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7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10  
11 **FEDERAL TRADE COMMISSION,**

12 **Plaintiff,**

13 **v.**

14 **AMG SERVICES, INC., et al.,**

15 **Defendants, and**

16 **PARK 269, LLC, et al.,**

17 **Relief Defendants.**  
18  
19

Case No. 2:12-cv-00536-GMN-VCF

**DEFENDANTS THE MUIR LAW  
FIRM, LLC AND TIMOTHY J.  
MUIR'S OPPOSITION TO MOTION  
FOR PRELIMINARY INJUNCTION  
AND OTHER EQUITABLE RELIEF**

**REQUEST FOR EVIDENTIARY  
HEARING**

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**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>STANDARD FOR INJUNCTIVE RELIEF .....</b>	<b>4</b>
<b>III.</b>	<b>THE FTC’S MOTION MUST BE DENIED .....</b>	<b>5</b>
	A. As Set Forth In The Tribal Defendants’ Opposition, The FTC Cannot Establish That It Is Entitled To A Preliminary Injunction.....	5
	B. The FTC Is Unlikely To Prevail On The Merits Because It Has Not Pled Its Claims Against Mr. Muir Or The Muir Law Firm With Particularity As Required By <i>Twombly</i> And Rule 9 Of The Federal Rules Of Civil Procedure .....	5
	1. Injunctive Relief Is Improper If The Complaint Is Legally Deficient.....	5
	2. The FTC’s Complaint Fails To State A Claim For Relief Against Mr. Muir And The Muir Law Firm .....	7
	C. The FTC Is Unlikely To Prevail On The Merits Because It Cannot Establish That The Muir Law Firm Is Part Of Any Alleged Common Enterprise .....	10
	D. The FTC Is Unlikely To Succeed On The Merits Of Its Claims Against Mr. Muir Because Mr. Muir Did Not Engage In And Has No Individual Liability For The Conduct Alleged.....	15
	1. Mr. Muir Did Not Participate In The Lending Activities At Issue Nor Did He Control Such Activities.....	17
	2. Providing Legal Services Or Serving As An Officer Of Black Creek Is Not A Basis For Liability .....	20
	3. The FTC Cannot Prove That Mr. Muir Knew That The Tribal Defendants Were Engaged In Deceptive Practices That Caused Consumer Injury .....	23
	E. The Equities Weigh Heavily Against Granting A Preliminary Injunction Against Mr. Muir And The Muir Law Firm .....	24
	F. The Public Interest Does Not Support A Preliminary Injunction Against An Attorney For The Alleged Misconduct Of His Clients .....	25
	G. Mr. Muir And The Muir Law Firm Are Entitled To An Evidentiary Hearing On The FTC’s Motion For Preliminary Injunction.....	26

iii

1	<i>FTC v. Ivy Capital, Inc.</i>	
2	No. 2:11-cv-283, 2011 WL2118626, at *3 (D. Nev. May 25, 2011) .....	8
3	<i>FTC v. J.K. Publ'ns</i>	
4	99 F.Supp.2d 1176, 1202 (C.D. Cal. 2000) .....	11
5	<i>FTC v. Lights of Am., Inc.</i>	
6	760 F.Supp.2d 848, 854-55 (C.D. Cal. 2010) .....	10
7	<i>FTC v. Network Servs. Depot, Inc.</i>	
8	617 F.3d 1127, 1138 (9 <sup>th</sup> Cir. 2010) .....	16
9	<i>FTC v. Publ'g Clearing House, Inc.</i>	
10	104 F.3d 1168, 1170 (9 <sup>th</sup> Cir. 1997) .....	18
11	<i>FTC v. QT, Inc.</i>	
12	448 F.Supp.2d 908, 973 (N.D. Ill. 2006) .....	18
13	<i>FTC v. Swish Mktg.</i>	
14	No. 09-03814, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010) .....	18, 19
15	<i>FTC v. Wellness Support Network, Inc.</i>	
16	No. 10-04879, 2011 WL 1303419, at *9 (N.D. Cal. Apr. 4, 2011) .....	8, 18
17	<i>FTC v. Wolf</i>	
18	No. 94-8119, 1996 WL 812940, at *7 (S.D. Fla. Jan. 31, 1996) .....	11
19	<i>Hoffman v. Countrywide Home Loans, Inc.</i>	
20	No. 3:11-cv-00201, 2012 WL 937990 (D. Nev. Mar. 19, 2012) .....	9
21	<i>Madrid v. Bank of Am. Corp.</i>	
22	No. 3:11-cv-0077, 2011 WL 1597475, at *4 (S.D. Cal. Apr. 26, 2011) .....	6
23	<i>Mazurek v. Armstrong</i>	
24	520 U.S. 968, 973 (1997) .....	5
25	<i>McDonald's Corp. v. Robertson</i>	
26	147 F.3d 1301, 1312 (11 <sup>th</sup> Cir. 1998) .....	26
27	<i>Medeco Sec. Locks, Inc. v. Swiderek</i>	
28	680 F.2d 37, 38 (7 <sup>th</sup> Cir. 1981) .....	27
	<i>Moss v. U.S. Secret Serv.</i>	
	572 F.3d 962, 969 (9 <sup>th</sup> Cir. 2009) .....	8
	<i>OK Hee Park v. Carson Mineral Hot Springs, LLC</i>	
	No. C09-5433, 2010 WL 5185421 (W.D. Wash. Dec. 16, 2010) .....	21

1	<i>Prof. Plan Exam'rs of N.J., Inc. v. Lefante</i>	
2	750 F.2d 282, 288 (3d Cir. 1984).....	26
3	<i>Romero-Barcelo</i>	
4	456 U.S. 305, 313 (1982).....	4
5	<i>SEC v. Hughes Capital Corp.</i>	
6	124 F.3d 449, 470 (3d Cir. 1997).....	15
7	<i>Sec. &amp; Exch. Comm'n v. G. Weeks Sec., Inc.</i>	
8	678 F.2d 649, 651 (6 <sup>th</sup> Cir. 1982) .....	26
9	<i>Schwartz v. Pillsbury</i>	
10	969 F.2d 840, 843 (9 <sup>th</sup> Cir. 1992) .....	18
11	<i>South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior</i>	
12	No. 3:08-cv-00616, 2009 WL 73257, at *3 (D. Nev. Jan. 7, 2009) .....	26
13	<i>Stanley v. Univ. of S. Cal.</i>	
14	13 F.3d 1313, 1326 (9 <sup>th</sup> Cir. 1994) .....	27
15	<i>Stockton v. Ford</i>	
16	52 U.S. 232, 247 (1850).....	1, 27
17	<i>Sunshine Art Studios v. FTC</i>	
18	481 F.2d 1171, 1173, 1175 (1 <sup>st</sup> Cir. 1973).....	11
19	<i>Swartz v. KPMG, LLP</i>	
20	476 F.3d 756, 764-65 (9 <sup>th</sup> Cir. 2007) .....	9
21	<i>Thomas v. City of Los Angeles</i>	
22	978 F.2d 504, 509 (9 <sup>th</sup> Cir. 1993) .....	26
23	<i>Thomas v. Wachovia Mortg., FSB</i>	
24	No. 2:10-cv-01819, 2011 WL 3159169 (D. Nev. July 25, 2011).....	10
25	<i>U.S. v. Building Inspector of Am., Inc.</i>	
26	894 F.Supp. 507, 519-20 (D. Mass. 1995).....	18
27	<i>U.S. v. Corinthian Colls.</i>	
28	655 F.3d 984, 997-98 (9 <sup>th</sup> Cir. 2011) .....	9
	<i>Vess v. CibaGeigy Corp., USA</i>	
	317 F.3d 1097, 1106 (9 <sup>th</sup> Cir. 2003) .....	8
	<i>Waltham Precision Instrument Co. v. FTC</i>	
	327 F.2d 427, 431 (7 <sup>th</sup> Cir. 1964) .....	11

1	<i>Winter v. Natural Res. Def. Council, Inc.</i>	
2	555 U.S. 7, 24 (2008).....	4, 5

## STATUTES

3		
4	15 U.S.C. § 53.....	4
5	15 U.S.C. § 53(b)(2) .....	5
6	K.S.A. § 17-7666 .....	21
7	N.R.S. § 78.090.....	21

## RULES

8		
9		
10	Fed. R. Civ. P. 65(a)(2).....	5
11	Fed. R. Civ. P. 9(b) .....	8, 9, 10, 19
12	Fed. R. Civ. P. 65(d) .....	24

Defendants The Muir Law Firm LLC and Timothy J. Muir, Esq., by and through their attorneys, Jolley Urga Wirth Woodbury & Standish, hereby oppose Plaintiff Federal Trade Commission's Motion for Preliminary Injunction and Other Equitable Relief [Doc. No. 4] and Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction and Other Equitable Relief [Doc. No. 5] (the "Motion"). This Opposition is based on the pleadings on file herein, the points and authorities below, and the Declaration of Timothy J. Muir attached hereto as Exhibit 1.

## **I. INTRODUCTION**

The bedrock of our American legal system is the attorney-client relationship. The United States Supreme Court has long since pronounced its utmost regard for the sanctity and integrity of the attorney-client bond, stating more than 160 years ago:

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

*Stockton v. Ford*, 52 U.S. 232, 247 (1850).

In an astounding disregard of this most cherished relationship, Plaintiff Federal Trade Commission ("FTC") asks this Court to invoke its extraordinary powers and issue a preliminary injunction against a Kansas law firm and the individual lawyer that owns and manages that law firm to enjoin alleged ongoing violations of the FTC Act, the Truth in Lending Act ("TILA"), and the Electronic Funds Transfer Act ("EFTA"). The FTC's brazenness, and virtually unprecedented display of impudence, is underscored by its assertion that a lawyer and his law firm are somehow jointly and severally liable for alleged unfair and deceptive practices in connection with online short-term lending transactions between tribal lending entities and

1 consumers nationwide, even though neither the lawyer nor his law firm are engaged in the  
2 business of lending.

3 Timothy J. Muir and his law firm, The Muir Law Firm LLC (the “Muir Law Firm”), have  
4 been dragged into this lawsuit as a part of a compendium of twenty (20) corporate and individual  
5 defendants based upon nothing more than unsupported conclusions and allegations that  
6 dubiously collectivize all defendants as one – regardless of whether they in fact engage in  
7 lending activities or have anything to do with the lending activities at issue. Yet, Mr. Muir and  
8 the Muir Law Firm are now forced to defend against audacious claims for injunctive relief,  
9 restitution and disgorgement because they provided arm’s length legal services to several of the  
10 defendants named in this action. The FTC has no basis in law or in fact for bringing these claims  
11 against Mr. Muir or the Muir Law Firm, and its unsupported and unprecedented “shotgun”  
12 litigation tactic against a lawyer underscores its bad faith here.<sup>1</sup>

13  
14  
15 The FTC's motion should be denied. Notwithstanding that the FTC's request for relief by  
16 way of a preliminary injunction – which in no way could be considered preliminary in any sense  
17 as the FTC has been tracking the operations of the tribal entities for over 4 years – the FTC  
18 cannot present to the Court any compelling justification for granting the extraordinary relief it  
19 seeks against a lawyer and his law firm for merely providing legal services to clients. The FTC  
20 bases its claims against Mr. Muir and the Muir Law Firm on nothing more than supposition and  
21 speculation, frivolously arguing that liability lies for a lawyer engaging in the very types of  
22 activities that lawyers routinely provide for their clients. The FTC goes so far as to argue that  
23

24  
25 <sup>1</sup> As Mr. Muir contemplates how he and his firm could have possibly been named in this action, he can  
26 only conclude that it relates to his involvement in requesting, on behalf of one of his clients, that the FTC  
27 investigate what appears to be a serious violation of FTC policy and regulations in connection with what  
28 is believed to be an employee of the FTC providing to at least one state agency confidential banking  
records of certain of these defendants that the FTC obtained through non-public, compulsory process, *i.e.*,  
a Civil Investigative Demand. (Muir Declaration ¶¶ 24-27, attached as Ex. 1).



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1 advancing nominal and ordinary client expenses (*all* of which are subsequently reimbursed),  
2 being paid for legal services rendered, acting as a registered agent for a client and/or preparing  
3 and filing organization documents for clients somehow subjects a lawyer to claims that he or she  
4 in fact “controls” a client’s activities and therefore, the FTC’s argument goes, *ipso facto* actively  
5 participates in a client’s business. This is not the law, and such amorphous claims, if allowed,  
6 would open the floodgates of potential liability of countless lawyers across this country who are  
7 doing nothing more than providing routine legal advice and services to their clients every day.

9 Furthermore, it is beyond dispute that there can be no liability for either Mr. Muir or the  
10 Muir Law Firm if the FTC does not establish the lenders engaged in a fraudulent, deceptive or  
11 unlawful practice in the first instance. As set forth in the Joint Memorandum of Points and  
12 Authorities in Opposition to the FTC’s Motion for Preliminary Injunction submitted by  
13 Defendants AMG Services, Inc., Red Cedar Services, Inc., and Miami Nations Enterprises (the  
14 “Tribal Defendants”), which is incorporated in its entirety as though fully set forth herein, the  
15 FTC cannot establish any likelihood of success on the merits of its request for an injunction  
16 because it cannot demonstrate that a violation of the FTC Act, TILA, or the EFTA by the Tribal  
17 Defendants has actually occurred. Even assuming *arguendo* that the FTC could establish some  
18 violation of any of these provisions, the FTC does not and cannot claim, much less prove, that  
19 Mr. Muir or the Muir Law Firm actually engaged, or has ever engaged, in the lending activities  
20 that are the subject of this action.

22 Nor has the FTC properly alleged, let alone established with any competent evidence,  
23 that the Muir Law Firm was part of some common enterprise that directed or controlled the  
24 lending activities from which any liability as a “collaborating defendant” could arise. Similarly,  
25 the FTC fails to properly allege or to submit competent evidence showing that Mr. Muir actively  
26 participated in any of the alleged conduct, had the authority to control the lenders’ actions, or  
27  
28

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1 that he knew any of the defendants were engaging in allegedly fraudulent conduct, as required  
2 for individual liability to arise. In the end, the FTC will not be able to show that Mr. Muir did  
3 anything other than provide legal services to his clients.

4 For all of these reasons, the FTC is unlikely to prevail on the merits as to the claims  
5 asserted against Mr. Muir and the Muir Law Firm, and its Motion for Preliminary Injunction  
6 should be summarily denied. Given the serious misstatements made in the declarations and  
7 affidavits attached to the FTC's Motion, and the fact that the FTC relies on inadmissible  
8 evidence that, among other things, is unauthenticated, lacks foundation, constitutes hearsay, is  
9 not based on personal knowledge, and violates the best evidence rule, Mr. Muir and the Muir  
10 Law Firm respectfully request that the Court set this matter for evidentiary hearing and permit  
11 pre-hearing discovery as reasonably necessary to permit them to challenge such evidence,  
12 demonstrate its falsity and inherent unreliability and clear Mr. Muir's and his firm's good name.  
13 The FTC makes serious allegations and seeks draconian remedies against myriad defendants  
14 based primarily on speculation and conclusions. Therefore, Mr. Muir and the Muir Law Firm  
15 should be afforded every opportunity to defend against these fallacious claims and the severe  
16 relief sought.

## 19 **II. STANDARD FOR INJUNCTIVE RELIEF**

20 "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*  
21 *v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "An injunction is a matter of equitable  
22 discretion; it does not follow from success on the merits as a matter of course." *Id.* at 32  
23 (quoting *Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is  
24 not mechanically obligated to grant an injunction for every violation of law")).

25 In this case, the FTC seeks injunctive relief pursuant to 15 U.S.C. § 53, which, among  
26 other things, requires "a proper showing that weighing the equities and considering the  
27  
28

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Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b)(2). The "proper showing" requirement of 15 U.S.C. § 53(b)(2) is consistent with the requirement under Federal Rule of Civil Procedure 65 that evidence be "admissible at trial." Fed. R. Civ. P. 65(a)(2); *see also Winter*, 555 U.S. at 20-22 (plaintiff is required to submit admissible evidence supporting his contention that he is entitled to the relief he seeks). As the United States Supreme Court has stated, "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (internal quotation omitted).

### III. THE FTC'S MOTION MUST BE DENIED.

#### A. As Set Forth In The Tribal Defendants' Opposition, The FTC Cannot Establish That It Is Entitled To A Preliminary Injunction.

Although this Opposition establishes an independent basis to deny the FTC's Motion for Preliminary Injunction, Mr. Muir and the Muir Law Firm also hereby incorporate the facts, evidence and arguments contained in the Tribal Defendants' Opposition as though fully set forth herein. The FTC's Motion for Preliminary Injunction should be denied because the FTC cannot establish that an unlawful or deceptive practice occurred, that irreparable harm will occur if an injunction is not issued, or that the balance of the equities weighs in favor of injunctive relief. These same arguments apply with equal force to all claims asserted against the Muir Law Firm and Mr. Muir.

#### B. The FTC Is Unlikely To Prevail On The Merits Because It Has Not Pled Its Claims Against Mr. Muir Or The Muir Law Firm With Particularity As Required By *Twombly* And Rule 9 Of The Federal Rules Of Civil Procedure.

##### 1) Injunctive Relief Is Improper If The Complaint Is Legally Deficient.

Section 13(b) of the FTC Act permits the FTC to seek preliminary injunctive relief before bringing a complaint; it only requires that a complaint be filed within 20 days after a preliminary injunction is issued. This unique procedural device presents the unfortunate "cart before the

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1 horse" situation that exists here, where defendants are required to respond to a motion for  
2 preliminary injunction and defend on the merits before the sufficiency of the FTC's Complaint  
3 against them can even be reasonably challenged. It is axiomatic that unless and until a plaintiff  
4 states a viable claim against a defendant upon which injunctive relief may be based, no  
5 injunction should issue. In this case, the FTC filed a Complaint in conjunction with its Motion  
6 for Preliminary Injunction, but defendants have been forced to address the merits of that Motion,  
7 and the serious deficiencies in the evidence and arguments presented, before addressing the  
8 inadequacies of the FTC's underlying claims.

9  
10 As set forth below, the FTC must meet stringent pleading requirements in cases  
11 involving claims sounding in fraud, such as those alleged here. The FTC utterly fails to meet  
12 those requirements, and its claims fail to state a claim upon which relief can be granted as to any  
13 defendant. Mr. Muir and the Muir Law Firm intend to file a motion to dismiss the FTC's claims  
14 against them, and they are advised that certain other defendants intend to file similar motions.  
15 Those motions to dismiss, if granted, will render the FTC's Motion for Preliminary Injunction  
16 moot. *See Chavez-Gallegos v. First Magnus Fin. Corp.*, No. 3:11-CV-0709, 2011 WL 6402182  
17 (D. Nev. Dec. 20, 2011) (denying motion for preliminary injunction for failing to establish  
18 likelihood of success on the merits because complaint made only conclusory allegations that  
19 failed to state a claim); *Madrid v. Bank of Am. Corp.*, No. 3:11-CV-0077, 2011 WL 1597475, at  
20 \*4 (S.D. Cal. Apr. 26, 2011) (dismissing complaint for failure to state a claim for fraud with  
21 particularity and denying motion for preliminary injunction based on allegations of complaint as  
22 moot).

23  
24  
25 Defendants have already had to expend substantial time and effort defending on the  
26 merits against baseless claims that have not been properly alleged in the first instance.  
27 Accordingly, Mr. Muir and the Muir Law Firm respectfully request that the Court defer any  
28

1 hearing or ruling on the FTC's Motion for Preliminary Injunction until after any and all motions  
2 to dismiss have been fully briefed, submitted and ruled on. Because the FTC has failed to state a  
3 claim upon which relief can be granted against these defendants, dismissal of the claims against  
4 Mr. Muir and the Muir Law Firm will render the FTC's request for an injunction against them  
5 moot.  
6

7 **2) The FTC's Complaint Fails To State A Claim For Relief**  
8 **Against Mr. Muir And The Muir Law Firm.**

9 The United States Supreme Court has recently clarified that in order to state a claim upon  
10 which relief may be granted, a plaintiff must assert "enough facts to state a claim to relief that is  
11 plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial  
12 plausibility when the pleaded factual content allows the court to draw the reasonable inference  
13 that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).  
14 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
15 allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires  
16 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
17 will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks, citations, and alterations  
18 omitted). Instead, "[f]actual allegations must be enough to raise a right to relief above the  
19 speculative level . . . on the assumption that all the allegations in the complaint are true (even if  
20 doubtful in fact)." *Id.* This standard "calls for enough fact to raise a reasonable expectation that  
21 discovery will reveal evidence" of the claim. *Id.* at 556; *see also Iqbal*, 556 U.S. at 678 (A  
22 pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements  
23 of a cause of action," and mere legal conclusions must be disregarded).  
24

25 The Ninth Circuit has summarized the governing standard, in light of *Twombly* and *Iqbal*,  
26 as follows: "In sum, for a [pleading] to survive a motion to dismiss, the non-conclusory factual  
27 content, and reasonable inferences from that content, must be plausibly suggestive of a claim  
28

1 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009)  
2 (internal quotation marks omitted). The FTC’s allegations against Mr. Muir and the Muir Law  
3 Firm do not meet these standards and, as such, cannot support its request for injunctive relief.

4  
5 Moreover, a heightened pleading standard applies to claims of fraud. Under Federal Rule  
6 of Civil Procedure 9(b), “[i]n alleging fraud or mistake, a party must state with particularity the  
7 circumstances constituting fraud or mistake.” Nevada federal courts have held that this  
8 heightened pleading standard applies to an action for deceptive trade practices brought by the  
9 FTC under Section 5 of the FTCA because such an action “sounds in fraud.” *See FTC v. Ivy*  
10 *Capital, Inc.*, No. 2:11-CV-283, 2011 WL 2118626, at \*3 (D. Nev. May 25, 2011). The court  
11 reasoned that the FTC had alleged the defendants collectively engaged in a unified course of  
12 fraudulent conduct, and rejected the FTC’s arguments that because scienter need not be proved,  
13 the claim was not based in fraud: “The FTC’s arguments to the contrary are unpersuasive: ‘As  
14 Rule 9(b) particularity is not focused on intent, it would be anomalous to suggest that a section 5  
15 claim is free from Rule 9(b)’s heightened pleading requirement because the FTC need not prove  
16 scienter....’” *Id.* (citing *FTC v. Wellness Support Network, Inc.*, No. 10-04879, 2011 WL  
17 1303419, at \*9 (N.D. Cal. Apr. 4, 2011) (*quoting FTC v. Swish Mktg.*, No 09-03814, 2010 WL  
18 653486 (N.D. Cal. Feb. 22, 2010)).

19  
20  
21 Under Federal Rule of Civil Procedure 9(b), “[i]n alleging fraud or mistake, a party must  
22 state with particularity the circumstances constituting fraud or mistake.” This rule requires that  
23 claims of fraud be accompanied by the “who, what, when, where, and how” of the conduct  
24 charged. *Vess v. CibaGeigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (*quoting Cooper*  
25 *v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

26  
27 Importantly, when an action involves several different defendants, a plaintiff cannot  
28 simply “lump multiple defendants together” in the allegations of the complaint but must, at a

1 minimum, identify each defendant's role in the alleged fraud. *Destfino v. Reiswig*, 630 F.3d 952,  
2 958 (9th Cir. 2011); *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007). “Rule 9(b)  
3 does not allow a complaint to merely lump multiple defendants together but requires plaintiffs to  
4 differentiate their allegations when suing more than one defendant and inform each defendant  
5 separately of the allegations surrounding his alleged participation in the fraud.” *Id.* This  
6 requirement ensures that the defendants are on “notice of the particular misconduct ... so that  
7 they can defend against the charge and not just deny that they have done anything wrong.” *Vess*,  
8 317 F.3d at 1106.

9  
10 In this case, the FTC's conclusory allegations that all of the defendants, lumped together,  
11 engaged in deceptive or unlawful practices in connection with short-term, online lending, clearly  
12 violates the requirements of Rule 9. This is particularly true for Mr. Muir and the Muir Law  
13 Firm, where the FTC wholly fails to identify what conduct or activities that they personally, as  
14 opposed to the other defendants, supposedly engaged in that violated any applicable law. While  
15 the Complaint identifies each defendant, the FTC makes no effort to describe what fraudulent or  
16 deceptive action Mr. Muir or the Muir Law Firm allegedly took. Indeed, all of the FTC's  
17 allegations concerning the alleged unlawful business practices, as well as its claims for relief,  
18 collectivize all of the defendants as one without differentiating between them. Courts regularly  
19 dismiss such claims as overstepping the mandates of Rule 9(b). See *U.S. v. Corinthian Colls.*,  
20 655 F.3d 984, 997-98 (9th Cir. 2011) (dismissing government's claims against individual  
21 defendants under the False Claims Act because “the Complaint provides no additional detail as  
22 to the nature of the Individual Defendants' involvement in the fraudulent acts, but simply  
23 attributes wholesale all of the allegations against Corinthian to the Individual Defendants. Rule  
24 9(b) undoubtedly requires more.”); *Hoffman v. Countrywide Home Loans, Inc.*, No. 3:11-CV-  
25 00201, 2012 WL 937990 (D. Nev. Mar. 19, 2012) (dismissing vague and conclusory allegations  
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of fraud that lumped all defendants together); *Thomas v. Wachovia Mortg., FSB*, No. 2:10-CV-01819, 2011 WL 3159169 (D. Nev. July 25, 2011) (dismissing claim for deceptive trade practices because allegations lumped multiple defendants together without differentiating the allegations against them in violation of Rule 9(b)); *FTC v. Lights of Am., Inc.*, 760 F.Supp.2d 848, 854-55 (C.D. Cal. 2010) (allegations that individual defendants' promotional materials made false and unsubstantiated statements about certain characteristics of their LED lamps, in violation of the FTC Act, did not satisfy rule requiring fraud to be pled with particularity; FTC's allegations did not differentiate between conduct committed by the individual defendants and their corporation, nor did they explain when or where the alleged misrepresentations were made).

Since the FTC's Complaint falls far short of even stating a valid claim for relief against Mr. Muir and the Muir Law Firm, there is no possible way the FTC can demonstrate it is entitled to the drastic remedy of a preliminary injunction.

**C. The FTC Is Unlikely To Prevail On The Merits Because It Cannot Establish That The Muir Law Firm Is Part Of Any Alleged Common Enterprise.**

The FTC does not allege that the Muir Law Firm is one of the Tribal Defendants, nor does the FTC allege that the Muir Law Firm actually made any misrepresentations to consumers or engaged in unlawful debt collection activities. Instead, the FTC baldly claims, without any specific facts or supporting evidence, that the Muir Law Firm is a "collaborating defendant" in some amorphous "common enterprise of entities that operate and facilitate the lending and collections operations...." (Motion, 3:4-5). While participants in a "common enterprise" share liability for the unlawful practices of any of the participants without regard to their corporate identities or affiliation, the FTC must establish the existence of such enterprise—and more specifically here the participation by the Muir Law Firm in that enterprise—in order to state a claim against the Muir Law Firm and obtain a preliminary injunction. The FTC has not shown



1 and cannot show that the Muir Law Firm is part of a common enterprise with the other  
2 defendants so as to establish any liability for the alleged conduct or the need for injunctive relief.

3 The factors courts typically consider to determine the existence of a “common enterprise”  
4 include: (1) whether purportedly separate corporations share employees, officers and office  
5 space; (2) whether corporate entities deal at arm’s-length; (3) whether corporate entities have  
6 their own substantive businesses; and (4) whether there is a commingling of corporate assets.  
7 *See, e.g., FTC v. J.K. Publ’ns*, 99 F.Supp.2d 1176, 1202 (C.D. Cal. 2000) (common enterprise  
8 found where corporate defendants were under individual defendant's common control, shared  
9 office space, employees, and officers); *see also Sunshine Art Studios v. FTC*, 481 F.2d 1171,  
10 1173, 1175 (1st Cir. 1973); *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *Waltham*  
11 *Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964). Generally, courts look to  
12 evidence that “reveals that no real distinction existed between the Corporate Defendants.” *FTC*  
13 *v. Wolf*, No. 94-8119, 1996 WL 812940, at \* 7 (S.D. Fla. Jan. 31, 1996) (internal citations  
14 omitted). Based upon these factors, the FTC has not established and cannot prove that the Muir  
15 Law Firm acts as a “common enterprise” with any of the other corporate defendants in this case.

16 First, the Muir Law Firm maintains its own separate substantive business, which provides  
17 legal services to a variety of clients, including some of the corporate and individual defendants  
18 named in this action. (Muir Decl. ¶¶ 7-9). This business is separate and apart from the various  
19 businesses in which the other defendants are engaged; none of the other defendants are engaged  
20 in the practice of law. (Muir Decl. ¶ 7). All of the payments made by various of the corporate  
21 defendants to the Muir Law Firm, as summarized in the Budich Declaration attached to the  
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1 FTC's Motion, were made as compensation for legal services that were provided by or through  
2 the Muir Law Firm.<sup>2</sup> (Muir Decl. ¶ 23).

3 Second, the FTC admits in its pleadings that the Muir Law Firm is a separate legal entity  
4 and that it has a sole member, manager, and employee—Mr. Muir. (Motion at 10:15). With the  
5 exception of Black Creek Capital Corporation ("Black Creek") (for which, as fully explained in  
6 Section III.(D)(2) below, Mr. Muir exercises severely restricted functions), the Muir Law Firm  
7 shares no officers, directors, members or managers with any other corporate defendant. (Muir  
8 Decl. ¶¶ 6, 10-11, 20-21). With the exception of Black Creek, Mr. Muir is not an officer,  
9 director, member or manager of any of the corporate defendants. (*See id.*).

11 Third, the Muir Law Firm maintains its own, separate office space at 10895 Lowell Ave.,  
12 Suite 210, Overland Park, Kansas. (Muir Decl. ¶ 7). The Muir Law Firm does not share its  
13 offices with any other corporate defendant (*see id.*), and the FTC has not identified any other  
14 corporate defendant that has listed this address as its own. The FTC itself acknowledges by and  
15 through its pleading, as well as Budich's Declaration and attachments, that the corporate  
16 defendants have different addresses than the Muir Law Firm, as follows:

18 Red Cedar Services, Inc., 515 G Street, SE, Miami, Oklahoma. (Motion at 4:11-14)

19 SFS, Inc., 52946 Hwy 12, Suite 3, Niobrara, Nebraska (Motion at 5:3-5)

20 Tribal Financial Services Corporation/Miami Nation Enterprises, 3531 P. Street, NW,  
21 Miami, Oklahoma (Motion at 5:11-12)

22 Level 5 Motorsports, LLC, 871 Coronado Center Dr., Ste 200, Henderson, Nevada  
(Motion at 6:10-12)

23 LeadFlash Consulting, LLC, 871 Coronado Center Dr., Ste 200, Henderson, Nevada  
24 (Motion at 6:18-20)

25 \_\_\_\_\_  
26 <sup>2</sup> Victoria Budich, the FTC investigator who submitted the Declaration upon which the FTC relies in  
27 bringing its Motion, has no personal knowledge whatsoever about Mr. Muir, the Muir Law Firm, or the  
28 purpose of the payments Mr. Muir and his firm received from their clients for legal services. For this and  
for other evidentiary reasons, Mr. Muir and the Muir Law Firm have filed a motion to strike Ms. Budich's  
Declaration concurrently herewith.

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1 Broadmoor Capital Partners, LLC, 871 Coronado Center Dr., Henderson Nevada (Motion  
at 7:3-5)

2 Black Creek, 289 Manzanita Ranch Lane, Henderson, Nevada (Motion at 7:8-10))

3 Partner Weekly, LLC, 325 E. Warm Springs Rd., Ste. 200, Las Vegas, Nevada (Motion at  
4 8:1-2)

5 AMG Capital Management, LLC, 871 Coronado Center Drive, Ste. 200, Henderson,  
Nevada (Motion at 8:6-9) at 7:3-5).

6 AMG Services, Inc. has a place of business located at 10895 Lowell Ave., Suite 100 Overland  
7 Park, Kansas, but it does not share offices with the Muir Law Firm, and it operates out of a  
8 separate business suite with a separate postal address. (Muir Decl. ¶ 7). Indeed, the Muir Law  
9 Firm pays substantial rent for its office space. (*See id.*).

11 Fourth, the FTC does not allege, nor does it attach any evidence showing, that the Muir  
12 Law Firm has not dealt with any of the other corporate defendants at arm's length. Various of  
13 the corporate defendants have, at one time or another, been clients of the Muir Law Firm, and at  
14 all times, their dealings have been consistent with that of lawyer and client. (Muir Decl. ¶¶ 8-10,  
15 20-21).

17 Finally, the FTC has not alleged, nor has it offered any evidence to demonstrate, that the  
18 Muir Law Firm has commingled any of its funds with that of any of the other defendants. To the  
19 contrary, the FTC has gone to great pains to identify payments that have been made by various  
20 defendants to the Muir Law Firm. (Motion, PX22, pp. 616-19). All of these payments were  
21 made in connection with legal services that were provided by or through the Muir Law Firm.  
22 (Muir Decl. ¶ 23). The FTC has identified numerous lawsuits in which various of the defendants  
23 have been involved, underscoring the FTC's knowledge that the Muir Law Firm has provided  
24 ongoing legal services to certain of the defendants for which payment is proper and justified.  
25 (Motion, PX22 620-624).

27 The only evidence proffered by the FTC as to the Muir Law Firm's relationship to the  
28 Lenders, or to any of the other corporate defendants named here, is that the Muir Law Firm

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1 advanced certain nominal expenses, including filing fees, registration fees and renewal fees for  
2 website domain names on behalf of its clients. (Motion at 6:2-7 & 8:13-14). As the Muir Law  
3 Firm has done for other clients, and as is customary in the practice of law, the Muir Law Firm  
4 has, in the course of providing legal services, advanced ordinary costs or expenses to some of the  
5 named defendants. Without exception, such costs and expenses are passed on to the clients and  
6 are reimbursed in full. (Muir Decl. ¶ 12). Some such costs and expenses have included those  
7 associated with corporate organization or annual filings, resident agent fees, and costs of domain  
8 and website registration and maintenance. They also include airfare, hotel accommodations,  
9 meals, transportation and other expenses the Muir Law Firm incurs while traveling in the course  
10 of providing legal services of behalf of these clients. (Muir Decl. ¶¶ 12, 23). Furthermore,  
11 neither the Muir Law Firm nor Mr. Muir has ever been the administrator, nor had the password  
12 for any of the Lenders' domains/websites. (Muir Decl. ¶ 13). Neither the Muir Law Firm nor  
13 Mr. Muir has ever had control or decision making authority over website content. (*See id.*). Mr.  
14 Muir's involvement with these websites has been as an attorney providing legal advice and  
15 services, including domain/website registration and maintenance. (*See id.*). Over the past three  
16 years, the Muir Law Firm advanced less than \$5,000.00 for such registration costs, all of which  
17 have been reimbursed. (*See id.*).  
18  
19

20 Application of these factors unequivocally demonstrates that the Muir Law Firm does not  
21 operate as a common enterprise with any of the other corporate defendants, and therefore, cannot  
22 be held responsible for any actions or omissions of the other entities that the FTC alleges here,  
23 much less subject to a preliminary injunction. The bare conclusions pled by the FTC, the total  
24 lack of credible or competent evidence attached to the FTC's Motion, and the irrefutable  
25 evidence presented by the Muir Law Firm, confirm that the FTC cannot succeed on the merits of  
26 its claims against the Muir Law Firm. Specifically, the FTC cannot establish that the Muir Law  
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Firm participated in the alleged conduct, that the Muir Law Firm was so intertwined with the other defendants as to lose its separate identity, or that the Muir Law Firm is not separate and distinct from the other defendants. The only conclusion that can be drawn is that the Muir Law Firm did nothing more than provide legal advice and services to clients—it simply had no involvement in or control over any of the lending practices that are the subject of the action and the FTC’s Motion. The FTC’s request for injunctive relief must therefore be denied.

**D. The FTC Is Unlikely To Succeed On The Merits Of Its Claims Against Mr. Muir Because Mr. Muir Did Not Engage In And Has No Individual Liability For The Conduct Alleged.**

Not only does the FTC improperly seek to enjoin the Muir Law Firm and impose joint and several liability upon it for millions of dollars of erroneously described “ill-gotten gains” based solely on its attorney-client relationship with some of the other defendants, but the FTC further overreaches by seeking to hold Mr. Muir individually liable for the alleged practices of the Tribal Defendants. Based upon the FTC’s own pleadings and purported “evidence,” the FTC has failed to state a claim against Mr. Muir upon which any relief can be based, and the FTC will be unable to prevail on the merits of these claims. Furthermore, the FTC has absolutely no evidence that Mr. Muir has done anything wrongful, or that he has done or is actually doing any of the things the FTC seeks to enjoin. Therefore, injunctive relief as to Mr. Muir is unwarranted, inappropriate and must be flatly rejected.

It is well settled that an individual may be held liable under the FTC Act for alleged corporate practices only after corporate liability is established. See *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). Corporate and individual defendants may be held jointly and severally liable only where those defendants are directly responsible for the acts or practices violating the FTC Act. *Id.*; *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 470 (3d Cir. 1997). To establish individual liability for injunctive relief or restitution under the FTC Act, an individual

1 must have “participated directly in the deceptive acts or had the authority to control them” and  
2 “had *knowledge* that the corporation or one of its agents engaged in dishonest or fraudulent  
3 conduct, that the misrepresentations were the type upon which a reasonable and prudent person  
4 would rely, and that consumer injury resulted.” *FTC v. Network Servs. Depot, Inc.*, 617 F.3d  
5 1127, 1138 (9th Cir. 2010) (emphasis in original).  
6

7 Thus, in order to even reach potential individual liability for Mr. Muir, the FTC must  
8 establish: (1) the Tribal Defendants engaged in an unlawful or deceptive practices; (2) some or  
9 all of the purported “Collaborating Defendants” were part of a “common enterprise” with the  
10 Tribal Defendants to engage in such alleged unlawful or deceptive practices; (3) more  
11 specifically, the Muir Law Firm was part of that so-called “common enterprise;” (4) Mr. Muir  
12 actively participated in the alleged unlawful or deceptive practices or had the authority to control  
13 them; and (5) Mr. Muir knew that the Tribal Defendants were engaged in fraudulent or deceptive  
14 practices that caused consumer injury. The FTC cannot meet any of these levels of proof  
15 necessary to hold Mr. Muir personally liable for the alleged conduct.  
16

17 As set forth above and in the Tribal Defendants’ Opposition, the FTC will be unable to  
18 prevail on the merits of its claims against the Tribal Defendants in the first instance, because  
19 there was no deceptive or unlawful practice. Nor can the FTC establish the requisite corporate  
20 liability of the purported “Collaborating Defendants” in general, or the Muir Law Firm in  
21 particular, because the FTC has no evidence showing that the Muir Law Firm was part of any  
22 “common enterprise” involving the alleged unlawful activity. Without the mandated corporate  
23 liability, the FTC’s claims against Mr. Muir fail as a matter of law. Even if the FTC could  
24 establish some corporate liability for any of the purported “Collaborating Defendants,” the FTC  
25 cannot prevail on the merits of its claims against Mr. Muir because the FTC cannot demonstrate  
26 that Mr. Muir directly participated in the activities or had any control over the lending. Nor can  
27  
28

the FTC show that Mr. Muir knew that the Tribal Defendants were engaged in allegedly deceptive practices that caused consumer injury.

**1) Mr. Muir Did Not Participate In The Lending Activities  
At Issue Nor Did He Control Such Activities.**

The FTC makes many misstatements and false accusations against Mr. Muir in its Motion. Only three specific instances are mentioned here. First, the FTC claims Mr. Muir “participated” in the Tribal Defendants’ operations by “providing management and consulting services.” (Motion at 6:2-7). Second, the FTC claims Mr. Muir had knowledge of unlawful activity and also “had authority to control the companies involved in those practices.” (Motion at 8:15-17 & 9:1-2). Third, the FTC claims Mr. Muir “controls the finances of the [sic] each of the payday lenders” and is a “substantial beneficiary of funds from the common enterprise.”<sup>3</sup> (Motion at 33:9-11).

There is one fact common to each of these assertions that cannot be over emphasized: none of them are supported by evidence. There are no declarations, affidavits or any other proof of any kind to support these wild assertions. The Court could deny the FTC’s Motion on that basis alone. When the Court also considers the legal authorities below and Mr. Muir’s Declaration attached hereto, it becomes clearer than ever that Mr. Muir and his firm never should have been named in this action.

Courts addressing individual liability for deceptive advertising or other unlawful lending practices have found that liability is appropriate only where an individual: (1) was a corporate officer with the capacity to make decisions regarding the challenged conduct; and (2) knew or

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<sup>3</sup> For someone who the FTC alleges exercised “control” over the Tribal Defendants’ finances, Mr. Muir certainly did not do a very good job of benefiting from that “control”. The total payments the Muir Law Firm received from the Tribal Defendants, according to paragraph 68 of Ms. Budich’s Declaration, amount to a mere fraction of the funds referenced in that paragraph – .00137 to be more specific. As Mr. Muir explains in his Declaration, all payments related to legal services provided. (Muir. Decl. ¶ So much for being a “substantial beneficiary” of funds.



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1 should have known that there was no reasonable basis for the deceptive claims. *See, e.g., FTC v.*  
 2 *Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). To establish knowledge, the  
 3 FTC must show that the individual "had actual knowledge of material misrepresentations, [was]  
 4 recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high  
 5 probability of fraud along with an intentional avoidance of the truth." *Id.* (quoting *FTC v. Am.*  
 6 *Std. Credit Systems, Inc.*, 874 F.Supp. 1080, 1087 (C.D. Cal. 1994)).

7  
 8 The individual liability of corporate officers or directors can exist only if the officer or  
 9 director personally authorized, directed, or participated in the corporation's alleged conduct at  
 10 issue. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir.  
 11 1999); *Schwartz v. Pillsbury*, 969 F.2d 840, 843 (9th Cir. 1992). "Authority to control the  
 12 company can be evidenced by active involvement in business affairs and the making of corporate  
 13 policy." *Am. Std. Credit*, 874 F.Supp. at 1089. A mere allegation that an individual defendant is  
 14 an officer of a defendant corporation is not sufficient to state a claim for relief against that  
 15 individual under Section 5 of the FTC Act. *Wellness Support*, 2011 WL 1303419 at \*11  
 16 (dismissing claim against individual defendant where only factual allegation was that defendant  
 17 was an officer of the corporation); *see also FTC v. QT, Inc.*, 448 F.Supp.2d 908, 973 (N.D. Ill.  
 18 2006) (corporate officer who "had no involvement in the actions that led to corporate liability"  
 19 and "has no set position and provides help around the office" not liable); *U.S. v. Building*  
 20 *Inspector of Am., Inc.*, 894 F.Supp. 507, 519-20 (D. Mass. 1995) (finding liability where  
 21 "founder and president[s]" claim of no involvement was "entirely implausible;" finding issue of  
 22 fact as to liability for vice president with no evidence of actual authority or direct involvement;  
 23 and finding no liability for treasurer with no evidence of any authority or any involvement).

24  
 25  
 26 *Swish* is instructive here. In that case, the FTC alleged that a corporate defendant, Swish  
 27 Marketing, engaged in a fraudulent credit card scheme, in violation of Section 5 of the FTC Act,  
 28



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1 and that individual defendant Mark Benning, who was CEO of Swish Marketing, controlled, had  
2 the authority to control, or participated in the deceptive acts of the corporation. *Swish*, 2010 WL  
3 653486 at \*1, 4 . The trial court applied Rule 9(b), finding that the FTC was required to plead  
4 the elements of its claim, with the exception of intent to defraud, with particularity. *Id.* at \*3.  
5 The court dismissed the FTC's claims against the individual as too conclusory and unsupported  
6 by properly plead facts. Specifically, apart from the FTC's conclusory and unsupported  
7 allegations of Benning's control over the corporation, the only fact alleged was Benning's  
8 position as CEO of the company. *Id.* at \*5. The court concluded that "[t]he Commission's  
9 conclusory assertions of authority—untethered to virtually any supportive facts—do not support  
10 an inference of Benning's involvement." *Id.* Similarly, the court found that the conclusory  
11 allegations in the complaint were insufficient to support a plausible inference that Benning had  
12 knowledge of the alleged deceptive acts. *Id.*

13  
14  
15 The FTC's allegations against Mr. Muir here are even less specific and in fact are more  
16 conclusory than those rejected by the court in *Swish*. Apart from its bald conclusions set forth  
17 above, unsupported by any facts or evidence, the FTC offers no facts, let alone competent  
18 evidence, that Mr. Muir directly participated in or controlled any of the lending practices or the  
19 associated activities of any of the corporate defendants. There is no evidence that Mr. Muir had  
20 any ability to control the finances of any of the defendants, other than the Muir Law Firm. The  
21 FTC readily concedes as much when it admits that Mr. Muir has no signatory authority for any  
22 of the subject bank accounts, and that Mr. Muir never signed a check in connection with such  
23 accounts. (Motion, PX22, Budich Declaration, ¶¶ 8, 9, 10, 12, 15, 63, 64, 65). In fact, Mr. Muir  
24 has never signed a check from the subject bank accounts, has never been a signatory on any bank  
25 account for any of the corporate defendants (other than the Muir Law Firm), and has never been  
26 involved in the decision making process of any of the defendants, other than the Muir Law Firm,  
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1 about the issuance of a check. (Muir Decl. ¶ 10). Neither Mr. Muir nor the Muir Law Firm have  
2 ever had any involvement in or authority over the distribution of earnings or other financial  
3 issues in regard to the Lenders, AMG Services, Inc., or any of the purported “Collaborating  
4 Defendants,” other than the Muir Law Firm. (*See id.*).

5  
6 Nor is there any evidence that Mr. Muir had the authority to control any of the corporate  
7 defendants, their finances, or their practices. To the contrary, the only relationship between Mr.  
8 Muir and the Muir Law Firm and the other lending defendants is that of attorney-client. The  
9 only competent evidence unequivocally demonstrates that at no time has Mr. Muir ever provided  
10 any management services or consulting services for or on behalf of the Lenders, AMG Services,  
11 Inc. or any of the purported “Collaborating Defendants,” other than the Muir Law Firm. (Muir  
12 Decl. ¶ 10). Mr. Muir has never been an officer or member of a board of directors of the Lenders  
13 or AMG Services, Inc. (*See id.*). Of the purported “Collaborating Defendants” Mr. Muir is only  
14 an officer of the Muir Law Firm and Black Creek. (Muir Decl. ¶¶ 6, 10, 16-18). Mr. Muir never  
15 had any management or decision making authority for or over the Lenders or any aspect of their  
16 lending operations, AMG Services, Inc. or any of its loan servicing operations, or any of the  
17 purported “Collaborating Defendants,” other than the Muir Law Firm. (Muir Decl. ¶ 10).

18  
19 **2) Providing Legal Services Or Serving As An Officer**  
20 **Of Black Creek Is Not A Basis For Liability.**

21 The FTC hangs its hat as to Mr. Muir on allegations that: (1) he, at one or time another in  
22 his capacity as a lawyer representing clients, assisted in the filing of formation documents for  
23 certain entities and/or acted as a resident agent for certain entities; and (2) he is an officer of  
24 Black Creek. But these allegations are insufficient to establish the requisite control required for  
25 individual liability.  
26

27 First, both Kansas law and Nevada law require corporations and limited liability  
28 companies organized under the laws of their states and/or doing business there to have a resident

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1 agent for service of process. See K.S.A. §17-7666 (Kansas limited liability company required to  
2 have a resident agent for service of process); N.R.S. §78.090. There is no authority for the  
3 proposition that a person who serves as a resident agent for an entity is automatically imbued  
4 with the ability to manage or control the affairs of that entity, and the FTC's suggestion  
5 otherwise is specious. Similarly, a person who agrees to act as a resident agent for an entity does  
6 not assume liability for the acts or omissions of the entity solely by virtue of that status. See *OK*  
7 *Hee Park v. Carson Mineral Hot Springs LLC*, No. C09-5433, 2010 WL 5185421 (W.D. Wash.  
8 Dec. 16, 2010) (registered agent not liable for conduct of company solely because of his role as  
9 statutorily mandated resident agent). Lawyers and/or law firms routinely serve as registered  
10 agents for their clients (as do independent service corporations), and it has never been the law  
11 that providing such services subjects them to individual liability for the corporate deeds. The  
12 same applies to formation and organization of business entities, also a routine legal service.

15 Second, the mere fact that Mr. Muir is an officer of Black Creek, and sometimes signs  
16 documents on its behalf, also does not demonstrate sufficient control to establish individual  
17 liability nor is it relevant. Although the FTC's Motion characterizes Black Creek as "a pivotal  
18 hub for the Corporate Defendants' financial dealings" (Motion at 33:11-12), the FTC has no  
19 personal knowledge about what Black Creek is or what it does. Indeed, similar to other  
20 assertions in its Motion, the FTC's claim that Black Creek is a "pivotal hub" of the lending  
21 operations is not supported by affidavit, declaration or any other proof of any kind whatsoever.  
22 Because the FTC has no clue about the nature or purpose of Black Creek, it comes as little  
23 surprise that the "pivotal hub" claim is entirely untrue. Given the FTC's misstatements about  
24 Black Creek, Mr. Muir's Declaration provides this Court with Black Creek's true background as  
25 well as his involvement with Black Creek.

1 Black Creek is a Nevada corporation wholly owned by Scott Tucker. (Muir Decl. ¶ 15).  
2 Mr. Tucker uses Black Creek for a variety of business transactions and investments, including  
3 secured real estate lending and providing venture capital to startup companies. (*See id.*).

4 Black Creek's various real estate transactions and associated lending are document  
5 intensive transactions that often require the immediate availability of an officer of Black Creek to  
6 review and sign documents on its behalf. (Muir Decl. ¶ 18). Scott Tucker was often unavailable  
7 to sign such documents due to his extensive travel and business schedule. Thus, in order to  
8 facilitate the timely and efficient review and execution of documents associated with Black  
9 Creek's activities and lending, Mr. Tucker asked Mr. Muir to serve as Black Creek's officer and  
10 director for the sole purpose of signing any necessary documentation. (Muir Decl. ¶¶ 16-18).

11  
12 Mr. Muir became the president, secretary, treasurer and director of Black Creek in  
13 approximately February 2008. By virtue of a shareholder resolution, however, his authority as  
14 officer and director has always been strictly limited to doing what Scott Tucker, as Black Creek's  
15 sole shareholder, instructed him to do. (Muir Decl. ¶¶ 17-19; and Shareholder Consent, attached  
16 as Ex. A thereto). That Shareholder Consent states, "such Officers of the Corporation shall have  
17 no right, power and authority to bind the Corporation without an express written resolution  
18 signed by the Stockholder of the Corporation delegating such power and authority." (*Id.*)

19  
20 Consistent with the limitations in the Shareholder Consent, the only function Mr. Muir  
21 ever performed as an officer or director of Black Creek has been to sign documentation, and he  
22 did so only upon the express direction of Scott Tucker. (Muir Decl. ¶ 19). Mr. Muir has never  
23 received a salary, bonus, distribution, or compensation of any kind from Black Creek for acting  
24 as an officer or director. The only compensation from Black Creek has been payment of  
25 attorney's fees or reimbursement of costs and expenses in connection with legal services  
26 provided. (*See id.*). Mr. Muir has never been a signatory on a bank account, signed a check, or  
27  
28

1 initiated or confirmed a wire transfer to or from any Black Creek bank account. (*See id.*) As the  
 2 FTC concedes, the only signatories to any Black Creek bank account are Scott Tucker and Blaine  
 3 Tucker. (Motion, PX22, Budich Decl., ¶8).

4 Mr. Muir has never had or exercised any decision making authority or involvement in  
 5 Black Creek's investments. Exclusively Scott Tucker makes all decisions about Black Creek's  
 6 operations, which investments or business opportunities it will pursue, and the terms of any such  
 7 investments and opportunities. (Muir Decl. ¶ 19). Mr. Muir cannot act or make any decisions on  
 8 behalf of Black Creek without Scott Tucker's express permission and direction to do so, nor at  
 9 any time has he taken any actions without Mr. Tucker's specific directions. (*See id.*). Although  
 10 Black Creek has no relevance to the issues before the Court, Mr. Muir has no ability to control  
 11 Black Creek, nor can he be held individually liable for any actions of Black Creek simply  
 12 because he is an officer and director of that company with severely restricted authority.  
 13

14 In short, the FTC has presented no evidence that Mr. Muir is or at any time has been an  
 15 officer, director or employee of any of the Tribal Defendants or that he otherwise has had the  
 16 capacity to control the Tribal Defendants. Based on Mr. Muir's Declaration, the undisputed  
 17 evidence is that he has never held such positions or possessed such control. In these  
 18 circumstances, the FTC has not even come close to meeting the high burden it carries in seeking  
 19 injunctive relief against Mr. Muir and his firm.  
 20

21  
 22 **3. The FTC Cannot Prove That Mr. Muir Knew That The Tribal**  
 23 **Defendants Were Engaged In Deceptive Practices That Caused**  
 24 **Consumer Injury.**

25 "[A]n individual may be subject to injunctive relief if the FTC can prove that an  
 26 individual participated directly in the acts in question or had authority to control them.... [T]o  
 27 hold an individual liable for restitution, the FTC must also show that the individual had actual  
 28 knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of

1 a misrepresentation, or had an awareness of a high probability of fraud along with an intentional  
2 avoidance of the truth.” *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004) (internal citations  
3 omitted).

4 As discussed in the Tribal Defendants’ Opposition brief, the Tribal Defendants adamantly  
5 deny any deceptive trade practices or wrongful conduct of any kind. In any event, the FTC  
6 attaches no evidence to its Motion that shows that Mr. Muir had any knowledge of what the FTC  
7 alleges to be material misrepresentations in the Tribal Defendants’ loan documents and websites.  
8 Nor has the FTC proffered any evidence that Mr. Muir acted in reckless indifference to the truth  
9 or falsity of the representations made. Moreover, as set forth above, Mr. Muir had no  
10 involvement in or control over the content of the Lenders’ websites or in the lending practices  
11 alleged in this action. With the exception of the Muir Law Firm, Mr. Muir is not involved in,  
12 and does not control any of the operations, business, finances or other activities of any the  
13 Lenders, AMG Services, or the other purported “Collaborating Defendants.” There is no  
14 relationship or other conduct between Mr. Muir and any of the defendants that would give rise to  
15 any inference or imputation of knowledge, and the FTC cannot impute such knowledge to Mr.  
16 Muir based solely on the fact that he has provided legal services to some of the defendants.  
17  
18

19 **E. The Equities Weigh Heavily Against Granting A Preliminary**  
20 **Injunction Against Mr. Muir And The Muir Law Firm.**

21 Balancing the equities of the FTC’s request for injunctive relief against the devastating  
22 impact such an injunction would have on Mr. Muir and his firm requires that the FTC’s Motion  
23 be denied. Mr. Muir is a practicing attorney. He is licensed in Kansas and Missouri. (Muir  
24 Decl. ¶ 4). An injunction against Mr. Muir (and any findings made by this Court as required by  
25 Rule 65(d)) would necessarily imply that he is guilty of the conduct alleged in the Complaint.  
26 Although “preliminary” for purposes of this action, the practical effect of a preliminary  
27 injunction in the eyes of the public and legal community would be that Mr. Muir is guilty of  
28

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1 fraud and other wrongful actions. Being named in the FTC's Complaint without any legal or  
2 factual basis was harmful enough. Being named in a preliminary injunction order would be  
3 irreparably devastating.

4 The FTC, on the other hand, can show no circumstances or equitable considerations that  
5 require the Court to exercise its discretion in favor of the drastic remedy of injunctive relief. The  
6 FTC's Complaint is fatally deficient in its allegations against Mr. Muir and his firm. The FTC's  
7 Motion is bereft of any evidence to support its claims of misconduct (or *any* conduct). The FTC  
8 cites no legal authority to support its theory that providing legal services somehow renders an  
9 attorney liable for alleged client misconduct. And despite a 39 page Motion and more than 2,200  
10 pages of exhibits, the FTC has still not explained exactly what Mr. Muir and his firm have done,  
11 are currently doing, or pose a threat of doing in the future, so as to justify invoking the most  
12 extraordinary of this Court's equitable powers.  
13

14 Based on these considerations and the other matters set forth herein, the question is not  
15 even close: the equities overwhelmingly weigh against granting any relief as to Mr. Muir or the  
16 Muir Law Firm.  
17

18 **F. The Public Interest Does Not Support A Preliminary Injunction**  
19 **Against An Attorney For The Alleged Misconduct Of His Clients.**

20 As stated in *Stockton*, the attorney-client relationship should be protected, not  
21 undermined. *Stockton*, 52 U.S. 232, 247 (1850). Yet, the FTC argues in its Motion that the  
22 public has an interest in protecting consumers from deceptive and unlawful lending and debt  
23 collection practices that allegedly violate federal law. (Motion at 29:16-23) For these precise  
24 reasons, the public interest requires that the FTC's Motion be denied. Mr. Muir and his firm do  
25 not engage in either lending or debt collection. The public has no interest in seeing the relief the  
26 FTC seeks granted against Mr. Muir and the Muir Law Firm.  
27  
28



**G. Mr. Muir And The Muir Law Firm Are Entitled To An Evidentiary Hearing On The FTC's Motion For Preliminary Injunction.**

Generally "the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (quoting *Prof. Plan Exam'rs of N.J., Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984) (citations omitted)). "As a general rule, a preliminary injunction should not issue on the basis of affidavits alone." *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1575-76 (Fed. Cir. 1990) (applying Ninth Circuit law). Where there are disputed issues of fact, the failure to hold an evidentiary hearing on a motion for a preliminary injunction is error. *See Thomas v. City of Los Angeles*, 978 F. 2d 504, 509 (9th Cir. 1993) (reversing grant of preliminary injunction where parties submitted "diametrically opposing declarations and counter-declarations" but district court failed to hold evidentiary hearing to resolve the disputed matters); *See also South Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, No. 3:08-CV-00616, 2009 WL 73257, at \*3 (D. Nev. Jan. 7, 2009) (evidentiary hearing was appropriate on request for preliminary injunction, because court would have to determine the likelihood of plaintiff's success on the merits as part of its preliminary injunction analysis); *Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir. 1987) (hearing is required for preliminary injunction if essential facts are in dispute); *Elliott v. Keisewetter*, 98 F.3d 47, 53 (3d Cir. 1996) ("[A] district court cannot issue a preliminary injunction that depends upon the resolution of disputed issues of fact unless the court first holds an evidentiary hearing."); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1312 (11th Cir. 1998) (collecting cases: "where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held"); *Sec. & Exch. Comm'n v. G. Weeks Sec., Inc.*, 678 F.2d 649, 651 (6th Cir. 1982) (emphasizing importance of hearing requirement "where the facts



1 are disputed”); *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981) (where  
2 factual issues are outcome determinative and facts are in sharp dispute, need for evidentiary  
3 hearing is at “its maximum”).

4 The nature of the allegations against Mr. Muir and the Muir Law Firm, the lack of  
5 credible, admissible evidence, and the egregious mischaracterization of the documents presented  
6 by the FTC to support those claims demonstrates that an evidentiary hearing is warranted and  
7 necessary to allow these defendants to challenge the credibility of the affiants and to show the  
8 falsity of the accusations made. As set forth above, the FTC’s so-called facts as to the nature of  
9 the relationships between Mr. Muir and the Muir Law Firm and the other defendants are bitterly  
10 contested. Mr. Muir and the Muir Law Firm should be afforded the opportunity to cross-  
11 examine the FTC’s affiants and to present oral testimony confirming their utter lack of  
12 participation in the alleged conduct, their inability to control the other defendants, and their lack  
13 of knowledge of a deceptive or unlawful practice. In determining whether or not a preliminary  
14 injunction should issue against Mr. Muir and the Muir Law Firm, the Court will necessarily have  
15 to consider the merits of the FTC’s claims against them, as part of its determination of whether  
16 the FTC is likely to succeed on the merits at trial.

17 In addition, Mr. Muir and the Muir Law Firm respectfully request that the Court grant  
18 them the ability to engage in expedited discovery as to the affiants and documents proffered by  
19 the FTC in advance of the hearing so that they may fully and completely prepare to cross-  
20 examine these witnesses at the hearing and present such additional evidence as may be revealed.  
21 *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994) (court has authority to allow  
22 early discovery before issuing a preliminary injunction).

1 **IV. CONCLUSION**

2 For all the reasons set forth herein, the FTC's Motion for Preliminary Injunction and  
3 Other Equitable Relief should be denied in its entirety as to Mr. Muir and the Muir Law Firm as  
4 well as all other Defendants.

5 DATED this 4<sup>th</sup> day of May, 2012.

6  
7 JOLLEY URG A WIRTH WOODBURY  
& STANDISH

8 /s/ L. Christopher Rose

9  
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13 *Attorney for Defendants The Muir Law Firm, LLC*  
14 *and Timothy J. Muir*  
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**CERTIFICATE OF SERVICE**

This will hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is that of Jolley Urga Wirth Woodbury & Standish, 3800 Howard Hughes Parkway, 16<sup>th</sup> Floor, Las Vegas, Nevada 89169.

This is to certify that on May 4, 2012, I electronically filed the **DEFENDANTS THE MUIR LAW FIRM, LLC AND TIMOTHY J. MUIR'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND OTHER EQUITABLE RELIEF AND REQUEST FOR AN EVIDENTIARY HEARING** with the Clerk of Court using the CM/ECF system, which will cause the document to be served upon all current counsel of record.

/s/ Kelly McGee

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An Employee of JOLLEY URG WIRTH  
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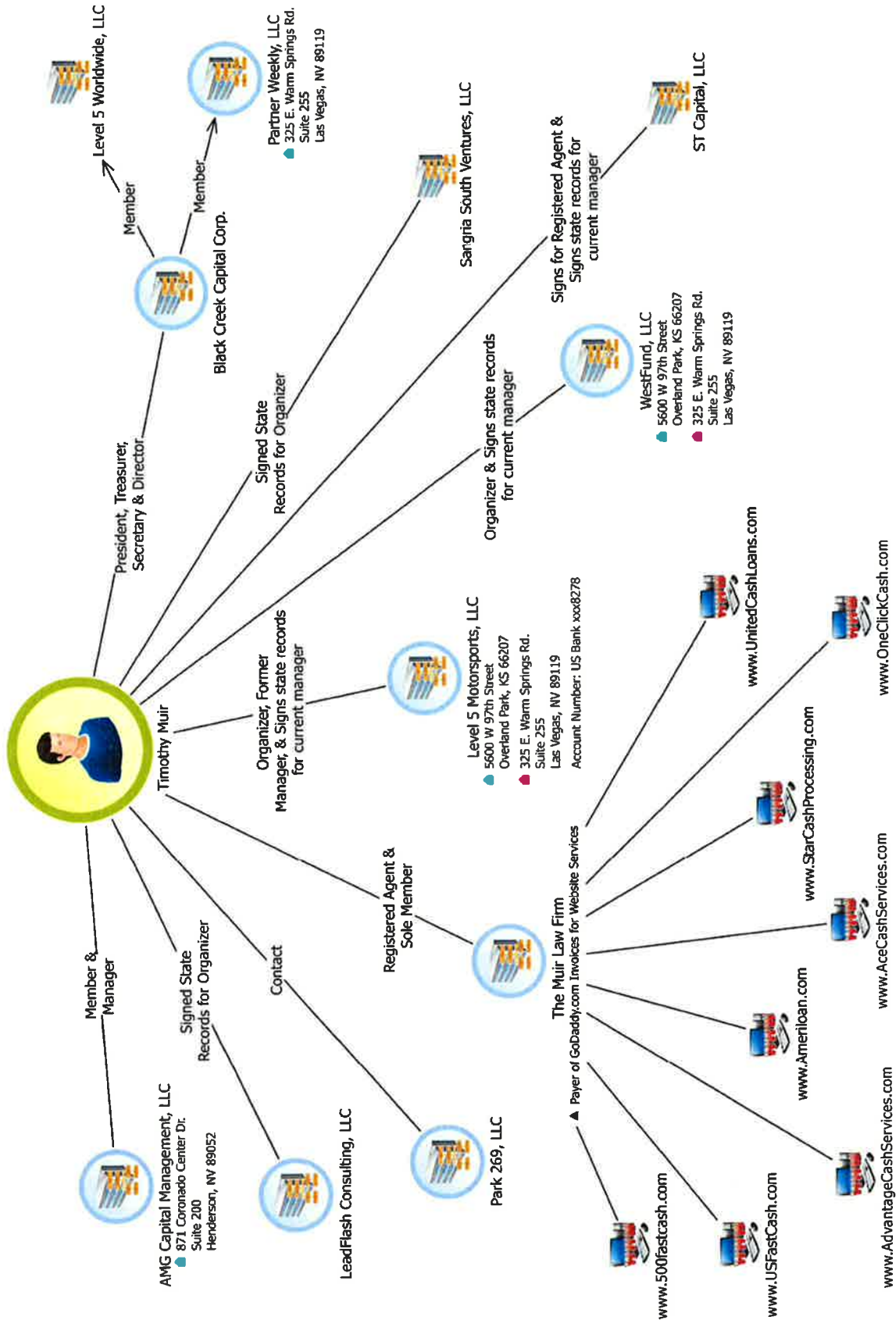
# **EXHIBIT 1**

**FILED UNDER  
SEAL**

**EXHIBIT A**

**FILED UNDER  
SEAL**

# **EXHIBIT B**



**EXHIBIT C**

**FILED UNDER  
SEAL**