SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

Laura Squassoni, Frances Gagliostro, Scott Farley, Cynthia Tabares, Bert Tabares, Sophia Burke, Darlene Henson, Kathie Crete, David Crete, Judy Johns, Randall Johns, Bonnie Scarborough, James Hegler, Deborah Hegler, Lorraine Boardwine, Randy Boardwine, Michael Ellis, Tina Ellis, Phillip Stanford, Shakirah Stanford, Carolyn Campbell, Andrea Niedelman, Barry Niedelman, Levi Gales, Heather Risch and Randall Witt,

Plaintiffs,

- against -

Anthony Blackwell, United Legal Solutions, Inc. (a/k/a United Solutions Corporation), United Solutions Law Firm LLC, Consumer First Corporation, Consumer First Law Group LLC, Blackwell's Attorneys LLC, Andre Day, Derrick Lafond, Jake Daloya, Kevin Quinn, Matthew Lapides, Vincent Villani, Jaime Enciso, Gabriel Katz, Jonathan Lyons, Akeem Hutchinson, Matthew Volpe, Aren Goldfaden, Jerzy Bialik, Ralphie Tarazi, and Michael Katz,

Defendants

Index No.
Justice 3571/12
IAS Part

MEMORANDUM OF LAW

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Laura Squassoni, Frances Gagliostro, Scott Farley, Cynthia Tabares, Bert Tabares, Sophia Burke, Darlene Henson, Kathie Crete, David Crete, Judy Johns, Randall Johns, Bonnie Scarborough, James Hegler, Deborah Hegler, Lorraine Boardwine, Randy Boardwine, Michael Ellis, Tina Ellis, Phillip Stanford, Shakirah Stanford, Carolyn Campbell, Andrea Niedelman, Barry Niedelman, Levi Gales, Heather Risch and Randall Witt, Plaintiffs, - against - Anthony Blackwell, United Legal Solutions, Inc. (a/k/a United Solutions Corporation), United Solutions Law Firm LLC, Consumer First Corporation, Consumer First Law Group LLC, Blackwell's Attorneys LLC, Andre Day, Derrick Lafond, Jake Daloya, Kevin Quinn, Matthew Lapides, Vincent Villani, Jaime Enciso, Gabriel Katz, Jonathan Lyons, Akeem Hutchinson, Matthew Volpe, Aren Goldfaden, Jerzy Bialik, Ralphie Tarazi, and Michael Katz, Defendants.	Index No. 3571/12 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs Laura Squassoni, Frances Gagliostro, Scott Farley, Cynthia Tabares, Bert Tabares, Sophia Burke, Darlene Henson, Kathie Crete, David Crete, Judy Johns, Randall Johns, Bonnie Scarborough, James Hegler, Deborah Hegler, Lorraine Boardwine, Randy Boardwine, Michael Ellis, Tina Ellis, Phillip Stanford, Shakirah Stanford, Carolyn Campbell, Andrea Niedelman, Barry Niedelman, Levi Gales, Heather Risch and Randall Witt (collectively, "Plaintiffs"), by their undersigned attorneys, Davis Polk & Wardwell LLP, and Linda H. Mullenbach[1] and Meredith Horton, on behalf of the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), respectfully submit this memorandum of law in support of Plaintiffs' motion for a preliminary injunction, pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") §§ 6301 and 6311 enjoining Defendants Anthony Blackwell, United Legal Solutions, Inc. (a/k/a United Solutions Corporation), United Solutions Law Firm LLC, Consumer First Corporation, Consumer First Law Group LLC, and Blackwell's Attorneys LLC ("Defendants") from:

a) Marketing, advertising, offering, selling or engaging in "Mortgage Loan Modification Services," as that term is defined herein, or aiding and abetting the marketing, advertising, offering, selling, or carrying out of those services;

b) Marketing, advertising, offering, selling or engaging in legal representation of consumers in connection with the performance of Mortgage Loan Modification Services;

c) Being employed by (as in-house legal counsel or otherwise), or serving as a consultant to, any person or entity that sells or carries out Mortgage Loan Modification Services;

d) Owning, managing, operating, creating, or assisting in the creation of any entity that markets, advertises, offers, sells, or carries out Mortgage Loan Modification Services;

e) Engaging in any deceptive acts and practices or false advertising in violation of New York General Business Law § 349 or 350, including:

[1] Application for pro hac vice admission pending.

1) Falsely promising to offer "legal representation" in connection with consumers' loan modification applications;

2) Misrepresenting to consumers the nature and mechanics of Mortgage Loan Modification Services;

3) Falsely promising to engage in negotiations with consumers' mortgage lenders or servicers;

4) Misrepresenting the progress of loan modification applications;

5) Falsely representing that consumers are certain to receive a reduction in mortgage interest rates and/or a reduction in mortgage principal;

6) Falsely representing that refunds will be issued if the offered Mortgage Loan Modification Services do not lead to a successful result;

7) Encouraging consumers to stop paying their monthly mortgage payments and/or to cease communications with their lenders or servicers;

8) Charging consumers an upfront fee for Mortgage Loan Modification Services; and

9) Forming a business or organizational identity or operating as a "doing business as" organization as a method of evading dissatisfied customers.

For purposes of Plaintiffs' motion for a preliminary injunction, the term "Mortgage Loan Modification Services" shall mean any service, plan or program offered or provided to a consumer in exchange for consideration that is represented, expressly or by implication, as having the effect of assisting or attempting to assist the consumer with any of the following:

a) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

b) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

c) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may cure his or her default on a dwelling loan; or

d) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling.

PRELIMINARY STATEMENT

Defendants represent the second generation of a fraudulent scam to separate desperate homeowners, who are seeking help regarding their unaffordable mortgage payments, from money they cannot afford to lose. In mid-2010, Anthony Blackwell ("Blackwell"), an attorney licensed to practice in only Nevada,[2] began providing legal counsel to Homesafe America, Inc. ("Homesafe"), a Nassau County for-profit mortgage modification outfit run by nonparties Scott Schreiber ("Schreiber") and Guy Samuel ("Samuel"). In the course of that employment, Blackwell learned about two laws, one state and one federal, that prohibited Homesafe's practice of demanding up-front fees for mortgage modification work, subject to a narrow exception for attorneys admitted in New York state providing distressed mortgage consulting in the course of their regular legal practice.[3] Schreiber, Samuel, Homesafe and others presently are defendants in a different lawsuit regarding that business.[4]

After Homesafe ceased doing business in December 2010, Blackwell developed a scheme to quickly pick up where Homesafe left off, while adding a new gloss to the deceptive and fraudulent practices: this time, Blackwell would run a "law firm" and continue to collect up-front fees in a sham approximation of the narrow exception to the laws regulating mortgage modification companies. Blackwell, who is facially ineligible for the exception, may have

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[2] During the time period relevant to this action, Blackwell was a member of the bar of the State of Nevada. As of the date of this filing, Blackwell is no longer licensed to practice law in any jurisdiction because he was suspended from the Nevada bar for failure to pay dues in February 2012. See Verified Complaint ("Compl.") ¶ 47; Affirmation of Jillian Stillman ("Stillman Aff.") ¶ 19.

[3] See N.Y. R.P.L. § 265-b; 16 C.F.R. Part 322.

[4] *Mook v. Homesafe America, Inc.*, No. 9472/11 (Sup. Ct. Nassau Cnty.). After earlier having granted plaintiffs' motion for a temporary restraining order, Justice John Galasso granted the plaintiffs' motion for a preliminary injunction on August 15, 2011, enjoining Homesafe, Schreiber, Samuel, and United Legal Solutions Inc. (a defendant in this action) from engaging in mortgage assistance relief services of any kind.

figured that his arrangement would be "close enough" that it would appear legitimate to the average consumer.

So, he went into business with *both* former Homesafe partners separately, creating one company called "United Solutions" and another called "Consumer First," the latter of which was also sometimes called "Blackwell's Attorneys."[5] Starting in or around January 2011, Defendants signed up hundreds of clients, including Plaintiffs, with "legal retainers" that Blackwell drafted. The salespeople, many of whom previously had worked at Homesafe, made nearly all of the same promises as were made to victims of Homesafe's scam, including guarantees of success and promises of a refund—all of which were later broken. Blackwell's fast and loose operations preyed on the trust of consumers in lawyers and the legal system.

Defendants laid their trap using slick, deceptive websites that falsely advertised that the companies were New York law firms and were somehow affiliated with the Obama Administration's housing programs. After Plaintiffs provided their contact information through the websites, salespeople working for Defendants contacted them by telephone. The reassuring salespeople made a series of promises to each customer: for a one-time up-front fee, the Defendants' "law firm" would negotiate with the customer's lender to lower the homeowner's monthly mortgage payments; the homeowner did not need to make mortgage payments until this ostensible negotiation period was complete; and Defendants would be available to the homeowner on a "24/7" basis to answer questions. For more skeptical homeowners, salespeople often added promises of a full or partial refund in the event the company was unsuccessful. To every homeowner, Defendants emphasized that their "attorney" or an affiliated attorney who was licensed to practice law in the customer's jurisdiction would supervise the modification

[5] These entities are more precisely defined on p. 12-13.

application process or would negotiate with the customer's lender. Defendants told Plaintiffs that by hiring the company they were retaining the legal services of a law firm.

As soon as homeowners expressed interest, Defendants sent them a raft of paperwork that they were asked to sign and return as soon as possible. Included among those documents was Blackwell's retainer agreement. This document reiterated some of the false representations made by Defendants' salespeople, such as that Plaintiffs would have the benefit of the legal expertise of a lawyer licensed to practice in their jurisdiction. Compl. ¶ 157, Stillman Aff. Exs. 30, 36. On the other hand, the document also walked away from other misrepresentations made by the salespeople. In a tiny font, the document retracted some of the promises explicitly made by Defendants over the phone. Compl. ¶ 155. Other documents in the enrollment package contained misrepresentations similar to those made over the telephone. Defendants also demanded an up-front payment, usually between $1,000 and $4,000, at the outset. After Plaintiffs paid, they submitted additional financial documents to Defendants, and believed that Defendants were busily at work on their behalf.

While Defendants did contact some of the Plaintiffs' lenders at least one time, other Plaintiffs discovered weeks and months later that no one from their "law firm" ever had contacted their bank. Then, just a few months after the companies came into existence, employees at Defendants' companies stopped answering the phone. They stopped answering email. Then, emails bounced back, and voicemail boxes were full. Homeowners were left alone, abandoned by their "attorney," and in a far worse financial position than before. None of the Plaintiffs have received a modification at anywhere near the terms promised by Defendants.

Defendants' deceptive acts and practices are squarely prohibited by §§ 349 and 350 of the New York General Business Law ("N.Y. G.B.L."), both of which expressly empower Plaintiffs

to seek this preliminary injunction enjoining Defendants' deceptive conduct. Absent a preliminary injunction, there is a risk of irreparable harm to the public of Defendants continuing to engage in these deceptive practices.

FACTS OF THE CASE

Plaintiffs are middle- and lower-income homeowners, struggling with the effects of the collapse of the U.S. housing market and other challenges, including decreased earnings from the economic downturn. Many took out mortgages on which they now owe more than their home is worth. Having reached the point of economic desperation, Plaintiffs turned to purported law firms Consumer First and United Solutions and their "managing attorney" Anthony Blackwell to find help for overwhelming mortgage payments and possible foreclosure. Unfortunately, they walked directly into a scam.

I. Blackwell's Scheme to Whitewash an Illegal Operation

Consumer First and United Solutions both came out of Blackwell's experience working as an attorney for Homesafe, another illegal for-profit mortgage modification company in Nassau County. Homesafe operated in violation of New York Real Property Law Section 265-b.[6] The company reeled in homeowners with false advertisements guaranteeing mortgage modifications and through deceptive business practices that misled customers, collected up-front fee payments, and then failed to perform the promised work.

After joining Homesafe, Blackwell became aware that the company was operating in violation of Section 265-b and of the impending FTC MARS Rule, which is now in effect. Both laws prohibit up-front payments for mortgage modification services in almost all circumstances.

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[6] Samuel and Schrieber readily admit that Homesafe was in violation of Section 265-b. According to Samuel, "the entire [Homesafe] operation was illegal" (March 7, 2011 Defendants' Cross-Motion to Dismiss and Memorandum of Law in Opposition to Plaintiff's Order to Show Cause and In Support of Defendant's Motion to Dismiss, *Schreiber v. Homesafe*, 2011 N.Y. Slip Op. 31445, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011)).

Both laws also contain a narrow exception that allows an attorney admitted to the bar of New York to perform mortgage modification work in New York if it is part of that attorney's regular legal practice. In his deposition testimony in *Mook v. Homesafe America, Inc.*, Blackwell admitted that, in the fall of 2010, he told Samuel and Schreiber that "you guys are going to have to set up a law firm or associate yourselves with a law firm or something" in order to be legally compliant. Compl. ¶ 72.

After a falling out between Schreiber and Samuel in December 2010, Samuel left the company and Homesafe ceased doing business under that name. This turn of events gave Blackwell the opportunity to follow his own advice to "set up a law firm" and continue to demand up-front payments from customers. In fact, he set up two. Defendant Blackwell came to separate agreements with Samuel and Schreiber to continue Homesafe's business as "law firms" under Blackwell's supervision. The two rival entities both came into existence in or around December 2010. Compl. ¶ 77.

Blackwell aimed to create the *appearance* of a law firm that could demand up-front payments for mortgage modification services legitimately in accordance with the narrow exception to Section 265-b. To achieve this goal, Blackwell structured the entities as follows. Schreiber and Samuel each incorporated a New York corporation. Schreiber's was called United Legal Solutions, Inc., while Samuel's was called Consumer First Corp. Then, Blackwell registered two corresponding "law firms" as limited liability companies in Nevada. The LLCs were called United Solutions Law Firm LLC (to match the corporation set up by Schreiber) and Consumer First Law Group LLC (to match Samuel's Consumer First Corp.). Each LLC was registered with the same mailing address in Woodbury, New York. Blackwell and Schreiber remained in Homesafe's office space and started doing business as United Solutions Law Firm.

Meanwhile, Blackwell and Samuel began operating as Consumer First Law Group, in Woodbury, New York. Compl. ¶¶ 82, 91. The purpose of this structure was that, theoretically, the New York business corporations would do the sales work for the Nevada "law firms." In reality, there was no separation between Consumer First Corp. and Consumer First Law Group LLC. Compl. ¶ 91-94, 96, 116. For that reason, the two entities will be called "Consumer First" for convenience. Likewise with "United Solutions." Compl. ¶ 96.

Blackwell drafted the documents that would set the new "law firms" apart from Homesafe, including an "Eligibility Worksheet" that purported to be covered by the attorney-client privilege, and a retainer agreement for legal services, styled "Agreement for Mortgage Assistance Relief Services." Compl. ¶¶ 141, 142. Later in 2011, when Consumer First started receiving some negative publicity, Blackwell incorporated Blackwell's Attorneys LLC as another Nevada LLC with the same Woodbury, New York mailing address. He told the salespeople to sell the business under the new name in addition to, or instead of, Consumer First. Compl. ¶ 94.

Blackwell's entire scheme to create the appearance of legality was just that: a scheme to continue Homesafe's highly profitable practice of demanding up-front fees, with a new tactic of hiding behind a facade of legality. The companies were nothing but fly-by-night mortgage modification mills. By virtue of the fact that Blackwell is an attorney admitted to practice only in Nevada (Compl. ¶ 47), he *cannot* qualify for the narrow exception in Section 265-b, and his companies may very well violate other laws. Defendants' advertisements and entire business practice of acting as a "law firm" deceived and misled homeowners both in New York and elsewhere, because they falsely proclaimed that the companies offered legitimate legal services when that was not the case. During the approximately eight months that Consumer First

solicited and accepted customers, it had 350 customers and accepted up-front payments in amounts of $1,000 or more, often approximately $3,000 per customer. Compl. ¶ 101. United Solutions was in business for a shorter period of time in the first several months of 2011, but also drew in scores of customers and charged them a similar range of fees before abruptly closing up shop in or around late spring 2011.

On July 21, 2011, Defendant Blackwell incorporated American Freedom Law Group LLC under Nevada law. The Articles of Organization filed with the Nevada Secretary of State list the same Woodbury, New York mailing address associated with United Solutions and Consumer First. Compl. ¶ 103. In his deposition in connection with *Mook v. Homesafe America, Inc.*, Defendant Blackwell testified that the business of American Freedom Law Group LLC would include predatory lending litigation and claims against banks for violations of the Fair Housing Act. Despite this purported change in focus, Blackwell has admitted that, to the extent that it is necessary to provide loan modification services in connection with his new business, he will continue to do so. Defendant Blackwell still resides in Nassau County.

II. Defendants' False Advertising and Deceptive Business Practices

Aside from the overall deceptive nature of the companies, Defendants also solicited business using websites, advertisements, oral sales pitches, and documents that contained specific false and misleading statements.

A. Defendants Lured Financially Desperate Homeowners with False Statements on the Internet

Defendants set their trap on the Internet. Plaintiffs and others who researched mortgage modifications using Internet search engines such as Google, often looking for the official Making Home Affordable website run by the federal Departments of the Treasury and Housing and Urban Development, found Defendants' websites instead. These websites were Defendants'

primary marketing tools and were designed to convince homeowners that Consumer First, Blackwell's Attorneys, and United Solutions were reputable law firms that provide a variety of legal services. While most of the websites are no longer available, one of them, www.consumer1stlaw.com, is still online.[7]

The websites are viciously deceptive. One of Consumer First's websites features a large picture of President Obama in front of a flag to create the appearance that the website is associated with the Obama Administration or a federal housing program. The website implies that a mortgage modification is guaranteed, and contains such misleading statements as: "Take advantage of this program while it is still available! You will be able to lower your rate as low as 2% . . . ." and "The funds the Obama Administration has made available for this program come from YOUR tax dollars." Compl. ¶ 120-122, Stillman Aff. Ex. 23. Other of Consumer First's websites create the appearance that Consumer First is a law firm that employs an attorney or attorneys licensed to practice law in New York. The company also claims that it can provide legal services in a variety of states through affiliate attorneys licensed in the relevant jurisdiction. Compl. ¶ 128, Stillman Aff. Ex. 25 ("We have offices in New York and Nevada and we've been providing legal counsel services to consumers across the nation." "We have affiliate attorneys locally available in most metropolitan areas . . ."). One website for Blackwell's Attorneys goes so far as to boast that the company is "Federally and 50-State Compliant."[8] Compl. ¶ 133, Stillman Aff. Ex. 27. The United Solutions websites state that the company offers "distinctive

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[7] Consumer First operated multiple websites during 2011, including (i) *http://www.theobamahamp.net*, (ii) *http://www.consumer1stlaw.com*, (iii) *http://www.consumerfirstlawgroup.com*, and (iv) *http://www.blackwellsattorneys.com*. Currently, *http://www.consumer1stlaw.com* is still accessible online. United Solutions' websites are *http://www.unitedsolutionscorp.com* and *http://www.ulsinc.co*, which are no longer available, but were in operation for several months during 2011. Compl. ¶¶ 109-135.

[8] Defendants' misrepresentation that they were "compliant" was repeated in a flyer received by email by at least one Plaintiff. Compl. ¶ 136, Stillman Aff. Ex. 33.

legal services . . . in Levittown, New York" by its "Levittown, New York business attorney" and claims it has been in business since 1993 (Compl. ¶ 111), while Consumer First's websites claim it has "over 50 years" of experience. (Compl. ¶ 128). None of it is true. Among other things, Consumer First and United Solutions have been in business only since 2011; they do not comply with federal and state law; and there is no "Levittown, New York business attorney"—at least not one licensed to practice law—to help consumers.

Plaintiffs, upon visiting these websites, often believed that they had either found the official government website for the HAMP program, or that they had reached the website for a law firm that specialized in mortgage modification work and could provide legal services "nationwide," as advertised. Compl. ¶¶ 407 (Mr. Hegler believed that Consumer First's website was sponsored by the government), 380 (Ms. Scarborough believed that Consumer First was a law firm specializing in the HAMP Program), and 230 (Mr. Farley believed that United Solutions was a large nationwide company specializing in loan modifications). In reality, Defendant Blackwell was the only attorney working at Consumer First, and he has never been licensed to practice law in New York, or any other jurisdiction except Arizona and Nevada. And while United Solutions very briefly employed an attorney other than Defendant Blackwell, she did not do anything but make "welcome" phone calls and did not know how to do mortgage modification work. Compl. ¶ 85. The vast majority of Plaintiffs, who reside in states in which Defendant Blackwell is not licensed to practice law, never communicated with or received information about any attorney other than Blackwell, and they have no reason to believe that an affiliate attorney worked on their modification applications. Compl. ¶ 129.[9]

[9] In one instance, a Florida plaintiff received a "welcome" phone call from the aforementioned other attorney on behalf of United Solutions. Compl. ¶ 256.

The websites also misrepresent that the companies will provide excellent customer service, when, in reality, homeowners received lavish attention until they paid the up-front fee, at which point Defendants often became nearly impossible to reach before ultimately disappearing completely. For example, the companies promised that "Each of our clients is assigned dedicated support staff to guide them for the duration of their case." Compl. ¶ 131. This is contrary to the experience of Plaintiffs, who often struggled to reach their "assigned" salesperson or mitigator, dealt with numerous individuals at different times, and ultimately could not leave a message for *anyone* at the companies because all voicemail boxes were full or otherwise not accepting messages. *E.g.*, Compl. ¶ 258-261 (After the Tabareses paid $2,500 to United Solutions, they began to have difficulty reaching anyone at the company, had to send faxes multiple times, and could not leave a message. Ms. Tabares' handwritten letters were returned unopened).

B. Defendants Made False Promises and Deceptive Claims to Convince Struggling Homeowners to Make Significant Up-Front Payments

After collecting initial information from financially troubled homeowners through their websites, members of the Defendants' sales teams called the homeowners to convince them to hire Defendants to obtain a mortgage modification on their behalf. The price was an up-front payment, typically between $1,000 and $4,000. In exchange, salespeople offered homeowners the "peace of mind" that would come from having an experienced attorney supervise the negotiation of the homeowner's modification. Salespeople never told prospective customers that the principal attorney—and in the case of Consumer First, the only attorney—was not admitted to practice law in New York or in any jurisdiction in which any Plaintiff lives. Instead, salespeople affirmatively misrepresented that an attorney licensed in the relevant jurisdiction would oversee the application. *E.g.*, Compl. ¶¶ 171, 292, 472, 559.

The salespeople also guaranteed success fast, or the homeowners' money back. First, the salespeople often "promised" or "guaranteed" that Defendants would obtain a mortgage modification for the homeowner, which was in line with its nearly perfect or "100%" success rate in obtaining mortgage modifications.[10] Compl. ¶¶ 294 (Defendant Quinn claimed that Consumer First had a 100% success rate and would be able to modify Ms. Henson's mortgage), 317 (Defendant Villani told Ms. Crete that Consumer First's attorneys had determined that the Cretes qualified for a HAMP modification and that Consumer First had a 95% success rate), 247 (Defendant Lyons told Ms. Tabares that she and her husband would definitely succeed in obtaining a mortgage modification), 472 (Defendant Gabriel Katz told Mr. Ellis that Consumer First succeeded in obtaining modifications almost 100% of the time), and 496 (Defendant Goldfaden told Mr. Stanford that the company had a 90% success rate in reducing homeowners' mortgage payments by $700-800). Salespeople implied or told homeowners directly that they were not equipped to negotiate with their mortgage lender directly and that hiring a "law firm" and a "lawyer" to negotiate for them would be beneficial. Compl. ¶¶ 269 (Defendant Lafond told Ms. Burke that the attorney at United Solutions knew what the bank was looking for and would therefore be successful in obtaining a modification), and 587-88 (Defendant Michael Katz told Mr. Gales that Consumer First's experienced attorney knew all the "loopholes").[11]

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[10] Even in one circumstance in which a Plaintiff was facially ineligible for a particular modification, a Consumer First salesperson promised to obtain a modification, claiming the company had been able to do so previously under similar circumstances. Defendant Lyons promised Plaintiffs Judy and Randall Johns that they could qualify for a HAMP modification for a property that was not the Johns' primary residence and that they rented to tenants, claiming that Consumer First had been able to do so before. Compl. ¶ 346. In fact, the HAMP program requires that the property be the primary residence of its owner to qualify.

[11] In fact, Consumer First represented to homeowners via its website that they should not negotiate directly with their lenders because there was a conflict of interest. Compl. ¶ 130.

Salespeople followed these guarantees of success with concrete representations of the amount by which the company could decrease Plaintiffs' mortgage payments. Over the telephone, salespeople told Plaintiffs that they could reduce the interest rate on the plaintiff's mortgage by between 1.5% and 6.375%, which would reduce Plaintiffs' monthly payments by hundreds of dollars. *E.g.*, Compl. ¶¶ 170, 200, 317. These representations were later confirmed in writing in the "Loan Modification Proposal" that the company sent to the homeowner as part of the enrollment package.

Finally, Defendants promised skeptical homeowners that the companies would refund all or most of their money if the company was unable to obtain the modification it had promised. *E.g.*, Compl. ¶¶ 317 (Defendant Villani assured Ms. Crete she would get her money back, less FedEx fees and the cost of work that had already been completed), 381 (Defendant Lapides promised Ms. Scarborough that if she was unable to obtain a modification, she would get her money back), and 412 (Defendant Enciso promised Mr. Hegler that his payment would be placed in escrow, and if Consumer First was unable to obtain a modification, he would get his money back).

Defendants' slick salespeople were effective at winning the confidence of homeowners who were short on financial options. The companies portrayed themselves as advocates—*legal* advocates—for the homeowners, standing with the homeowner against the mortgage lender. Compl. ¶¶ 293 (Defendant Quinn told Ms. Henson that Consumer First would represent her interests against her lender. Feeling overwhelmed by her financial situation and inability to secure a modification directly from her lender, Ms. Henson was comforted by Defendant Quinn's claims that he and Consumer First would be on her side.), and 561 (Ms. Niedelman felt more comfortable working with a law firm than with any other kind of company).

Based on the promises and assurances from Defendants, plaintiffs made substantial initial payments, to "retain" the services of the "law firms" for legal services and to have an attorney negotiate on their behalf. Compl. ¶¶ 323, 326 (the Cretes paid the up-front fee believing that an attorney named Anthony J Blackwell would be responsible for their modification application), and 591 (Mr. Gales paid the fee believing that Consumer First would lend its legal expertise as a law firm in support of his application).

After establishing the relationship of trust that comes with an attorney-client relationship, Defendants told Plaintiffs in many cases that they should no longer make any mortgage payments. *E.g.*, Compl. ¶¶ 201 (Keys told Ms. Gagliostro to continue missing mortgage payments), 232 (Defendant Day told Mr. Farley he could stop making mortgage payments in order to show hardship, which would be helpful for his application), and 275 (Defendant Lafond told Ms. Burke there would be no consequences to missing mortgage payments). In some cases, Defendants told Plaintiffs to pay Defendants the demanded up-front fee instead of their monthly mortgage payments if they could only afford one or the other. Compl. ¶ 249 (Defendant Lyons told the Tabareses to pay United Solutions instead of their mortgage lender if they could not afford both). Based on Plaintiffs' understanding that they were receiving legal advice from their law firm, many followed this guidance. *E.g.*, Compl. ¶ 275 (Ms. Burke followed Defendant Lafond's guidance that there would be no consequences to not paying her mortgage and stopped making payments).

These misleading and false statements induced Plaintiffs to enter retainer agreements with, and to pay substantial amounts to, the Defendants. The "Eligibility Worksheet" sent to Plaintiffs prior to any contract being signed stated in all caps that it was protected by the attorney-client privilege and work product doctrine; these representations helped convince

homeowners to hire the "law firm" and sign a retainer agreement. Compl. ¶¶ 144, 145, 320. The Agreement for Mortgage Assistance Relief Services was itself a deceptive and misleading document. It reiterated some of the salespeople's promises, while attempting to wiggle out of others, in tiny type. Specifically, the agreement stated that the fee was nonrefundable. Stillman Aff. Ex. 30, 36. But if a customer noticed this provision and pointed out that it contradicted a salesperson's promises, the salesperson assured the customer that the fee wasn't *really* nonrefundable, despite the terms of the agreement. Compl. ¶ 351-352 (Ms. Johns asked Defendant Lyons about the non-refundable language in the agreement and he assured her that her fee was, in fact, refundable; she later put this understanding in writing in a letter to the company). The document also contains an "acknowledgement" that the homeowner has not been advised to postpone or stop making mortgage payments. Salespeople worked around this provision by orally telling Plaintiffs to stop making payments, or doing so in writing with an aggressive wink and a nod, the meaning of which was clear: stop making payments. Compl. ¶ 454 (In response to Ms. Boardwine's question about whether to continue making mortgage payments, Defendant Hutchinson told her that he was not allowed to tell her whether to pay her mortgage, but that "you should know what you should do" and "I told you already you definitely know the answer to that!"), 330 (Defendant Villani told Ms. Crete that although he wasn't allowed to tell her whether to continue making mortgage payments, if it were him, he would not pay it), and 610 (Defendant Quinn told Ms. Risch that "legally" he couldn't tell her to stop making payments, but "a lot of people" stop because it can help them obtain a modification).

C. After Receiving the Illegal Up-Front Payment, Defendants Became Difficult to Contact and then Closed Up Shop

After the homeowner signed the purported "retainer agreement" with Defendants and paid them, Defendants were at first responsive, demanding that Plaintiffs fax additional financial

documents and records, often multiple times. Soon, however, Plaintiffs experienced difficulty reaching both companies. Calls and emails went unreturned for long stretches; faxes were not acknowledged; eventually, emails bounced and voicemail boxes were full. *E.g.*, Compl. ¶ 307 (Plaintiff Darlene Henson tried to call Consumer First and discovered that no one would pick up the phone at any extension. She felt abandoned by her attorney.). In the case of United Solutions, a staff member admitted to Plaintiffs that she was stopping her work on Plaintiffs' files because she wasn't being paid, and had no information about what would happen to them, their money, or their homes. Compl. ¶ 240.

While in some cases Defendants did submit at least some information to Plaintiffs' banks on their behalf, it was often the case that the companies had not done any work for Plaintiffs long after Plaintiffs believed the companies to be busily negotiating and advocating for them. Compl. ¶ 307 (Plaintiff Darlene Henson was surprised and upset to learn that Consumer First had failed to even contact her mortgage servicer about a loan modification). Several Plaintiffs were surprised to learn that their mortgage lender had never heard of Consumer First, and had never been contacted by anyone at Consumer First. Compl. ¶¶ 578 (the Niedelmans' lender never received a mortgage modification application from Consumer First and had never heard of the company), and 368 (no one from Consumer First ever contacted Ms. Johns' lender). Even for those Plaintiffs for whom Defendants did some amount of work, *no* Plaintiff has received a modification at anywhere near the terms promised by Defendants. Compl. ¶ 114.

As Plaintiffs grew increasingly dissatisfied with Defendants and experienced greater difficulty reaching anyone at Defendants' offices, they began to ask for refunds. In all instances they were denied or ignored, in stark contrast to the sunny reassurances they heard before paying. Compl. ¶¶ 460 (Ms. Boardwine asked for a refund and did not receive one), 261 (Ms.

Tabares' letter seeking a refund was returned unopened), and 399 (Ms. Scarborough's request for a refund supposedly was referred to the attorney, and then she never heard from the company again). More frequently, however, Plaintiffs were not even able to get in contact with Consumer First or United Solutions to request a refund. *E.g.*, Compl. ¶¶ 191, 238, 309. Despite Defendants' guarantees, not a single Plaintiff has succeeded in obtaining the refund that he or she was initially promised.

Starting around March or April 2011, calls to United Solutions went unanswered, and emails began to bounce back to the sender. A salesperson told one Plaintiff that the company shut down, and he didn't know what would happen to her application. Compl. ¶ 188. It is Plaintiffs' understanding that United Solutions is no longer doing business. Likewise, after August 2011, Homeowners who called Consumer First's primary office number were directed to a voicemail box that was full and would not accept new messages, or have otherwise been unable to reach anyone at Consumer First. *E.g.*, Compl. ¶ 331. To the best of Plaintiffs' knowledge, Consumer First stopped operating for several months starting in the late summer of 2011. In September 2011, someone purporting to represent Consumer First contacted Plaintiff Phillip Stanford seeking to continue "helping" him obtain a mortgage modification. Compl. ¶ 521. She said that she had purchased the company from Defendant Blackwell and wanted to continue to "help" Mr. Stanford with his mortgage modification. Mr. Stanford declined and asked for his money back.

D. Financially Desperate Homeowners are Left in Even Worse Financial Situations

The effect of these spurious promises and deceitful guarantees was to leave struggling homeowners in even more desperate financial situations. Homeowners lured into Defendants' scheme lost not only the up-front fees that they could ill afford in the first place. In many

instances, homeowners missed mortgage payments and entered default based on Defendants' promises. Compl. ¶¶ 453-54 (the Boardwines agreed to pay $2,600 for a mortgage modification, even though they could not afford it and had to underpay their mortgage, based on the Defendants' promises of success and implied advice to not worry about missing mortgage payments), and 425 (same, for the Heglers). Plaintiffs thought they were hiring a lawyer to help them out of a financial mess; instead, Defendants' false advertising and promises and deceptive business practices left them in a worse position than before.

ARGUMENT

I. Plaintiffs May Enjoin Defendants' Activities Under New York General Business Law Sections 349 and 350.

Private plaintiffs are empowered under N.Y. G.B.L. §§ 349 and 350 to act as "private attorneys general," bringing claims on their own behalf to enforce the laws against deceptive practices and false advertising. *See* N.Y. G.B.L. §§ 349(h), 350(d). These consumer protection laws are intended as broad and powerful safeguards of consumer rights. *Blue Cross Blue & Blue Shield of New Jersey, Inc. v. Phillip Morris USA Inc.*, 3 N.Y.3d 200, 205 (2004); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24-25 (1995). In keeping with that purpose, the law allows consumers to enjoin deceptive practices and false advertising. *Jones v. Wide World of Cars, Inc.*, 820 F. Supp. 132, 138 (S.D.N.Y 1993) (Sections 349 and 350 provide for injunctive relief for private plaintiffs); *McDonald v. N. Shore Yacht Sales, Inc.*, 513 N.Y.S.2d 590, 593 (Sup. Ct. Nassau Cnty. 1987) (a private plaintiff may enjoin false advertising); *Beslity v. Manhattan Honda*, 467 N.Y.S.2d 471, 474 (Sup. Ct. App. Term 1st Dep't 1983) (a consumer suing under § 350 may sue for damages, an injunction, or both); *see also Marcus v. Jewish Nat'l Fund*, 158 A.D.2d 101, 107-08 (1st Dep't 1990) (Kupferman, J., dissenting) ("[T]he Attorney General of the State of New York is empowered to protect the

public in the event there is any deception [by defendant] . . . . [P]laintiffs cannot, as private attorneys general, engage in an enforcement venture *except pursuant to General Business Law § 349(h)*. . . .") (emphasis added). The statutes protect consumers in connection with "virtually all economic activity," so long as the transaction takes place in New York State. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002) (quoting *Karlin v IVF Am.*, 93 N.Y.2d 282, 290 (1999)).

Defendants conducted all of their business from New York, which is sufficient to subject them to the prohibitions of §§ 349 and 350. *See People v. H&R Block*, 58 A.D.3d 415, 417 (1st Dep't 2009) ("New York's vital interest in securing an honest marketplace in which to transact business was threatened when defendants used a New York business to complete the deceptive transactions."); *Goshen*, 98 N.Y 2d at 325 (holding that N.Y. G.B.L. § 349 was not "intended to function as a per se bar to out of state plaintiffs' claims of deceptive acts leading to transactions within the state."). New York courts have repeatedly ruled that out-of-state consumers who were deceived within the State are authorized to hold Defendants to account pursuant to these provisions.[12] Pursuant to the Court of Appeals' ruling in *Goshen*, a plaintiff may assert claims

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[12] *See Microsoft v. Advanced Software Solutions*, No. 05 Civ. 5796 (DRH), 2007 U.S. Dist. LEXIS 19241, at *19-20 (E.D.N.Y. Mar. 12, 2007) (holding that out-of-state plaintiff could assert claims pursuant to N.Y. G.B.L. § 349 because "[t]he complaint clearly alleges that Defendants, who operated out of their New York residence, distributed and sold 'to residents of New York and elsewhere' 'counterfeit, tampered and/or infringing software that is inferior to genuine Microsoft software'" and distinguishing *Goshen* on the grounds that "[t]his is not a case . . . in which only the mere formulation of a plan to deceive occurred in New York."); *People v. Telehublink*, 301 A.D.2d 1006, 1009-10 (3d Dep't 2003) (Attorney General's N.Y. G.B.L. § 349 claims on behalf of in-state and out-of-state consumers were viable because "[t]he interests of New York were implicated when [the defendant] used a New York address to send and receive correspondence related to the telemarketing scheme."); *People v. H&R Block*, 2007 Slip Op. 51562U, *9 (Sup. Ct. N.Y. Cnty. 2007) ("[U]nlike *Goshen*, where both the deception and the transaction occurred out-of-state, in this case, the . . . customer completed the transaction by depositing his or her funds in a New York money market account." (citing *Telehublink*, 301 A.D.2d at 1009-10); *aff'd*, 58 A.D.3d 415 (1st Dep't 2009) (affirming Attorney General's authority to assert N.Y. G.B.L. § 349 claims for non-New York residents on the grounds that "New York's vital interest in securing an honest marketplace in which to transact business was threatened when defendants used a New York business to complete the deceptive transactions at issue here by administering their money market fund, and advised customers that the New York business would be their 'authorized agent.'"); *People v. National Home Protection, Inc.*, 2009 Slip Op. 32880U, at *5-6 (Sup. Ct. N.Y. Cnty. Dec. 8, 2009) (where defendant New York corporation "operates from a single office in New York," "solicited

under N.Y. G.B.L. § 349 so long as "the transaction in which the consumer is deceived . . . occur[s] in New York." *Goshen*, 98 N.Y.2d at 325.[13]

All of the transactions between Defendants and Plaintiffs in this case took place in New York. Defendants have operated exclusively in the State of New York. Both "law firm" entities were physically located in New York mailing, despite being registered elsewhere. Compl. ¶¶ 41, 44. The companies operated out of offices in Nassau County. Id. All deceptive material sent to Plaintiffs was drafted and edited in New York. Compl. ¶ 142. All of Defendants' deceptive communications—whether by phone, e-mail, or fax—originated in New York. All of the "enrollment" documents sent to Plaintiffs included Defendants' return mailing address in New York.[14] Stillman Aff. Exs. 28-32, 34-39. All of Defendants' known websites not registered by proxy were registered to Defendants' mailing addresses in New York. Compl. ¶¶ 115, 126. Plaintiffs sent payment to the Defendants in New York. Compl. ¶¶ 182, 325, 424, 453, Stillman Aff. Exs. 15, 16, 17, 18. Based on the foregoing, there is no question that Plaintiffs engaged in

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business and serviced customers using telephones in New York," "made allegedly false and misleading statements during those telephone conversations," and "directed customers to send gift card rebate forms to . . . New York office," "[t]hese alleged actions are more than sufficient to satisfy the requirement that 'at least some part' of the deceptive acts take place in New York."); *Mountz v. Global Vision Prods.*, 3 Misc. 3d 171, 177 (Sup. Ct. N.Y. Cnty. 2003) ("[A] telemarketing site and even the receipt of Internet orders physically within New York State appear to form a New York locus for a transaction covered by the New York state consumer protection statutes."); *Direct Revenue, LLC*, 2008 NY Slip Op 5085U, at *7 (Sup. Ct. N.Y. Cnty. Mar. 12, 2008) (dismissing N.Y. G.B.L. §§ 349 and 350 claims relating to transactions occurring outside of New York on the grounds that the complaint "nowhere alleges that respondent completed, in whole or in part, any wrongful act employing a computer or other instrumentality within the state.").

[13] This same standard applies to claims asserted pursuant to N.Y. G.B.L. § 350. *See Goshen*, 98 N.Y.2d at 324 n.1 ("The standard for recovery under [N.Y. G.B.L. § 350], while specific to false advertising, is otherwise identical to [N.Y. G.B.L. § 349]."); *Gotlin v. Lederman*, 616 F. Supp. 2d 376, 392 (E.D.N.Y. 2009) ("§§ 349 and 350 only prohibit consumer deception or false advertising that occurs in New York state.").

[14] Similar acts by out-of-state plaintiffs have been deemed sufficient to state a viable § 349 claim. *See Telehublink*, 301 A.D.2d 1006, 1009-10 (3d Dep't 2003) (holding defendants liable under § 349 of the N.Y. G.B.L. on the grounds that "the interests of New York were implicated when [the defendant] used a New York address to send and receive correspondence related to the telemarketing scheme").

transactions in New York and are therefore entitled to the protections of N.Y. G.B.L. §§ 349 and 350.

II. Plaintiffs Are Entitled to Preliminary Relief

Whether to grant a motion for a preliminary injunction is a decision committed to the discretion of the trial court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Jiggets v. Perales*, 202 A.D.2d 341, 342 (1st Dep't 1994). Preliminary relief is only appropriate where: (1) the moving party is likely to succeed ultimately on the merits of its claim; (2) there exists the prospect of irreparable injury if the provisional relief is withheld; and (3) the balance of equities tips in the moving party's favor. *Nobu Next Door LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005). In cases brought pursuant to N.Y. G.B.L. §§ 349 and 350, the irreparable harm inquiry requires only that Plaintiffs establish, at most, future irreparable harm to the public. *See McDonald*, 513 N.Y.S.2d, at 595.

A. Plaintiffs Are Likely to Succeed on the Merits

Section 349 of the N.Y. G.B.L. makes it unlawful to engage in "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." N.Y. G.B.L. § 349(a). "A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349." *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). Intent to defraud and justifiable reliance are not elements of a § 349 claim. *Oswego Laborers' Local 214 Pension Fund*, 85 N.Y.2d at 26. Rather, to prove a cause of action under § 349, an aggrieved consumer must show that (1) the act or practice was "consumer-oriented," (2) the act or practice was misleading in a material way, and (3) the consumer suffered an injury as a result of the deceptive act. *See Stutman*, 95 N.Y.2d at 29. Plaintiffs' claims easily satisfy all three elements. "The standard for recovery under [N.Y. G.B.L. § 350], while specific

to false advertising, is otherwise identical to [N.Y. G.B.L. § 349]." *Goshen*, 98 N.Y. 2d at 324 n.1; *see also Andre Strishak & Assoc., P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 (2d Dep't 2002) ("A plaintiff must demonstrate that the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury.").

1. Defendants' advertisements and practices are consumer-oriented.

To be prohibited under §§ 349 and 350, conduct must be "consumer-oriented." Consumer-oriented practices and advertising "have a broader impact on consumers at large" and are "directed to consumers." *Oswego*, 85 N.Y.2d at 25; *see also N.Y. Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 ("The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; '[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute.'" (quoting *Oswego*, 85 N.Y.2d at 25)).

A deceptive practice or false advertisement will likely be consumer-oriented if it is the defendant's standard practice toward members of the public. *See, e.g.*, *Exxonmobil Inter-Am. v. Advanced Info. Eng'g Servs., Inc.*, 328 F. Supp. 2d 443, 449 (S.D.N.Y. 2004) (Section 349 liability "attaches primarily where a party's misrepresentations are boilerplate and have the potential to be repeated in order to deceive numerous similarly situated buyers" (citing *Oswego*, 85 N.Y.2d at 20)). The Second Department has explained: "Courts have traditionally applied General Business Law § 349 in the context of consumer sales transactions. 'The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising.'" *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 146 (2d Dep't 1995) (quoting *Genesco Entertainment v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984)).

In this case, Defendants have continued the same tried-and-true sales tactics and gross misrepresentations that worked to deceive the customers of Homesafe, this time with the additional deceptive and false representations that Defendants worked for a "law firm" and would provide legal services to the Plaintiffs. Compl. ¶ 112, 136, 157, 171. Defendants made deceptive statements and false claims as a standard practice in their website advertisements, their printed contracts and other documents, and their oral conversations with consumers over the telephone, all for the purpose of inducing those consumers to pay large up-front fees for mortgage modification services. For example, Defendants' website advertisements represented that the company is a New York-based law firm that had been in business since 1993 (Compl. ¶ 111), that the company had fifty years of experience (Compl. ¶ 128), and that the company's services were associated with the Obama Administration and funded by federal tax dollars (Compl. ¶ 121), among other things.

Defendants also made standardized oral representations to potential and actual customers by telephone. Defendants, as a standard practice, told customers that an attorney would work on their modification application, without disclosing that Defendant Blackwell was not licensed to practice law in any jurisdiction except Nevada (*e.g.* Compl. ¶¶ 171, 472); that the customers were guaranteed to receive a mortgage modification (*e.g.* Compl. ¶¶ 270, 342); and that the companies offered a money-back guarantee in the event a modification could not be secured (Compl. ¶¶ 170, 589). In several instances, Defendants told Plaintiffs that if they stopped making mortgage payments, it would improve their chances to receive a mortgage modification (Compl. ¶¶ 260, 330 ,454, 569).

Defendants' written materials contained similarly standardized misrepresentations that were directed to the public at large. Plaintiffs received an identical, or nearly identical, package

of boilerplate forms to complete as part of their "enrollment" with the company. The forms provided by Defendants are materially deceptive in that they suggest that an attorney has made a legal judgment that the client qualifies for a mortgage modification under the federal HAMP program; and that the forms constitute legal services covered by the attorney-client privilege. (Compl. ¶¶ 144-162). The Agreement for Mortgage Assistance Relief Services represents that the company is prepared to offer legal services with respect to the law of the customer's home state, whatever it may be (Compl. ¶¶ 152, 157). Additionally, some customers received a flyer that boasted that Consumer First provided "federally and state compliant services," which provided a benefit to consumers that other modification companies not associated with a lawyer could not provide. Compl. ¶ 136, Stillman Aff. 33. All of the foregoing examples of standardized deceptive practices and false advertisements by Defendants demonstrate the degree to which Defendants made misrepresentations to the public at large.

Defendants' business practices were not "single shot" arm's-length contracts negotiated between sophisticated parties, *see Oswego*, 85 N.Y.2d at 25, but rather one-size-fits-all promises designed to ensnare distressed homeowners. Defendants offered highly technical advice and promises to homeowners on the understanding that Defendants were specially qualified to provide that advice and instruction, and then required Plaintiffs to sign boilerplate contracts that were non-negotiable. Such a disparity in bargaining power between Defendants and the distressed homeowners they conned is ample indication that Defendants' actions are "consumer-oriented" because § 349 "was intended to protect 'small-time individual consumers' and not sophisticated commercial entities." *See Ng v. HSBC Mortg. Corp.*, No. 07 Civ. 5434, 2009 U.S. Dist. LEXIS 125711, at *45 (E.D.N.Y. Dec. 15, 2009) (citing *Exxonmobil*, 328 F. Supp. 2d at 449). Plaintiffs are such individual consumers, who all had the same misfortune of falling for

Defendants' well-honed set of slick and expert lies.

2. Defendants' practices and advertisements were materially misleading.

A practice is "misleading" for purposes of §§ 349 and 350 if it is "'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (quoting *Oswego*, 85 N.Y.2d at 26). "The courts have traditionally taken an expansive view of what constitutes 'false advertising.'" *Beslity*, 467 N.Y.A.2d at 474.

Defendants' collection of up-front fees for mortgage modification services from New York Plaintiffs is a deceptive practice because it violates New York Real Property Law ("N.Y. R.P.L.") § 265-b. "New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349." *Cohen*, 498 F.3d at 126; *Negrin v. Norwest Mortgage, Inc.*, 263 A.D.2d 39, 50 (2d Dep't 1999) ("Allegations of a bank's unilateral imposition of illegal and/or unwarranted fees upon its customers state a valid claim [under § 349]."). Real Property Law § 265-b expressly forbids the acceptance of up-front fees prior to the completion of mortgage modification services, even by registered mortgage brokers, licensed mortgage bankers, or registered loan servicers, for homeowners who own property in New York State. *See* N.Y. R.P.L. § 265-b (2)(b); N.Y. R.P.L. § 265-b(1)(e)(vii); *see also Schreiber v. Homesafe America*, 2011 N.Y. Slip Op 31445U, at *3 (Sup. Ct. Nassau Cnty. May 16, 2011) ("Pursuant to Real Property Law § 265-b(2) a 'distressed property consultant' is prohibited from charging for or accepting any payment for consulting services before the full completion of such services."); *People v. Amerimod*, 2010 N.Y. Slip Op. 31360U, at *7 (Sup. Ct. Nassau Cnty. Apr. 7, 2010) ("RPL § 265-b(2)(b) prohibits 'distressed property consultants' from charging fees prior to completion of their services. This section became law on September 1, 2008.").

Defendants in this case demanded up-front payments from New York homeowners prior

to completing the services, in violation of § 265-b. Salespeople for both United Solutions and Consumer First required customers to pay thousands of dollars before the companies began working on their modification applications. *E.g.* Compl. ¶ 295 (Defendant Quinn stated to Darlene Henson that Consumer First Law Group's services would cost a one-time up-front payment of $2,595.). Defendants' violations of state law establish that their deceptive acts and false advertising were materially misleading. *Cohen*, 498 F.3d at 126.

The narrow exception to § 265-b which allows "an attorney *admitted to practice in the state of New York*" to collect an up-front fee "when the attorney is *directly* providing consulting services to a homeowner *in the course of his or her regular legal practice*" has no bearing on this case. NY RP.L. § 265-b(1)(e)(i) (emphasis added). Blackwell is not admitted to practice law in New York. Compl. ¶ 47. Because he was the only attorney affiliated with Consumer First (Compl. ¶ 92), all up-front fees collected by Consumer First violated the law. The fees collected by United Solutions similarly violated the law. The only attorney other than Defendant Blackwell who worked at United Solutions did not provide mortgage modification consulting services in the course of her regular legal practice. In fact, she did not have a "legal practice" at United Solutions at all; she merely made telephone calls to welcome customers to the "firm" and did no client work that was not directly supervised by Defendant Blackwell or others. Compl. ¶ 85. While no court has yet interpreted this portion of the statute, the Attorney General's Office's interpretation of this law confirms that "[m]erely having an attorney on staff does not exempt a company from the requirements of Section 265-b." (*See* Stillman Aff. Exhibit 48, Attorney General Standard Cease and Desist Letter for Violations of R.P.L. § 265-b, Letter from Joy Feigenbaum, Bureau Chief, Bureau of Consumer Frauds & Protection, State of New York Office of the Attorney General (June 23, 2010)). United Solutions merely had a New York

attorney on staff (and only for a brief period of time), which is insufficient to make lawful its practice of charging up-front fees. The fees collected by United Solutions violated the law and therefore were materially misleading.

Even if Defendant Blackwell were admitted to practice in this jurisdiction, Defendants' activities were not carried out in the course of any regular legal practice. The exemption contained in Section 265-b(1)(e)(i) was intended to protect honest lawyers performing honest work, allowing them to collect customary retainer fees in the ordinary course of their practice. Defendants and their loan modification business model by no means fit this mold. They have run their loan modification practice like a mill, aiming to maximize profits while performing little or no work on their clients' behalf. To the extent Defendants performed any "work" for Plaintiffs, it patently did not include "direct" consulting services in the course of Defendant Blackwell's "regular legal practice." Instead, Defendants manufactured their loan modification practice as a non-legal business unto itself, one that would draw in a new, uniquely vulnerable clientele. Accordingly, Defendants' collection of thousands of dollars in upfront fees in violation of Section 265-b, for work either not performed or performed in derogation of Defendants' contractual duties, in combination with Defendants' other misconduct described herein, establishes the "misleading" element of Plaintiffs' Section 349 claim. *Cohen*, 498 F.3d at 126.

In addition, Defendants' practices and advertisements were materially misleading because the unauthorized practice of law is itself a deceptive practice. *Sussman v. Grado*, 746 N.Y.S.2d 548, 553 (Dist. Ct. Nassau Cnty. 2002); *see also Amerimod*, 2010 N.Y. Slip. Op. 31360U at *8-9 (mortgage modification company's claim that it was affiliated with legal experts is a basis for a false advertising claim). Plaintiffs' allegations establish that Defendant

Blackwell's conduct amounts to the unauthorized practice of law. Compl. ¶¶ 47, 74, 111-133, 142, 145, 150-159, 303 (Defendant Blackwell called New York resident Darlene Henson and told her that he was the attorney who would work on her application), 594 (Defendant Blackwell called Maryland resident Plaintiff Levi Gales and told him that he would be representing him as his attorney). Therefore, Defendant Blackwell's business practices in connection with his "law firms" and the advertisements related to his purported legal services are materially misleading as a matter of law.

Even as a factual matter, Defendants' advertisements, oral sales pitch, and written materials are materially misleading to the average consumer. The definition of "false advertising" includes advertising that is materially misleading because it "fails to reveal facts material in the light of" representations that are made. N.Y. G.B.L. §350-a(1); *see McDonald*, 513 N.Y.S.2d 594-95 (holding that an advertisement was materially misleading in part due to its failure to disclose that certain advertised yacht specifications were only preliminary). Defendants' websites, to take one example, represent that the companies are "law firms" based in New York. Compl. ¶¶ 128. This representation is materially misleading because it fails to disclose that the companies' principal—and in the case of Consumer First, *only*—attorney was not authorized to practice law in New York. Defendants' other representations to consumers, including that the companies had a very high success rate of 90 to 100% (Compl. ¶¶ 200, 294, 317), having helped "thousands" of customers (Compl. ¶ 117), having fifty years of experience (Compl. ¶ 128), and that the companies would refund Plaintiffs' money if the company were unable to secure a mortgage modification on their behalf (Compl. ¶¶ 170, 589), were also materially misleading. *Amerimod*, 2010 NY Slip Op 31360U, at *7-8 (high success rate); *People v. Lipsitz*, 663 N.Y.S.2d 468, 475 (Sup. Ct. N.Y. Cnty. 1997) (money-back guarantee).

Defendants' claims regarding their success rate are misleading because they suggest that Plaintiffs are almost certain to receive a mortgage modification on the terms described to them in their Loan Proposal forms. In fact, none of the Plaintiffs received a modification offer that came anywhere near to the terms offered by the Defendants, and most received no modification at all. Additionally, none of the Plaintiffs received a refund, even though many have made explicit oral and written demands for a refund in light of Defendants' failure to facilitate any type of mortgage modification. Without the materially misleading promises, assurances, and claims described above, Plaintiffs would not have chosen to hire the Defendants. (*See, e.g.*, Compl. ¶ 211).

3. Plaintiffs each suffered an injury as a result of Defendants' deceptive acts and false advertisements.

For a deceptive act or false advertising claim to be actionable, the injury suffered must be a loss independent of the initial deceptive act; monetary loss is sufficient to state an injury under § 349 of the N.Y. G.B.L. *See, e.g.*, *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *Sokoloff v. Town Sports Int'l, Inc.*, 6 A.D.3d 185, 186 (1st Dep't 2004) (dismissing deceptive practice claim made by health club member because plaintiff alleged no other loss apart from the payment of her membership fee, and therefore had "impermissibly 'set[ ] forth deception as both act and injury.'" (quoting *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999))). The loss required to sustain a § 350 claim is *de minimis*. *See Beslity*, 467 N.Y.S.2d at 475 ("Inasmuch as the plaintiff travelled to defendant's showroom on the basis of a misleading and deceptive ad, plaintiff suffered injury and is entitled to recover damages.").

Plaintiffs' losses in this case include losses independent of the money they paid to the defendants. Plaintiffs have accumulated additional debt as a result of hiring the company. *E.g.*, Compl. ¶ 526. Plaintiffs who relied on Defendants' direction to stop making mortgage payments

found their mortgages in default, sometimes subject to "acceleration" clauses that cause the entire principal amount to come immediately due. Compl. ¶¶ 229, 241. Defendants' verbal instructions to cease making mortgage payments disqualified many Plaintiffs from certain federal housing assistance programs, thereby substantially reducing their ability to obtain successful mortgage modifications. Finally, each of the Plaintiffs certainly suffered the *de minimis* injury required to state a false advertising claim, by virtue of the hours of frustration and anxiety spent trying to contact the company to attempt to secure the benefit of their promised bargain. Compl. ¶¶ 459-464.

B. In the Absence of Preliminary Relief, Irreparable Harm Will Result

A preliminary injunction may issue when a defendant

> threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action . . . , or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

C.P.L.R. § 6301. Irreparable harm will redound to both Plaintiffs and the public at large absent an order from this Court enjoining Defendants' deceptive and unlawful activities. Allowing Defendants to continue or resume their course of unlawful conduct will irreparably injure citizens both inside and outside of the State of New York.[15]

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[15] Certain courts in New York have further suggested that § 349 of the N.Y. G.B.L. is such a broad remedial statute, similar in nature to like-minded federal regulatory statutes, that—as with those federal statutes—*no* showing of irreparable harm is necessary to obtain a preliminary injunction. *See People v. P.U. Travel*, 2003 N.Y. Misc. LEXIS 2010, at *8 (Sup. Ct. NY Cnty. June 19, 2003) (explaining that "[i]n a case decided under federal regulatory statutes which are analogous to [§ 349], an appeals court held that the usual prerequisites for issuing a preliminary injunction (i.e. showing of irreparable injury) are not required." (citing *Commodity Futures Trading Comm'n v. Muller*, 570 F.2d 1296 (5th Cir. 1978)); *but see Cooper Square Realty, Inc. v. Building Link, LLC*, 2010 N.Y. Slip Op. 30197U (Sup. Ct. N.Y. Cnty. Jan. 28, 2010) (denying plaintiff's request for a preliminary injunction for failure to meet traditional preliminary injunction standard, but not considering the question of whether a showing of irreparable injury is required under the statute); *see also People v. Laman*, 277 N.Y. 368, 384 (1938) (recognizing that while in most cases "the People would not be entitled to an injunction upon a mere showing" that a statute had been violated, the existence of "special statutory authority" may nevertheless permit injunctive relief in those

The irreparable harm analysis for claims brought pursuant to §§ 349 and 350 differs from the traditional analysis applicable to other claims. Sections 349 and 350 entitle private plaintiffs to seek injunctive relief so long as they have *already* suffered an injury as a result of a defendant's deceptive acts or false advertising. *See* N.Y. G.B.L. § 349(h) ("[A]ny person who *has been* injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice . . . .") (emphasis added); N.Y. G.B.L. § 350-e (same). Accordingly, a showing of future irreparable harm to the public is sufficient to establish the irreparable harm requirement. *McDonald*, 513 N.Y.S.2d, at 595 (holding that "the irreparable injury at issue [is] irreparable injury to the public-at-large, not just to one consumer," in light of the Legislature's intent); *see also Marcus v. Jewish Nat'l Fund*, 158 A.D.2d 101, 105-06 (1st Dep't 1990) (granting the preliminary injunction because "if [the defendant] were to be allowed to persist in its deceptive practices, there would be a significant risk that *people* would read defendant's literature and contribute moneys under the mistaken impression [as to how their money would be used], and thereby be irreparably injured") (emphasis added).

Plaintiffs have established future irreparable harm to the public. While it appears that United Solutions may at the moment no longer be operating, Consumer First may be. Individuals using the name Consumer First have contacted Consumer First customers offering to continue to provide mortgage modification services, and, while it was represented that Defendant Blackwell had sold the company, it is unknown whether he retains any interest or involvement in its operations or ownership. Compl. ¶ 522. There is nothing to stop the Defendants from resuscitating these fraudulent vehicles and resuming their scam. And, given Defendant

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cases.); *People v. Romero*, 91 N.Y.2d 750, 756 (1998) (endorsing the *Bennett* court's approach to cases where "the Legislature by statute has authorized equity to act and enjoin criminal behavior without the necessity of showing, in the individual case, that the public health or welfare was in danger").

Blackwell's practice since at least 2010 of holding himself out as an attorney in New York, there is a substantial likelihood that he will continue to do so unless he is enjoined.

Particularly, there is nothing stopping Defendant Blackwell from continuing to engage in mortgage modification work under the ruse that he is a lawfully admitted attorney, as he was willing to do at Homesafe, and brazenly continued under his own banner as the owner of Consumer First and United Solutions. Moreover, Blackwell is no longer an active member of *any* state's bar, but has indicated his willingness to continue to do mortgage modification work in connection with American Freedom Law Group. Compl. ¶¶ 47, 103, 104. Blackwell still resides in New York, and still is not a licensed member of the New York bar. Because of his established pattern of deceiving consumers, Blackwell should be enjoined individually. A preliminary injunction against individual defendants Samuel and Schreiber was granted in Homesafe, and no different result is warranted as to Defendant Blackwell here. Order Granting Preliminary Injunction, *Mook v. Homesafe America Inc.*, No. 9472/11 (Sup. Ct. Nassau Cnty. Aug. 15, 2011).

The public will suffer irreparable harm if Defendants are allowed to continue their deceptive business practices and false advertisements. They will suffer irreparable injuries like those of the Plaintiffs', such as the imposition of late payment fees, being made ineligible for federal mortgage modification programs by virtue of following the companies' advice to cease making mortgage payments, and going into default and possible foreclosure, for which no adequate remedy at law exists. In particular, Defendants' practices undermine consumers' ability to obtain mortgage modifications. The Defendants often instruct their customers orally to stop making any mortgage payments to their lenders in order to show "hardship" that Defendants claim will help them obtain mortgage modifications. Compl. ¶ 232. This advice, which is

delivered in many cases after a customer has signed a legal retainer agreement to obtain what they believe to be valid legal advice from a bar-certified attorney, is devastating to Defendants' victims. The harm comes in part in that many standard-form mortgage notes contain "acceleration" clauses which, after a *single* missed payment, cause the borrower to be in default and bring due the entire principal of the loan. In New York state, such clauses entitle the lender to begin foreclosure proceedings after one missed payment. *See* N.Y. Real Prop. Law § 258 (sample short form deed and mortgage containing an acceleration clause). In the worst cases, Plaintiffs lost their homes to foreclosure. Compl. ¶ 401. If Defendants are allowed to continue their deceptive practices, every homeowner they target in the future will be at great risk of suffering the same irreparable injuries.

Causing a homeowner to default and face foreclosure also severely prejudices a borrower's future ability to secure a mortgage modification. Those borrowers risk losing their eligibility to modify their mortgage under federal programs designed to assist homeowners just like them. In February 2009, the Federal government introduced the Making Home Affordable Program, a non-profit program designed to "stabilize the housing market and help struggling homeowners get relief and avoid foreclosure." Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages 10 (Dec. 2, 2010). To qualify for the Federal Housing Administration's Home Affordable Modification Plan ("FHA-HAMP") created under this program, one must be in arrears on their mortgage for no more than 12 months. *See* Making Home Affordable Program, *available at* http://www.hud.gov/offices/hsg/sfh/nsc/rep/hampfact.pdf. Similarly, the Home Affordable Refinance Program, which assists homeowners whose mortgages are held by Freddie Mac or Fannie Mae to refinance, requires participants to be "current on [their] mortgage payments" with "a good payment history over the

last twelve months." *See* Home Affordable Refinance Program (HARP), http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx. Accordingly, counseling homeowners to stop making monthly mortgage payments for considerable amounts of time—or, depending on the degree to which a borrower has already fallen behind, for even a single month—Defendants will render future victims of their scam ineligible for federal assistance. This harm—foreclosing homeowners from the very assistance that they were desperate to take advantage of in the first place—is an irreparable harm that cannot be compensated by money damages.

In addition, homeowners who miss mortgage payments may suffer damage to their credit score and overall creditworthiness, which may impact their ability to refinance their mortgage loans as well. Such damage to a person's creditworthiness and good will constitutes an irreparable harm. *See Four Times Square Assoc., L.L.C. v. Cigna Investments, Inc.*, 764 N.Y.S.2d 1, 3 (1st Dep't 2003) (holding that a "threat to [plaintiff's] good will and creditworthiness" was sufficient irreparable harm to warrant an injunction). For this reason, the Court should enjoin Defendants' deceptive practices and false advertisements.

C. The Balance of Equities Favors Granting the Preliminary Injunction

Balancing the equities for purposes of a preliminary injunction motion "simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Ma v. Lien*, 198 A.D.2d 84, 85 (1st Dep't 1993).

The prejudice to Plaintiffs, as well as the public at large, is clear. Defendants possess sensitive personal and financial information for Plaintiffs that may be used to continue to contact Plaintiffs in furtherance of their deception and fraud. And while the Defendants seem to have stopped operating for now, there is no guarantee that they will "stay dead." Absent an

injunction, Plaintiffs face the uncertainty that Defendants may continue or renew their harmful interference with Plaintiffs' mortgage lenders. In addition, allowing Defendants to continue to engage in their deceptive practices creates an imminent risk of harm to consumers. The fact that Defendants' continued their illegal business practices even after this Court entered a temporary restraining order enjoining the continued operation of Homesafe, in particular, shows that absent a court order, they, and particularly Defendant Blackwell, will continue to fleece homeowners under any name not yet brought to the Court's attention.

On the other hand, Defendants face no legitimate prejudice. The Defendants' business activities are illegal, in that they violate § 265-b and state law governing the unauthorized practice of law. As has been amply illustrated above, Defendants have emphasized the "legal" nature of their services and have exploited their affiliation with an attorney in order to ensnare vulnerable clients looking for trustworthy and expert assistance in the loan modification process. Defendant Blackwell's practice of holding himself out to the public as an attorney licensed to practice law in New York, and Defendants' false representations as to Defendant Blackwell's or their "law firm's" legal expertise, deceived Plaintiffs. While Defendant Blackwell is an attorney (though not currently licensed to practice in any state), and a narrow injunction enjoining him from working on loan modifications will deprive him of the clients and income that attend that business, that deprivation is warranted by his persistent abuse of his status as an attorney. The only harm that will accrue to Defendants as a result of a temporary injunction is that they will be restrained from doing what is already forbidden: running an illegal company whose entire business model relies on deception.

Plaintiffs know all too well the personal and financial pain wrought by Defendants; they now seek an injunction in the hopes of preventing others from experiencing the same injuries

they suffered. The balance of equities requires preliminary relief while the Court reaches its ultimate determination on the merits.

CONCLUSION

For the reasons set forth above, and based on the Stillman Affirmation and exhibits submitted herewith in support of Plaintiffs' motion for a preliminary injunction, Plaintiffs respectfully request that the Court grant its motion in all respects.

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