Sealed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

17-61862-
CV-Gayles

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN STUDENT LOAN CONSOLIDATORS, LLC, a Florida limited liability company, d/b/a ASLC Processing;

BBND MARKETING, LLC, a Florida limited liability company, d/b/a United Processing Center, United SL Processing, and United Student Loan Processing;

DANIEL UPBIN, individually and as owner, officer, or manager of American Student Loan Consolidators, LLC, and BBND Marketing, LLC; and

PATRICK O'DEADY, individually and as owner, officer, or manager of American Student Loan Consolidators, LLC, and BBND Marketing, LLC,

Defendants.

PLAINTIFF'S *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER, ASSET FREEZE, APPOINTMENT OF A RECEIVER, IMMEDIATE ACCESS, AND OTHER EQUITABLE RELIEF, AND AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE
AND
MEMORANDUM IN SUPPORT OF *EX PARTE* MOTIONS

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I. MOTION AND INTRODUCTION

The Federal Trade Commission ("FTC") respectfully moves that this Court grant a temporary restraining order with asset freeze, appointment of a receiver, immediate access to Defendants' business premises, and other equitable relief, and an order to show cause as to why a preliminary injunction show not issue. This memorandum supports FTC's request for a TRO as well as the request for an order to seal the case until Defendants' are served with the pleadings.

The FTC requests that the Court halt a student loan debt relief operation that has bilked consumers out of millions of dollars. Defendants prey on consumers trying to pay off their student loans with deceptive sales pitches. Defendants offer to provide a service—enrolling consumers in student loan forgiveness or payment reduction programs—and typically fail to deliver on the promised service. Sometimes, Defendants tell consumers that some or all of the payments made to Defendants will be used to pay down their student loans. Instead, Defendants pocket the payments. In furtherance of their scheme, Defendants often tell or imply to consumers that they are part of or are affiliated with the U.S. Department of Education or the consumers' loan servicers. These practices violate the Federal Trade Commission Act ("FTC Act") and the Telemarketing Sales Rule ("TSR").

To protect consumers from additional harm, the FTC seeks an *ex parte* temporary restraining order ("TRO") to immediately halt Defendants' deceptive practices, preserve assets for potential redress to consumer victims, and appoint a temporary receiver over the Corporate Defendants.[1] These measures are necessary to prevent continued consumer injury, dissipation of assets, and destruction of evidence, thereby preserving this Court's ability to provide effective

[1] In similar circumstances, this Court has routinely awarded equivalent temporary equitable relief, on an *ex parte* basis. *See FTC v. Strategic Student Solutions LLC,* Case No. 17-cv-80619-WPD (S.D. Fla. May 15, 2017) (*ex parte* and temporarily sealed TRO with, *inter alia*, immediate access, temporary receiver, and asset freeze) (**Attached as Exhibit 1-A**); s*ee also, e.g., FTC v. World Patent Mktg., Inc.*, No. 17-cv-208448-GAYLES, Doc. No. 11 (S.D. Fla. Mar. 8, 2017) (*ex parte* and temporarily sealed TRO with, *inter alia*, immediate access, temporary receiver, and asset freeze); *FTC v. Mail Tree, Inc.*, No. 15-cv-61034-COHN, Doc. No. 16 (S.D. Fla. May 19, 2015) (same); *FTC v. Inbound Call Experts*, No. 14-81395-CIV-MARRA, Doc. No. 12 (S.D. Fla. Nov. 14, 2014) (same); *FTC v. Boost Software, Inc.*, No. 14-81397-CIV-MARRA, Doc. No. 13 (S.D. Fla. Nov. 12, 2014) (same); *FTC v. Centro Natural Corp.*, No. 14-23879-CIV-ALTONAGA, Doc. No. 10 (S.D. Fla. Oct. 20, 2014) (same); *FTC v. Partners in Healthcare Assoc., Inc.*, 14-cv-23109-SCOLA, Doc. No. 9 (S.D. Fla. Aug. 25, 2014) (same); *FTC v. FMC Counseling Servs., Inc.*, No. 14-61545-CIV-ZLOCH, Doc. No. 15 (S.D. Fla. Jul. 7, 2014) (same).

final relief to the victims of Defendants' scheme. Such relief is particularly appropriate where, as here, Defendants have shifted company names, presumably to avoid detection.

II. STATEMENT OF FACTS

A. The Defendants

Individual Defendants Daniel Upbin and Patrick O'Deady formed Corporate Defendants American Student Loan Consolidators, LLC, and then BBND Marketing, LLC.

1. Corporate Defendants

American Student Loan Consolidators, LLC ("ASLC"), is a Florida limited liability company formed by Upbin and O'Deady in 2013 and led by them. ASLC markets student loan debt relief through telemarketing and website advertising. "ASLC Processing" was registered as a fictitious name on April 15, 2016. On May 17, 2016, ASLC Processing's fictitious name was canceled.[2]

BBND Marketing, LLC, is a Florida limited liability company formed by Upbin and O'Deady in 2014 and led by them. BBND markets student loan debt relief through telemarketing and website advertising. BBND operates under the fictitious names of United Processing Center, United SL Processing, United Student Loan Processing, and other names ("United"). On May 16, 2016, United Processing Center was registered as a fictitious name for BBND Marketing.[3]

2. Individual Defendants

Daniel N. Upbin and Patrick O'Deady are the two managing members of ASLC and United. Upbin registered ASLC Processing as fictitious name for ASLC. Upbin and O'Deady were listed as owners of that fictitious name. Upbin registered United Processing Center as a fictitious name for BBND Marketing. Upbin and O'Deady were listed as owners of the fictitious name United Processing Center.[4]

B. Defendants' Business Practices

Since at least 2013, Defendants' operation has bilked millions of dollars from consumers. Consumers report that, rather than having their loans forgiven or their payments reduced as Defendants promised, Defendants charge them upfront fees for services they do not receive and

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[2] PX 1[Liggins],¶6; PX 2[Compton I],pp. 3, 5-6.
[3] PX 1[Liggins],¶¶6-7.
[4] PX 1[Liggins],¶¶5-7.

that Defendants keep for themselves payments that consumers thought were going towards their loans.

1. Defendants' Deceptive Marketing of Student Loan Debt Relief

Since 2013, ASLC and United have engaged in a deceptive scheme designed to trick consumers into believing that they must pay ASLC and United in order to have their student loan payments or interest rates reduced, to be placed into loan forgiveness programs, or to receive other loan debt relief services.

ASLC and United either cold-call consumers directly, or consumers get ASLC or United's contact information from another source (usually the internet) and then make the call. Once the call is placed, Defendants often state or imply that they are or are affiliated with the U.S. Department of Education or the consumers' loan servicer (*e.g.*, Navient, Nelnet, or Great Lakes).[5] When some consumers find a phone number on the internet, they think that the phone number is for their loan servicer and that they are calling their loan servicer, but somehow they end up on the phone with ASLC or United.[6]

During the presentations to consumers, ASLC and United tell consumers that they can get them lower monthly payments and/or lower interest rates for their student loans[7] or that they can get them into loan forgiveness programs.[8] ASLC and United then often provides the consumers with quotes for new payments and promises these lower amounts to them.[9] Some of Defendants'

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[5] PX 4[Mason].¶18; PX 8[Amonu],¶¶3-4; PX 9[Burton],¶2; PX 10[Butler],¶3; PX 11[Campbell], ¶6; PX 12[Caroccia],¶¶4, 8; PX 15[Dagon],¶3; PX 18 [Ellison],¶3; PX 19[Felber],¶2; PX 20[Geremew],¶3; PX 21[Gurley],¶2; PX 23[Hazen],¶3; PX 26[Leon],¶¶3-4; PX 27[Listle],¶3; PX 28[Munoz],¶3; PX 30[O'Connor],¶¶2-5; PX 31[Ornat],¶4; PX 32[Schafer],¶4; PX 33[Sharp],¶4; PX 34[Skinner],¶3; PX 35[Sledge],¶4; PX 36[Szumowski],¶4; PX 37[Tye],¶4.
[6] PX 12[Caroccia],¶3; PX 14[Cole],¶3; PX 21[Gurley],¶2; PX 23[Hazen],¶¶2-3; PX 25[Langlois],¶¶3-4; PX 26[Leon],¶3; PX 27[Listle],¶3; PX 28[Munoz],¶3; PX 30[O'Connor],¶2;
[7] PX 4[Mason],¶17; PX 7[Ayl],¶3; PX 9[Burton],¶2; PX 9[Butler],¶2; PX 11[Campbell],¶4; PX 15[Dagon],¶3; PX 18[Ellison],¶4; PX 20[Geremew],¶3; PX 21[Gurley],¶3; PX 22[Harris],¶4; PX 23[Hazen],¶¶3-4; PX 24[Hilton],¶3; PX 26[Leon],¶4; PX 27[Listle],¶4; PX 29[Nord],¶2; PX 33[Sharp],¶6; PX 34[Skinner],¶¶4, 6; PX 35[Sledge],¶3; PX 36[Szumowski],¶¶5, 8.
[8] PX 9[Burton],¶2; PX 11[Campbell],¶3; PX 12[Caroccia],¶4; PX 14[Cole],¶3; PX 15[Dagon], ¶¶3, 5; PX 16 [Daigrepont],¶2; PX 17 [Dunham],¶4; PX 19[Felber],¶¶3-4; PX 21 [Gurley],¶2; PX 24[Hilton], ¶3; PX 25[Langlois],¶¶5-6; PX 27[Listle],¶¶3-4; PX 28 [Munoz], ¶3; PX 32[Schafer],¶5; PX 36[Szumowski],¶¶5, 8; PX 37[Tye],¶4; PX 38[Palmer],¶¶4-5.
[9] *E.g.*, PX 25[Langlois],¶¶4-6; PX 27[Listle],¶4; PX 34[Skinner],¶6; PX 36[Szumowski],¶8.

written communications also imply that they can get consumers into loan forgiveness or other student loan debt reduction programs.[10]

ASLC and United tell consumers that they must pay a fee (ranging usually from $499 to $899) in order to get into these payment/interest reduction and loan forgiveness programs and to have these services performed.[11] If consumers cannot afford to pay the fee in full, ASLC and United will break it down into 2-4 installment payments. ASLC and United's form contract or authorization form states that the fee is required in advance of analyzing the client's financial situation and initiating the consolidation process or before any service can be performed.[12] Some consumers are also led to believe by the salespeople that some or all of the advance fees that they pay are being put directly towards their loan repayments.[13]

For some consumers, Defendants tell them that they can only obtain access to the debt reduction or loan forgiveness programs by going through Defendants.[14]

Either during or shortly after the initial conversation, ASLC and United send paperwork to the consumers to fill out. This includes a form contract. The paperwork is sent by email and includes a request for an electronic signature of the consumer.[15] ASLC and United often rush consumers through the process of signing these documents over the internet; representatives will even stay on the phone to be sure that the consumers are completing the process.[16]

None of Defendants' claims are true, as detailed below in Section D.1.a. When consumers complain about Defendants' failure to fulfill their promises to consumers, Defendants

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[10] PX 9[Burton],p.9 and p.11, items 2-3; PX 11[Campbell],p.16; and PX 15[Dagon],p.12.
[11] PX 4[Mason],¶19; PX 8[Amonu],¶¶5, 8-9; PX 9[Burton],¶3; PX 11[Campbell],¶3; PX 12 [Caroccia],¶¶4-5; PX 14 [Cole],¶3; PX 16[Daigrepont],¶3; PX 17 [Dunham],¶7; PX 18 [Ellison],¶4; PX 19[Felber],¶¶4-5; PX 25[Langlois],¶¶5, 7; PX 21[Gurley],¶2; PX 22[Harris],¶4; PX 23[Hazen],¶5; PX 24[Hilton],¶4; PX 26[Leon],¶5; PX 28[Munoz],¶4; PX 31[Ornat],¶3; PX 32[Schafer],¶5; PX 33 [Sharp],¶5; PX 34[Skinner],¶7; PX 35[Sledge],¶5; PX 36[Szumowski],¶5.
[12] PX 11[Campbell],p.6; PX 25[Langlois],pp.10, 13. ASLC and United representatives never inform consumers that they can get these services elsewhere free of charge. *E.g.*, PX 11 Campbell],¶14.
[13] PX 9[Burton],¶3; PX 10[Butler],¶3; PX 22[Harris],¶5; PX 29[Nord],¶2.
[14] PX 12[Caroccia],¶9; PX 17[Dunham],¶4; PX 23[Hazen],¶5.
[15] *E.g.*, PX 9[Burton],¶5; PX 11[Campbell],¶8; PX 17[Dunham],¶7; PX 19[Felber],¶4; PX 25 [Langlois],¶6; PX 26[Leon],¶7; PX 28[Munoz],¶4; PX 31[Ornat],¶5; PX 35[Sledge],¶6.
[16] *E.g.*, PX 9[Burton],¶5; PX 11[Campbell],¶8; PX 26[Leon],¶7; PX 27[Listle],¶6; PX 33 [Sharp],¶5; PX 35[Sledge],¶6.

claim they are just a document preparation service.[17] However, the contract is inconsistent with what the telemarketers have told consumers just minutes earlier, but the contract is also not clear on this point. For example, the contract states that in addition to assembling student loan consolidation and "other application documents for student loan assistance programs" offered by the DOE, it "will provide other services," making it seem that it will assist in other ways, which are in fact stated by the Defendants' salespeople.[18]

2. Defendants Charge Unlawful Advance Fees

After deceiving consumers into signing up for their services, Defendants injure consumers by charging hundreds of dollars in illegal upfront fees. Defendants' advance fees are typically in the range of $499 to $899. Defendants withdraw these fees from consumers' accounts before they obtain the promised debt relief results for consumers, whether the promises are fulfilled or unfulfilled.[19]

3. Defendants' Practices Have Squeezed Millions of Dollars from Consumers and Generated Many Complaints

Defendants' scam has caused substantial consumer losses, and has been correspondingly lucrative for Defendants. Defendants' corporate bank records indicate that, since November 2013, they have extracted over $11 million from consumers through deceptive sales pitches.[20] Defendants often refuse or ignore requests for refunds by consumers.[21] When Defendants provide refunds, it is typically 50% of what consumers paid them.[22] If the consumer requests a refund, Defendants state that their contracts provide for only a 50% refund. Sometimes

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[17] PX 8[Amonu],¶13; PX 17[Dunham],¶9.
[18] *E.g.*, PX 9[Burton],p.9.
[19] PX 7[Ayl],¶5; PX 8[Amonu],¶¶5, 8; PX 9[Burton],¶¶3, 8; PX 10[Butler],¶4; PX 11 [Campbell],¶7; PX 12[Caroccia],¶¶4-5; PX 14[Cole],¶¶3-4; PX 15[Dagon],¶¶4-5; PX 16 [Daigrepont],¶3; PX 17[Dunham],¶7; PX 18[Ellison],¶¶4, 6; PX 19[Felber],¶¶4-5; PX 20 [Geremew],¶3; PX 21[Gurley],¶¶2, 4; PX 22[Harris],¶4; PX 23[Hazen],¶5; PX 24[Hilton], ¶¶4-5; PX 25[Langlois],¶¶5, 7-8; PX 26[Leon],¶5; PX 27[Listle],¶4; PX 28[Munoz],¶¶4-5; PX 29[Nord],¶¶2, 5; PX 31[Ornat],¶¶3, 6; PX 32[Schafer],¶¶5-6; PX 33[Sharp],¶¶5, 8; PX 34 [Skinner],¶¶7, 9; PX 35[Sledge],¶¶5, 7; PX 36[Szumowski],¶¶5-7.
[20] PX 5[Agarwal],¶¶7-8 – the calculation for 2015 through 2017 shows just under $11 million of net revenue. Amounts for 2013 through January 2015 have not been calculated yet.
[21] PX 7[Ayl],¶8; PX 8[Amonu],¶13; PX 11[Campbell],¶12; PX 17[Dunham],¶9; PX 20[Geremew],¶6; PX 33[Sharp], ¶10; PX 35[Sledge],¶¶13, 15; PX 36[Szumowski],¶¶14-15.
[22] PX 9[Burton],¶¶10-11; PX 14[Cole],¶¶9-10; PX 15[Dagon],¶¶8-9; PX 18[Ellison],¶9; PX 21[Gurley],¶7; PX 25[Langlois],¶9; PX 32[Schafer],¶9.

Defendants provide a half or full refund only after the consumer has complained through the Better Business Bureau or a government agency, which contacted the Defendants about the consumer's issues.[23]

Defendants benefitted from the scam. Upbin and O'Deady have personally profited immensely from the enterprise, as they have used corporate funds to pay themselves large sums -- $1.1 million in checks to Daniel Upbin and $1.1 million in checks to Patrick O'Deady.[24]

More than 125 consumers have filed complaints against Defendants with the South Florida BBB and the Florida Department of Agriculture and Consumer Services.[25]

A temporary restraining order should issue against the Defendants.

III. 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 Court to issue temporary, preliminary, and permanent injunctions. It also empowers the courts to exercise the full breadth of their equitable powers, including ordering rescission of contracts, restitution, and disgorgement of ill-gotten gains.[26] By enabling the courts to use their full range of equitable powers, Congress gave them authority to grant preliminary relief, including a temporary restraining order, preliminary injunction, and asset freeze. The Court therefore can order the full range of equitable relief sought and can do so on an *ex parte* basis.[27]

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[23] PX 4[Mason],¶20; PX 7[Ayl],¶9; PX 9[Butler],¶7; PX 16[Daigrepont],¶9; PX 19[Felber],¶10; PX 21[Gurley],¶7; PX 22[Harris],¶¶12-13; PX 24[Hilton],¶9; PX 27[Listle],¶12; PX 31[Ornat],¶¶11-12; PX 34 [Skinner],¶¶13-14.

[24] PX 5[Agarwal],¶11.

[25] PX 2[Compton I],pp.34-52; PX 4[Mason],¶¶14, 20. These complaints are likely just the tip of the iceberg. In the FTC's experience, the raw number of complaints actually reported to government and consumer protection agencies represent only a fraction of consumer harm. *See* Keith Anderson, *Consumer Fraud in the United States: An FTC Survey* 80 (Aug. 2004), *available at* https://www.ftc.gov/sites/default/files /documents/reports/consumer -fraud-united-states-ftc-survey/040805confraudrpt.pdf (FTC Bureau of Economics report noting that only 8.4% of consumer fraud victims complain to an "official source" such as the federal government or the BBB).

[26] *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984)

[27] *U.S. Oil & Gas*, 748 F.2d at 1432 (authorizing preliminary injunction and asset freeze); *see also, e.g., FTC v. Strategic Student Solutions, LLC*, Case No. 17-cv-80619-WPD (S.D. Fla. May 15, 2017) (*ex parte* and temporarily sealed TRO with immediate access, temporary receiver, and asset freeze).

IV. THE FTC MEETS THE STANDARD FOR GRANTING A GOVERNMENT AGENCY'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

To obtain preliminary injunctive relief under Section 13(b), including a TRO, the FTC must show that it is likely to succeed on the merits and that equitable relief is in the public interest.[28] "The burden imposed on the FTC is lighter than the burden imposed on private litigants by the traditional equity standard, and the FTC need not show irreparable harm . . . ."[29] The public interest is determined by the balancing of the equities; public interests should receive greater weight than private interests.[30] Here, the benefit of protecting consumers far outweighs Defendants' desire to con people out of their money. As set forth below, the FTC has amply demonstrated that it will ultimately succeed on its claims and that the balance of equities favors entry of the TRO.[31]

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[28] *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991). This action is not brought pursuant to the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary injunctive relief before or during the pendency of an administrative proceeding. Because the FTC brings this case pursuant to the second proviso of Section 13(b), its complaint is not subject to the procedural and notice requirements in the first proviso. *U.S. Oil & Gas Corp.*, 748 F.2d at 1434 ("Congress did not limit the court's powers under the [second and] final proviso of § 13(b) and as a result this Court's inherent equitable powers may be employed to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief"); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that routine fraud cases may be brought under second proviso, without being conditioned on first proviso requirement that the FTC institute an administrative proceeding).

[29] *FTC v. U.S. Mortg. Funding, Inc.*, No. 11–CV–80155, 2011 WL 810790, at *2 (S.D. Fla. Mar. 1, 2011); *see also IAB Mktg. Assocs.*, 746 F.3d at 1232; *Univ. Health, Inc.*, 938 F.2d at 1217-18.

[30] *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989); *FTC v. USA Beverages, Inc.*, No. 05-61682 CIV, 2005 WL 5654219, at *5 (S.D. Fla. Dec. 6, 2005), *report and recommendation adopted,* No. 05-61682, 2005 WL 5643834 (S.D. Fla. Dec. 9, 2005).

[31] Although not required to do so, the FTC also meets the test for private litigants to obtain injunctive relief, which requires showing two additional factors: irreparable injury and no harm to the public interest. "'[I]rreparable injury should be presumed from the very fact that [a] statute has been violated.'" *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (quoting *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969)); *see also Univ. Health, Inc.*, 938 F.2d. at 1218. As discussed below, Defendants are violating the FTC Act and the TSR, and thus irreparable injury is presumed. Irreparable injury is also present because new and existing consumers are charged for Defendants' worthless services and are often likely to miss loan payments, accrue additional interest on their student loans, and suffer damage to their credit records (*See* PX 16[Daigrepont],¶11; PX 17[Dunham],¶12; PX 22[Harris],¶14; PX 35[Sledge],¶9) or feel that they have to pay for extra identity theft protection. (PX 30 [O'Connor],¶11),. Moreover, the requested relief would do no harm to the public interest

A. The FTC Is Likely to Succeed on the Merits

To demonstrate a likelihood of success on the merits, the FTC need only present evidence showing that it will likely prevail, rather than evidence that would justify a final determination on the merits.[32] That evidence can include "affidavits and hearsay materials."[33] Here, the FTC's evidence shows systemic violations of the FTC Act and the TSR. Moreover, it shows that Corporate Defendants and Individual Defendants are liable for injunctive and monetary relief.

1. Defendants Have Violated the FTC Act

Defendants' deceptive representations to steer consumers into their fraudulent program violate the FTC Act. The FTC Act prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An act or practice is "deceptive" if it involves a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances.[34] A misrepresentation is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product."[35] "Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material."[36]

In determining whether a representation is deceptive, courts examine its "net impression" on consumers.[37] "A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."[38] In addition, "deception is evaluated from the perspective of ... a reasonable consumer in the audience targeted" by Defendants.[39] "[C]onsumer interpretation informs whether a communication was deceptive."[40]

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because the injunction would preclude only harmful, fraudulent representations. In fact, "[t]he public interest in ensuring the enforcement of federal consumer protection laws is strong." *FTC v. Mallett*, 818 F. Supp. 2d 142, 149 (D.D.C. 2011).

[32] *Univ. Health*, 938 F.2d at 1218; *see also World Wide Factors*, 882 F.2d at 347.

[33] *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

[34] *See, e.g., FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995).

[35] *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *In the matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110, 165 (1984)).

[36] *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007).

[37] *FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1329 (M.D. Fla. 2010).

[38] *Id.* (quotations omitted).

[39] *FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012), *aff'd sub nom. FTC v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013).

The FTC need not prove that Defendants make misrepresentations with the intent to deceive.[41] Representations are deceptive if they are false or if Defendants make them without a reasonable basis for believing that they are true.[42] Specifically, claims that Defendants' services would likely achieve results for consumers necessarily include an express or implied representation that Defendants had a "reasonable basis" to think they would.[43]

Any disclaimers do not shield Defendants from liability. "Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."[44] Courts in the Eleventh Circuit and other circuits have found that buried disclaimers do not dispel the deceptive net impression created by Defendants' more prominent claims.[45] For example, one court reasoned that verbal and written disclaimers "were given only after consumers **heard** or saw [Defendants'] deceptive advertising, and **after [Defendants'] telemarketers made repeated false claims** about the nature of the services they would provide" as well as their alleged experience, history of success and great likelihood of negotiating substantial reductions. (Emphasis added.)[46]

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[40] *Id.* at 1273.

[41] *See, e.g., FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050-CIV, 2004 WL 5149998, at *33 (S.D. Fla. Feb. 20, 2004); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

[42] *See* FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1984) (appended to *Thompson Med. Co.*, 104 F.T.C. 648 (1984)).

[43] *FTC v. Tashman*, 318 F.3d 1273, 1276 (11th Cir. 2003) (reversing judgment in favor of defendant and rendering judgment in favor of plaintiff, finding that "[u]nfortunately for [Defendant's] customers, [Defendant] had no basis for many of its claims"); *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008).

[44] *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2003 WL 25429612, at *5 (S.D. Fla. June 2, 2003) *aff'd,* 157 F. App'x 248 (11th Cir. 2005) (quoting *Removatron Intern. Corp. v. FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989)).

[45] *See, e.g., Washington Data Res.*, 856 F. Supp. 2d at 1274-75 (holding that "inconspicuously buried" disclaimers failed to change the deceptive "net impression"); *see also FTC v. Think Achievement*, 144 F. Supp. 2d 993, 1010 (N.D. Ind. 2000) ("The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace."), *aff'd*, 312 F.3d 259 (7th Cir. 2002).

[46] *FTC v. Data Med. Capital, Inc.*, No. SA CV 99-1266 AHS (EEx), 2010 U.S. Dist. LEXIS 3344, at *77-78 (C.D. Cal. Jan. 15, 2010); *see also FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2009 U.S. Dist. LEXIS 29522, at *40-42 (M.D. Tenn. Apr. 6, 2009).

Here, the evidence shows that Defendants have widely disseminated their material misrepresentations. Defendants have made five false claims to consumers regarding their student loan debt relief services: (1) Defendants are part of or affiliated with the government, government loan programs, the Department of Education, or consumers' loan servicers; (2) Consumers who purchase Defendants' debt relief services generally will have their monthly payments reduced or their loan balances forgiven in whole or in part; (3) A government loan repayment or loan forgiveness program requires consumers to pay a fee to enroll; (4) Some or all of consumers' monthly payments to Defendants will be applied toward consumers' student loans; and (5) Consumers can only obtain access to the debt reduction or loan forgiveness programs by going through Defendants.[47]

Defendants' claims are false. In numerous instances, Defendants do not get reduced monthly payments or reduced interest rates or do not get consumers into loan forgiveness or other debt reduction programs; instead, in many instances, consumers have complained that Defendants have done nothing or next to nothing with their student loans.[48] Consumers' payments to Defendants do not go towards their student loans but rather into Defendants' pockets.[49] The government loan programs do not require a fee to be paid in order to apply and enroll.[50] Defendants are not part of, or affiliated with, the government, the Department of Education, or any loan servicer.[51]

The claims are also unsubstantiated because Defendants have no basis for believing that they are true. Indeed, their history of complaints and their lack of any relationship with the consumers' loan servicers or the Department of Education demonstrate precisely the opposite.[52]

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[47] See text at footnotes 5-14.

[48] PX 7[Ayl],¶7; PX 8[Amonu],¶12; PX 9[Burton],¶9; PX 11[Campbell],¶¶9, 11; PX 14[Cole], ¶6; PX 15[Dagon],¶¶6-7; PX16[Daigrepont],¶6; PX 17[Dunham],¶9; PX 18[Ellison],¶¶7-8, 10; PX 20[Geremew],¶¶5, 8; PX 21[Gurley],¶5; PX 22[Harris],¶¶9-11; PX 23 [Hazen],¶¶6; PX 24[Hilton],¶¶6-7; PX 25[Langlois],¶8; PX 26[Leon],¶12; PX 27[Listle],¶10; PX 28[Munoz],¶¶3-4; PX 29[Nord],¶¶2, 5; PX 31[Ornat],¶¶7, 9; PX 32[Schafer],¶¶7-8; PX 33[Sharp],¶9; PX 35 [Sledge],¶12; PX 36[Szumowski],¶10; PX 37[Tye],¶7; PX 38[Palmer],¶¶5-11.

[49] PX 22[Harris],¶9; PX 29[Nord],¶5.

[50] PX 6[Lee], ¶3; PX 14[Cole],¶7; PX 28[Munoz],¶7.

[51] PX 8[Amonu],¶12; PX 12[Caroccia],¶10; PX 20[Geremew],¶5; PX 32[Schafer],¶8; PX 37 [Tye],¶7.

[52] PX 6[Lee],¶¶2, 7; see footnote 51 and its accompanying text.

Finally, Defendants' student loan debt relief claims are material because they affected consumers' decision to pay for Defendants' services. Consumers have stated that they would not have paid Defendants any money if they had known that Defendants' claims and promises were not true. Indeed, the only reason that a consumer would purchase Defendants' services is if doing so would reduce their payments or their debt. Many consumers have also said that they would not have signed up for Defendants' program if they had known that Defendants were not, or were not affiliated with, the Department of Education or the consumers' loan servicers.[53] Additionally, because Defendants' student loan claims are express, they are also presumptively material.[54]

Defendants' entire scheme has been to trick consumers into paying hundreds of dollars in fees on the premise that Defendants would reduce their student loan debt burdens and would apply their payments to their loans. But Defendants did not provide such reduction or apply any of the consumers' payments to their loans, rendering their claims deceptive under the FTC Act. Defendants' disclaimers do nothing to assist Defendants. Here, any disclaimers are simply confusing because other adjacent language in the client agreements and other papers convinces consumers that Defendants will assist in getting what Defendants' salespeople have promised, or is at least not inconsistent with the claims of the salespeople. Accordingly, the FTC is likely to prevail on its Section 5 claims.

2. Defendants Have Violated the TSR

Defendants' have also violated the TSR by materially misleading consumers about their student loan debt relief services and collecting millions of dollars in illegal advance fees. The TSR prohibits abusive and deceptive telemarketing practices, and specifically addresses debt relief operations like Defendants' enterprise. It defines "telemarketing" as a "plan, program, or campaign which is conducted to induce the purchase of goods or services . . . by use of one or

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[53] PX 7[Ayl],¶10; PX 9[Burton],¶12; PX 10 [Butler],¶8; PX 11[Campbell],¶14; PX 12 [Caroccia],¶11; PX 14[Cole],¶10; PX 15[Dagon],¶9; PX 16[Daigrepont],¶11; PX 17[Dunham], ¶11; PX 18[Ellison],¶14; PX 19[Felber],¶12; PX 20 [Geremew],¶8; PX 21[Gurley],¶8; PX 22 [Harris],¶15; PX 23[Hazen],¶8; PX 24[Hilton],¶11; PX 25[Langlois],¶11; PX 26[Leon],¶14; PX 27[Listle],¶13; PX 28[Munoz],¶9; PX 29[Nord],¶7; PX 31[Ornat],¶13; PX 32[Schafer],¶11; PX 33[Sharp],¶14; PX 34[Skinner],¶15; PX 35[Sledge],¶15; PX 36[Szumowski], ¶16; PX 37 [Tye],¶11; PX 38[Palmer],¶14.

[54] *See Transnet Wireless Corp.*, 506 F. Supp. 2d at 1266.

more telephones and which involves more than one interstate telephone call."[55] The TSR applies to any "seller"[56] or "telemarketer"[57] of "debt relief services," which it defines as "any program or service *represented*, directly or by implication, to renegotiate, settle, or in any way alter" debt between a consumer and unsecured creditors, including "a reduction in the balance, interest rate, or fees."[58] Here, Defendants have repeatedly represented to consumers, via many interstate telephone calls, that Defendants will enroll them in student loan forgiveness programs, and that at the end of the programs, their student loans will be forgiven; or enroll them in debt reduction programs that would reduce the amount of their payments or balances, in whole or in part. Thus, Defendants are subject to the TSR.

Defendants' conduct violates three provisions of the TSR: the advance fee ban, the prohibition on material misrepresentations, and the prohibition on misrepresenting affiliation.[59] First, companies selling debt relief services through telemarketing cannot, under the TSR, collect any advance fees, i.e., fees collected before the seller, among other things, successfully renegotiates or settles one of the consumer's debts.[60] Here, Defendants have collected fees before renegotiating or settling their customers' debts. They have typically withdrawn the first payment the day that the contract is signed or very shortly afterwards.[61] Even their Client Agreement indicates that "Upon . . . payment for the Services . . ., ASLC shall promptly analyze client's financial situation . . ."[62] Second, the TSR prohibits debt relief sellers or telemarketers from misrepresenting any material aspect of their services, such as the amount of the debt that consumers will save and the amount of time necessary to achieve represented results.[63] As discussed above, Defendants' sales pitches featured multiple misrepresentations. Third, The TSR prohibits misrepresenting a seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity. Many consumers are told or are led to believe

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[55] 16 C.F.R. § 310.2(gg).
[56] 16 C.F.R. § 310.2(dd).
[57] 16 C.F.R. § 310.2(ff).
[58] 16 C.F.R. § 310.2(o) (emphasis added).
[59] The Telemarketing Act provides that any violation of the TSR constitutes a violation of Section 5 of the FTC Act. 15 U.S.C. § 6102(c)(1); 15 U.S.C. § 57a(d)(3).
[60] 16 C.F.R. § 310.4(a)(5)(i).
[61] PX 33[Sharp],¶¶7-8 and pp.5 and 11.
[62] PX 33[Sharp],p.6.
[63] 16 C.F.R. § 310.3(a)(2)(x).

that they are dealing with either the Department of Education or with their loan servicer company. Those statements are false.

3. The Corporate Defendants Are Jointly and Severally Liable

Corporate Defendants are liable for the entirety of the monies taken from consumers through the deceptive acts and practices of Defendants. In Florida, the general rule is that the obligations and liabilities of a predecessor corporation are not imposed upon the successor company unless: (1) the successor expressly or impliedly assumes the obligations of the predecessor, (2) the transaction is a de facto merger, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor.[64] In the instant case, BBND Marketing is a successor company to American Student Loan Consolidators. As such, BBND Marketing is liable for the entirety of the money scammed from consumers through the acts and practices of both American Student Loan Consolidators and BBND Marketing.

4. Defendants Upbin and O'Deady are Individually Liable for Monetary and Injunctive Relief

As the controlling forces behind Defendants' scheme, Upbin and O'Deady are also liable for the law violations committed by Corporate Defendants. Under the FTC Act, individual defendants may be liable for corporate acts or practices if they: (1) participated directly in the challenged conduct or had the authority to control it, and (2) had some knowledge of the deceptive acts and practices.[65]

Regarding authority to control, "[a]n individual's 'authority to control a company's practices can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.'"[66] "Moreover, in the case of small, closely-held corporations, an individual's status as a corporate officer gives rise to a presumption of ability to control."[67] Bank signatory authority or acquiring services on behalf of a corporation

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[64] Redman v. Cobb International, 23 F. Supp.2d 1372, 1374 (M.D. Fla. 1998) (quoting *Bernard v. Kee Manufacturing Company, Inc.*, 409 So.2d 1047, 1049 (Fla.1982).
[65] *Gem Merch. Corp.*, 87 F.3d at 470.
[66] *FTC v. Am. Precious Metals, LLC*, No. 11-61072-CV, 2012 WL 3683467, at *2 (S.D. Fla. Aug. 24, 2012) (quoting *Wilcox*, 926 F. Supp. at 1104) (brackets omitted).
[67] *Id.* (internal quotation marks omitted).

also evidences authority to control.[68]

Regarding knowledge, an individual may be held liable for monetary relief for corporate practices if the individual defendant had or should have had knowledge of the illicit conduct, showed reckless indifference to the truth or falsity of a representation, or had an awareness of a high probability of fraud with an intentional avoidance of the truth.[69] Participation in corporate affairs is probative of knowledge.[70]

Here, Defendants cannot hide behind the corporate form to evade individual liability because they participated directly in or had authority to control, and had knowledge of Corporate Defendants' unlawful acts; indeed, they were the ringleaders of the scam. Upbin and O'Deady are the only managing members of the two Corporate Defendants, and have sole signatory authority over all of the Corporate Defendants' bank accounts. Upbin registered, and Upbin and O'Deady are the owners of, the fictitious names used by both Corporate Defendants.[71] Daniel Upbin also maintains the domain names for Corporate Defendants and is the registrant for Defendants' Internet websites.[72] This evidence demonstrates "requisite control" and is probative of Upbin and O'Deady's participation and knowledge. Their knowledge is also evident from the consumer complaints that came to them through the BBB. They likely also received numerous complaints directly from consumers. for example, consumer Nord spent "countless hours" talking with employees of Defendants, including a manager who told Nord that she would talk with the owner, Dan U. In another example, consumer O'Connor was transferred to a supervisor who said his name was Patrick. Patrick acknowledged that Defendants often imply that they are one of the loan servicers.[73]

Accordingly, Upbin and O'Deady are subject to monetary as well as injunctive liability for their conduct.[74]

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[68] *See FTC v. USA Fin.*, 415 F. App'x., 970, 974-75 (11th Cir. 2011).
[69] *See FTC v. 1st Guar. Mortg. Corp*, No. 09-CV-61840, 2011 WL 1233207, at *14-15 (S.D. Fla. Mar. 30, 2011).
[70] *Id.* at 15.
[71] See footnote 4.
[72] PX 1[Liggins],¶12.
[73] PX 29[Nord],¶6; PX 30[O'Connor],¶8. *See Gem Merch. Corp.*, 87 F.3d at 470; *1st Guar. Mortg. Corp.*, 2011 WL 1233207, at *15.
[74] *World Travel*, 861 F.2d at 1031; *see also Gem Merch.*, 87 F.3d at 470 (upholding use of individual defendants' assets for restitution).

5. The Equities Tip Decidedly in the Public's Favor

The public interest in halting Defendants' unlawful conduct, preserving evidence, and preserving assets to provide redress to consumers far outweighs any interest Defendants may have in continuing to operate their fraudulent business. In balancing public and private interests, "public equities must receive far greater weight."[75] This principle is especially important in the context of enforcement of consumer protection laws.[76] Here, the balance of equities justifies the relief sought. The evidence demonstrates that the public equities—protection of consumers from Defendants' deceptive practices; effective enforcement of the law; and the preservation of Defendants' assets for consumer redress and disgorgement—weigh heavily in favor of granting the proposed injunctive relief. Granting such relief is also necessary because Defendants' conduct indicates that they will likely continue to deceive the public.[77]

By contrast, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden.[78] Because the injunction will preclude only harmful, illegal behavior, the dissipation of assets, and the destruction of documents, the public equities supporting the proposed injunctive relief far outweigh any burden imposed by such relief on Defendants.

B. An *Ex Parte* TRO Is Necessary to Stop Defendants' Unlawful Conduct and Preserve Effective Final Relief

The evidence demonstrates that the FTC is likely to succeed in proving that Defendants are engaging in deceptive practices in violation of the FTC Act and the TSR, and that the balance of equities strongly favors the public. Thus, preliminary injunctive relief is justified. Each of the principal components of the attached proposed temporary restraining order ("Proposed Order")—conduct relief, asset freeze, record preservation, appointment of a temporary receiver, and immediate access to the business premises—are discussed below. This preliminary relief—

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[75] *USA Beverages, Inc.*, 2005 WL 5654219, at *5 (citing *World Travel*, 861 F.2d at 1029-1030); *see also FTC v. Warner Commc'ns. Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (same).

[76] *Mallett*, 818 F. Supp. 2d at 149 ("The public interest in ensuring the enforcement of federal consumer protection is strong.").

[77] *See USA Beverages, Inc.*, 2005 WL 5654219, at *8 (holding that "past misconduct gives rise to the inference that there is a reasonable likelihood of future violations"); *SEC v. R.J. Allen & Assocs., Inc.*, 386 F. Supp. 866, 877 (S.D. Fla. 1974) (same).

[78] *See World Wide Factors, Ltd.*, 882 F.2d at 347 (holding that "there 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").

commonly awarded by this Court in FTC matters such as this[79]—is necessary to stop Defendants' unlawful activities and preserve the Court's ability to grant effective final relief.

1. Conduct Relief

To prevent ongoing consumer injury, the Proposed Order would enjoin Defendants from further violating the law. Specifically, the Proposed Order would prohibit Defendants from engaging in any conduct that violates the FTC Act and the TSR, including, but not limited to: (a) making misrepresentations concerning the provision of any debt relief services; and (b) charging advance fees for debt relief services. These requested prohibitions do no more than order that Defendants comply with the FTC Act and the TSR.

2. Asset Freeze and Accounting

An asset freeze is critical to preserving the ability to provide consumer redress. When a district court determines that the FTC is likely to prevail in a final determination on the merits, it has "a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers."[80] The Eleventh Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress.[81]

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[79] Courts in the Eleventh Circuit have routinely awarded this relief in previous FTC cases. *See* footnote 1 *supra*.

[80] *World Travel*, 861 F.2d at 1031.

[81] *See, e.g., USA Fin*, 415 F. App'x at 976 ("Maintaining the asset freeze until the monetary judgment was satisfied was necessary to accomplish complete justice.") (internal quotation marks omitted); *Gem Merch. Corp.*, 87 F.3d at 469; *U.S. Oil & Gas*, 748 F.2d at 1433-34. This Court and other courts in the Eleventh Circuit have frozen defendants' assets in many FTC enforcement actions. *See, e.g., FTC v. Strategic Student Solutions, LLC*, Case No. 17-cv-80619-WPD (S.D. Fla. May 15, 2017); *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1309 (S.D. Fla. 2013); *FTC v. SouthEast Trust, LLC*, No. 12-cv-62441-CIV-ZLOCH, Doc. No. 12 at 16 (S.D. Fla. Dec. 11, 2012) ; *FTC v. Am. Precious Metals, LLC*, No. 11-61072-CV-ZLOCH, Doc. No. 13 at 8 (S.D. Fla. May 13, 2011); *FTC v. VGC Corp.*, No. 1:11-cv-21757/Martinez, Doc. No. 16 at 5 (S.D. Fla. May 16, 2011); *FTC v. Home Assure, LLC*, No. 8:09-CV-547-T-23TBM, 2009 WL 1043956, at *1 (M.D. Fla. Apr. 16, 2009); *FTC v. Kirkland Young, LLC*, No. 09-23507-CIV-GOLD/MCALILEY, Doc. No. 19 at 9 (S.D. Fla. Nov. 18, 2009); *FTC v. Global Mktg.*, 594 F. Supp. 2d 1281, 1286 (M.D. Fla. 2009); *FTC v. RCA Credit Servs., LLC*, No. 8:08-CV-2062-T27MAP, 2008 WL 5428039, at *1 (M.D. Fla. Dec. 31, 2008); *FTC v. USA Fin., LLC*, No. 8:08-CV-899-T-17MAP, 2008 WL 3165930, at *1 (M.D. Fla. Aug. 6, 2008); *U.S. Mortg. Funding, Inc.*, 2011 WL 810790, at *6-9; *First Universal Lending, LLC*, 773 F. Supp. 2d 1332, 1335 (S.D. Fla. 2011).

To obtain an asset freeze in the Eleventh Circuit, the FTC need only show that it is proper to preserve funds for final relief.[82] "The FTC's burden of proof in the asset-freeze context is relatively light."[83] "There does not need to be evidence that assets will likely be dissipated in order to impose an asset freeze."[84] The FTC need only show a "reasonable approximation of a defendant's ill-gotten gains" for an asset freeze; "[e]xactitude is not a requirement."[85]

Such relief is particularly important here because there is a large amount of consumer injury and a relatively small amount of remaining assets. The FTC estimates that Defendants' ill-gotten gains, measured by consumer payments, are over $11 million.[86] Courts, including in this District, have granted asset freezes in cases with far less consumer injury.[87] In contrast, there was less than $30,000 remaining in Defendants' corporate bank accounts as of July 2017, intensifying the need for immediate relief. This relatively low balance indicates that corporate assets are already significantly lower than the amount required to provide consumer victims with full redress. An asset freeze is critical to preserve whatever funds remain so that they can be used to pay redress to consumers injured by Defendants' unlawful conduct.

Courts have held, and experience has shown, that Defendants who engage in deceptive or other serious law violations are likely to waste assets prior to resolution of the action.[88] Here, Defendants' ongoing fraud demonstrates their willingness to engage in wrongdoing. Furthermore, the possibility of a large monetary judgment provides Defendants with ample incentive to conceal or dissipate otherwise recoverable assets.

Finally, the Proposed Order would require an immediate accounting of Defendants' assets. Specifically, it would require Defendants to complete and return to the FTC financial statements on the forms attached to the Proposed Order. This accounting, combined with an

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[82] *Gem Merch. Corp.*, 87 F.3d at 469.
[83] *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1234 (11th Cir. 2014).
[84] *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1313 n.3 (S.D. Fla. 2013).
[85] *IAB Mktg*, 746 F.3d at 1234 (quoting *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005)).
[86] See footnote 20.
[87] *See FTC v. USA Beverages, Inc.*, No. 05-61682, 2005 WL 5654219, at *9 (S.D. Fla. 2005) (granting asset freeze in case with $1.2 million in consumer harm and noting "[t]he scope of the monetary liability for Defendants' unlawful conduct is enormous and provides considerable motivation for Defendants to place their assets beyond the Court's reach").
[88] *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

asset freeze, will increase the likelihood of preserving existing assets pending final determination of this matter.[89]

3. Appointment of a Receiver

The Court should also appoint a temporary receiver pursuant to the Court's equitable powers under Section 13(b) of the FTC Act. Appointment of a temporary receiver is appropriate where, as here, there is "imminent danger of property being lost, injured, diminished in value or squandered, and where legal remedies are inadequate."[90] When a corporate defendant has used deception to obtain money from consumers, "it is likely that, in 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 victims.[91]

Appointment of a receiver is particularly appropriate here because Defendants' deceptive practices and efforts to shift their operation to new companies to avoid detection demonstrate such indifference to the law that Defendants are likely to frustrate the FTC's law enforcement efforts by destroying evidence and dissipating assets. The receiver would help prevent Defendants from disposing of ill-gotten funds by identifying, securing, and controlling the use of Defendants' assets, as well as marshaling and preserving their records.

4. Immediate Access

In order to locate assets wrongfully obtained from defrauded consumers and to preserve evidence, the Proposed Order would authorize the FTC and the temporary receiver immediate access to Defendants' business premises and records. Immediate access is critical to protecting evidence against destruction and ensuring that the Court can ultimately determine: (a) the full scope of Defendants' law violations; (b) the identities of injured consumers; (c) the total amount of consumer injury; and (d) the nature, extent, and location of Defendants' assets. District courts

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[89] *See, e.g., FTC v. Strategic Student Solutions, LLC*, Case No. 17-cv-80619-WPD (S.D. Fla. May 15, 2017) (ordering of financial statements).

[90] *Leone Indus. v. Assoc. Packaging, Inc.*, 795 F. Supp. 117, 120 (D.N.J. 1992); *U.S. Oil & Gas*, 748 F.2d at 1432.

[91] *SEC v. First Fin. Group of Tex.*, 645 F.2d 428, 438 (5th Cir. 1981) ; *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963); *see also U.S. Oil & Gas Corp.*, 748 F.2d at 1432 (affirming preliminary injunction that appointed receiver).

have broad and flexible authority in equity to alter standard discovery procedures and applicable time frames, particularly in cases involving the public interest. [92]

The Proposed Order also contains a provision directing Defendants to preserve records, including electronic records, and evidence. It is appropriate to enjoin Defendants charged with deception from destroying evidence and doing so would place no significant burden on them.[93]

5. The TRO Should Be Issued *Ex Parte*

The substantial risk of asset dissipation and evidence destruction justifies *ex parte* relief. Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. *Ex parte* orders are proper in cases where "notice to the defendant would render fruitless the further prosecution of the action."[94] In cases involving pervasive fraud, "it [is] proper to enter the TRO without notice, for giving notice itself may defeat the very purpose for the TRO." [95]Mindful of this problem, this Court has regularly granted the FTC's request for *ex parte* TROs in Section 13(b) consumer fraud cases to preserve the possibility of full and effective final relief.[96]

Immediate and irreparable injury will result if notice is provided. As discussed above, Defendants' business operations are permeated by, and reliant upon, unlawful practices. The FTC's past experience has shown that defendants engaged in fraudulent schemes often dissipate assets and destroy records if they receive notice of an impending FTC enforcement action.

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[92] *See* Fed. R. Civ. P. 26(d), 33(a), 34(b); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *FTC v. Univ. Health*, 938 F.2d 1206 (11th Cir. 1991).

[93] *See SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (such order is "innocuous")

[94] *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *see also Granny Goose Foods, Inc. v. Bd. of Teamsters*, 415 U.S. 423, 439 (1974).

[95] *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1987).

[96] Numerous courts in this district have issued *ex parte* temporary restraining orders in cases involving deceptive practices perpetrated against consumers. *See, e.g., FTC v. Strategic Student Solutions, LLC*, Case No. 17-cv-80619-WPD (S.D. Fla. May 15, 2017); *FTC v. SouthEast Trust, LLC*, No. 12-cv-62441-CIV-ZLOCH, Doc. No. 12 (S.D. Fla. Dec. 11, 2012) (*ex parte* temporary restraining order with asset freeze, expedited discovery, and immediate access to business premises); *FTC v. Timeshare Mega Media & Mktg. Grp., Inc.*, No. 10-62000-CIV, 2011 WL 6102676, at *2 (S.D. Fla. Dec. 7, 2011) (*ex parte* temporary restraining order); *U.S. Mortg. Funding, Inc.*, 2011 WL 810790, at *6-9 (*ex parte* temporary restraining order freezing assets, appointing receiver, and authorizing expedited discovery and immediate access to business premises); *FTC v. First Universal Lending, LLC*, 773 F. Supp. 2d 1332, 1335 (S.D. Fla. 2011) (same); *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1252 (same).

(Declaration of FTC Counsel) Given the fraudulent nature of Defendants' scheme, Defendants have every incentive to destroy inculpatory documents if given notice of the FTC's action.

Defendants are likely to destroy evidence if given notice based on their past conduct of creating multiple corporate entities and operational names to hide their identities. The scheme was initially operated through American Student Loan Consolidators and related entities, with Upbin and O'Deady listed on the corporate records. Defendants then shifted the operation to a new company BBND Marketing with several d/b/a names under which they have been operating. Given these facts, there is a risk that Defendants would not properly preserve evidence and assets without a court order in place.

V. CONCLUSION

Ex parte injunctive relief is necessary to protect consumers from further harm and to help ensure the possibility of effective final relief for consumers who have been fleeced out of millions of dollars and left worse off than before signing up for Defendants' program. For the above stated reasons, the FTC respectfully requests that the Court grant its Motion, issue the requested temporary restraining order, and order Defendants to show cause why a preliminary injunction should not issue.

Dated: September 25, 2017

Respectfully submitted,
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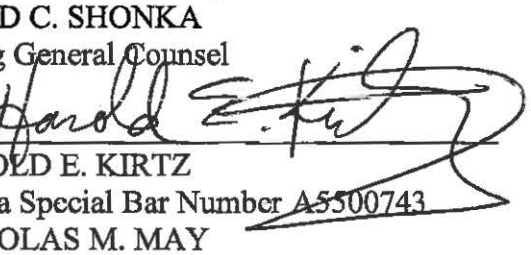

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