UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Kirkland Young, LLC, a limited liability company, and

David Botton, individually and as manager of Kirkland Young, LLC,

Defendants.

09-23507

CIV - GOLD

/ McALILEY

PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE AND OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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I. INTRODUCTION

Plaintiff Federal Trade Commission ("Commission" or "FTC"), brings this action to obtain an immediate halt to the unlawful activities of Defendants Kirkland Young, LLC ("Kirkland"), and its manager and owner David Botton ("Botton"). Defendants deceptively market loan modification and foreclosure relief services and victimize consumers who are struggling to make their monthly mortgage payments.

Defendants market to consumers who are already on their financial "knees" and worried about losing their homes to foreclosure. To ensnare these victims, Defendants use false and deceptive claims that Defendant Kirkland will obtain loan modifications to make consumers' mortgage payments substantially more affordable in all or virtually all instances. In addition, Defendants often make the offer more seductive by falsely representing that Defendant Kirkland is closely affiliated with the consumers' lenders. While some consumers caught in Defendant Kirkland's web of deceit have received offers of modification, they are not substantially more affordable than the original payment amounts the consumers were already obligated to pay, despite Defendants' promises. In fact, the offers of modification in numerous instances have actually required higher monthly payments.

Defendants' practices violate both Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § U.S.C. 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce, and the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, which prohibits sellers and telemarketers from misrepresenting the performance, efficacy, nature or central characteristics of services being marketed and also prohibits misrepresenting that a seller or telemarketer has affiliation with or endorsement or sponsorship by a person. Therefore, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Fed. R. Civ.

P. 65(b), the FTC seeks an *ex parte* temporary restraining order ("TRO"): (1) ordering Defendants to cease their deceptive practices; (2) freezing all of Defendants' assets; (3) appointing a temporary receiver; (4) granting the temporary receiver and Plaintiff immediate access to Defendants' business premises to preserve documents and other records related to Defendant Kirkland; (5) providing other necessary equitable relief; and (6) ordering Defendants to show cause why a preliminary injunction should not be issued against them. Such an order is necessary to stop continued harm to the public as well as to prevent the dissipation of assets and destruction of records, thereby preserving the Court's ability to provide effective final relief.[1]

II. THE PARTIES

A. Federal Trade Commission

Plaintiff **Federal Trade Commission** is an independent agency of the U.S. government created by the FTC Act, 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive and abusive telemarketing acts or practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the Telemarketing

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[1] This memorandum is supported by two volumes of declarations and exhibits (Volumes I and II) and two volumes containing copies of sections of the FTC Act, the TSR, and copies of *ex parte* TROs from this and other U.S. District Courts (Volumes III and IV). Citations to Plaintiff's Exhibits are provided as discussed and are abbreviated as "PX." Citations to declarations are by the Declarant's last name and a paragraph number. Page references to Plaintiff's Exhibits are to the sequentially numbered pages of Volume I and II. The contents of Volume III and IV are labeled as Attachment A-P and references to those documents are abbreviated as "Att."

Sales Rule and to secure such equitable relief as may be appropriate in each case, including restitution and disgorgement. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), 57b, 6102(c), and 6105(b).

B. Kirkland Young, LLC

Defendant Kirkland is a Florida limited liability company that sells loan modification and foreclosure relief services throughout the country. (PX 1, p. 6; PX 17, p. 85; Carlton ¶ 1 [NY]; Costa ¶ 1 [NJ]; Christopher Cross ¶ 2 [MI]; Cicora ¶ 2 [AZ]; Fowler [NV]; Lewis ¶ 2 [VA]; Marcum ¶ 2 [KY]; Meininger ¶ 2 [OH]; Pajak ¶ 2 [NY]; Stewart ¶ 2[ID]; Yadira Valdez ¶ 2 [NV]; Williams ¶ 2 [TX]). It was incorporated on December 11, 2007, and its office is located in Miami, Florida. (PX 1, p. 6; PX 4, p. 10; PX 7, p. 24). According to representations of its counsel made in a state court filing, Defendant Kirkland has hundreds of clients, but provides its services only to consumers outside of Florida. (PX 17 ¶¶ 10, 14 [pp. 87, 89]).

C. David Botton

Defendant David Botton is the manager and owner of Defendant Kirkland and resides in the Southern District of Florida. (PX 4, p. 10; PX 16, p. 82). He is identified as the manager of Defendant Kirkland in its filings with the Secretary of State of Florida. (PX 3, p. 9; PX 4, p. 10). Defendant Botton is actively involved in Defendant Kirkland's affairs, terminating employees (PX 19, p. 115), responding to consumer complaints to law enforcement agencies (PX 16, pp. 82-83; PX 30, pp. 208-11; PX 46, pp. 294-96) and speaking with disgruntled consumers. (Fowler ¶ 7; Marcum ¶ 8; Lewis ¶ 13).

III. DEFENDANTS' UNLAWFUL PRACTICES

A. Defendants Use Outbound Telemarketing to Contact Consumers About Their Deceptive Scheme.

Defendants are running a deceptive loan modification scheme. Defendant Kirkland primarily uses outbound telemarketing to contact consumers, and Defendants' initial contact with consumers is usually either a telephone message or a live call. (Carlton ¶ 3; Costa ¶ 3; Christopher Cross ¶ 3; Cicora ¶ 4; Fowler ¶ 2; Lewis ¶ 4; Marcum ¶ 3; Meininger ¶ 3; Pajak ¶ 3; Stewart ¶ 2; Yadira Valdez ¶ 3; Williams ¶ 3). The messages are left both by Defendant Kirkland directly or by lead generators that it uses. (*See* Liggins ¶ 5). These messages inform consumers that they are being called about loan modifications and often give the impression that the consumer's lender is calling to approve an application for loan modification. For example, one message that Defendants use states the following:

> We did receive your application for loan modification, and we do understand that you are having issues paying your monthly mortgage payment at this time. We would like to approve you for a loan modification on your current home mortgage. This procedure can help you avoid foreclosure. We do understand times are tough and we would like to work together to achieve a monthly payment that is affordable to you in your current hardship. Please call me. It's 8:15. Again this is Jeffery Wilkinson in the Loan Modification Department . . . .

(PX 10 TR, p. 45; *see also* PX 9TR, p. 44; PX 11TR, p. 46). Consumers often understand that the "Loan Modification Department" is their mortgage lender. (Costa ¶ 3; Christopher Cross ¶ 3; Lewis ¶ 4; Williams ¶ 3).

B. Defendants Use a Misleading Sales Pitch.

After a consumer responds to the message or when they speak to a live telemarketer, they are given a sales pitch. The telemarketers represent that they will obtain loan modifications for consumers that will make the consumers' mortgage payments substantially more affordable.[2]

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[2] In numerous instances, at some point during the sales pitch, the telemarketers mention that they work for Defendant Kirkland.

(Carlton ¶ 3; Costa ¶ 4; Amy Cross ¶ 4; Cicora ¶ 4; Fowler ¶ 2; Lewis ¶ 5; Marcum ¶ 3; Meininger ¶ 3; Pajak ¶ 3; Stewart ¶ 2; Yadira Valdez ¶ 4; Williams ¶ 4; PX 13, p. 61 ln. 17 - p. 62 ln. 5). The company's telemarketers often offer specific loan terms or ranges of such terms to consumers. (Amy Cross ¶ 4; Cicora ¶ 4; Fowler ¶ 2; Lewis ¶ 5; Marcum ¶ 3; Meininger ¶ 3; Yadira Valdez ¶ 4; Williams ¶ 4; PX 13, p. 61 ln. 17 - p. 62 ln. 5). Telemarketers then lead consumers to believe that they are highly likely to receive such loan modifications. (Carlton ¶ 4; Costa ¶ 4; Amy Cross ¶ 4; Cicora ¶ 4; Fowler ¶ 2; Lewis ¶ 5; Marcum ¶ 3; Pajak ¶ 3; Stewart ¶ 2; Yadira Valdez ¶ 4; Williams ¶ 2). A recording of a telephone call to Kirkland made by a Commission employee posing as a consumer illustrates this. During the call, a Kirkland salesman said he was "confident" that Defendant Kirkland could get the interest on his loan lowered by 2.5 percent and could lower the monthly payment from $1300 to $798.42. (PX 13, p. 61 ln. 22 - p. 62 ln. 5). The Kirkland salesman also said that Defendant Kirkland had made 7000 submissions to the consumer's lender and was successful in about 92 percent of them. (PX 13, p. 69 ln. 24 - p. 70 ln. 1).

C. Defendant Kirkland Charges Each Customer a Nonrefundable Initial Fee.

During the sales pitch, Kirkland telemarketers request payment of an initial fee by credit or debit card or phone check over the telephone. (Carlton ¶¶ 5, 7 [$698]; Costa ¶ 4; Amy Cross ¶ 4 [$699]; Cicora ¶ 5 [$599]; Lewis ¶ 5 [$698]; Meininger ¶ 3[$499]; Pajak ¶ 4 [$399]; Stewart ¶ 2[$299]; Yadira Valdez ¶ 4[$499]; Williams ¶ 4 [$499]). Telemarketers say the fee is necessary to get the process started. (Carlton ¶ 5; Costa ¶ 4; Amy Cross ¶ 4; Cicora ¶ 5; Lewis ¶ 5; Stewart ¶ 2; Williams ¶ 4; PX 13, p. 71 ln. 13-14). The fees vary from $299 to $699 and are nonrefundable according to Defendant Kirkland's contract. (*E.g.*, PX 22, p. 142). The request for payment is made before any documentation of the offer is sent to the consumer, and

often consumers pay before receiving documentation of the offer.[3] (Carlton ¶¶ 5, 6; Costa ¶¶ 4, 6; Amy Cross ¶¶ 4, 5; Lewis ¶¶ 5, 6; Meininger ¶¶ 3, 4; Stewart ¶¶ 2, 4; Yadira Valdez ¶¶ 4, 5; Williams ¶¶ 4, 7).

D. Defendant Kirkland Sends Documents to Consumers After Requesting Payment.

After requesting payment, Defendant Kirkland sends consumers a package of documents. (*Id.*) The package includes a welcome letter, a "Loan Mitigation/Modification" contract, and other forms to be filled out. (PX 23, p. 166; PX 38, p. 252; PX 48, p. 299). The welcome letter echoes Defendants' representations that they will obtain loan modifications with affordable payments and save consumers' homes from foreclosure: "By taking this important first step you are on track to affordable payments, and most importantly to keeping your home for years to come."[4] (*Id.*)

The "Loan Mitigation/Modification" contract includes what Defendant Kirkland describes as benefits of the program. (PX 22, p. 142; PX 23, p. 168; PX 25, p. 196; PX 31, p. 225; PX 38, p. 253; PX 45, p. 275; PX 48 p. 300; PX 50, p. 330). This description implies that

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[3] In addition to the initial fee, Defendant Kirkland also charges a second fee ("back-end fee"). Only consumers who accept an offer of modification are obligated to pay the back-end fee. (*E.g.*, PX 13, p. 67 ln. 19 - p. 68 ln. 4; PX 22, p. 142). The back-end fee that is quoted varies in size and is larger than the initial fees that are charged. (*E.g.*, Lewis ¶ 5[$2999]; Williams ¶ 4 [$1299]). In numerous instances, Defendant Kirkland represents that the back-end fee will be rolled into the loan amount. (Cross ¶ 4; Williams ¶ 4; PX 13, p. 67 ln. 19-23).

[4] Later, Defendant Kirkland sends other letters to its customers making similar claims. For example, letters requesting financial information state "We are prepared to modify your loan to an affordable mortgage that will keep you and your family in your home for years to come." (PX 39, p. 263; PX 42, p. 268). Similarly, an instruction letter that Defendant Kirkland sends to its clients states "we would like to welcome you to your first step at attaining an affordable mortgage" and "we are here every step of the way towards an affordable mortgage that will keep you and your family in your home for years to come!" (PX 26, p. 201).

Defendant Kirkland will lower monthly mortgage payments by pursuing one of a series of options to change loan terms. It also states that "other options may be used to lower [the consumer's] monthly payments." (*Id.*) In addition, the contract prohibits consumers from communicating with their lenders. It provides that "[a]ny communication between a Borrower and their Lender is considered a great interference in Young's modification process, will be deemed a breach of contract, and will terminate this agreement . . . ." (*E.g.*, PX 22, p. 143). Although buried in the contract is a paragraph which is an apparent attempt by Defendants to disclaim any guarantee that a satisfactory modification will be obtained, this language does not excise the explicit and implicit claims in the telephone message, sales pitch, and letters to consumers. (*Id.* at ¶ 5). Moreover, this attempted disclaimer is buried in the welcome package and is often received after consumers have paid.

IV. THIS COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED.

This Court has the power to grant the requested relief under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to bring suit in federal district court whenever it has reason to believe that a party "is violating, or is about to violate, any provision of the law enforced by the Federal Trade Commission and that enjoining such conduct is in the public interest."[5] The second proviso of Section 13(b), under which this action is brought, provides that, "in proper cases the FTC may

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[5] Section 13(b) consists of two distinct parts. The first portion of the statute, through and including the first proviso, is concerned with provisional injunctive relief in aid of an administrative complaint. This portion of Section 13(b), which is inapplicable to the current action, gives authority for the issuance of temporary restraining orders and preliminary injunctions after a proper showing by the FTC and notice to the defendants. The instant action is brought under the second portion of Section 13(b), which concerns actions for permanent injunction.

seek and, after proper proof, the court may issue a permanent injunction." This proviso of Section 13(b) gives the FTC authority to bring a permanent injunction action in district court.[6] By permitting the FTC to bring a permanent injunction action, Congress also gave the district court power to order whatever preliminary relief may be needed to make permanent relief possible, including preliminary injunctions, temporary restraining orders, and other ancillary, equitable relief.[7]

> Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.[8]

To bring an immediate halt to unlawful, injurious trade practices and to preserve the availability of effective permanent injunctive relief, the district court may issue a temporary restraining order, including a freeze of assets and a preliminary injunction during the pendency of an action for permanent injunction as part of its inherent equitable authority.[9]

A case such as this one clearly qualifies as a "proper case" under the second proviso of Section 13(b). Where, as here, there is evidence of straightforward deceptive practices or routine

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[6] *See FTC v. Gem Merchandising Corp.*, 87 F. 3d 466, 468 (11th Cir. 1996); *FTC v. U.S. Oil & Gas* Corp., 748 F. 2d 1431, 1432-34 (11th Cir. 1984); *FTC v. H. N. Singer, Inc.*, 668 F. 2d 1107, 1111 (9th Cir. 1982).

[7] *U.S. Oil & Gas*, 748 F. 2d at 1434 (quoting *Singer*, 668 F. 2d at 1113); s*ee also FTC v. Amy Travel Serv., Inc.*, 875 F. 2d 564, 571-2 (7th Cir. 1989).

[8] *U.S. Oil & Gas*, 748 F. 2d at 1434 (quoting *Singer*, 668 F. 2d at 1113); *see also Gem Merch.*, 87 F. 3d at 469; *FTC v. Amy Travel Serv.*, 875 F. 2d at 571-2; *FTC v. Southwest Sunsites*, 665 F. 2d 711, 718-19 (5th Cir. 1982).

[9] *U.S. Oil & Gas*, 748 F. 2d at 1432-34.

fraud, courts have consistently held that the remedies of Section 13(b) are warranted.[10] Courts have applied the remedies of Section 13(b) to these types of "proper cases" for permanent injunctions by granting the FTC temporary restraining orders and other forms of ancillary relief.[11]

A second basis to provide preliminary relief is Section 19 of the FTC Act, 15 U.S.C. § 57b. Section 19 grants the Court jurisdiction to order relief necessary to redress injury to consumers from Defendants' violations of the TSR. 15 U.S.C. § 57b (a)(1), (b). "The court's authority to grant equitable relief under Section 19 of the FTC Act, 15 U.S.C. § 57b, includes the authority to grant preliminary injunctive relief."[12]

V. ENTRY OF A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION IS APPROPRIATE.

The FTC has submitted ample evidence in support of this motion that clearly

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[10] *See, e.g., FTC v. World Travel Vacation Brokers*, 861 F. 2d 1020, 1026-28 (7th Cir. 1988).

[11] Examples of cases in the Southern District of Florida where *ex parte* TROs (copies of which are attached in Volume III) were issued include: *FTC v. Fidelity ATM, Inc.*, No. 06-81101-Civ-Hurley (S.D. Fla. November 29, 2006)(conduct prohibitions, asset freeze, appointment of temporary receiver, immediate access, and other relief)[Vol. III, Att. E]; *FTC v. USA Beverages,* No. 05-61682-Civ-Lenard (S.D. Fla. November 4, 2005)(conduct prohibitions, asset freeze, appointment of temporary receiver, and immediate access)[Vol. III, Att. F]; *FTC v. Transnet Wireless Corp.*, No. 05-61559-Civ-Marra (S.D. Fla. September 27, 2005)(conduct prohibitions, asset freeze, appointment of temporary receiver and immediate access)[Vol. III, Att. G]; *FTC v. Greeting Cards of Am., Inc.*, No. 03-60746-Civ-Gold (S.D. Fla. April 21, 2003)(asset freeze, appointment of temporary receiver, immediate access and other relief)[Vol. III, Att. H]; *FTC v. Associate Records Distributors, Inc.*, No. 02-21754-Civ-Graham (S.D. Fla. June 12, 2002)(conduct prohibition, asset freeze, appointment of temporary receiver, and immediate access)[Vol. III, Att. I]. Copies of *ex parte* TROs from other districts involving loan modification and foreclosure relief schemes are included in Volume IV, *see infra* n.28.

[12] *FTC v. Investment Dev., Inc.*, 1989 U.S. Dist. LEXIS 6502 (N.D. La. 1989); *see Singer,* 668 F. 2d at 1110 ("[I]t is clear . . . that a district court has jurisdiction to issue a preliminary injunction.")

demonstrates Defendants' deceptive loan modification scheme. Sections13(b) and 19 were designed to combat such practices. The standard for awarding preliminary relief in such enforcement actions is lower than that required for private litigants. Courts consider two factors in determining whether to grant preliminary injunctive relief in an FTC enforcement action: (1) the likelihood of success on the merits and (2) the balance of equities.[13] Irreparable injury need not be shown.[14] Harm to the public interest is presumed in a statutory enforcement action.[15] Moreover, in demonstrating its "likelihood of ultimate success," the FTC is not required to show a strong probability of success, although the evidence presented in this matter does make such a showing. Rather, because irreparable injury is presumed in a statutory enforcement action, the FTC need only show that it has "some chance of probable success on the merits."[16]

A. The FTC Has Demonstrated a Likelihood of Success on the Merits.

The compelling evidence submitted, including fourteen consumer declarations, two declarations from Bank of America (Edwards and Gilbert), a transcript of Kirkland's misleading sales pitch (Ex. 13, pp. 48-73), and transcripts of telephone messages used by Defendants (PX 9 TR, p. 44; 10 TR, p. 45; 11 TR, p. 46) to ensnare victims, clearly demonstrates a substantial

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[13] *See FTC v. Affordable Media, LLC*, 179 F. 3d 1228, 1233 (9th Cir. 1999) (quoting *FTC v. Warner Comms., Inc.*, 742 F. 2d 1156, 1160 (9th Cir. 1984)); *World Travel Vacation Brokers,* 861 F. 2d at1029; *World Wide Factors*, 882 F. 2d 344, 346-47 (9th Cir. 1989); *FTC v. USA Beverages, Inc.*, 2005 U.S. Dist. LEXIS 39075, *14-15 (S.D. Fla. Dec. 5, 2005); and *FTC v. Para-Link Int'l, Inc.*, 2000 U.S. Dist. LEXIS 21509, *6-7 (M.D. Fla. Nov. 21, 2000).

[14] *World Travel Vacation Brokers*, 861 F. 2d at 1029; *cf., Gresham v. Windrush Partners, Ltd.*, 730 F. 2d 1417 at 1423 (11th Cir. 1984) (injury presumed in violation of fair housing statute).

[15] *World Wide Factors*, 882 F. 2d at 346 (citing *U.S. v. Odessa Union Warehouse Co-op*, 833 F. 2d 172, 175-76 (9th Cir. 1987)); *Warner Comms., Inc.*, 742 F. 2d at1159.

[16] *World Wide Factors,* 882 F. 2d at 347 (citing *U.S. v. Odessa Union Warehouse Co-op*, 833 F. 2d at176).

likelihood that the FTC will succeed in establishing that the Defendants' loan modification scheme violates Section 5 of the FTC Act and the TSR.

1. Defendants have violated Section 5 of the FTC Act (Counts I and II).

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." To establish that a defendant has engaged in a deceptive act or practice under Section 5 of the FTC Act, the FTC must show that: "(1) there was a representation, (2) the representation was likely to mislead consumers acting reasonably under the circumstances; and (3) the representation was material."[17] Defendants violate Section 5 by falsely claiming that they can obtain loan modifications that will make monthly payments substantially more affordable in all or virtually all instances and by falsely claiming that they are affiliated with the lenders of consumers.

Defendants' business practices are premised on false representations, and Defendants use these false representations to deceive consumers. Defendants solicit consumers using the false and misleading representation that Defendants are highly likely to obtain a loan modification that would make consumers' monthly payments substantially more affordable. Also, Defendants lead consumers to believe that the consumers have been referred to Defendant Kirkland by the consumers' lenders. Defendants' deceptive representations are material as a matter of law and fact. "A representation or omission is material if it is of the kind usually relied on by a reasonably prudent person."[18] "Express claims or deliberately-made implied claims used to

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[17] *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003).

[18] *FTC v. Slim America, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999)(citing *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760, 1997-1 Trade Cas. (CCH) P71,713 at 79,078 (S.D. Fla. 1996);

induce the purchase of a particular product or service are presumed to be material."[19] In this case, the misleading claims about obtaining a loan modification for consumers and Defendant Kirkland's affiliation with the lender are material. Consumers obviously purchased the services of Defendant Kirkland to obtain the loan modifications described to them. (*See e.g.*, Carlton ¶¶ 4,5; Cicora ¶ 4; Marcum ¶¶ 3,5; Meininger ¶¶ 4-5; Valdez ¶ 5; Williams ¶ 4). Likewise, the false representation that Defendant Kirkland was affiliated with their lenders was also an important consideration for consumers in deciding to pay Kirkland's fee. (Pajak ¶¶ 5-6; Williams ¶ 8). The importance of affiliation with the lender derives from the fact that the lender is the one from whom the modification is sought.

As described above in Part III, Defendants violate Section 5 by falsely representing that Defendants will obtain mortgage loan modifications for consumers in all or virtually all instances that will make their mortgage payments substantially more affordable. Defendants' representations are false because they do not obtain the promised modification for consumers in numerous instances. (Carlton ¶ 10; Lewis ¶ 10; Marcum ¶ 12; Christian Valdez ¶ 4). Similarly, the representation that consumers are referred to Defendant Kirkland by their lender is equally false. By leaving telephone messages saying that the consumers' request for loan modification has been received and the caller would like to approve it, Defendants trick their victims into believing the call is from the consumers' lender and therefore the referrals to Defendant Kirkland are by the consumers' lenders. The message, however, is totally false. The caller

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FTC v. Jordan Ashley, Inc., 1994 U.S. Dist. LEXIS 7494, 1994-1 Trade Cas. (CCH) P70,570 at 72,096 (S.D. Fla. 1994)).

[19] *Slim America, 77 F. Supp. 2d 1263,* 1272 (citing *FTC v. Pantron I* Corp., 33 F.3d 1088, 1096 (9th Cir. 1994)); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995).

leaving the telephone message has not received a request for loan modification from the consumer; the caller does not have the power to approve such a request or application; and the caller does not work in any lender's loan modification department.

2. Defendants Have Also Violated the TSR (Counts III and IV).

Defendants are violating the TSR in two ways. First, Defendants misrepresent a central characteristic of the service that they provide. Section 310.3(a)(2)(iii) of the TSR provides that it is a deceptive telemarketing practice for a seller or telemarketer to misrepresent any material aspect of performance or central characteristic of the service offered. Defendants misrepresent that they will obtain loan modifications that will make consumers' mortgage payments substantially more affordable in all or virtually all instances. This is a central characteristic of the service. Defendant Kirkland has not provided such loan modifications in all or virtually all circumstances. (Carlton ¶ 10; Lewis ¶ 10; Marcum ¶ 12; Christian Valdez ¶ 4).

Second, Defendants misrepresent their affiliation with lenders. Section 310.3(a)(2)(vii) of the TSR provides that it is a deceptive telemarketing practice for a seller or telemarketer to misrepresent their affiliation with any person. Defendants violate this rule by misrepresenting that consumers have been referred to Defendant Kirkland by their lenders (*see supra,* pp. 11-12; Pajak ¶ 3) or that Defendant Kirkland works with consumers' lenders. (Williams ¶ 4; Costa ¶ 4).

Consequently, Defendants' practices of misrepresenting that consumers will obtain loan modifications that will make their payments substantially more affordable in all or virtually all circumstances and misrepresenting that it is affiliated with consumers' lenders are blatant violations of the TSR.

B. The Balance of Equities Favors Issuance of a TRO.

The public interest in halting Defendants' law violations and preserving assets for a meaningful monetary remedy far outweighs any interest Defendants may have in continuing to falsely advertise their services. In balancing the hardships between the public and private interest, the public interest should receive greater weight. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1030 (7th Cir. 1988). In contrast, "[t]here is no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment." *World Wide Factors*, 882 F.2d at 347.

VI. DEFENDANT DAVID BOTTON IS INDIVIDUALLY LIABLE.

An individual defendant is liable for a corporate defendant's violations of Section 5(a) of the FTC Act and the TSR when: (1) corporate violations are established; (2) the individual defendant has authority to control the corporate defendant or participates directly in the wrongful acts or practices; and (3) the individual defendant has some knowledge of the wrongful acts or practices.[20] Defendant Botton has the authority to control in his capacity as manager and owner of the limited liability company.[21] In addition, the fact that Defendant Botton has held himself

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[20] *Gem Merch.*, 87 F. 3d at 470; *Amy Travel Serv.*, 875 F.2d at 573. To satisfy the knowledge requirement, the Commission "need not demonstrate . . . that the individual defendants possessed the intent to defraud." *FTC v. World Media Brokers,* 415 F. 3d 758, 764 (7th Cir. 2005); *Jordan Ashley*, 1994-1 Trade Cas. (CCH) ¶ 70,570, 72,096) (citing *Amy Travel Service*, 875 F. 2d at 573-74). Nor must the Commission demonstrate that defendants had actual knowledge of the misrepresentations – reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice. *World Media Brokers,* 415 F. 3d at 764; *FTC v. Atlantex Assoc.*, 1987-2 Trade Cas. (CCH) ¶ 67, 788, 69,253 (S.D. Fla. 1987), *aff'd,* 872 F. 2d 966 (11th Cir. 1989); *FTC v. Kitco of Nev.*, 612 F. Supp. 1282, 1292 (8th Cir. 1985).

[21] *See FTC v. Windward Mktg.*, 1997 U.S. Dist. LEXIS 17114, *38 (N.D. GA 1997) (citing *Standard Educators, Inc. v FTC*, 475 F. 2d 401, 403 (D.C. Cir. 1973)) ("An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held

out as the president of Kirkland (PX 16, p. 82; PX 30, p. 211; PX 46, p. 296) is probative of his control[22] as is his active involvement in the company.[23]

Defendant Botton also has the requisite knowledge for individual liability. "A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception."[24] Defendant Botton has notice of misleading practices through responding to consumer complaints made to state agencies and communicating with disgruntled consumers. (PX 16, p. 83; PX 30, pp. 208-10; PX 36, p. 245; PX 46, pp. 294-96; Fowler ¶ 7; Lewis ¶¶ 13, 15). For example, he responded to the written complaints of consumers Brad Meininger and Amy Cross respectively to the Attorneys General of Ohio and Michigan. These consumers recounted the representations of Defendant Kirkland that it would obtain loan modifications with substantially more affordable payments. (PX 30, pp. 208-10; PX 46, pp. 294-96). In addition, Defendant Botton's knowledge of Defendant Kirkland's use of the misrepresentation that Kirkland is affiliated with the lenders of consumers is apparent in the fact that he has sought to perpetuate the deception. When responding to consumer Amy Cross' complaint to the Office of the Michigan Attorney, Defendant Botton falsely claimed that Kirkland had been referred to the consumer by her lender, Countrywide. (PX 30, p. 210). The falsity of his claim is demonstrated by two declarations from employees of

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corporation.")

[22] *See FTC v. Career Assistance Planning, Inc.*, 1997-2 Trade Cas. (CCH) ¶ 71,948, PL. 80,626 (N.D. Ga. Sept. 19, 1997)(finding that evidence of the defendant holding himself out as director was probative of control.)

[23] *See Amy Travel Serv.*, 875 F.2d at 573.

[24] *Standard Educators, Inc.*, 475 F.2d at 403.

Bank of America ("BOA"), which purchased Countrywide last year. According to these BOA employees, there is no record of a referral relationship between Countrywide and Defendant Kirkland. (Edwards ¶¶ 4, 5; Gilbert ¶¶ 4, 5).

VII. A TRO, INCLUDING INJUNCTIVE RELIEF, AN ASSET FREEZE, APPOINTMENT OF A TEMPORARY RECEIVER AND IMMEDIATE ACCESS TO DEFENDANTS' BUSINESS PREMISES, IS NECESSARY.

Defendants' business is permeated with fraud and based on deception, false promises, and misrepresentations. Their deceptive practices should be immediately halted. The injunctive relief sought by the FTC simply orders Defendants to obey Section 5(a) of the FTC Act and the TSR. This relief would stop further harm to members of the public. In addition to injunctive relief, the FTC asks this Court to freeze Defendants' assets, appoint a temporary receiver and allow the temporary receiver and Plaintiff immediate access to Defendants' business premises to preserve documents and other records related to Kirkland. This temporary relief is necessary to preserve the *status quo*.

A freeze of the Defendants' assets is essential here to prevent the likelihood of dissipation of assets during the pendency of litigation. An asset freeze is a proper equitable remedy to assure the availability of permanent relief.[25] The power of a district court to freeze assets in a §13(b) action is well established.[26] A freeze of assets of the individuals and the corporation is essential to prevent the dissipation of assets during the pendency of litigation.[27] Defendants' pervasive and ongoing deception demonstrates their willingness to engage in

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[25] *Gem Merch.*, 87 F. 3d at 469; *U.S. Oil & Gas,* 748 F. 2d at 1434.

[26] *Gem Merch.*, 87 F. 3d at 469.

[27] *See Singer*, 668 F. 2d at 1113 (asset freeze appropriate when FTC objective is "to obtain restitution of monies fraudulently obtained").

wrongdoing. The likelihood of a large monetary judgment depriving Defendants of the fruits of their illicit labor provides Defendants with ample incentive to conceal or dissipate otherwise recoverable assets.

The appointment of a temporary receiver is also critically necessary. As the former Fifth Circuit recognized, the Court's exercise of its equitable power to appoint a receiver is particularly appropriate in fraud cases. "[I]n the absence of the appointment of a receiver to maintain the *status quo*, the corporate assets will be subject to diversion and waste" to the detriment of the victims of the Defendants' fraud. *SEC v. First Financial Group*, 645 F.2d 429, 438 (5th Cir. 1981). In the case at bar, the appointment of a receiver and asset freeze is particularly appropriate because Defendants' deceptive scheme demonstrates such an indifference to the law that both the individual and corporate defendants may reasonably be expected to attempt to frustrate the FTC's law enforcement efforts and the Court's ability to order a remedy by destroying evidence and concealing or dissipating assets during the pendency of the actions, unless prohibited by order of the Court.

The proposed temporary restraining order also grants the temporary receiver and Plaintiff's immediate access to the business premises of the corporate Defendants for the purpose of locating, copying, and preserving relevant evidence. Immediate access is needed to protect evidence against destruction and ensure that the Court can ultimately determine: (1) the full scope of Defendants' law violations; (2) the identities of injured consumers; (3) the total amount of consumer injury; and (4) the nature, extent, and location of the assets of Defendants.

VIII. THE REQUESTED RELIEF SHOULD BE GRANTED *EX PARTE.*

Rule 65(b) of the Federal Rules of Civil Procedure provides that a court may enter a temporary restraining order without notice to the opposing party where it appears that

"immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." Consumer fraud cases like this one fit squarely into a narrow category of situations where *ex parte* relief is not only appropriate, but necessary to make possible full and effective final relief. In cases such as this one, where Defendants' business operations are rife with fraud, there is a strong likelihood that Defendants will attempt to dissipate assets or destroy evidence. Courts have repeatedly issued *ex parte* TROs in FTC cases involving loan modification schemes.[28] As is set forth in detail in the Rule 65(b) declaration of Plaintiff's counsel, notice to defendants would cause irreparable injury. Defendants have shown such a disregard for the law that an *ex parte* temporary restraining order is necessary. Only through an *ex parte* TRO can the Court prevent the likelihood of destruction of documents and secretion of assets -- both of which would jeopardize the possibility of final effective relief for victims.

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[28] *FTC v. U.S. Foreclosure,* SACV09-768JVS (C.D. Cal. July 7, 2009)(conduct prohibitions, asset freeze, appointment of temporary receiver and other relief)[Vol IV, Att. J]; *FTC v. Lucas Law Center* SACV09-0770DOC (C.D. Cal. July 9, 2009)(conduct prohibitions, asset freeze, immediate access, appointment of temporary receiver, and other equitable relief)[Vol IV, Att. K]; *FTC v. Dinamica Financiera LLC*, No. CV09-3554MMM (C.D. Cal. May 20, 2009) (conduct prohibitions, asset freeze, and other relief)[Vol IV, Att. L]; *FTC v. Home Assure, LLC*, Case No. 8:09-CV-547-T-23-TBM (M.D. Fla. Mar. 24, 2009) (conduct prohibitions, asset freeze, immediate access, and appointment of temporary receiver)[Vol IV, Att. M]; *FTC v. National Foreclosure Relief, Inc.*, No. SACV09-117DOC (C.D. Cal. Feb. 2, 2009) (conduct prohibitions, asset freeze, appointment of temporary receiver, immediate access, and other equitable relief)[Vol IV, Att. N]; *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-388-T-23EAJ (M.D. Fla. Feb. 27, 2008) (conduct prohibition, asset freeze, appointment of temporary receiver, immediate access and other equitable relief)[Vol IV, Att. O]; *FTC v. National Hometeam Solutions, Inc.*, No. 4:08-cv-067 (E.D. Tex. Feb. 27, 2008) (conduct prohibitions, asset freeze, and other equitable relief)[Vol IV, Att. P].

IX. CONCLUSION

Defendants have caused substantial injury to consumers through their violations of the FTC Act and the TSR. Therefore, the FTC requests that this Court issue the proposed Temporary Restraining Order which will halt Defendants' fraudulent practices, freeze assets and appoint a temporary receiver to preserve restitution for consumers, grant Plaintiff immediate access to Defendants' business premises to assure the preservation of relevant documents and data, require Defendants to produce financial information, including completion of financial disclosure documents, and require Defendants to show cause why a preliminary injunction should not issue.

Respectfully submitted,

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