UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SACV09-800 DOC(ANX)

Federal Trade Commission,

Plaintiff,

v.

Loss Mitigation Services, *et al.*

Defendants.

Case No.:

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

EXHIBITS TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF FTC'S MOTION FOR 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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INTRODUCTION

Defendants target consumers across the country in what for many is their moment of greatest financial distress – when they are no longer able to afford their monthly mortgage payments and face the loss of their homes to foreclosure. To obtain an advance fee, typically $2,500 to $5,500, Defendants deceptively tell these consumers that in all or virtually all cases, Defendants can lower consumers' mortgage payments and save their homes from foreclosure. Defendants deceptively claim to be so certain of their ability to get results that, if consumers pay the fee but do not receive a loan modification, the fee will be refunded. Defendants also deceptively lead many consumers to believe that Defendants are actually a department of the consumers' lender or servicer, or are affiliated with, working with, or authorized by the consumers' lender or servicer, and that Defendants are making consumers a last-chance offer to save their homes.

The effects of Defendants' deception are devastating for many consumers. Once Defendants collect their advance fee, they do little, if anything, to help consumers obtain a loan modification. They string consumers along, telling them that a modification is in the works and that consumers need not worry about foreclosure. Yet, Defendants fail to obtain loan modifications in numerous cases. Many consumers have gone into foreclosure while waiting for Defendants to deliver the promised results. Others have discovered that they could more effectively negotiate a loan modification or other workout on their own. When these consumers request refunds after realizing that Defendants have failed to deliver the services or produce the results they promised, Defendants routinely deny the requests. Adding insult to injury, after hiring Defendants, many consumers have lost not just their homes, but also the thousands of dollars in up-front fees they paid for Defendants' false promises.

Defendants' practices violate Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. To immediately halt Defendants' illegal practices and

preserve assets necessary for consumer redress, Plaintiff Federal Trade Commission ("FTC") seeks, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), issuance of a temporary restraining order ("TRO") with an asset freeze and an order to show cause why a preliminary injunction should not issue. The proposed TRO would enjoin Defendants' illegal conduct and their collection of advance fees before performing the promised services, preserve assets and documents, and require Defendants promptly to report limited information about their business. This relief is necessary to prevent continued harm to consumers, dissipation of assets, and destruction of evidence, thereby preserving the Court's ability to provide effective final relief to consumers injured by Defendants' illegal practices.

I. THE PARTIES

A. Plaintiff

The FTC is an independent agency of the United States government created by the FTC Act. 15 U.S.C. § 41. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission of contracts and restitution, the refund of monies paid, and the disgorgement of ill-gotten gains.

B. Defendants

Defendants consist of a group of interconnected individuals and corporations, some of which were involved in marketing and brokering mortgage loans before beginning to market mortgage loan modification and foreclosure relief services.

Defendant Synergy Financial Management Corporation, doing business under the fictitious business names Direct Lender and DirectLender.Com ("Synergy" or "Direct Lender"), is a California corporation. PX 24 (Redding), Att. A, at 683. Its principal place of business is 8700 Warner Avenue, Suite 200, Fountain Valley,

California 92708. *Id.*, Atts. A, I, at 683, 707; PX 04 (Dondi), Att. B, at 55. Prior to late 2007, Direct Lender operated primarily as a branch network of mortgage brokerages, resembling a mortgage banking franchisor. PX 24 (Redding), Att. V, at 1049-53. In or around late 2007, concurrent with a sharp decline in the mortgage brokerage market, Direct Lender expanded its operations to include the advertising, marketing and/or selling of mortgage loan modification and foreclosure relief services. *Id.*, Att. W, at 1055-61; PX 04 (Dondi) ¶ 2 & Att. A, at 44, 52; PX 14 (Studt) ¶ 3, at 280; PX 05 (Hall) ¶¶ 2-3 & Att. A, at 94, 98-112. In or around late March 2008, Direct Lender informed customers that these "loss mitigation services" would begin operating under a separate California corporation, Loss Mitigation Services, Inc. PX 24 (Redding), Att. U, at 1047.

Defendant Loss Mitigation Services, Inc. ("LMS") is a California corporation incorporated on February 13, 2008. *Id.*, Att. H, at 704. After purportedly assuming the loan modification operations of Direct Lender, LMS initially remained at the same location as Direct Lender and maintained the same personnel and phone numbers. *Id.*, Att. U, at 1047; PX 16 (Turley), Att. D, at 328. Additionally, through at least May 2008, LMS corresponded with customers using stationery with emblems for both LMS and Direct Lender. PX 16 (Turley), Att. D, at 328. Thereafter, and continuing to the present, LMS maintained its principal place of business at 1700 Carnegie Avenue, Suite 250, Santa Ana, California 92705. *Id.*, Att. H.1, at 345; PX 08 (Osorio), Att. E, at 189; PX 24 (Redding), Att. J, at 734.

Defendant Dean Shafer co-founded LMS with Defendant Bernadette Perry. PX 24 (Redding), Att. W, at 1055-61. He initially registered the corporation to his home address, and listed himself in corporate registration documents as CEO, CFO, Secretary, and a director of LMS. *Id.*, Att. C, at 688. Mr. Shafer has a background in marketing, and has been credited with creating the direct mail solicitation that LMS has used since late 2007. *Id.*, Att. W, at 1055-61; *see also* PX 04 (Dondi), Att. A, at 52 (early solicitation); PX 16 (Turley), Att. V, at 434 (substantially similar later

solicitation). Mr. Shafer is signatory on numerous bank accounts registered to LMS. PX 24 (Redding), Att. N, at 752-64. Mr. Shafer also opened bank accounts, using LMS's business address, for The National Loss Mitigation Association ("TNLMA"). *Id.*, Att. P, at 774. Mr. Shafer is a signatory on the TNLMA bank accounts and listed an LMS email address for his contact information. *Id.*[1]

Defendant Bernadette Perry, a.k.a. Bernadette Carr, co-founded LMS with Defendant Dean Shafer. *Id.*, Att. W, at 1055-61. Ms. Perry has a background in mortgage banking, having worked for Direct Lender prior to 2008. *Id.*; *see also* PX 03 (Browne), Att. B, at 41. Ms. Perry became CEO, CFO, Secretary, and a director of Direct Lender in late 2007, at approximately the time when Defendant Direct Lender was beginning to market loan modifications. PX 24 (Redding), Att. G, at 701. Ms. Perry also is actively involved in LMS's operations, serving as its "Senior Negotiator" for loan modifications, and interacting with consumers and government officials on behalf of LMS. PX 03 (Browne), Att. B, at 41; PX 16 (Turley) ¶¶ 31-34 & Atts. T.1-T.4, T.6-T.8, at 294-95, 406-16, 420-25; PX 20 (Lockwood) ¶¶ 6-7 & Att. B, at 540, 546.

Defendant Marion Anthony ("Tony") Perry, is President and Acting COO of LMS. PX 03 (Browne), Att. B, at 41. He has been a licensed real estate agent in California, and although his license has expired, LMS has marketed its loan modification services using his expired license. PX 24 (Redding), Att. Y, at 1070-77.

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[1] Although TNLMA appears to be substantially controlled by LMS and its associates, *see infra* Part IV.4, TNLMA purports to be an industry association, *see id.*, and LMS markets itself as a "Premier Certified Member of TNLMA." PX 19 (White), Att. E, at 538; PX 24 (Redding), Att. Q, S, at 780, 802.

II. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the FTC's claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. Personal jurisdiction over Defendants exists pursuant to the FTC Act. 15 U.S.C. § 53(b). Additionally, venue is proper in the Central District of California. Under the FTC Act, an action may be brought where a corporation or person "resides or transacts business." *Id.* As noted above, Defendants do business in this district in Santa Ana and Fountain Valley, among other places, which are located in Orange County.

III. BACKGROUND ON THE MORTGAGE FORECLOSURE CRISIS

Over the past year and a half, the nation has confronted an unprecedented downturn in the housing and mortgage markets. Home sales and housing starts are stagnant. Home prices are in steep decline, causing many homeowners to owe more on their mortgages than their homes are worth. Concurrently, mortgage delinquencies and foreclosures have accelerated. The joined effects of falling home prices, resetting adjustable rate mortgages, tighter underwriting standards, and the worsening job market have led to a mortgage credit meltdown.

In response to this crisis, numerous mortgage lenders and servicers have instituted free programs to assist financially distressed homeowners by offering them the opportunity to modify loans that have become unaffordable. The availability of these "loan modification" programs have expanded dramatically as lenders have increased participation in the President's "Making Home Affordable" plan. Moreover, numerous major mortgage lenders and servicers, non-profit and community-based organizations, the federal government, and the news media have helped publicize the availability of these free mortgage loan modification programs. Lenders often notify consumers of their eligibility for these programs through their "loss mitigation" departments. Defendants divert consumers from these free programs and induce them instead to spend thousands of dollars in up-front fees on their purported "Loss Mitigation Services."

IV. DEFENDANTS' DECEPTIVE PRACTICES

Defendants make three primary deceptive representations to induce consumers to pay up-front fees and enroll in their program. First, they represent that they will obtain mortgage loan modifications for consumers or stop foreclosure on their homes in all or virtually all instances. *See, e.g.*, PX 04 (Dondi) ¶¶ 5, 12 & Att. F, at 45, 46, 76; PX 14 (Studt) ¶ 3, at 280; PX 05 (Hall) ¶ 3, at 94; PX 16 (Turley) ¶¶ 4, 7, 15 & Att. D, at 287-88, 290, 328; PX 10 (Ruiz) ¶ 4, at 193; PX 13 (Stewart) ¶¶ 3-4, at 249-50; PX 18 (Wells) ¶ 4, at 439; PX 02 (Bavadi) ¶ 4, at 20; PX 06 (Luke) ¶ 5, at 115. Second, Defendants represent that they will refund consumers' money if Defendants do not succeed in obtaining a loan modification or stopping foreclosure. *See, e.g.*, PX 14 (Studt) ¶ 4, at 280; PX 10 (Ruiz) ¶ 5, at 193; PX 03 (Browne) ¶ 4 & Att. B, at 27, 34; PX 08 (Osorio) ¶ 4, at 170; PX 19 (White) ¶ 4, at 492-93; PX 12 (Sciutti) ¶¶ 5,7 & Att. A, at 212, 213, 220; PX 23 (Budich), Atts. A, F, at 636, 667; PX 24 (Redding), Att. AA, at 1100-05. Third, Defendants lead numerous consumers to believe that Defendants are the consumers' lender or servicer, or that they are affiliated with, working with, or authorized by, the consumers' lender or servicer. *See, e.g.*, PX 16 (Turley) ¶¶ 3-4 & Att. A, at 287, 298; PX 10 (Ruiz) ¶ 2 & Att. A, at 193, 200; PX 02 (Bavadi) ¶ 3, at 20; PX 08 (Osorio) ¶ 2 & Att. A, at 170, 178; PX 01 (Anderson) ¶ 3 & Att. A, at 1, 6. Defendants make these deceptive representations orally and in writing throughout the marketing and sales process that leads up to consumers' payment of Defendants' up-front fee.

Most consumers' first contact with Defendants occurs when consumers receive Defendants' direct mail solicitation. The solicitation is targeted at distressed homeowners, whom Defendants identify through mortgage and property data they purchase. The overall design of the solicitation deceives many consumers into believing that they are receiving a notice from their mortgage lender or servicer offering them a last chance to save their home. The letter prominently includes the name of the consumer's mortgage lender, specifies the original loan amount, and

purports to be a "**FINAL NOTICE**," making an offer that will expire in approximately three weeks to renegotiate the consumer's mortgage. The solicitation invites consumers to call Defendants' toll-free number.

Defendants also market via the website www.lmslossmit.com. The website urges consumers to "[g]et started" by calling LMS at a toll-free number or to input personal information directly on screen. PX 24 (Redding), Att. Q, at 780. The website warns homeowners that "Representing Yourself Can Be Hazardous!" and that, if they do, "you will be offered less of a modification or short sale than you could really get." *Id.* The website also claims that "[m]any times we can substantially improve your loan modification or short sale. We know how to communicate with your lender." *Id.* Defendants' marketing efforts yield approximately 500 inbound calls per day from consumers, *id.*, Att. W, 1055-61. LMS's profit and loss statement reflects that it collected an average of approximately $741,000 per month in "Loan Mod Fees" between October 2008 and April 2009. PX 21 (Sibner), Att. D, at 580 (CD-ROM). With typical advance fees of $3,500 (though they range between $2,500 and $5,500), this amounts to approximately 200 consumers per month.

In actuality, Defendants do not live up to their promises. Once consumers pay the up-front fee, Defendants do little, if anything, to negotiate with the consumers' lenders and often fail to obtain the promised modifications. The consequences of Defendants' deceptive conduct are devastating. Many consumers have gone into foreclosure and lost their homes while they waited for Defendants to obtain them a loan modification. Many have lost valuable time they could have spent working directly with their lenders or servicers to save their homes, or getting help from a free housing counseling service. Many have fallen behind on mortgage payments after paying Defendants' up-front fee, while others have missed payments acting on Defendants' advice.

A. Defendants Misrepresent that They Will Obtain a Loan Modification or Stop Foreclosure in All or Virtually All Instances

Defendants make numerous misrepresentations to convince consumers that Defendants will secure loan modifications or stop foreclosure in all or virtually all instances, and that a loan modification in the consumer's particular case is assured or virtually assured. Defendants make the majority of these misrepresentations at the beginning of the marketing process to extract their advance fee from consumers. However, even after Defendants have collected their advance fee, they continue to mislead consumers to assuage their concerns about the lack of apparent progress in obtaining loan modifications, and thereby to forestall or avoid having to pay refunds.

1. Defendants Falsely Claim a High Probability of Success

Among the earliest and most powerful claims Defendants make to foster the belief that a loan modification is assured or virtually assured is their claim that they have a high success rate – ninety percent or above – in modifying mortgage loans. PX 14 (Studt) ¶ 3, at 280 (Direct Lender has 100% success rate); PX 04 (Dondi) ¶¶ 5, 12 & Att. F, at 45, 46, 76 (Direct Lender has 97% success rate); PX 16 (Turley) ¶¶ 4, 15 & Att. D, at 287-88, 290, 328 (LMS has 97% success rate); PX 23 (Budich), Att. A, at 636 (LMS has a 93% success rate); PX 18 (Wells) ¶ 4, at 439 (LMS has 90% success rate).[2] These claims, which Defendants make both orally and in writing, have induced numerous consumers to pay Defendants' up-front fees.

For example, a representative of LMS told homeowner Bobby Turley by phone that LMS had a 97% success rate in modifying customers' loans. PX 16 (Turley) ¶ 4, at 287-88. After Mr. Turley provided LMS with detailed personal and financial information, *id.* ¶ 5, at 288, the representative sent him a letter falsely stating, "[y]our

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[2] In addition, Defendants tell many consumers that there is a high likelihood that their particular modification will be obtained. PX 05 (Hall) ¶ 3, at 94; PX 10 (Ruiz) ¶ 4, at 193; PX 02 (Bavadi) ¶ 4, at 20; PX 19 (White) ¶ 4, at 492-93; PX 06 (Luke) ¶ 5, at 115.

loan modification was approved," and reiterating that "[w]e have a proven track record with a 97% success rate in modifying our customer's [sic] loans," *id.* ¶ 7 & Att. D, at 288, 328. To close the deal, the representative attached a form to the letter so that Mr. Turley could authorize payment to LMS of a $5,500 advance fee. *Id.* Mr. Turley paid the fee, *id.* ¶ 8, at 288, but LMS failed to obtain a loan modification for him, *id.* ¶ 27, at 293. Mr. Turley's home was put in foreclosure, and he was left to negotiate a workout plan with his lender on his own. *Id.* ¶¶ 27-29, 35, at 293-94, 295. More than a year after LMS collected its advance fee, it denied Mr. Turley's request for a refund, claiming LMS "never guaranteed [him] any particular loan modification result." *Id.*, Att. W, at 438.

Numerous other homeowners have similar stories. For example, a representative of Direct Lender told homeowner Elizabeth Dondi orally and in writing that Direct Lender had a 97% success rate in modifying customers' loans. PX 04 (Dondi) ¶¶ 5, 12 & Att. F, at 45, 46, 76. Ms. Dondi paid the requested $4,995 fee, *id.* ¶ 13, at 46-47, but Direct Lender failed to obtain a loan modification for her, *id.* ¶ 22, at 49. Ms. Dondi's home was put in foreclosure, and she was left to negotiate a forbearance agreement on her own. *Id.* ¶¶ 20, 23, at 48, 49. A Direct Lender representative also told homeowner Rainy Studt that it had a 100% success rate, PX 14 (Studt) ¶ 3, at 280, after which Ms. Studt paid the requested $2,995 fee, *id.* ¶ 5, at 281, but did not receive a modification, *id.* ¶ 12, at 282. A representative of LMS told homeowner Clifford Wells that LMS had a 90% success rate, PX 18 (Wells) ¶ 4, at 439, after which Mr. Wells paid the requested $3,500 fee, *id.* ¶ 10, at 441, but did not receive a modification, *id.* ¶ 14, at 442-43.

An LMS representative made a similar claim to an FTC investigator who called LMS's toll-free number in March 2009. The representative told the investigator, "[w]e have a 93 percent success rate on loan modifications and a full money back guarantee. So, you called probably the best people in the country to do this for you." PX 23 (Budich), Att. A, at 636.

Despite Defendants' success rate claims, they have not secured loan modifications for consumers in anything approaching all or virtually all instances. Numerous declarants have stated that they did not receive the loan modification or services they were promised after paying Defendants their up-front fee. *See* PX 14 (Studt) ¶ 12, at 282; PX 05 (Hall) ¶ 10, at 95; PX 16 (Turley) ¶ 27, at 293; PX 10 (Ruiz) ¶ 26, at 198; PX 18 (Wells) ¶ 16, at 443; PX 02 (Bavadi) ¶¶ 13-14, at 22-23; PX 19 (White) ¶ 25, at 497; PX 06 (Luke) ¶ 26, at 120. In addition to these declarants, the FTC has collected complaints from approximately 70 consumers who were dissatisfied with their dealings with Defendants. PX 24 (Redding) ¶ 38, at 678. Approximately half of these consumers reported that they signed up with Defendants but did not receive the promised results. *Id.* Further, in direct contradiction to Defendants' oral and written success rate claims, Defendant Dean Shafer, the President and co-founder of LMS, admitted in a news interview published in late March 2009 that LMS's 97% success rate claim was untrue. *Id.*, Att. W, at 1055-61. Moreover, in an internal email in late May 2009, he wrote that LMS's customers are "now hammering for refunds." PX 21 (Sibner), Att. A, at 572.

2. Defendants Deceptively Promise Attractive Lender Concessions

In numerous instances, Defendants' phone representatives have led consumers to believe they would receive loan modifications by telling them of attractive lender concessions or specific loan modification outcomes consumers could expect to receive if they hired Direct Lender or LMS. Defendants' representatives make these claims without possessing sufficient financial information about the consumers to know whether the concessions were plausible, and without having contacted consumers' lenders, who actually would have to make the decision whether to grant any such concessions.

In one instance, for example, an LMS phone representative told homeowner Clifford Wells that LMS could reduce his mortgage payment from approximately

$2,400 or $2,500 per month to $1,500 per month. PX 18 (Wells) ¶¶ 3-4, at 439. At the time, the representative had asked Mr. Wells only for his monthly mortgage payment, his interest rate, and whether he was current on his payments. *Id.* ¶ 4, at 439. After hearing these representations, Mr. Wells paid LMS an up-front fee of $3,500. *Id.* ¶ 10, at 441. He did not receive a loan modification. *Id.* ¶ 22, at 444-45. Other consumers have reported similar experiences. *See, e.g.*, PX 14 (Studt) ¶¶ 3, 12, at 280, 282 (without requesting financial information, Direct Lender claimed it could obtain a 30-year fixed-rate mortgage with 4% interest and $2,300 monthly payments, but failed to do so); PX 05 (Hall) ¶¶ 3, 10, at 94, 95 (without requesting financial information, Direct Lender claimed it could obtain a lower interest rate, a lower monthly payment, and a reduction of the mortgage principal amount, but failed to do so).

Defendants have made similar representations to FTC investigators who have called LMS's toll-free number. For example, an LMS representative twice told an FTC investigator that she had "hit the trifecta" for a loan modification, PX 23 (Budich), Att. A, at 642, 647, without having asked whether she had a job or any source of household income at all, or for an estimate of her monthly expenses.[3] The representative added that, if the investigator hired LMS, "you'll be really pleased" with the result. *Id.*, at 647. Another LMS telephone representative told an FTC investigator that LMS could reduce his mortgage payments from $2,600 per month to $1,200 per month, reduce the interest rate and principal amount owed, and convert a variable rate mortgage to a 30-year fixed rate mortgage. PX 22 (Figueroa), Att. A, at 591-92. The representative made these statements without having asked the

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[3] The representative asked the investigator only: the name of her mortgage lender; her interest rate and whether it had increased; her monthly payment and whether it had increased; the balance of her mortgage; whether her home had lost value; whether her income had decreased; and whether she had filed for bankruptcy. PX 23 (Budich), Att. A, at 635-39.

investigator whether he had a job or any source of household income at all, or for an estimate of his monthly expenses.[4]

3. Defendants Falsely Claim that Consumers' Modifications Have Been "Approved"

At the conclusion of the initial telemarketing call, Defendants typically send consumers an email or letter attaching various documents, including a loan modification application that requests detailed personal and financial information. In numerous instances, after consumers return the completed application, Defendants send the consumers letters and emails falsely implying – or stating outright – that LMS already has obtained a loan modification for the consumer. In reality, Defendants have not even contacted consumers' lenders at the time they make these representations. Defendants use these deceptive representations as a way to close the deal – in the same communication, they ask consumers to pay the up-front fee:

> Your loan modification was approved. **I have attached the payment form to process the fee for your loan modification.** The fee for your loan modification is $5,500. PX 16 (Turley), Att. D, at 328 (emphasis in original).
>
> * * *
>
> Your application has passed our Underwriting Department. The fee required to handle your modification is $3700. PX 13 (Stewart), Att. C, at 270.
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> * * *

[4] The representative asked the investigator for only: his mortgage balance; his total monthly payment amount; his interest rate and whether the rate had changed; whether he had filed for bankruptcy; and whether he was late on his payments. PX 22 (Figueroa), Att. A, at 590-91.

> Congratulations! Your application has been accepted for a loan modification. I have attached the payment forms to process the fee for your loan modification. The processing fee for your loan modification is $3,500. PX 18 (Wells), Att. E, at 475.
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> * * *
>
> Your loan modification application was reviewed and accepted. I have attached the payment form to process the fee for your loan modification. The fee for your loan modification is $3,500. PX 19 (White), Att. B, at 523.

These misrepresentations are particularly pernicious. They exploit consumers' hope that someone can help them find a way out of a financial predicament that threatens their home. In each case above, the consumer paid LMS its requested up-front fee. PX 16 (Turley) ¶ 8, at 288; PX 13 (Stewart) ¶ 9, at 251; PX 18 (Wells) ¶ 10, at 441; PX 19 (White) ¶ 10, at 494. In each case, LMS failed to obtain the promised loan modification. PX 16 (Turley) ¶ 27, at 293; PX 13 (Stewart) ¶ 13, at 252; PX 18 (Wells) ¶ 16, at 443; PX 19 (White) ¶ 16, at 495. In one case, the consumer lost her home. PX 13 (Stewart) ¶ 17, at 253.

4. Defendants Make Various Other Misrepresentations to Entice Consumers to Pay an Up-Front Fee

Defendants make numerous other misrepresentations to further entice consumers to pay an up-front fee, and to cover up their lack of work on behalf of consumers once the fee is paid.

Defendants convince consumers that the process will be "quick and easy" if they hire Direct Lender or LMS, PX 02 (Bavadi) ¶ 4, at 20, often by telling consumers that their loan modifications will be complete within 30-90 days. PX 14 (Studt) ¶ 3, at 280 (six weeks); PX 16 (Turley) ¶ 4, at 288 (30-45 days); PX 10 (Ruiz) ¶ 7, at 194 (three months); PX 23 (Budich), Att. A, at 646 (30 days to a few months);

PX 24 (Redding), Att. AA, at 1103 (one to three months). In reality, Defendants often fail to come anywhere close to satisfying this representation. *E.g.*, PX 14 (Studt) ¶ 9, at 281 (no results after nearly three months); PX 16 (Turley) ¶ 27, at 293 (modification denied after seven months); PX 10 (Ruiz) ¶ 26, at 198 (home sold in foreclosure after nine months); PX 02 (Bavadi) ¶ 16, at 23 (no results after six months).

To convince consumers they have a better chance of obtaining a loan modification if they hire Defendants, Direct Lender and LMS have deceptively claimed to have special relationships with lenders and special expertise that will benefit consumers. For example, an LMS representative told Luis Osorio that it could "pull strings" to secure him a modification with better terms than one he already had been offered by his lender. PX 08 (Osorio) ¶ 4, at 170. After Mr. Osorio paid a $2,500 up-front fee, LMS presented him with the same loan modification offer he previously had received. *Id.* ¶¶ 11-12, at 172-73; *see also* PX 04 (Dondi) ¶¶ 5, 19 & Att. I, at 45, 48, 91 (Direct Lender claimed it could work with bank managers who consumers could not reach by phone, but after collecting a $4,995 advance fee, admitted it was simply leaving messages with customer service because it did not have the phone number of a negotiator); PX 13 (Stewart) ¶¶ 4, 9, 13, at 249, 251, 252 (LMS claimed it knew "all the right people" to secure a modification that would save her hundreds of dollars each month, but after collecting a $3,500 advance fee, LMS presented the consumer a loan modification offer that increased her monthly payments by $50).[5] Notwithstanding these and other failures, LMS states on its

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[5] In many other instances, consumers have paid Defendants' up-front fee only to be told by their lenders that they do not work with third parties such as LMS to modify consumers' mortgages. PX 05 (Hall) ¶ 8, at 95; PX 18 (Wells) ¶ 12, at 441-42; PX 06 (Luke) ¶ 25, at 119-20. In other cases, lenders have told consumers they had never been contacted by Defendants. PX 10 (Ruiz) ¶ 16, at 195-96.

website that "[w]e know how to communicate with your lender" and warns that "Representing Yourself Can Be Hazardous!" PX 24 (Redding), Att. Q, at 780.

Defendants also often advise consumers who cannot afford Defendants' fee that, if the consumers skip a mortgage payment, it will improve their chances of receiving a loan modification or at least not hurt them because any missed payments would be worked in the modified loan. PX 19 (White) ¶ 10, at 494; PX 18 (Wells) ¶ 9, at 441; PX 13 (Stewart) ¶ 5, at 250. As a result, consumers often pay Defendants' fee instead of their mortgages, exacerbating their already precarious financial situation, and complicating their relationships with their lenders.

Defendant LMS also deceives many consumers to believe it is "certified" and thereby subject to some form of oversight. LMS's website tells homeowners that LMS is a "Proud Premier Member of The National Loss Mitigation Association ("TNLMA"™)," and that LMS is "Certified" by TNLMA as a "Loan Modification Specialist."[6] In fact, rather than being an independent organization, TLMNA is substantially under the control and direction of Defendants. The organization is incorporated at the same address as LMS and its bank account was opened by Defendant Dean Shafer, the president of LMS, who also identified himself as the president of TNLMA. PX 24 (Redding), Atts. B, P, at 685, 777. TNLMA also lists as its president Aaron Cuha, the founder of Direct Lender, and Mr. Cuha registered TNLMA's URL to Synergy Capital Management Corporation, a company owned by him. *Id.*, Atts. S, T, F, at 989, 1044, 698. Additionally, in correspondence with government officials, employees of TNLMA have purported to speak on behalf of

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[6] One LMS telemarketer alluded to TNLMA in his sales pitch as "a watchdog committee that's supported by the State of California and a couple other political people, and what they're doing is they're trying to keep people from preying on people like you." PX 23 (Budich), Att. A, at 642-43. Another LMS phone representative told an FTC investigator that LMS was "certified to work with all nationwide lenders as well as over hundred lenders who are not nationwide." PX 24 (Redding), Att. AA, at 1095.

LMS, and employees of LMS have identified themselves as working for officials of TNLMA. *See* PX 20 (Lockwood) ¶¶ 8-9 & Att. C, at 540-41, 554-55.

LMS's "certification" by TNLMA also does not protect consumers. As set forth in Section 1 of TNLMA's bylaws and code of ethics, "[a]ll Members and their Representatives shall comply with all federal and state laws . . . *excluding* . . . interpretations that may be impractically and unfeasibly able to be complied with." PX 24 (Redding), Att. S, at 832 (emphasis added). In effect, TNLMA's "ethical" standards permit its members to disregard inconvenient laws, such as those prohibiting the collection of advance fees. Moreover, among other things, TNLMA tries to scare consumers away from attempting to modify their mortgages on their own, or from using free housing counselors, such as those certified by the United States Department of Housing and Urban Development. It has also published a "consumer alert" advising that "FREE Loan Modifications May Be Hazardous To Your Mortgage." *Id.*, Att. S, at 803.

To further foster an appearance of legitimacy, LMS has authored a "Credibility & Legitimacy Report" about itself, which it provides to prospective customers. The report attempts to explain away LMS's "F" rating with the Better Business Bureau ("BBB"); includes a "corporate bio" claiming, among other things, that LMS has approximately 270 "Lender/Servicer Relationships"; and provides purported testimonials from consumers whose full names are not provided. PX 03 (Browne), Att. B, at 35-43; *see also* PX 16 (Turley) ¶ 23 & Att. M, at 292, 370. These representations also are misleading. For example, although LMS claims that "[o]ne complaint even if handled to the BBB's satisfaction" will cause a loan modification company to be given an "F" rating, PX 03 (Browne), Att. B, at 37, the BBB reports that as of December 2008, it had received numerous complaints about LMS, and that the company had responded not by resolving them, but "by disputing the complaint[']s allegations . . . and by generally denying refund requests," PX 24 (Redding), Att. K, at 741. Additionally, contrary to LMS's unsubstantiated claim

that it has relationships with 270 lenders, numerous consumers have paid Defendants' up-front fees only to be told by their lenders that they do not work with third parties such as LMS or had never heard from LMS. *See supra* note 5. Even the "Real Life Testimonials" section is dubious. Although LMS was incorporated on February 13, 2008, PX 24 (Redding), Att. H, at 704, the section begins with a purported testimonial stating, "I contacted LMS in January of 2008," PX 03 (Browne), Att. B, at 42.

Finally, Defendants create an atmosphere of pressure and urgency to encourage consumers to pay the up-front fee. In numerous instances, Defendants' representatives have sent consumers emails transmitting LMS's loan modification application that include arbitrary deadlines and other warnings to pressure consumers to return the information fast. These emails have stated:

- "If the Application Process and Mitigation Process are not handled with precision and a sense of urgency you could very likely lose your home."
- "Our Modification Department can only handle so many cases of the hundreds they receive."
- "[T]hey will only take on clients that cooperate in a timely manner."
- "It is extremely important that this application be faxed back by the (3) day deadline to avoid cancellation of the file."

PX 03 (Browne), Att. B, at 33-34; *see also* PX 01 (Anderson), Att. C, at 14-15 (similar representations); PX 22 (Figueroa), Att. C, at 606 (similar representations).[7]

[7] A phone representative told an FTC investigator that, if he did not return LMS's application worksheet under a strict but artificial deadline, he would be "disqualified." PX 22 (Figueroa), Att. E, at 620-21. Another phone representative pressured an investigator to return the worksheet by telling her that "a lot of the Republicans in office are trying to stop a lot of this. So, it's kind of you're working really against the time tables right now." PX 23 (Budich), Att. A, 640-41.

5. After Collecting the Fee, Defendants Become Difficult to Reach and Often Fail to Obtain Promised Loan Modifications

Once consumers have paid the up-front fee, they often find it difficult or impossible to reach Defendants by phone or email, and in numerous instances, Defendants fail to deliver the loan modification they promised. Initially, consumers receive the run-around from Defendants, who frequently ignore consumer requests for updates and fail to return calls or respond to emails. PX 06 (Luke) ¶¶ 11-12, 20, 23, at 117, 119 (despite LMS representative's promise to provide updates every two weeks, consumer found that "it became extremely difficult to reach [the representative] or anybody else at LMS"); *see also* PX 02 (Bavadi) ¶ 9, at 21; PX 05 (Hall) ¶ 7, at 95; PX 15 (Tully) ¶ 9, at 284; PX 18 (Wells) ¶¶ 11-15, at 441-43.

When consumers are able to make contact, Defendants often provide cursory responses and avoid providing meaningful updates on the status of supposed negotiations. PX 05 (Hall) ¶ 7, at 95; PX 06 (Luke) ¶¶ 14, 18, at 117,118; PX 10 (Ruiz) ¶ 12, at 195; PX 13 (Stewart) ¶¶ 11-12, at 251-52; PX 16 (Turley) ¶ 19, at 291. Defendants often tell consumers that negotiations are underway and proceeding smoothly, only to fail in the end to obtain the promised loan modification. PX 13 (Stewart) ¶¶ 11-13, at 251-52; PX 16 (Turley) ¶¶ 20-21, at 291-92; PX 04 (Dondi) ¶¶ 18-19 & Att. I, at 48, 85-91. Often, consumers learn from their lenders that Defendants had not yet contacted the lenders or had only left messages or had superficial contacts. PX 05 (Hall) ¶ 8, at 95; PX 18 (Wells) ¶ 12, at 441-42.

Defendants also routinely make excuses to placate consumers so they will accept lengthy delays. For example, Defendants have blamed personnel turnover, PX 05 (Hall) ¶ 7, at 95, or a flood of modification requests due to the state of the economy, PX 16 (Turley) ¶ 16, at 290. Defendants also have blamed inaccessible lenders – those with whom they touted special relationships during the sales pitch – for delays in processing modification requests, even in cases where Defendants have

made little if any effort to contact the lender. PX 10 (Ruiz) ¶¶ 12, 17-18, at 195, 196; PX 04 (Dondi) ¶¶ 18-19 & Att. I, at 48, 85-91.

Defendants also cover up their lack of action on behalf of consumers by instructing them not to communicate with their lenders during the modification process. PX 08 (Osorio) ¶ 7, at 171; PX 13 (Stewart) ¶ 4, at 249-50; PX 16 (Turley) ¶ 17, at 291; PX 18 (Wells) ¶ 11, at 441; PX 15 (Tully) ¶ 8, at 284; PX 06 (Luke), Att. B, at 126 ("Client Responsibilities" section). In numerous instances, Defendants have warned consumers that any contact with their lenders will hinder Defendants' modification negotiations, PX 10 (Ruiz) ¶ 17, at 196; PX 13 (Stewart) ¶ 4, at 249-50, and have threatened to drop consumers and deny them refunds if they independently talk to their lenders. PX 08 (Osorio) ¶ 7, at 171. Relying on this advice, many consumers avoid their lenders during critical periods, including after receiving notices of default or foreclosure, or other important communications. *E.g.*, PX 06 (Luke) ¶¶ 15-16, at 118; PX 10 (Ruiz) ¶ 14, at 195.

Ultimately, after waiting many months, numerous consumers have not received the loan modifications they were promised. At that point, the cumulative effects of Defendants' misrepresentations are devastating. After losing crucial time to negotiate directly with their lenders, missing mortgage payments after following Defendants' advice, and paying thousands of dollars they could ill-afford on Defendants' advance fees, many consumers have lost their homes. PX 10 (Ruiz) ¶ 26, at 198; PX 13 (Stewart) ¶ 17, at 253. Still others have gone into foreclosure, ruining their credit and exacerbating the financial difficulties they were experiencing when they first contacted LMS. PX 16 (Turley) ¶ 29, at 293-94; PX 04 (Dondi) ¶ 20, at 48.

B. Defendants Falsely Promise Refunds if They Do Not Obtain Loan Modifications

To further induce consumers to pay their up-front fees, in numerous instances, Defendants have falsely represented that they offer a full money-back guarantee if they fail to obtain a loan modification. PX 14 (Studt) ¶ 4, at 280; PX 10 (Ruiz) ¶ 5, at

193; PX 03 (Browne) ¶ 4 & Att. B, at 27, 34; PX 08 (Osorio) ¶ 4, at 171; PX 19 (White) ¶ 4, at 492-93; PX 12 (Sciutti) ¶¶ 5, 7 & Att. A, at 212, 213, 220 (partial money back guarantee); PX 23 (Budich), Att. A, F, at 636, 667; PX 24 (Redding), Att. AA, at 1100-05. Apart from being an independent misrepresentation, Defendants' claim of a money-back guarantee also bolsters their misrepresentation that they will obtain a loan modification in all or virtually all cases. Many consumers reasonably conclude that Defendants would not make a money-back guarantee unless it was highly likely that they would succeed in obtaining a loan modification for the consumers. In actuality, when Defendants ultimately fail to obtain the promised loan modification and consumers request their money back, Defendants routinely refuse to provide a refund. Defendants also make it difficult for consumers to request refunds by, for example, purporting to require such consumers to sign a release of liability merely to be considered. This deceptive conduct often has caused severe consequences for consumers.

For example, an LMS phone representative told homeowner Israel Ruiz that LMS could lower his mortgage payments by $800 to $1,000. PX 10 (Ruiz) ¶ 4, at 193. The representative requested an advance fee of $3,995, and twice told Mr. Ruiz that LMS would fully refund this money if it was not able to secure a modification. *Id.* ¶¶ 5, 8, at 193, 194. Mr. Ruiz paid the fee. *Id.* ¶ 9, at 194. During the ensuing months, LMS repeatedly made excuses for its lack of progress, told Mr. Ruiz not to worry about making late payments because they would be resolved in the modification, and told him to disregard warnings and payment plan offers from his lender. *Id.* ¶¶ 12-14, 16, 19, at 195, 196. Six months after hiring LMS, Mr. Ruiz received a notice of foreclosure, but LMS representatives continued to tell him not to worry because LMS was working on his modification. *Id.* ¶¶ 19, 22, at 196, 197. Finally, an LMS representative called Mr. Ruiz the day before the auction sale and told him that he could save his home only by paying $8,000 to his lender by noon the next day. *Id.* ¶ 25, at 198. Mr. Ruiz was unable to make such a payment, and his

home was sold back to the bank the next day. *Id.* ¶¶ 25-26, at 198. Mr. Ruiz requested a refund of the fee he had paid LMS. *Id.* ¶ 27, at 198. LMS denied the request in a letter, asserting that it had "produced a result where upon your lender has offered you a loan modification." *Id.*, Att. C, at 204. This supposed loan modification offer "consisted of: Contribution of $8,110 to stop sale." *Id.*

Other consumers have reported similar experiences. *See* PX 19 (White) ¶¶ 4, 10, 21-25, at 492-93, 494, 496-97 (LMS told consumer it would not accept her case unless it could obtain a loan modification, and if it failed, LMS would provide a full refund; but after collecting a $3,500 advance fee and failing to obtain a modification, LMS refused to provide a refund); PX 14 (Studt) ¶¶ 3-5, 9-12, at 280-82 (Direct Lender told consumer it would refund money if she did not receive loan modification, but after collecting $2,995 advance fee and failing to obtain loan modification, Direct Lender refused to provide refund).

LMS phone representatives also have expressly told FTC investigators that the company offered a money-back guarantee. For example, one LMS phone representative told an FTC investigator that "[w]e have a 93 percent success rate on loan modifications and a full money back guarantee." PX 23 (Budich), Att. A, at 636. Another telemarketer repeatedly told an FTC investigator that LMS would offer a "guarantee" if it accepted her application. PX 24 (Redding), Att. AA, at 1100, 1102, 1103, 1105 (numerous representations, including "we do have a money-back guarantee," "everything is guaranteed, you know?," "the process is guaranteed," and after the application is approved, "we can guarantee you the modification").

Defendants also make their money-back guarantee in written materials sent to consumers. For example, an LMS representative sent homeowner John Browne an email transmitting a loan modification application and stating, "[w]e do offer a money back guarantee." PX 03 (Browne), Att. B, at 34. Another LMS representative sent a loan modification application to an FTC investigator, with a cover email stating, "[w]e also have a money back guarantee. If we don't get your loan modified

we will give you your money back. That guarantee is in writing." PX 23 (Budich), Att. F, at 667.

Defendants' false representation that it offers a money-back guarantee not only violates Section 5 of the FTC Act, 15 U.S.C. § 45, it adds insult to injury for consumers who already are in dire straits. After failing to obtain loan modifications for consumers and often leaving them in a worse position than when they started, Defendants walk away with thousands of dollars that consumers might otherwise have used to get their finances back on track.

C. Defendants Mislead Consumers Into Believing That Defendants Are Consumers' Lender or Servicer

Defendants' primary means of making initial contact with consumers – its direct mail solicitation – leads many consumers to believe they have received a notice from their mortgage lender or servicer, or a party affiliated with, working with, or authorized by their mortgage lender or servicer. The solicitation fails adequately to disclose that LMS is not affiliated with, working with, or authorized by the consumer's mortgage lender or servicer. Moreover, in numerous instances, Defendants have reinforced this deceptive claim in subsequent contacts.

Using property and mortgage data purchased from list vendors, Defendants target their direct mail solicitation at homeowners who have experienced, or are expected to experience, an event suggesting financial hardship. *See* PX 24 (Redding), Att. W, at 1055-61. Homeowners have received these letters shortly before or after their loans reset to a higher rate, PX 04 (Dondi) ¶ 3, at 44; PX 16 (Turley) ¶ 3, at 287; PX 13 (Stewart) ¶ 2, at 249; PX 18 (Wells) ¶ 3, at 439; PX 19 (White) ¶ 3, at 492, shortly after falling behind on their mortgage loans, PX 13 (Stewart) ¶ 2, at 249; PX 08 (Osorio) ¶ 3, at 171, shortly after unsuccessfully trying to refinance or modify a mortgage, PX 18 (Wells) ¶ 3, at 439; PX 02 (Bavadi) ¶ 2, at 20; PX 03 (Browne) ¶ 3, at 27; PX 08 (Osorio) ¶ 3, at 171, after a job loss, PX 06 (Luke) ¶ 3, at 115, and even after foreclosure proceedings had been instituted, PX 16

(Turley) ¶ 36 & Att. V, at 295-96, 434; PX 11 (Ruiz) ¶¶ 3-4 & Att. E, at 205, 211. The solicitations arrive at consumers' homes in a window-type envelope, addressed so that showing through the window just above the consumer's name and address, in bold print, is the name of the consumer's mortgage lender or servicer followed by a hyphen and the phrase "Loan Modification Notice." Immediately above that notation is what appears to be a serial number or account number. *See, e.g.*, PX 04 (Dondi), Att. A, at 52; PX 16 (Turley), Atts. A, V, at 298, 434; PX 10 (Ruiz), Att. A, at 200; PX 18 (Wells), Att. A, at 447; PX 06 (Luke), Att. A, at 112; PX 03 (Browne), Att. A, at 31; PX 08 (Osorio), Att. A, at 178; PX 01 (Anderson), Att. A, at 6.

Upon opening the envelope, the consumer finds a one-page notice which includes, at the top left, in bold lettering where a company name or logo typically would appear, only the generic name "Loss Mitigation Services." Immediately below this line, Defendants print the phrase "Original Loan Amount," followed by the homeowner's loan amount. Immediately below that is a purported "Customer Code." Below the customer code is the address block, which shows through the envelope window.

At the top right of the letter, in all-capital, bold lettering, Defendants have printed the phrase "**FINAL NOTICE**" and have indicated that the notice was "**FILED ON**" a date that appears to reflect the mailing date of the solicitation. The top portion of a typical initial solicitation letter appears as follows (redacted to omit personally-identifiable information):

LOSS MITIGATION SERVICES
Original Loan Amount: $xxx,xxx
Customer Code: **[---------]**

FINAL NOTICE
FILED ON:

03/13/2009

For Your Information
Call (866) 371-7588

[S E R I A L N U M B E R]
Re: Chase Home Finance Llc - Loan Modification Notice
[Consumer's Name]
[Consumer's Address]

PX 16 (Turley), Att. V, at 434; *see also* PX 10 (Ruiz), Att. A, at 200; PX 18 (Wells), Att. A, at 447; PX 06 (Luke), Att. A, at 122; PX 03 (Browne), Att. A, at 31; PX 08 (Osorio), Att. A, at 178; PX 01 (Anderson), Att. A, at 6.

The body of the solicitation letter has not materially changed since Defendants began marketing in early 2008. *Compare* PX 04 (Dondi), Att. A, at 52, *with* PX 16 (Turley), Att. V, at 434. It begins by instructing consumers to "[p]lease contact us today regarding your existing mortgage. Our records indicate that **you may be eligible for a loan modification** which could include a **rate reduction** and **loan amount reduction** on your existing loan." PX 16 (Turley), Att. V, at 434 (emphasis in original). The letter instructs homeowners to call a toll-free number, and advises consumers that "[t]his offer is good until" a date typically approximately three weeks after mailing, and "**[n]o other notices will be issued and no representatives will call you.**" *Id.* (emphasis in original). The letter further represents that "[o]ur loan modification team has searched existing records to make you this comparison offer as it relates to your existing loan," *id.*, although no "comparison offer" actually appears in the letter. The letter also advises consumers that "[t]his offer to negotiate your mortgage could **save you thousands of dollars**," and that "**[a] Senior Loan Modification Specialist is waiting to assist you**." *Id.* (emphasis in original).

At the bottom of the page, in a large but generic font, Defendants again print their name, "Loss Mitigation Services." *Id.* Below that, in approximately 8-point font, smaller than any other text in the letter, Defendants include several disclaimers, stating, "Loss Mitigation Services, Inc. is a California Corporation. This information was obtained thru [sic] public record. We are not an affiliate of, nor endorsed by, nor associated with your lender." *Id.*

Numerous consumers report having believed that LMS was their lender or servicer or was somehow affiliated with their lender or servicer. *See, e.g.,* PX 16 (Turley) ¶¶ 3-4, at 287-88; PX 10 (Ruiz) ¶ 2, at 193; PX 02 (Bavadi) ¶ 3, at 20; PX 08 (Osorio) ¶ 2, at 170; PX 01 (Anderson) ¶ 3, at 1. Defendants reinforce this

deceptive claim in subsequent contacts. Consumers' first live contact with Defendants generally occurs upon calling Defendants' toll free number in response to a direct mail solicitation. Such consumers are greeted by telephone representatives who answer the phone, "Modification Department . . . . [c]an I help you?" PX 23 (Budich), Att. A, at 632; PX 22 (Figueroa), Att. A, at 588, or by a recorded message stating, "[y]ou are now connected to the Loss Mitigation Servicing Department," followed by a telephone representative who answers, "Loss Mitigation," PX 24 (Redding), Att. AA, at 1089. In subsequent calls to consumers, telephone representatives identify themselves as being "with the loan modification department." PX 22 (Figueroa), Att. E, at 619.

In some instances, LMS representatives have obfuscated in response to consumers' direct inquiry about LMS's relationship with their lenders. For example, when homeowner Greg Anderson asked an LMS representative about the company's relationship with his lender, Countrywide, the representative told him that LMS and Countrywide "worked together," which strengthened his belief that LMS was affiliated with Countrywide. PX 01 (Anderson) ¶ 5, at 1. In the case of homeowner Deborah Bavadi, LMS's obfuscation was so effective that she did not realize the company was distinct from and unaffiliated with her lender, IndyMac, until seven months after she first contacted LMS, and only after she was so advised in connection with submitting a declaration in this matter. *See* PX 02 (Bavadi) ¶ 3, at 20.

These deceptive representations often are the first thing to draw consumers' attention to LMS. Consumers' impression that they have received a notice from their mortgage lender or servicer, or a party affiliated with, working with, or authorized by their mortgage lender or servicer, causes them to pick up the phone and call the Defendants' toll-free number. Once having made the call, the door has been opened

for Defendants to make other misrepresentations that cause consumers to pay the advance fee.[8]

V. LEGAL ANALYSIS

To stop Defendants' ongoing deceptive marketing of their loan modification services, the FTC respectfully requests that the Court issue a TRO enjoining future misrepresentations; prohibiting the collection of advance fees until promised services are performed; preserving assets and documents; requiring a prompt reporting of customers and status; requiring an accounting of Defendants' finances and scope of their operations; and ordering Defendants to show cause why a preliminary injunction should not be entered. The requested relief, which the Court is authorized to grant under Section 13(b) of the FTC Act, is warranted because the FTC is likely to succeed on the merits and because irreparable injury to consumers and to the Court's ability to provide effective final relief to consumers is likely to result if Defendants' misrepresentations and their receipt of advance fees is not enjoined, assets and documents are not preserved, and Defendants' customers are not informed of this action.

A. The Court is Authorized to Grant the Requested Relief

Section 13(b) of the FTC Act authorizes the FTC to seek, and the Court to issue, temporary, preliminary, and permanent injunctions. The second proviso of Section 13(b) states that "in proper cases the Commission may seek, and after proper

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[8] In some instances, consumers who initiated contact with LMS believing it to be affiliated with their lender were, in fact, told after inquiring of the phone representative, that LMS was not affiliated with their lender. PX 13 (Stewart) ¶ 4, at 170; PX 08 (Osorio) ¶ 4, at 249. In each case, however, the representative made the most of LMS's deceptive door opener, and secured an advance fee from the consumer after making other misrepresentations. PX 13 (Stewart) ¶¶ 4, 9, at 249, 251 (consumer paid fee after being told LMS "knew the right people" and had "successfully obtained loan modifications for many people"); PX 08 (Osorio) ¶¶ 4, 8, at 170-72 (consumer paid fee after being told LMS had been "very successful," could "pull strings," and offered a money-back guarantee).

proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b).[9] The Ninth Circuit has recognized that any case alleging violations of a law enforced by the FTC constitutes a proper case for which injunctive relief may be sought. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985); *H.N. Singer*, 668 F.2d at 1111-13. Moreover, Section 13(b) preserves the Court's inherent authority not only to order permanent relief, restitution, and disgorgement of ill-gotten gains but also to grant ancillary and preliminary equitable relief, including temporary orders imposing asset freezes and issuing other relief. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *H.N. Singer*, 668 F.2d at 1113 (finding that the district court is authorized to order an asset freeze and rescission in a case brought under 13(b)).[10]

Here, where the public interest is at stake, exercise of the Court's broad equitable authority is particularly appropriate. *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *World Wide Factors*, 882 F.2d at 347. The Ninth Circuit has held that a

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[9] *See also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) ("Section 13(b) of the Federal Trade Commission Act authorizes the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission"). The FTC is not proceeding under the first proviso of 13(b), which allows the Court to issue temporary relief in aid of an administrative action brought by the FTC. Therefore, the procedural and notice requirements of the first proviso do not apply to this case. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982); *see also FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984).

[10] *See also Gem Merch. Corp.*, 87 F.3d at 468-70 (finding that district court may award consumer redress under Section 13(b)); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-16 (8th Cir. 1991) (upholding the district court's rescission remedy); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982) (stating that court is authorized to "exercise the full range of equitable remedies traditionally available to it" in Section 13(b) actions).

court may exercise the full breadth of its equitable authority in a Section 13(b) action because Congress "did not limit that traditional equitable power" when enacting the FTC Act. *H.N. Singer*, 668 F.2d at 1113. Thus, the Court has latitude to issue the full range of equitable relief, including an order to freeze assets and a TRO enjoining deceptive practices and allowing expedited discovery. *See, e.g.*, *id.* at 1113-14; *U.S. Oil & Gas*, 748 F.2d at 1432; *FTC v. Gill*, 183 F. Supp. 2d 1171, 1175-77 (C.D. Cal. 2001); *see also* S. Rep. No. 103-130, at 15-16 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 1776, 1790-91 ("Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress."). Finally, district courts are authorized to depart from normal discovery procedures and to fashion discovery by order to meet needs in particular cases. Fed. R. Civ. P. 1, 26(b)(2), 30(a), 34(b).

B. The FTC Has Met the Standard for Issuance of a Temporary Restraining Order

To determine whether to grant a temporary or preliminary injunction in a case pursuant to Section 13(b) of the FTC Act, the Court must consider the Plaintiff's likelihood of success on the merits and weigh the equities. *World Wide Factors*, 882 F.2d at 346; *see also FTC v. Arlington Press, Inc.*, No. 98CV9260, 1999 WL 33562452, at *8 (C.D. Cal. Jan. 18, 1999); *FTC v. Sage Seminars, Inc.*, No. 95-2854, 1995 WL 798938, at *2 (N.D. Cal. Nov. 2, 1995). Unlike private litigants, the government need not show irreparable injury.[11] *World Wide Factors*, 882 F.2d at 347; *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir.

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[11] While not a necessary element, irreparable injury is likely in this case in the absence of a TRO. Defendants' conduct is ongoing, and as demonstrated by the evidence, has caused numerous consumers to suffer devastating financial consequences, up to and including losing their homes in foreclosure. *See supra* Part IV.

1987) ("No specific or immediate showing of the precise way in which violation of the law will result in public harm is required."). Because irreparable injury is presumed in statutory enforcement actions, "the district court need only . . . find some chance of probable success on the merits" to grant an injunction. *World Wide Factors*, 882 F.2d at 347 (quoting *Odessa Union*, 833 F.2d at 176). In balancing the equities, the public interest should receive greater weight, particularly where, as here, the evidence demonstrates that Defendants are engaged in deceptive practices. *Id.* As set forth below, a TRO should issue in this case because the FTC is likely to succeed in proving Defendants are violating the FTC Act and will continue to do so absent court intervention, and because the public interest favors entry of the requested Order.

1. The FTC is Likely to Succeed on the Merits

As described above and evidenced in the exhibits to this memorandum, the FTC is likely to succeed in establishing that Defendants are violating Section 5 of the FTC Act. Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Section 5 condemns as deceptive any material representation or omission that would likely mislead consumers acting reasonably under the circumstances. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *Pantron I Corp.*, 33 F.3d at 1095 (citing *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984)). Through their marketing practices, Defendants have made material misrepresentations about their purported mortgage loan modification services, have falsely represented that they would provide refunds if they did not obtain loan modifications, and have falsely represented that they are affiliated with, working with, or authorized by the consumer's lender.[12]

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[12] In addition to federal and state laws prohibiting deceptive acts and practices, many states have enacted laws to protect homeowners by prohibiting foreclosure consultants from collecting payment before all promised services have been completed. Cal. Civ. Code § 2945 *et seq.*; Colo. Rev. Stat. § 6-1-1101 *et seq.*;

a. Defendants Falsely Promise to Obtain Loan Modifications

Defendants falsely represent that they can obtain loan modifications for consumers in all or virtually all cases. As described above, the evidence demonstrates that Defendants market their mortgage loan modification services using deceptive claims of high success rates and attractive lender concessions, as well as numerous other claims that are false. PX 14 (Studt) ¶ 3, at 280; PX 05 (Hall) ¶ 3, at 94; PX 16 (Turley) ¶ 4, at 287-88; PX 10 (Ruiz) ¶ 4, at 193; PX 13 (Stewart) ¶¶ 3-4, at 249-50; PX 18 (Wells) ¶ 4, at 439; PX 02 (Bavadi) ¶ 4, at 20; PX 19 (White) ¶ 4, at 492-93; PX 06 (Luke) ¶ 5, at 115. Despite making these claims, as demonstrated by consumer declarations and numerous consumer complaints filed with the BBB and other agencies, Defendants have failed to obtain promised loan modifications for many consumers. *See supra* Part IV.A.5. Defendants cannot represent that they will obtain loan modifications for consumers unless that result is, in fact, typical and not the exception. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("[I]t would have been reasonable for consumers to have assumed that the promised rewards were achievable by the typical . . . participant.").[13]

Fla. Stat. § 501.1377; 765 Ill. Comp. Stat. § 940/1 *et seq.*; Ind. Code § 24-5.5-2-1 *et seq.*; Md. Code Ann., Real Prop. § 7-301 *et seq.*; Minn. Stat. § 325N.01 *et seq.*; Mo. Rev. Stat. § 407.935 *et seq.*; N.H. Rev. Stat. Ann. § 479-B:1 *et seq.*; R.I. Gen. Laws § 5-79-1 *et seq.*; *see also* Cal. Bus. & Prof. Code §§ 14701-02 (prohibiting unauthorized use of lender's name or reference to homeowner's loan amount without clear and conspicuous disclosure that marketer is not affiliated with or authorized by the lender). Despite having been put on notice of its violation of foreclosure consultant laws prohibiting the collection of advance fees in at least two states – California and Florida – LMS persisted in soliciting and collecting up-front fees from consumers. *See infra* Part V.C.

[13] Even if there were any satisfied consumers, this would not be a defense to alleged FTC Act violations. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla. 1999).

b. Defendants Falsely Promise Refunds if They Fail to Obtain Loan Modifications

In numerous instances, Defendants further their deception by telling consumers they will receive refunds if they do not obtain loan modifications. In numerous instances, however, LMS has refused to give consumers full refunds. *See supra* Part IV.B. In other instances, LMS has made it difficult for consumers to request refunds. For example, it has made consumers sign a form that purports to "hold us free from all liability and responsibility" and states that "[p]rocessing your refund could take up to thirty (30) days." PX 18 (Wells), Att. I, at 491. Despite signing the form, many consumers report that they never received a refund. *E.g.*, *id.* ¶ 20, at 444.[14]

c. Defendants Represent that They are Affiliated with Consumers' Lenders

Defendants' direct mail solicitation deceives many consumers into believing that it is a notice from the consumer's mortgage lender or servicer, or a party affiliated with, working with, or authorized by, the consumer's lender or servicer. In subsequent contacts, Defendants reinforce this misrepresentation. *See supra* Part IV.C.

Defendants target their direct mail solicitations at consumers who have experienced an event suggesting financial hardship, such as a mortgage rate reset or delinquency. *Id.* The letters arrive in a window-type envelope, addressed so that the name of the consumer's mortgage lender or servicer shows through the window in bold print, separated by a hyphen from the notation "Loan Modification Notice." *Id.* After opening the envelope, consumers see specific information concerning their

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[14] Defendants' purported money-back guarantee – even if honored in some cases – is no defense to the alleged misrepresentations. It is well-settled law that providing refunds does not sanitize misrepresentations. *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) (stating that argument that misrepresentations are cured by refunds has been "repeatedly rejected").

actual mortgage loan near the top in bold print. *Id.* The letter presents the company name, "Loss Mitigation Services," in a generic typeface, and includes no company logo to suggest that "Loss Mitigation Services" is an independent company. *Id.* The company's name resembles that of the "loss mitigation department" in many lenders' operations that handles loan modifications. *See supra* Part III. The letter also omits the word "Inc." when using the name "Loss Mitigation Services," further obscuring that LMS is an independent company, distinct from the consumer's mortgage lender. *See supra* Part IV.C. When consumers call LMS's toll free number, telemarketers answer the phone, "modification department, can I help you?" without identifying LMS. *See id.* Defendants' representatives often continue to obfuscate in subsequent contacts. *Id.*

The deceptive claim that LMS is the consumer's mortgage lender or servicer, or a party affiliated with, working with, or authorized by the consumer's lender or servicer, is express or strongly implied in the solicitation letters. *See, e.g*, *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) ("[I]mplied claims fall on a continuum, ranging from the obvious to the barely discernible."). Established law directs courts to consider the "overall net impression" of the advertisement to determine whether a particular claim is made. *See Am. Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982) ("[T]he tendency of the advertising to deceive must be judged by viewing it as a whole.") (alteration in original) (quoting *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1043 (C.D. Cal. 1999) (the Court looks at "overall net impression" in deciding questions of ad interpretation) (quoting *FTC v. US Sales Corp.*, 785 F. Supp. 737, 745 (N.D. Ill. 1992)). When considered in its entirety, Defendants' solicitation, which names the consumer's mortgage lender and provides the initial balance of the mortgage, coupled with Defendants' subsequent statements convey the overarching message that "Loss Mitigation Services" is part of the consumers' lender or servicer, or is affiliated with, working with, or authorized by, the consumers' lender or servicer.

Moreover, Defendants' purported disclaimer at the bottom of the letter is entirely ineffective. The disclaimer is not presented in a clear or prominent manner, is not connected to any representation in the text by a footnote or asterisk, and directly contradicts many of the core claims made in bold, headline representations and in the body of the letter. After prominently identifying the consumer's lender and loan amount in bold print near the top of the letter, and instructing consumers to "contact us today regarding your existing mortgage," the inconspicuous disclaimer at the bottom states "[w]e are not an affiliate of, nor endorsed by, nor associated with your lender."[15] As set forth in long-standing FTC Act case precedent, "[d]isclaimers 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. Anything less is only likely to cause confusion by creating contradictory double meanings." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *see also FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 929-30 (N.D. Ill. 2006) (inconspicuous disclaimers do not cure deceptive overall net impression).[16] Further, employing inconspicuous disclaimers in communications

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[15] Not only is the disclaimer ineffective for its purported purpose, it is evidence that LMS is aware of, and intends to convey the claim that the solicitation was sent by the consumer's lender, or a party affiliated with, working with, or authorized by, the consumer's lender. Although not necessary, a showing of intent to make a claim is powerful evidence that the alleged claim in fact was conveyed to consumers. *See, e.g.*, *In re Telebrands Corp.*, 140 F.T.C. 278, 304 (2005) (citing *In re Novartis Corp.*, 127 F.T.C. 580, 683 (1999)).

[16] *See also In re Thompson Med. Co.*, 104 F.T.C. 648, 799 (1984) ("[P]ersons reading a print ad often will read only the headline, and will take their sole impression of the ad from it. The special significance of headlines has previously been recognized in Commission cases, which hold that even an express disclosure in the text of an ad may not be enough to change the ad's net impression upon consumers."), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *In re Removatron Int'l Corp.*, 111 F.T.C. 206, 294 (1988) ("[E]quivocal, vague, and ambiguous [qualifications] . . . could not reasonably be expected to offset or undo the clear and

that identify consumers' lenders and specify their loan amounts is expressly contrary to public policy, as articulated by California law. *See* Cal. Bus. & Prof. Code §§ 14701-02. Consistent with the deceptive overall net impression conveyed by the solicitation letter, numerous consumers report having believed that LMS was their lender or servicer or was somehow affiliated with their lender or servicer.

As a matter of law, Defendants' deceptive claims concerning their success rate, their guarantee, and their affiliation with consumers' lenders are material because they are express (or nearly express) in nature and would affect consumers' decision to purchase Defendants' mortgage loan modification services.[17] Indeed, Defendants' claim that they will obtain modifications in all or virtually all cases goes to the core of why consumers would consider purchasing their services. Defendants' deceptive refund and lender affiliation claims also are important to consumers' purchase decisions. It is also a matter of law that consumers are entitled to rely on express claims and are under no obligation to doubt the veracity of such claims.[18]

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strong initial message . . . ."), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); FTC Policy Statement on Deception (1983), *appended to Cliffdale Assocs.*, 103 F.T.C. at 180-81.

[17] A claim is considered material if it "involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). Express claims and implied claims used to induce the purchase of a product are presumed to be material. *Thompson Med. Co.*, 104 F.T.C. at 816; *see also Pantron I Corp.*, 33 F.3d at 1095-96; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) (no distinction between express and implied claims); *Am. Home Prods.*, 695 F.2d at 688 n.11 ("Once the Commission finds deception, it is normally allowed to infer materiality.").

[18] *See FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937); *Five-Star Auto Club*, 97 F. Supp. 2d at 528 ("Consumer reliance on express claims is presumptively reasonable. It is reasonable to interpret express statements as intending to say exactly what they say.") (quoting *FTC v. Int'l Computing Concepts, Inc.*, No. 5:94CV1678, 1994 WL 730144, at *12 (N.D. Ohio Oct. 24,

Accordingly, as supported by the evidence in this case and established by law, Defendants have made false and deceptive express claims; these claims are material to consumers and are likely to mislead; and thus, the FTC is likely to prevail in showing that Defendants are violating Section 5 of the FTC Act.

2. The Corporate and Individual Defendants are Subject to Joint and Several Liability

a. The Corporate Defendants are Liable as a Common Enterprise

Corporate defendants may be held jointly and severally liable if they operate as a common enterprise. *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000); *see also Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173 (5th Cir. 1973); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000). To determine whether a common enterprise exists, "the pattern and frame-work of the whole enterprise must be taken into consideration." *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (quoting *Art Nat'l Mfrs. Distrib. Co. v. FTC*, 298 F.2d 476, 477 (2d Cir. 1962)). A host of factors may demonstrate the existence of a common enterprise, including: common control, shared officers, shared office space, commingling of funds, unified advertising and whether business was transacted through a maze of interrelated companies. *Id.*; *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008); *J.K. Publ'ns*, 99 F. Supp. 2d at 1201-02. Continuity, such as product continuity and work force continuity, may also make one corporation liable for another. *FTC v. U.S. Oil & Gas Corp.*, No. 83-1702, 1987 U.S. Dist.

1994)). Moreover, consumers reasonably assume that Defendants' claims of successful loan modifications would apply to them. *Five-Star Auto Club*, 97 F. Supp. 2d at 528. The FTC, however, does not have to prove actual reliance. *FTC v. Freecom Commc'ns*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) ("[T]he FTC need not prove scienter, reliance, or injury to establish a § 5 violation."). Further, "[t]he existence of a money-back guarantee . . . is neither a cure for deception nor a remedy for consumer injury." *SlimAmerica*, 77 F. Supp. 2d at 1272.

LEXIS 16137, at *59 (S.D. Fla. Jul. 10, 1987). No one factor is dispositive, and all factors need not be present to justify a finding of common enterprise. *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008) ("It is not necessary that the FTC prove any particular number of entity connections and any specific connection.").

Several of the factors necessary to demonstrate common enterprise are present here. First, each of the interrelated corporate defendants has conducted business through the other, and through at least one entity they have jointly operated. From approximately late 2007 through approximately May 2008, corporate defendant Direct Lender advertised, marketed, offered to sell, and sold loan modification and foreclosure relief services, using the name "Loss Mitigation Department" and a direct mail solicitation designed by Defendant Dean Shafer, who ultimately co-founded LMS. *See* PX 24 (Redding), Att. W, at 1055-61; PX 04 (Dondi), Att. A, at 52. Beginning on or about April 2008, Direct Lender purported to transfer its loss mitigation operations to Corporate Defendant LMS. Following the purported transfer, LMS continued to advertise, market, offer to sell, and sell the same services using the same, or virtually the same, direct mail solicitation. *Compare* PX 04 (Dondi), Att. A, at 52, *with* PX 16 (Turley), Atts. A, V, at 298, 434. Through approximately mid-2008, both corporate defendants operated out of the same address, PX 24 (Redding), Att. U, at 1047, with corporate letterhead containing logos for both Defendants, PX 16 (Turley), Att. D, at 328. Additionally, LMS has used TNLMA to perpetuate its fraudulent activity, and TNLMA has ties to both corporate defendants. *See supra* Part IV.A.4.

Second, the corporate defendants are commonly controlled with overlapping officers. Individual Defendant Bernadette Perry, a.k.a. Bernadette Carr, serves as an officer of Direct Lender, including but not limited to, in the capacity of CEO, CFO, Secretary, PX 24 (Redding), Att. G, at 701, and is a member of the Operational Executive Team of LMS. PX 03 (Browne), Att. B, at 41. Another individual who is

not a defendant, Debi Britt, serves as the General Manager of Operations for LMS and previously handled operations oversight for Direct Lender. *Id.*

Third, the corporate defendants share or have shared office space. LMS and Synergy have operated at 8700 Warner Avenue #200, Fountain Valley, California 92708. PX 24 (Redding), Atts. A, I, U, at 683, 707, 1047; PX 16 (Turley), Att. D, at 328.

Because numerous factors support the conclusion that Direct Lender and LMS have operated as a common enterprise, each is liable for the other's activities. These factors include common control, shared officers, shared office space, unified advertising, and transacting business through interrelated companies.

b. Defendants Dean Shafer, Bernadette Perry and Tony Perry Can Be Held Individually Liable for the Acts and Practices of the Enterprise

Individuals also can be held liable for corporate violations of Section 5 of the FTC Act. *Cyberspace.com*, 453 F.3d at 1202; *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1089-90 (C.D. Cal. 1994). Individual liability for injunctive relief is appropriate where, as here, the individual defendant directly participated in or had the authority to control corporate deceptive acts and practices. *Am. Standard*, 874 F. Supp. at 1089. Individual defendants are further subject to monetary liability if they had knowledge of the practices at issue. *Id.* An individual need not have had subjective intent to deceive or actual knowledge of the deception; reckless indifference to the truth or falsity of a misrepresentation or an awareness of a high probability of fraud coupled with intentional avoidance of the truth will suffice. *Amy Travel*, 875 F.2d at 573-74; *Cyberspace.com*, 453 F.3d at 1202; *Am. Standard*, 874 F. Supp. at 1089; *J.K. Publ'ns*, 99 F. Supp. 2d at 1204.

The individual defendants are subject to injunctive relief because they had authority to control the corporate enterprise. Authority to control can arise from assuming the duties of a corporate officer. *Amy Travel*, 875 F.2d at 573; *see also Am.*

Standard, 874 F. Supp. at 1089. This is especially true when the corporate defendants, as those in this case, are small, closely held corporations. *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007). Here, all of the individual defendants are principals of LMS.[19]

Defendant Dean Shafer co-founded LMS with Defendant Bernadette Perry and serves or has served as LMS's CEO, CFO, Secretary and a director. PX 24 (Redding), Att. W, C, J, at 1055-61, 688, 735. He initially registered the corporation to his home address. *Id.*, Att. C, at 688. Mr. Shafer designed the direct mail solicitation that has been the primary source of Defendants' customers since inception. *Id.*, Att. W, at 1055-61. He also has taken credit for reviewing leads to identify the consumers who will receive the solicitations. *Id.* Mr. Shafer is signatory on numerous bank accounts registered to the company. *Id.*, Att. N, at 752-72. Thus, Mr. Shafer has authority to control LMS. *J.K. Publ'ns*, 99 F. Supp. at 1204 (stating that authority to sign documents on behalf of corporation indicates authority to control).

Defendant Bernadette Perry co-founded LMS with Defendant Shafer and serves or has served as a member of the Operational Executive Team of Loss Mitigation Services, Inc. Ms. Perry is actively involved in LMS's operations, serving as its "Senior Negotiator" for loan modifications, and interacting with consumers and

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[19] "An officer of a corporation may be held individually liable for injunctive relief under the [FTC Act] for corporate practices if the FTC can prove (1) that the corporation committed misrepresentations or omissions of a kind usually relied on by a reasonably prudent person, resulting in consumer injury, and (2) that the individual defendants participated directly in the acts or practices or had authority to control them." *Am. Standard*, 874 F. Supp. at 1087 (citing *Amy Travel*, 875 F.2d at 573); *see also FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)); *FTC v. Nat'l Urological Group*, No. 1:04-cv-3294-CAP, 2008 WL 2414317, at *28 (N.D. Ga. June 4, 2008). An individual's status as a corporate officer of a small, closely-held corporation gives rise to a presumption of ability to control the corporation. *Transnet Wireless*, 506 F. Supp. 2d at 1270.

government officials on behalf of LMS. PX 03 (Browne), Att. B, at 41; PX 16 (Turley) ¶¶ 31-34 & Atts. T.1-T.4, T.6-T.8, at 294-95, 406-16, 420-25; PX 20 (Lockwood) ¶¶ 6-7 & Att. B, at 540, 546. In late 2007, at approximately the time that defendants were beginning to market loan modifications through Synergy/DirectLender, corporate registration documents for Synergy/DirectLender began listing Ms. Perry as CEO, CFO, Secretary, and a director. PX 24 (Redding), Att. G, at 701.

Defendant Tony Perry is listed in marketing materials sent to consumers as LMS's President and Acting COO, as well as a member of its Operational Executive Team. PX 03 (Browne), Att. B, at 41. According to these materials, Tony Perry is responsible for overseeing the day-to-day operations, with the objective of balancing operating efficiency and growth initiatives. *Id.* Marketing materials for LMS also include a "personal message" to consumers from Tony Perry in his capacity as President. *Id.* Moreover, LMS has marketed its loan modification services using Mr. Perry's expired real estate license. PX 24 (Redding), Att. Y, at 1070-77.

The individual defendants also had requisite knowledge of LMS's deceptive acts and practices to be subject to monetary liability. LMS and each of the individual defendants were named in a Desist and Refrain Order ("D&R") issued by the California Department of Real Estate ("DRE") in May 2009, requiring them to stop collecting advance fees. *Id.*, Att. X, at 1063-68. Defendant Dean Shafer designed the direct mail solicitation and culled the leads that have been the primary source of the corporate defendants' customers since inception. *Id.*, Att. W, at 1055-61. Defendant Bernadette Perry oversees LMS's modification operations and has represented to consumers that she personally gets involved when LMS has failed to obtain loan modifications. PX 16 (Turley), Att. T.1, at 406-08. Defendant Tony Perry has used his expired real estate license to offer services to customers of LMS, and was named in an Accusation issued by the DRE in April 2009, ordering him, among other things, to stop making misrepresentations and false promises to induce consumers to enter

into advance fee loan modification agreements. PX 24 (Redding), Att. Y, 1070-77. It would be unreasonable and unrealistic for any of the named individual defendants to argue that they did not have knowledge of the acts and practices described herein.

3. The Balance of Equities Favors Issuance of An Injunction

The public interest in halting Defendants' misrepresentations and deceptive claims about their mortgage loan services, and in preserving assets for a meaningful monetary remedy, far outweighs any interest Defendants may have in continuing to deceptively market their services. In balancing the hardships between the public and private interest, "public equities receive far greater weight." *FTC v. Warner Commc'n Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *see also FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("Obviously, the public interest in preserving the illicit proceeds . . . for restitution to the victims is great."). Here, the balance tips strongly in favor of issuance of the requested TRO. Defendants' past law violations, hardly isolated in nature, strongly suggest they will persist in defrauding consumers absent the requested injunctive relief. In contrast, "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." *World Wide Factors*, 882 F.2d at 347. The Court has no obligation to protect ill-gotten profits or illegal business interests. *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d. Cir. 1977) (citing *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)). The public interest thus strongly favors entry of the requested Order.

C. Injunctive Relief Prohibiting Future Misrepresentations and Collection of Advance Fees is Warranted

To prevent ongoing consumer injury, the proposed TRO prohibits Defendants from making future misrepresentations concerning the provision of loan modification services and from collecting or charging fees in advance of performing any such

services. As discussed above, this Court has broad equitable authority under Section 13(b) of the FTC Act to grant ancillary relief necessary to accomplish complete justice. *Amy Travel*, 875 F.2d at 571-72; *H.N. Singer*, 668 F.2d at 1113; *Five-Star Auto Club,* 97 F. Supp. 2d at 532-39. The prohibition against making material misrepresentations or omissions of fact in promoting any loan modification or foreclosure relief service does no more than order that Defendants comply with the FTC Act. The provision barring Defendants from charging or requesting advance fees from consumers in connection with the sale of any loan modification or foreclosure relief service is necessary to prevent ongoing consumer injury. This second provision is justified by Defendants' past illegal conduct and the high fees Defendants charge consumers who can least afford to pay them, resulting in devastating financial harm to many.

The prohibition on advance fees also is consistent with relevant state laws regulating foreclosure consultants. These laws reflect widespread agreement that public policy favors delaying payment until foreclosure consultants actually perform the promised services, in light of the high risk for fraud coupled with enormous required fees. *See supra* note 12. The California legislature made express findings to this effect in enacting such a ban on advance fees:

> The Legislature finds and declares that homeowners whose residences are in foreclosure are subject to fraud, deception, harassment, and unfair dealing by foreclosure consultants . . . . These foreclosure consultants . . . often charge high fees . . . and perform no service or essentially a worthless service. Homeowners, relying on the foreclosure consultants' promises of help, take no other action, are diverted from lawful businesses which could render beneficial services, and often lose their homes.

Cal. Civ. Code § 2945.

As the evidence demonstrates, Defendants' conduct fits squarely within this description, and thus, public policy militates against permitting Defendants to continue collecting advance fees.[20] As described above, Defendants charge thousands of dollars in fees up-front, and then do little or nothing of value for consumers after receiving payment. *See supra* Part IV.A. Those consumers targeted by Defendants' marketing can little afford to have thousands of dollars taken by Defendants or tied up with Defendants for months while little or nothing is done on their behalf. These consumers otherwise could use the money to continue paying their mortgages or reduce other debt. Moreover, many consumers lose valuable time they otherwise could have used to work directly with their lenders. The requested preliminary injunctive relief is necessary to protect consumers from injury during the litigation and to stop further harm.

Injunctive relief also is warranted given Defendants' knowing disregard for state laws prohibiting the collection of advance fees. Defendants have received notice in at least two states – California and Florida – that their conduct violates state statutes prohibiting the collection of up-front fees. However, Defendants did not discontinue their conduct in response to these notices.

In May 2009, the DRE filed a D&R enjoining Defendants LMS, Dean Shafer, Bernadette Perry and Tony Perry, as well as several other LMS employees, from collecting advance fees in violation of section 10130 of the California Business & Professions Code. PX 24 (Redding), Att. X, at 1063-68.[21] Later that same month,

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[20] Defendants not only promise that they will obtain loan modifications to help homeowners avoid foreclosure, *see, e.g.*, PX 10 (Ruiz) ¶ 5, at 193, they promise that they will assist consumers who already are in foreclosure, *see, e.g.*, PX 11 (Ruiz) ¶¶ 3-4 & Att. E, at 205, 211; PX 16 (Turley) ¶¶ 29-30 & Att. V, at 293-94, 434; PX 23 (Budich), Att. A, at 643-46.

[21] The DRE also has sent Defendant Tony Perry an Accusation enjoining him from making misrepresentations and false promises to induce consumers to

Defendant Dean Shafer acknowledged the D&R in an email to Defendants Tony Perry and Bernadette Perry. He wrote that:

> [W]ith the advent of this action, the countdown has been triggered and LMS will at some point cease to exist at least in its current state. We of course expected this and planned for this . . . . The next level of response ultimately could end up with me going to jail. I will of course be trying to mitigate this.

PX 21 (Sibner), Att. A, at 571. Mr. Shafer also wrote that "[w]ith people now hammering for refunds, I have spent the last week night and day developing a counter refund insurgence system." *Id.* at 572.

Despite these candid acknowledgments, neither LMS nor the named individuals has responded to the D&R, and LMS continues to market its services and collect advance fees. Indeed, Defendants not only privately, but also publicly have flouted California's prohibition on collecting advance fees. In March 2009, Defendant Dean Shafer admitted in a news interview that he was not following a state rule that limits the collection of up-front fees because "obeying the rule would deplete his working capital." PX 24 (Redding), Att. W, at 1055-61. Mr. Shafer was quoted as saying, "I'm all for rules and regulations, but they have to be for the good of the masses." *Id.*[22]

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enter into advance fee loan modification agreements. PX 24 (Redding), Att. Y, at 1070-77. Mr. Perry has not responded.

[22] LMS's initial marketing letter also violates California statutes which: (1) prohibit a person from using a lender's name or a consumer's loan amount in a solicitation without authorization unless the person equally prominently discloses that he is not affiliated with, and not authorized by, the lender; and (2) prohibit the use of names similar to those of consumers' lenders if such use could reasonably confuse or deceive consumers. Cal. Bus. & Prof. Code §§ 14701-02. Despite these provisions, Defendants prominently use *both* the lender's name and the consumer's loan amount in their direct mail solicitations, while including an

Beginning in March 2008, Gerard Lockwood, Chief of Investigations for the Florida Office of the Attorney General, Economic Crimes Division, contacted numerous representatives of LMS, including Defendant Bernadette Perry, to inform them that LMS's collection of advance fees from Florida consumers violated Florida Statutes, section 501.1377. *See generally* PX 20 (Lockwood), at 539-63. Defendants have refused to provide assurances that they would comply with this provision, *id.* ¶ 11, at 541, and the Florida Attorney General continues to receive complaints from consumers who were charged advance fees, *id.* ¶ 12, at 541. When one Florida consumer learned about the advance fee prohibition and confronted an LMS representative about it, the representative responded in an email that "if we were to provide our services and receive payment at completion most clients would not pay." PX 01 (Anderson) ¶¶ 12-14 & Att. E, at 3, 19. This sort of protection against false promises and non-performance, however, is exactly the point of such laws.

The balance of equities, as well as public policy as articulated in the laws of California, Florida, and other states banning advance fees, favors entry of an order enjoining Defendants from continuing to engage in deceptive conduct and from collecting advance fees from consumers.

D. An Asset Preservation Order is Necessary to Preserve the Possibility of Final Effective Relief

In addition to injunctive relief, the FTC will seek a final order with monetary redress. To preserve the availability of funds to redress consumers and to determine the scope of the harm, the FTC requests that the Court issue an order requiring the preservation of assets and evidence. Such an order is well within the Court's authority. *See CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988) (affirming asset freeze obtained by FTC); *H.N. Singer*, 668 F.2d at 1111-13 (same);

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inconspicuous disclaimer in small print at the bottom of the letter.

In re Nat'l Credit Mgmt. Group, L.L.C., 21 F. Supp. 2d 424, 462 (D.N.J. 1998) ("[A] freeze of the assets of all Defendants is appropriate to preserve those assets for possible restitution awards."). Moreover, the Ninth Circuit and other courts have imposed asset freezes on the basis of the mere possibility of dissipation. *See, e.g.*, *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (holding that when a government agency is the movant, the possibility of a dissipation of assets is sufficient to justify a freeze).[23]

An asset freeze is appropriate where, as here, there is a large magnitude of financial injury and a risk of dissipation.[24] *See, e.g.*, *FTC v. USA Bevs., Inc.*, No. 05-61682, 2005 WL 5654219, at *8-9 (S.D. Fla. Dec. 5, 2005) (noting considerable motivation to hide assets because of potential size of monetary remedy). According to an LMS "Profit and Loss Statement," between October 2008 and April 2009, LMS took in approximately $4.5 million in "Loan Mod Fees." PX 21 (Sibner), Att. D, at 580 (CD-ROM, Tab "PL0811-0904"). Yet, according to an LMS "Summary Balance Sheet," at the end of that period, LMS had an aggregate *negative* balance of $1,420.94 in its bank accounts. *Id.* (Tab "BS0811-0904"). Similarly, on May 28, 2009, Defendant Dean Shafer wrote in an email to LMS senior officials and investors that "there is about 3 million dollars in mods that [are] not completed." *Id.*, Att. A.

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[23] Moreover, the requested relief is similar to that ordered in prior FTC cases in the Central District of California. *See, e.g.*, *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV 09-401-CJC(MLGx) (C.D. Cal. Apr. 10, 2009) (grant of TRO with asset freeze); *FTC v. Nat'l Foreclosure Relief, Inc.*, No. SACV09-117-DOC (MLGx), 2009 WL 650401, at *1 (C.D. Cal. Mar. 6, 2009) (grant of TRO with asset freeze); *FTC v. Productive Mktg., Inc.*, 136 F. Supp. 2d 1096, 1100 (C.D. Cal. 2001).

[24] Defendant Dean Shafer illustrated this risk in an email on May 28, 2009, in which he wrote that the issuance of the D&R ordering Defendants to stop collecting advance fees meant that "the countdown has been triggered and LMS will at some point cease to exist at least in its current state. We of course expected this and planned for this." PX 21 (Sibner), Att. A, at 571.

However, the "Summary Balance Sheet" attached to his email reflected that LMS had only $1,086,053 in "Total Assets," and most of these are not fully available to fund operations, benefit consumers or provide refunds. *Id.*, Att. D (CD-ROM, Tab "BS0811-0904").[25] Such a situation is consistent with a business that is using advance fees to fund ongoing operations.[26]

Defendants' potential liability thus already exceeds the funds that are available for redress by nearly threefold, and any new business expenditures would jeopardize the possibility of effective relief. 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." *World Travel Vacation Brokers*, 861 F.2d at 1031. To help ensure the availability of assets, preserve the status quo, and guard against the dissipation and diversion of assets, the Court may issue an order freezing Defendants' assets. Not only may the Court freeze the assets of the corporate defendants, it may freeze the assets of the individual defendants where, as here, the individual defendants controlled the deceptive activity and had actual or constructive knowledge of the deceptive nature of the practices in which they were engaged. *Amy Travel*, 875 F.2d at 574-75; *Nat'l Credit Mgmt.*, 21

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[25] LMS characterized $501,181 as "Fixed Assets," which presumably are not available to fund operations or pay refunds. Another $239,248 in assets is characterized as "Accounts Receivable," but the company also lists "Accounts Payable" of $242,853, greater than the amount of "Accounts Receivable." LMS reported "Other Current Assets" of $266,644, but this consists almost entirely of merchant reserves with PayPal and Monterrey Bank. Finally, LMS reported having another $80,400 in "Other Assets," which consist of "Security Deposits." PX 21 (Sibner), Att. D, at 580 (CD-ROM, Tab "B50811-0904").

[26] Further supporting this conclusion, Mr. Shafer explained in an interview reported on March 27, 2009 that "obeying the rule [prohibiting collection of advance fees] would deplete his working capital and cripple the company." PX 24 (Redding), Att. W, at 1055-61.

F. Supp. 2d at 462.[27] As discussed above, these factors are present here. *See supra* Part V.C.

In addition to a provision directing Defendants not to dissipate or conceal assets, the FTC seeks a provision in the TRO directing banks and other financial institutions to freeze Defendants' assets in their custody or control. This Court has the authority to direct its order to such third parties to preserve assets that are easily dissipated and may be difficult or impossible to trace. *See First Nat'l City Bank*, 379 U.S. at 385; *see also Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995); *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985).

Finally, the FTC seeks an immediate accounting of Defendants' assets. The FTC requests that the Court order Defendants to complete and return to the FTC financial statements on the forms attached to the proposed TRO. An accounting and financial statements, combined with an asset freeze, will increase the likelihood of preserving existing assets pending final determination of this matter. *See, e.g.*, *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 532 n.3 (D.D.C. 1994); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 676-78 (D.D.C. 1995).

Here, Defendants' ongoing fraud demonstrates their willingness to engage in wrongdoing. The possibility of a large monetary judgment provides Defendants with ample incentive to conceal or dissipate otherwise recoverable assets. Without an immediate freeze of the recoverable assets of Defendants, it is unlikely that funds will

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[27] Further, the Court can order Defendants' assets to be frozen whether the assets are inside or outside the United States. *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States.").

remain to satisfy any final order granting redress to deceived consumers or disgorging Defendants' ill-gotten gains.[28]

E. Limited Expedited Discovery is Necessary

The Court should grant the FTC's request for limited discovery to locate and identify consumers, documents, and assets, and determine the status of Defendants' work on each consumer's case, and to identify the individuals whom Defendants use to negotiate with consumers' lenders. District courts are authorized to depart from normal discovery procedures and fashion discovery to meet discovery needs in particular cases. Fed. R. Civ. P. 26(d), 33(a), 34(b) (authorizing alteration of standard discovery provisions, including applicable time frames governing depositions and production of documents). Such a departure is justified in light of the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *See, e.g.*, *Gill*, 183 F. Supp. 2d at 1177 (noting grant of expedited discovery); *Productive Mktg.*, 136 F. Supp. 2d at 1100 (same); *see also FSLIC v. Dixon*, 835 F.2d 554, 557, 562 (5th Cir. 1987); *Fed. Express Corp. v. Fed. Espresso, Inc.*, No. 97CV1219RSPGJD, 1997 WL 736530, at *2 (N.D.N.Y. Nov. 24, 1997). In this case, limited expedited discovery is crucial for several reasons. First, it will aid in locating and securing assets for final relief and ensuring compliance with any asset freeze the Court may order. Second, it will help preserve documents that are necessary to determine the scope of consumer injury and mitigate further injury, including documents necessary to determine whether and, if so, what Defendants have done to advance consumers' loan modification requests. Third, it will aid in ensuring that Defendants comply with the injunctive provisions of

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[28] The proposed TRO also contains a provision directing Defendants to preserve 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. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (characterizing such orders as "innocuous").

the requested order. The FTC's limited expedited discovery request will not unduly burden Defendants, as the requested information should be available readily in a computerized, business-records format because it is the very information needed by Defendants to fulfill their promise to provide mortgage loan modification services in complex, time-sensitive situations.[29]

[29] This type of information is commonly kept on proprietary, client-contact software, which is often not readable in its native format without the underlying software. As a result, an order to provide information in written format, rather than produce the computer records themselves, will facilitate the design of appropriate preliminary injunctive relief by the Court.

Conclusion

For the reasons set forth above, the Commission respectfully requests that the Court enter a Temporary Restraining Order and Show Cause Order, including provisions for the preservation of assets and evidence, to halt Defendants' ongoing violations of the FTC Act and to protect the Court's ability to issue effective, final relief in this matter as it may deem appropriate.

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Respectfully submitted,

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