UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION and PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiffs,

v.

KELLY S. BRACE et al.,

Defendants,

JOELLE LECLAIRE,

Relief Defendant.

Case No.:

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER WITH AN ASSET FREEZE AND OTHER EQUITABLE RELIEF, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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I. INTRODUCTION

Defendants Kelly Brace and his debt-collection companies have taken millions from consumers through deception and fraud. Most egregiously, they have collected on payday loan debts that the purported lender had told them were fabricated, and that they knew consumers did not really owe. But even when the Defendants have collected on legitimate debts, they have used lies and other unlawful tactics. In short, as one of their former employees put it, the Defendants "shake down America." PX18 ¶ 78, at 185.

Unfortunately, the Defendants' fraudulent conduct has paid off, so far. Despite operating a relatively modest operation, their collectors have coerced, extorted, and tricked consumers into giving them almost $12 million. And Brace has diverted over $1 million of that money to himself and his ex-wife, Relief Defendant Joelle Leclaire.

The Defendants' scheme to deceive and pressure consumers into paying debts, regardless of whether they actually owe anything, is illegal. Their actions have violated the Federal Trade Commission Act, the Fair Debt Collection Practices Act ("FDCPA"), New York Executive Law Section 63, and New York General Business Law Sections 349 and 601.

To stop them from harming anyone else, the Federal Trade Commission and the State of New York request a Temporary Restraining Order enjoining further unlawful conduct, freezing assets, and allowing for expedited discovery, including immediate access to business premises for copying crucial documents. Brace and his companies' prior conduct shows that these measures are necessary. Brace already has a criminal conviction for defrauding consumers, and his scheme's operation shows a staggering contempt for legal process by: collecting on bogus debts, communicating with consumers using the names of shell companies to evade legal scrutiny and defeat creditors, and moving money out of the Corporate Defendants' accounts to

other accounts under his or his family's control. Without the proposed relief, Brace would likely abscond with assets and destroy evidence. The Court should therefore enter the proposed order to ensure effective final relief.[1]

II. DEFENDANTS

A. Individual Defendant

Individual Defendant **Kelly S. Brace** has been described as the CEO and "100%" owner of Defendant Credit Clear Solutions; Vice President, "member," and co-owner of Defendant Braclaire Management;[2] partner, "member," and owner of Defendant Solidus Group; and the only listed "member" of Defendant Solidus Solutions. PX18 ¶¶ 20, 25, 30, 38-40, 42, at 166, 168-70, 172-73; Atts. D, E, M.ttts. D, E, M.ttt, M, Q, R, S, U aolid3 D, E,fBT.TT.TT.TT.-.0es

employees' salaries, the call centers' rent and utilities, and purchased the phone numbers the enterprise used for collection. *Id*. ¶¶ 13 and 106, at 164, 194-95. Finally, Braclaire has held several merchant accounts with payment processors. *Id.* ¶ 19, at 166.

Corporate Defendant **Credit Clear Solutions, LLC** has held the scheme's merchant

transferred at least $620,000 to Braclaire, and Braclaire transferred over $2.3 million to Solidus Group. *Id.* ¶¶ 92, 93, 98, at 190-92.

To hide Brace and his companies' involvement, Brace's collectors have told consumers that they were employed by shell companies (now all defunct) and at least one fake company. Most prominently, they have collected under the names "Delaware Solutions, LLC," "Clear Credit Services, LLC," and "Clear Credit Solutions, LLC," which are named here as D/B/As of Braclaire. *Id.* ¶ 43, at 173-74. To further confuse consumers, these entities have used a single "virtual office" location in Delaware for their corporate address. *Id.* ¶¶ 47 and 68, at 175, 181-82.

Until they recently dissolved, Delaware Solutions and Clear Credit Services were active New York limited liability companies. *Id.* ¶¶ 44, 48, 49, 51, at 174-76; Atts. V, Z, AA, BB, at 302-03, 316-17, 319-20, 322-23. They are named as D/B/As of Braclaire because they are no longer active entities. Clear Credit Solutions never formally incorporated. *Id.* ¶ 60, at 178. Even when Delaware Solutions and Clear Credit Services existed, Braclaire and Credit Clear collected all consumer payments. *Id.* ¶ 90, at 188. So if consumers tried to recoup their money

"Delaware Solutions" harassed him as recently as September 1st, and the Commission continues to receive complaints about calls from Braclaire phone numbers. *Id.* ¶¶ 113-115, at 196-97.

C. Relief Defendant Leclaire

Joelle Leclaire is Brace's ex-wife and was a co-signatory until March 24, 2014 on the Braclaire accounts, from which she received over $340,000. *Id.* ¶¶ 18, 95, at 165-66, 191. She has also received at least $75,000 from Solidus Group. *Id.* ¶ 99, at 192. We have not yet uncovered evidence showing that she is currently involved in the scheme, so the Plaintiffs are not seeking preliminary relief against her.

III. DEFENDANTS' ILLEGAL DEBT-COLLECTION PRACTICES

Federal and New York laws prohibit debt collection through deceptive and abusive tactics. Below, we detail how the Defendants have violated those laws by collecting on debts that consumers never actually owed and, even when collecting on legitimate debts, routinely lying and applying unlawful pressure tactics.

A. Federal and New York Law Prohibit Deceptive Debt Collection.

Lying to consumers to get them to pay a debt, even a legitimate one, is unlawful. Section 5 of the FTC Act prohibits "unfair or deceptive practices in or affecting commerce." 15 U.S.C. § 45. Under Section 5, a material representation is deceptive if it is likely to mislead consumers who are acting reasonably under the circumstances. *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *FTC v. Navestad* ("*Navestad II*"), No. 09-CV-6329T, 2012 WL 1014818, at *4 (W.D.N.Y. Mar. 23, 2012).

In determining whether a representation is likely to mislead consumers, the "court should focus on the overall impression" of the representation, "not its 'literal truth or falsity.'" *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008) (citation omitted). In

particular, courts must consider the representation "'as a whole without emphasizing isolated words or phrases apart from their context.'" *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (citation omitted). In determining whether a representation is deceptive, courts apply the perspective of "the least sophisticated consumer." *Id*. at 532.

A representation is material if it "'involves information that is important to consumers'" and will likely affect their conduct. *Navestad II*, 2012 WL 1014818, at *4 (citation omitted). Express representations are "presumed material," *Med. Billers Network*, 543 F. Supp. 2d at 304, as are any implied claims the speaker intends to make. *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 135 (D. Conn. 2008).

Like the FTC Act, the FDCPA prohibits deceptive, unfair, and abusive practices in debt collection. 15 U.S.C. §§ 1692-1692p. In enacting the FDCPA, Congress recognized that "less ethical debt collectors," among other things, "impersonate public officials and lawyers, disclose debtors' personal affairs to employers and engage in other sorts of unscrupulous practices." *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996). The FDCPA aims "to eliminate such practices." *Id.* As an enforcement mechanism, the FDCPA deems a violation of its provisions "an unfair or deceptive act or practice" in violation of the FTC Act. 15 U.S.C. § 1692*l*(a).

Section 807 of the FDCPA forbids debt collectors from making "any false, deceptive, or misleading representation" and provides a non-exhaustive list of prohibited misrepresentations. 15 U.S.C. § 1692e. In applying Section 1692e, courts look to whether the "least sophisticated consumer" would be deceived to ensure that the statute "protects all consumers, the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993).

In addition, the FDCPA forbids debt collectors from harassing, oppressing, or abusing consumers, and explicitly prohibits many practices. The prohibited practices include: contacting

third parties except to acquire information about consumers' locations; placing telephone calls "without meaningful disclosure of the caller's identity"; and failing to provide, either in the initial communication with the consumer or within five days of that communication, the amount of the debt, the name of the creditor, and information about the consumer's right to contest the debt. 15 U.S.C. §§ 1692c(b); 1692d(6); and 1692g(a).

New York law also bars deceptive and abusive debt-collection practices. New York Executive Law Section 63(12) empowers the Attorney General to seek relief against businesses engaging in persistent or repeated "fraud or illegality." N.Y. Exec. Law § 63(12).
Section 63(12) defines "fraud" to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." N.Y. Exec. Law § 63(12). A violation of state, federal, or local law constitutes illegality within the meaning of § 63(12).

New York General Business Law Section 349 similarly provides that "[d]eceptive acts or practices in the conduct of any business . . . in this state are hereby declared unlawful." N.Y. Gen. Bus. Law § 349(a). The meaning of deceptive practices under General Business Law Section 349 is parallel to fraud under Executive Law Section 63(12). *State v. Colo. State Christian Coll.*, 76 Misc. 2d 50, 56 (Sup. Ct. N.Y. Co. 1973).

In addition to general prohibitions against fraud and deception, New York General Business Law Section 601 prohibits several debt-collection practices. Among other things, Section 601 forbids: simulating a representative of State government; communicating or threatening to communicate any information affecting a consumer's credit with knowledge or reason to know the information is false; disclosing or threatening to disclose information concerning the existence of a debt known to be disputed by the debtor without disclosing that fact; threatening any action which the debt collector does not take in its usual course of business; and claiming, attempting, or threatening to enforce a right with knowledge or reason to know that the right does not exist. N.Y. Gen. Bus. Law § 601(1), (3), (5), (7), and (8).

As detailed below, Defendants' scheme has violated all of these laws by collecting on fake debts and engaging in other deceptive and unlawful practices.

B. Collection on Fake Debts

The Defendants collected on a portfolio of "debts" owed to "500FastCash" that they knew were fake, and collected on other debts they knew or should have known were dubious, in violation of Federal and New York law.

1. *The Fake "500FastCash" Debts*

At some point in 2014, the Defendants obtained debts supposedly owed to "500FastCash," a d/b/a of payday lender Red Cedar Services, Inc. As described in a declaration

from Red Cedar's former General Counsel Jared Marsh, in the summer of 2014, Red Cedar began receiving complaints from consumers who had been harassed by "Delaware Solutions" and "Clear Credit Services." PX16 ¶¶ 4-5, 9, at 94-95. Disturbingly, most of these consumers were not Red Cedar borrowers. *Id.* ¶ 5, at 95.

After learning about the collection on fake 500FastCash debts, Marsh tried to stop it. First, in late September and early October he sent letters by mail and fax to "Clear Credit Solutions" and by mail to "Delaware Solutions." *Id.* ¶¶ 13-14, at 96; Atts. A and B at 100-05. The letters explained that Red Cedar had never sold any of its debts and further stated, "any activity [Delaware Solutions/Clear Credit Solutions] has undertaken on accounts where 500FastCash is identified as a creditor are UNAUTHORIZED and UNLAWFUL and 500FastCash hereby ORDERS YOU TO STOP such activities immediately." *Id.* Atts. A and B, at 101, 104. Marsh's letters did not return to sender, and his fax transmitted successfully. *Id.* ¶ 16, at 97.

Next, Marsh called a number for Clear Credit Solutions provided by a consumer. *Id.* ¶ 18, at 97. He spoke with a manager and informed him that collection on the fake 500FastCash debts was unlawful. *Id.* The manager replied that a rogue, and now fired, employee had uploaded the 500FastCash debts, and that the Defendants had deleted the debts from their database. *Id.* ¶ 19, at 97.

But Red Cedar continued to receive complaints, so Marsh called again in October. *Id.* ¶ 21, at 98. This time, the Defendants' employees responded with hostility, demanding that he speak with their attorney but refusing to give him the attorney's contact information. *Id.*

Moseley et al., which the Commission and the Consumer Financial Protection Bureau filed in September of 2014. The defendants in those cases used consumers' bank account information to access their accounts and impose loans on the consumers without their permission. If they refused to pay, those lenders sold the "debts" to collectors, who then harassed the consumers for more money.

information about the supposed loan, she "assumed that he was being honest" and decided to pay.[5] PX8 ¶ 4, at 52.

4. *Defendants' Fake-Debt Collection Was Illegal.*

The Defendants' fake-debt collection violated Section 5 of the FTC Act, the FDCPA, New York Executive Law Section 63(12), and New York General Business Law Section 349. It violated Section 5 in two ways. First, by representing that consumers owed a debt that they do not owe, or that the Defendants could make them pay, the Defendants made false representations that were material and upon which consumers were likely to rely. Second, by claiming that the debts were valid, the Defendants represented that they had a reasonable basis for believing that consumers owed those debts. But they could not have had a reasonable basis because Red Cedar had repeatedly told them that its debts were fake, the government's suits had cast doubt on the *CWB* and *Moseley* debts, and many consumers had contested their debts. For the same reasons, the Defendants' fake-debt collection violated FDCPA Section 807's prohibition on false, deceptive, or misleading representations; New York Executive Law Section 63's prohibition on fraudulent or illegal acts; and General Business Law Section 349's prohibition on deceptive acts and practices. 15 U.S.C. § 1692e; N.Y. Exec. Law § 63(12); N.Y. Gen. Bus. § 349.

C. Defendants' Deceptive and Abusive Debt Collection

The Defendants fake-debt collection has been only part of their larger scheme to collect debts through deception and abuse. Consumer declarations, and almost 1,000 consumer

[5] Fortunately, after scheduling their payments, both Ms. Middleton and Ms. Sims learned that the operation was fraudulent before the Defendants could steal their money. Ms. Middleton researched the name Defendants had used when talking to her, Clear Credit Services, and immediately concluded that it was a fraud. Ms. Sims heard from a friend that the 500FastCash calls were scams. Both were able to stop their scheduled payments, but only by cancelling their bankcards, a serious inconvenience. PX4 ¶¶ 12-13, at 20; PX8 ¶¶ 5-6, at 52-53.

complaints,[6] detail the Defendants' unlawful collection practices. The Defendants' collectors have frequently initiated contact with consumers using fake identities, such as process servers, to trick them into calling back. If consumers call, the collectors have misrepresented that they would face dire consequences, like criminal prosecution, if they did not pay immediately. To harass or shame consumers into paying, the collectors have also disclosed or threatened to disclose the alleged debts to third parties. Finally, they have failed to identify themselves when calling consumers, and failed to provide FDCPA-required disclosures. As with their fake debt collection, the Defendants' illegal tactics have succeeded far too often.

1. *Defendants' Use of Fake Identities*

Brace's collectors have often misrepresented themselves as process servers or lawyers, or as affiliated with lawyers or law enforcement. They have used these fake identities to convince consumers that they can initiate civil or criminal proceedings on a moment's notice. For example, Declarant Shirena Outlaw reports receiving a voicemail for her husband from a "process server" named David Brown, who threatened to serve process at her husband's work or home, unless he called Delaware Solutions. PX13 ¶ 2, at 80; *see also* PX5 ¶ 7, at 29 ("I received a call from someone claiming to be a 'judiciary process server.' He told me that he intended to show up at my place of work with a uniformed officer in order to serve me with court papers."); PX12 ¶ 4, at 77 ("He said he was a process server and that he planned to come to my place of employment within the next 48 hours to serve me a warrant."). Other consumers report voicemails from the "pre-legal" divisions of the Defendants. PX4 ¶ 2, at 18; PX1 ¶ 5, at 1; PX10 ¶ 2, at 65; *see also* PX6 ¶ 2, at 30 (voicemails from "litigation firm" Clear Credit Solutions);

[6] Consumer complaints usually represent only the "tip of the iceberg" when it comes to consumer harm. *See, e.g.*, *United States v. Brien*, 617 F.2d 299, 308 (1st Cir. 1980); *United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983).

2. *Defendants' Misrepresentations*

nothing. PX17 ¶ 4, at 122. Likewise, consumers who refused to pay have not been sued. *See, e.g.*, PX1 ¶¶ 6-7, at 2 (consumer threatened with lawsuit refused to pay and was subject only to

FDCPA-validation notice, and the collector refused. PX7 ¶ 7, at 47; *see also* PX6 ¶ 13, at 32 (refusal to provide documentation on debt subject to *FTC v. CWB* litigation). Many others have reported similar stories. PX18 ¶ 73, at 184.

The Defendants have also failed to tell consumers during their initial contact that they are debt collectors attempting to collect on a debt (i.e., the "mini-Miranda" disclosure), as required by the FDCPA. One consumer, a former debt collector, only received a mini-Miranda disclosure after asking why she did not receive one. PX12 ¶ 8, at 78. And a former employee of the Defendants admitted that they never provided mini-Miranda disclosures. PX18 ¶ 80, at 186. Most troublingly, the Defendants deliberately and intentionally failed to give mini-Miranda disclosures when they contacted consumers using fake identities.

5. *Defendants' Tactics Were Unlawful.*

The Defendants have violated a host of federal and New York laws. They have violated Section 5 of the FTC Act, Section 807(10) of the FDCPA, New York Executive Law Section 63 and General Business Law Section 349 because they have made material misrepresentations upon which consumers relied in deciding to pay. They also have violated several specific FDCPA provisions: the prohibition on communicating with third parties (Section 805(b)); the requirement that collectors reasonably identify themselves when placing phone calls (Section 806(6)); the prohibition on certain false representations (Section 807);[7] and the requirement to disclose information about the debt and the consumer's right to dispute it (Section 809(a)). 15 U.S.C. §§ 1692c(b); 1692d(6); 1692e; and 1692g(a). And they violated New York General

[7] The Section 807 violations include misrepresenting affiliations with lawyers or the government; misrepresenting that the consumers will face arrest or lawsuits; misstating a debt's character, amount, or legal status; and communicating without initially disclosing that the Defendants are debt collectors attempting to collect a debt. 15 U.S.C. § 1692e(1), (2), (3), (4), (5), and (11).

Business Law Section 601's prohibitions on false claims of government affiliation, disclosing or threatening to disclose debt information the collector knows or has reason to know is false, disclosing or threatening to disclose the existence of a debt the consumer disputes without disclosing that fact, threatening actions the collector does not take, and threatening actions that the collector knows it cannot take, like having the consumer arrested. N.Y. Gen. Bus. Law § 601(1), (3), (5), (7), and (8). In sum, the Defendants' operation has violated the law in all aspects of its debt collection.

IV. THE COURT SHOULD ISSUE A TEMPORARY RESTRAINING ORDER AGAINST THE DEFENDANTS.

To stop the Defendants from harming more consumers, and to preserve the possibility of meaningful relief, the Court should issue the proposed Temporary Restraining Order ("TRO"). Below, we explain why the Court has the authority to grant the proposed order, why the Court should grant it, and why it should enjoin all the Corporate Defendants and Brace.

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

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek, and the Court to issue, temporary, preliminary, and permanent injunctions. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011). As part of its authority to issue permanent injunctions, this Court has the "broad equitable authority to 'grant any ancillary relief necessary to accomplish complete justice.'" *Five-Star Auto Club*, 97 F. Supp. 2d at 533 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982)). This includes a TRO, an asset freeze, expedited discovery, and other appropriate remedies. *See, e.g.*, *id.*; *FTC v. Strano*, 528 F. App'x 47, 49 (2d Cir. June 20, 2013) (holding that asset freeze was appropriate ancillary relief); *FTC v. Unified Global Group, LLC*, No. 1:15-cv-00422-EAW (W.D.N.Y. May 12, 2015) (granting TRO, asset freeze, immediate access); *FTC v. Premier Debt Acquisitions*, No. 1:15-cv-00421-FPG

(W.D.N.Y. May 12, 2015) (same); *FTC v. 4 Star Resolution LLC*, 15-cv-112S (W.D.N.Y. Feb 10, 2015) (same); *FTC v. Vantage Point Servs., LLC*, 15-CV-0006S (W.D.N.Y. Jan. 5, 2015) (same); *FTC v. Nat'l Check Registry*, 14-CV-0490A (W.D.N.Y. June 23, 2014) (same); *FTC v. Fed. Check Processing, Inc.*, 14-CV-0122S (W.D.N.Y. Feb. 24, 2014) (same); *FTC v. Navestad*, No. 09-CV-6329T (W.D.N.Y. July 1, 2009) (same). Similarly, New York Executive Law Section 63 and General Business Law Sections

Civil Practice Law and Rules Section 6301, New York Executive Law Section 63(12), and New York General Business Law Sections 349(b) and 602(2), the Attorney General may obtain a preliminary injunction upon a similar showing. Unlike private litigants, the Plaintiffs need not prove irreparable injury because this injury is presumed in a statutory enforcement action.[10] *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Verity Int'l, Ltd.* ("*Verity I*"), 124 F. Supp. 2d 193, 199 (S.D.N.Y. 2000); *People v. P.U. Travel, Inc.* 2003 N.Y. Misc. LEXIS 2010, at *7-8, (Sup. Ct. N.Y. Cnty. 2003).

The Plaintiffs will ultimately succeed on their claims, and the balance of equities favors injunctive relief.

1. *Plaintiffs Are Likely to Succeed on the Merits.*

The Plaintiffs meet their burden to show likelihood of ultimate success if they "show[] preliminarily, by affidavits or other proof, that [they have] a fair and tenable chance of ultimate

As detailed above, the Plaintiffs have presented ample evidence that they are likely to prevail. In addition to the 892 complaints against the Defendants (PX18 ¶¶ 67, 69, at 181-82), this evidence includes 15 sworn consumer declarations, voicemail transcripts with deceptive representations, bank records showing payments and movement of funds, and a declaration from the former general counsel of the purported lender on the 500FastCash debts. The evidence shows that the Defendants collected on fake-debts, in violation of the FTC Act, the FDCPA, New York Executive Law Section 63, and New York General Business Law Section 349. The evidence also shows that their typical debt-collection activities routinely violated those same statutes, and General Business Law Section 601, in numerous other ways.

2. *The Equities Weigh in Favor of Granting Injunctive Relief.*

Once the Plaintiffs establish a likelihood of success on the merits, preliminary injunctive relief is warranted if the Court, weighing the equities, finds that relief is in the public interest. In balancing the equities, courts should give public equities far greater weight. *See, e.g.*, *Lancaster Colony Corp.*, 434 F. Supp. at 1096; *Univ. Health*, 938 F.2d at 1225 ("While it is proper to consider private equities in deciding whether to enjoin a particular transaction, we must afford such concerns little weight, lest we undermine section 13(b)'s purpose of protecting the 'public-at-large, rather than individual private competitors.'") (citation omitted).

The evidence here demonstrates that the public equities – protection from the Defendants' deceptive and abusive debt collection practices, effective enforcement of the law, and the preservation of the Defendants' assets for final relief – are significant. This relief is also necessary because the Defendants' conduct indicates that they will likely continue to defraud and deceive the public. *Five-Star Auto Club*, 97 F. Supp. 2d at 536 ("[P]ast illegal conduct is highly suggestive of the likelihood of future violations."). Indeed, the need for injunctive relief is

particularly acute here given the Defendants' attempts to cover up their identities by using the names of front corporations while collecting.

By contrast, any private equities in this case are not compelling. Compliance with the law is not a burden. *See Cuban Exch.*, 2012 WL 6800794, at *2 ("A preliminary injunction would not work any undue hardship on the defendants, as they do not have the right to persist in conduct that violates federal law."). And because the Defendants "'can have no vested interest in business activity found to be illegal,'" the balance of equities tips decidedly toward granting the relief. *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (citation omitted).

C. Defendants Are a Common Enterprise and Jointly and Severally Liable for the Law Violations.

The Court should issue the proposed TRO against all Corporate Defendants because they operate as a common enterprise and are jointly and severally liable for their conduct. When determining whether a common enterprise exists, the Second Circuit considers whether "the same individuals were transacting an integrated business through a maze of interrelated companies." *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964). Defendants in a common enterprise are jointly and severally liable for the injury caused by their violations of the FTC Act. *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 469 (S.D.N.Y. 2014). Factors that indicate a common enterprise include whether the nominally distinct entities "'(1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing.'" *Id.* (Citation Omitted.) All these factors are present here.

The Corporate Defendants are significantly intertwined. Braclaire Management, Credit Clear Solutions, Solidus Group, and Solidus Solutions are controlled by one person: Kelly

$2.3 million to Solidus Group and sent another approximately $925,000 to Brace and Leclaire. *Id.* ¶¶ 92 and 100, at 190, 193. Solidus Group also transferred almost $120,000 to Brace and Leclaire and another $75,000 to Leclaire separately. *Id.* ¶ 100, at 193.

Finally, the Defendants share "marketing" because they use the same collectors and the same lies to collect payments that eventually circulate through their various corporate accounts. Put simply, the technically distinct Corporate Defendants operate as a single enterprise to deceive consumers.

D. Brace Is Personally Liable.

Individual Defendant Kelly Brace is liable for the Corporate Defendants' violations. Under the FTC Act, individuals "may be liable for corporate acts or practices if they (1) participated in the acts or had authority to control the corporate defendant and (2) knew of the acts or practices." *Med. Billers Network*, 543 F. Supp. 2d. at 320. The FTC can establish that an individual knew about the acts and practices by showing that the individual had a "reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989));

("*Apple Health II*"), 80 N.Y.2d 803, 807 (1992); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 734 (N.Y. App. Div. 3d Dept. 1996).

Brace unquestionably has authority to control, and has controlled, the enterprise. "'Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.'" *Med. Billers Network*, 543 F. Supp. 2d at 320 (citation omitted). *See also Consumer Health Benefits*, 2012 WL 1890242, at *5 ("[A]n individual's status as a corporate officer on behalf of a corporate defendant can be probative of control."); *Five-Star Auto Club, Inc.*, 97 F. Supp. 2d at 535 ("Assuming the duties of a corporate officer establishes authority to control."). In particular, bank signatory authority or acquiring services on behalf of a corporation evidences authority to control. *FTC v. USA Fin., LLC*, 415 F. App'x 970, 974-75 (11th Cir. 2011). As discussed above, Brace has owned and operated this scheme. In addition, he has controlled all of the money, including payroll. *See* Section II.A, *supra.*

Brace also has the requisite notice of his operation's fraud to meet the standard for monetary relief. As the enterprise's mastermind, Brace has participated in, and has knowledge of, his scheme's fraud. He has set up the entities to obscure his involvement from consumers and regulators. *See* Section II.B, *supra*. Through Braclaire, he has purchased over 200 phone numbers to help his collectors hide their identities. PX18 ¶¶ 16 and 118, at 165 and 198; Atts. B and C, at 205-213. He has personally signed payroll, rent, and utilities checks. *Id.* ¶ 106, at 194-95. Former employees say he has run the enterprise. *Id.* ¶ 77, at 185. And he has directed the funds through a maze of corporate accounts. *See* Section IV.C, *supra*. Most importantly, he has operated the enterprise for years, shepherding it through numerous name changes, formation and dissolution of front entities, and Better Business Bureau inquiries. PX18 ¶¶ 6-7, at 162 (noting

BBB complaints). Brace has more than participated in his fraudulent enterprise; he has created it and directed it. Therefore, he knew, or has been at least recklessly indifferent to, the lies his collectors have told consumers.[11]

V. DEFENDANTS' CONDUCT WARRANTS THE REQUESTED RELIEF.

The Plaintiffs seek a TRO that would enjoin the Defendants from further illegal activity, preserve assets and evidence, and provide for expedited discovery. Below, we show why the Defendants' actions justify each component of the proposed relief: conduct relief, asset freeze, immediate access, record preservation, and expedited discovery. We further show why the Court should grant the TRO on an expedited basis.

A. Conduct Relief

To prevent ongoing consumer injury, the proposed TRO would prohibit the Defendants from making misrepresentations concerning the collection of debts and from collecting, or attempting to collect, amounts not owed. As in previous FTC-State of New York actions, the proposed order would also prohibit the Defendants from engaging in the particular violations alleged in the Complaint: misrepresenting the Defendants' identity; making false or unsubstantiated threats, including false threats that consumers will be sued, arrested, or imprisoned; improperly communicating with third parties regarding consumers' debts; failing to

[11] The Plaintiffs have also named Leclaire as a Relief Defendant because she should not be permitted to keep the $418,789.62 she received from Braclaire and Solidus Group. The Plaintiffs may obtain disgorgement from persons, like Leclaire, who have received ill-gotten gains; knowledge of or participation in the wrongdoing is not required for recovery. *See Tax Club*, 994 F. Supp. 2d at 473. Even though knowledge or participation is not required, Leclaire, at a minimum, knew of the wrongdoing. Tellingly, the name "Braclaire" appears to be a *portmanteau* combining the first three letters of Brace's last name with the last six of Leclaire's. More importantly, until March 24, 2014, she was a signatory on Braclaire's bank accounts, and was repeatedly identified as its "President." *See* Section II, *supra*. It defies credulity that she was oblivious to the operation's nature.

disclose that the caller is a debt collector attempting to collect a debt; failing to provide validation notices regarding consumers' debts; collecting on debts without a reasonable basis for believing that consumers actually owe the debt; and engaging in other conduct that violates the FDCPA.

B. Ancillary Relief

As part of the permanent relief in this case, the Plaintiffs seek equitable monetary relief, including consumer redress or disgorgement of ill-gotten gains. To preserve the availability of monetary relief, the Plaintiffs request that the Court require preservation of assets and evidence. The Court should also order expedited discovery, including allowing the Plaintiffs access to the Corporate Defendants' business premises to inspect and preserve evidence. This Court has ordered immediate access, frozen assets, and allowed expedited discovery in prior FTC debt collection cases.[12] It should do so again here.

1. *Asset Freeze*

The proposed TRO would freeze Brace's assets and restrict the Corporate Defendants' asset transfers to payments for limited, necessary

practices permeate a company's operations, courts have found a strong likelihood that defendants will dissipate assets during litigation. *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). In such a case, "[t]o allow Defendants to control their frozen assets and to operate their deceptive scheme would create an unreasonable risk that effective relief would be frustrated." *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *12 (N.D. Okla. Aug. 31, 2001). Notably, defendants in prior FTC cases who had engaged in similarly unlawful practices have, in the absence of a freeze, secreted assets upon learning of an impending law enforcement action. PX18 ¶ 125, at 200.

Here, there is evidence that substantial dissipation has already occurred and, absent an asset freeze, will continue to occur. A freeze would ensure that funds are available not only to redress victims of the Defendants' deceptive and abusive debt collection practices, but also to serve as the *res* for disgorgement of the Defendants' ill-gotten gains. Any hardship on the Defendants 979"ed and, abyj-2freeze,

relatives, and coworkers. The Defendants' systemic fraudulent conduct, attempts to mask their identities, use of multiple corporate fronts, and dissipation of their unlawful proceeds demonstrates the need for an asset freeze. This is especially true considering Brace's history of committing criminal fraud against consumers. *See* PX18 ¶¶ 64-65, at 180-81. Therefore, there is a particularly strong basis to take the unlawful proceeds of the Defendants' operation out of their hands and preserve them for consumer redress. *See Skybiz.com*, 2001 WL 1673645, at *12.

Second, the Defendants have attempted to mask the flow of money into the enterprise by creating multiple corporate fronts, thus creating a circuitous route for the money they extracted from their victims. Payments into Braclaire's and Credit Clear's bank accounts have sluiced through bank accounts held by the other Corporate Defendants, including over $2.3 million to Solidus Group. *See* PX18 ¶ 92, at 190. And Brace and Leclaire have siphoned off over $1.1 million from the corporate accounts, on top of the approximately $90,000 salary he paid himself. *Id.* ¶ 96, at 191. The circuitous route of the Defendants' unlawful proceeds, and the rapid dissipation of funds from the Corporate Defendants' accounts, reinforces the need for an asset freeze on Brace's assets and a restriction on the Corporate Defendants' transfer of assets to preserve the possibility of full monetary relief.[14]

2. *Immediate Access*

As shown above, the Defendants have engaged in a slew of conduct indicating a high likelihood that they will destroy evidence they control during the litigation. They have gone to great lengths to evade detection and regulatory and legal scrutiny, hiding behind shells and

fictitious entities, frequently changing names, misrepresentating their addresses to consumers and third parties, and omitting mention of their actual offices. The Defendants have given no indication that they will stop, and common sense dictates that they will have no qualms about destroying records to cover their tracks. Put simply, they cannot be trusted to preserve evidence. Under these circumstances, giving the Plaintiffs immediate access to the Defendants' business premises is necessary to locate, identify, and preserve relevant evidence.

The Plaintiffs request access to the business premises as soon as reasonably possible. To ensure the integrity of the evidence, the proposed TRO would allow the Plaintiffs to exclude the Defendants and their employees from the premises. In addition, the TRO would direct the Defendants to instruct third parties to turn over to the Plaintiffs any documents related to the business or corporate finances. This will ensure that the Plaintiffs have access to crucial buisness records, including emails, even if housed offsite.

3. *Preservation of Records and Limited Expedited Discovery*

The proposed TRO would direct the Defendants and third parties, like banks and electronic data hosts, to preserve records and evidence. The Second Circuit has held that it is appropriate to enjoin defendants charged with deception from destroying evidence and doing so imposes no significant burden. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (characterizing such orders as "innocuous").

To locate assets wrongfully obtained from consumers and ensure that the fullest information is available for the preliminary injunction hearing, the FTC also asks the Court to order financial reporting by the Defendants and permit limited expedited discovery. Rules 1, 26, 33, and 34 of the Federal Rules of Civil Procedure allow courts to depart from normal discovery procedures in particular cases. A narrow, expedited discovery order reflects the Court's broad

and flexible authority in equity to grant pre

Both Federal Rule of Civil Procedure 65(b) and Local Rule 65(b) grant the Court broad latitude when issuing a TRO. Local Rule 65(b) further provides that a court may issue a TRO following an expedited hearing. A party seeking a TRO need only provide notice to the adverse party and an opportunity to be heard. L.R. 65(b).

Here, the Defendants have raked in millions by shaking down consumers for payments on debts they do not owe. The Defendants' conduct – including a fraudulent debt collection scheme and movement of large sums of money out of their corporate accounts – demonstrates that they will likely conceal or dissipate assets if given sufficient time to do so. Balancing the requirement for notice and an opportunity to be heard against the severity of the Defendants' fraudulent debt collection scheme, the Plaintiffs respectfully request that the Court schedule a hearing on this matter within 24 hours of filing the Complaint and the Motions for a TRO and expedited hearing.[15]

VI. CONCLUSION

Brace and his Corporate Defendants have operated a scheme designed to collect debts through lies, regardless of whether consumers actually owe them. Even for a deceptive debt-collection enterprise, the Defendants' conduct shows a brazen contempt for the law. Brace has designed the enterprise to collect under the names of various corporate fronts in an attempt to obscure his and the other Defendants' involvement. His companies routinely used misrepresentations to collect on debts. And even when a purported creditor repeatedly told the operation it was collecting on bogus debts, the Defendants shrugged and kept on collecting. The

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[15] Consistent with Local Rule 7(d)(1), a motion setting forth the reasons why an expedited hearing is needed is filed concurrently herewith.

enterprise has taken in almost $12 million in just two short years, and Brace and his ex-wife have taken at least $1 million of that for themselves.

The Defendants' operation to "shake down America" has victimized thousands of