl.'s Mot. Ex. 2 at 277.)

Michael Bradford, an employee of Express and President and Director of DMCCI, also authored and participated in the distribution of the letters. (*See Id*. at 5, 11, 12, 13; (Pl.'s Mot. Ex. 6 PCX 6, at 6.)(indic

26. On or about May 15, 2008, DMCCI transferred its existing clients who had signed contracts with DMCCI to Express by assigning the contracts to Express and sending a form letter notifying the relevant existing clients of the assignments. (*See* D.E. 382-4.)(letter advising clients of assignment to Express); (Hr'g Tr., 2/13/07 at 85:15-19); (Pl.'s Mot. Ex. 8 at 47-96.) The contracts that Express accepted by assignment from Express on May 15, 2008. included:

a. 169 contracts with Kentucky residents,

b. 721 contracts with Florida residents,

c. 701 contracts with Georgia residents,

d. 600 contracts with Ohio residents,

e. 287 contracts with Tennessee residents, and

f. 158 contracts with Minnesota residents

Id.[9]

27. On May 15, 2008, Express had not completed registration under the Kentucky Debt Adjuster Act and had not received confirmation that its registration pursuant to that act was complete. (Pl.'s Mot. Ex. 9 at 000009)(indicating Kentucky registration "not complete.") Indeed, at the time of the show cause hearing, February 17, 2009, Express still had not completed registration under the Kentucky Debt Adjuster Act. (Hr.'g Tr., 2/13/2009, at 68-69.)

28. On May 15, 2008, the only insurance that Express had to satisfy the insurance requirements for debt consolidation services under Kentucky, Florida, Georgia, Ohio, and

[9] At the contempt hearing, Defendants disclosed for the first time that the contracts transferred from DMCCI to Express pursuant to Paragraph XII were transferred back to DMCCI after the Court's July 22 ruling. (Hr'g Tr., 02/13/09 at 73-74.)

[10] Leshin claims that Express obtained the accreditation on or before July 30, 2008 (DCX 10). However, the "Initial Assessment Visit Report" with which he attempted to support that proposition merely states that the assessor is "pleased to recommend Registration." (D.E. 375-12 at 3). The actual Certificate of Registration says Express Consolidatio

counseling services and disbursing funds from the Express Consolidation Disbursement Account to the clients' creditors. These post-order contracts with DMCCI include:

a. 126 contracts with Kentucky residents; and

b. 159 contracts with Tennessee residents.

(Pl.'s Mot. Ex. 6 at 146-175.) The contracts that named DMCCI as the contracting party include but are not limited to contracts that Defendants obtained by soliciting existing clients who had contracts with Leshin or Leshin, P.A. to cancel their contracts in response to the C Notice and execute contracts with DMCCI for continued service by Express.

3. After Entry of the Order on May 5, 2008, Defendant Leshin Continued to Execute Contracts with Consumers in California, and Express Offered or Serviced Such Contracts.

34. On July 30 and August 6, 2008, Express sent letters and emails that solicited California customers to execute a contract with Defendant Leshin. (Pl.'s Mot. Ex. 8 at 000005, 000011.) On August 22, 2008, Defendants produced a report identifying customers to whom these letters and emails were sent. The report shows that Express sent these offers to hundreds of customers in California. (Pl.'s Mot. Ex. 8 at 000027-41.)

35. Defendants' August 22, 2008, reports lists clients with whom Leshin executed or entered into contracts for debt consolidation services after May 5, 2008. The report identifies 404 California residents with whom Defendant Leshin executed contracts after the entry of the Order on May 5, 2008. (Pl.'s Mot. Ex. 8 at 000099-104.)

36. Express services the contracts between Defendant Leshin and California residents, and this servicing includes disbursing funds from the Express Consolidation Disbursement Account to the clients' creditors. (Hr'g Tr. 2/13/2009 at 114:11-115:23; 106:12-21.)

37. The post-order contracts that Express and Leshin, P.A. executed, as well as the contracts that Express accepted in transfer from DMCCI under Paragraph XII, are for "debt consolidation service" as defined in the Order.[11] (*See* Pl.'s Mot. Ex. 9 at 6-7, 37-38, 46-48, 53-54, 58-59, 67-68, 72-73, 154-155, 159-160.)

II. CONCLUSIONS OF LAW

A. Legal Standard for Civil Contempt.

38. United States District Courts have the inherent power to enforce their orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966).

39. The moving party must show civil contempt by clear and convincing evidence. *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988); *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998). This evidence must demonstrate that the alleged contemnors violated a valid order that was clear, definite and unambiguous, and that they had the ability to comply with the order. *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000).

[11] The Order, Definition I., at p.6, defines "debt consolidation service" as:

> (1) receiving money from a consumer for the purpose of distributing one or more payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation;
>
> (2) arranging or assisting a consumer to arrange for the distribution of one or more payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation;
>
> (3) exercising direct or indirect control, or arranging for the exercise of such control, over funds of a consumer for the purpose of distributing payments to or among one or more creditors of the consumer in full or partial payment of the consumer's obligation; or
>
> (4) acting or offering to act as an intermediary between a consumer and one or more creditors of the consumer for the purpose of altering the terms of payment of the consumer's obligation.

40. Once this *prima facie* showing of a violation is made, the burden then shifts to the alleged contemnor "to produce evidence explaining his noncompliance" at a "show cause" hearing. *See Chairs*, 143 F.3d at 1436 (quoting *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991)).

41. A showing of substantial, diligent efforts does not rebut the prima facie showing of contempt. *Combs v. Ryan's Coal Company, Inc.*, 785 F.2d 970, 984 (11th Cir. 1986). At that point, "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." *Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990). As the Supreme Court long ago stated, "[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

42. Rule 65(d) dictates that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitware Co. v. NLRB*, 324 U.S. 9, 14 (1945). Indeed, Rule 65(d)(2)(C), Fed.R.Civ.P., provides liability for non-parties who have notice of an order and act in concert and participation with the restrained party.

B. Contempt Defendants Have Violated the Order.

43. The Court concludes that the FTC proved by clear and convincing evidence that the Contempt Defendants violated the Order when: (1) Defendants failed to discontinue all collections from clients who cancelled in response to the Monitor's notices, as required by paragraph X. A of the Permanent Injunction; (2) Express accepted transfers of debt consolidation

contracts from DMCCI for persons who resided in certain states where Express, at the time of the transfers, was not in compliance with the state's requirements; (3) Defendants and DMCCI offered and executed debt consolidation contracts in certain states where Defendants Express or Leshin should have been but were not in compliance with state law at the time that the offers were made or the contracts were executed.

1. Contempt Defendants Violated the Order When They Continued to Collect from Existing Clients Who Cancelled.

44. Defendants do not dispute that they have continued to collect from 971 clients who,

46. The scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *United States v. Armour*, 402 US 673 (1971).

47. *Frulla v. CRA Holdings*, 543 F.3d 1247, 1252 (11th Cir. 2008) recently set out the test for determining if an agreed order is ambiguous: "A contract is ambiguous where it is susceptible to two different interpretations, eac

clients who cancelled in response to the Monitor's notice. Defendants violated paragraph X.A by soliciting new contracts and continuing collections from these clients. Defendants' violation appears to be ongoing, as they offered no evidence that they had discontinued collections from such clients and rested solely on their claim that continued collection from these clients is not prohibited by paragraph X.A.

52. At least 552 of the 971 clients from whom Defendants continued to collect after cancellation were signed to contracts with DMCCI. Defendant Leshin directed DMCCI to solicit these contracts. Therefore, Defendant Leshin is responsible for the activities of DMCCI as its principal and DMCCI is responsible for violating Paragraph VI. D because it aided and abetted Leshin in continuing to collect from clients who cancelled their contracts pursuant to the C notice issued after notice of the Order.

2. Contempt Defendants Violated Paragraph VI.D of the Order When Express, Acting in Concert with the Other Contempt Defendants, Accepted Transfer of DMCCI Contracts With Clients in Florida, Georgia, Kentucky, Ohio, Tennessee and Minnesota.

53. Paragraph VI.D states: "Defendants *and their Representatives*" are restrained and enjoined from offering, entering contracts, or accepting transfer of them "*when Defendants are not,* at the time of the . . . transfer or execution of the contract, *in compliance with legal requirements imposed by the state*[.]" Defendants violated this provision when Express accepted transfer of DMCCI contracts with residents of Florida, Georgia, Kentucky, Ohio, Tennessee and Minnesota because Express was not, at the time of the transfer on May 15, 2008, in compliance with the legal requirements of these

states by June 4, 2008, it was not in compliance with the insurance requirements in these states "at the time of the . . . transfer" on May 15, 2008.

57. Defendants argue that the language in the Zurich policy provides retroactive coverage back to the date of the Order. However, the policy cannot circumvent or trump paragraph VI.D's requirement that the Defendants and their Representatives cannot offer, execute, or accept the transfer of contracts *when* the Defendants are not in compliance with state law on the dates of the offer, execution or ac

> limited to offering, advertising, or executing or causing to be executed any debt management services or debt management services agreement, except as authorized by law without first becoming registered as provided in this chapter.

Minn Stat. § 332A.03. At the contempt hearing, Defendants took the position that the Minnesota registration requirement did not apply to the contracts that DMCCI transferred to Express because they fell within the following provision in the Minnesota law: "Debt proraters who were not required to be licensed as debt proraters before August 1, 2007, may continue to provide debt management services without complying with this chapter to those debtors who entered into a contract to participate in a debt management plan before August 1, 2007[.]" (Defendants' Response to Motion for Order to Show Cause, D.E. 375 at 11-12.) Defendants contended, and Defendant Leshin testified, that the clients residing in Minnesota are all being serviced under contracts executed prior to August 1, 2007. (Hr'g Tr. 02/13/09, at 135.)

64. Leshin's testimony that the Minnesota contracts that DMCCI transferred to Express were all dated prior to August 1, 2007 was not supported by any documentation and is contradicted by records in Defendants' own files. FTC Investigator Carol Jones testified that she extracted the identities of the Minnesota residents whose contracts were transferred from DMCCI to Express and placed them in a spreadsheet. (Hr'g Tr., 02/17/09 at 243-245.); Jones then ran those identities through the Apollo client database that the Defendants had produced in the underlying litigation, extracted the "Pend Date" for each such Minnesota client, and created spreadsheets showing those dates. (*Id*.); (*See* D.E. 382-15, & D.E. 382-16.)[2] The spreadsheet that Jones produced shows that Defendants' own client database identifies 121 contracts with

[2] Ferdon testified that "pend date" means "the date that the individual consumer would have signed a individual contract and sent it back to us." (Hr'g. Tr. 02/13/09 at 84.)

Minnesota clients executed on or after August 1, 2007. (*See* D.E. 382-16.) After this documentation was presented, counsel for Defendants acknowledged that Defendant Leshin's statements to the contrary were in error and stated that Defendants acknowledged that Express or DMCCI had executed 119 contracts with Minnesota residents that were dated on or after August 1, 2007. (Hr.'g Tr., 2/17/09 at 302.)

65. Because Express accepted transfer from DMCCI of at least 119 Minnesota contracts that were executed by debtors after August 1, 2007 and neither DMCCI nor Express prior were licensed prior to August 1, 2007 to act as a "debt prorater" as required by Minnesota law, Express entered into or accepted these contracts in violation of paragraph VI(D) of the Order.

66. As to the remaining 39 contracts, which presumably were exec

Commerce and the definitions of "Debt management services" and "Debt management services provider" contained in Minn. Stat. § 332A.03 subdivs. 8 and 9.

68. Pursuant to Minn. Stat. §332A.02, subdiv. 9, "debt management services" include receiving funds for the purpose of distributing the funds among creditors in payment or in partial payment of obligations of the debtor. Defendant Leshin testified that while DMCCI is the contracting party, Express acts as DMCCI's servicing agent by, among other activities, disbursing the debtors' funds to the creditors. Therefore, under the statute, Express is providing "debt management services" in Minnesota and is subject to the registration requirements contained in Chapter 332A, Debt Management Services, notwithstanding that DMCCI is the nominal contracting party.

69. Additionally, Express, in its capacity as servicing agent for DMCCI, falls within the definition of "debt management services provider" contained in Minn. Stat. § 332A subdiv. 8 as follows: "Debt management services provider" means any person offering or providing debt management services to a debtor domiciled in this state, regardless of whether a fee is charged for the services. For the reasons stated in paragraph 67 *supra*, Express is offering "debt management services," even though the debtor pays his or her fees to DMCCI, and Express therefore, is subject to the registration requirements contained Chapter 332A, Debt Management Services.

3. Defendants Violated Paragraph VI.D By Offering and Entering Into Contracts in States Where They Were Not Qualified To Provide Debt Consolidation Services.

70. Paragraph VI.D of the Order also prohibits Defendants and their representatives from offering or entering into a contract for debt consolidation services "when Defendants are

not, at the time of the offer . . . or execution of the contract, in compliance with legal requirements impose

30 or 40 clients in California from whom Leshin, P.A. has not received a signed contract with the new language. (Hr.'g Tr., 02/13/09 at 113). Neither Leshin nor anyone else on behalf of the Defendants ever sent the new contract language to officials of the State of California (Hr'g Tr., 02/13/09 at 18-19), even though they were subject to a Desist and Refrain Order there. Leshin also testified that the Defendants never refunded the fees overcharged to those consumers. (Hr'g Tr., 02/13/09 at 113-114.)

76. When the State of California receives information about an attorney acting as a prorater in the state, the state often undertakes an investigation in which it seeks to obtain from the attorney "their contracts, explanation of how they are doing business, and that it is qualified" under the attorney exemption. (Hr.'g Tr., 02/13/09 at 10.) Under the statute, "prorating should be incidental to his or her legal practice and not the entire practice." *Id.*

77. The exemption for attorney

(Hr'g Tr., 02/13/09 at 106) ("the payment from the customer, goes into. . . an RLL account if its an RLL contract . . . and then pursuant to the written agreements, funds are transferred . . . from . . . RLL . . .into an Express or ECI Disbursement Account from which the funds are transmitted to the creditors.")

79. Based on the Desist and Refrain Order, the Denial of the Application, the evidence that Leshin does not offer services to California residents that are otherwise incidental to his practice of law and the evidence that Defendants' contracts with California clients and fee arrangements are inconsistent with the exemption for attorneys in Cal. Fin. Code § 12100(c), Leshin and Leshin, P.A. are not in compliance with California law and were not in compliance when Defendants made the contract offers to each of the "existing clients." (*See* Pl.'s Mot. Ex. 9 at 000018-27.) For the same reasons, the Defendants also were not in compliance when Leshin executed contracts with new clients after July 25, 2008. (Pl.'s Mot. Ex. 11 at 99-104.)

b. Express and DMCCI Offered and Entered into Post-OrderContracts in States Where Defendants Did Not Satisfy State Requirements.

80. Defendants' reports listing the new contracts that they have executed since the Order was entered on May 5, 2008, show that Defendants and DMCCI also executed new contracts with residents of Kentucky, Tennessee, and Nevada in violation of the legal requirements of these states.

Tennessee

81. Express entered into post-order contracts with 61 Tennessee residents. (Pl.'s Mot. Ex. 8 at 000047-94; Ex. 8 at 000115-16.) Express's execution of these 61 post-order contracts

legal deficiencies under Tennessee law. Additionally, a subset of 63 of the 159 post-order contracts of DMCCI in Tennessee also violate paragraph X.A because the contracts resulted from solicitation of "existing clients" who cancelled in response to the Monitor's C Notice.

Kentucky

84. In Kentucky, Express entered into 37 post-order contracts. (Pl.'s Mot. Ex. 8 at 000049-93.)

85. Express's execution of the 37 post-order contracts violated paragraph VI.D of the Order because Express was not in compliance with Kentucky law on the date it e

Nevada

88. Express ha

collect any fees under the contracts, and were unable to say precisely when refunds were paid and fees were suspended. The only documentary evidence concerning fees charged to Nevada clients shows that Defendants have collected fees under contracts executed after May 5, 2008. In August 2008, when asked by the FTC for a compliance report showing the fees that they charged to consumers who contracted after the entry of the Order, Express produced a table showing that Express had charged 51 Nevada monthly consumers administrative fees monthly, totaling $1,589.51. (Pl.'s Mot. Ex. 8 at 000112-113.)

90. In any event, the Defendants' decision to solicit contracts from Nevada residents when they knew they lacked a license or registration was a willful and flagrant violation of the Order.

91. Nevada state investigator Fred Washington testified that, even if the refunds had been provided, the Defendants stil

requirements, Express was not in compliance with the legal requirements of these states regarding insurance until July 18, 2008, at the earliest.

93. Express, under the direction of Defendants' Leshin and Ferdon, entered into over 300 contracts with residents of Florida, Georgia, and Ohio between May 5, 2008, when the Order was entered, and July 18, 2008. Specifically, Express entered into post-order contracts with 117 Florida residents before July 18, 2008. (Pl.'s Mot. Ex. 8 at 105-107); 112 post-order contracts with Georgia residents before July 18, 2008; (Pl.'s Mot. Ex. 8 at 107-108.); and 88 post-order contracts with Ohio residents before July 18, 2008. (Pl.'s Mot. Ex. 8 at 113-114.) Each of these contracts violated paragraph VI.D because, at the time that Express offered and entered into these contracts, Express was not in compliance with the legal requirements in these states.

Texas

94. As discussed above, at the July 22, 2008 hearing, this Court ruled that Express was not qualified to operate in Texas because it did not have the independent accreditation required by Tex. Admin. Code § 88.304(a). At the show cause hearing, Express presented an ISO accreditation that it subsequently obtained to address this defect. Although the accreditation certificate is dated August 8, 2008, Express argued that the accreditation was effective July 30, 2008. The Court finds that Express was not in compliance with Texas law until August 8, 2008, and that Defendants violated paragraph VI.D with respect to all post-order contracts with Texas residents executed before August 8, 2008.

d. **Re-transfers of Contracts from Express to DMCCI after the July 2008 Hearing**.

Georgia, Florida and Ohio

95. As noted *supra*, Ferdon testified that after the Order was executed DMCCI timely transferred all of its contracts to Express and then after the contempt hearing in July 2008, Express transferred those contracts back to DMCCI that were with debtors in Minnesota, Florida, Georgia and Ohio. The Court has addressed Minnesota in parag

required of persons engaged in "debt management services" because in Georgia the applicable statute regulates only "debt adjusting" for a fee. Ga. Code Ann. §18-5-1. In the case of the DMCCI contacts, the debtors pay their fees to DMCCI and no evidence was presented that DMCCI lacked the required insurance when these contracts were executed.[4] The Court also is unpersuaded at this time that the law would permit the conclusion that Express is the alter ego of the lender the fees is

[4] The Court does not understand from the testimony that DMCCI turns over the fees it collects directly to Express; rather the fees are deposited in a Leshin-controlled account from which he causes the administrative expenses and overhead of Express to be paid.

Express on July 18, 2008 failed to satisfy Florida law because it was not retroactive for all "occurrences" prior to July 18, 2008. Fla. Stat. §817.804 requires that the insurance coverage be maintained "at all times." The Court is satisfied that the Zurich policy, which covers "occurrences" "during the Policy Period shown in the Declarations, before such policy period or both" substantially complies with the requirements of Florida law.

100. In Ohio, persons engaged in "debt adjusting" are required to obtain and maintain insurance coverage on certain terms for employee dishonesty, depositer's forgery and computer fraud "at all times." Ohio Rev. Code Ann. § 4710.02(E). "Debt adjusting" includes doing business in debt adjusting, budget counseling, debt management or debt pooling service to effect the adjustment compromise or discharge of any consumer debt to receive from the debtor and disburse to the debtor's creditors any money. The Court finds that with respect to the "re-transferred" DMCCI contracts, it is Express that engages in debt adjusting, budget counseling and/or debt pooling service and that it is Express that effects the adjustment, compromise or discharge of consumer debt. Accordingly, Express was required to be in compliance with Ohio Rev. Code Ann. § 4710.02(E), but was not until July 18, 2008 for the same reasons as stated above.

C. Ferdon and Leshin are Individually Liable for Contempt

101. Leshin wrote the scripts that violated paragraph X.A. of the Order. Additionally, he controls Express and DMCCI and caused these entities to violate paragraph VI.D. Ferdon approved of the transfers that violate VI.D. In addition to Leshin's and Ferdon's liability for directly participating in the Order violations, Ferdon and Leshin are also individually liable for the contemptuous acts of Express, Leshin, P.A. and DMCCI through their positions as officers.

"A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs." *Wilson v. United States*, 221 U.S. 361, 376-77 (1911); *Connolly v. J.T. Ventures*, 851 F.2d 930, 93-35 (7th Cir. 1988) (corporate president and vice president liable for contempt). Both Leshin and Ferdon had notice of the Order at issue as well as the legal requirements in the states discussed above. Nonetheless, instead of consulting the Court as to their proposed course of action, they proceeded at their peril. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949); *Combs v. Ryan's Coal Company, Inc.*, 785 F.2d 970, 979 (11th Cir. 1986). "If a defendant acquiesces in a decree and undertakes to make his own determination of its meaning, having been alerted by it he acts at his own peril." *Wirtz v. Ocala Gas Company, Inc.*, 336 F.2d 236, 240 (5th Cir. 1964). Defendants neither sought to modify their ban from entering into or accepting transfer of contracts where they were not in compliance nor the prohibition on ceasing collections from those who cancelled. Nor did they seek clarification whether their proposed course of action in soliciting the C Notice clients complied with those provisions, even though they knew during the July 21 and 22 hearing that they were going to proceed in that manner. As officers of the three corporations that violated the Order, Ferdon and Leshin also liable.

D. Appropriate Remedies for Civil Contempt

102. Civil contempt remedies "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. U.S. 821, 827 (1994). The Contempt Defendants were placed on notice by the FTC's contempt motion (D.E. 366), as well as prior motions for extension of the Monitor's tenure in light of the Defendants' failure to properly cancel existing clients (*See* D.E. 355), and

they had their opportunity to be heard in briefs (D.E. 358, 359, 375), and the evidentiary hearing on February 13 and 17, 2009.

103. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb*, 336 U.S. at 193. In such proceedings, the court utilizes its inherent authority by providing the relief necessary to effect complete compensation to those aggrieved by the contempt. *See, e.g., Bagwell*, 512 U.S. at 829 (compensatory nature of the relief sought is a hallmark separating civil from criminal contempt) (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947)). In civil contempt, proper sanctions either coerce compliance with the order, *Lawrence v. Goldberg*, 279 F.3d 1294, 1300 (11th Cir. 2002); or redress consumer injury. *McGregor v. Chierico*, 206 F.3d 1378,1387 (11th Cir. 2000); *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 465 (S.D. Fla. 1998). The fact that the FTC is seeking redress, not for its own losses, but for the losses of consumers, does not remove this action from the auspices of civil contempt. *See e.g., FTC v. Kuykendall*, 371 F.3d 745, 753 (10th Cir. 2004). Further, the Court may properly seek the assistance of the Court-Appointed Monitor in seeking accurate amounts to compensate proven contempt violations. *See FTC v. Neiswonger*, 494 F.Supp.2d 1067, 1082 fn.20 (E.D. Mo. 2007) ("the Court will await a final computation from the Receiver, at which time the Court will modify the contempt order to include a compensatory sanction to be levied against any or all defendants.")

1. Consumer Redress for Paragraph VI.D violations.

104. Disgorgement is a proper civil contempt remedy. *See In re: General Motors Corp.*, 110 F.3d 1013, 1018-19 (4th Cir. 1997). Contempt Defendants are ordered to disgorge all amounts collected from consumers since May 5, 2008 as follows:

California

105. All fees obtained from consumers who are parties to the 404 post-order consumer contracts in California as discussed in paragraph 35 *supra*.

Tennessee

106. All fees obtained from consumers who are parties to the 61 post-order consumer contracts with Express in Tennessee as discussed in paragraph 81 et. seq. *supra*.

107. All fees collected from consumers who are parties to contracts that DMCCI's transferred to Express referred to in paragraph 83 *supra*.

108. All fees obtained from consumers who are parties to the 159 post-order consumer contracts with DMCCI referred to in paragraph 83 *supra*.

Kentucky

109. All fees obtained from consumers who are parties to the 37 post-order consumer contracts with Express in Kentucky as discussed in paragraph 84 *supra*.

110. All fees collected by Express on account of DMCCI's transfer of 169 Kentucky consumer contracts to Express referred to in paragraph 60 *supra*.

111. All fees collected by DMCCI on account of the 126 post-order consumer contracts that it entered into with Kentucky residents referred to in paragraph 87 *supra*.

Texas

120. All fees obtained from 391 consumers who entered into post-order contracts with Express prior to August 8, 2008 discussed in paragraph 32 *supra*.

2. _____

F. Modification of the Order

123. The Contempt Defendants' demonstrated failure to comply with the Final Order constitutes appropriate changed circumstances warranting a modification of that order pursuant to Rule 60(b), Fed. R. Civ. P. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968) (if it is shown that the decree has not achieved adequate relief in a statutory enforcement action, it is the duty of the court to modify the decree).

124. Courts have the power to modify a stipulated injunction following a finding of contempt. *See System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961); *FTC v. Neiswonger*, 494 F.Supp.2d at 1084.

125. Within 10 days hereof, the FTC shall submit a proposed Modified Stipulated Injunction and Order that includes the following provisions: (1) the Monitor to send new Notices to all consumers who executed contracts in violation of the Order, (a) for those clients who cancelled pursuant to the C notice and from whom the Contempt defendants continued to collect, the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants, (b) for those clients in states where the Defendants are not or were not in compliance with state law (as found above) when the contracts were executed the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants, (c) for those clients whose contracts were executed before Defendants' complied with the law of the state where the client resides, the option to cancel or transfer, making clear that cancelling or transferring means no more contracts or services with the Contempt Defendants; (2) a restriction on any transfers of clients or contracts by the Contempt Defendants amongst

themselves or to any debt consolidation servic

Court for her approval within 10 days hereof.

127. Defendants shall cease collecting fees from any clients who reside in states identified in this Court's Omnibus Order as states in which Defendants are not qualified to conduct debt management services (DE 339, Omnibus Order, Pages 6-7, ¶¶ 1, 3) and from whom Defendants have continued to collect payments under contracts executed prior to the Stipulation and Order.

128. Unless specifically Modified in the Modified Stipulated Injunction and Order, all provisions of the Order will remain.

G. Appointment of Monitor To Determine Amount To Be Disgorged

129. The Court is unable to compute the exact amounts to be disgorged from the exhibits. Therefore, the Monitor is hereby appointed to determine the amount to be disgorged for each of paragraphs 104 through 121 and to file a report within 30 days here of setting forth the amounts in categories by state.

H. Extension of the Monitor's Appointment

131. The Monitor's Appointment is hereby extended for a period of 240 days from entry of this Order or the completion of all duties, whichever occurs first.

DONE AND ORDERED in Chambers at Miami, Florida this 6th day of April 2009 *nunc pro tunc* for March 27th , 2009.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record