UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FEDERAL TRADE COMMISSION,	*	
	*	Civil Case No. 11-3017
Plaintiff,	*	
v.	*	
	*	
PAYDAY FINANCIAL, LLC, et al.,	*	
	*	
Defendants.	*	

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO SUMMARY JUDGMENT

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I. INTRODUCTION

The Court should grant the FTC's Motion for Summary Judgment because, even after Defendants' Opposition to the Motion, no genuine issue of material fact exists that requires resolution by trial.[1] The undisputed facts prove that Defendants garnished almost $1.5 million[2] from consumers' wages by sending garnishment letters to consumers' employers misrepresenting that the Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux authorized Defendants to garnish wages without a court order (Count I). Moreover, Defendants do not dispute that they disclosed the existence and amount of consumers' debts to third-parties, including consumers' employers, offering no facts (only argument of counsel unsupported by the factual record) to dispute that such practice caused substantial harm to consumers (Count III).

Defendants' violations of the Credit Practices Rule and Electronic Fund Transfer Act ("EFTA") are plain from the face of their loan agreements. Defendants violated the Credit Practices Rule because their loan agreements contained prohibited wage assignment clauses (Count IV). And, Defendants violated EFTA because their loan agreements conditioned credit on consumers' agreement to repay loans by mandatory preauthorized transfers (Count V).

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[1] We file this Memorandum with the Second Supplemental Declaration of Victoria M. L. Budich and contemporaneously with Plaintiff's Reply to Defendants' Response to Plaintiff's Statement of Facts.

[2] As discussed below in Section VII.B, the FTC is only seeking $417,740 of this amount as disgorgement.

It also is undisputed that Defendants sued consumers in tribal court and represented in their loan contracts that they could sue consumers in tribal court and obtain valid orders to garnish consumers' wages. Because the tribal court has no subject matter jurisdiction over consumers who neither reside on nor transact any business on the reservation, Defendants' practice of suing consumers in tribal court and threatening such suits, is unfair and deceptive. (Counts VI and Counts VII).

Finally, the undisputed facts prove that all Defendants are jointly and severally liable because they operate as a common enterprise with, *inter alia*, shared ownership, management, and employees. The record also shows that Defendant Webb, who controlled and participated in the unlawful activities of the Corporate Defendants, also is individually liable for injunctive and monetary relief.

In light of the foregoing, the injunctive and monetary relief that the Plaintiff seeks is appropriate and necessary.

Nothing in the Defendants' Opposition has established that the FTC is not entitled to judgment as a matter of law and the Court should enter summary judgment in Plaintiff's favor as to Counts I and III-VII.

II. THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANTS HAVE VIOLATED SECTION 5 OF THE FTC ACT

Defendants misconstrue the nature of the Section 5 allegations against them, often conflating the deception and unfairness standards and inventing new requirements. Without citation to any authority, Defendants assert that

'[t]o condemn a practice as 'unfair' or 'deceptive' under Section 5, the FTC was required to demonstrate that the practice caused or will likely cause cognizable consumer harm." (Def. Opp'n. at 7, Dkt. # 103.) It is well-established that proof of deception does not require proof of actual consumer injury, much less cognizable consumer injury. *See, e.g.*, *FTC v. Direct Marketing Concepts, Inc.* 569 F. Supp. 2d 285, 297 (D. Mass. 2008). The latter is true because deception harms consumers' choice, and therefore, injures consumers. *See In re Novartis Corp.*, 1999 FTC Lexis 90, at *50 (May 13, 1999). And, while the unfairness standard does require a showing that a practice causes or is likely to cause substantial injury to consumers, there is no requirement that the FTC prove "cognizable" consumer harm under either the unfairness or deception standard. This injury may take many forms. *See, e.g.*, *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984).

Similarly, Defendants contend that under the deception standard, the FTC is required to show that a consumer detrimentally relied on a representation. That is a bold misstatement of the law. In fact, courts, including this Circuit, have specifically rejected a requirement that the FTC must prove that a consumer relied on a deceptive claim to establish a violation under Section 5 of the FTC Act. *See FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). In *Security Rare Coin*, the defendant argued that redress was inappropriate because the FTC had not proven that each consumer who would be reimbursed had relied on defendants' false and

misleading statements in question. In rejecting defendant's argument, the Eighth Circuit stated:

> It would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action. This is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer.

Id. at 1316 (citing *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)). *See also*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) ("Neither proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation. Otherwise, the law would preclude the FTC from taking preemptive action against those responsible for deceptive acts or practices, contrary to § 5's prophylactic purpose.")(internal citations omitted); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) ("Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]."). Therefore, both brazenly inaccurate contentions are not elements of unfairness or deception under the well-established body of FTC law, and thus fail, as a matter of law.

A. The Undisputed Facts Show That Defendants Violated Section 5 As Alleged In Count I By Misrepresenting That They Are Permitted To Garnish Wages Without Court Order

The Plaintiff presented uncontroverted evidence that Defendants made express claims to consumers' employers that Defendants are legally authorized, pursuant to the Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux Tribe, to garnish the wages of consumers who purportedly owe debts to Defendants without first obtaining a court order. These representations were false and deceptive because the Constitution and laws of the Tribe offer Defendants no such authorization.

Defendants concede that they sent letters to consumers' employers claiming that the Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux allowed them to garnish consumers' wages without a court order. (Def. Opp'n. at 21) (admitting that "Defendants sent wage garnishment packets to the borrowers' employers"). Defendants fail to dispute the deceptive nature of those representations because they fail to cite any provision in the Constitution or laws of the Tribe that allow them to garnish consumers' wages without court order.

Rather than identifying any actual legal authority to garnish wages, Defendants make the bald assertion that the absence of any Congressional or tribal law gives them carte blanche to do so. Essentially, their defense is that "Congress has not passed any law requiring a court order before a wage assignment can be enforced" and tribal law is silent on the subject. (Def. Opp'n. at 22.) But Defendants' wage garnishment packages were not silent

and they expressly told consumers' employers that such authorization existed. Thus, neither defense provides a legal basis for Defendants express misrepresentation that they are authorized by law to garnish consumers' wages without a court order.

On the contrary, the FTC has carried its burden and put forth undisputed evidence that Defendants' representation is deceptive under Section 5 of the FTC Act. For purposes of Counts I and III in this case, employers are the consumers to whom Defendants' deceptive garnishment letters were directed.[3] To establish that an act or practice is deceptive under Section 5 of the FTC Act, the FTC must demonstrate that: (1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation was material. *See, e.g., FTC v. Tashman*, 318 F. 3d 1273, 1277 (11th Cir. 2003); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). Here, the FTC has established with undisputed evidence all the necessary elements to establish deception: (1) there was a misrepresentation regarding the Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux; (2) it was likely to mislead employers acting reasonably;[4] and (3) the representation was

[3] *See, e.g., FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. Cal. 2010), *aff'd*, 475 F. App'x. 106 (9th Cir. 2012) ("consumer" includes both business and individuals). *See also, FTC v. LoanPointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304, at *5 (D. Utah Sept 16, 2011) ("sending misleading information to the consumers' employers qualifies as a deceptive act for purposes of the FTC Act.")

[4] In fact, Defendants' representations caused $1.5 million of vulnerable consumers' wages to be garnished without the due process safeguards of a

material.[5] (*See* Plaintiff's Memorandum in Support of its Motion for Summary Judgment at 5-7, Dkt. # 94.) Defendants' only defense is that the Constitution and laws of the Tribe are silent on wage garnishment without a court order, which fails to explain why their wage garnishment packages made express and untrue references to those bodies of law. However, most states require nongovernmental entities to obtain a court order to garnish a consumer's wages[6] and the Supreme Courts has noted that tribal law does not triumph state law when a state's interest is implicated.[7] Accordingly, the uncontroverted evidence demonstrates that Defendants' deceptive representation violated Section 5 of the FTC Act as alleged in Count I of the Complaint.

B. The Undisputed Facts Show That Defendants Have Violated Section 5 as Alleged in Count III By Disclosing Consumers' Purported Debts to their Employers

Defendants also do not dispute that they disclosed the existence, and sometimes the amount, of consumers' debts to employers. Count III alleges that this practice is unfair. Defendants' Opposition confuses the unfairness standard with principles of contract law. By arguing that consumers

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hearing or an opportunity to present defenses. Such a harmful result warrants an injunction against using wage assignment clauses and a judgment disgorging Defendants' ill-gotten gains. *See* Section XII.A *supra*.

[5] Because the claim is express, it is presumed to be material. *See, e.g., FTC v. SlimAmerica, Inc.* 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999).

[6] Four states, Pennsylvania, North Carolina, South Carolina and Texas, do not permit wage garnishments on civil judgments.

[7] *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) ("When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.")

consented to the terms of their loan agreements, Defendants assert that their practice of disclosing consumers' debts cannot be unfair under contract law. (Def. Opp'n. at 23-24.) Contrary to Defendants' assertion, this is not a case to resolve the contract dispute between private parties, in which contract law is often dispositive. Here, the fact that consumers consented to Defendants' loan terms, does not preclude Defendants' practice from being unfair. The FTC brought this enforcement action pursuant to its statutory mandate to protect consumers and the general public welfare from practices that are unfair and deceptive, regardless of whether those practices are disclosed in a contract.[8] Therefore, the issue for unfairness analysis is not whether a consumer agreed to an illegal wage assignment provided in an adhesion contract, but that Defendants disclosed consumers' debts to third parties through the use of the *unlawful* wage assignment. The operative fact here is that Defendants sent consumers' employers an *unlawful* wage assignment for the sole purpose of illegally garnishing consumers' wages.[9]

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[8] The primary purpose of the FTC Act, as well as other federal and state consumer protection laws, is to protect consumers and lessen the harsh effect of *caveat emptor*. *See FTC. v. Millennium Telecard, Inc.*, No. 11-CV-2479 (JLL), 2011 WL 2745963, at *4 (D.N.J. July 12, 2011). *See, also*, *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (defendants "contend that the fine print notices they placed on the reverse side of the check, invoice, and marketing insert preclude liability under FTC[Act] § 5. We disagree.").

[9] In their opposition, Defendants attempt to limit the harm to consumers as simply the receipt of a garnishment packet. They argue that if the harm is the receipt of a garnishment packet then all garnishments are unfair. (Def. Opp'n. at 23-24.) However, the distinguishing factor that Defendants ignore is that garnishments sent by federal agencies under the Debt Collection

Defendants practice has caused substantial injury to consumers and employers. Consumers and their co-workers' work was interrupted to deal with Defendants' purported wage garnishment orders and other unsolicited communications, and consumers risked losing their jobs because of the interference caused by Defendants' activities. (FTC MF 48.) Consumers also suffered harm in the form of embarrassment caused by the unauthorized disclosure of their debts. Consumers cannot reasonably avoid this harm because some did not realize that Defendants were contacting their employers and co-workers, and all had no control over the unlawful actions of Defendants.

Defendants offer no evidence to counter the representative experiences described in the FTC's opening brief regarding the harm– fear of job loss, embarrassment, etc. – Defendants caused when they revealed consumers' debts to their employers. Neither do they offer any plausible evidence as to how consumers reasonably could have avoided these harms that resulted from Defendants disclosing their debts pursuant to a wage garnishment packet that included an invalid wage assignment.[10] Finally, they offer no evidence of

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Improvement Act do not require a court order and that valid private party garnishments sent are accompanied by court orders.

[10] Defendants essentially argue that consumers can avoid the harm of their debts being unfairly disclosed to employers by paying the debts. The fallacy of this argument, apart from the fact that the wage assignment was not valid, is that it assumes that debt is owed and deprives consumers of their due process right to dispute the debt and present any defenses. *See Am. Fin. Servs. Ass'n. v. FTC, 767* F.2d 957, 974 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) ("Wage assignments [are] particularly harmful to consumers because

countervailing benefit to consumers or to competition that might occur as a result of disclosing consumers' debts to their employers. Here, the FTC has demonstrated with undisputed evidence all the necessary requirements to establish unfairness: (1) consumers were injured by Defendants' practice of disclosing their debts to employers; (2) consumers were not able to reasonably avoid the harm; and (3) the adverse consequences for consumers were not accompanied by benefits to consumers or to competition. Accordingly, the undisputed facts show that Defendants' practice of disclosing consumers debts to employers is unfair and in violation of Section 5 of the FTC Act, as alleged in Count III of the Complaint.

C. The Undisputed Facts Show That Defendants Have Violated Section 5 As Alleged In Count VI and Count VII By Suing Consumers In Courts Without Jurisdiction To Hear the Claims

It also is undisputed that Defendants sued consumers in tribal court and represented in their loan contracts that they could sue consumers in tribal court and obtain valid orders to garnish consumers' wages.[11] Because the tribal court lacks subject matter jurisdiction to hear such claims, Defendants' practice of suing in tribal court is unfair and their threats are deceptive.

The central question to these counts is the non-existence of subject matter jurisdiction of the tribal courts, which are courts of limited jurisdiction.

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they can be invoked without the due process safeguards of a hearing and an opportunity to present defenses.").

[11] The parties have filed a joint statement of material facts, fully briefed the issue, and presented oral argument on subject matter jurisdiction. In the interest of brevity, the FTC incorporates by reference its arguments in Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment (Dkt. # 58).

This is a legal question of federal jurisprudence. Defendants spend a significant portion of their Opposition arguing that this Court should determine the tribal court's *subject matter jurisdiction* based on principles drawn from cases involving personal jurisdiction, libel, money laundering, torts, and common law breach of contract – indeed, anything except cases involving actual tribal court subject matter jurisdiction determinations. (Def. Opp'n. at 10 -13.) The application of other principles of law is inappropriate, especially given that there is Supreme Court and Eighth Circuit precedent directly on the issue of the subject matter jurisdiction of tribal courts. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) ("*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests.") (emphasis added); *Montana v. United States*, 450 U.S. 544, 565 (1981) (holding that exceptions allow tribal courts to exercise "some forms of civil jurisdiction over non-Indians *on their reservations*") (emphasis added); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) ("Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*.").

Defendants also raise two additional arguments and provide absolutely no support for their claims. First, they argue that this Court should expand the limited jurisdiction of tribal courts and make them courts of general

jurisdiction like state courts.[12] (Def. Opp'n. at 14.) Defendants next attempt to distinguish the language of *Montana* as pre-Internet and ask the court to reinvent the plain language of the case.[13] (Def. Opp'n. at 15.) But, throughout Defendants' discussion, they fail to cite a single case that actually applies their novel ideas to determine subject matter jurisdiction or discuss any relevant cases determining tribal court subject matter jurisdiction of non-members who reside off the reservation and *conduct no activity* on the reservation.[14] Because Defendants' lawsuits involve consumers who are neither tribal members or nonmembers engaged in activity *on the reservation*, the Cheyenne River Sioux tribal court lacks subject matter jurisdiction under the Supreme Court

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[12] Defendants contend that "[i]f Defendants were not residents of the Reservation but instead of State X, nobody would dispute that their borrowers had transacted commerce, had undertaken conduct, and had acquired contractual duties to perform, all in State X." Again, state courts are courts of general jurisdiction and the scenario that Defendants present is not before the court. *See also Nevada v. Hicks*, 533 U.S. at 367 ("Tribal courts, it should be clear, cannot be courts of general jurisdiction.").

[13] Defendants present several novel ways for the Court to interpret what the Supreme Court meant when it used the language "on the reservation." Defendants argue that when the Supreme Court stated "on the reservation," "on" was a "grammatical necessity," "on the reservation" was "merely setting up the expansion of jurisdiction" or "included to clarify that tribes . . . are without 'extraterritorial jurisdiction'." Each explanation is nonsensical in light of *Montana's* progeny and Eight Circuit cases such as *Hornell.*

[14] Defendants mention *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) for the proposition that tribes maintain sovereignty over economic activity within its jurisdiction. (Def. Opp'n. at 16.) The FTC does not dispute that tribal courts can have control over economic activity "within its jurisdiction." This case, however, is not within the jurisdiction of the tribal court. Furthermore, in *Jicarilla Apache*, the Supreme Court found that the tribe had regulatory authority to impose taxes on non-Indians because they were mining oil and gas *on tribal reservation land*, a fact that is noticeably missing here.

decisions of *Montana* and its progeny which includes post-internet cases. Therefore, Defendants' practice of suing in tribal court is an unfair and deceptive act in violation of Section 5.

III. THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANTS HAVE VIOLATED THE CREDIT PRACTICES RULE AS ALLEGED IN COUNTS IV BY INCLUDING PROHIBITED WAGE ASSIGNMENT CLAUSES IN THEIR LOAN AGREEMENTS WITH CONSUMERS

There are no disputed facts that a wage assignment clause was included in Defendants' contracts and that it violated the Credit Practices Rule. Under the Credit Practices Rule, such clauses can be included only if the assignment: (i) is, *by its terms*, revocable at the will of the debtor; (ii) is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (iii) applies only to wages or other earnings already earned at the time of the assignment. 16 C.F.R. § 444.2(a)(3) (emphasis added). Defendants attempt to argue that their wage assignment clause meets the revocability requirement, and therefore, satisfies the Rule.

Defendants assert that their "practice" was to permit consumers to opt out of the wage assignment clause at any time. (Def. Opp'n. at 25.) However, Defendants present no evidence to show that their claim is true, and even if they could, it would be moot because their "practice" conflicts with the plain language of their contracts. Clearly, the reason that Defendants include the language in their contracts is to make the consumer believe that her choice is limited. Therefore, Defendants' supposed willingness to waive the wage assignment clause after the fact does not "undo" the violation caused by

originally including the provision. *Cf. FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 262 (E.D.N.Y. 1998) ("a conflict between a specific disclaimer and a contrary oral representation . . . is, as discussed previously, *ipso facto*, actionable by the FTC"); *FTC v. Career Assistance Planning, Inc.*, 1997 U.S. Dist. LEXIS 17191, at *7 (N.D. Ga. Sept. 18, 1997) (The Court finds that, because [defendant's] alleged practice of refunding money in accordance with its stated refund policy is the type of claim for which supporting documentary evidence would be readily available, . . . defendants' self-serving statements alone cannot create a genuine issue of fact on this issue); *FTC v. Sec. Rare Coin & Bullion Corp.*, Civ. A. No. 3-86-1067, 1989 WL 134002, at * 20 (D. Minn. Sept. 11, 1989) (finding that "[i]t is reasonable that consumers would rely on the company's statements about its own policies.").

Indeed, the fact that Defendants consciously chose to offer contracts that ignored the Credit Practices Rule's specifications and implemented their own "practice" further justifies the need for injunctive and monetary relief. Given that Defendants do not dispute the Credit Practices Rule's requirements, their opposition to the Commission's motion for summary judgment as to Count IV created no disputed issue of material fact as to whether their contract provision violated the Credit Practices Rule, and thus, Section 5 of the FTC Act.

IV. THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANTS HAVE VIOLATED EFTA AS ALLEGED IN COUNT V BY CONDITIONING CREDIT UPON CONSUMERS' AGREEMENT TO REPAY VIA PREAUTHORIZED ELECTRONIC FUND TRANSFERS

There is no genuine issue of material facts that Defendants have conditioned the extension of credit on mandatory preauthorized electronic transfers and violated EFTA. Defendants agree that EFTA prohibits the *conditioning of the extension of credit* to a consumer on the consumer's repayment by preauthorized electronic fund transfers. Defendants also admit that every loan contract contained a provision requiring repayment by electronic fund transfer – the same contract that every consumer must sign *before* he or she is eligible to be considered for the extension of credit (a loan) (FTC MF 31.)

Given that every one of Defendants' consumers was required to agree to repay the loan through preauthorized electronic fund transfers in order to be considered for a loan, it defies reason for Defendants to now argue that they did not "condition" the extension of credit on repayment through electronic fund transfers. A consumer simply cannot get a loan without agreeing to the provision in Defendants' contract. It also is nonsensical for Defendants to argue that the provision was somehow provided as merely a convenience to consumers and that their "practice" was to allow the provision to be revoked at any time – except as a condition for the extension of credit. As noted above in *Minuteman Press*, creating a subsequent "practice" that conflicts with written policy is not a defense. Further, it is irrelevant that a consumer could potentially cancel the electronic transfer at a later point, if the only way they

could obtain a loan is to agree to the provision. As with the Credit Practices Rule count, Defendants cannot escape the violation at the outset of the agreement by claiming that consumers were supposedly able to revoke the authority thereafter. *See O'Donovan v. Cashcall, Inc.*, 2009 U.S. Dist. LEXIS 53895, *7-*8 (N.D. Cal. June 24, 2009) ("[T]he right to later cancel EFT payments does not allow a lender who conditions the initial extension of credit on such payments to avoid liability."). Thus, Defendants' Opposition has not controverted any evidence that Defendants violated EFTA as alleged in Count V of the Complaint.

V. THE UNDISPUTED FACTS PROVE THAT DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE AS A COMMON ENTERPRISE

"Where one or more corporate entities operate in a common enterprise, each may be held liable for the deceptive acts and practices of the other."[15] *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973). The factors that courts consider when applying a common enterprise theory include whether ostensibly separate corporations operate under common corporate control, share office space, officers, and employees, commingle funds,

[15] Defendants seem to argue that in order for a common enterprise to exist each Defendant must commit every action alleged in the complaint (Def. Opp'n. at 3-7.) Defendants misunderstand common enterprise theory because such a requirement would defeat the purpose of holding one corporate entity liable for the actions of another corporate entity. Therefore, no such requirement exists and the FTC is not required to show that Defendants Payday Financial, Great Sky Finance, Western Sky Financial, Red Stone Financial, Management Systems, 24-7 Cash Direct, Red River Ventures, High Country Ventures, and Financial Solutions each made their own deceptive statements at issue, engaged in unfair collection practices, and violated federal lending law. Rather each defendant is liable for its own misconduct and the conduct of co-defendants because they operate as a common enterprise.

participate in unified advertising, conduct business through a maze of interrelated companies, and any other factors that reveal that no real distinction exists. *See, e.g.*, *Sunshine Arts Studios*, 481 F.2d at 1171; *Delaware Watch Co v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. Sept. 2008). The common enterprise analysis is flexible and allows the court to consider a multitude of factors depending on the facts of the case. Companies may be held jointly liable as a common enterprise where the same individuals were transacting an integrated business through a "maze of interrelated companies." *Delaware Watch,* 332 F.2d at 746. Because "no one factor is controlling . . . the 'pattern and frame-work of the whole enterprise'" must be considered. *FTC v. Consumer Health Benefits Ass'n.*, No. 10-CV-3551 (ILG), 2011 WL 3652248, at *5 (E.D.N.Y Aug. 18, 2011) (quoting *Delaware Watch,* 332 F.2d at 746). *See FTC v. 120194 Canada, Ltd.*, No. 04-7204, 2007 U.S. LEXIS 12657, at *15 (N.D. Ill. Feb. 12, 2007) (evidence of commingling of funds "is only one factor in the overall [common enterprise] calculus, and thus, is not essential to the FTC's case.").

In the present case, when all relevant factors and the operations of Defendants are considered as a whole, it is clear that they functioned as a common enterprise. The uncontroverted facts show that the Corporate Defendants were under the common control of Webb and conducted their business through a "maze of interrelated companies" that participated in a common venture to offer loans, collect on loans, or provide support services that enabled other Corporate Defendants in the marketing and collection of

loans. Defendants Payday Financial, Great Sky Finance, Western Sky Financial, Red Stone Financial, 24-7 Cash Direct, Management Systems, Red River Ventures, and High Country Ventures offer or have offered consumers payday loans.[16] Defendant Management Systems owns the buildings that serve as the offices of the Corporate Defendants, funded the loans of Corporate Defendants who offered loans, and performed the billing and payroll functions for other Corporate Defendants.[17] Defendants Payday Financial and Financial Solution garnished consumer wages without a court order. The few nominal distinctions among the corporations (*i.e.*, Defendants' assertion that they maintained separate bank accounts and offered loans through different companies)[18] are "superficial in nature and would not, when considered in light of the overwhelming evidence of the corporations' interrelated functions, provide a reasonable jury with a basis to reject the application of the common

[16] Defendant 24-7 Cash Direct was never operational according to Defendants, but it did offer loans through its website www.24sevensolution.com. (FTC MF 18.) Defendants also claim that Management Systems never offered loans, but it once offered loans through its website www.managementsystemsllc.net. (FTC MF 17.) Both domain names were registered by Defendant Webb. (FTC MF 8.)

[17] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.E, p. PAYDAY0371 (Item 2.) Def. Add'l Facts ¶ 48. Although other Corporate Defendants paid Management Systems a fee for its services and rent, such payments do not negate the interrelated functions of the corporations, which are all controlled by Defendant Webb.

[18] Defendants represent in their papers, without citation to record evidence other than their self-serving affidavit, that they had separate bank accounts and dealt independently with consumers. Even if Defendants had separate bank accounts and dealt independently with consumers through the various loan products offered, it would not preclude a common enterprise finding when the pattern and framework of the businesses are considered.

enterprise theory here." *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1184 (N.D. Ga. 2008).

More specifically, there is no dispute that Defendant Webb owns, controls, and serves as the sole officer for each of the Corporate Defendants and incorporated Defendants Payday Financial and Financial Solution. There is no dispute that Defendant Payday Financial incorporated each of the other Corporate Defendants, served as their sole and controlling managing member, and advertised on behalf of other Corporate Defendants. On its website, www.paydayfinancialllc.com, Defendant Payday Financial states:

> Payday Financial LLC offers different loan alternatives through the following companies:
>
> Lakota Cash
> Great Sky Finance, LLC
> Red Stone Financial, LLC
> Western Sky Financial, LLC[19]

Also, there is no dispute that Corporate Defendants share the same business address, office space and procedures, and some employees. Defendants concede and corporate records show that they share a common address and office space at 612 E. Street, Timberlake, SD (FTC MF 9), as well as an additional location at 602 E. Street, Timberlake, SD. (FTC MF 10). Defendant Payday Financial also provides the other Corporate Defendants, who provide different loan alternatives on its behalf, with the benefit of office

[19] *See* Plaintiff's Exhibits in Support of Summary Judgment, Exhibit PX09, Exhibit P, p. 139 (Payday Financial website capture). At the time of the advertisement, Defendants Red River Ventures and High Country Ventures had ceased operation and no longer offered loans.

furniture, computers and software, and the use of a generator.[20] Defendants Payday Financial and Financial Solutions, who garnished consumers' wages, shared employee training manuals and procedures. (FTC MF 35.) Defendants concede in their statement of facts that some employees worked for more than one corporate defendant. (Def. Add'l Facts ¶¶ 79, 89, and 99) (indicating employees of Defendants Western Sky Financial, Financial Solution, and Payday Financial did not work exclusively for the company).

Furthermore, the Employer's Quarterly Contribution, Investment and Wage Report from the South Dakota Department of Labor, Unemployment Insurance Division shows that Defendants Payday Financial, Western Sky Financial, and Management Systems had overlapping employees.[21] Additionally, in Defendants' sworn financial statements provided to the FTC, only Defendants Payday Financial, Western Sky Financial, and Management Systems list compensation to employees for the period September 2009 to

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[20] In the sworn financial records that Defendant Payday Financial provided to the FTC, Payday Financial states that it provides the furniture, computers, software, and generator for 612 E. Street, Timber Lake, SD, where all Corporate Defendants reside. *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX13.A, p. PAYDAY0402 (Item 23).

[21] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX12, Exhibit N (showing that employee Betty Strehlow was employed by Defendants Management Systems and Payday Financial for quarter ending 1/2011 and 2/2011; Tawney Lawrence and Kelsey Maher were both employed by Defendants Western Sky Financial and Payday Financial for quarter ending 2/2011). S*ee also* Declaration of Victoria M. L. Budich, Exhibit PX07, Exhibit N, pp. 113-127 (showing that employee Samantha Goldache was employed by both Defendants Payday Financial and Financial Solutions for the quarter ending 2/2010; employee Karen Garber was employed by both Defendants Payday Financial and Financial Solutions for the quarter ending 4/2010).

September 2011.[22] Interestingly, Western Sky Financial began offering loans in 2009, but only lists compensation to employees for the year of 2011.[23] Defendant Financial Solutions which began operations in 2010, lists compensation to employees for fiscal year 2010 only.[24] Although Great Sky Finance began offering loans in 2009, it does not list compensation to employees except Defendant Management Systems as an independent contractor.[25] Similarly, Defendant Management Systems, which began operation in 2009, only lists compensation to one employee for the fiscal year of 2011.[26] Defendant Red Stone Financial, which began offering loans in 2009, does not list any compensation to employees for the reporting period of September 2009 through September 2011.[27] Defendants' failure to report compensation to employees for the entire reporting period in which they were

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[22] Defendants High Country Ventures and Red River Ventures were not operational during the reporting period, and Defendant 24-7 Cash Direct was inactive during the reporting period. *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX13.H, p. PAYDAY0347 (Item 2), Exhibit PX13.G., p. PAYDAY0451 (Item 2) and Exhibit PX 13.F, p. PAYDAY0213 (Item 2), respectively.

[23] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.C, p. PAYDAY0510 (Item 29).

[24] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.I, p. PAYDAY0246 (Item 29).

[25] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.B, p. PAYDAY0302 (Item 29).

[26] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.E, p. PAYDAY0382 (Item 29).

[27] *See* Second Supplemental Declaration of Victoria M. L. Budich, Exhibit PX 13.D, p. PAYDAY0486 (Item 29).

active suggests that more Corporate Defendants shared employees than indicated in Defendant Webb's affidavit or Defendants' sworn financial statements are false. In any event, Defendants have admitted that three corporate entities shared employees.

Overall, Defendants have conducted their business practices through a maze of companies that have common ownership, officers, employees, office space, advertising, and business functions. The interrelated companies functioned as a common enterprise. *See FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1082 (C.D. Cal. 2012) (finding defendants jointly and severally liable as a common enterprise because the Corporate Defendants were controlled by the same individuals and shared the same business address and office space); *FTC v. Grant Connect,* LLC, 827 F. Supp. 2d 1199, 1215-1218 (D. Nev. 2011) (finding certain Defendants operated as a common enterprise for the various offers involved in the case even though Defendants maintained separate bank accounts, obeyed corporate formalities, entered separate contracts, and filed separate tax returns.); *LoanPointe, LLC*, 2011 WL 4348304 at *10 (finding a common enterprise where Defendants shared ownership and control, office space and addresses, and employees). "[I]n situations where corporations are so entwined that a judgment absolving one of them of liability would provide the other defendants with a clear mechanism for avoiding the terms of the order, courts have been willing to find the existence of a common enterprise." *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d at 1182 (internal quotation marks omitted). Accordingly, the uncontroverted evidence

demonstrates that Defendants should be held jointly liable as a common enterprise.

VI. THE UNDISPUTED FACTS DEMONSTRATE THAT DEFENDANT WEBB IS LIABLE FOR INJUCTIVE AND MONETARY RELIEF

The uncontroverted facts show that Defendant Webb is liable individually for injunctive and monetary relief as the sole member and officer of the Corporate Defendants. Here, Defendant Webb either directly participated in the acts or practices at issue or had authority to control those acts, and therefore, is subject to injunctive relief for the acts of the Corporate Defendants. (FTC MF 2-8.) Similarly, the uncontroverted facts show that Defendant Webb had actual or constructive knowledge of the Corporate Defendants' deceptive and unfair practices (FTC MF 2-8), and is, therefore, liable for monetary relief. Most telling of Webb's liability is that the Opposition filed by Defendants does not even dispute Webb's participation, control or knowledge of the Corporate Defendants' unlawful acts that violate Section 5 of the FTC Act, the Credit Practices Rule, and EFTA. Therefore, the uncontroverted facts demonstrated that Defendant Webb is individually liable for injunctive and monetary relief.

VII. THE FTC'S PROPOSED PERMANENT INJUNCTIVE AND MONETARY RELIEF IS NECESSARY AND APPROPRIATE

As the incontrovertible facts have shown, Defendants have engaged in a pattern and practice of conduct that violates the FTC Act, the Credit Practices Rule, and EFTA. There is a likelihood that, unless Defendants are enjoined, they will harm consumers in the future. The FTC Act provides that "in proper

cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). This Court has full authority to enter a permanent injunction against Defendants. The Court may avail itself of its full inherent equitable power in granting injunctive and ancillary equitable relief for violations of the FTC Act pursuant to Section 13(b) of the Act. *See Security Rare Coin*, 931 F.2d at 1315; *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468–69 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994). Expounding upon the complete nature of a court's equitable authority to protect the public in the case of a statutory violation, the Supreme Court stated that the Court's powers:

> [a]ssume an even broader and more flexible character than when only a private controversy is at stake . . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

A. The Injunctive Relief Is Necessary and Appropriate

Given the overwhelming nature of Plaintiff's evidence, Plaintiff submitted a proposed final order that includes injunctive relief to ensure that the deceptive and unfair conduct does not continue, which includes a ban on using wage assignments and fencing-in relief to prevent further illegal practices, equitable monetary relief, a civil penalty, and ancillary relief to ensure that Defendants are complying with the order. The Court should grant the injunctive relief that Plaintiff has requested.

Defendants argue, however, that the relief Plaintiff seeks against them, including a ban on using wage assignments, is not appropriate. To support this contention, Defendants state in their Opposition that the injunctive relief that the FTC requests bears no reasonable relations to the violations of law that the FTC has alleged. (Def. Opp'n. at 33-38.) Yet, at the same time, Defendants argue that a permanent injunction is not warranted because they have stopped engaging in the unlawful conduct that the FTC alleged in its complaint, and therefore, there is no likelihood the violation will reoccur in the future.

The fact that Defendants discontinued sending the deceptive garnishment letter in September 2011, after the FTC filed this action, is not relevant. The cessation of that practice during this litigation does not negate the harm it cause to consumers for months or the need for injunctive and equitable monetary relief after this cases concludes. *See FTC v. Citigroup Inc.*, 239 F. Supp. 2d 1302, 1306 (N.D. Ga. 2001) ("the fact that illegal conduct has ceased does not foreclose injunctive relief.") (internal quotation marks omitted). A permanent injunction is warranted because the violations of law are likely to recur. Prior illegal conduct is highly suggestive of the likelihood of future violations. *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). The active Defendants are still in the business of offering loans to consumers and Webb has registered 338 domain names which can conveniently be used to expand his operation under new corporate names to evade detection.[28]

[28] *See* FTC MF 8; Budich Declaration, PX07 ¶ 16, Att. W, pp. 205-220.

Here, Plaintiff has submitted admissible evidence to show that Defendants represented to consumers' employers that they were legally authorized to garnish the pay of consumers without first obtaining a court order. The incontrovertible evidence shows that Defendants' representation was false and consumers were injured by the illegal wage garnishments.

Numerous courts have granted bans in order to curtail deceptive conduct. *See, e.g.*, *FTC v. Accusearch I*, 2007 WL 4356786, at *9 (D. Wyo. Sept. 28 2007) (banning defendant from selling customer phone records) (*aff'd* 570 F.3d 1187 (10th Cir. 2009); (*cf.* *Gill*, 265 F.3d at 957–58 (banning defendants from future participation in credit-repair services); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (banning defendant from multi-level marketing); *FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1053-54 (C.D. Cal. 2002) (banning defendants from engaging in future marketing of work-at-home medical billing opportunities); *FTC v. Wetherill*, No. 92-CV-2295 (DT), 1993 WL 264557, at *6 (C.D. Cal. June 10, 1993) (banning defendant from telemarketing). The bans, as is the case here, were imposed "on otherwise legitimate behavior based on the past conduct of defendants as a means of preventing potential future law violations." *Five-Star Auto Club*, 97 F. Supp. 2d at 536. Accordingly, the injunctive relief that Plaintiff seeks, including a ban on using wage assignment clauses, is appropriate.

Also, the proposed injunction prohibits making false or misleading statements or representations of material fact. Defendants made false representations about their legal authority to garnish wages, and therefore, a

prohibition on false and misleading statements tracks the evidence in the case. Additionally, it is appropriate to extend this prohibition beyond garnishments so that Defendants do not simply continue unlawful conduct by making small changes to their business model. Courts are empowered to grant fencing in relief. "'[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents 'must expect some fencing in'." *FTC v. Ruberoid, Co.*, 343 U.S. 470, 473 (1952); *FTC v. Colgate-Palmolive Co.*, 380 U.S 374, 395 (1965) ("[it is] reasonable for the Commission to frame its order broadly enough to prevent [defendants] from engaging in similarly illegal practices in the future.").

Furthermore, the proposed injunction limits where Defendants can sue consumers because Defendants' practice of filing collection lawsuits against non-resident consumers in tribal court violated the FTC Act. The remaining provisions of the proposed injunction involve monitoring and compliance provisions, record keeping provisions, and a provision that the Court retains jurisdiction. These are all common order provisions found in FTC enforcement actions. It is important to be able to monitor the Defendants, and ensure their compliance, so that any future law violations can be detected and stopped as early as possible. *See FTC v. Career Assistance Planning, Inc.*, No. 1:96-CV-2187, 1997 US. Dist. Lexis 17191, at *10-11 (N.D. Ga. Sept. 19, 1997) (finding ancillary relief necessary to monitor defendants' compliance with the terms of the order and to ensure that defendants do not perpetrate new frauds). The

record keeping provision is warranted so that future evidence is not destroyed. Finally, the Court should retain jurisdiction so there will be a venue to ensure compliance with the Order. Thus, the Court should impose the injunctive relief requested in the proposed order submitted with Plaintiff's Motion (Dkt. # 93).

B. Disgorgement Is Necessary and Appropriate

Disgorgement is appropriate for violations of the FTC Act. *FTC v. Neovi Inc.*, No. 06-CV-1952-JLS JMA, 2009 WL 56130, at *10 (S.D. Cal. Jan. 7, 2009), *aff'd* 604 F.3d 1150 (9th Cir. 2010); *FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008); *FTC v. Gem Merch. Corp.*, 87 F.3d at 469-470; *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011). This equitable remedy is intended to prevent a wrongdoer from keeping the fruits of an unlawful operation, as well as to deter others from violating the law. *SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006). Once the plaintiff has put forth a reasoned basis for, and approximation of, the total proposed disgorgement, the burden falls to the defendant to show why this figure is inaccurate.

As discussed, on all counts of the Complaint, Defendants either concede liability or do not dispute the material facts sufficient to establish liability. They raise no argument that the individual defendant Webb should not be liable for monetary relief. Their sole argument is that awarding disgorgement is

not warranted because "Defendants only received money pursuant to a consensual consumer loan."[29] (Def. Opp'n at 27.)

Defendants' argument fails because in a very similar matter before the District of Utah, involving garnishment of consumers' wages without a court order, the court held that once liability was established, the appropriate disgorgement amount was "the amount that Defendants received through garnishment . . . minus any amount in that figure that represents the repayment of principal on the loans in question." *LoanPointe*, 2011 WL 4348304, at *13 (awarding disgorgement in the amount collected through garnishment in excess of principal).

Here, the FTC is not seeking to disgorge "money that borrowers agreed to repay," but money that Defendants unlawfully obtained by garnishing consumers' wages without a valid wage assignment or court order or any type of procedural due process regarding whether the debt was owed. (Def. Opp'n. at 27.) As Defendants note, the "purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains." (Def. Opp'n at 28.) "[D]isgorgement should include all gains flowing from the illegal activities." *FTC v. Neovi, Inc.*, 604 F.3d

[29] The fundamental flaw of such an argument is that Defendants' misstate the nature of the Section 5 allegations against them. The FTC does not allege that Defendants' loan agreements were deceptive or make any claims regarding whether consumers owed Defendants money for nonpayment of the loans. What the FTC challenges is Defendants' deceptive representations in violation of Section 5 *in collecting* on the loans. In particular, Defendants made explicitly false claims that the Indian Commerce Clause of the US Constitution and the laws of the Cheyenne River Sioux Tribe authorize Defendants to garnish the wages of consumers without a court order. Defendants also engaged in unfairness in disclosing consumers' debts to third parties, namely consumers' employers.

1150, 1159 n.8 (9th Cir. 2010). Defendants also are correct that "[c]ourts distinguish between illegally-obtained profits and legally obtained profits when considering the amount of disgorgement." (Def. Opp'n. at 28.) Yet, Defendants fail to distinguish that the disgorgement that the FTC seeks is to deprive Defendants of the illegally obtained profits they received from garnishing consumers' wages.

The undisputed facts show that Defendants collected $1.5 million in consumer wages through their garnishment packages that violated Section 5 of the FTC Act. However, the FTC does not seek to disgorge the entire $1.5 million, which includes principal owed on the debt, but rather seeks a disgorgement judgment of $417,740 in fees, interest, finance charges, and other miscellaneous items collected. This is precisely the type of relief awarded in *LoanPointe*. Once the FTC has put forth a reasoned basis, the burden shifts to Defendants to show why the figure is inaccurate. Defendants fail to put forth any evidence that the FTC's disgorgement calculation is improper. Thus, the FTC is entitled to a judgment requiring that Defendants disgorge $417,740 to remedy their violations of the FTC Act as alleged in Count I.

C. Civil Penalty Is Necessary and Appropriate

The FTC also seeks a civil penalty for Defendants' rampant violations of the Credit Practices Rule.

In determining the amount of a civil penalty under the Credit Practices Rule, the Court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business,

and such other matters as justice may require. 15 U.S.C. § 45(m)(1)(C) (2011). For their numerous violations, Defendants face a substantial amount of penalties. The maximum penalty for each violation occurring on or after February 10, 2009 is $16,000 per violation, or per day of a continuing violation.[30] Defendants' actions caused significant harm to consumers and warrant substantial penalties. The Credit Practices Rule is intended to limit: (1) interference with employment relationships and (2) disruption of family finances. *See Am. Fin. Servs. Ass'n,* 767 F.2d at 974-75. Defendants' actions violated these substantial interests.

With respect to Count IV, it is undisputed that Defendants collected a total of $35,828,675 from consumers on loans with a wage assignment clause that violated the Credit Practices Rule. Multiplying the allowable penalty ($16,000 per violation) by the number of loans containing a violative wage assignment clause (approximately 72,195), would result in an astronomical penalty calculation.[31] But, the FTC is merely seeking $3,800,000 for 241 days of a continuing violation in which consumers could not revoke the wage assignment after 10 days of submitting an application.[32] In Defendants'

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[30] Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note); 16 C.F.R. § 1.98 (2013), 61 Fed. Reg. 54548 (Oct. 21, 1996); 74 Fed. Reg. 857 (Jan. 9, 2009).

[31] The civil penalty would be $1,155,120,000.

[32] Although Defendants modified their wage assignment clause on June 7, 2010 to make it less egregious, the modification still violated the Credit Practices Rule. However, the FTC considered it as a mitigating factor in proposing the current civil penalty amount.

Opposition, they do not assert an inability to pay[33] the requested civil penalty or that the amount of the penalty would prevent them from continuing to do business.[34] (Def. Opp'n. at 32.)

The undisputed facts do not support Defendants' argument that they engaged in these practices in good faith. Defendants undoubtedly know about the Credit Practices Rule because they are in the business of extending credit through consumer loans, and because they modified the wage assignment clause somewhat. Defendants chose to forego even the most basic due diligence about the statutes and regulations that govern their chosen business. A basic search of the FTC's website, for example, would have alerted them to the Credit Practices Rule and business guidance materials about the Rule. They also employed language in their garnishment request packets that, at the very least, they should have known was deceptive.[35] None of this bespeaks of Defendants doing business in good faith. Moreover, as noted above, by

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[33] According to Defendant Webb's financial statements, he has substantial personal assets. These financial statements, including tax returns, are available for *in camera* review at the request of the Court.

[34] Defendants contend that they "may be unable to continue [their] growth." While continued growth is not an enumerated civil penalty factor, Defendant have been able to expand their operation to a new location in Eagle Butte since signing the preliminary injunction. Their expansion suggests that Defendants are financially stable and their common enterprise is performing well.

[35] Defendants repeatedly assert that their wage assignments are legal under tribal law (albeit they cannot point to any tribal law that supports their assertion). Yet, they fail to acknowledge that they were not attempting to enforce a wage assignment against another tribal member on tribal land where it is allegedly legal to garnish wages without a court order, but sending the wage assignment clauses off the reservation to unsuspecting employers.

recommending a civil penalty lower than the statutory maximum amount, the FTC has already factored in any potential good faith. Thus, the FTC is entitled to judgment for $3,800,000 as a civil penalty for Defendants' violations of the Credit Practices Rule as alleged in Count IV.

VIII. CONCLUSION

The record conclusively establishes that Defendants' made false representations that they were authorized under the law to garnish the wages of consumers without a court order; unfairly disclosed consumers' debts to third parties; violated the Credit Practices Rule and EFTA; and made deceptive and unfair representations regarding their ability to sue consumers in tribal court. Record evidence incontrovertibly establishes that Defendants obtained $417,740 in ill-gotten gains that should be disgorged and that they are liable for civil penalties in the amount of $3,800,000 for their violations of the Credit Practices Rule. And, Plaintiff's uncontroverted Material Facts clearly establish that without broad and strong injunctive relief these Defendants will continue to violate the law. Accordingly, the Court should enter judgment in favor of Plaintiff with respect to Counts I and III-VII, and impose the injunctive and monetary relief requested in the proposed order submitted with Plaintiff's Motion.

Dated: March 26, 2013.

Respectfully submitted,

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D.S.D. Civ. LR. 7.1.B(1) WORD COUNT COMPLIANCE CERTIFICATE

I, LaShawn M. Johnson, certify that Plaintiff's Reply to Defendants' Opposition to Summary Judgment complies with the word count limitation in D.S.D. Civ. LR. 7.1.B(1) (specifying that a court filing shall not be longer than 12,000 words). In preparation of this memorandum, I used Microsoft Word 2010, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above referenced memorandum contains 10,154 words.

Dated: March 26, 2013.

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CERTIFICATE OF SERVICE

I, Cheryl Schrempp DuPris, do hereby certify that on this 26th day of March, 2013, I caused copies of the foregoing Plaintiff's Reply to Defendants' Opposition to Summary Judgment to be served upon the following, via electronic filing, to-wit:

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