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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**
16

17 Plaintiff,

18 vs.

19 AMERICAN FINANCIAL BENEFITS CENTER,
20 a corporation, also d/b/a AFB and AF STUDENT
21 SERVICES;

22 AMERITECH FINANCIAL, a corporation;

23 FINANCIAL EDUCATION BENEFITS CENTER,
24 a corporation; and

25 **BRANDON DEMOND FRERE,**
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1 **I. INTRODUCTION**

2 Plaintiff has put forth evidence laying bare Defendants' scheme. Defendants continue to
3 profit by misrepresenting that consumers qualify for plans that will permanently lower their
4 monthly loan payments and/or lead to loan forgiveness, and that consumers' monthly payments

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1 fee, the monthly “financial benefits” membership fee, and the escrow account management fee,
2 along with the consumer’s projected student loan payment.⁴ Only later in the lengthy enrollment
3 calls do the sales agents break down these fees (if they do so at all).⁵

4 Indeed, Defendants’ *own* evidence demonstrates that they fail to disclose the FEBC
5 program to consumers. Neither of the scripts that Defendants provided to the Court includes
6 language explaining the FEBC program or treating the FEBC program as an “optional upsell.”⁶

7 In the call recordings and transcripts selected by Defendants as examples of their fulsome

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1 more consumers.¹¹

2 Defendants cannot be trusted to provide consumers with accurate information about the
3 family size definition.¹² Although Defendants contend that their sales representatives read only
4 what is in the sales scripts, the evidence shows otherwise. Defendants' former employees reveal
5 that Defendants trained and encouraged sales agents to manipulate clients into providing an
6 inflated family size.¹³ Defendants' own evidence demonstrates this practice. In a compliance
7 audit cited by Defendants in their Opposition, the sales agent was congratulated because he
8 apparently "[g]ave good examples" of family size, even though Defendants' script does not
9 provide any examples.¹⁴ This audit supports the ample evidence showing that Defendants' sales
10 representatives routinely embellished the script and told consumers that they could include
11 *nearly anyone* as a family member in their IDR program applications.¹⁵

12 3. Defendants Continue to Collect Funds From Deceived Consumers

13 Defendants continue to receive monthly payments for their "financial education" program
14 from consumers enrolled in the past by AFBC and FEBC. As Plaintiff demonstrated in its
15 Motion for Preliminary Injunction ("PI Motion"), Defendants induce unknowing consumers to
16 enroll in these "financial education" programs and continue to charge consumers monthly for the
17 life of their loans.¹⁶ Defendants thus continue to collect money from consumers who they misled
18 months or years ago. Without the requested receiver – with authority to assess whether and to
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20 ¹¹ "[S]tudent loan servicers questioned the family size figures for some of Ameritech's clients
and were denying applications right and left." Kinney ¶ 10.

21 ¹² Even sales representatives who Defendants laud in their Opposition mislead consumers
22 regarding family size. Vorhis Exs. 13 and 14 show a call between sales agent Michael Becerra
23 and a consumer. Ortiz II Atts. E and F include an enrollment call between a consumer and
24 "Michael," the sales agent. The sales agent's voice on this recording sounds to be the same as
that in Vorhis Ex. 13. The sales agent states: "So, for example, me and my wife, we live alone
25 and we do not have any children, but I claim a family size of nine because I donate to afterschool
programs to help my cousins out." Ortiz II Att. F at 11:2-12:5; *see* Ortiz II Att. H at 8:10-11:16.

26 ¹³ Ortiz II Att. J at 7:23-8:9 (in a recorded training session, the trainer instructs the trainee to
"[j]ust say yes" in a situation where a consumer asks if they can count a certain person in their
family size); Cretcher ¶ 7; Stalick ¶¶ 6-8; Zaorski ¶ 6; Hamilton ¶¶ 10-11; Martinez ¶¶ 8-9.

27 ¹⁴ *Compare* Gangnath Ex. 1 at 1, *with* Cutter Ex. 3 at 2, *and* Cutter Ex. 4 at 2.

28 ¹⁵ Gangnath Ex. 1 at 1; *see infra* 12 n.57; Ortiz II Att. F at 11:2-12:5.

¹⁶ PI Mot. at 10-12.

1 what extent these charges are appropriate – Defendants will continue to reap unjust rewards.

2 **B. Voluntary Cessation Is Not Sufficient to Avoid a Preliminary Injunction**

3 A preliminary injunction would be necessary even if Defendants had in fact ceased their
4 unlawful practices. To avoid injunctive relief, Defendants “must show that subsequent events
5 have made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected
6 to recur.”¹⁷ *See Affordable Media*, 179 F.3d at 1238 (internal quotations and alteration omitted).
7 Their Opposition falls far short of this “stringent” burden. *See id.* Voluntary cessation “is
8 unlikely to moot the need for injunctive relief [because] the defendant could simply begin the
9 wrongful activity again.” *Id.* True to that principle, Defendants here could reinstate their
10 allegedly abandoned – and presumably more lucrative – practices virtually overnight.¹⁸

11 On top of that, Defendants made the bulk of their claimed improvements to their
12 marketing only after learning of the FTC’s investigation. “As such, any cessation on the part of
13 [Defendants] can hardly be considered ‘voluntary.’” *See FTC v. Sage Seminars, Inc.*, 1995-2
14 Trade Cas. (CCH) ¶ 71,256, 1995 U.S. Dist. LEXIS 21043, at *16 (N.D. Cal. 1995).¹⁹

15 Defendants’ past conduct also weighs heavily against them. As the Ninth Circuit has
16 observed, “An inference arises from illegal past conduct that future violations may occur.” *SEC*
17 *v. Koracorp Indus., Inc.*, 575 F.2d 692, 698 (9th Cir. 1978); *see also SEC v. Mgmt. Dynamics*,

19 ¹⁷ Contrary to Defendants’ assertion (*see Opp.* at 22), the FTC proceeds here under the second
20 proviso of Section 13(b). 15 U.S.C. § 53(b). Cases brought under this proviso are not subject to
21 the conditions set forth in the first proviso of Section 13(b) for the issuance of a preliminary
22 injunction in aid of administrative proceedings. *FTC v. H.N. Singer*, 668 F.2d 1107, 1111 (9th
23 Cir. 1982). In such cases, “it is actually well-settled ‘that an action for an injunction does not
24 become moot merely because the conduct complained of was terminated, *if there is a possibility*
25 *of recurrence*, since otherwise the defendant[s] would be free to return to [their] old ways.’”
FTC v. Affordable Media, LLC, 179 F.3d 1228, 1237 (9th Cir. 1999) (emphasis original)
(quoting *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)).

26 ¹⁸ Indeed, there is some limited evidence that Defendants have explored ways to continue their
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1 *Inc.*, 515 F.2d 801, 807 (2d Cir. 1975) (“[T]he commission of past illegal conduct is highly
2 suggestive of the likelihood of future violations.”).

3 **III.**

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1 sales calls, treatment of family size, and disclosure of FEBC fees.²³ Defendants' own evidence
2 undermines their position – they admit that **10% of their customers request refunds.**²⁴ Given
3 that many consumers do not learn of Defendants' misrepresentations for months or years, one
4 can presume that even more consumers would be displeased if they were made aware of
5 Defendants' scheme. Defendants' figures also indicate that over 20,000 of their consumers have
6 not been enrolled in any government loan program.

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1 able to read the agreement, providing fine print disclosures after the initial deception (via the
 2 mailer and the sales call) is not sufficient to cure the FTC Act violation. *See Resort Car Rental*
 3 *Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044
 4 (C.D. Cal. 1999) (disclaimer in a contract that “consumers eventually sign” is insufficient as “the
 5 disclaimer is not included in the representations”), *aff’d*, 265 F.3d 944 (9th Cir. 2001); *FTC v.*
 6 *Alliance Document Prep.*, No. 17-7048, slip op. at *10-11 (C.D. Cal. Nov. 2, 2017).

7 Further, the fine print that Defendants rely on is confusing and unclear.³⁰ Nowhere does
 8 it say that the consumer needs to continue to pay their loan servicer. It simply states: “I AM
 9 RESPONSIBLE FOR MAKING MY PAYMENTS.” However, consumers *did* believe they
 10 were making their loan payments when they paid Defendants;³¹ this contract language, even if
 11 read, would not have alerted them otherwise.

12 (2) Ineffective Website Disclaimers

13 Defendants also point to their website disclosures to relieve them of culpability.³² Yet,
 14 Defendants admit that their mailers, not their website, are their primary source of consumers.³³
 15 For the vast majority of Defendants’ time in business, their mailers gave only a phone number,
 16 and did not provide the company name or website,³⁴ preventing consumers from visiting
 17 Defendants’ website prior to their initial enrollment call.

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 20 ³⁰ Defendants repeatedly cite excerpted disclaimer language; the full sentences state:
 21 **“I HEREBY ACKNOWLEDGE THAT I HAVE NOT BEEN ADVISED BY AMERITECH**
 22 **FINANCIAL, ANY OF ITS AGENTS, AND/OR AFFILIATES TO FOREGO A**
 23 **STUDENT LOAN PAYMENT IN EXCHANGE FOR THE GOOD FAITH PAYMENT**
 24 **AND FEDERAL STUDENT LOAN CONSOLIDATION PROGRAM. DURING THIS**
 25 **PROCESS, I AM RESPONSIBLE FOR MAKING MY PAYMENTS, AND FAILURE TO**
 26 **DO SO COULD DISQUALIFY ME/US FROM OBTAINING THE SERVICE THAT WAS**
 27 **AGREED UPON.”** Cutter Ex. 5 at 27 (emphasis in original).

28 ³¹ *See, e.g.*, Belnap ¶ 10; Carbonneau ¶ 5; Emerson ¶ 10; Olds ¶¶ 4-5; Sills ¶ 2, 4.

³² Defendants accuse Plaintiff of offering “inaccurate” evidence regarding a pop-up disclaimer
 on the Ameritech website. This is simply false. Ortiz Att. O is a video capture of the website
 and does indeed show the pop-up disclaimer on the website.

³³ Cutter ¶ 4.

³⁴ Cutter ¶¶ 4, 15 (Defendants added their name to their mailers in December 2017.), Ex. 1; Ortiz
 II ¶ 7, Att. D.

1 Plaintiff has shown that Defendant Frere has already spent large amounts of company assets for
2 personal purposes, funneled money to family members and family businesses, and transferred
3 millions of dollars into foreign accounts.⁵⁰ While Defendants complain that this information is
4 “stale,” they neither provide updated information nor explain how expenses such as over \$19,000
5 to a cruise line or over \$73,000 on custom wine tanks from a company owned by family
6 members are related to their business.⁵¹ There is also reason to believe that Frere transferred
7 over \$3.164 million from Corporate Defendants’ accounts to his personal account; Defendants
8 do not rebut this.⁵² Provided the allegations against Defendants, there are sufficient indications
9 of dissipation of assets for the Court to appoint a receiver with authority over Defendants’ assets.

10 **D. Defendants’ Timeliness Argument Is Without Merit**

11 Defendants argue, without legal support, that the Court should not order an injunction
12 because such a request is “untimely.” Aside from the legal deficiencies of this assertion, the
13 facts show that the FTC has conducted a diligent investigation. Defendants acknowledge that the
14 FTC has been in “constant dialogue with the Companies for the last eight months.”⁵³ Plaintiff
15 provided Defendants opportunities to explain their practices to staff, the then-Acting Director of
16 the Bureau of Consumer Protection, and the FTC Commissioners.⁵⁴ In an effort to immediately
17 curb consumer harm and preserve judicial resources, Plaintiff offered to enter into a Stipulated
18 Preliminary Injunction.⁵⁵ Defendants waited until the last hour to reject this compromise.⁵⁶

19 _____
20 ⁵⁰ PI Mot. at 23 nn.114-116, 24 nn.117 & 118, 25 n.120.

21 ⁵¹ George Att. H at 8 (two charges totaling \$19,673 to “PG Cruise Line – Dublin”); George ¶ 14,
22 Att. G (showing payments of \$73,408 to Sonoma Stainless); Ortiz ¶ 15, Att. J (Andre Frere and
23 Gloria Frere are officers); <http://sonomastainless.com/>.

24 ⁵² Td215T1 7two ch

1 Defendants took every opportunity to delay the FTC's impending enforcement action and cannot
2 now claim that those few extra months have rendered the FTC's evidence outdated.

3 **IV. DEFENDANTS OMIT AND OBSCURE KEY INFORMATION**

4 In their Opposition, Defendants omit and obscure information that is key to a full
5 understanding of their practices. In this section, Plaintiff highlights some of the crucial gaps.

6 **A. Defendants Ignore Their Misrepresentations Regarding Family Size**

7 Defendants largely ignore the voluminous evidence showing that their representatives
8 mislead consumers regarding who may be included in the family size reported to the government
9 on IDR applications. This is not a surprise, as the evidence lays out Defendants' concerted and
10 egregious effort to manipulate consumers to overstate their family size.⁵⁷ Defendants train their
11 sales agents to give consumers inaccurate information.⁵⁸ Defendants do not claim to have
12 changed this practice.⁵⁹ The evidence shows that even when sales representatives rattle off the
13 scripted family size definition, the representatives then go on to use misleading examples and
14 inaccurate statements to persuade consumers that it is appropriate to inflate their family size.⁶⁰
15 When a consumer wavers, the sales representatives call in supervisors to finish the job.⁶¹

16 The data corroborates this point: Defendants' clients' applications provide family sizes
17 *significantly higher* than those provided by the general pool of borrowers who apply for IDR
18 programs. According to Defendants, the *average* family size for consumers enrolled in AFBC
19 and Ameritech programs over the last four years was: 6.03 (2015); 6.57 (2016); 5.05 (2017); and
20 4.3 (2018).⁶² In stark contrast, the average family size for all borrowers repaying loans under
21 ICR or IBR programs ranged between 2.11 and 2.47 as of November 11, 2016.⁶³

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1 **B. Defendants Advertise Primarily Through Deceptive Mailers**

2 Defendants claim they no longer contact potential clients via mailers.⁶⁴ This is
3 surprising, given that consumer complaints as recent as January 2018 indicate that Defendants
4 were scraping consumers' Facebook accounts to find pictures to use on personalized mailers.⁶⁵

5 Defendants do not mention how they currently contact prospective clients.⁶⁶ Defendants
6 do not provide any evidence indicating that their current methods of contacting consumers are
7 less deceptive than their previous mailers, or that they now advertise that Defendants also sell a
8 "financial education" program. Defendants merely assert that they have changed their practices,
9 and hope that the Court accepts this excuse.⁶⁷

10 **C. Defendants' Use of Scripts and Compliance Processes Are Flawed**

11 Defendants point to disclosures in their scripts and their claimed compliance processes to
12 show that they inform consumers about their services and fees. Defendants' scripts are largely
13 irrelevant in light of evidence showing that Defendants encouraged sales representatives to
14 obscure details about "the program" after a perfunctory reading of the materials.⁶⁸ Plaintiffs have
15 provided numerous examples where Defendants' sales agents added commentary outside the
16 script to mislead consumers.⁶⁹ Likewise, compliance audits are only useful if the auditors
17 accurately review calls and if Defendants correct any misstatements with deceived consumers.
18 Plaintiff has produced evidence of numerous calls with misstatements, and Defendants have not
19 claimed that these misrepresentations were caught by compliance auditors. In fact, even the
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21 ⁶⁴ Opp. at 13.

22 ⁶⁵ Holmes ¶¶ 2-8 ("I felt scared that a random company had gone through my Facebook account.
23 [I]t made me feel like I was being stalked."), Att. A; Bussewitz ¶¶ 2-3, Att. A ("I was upset that a
24 company used my private photo without my permission."); Ortiz II Att. A at 16-17, 23.

25 ⁶⁶ This is important information given that mailers have been Defendants' primary method of
26 contacting consumers. Cutter ¶ 4.

27 ⁶⁷ Defendants state that they "almost immediately made the one requested change and included
28 the company's name on the mailer." Opp. at 13. However, in Defendants' December 29, 2016
letter to the FTC, the attached mailers *did* include the company name. Although Defendants sent
this version to the FTC in December 2016, it appears that mailers with Defendants' names

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1 **2. Great Lakes**

2 Defendants offer no evidence negating Mr. Lee’s significant experience in and
3 understanding of the student loan industry. Nor do Defendants offer any credible attacks on the
4 authenticity of the consumer complaints attached to Mr. Lee’s declaration.⁷³

5 **3. Consumer and Former Employee Declarants**

6 The declarations of Defendants’ former employees and consumers tell a consistent story
7 – one where Defendants intentionally hide their fees, misrepresent their services, and inflate
8 family sizes, among other things.⁷⁴ Consumer call recordings and complaints submitted to the
9 Court also support the declarants’ descriptions of Defendants’ practices. The fact that the
10 company terminated some of the employee declarants does not make them less credible.⁷⁵
11 Defendants in fact have an incentive to terminate some employees to make a show of
12 compliance, while still reaping the benefits of those terminated employees’ sales.

13 Defendants largely rely on the electronically-signed agreements to impugn consumer
14 declarants.⁷⁶ For most of these declarants, Defendants merely point to the signed contract to
15 show they were duly informed about Defendants’ services. As explained about, these contract
16 disclosures are insufficient to cure Defendants’ misrepresentations.⁷⁷

17 **V. CONCLUSION**

18 The FTC respectfully requests the proposed Preliminary Injunction be issued to protect
19 the public from further harm and help ensure effective relief for those already harmed.
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