UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF AND AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Plaintiff Federal Trade Commission ("FTC"), moves this Court, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act, 15 U.S.C. § 53(b) and 57b and Federal Rule of Civil Procedure 65(b), for a Temporary Restraining Order ("TRO"):

A. Temporarily restraining Defendants from making certain misrepresentations about wage garnishment; or contacting consumers' employers or co-workers to seek wage garnishment;

B. Temporarily restraining Defendants from obtaining contracts from consumers containing unlawful wage assignment clauses or receiving any funds pursuant to such wage assignment clauses;

C. Temporarily restraining Defendants from conditioning the extension of credit on mandatory preauthorized electronic fund transfers;

D. Requiring Defendants to make an accounting of their present financial condition;

E. Requiring Defendants to serve a copy of the requested Order on all employees, agents, and independent contractors;

F. Providing other equitable relief; and

G. Requiring Defendant to show cause why a preliminary injunction should not issue extending the foregoing temporary relief until the merits of the FTC's allegations are finally adjudicated.

The grounds for this motion are set forth in the accompanying memorandum of points and authorities and a proposed TRO has also been filed herewith.

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Dated: Sept 6, 2011

Respectfully submitted,

WILLARD K. TOM
General Counsel

LASHAWN M. JOHNSON, DC Bar #475164
K. MICHELLE GRAJALES
NIKHIL SINGHVI
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-3158
Washington, DC 20580
(202) 326-3057 (Johnson)
(202) 326-3172 (Grajales)
(202) 326-3480 (Singhvi)
(202) 326-3768 (facsimile)
Email: ljohnson@ftc.gov, mgrajales@ftc.gov

BRENDAN JOHNSON
United States Attorney

CHERYL SCHREMPP DUPRIS
Assistant United States Attorney
P.O. Box 7240
Pierre, SD 57501
(605) 224-5402 (telephone)
(605) 224-8305 (facsimile)
Email: cheryl.dupris@usdoj.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

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PAYDAY FINANCIAL, LLC, et al.,	*	
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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF AND AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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I. INTRODUCTION

Defendants engage in unlawful and egregious payday lending and collection practices, taking advantage of vulnerable consumers who often live paycheck to paycheck and resort to taking out high-interest payday loans as a means to make ends meet. In their collection efforts, Defendants engage in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Defendants' unlawful tactics include using spoofed versions of the federal government's forms to misrepresent that Defendants, like the federal government, have the legal right to garnish wages without obtaining a court order. Specifically, Defendants deceptively proclaim that the Indian Commerce Clause of the U.S. Constitution and the laws of the Cheyenne River Sioux Tribe permit such garnishment. The Indian Commerce Clause does no such thing. Instead, it grants Congress the authority to "regulate Commerce . . . with the Indian tribes." U.S. CONST. ART. I § 8.

Further, tribal law does not allow Defendants to garnish wages without a court order of non-tribal members working for non-tribal employers nationwide. *See infra* Section IV.C. Notably, Defendants do not offer payday loans to residents of the Cheyenne River Sioux Indian Reservation or the state of South Dakota. *See* PX07, Att. O, p. 134; Att. S, p. 173; Att. T, p. 176; Att. V, p. 199; Att. AC, p. 322.[1] Although the architect of Defendants' scheme is a member of the Cheyenne River Sioux Tribe, he is not a Tribal official, and all Corporate Defendants are South Dakota corporations. Defendants admit that they do not lend within the Tribe and are not acting in any official capacity for the Tribe, and do not otherwise have any legal or factual basis

[1] "PX" references in this memorandum refer to Plaintiff's Exhibits filed contemporaneously with this memorandum.

to shield their interstate lending and collection activity from federal law. *See* PX07 Att. O, p. 134; Att. S, p. 173; Att. T, p.176; Att. V, p. 199; Att. AC, p. 322 (admitting that they do not lend to the Tribe); PX07 Att. O, p. 130; Att. R, p. 156; Att. S, p. 167 (admitting that they are not owned or operated by the Tribe). Further, during their collection process, Defendants also falsely represent to consumers' employers that they have notified consumers of the garnishment request and have provided consumers the opportunity to dispute the debt. Finally, they unfairly disclose to third parties the identity of consumers who have taken out payday loans and are allegedly delinquent in repaying the loans.

In addition to their deceptive and unfair collection practices, Defendants include two plainly unlawful provisions in their payday loan contracts with consumers. Specifically, in violation of the Credit Practices Rule, 16 C.F.R. § 444, Defendants include a wage assignment clause in their loan documents that purports to give Defendants the right to garnish consumers' wages upon a claimed default. This clause – which Defendants bury in a series of small print terms and conditions[2] – would deprive consumers of their hard-earned money and disrupt family finances without any of the procedural safeguards of a court proceeding. Further, in violation of the Electronic Fund Transfer Act ("EFTA"), Defendants include in their loan contracts a provision requiring consumers to agree to preauthorized electronic transfers from their bank accounts in order to obtain a payday loan. The wage assignment and preauthorized transfer language constitute blatant violations of federal law and prey on vulnerable consumers.

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[2] Defendants typically provide copies of consumers' loan contracts to borrowers in small print, whereas they provide copies of consumers' loan contracts to borrowers' employers in ordinary size print. *Compare* PX01, Att. A, pp. 11-15; PX03, Att. A, pp. 12-17; PX04, Att. A, pp. 12-15; *with* PX02, Att. B, pp. 10-17; PX05, Att. E, pp. 27-34; PX06, Att. C, pp. 21-24.

To put an immediate stop to Defendants' illegal activities, Plaintiff Federal Trade Commission ("FTC" or "Commission") seeks issuance of a Temporary Restraining Order ("TRO") pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b. The proposed TRO would enjoin Defendants' illegal practices, require Defendants to report promptly certain information regarding their business practices, and preserve documents.[3] These measures are necessary to prevent continued consumer injury and protect the Court's ability to order effective final relief. Finally, the FTC requests that the Court direct Defendants to show cause why a preliminary injunction should not issue pending a final decision in this matter.

II. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the FTC's claims pursuant to 15 U.S.C. §§ 45(a) and 53(b) and 28 U.S.C. §§ 1331, 1337(a), and 1345. As demonstrated below in Section IV.C, the federal statutes and regulations at issue here apply to all persons, including Indians, and Defendants therefore cannot raise any plausible jurisdictional defense. Venue in this district is proper pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b)-(c).

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[3] Courts in this Circuit have ordered temporary restraining orders and other ancillary relief in circumstances similar to those found here. *See, e.g.*, *FTC v. Real Wealth, Inc.*, Case No. 4:10-CV-00060-FJG (W.D. Mo. January 21, 2010) (granting FTC's TRO with asset freeze, expedited discovery, and financial reporting); *FTC v. Business Card Experts, Inc.*, Case No. 0:06-CV-04671-PJS (D. Minn. November 29, 2006) (granting FTC's *ex parte* TRO with appointment of receiver, asset freeze, and expedited discovery, including financial reporting); *FTC v. Kruchten*, Case No. 01-523- ADM/RLE (D. Minn. May 10, 2001) (granting FTC's *ex parte* TRO with appointment of receiver and asset freeze); *FTC v. Neiswonger*, No. 4:96-CV-2225-SNL (E.D. Mo July. 17, 2006) (granting FTC's *ex parte* TRO with appointment of reciever, asset freeze, and expedited discovery); *FTC v. TG Morgan*, Case No. 4:91-CV-638-DEM (D. Minn. Aug. 26, 1991) (granting FTC's *ex parte* TRO with asset freeze, and immediate access); *FTC v. Security Rare Coin & Bullion Corp.*, Case No. 3:86-CV-1067 (D. Minn. Dec. 29, 1986) (granting FTC's *ex parte* TRO with asset freeze and financial accounting).

III. FACTS

A. The Parties

1. The Federal Trade Commission

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. § 41 *et seq*. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the Credit Practices Rule, 16 C.F.R. § 444, which prohibits unfair and deceptive credit practices and EFTA, 15 U.S.C. §§ 1693-1693r, which regulates the rights, liabilities, and responsibilities of participants in electronic fund transfer systems.

The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, the Credit Practices Rule, and EFTA, and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), 57b, 1693o(c); *see FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991).

2. The Defendants

Defendant **Payday Financial, LLC** ("Payday Financial") was formed by Defendant Martin A. "Butch" Webb ("Webb") as a South Dakota limited liability company on October 22, 2007. Its principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. E, pp. 54, 56. Webb is Payday Financial's only managing member. PX07, Att. E, p. 56. Payday Financial, under Webb's control, incorporated each Corporate Defendant except for Financial Solutions, LLC (a separate Webb company). PX07, Att. A, p.18; Att. C, p.

36; Att. D, p. 46; Att. F, p. 64; Att. G, p. 74; Att. H, p. 84; Att. I, p. 93. Payday Financial also served as the sole managing member of each Corporate Defendant, except for Financial Solutions, LLC, until at least February 2011.[4] PX07, Att. A, pp. 18, 22-23; Att. C, pp. 36, 40-41; Att. D, pp. 46, 50-51; Att. F, pp. 64, 68-69; Att. G, pp. 74, 78-79; Att. H, p. 84; Att. I, p. 93. Payday Financial advertises and offers its payday loans to consumers through the Internet websites www.lakotacash.com, www.bigskycash.com, and www.paydayfinancialllc.com. PX07, Att. O, pp. 130-137; Att Q, pp. 144-154; Att. P, pp. 139-142. On its website, www.paydayfinancialllc.com, Payday Financial states that it offers payday loans through the companies Lakota Cash, Big Sky Cash, Great Sky Finance, LLC, Red Stone Financial, LLC, and Western Sky Financial, LLC. PX07, Att. P, p. 139.

Defendants **Great Sky Finance, LLC** ("Great Sky") and **Western Sky Financial, LLC** ("Western Sky") were formed by Payday Financial as South Dakota limited liability companies on May 15, 2009. Each company's principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. C, pp 34, 36; Att G, pp.72, 74. Great Sky advertises and offers payday loans to consumers through the Internet website www.greatskycash.com. PX07 ¶ 13, Att. T, pp. 176-183. Western Sky advertises and offers payday loans to consumers through the Internet website www.westernsky.com. PX07 ¶ 12, Att. S, pp. 167-174.

Defendant **Red Stone Financial, LLC** ("Red Stone") was formed by Webb as a South Dakota limited liability company on February 10, 2010. Its principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. F, pp. 62, 64. Red Stone advertises

[4] In February 2011, Payday Financial dissociated from Great Sky, Western Sky, Red Stone, Management Systems, and 24-7 Cash. Payday Financial was the only managing member for these entities; however, the entities continue to conduct business.

and offers payday loans to consumers through the Internet website www.redstonecash.com. PX07 ¶ 11, Att. R, pp. 156-165.

Defendant **Management Systems, LLC** ("Management Systems") was formed by Payday Financial as a South Dakota limited liability company on March 2, 2009. Its principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. D, pp. 44, 46. Management Systems advertises and offers payday loans to consumers through the Internet website www.managementsystemsllc.net. PX07 ¶ 14, Att. U, pp. 185-193.

Defendant **24-7 Cash Direct, LLC** ("24-7 Cash") was formed by Payday Financial as a South Dakota limited liability company on May 15, 2009. Its principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. A, pp. 16, 18. 24-7 Cash advertises and offers payday loans to consumers through the Internet website www.24sevensolution.com. PX07 ¶ 15, Att. V, pp. 195-203.

Defendants **Red River Ventures, LLC** ("Red River") and **High Country Ventures, LLC** ("High Country") were formed by Payday Financial as South Dakota limited liability companies on February 9, 2009.[5] Each company's principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. H, pp. 82, 84; Att. I, pp. 91, 93. In 2009, Red River advertised and offered payday loans to consumers through the Internet websites www.togethercash.com and www.citiviewcash.com. PX07 ¶ 18. In 2009, High Country advertised and offered payday loans to consumers through the Internet websites

[5] Red River Ventures and High Country Ventures are both currently delinquent for failing to file their annual reports. Administrative cancellations of the companies' Articles of Incorporation are pending with the South Dakota Secretary of State. *See* PX07 ¶ 5, Att. H, p. 87; Att. I, p. 96.

www.cashtransfercenter.com, www.impactcashusa.com, www.cashnetusa.com, and www.pdlloancent.com. PX07 ¶ 18. While these websites are no longer active, Red River and High Country Ventures are a part of the common enterprise through which Corporate Defendants continue to offer payday loans. *See infra* Section IV.D.2.

Defendant **Financial Solutions, LLC** ("Financial Solutions") was formed by Webb as South Dakota limited liability company on February 10, 2010. Its principal place of business is located at 612 E Street, Timber Lake, South Dakota. PX07 ¶ 5, Att. B, pp. 26 ,28.

Defendant **Martin A. "Butch" Webb** resides in South Dakota and is intimately connected to each Corporate Defendant. Webb is the owner and president of Payday Financial and he is the sole owner of Great Sky, Western Sky, Red Stone, Management Systems, and Red River.[6] PX07 ¶ 7, Att. N, p. 128, Att. AA, ¶ 4, p. 309. He serves as the registered agent of Payday Financial, Great Sky, Western Sky; Red Stone, Management Systems, 24-7 Cash, Red River, and High Country. PX07, Att. E, p.59; Att. C, p. 39; Att. G, p. 77; Att. F, p. 67; Att. D, p. 48; Att. A, p. 21; Att. H, p. 87; Att. I, p. 96. Webb served as the authorized manager of Great Sky, Western Sky, Red Stone, Management Systems, and 24-7 Cash until their managing member, Payday Financial, dissociated in February 2011. PX07, Att. C, p. 38; Att. G, p. 76; Att. F, p. 66; Att. D, p. 47; Att. A, p. 20. Webb is the organizer, managing member, and registered agent of Financial Solutions. PX07 ¶ 5, Att. B, pp. 28, 30-31. Webb also registered and pays fees associated with the domain registration and related services of Corporate Defendants. PX07 ¶¶ 16-17, Att. W, pp. 205-220; Att. X, pp. 222-299. In short, Webb, by his own admission,

[6] Webb has admitted that Payday Financial, Great Sky, Western Sky, Red Stone, and Management Systems are wholly owned by him. *See* PX07, Att. AA ¶ 4, p. 309.

created Corporate Defendants' business model, oversees the payday lending operations, and supervises office activities of Corporate Defendants. PX07 Att. AC, p. 322 (In Webb's published response to a news article written about Defendants, Webb refers to "[m]y internet lending business model," "my company," "my businesses," and his personal supervision of Defendants' employees and involvement in borrowers' repayment negotiations.).

Corporate Defendants admit that they are not owned or chartered by the Tribe and do not lend in any official Tribal capacity. *See* PX07, Att. O, p. 130 ("PayDay Financial, LLC, is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions."); *see also* PX07 Att. O, p. 130; PX07 Att. R, p. 156; PX07 Att. S, p. 167. Webb is a member of the Cheyenne River Sioux Tribe, though he does not claim to be any type of Tribal official.[7] Nor is Webb listed among the Tribal officials on the Tribe's website.[8] Moreover, Defendants acknowledge that they specifically exclude Tribe members and South Dakota residents from their payday loan offers and subsequent collection efforts. *See, e.g.*, PX07 Att. O, p. 130; PX07 Att. R, p. 156; PX07 Att. S, p. 167; *see also* PX07 Att. AC, p. 322 (Webb states, "nor do I loan to residents of the Cheyenne River Indian Reservation or the state of South Dakota.").

C. Defendants' Deceptive and Unfair Lending and Collection Practices

Since at least October 2007, Defendants have advertised and collected on payday loans. Through Internet websites and television ads, Defendants offer consumers throughout the

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[7] In separate state-initiated proceedings, Webb has filed a Tribal certificate indicating his membership in the Tribe. *See* PX07, Att. AB, p. 317.

[8] *See* http://www.sioux.org/English/tribal_council.php.

country (except South Dakota and Cheyenne River Sioux Tribe residents) payday loans ranging from $300 to $2,525. PX07, Att. R, p. 161; Att. S, p. 167. Defendants collect on those loans through Payday Financial, using the d/b/a "Lakota Cash" and "Financial Solutions." PX01 ¶ 3, Att. A, p. 5; PX03 ¶ 3, Att. A, p. 6; PX04 ¶ 4-5, Att. A, pp. 5-6. Defendants violate federal law in both aspects of this business – lending and collection.

1. Defendants' Unlawful Lending Practices

Defendants' payday loans are short-term, unsecured, high-interest rate extensions of credit. PX02 ¶ 6, Att. B, p. 12 (consumer borrowed $500 at 537.89% APR); PX05 ¶¶ 2-3, Att. E, p. 29 (consumer borrowed $500 at 782.14% APR); PX06 ¶ 5, Att. C, p. 22 (consumer borrowed $350 at 521.429% APR). The loans are commonly referred to as "payday loans" in part because the loans often come due on the borrower's next payday.

Consumers who are interested in obtaining payday loans from Defendants complete an online application via one of Defendants' websites or call an advertised toll-free number to apply. PX02 ¶ 3; PX05 ¶ 2; PX06 ¶ 3. Regardless of how they apply, all consumers are required to sign a loan agreement electronically to indicate that they accept the terms of the loan.[9] PX05 ¶ 3, 34; *see also* PX06, Att. C, p.24; PX02, Att. B, 16-17.

Defendants include a clause in their contracts that, if legal, would irrevocably assign to Defendants future wages earned by consumers. Specifically, the clause reads:

> Should you default on this Agreement, you hereby consent and agree to the potential garnishment of wages by us or our assigns, or service agents to ensure

[9] Consumers sign for their loan by accessing the loan documents electronically and typing in their name where the document indicates "Borrower's E-Signature." *See* PX06, Att. C, p. 24; PX05 ¶ 3, Att. E, p. 34.

> repayment of this Agreement, fees and costs associated in the collection of outstanding principal and interest.

PX01, Att. A, pp. 11-12; PX03, Att. A, p. 13.[10]

Defendants bury the wage assignment clause several pages before the signature block in an approximately seven-page, small-print document. PX06, Att. C, pp 22-23; PX05 Att. E, p. 31; *see also* note 2, *supra*. The small size of the print in the loan contract and the location of the clause obscures the existence of the wage assignment clause from consumers. PX06, Att. C, p. 22; PX05, Att. E, pp. 30-31; *see also* note 2, *supra*.

Defendants' loan agreement also includes a provision that requires consumers to authorize Defendants to initiate electronic fund transfers for withdrawal of the consumer's recurring loan payments as a condition of obtaining credit.[11] PX02, Att. B, p. 13, 16; PX05, Att. E, pp. 28, 30; PX06, Att. C, pp. 21-22.

2. Defendants' Unlawful Collection Practices

Without giving consumers adequate opportunity to contest the validity of a debt or otherwise challenge a debt in court, Defendants attempt to garnish consumers' wages for purportedly delinquent loans. Defendants, through the d/b/a Lakota Cash and Financial Solutions, mail a wage garnishment packet to the consumers' employers nationwide (except for

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[10] The loan agreement also includes a "Garnishment Opt-Out" provision that states: "You may choose to opt out [of] the Garnishment provision, but only by following the process set-forth [sic] below. If you do not wish to be subject to this Garnishment Provision, then you must notify us in writing within (10) calendar days of the date of this Agreement." PX01, Att. A, pp. 11-12; PX03, Att. A, p.13. As discussed *infra* Section IV.B.1.b, this limited opt-out provision does not transform Defendants' unlawful wage assignment clause into one that meets the requirements of the Credit Practices Rule.

[11] As discussed *infra* Section IV.B.1.c, this term plainly violates EFTA.

employers located in South Dakota or on the Cheyenne River Sioux Reservation). PX01 ¶ 4, Att. A, pp. 5-10; PX03 ¶¶ 4-5, Att. A, pp. 6-11; PX04 ¶ 5, Att. A, pp. 6-11 (letter identifies Payday Financial/Lakota Cash).

Defendants' wage garnishment package is very similar, in both form and substance, to the documents the federal government sends to employers when seeking to garnish wages pursuant to the Debt Collection Improvement Act (DCIA).[12] Defendants' garnishment packet includes documents titled: (1) "Important Notice to Employer," and (2) "Wage Garnishment," which includes a "Wage Garnishment Worksheet" and an "Employer Certification." PX01 ¶ 4, Att. A, pp. 5-10; PX03 ¶ 4, Att. A, pp. 6-11; PX04 ¶¶ 4-5, Att. A, pp. 6-11.[13] Similarly, the wage garnishment package sent to employers by federal agencies seeking to garnish wages pursuant to the DCIA includes documents titled: (1) "Letter to Employer & Important Notice to Employer," (2) "Wage Garnishment Order (SF-329B)," (3) "Wage Garnishment Worksheet (SF-329C)," and (4) "Employer Certification (SF-329D)." PX07 ¶ 34, Att. AD, pp. 324-332.

In the first of the documents listed above, Defendants mimic significant portions of the federal government's "Letter to Employer & Important Notice to Employer" in their own "Important Notice to Employer":

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[12] The DCIA allows the federal government, and no other entity, to use streamlined garnishment procedures. *See* 31 U.S.C. § 3720D(a). Specifically, once the federal government has obtained a court judgment against a consumer, the federal government can seek garnishment without a court order. PX07 ¶ 33-34, Att. AD, p. 326 (federal government Letter to Employer & Important Notice to Employer).

[13] In addition to the garnishment documents listed above, Defendants also send the employer a copy of the consumer's loan application. PX01, Att. A, pp. 11-16; PX03 ¶ 4, Att. A, pp. 12-18; PX04 ¶ 5, Att. A, pp. 12-16.

Defendants' Letter	Treasury's Letter
One of your employees has been identified as owing a delinquent debt to Payday Financial LLC/Lakota Cash.	One of your employees has been identified as owing a delinquent nontax debt to the United States.
The Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux Tribe permit agencies to garnish the pay of individuals who owe such debt without first obtaining a court order.	The Debt Collection Improvement Act of 1996 (DCIA) permits Federal agencies to garnish the pay of individuals who owe such debt without first obtaining a court order.
Enclosed is a Wage Garnishment Assignment directing you to withhold a portion of the employee's pay each pay period and to forward those amounts to Payday Financial, LLC.	Enclosed is a Wage Garnishment Order directing you to withhold a portion of the employee's pay each period and to forward those amounts to us.
The employee has previously consented to such a garnishment and we have notified the employee that this action was going to take place, providing the employee with the opportunity to dispute the debt, and/or make payment arrangements.	We have previously notified the employee that this action was going to take place and have provided the employee with the opportunity to dispute the debt.

Compare PX01 ¶ 4, Att. A, p. 5; PX03 ¶ 4, Att. A, p. 6; PX04 ¶ 5, Att. A, p. 6; *with* PX07 ¶ 34, Att. AD, pp. 324-332.[14] Of course, Defendants have modified certain phrases in the letter. Most notably, they have substituted "Payday Financial LLC/Lakota Cash" for "the United States" and substituted the "Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux Tribe" for the "Debt Collection Improvement Act of 1996."[15]

[14] As discussed below, neither the Indian Commerce Clause nor the laws of the Tribe (nor any other law) permit such garnishment.

[15] The balance of the documents in Defendants' garnishment package also closely resembles the documents typically sent by federal agencies. *Compare* PX01 ¶ 5, Att. A, p. 5; PX03 ¶ 4, Att. A, p. 6; PX04 ¶ 4, Att. A, p. 6; *with* PX07 ¶ 34, Att. AD, pp. 324-332.

Defendants' letter to employers also expressly states that Defendants have obtained the consent of consumers to garnish their wages, notified consumers of their intent to garnish, and provided consumers with the opportunity to dispute the relevant debt or make payment arrangements prior to garnishment. PX01 ¶ 4, Att. A, p. 5; PX03 ¶ 4, Att. A, p. 6; PX04 ¶ 5, Att. A, p. 6. Defendants do not, however, provide consumers with adequate notice and opportunity to dispute their debts before contacting consumers' employers. For example, one consumer first learned of the wage assignment clause when a coworker in his employer's human resources department informed him that Lakota Cash was seeking to garnish his wages. PX07 ¶ 30. Another consumer believed her loan was repaid in full and called to dispute additional charges; Defendants responded by sending her employer a wage garnishment request. PX05 ¶¶ 8-10. Additionally, another consumer believed his loan was paid in full and closed his checking account. He received a letter from defendants regarding the debt and Defendants sent his employer a wage garnishment request two days later without giving him an opportunity to dispute the debt. PX06 ¶¶ 7-8.

IV. ARGUMENT

The Commission asks this Court to prevent further harm to consumers by halting Defendants' widespread deceptive and unfair practices. As set forth in detail below: (A) this Court has authority to grant the requested relief; (B) the evidence demonstrates that the Commission is likely to succeed on the merits and the equities of protecting the public support entry of an injunction; (C) Defendants cannot avoid application of federal law by claiming tribal immunity; (D) Defendants are liable for injunctive and monetary relief; and (E) a TRO and additional equitable relief are necessary to preserve effective final relief.

A. Section 13(b) of the FTC Act Authorizes this Court to Grant the Requested Relief

This Court has the authority to grant preliminary and permanent relief pursuant to the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which provides that "in proper cases the FTC may seek, and, after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b).[16] Section 13(b) confers full equitable powers on this Court. Specifically, the Eighth Circuit has held that the second proviso of Section 13(b) empowers district courts to grant not only a permanent injunction in cases involving violations of Section 5(a), but also to grant any ancillary equitable relief necessary under the circumstances to "accomplish complete justice." *Sec. Rare Coin*, 931 F.2d at 1314 (citing *Singer*, 668 F.2d at 1113); *U. S. Oil and Gas*, 748 F.2d at 1434. A case involving fraudulent representations, such as this one, qualifies as a "proper case" under Section 13(b). *Sec. Rare Coin*, 931 F.2d at 1314-1315

[16] This action is not brought pursuant to the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary injunctive relief before or during the pendency of an administrative proceeding. Because the FTC brings this case pursuant to the second proviso of Section 13(b), its complaint is not subject to the procedural and notice requirements in the first proviso. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (Congress did not limit the court's powers under the second and final proviso of § 13(b) and as a result this Court's inherent equitable powers may be employed to issue a preliminary injunction, during the pendency of an action for permanent injunctive relief); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that routine fraud cases may be brought under second proviso, without being conditioned on first proviso requirement that the FTC initiate an administrative proceeding).

(citing *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir.1988)).[17] Indeed, courts in this Circuit have granted such relief.[18]

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

The FTC has met the standard for issuance of a temporary restraining order and preliminary injunction under the standard set forth in Section 13(b) of the FTC Act, which provides that such relief is available after the court (1) determines the likelihood that the FTC will ultimately succeed on the merits, and (2) balances the equities. *See* 15 U.S.C. § 53(b); *see also World Travel Vacation Brokers*, 861 F.2d at 1029; *FTC v. Business Card Experts, Inc.*, No. 06-4671, 2007 WL 1266636, at *3 (D. Minn. Apr. 27, 2007) (citing *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) and stating that "under § 53(b), irreparable harm is presumed and the Court need only consider the FTC's likelihood of success and the balance of any conflicting equities."). In considering the likelihood of ultimate success, "the district court need only find some chance of probable success on the merits." *World Wide Factors*, 882 F.2d at 347 (citations omitted). In balancing the equities of "the public interest against private interest, the public interest should receive greater weight." *Id.*; *see also World Travel Vacation Brokers*, 861 F.2d at 1029-30. Unlike private litigants, the Commission need not prove irreparable injury,

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[17] A "proper case" includes any matter involving a violation of a law that the FTC enforces. *See, e.g., Singer*, 668 F.2d at 1113; *FTC v. Amy Travel*, 875 F.2d 564, 571-72 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989). In fact, Congress observed that Section 13 "authorizes the FTC to file suit to enjoin any violations of the FTC [Act]. The FTC can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 130, 103rd Cong., 2d Sess. 15-16, reprinted in 1994 U.S. Code Cong. & Admin. News 1776, 1790-91.

[18] *See supra* note 3.

because "[h]arm to the public is presumed." *World Wide Factors*, 882 F.2d at 346; *see also Business Card Experts,* 2007 WL 1266636 at *3.

1. The FTC Has Demonstrated a Likelihood of Success in Proving Defendants' Practices Violate the FTC Act, the Credit Practices Rule, and EFTA

a. Violations of the FTC Act

Defendants violate the FTC Act by making deceptive and unfair statements in connection with their payday lending and collection practices. Section 5 of the FTC Act prohibits "unfair or deceptive practices in or affecting commerce." 15 U.S.C. § 45.

An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied* 507 U.S. 909 (1993); *Southwest Sunsites v. FTC*, 785 F.2d 1431, 1435 (9th Cir.1986); *FTC v. Real Wealth Inc.*, No. 10-0060, 2011 WL 1930401, at *2 (W.D. Mo. May 17, 2011) (citing *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 199 (9th Cir. 2006)). Express and deliberate claims are presumed material.[19] *FTC v. SlimAmerica,* 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995); *In re Thompson Med. Co.*, 104 F.T.C. 648, 788-89 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 1086 (1987).

[19] The FTC need not prove that Defendants' misrepresentations were made with an intent to defraud or deceive consumers or were made in bad faith. *See, e.g., World Travel Vacation Brokers*, 861 F.2d at 1029; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000).

The FTC need not prove that each consumer relied on Defendants' deceptive claims to establish a violation of Section 5 of the FTC Act. *Sec. Rare Coin*, 931 F.2d at 1316. "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)]." *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (citing *Sec. Rare Coin*, 931 F.2d at 1316). Rather, a "presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.* at 605-6; *see also SlimAmerica*, 77 F. Supp. 2d at 1275. Further, whether material promises are expressly misleading or impliedly misleading is of no consequence to the legal analysis. *Figgie*, 994 F.2d at 604 (there is "nothing in statute or case law which protects from liability those who merely imply their deceptive claims; there is no such loophole.").

An act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see also FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009). The FTC meets the first prong (substantial injury) by establishing, among other things, that consumers were injured by a practice for which they did not bargain. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988). Injury may be sufficiently substantial if it causes a small harm to a large class of people, *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114, at *29-32 (N.D. Ga. Sep.

30, 1997) (unpublished), or severe harm to a limited number of people. *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984).[20]

Here, Defendants engage in the following deceptive and unfair practices: (1) they deceptively represent to consumers' employers that they are legally authorized to garnish the pay of consumers without a court order; (2) they deceptively represent to consumers' employers that before sending a garnishment request to the employers that they have notified consumers of their intent to garnish and have provided consumers with the opportunity to dispute the debt; and (3) they unfairly communicate with consumers' employers and co-workers about the consumer's debt and purported delinquency. Defendants' deceptive and unfair acts and practices directed to consumers' employers violate the FTC Act to the same extent as deceptive and unfair acts and practices directed to consumers themselves.[21]

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[20] *See also* FTC Unfairness Policy Statement, Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Senate Committee on Commerce, Science, and Transportation (Dec. 17, 1980), appended to *Int'l Harvester*, 104 F.T.C. at 1070.

[21] Although the Defendants communicate their misrepresentations to third parties (consumers' employers) and not directly to consumers, the misrepresentations nonetheless result in direct harm to the consumers. *See FTC v. Guzzetta d/b/a Smart Data Systems*, Case No. 1:01-cv-02335-DGT-ASC (E.D.N.Y. Apr. 17, 2001) (finding consumers were harmed when information brokers used false pretenses, fraudulent statements, or impersonation to illegally obtain consumers' confidential financial information and sell it to third parties); *FTC v. Rapp d/b/a Touch Tone Info, Inc.*, Case No. 1:99-cv-00783-WDM (D. Colo. Apr. 21 1999) (same).

1. Defendants Falsely Represent to Consumers' Employers That Defendants Are Legally Authorized to Garnish the Pay of Consumers Without First Obtaining a Court Order

As discussed above, Defendants' "Important Notice to Employer" expressly represents to employers that Defendants are authorized under the Indian Commerce Clause of the United States Constitution and the laws of the Cheyenne River Sioux Tribe to garnish the pay of consumers who owe debts to Defendants, without first obtaining a court order. In reality, Defendants are not authorized by the cited authority or any other law to garnish wages without a court order. Similarly, Defendants deceptively, through a garnishment package mimicking that of the federal government, mislead consumers' employers into believing that the DCIA permits garnishment of their borrowers' wages without a court order.

The Indian Commerce Clause does not grant Indian tribes, individual Indians, or state-chartered businesses owned by individual Indians, any powers, much less the power to garnish wages without a court order. U.S. Const. art. I, § 8. Rather, the Clause simply confers to Congress the power to regulate commerce with Indian tribes. Similarly, the laws of the Cheyenne River Sioux Tribe do not permit Defendants to garnish the pay of non-Tribal, non-South Dakota consumers who live and work for non-Tribal employers in various states throughout the country. *See infra* Section IV.C. Accordingly, Defendants' express statements that the Indian Commerce Clause and Tribal law permit Defendants to garnish wages without court order is demonstrably false and deceptive. Indeed, the law in South Dakota (where Corporate Defendants are chartered and domiciled) prohibits garnishment of wages without a court-ordered judgment. *See, e.g.,* S.D. CODIFED LAWS § 21-18-3.1 *et seq.* (2011) (garnishment of earnings prohibited prior to judgment).

In addition to their express misstatement regarding the Constitution and Tribal law, Defendants deceptively imply that they can make use of the streamlined collection procedures in the DCIA. The streamlined procedures authorized by the DCIA, however, apply to federal agencies, not private debt collectors like Defendants. *See* 31 U.S.C. § 3720D(a) (permitting "the head of an executive, judicial, or legislative agency" of the federal government to use garnishment procedures without a court order). As private businesses, Defendants do not stand in the shoes of the federal government and cannot utilize the expedited garnishment procedures available to the federal government through the DCIA. Indeed, Defendants' letter to employers of consumers contains the peculiar statement that "[w]hile not applicable to tribal entities, Payday Financial LLC follows the general principals [sic] of the Debt Collection Improvement Act of 1996 (DCIA)." PX01 ¶ 4, Att. A, p. 5; PX03 ¶ 4, Att. A, p. 6; PX04 ¶ 5, Att. A, p. 6. As with their misguided reference to the U.S. Constitution, Defendants' inapt reference to the DCIA serves no purpose other than to attempt to confuse consumers' employers through passing mention of an authority that seems familiar and credible. This ruse is particularly evident given Defendants' mimicking of the forms used by the federal government under the DCIA. This implied misstatement is material because, if accepted by employers, it would cause financially distressed consumers to receive less than their full wages without the protection of court proceedings to ensure the existence and legality of their purported debts and delinquency.

2. Defendants Falsely Represent to Consumers' Employers That Before Sending a Garnishment Request to the Employers, Defendants Have Notified Consumers of Their Intent to Garnish and Have Provided Consumers with the Opportunity to Dispute the Debt

The "Employer Notice" that Defendants send to consumers' employers expressly states that they "have notified the employee that this action was going to take place, providing the employee with the opportunity to dispute the debt, and/or make payment arrangements." PX01 ¶ 4, Att. A, p. 5; PX03 ¶ 4, Att., A, p. 6; PX04 ¶ 5, Att. A, p. 6. This statement is false. When attempting to garnish consumers' wages, Defendants do not in fact provide consumers with sufficient notice and opportunity to dispute the debt. In fact, some victims of Defendants' scheme indicate that they first became aware of Defendants' collection efforts for the payday loans *after* they attempted to dispute the debt. PX05 ¶¶ 8-10 (consumer believed loan was repaid in full and called to dispute additional charges and Defendants responded by sending her employer a wage garnishment request); PX06 ¶¶ 7-8 (consumer not given the opportunity to dispute debt before Defendants sent consumer's employer a wage garnishment request two days after contacting consumer about debt).

At most, Defendants may argue that their loan documents include a clause permitting wage garnishment and, therefore, consumers were on notice that Defendants would attempt to garnish their wages and contact their employers about their debts. The generalized language of that clause hardly constitutes the particularized notice and dispute right that Defendants claim in the loan applications forms. The fact that the original lending document contained a *prospective* wage assignment clause does not put consumers on notice that Defendants would *later* attempt to

assert a default and garnish their wages, without adequate notice and opportunity to dispute. Indeed, it would have been impossible to dispute the debt at the time the loan was originated and, importantly, Defendants do not give notice and adequate opportunity to dispute the debt at the later point in time at which Defendants claim a default.

Moreover, the wage assignment clause is located near the middle of the document. It also is several pages from the signature block, which is located at the end of an approximately seven-page, small-type document. Therefore, consumers likely are unaware of the existence of the clause until after Defendants attempt to garnish their wages.[22] *See* PX07 ¶ 30 (consumer was not aware of the wage assignment clause in contract); PX06, Att. C, pp. 22-23, 25; PX05, Att. E, pp. 31, 34 (detailing location of wage assignment clause and signature block); *see also note* 2, *supra*.

Thus, Defendants' misrepresentation regarding consumers' notice and opportunity to dispute debts constitutes a deceptive act or practice in violation of Section 5 of the FTC Act.

3. Defendants Unfairly Disclose the Existence and Amount of Consumers' Purported Debt and Delinquency to Employers and Co-Workers

As part of their collections practices, Defendants routinely communicate with consumers' employers and co-workers and reveal consumers' debt, and their supposed delinquency regarding the debt, without consumers' knowledge or consent. This practice is unfair. When Defendants send garnishment packets directly to consumers' employers, the communication circumvents the judicial garnishment process and pressures consumers to forgo the procedural safeguards available in court. This practice is likely to cause substantial harm to consumers and their

[22] To be effective, disclosures must be clear and conspicuous. *Thompson Medical Co.*, 104 F.T.C. 648, 842-43 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1086 (1987).

employers. Employers and consumers are likely to experience reduced productivity while having to deal with Defendants' purported wage garnishment notices, the validity of which have not been tested in court. Further, if employers become aware that an employee owes a debt, particularly for failure to repay a payday loan, the consumer may suffer lost opportunities and potential sanctions. Because Defendants routinely send the garnishment packets without any notice to consumers, consumers cannot reasonably avoid these harms. No valid countervailing benefit to consumers or to competition occurs as a result of Defendants' communications with consumers' employers and co-workers regarding their alleged debts, particularly given that Defendants' communications occur as a result of their unlawful attempt to garnish wages without a court order. Thus, Defendants' communications constitute unfair acts or practices in violation of Section 5 of the FTC Act.

b. Violation of the Credit Practices Rule

Separate from their unlawful collection practices, Defendants violate federal law in their loan documents by requiring borrowers to assign their future wages to them. In 1984, the FTC promulgated the Credit Practices Rule, 16 C.F.R. § 444, to address certain unfair creditor collection remedies. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 962 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). One of the practices specifically addressed by the Credit Practices Rule was the use of wage assignment clauses – loan provisions that permit a lender to access a borrower's wages. *Id.* at 974. In promulgating the Credit Practices Rule, the FTC determined that wage assignments, unlike garnishment orders, occur without the procedural safeguards of a court hearing and an opportunity for debtors to assert defenses or counterclaims. *Id.* In addition, the FTC determined that the use of wage assignments interferes with employment relationships

and disrupts family finances. *Id.* at 974-75. Wage assignments were found to be particularly harmful because they cause injury to consumers who may have valid reasons for nonpayment. *Id.*

Accordingly, Section 444.2(a)(3) of the Credit Practices Rule prohibits lenders from including wage assignment clauses in their credit contracts unless 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.

Despite the Rule, Defendants use the very type of clause the FTC found unfair and disruptive of employment relationships and family finances. The wage assignment clause contained in Defendants' loan documents meets none of the required conditions of the Credit Practices Rule and is therefore unlawful. First, although Defendants' assignment clause includes an opt-out provision, the provision is limited: it allows a consumer to opt out only for ten days and is thus not revocable "at the will of the debtor" as required by the Rule. Second, Defendants' wage assignment clause is not a payment plan that commences at the time of the transaction; rather, it takes effect only if and when the consumer becomes delinquent. Finally, the clause does not apply only to wages already earned, but garnishes the future earnings of consumers. Accordingly, Defendants are blatantly violating Section 444.2(a)(3) of the Credit Practices Rule.

c. Violations of the Electronic Fund Transfer Act

Defendants' loan documents also clearly violate federal law by requiring preauthorized electronic transfers. Under EFTA regulations, "[n]o ... person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers."

12 C.F.R § 205.10(e). Defendants blatantly and repeatedly violate this regulation by including a mandatory preauthorized electronic fund transfer provision in all their loan contracts.

Defendants, who include a natural person (Webb) and corporations (Corporate Defendants), are "persons" within the meaning of EFTA regulations. *Id* § 205.2(j) (defining "persons" as a natural person or an organization, including a corporation). Under those regulations, "credit" is defined as the right "to incur debt and defer its payment." *Id* § 205.2(f) (definitions applicable to Regulation E). Here, Defendants extend "credit" to consumers by offering payday loans that permit consumers to "defer" payment of the balance. Further, the regulations define "preauthorized electronic transfers" as "electronic fund transfer[s] authorized in advance to recur at substantially regular intervals." *Id.* § 205.2(k). Defendants' offer of credit is conditioned on mandatory "preauthorized electronic transfers" because their financing contracts require consumers to agree to weekly or bi-weekly electronic debit entries from consumers' bank accounts. Thus, Defendants' financing contracts extend credit conditioned on mandatory preauthorized transfers in plain violation of EFTA.

2. The Equities Weigh in Favor of Granting Injunctive Relief

The public interest in protecting consumers from Defendants' deceptive and unfair payday lending and debt collection activities far outweighs any interest Defendants may have in continuing to engage in unlawful practices. When a court balances the hardships accruing to the public against a private interest, the public equities must be given far greater weight. *World Travel Vacation Brokers*, 861 F.2d at 1030; *Business Card Experts,* 2007 WL 1266636, at *3.

Furthermore, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden. *See World Wide Factors*, 882 F.2d at 347 (stating "there is no oppressive hardship to Defendants in requiring them to comply with the FTC Act [or] refrain from fraudulent representation . . ."). Indeed, Defendants "can have no vested interest in a business activity found to be illegal." *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and citations omitted); *see also CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)) ("[a] court of equity is under no duty 'to protect illegitimate profits or advance business which is conducted illegally'"). Because the temporary and preliminary injunctions sought here will preclude only harmful, illegal behavior, the public equities supporting the proposed injunctive relief outweigh any burden imposed by such relief on Defendants. *See, e.g., Nat'l Soc'y of Prof'l. Eng'rs v. United States*, 435 U.S. 679, 697 (1978) (finding that district court is empowered to fashion appropriate restraints to avoid recurrence of violations of statutory law).

C. Defendants Cannot Avoid Application of Federal Law by Claiming Tribal Immunity

As discussed above, Defendants' loan documents and garnishment materials make repeated references to Tribal law. To the extent Defendants are arguing that they do not have to follow federal law because one Defendant is a Tribal member, such an argument would be without merit.

The FTC Act, Credit Practices Rule, and EFTA undoubtedly apply to Defendants' interstate lending and collection operations. First, these laws, like other federal laws,

presumptively apply to all persons, including Indians. Second, there is no infringement on the Tribe's sovereignty posed by federal regulation of Defendants' lending and collection activity.

First, it is well settled that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) (quoted in *Equal Employment Opportunity Comm'n v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993)); *Alltel Commc'n LLC v. Oglala Sioux Tribe*, Civ. No. 10-5011-JLV, 2011 WL 796409, at *5 (D.S.D. Feb. 28, 2011) (citing *Tuscarora*). This principle also applies to agency regulations promulgated pursuant to statute. *See Phillips Petroleum Co. v. United States Envtl. Prot. Agency*, 803 F.2d 545, 556 (10th Cir. 1986) (applying *Tuscarora* presumption in challenge to applicability of federal statute and regulations on Indian lands). Accordingly here, the applicable federal statutes and regulations, *i.e.*, the FTC Act (15 U.S.C. § 45 *et seq.*), the Credit Practices Rule (16 C.F.R. § 444 *et seq.*), and EFTA (15 U.S.C. § 1693 *et seq.*), presumptively apply to all persons, including Indians and, therefore, Defendants. Indeed, Defendants have admitted in another proceeding that "[a]s a general rule, Native Americans are subject to federal and tribal law, not state law." PX07, Att. AA ¶ 9, p. 310.

Second, there is no potential infringement to Tribal sovereignty posed by applications of the federal laws at issue here. In certain cases, federal laws of general applicability are found not to apply on Indian lands when they relate to subject matters traditionally left to tribal self-government. *See Fond du Lac*, 986 F.2d at 248 (federal age discrimination law did not apply to Indian employee's age discrimination claim against employer wholly owned and operated by tribe). Here, the activity being regulated does not interfere with the Tribe's self-government

because the lending and collection activity occurs only between Defendants – a Tribal member and South Dakota Corporations – and non-Tribe, out-of-state individuals and employers, and because the Defendants do not act in any official Tribal capacity. *See In re Nat'l Cattle Cong.*, 247 B.R. 259, 265 (Bankr. N.D. Iowa 2000) ("A tribe's commercial dealings with non-Indians are not 'matters dealing with the tribe's right to self-governance.'") (internal quotations omitted).

Here, as noted above, Defendants confine their lending and collection activity to borrowers outside the Tribe and outside of South Dakota. Unlike in *Fond du Lac*, Defendants' challenged business activities are thus exclusively targeted outside of the Tribe, and cannot be characterized as "strictly internal." *See Fond du Lac*, 986 F.2d at 248-249. Indeed, the Indian Commerce Clause, cited and relied upon by the Defendants in their garnishment materials, provides that Congress "shall have Power ... [t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8. Under these circumstances, Defendants cannot credibly contend that their lending to and collection from non-Tribal, non-South Dakota residents and their employers has any affect on Tribal self-government and is outside the power of the federal government.

Moreover, these Defendants do not act in any official Tribal capacity and cannot assert Tribal immunity from federal courts and federal law. The Supreme Court has held that individual members of an Indian tribe are not entitled to immunity to the same extent as a tribe. *Puyallup Tribe, Inc. v. Dep't of Game of the State of Washington*, 433 U.S. 165, 171-72 (1977) (cited in *Alltell Commc'n, LLC v. DeJordy*, Civ. No. 10-MC-00024, 2011 WL 673766, at *6 (D.S.D. Feb. 17, 2011)). Accordingly, courts have routinely rejected immunity claims from Indian persons and entities who, like Defendants, act in their own commercial interests and not in any official tribal

capacity, even if business is conducted from within Indian lands. *See, e.g., Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 477 (E.D.N.Y. 2009) (tobacco shop located on tribal land, licensed by the tribe and owned by an Indian, was not an arm of the tribe entitled to tribal immunity from violations of the Racketeer Influenced and Corrupt Organizations Act, the Lanham Act, and state consumer protection laws; the owner of the shop, a tribal chief, was entitled to immunity only for official tribal acts and not in his capacity as owner of the shop); *In re Stringer*, 262 B.R. 347, 348-50 (Bankr. W.D.Pa. 2001) (court had jurisdiction over Indian debtor and business located on Indian land, where "there is no allegation that the *individual* is an official of the tribe or that the operation of the individual's business was done in an official capacity for the tribe") (emphasis in original) (citing *Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co.,* 84 B.R. 638 (D.S.D. 1988)).

Webb is a member of the Cheyenne River Sioux Tribe, but he is not an official thereof.[23] Corporate Defendants state that their common office is physically located on Tribal land, but that fact alone would not confer upon them any immunity. *See Gristede's Foods*, 660 F. Supp. 2d at 478 (testimony that businesses located on tribal grounds must be licensed by the Tribe was insufficient to show arm of the Tribe). Indeed, as noted above, Corporate Defendants are all chartered under South Dakota law, and themselves state that they are not owned or operated by the Tribe. PX07, Att. O, p. 130 ("PayDay Financial, LLC, is owned wholly by an individual

[23] In various state-initiated proceedings, Webb has asserted various immunity defenses but has never claimed to be a Tribal official. Nor is Webb listed among the Tribal officials on the Tribe's website. *See* http://www.sioux.org/English/tribal_council.php.

Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions.").

D. The Liability of Defendants

1. Webb Is Liable for Injunctive and Monetary Relief

Webb is liable for injunctive and monetary relief for law violations committed by Corporate Defendants. To obtain an injunction against an individual, the FTC must show that the individual participates directly in the acts or practices or has authority to control the company involved in the unlawful practices. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *Amy Travel*, 875 F.2d at 573; *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp 1282, 1292 (D. Minn. 1985). "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573 (citing *Kitco*, 612 F. Supp. at 1292); *Publ'g Clearing House*, 104 F.3d at 1170-71; *U.S. v. Hopkins Dodge Sales, Inc.*, 661 F. Supp. 1155, 1158 (D. Minn. 1987) (holding individual defendants liable for permanent injunctive relief where they were in a position of high authority and had management responsibility for corporate defendants).

An individual is liable for monetary relief for a company's violation when the individual had actual or constructive knowledge of the deceptive acts or practices. *Kitco*, 612 F. Supp. at 1292; *Publ'g Clearing House*, 104 F.3d at 1171; *Amy Travel*, 875 F.2d at 573; *see also U.S. v. Johnson*, 541 F.2d 710, 712-713 (8th Cir. 1976) (finding the individual defendant, as the organizer, sole stockholder, and chief executive of corporate defendant who was responsible for

the daily operation of the company, liable for civil penalties assessed for violation of FTC order to cease and desist). This knowledge element, however, need not rise to the level of subjective intent to defraud. *Amy Travel*, 875 F.2d at 574 (citing *U.S. v. Johnson*, 541 F.2d at 712-13). Instead, the Commission may satisfy the knowledge requirement by showing the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. *Amy Travel*, 875 F.2d at 574 (citing *Kitco*, 612 F. Supp. at 1292). Participation in corporate affairs is probative of knowledge. *Amy Travel*, 875 F.2d at 564.

Here, Webb satisfies both standards of liability. First, Webb wholly owns Corporate Defendants. *See* PX07, Att. AA ¶ 4, p. 309. As the only officer or member of Corporate Defendants identified in public filings, Webb has authority to control the corporations' activities. In his roles as (1) sole owner of Defendants Payday Financial, Great Sky, Western Sky, Red Stone, Management Systems; (2) managing or authorized manager of Defendants Payday Financial, Great Sky, Western Sky, Red Stone, 24-7 Cash, Management Systems, and Financial Solutions; and (3) registered agent of all Corporate Defendants, Webb participates directly in Corporate Defendants' deceptive and unfair lending and collection practices. Specifically, Webb created the business model of Corporate Defendants, oversees their day-to-day lending activities, and supervises the office activities of Corporate Defendants. PX07, Att. AC, p. 322. Indeed, Webb appears to be the singular figure directing all aspects of Corporate Defendants' payday lending operation. As such, Webb has knowledge of the companies' wrongful acts, and accordingly, he should be enjoined from violating the FTC Act, the Credit Practices Rule, and

EFTA, and held liable for consumer redress or other equitable monetary relief in connection with Corporate Defendants' activities. Preliminary relief, therefore, is appropriate against him.

2. Corporate Defendants Operate as a Common Enterprise and Are Jointly and Severally Liable for the Law Violations

The relief sought is appropriate against all Corporate Defendants because they operate as a common enterprise under the leadership and control of Webb. "Where one or more corporate entities operate as a common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd* 312 F.3d 259 (7th Cir. 2002). Courts have found a common enterprise where companies share common control, office space, employees, interrelated funds, or other factors. *See, e.g., FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). Where the same individuals transact business through a "maze of interrelated companies," the whole enterprise may be held liable as a joint enterprise. *See id.* (quoting *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964)). As participants in a common enterprise, all Corporate Defendants are jointly and severally liable for violations of the FTC Act. *FTC v. Bay Area Bus. Council, Inc.*, 2004 WL 769388, at *12 (N.D. Ill. 2004) (citing *FTC v. Think Achievement Corp.*, 144 F. Supp.2d 993, 1011 (N.D. Ind. 2000), r*ev'd in part on other grounds*, 312 F.3d 259 (7th Cir. 2002)).

Corporate Defendants, all under Webb's control, operate as a prototypical common enterprise in the payday lending and debt collection business. As discussed *supra* Section III.A.2, Webb is the owner, managing member, authorized member, and/or registered agent of all Corporate Defendants. In addition, all Corporate Defendants share the same employees and

address at a single location in Timber Lake, South Dakota. *See* PX07 ¶ 7, Att. N, pp. 113-127. Thus, Corporate Defendants' operation satisfies the factors courts use to determine the existence of a common enterprise. Each Corporate Defendant is therefore liable for the other's violations.

E. A TRO and Additional Equitable Relief Are Necessary to Preserve Effective Final Relief

As part of the permanent relief in this case, the Commission may seek restitution for consumers harmed by Defendants' unlawful practices or disgorgement of Defendants' profits. To preserve the possibility of such relief, the Commission seeks a TRO that, consistent with the Court's authority under the FTC Act and orders in similar cases, would require that Defendants immediately cease their deceptive and unfair practices; mandate financial reporting; and require Defendants to preserve documents.

1. The Temporary Restraining Order Is Narrowly Tailored to Prohibit Defendants' Law Violations

The Commission's proposed TRO seeks to prohibit Defendants from continuing their deceptive and unfair practices. Specifically, in connection with the collection of a debt, Defendants would be prohibited from: (1) misrepresenting that they are authorized to garnish the pay of consumers without first obtaining a court order; (2) misrepresenting that they have notified the consumer of their intent to garnish and have provided the consumer with the opportunity to dispute the debt; and (3) contacting consumers' employers or co-workers unless the communication is in connection with seeking garnishment pursuant to a valid court order. In connection with the extension of credit to consumers, Defendants are prohibited from including in their contracts wage assignments clauses which do not comply with the FTC's Credit Practices Rule. Further, Defendants are prohibited from conditioning the extension of credit to any

consumer on the consumer's repayment by preauthorized electronic fund transfers. The scope of the proposed injunction is tailored to Defendants' deceptive and unfair practices and is appropriate given the scope of Defendants' scheme.

As discussed above, this Court has broad equitable authority under Section 13(b) of the FTC Act to grant ancillary relief necessary to accomplish complete justice. *See Sec. Rare Coin*, 931 F.2d at 1314. The prohibitions relating to payday lending and debt collection do no more than order that Defendants comply with the specific provisions of the FTC Act, the Credit Practices Rule, and EFTA that Defendants are violating.

2. Expedited Discovery Is Essential to Identify Defendants' Assets

Section 13(b) gives federal courts broad authority to fashion appropriate remedies for violations of the FTC Act. *See Sec. Rare Coin*, 931 F.2d at 1314. In addition to injunctive relief, the FTC will seek a final order with equitable monetary relief. To determine the scope of the harm and identify assets to effectuate final relief, the FTC requests that the Court issue an order requiring an immediate accounting of Defendants' profits and losses and assets and liabilities. The FTC requests that the Court order Defendants to complete and return to the FTC the financial disclosure forms attached to the proposed TRO. An accounting and financial statements will increase the likelihood of identifying assets pending final determination of this matter so that appropriate monetary relief can be ordered. *See, e.g., SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 676 (D.D.C. 1995) (TRO required defendants to file with the Court and serve upon the Commission a sworn financial accounting); *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 532 n.3, 537 (D.D.C. 1994) (TRO required each defendant to provide a sworn accounting of all assets). The disclosure of certain information and expedited discovery falls well within the

court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *FSLIC v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987); *Fed. Express Corp. v. Fed. Expresso, Inc.*, No. 97-CV-1219, 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction") (quoting commentary to FED. R. CIV. P. 26(d)); *FTC v. Vocational Guides, Inc.*, No. 01-0170, 2008 WL 4908769 (M.D. Tenn. Nov. 12, 2008) (finding that financial disclosure and expedited discovery are in the public interest); FED. R. CIV. P. 1, 26(d), 30(a), 33(a), and 34(b) (district courts may depart from normal discovery provisions, including applicable time frames, to meet the discovery needs of particular cases); *see also* cases cited in note 3, *supra*.

3. Preservation of Records Is Necessary to Determine the Scope of Defendants Unlawful Lending and Collection Practices

The proposed TRO also contains a provision directing Defendants to preserve records and evidence. It is appropriate to enjoin Defendants charged with deception from destroying evidence and doing so would place no significant burden on them. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (characterizing such orders as "innocuous"). Further, the hardship caused by the relief would be temporary and greatly outweighed by the public's interest in safeguarding documents and information necessary to recover assets procured through deception.

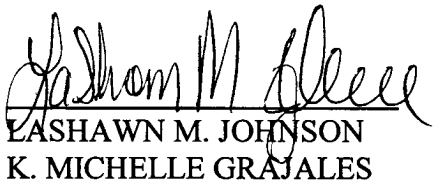
V. CONCLUSION

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

Dated: September 6, 2011

Respectfully submitted,

WILLARD K. TOM
General Counsel



LASHAWN M. JOHNSON
K. MICHELLE GRAJALES
NIKHIL SINGHVI
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-3158
Washington, DC 20580
(202) 326-3057 (Johnson)
(202) 326-3172 (Grajales)
(202) 326-3480 (Singhvi)
(202) 326-3768 (facsimile)
Email: ljohnson@ftc.gov, mgrajales@ftc.gov,
nsinghvi@ftc.gov

BRENDAN V. JOHNSON
United States Attorney

Dated: September 6, 2011

CHERYL SCHREMPP DUPRIS
Assistant United States Attorney
P.O. Box 7240
Pierre, SD 57501
(605) 224-5402 (telephone)
(605) 224-8305 (facsimile)
Email: cheryl.dupris@usdoj.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION