Eric G. Benson (Bar No. 10414)
Z. Ryan Pahnke (Bar No. 11146)
RAY QUINNEY & NEBEKER P.C.
35 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Fax: (801) 532-7543
EBenson@rqn.com
RPahnke@rqn.com

Leonard L. Gordon (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
VENABLE LLP
1270 Avenue of the Americas
24th Floor
New York, NY 10020
Telephone: (212) 370-6277
Fax: (212) 307-5598
LLGordon@venable.com
EKelly@venable.com

Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP
600 Massachusetts Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 344-4000
Fax: (202) 344-8300
SRFreeland@venable.com
MMGardner@venable.com
MAMunoz@venable.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL TRADE COMMISSION, and UTAH DIVISION OF CONSUMER PROTECTION, Plaintiffs, vs. ZURIXX, LLC; CARLSON DEVELOPMENT GROUP, LLC; CJ SEMINAR HOLDINGS, LLC; ZURIXX FINANCIAL, LLC; CRISTOPHER A. CANNON; JAMES M. CARLSON; and JEFFREY D. SPANGLER, Defendants.	**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO CERTIFY FOR APPEAL, UNDER 28 U.S.C. § 1292(B), MEMORANDUM DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No. 2:19-cv-00713 Judge Dale Kimball Magistrate Judge Evelyn J. Furse

INTRODUCTION

Defendants seek an order certifying the Court's February 26, 2020 Order Denying Defendants' Partial Motion to Dismiss (ECF No. 112) (the "Order") for appeal. The Order involves a controlling question of law as to which substantial grounds for difference of opinion exist, and immediate appeal of the Order would materially advance the termination of this litigation. *See generally* Defendants' Motion to Certify for Appeal, under 28 U.S.C. § 1292(b), Order on Defendants' Partial Motion to Dismiss (ECF No. 114) ("Defendants' Motion"). In response, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Certify for Appeal the Court's Order Denying Defendants' Partial Motion to Dismiss (ECF No. 121) ("Plaintiffs' Opposition") obfuscates Defendants' Motion in three ways.

First, contrary to Plaintiffs' assertion, a ruling by the Tenth Circuit that could substantially limit the FTC's recovery is a controlling question of law. Second, the two Tenth Circuit cases on which Plaintiffs and the Order rely do not preclude a finding that a substantial ground for a difference of opinion exists. To the contrary, the fact that neither case addressed or analyzed the issue—does Section 13(b) authorize the FTC to recover monetary relief—demonstrates that this issue is ripe for certification and interlocutory appeal. Finally, an interlocutory appeal will materially advance the ultimate termination of this litigation because the FTC's claims for equitable monetary relief under Section 13(b) will drive how these parties proceed in litigation, and, if invalidated, will streamline this case. Because the Order satisfies the three requirements for certification under Section 1292(b), Defendants respectfully request that this Court issue an order certifying the Order for appeal under Section 1292(b).

ARGUMENT

I. The FTC's Statutory Authority to Seek Monetary Relief is a Controlling Question of Law.

Whether the FTC possesses statutory authority to seek equitable monetary relief will control the contours of the remainder of this litigation. In an effort to obscure this uncontroversial proposition, Plaintiffs seek to improperly narrow the scope of what constitutes a "controlling question of law" under Section 1292(b), contending that an issue only constitutes a controlling question where it relates "to the merits of Plaintiffs' claims or the determination of liability on the merits." Plaintiffs' Opposition at 3. This is not the standard for a controlling question of law. Instead, a controlling question of law is one that is:

> (1) serious to the conduct of the litigation, either practically or legally; (2) could affect the ability of the district court to render a binding decision or materially affect the outcome of the litigation in the district court; or (3) might save time for the district court, and time and expense for the litigants.

Roberts v. C.R. England, Inc., No. 2:12-cv-00302-RJS-BCW, 2018 WL 2386056, at *2 (D. Utah Apr. 24, 2018). Accordingly, as discussed below and in Defendants' Motion, whether the FTC is entitled to obtain equitable monetary relief under Section 13(b) of the FTC Act is a controlling question of law under Section 1292(b) because the answer will unquestionably affect the practical course of this litigation, will affect the outcome of this litigation, and will save both parties time and money in litigating this issue.

In an effort to avoid this conclusion, Plaintiffs erroneously assert that questions regarding "potential or alternative remedies" can never be controlling in nature. Plaintiffs' Opposition at 3. Again, this is simply inaccurate. Indeed, questions regarding the scope of relief are routinely found to be "controlling," particularly where, as here, entitlement to such relief is "quite likely to

affect the further course of the litigation, even if it is not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). For example, in *Newsome v. Wisconsin Cent. Ltd.*, the district court pointed out that a "ruling that substantially limits the damages a plaintiff may recover is a controlling question of law." No. 13-CV-1379, 2015 WL 6872360, at *3 (E.D. Wis. Nov. 9, 2015); *see also Kostal v. Life Ins. Co. of N. Am.*, No. 09–CV–31, 2011 WL 5374432, at *1 (E.D. Wis. Nov. 7, 2011) ("[A] ruling which substantially limits the damages a plaintiff may recover has been held to be a controlling question of law."); *Mister v. Illinois Centr. Gulf. R. Co.*, 790 F. Supp. 1411, 1426 (S.D. Ill. 1992) (finding controlling question of law where the order disposed of "a large part of the damages the plaintiff had hoped to recover"); *In re Brand Name Prescription Drugs*, No. 94 C 897, 1998 WL 808992, *5 (N.D. Ill. Nov. 17, 1998) (in orders disposing of a large percentage of the plaintiff's recoverable damages, "the proper measure of damages is always a controlling question of law").

Moreover, the cases on which Plaintiffs rely are wholly inapposite as they involve parties asking a court to certify a question of how to calculate monetary relief, not whether monetary relief is available at all.[1] *See, e.g.*, *Fujitsu Ltd. v. Tellabs, Inc.*, 539 F. App'x 1005, 1007 (Fed. Cir. 2013) (denying certification of issues regarding calculation of lost profits); *Jones v. Norton*, No. 2:09-CV-730-TC, 2012 WL 1788184, at *2 (D. Utah May 16, 2012) (holding that an order

---

[1] Plaintiffs' reliance on *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269 (10th Cir. 1994), is also misplaced. That case simply does not stand for the proposition that whether a party is entitled to monetary relief can never be a controlling question. Instead, *Homeland Stores* held that because the "complaint . . . state[d] a claim and, at minimum, relief would be available in the form of damages at law, we need not decide the availability of any specific type of alternate relief here." *Id*. at 1272. The court reached this conclusion by analyzing whether the availability of alternate relief "controls the disposition of the certified order[.]" *Id*. As Defendants demonstrate, whether the FTC is entitled to equitable monetary relief under Section 13(b) not only controls the disposition of the certified order, but also controls the remainder of the litigation.

denying Plaintiffs the opportunity to plead in the alternative is not a controlling question of law because "the court's ruling does not prevent Plaintiffs from presenting their case to a jury.").

Here, the issue is not how to calculate the amount of equitable monetary relief the FTC seeks, but, rather, whether the FTC has the authority to obtain monetary relief for claims brought pursuant to Section 13(b) in the first place. The FTC will likely seek as equitable monetary relief to impose joint and several liability on each of the Defendants for Zurixx's gross sales minus refunds. Whether the FTC is entitled to seek that relief will have a significant impact on this litigation. It will affect both sides' strategic choices about the trajectory of this litigation, including decisions regarding discovery, motion practice, trial, and potential settlement.

Because the question of whether the FTC is entitled to equitable monetary relief will "materially affect the outcome of the litigation," and could "save time for the district court, and time and expense for the litigants," it is a "controlling question of law" appropriate for interlocutory appeal under Section 1292(b).

II. The Tenth Circuit's Prior Uncontested Analysis Creates a Substantial Ground for Difference of Opinion.

Defendants also satisfy the second prong of Section 1292(b) because the federal courts of appeals are split on the issue of whether the FTC is entitled to equitable monetary relief under Section 13(b), and the Tenth Circuit has not squarely addressed the issue. *Roberts*, 2018 WL 2386056, at *2 (quoting *Kell v. Crowther*, No. 2:07-cv-00359-CW, 2018 WL 813449, at *2 (D. Utah Feb. 9, 2018) (finding that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point[.]")). Here, Plaintiffs do not dispute that a circuit split exists regarding this issue. *See* Plaintiffs' Opposition at 5–7; *compare FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 783–

84 (7th Cir. 2019) (holding that FTC is not entitled to equitable monetary relief under Section 13(b)), *with, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365–67 (2nd Cir. 2011) (holding that Section 13(b) allows FTC to obtain equitable monetary relief).

Thus, the only remaining dispute between the parties is whether the Tenth Circuit directly addressed whether the FTC can obtain equitable monetary relief under Section 13(b) in *Freecom* and *LoanPointe*. Plaintiffs' Opposition at 6. A review of these decisions confirms that the Tenth Circuit has never had the opportunity to adjudicate where the issue was contested whether the FTC is entitled to equitable monetary relief under Section 13(b). *See* Defendants' Motion at 4–5, 7–8. Indeed, as courts within the Tenth Circuit have acknowledged, a circuit court has not adequately spoken on an issue "[w]hen prior precedents only 'potentially indicate the correct outcome . . . .'" *Hart v. The Boeing Co.*, No. 09 CV-01066-REB-MEH, 2010 WL 2635449, at *2 (D. Colo. June 28, 2010) (quoting *Boellstorff v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 552247, at *3 (D. Colo. Feb. 20, 2007)); *see also SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1303–04 (D. Utah 2017), *aff'd sub nom. SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019) (certifying order for interlocutory appeal where other district courts had noted that "Section 929P(b) of Dodd–Frank may have superseded the *Morrison* test, none [had] *actually decided the question*" (emphasis added)).

In prior cases, the Tenth Circuit has simply accepted, based on the parties' concessions, that the FTC is entitled to equitable monetary relief under Section 13(b). But it has never squarely decided a challenge to the FTC's authority. First, in *Freecom*, the issue presented to the Tenth Circuit was whether the district court's award of attorneys' fees and costs in favor of the defendant Haroldsen under the Equal Access to Justice Act should stand. *FTC v. Freecom*

Commc'ns, Inc., 401 F.3d 1192, 1200 (10th Cir. 2005). The defendant-appellee conceded that the FTC was entitled to consumer redress under Section 13(b) in certain cases, Brief of the Appellee Mark O. Haroldsen, *FTC v. Haroldsen*, No. 03-4063 (10th Cir. Aug. 11, 2003), at 36–37, n.17, and the Tenth Circuit's decision summarily recognized the parties' concession without analyzing the FTC's authority under Section 13(b). *Freecom*, 401 F.3d at 1202, n.6. *Freecom*'s passing reference to how other courts have analyzed the FTC's request for injunctive relief, especially without adversarial briefing, does not eliminate the difference of opinion on this issue.

Eight years later, in an unpublished opinion, the Tenth Circuit again accepted the parties' concession as to the scope of the FTC's authority in *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 699 (10th Cir. 2013) (quoting *Freecom*, 401 F.3d at 1202, n.6). *See* Defendants' Opposition to the FTC's Motion for Summary Judgment, *FTC v. LoanPointe, LLC*, No. 2:10-cv-225-DAK (D. Utah Apr. 18, 2011) (ECF No. 52), at 42 (attached hereto as Exhibit 1 for the Court's convenience) (conceding that "Section 13(b) . . . also gives equitable authority to grant ancillary relief in the form of either restitution (consumer redress) or disgorgement[,]" and citing cases outside of the Tenth Circuit); Opening Brief of Appellants, *FTC v. LoanPointe, LLC*, No. 12-4006 (10th Cir. Mar. 19, 2012) at 20 (attached hereto as Exhibit 2 for the Court's convenience) (same).

Further demonstrating that the Tenth Circuit has not spoken on this issue is the stark contrast between the Tenth Circuit's abbreviated recognition of the parties' concessions and the Seventh Circuit's decision in *Federal Trade Commission v. Credit Bureau Center, LLC*, in which the parties hotly contested—and the court conducted an in-depth assessment—of whether the FTC was entitled to equitable monetary relief under Section 13(b). 937 F.3d at 778–79 ("notably

absent was any inquiry into whether an implied remedy was compatible with the statutory text and structure or whether Congress precluded the implied remedy."). The *Credit Bureau* decision, like the *Bronson Partners* decision in the Second Circuit, are textbook examples of courts squarely analyzing this precise issue. Likewise, the Tenth Circuit should have the opportunity to revisit its assumed and unreasoned dicta. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *see also Tokoph v. United States*, 774 F.3d 1300, 1304 (10th Cir. 2014), *as amended on reh'g* (Jan. 26, 2015) ("[T]he "dicta" do not appear to be of the considered sort that would compel us to reach the suggested conclusion.").

Because the Tenth Circuit's decisions in *Freecom* and *LoanPointe* do not directly and squarely analyze whether the FTC is entitled to obtain equitable monetary relief under Section 13(b), and instead only "potentially indicate the correct outcome, . . . it is clear that there is room for reasonable debate." *Hart*, 2010 WL 2635449, at *2. Accordingly, substantial ground for a difference in opinion exists, and this issue should be certified for interlocutory appeal under Section 1292(b).

III. Defining the Scope of the FTC's Ability to Obtain Monetary Relief Will Materially Advance This Litigation.

Allowing the Tenth Circuit to squarely address whether the FTC is entitled to equitable monetary relief under Section 13(b) will materially advance the ultimate termination of this litigation. Indeed, contrary to Plaintiffs' contention that this question has no effect on the remaining claims, *see* Plaintiffs' Opposition at 8–9, whether the FTC is entitled to equitable monetary relief under Section 13(b) is an issue that will directly impact the focus of the parties' discovery efforts, and could impact settlement negotiations as to all claims. Under Section

1292(b), this conclusion alone is sufficient to satisfy the material advancement element, as "the statutory requirement is not whether an appeal might affect the outcome of the litigation, but whether it might advance its termination." *Roberts*, 2018 WL 2386056, at *3.

And, significantly, Defendants "need not show that a reversal on appeal would actually end the litigation" in order to demonstrate that guidance regarding a certified question will materially advance the litigation. *Molock v. Whole Foods Mkt. Grp., Inc.*, 317 F. Supp. 3d 1, 6 (D.D.C. 2018). Instead, "the relevant inquiry is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Id*. For example, in *Molock*, the defendant sought certification under Section 1292(b) of a court's order denying the defendant's motion to dismiss. *Id.* at 3–4. The court found that a Section 1292(b) appeal would materially advance the litigation because it has "the potential of avoiding burdensome discovery costs and conserving judicial resources in the event of a reversal[.]" *Id*. at 6. The court reasoned that if the parties were to proceed with discovery on certain of the claims, "[t]he potential time and expense of obtaining such discovery is staggering." *Id*. To the contrary, if the circuit determined that the court was wrong, "this case becomes simpler and discovery far more manageable." *Id*.

As demonstrated by *Molock*, and contrary to Plaintiffs' assertions, a Section 1292(b) appeal of an issue need not implicate a dispositive issue—one that might terminate the case altogether. Instead, a Section 1292(b) appeal materially advances the ultimate termination of litigation if it can limit drawn out, complex, and expensive discovery. That is precisely the case here, where, without Tenth Circuit review, the parties will be forced to engage in extensive

discovery that can be avoided by properly defining the scope and extent of equitable monetary relief available to the FTC.[2]

Indeed, Plaintiffs seek broad and far-reaching discovery, on a variety of topics, most of which implicate the FTC's ability to obtain equitable monetary relief. Specifically, in the Attorney Planning Meeting Report (ECF No. 66), Plaintiffs have indicated that they intend to seek discovery on a broad swath of topics, including, but not limited to: (1) the role of the individual and corporate Defendants; (2) the role of potential corporate and individual Defendants; (3) the extent of unreimbursed consumer injury; and (4) the extent to which Defendants collected or otherwise obtained information about their customers' financial success. *Id*. at 6–7. Given the breadth of these requested discovery topics and the expense of discovery, whether and what discovery proceeds on these topics necessarily turns on whether the FTC is entitled to the large amount of equitable monetary relief it seeks in this action, as the FTC must demonstrate that the burden imposed on Defendants in responding to these discovery requests is proportionate to the needs of the case. Fed. R. Civ. P. 26.

Moreover, that the Division's claims would not be directly impacted by an interlocutory appeal of whether the FTC is entitled to obtain equitable monetary relief under Section 13(b) does not vitiate the simple fact that this litigation will be materially advanced by the Tenth

[2] Though discovery is largely stayed pending the Supreme Court's decision in *Liu v. SEC*, No. 18-1501 (U.S. Nov. 1, 2019), *see* Order Granting In Part Defendants' Motion to Stay Discovery (ECF No. 108), Plaintiffs have filed objections to the Order Granting In Part Defendants' Motion to Stay Discovery, ECF Nos. 110 and 111. Should the Court affirm the order staying discovery, the Supreme Court will issue its opinion in *Liu* in the coming months, if not weeks. Alternatively, should the Court overturn the order staying discovery, the parties will immediately proceed to discovery. In both circumstances, Defendants will be subject to discovery obligations that may largely be rendered moot by the Tenth's Circuit's review of the Order at issue in Defendants' Motion.

Circuit's guidance. Contrary to Plaintiffs' argument, the test for material advancement is not whether all parties' claims would be impacted by the appeal. Instead, as discussed above, certification of a question for interlocutory appeal materially advances an action where resolution of the issue "simplif[ies] the litigation in some material way, such as by significantly narrowing the issues . . . ." *Molock*, 317 F. Supp. 3d at 6. Plaintiffs cannot avoid the simple fact that, should the Tenth Circuit decide that the FTC is not entitled to equitable monetary relief pursuant to Section 13(b), the issues in this litigation will undoubtedly be simplified, regardless of the appeal's impact on the Division's claims. Thus, that one plaintiff's claims—here, the Division's—are not directly impacted by the appeal is beside the point.

In sum, the overwhelming and burdensome amount of discovery that Plaintiffs intend to seek related to purported consumer injury will be for naught should the Tenth Circuit determine that the text of Section 13(b) does not allow the FTC to obtain equitable monetary relief. Thus, certifying this question to the Tenth Circuit to provide further guidance on the scope of equitable monetary relief provided by Section 13(b) will allow the parties to "avoid[] burdensome discovery costs and conserv[e] judicial resources in the event of a reversal," materially advancing this litigation. *Molock*, 317 F. Supp. 3d at 7.

CONCLUSION

For these reasons, Defendants respectfully request that the Court grant Defendants' Motion and enter an order stating that the Order involves a "controlling question of law," as to which there is "substantial ground for difference of opinion," and that immediate appeal "may materially advance the ultimate termination of the litigation," and further order that this case be stayed pending appeal.

DATED this 8th day of April, 2020. Respectfully Submitted,

By: */s/ Z. Ryan Pahnke*
Eric G. Benson (Bar No. 10414)
Z. Ryan Pahnke (Bar No. 11146)
RAY QUINNEY & NEBEKER P.C.

Leonard L. Gordon (*pro hac vice*)
Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO CERTIFY FOR APPEAL, UNDER 28 U.S.C. § 1292(B), MEMORANDUM DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS** to be filed electronically with the Court, which will send notice of electronic filing to counsel of record in this matter.

/s/ Z. Ryan Pahnke

#1525533

EXHIBIT 1

Ryan West (10398)
CORVUS LAW GROUP, LLC
15 West South Temple, Suite 1000
Salt Lake City, Utah 84101
Telephone: (888) 315-4375
Facsimile No. (888) 316-0929
ryan@corvuslaw.com

John J.E. Markham, II (*pro hac vice* Mass. Bar No. 638579)
MARKHAM & READ
One Commercial Wharf West
Boston, Massachusetts 02110
Telephone: (617) 523-6329
Facsimile No. (617) 742-8604
jmarkham@markhamread.com

Attorneys for Defendants LoanPointe, LLC, Eastbrook, LLC, and Joe S. Strom

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. LOANPOINTE, LLC, et al., Defendants.	Civil No. 2:10 CV 00225 DAK

OPPOSITION OF DEFENDANTS LOANPOINTE, LLC, EASTBROOK, LLC, AND JOE S. STROM TO THE FTC'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES…………………………………………………………………......iii

The FTC's Last-Minute Change Prompting Defendants' Motion to Reopen Discovery…………1

Preliminary Statement Regarding "Undisputed Facts"……………………………….…………….2

RESPONSE TO THE FTC'S "UNDISPUTED FACTS"………………………………………...5

Summary of Argument…………………………………………………………….................29

ARGUMENT………………………………………………………………...........................31

I. STANDARD ON SUMMARY JUDMENT…………………………………………..31

II. THE GetECash LOANS ARE NOT SUBJECT TO THE FAIR DEBT COLLECTION PRACTICES ACT BECAUSE DEFENDANTS WERE NOT "DEBT COLLECTORS" UNDER THE ACT……………………………………32

III. THE FTC FAILS TO SHOW THE SECTION 5 VIOLATIONS IT ALLEGES IN COUNTS I THROUGH III OF ITS COMPLAINT…………………………………34

A. Introduction…………………………………….………………….……………..34

B. Count I – Use of the Federal Agency Debt Collection Language……………….36

C. Count II – "Misrepresentation" that Borrowers Knew of Wage Assignment…...37

D. Count III – "Harm" Caused by Agreed-upon Wage Assignment………………..37

IV. THE FTC HAS FAILED TO DEMONSTRATE ITS RIGHT TO DISGORGEMENT UNDER COUNT VII CLAIMING IMPROPER WAGE ASSIGNMENTS IN VIOLATION OF THE ACT……………………………..40

A. The Language of the Wage Assignment…………………….…………………...40

V. DISGORGEMENT IS NOT A FAIR REMEDY HERE……………………………...42

VI. THE SECOND SET OF REQUESTS FOR ADMISSION SHOULD NOT BE BINDING ON DEFENDANTS…………………………………………………….45

CONCLUSION……………………………………………………………………………..45

Certificate of Service

TABLE OF AUTHORITIES

Cases

Adler v. Wal-Mart Stores, Inc.,
144 F.3d 664 (10th Cir. 1998)..........31

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)..........31

Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,
912 F.2d 1238 (10th Cir. 1990)..........31

Bushman Construction Co. v. Conner,
307 F.2d 888 (10th Cir. 1962)..........31

C.F.T.C. v. Hunt,
591 F.2d 1211 (7th Cir.1979)..........42

F.T.C. v. Brown & Williamson Tobacco Corp.,
778 F.2d 35 (D.C. Cir., 1985)..........35

F.T.C. v. Direct Mktg. Concepts, Inc.,
648 F. Supp. 2d 202 (D. Mass. 2009), aff'd, 624 F.3d 1 (1st Cir. 2010)..........42

F.T.C. v. Febre,
128 F.3d 530, 537 (7th Cir. 1997)..........43

F.T.C. v. Figgie Intern., Inc.,
994 F.2d 595 (9th Cir. 1993)..........38, 43

F.T.C. v. Gem Merchandising Corp.,
87 F.3d 466 (11th Cir. 1996)..........42

F.T.C. v. Pantron I Corp.,
33 F.3d 1088 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995)..........34

F.T.C. v. Publishing Clearing House, Inc.,
104 F.3d 1168 (9th Cir. 1997)..........36

F.T.C. v. Security Rare Coin & Bullion Corp.,
931 F.2d 1312 (8th Cir., 1991)..........38

F.T.C. v. Verity Int'l, Ltd.,
443 F.3d 48 (2d Cir. 2006)..........42-43

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.,
130 S.Ct. 1605 (2010) ……..……………………………………………………..45

In re Cliffdale Associates, Inc.,
103 F.T.C. 110 (1984) …………………………………………………..............41

Kraft, Inc. v. F.T.C.,
970 F.2d 311 (7th Cir. 1992) …………………………………………………………35

Mitchell v. General Electric Co.,
689 F.2d 877 (9th Cir. 1992) ………………………………………………..36, 37

Neff v. Capital Acquisitions & Management Co.,
352 F.3d 1118 (7th Cir. 2003) ……………………………………………………..32

Nielsen v. Dickerson,
307 F.3d 623 (7th Cir. 2002) …………………………………………………………33

Perry v. Stewart Title Co.,
756 F.2d 1197 (5th Cir.1985) ………………………………………..............33

Schwartz v. Bank of America, N.A.,
2011 WL 1135001 (D.Colo., March 28, 2011)(unpublished) …………………………..32

S.E.C. v. Bilzerian,
814 F. Supp. 116, (D.D.C. 1993) aff'd, 29 F.3d 689 (D.C. Cir. 1994) ………………….44

S.E.C. v. Blatt,
583 F.2d 1325 (5th Cir. 1978) ……………………………………………………42, 44

S.E.C. v. ETS Payphones, Inc.,
408 F.3d 727 (11th Cir. 2005) ……………………………………………………..44

S.E.C. v. First City Fin. Corp., Ltd.,
890 F.2d 1215 (D.C. Cir. 1989)…………………………………………...............42, 43

S.E.C. v. Manor Nursing Centers, Inc.,
458 F.2d 1082 (2d Cir. 1972) ……………………………………………………....42

Williams v. Countrywide Home Loans, Inc.,
504 F.Supp.2d 176 (S.D.Tex., 2007) ………………………………………………32

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,
471 U.S. 626, 105 S.Ct. 2265 (1985) ………………………………………………35

Codes

15 U.S.C. § 45 ..... 32, 41

15 U.S.C. § 53(b) 42

15 U.S.C. § 1692 et seq. 29, 32-34

16 C.F.R. 444.2(a) 3, 29, 32, 33, 38, 40

Debt Collection Improvement Act of 1996 ("DCIA"), P.L. 104-134,
Title III, Ch 10, § 31001(o)(1) codified at 31 U.S.C. § 3720D 36

Fed.R.Civ.P. 56(c) 22, 36

DUCiv R 56-1(b) 2

Defendants LoanPointe, LLC, Eastbrook, LLC (both doing business as GetECash and ECash), and Joe S. Strom ("defendants") submit this Memorandum in Opposition to the Motion for Summary Judgment filed by the Federal Trade Commission ("FTC").

The FTC's Last-Minute Change Prompting
Defendants' Motion to Reopen Discovery

On the day before the FTC filed its motion for summary judgment, which was 15 days after discovery had closed, the FTC radically altered its claim against the defendants in a way that requires defendants to seek a reopening of discovery, which defendants do by separate motion. As explained in more detail in that motion, the Initial Disclosure filed by the FTC on June 10, 2010 (and the one that prevailed throughout discovery) stated that the FTC made claims and sought damages for only those payments received by defendants through voluntary wage garnishments, an amount that comprised less than 16 per cent of the payments received by defendants from all borrowers, on fewer than 10 percent of all loans made. Fifteen days after discovery closed, on February 15, 2011, the FTC changed its claim by informing defendants in an "Amended Initial Disclosure," that it now sought disgorgement of *all* moneys paid to defendants by *any* borrower, even moneys repaid in connection with more than 90% of loans where no voluntary garnishment was used because the borrower involved had voluntarily paid as agreed.[1]

In both substance and amount, that is a substantial change. It not only changes the legal theory but the damages. As the FTC itself pegs the numbers (FTC Fact No. 51):

[1] Specifically, the Initial Disclosure read (at part 3, p.p. 5-6) "consumer injury includes all funds garnished from consumers' bank accounts without a court order garnishment and paid to defendants by consumer employees." The "Amended Initial Disclosure" (at part 3, p. 6) changed the just quoted language to read "consumer injury includes all funds paid to Defendants by consumers or their employers on loans funded by Defendants that included a wage assignment clause." This is a different legal theory raising different facts and damage discovery, in that, among other things, it upped the claimed damages by more than $2.5 million.

> Since commencing operations, Defendants have made at least 7,121 payday loans to consumers that included the unlawful wage assignment clause and collected from consumers a total of $3,013,044 in income from those loans. Of this amount, Defendants collected $468,020.91 from consumers through their illegal wage garnishment activities.

While defendants contend that no amount should be subject to disgorgement, they are surely entitled to discovery on both the legal basis and the damage figures behind that substantial post-discovery change. Accordingly defendants urge this Court to allow for the needed discovery and defer decision on this motion until that it is completed. *See*, Defendants' Motion to Reopen Discovery, separately filed.

Preliminary Statement Regarding "Undisputed Facts"

The FTC's sixteen-page "Statement of Undisputed Facts" sets forth 54 separately-numbered, single-spaced paragraphs, some with subparts. Rather than stating facts one at a time, the FTC presents what is truly a hodgepodge of lengthy assertions of law and fact mixed together in paragraphs containing multiple assertions of each. Answering in kind would be equally muddy. Thus defendants commence with a brief overview to focus the factual issues.[2]

By their motion the FTC seeks "disgorgement" of all money repaid on short-term, payday loans made by and through defendant GetECash. Yet the amount sought represents loan repayments and attendant fees owed, nothing more, and thus is beyond any rightful claim to disgorgement of ill-gotten gains. Those who borrowed from GetECash got the loans they wanted, in the amount they had asked for, were fully informed of the costs of the loan, in writing, and were never asked to repay more than they owed. There were no overcharges, no false

---

[2] The FTC certainly did not present a "concise statement of material facts as to which movant contends no genuine issue exists". DUCiv R 56-1(b). This makes a response more difficult. Defendants have therefore started this Memorandum with a slight variation of that same Rule's part 56-1(c) to provide a brief factual overview before taking on the factual hodgepodge of the FTC. Defendants will of course correct this format if the Court wishes but believe that the introduction will assists the Court in identifying the few factual issues to be found within the lengthy "undisputed" fact submission that begins the FTC's Brief.

statements to induce the borrowing, no failure to deliver loans promised, and no attempts to collect more than was due. The FTC does not even seriously claim otherwise.

There were thus no ill-gotten gains and no unjust enrichment.

The FTC seeks disgorgement (now that it has changed its claim to *all* the money repaid by any borrower even if no voluntary garnishment was used) of $3,013,044.00, on three grounds stated in seven separate counts: (1) alleged violations of the Fair Debt Collection Practices Act, (2) use of a wage assignment clause lacking a specific term in the loan agreement used by defendants, and (3) a reference to the “Debt Collection Improvement Act” (“DCIA”) in an early version of a cover letter to borrowers’ employers, and other contacts with employers, undertaken in an attempt to garnish wages when all other attempts to collect loans in default had failed. [Defendants discontinued use of the DCIA reference when advised that it applied only to collections by federal agencies.]

As defendants show below, there are no violations under the Fair Debt Collection Practices Act since the defendants are not legally subject to that Act, plain and simple. That Act applies only to debt collectors collecting the debts of others, not to lenders collecting their own debts, as was the case here. The only lender here was GetECash, and it collected only its own loans.

The remaining claims involve the use of wage garnishment, a procedure that had been agreed to by all borrowers in the event that they defaulted. While such voluntary wage garnishments themselves are not prohibited, the wage assignment language used by GetECash in its loan agreement did not meet the requirements of the so-called “Credit Practices Rule,” found at 16 C.F.R. 444.2(a)(3), as it did not state that such a wage assignment is revocable at any time by the borrower. Defendants have stipulated to this assertion.

However, none of the defendants knew of this rule and had no idea their language was incomplete. Indeed they posted their loan form on a public website, indicating that they believed the form was permissible. Voluntary wage garnishments would be used only when the employer and the employee who borrowed the money cooperated to implement them after a default in loan payments. Most importantly, all of the money to be repaid was money that was owed. And the FTC, while it speaks of the need for court process to protect consumers from fake claims by giving them due process, a protection with which defendants agree, does not claim that the GetECash garnishments represented fake claims or resulted in payment of money that was not owed. That did not happen here. Garnishment was used in connection with fewer than 10 per cent of all loans and amounts collected never exceeded amounts owed.

Defendants are aware that for the FTC to establish a violation of the Credit Practices Rule it need not show that defendants knew that their wage assignment did not meet all the criteria of that rule. But the remedies for the improperly worded agreement are equitable in nature, not punitive, thus allowing this Court to bring its sense of fairness to the question of disgorgement. The FTC is asking for truly harsh sanctions for a small company that did not know it was doing anything wrong, stopped doing it the minute they were so advised, and did not receive from any borrower any more than the borrower actually owed and had agreed to pay.

When all is said and done, there are four essential disputes:

(1) The FTC contends (Counts IV, V, and VI) that defendants were subject to the Fair Debt Collection Practices Act, and defendants dispute these assertions;

(2) The FTC contends (Counts I, II, and III), that the defendants' debt collection practices deceived and harmed consumers, and defendants dispute these assertions; and,

(3) The FTC contends (Count VII) that the wage assignment in the loan agreement did not comply with the Credit Practices Rule, but does not allege or prove that those borrowers who did not pay as agreed and whose employers received and implemented the voluntary wage garnishments had not consented to the garnishment once it had been sent to the employers and before it was implemented. Thus the defendants dispute the FTC's assertion in Count VII.

(4) The FTC contends that defendants were not acting in good faith and defendants dispute this assertion.

RESPONSE TO THE FTC'S "UNDISPUTED FACTS"

FTC 1: 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 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the FDCPA, 15 U.S.C. § 1692 *et seq.*, which prohibits deceptive, unfair, and abusive debt collection practices, and the Credit Practices Rule, 16 C.F.R. Part 444, which prohibits unfair and deceptive credit practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, the FDCPA, and the Credit Practices Rule, 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, 1692*l*(a). *See, e.g.*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1315 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–34 (11th Cir. 1984); *FTC v. Southwest Sunsites, Inc*., 665 F.2d 711, 718–19 (5th Cir. 1982). (PX01 at 2 ¶¶ 4-5.)

DEFENDANT 1: These statements and conclusions of law do not require an answer from defendants. These legal conclusions seem accurate, however.

FTC 2: Defendants operate through two interrelated companies, Eastbrook, LLC and LoanPointe, LLC, and do business under the name GetECash. (PX01 at 3 ¶ 16.)

DEFENDANT 2: This is only partially true. Defendants agree that they did business under GetECash but Eastbrook is not an operating entity. As the declaration of Joe Strom states, at

paragraph 6, Eastbrook was formed and some money was invested in it. Then LoanPointe was formed and some money was invested in it. There being no need for two entities with two sets of books, Eastbrook books were merged with LoanPointe, and the LoanPointe LLC is the only one operating. It uses GetECash as its DBA. The FTC papers themselves state that Eastbrook has not even kept its LLC registration alive. It never made any loans or attempted to collect any.

FTC 3: Defendant Eastbrook, LLC was formed as a Utah limited liability company on September 12, 2008. (PX14 Att. A at 10-12.) Eastbrook is headquartered at 696 North 1890 West, Provo, Utah. (*Id.* at 11.) The Utah Department of Commerce lists Ecash as a d/b/a for Eastbrook, LLC. (PX14 at 2 ¶ 7.) Eastbrook also does business as GetECash and ECash. (PX01 at 2 ¶ 7; PX05 at 15 (admission 71, 72).)

DEFENDANT 3: Defendants do not operate Eastbrook as a going concern. It does not make loans nor collect loans. It is defunct. Strom Dec. ¶ 6.

FTC 4: Defendants have advertised and offered their payday loans to customers through Internet websites, including www.GetECash.com. (PX14 at 5-6 ¶¶ 13-14, Att. N at 81-85, Att. O at 87-91.) Defendants also used P.O. Box 424, Orem, Utah as an address for GetECash. (*Id.* Att. D at 20.) Forms sent by Defendants to consumers' employers have listed GetECash's address as 357 South 670 West, Lindon, Utah. (PX03 at 10 (admission 41); PX14 Att. Q at 123, 124.)

DEFENDANT 4: Defendants Eastbrook, LoanPointe and Joe Strom have no Internet websites and payday loans have never been offered under any name *other than* GetECash. Strom Dec. ¶¶ 6 and 7. GetECash maintained the only website as an interface to obtain loan applications but the defendants have not engaged in any solicitation or advertising of the GetECash loan services. *Id.* GetECash advertises the loan services on its website. The loans are made under the name GetECash. The agreements are on the logo of GetECash. Collections are made payable to GetECash. All collection efforts by telephone and email are made in the name of GetECash and collection letters and the garnishment paperwork (before discontinued) are in the name of GetECash. Neither LoanPointe, nor Strom, nor the defunct Eastbrook make loans or

collections. GetECash and LoanPointe are affiliated in that GetECash is the DBA. Strom Dec. ¶¶ 6 and 7.

FTC 5: Defendant LoanPointe, LLC was formed as a Utah limited liability company on February 17, 2009. (PX14 Att. B at 14-15.) LoanPointe lists its address on Utah state filings as 11529 North Bull River Circle, Highland, Utah. (*Id.*) Defendants also have used 357 South 670 West, Lindon, Utah as another address for LoanPointe. (PX01 at 2 ¶ 6; PX03 at 10 (admission 41).)

DEFENDANT 5: Undisputed.

FTC 6: At all times material to the FTC's Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. (PX01 at 3 ¶ 13.)

DEFENDANT 6: Undisputed.

FTC 7: GetECash is the subject of numerous state cease and desist orders or other state law enforcement inquiries. (PX14 at 3-4 ¶ 11.) For example, on October 28, 2009, the California Business, Transportation and Housing Agency's Department of Corporations issued a cease and desist order against GetECash and 14 other respondents for violating the California Deferred Deposit Transaction Law by making payday loans without a license, failing to make required disclosures, and charging excessive fees. (PX04 at 8 admission 24); PX05 at 8 (admission 24); PX14 Att. E at 25-28.) Defendants are also subject to cease and desist orders issued, or investigations being conducted, by the states of Colorado (PX14 Att. F at 30-31 (investigation by Colorado Department of Law for violations of the Colorado Deferred Deposit Loan Act)), Idaho (*Id.* Att. G at 33-41 (cease and desist issued by Idaho Department of Finance for violations of Idaho's Credit Code and Payday Lender Act)), Kansas (*Id.* Att. H at 43-45 (investigation by Kansas Office of the Bank Commissioner for violations of the Kansas Uniform Consumer Credit Code)), Minnesota (*Id.* Att. I at 47-48 (investigation by Minnesota Office of the Attorney General for violations of the Minnesota payday lending laws)), North Dakota (*Id.* Att. J at 50-52) (cease and desist issued by the North Dakota Commissioner of Financial Institutions for violations of the North Dakota Deferred Presentment Service Provider Act)), South Carolina (*Id.* Att. K at 54-60) (investigation by South Carolina Department of Consumer Affairs for violations of the South Carolina Consumer Protection Code)), Washington (*Id.* Att. L at 62-67) (investigation by Washington Department of Financial Institutions for violations of Washington Check Cashers and Sellers Act)), and West Virginia (*Id.* Att. M at 69-79 (investigation by West Virginia Office of the Attorney General for violations of West Virginia's Consumer Credit and Protection Act)).

DEFENDANT 7: GetECash has been contacted by various states regarding its loan practices because those states believe they have the power to regulate the Utah-based GetECash and make it comply with certain of their lending-related rules. But these state proceedings are outside the jurisdiction of the Federal Trade Commission and are not admissible or probative of any fact at issue in this litigation. Defendants have no physical business location outside of the state of Utah and no cease and desist order has been issued by the State of Utah. Strom Dec. ¶ 8. GetECash has no offices outside of Utah but intends to comply with all final orders of any state having jurisdiction over it.

FTC 8: Defendants have acknowledged operating as a payday lender without appropriate licensure in other states. (PX13 at 3 ¶ 9, Att. E at 29 (not licensed in Idaho).)

DEFENDANT 8: GetECash is licensed in the State of Utah, the state in which it does business. GetECash denies that it has not obtained "appropriate" licensure in other states as that term is undefined. In any event, by the dint of the proceedings cited by the FTC in its "Fact No. 6" it is obvious that those states can enforce their own rules and do not need the FTC to wade in to that enforcement, without the benefit of Congressional enlargement of the FTC's jurisdiction.

FTC 9: Defendant Joe Strom is a manager, officer, and principal of Eastbrook and LoanPointe. (PX01 at 2 ¶ 8; PX02 at 5 (in response to interrogatory as to Defendants' organizational structure, Defendant Eastbrook identifies Defendant Strom as the ultimate person in control); PX03 at 3-4, 10-11 (admissions 1, 2, 3, 4, 5, 6, 7, 8, 43, 44, 45, 46, 47, 48, 49); PX04 at 11-12 (admission 43, 44, 45, 46, 47); PX05 at 11-12 (admission 43, 44, 45, 46, 47); PX11 Att. B at 10-11; PX14 Att. C at 17-18, Att. D at 20.)

DEFENDANT 9: Undisputed except to the extent it states facts in the present tense. Eastbrook is no longer a going concern and Joe Strom has no managerial responsibility for that entity. *See,* Defendant's fact reply 3 above.

FTC 10: Defendant Strom is also the registered agent for both companies. (PX03 at 10 (admission 40); PX04 at 11 (admission 40); PX05 at 11 (admission 40); PX14 Att. C at 17-18.)

DEFENDANT 10: Undisputed.

FTC 11. Defendant Strom had the authority to control the acts and practices of Eastbrook and LoanPointe. (PX03 at 4-5, 6-7, 8 (admissions 9, 10, 21, 22, 28); PX04 at 6, 7, 11, 12 (admission 14, 20, 43, 44, 45, 46, 47); PX05 at 6, 7 (admission 14, 20).)

DEFENDANT 11: Undisputed. Strom has received total remuneration over the two years of $37,000.00. Strom Dec. ¶ 29.

FTC 12: Defendant Strom had knowledge of the acts and practices of Eastbrook and LoanPointe. (PX01 at 2 ¶ 8; PX03 at 4-6 (admissions 11, 12, 13, 14, 15, 16).)

DEFENDANT 12: Undisputed.

FTC 13: Defendants LoanPointe and Eastbrook have common ownership, officers, managers, business functions, employees, and office locations (PX03 at 10-11 (admissions 41, 42, 48, 53, 54); PX04 at 11-13 (admission 41, 42, 46, 47, 51-53, 55, 56, 59, 60); PX05 at 11-13 (admission 41, 42, 57, 58).)

DEFENDANT 13: Disputed to the extent it states facts in the present tense. Eastbrook is no longer a going concern and has no business functions, employees or office locations.

FTC 14: Defendants LoanPointe and Eastbrook have commingled funds. (PX03 at 11-12 (admissions 55, 56, 57).) Strom Dec. ¶¶ 6 and 7.

DEFENDANT 14: Disputed. Initially Eastbrook and LoanPointe maintained separate accounts, but then Eastbrook ceased doing business and has no funds.

FTC 15: To understand the harm from Defendants' conduct, it is necessary to recognize the differences between: (1) wage assignment and wage garnishment, and (2) federal government wage garnishment and private wage garnishment.

DEFENDANT 15: This is not a fact that proves or disproves an element of the claims stated in this action. However, this statement leads to the argument the FTC makes further below, namely that GetECash used a voluntary garnishment, with the customer's agreement rather than going to court and they contend that this deceived or harmed the consumer in a way that requires disgorgement. Defendants disagree for the reasons stated below.

FTC 16: A wage assignment is an agreement between a creditor and a debtor through which a debtor agrees to the transfer or assignment of his or her wages directly from his or her employer to the creditor. *See* Consumer Credit and the Law, CONCRED §10:5 (West 2010) (noting that "A wage assignment is a contractual arrangement between the creditor and the debtor, whereby the creditor is given the irrevocable right to receive the wages directly from the consumer's employer, usually at the creditor's option and without notice or prior hearing"). A clause permitting a wage assignment typically is included in the credit contract at the time that the creditor extends credit to the debtor. A wage assignment under such a contract operates without state judicial involvement or oversight. *Id.* (providing that "a wage assignment . . . being a purely contractual arrangement, does not require any kind of court proceeding to become effective").

DEFENDANT 16: Defendants dispute this "statement of fact" to the extent it sets forth conclusions of law that must be proven. Further, while this statement notes that a wage assignment is "typically" included in a credit contract, no suggestion is made that it can only exist if it is stated in that contract. Factual circumstances may arise in which a borrower consents to a wage assignment to pay a debt already due *after* the original contract to lend money results in the loan being made and after the borrower has not repaid the loan as agreed. Indeed that seems to be the case here and certainly the FTC has not proven otherwise. GetECash borrowers entered into loan agreements that contained a wage assignment. Strom Dec. ¶ 15. However, when garnishment was attempted after a borrower defaulted, approximately 80 per cent of those borrowers refused to allow their employers to implement the GetECash wage assignment. The remaining 20 per cent agreed to garnishment by their employers. Strom Dec. ¶ 19. Thus, even if the original wage assignment was not enforceable, as demonstrated by the 80 per cent declination rate, a new agreement could be made to repay a debt due. The FTC submission is virtually silent on this point except for several dubious and hearsay claims discussed below.

FTC 17: In contrast to wage assignment, a creditor obtains the right to wage garnishment after a consumer has not paid back a debt and after a state court has issued an order permitting the garnishment. *Id.* (explaining that "wage garnishment, however, unlike wage assignment, requires a court judgment before it can be carried out, and is generally based on an order issued by the court"). Specifically,

a private creditor must take a series of steps to garnish the wages of a consumer. *See, e.g.,* Utah R. Civ. P. Rule 64D.

DEFENDANT 17: Defendants dispute this "statement of fact" to the extent it sets forth conclusions of law that must be proven.

FTC 18: Many, if not all, of these steps state law requires for wage garnishment are procedural safeguards built into the system to ensure that creditors do not mistakenly or maliciously garnish consumers' wages. First, the creditor must obtain a state court judgment requiring that the consumer pay the debt. *See, e.g., Id.* 64D(a)-(b) (Utah allows for a writ prior to judgment in certain circumstances). If the consumer does not have the assets to pay the judgment, then the creditor must ask the state court to issue an order allowing the creditor to garnish the consumer's wages. The creditor must also notify the consumer that a garnishment order has been requested and the procedures to follow if the consumer wants to contest the issuance of the garnishment order. If the court determines that wage garnishment in a specific amount is appropriate, then the court will issue a garnishment order. (PX08 at 2 ¶ 9 (in 13 years of payroll work never saw a garnishment request, other than from a government agency, that was not accompanied by a court order); PX09 at 2 ¶ 8 (in 23 years as payroll officer, never saw garnishment request without court order).) Finally, the creditor (often through the local sheriff) will serve the judgment and the garnishment order on the consumer's employer. The garnishment order requires the consumer's employer to take a specified amount out of the consumer's paycheck and send it to the creditor. *See, e.g.,*Utah Code Ann. § 70C-7-103; Utah R. Civ. P. 64D.

DEFENDANT 18: Defendants dispute this 'statement of fact' to the extent it sets forth conclusions of law that must be proven.

FTC 19: Congress has enacted laws that permit the federal government, the owner of many types of debts, to use a more streamlined process than private creditors to garnish the wages of debtors who owe money to the federal government. 31 C.F.R. § 285.11(a). Specifically, once the federal government has a state court judgment against a consumer, the Debt Collection Improvement Act of 1996 ("DCIA"), P.L. 104-134, Title III, Ch 10, § 31001(o)(1) codified at 31 U.S.C. § 3720D, allows the federal government to garnish a consumer's wages without having to obtain a garnishment order from a state court. Instead, federal agencies are permitted to contact a consumer's employer directly and demand that it garnish the wages of the consumer against whom the federal government has obtained a judgment. 31 C.F.R. § 285.11(g). The consumer's employer is required to take a specified amount out of each of the consumer's paychecks and send it to the federal government. 31 U.S.C. § 3720D(f)(1); 31 C.F.R. § 285.11(i). The Treasury Department's Financial Management Service ("FMS") is responsible for

collecting this non-tax debt for the federal government and contacting employers to garnish wages pursuant to the DCIA. 31 C.F.R. § 285.12. (PX01 at 3 ¶ 14.)

DEFENDANT 19: Defendants dispute this 'statement of fact' to the extent it sets forth conclusions of law that must be proven.

FTC 20: When federal agencies seek to garnish wages pursuant to the DCIA, FMS sends a package of documents to the employer that includes documents entitled: (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 at 1¶ 6, Att. A at 6-12.) The "Letter to Employer" states: One of your employees has been identified as owing a delinquent nontax debt to the United States. 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 Order directing you to withhold a portion of the employee's pay each period and to forward those amounts to us. 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. (*Id.* Att. A at 6; PX01 at 3 ¶ 15.)

DEFENDANT 20: Defendants dispute this 'statement of fact' to the extent it sets forth conclusions of law that must be proven. The facts stated are within the knowledge of the United States, not the defendants.

FTC 21: Since at least September 2008, doing business as Ecash and GetECash and through Internet websites such as www.GetECash.com, Defendants have offered consumers payday loans of $1,000 or less. (PX01 at 3 ¶ 16; PX05 at 15 (admission 70); PX14 Att. N at 81- 82, Att. O at 87-88.) [3]

DEFENDANT 21: Defendants dispute this statement of fact to the extent it suggests that defendants used websites other than www.GetECash.com. That was the only website used and it only offered GetECash loans. GetECash did not collect debts for others. Strom Dec. ¶¶ 6 and 7.

FTC 22: Using the name LoanPointe, Defendants have collected on those payday loans. (PX01 at 3 ¶ 16; PX04 at 18 (admission 84); PX05 at 18 (admission 84); PX08

[3] The loans are commonly referred to as "payday loans" in part because the loans often come due on the borrower's next payday. To obtain a payday loan, consumers typically need only show that they have a bank account and a steady source of income, however modest, such as a job or periodic checks.

Att. A at 6 (garnishment package sent from Loan Pointe); PX11 Att. C at 13 (same); PX14 Att. Q at 122 (same).)

DEFENDANT 22: Disputed as incomplete and misleading. The FTC is trying to stretch LoanPointe and GetECash into separate entities so that it can trigger the Fair Debt Collection Practices Act, which forms the basis of Counts IV through VI of its Complaint, but such assertions are untrue. Defendant GetECash, as the lender on the loans at issue in this litigation, owned the debts and collected payments on its own behalf. All collections were done by the lender GetECash, not LoanPointe. Strom Dec. ¶ 7. At times, GetECash apparently used a fax machine that reflected LoanPointe's fax number and initially used email with a LoanPointe domain name until collectors migrated to the GetECash domain, but collections were made in the name of the lender, GetECash, not a third-party "debt collector". *See,* Strom ¶ 7. In any event, as alleged by the FTC, LoanPointe was related to GetECash by common ownership and affiliated by corporate control. Neither entity acted as a debt collector as its principal business or collected debts for other than related entities. *Id.* Thus the Fair Debt Collection Practices Act does not apply.

FTC 23: Defendants have offered payday loans to, and collected or attempted to collect on those loans from, consumers residing throughout the United States. (PX08 at 1 ¶ 2 (Texas); PX09 at 1 ¶ 1 (Iowa); PX11 at 1 ¶ 1 (Missouri); PX12 at 1 ¶ 1 (Idaho); PX14 at 4-5 ¶ 12 (Defendants funded 7,123 payday loans to consumers in over 41 states, territories, and the District of Columbia, and successfully garnished wages from over 300 consumers located in 39 states and the District of Columbia), Att. N at 84, Att. O at 90.)

DEFENDANT 23: Undisputed to the extent it conforms to Defendant No. 22, above.

FTC 24: Defendants' payday loans are short-term (often as little as two weeks), small dollar (usually the principal of the loan is less than $1,000), unsecured, high-interest rate (sometimes as high as 1720% APR) extensions of credit. (PX08 at 2 ¶ 6, Att. A at 14 (consumer borrowed $300 at 782.14% APR); PX09 at 2 ¶ 6, Att. A at 13 (consumer borrowed $300 at 1720.71% APR); PX10 at 1 ¶ 3 (borrowed $300); PX11 at 1 ¶ 2, Att. A at 7 (borrowed $300 at an annual percentage rate of 1095%); PX12 at 1 ¶ 2, Att. A at 11 (borrowed $300 at an annual percentage rate

of 1095%); PX14 Att. Q at 130 (consumer borrowed $300 at an annual percentage rate of 1720.71%); PX16 Att. A at 9 (consumer borrowed $300 at an annual percentage rate of 1095%).)

DEFENDANT 24: Disputed, and like many others, this FTC "fact" is really many facts. Defendants agree that GetECash offered payday loans and that they were short-term loans, but clarifies that "as little as two weeks" was the intended maximum loan term, as explained on the website. The aim of the payday loan was to obtain cash between pay periods for emergencies. As the GetECash website (attached at FTC Exhibit 14, p. 82) tells every potential lender:

> Payday loans are designed to help consumers meet serious and unexpected financial emergencies between paychecks. Payday loans have the unique advantage of providing any wage-earner, salaried professional or other benefits recipient with a quick cash advance on the next paycheck that's very easy to qualify for and obtain.
>
> These loans offer an excellent short-term solution to the occasional financial dilemma that can't be handled any other way. While not intended to be a long-term answer to chronic budgetary shortfalls, payday loans can be an effective and invaluable resource when used judiciously and when the terms of the loan are honored in a responsible way.

Payday loans are normally for small amounts, usually around $300.00, but sometimes up to $1,000.00. Since these are for emergency cash, requests must be processed quickly. Someone needing a loan from GetECash (or from one of the many other payday loan providers) need only show, in completing the application on line, that they have a job earning at least $1,000.00 per month, that they have a bank account into which the payday loan can be promptly wired, and that they are at least 18 years old. GetECash did not inquire as to the purpose for which the loan proceeds would be used. Strom Dec. ¶ 11. If someone meeting these minimal criteria needs emergency cash, GetECash would lend them money and get it into their bank account that day or the next business day, by wire, for their immediate use. But as GetECash tells all prospective borrowers, in clear language on its website:

> Payday loans can be a blessing that makes it possible to manage a financial crisis when other means are not an option.... Payday loans are not a quick fix for ongoing financial challenges. You will be responsible for the repayment of your entire loan balance together with interest owed. Make sure you can cover your loan obligation when the due date arrives, otherwise you will liable for additional charges.

See, FTC Exhibit 14, p. 83. By this and other information on the GetECash website, GetECash fully disclosed to everyone considering one of its payday loans both its benefits and the need to keep the loan short-term. There is nothing deceptive or unfair on the website. Strom Dec. ¶ 11.

The costs of a GetECash payday loan are clearly stated. The loan is taken out before a payday and repayment is due on that next payday. The finance fee is $30 for every $100 loaned, so $90 for the $300 loan that has been the typical loan amount. This finance fee is due on the first payday, along with the loan repayment, and it is also paid every two weeks after that on each new payday to the extent any part of the loan remains outstanding. If a borrower wants to pay in full on the first payment, the total would be $390 ($300 principal plus $90 finance fee) on whenever that borrower's next payday would be, whether it is 5 days or 14 from the time the loan is made. Apart from this fee, there is no additional interest charge. The APR on the application is always calculated using the next payday of the customer, so it will vary from loan to loan. In its papers, the government declaims that the annualized interest rate is over 1000%. No payday loan should ever be taken for such a long period of time or even any sizeable fraction of that time. The duration should be the days between paychecks. Annualizing the interest on a payday loan is like calculating the cab fare between the Salt Lake City airport and the courthouse, extrapolating from that rate how much a taxi would cost from Salt Lake City to New York City, and then decrying the amount. People should never ask for such a taxi ride. As GetECash's website says, "Payday loans are not for anything like long-term debt." In any event, all prospective borrowers are told of the terms, clearly, before they apply and it is also stated on

the Application, in terms of the annualized interest rate so that everyone knows what the cost will be if the loan is not paid off. *See*, Loan Application, attached as Exhibit "A" to the Strom Declaration. GetECash also has a fee for checks returned for insufficient funds, in the amount of $25.00. Strom Dec. ¶12.

FTC 25: Defendants have required consumers who are interested in obtaining a payday loan to complete an online application via one of Defendants' websites. (PX01 at 3 ¶ 17; PX10 at 1 ¶ 3; PX11 at 1 ¶ 2; PX16 at 1 ¶ 3.)

DEFENDANT 25: Defendants have only one website: www.GetECash.com. GetECash does not "require" consumers to do anything. If someone searching the internet for loans chooses to apply for a GetECash loan, they complete the application in the manner described in Defendant's Reply to FTC Fact 24 and submit it online. If approved by GetECash, the money was wired to the borrower's account within one day as advertised. Defendants dispute the FTC statement to the extent it suggests that the lenders "required" that borrowers do something involuntarily. Further, only one web site was used for loan applications, not multiple sites.

FTC 26: The online application required consumers to check a box, identified as an electronic signature, indicating that they accept the terms of the loan. (PX01 at 3 ¶ 17; PX10 at 1 ¶ 3; PX11 Att. A at 6-7.)

DEFENDANT 26: Not disputed except to the extent it suggests that the lenders "required" the borrowers to do something involuntarily. Borrowers were asked to review four separate web pages, each setting forth separate terms and conditions, as a condition to the funding of the requested loan. Specifically, borrowers had to click on each of the following pages, and indicate their assent to the terms therein:

YES (click on each to confirm)

☐ I have read and accept the terms of the Application.

☐ I have read and accept the terms of the Privacy Policy.

☐ I have read and accept the terms of the Authorization Agreement.

☐ I have read and accept the terms of the Loan Note and Disclosure.

See, Defendants' Reply to Fact 24 *and* Strom Dec. ¶¶ 14 and 15.

FTC 27: One of the terms of the payday loan was a clause that reads: "NOTICE: I agree to have my wages garnished to pay any delinquent amount on this loan." (PX01 at 3 ¶ 17; PX08 Att. A at 14; PX09 Att. A at 13; PX11 Att. A at 7; PX12 Att. A at 11; PX14 Att. Q at 130; PX16 Att. A at 10 (emphasis in original).)

DEFENDANT 27: Undisputed.

FTC 28: This clause was written in very small print located near the bottom of the third of four pages of small print disclosures. (PX08 Att. A at 12-15; PX09 Att. A at 10-14; PX11 Att. A at 5-8; PX14 Att. Q at 128-31; PX16 Att. A at 7-10.)

DEFENDANT 28: Disputed. This is simply false. *See* Defendant's Reply to FTC Fact 26, which discusses how each of the four parts of the integrated on line loan agreement are separately stated and each must be acknowledged in order to trigger the final loan application being submitted to the lender and the sought after loan money received. Thus the borrower could read the entire application online, zero in on the subject matters specified in the four links on the entry page, and/or print out the application in full in hard copy and read it that way. No loan application could be submitted unless the prospective borrower separately checked all four of the boxes signifying that he or she had read and accepted each of the points covered. *See,* Strom Dec., ¶ 14 and Exhibit A attached thereto.

It is not true, despite what the FTC tells this Court, that the wage garnishment reference (which appears when the link "Loan Note and Disclosure" is clicked) was obscure or in "very small print." The reference to wage garnishment is in fact highlighted. It starts with the word "**NOTICE**" in bold print, the same size as surrounding print, all capitals, and underlined, which is in turn followed by the bold and underlined statement:

I agree to have my wages garnished to pay any delinquent amount on this loan.

See, Strom Declaration, ¶15, and Exhibit B thereto, p. 3. Thus, this part of the loan agreement is not hidden, nor was it intended to be hidden. It was on the same page as all of the terms regarding the amount financed and the finance charges. Defendants emphasize that before the loan could be processed, a prospective borrower must have checked all four boxes on the entry page, each of which is next to one of the four links quoted above. The fourth link that must be checked reads, "I have read and accept the terms of the Loan Note and Disclosure," the link that takes the borrower to the screen setting forth the loan disclosures required by law. Unless that box is checked, the loan is never made.

FTC 29: Because of the small size of the print and the location of the clause, many consumers were unaware of the existence of the wage assignment clause. (PX10 at 1-2 ¶ 5(consumer Paulette Okibe first learned of the wage assignment clause when a coworker in her employer's human resources department asked if she had consented to GetECash garnishing her wages); PX11 at 1 ¶ 4 (consumer Brandon Burkhart, a human resource specialist with his employer, stated that, after reviewing GetECash's loan application, he did not think GetECash had the authority to garnish his wages); PX12 at 1 ¶ 4 (consumer Elia Ho was unaware that GetECash would garnish her wages until she discovered that GetECash was in fact garnishing her wages), at 2 ¶ 6, Att. C at 17-26 (Defendants ultimately garnished almost $800 from Ms. Ho).)

DEFENDANT 29: Disputed. While the FTC says "many consumers were unaware of the existence of the wage assignment," the FTC gives only three references. Elia Ho professes that

she knew nothing of a wage assignment, and never spoke to GetECash. However, as reflected in the Strom Declaration at paragraph 17 and Exhibit C attached thereto, Ms. Ho was contacted many times about her failure to pay and reminded twice in separate conversations or emails about the garnishment procedure to which she had agreed. Brandon Burkhart, also referenced by the FTC, obviously saw the wage garnishment provision in the loan application but said "he did not think GetECash had the authority to garnish his wages." He, like many other GetECash borrowers in default, 80% in all, refused to allow the garnishment. The third individual, Paulette Okibe, claims that she did not see the wage assignment clause but her declaration also shows that when the garnishment request was submitted, she rejected it.

FTC 30: Defendants used the wage assignment clause to garnish the wages of consumers who purportedly owed them. Defendants have acknowledged that this wage assignment clause was a major focus of their collection strategy. (PX13 Att. E at 29 (in a letter to the Idaho Department of Finance, Defendants explain that "[w]e have found that using contracted wage assignment has been useful in collecting from borrowers who refuse to pay back their loans").)

DEFENDANT 30: Disputed. The wage assignment clause was used to recover less than 16% of all loan repayments, from fewer than 10 per cent of all borrowers, and was agreed to by only 20 per cent of those borrowers in default to whose employers a request for garnishments was sent. Strom Dec. ¶ 19, 28. The author of the letter quoted by the FTC is no longer employed by GetECash, that letter was his personal opinion, and GetECash has stopped using this method of collection since the moment it was asked to do so. Collection through wage garnishment was expensive, time-consuming, and undertaken only after repeated contact with the debtor and exhaustion of every other option. It was not a "major focus" of a collection strategy.

FTC 31: Defendant Strom approved and/or authorized the "Loan Note and Disclosure" form used by Defendants containing the clause. (PX03 at 8 (admission 28).)

DEFENDANT 31: Disputed to the extent it is incomplete. Defendant Strom sought and received advice of counsel before authorizing use of any loan documents. *See,* Strom Dec. ¶ 21. The name of the attorney was Byron Smith, who worked with Justin Berry who had an accounting background, who had worked on payday loans before, and who presented the completed forms to Joe Strom for approval. *Id.* It is conceded that Strom is the manager and as such, had the authority involved here. But this court sits in equity, and in deciding whether there were ill-gotten gains that ought to be reversed, we respectfully submit that Strom's belief that his companies could lawfully do what they were doing with the wage assignment is a significant factor. When notified by the government that certain documents were not authorized, he withdrew his approval and authorization for use of those documents challenged by the government.

FTC 32: Defendant Strom knew that Defendants' loan agreements contained that clause. (PX03 at 13 (admission 65).)

DEFENDANT 32: Undisputed.

FTC 33: Defendants have acknowledged that the clause was a wage assignment clause. (PX13 Att. E at 29 (in a letter to the Idaho Department of Finance, Defendants explain that "[w]e have found that using contracted wage assignment has been useful in collecting from borrowers who refuse to pay back their loans").)

DEFENDANT 33: Disputed, although defendants acknowledge that he sent the letter.

FTC 34: The Credit Practices Rule prohibits lenders from including wage assignment clauses in their credit contract 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. 16 C.F.R. § 444.2(a)(3).

DEFENDANT 34: Undisputed.

FTC 35: Defendants' wage assignment clause meets none of these requirements. (PX01 at 3 ¶ 18; PX08 Att. A at 14; PX09 Att. A at 13; PX11 Att. A at 7; PX12 Att. A at 11; PX14 Att. Qat 130; PX16 Att. at 10.)

DEFENDANT 35: Defendants agree that the clause used in the loan application does not specify that the wage assignment was revocable by the borrower.

FTC 36: If a consumer did not pay his or her debt in a timely fashion, Defendants engaged in collection efforts to collect the debt. (PX01 at 3 ¶ 20.)

DEFENDANT 36: Undisputed.

FTC 37: Defendants, using the name LoanPointe, have faxed to consumers' employers a wage garnishment packet. (PX04 at 8-9, 14-15 (admission 25, 26, 27, 28, 68, 69); PX05 at 8-9, 14-15 (admission 25, 26, 27, 28, 66, 67); PX08 at 1 ¶ 5, Att. A; PX09 at 1 ¶ 4, Att. A (fax tagline identifies LoanPointe); PX11 at 2 ¶ 5, Att. C at 13; PX12 at 1-2 ¶ 4, Att. A; PX14 Att. Q; PX16Att. B at 13 (fax tagline identifies LoanPointe).)

DEFENDANT 37: Collection efforts were undertaken by GetECash, not "defendants," and the name GetECash appeared on all documents related to collection. The fax tag line indicating LoanPointe as the owner of the fax machine does not constitute debt collection efforts by LoanPointe, but in any event LoanPointe and GetECash are not separate lenders. *See*, Reply to Fact No. 22.

FTC 38: Just as FMS does when it collects on non-tax debt owed to the federal government, Defendants' garnishment packet included the following: (1) a document entitled "Letter to Employer & Important Notice to Employer," (2) a document entitled "Wage Garnishment," (3) a document entitled "Wage Garnishment Worksheet," and (4) a document entitled "Employer Certification." (PX04 at 8-9 (admission 25, 26, 27, 28); PX05 at 8-9 (admission 25, 26, 27, 28); PX08 at 1 ¶ 6, Att. A at 7-11; PX09 at 1 ¶ 5, Att. A at 5-9; PX11 at 2 ¶ 5, Att. C at 14-18; PX12 at 1-2 ¶ 4, Att. A at 5-9; PX14 Att. Q at 123-27.)

DEFENDANT 38: Undisputed as to what the GetECash garnishment documents included before the process was stopped voluntarily. Defendants are not aware of the content of the FMS debt collection package. *See,* Strom Dec. ¶ 19.

FTC 39: In addition to the garnishment forms, Defendants also have sent to consumers' employers copies of consumers' loan applications. (PX04 at 8-9 (admission 25, 26, 27, 28); PX05 at 8-9 (admission 25, 26, 27, 28); PX08 at 1 ¶ 6, Att. A at 12-15; PX09 at 1 ¶ 5, Att. A at 10-14; PX11 at 2 ¶ 5, Att. C at 19-24; PX12 at 2 ¶ 4, Att. A at 10-12; PX14 Att. Q at 128-31.)

DEFENDANT 39: Undisputed except to note that not all debt collection actions involved a wage garnishment process. *See,* 38 above.

FTC 40: Defendants' wage garnishment package was nearly identical to the package that FMS sends to employers when it garnishes wages on behalf of federal agencies. (*Compare* PX08 Att. A; PX09 Att. A; PX11 Att. C; PX12 Att. A; PX14 Att. Q at 123-27 *with* PX07 Att. A.)

DEFENDANT 40: Defendants are unable to confirm the contents of a package of documents sent by FMS in connection with wage garnishments by federal agencies. Strom Dec. ¶ 23.

FTC 41. For example, the "Letter to Employer" sent by Defendants states:

> One of your employees has been identified as owing a delinquent debt to GetECash. The Debt Collection Improvement Act of 1996 (DCIA) permits 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 GetECash. 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.

(PX01 at 3 ¶ 22 (Defendants admit using such a letter until informed not to do so by FMS);PX04 at 8, 17-18 (admission 22, 82); PX05 at 8, 17-18 (admission 22, 82); PX08 at 2 ¶ 8, Att. A at 7; PX09 at 2 ¶ 7, Att. A at 5; PX11 Att. C at 14; PX12 Att. A at 7; PX14 Att. Q at 123.)

DEFENDANT 41: Disputed. When advised, some 8 months before this action was commenced, by an agent of the United States Department of the Treasury that the portion of GetECash's wage garnishment letter referring to the Debt Collection Improvement Act ("DCIA") were unacceptable to the government, defendant GetECash discontinued use of the challenged documents. Strom Dec. ¶ 23. Moreover, after that language involving the DCIA was removed, GetECash specifically asked whether the Treasury agent with whom it was

communicating had any other concerns with the letter, which contained the voluntary garnishment, and she never responded, leading GetECash to believe (incorrectly, as it turns out) that the garnishment language itself was, as Joe Strom had believed, up to the time the suit was filed, proper. Strom Dec. ¶ 23.

FTC 42: This language is identical to the letter FMS uses, except that Defendants changed the letter from stating that "Federal agencies" do not need to get a court order to garnish wages to "agencies" (*i.e.*, debt collection agencies) do not need such an order. (*Compare* PX08 Att. A at 7; PX09 Att. A at 5; PX11 Att. C at 14; PX12 Att. A at 7; PX14 Att. Q at 123 *with* PX07 Att. A at 6.)

DEFENDANT 42: Disputed. Defendants dispute that GetECash was a "debt collection agency" at any time and the wording of the letter, before GetECash stopped using it, speaks for itself and cannot convert a lender like GetECash into a debt collector under the Fair Debt Collection Practices Act while GetECash was at all times collecting only its own loans. Strom Dec. ¶¶ 6 and 7.

FTC 43: Defendant Strom knew that such a letter was being sent to employers in order to collect on debts owed by consumers to Defendants. (PX03 at 8-9 (admissions 31, 32).) *See* above.

DEFENDANT 43: Undisputed as to actions taken in the initial stages of the debt collection process, but use of such a letter was discontinued.

FTC 44: Defendants were not, and are not, authorized under the DCIA to garnish the pay of consumers who owed debts to Defendants without first obtaining a court order. The DCIA grants that authority only to federal government entities. (PX01 at 4 ¶ 27; PX07 at 1 ¶ 5; *see also* PX08 at 3 ¶ 11; PX09 at 3 ¶¶ P10-11.)

DEFENDANT 44: Undisputed only with respect to lack of authorization under the DCIA. Wage garnishment is allowed without court order under other circumstances.

FTC 45: Indeed, in a letter from Defendants to the Idaho Department of Finance, Defendants admitted that they used language representing that they could use the DCIA to garnish wages without court order. (PX13 at 3 ¶ 9, Att. E at 29.)

DEFENDANT 45: Defendants used that language until the Treasury agent told GetECash to stop and it did so. *See* Defendants' Reply to FTC Fact No. 41.

FTC 46: Defendants knew, before they began sending letters to employers with the DCIA language, that the DCIA did not authorize Defendants to garnish the pay of consumers without first obtaining a court order. (PX06 Att. A at 7 (admission 70, 71).)

DEFENDANT 46: Disputed. *See* Defendants' Reply to FTC Fact Nos. 41, 45.

FTC 47: Defendants have admitted that, in numerous instances, in connection with the collection of payday loans from consumers, Defendants have misrepresented to the consumers' employers, directly or indirectly, expressly or by implication, that Defendants were authorized under the DCIA to garnish the pay of consumers who owed debts to Defendants, without first obtaining a court order. (PX01 at 4 ¶¶ 26, 27.)

DEFENDANT 47: Disputed. This is repetitive, but GetECash believed that the collection procedures undertaken by GetECash were authorized. *See* Defendants' Reply to FTC Fact Nos. 41, 44, 45, 46.

FTC 48: Defendants' letter also expressly stated that they had obtained the consent of consumers to contact the consumers' employers, or at least had notified consumers that their employers may be contacted and had provided consumers with an opportunity to dispute the debt. (PX08 at 2 ¶ 8, Att. A at 7; PX09 at 2 ¶ 7, Att. A at 5; PX10 at 1 ¶ 5; PX11 at 2 ¶ 5, Att. C at 14; PX12at 2 ¶ 4, Att. A at 7; PX14 Att. Q at 123.)

DEFENDANT 48: Disputed. Prior to undertaking any garnishment of wages GetECash contacted debtors numerous times by telephone, voice mail and email (Strom Dec. ¶¶ 17, 18; *see e.g.,* Exhibit C to Strom Declaration) in an effort to collect amounts due without resort to the costly and time-consuming wage garnishment process. Borrowers were advised that wage garnishment was a last resort but that continued failure and refusal to repay loans left GetECash no choice but to proceed to garnishment. *Id.* The garnishment process was not favored by GetECash as it yielded results in connection with less than 10 per cent of all loans made, and

only 20 per cent of those defaulting borrowers to whose employers the agreed-upon garnishments had been sent agreed to allow for the garnishment. Strom Dec. ¶ 19.

FTC 49: In many instances, the wage assignment clause in the original loan application is the only manner in which Defendants purportedly obtained such consent from, or provided such notice to, consumers. (PX10 at 1-2 ¶ 5; PX11 at 1-2 ¶ 4; PX12 at 1, 2 ¶¶ 3, 4; PX06 Att. A at 7-8, 9 (admission 74, 82), Att. B at 16-17, 18 (admission 91, 99), Att. C at 25-26, 27 (admission 94, 102).)

DEFENDANT 49: Disputed. *See,* Defendants' Reply to FTC Fact No. 48.

FTC 50: Defendants' contacts exposed consumers to the embarrassment of having their debts disclosed to third parties and the risk of adverse actions by their employers. For example, consumer Paulette Okibe states she was embarrassed that her company learned she was indebted to a payday lender and was concerned that she could get fired. (PX10 at 2 ¶ 6.) Consumer Shalandria Jones states that she suffered a great deal of embarrassment and anxiety due to Defendants' contacts with her employer. (PX16 at 4 ¶ 15.) She is now concerned that such contacts may affect her standing with her employer and hurt her chances for future pay raises or promotions. (*Id.*) A consumer in Kansas, who filed an online complaint with the FTC, reported that Defendants repeatedly called her employer telling employees that she owed $300. (PX14 Att. P at 117.) The consumer reported that her boss was very upset and that she was "not sure if i [sic] will have a job." (*Id.*) Another consumer from South Carolina, who filed an online complaint with the FTC, reported that Defendants faxed all five of her company's offices with information about her debt causing her great embarrassment. (*Id.* at 107.) Moreover, the consumer reported that she was sent home for the day. (*Id.*)

DEFENDANT 50: Disputed. To begin with, the allegations made in this multi-fact assertion relate to supposed violations of the Fair Debt Collection Practices Act, an Act that does not apply to lenders collecting their own loans. Moreover, these four references are hardly representative of the more than 7,000 loans made by GetECash, and the content of the assertions is quite suspect. Paulette Okibe's fear about job loss was said to arise on October 14, 2009, fully 18 months ago. She still has her job. There is also nothing in her declaration to support her conclusory assertion that "I was also concerned that a person in my position could get fired over something like this." FTC Exhibit 10, ¶ 6. Yet it appears, from her declaration, that her supervisor worked with her collegially to determine the efficacy of the GetECash garnishment

papers. The same, it is fair to say, can be said in relation to Shalandria Jones' professed fear and anxiety. As for the "consumer in Kansas," his statement is offered through a hearsay, online complaint. The same is true in relation to the online complaint from the "consumer from South Carolina."

Defendants generally agree with the numbers stated in this proposed fact.

FTC 51: Since commencing operations, Defendants have made at least 7,121 payday loans to consumers that included the unlawful wage assignment clause (PX15 at 3 ¶ 9, Att. C at 14) and collected from consumers a total of $3,013,044 in income from those loans. (*Id.* at 2 ¶ 6, Att. A at 6-7.) Of this amount, Defendants collected $468,020.91 from consumers through their illegal wage garnishment activities. (PX06 Att. A at 10 (admission 93), Att. B at 28 (admission 113), Att. C at 28 (admission 113); PX15 at 2-3 ¶¶ 7-8, Att. B at 9.)

DEFENDANT 51: Defendants agree with the number of loans made, dispute that all amounts collected amounted to "income" rather than loan repayment, and dispute the remaining inferences contained in this statement. At the very least it is incomplete. Fully 80 per cent of those as to whom garnishment was requested because they had not paid as agreed rejected the use of garnishment as a way of paying down their lawfully-incurred debt. A fair inference arises that the 20 per cent whose wages were garnished were likewise informed, and went along with the procedure, acquiescing in it because they knew they had to pay the debt and this was a way to do so. It was the practice of GetECash to remind borrowers in default that they had agreed to a wage garnishment as a way to repay amounts due. Strom Dec., ¶ 17.

FTC 52: On November 10, 2010, the FTC served Defendants with the FTC's second set of requests for admissions. (PX06 at 2 ¶¶ 2 - 4.) To date, Defendants have failed to respond to any of these requests. (*Id.*) Accordingly, each admission is deemed admitted pursuant to Federal Rule of Civil Procedure 36(a)(3) and summary judgment may be granted based on matters deemed admitted. Fed. R. Civ. P. 36(b); *see United States v. Palmer*, 2010 U.S. Dist. LEXIS 92259, at *7-8 (D. Utah Sept. 2, 2010) (unpublished); *Walston v. UPS*, 2008 U.S. Dist. LEXIS 99947, at *5 n.11 (D. Utah Dec. 10, 2008) (unpublished).

DEFENDANT 52: This answer applies equally to FTC Facts 53 and 54 below.

The "Second Set of Requests For Admissions of Fact" served on defendants' counsel on November 10, 2010 is in virtually all respects duplicative of the First Request for Admissions of Fact which was answered completely by defendants earlier in the case, along with selected Interrogatories and Document Requests. There is no need to deny something already denied. To the extent that the Second Request was different from the First, the Second Set was not a Request seeking factual admissions, as authorized by Rule 36, but rather called for admissions of legal conclusions which is not the purpose or within the limits of the Rule.

For the reasons set forth in the accompanying Motion to Reopen Discovery and for Relief from Having the FTC's Second Set of Requests for Admissions "Deemed Admitted" and to have Defendants' Denials Accepted. Defendants request that the answers they have now served to the Second Request be accepted by this Court and that this case be decided on its merits.

FTC 53: In particular, by operation of Rule 36(a)(3), Defendants have admitted that they violated:

a. Section 5 of the FTC Act, 15 U.S.C. § 45, by:

i. misrepresenting that the DCIA authorized Defendants to garnish the pay of consumers without first obtaining a court order (PX06 Att. A at 7 (admission 72), Att. B at 16 (admission 89), Att. C at 25 (admission 92));

ii. misrepresenting that, before sending a garnishment request to employers, Defendants had notified consumers of Defendants' intent to garnish consumers' wages and provided consumers with an opportunity to dispute the debt (*Id.* Att. A at 8 (admission 79, 80), Att. B at 17 (admission 96, 97), Att. C at 26 (admission 99, 100)); and

iii. unfairly disclosing to employers and co-workers of consumers the existence, and sometimes the amount, of debts purportedly owed by consumers to Defendants, without first having obtained the prior consent of consumers (*Id.* Att. A at 9 (admission 83), Att. B at 18 (admission 100), Att. C at 27 (admission 103));

b. Section 807 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692e, by:

i. falsely representing that the DCIA authorized Defendants to garnish the pay of consumers without first obtaining a court order (*Id.* Att. A at 9 (admission 85), Att. B at 18 (admission 102), Att. C at 27 (admission 105)); and

ii. falsely representing that Defendants had notified consumers of Defendants' intent to garnish consumers' wages and provided consumers with an opportunity to dispute the debt (*Id.* Att. A at 9-10 (admission 87, 88), Att. B at 18-19 (admission 104, 105), Att. C at 27-28 (admission 107, 108));

c. Section 805(b) of the FDCPA, 15 U.S.C. § 1692c(b) by disclosing to employers and co-workers of consumers the existence, and sometimes the amount, of debts purportedly owed by consumers to Defendants, without first having obtained the prior consent of consumers (*Id.* Att. A at 10 (admission 90), Att. B at 19 (admission 107), Att. C at 28 (admission 110)); and d. Section 444.2(a)(3) of the Credit Practices Rule, 16 C.F.R. § 444.2(a)(3). (*Id.* Att. A at 10 (admission 92), Att. B at 19 (admission 109), Att. C at 28 (admission 112).)

DEFENDANT 53: *See*, Defendants' Reply to FTC Fact No. 52.

FTC 54: Further, by operation of Rule 36(a)(3), Defendants have admitted they are liable for violating Section 5 of the FTC Act, the FDCPA, and the Credit Practices Rule, as alleged in Counts I, II, III, IV, V, VI, and VII of the FTC's complaint. (*Id.* Att. A at 7, 9-10 (admission 73, 81, 84, 86, 89, 91, 92), Att. B at 16-19 (admission 90, 98, 101, 103, 106, 108, 109), Att. C at 25- 28 (admission 93, 101, 104, 106, 109, 111, 112).)

DEFENDANT 54: *See*, Defendants' Reply to FTC Fact No. 52 and the accompanying Motion to Reopen Discovery and for Relief from Having the FTC's Second Set of Requests for Admissions "Deemed Admitted" and to have Defendants' Denials Accepted. In particular, Defendants note here that they had previously been asked to admit that they had violated the Fair Debt Collection Practices Act and specifically denied that. The First Set of Requests for Admissions served separately on LoanPointe and GetECash were asked and answered as follows:

First Request No 7. Prior to the filing of the original complaint in this case, you were a "debt collector" as that term is defined in section 803(6) of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692a(6).

Objection – calls for a legal conclusion.

First Request No. 8. Prior to the filing of the original complaint in this action, you were engaged in the collection of debts arising or purportedly arising from payday loans taken out by GeteCash consumers from GeteCash.

Deny because GeteCash was a d/b/a of LoanPointe.

The FTC cannot seriously be contending that this first denial of the requested admission does not suffice and, further, that the failure to deny this same conclusory allegation for a second time (three times if you count the Answer to the Complaint) allows the defendants to be subjected to a federal act that does not apply to them pursuant to the terms of the Act as passed by Congress.

The defendants' position on these three "deemed admitted" facts is set forth in more detail in the accompanying motion for relief.

Summary of Argument

The FTC seeks, without a trial, to disgorge from defendants all of the money that defendant GetECash collected from borrowers who repaid their loans. It cites three grounds.

First, the FTC claims that defendants engaged in "unfair debt collection practices" in violation of 15 U.S.C.¶1692(a) (the Fair Debt Collection Practices Act., hereinafter referred to as "FDCPA"). But as defendants show below, GetECash lent and collected money only for itself, as a d/b/a for LoanPointe. Defendant Eastbrook merged its books into LoanPointe shortly after it was formed, and never made nor collected a loan. All entities share common ownership and are affiliated by corporate control. Thus under any interpretation these parties were not debt collectors and the FDCPA does not apply to these defendants.

Second, the FTC objects to the consensual garnishment agreement that GetECash had with its borrowers because it did expressly state that the garnishment was revocable at will. While many borrowers knew that fact, and thus rejected the garnishment when it was sent to their employer, defendants admit the precise language was not in the wage assignment clause contained in the GetECash loan agreement and thus there was a literal violation of the FTC "Credit Practice Rules," 16 C.F.R. 444.2(a)(3). However, the required wording was not known by defendants and they had no intent to violate the Rule. The absence of the language is by

statute an unfair but not deceptive practice and defendants ceased using the non-compliant language as soon as the FTC notified them of its objection. As noted, however, apart from the written agreement, borrowers had the opportunity and right to object when the voluntary garnishment papers were sent to their employers; indeed, 80 per cent of them did. Moreover, while used, the voluntary garnishment never resulted in a payment of more money than was owed. There were thus no ill-gotten gains derived from its use.

Third, the FTC complains that when GetECash initially sent voluntary garnishment papers to employers, it referenced the Debt Collection Improvement Act of 1996 ("DCIA"), which it should not have done since it was not a federal agency (the only entities allowed to collect debts in the manner provided in the DCIA). GetECash did not say it was a federal agency. However, when the Treasury Department contacted GetECash and said it had to remove that citation from its collection letter, it promptly did so, submitted the new letter to the Treasury agent and asked if she had any other concerns. When she did not respond further, GetECash believed they were in compliance. The submission included the voluntary garnishment provisions contained in the letter reviewed by the Treasury agent, about which she had made no criticism. Then, eight months later, the FTC brought suit alleging that the wage assignment provision was defective even without the reference to the DCIA. The defendants promptly agreed to stop using the wage assignment and agreed to appropriate injunctive relief without a fight.

Defendants have been cooperating ever since. Indeed, not only have they answered hundreds of requests for admissions, interrogatories and document requests promulgated by the FTC in this action, GetECash actually gave the FTC a code by which the FTC could enter the defendants' data base at will to retrieve any information about any loan from GetECash to any

borrower, including a record of all collection efforts made by GetECash. It also instructed its employees to explain how to access the database to the FTC's data-control personnel. In every way these defendants have acted as law-abiding citizens who responded as expected when they learned that their conduct violated the FTC's Credit Practices Rule.

The injunctive relief already entered without objection, which prohibits any further use of GetECash's wage assignment is, defendants respectfully submit, all the equitable relief that ought to be imposed here. Acting in equity, this Court should not punish defendants for doing something that they did not know was wrong and stopped as soon as informed, particularly where their conduct has not resulted in payment from the borrowers of anything that they did not owe, was not deceptive, and did not result in unjust enrichment.

ARGUMENT

I. THE STANDARD ON SUMMARY JUDGMENT

Summary judgment should enter only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). On these motions, the Court should "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). In summary judgment proceedings all facts are to be construed liberally against the moving party, *Bushman Construction Co. v. Conner,* 307 F.2d 888 (10th Cir. 1962)

The claims of the FTC break down into three categories: Counts I – III are general claims of unfair and deceptive practices claimed to violate Section 5 of the FTC Act (15 U.S.C. § 45); Counts IV – VI are claims that defendants violated the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*); and Count VII alleges use of an improperly worded "wage assignment," in violation of the FTC's "Credit Practices Rules" (16 C.F.R. §444.2(a)(3)).

We discuss each of these three separate theories of liability separately below.

II. THE GetECash LOANS ARE NOT SUBJECT TO THE FAIR DEBT COLLECTION PRACTICES ACT BECAUSE DEFENDANTS WERE NOT "DEBT COLLECTORS" UNDER THAT ACT

The Fair Debt Collection Practices Act, (15 U.S.C. 1692 *et seq.*) ("FDCPA") applies only to the collection of the debts of another, *not* to a lender collecting its own debts. Under the FDCPA, a "creditor" is one who "offers or extends credit creating a debt or to whom a debt is owed." 15 U.S.C. §1692a(4). A "debt collector", on the other hand, is one who attempts to collect debts "owed or due or asserted to be owed or due another." 15 U.S.C. §1692a(6). The Act applies only to debt collectors:

> . . . the FDCPA. . . however, applies only to debt collectors, *Pettit v. Retrieval Masters Creditors Bureau, Inc.,* 211 F.3d 1057, 1059 (7th Cir.2000), and only when their conduct is undertaken "in connection with the collection of any debt." 15 U.S.C. § 1692e. *See also 15 U.S.C. § 1692f* ("[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."). Capital One was not a debt collector when it sold Neff's account to CAMCO. 15 *U.S.C. § 1692a(6)* (defining a "debt collector" as any person who "regularly collects or attempts to collect, directly or indirectly, debts owed or *due or asserted to be owed or due another*.")

Neff v. Capital Acquisitions & Management Co., 352 F.3d 1118, 1121 (7th Cir., 2003) This Act, it is well known, does not apply to "lenders." *See, Nielsen v. Dickerson*, 307 F.3d 623, 634 (7th Cir. 2002)("Creditors who are attempting to collect their own debts generally are not considered debt collectors under [FDCPA]."); *Williams v. Countrywide Home Loans, Inc*., 504 F.Supp.2d

176, 190 (S.D.Tex., 2007) (mortgage lender collecting debts are not "debt collectors"), citing *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1208 (5th Cir.1985) (noting that the legislative history of the FDCPA indicates that a "debt collector" does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned). *See also, Schwartz v. Bank of America, N.A.*, 2011 WL 1135001, 4 (D.Colo., March 28, 2011)(unpublished)("…lenders and loan servicers are specifically excluded from the [FDCPA], which applies exclusively to "debt collectors" or "collection agencies.")

These defendants are not debt collectors within the meaning of the FDCPA. Indeed, the FTC itself asserts that the defendants are lenders, not debt collectors. In its Complaint the FTC specifically alleges that these defendants are "lenders" for the purpose of the Credit Practices Rule, 16 C.F.R. 444.2, Complaint, ¶ 44, that is, "one who engages in the business of lending money to consumers." 16 C.F.R. 444.1. As stated by the FTC, "Defendants Eastbrook, LLC d/b/a Ecash and GetECash ("GetECash") and LoanPointe, LLC, operating as a common enterprise under the close supervision of founder, president and co-defendant Joe Strom . . . have offered and extended . . . loans . . . to consumers". FTC Brief, p. 1. In its Statement of Undisputed Facts the FTC alleges: "Defendants operate through two interrelated companies, Eastbrook, LLC and LoanPointe, LLC, and do business under the name GetECash" (FTC Fact No. 2); "Defendants have advertised and offered their payday loans to customers through Internet websites . . . " (FTC Fact No. 4); ". . . doing business as Ecash and GetECash and through Internet websites . . . Defendants have offered consumers payday loans . . . " (FTC Fact No. 21). These statements of fact by the FTC foreclose application of the FDCPA, which governs only "debt collectors," not lenders collecting their own debts.

In an attempt to label defendants separately as lenders and debt collectors, the FTC states that "[d]efendants have operated as a common enterprise, lending under the names 'Ecash' and 'GetECash' and collecting under the name 'LoanPointe'." FTC Brief, p. 25. *See* also FTC Facts Nos. 21, 22. While a creditor cannot use a name other than his own to collect a debt, the FDCPA does not apply to "any person while acting as a debt collector for another person, both of whom *are related by common ownership or affiliated by corporate control*." *See*, 15 U.S.C. §1692a(6)(B). The FTC itself characterizes these defendants as creditors acting as a common enterprise with common ownership and affiliated by corporate control. See FTC Fact No. 13.

Finally, the declaration of Joe Strom shows specifically that the only loans made here were made by GetECash, on GetECash forms, obtained through the GetECash website, and that all collection efforts were undertaken by GetECash-generated phone calls and letters. The FTC is not entitled to summary judgment on Counts Iv, V and VI as these defendants and the claims herein are not within the purview of FDCPA. The FTC has not substantiated its claims.

III. THE FTC FAILS TO SHOW THE SECTION 5 VIOLATIONS IT ALLEGES IN COUNTS I THROUGH III OF ITS COMPLAINT

A. Introduction

The conduct complained in Counts I through III has not been shown to violate Section 5 of the FTC Act, warranting the sanction of disgorgement. Section 5 prohibits "unfair or deceptive practices." An "*unfair*" practice is one which "causes or is likely to cause *substantial injury to consumers which is not reasonably avoidable by consumers themselves* . . ." *See,* FTC Brief, p. 20. "[A]n 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 Brief at 21, *citing FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995).

The consumers in this case were neither deceived nor subjected to any "unfair" practice as defined and thus the FTC should not be entitled to summary judgment as to Counts I, II, or III.

Before discussing the supposed deceptions or harms in the three counts involved, defendants note the scant proof of either deception or harm (declarations of three borrowers) offered by the FTC for its sweeping claims of deception and harm to more than 7,000 borrowers. Unless the deception is obvious on the face of the advertisement or other document, large numbers of witnesses or a fair survey is needed to establish harm or deception to consumers. *See, Kraft, Inc. v. F.T.C*., 970 F.2d 311, 314 (7th Cir. 1992)(considering the harm from misleading advertisements) *See, Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 652-653, 105 S.Ct. 2265, 2282 - 2283 (1985)("When the possibility of deception is as self-evident …we need not require the State to "conduct a survey of the ... public before it [may] determine that the [representation] had a tendency to mislead.") *See also, F.T.C. v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 40-41, (D.C. Cir., 1985). ("We accept the general desirability of having some empirical evidence of consumer perception…").

> The Lanham Act false advertising cases relied on by appellant [in this FTC action] clearly do suggest that if "the language of the advertisement is not unambiguous," then the trial judge may be "compelled to examine consumer data to determine first the message conveyed." [citations omitted] *Thus, if the lower court confronts an advertisement involving "literally true or grammatically correct" statements, the trial judge cannot make a finding of deceptiveness unless the parties provide "evidence of substance" about what "the person to whom the advertisement is addressed find[s] to be the message.*" [citations omitted].

[*Id.,* emphasis added] The several borrowers whose statements were offered by the FTC to show harm (not even deception) do not carry the FTC's burden to fairly show that the paperwork supplied by defendants was in fact deceptive. And defendants' paperwork was certainly not deceptive on its face. It plainly told each prospective borrower the terms of the loan and that *a*

wage assignment would be used, if they agreed to borrow the money and then did not repay it. *See*, Defendants' Reply to FTC Fact, Nos. 24-28, *supra*.

B. Count I – Use of the Federal Agency Debt Collection Language

Count I complains of GetECash's use of a collection letter directed to employers which cited, as a basis for the garnishment being sought, that such garnishment was allowed by Debt Collection Improvement Act of 1996, an Act that only applied to federal agency collections, not those of private entities such as GetECash. This use was wrong, and when the Treasury agent contacted GetECash and explained the language's applicability to only those debts of a federal agency, it was removed from the collection letter. *See* Defendants' Fact Response 44.

However, the letters containing that language were directed to employers, not consumers. Consumers were not induced to take any action by reason of the complained-of collection procedures, and the FTC's conclusory allegations of "detriment" to employers (*see* FTC Brief, p. 24.) proves nothing for summary judgment purposes. The general allegations it makes about consumer injury, without more, are insufficient to support summary judgment. "[C]onclusory, self-serving statements in appellate briefs . . . are insufficient to create a genuine issue of material fact." *Mitchell v. General Electric Co.*, 689 F.2d 877, 878-79 (9th Cir. 1992); *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *citing Mitchell v. General Electric Co.*, 659 F.2d 877, 878-79 (9th Cir. 1992). The FTC offers no survey or factual basis for its assertions.

The use of the federal collection language after the loan had been made and the money delivered as promised was not deceptive to consumers. Nor was it a representation causing harm to them. Certainly the FTC has not shown any such deception or harm, much less that GetECash was unjustly enriched by ill-gotten gains.

C. Count II – "Misrepresentation" that Borrowers Knew of Wage Assignment

In Count II, the FTC claims a Section 5 violation because defendants "represented to consumers' employers, directly or indirectly, expressly or by implication" that GetECash had notified consumers of their intent to garnish and provided consumers an opportunity to dispute the debt. To begin with, this is not true, as Joe Strom's declaration shows. *See*, Defendants' Response to FTC Fact No. 44. *See also*, note 4, below, showing that one of the three consumers chosen by the FTC to give a declaration not only falsely stated that she had never been contacted, but was in fact told twice that unless she commenced repaying her loan, the garnishment she had agreed to would be sent to her employer. Further, the language of the wage assignment is fairly interpreted as itself giving notice to the borrower that their wages will be garnished. Finally, as a legal matter, while this "misrepresentation" was not made because all consumers were informed of the wage assignment, the FTC itself alleges that it was made to employers, not to the consumers covered by Section 5 of the Act.

D. Count III – "Harm" Caused by Agreed-upon Wage Assignments

In Count III, the government continues its conclusory approach, alleging that by contacting employers to effectuate the wage assignments (GetECash's collection practice of last resort), the defendants caused "substantial economic harm" to the consumers and their employers. Again, no citations to any law are provided, and unsubstantiated allegations in a brief, without more, are simply insufficient to justify the relief sought. *Mitchell,* 689 F.2d at 878-79. It is simply not enough to pick a few borrowers who did not repay their loans and whose wages were thus garnished in accordance with their voluntary agreements and offer up their

assertions of embarrassment or apparently unfounded fear of job loss as justification for summary judgment. They are not representative, persuasive or worthy of belief.[4]

The government's reliance on cases that involved deceptive practices aimed at consumers is misplaced. This is not a case where a company made material representations that induced consumers to purchase worthless products. (*Cf, F.T.C. v. Figgie Intern., Inc*., 994 F.2d 595 (9th Cir. 1993) and *F.T.C. v. Security Rare Coin & Bullion Corp*. 931 F.2d 1312 (8th Cir., 1991)). In the case of GetECash loans, the borrowers got the loans they sought when they went on the website, at the cost they had agreed to repay, and with the repayment schedule they had agreed to. The wage assignment could hardly be argued to have *induced consumers* to borrow money; its presence would presumably dissuade, rather than persuade, some from borrowing. In any event, the wage assignment, while not complying with the FTC's Credit Practice Rules, was not deceptive within the meaning of Section 5 of the FTC Act, and thus does not trigger any of its unjust enrichment provisions.[5]

---

[4] The FTC's offer of the declaration of Elia Ho fails utterly. To begin with, she sought out the loan, agreed to the wage assignment and then did not pay anything toward the debt. She admits as much. Exhibit 12, p.1. What she does not tell the Court is that she bounced checks several times and despite her claim that she was in fact called by GetECash many times (she said none) and was warned twice about the garnishment she had agreed to:

> Your scheduled payment to us was not collected due to non-sufficient funds in your account. Your payment is still due, in addition to a $25 NSF fee for the rejected payment. You must contact us immediately to resolve this issue. If you fail to resolve the issue, we have the right to collect the full balance due, *in addition to possible negative credit reporting, lien of your bank account, and voluntary garnishment of your wages (see attached contract).* We hope to avoid those options. If you would like to review your contract, click on the link. In order to avoid this potential action, please contact us at 801-717-1550 today.
>
> Best Regards,
> The GetECash.com Team (emphasis added)

See, Strom Declaration, Exhibit C.

[5] Wage assignments are not *per se* unlawful; the FTC's regulation (16 C.F.R. 444.2) does not declare them to be so. Rather, the FTC requires that wage assignments contain certain wording, the

The only attempt to show "deception" by the FTC here is the palpably disprovable assertion that the wage assignment was somehow hidden in "very small print located near the bottom of the third of four pages of small print disclosures"), and that the high cost of the loan was also hidden. *See,* FTC Brief, para. 28, p. 11. That is simply not the case here as shown by the declaration of Joe Strom.

As Strom's declaration shows, any prospective borrower was warned twice on the GetECash website of the high cost of payday loans and the need to repay quickly. Strom Dec. ¶ 11. They were urged to use these loans only for emergencies until the next paycheck. *Id.* The cost of the loans was clearly stated, repeatedly. Strom Dec. ¶ 12. The wage assignment clause was not hidden, or obscured. Rather, it was highlighted. Strom Dec. ¶ 14. It was underlined and stated in bold "**NOTICE. I agree to have my wages garnished to pay any delinquent amount of this loan."** *See,* Strom Declaration, Exhibit B, p. 3**.**

To apply for the loan a prospective borrower must click four signature boxes, each connected to a separate link to a place in the four-page loan agreement. Strom Dec. ¶14. One of those links specifically directed the borrower to the wage assignment portion of the agreement and the associated box must be checked before the loan application could be submitted. Only persons with access to a computer who have located the GetECash website, read through its warnings, clicked the box that opens the loan entry page, clicked the four links to the loan agreement itself, thus revealing to the borrower, on screen, each portion of the loan agreement, and then checked the four required agreement boxes, could submit a loan application. *Id.* There is simply no deception in any of this, and the fact that one borrower tells this Court that she was

absence of which is deemed an unfair (but not deceptive) practice. In this case, the wage assignment provision did not state that it could be revoked by the borrower but its absence was not deceptive. The FTC cannot rely on deception; the fraud that normally leads to disgorgement of ill-gotten gains is simply not present in this case.

unaware of the wage garnishment provision should be highly unpersuasive, particularly since her statement is provably false. *See* Footnote 4, above.

The FTC simply has not demonstrated that, in its offering of the loan service the borrowers in this case elected to use, the defendants acted in a way that was "likely to mislead the consumer to the consumer's detriment." FTC Unfairness Policy Statement, p. 2, cited in the FTC Brief at footnote 3, and appended to *FTC v. International Harvester*, 104 F.T.C. at 1070. Equally, the FTC does not show that the defendants' collection procedures were "likely to mislead the consumer". The FTC offers no facts, even in the declarations of debtors, which indicate any dispute regarding the fact that money was borrowed, repayment was owed, repayment was only sought in accordance with the terms of the loan, and that GetECash had a right to that repayment. Deception thus is not at issue.

The question here really is concerning the method used by GetECash to obtain repayment, but those procedures do not, in and of themselves, give rise to a claim under Section 5. Congress has specifically relegated debt collection practices to the Fair Debt Collection Practices Act, and limited its applicability to debt collectors, not lenders such as defendants.

IV THE FTC HAS FAILED TO DEMONSTRATE ITS RIGHT TO DISGORGEMENT UNDER COUNT VII CLAIMING IMPROPER WAGE ASSIGNMENTS IN VIOLATION OF THE FTC ACT

A. The Language of the Wage Assignment

The final alleged violation of the FTC Act is stated in Count VII and is based on the Credit Practices Rule, 16 C.F.R. §444.2, which regulates but does not impose an outright ban on the use of wage assignments in loan agreements. As noted in earlier discussions, the FTC must present more than conclusory arguments that the wage assignment at issue caused harm that warrants disgorgement.

The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. The Credit Practices Rule, by its terms, declares that it is an "unfair act or practice" within the meaning of Section 5 [of the Federal Trade Commission Act, 15 USC § 45 et seq.], "to take or receive from a consumer an obligation that contains an assignment of wages," unless the wage assignment by its terms contains certain specific language, in this instance that it was revocable at will. Defendants concede that the GetECash wage assignment provision did not so state. It should have, under the rule, and when GetECash was asked to stop using this agreement, it did so, consenting immediately to an injunction as requested. Thus the FTC has obtained all of the of equitable relief that is warranted in this circumstance.

The wage assignment, now discontinued, was not the tricky or deceptive feature the FTC describes. It was clearly stated in the application, underlined, and in bold print. *See* Defendants' Reply to FTC Fact No. 28. One or two borrowers' statements cannot suffice to establish deception even were they telling the truth. A practice will "not be considered deceptive merely because it could be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *In re Cliffdale Associates, Inc.,* 103 F.T.C. 110 (1984). The FTC's own Deception Statement provides that claims must be evaluated "in light of the sophistication and understanding of the persons to whom they were directed." These were persons who were presumably facile in using the internet, were employed, and were able to manage the process of obtaining an electronic loan. It is not unreasonable to assume they were able to read and understand all of the language of a loan agreement.

Moreover, as to the unfairness of the wage assignment practice, only 20% of those borrowers whose employers received the garnishment forms acquiesced to any garnishment of

their salaries. And given the practice of reminding the borrower of the wage assignment before it was implemented, *see,* e.g., Footnote 4, and Fact Response Nos. 48-49, it is a fair inference that the remaining borrowers agreed to have their wages garnished after the debt was past due. That inference aside, there is certainly no evidence that any borrower was induced by the wage assignment to obtain the loan or relied on it to his detriment.

V. DISGORGEMENT IS NOT A FAIR REMEDY HERE

Section 13(b) (15 U.S.C. § 53(b)) permits courts to enjoin violations of the FTC Act, with broad equitable authority to grant ancillary relief, including the award of monetary relief in the form of either restitution (or consumer redress) or disgorgement. *F.T.C. v. Direct Mktg. Concepts, Inc.,* 648 F. Supp. 2d 202, 213 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *F.T.C. v. Gem Merchandising Corp*., 87 F.3d 466, 469-70 (11th Cir. 1996). The primary purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains. *Id.* ("The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."); *Sec. & Exch. Comm'n v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *see also, SEC v. Manor Nursing Centers, Inc*., 458 F.2d 1082 (2d Cir. 1972) (finding defendant only need disgorge wrongfully obtained profits and interests); *C.F.T.C. v. Hunt*, 591 F.2d 1211, 1222 (7th Cir.1979) ("[D]isgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains.").

Courts distinguish between illegally obtained profits and legally obtained profits when considering the amount of disgorgement. *F.T.C. v. Verity Int'l, Ltd*., 443 F.3d 48, 70 (2d Cir. 2006); *S.E.C. v. First City Fin. Corp., Ltd*., 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Therefore, the SEC generally must distinguish between legally and illegally obtained profits.") In *Verity,* the court held that the total amount of the defendant's overall gains from a telephone billing

system was not the proper way to determine the defendant's unjust gains. *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir. 2006). Instead, the court held that only the portion of the profits from the illegal part of the billing system could be disgorged. *Id.* The illegal part was that part where the billing system had overcharged or charged those who had not used the service.

> Here, because some fraction of consumers who paid the bills incurred through the defendants-appellants' billing system *actually used or authorized others to use the services at issue*, the amount of the defendants-appellants' *unjust* gains is only a fraction of the amount of their overall gains from the billing system. A reasonable approximation of the defendants-appellants' unjust gains must take this into account.

Id. 29-70 (2d Cir. 2006). Analogizing to this case, defendants did not collect any money than was not owed and were not unjustly enriched by deceptive practices that induced a consumer to act to its detriment. *Cf. F.T.C. v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997); *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595 (9th Cir. 1993). In those cases, deception is what induced the consumer to enter into the transaction, and the fraud was what produced the defendant's profits. And even in those cases, the courts limited relief to the amount consumers lost, not the total amount paid to defendants.

In this case, GetECash recovered only money it had loaned and agreed-upon fees, nothing more. The FTC overreaches in seeking payment of those amounts to the government, calling them ill-gotten gains. Amounts were owed pursuant to a voluntary agreement with each borrower, reached through no deception, and only after the borrower had sought out the GetECash website and elected to accept the terms clearly stated in it. Courts must look at prevention of unjust enrichment only; anything more would be a penalty. *Febre,* 128 F.3d at 536-37. Requiring defendants to disgorge amounts paid for repayment of loans would amount to a penalty, not consumer redress, and is beyond the scope of fair equitable relief. The "power to

order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *See, SEC v. ETS Payphones, Inc.,* 408 F.3d 727, 735 (11th Cir. 2005), quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).

The courts' equitable power may only be exercised over property that is causally related to the illegal actions of the defendant. *S.E.C. v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993) aff'd, 29 F.3d 689 (D.C. Cir. 1994). "As such, 'the loss complained of must proceed directly and *proximately from the violation claimed and not be attributable to some supervening cause*.'" *S.E.C. v. Bilzerian,* 814 F. Supp. 116, 121 (D.D.C. 1993) aff'd, 29 F.3d 689 (D.C. Cir. 1994).

All the borrowers here suffered no injury because any moneys they paid were due. There is not a hint by the FTC that the garnishments or any other payments were received for debts not due. Indeed the FTC has identified only three persons subject to a garnishment procedure and does not define or describe any pecuniary injury or damage sustained by any of them. *See* FTC Fact No. 29. Instead, the FTC offers conclusory language, unsupported by any facts, that these practices "resulted in significant harm to consumers and their employers." FTC Brief, at 1. This is insufficient to justify summary judgment or the relief sought herein.

The defendants have stipulated to injunctions that are reasonable in scope and effect, promising not to use wage assignments that do not comply with the Credit Practices Rule. Eight months before the lawsuit, they had stopped using the DCIA language, voluntarily. This should be enough. The FTC has failed to substantiate its claims to an award of monetary relief from the defendants, or any of them.

The more onerous penalties of the FTC Act are reserved for debt collectors "whose intentional actions also reflected 'knowledge fairly implied on the basis of objective

circumstances' that the conduct was prohibited." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, et al.*, 130 S.Ct. 1605, 1612 (2010). As the declaration of Joe Strom shows, the defendants have acted in good faith. If the onerous penalties sought by the FTC are to be levied upon individuals by reason of their failure to comply with a federal regulation as to which the FTC can show no resulting harm, it should be done only after (1) the court takes into account the good faith of the defendants and (2) the government shows much more clearly than it has done on its motion that they have been unjustly enriched.

VI. THE SECOND SET OF REQUESTS FOR ADMISSION SHOULD NOT BE DEEMED BINDING ON DEFENDANTS

By separate motion defendants address the second set of Requests for Admission, why they should not be deemed admitted (See FTC Fact Nos. 52-54) and why the answers now submitted should be accepted by the Court.

CONCLUSION

For the foregoing reasons, the FTC's motion for summary judgment should be denied.

Dated: April 18, 2011

Respectfully submitted,

LOANPOINTE, LLC, EASTBROOK, LLC
and JOE S. STROM

/s/ John J.E. Markham, II
John J.E. Markham, II
MARKHAM & READ
One Commercial Wharf West
Boston, Massachusetts 02110

Attorneys for Defendants LoanPointe, LLC, Eastbrook, LLC, and Joe S. Strom

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2011, I filed the attached

OPPOSITION OF DEFENDANTS LOANPOINTE, LLC, EASTBROOK, LLC, AND JOE S. STROM TO THE FTC'S MOTION FOR SUMMARY JUDGMENT
and the accompanying
DECLARATION OF JOE S. STROM and EXHIBITS and
DECLARATION OF BRIDGET A. ZERNER, ESQ. and EXHIBITS

using the Court's CM ECF System, and thereby served the attached document to the following parties entitled to service:

Carlie Christensen
Acting United States Attorney
Jeannette Swent
Assistant United States Attorney
185 South State Street, Suite #300
Salt Lake City, UT 84111
Email: jeannette.swent@usdoj.gov

Willard K. Tom
General Counsel
Christopher Koegel
Stephanie Rosenthal
Gregory A. Ashe
Attorneys for Plaintiff Federal Trade Commission
600 Pennsylvania Avenue, NW, NJ-3158
Washington, DC 20580
Email: ckoegel@ftc.gov, srosenthal@ftc.gov, gashc@ftc.gov

/s/ John J.E. Markham, II
John J.E. Markham, II

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff - Appellee,

v.

LOANPOINTE, LLC; EASTBROOK, LLC; and JOE S. STROM,

Defendants – Appellants,

BENJAMIN J. LONSDALE; JAMES C. ENDICOTT; MARK S. LOFGREN,

Defendants.

Case No. 12-4006

(D.C. No. 2:10-CV-00225-DAK)

OPENING BRIEF OF APPELLANTS LOANPOINTE, LLC, EASTBROOK, LLC, AND JOE S. STROM

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

I. JURISDICTIONAL STATEMENT 1

II. STATEMENT OF THE ISSUES ON APPEAL 2

III. STATEMENT OF THE CASE. 3

IV. STATEMENT OF FACTS. 5

1. The Appellants' Payday Loan Program 5

2. The Online Process for Obtaining a Payday Loan 6

3. The Lending History of Appellants 8

4. The Court's Disgorgement Order and Underlying Reasoning 9

V. SUMMARY OF ARGUMENT. 13

VI. ARGUMENT. 14

A. THE SUMMARY JUDGMENT STANDARD. 14

1. Standard of Review 14

2. The Requirements for Summary Judgment 14

B. THERE WAS NO FACTUAL SHOWING THAT WARRANTED NY DISGORGEMENT, MUCH LESS ANY FINE 14

1. By the FTC's Choice, This Is Not a Fine or a Penalty Case 14

2. Wage Assignments Are Deemed "Unfair" by Rule, But That Does Not, Without More, Warrant Disgorgement, Much Less A Fine . . 16

CONCLUSION. 20

REASONS ORAL ARGUMENT IS REQUESTED. 20

CERTIFICATION OF BAR MEMBERSHIP. 21

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION. 22

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31. 22

CERTIFICATE OF SERVICE. 23

ATTACHMENT 1: Memorandum Decision and Order, 9/16/2011

ATTACHMENT 2: Final Order of Judgment and Permanent Injunction as to Defendants Eastbrook, LLC, LoanPointe, LLC, and Joe S. Strom, 12/09/2011

TABLE OF AUTHORITIES

CASES

Adler v. Wal-Mart Stores, Inc.,
144 F.3d 664 (10th Cir.1998) 14

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 14

Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,
912 F.2d 1238 (10th Cir. 1990) 14

Buchanan v. Sherrill,
51 F.3d 227 (10th Cir.1995) 14

C.F.T.C. v. Hunt,
591 F.2d 1211 (7th Cir.1979) 15, 17

F.T.C. v. Accuresearch, Inc.,
570 F.3d 1187 (10th Cir. 2009). 16

F.T.C. v. Direct Mktg. Concepts, Inc.,
648 F. Supp. 2d 202 (D. Mass. 2009),
aff'd, 624 F.3d 1 (1st Cir. 2010). 15

F.T.C. v. Febre,
128 F.3d 530 (7th Cir. 1997). 17, 18, 19

F.T.C. v. Figgie Intern., Inc.,
994 F.2d 595 (9th Cir. 1993). 19

F.T.C. v. Five-Star Auto Club, Inc.,
97 F. Supp. 2d 502 (S.D.N.Y. 2000). 18

F.T.C. v. Gem Merchandising Corp.,
87 F.3d 466 (11th Cir. 1996). 15

F.T.C. v. INC21.com Corp.,
745 F. Supp. 2d 975 (N.D. Cal. 2010) 18

F.T.C. v. Medicor, L.L.C.,
217 F. Supp. 2d 1048 (C.D. Cal. 2002). 18

F.T.C. v. Seismic Entm't Prods.,
441 F. Supp. 2d 349 (D.N.H. 2006) 18

F.T.C. v. Stefanchik,
559 F.3d 924 (9th Cir. 2009) 17

F.T.C. v. Verity Int'l, Ltd.,
443 F.3d 48 (2d Cir. 2006) 18-19

S.E.C. v. Blatt,
583 F.2d 1325 (5th Cir. 1978) 15

S.E.C. v. First City Fin. Corp., Ltd.,
890 F.2d 1215 (D.C. Cir. 1989) 18

S.E.C. v. Manor Nursing Centers, Inc.,
458 F.2d 1082 (2d Cir. 1972) 15

STATUTES AND RULES

15 U.S.C. § 45(a) 1, 17

15 U.S.C. § 53(b) 1, 15

15 U.S.C. § 57b. 1

15 U.S.C. § 1692 1

16 C.F.R. Part 444. . . . . .1, 17

Federal Rules of Procedure, Rule 56(c) 14

I. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction in this case under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b; Section 814 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692*l*, Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), 15 U.S.C. § 1692 *et seq.*; and the FTC's Trade Regulation Rule Concerning Credit Practices ("Credit Practices Rule"), 16 C.F.R. Part 444; all because the Federal Trade Commission claimed below that defendants violated the FTC Act, FDCPA, and the Credit Practices Rule in relation to the operation of their payday loan business.

This Court has jurisdiction over this appeal under Title 28 U.S.C. § 1291 in that this appeal is from a final judgment rendered in the district court. The final order of judgment appealed from was entered on December 9, 2011. (Attachment 2, pp. 1-12,[1] and App. 823-34) A timely Notice of Appeal was filed on January 6, 2012. (App. 835-36)

The appeal is from a final judgment disposing of all parties' claims.

---

[1] Numbers following "Att. 1 and Att. 2" refer to the Attachments to this brief made pursuant to 10th Cir. R. 28.2(A)(1). Numbers in parenthesis following "App." refer to pages of Appellants' Appendix. Numbers in parenthesis following "DC" refer to entries on the docket sheet of the District Court.

II. STATEMENT OF THE ISSUES ON APPEAL

A. When lenders (appellants) made loans to borrowers who agreed in advance that their wages could be voluntarily garnished without court order to repay the loans if the borrowers themselves did not repay the loans some other way, and lenders thereafter used the agreed-upon wage garnishment forms to collect amounts admittedly due and owing from these borrowers as a lawful debt, are these payments "ill gotten gains" that should be disgorged as a matter of equity because the wage garnishment form used by these appellant lenders (and agreed upon in advance by the borrowers) did not state that the borrower could cancel said wage garnishment at any time, and where the Federal Credit Practices Rule, 16 C.F.R. §444.2, provides that all voluntary wage garnishments must so state?

[This issue was decided by the court below in its summary judgment order, Attachment 1, at p. 20 and was raised in Appellant's Opposition to the FTC's Motion for Summary Judgment (App. 37-40 and at 40-45).]

B. Was it proper for the Court below to find without a trial that every repayment of interest by all borrowers to appellant lenders under the above-described voluntary garnishment agreements was "ill gotten" and thus should be disgorged from appellant lenders to the FTC, where

(1) the Court did not either hear evidence concerning nor even find that any of the borrowers involved actually objected to the wage garnishments once they had been placed on the borrowers' wages; and

(2) all the monies so garnished were admittedly owed by the borrowers to the appellant lenders, so the repayments caused no loss nor any undue gain?

[This issue was decided by the court below in its summary judgment order, Attachment 1, at p. 20 and was raised in Appellant's Opposition to the FTC's Motion for Summary Judgment (App. at 40-45).]

III. STATEMENT OF THE CASE

The FTC commenced this case with a complaint filed on March 15, 2010 (DC. No. 1; App. 11-26). It claimed that Appellants LoanPointe, LLC, Eastbrook, LLC and Joe S. Strom (hereinafter, collectively referred to as "appellants")[2] had violated various laws and rules regulated by the FTC by the way they collected money they had lent to consumers under their "payday" loan program. *Id.*

While the FTC hurled many allegations at these appellants, in the end this case came down to what remedy was appropriate to impose on these appellants because some of the money they collected from borrowers, money admittedly due to be repaid by these borrowers, had been collected by use of voluntary wage garnishment forms which the borrowers had fully agreed to, but which did not conform to the FTC requirement (found in the Credit Practices Rule, 16 C.F.R. §444.2) that any wage assignment agreement state explicitly that the borrower agreeing to it could discontinue the wage assignment at any time. *See*, FTC Complaint (App 23-24) and the

---

[2] Other named defendants settled and are not involved on this appeal.

Court's Memorandum Decision and Order on Summary Judgment (Att. 1, pp. 17-21)

After discovery, the FTC moved for summary judgment seeking a permanent injunction and disgorgement of all the interest repayments that had been made by the borrowers under the loan program, arguing that all these payments were ill-gotten as they must have been prompted by the threat of the wage garnishments agreement to which each borrower had agreed. Appellants argued that a permanent injunction should suffice because of its strict control and reporting requirements, because none of the appellants had known of the requirement that voluntary wage garnishments have a clause allowing discontinuance at the option of the borrower, and, most importantly, that the sums thus collected were due and owing and there was no evidence that those borrowers who allowed the wage garnishments to actually be used to repay the debt when these forms arrived, had actually not wanted to use them as a way to pay off the debt.

Without hearing any evidence as to whether those borrowers actually wanted these forms used, the Court below entered the permanent injunction against use of the forms (appellants had already ceased using them) and also ordered appellants to disgorge (Att. 2, p. 1, A823) repayments of interest ($294,436.31) which had been repaid pursuant to the agreed-upon wage

garnishment form because, the Court reasoned, those agreements did not state that they could be discontinued at any time the borrower wanted, and thus all those repayments were "ill-gotten," even though admittedly due and owing to appellants from the borrowers involved.

This appeal challenges that disgorgement ruling.

IV. STATEMENT OF FACTS

1. The Appellants Payday Loan Program

The Court below found that over 7,000 loans were made to consumers through appellants' "payday" loan program. (App. 739) The aim of the payday loan was to provide cash between pay periods for emergencies. As the appellants' website told every potential lender (App 599):

> Payday loans are designed to help consumers meet serious and unexpected financial emergencies between paychecks. Payday loans have the unique advantage of providing any wage-earner, salaried professional or other benefits recipient with a quick cash advance on the next paycheck that's very easy to qualify for and obtain.
>
> These loans offer an excellent short-term solution to the occasional financial dilemma that can't be handled any other way. While not intended to be a long-term answer to chronic budgetary shortfalls, payday loans can be an effective and invaluable resource when used judiciously and when the terms of the loan are honored in a responsible way.

The appellants' payday loans were normally for small amounts, usually around $300.00, but sometimes up to $1,000.00. *Id.* Since these were for

emergency cash, requests had to be processed quickly. *Id.* Someone needing a loan from appellants (or from one of the many other payday loan providers) needed only to show, in completing the application on line, that they had a job earning at least $1,000.00 per month, that they had a bank account into which the payday loan could be promptly wired, and that they were at least 18 years old. (App. 613-615) Appellants' loan program did not inquire as to the purpose for which the loan proceeds would be used. *Id.* If a prospective lender meeting the above-stated, minimal criteria needed emergency cash, appellants would then deposit the loan into their bank account that day or the next business day, by wire, for immediate use. (App. 601-603)

2. The Online Process for Obtaining a Payday Loan

Appellants were not some evil or preying group of lenders. Indeed, their website told all prospective borrowers, in clear language:

> Payday loans can be a blessing that makes it possible to manage a financial crisis when other means are not an option.… Payday loans are not a quick fix for ongoing financial challenges. You will be responsible for the repayment of your entire loan balance together with interest owed. Make sure you can cover your loan obligation when the due date arrives, otherwise you will liable for additional charges.

(App. 599) The costs of appellants' payday loans were clearly stated and the FTC does not contend, and the Court certainly did not find, that the loans were usurious. (Att. 1, pp. 1-20)

Appellants did not solicit loans, but only responded to inquiries made by those using the Internet to find appellants' website, which advertised its loans. (App. 601) If someone chose to apply for a loan using appellants' website (one among many such sites), he or she would complete the application posted on the website. *Id.* Prospective borrowers were told that if they wanted to borrow money, they should review four separate web pages, each setting forth separate terms and conditions. Specifically, borrowers had to click on each of the following pages, and indicate their assent to the terms stated on each one (App. 601):

YES (click on each to confirm)

☐ I have read and accept the terms of the Application.

☐ I have read and accept the terms of the Privacy Policy.

☐ I have read and accept the terms of the Authorization Agreement.

☐ I have read and accept the terms of the Loan Note and Disclosure.

When the last of the above four sites (the "Loan Note and Disclosure) was clicked open a prospective borrower -- as it must have been (*id.*) for any loan to be approved -- what flashed up on the screen was the reference to the voluntary wage garnishment. (App. 602) It starts with the word "**NOTICE**" in bold print, in the same font size as surrounding print, in all upper case letters, and underlined. It is followed by the bolded and underlined statement: **I agree to have my wages garnished to pay any delinquent amount on this loan.** (App. 602, 615) Appellants emphasized on their site that before the loan could be processed, a prospective borrower must have checked all four boxes on the entry page, each of which is next to one of the four links quoted above. (App. 602) The fourth link that must be checked reads, "I have read and accept the terms of the Loan Note and Disclosure," the link that takes the borrower to the screen setting forth the loan disclosures required by law. (App. 602, 615) Unless that box was checked, the loan was never made. (*Id.*) Checking the last box indicated assent to the clearly stated voluntary wage garnishment.

3. The Lending History of Appellants

Over the two years that Appellants were in business (App. 597), they lent an unspecified amount to borrowers who sought them out online. The

Court found that they collected a total of $2,036,936.00 in interest payments on all outstanding loans. (Att. 1, p. 19; App. 753). It further found that they collected a total of $468,020.91 by using the agreed upon but defective wage garnishment agreements and that $294,436.31 of that sum was repayment of interest due on the loans involved. It is this interest sum that the Court ordered disgorged as ill-gotten gains.

4. The Court's Disgorgement Order and Underlying Reasoning.

The Court, in its summary judgment opinion, ordered that appellants disgorge to the FTC (not to the borrowers, it should be noted) $294,436.31. (Att. 1, p. 19; App. 753). It did so not by finding that the FTC had proven factually that the garnishment agreement was actually unfair of deceptive. It held instead (Att. 1, 17; App. 751):

> Defendants incorrectly attempt to require the FTC to make an additional showing that the violation is an unfair or deceptive practice. In promulgating the Credit Practices Rule, however, the FTC already found that improper wage assignment clauses are unfair and cause substantial harm to consumers.

Appellants do not argue with the just-quoted finding. But this finding does not automatically require the disgorgement the Court ordered -- a remedy only allowable to the extent necessary to recover ill-gotten gains -- and such disgorgement was not warranted by the Court's Opinion because:

(i) The Court did not find that any of the borrowers involved in fact did not owe the payments involved. (Att. 1, p. 1-25) In fact, it noted that appellants were due "the interest payments under the terms of the loans." (Att. 1, p. 21; App. 755) It also found that apart from the voluntary garnishment agreement that failed to include the opt-out clause, "there is no argument in this case that the other terms of repayment were misleading, deceptive, or inappropriate." (Att. 1, p. 20, App. 754)

(ii) The Court made no finding that any of the borrowers had not fully agreed at the outset to the wage garnishment as the method of payment if the borrower involved stopped paying by any other method. *Id.*

(iii) The Court also heard no evidence nor made any finding concerning whether any of the borrowers whose repayments were made by garnishment had actually objected to these payments. These payments were initiated only after these borrowers had stopped paying back their loans by any other means, garnishment forms were sent to their employers, and repayments on their loans resumed pursuant to such garnishments. Without any finding that these borrowers objected at the time, appellants contend, disgorgement is improper because there is no showing that the borrowers were at all unhappy with this method of repayment. If they wanted this done

and these debts were owed, it can hardly be "ill-gotten" even if the underlying agreement did not have all the right language.

(iv) In this regard, the Court even noted that some of those to whom the forms had been sent after they had otherwise had stopped paying "refused to allow Defendants to garnish their wages upon request," (Att. 1, p. 14; App. 748) creating the strong inference that those who did not object actually agreed to the voluntary garnishments again. It must be added here that while the Court below noted that "several" borrowers had rejected the forms, that simply does not fairly characterize the number of borrowers who objected. The appellants kept detailed records of their conversations and correspondence with each borrower (App. 603) and "it was our practice to remind the borrower that they had agreed that we could garnish their wages in order to collect . . ." (App. 604). Significantly, "*our records show that only about 20% of the borrowers as to whom we sought wage assignments agreed to allow their employer to pay us part of the wages earned by that employee*." (App. 605) This was not disputed and this large number of rejections reinforces appellants' contention that only those borrowers who actually agreed again, when the forms were received by their employers, were actually subject to garnishment and for only as long as they wanted those garnishments to continue as a method of paying their debt.

(v) The Court also noted that appellants "did not know that their wage assignment clause was illegal." (Att. 1, p. 14; App. 748)[3]

Despite all of the above, the Court found that all repayments of interest made by the agreed-upon garnishments should be disgorged, with the following reasoning:

> Technically Defendants may have been entitled to the interest payments under the terms of the loans. But requiring Defendants to disgorge the interest they received through garnishment fulfills one of the purposes of disgorgement, which is too make violations unprofitable. . . This disgorgement also serves to equalize the market place.

(Att. 1, p 21; App 755) In so holding, the Court rejected, improperly appellants contend, the appellants' argument below that the money repaid was due and owing, that the borrowers involved wanted this form of payment, and thus that these payments should not be "disgorged" in equity, by calling them "ill-gotten or unjust enrichment, because they were neither.

---

[3] (App. 604): "We had no idea that it was a violation of some part of the FTC rules to have agreed with the borrowers to provide for these assignments in advance of the wages involved being owed by the employer or before the debt became due. Had that been the case, we would not have done so. On the very day the FTC telephoned me to tell me that these clauses were not authorized, we stopped using wage assignments and instructed our lawyer to enter into a stipulated judgment on this matter."

V. SUMMARY OF ARGUMENT

The district court should not have granted summary disgorgement of indisputably due interest payments on the record before it. What it did was actually to impermissibly impose a penalty or a fine not grounded in the justification for disgorgement: to prevent unjust enrichment. First, all the money that was repaid by garnishment was owed, meaning, as the Court itself found, that "defendants were entitled to the interest payments." (Att. 1, p. 21; App. 755) Second, the borrowers had agreed to the garnishments when they borrowed the money. Third, there was no finding that the ultimately-garnished borrowers had not consented anew to the payments involved after they had received the garnishment forms at work, the same garnishment forms to which they had previously agreed.

No case cited by either the Court below or by the FTC stretches the remedy for unjust enrichment to cover amounts repaid that were (1) clearly owed pursuant to a lawful debt, (2) indisputably agreed to in amount, (3) repaid in the very manner agreed to when the money was first obtained, and (4) made under the circumstances in which there was no finding that those borrowers whose repayments are in issue even objected (while many others did) to the garnishment.

VI. ARGUMENT

A. THE SUMMARY JUDGMENT STANDARD

1. Standard of Review

This Court reviews the grant of summary judgment *de novo* applying the same standard as the district court embodied in Federal Rule 56(c). *See, Buchanan v. Sherrill,* 51 F.3d 227, 229 (10th Cir.1995).

2. The Requirements for Summary Judgment

Summary judgment should enter only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998). On such motions, the Court should "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990)

B. THERE WAS NO FACTUAL SHOWING THAT WARRANTED ANY DISGOREGMENT MUCH LESS ANY FINE

1. By the FTC's Choice, This Is Not a Fine or a Penalty Case

The FTC Act allows the FTC to proceed by way of claims seeking fines and penalties, for which jury trials are allowed, or to proceed in equity only, as they elected to proceed in this case. When they so elect, juries are not allowed but the relief available is limited only to that available in equity. Section 13(b) (15 U.S.C. § 53(b)), allowing injunctions of violations of the FTC Act, also gives equitable authority to grant ancillary relief in the form of either restitution (consumer redress) or disgorgement. *F.T.C. v. Direct Mktg. Concepts, Inc.,* 648 F. Supp. 2d 202, 213 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *F.T.C. v. Gem Merchandising Corp*., 87 F.3d 466, 469-70 (11th Cir. 1996). The purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains. *Id.* (“*The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment*.”); *S.E.C. v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978); *see also, S.E.C. v. Manor Nursing Centers, Inc*., 458 F.2d 1082 (2d Cir. 1972) (finding defendant only need disgorge wrongfully obtained profits and interests); *C.F.T.C. v. Hunt*, 591 F.2d 1211, 1222 (7th Cir.1979) (“[D]isgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains.”).

The FTC itself explained this limitation to the Court below:

THE COURT: I'm having a hard time understanding how we go from this violation, these violations, which I think are clear, to these enormous damages. I'm having trouble with that. * * * what about a fine? Do I have discretion to enter a fine that I think is a reasonable fine?

FTC COUNSEL: Your Honor, because of the way the FTC chose to proceed in this case, this is not a civil penalty case.

(App. 730-31)

Thus the FTC's remedy is limited only to ill-gotten gains and there are none here. The FTC should not be able to obtain a penalty under the guise of claiming that payments were ill-gotten when they were both due and owing, and not found to have even been objected to by those who paid them.

2. Wage Assignments Are Deemed "Unfair" by Rule, However This Does Not, Warrant Disgorgement of Voluntary Payments Made Under Them.

Generally, an "*unfair*"[4] practice under the FTC Act is one which "causes or is likely to cause *substantial injury to consumers which is not reasonably avoidable by consumers themselves . . .*" *F.T.C. v. Accuresearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009). The Court below did not make such a finding. [Indeed such a finding would have been difficult since fully 80% of those borrowers receiving a garnishment form easily avoided its implementation.] Instead the Court's finding was grounded (App. 1, p. 14;

[4] The court below did not find any "deceptive" practice, the other type of practice proscribed by the Federal Trade Act.

App. 748) on the Credit Practices Rule, 16 C.F.R. §444.2, which simply *declares* that it is an "unfair act or practice" within the meaning of Section 5 [of the Federal Trade Commission Act, 15 USC § 45 et seq.], "to take or receive from a consumer an obligation that contains an assignment of wages," unless the wage assignment by its terms provides that it was a revocable (wage assignment).

However, nowhere in the rules or in any of the cases is it suggested that for every such declared violation there is automatically compelled some sort of disgorgement, "[D]isgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains." *C.F.T.C. v. Hunt*, 591 F.2d 1211, 1222 (7th Cir.1979). The Courts disgorge all the actual losses suffered by the consumer, even if that figure is sometimes greater than the actual profit of the offending defendant. However, the disgorgement amount never exceeds either the ill-gotten gain or the actual loss. *See e.g., F.T.C. v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) (holding *inter alia* that the FTC could use defendant's database data to calculate damages, which could be awarded *based on consumer losses* rather than defendant's profits; *F.T.C. v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (stating that "because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers."); *F.T.C. v. INC21.com*

Corp., 745 F. Supp. 2d 975, 1101 (N.D. Cal. 2010) ("The FTC Act was designed to protect consumers from economic injuries. As such, courts have often awarded restitution in the full amount of funds lost by consumers rather than limiting restitution solely to a defendant's profits."); *F.T.C. v. Seismic Entm't Prods.*, 441 F. Supp. 2d 349, 353 (D.N.H. 2006) ("The appropriate measure for restitution is the benefit unjustly received by the defendants..") (citations omitted); *F.T.C. v. Medicor, L.L.C.*, 217 F. Supp. 2d 1048, 1057-58 (C.D. Cal. 2002) (citing *Febre* and stating that "Section 13(b) of the FTC Act permits the Court to order disgorgement regardless of the amount of the defendant's profits . . . . The full amount lost by consumers is an appropriate measure of damages."); *F.T.C. v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 534 (S.D.N.Y. 2000) (citing *Febre* and stating that "the proper amount of relief is the full amount lost by consumers").

Courts distinguish between illegally obtained profits and legally obtained profits when considering the amount of disgorgement. *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 70 (2d Cir. 2006); *S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Therefore, the SEC generally must distinguish between legally and illegally obtained profits.") In *Verity,* the court held that the total amount of the defendant's overall gains from a telephone billing system was not the proper way to determine

Appellate Case: 12-4006 Document: 01018813090 Date Filed: 03/19/2012 Page: 24

the defendant's unjust gains. *Verity Int'l, Ltd., supra*, 443 F.3d at 69. Instead, the court held that only the portion of the profits from the illegal part of the billing system could be disgorged. *Id.* The illegal part was that part where the billing system had overcharged or charged those who had not used the service:

> Here, because some fraction of consumers who paid the bills incurred through the defendants-appellants' billing system *actually used or authorized others to use the services at issue*, the amount of the defendants-appellants' *unjust* gains is only a fraction of the amount of their overall gains from the billing system. A reasonable approximation of the defendants-appellants' unjust gains must take this into account.

Id. at 69-70.

Analogizing to this case, appellants did not collect any money than was not owed and they were not unjustly enriched by any deceptive practices that induced a consumer to act to its detriment. *Cf. F.T.C. v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997); *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595 (9th Cir. 1993). In those cases, mass deception is what induced the consumer to enter into the transaction, and the fraud was what produced the defendant's profits. And even in those cases, the courts limited relief to the amount consumers lost, not the total amount paid to defendants.

Moreover, beyond the fact that nothing was gained here that was not owed, nor anything paid that was not due, there is also no finding that those

twenty percent of the borrowers who allowed their employers to garnish their wages actually objected to this method of repaying their debt, a debt the terms of which, apart from the improperly worded wage assignment, were not "misleading, deceptive, or inappropriate." (Att. 1, p. 20, App. 754)

CONCLUSION

This case should be reversed insofar as it awarded summary judgment ordering any disgorgement by these appellants.

REASONS ORAL ARGUMENT IS REQUESTED

This case presents an unsettled issue, deserving the close scrutiny coming with oral argument. The government virtually always seeks to push the envelopes of its power. This case is a good example of that because the FTC here seeks to take under the guise of restitution something that it concedes was actually owed as a lawful debt. No case has held that in this circumstance all of these payments must be disgorged. Here there is no financial loss since the money was owed anyway. Elaboration on this issue would therefore assist the parties and, the undersigned believes, the Court in relation to this and future cases where the government seeks to expand its power.

Dated: March 19, 2012

Respectfully submitted,

/s/ John J.E. Markham, II
John J.E. Markham, II
(MA BBO 638579)
MARKHAM & READ
One Commercial Wharf West
Boston, MA 02110
(617) 523-6329

CERTIFICATE OF BAR MEMBERSHIP

I, John J.E. Markham, II, attorney for Appellants, certify that I am a member in good standing of the bar of the Tenth Circuit Court of Appeals.

/s/ John J.E. Markham, II
John J.E. Markham, II

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the above brief complies with the type-volume limitation under Fed. R. App. P. 32(a)(7)(B) in that the brief was prepared using: **Microsoft Office Word 2003, Times New Roman, 14 point, proportionately spaced font.**

Exclusive of the table of contents, table of authorities, statement in support of oral argument, addendum, and certificate of service the brief contains: **4,553** (including headings, footnotes, and quotations), under the 14,000 word limit.

/s/ John J.E. Markham, II
John J.E. Markham, II

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 31

I hereby certify that all required privacy redactions have been made to this brief.

I hereby certify that the text of the electronic copy of this brief is identical to the text in the paper copies of this brief.

Further, I certify that a virus detection program has been run on the electronic file of the brief using **Norton Business Suite, Version: 4.3.0.5**, and **no virus was detected**.

/s/ John J.E. Markham, II
John J.E. Markham, II

CERTIFICATE OF SERVICE

I, Bridget Zerner, hereby certify that on March 19, 2012, I filed electronically with the Tenth Circuit Court of Appeals the foregoing OPENING BRIEF OF APPELLANT LOANPOINTE, LLC, EASTBROOK, LLC AND JOE S. STROM with the ATTACHMENTS and the same was served, via electronic mail to all counsel of record.

I further certify that that 7 hard copies of the Brief and Attachments and 2 hard copies of the Appendix were sent to the Court and a hardcopy of each were served via first class mail, postage prepaid upon all counsel of record.

/s/ Bridget A. Zerner
Bridget A. Zerner

Dated: March 19, 2012