LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-00999-BRO (AFMx)**	Date	June 1, 2016
Title	**FEDERAL TRADE COMMISSION V. KUTZNER, ET AL.**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

*****UNDER SEAL*****
ORDER RE: PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE, APPOINTMENT OF TEMPORARY RECEIVER, LIMITED EXPEDITED DISCOVERY, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE [4]

I. INTRODUCTION

Pending before the Court is Plaintiff Federal Trade Commission's ("FTC" or "Plaintiff") Ex Parte Application for Temporary Restraining Order with Asset Freeze, Appointment of Temporary Receiver, Limited Expedited Discovery, and Order to Show Cause Why a Preliminary Injunction Should Not Issue ("Ex Parte Application") against Defendants Damian Kutzner, Advantis Law P.C., Advantis Law Group P.C., Brookstone Law P.C. (California), Brookstone Law P.C. (Nevada), Vito Torchia, Jonathan Tarkowski, Geoffrey Broderick, and Charles Marshall (collectively, "Defendants"). (Dkt. No. 4 (hereinafter, "TRO").) For the reasons set forth below, the Court **GRANTS** Plaintiff's Ex Parte Application.

II. BACKGROUND

A. Parties

The FTC is an independent agency of the United States Government created by statute, 15 U.S.C. §§ 41–58. (Dkt. No. 1 (hereinafter, "Compl.") ¶ 4.) The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts

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or practices in or affecting commerce. (*Id.*) Pursuant to the Omnibus Act § 626, 123 Stat. at 678, as clarified by the Credit Card Act § 511, 123 Stat. at 1763–64, the FTC promulgated the Mortgage Assistance Relief Services Rule ("MARS Rule"), 16 C.F.R. Part 322, recodified as Mortgage Assistance Relief Services, 12 C.F.R. Part 1015 ("Regulation O"). (*Id.*)[1] "The FTC is authorized to initiate federal district court proceedings . . . to enjoin violations of the FTC Act; the Omnibus Act; the MARS Rule; and Regulation O." (Compl. ¶ 5.) It is also authorized 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." (*Id.*)

Defendant Brookstone Law P.C. (California), doing business as Brookstone Law Group ("Brookstone California"), is a California corporation. (Compl. ¶ 6.) Defendant Brookstone Law P.C. (Nevada), doing business as Brookstone Law Group ("Brookstone Nevada") (collectively with Brookstone California, "Brookstone"), is a Nevada corporation. (*Id.*) Brookstone's principal place of business is in California. (*Id.*) According to Plaintiff, Brookstone is a law firm that offers mortgage assistance relief services to consumers by representing them in litigation against their lenders. (*Id.*) Defendants Advantis Law P.C. and Advantis Law Group P.C. (collectively, "Advantis") are California corporations with their principal places of business in California. (Compl. ¶ 7.) Like Brookstone, Advantis is a law firm that offers mortgage relief services to consumers. (*Id.*)[2]

[1] The MARS Rule generally defines mortgage assistance relief services as express or implied assistance in, among other things, stopping or delaying foreclosures, negotiating or obtaining any modification of any term of a mortgage loan, and obtaining forbearance on mortgage payments. (Compl. ¶ 4.) It also prohibits certain conduct by providers of mortgage assistance relief services, including the collection of advance fees, the making of certain representations, and the failure to make certain disclosures. (*Id.*) The Dodd-Frank Act § 1097, 124 Stat. at 2102–03, 12 U.S.C. § 5538, transferred rulemaking authority over the MARS Rule to the Consumer Financial Protection Bureau, which recodified the MARS Rule as 12 C.F.R. Part 1015 effective December 30, 2011, and designated it Regulation O. (*Id.*) Pursuant to the Dodd-Frank Act, the FTC retains its authority to enforce the MARS Rule and Regulation O. (*Id.*)

[2] According to Plaintiff, Brookstone and Advantis "are under common control, with common employees and a common address while marketing the same product." (Compl. ¶ 13.) Plaintiff also avers that "Defendants have used the names Brookstone and Advantis interchangeably." (*Id.*)

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Defendant Damian Kutzner ("Kutzner")[3] is a founder and the chief operating officer of Brookstone and a principal of Advantis. (Compl. ¶ 8.) Although he is not an attorney, Defendant Kutzner allegedly controls the marketing and sales at both Brookstone and Advantis. (*Id.*) Defendant Vito Torchia, Jr. ("Torchia") was the managing attorney of Brookstone who also co-founded both Brookstone and Advantis (collectively, the "Corporate Defendants").[4] (Compl. ¶ 9.) According to Plaintiff, Defendants Kutzner and Torchia created Brookstone after their prior business, United Law Group ("ULG"), a mortgage assistance law firm, was dissolved following an investigation and raid by multiple federal and local agencies. (Compl. ¶ 8.)

Defendant Jonathan Tarkowski ("Tarkowski") was admitted to practice law in June 2014 in California, is the managing attorney of Brookstone, and is an attorney with Advantis. (Comp. ¶ 10.) Brookstone allegedly hired Defendant Tarkowski in July 2015. (*Id.*) At that time, Defendant Tarkowski was Brookstone's only attorney. (*Id.*)

Defendant R. Geoffrey Broderick ("Broderick") is a director and chief financial officer of Advantis. (Compl. ¶ 11.) Although Defendant Broderick is an attorney, he is not licensed to practice law in California. (*Id.*) In 2015, Defendant Broderick's company, Resolution Law Group ("RLG"), "was closed after the Connecticut and Florida Attorneys General filed a joint action alleging RLG and Broderick were falsely promising consumers mortgage relief through the filing of mass joinder actions." (*Id.*)

Finally, Defendant Charles T. Marshall ("Marshall") is a director, chief executive officer, and secretary of Advantis. (Compl. ¶ 12.) Defendant Marshall appeared as counsel in Brookstone's *Wright v. Bank of America* mass joinder case. (*Id.*) In November 2015, the State Bar of California imposed a ninety-day suspension upon Defendant Marshall for violations related to mortgage assistance relief services. (*Id.*)

[3] In its TRO, Plaintiff states that Defendant Kutzner is subject to two injunctive orders issued by the Honorable David O. Carter in *FTC v. GM Funding, Inc.*, SACV02-1026 DOC (C.D. Cal. May 5, 2003), and *United States v. Global Mortgage Funding, Inc.*, SACV07-1275 DOC (C.D. Cal. July 17, 2009). (TRO at 1 n.1.)

[4] In August 2014, the State Bar of California disbarred Defendant Torchia. (Compl. ¶ 9.)

According to Plaintiff, "Defendants Kutzner, Torchia, Tarkowski, Broderick, and Marshall [collectively, the 'Individual Defendants'] have formulated, directed, controlled, had the authority to control, or participated in the acts and practices of the Corporate Defendants that constitute the common enterprise." (Compl. ¶ 13.)

B. Factual Background

The instant action arises from the Individual Defendants' alleged scheme to defraud "consumers out of thousands of dollars in upfront and recurring monthly fees" in violation of the FTC Act. (TRO at 1.) Specifically, Plaintiff claims that the Individual Defendants, operating through the Corporate Defendants, "convince consumers that if added to a 'mass joinder' case against their lender, they can expect a significant recovery, typically at least $75,000." (TRO at 2.) Plaintiff claims that, despite their representations to the contrary, the Individual Defendants "have never won a mass joinder case, do not have the experience or resources to litigate them, and never sue on behalf of many paying consumers." (*Id.*)

The purported scheme began with Defendant Kutzner's ULG, a law firm offering advance fee loan modifications. (*Id.* (citing Decl. of Leslie Lewis ("Lewis Decl."), Exs. 1–2).) After the FBI and United State Postal Inspectors raided ULG due to claims that its two primary attorneys committed mortgage modification fraud, (TRO at 3 (citing Ex. 2, Transcript of Proceedings Before the Honorable Richard A. Platel, May 6, 2014, to May 8, 2014, *In the Matter of Vito Torchia, Jr., Esq.*, No. 12-O-11847-RAP (Cal. Bar Ct.) ("Torchia Trial Transcript") at II at 70)), and with ULG unraveling, Defendant Kutzner hired Defendant Torchia and formed Brookstone with the advice and support of Phil Kramer and Mitch Stein, attorneys who are now disbarred, (*id.* (citing Torchia Trial Transcript at II at 62–64, 75).) According to Plaintiff, Kramer and Stein helped Brookstone begin marketing "mass joinder" lawsuits.[5] (*Id.* (citing Torchia Trial

[5] Plaintiff explains that, in a mass joinder lawsuit, "tens or hundreds of plaintiffs are added to a single case against a common group of defendants." (TRO at 3.) "The facts and circumstances of each plaintiff are different and must be proved separately, unlike a class action." (*Id.*)

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Transcript at II at 145–149).)[6]

To market the mass joinder litigation, the Individual Defendants allegedly send a substantial amount of form mailers to the public, which include the following statements: "you may be a potential plaintiff against your lender"; "our team of experienced lawyers offers you a superior alternative for recovery"; and "[i]t may be necessary to litigate your claims against your lender to get the help you need and our lawyers know how to do so." (TRO at 6 (citing Decl. of Mario Rios ("Rios Decl."), Ex. 1; Decl. of Raymond Navarro ("Navarro Decl."), Exs. 4–5; Decl. of Jesse Chapman ("Chapman Decl."), Ex. 1; C. Durrett Decl., Ex. A).) The Individual Defendants also allegedly promote mass joinder litigation as a way to void mortgage notes and/or help consumers to obtain relief and monetary damages. (*See id.*) The mailers also emphasize, "[y]ou should act now!" and that "failing to act quickly" could "bar your claims in the future." (*See id.*)

When consumers contact the Corporate Defendants, the Individual Defendants and the Corporate Defendants' salespeople "convince consumers to come into the office for an evaluation." (TRO at 7 (citing Chapman Decl. ¶ 3; Rios Decl. ¶ 5; Navarro Decl. ¶ 4; Decl. of Richard Leonido ("Leonido Decl.") ¶ 4; C. Durrett Decl. ¶ 8).) At the office, consumers sign an initial retainer agreement, "agreeing to pay between $895 and $1,300 for a forensic mortgage analysis." (*Id.* (citing Chapman Decl. ¶ 6, Ex. 2; Rios Decl. ¶ 9, Ex. 2; Navarro Decl. ¶¶ 6–7, Ex. 1; C. Durrett Decl. ¶ 8).) The Individual Defendants and the Corporate Defendants' salespeople then categorically inform consumers that they

[6] As part of the marketing strategy, Brookstone filed multiple lawsuits against various lenders. (TRO at 3–4 (citing Decl. of Gregory Madden ("Madden Decl."), Exs. 1–32; Decl. of Anthony Gales ("Gales Decl."), Exs. 17 at 22).) Each case was subsequently dismissed for lack of prosecution, misjoinder, or failure to state a claim. (TRO at 4 (citing Madden Decl., Exs. 1–27, 29–30).) The one exception was *Wright v. Bank of America*, which Brookstone appealed following the trial court's dismissal for misjoinder. (*Id.*) While the appeal was pending in 2014, Brookstone transitioned into Advantis, and Brookstone became unresponsive to its clients. (*Id.* (citing Decl. of Teresa Irannejad ("Irannejad Decl.") ¶¶ 18–20; Decl. of Michael Nava ("Nava Decl.") ¶ 11; Decl. of Corina Durrett ("C. Durrett Decl.") ¶¶ 10–13).) However, after the California Court of Appeal held that mass joinders were "technically possible," the Corporate Defendants reemerged and existed as both Brookstone and Advantis. (TRO at 5 (citing Gales Decl., Exs. 4–5; Madden Decl., Ex. 43).) Defendant Marshall, through Advantis, represented the lead plaintiff in *Wright*, but after his license to practice law was suspended in November 2015, Defendant Tarkowski assumed that role. (*Id.* (citing Madden Decl., Exs. 36–38, 48).) Based on the information before the Court, it appears the *Wright* case is still pending. (*See* TRO at 5–6.)

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are excellent candidates for either existing or future mass joinder cases. (*Id.* (citing Nava Decl. ¶ 7; Decl. of Ronald Kolodziej ("Kolodziej Decl.") ¶ 8; Irannejad Decl. ¶ 12; Chapman Decl. ¶ 5; Rios Decl. ¶ 7; Navarro Decl. ¶ 7; Leonido Decl. ¶¶ 7, 9; C. Durrett Decl. ¶¶ 10–11).) Most consumers "are told they should expect to receive damages or that their loan be entirely forgiven." (TRO at 8 (citing Chapman Decl. ¶ 5; Rios Decl. ¶ 6; Navarro Decl. ¶ 6; Nava Decl. ¶¶ 6–7; C. Durrett Decl. ¶ 7; Leonido Decl. ¶ 9; Rios Decl. ¶¶ 17–18.)

To actually proceed with the mass joinder, the Individual and Corporate Defendants require consumers to execute yet another retainer agreement, with $1,500 to be paid upfront and typically $250 monthly thereafter. (*Id.* (citing Chapman Decl. ¶ 7; Rios Decl. ¶ 12; Navarro Decl. ¶ 7; Nava Decl. ¶¶ 8–9; C. Durrett Decl. ¶ 12; Leonido Decl. ¶ 8).) Contained within the retainer agreements are disclaimers, which contradict the salespeople's verbal assurances that recovery will be substantial and should be expected; namely, the disclaimers state that the mass joinder cases cannot and will not seek more than $75,000 in relief[7] and that litigation is inherently risky, thereby inferring that the consumers may not prevail. (TRO at 8–9 (citing Chapman Decl., Ex. 3 at 2, 8; Rios Decl., Ex. 4 at 4; Navarro Decl., Ex. 2 at 2, 8).) When one consumer inquired about the meaning of the disclaimer, the consumer was told "it was just legal words in the retainer . . . but there was no risk of losing." (TRO at 9 (citing Irannejad Decl. ¶ 14).)

Plaintiff also claims that, although Defendants take upfront fees from their clients, they fail to keep them in client trust accounts, as required by California law. (TRO at 9.) For example, through 2014, Defendants received over $15 million from their clients, but they failed to maintain any client trust accounts. (*Id.* (citing Decl. of Emil George ("George Decl.") ¶¶ 8–9, Ex. A).) Instead, Defendants "spent the money as they received it." (*Id.* (citing George Decl., Ex. C).)

Further, Plaintiff claims that many consumers received no benefit at all from Defendants' services. (*Id.*) For example, some consumers were never added to a mass joinder, receiving nothing for the upfront and monthly fees they paid to Defendants. (*Id.* (citing Navarro Decl. ¶¶ 9–13; Torchia August 6, 2014 Bar Decision at 13–15, 30–32; Rios Decl. ¶¶ 13–16; Chapman Decl. ¶ 12; C. Durrett Decl. ¶¶ 14–17; Nava Decl. ¶¶ 8–

[7] Plaintiff claims that this is to avoid federal jurisdiction. (*See* TRO at 9 n.33.)

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12).) For those actually added to a case, Defendants have failed to deliver the promised recoveries, with all but one of the mass joinder actions having been dismissed for lack of prosecution, misjoinder, or failure to state a claim. (TRO at 9–10.) Moreover, given Defendants' unresponsiveness, clients are unable to receive status updates on their cases. (TRO at 10 (citing Leonido Decl. ¶ 13; Chapman Decl. ¶ 12; C. Durrett Decl. ¶¶ 14–17; Nava Decl. ¶¶ 8–12; Decl. of Malu Lujan ("Lujan Decl.") ¶ 15; Kolodziej Decl. ¶¶ 23–24).) Plaintiff also notes that Defendant Tarkowski, a lawyer admitted to the bar in 2014 and with no trial experience, cannot effectively litigate hundreds of fraud cases simultaneously and therefore cannot adequately represent the numerous plaintiffs. (TRO at 11–12.)

Finally, Plaintiff maintains that, "[d]espite luring consumers with contrary representations, the mass joinder lawsuit do not [] attempt to void consumers' [mortgage] notes," because, if they did, "the banks could remove the cases to federal court, where they would be promptly dismissed for misjoinder under the Federal Rules of Civil Procedure." (TRO at 12.) Plaintiff claims that, to avoid removal, Defendants have explicitly contradicted their representations to potential clients by stating to courts that the lawsuits do not seek to void consumers' notes. (*Id.* (citing Madden Decl., Ex. 50).)

C. Procedural History

On May 31, 2016, Plaintiff filed a Complaint under seal against Defendants. (Dkt. No. 1.) The Complaint alleges two causes of action: (1) a violation of the FTC Act, 15 U.S.C. § 45(a); and, (2) a violation of the MARS Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015. (*Id.*) Plaintiff concurrently filed the instant TRO. Given that Plaintiff filed the Ex Parte Application without notifying Defendants, Defendants have not filed an Opposition.

III. LEGAL STANDARD

Rule 65(b) generally governs the issuance of temporary restraining orders. Fed. R. Civ. P 65(b). However, Section 13(b) of the FTC Act authorizes the FTC to bring an action in a U.S. District Court for temporary injunctive relief whenever the FTC "has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of [the FTC Act]." 15 U.S.C. § 53(b)(1). Although the standards

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under Rule 65(b) and Section 13(b) are similar, Section 13(b) "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm" to obtain temporary injunctive relief. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quotation and citation omitted). When evaluating a motion under this more lenient standard, a court must simply "(1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities." *Id.* "Under the second prong of this analysis, public interests are generally entitled to stronger consideration than private interests." *FTC v. Merch. Servs. Direct, LLC*, No. 13-CV-0279-TOR, 2013 WL 4094394, at *2 (E.D. Wash. Aug. 13, 2013) (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) ("[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.")).

IV. DISCUSSION

A. Plaintiff Justifies Excusal of Rule 65's Notice Requirement

In general, courts may issue TROs without notice to the opposing party only if: (1) specific facts show that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition"; and (2) "the movant's attorney certifies in writing any efforts to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). The Supreme Court has held that ex parte TROs "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 438–39 (1974) (internal citation omitted).

"Consistent with this overriding concern, courts have recognized very few circumstances justifying the issuance of an ex parte TRO." *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). An ex parte TRO generally is only appropriate where (1) notice would be impossible because the party is not known or cannot be located, or (2) notice would render further prosecution fruitless. *Id.* To justify excusal of the notice requirement on the ground that notice would render further prosecution fruitless, "the applicant must do more than assert that the adverse party would dispose of evidence if given notice." *Id.* (citing *First Tech. Safety Sys., Inc. v.*

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Depinet, 11 F.3d 641, 650 (6th Cir. 1993)). The applicant "must show that defendants would have disregarded a direct court order and disposed of the goods within the time it would take for a hearing . . . [and] must support such assertions by showing that the adverse party has a history of disposing of evidence or violating court orders or that persons similar to the adverse party have such a history." *Id.* (citing *First Tech.*, 11 F.3d at 650–51). Conclusory statements by the applicant's counsel that the defendant will destroy goods will not justify ex parte issuance. Were such bare allegations sufficient, ex parte orders "would be the norm and this practice would essentially gut Rule 65's notice requirements." *Id.* at 1132. Nevertheless, there are occasions where notice should be excused, as rendering further prosecution fruitless "is surely not what the authors of the rule either anticipated or intended" in drafting the notice requirement. *Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979).

The Court finds that Plaintiff has sufficiently demonstrated why notice should be excused in this matter. First, Plaintiff proffers evidence indicating that Defendants have evolved over time from ULG to Brookstone and Advantis in an effort to perpetuate their fraudulent practices. Based on Plaintiff's evidence, Defendant Kutzner appears to be a notable risk, as the evidence indicates that he is in violation of two previous permanent injunctions issued against him. (TRO at 1 n.1.) Further, Plaintiff has proffered evidence demonstrating that Defendants Kutzner, Torchia, and Broderick have a history of violating court orders; more specifically, "Kutzner, with Torchia's help, violated a bankruptcy court order when he absconded with ULG's computers and monitors by 'breaking and entering' the bankruptcy estate's premises," (TRO at 30 (citing *In re United Law Grp. Inc.*, No. 10-18945 (Bankr. C.D. Cal.)), a court has previously sanctioned Brookstone and Torchia, issuing a bench warrant to compel Torchia's appearance after he and Brookstone ignored the court's orders, (*id.* (citing Order to Show Cause Re Compliance of August 7, 2016 Order (Dkt. 52) and Why Enforcement or Contempt Proceedings Should Not Commence, *Randall v. Citigroup, Inc.*, LA CV14-00097 JAK (AGRx) (C.D. Cal. Feb. 23, 2015)), and Broderick has testified during discovery proceedings that he destroyed a computer and cell phone that he used to conduct business prior to a Rule 30(b)(6) deposition, (*id.*).

In light of these facts, the Court concludes that Plaintiff has satisfied its burden under *Reno Air*, justifying excusal of Rule 65's notice requirement. *See Reno Air*, 452 F.3d at 1131.

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B. Plaintiff Meets the Standard to Obtain a Temporary Restraining Order

As discussed above, when, as here, the FTC files a TRO, the Court applies only a two-prong approach in deciding whether to grant it. First, the Court must determine whether the FTC is likely to prevail on the merits. Second, the Court must balance the equities.

1. Plaintiff Has Demonstrated a Likelihood of Success on the Merits

Plaintiff's first cause of action alleges a violation of Section 5(a) of the FTC Act, which prohibits "[u]nfair methods of competition in or affecting commerce[] and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). "[A] practice falls within this prohibition (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006) (citing *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001)). A misleading claim or representation may be express or implied. *See FTC v. Figgie Int'l*, 994 F.2d 595, 604 (9th Cir. 1993) (holding that whether false or misleading representations are implied or express "is a distinction without a difference"). "A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Cyberspace.com*, 453 F.3d at 1200; *see also FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) ("Deception may be found based on the 'net impression' created by a representation."). Misleading statements may not be sufficiently cured merely by the inclusion of disclaimers in small print. *Cyberspace.com*, 453 F.3d at 1200.

Here, Plaintiff has provided sufficient evidence to establish a likelihood that Defendants have misrepresented the following: (1) the likelihood of success of the mass joinder litigation; (2) that Defendants will seek to void consumers' notes in the mass joinder lawsuits; (3) that Defendants will add certain consumers to the mass joinder lawsuits; and, (4) that Defendants possess the necessary skill, experience, and resources to adequately represent hundreds of plaintiffs in litigating the fraud cases simultaneously. These representations were certainly material and likely to mislead consumers acting reasonably under the circumstances. *See Cyberspace.com*, 453 F.3d at 1199.

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Moreover, Plaintiff adequately demonstrates a likelihood that Brookstone and Advantis form a "classic common enterprise," as Plaintiff provides evidence establishing their relationship to the Individual Defendants and their connection with the allegedly fraudulent scheme. Plaintiff has also shown that the Individual Defendants are liable because they "had knowledge that the [company] or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014) (internal quotation marks omitted). Thus, based on the information before the Court at this time, Plaintiff has established that it is likely both the Corporate and Individual Defendants could be liable under Section 5 of the FTC Act.

Given that Plaintiff has proffered sufficient evidence to demonstrate a likelihood of success on its Section 5 claim, the Court concludes that this factor weighs in favor of granting Plaintiff's Ex Parte Application.[8] *See World Wide Factors*, 882 F.2d at 347 ("Because irreparable injury must be presumed in a statutory enforcement action, the district court need only to find some chance of probable success on the merits." (quoting *United Stated v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987))). The Court now turns to the balance of equities.

2. The Balance of Hardships Weighs in Plaintiff's Favor

"[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *World Wide Factors*, 882 F.2d at 347. Here, the public interest in granting Plaintiff's Ex Parte Application is significant, as Plaintiff has proffered sufficient evidence to demonstrate a likelihood that Defendants have engaged in a scheme to defraud public consumers in violation of the FTC Act. Given that this scheme has evolved from Defendant Kutzner's ULG to Brookstone and Advantis notwithstanding the disbarment and/or suspension of certain

[8] In its TRO, Plaintiff states that "[a]ll of the relief included in the proposed TRO is supported by [D]efendants' high likelihood of violating Section 5 of the FTC Act," therefore "the Court need not reach" the MARS Rule claim "to grant the requested preliminary relief." (TRO at 24.) Given that an analysis regarding the merits of Plaintiff's MARS is unnecessary at this stage in the action, the Court will not do so at this time.

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attorneys involved, as well as other official action taken to thwart Defendants' conduct, Plaintiff has demonstrated that, absent relief, Defendants' behavior is likely to continue to harm consumers. Although Defendants will suffer some prejudice if the Court grants the Ex Parte Application, that hardship is considerably outweighed by the evidence of harm Defendants have caused consumers; namely, obtaining approximately $5,000 from each "client" while either deliberately failing to fulfill promises—e.g., to add the consumer to a mass joinder—or failing to pursue the relief they informed clients they would imminently obtain—e.g., failing to prosecute in a timely fashion and not seeking to void the consumers' mortgage notes. Accordingly, the hardships weigh in favor of granting Plaintiff's Ex Parte Application.

Given that Plaintiff has demonstrated a likelihood of prevailing on the merits, and because the hardships weigh in favor ordering the requested relief, the Court **GRANTS** Plaintiff's Ex Parte Application.

3. Ancillary Relief

In addition to the temporary injunction, Plaintiff asks the Court to freeze Defendants' assets, appoint a temporary receiver, and order limited expedited discovery. A court's authority to grant injunctive relief under Section 13(b) includes "all the inherent equitable powers . . . for the proper and complete exercise" of the court's equity jurisdiction. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (citation omitted). One such power is the authority to freeze a defendant's assets. *See id.* at 1113. In deciding whether to do so, a court must weigh "the disadvantages and possible deleterious effect of a freeze . . . against the considerations indicating the need for such relief." *Id.* Here, it appears that Defendants' business conduct is predicated on the scheme which Plaintiff has demonstrated is likely to violate the FTC Act. Accordingly, the disadvantages are outweighed by the need for the relief. Further, Plaintiff has demonstrated that, "absent a freeze, [Defendants] would either dispose of, or conceal, or send abroad, all of the moneys that they have obtained from their victims." *Id.* Given that an asset freeze appears necessary to maintain the status quo, the Court **GRANTS** Plaintiff's request.

"A court's inherent authority under Section 13(b) also extends to appointing a receiver to run the defendant's business." *Merch. Servs. Direct*, 2013 WL 4094394, at *3

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 16-00999-BRO (AFMx)**	Date	June 1, 2016
Title	**FEDERAL TRADE COMMISSION V. KUTZNER, ET AL.**		

(citing *World Wide Factors*, 882 F.2d at 348); *see also FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (holding that district courts have "the inherent power of a court of equity to grant ancillary relief, including freezing assets and appointing a Receiver, as an incident to [their] express statutory authority to issue a permanent injunction under Section 13 of the Federal Trade Commission Act."). "[T]he considerations discussed above in conjunction with asset freezes—i.e., the need to consider 'disadvantages and possible deleterious effect[s]' of the remedy-apply with equal force to requests for the appointment of a receiver." *Id.* (quoting *H.N. Singer*, 668 F.2d at 1113). Thus, the same reasons supporting the asset freeze also support granting Plaintiff's request for appointment of a receiver. Accordingly, the Court **GRANTS** that request. Per Plaintiff's recommendation, (*see* Dkt. No. 10), the court appoints Thomas W. McNamara of San Diego, California as the temporary receiver in this case.

As for expedited discovery, because the parties could not have already conferred as required by Federal Rule of Civil Procedure 26(f), Plaintiff "may not seek discovery . . . except . . . when authorized by . . . a court order." Fed. R. Civ. P. 26(d)(1). Courts employ the "good cause" standard to determine whether expedited discovery is warranted. *Rovio Entm't Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1099 (N.D. Cal. 2012). "Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). Courts may consider the following factors when determining whether good cause exists: "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009) (internal quotations omitted). Here, Plaintiff's purpose for requesting the expedited discovery demonstrates the requisite good cause, as the evidence Plaintiff has proffered indicates that Defendants may attempt to destroy discoverable documents absent expedited discovery. *See* discussion *supra* Section IV.A. Accordingly, the Court **GRANTS** this request.

LINK:

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4. Bond Amount

A TRO typically is accompanied by payment of a bond "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, 15 U.S.C. § 53(b) provides,

> [u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant,[9] a temporary restraining order or a preliminary injunction may be granted *without bond* . . . .

15 U.S.C. § 53(b) (emphasis added). As discussed above, the Court has weighed the equities and concluded that, given Plaintiff's demonstrated likelihood of success on the merits, a temporary injunction is in the public interest. Accordingly, the Court does not require Plaintiff to post a bond. *See* 15 U.S.C. § 53(b).

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Ex Parte Application. The specific injunctive relief granted is attached and incorporated by reference to this Order. The injunction shall expire on Wednesday, June 15, 2016, at 4:00 p.m.

IT IS SO ORDERED.

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Initials of Preparer rf

[9] As discussed above, the Court has excused the notice requirement given the unique circumstances of this action. *See* discussion *supra* Section IV.A.