SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Henry Mook, David Thorpe, Ellen Shanahan, Terry Boddie, Joylynn Boddie, Angela Warbington-Hopkins, Albert Darwin, Melody Darwin, Randall Sweatt, Robert Moffett, Susan Moffett, Concetta Baker, Pherry Elden Baker, Joseph Iorio, Dianne Iorio Plaintiffs, - against - Homesafe America, Inc., United Legal Solutions, Inc. (a/k/a United Solutions Law Firm, United Solutions Corporation), Scott Schreiber, Guy Samuel, Angel Gonzalez, Josef Dahari, Chad Walters, Teresa Marie Votto, Damon Laylock, Rupali Ahluwalia (a/k/a Rupa Singh, Rupi Singh, Rupa Ahluwalia), Darrell Keys, David Ainbinder, Nicole Lake, William DiDonato, Richard Gates, Kevin Cogan, Odette Talbert, Angie Estevez, Sophia Ricketts, Miladys Borohquez, Debra Rennie Defendants.	:	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER, ORDER OF ATTACHMENT, PRELIMINARY INJUNCTION, AND EXPEDITED DISCOVERY

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Plaintiffs Henry Mook, David Thorpe, Ellen Shanahan, Terry Boddie, Joylynn Boddie, Angela Warbington-Hopkins, Albert Darwin, Melody Darwin, Randall Sweatt, Robert Moffett, Susan Moffett, Concetta Baker, Pherry Elden Baker, Joseph Iorio, and Dianne Iorio (collectively, "Plaintiffs"), by their attorneys Linda H. Mullenbach and Hyon Min Rho, on behalf of the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), and Davis Polk & Wardwell LLP, respectfully submit this Memorandum of Law in support of Plaintiffs' application for a temporary restraining order, pursuant to New York Civil Practice Law and Rule ("C.P.L.R.") § 6313, pending the hearing of Plaintiffs' motion for: (1) an order of attachment, pursuant to C.P.L.R. §§ 6201 et seq., against the assets of the Defendants Homesafe America, Inc., United Legal Solutions, Incorporated (a/k/a United Solutions Law Firm, United Solutions Corporation), Scott Schreiber, and Guy Samuel (collectively, "Defendants") and any interest of the Defendants in personal or real property situated in the State of New York, or any debt owed to said Defendants, for the purpose of securing satisfaction of any judgment ultimately to be entered in this action; and (2) a preliminary injunction, pursuant to C.P.L.R. §§ 6301 et seq., enjoining Defendants' deceptive conduct described in Plaintiffs' Order to Show Cause. Plaintiffs further submit this Memorandum of Law in support of their motion for expedited discovery, pursuant to C.P.L.R. §§ 3102 and 6220.

PRELIMINARY STATEMENT

Defendants readily acknowledge that they broke the law. By their own admission, Defendants' "entire operation was illegal" and "continues to operate illegally." Rho Aff., Ex. 21 at 5 (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), hereinafter "Samuel Memorandum") . For the past two years, Defendants have scammed hundreds, if not thousands, of vulnerable homeowners by promising to save them from foreclosure. Plaintiffs, each of whom fell victim to this sophisticated scam, now seek to enjoin Defendants' activities to protect themselves and other homeowners from future injury.

Defendants' business relies on a simple scheme: a false promise to modify a homeowner's mortgage in exchange for an up-front payment. Equipped with fast-talking salespeople and masterfully deceptive websites, the operation specifically targets lower- and middle-class families desperate for a solution to their financial troubles. The perpetrators lure in victims with a series of attractive offers: they will convince lenders to lower the homeowners' monthly mortgage payments; the homeowners need not make their monthly payments until this ostensible negotiation period is complete; and homeowners will receive regular, personalized updates about the process. The scammers back up these promises with a "100% money back guarantee" and the possibility of obtaining a modification in 60 days or less. At no point are they told that these services are typically provided for free by federally certified housing counselors.

As soon as the homeowners pay their upfront fee and sign a package of "enrollment" documents, the lavish attention ends. After signing up new customers, Defendants often fail to make contact with their mortgage lenders or servicers for months, if at all. Where the Defendants do make initial contact, they have few, if any, substantive discussions or negotiations with the lender or servicer. In cases where homeowners' applications for loan modifications are denied, Defendants systematically

renege on their promise to refund the upfront fee. Victims are swindled out of thousands of dollars and pushed ever closer toward foreclosure.

Defendants have perpetrated this scam largely under the guise of a for-profit loan modification company, Homesafe America Inc. ("Homesafe"), which was founded and operated by Defendants Scott Schreiber ("Schreiber") and Guy Samuel ("Samuel"). After Samuel left the company in December 2010 to form a rival operation, Schreiber renamed the scam United Legal Solutions ("United Legal") and shifted the company's assets to a new corporation of the same name. Defendants have engaged in this business despite the fact that New York Real Property Law Section 265-b specifically prohibits for-profit loan modification companies – otherwise known as "distressed property consultants" – from accepting up-front fees from customers.

Homesafe's internal operations were thrust into public view in February 2011, when Schreiber sued the company and his co-founder Samuel in a stockholder derivative action. Among other claims brought in New York State Supreme Court, Schreiber accused Samuel of stealing approximately $181,000.00 of Homesafe's money, wasting corporate assets, and mishandling client documents. The litigation produced affidavits from both parties, as well as the filing of various documents with the court, including bank records, merchant account statements, and the company's internal profit/loss charts. These public records reveal a deeply dysfunctional company – plagued by drug abuse, tax evasion, and waste of corporate assets – that serves no purpose except to exploit vulnerable homeowners.

Defendants' deceptive acts and practices are squarely prohibited by Sections 349 and 350 of the New York General Business Law ("GBL"), both of which expressly

empower Plaintiffs to seek this preliminary injunction enjoining Defendants' deceptive conduct. Plaintiffs are further entitled – due to the recent plundering of Homesafe's funds and assets by Defendants – to an attachment of Defendants' funds. Absent an order of attachment, Plaintiffs risk being unable to secure satisfaction of any judgment that ultimately may be entered against Defendants in this action. Moreover, given Defendants' efforts to destroy or discard highly relevant documents, Plaintiffs require expedited discovery to ensure preservation of crucial evidence.

FACTS OF THE CASE

Plaintiffs are a mix of low- and middle-income homeowners scattered from the Arizona desert to Rockland County, New York. They share little except a common struggle to stave off foreclosure in the aftermath of the nationwide housing crisis. Faced with rising bills and the risk of losing their homes, each of these Plaintiffs turned to the Internet to find relief and, one way or another, came across Defendant Homesafe.

I. Homesafe's Scheme to Defraud Homeowners

Homesafe and its successor corporation, United Legal, misrepresent their services at all stages of their interactions with consumers – from a customer's first expression of interest until the final fight over the company's refund policy. The most widely disseminated misrepresentations appear on the company's websites and in the package of standard "enrollment documents" sent to all prospective customers.

A. Initiating the Relationship: False Statements on the Internet

Homesafe markets itself extensively on the Internet. It maintains or maintained several websites, each of which contains numerous fraudulent or misleading statements regarding the type of services provided by Homesafe and its employees.

Nearly every Plaintiff found Homesafe while searching the Internet for information about foreclosure prevention.[1] Complaint ¶¶ 72, 94, 128, 148, 172, 199, 220, 271. Homesafe designs its websites and online advertisements to trick visitors into believing that the company is somehow affiliated with government agencies or large financial institutions. Complaint ¶ 149 (stating how Ms. Boddie believed the Homesafe

[1] Homesafe pays Google tens of thousands of dollars each month for ad terms such as "loan modification," with the goal of luring desperate homeowners to the company's website. Rho Aff., Exs. 26 ¶ 20 (Samuel Aff.); 24 ¶ 8 (Schreiber Feb. Aff.).

website was affiliated with the government, thus leading her to contact Homesafe); Rho Aff., Ex. 4 (Website Screenshot of www.theobamahamp.net) ("The funds the Obama Administration has made available for this program come from YOUR tax dollars. Take advantage of this program while it is still available! You will be able to lower your rate as low as 2%, obtain a fixed lower monthly payment, and save your home from foreclosure."); Rho Aff., Ex. 2 (Website Screenshot of www.homesafeamerica.org) (stating that "Homesafe America is affiliated for Modification with these Banks and many more…" and including the logos of HSBC, Wells Fargo, Citibank, GMAC Mortgage, and Chase Bank).

Homesafe's websites provide visitors two ways to contact the company: by calling the toll-free number provided on the page, or by submitting contact information through an online form. Regardless of which one a visitor chooses, the data is funneled back to Homesafe's office in Levittown, New York, where a company representative receives the contact information and then calls the potential customer. Complaint ¶¶ 72, 128, 150, 172, 221, 271.

B. "Advising" The Victims: "Enrollment Documents," and a Conversation with a "Loss Mitigation Specialist"

The first person to contact a homeowner was typically a Homesafe employee or contractor posing as a "Loss Mitigation Specialist." The exact talking points varied from scammer to scammer, but the basic pitch was the same: Homesafe would use its expertise and strong relationships with financial institutions to reduce the homeowner's monthly mortgage payments. Some Homesafe representatives made specific promises about what they would be able to achieve. Complaint ¶ 72 (Defendant Laylock claiming he could get Plaintiff Mook's monthly mortgage payment down to two percent); ¶ 95

(Defendant Walters claiming he could get Plaintiff Thorpe's five percent interest rate reduced to two percent or three percent, and that he would most likely see his monthly payments of approximately $1,400.00 reduced to approximately $1,000.00 per month);¶ 240 (Defendant DiDonato promising to get the Plaintiffs Moffetts' mortgage down by at least $300.00 per month). Most representatives orally promised Plaintiffs that they were guaranteed a full refund if Homesafe failed to obtain a loan modification on their behalf. Complaint ¶¶ 72, 129, 221, 240. If a plaintiff expressed skepticism about Homesafe's practices, the representative would say whatever was necessary to assuage their concerns. Complaint ¶ 221 (Defendant Lake describing to Plaintiff Sweatt Homesafe's supposedly high success rates in negotiating modifications).

Once each Plaintiff agreed to hire Homesafe, he or she received a package of standardized "enrollment documents" through mail, fax or email. These documents served several purposes: to convince victims that Defendants operate a legitimate loan modification company, to obtain sensitive financial information from homeowners, and to lure plaintiffs into a devastating financial scam. Virtually every Plaintiff received, signed and returned to Homesafe's Levittown office four main documents:[2] an "Authorization to Represent"; a "Homeowner Disclosure"; a "Client's Responsibilities During Loss Mitigation" (hereinafter "Client's Responsibilities"); and a "Payment Authorization Form." Rho Aff., Exs. 10 – 13. The forms also requested sensitive

[2] Homesafe's enrollment documents are modeled on generic forms posted online by The Loan Post, a Florida-based web portal that caters to for-profit loan modification companies. In some cases, Homesafe copied The Loan Post's generic documents verbatim. In other cases, Homesafe copied the generic forms, but removed any language that warned consumers of the risks of working with a for-profit loan modification company. See Rho Aff., Ex. 15.

personal and financial information, including the victims' addresses, Social Security numbers, and mortgage information.[3]

C. Refusing To Interact With Plaintiffs Once They Received Their Illegal Upfront Payment

During the initial solicitation, Defendants assured potential customers of their availability to address their questions and concerns throughout the laon modification process. Once Plaintiffs paid Homesafe its up-front fee, however, the company's representatives became virtually impossible to reach. Complaint ¶¶ 80, 88 ("Mr. Mook contacted Defendant Homesafe but found it extremely difficult to actually reach an employee on the phone. . . . Mr. Mook tried calling Defendant Homesafe's offices for additional information but was unable to reach anyone who could speak to him about his file."); ¶¶ 230 – 31 ("After submitting his enrollment documents and payment information, Mr. Sweatt received only limited updates from Defendant Homesafe. . . . he had difficulty reaching company representatives for information."); ¶¶ 255, 261 ("Weeks

[3] These enrollment documents induced Plaintiffs to hire Homesafe and convinced them to undertake certain actions that ultimately undermined their financial health. For example:

The "Homeowner disclosure" form stated that Homesafe's "job is to make sure that you do not slip through the cracks." It further promised that "[w]e are committed to keeping you informed with regular updates about your case, and with transparency throughout the process. You will have regular contact from your dedicated negotiator and always get a live person answering the phone when you call, not an automated voice-mail maze." Rho Aff., Ex. 11. The Plaintiffs were reassured by the document's statement that "[w]e are here to provide you with answers and solutions, not to create more questions and problems." Complaint ¶ 100.

The first paragraph of the "Client's Responsibilities" document instructed the Plaintiffs to set aside money "equal to [my] mortgage payment during the mitigation process" and that these funds were "NOT to be forwarded to lender unless otherwise directed." The Plaintiffs who signed this document understood this statement to be an instruction to stop making monthly payments to their mortgage servicer for as long as they were a customer of Homesafe. See, e.g., Complaint ¶ 246. The fourth paragraph of the "Client's Responsibilities" document assured Plaintiffs that "the process of loss mitigation for some lenders can take as long as 1 to 90 days to complete" and that "[m]ost cases are completed in less than 60 days." Rho Aff., Ex. 12. These optimistic and entirely unfounded timeframes increased Plaintiffs' confidence in Homesafe's services, and gave them hope that the company could provide them with the help they so badly needed. See, e.g., Complaint ¶ 246.

passed, and the Moffetts heard nothing from Defendant Homesafe or their mortgage servicer. . . . The Moffetts tried calling Homesafe's New York offices numerous times, but had difficulty finding anyone to speak to about their file."); Thorpe Aff. ¶ 31 ("I had difficulty reaching anyone at Homesafe to discuss my file."). When Plaintiffs did receive an update from Homesafe, it usually came in the form of an auto-generated e-mail, which provided only minimal details about developments in their case file. See, e.g., Rho Aff., Ex. 42.

Plaintiffs found it particularly difficult to reach Homesafe representatives after December 2010. Homeowners that called Homesafe's offices would have difficulty getting anyone to pick up the phone; when someone did pick up, he or she usually answered on behalf of "United Legal Solutions." Complaint ¶ 192. Likewise, several Plaintiffs found that, around this time, the e-mail addresses of their Homesafe contacts stopped working, and that some of these Homesafe representatives began using e-mail addresses ending with @unitedsolutionscorp.com. See, e.g., Complaint ¶ 140 (Plaintiff Shanahan receiving an update on January 14, 2011 from her Homesafe representative, which indicated that Homesafe was now operating as United Legal Solutions Law Firm and that email contacts had been changed from @homesafeamerica.com to @unitedsolutionscorp.com).

Despite Homesafe's initial promises, not a single Plaintiff has received a loan modification as a result of Homesafe's efforts. See, e.g., Complaint ¶ 88. Indeed, the three Plaintiffs who have spoken with their banks or mortgage companies about Homesafe have all been told that Homesafe did nothing to increase their likelihood of receiving a loan modification. Complaint ¶ 83 ("Mr. Mook thereafter called Chase in

November 2010 to check the status of his loan application. However, the representative told him over the phone that he had never heard of Defendant Homesafe."); ¶ 191 ("Ms. Warbington-Hopkins eventually contacted her mortgage company, Vanderbilt, over the phone and found out . . . that Defendant Homesafe had never submitted an application on her behalf and, in fact, had never contacted Vanderbilt."); Thorpe Aff. ¶ ¶ 33 ("The representative at the mortgage company informed me that Homesafe had done nothing at all and that I was likely the victim of scam.").

D. Breaking the Promise to Refund Their Victims' Money

In a further insult, Homesafe refused to honor its "100% Money Back Guarantee," despite the fact that the company had failed to provide the services it promised. Some Plaintiffs demanded a refund over email, but received no response. Complaint ¶ 262 ("We [Plaintiffs Moffetts] are requesting that our money be returned . . . I believe I have every right to seek a refund based on your inability to negotiate this loan and my inability to speak with anyone in your organization concerning this matter); ¶ 234 ("Could you tell me [Plaintiff Sweatt] who can authorize a refund for my $1700.00 that you all charged me but could not deliver any results?"); Shanahan Aff. ¶ 23 (emailing Defendant Bohorquez "I want my money returned, there is nothing your company can do that I can't do myself.")). Others called Homesafe and spoke to various company representatives, only to be denied a refund without any explanation or were otherwise ignored. See, e.g., Complaint ¶ 167 (Plaintiff Boddie being told by Homesafe employee "Howard" — the man responsible for refunds — that "he did not know how long the processing would take" and then never returning her calls). Not a single Plaintiff has succeeded in obtaining the refund he or she was initially promised.

II. The Structure of Homesafe's Businesses

Even without the benefits of formal discovery, Plaintiffs have uncovered significant details about the internal workings of Homesafe and its successor corporation, United Legal Solutions. These facts lay bare the deceptive acts and practices that form the core of Defendants' business.

A. Creation of Homesafe

Homesafe America, Inc. was founded in December 2008 by two associates, Defendants Scott Schreiber and Guy Samuel. Their business model was simple: claim expertise in the field of "loan modifications," advertise heavily on the Internet, and charge clients an up-front fee. Their ability to actually obtain the modifications was irrelevant; Schreiber and Samuel knew that once they received their up-front fee, they had little incentive to follow through.

And indeed, Schreiber and Samuel were ill-equipped to provide the services they promised. Samuel had no experience in the mortgage industry besides working "periodically" as a loan officer between 2006 and 2008. Schreiber's most relevant credential was co-founding a "children's entertainment company" called Jump N' Entertainment. Rho Aff., Exs. 24 at ¶ 3 (Feb. 15, 2011 Affidavit of Scott Schreiber, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Schreiber Feb. Aff."); 25 ¶ 2 – 3 (Mar. 5, 2011 Affidavit of Guy Samuel, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Samuel Aff.").

But their lack of experience was no deterrent: on December 2, 2008, Schreiber and Samuel incorporated Homesafe as a New York business, with each of them controlling fifty percent of the company's 200 shares and serving as the only directors of

the company's board.[4] Complaint ¶ 321; Rho Aff., Exs. 19 ¶¶ 1 – 2 (Complaint, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Schreiber Complaint"); 22 ¶ 2 (Plaintiffs' Mar. 9, 2011 Reply Affirmation in Support of Order to Show Cause / Opposition to "Cross-Motion", Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Schreiber Reply"); 24 ¶ 4 (Schreiber Feb. Aff.). They soon opened offices at 1975 Hempstead Turnpike in East Meadow, New York, where they set up a call center and a series of websites. In September 2009, the company moved down the road to 3000 Hempstead Turnpike in Levittown, New York, where Homesafe and its successor corporation United Legal Solutions operate to this day.

Schreiber's February 2011 lawsuit provides a window into the company's day-to-day operations. Schreiber and Samuel disagree on the roles each played in the corporation, but the key fact is that neither one took any personal responsibility for serving clients. Schreiber claims that he handled "marketing," while Samuel handled "business contracts" and "important policy decisions." Rho. Aff., Ex. 24 ¶ 4 (Schreiber Feb. Aff.). Samuel, on the other hand, asserts that *he* oversaw "sales and marketing,"

[4] Homesafe's incorporation papers direct the New York Secretary of State to forward any service of process to "Scott Schreiber & Guy Samuel, 264 Forest Avenue, Woodmere, New York 11598." It is unknown whether the company ever operated at this address. The first location where Homesafe is known to have operated is 1975 Hempstead Turnpike, East Meadow, New York. In September 2009, Homesafe moved to a larger office at 3000 Hempstead Turnpike, Suite 200, Levittown, NY. Rho. Aff., Ex. 26 ¶ 6 (Mar. 9, 2011 Affidavit of Scott Schreiber, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Schreiber Mar. Aff."). In June 2010, Homesafe signed a lease for another office at 3000 Hempstead Turnpike, in Suite 317. Id. On information and belief, Homesafe has always operated out of Nassau County, New York. All – or nearly all – of the company's operations occur within the office. These operations include phone and e-mail communications with homeowners, the submission and processing of customers' payments, and the drafting of corporate documents, marketing materials, and customers' "enrollment packages."

while Schreiber was responsible for "dealing with the customers."[5] Rho. Aff., Ex. 25 ¶¶ 6 – 7 (Samuel Aff.).

Homesafe's Profit & Loss Statement, as filed in the Schreiber litigation, reveal the company's priorities: between January and October 2010, Homesafe spent approximately forty percent of its gross revenues on "commissions" for its salespeople and another thirty percent on "marketing" or "advertising and promotion." Rho Aff., Ex. 30 (Order to Show Cause Memorandum Exhibit D, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Profit & Loss"). There is no line item in the company's budget for anything resembling the processing or submitting of loan modification applications. Id.

B. Finances of Homesafe

Without formal discovery, it is impossible to know precisely how many clients came through Homesafe's doors. Samuel states that the company's websites[6] generated a "large volume of calls" and that when he departed Homesafe in December 2010, he "left behind more than 30,000 leads" the company had culled from Google[7] and "other marketing strategies." Rho Aff., Ex. 25 ¶¶ 21, 40 (Samuel Aff.). Schreiber states that, as of Samuel's December 2010 departure, Homesafe had "close to 1,000 files which were pending." Rho Aff., Ex. 24 ¶ 15 (Schreiber Feb. Aff.).[8]

[5] Samuel adds that, to the extent Schreiber dealt with customers, he "consistently mishandled" them, "sometimes committing fraud." Rho. Aff., Ex. 25 ¶ 18 (Samuel Aff.).

[6] Homesafe's various websites, including www.homesafeamerica.com, were maintained by Schreiber and/or Samuel. Several of these sites list Schreiber as the website's "administrative contact," and list the contact address as 3000 Hempstead Turnpike, Suite 317, Levittown, New York.

[7] Samuel states that the company lured potential customers to its website by paying Google for ad terms such as "loan modification" – at an average cost of $51,356.15 per month.

[8] The company experienced tremendous growth starting in January 2010. According to Homesafe's Profit & Loss Statement for January to October 2010, which were included in Samuel's court

Below is a monthly breakdown of Homesafe's gross revenues, commissions paid, and money spent on marketing, advertising and promotion as reported in the Profit & Loss Statement.[9]

MONTH	GROSS INCOME	COMMISSIONS	MARKETING, PROMOTION AND ADVERTISING
January 2010	$45,614.95	$11,918.00	$5,311.38
February 2010	$80,668.83	$15,687.00	$7,536.98
March 2010	$166,017.48	$71,345.75	$27,016.68
April 2010	$162,834.00	$80,517.92	$46,595.04
May 2010	$198,734.00	$83,472.06	$53,660.61
June 2010	$187,266.12	$92,440.42	$49,625.52
July 2010	$245,610.96	$104,848.96	$66,314.96
August 2010	$245,611.00	$103,156.62	$75,233.99
September 2010	$324.616.00	$149,417.00	$77,908.32
October 2010	$331,309.00	$160,761.00	$77,823.35
YTD 2010	**$1,988,293.34**	**$873,582.73**	**$487,026.83**

Rho Aff., Ex. 30 (Profit & Loss).

Samuel claims that Schreiber "has all of [Homesafe's] documentation or books and records in his possession." Rho. Aff., Ex. 25 ¶ 9 (Samuel Aff.). Schreiber claims that, when Samuel left Homesafe in December 2010, the company's billing department

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filings in Schreiber, Homesafe's gross revenue nearly doubled between January and February 2010, and then doubled again in March 2010. Rho Aff., Ex. 30 (Profit & Loss). By July 2010, the company was grossing more than $200,000 per month and, according to Samuel, by December 2010, the company was "grossing approximately $400,000 a month." Id.; Rho Aff., Ex. 25 ¶ 38 (Samuel Aff.). According to the Profit & Loss Chart, Homesafe had a net income of $111,841.50 between January and October 2010. Rho Aff., Ex. 30 (Profit & Loss).

[9] This chart should be viewed with some skepticism. Samuel claims that Schreiber underreported the company's income and that, as a result, the Profit & Loss Statement are "a fiction." Rho Aff., Ex. 25 ¶¶ 28 – 29 (Samuel Aff.). According to Samuel, the company's October 2010 merchant account statement indicate that Homesafe collected $50,000.00 more in revenue that month than was recorded in the Profit & Loss Statement. If anything, the company's actual gross revenues were quite a bit higher. Id. ¶ 31.

was "in shambles," and that "everything was extremely disorganized."[10] Rho Aff., Ex. 26 ¶ 19 (Schreiber Mar. Aff.).

Homesafe maintains at least one checking account,[11] one money market account,[12] and three merchant accounts, all based in New York. The checking account was used for day-to-day company operations, the money market account was used to store company profits, and the merchant accounts were used to process customer payments. Rho. Aff., Exs. 31 – 32 (Order to Show Cause Memorandum Exhibits A, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Citibusiness Account Statements 1-2"); 33 (Order to Show Cause Memorandum Exhibit G, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Citibusiness Account Statement 3"); 34 (Cross-Motion Exhibit C, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Trisource").

[10] On December 9, 2010, Schreiber's attorney, Elliott Martin, sent a letter to Samuel demanding the return of the $175,000.00 Samuel withdrew on December 3. In the letter, Martin warned Samuel that litigation would not only be "costly to both sides," but that it "might well be extraordinarily complex and intrusive." Martin wrote that, "[j]ust as one example, since the inception of the business you have withdrawn amounts well in excess of that withdrawn by Scott [Schreiber]; to calculate that amount we will need to correlate the company's books with your personal tax returns and other financial records. It is in your interest to sit down and straighten this situation out before it expands in directions you are well advised not to let it go." Order to Show Cause Memorandum Exhibit B, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011). This may or may not be a veiled threat to expose tax evasion.

[11] Homesafe maintains its checking account with Citibank and bears the account number 009947104903. Rho. Aff., Exs. 31 – 33 (Order to Show Cause Memorandum Exhibits A & G, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011). Schreiber claims that Samuel kept the "corporate checkbook" in his office, and that he would refuse to let Schreiber use it if Samuel disagreed with the proposed payment. Rho Aff., Ex. 26 ¶ 8 (Schreiber Mar. Aff.). Homesafe also has or had several debit cards associated with the checking account.

[12] Homesafe maintains a CitiBusiness Insured Money Market Account ("IMMA"), which bears the account number 009982133128. It was from this account that Samuel withdrew the $175,000 on December 3, 2010, giving rise to Schreiber's lawsuit. Immediately prior to Samuel's withdrawal, the account had a balance of $200.738.74. Rho Aff., Exs. 31 – 32. Homesafe also maintains merchant accounts with Aurum Bankcard and Check 21. Rho Aff., Exs. 34 (Cross-Motion Exhibit C, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Trisource"); 25 ¶ 30 (Samuel Aff.).

Most of the Homesafe's merchant transactions are or were processed through an account operated by TriSource Solutions LLC,[13] which handled all of the company's Visa, MasterCard, and Discover credit card transactions.[14] Schreiber and Samuel both indicate that TriSource shut down Homesafe's account in or around November 2010. Rho Aff., Exs. 25 ¶ 45 (Samuel Aff.); 24 ¶ 10 (Schreiber Feb. Aff.); 26 ¶¶ 17 – 18 (Mar. 9, 2011 Affidavit of Scott Schreiber, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Schreiber Mar. Aff."). Schreiber states that TriSource blocked his and Samuel's access to the account after Samuel made several unauthorized transactions involving customers' credit cards.[15] Rho Aff., Ex. 24 ¶ 10 (Schreiber Feb. Aff.).

C. The Waste and Plundering of Homesafe's Corporate Assets

Schreiber and Samuel repeatedly used Homesafe's assets for their personal benefit. Rho Aff., Exs. 19 ¶¶ 86 – 87, 90 (Schreiber Complaint); 26 ¶¶ 10 – 12 (Schreiber Mar. Aff.). Most remarkable was Samuel's 10-week adventure in the Dominican Republic, where he burned through more than $46,000.00 of company assets. Rho Aff., Ex. 24 ¶ 7 (Schreiber Feb. Aff.). As Schreiber explained, Samuel's trips

[13] The TriSource account bears the number 544968076211427. Schreiber claims that the account was in Samuel's name, (Rho Aff., Ex. 26 ¶ 9 (Schreiber Mar. Aff.)), while Samuel claims that it was in Schreiber's name. Rho Aff., Ex. 25 ¶ 34 (Samuel Aff.). Homesafe's October 2010 Monthly Billing Statement from TriSource does not indicate any specific individuals associated with the account. Rho Aff., Ex. 34 (Trisource). The Statement does, however, lists the address associated with Homesafe's account: 3000 Hempstead Turnpike, Levittown, New York. The Statement also notes that TriSource is based in Iowa but is a "registered agent of Merrick Bank Corp, Woodbury, NY 11797." Id.

[14] TriSource's October 2010 Billing Statement for Homesafe indicates that the company processed 449 credit card transactions worth a total of $376,104.58 between October 1 – 31, 2010. Rho Aff., Ex. 34 (Trisource). This amount is approximately $45,000.00 more than Homesafe's total monthly income listed in the company's Profit & Loss Statements for that same time period. Rho Aff., Ex. 30 (Profit & Loss).

[15] Schreiber states that these unauthorized transactions totaled more that $16,000.00. Rho Aff., Exs. 24 ¶ 10 (Schreiber Feb. Aff.); 26 ¶ 9 (Schreiber Mar. Aff.).

"never resulted in any benefit to the company," and were nothing more than an "extended vacation." Rho Aff., Exs. 19 ¶¶ 87, 90 (Schreiber Complaint); 26 ¶¶ 10 – 12 (Schreiber Mar. Aff.).

According to Schreiber, Samuel was never able to produce any receipts or business plan for the trips. Rho Aff., Exs. 19 ¶¶ 89 – 90 (Schreiber Complaint); 24 ¶ 7 (Schreiber Feb. Aff.). Samuel's debit card statements indicate that he withdrew the equivalent of $34,000 in cash from ATMs while in Santo Domingo, while spending $3,365.00 on hotels and hundreds of dollars on bars, clothes, and local boutiques. Rho Aff., Ex. 30 (Order to Show Cause Memorandum Exhibit F, Schreiber v. Homesafe, No. 002344-11 (N.Y. Sup. Ct., May 16, 2011), hereinafter "Dominican Republic Spending"). Samuel later defended the trip by saying he went to establish a Homesafe "call center" in the country, but never explains why the company, which caters to an English-speaking clientele, would want a call center in a Spanish-speaking nation. Rho Aff., Ex. 25 ¶ 21 (Samuel Aff.).

Samuel's trips created tension between Homesafe's co-owners. This tension escalated further in October 2010, when Schreiber began using a fake name with at least one of Homesafe's customers.[16] The conflict between Schreiber and Samuel reached a breaking point at the end of November 2010. By the first week of December, Samuel had left the company and absconded with approximately $181,000.00 in corporate assets.

[16] In late October, a Homesafe customer, Robin Piervinanzi, visited the company's offices and demanded a refund. Rho Aff., Ex. 26 ¶ 28 (Schreiber Mar. Aff.). Schreiber acknowledges that he used a pseudonym so that the customer would not be aware of his real identity. Id. Schreiber claims that Samuel refused to offer him a refund, but that he and Anthony Blackwell eventually agreed to provide one to Mr. Piervinanzi. Id. ¶ 29 – 30. Schreiber admits to signing a promissory note to the customer using the pseudonym, which Samuel claims was "John Goldfadden." Id. ¶ 30; Rho Aff., Ex. 25 ¶ 35 (Samuel Aff.).

The precise reasons for Samuel's departure remain in dispute. Samuel claims that, after he learned about Schreiber's use a fake name with a client, he became "fearful of what other fraud Schreiber had committed, or was capable of committing." Ex. 25 ¶ 36 (Samuel Aff.). Schreiber claims that Samuel's departure was part of a premeditated scheme to steal as much of the corporation's money as possible while Schreiber was on vacation. Rho Aff., Ex. 19 ¶¶ 40 – 43 (Schreiber Complaint). Samuel admits to withdrawing $175,000.00 from Homesafe's money market account in a single certified check, dated December 3, 2010. He claims, however, that he was entitled to these funds as a co-owner of the corporation. Rho Aff., Ex. 25 ¶ 37 (Samuel Aff.).

Schreiber states that, immediately prior to Samuel's departure, Homesafe had total liquid assets of approximately $200,000.00 (Rho Aff., Ex. 19 ¶ 47 (Schreiber Complaint)), and that Samuel's withdrawal "stripped virtually all of the liquidity from the Corporation" Id. ¶ 51; Rho Aff., Ex. 24 ¶ 10 (Schreiber Feb. Aff.) (stating that the withdrawals represented "between 80% and 90% of the Corporation's liquidity")).[17] Moreover, Schreiber claims that Homesafe had a "substantial amount of outstanding debt" at the time, which he says was $157,068.44. Rho Aff., Exs. 19 ¶ 59 (Schreiber Complaint); Ex. 24 ¶ 11 (Schreiber Feb. Aff.). Schreiber claims that, to "keep [Homesafe] afloat" after Samuel's departure, he was forced to invest $42,900.00 of his own money and $75,000.00 of his parents' money in the company. Rho Aff., Exs. 19 ¶ 141 (Schreiber Complaint); 24 ¶ 11 (Schreiber Feb. Aff.).

[17] Schreiber also states that, before Samuel left Homesafe on December 3, 2010, Samuel handwrote payroll checks to Homesafe employees, which bounced when the employees tried to cash them the following Monday. Rho Aff., Ex. 26 ¶ 16 (Schreiber Mar. Aff.).

According to Schreiber, Samuel's withdrawals had a "negative effect" on Homesafe's short term and long term "profitability" and "ability . . . to provide, as a going concern, goods [and] services." Rho Aff., Ex. 19 ¶¶ 107, 110 – 111, 114 (Schreiber Complaint).

D. Fallout from Samuel's Departure: Samuel Creates Consumer First, and Homesafe Becomes United Legal

On November 10, 2010, a month before he left Homesafe, Samuel filed incorporation documents with the New York Secretary of State's Office, creating a new company called "Consumer First Corp," located at 3000 Hempstead Turnpike, Suite 317, Levittown, New York. Consumer First Corp. is controlled "entirely" by Samuel, (Id. ¶¶ 133 – 134), and is, according to Schreiber, nothing more than Samuel's "alter ego" Id. ¶ 135.[18] On information and belief, the company now operates at 1000 Woodbury Road, Suite 107, Woodbury, New York 11797 and 2320 Paseo Del Prado, Suite B101, Las Vegas, NV 89102.

Schreiber alleges that all or some of Consumer First Corporation's start-up and ongoing operating costs were funded with money Samuel withdrew from Homesafe's account between November 29, 2010 and December 6, 2010. Id. ¶¶ 9 – 10, 53 – 54, 130. Schreiber also states that when Samuel left Homesafe for Consumer First, he took with him computers that contained "critical contracts and marketing documents from Homesafe" on their hard drives, and that Samuel is now using these materials in the operation of Consumer First. Rho Aff., Ex. 24 ¶ 12 (Schreiber Feb. Aff.).

[18] Samuel is the sole owner and the sole director of Consumer First. In addition, Consumer First Corp. does business as Consumer First Law Group. Rho Aff., Ex. 19 ¶ 7 (Schreiber Complaint).

Meanwhile, after Samuel left for Consumer First, Schreiber formed his own new entity. On December 10, 2010, Schreiber created United Legal Solutions Incorporated, based at 3000 Hempstead Turnpike. He began conducting all Homesafe business through this new entity, and all remaining funds, employees and clients were subsequently transferred from Homesafe to United Legal. Rho Aff., Ex. 25 ¶¶ 13, 49 (Samuel Aff.).

By all accounts, United Legal is simply Homesafe under a different name. Id. ¶ 49. Samuel states that United Solutions uses "the same office, equipment, personnel, phone lines, marketing plans and continues to collect the fees upfront." Id. The "only difference," Samuel says, is that Homesafe now "operates under the name of United Solutions Corp." Id.

The remnants of Homesafe have struggled to survive since Samuel's departure. Schreiber states that, in January and February 2011, "it became increasingly apparent" that Homesafe would be unable to process the 900 outstanding customer files that were pending when Samuel left the corporation. Rho Aff., Ex. 26 ¶ 31 (Schreiber Mar. Aff.). Schreiber states that, on February 28, 2011, he and seven or eight workers delivered thirty to thirty-five boxes to Samuel's new office at Consumer First Corp. According to Schreiber, they left the boxes in a "public hallway outside of Samuel's office." Id. ¶ 32. The photographs included in Exhibit G indicate that these offices were Consumer First Law Group. Samuel claims that Schreiber came to Consumer First's offices on February 28 in "an attempt to intimidate and threaten" him. Rho Aff., Ex. 25 ¶ 50 (Samuel Aff.). Samuel states that he filed a police report related to this incident. Id.

Schreiber states that when he returned to Homesafe's offices the next morning, on March 1, 2011, he found that the files "had been messily left outside Homesafe's office building with no one watching them." Rho Aff., Ex. 26 ¶ 34 (Schreiber Mar. Aff.)..

ARGUMENT

I. New York's Prohibitions on Deceptive Acts and Practices and False Advertising Broadly Empower Private Plaintiffs to Enjoin Defendants' Activities

From its inception, Section 349 of New York's General Business Law ("GBL") was intended as a broad and powerful safeguard of consumer rights. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995). In 1980, the state legislature expanded the statute's reach even further, creating a private right to action and empowering consumers to patrol the marketplace as "private attorneys general." See 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); see also Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205 (2004) ("The amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement."); see also Horn's Inc. v. Sanofi Beaute Inc., 963 F. Supp. 318, 328 (S.D.N.Y. 1997). The statute protects a sweeping range of injured consumers, so long as they can demonstrate that their injury arose from a transaction in New York. See Goshen v. Mut. Life. Ins. Co. of N.Y., 98 N.Y.2d 314, 325 (2002).

The same principles apply to Section 350 of the GBL, which similarly protects consumers from false advertising. Goshen, 98 N.Y.2d at 324 n.1.

II. Plaintiffs Meet the Requirements for the Issuance of a Preliminary Injunction Under Sections 349 and 350 of the General Business Law

The decision to grant a motion for a preliminary injunction is 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).

Because Plaintiffs are seeking a preliminary injunction pursuant to Sections 349 and 350 of the GBL, the irreparable harm analysis in this case differs from a traditional preliminary injunction analysis. Sections 349 and 350 on their face entitle private plaintiffs to seek injunctive relief so long as they have suffered an injury as a result of a defendant's deceptive acts or false advertising. See GBL § 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); GBL § 350-e ("Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice."). Accordingly, courts have treated future irreparable harm to the public as sufficient to obtain a preliminary injunction under Sections 349 or 350 of the GBL. See Marcus, 158 A.D.2d at 105-06 (granting a preliminary injunction to private plaintiffs under Sections 349 and 350 on the grounds that "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).

Certain courts in New York have further suggested that Section 349 of the GBL is such a broad remedial statute – similar in nature to federal regulatory statutes – that a showing of irreparable harm is not even necessary to obtain an injunction. See People v. P.U. Travel, 2003 N.Y. Misc. LEXIS 2010, at *8 (Sup. Ct. NY Cty. June 19, 2003) (declining to rule on the bottom-line requirements for a preliminary injunction under § 349, but explaining that "in 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)).

Regardless of whether Plaintiffs are in fact required to prove irreparable harm in this case, Plaintiffs can make such a showing. As will be demonstrated below, consumers will suffer irreparable injuries unless Defendants' deceptive acts and false advertising are enjoined.

A. Plaintiffs Are Likely To Succeed on the Merits of Their Sections 349 and 350 Claims

Section 349 of the GBL 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]." "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). A claim under Section 349 of the GBL similarly does not require a showing of intent to defraud, or justifiable reliance. See Small v. Lorrillard Tobacco Co., 94 N.Y.2d 43, 55 (1999); Morrissey v. Nextel Partners, Inc., No. 3194-06, 2009

N.Y. Slip Op. 50260U, at *6 (Sup. Ct. Albany Cty. Feb. 19, 2009) (stating that there is "no requirement that plaintiffs [in a § 349 case] must demonstrate reliance, reasonable or otherwise"). Rather, to prove that a practice was deceptive within the meaning of Section 349, harmed consumers must show that (1) the act or practice was "consumer-oriented," (2) the act or practice was misleading in a material way, and (3) they 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 [GBL § 350], while specific to false advertising, is otherwise identical to [GBL § 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' Deceptive Acts and False Advertising Were "Consumer-Oriented"

To be "consumer-oriented" – and therefore actionable – deceptive acts that are private in nature must nevertheless have ramifications for the public at large. See Oswego, 85 N.Y.2d at 25 ("Private contract disputes, unique to the parties . . . would not fall within the ambit of the statute."). "[T]he 'gravamen' of a section 349 claim [is] a 'consumer injury or harm to the public interest.'" City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 623 (2009) (quoting Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir 1995)). Allegations that the acts complained of "potentially affect similarly situated consumers[]" are sufficient to show that deceptive acts have ramifications for the public at large and warrant injunctive relief. Oswego, 85 N.Y.2d at 27.

A deceptive practice or false advertisement will likely be "consumer-oriented" if it is the *standard practice* of a given individual or company. 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 27)); Ng v. HSBC Mortg. Corp., No. 07 Civ. 5434, 2009 U.S. Dist. LEXIS 125711, at *44 (E.D.N.Y. Dec. 15, 2009) (Report & Recommendation) ("Indeed, the mortgage transaction herein was likely 'not unique to the parties, nor [was it] private in nature or a 'single shot transaction.'" (quoting Oswego, 85 N.Y.2d at 26 (quoting Genesco Entm't v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984)))).

In this case, Defendants had a keen eye turned towards consumers while drafting their deceptive advertisements and contracts, deceiving consumers through promises made through their various websites, and making false oral promises in initial phone calls with consumers to obtain upfront payments. All of these deceptive acts and practices, and false advertisements, were designed to drum up business for their loan modification scam. It is a critical part of Defendants' business plan that these misleading statements be easily repeated to deceive numerous similarly situated customers – since without the ability to disseminate their deceptive advertisements, it would be impossible for Defendants to find vulnerable homeowners to fleece.

Defendants' various deceptive acts and practices were a *standard practice*. All of the Plaintiffs were provided with the same boilerplate forms that they were instructed by Defendants to complete as part of their initial enrollment package. See Rho Aff., Exs. 10

– 14. This enrollment package contained materially deceptive statements such as a money back guarantee, promises of a high rate of success, and misleading information regarding the time it would take to obtain a mortgage modification. For example, Homesafe's "Homeowner disclosure" form contained several promises about the company's likelihood of success and the homeowner's ability to receive a refund if the company's efforts to obtain a loan modification were unsuccessful. Rho Aff., Ex. 11 (Homeowner Disclosure stating that the company would work with "unrelenting persistence" and that it had "a very high rate of success."). Another document in the enrollment package titled, "Client's Responsibilities during Loss Mitigation Processing," stated that the "process of loss mitigation for some lenders can take as long as 1 to 90 days to complete," but that "most cases are completed in less than 60 days." Rho Aff., Ex. 12.

Defendants also engaged in the standard practice of orally making deceptive promises to Plaintiffs during their initial calls to induce these Plaintiffs to pay upfront fees for Defendants' services. These oral promises included false money back guarantees. See, e.g., Complaint ¶ 95 (Defendant Walters claiming he could get Plaintiff Thorpe's five percent interest rate reduced to two percent or three percent, and that he would most likely see his monthly payments of approximately $1,400.00 reduced to approximately $1,000.00 per month);¶ 240 (Defendant DiDonato promising to get the Plaintiffs Moffetts' mortgage down by at least $300.00 per month and promising a money back guarantee).

Crucially, a disparity in parties' bargaining position helps inform whether challenged deceptive practices were "consumer-oriented." Such disparity, as is present

here between professional, for-profit loan modification companies and distressed homeowners, tends to favor a finding of "consumer-oriented" practice, because Section 349 "was intended to protect 'small-time individual consumers' and not sophisticated commercial entities." See Ng, 2009 U.S. Dist. LEXIS 125711, at *45 (citing Exxonmobil, 328 F. Supp. 2d at 449 (citing Genesco, 593 F. Supp. at 751-52)).

Furthermore, Defendants scammed victims through advertising that occurred on their various websites, including, but not limited to, www.homesafeamerica.com, www.theobamahamp.net, www.yourmortgagereliefnow.com, and http://www.ulsinc.co. See, e.g., Complaint ¶ 72. These websites all contained deceptive and misleading statements that were consumer-oriented, targeted the public at large, and had "the potential to be repeated in order to deceive numerous similarly situated buyers." Exxonmobil, 328 F. Supp. 2d at 449; see also Chiste v. Hotels.com, 756 F. Supp. 2d 382, 404-06 (S.D.N.Y. 2010) (allowing certain Section 349 claims regarding deceptive statements made in a website's user agreement to survive a motion to dismiss).

Finally, Defendants own affidavits demonstrate that as of December 3, 2010, there were at least 1,000 outstanding client files. Rho Aff., Ex. 24 ¶ 15 (Schreiber Feb. Aff.). This number does not include the files that had already been processed by the company. Accordingly, Defendants' deceptive practices were clearly targeted at the public at large. See Oswego, 85 N.Y.2d at 25 (noting that the proper standard for determining if the consumer-oriented prong is satisfied is whether "the acts or practices [had] a broader impact on consumers at large").

Given this confluence of factors, it is beyond cavil that Defendants' deceptive practices and false advertising were consumer-oriented.

2. Defendants' Deceptive Acts Were Materially Misleading

A practice is "misleading" 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).

"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 (citing Lum v. New Century Mortg. Corp., 19 A.D.3d 558, 559 (2d Dep't 2005) (holding no materially misleading statement under § 349 where yield spread premium disclosed to plaintiff was not per se illegal); 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]."); Bartolomeo v. Runco, 616 N.Y.S.2d 695, 699 (Yonkers City Ct. 1994) (holding representation that "cellar apartment was a legal apartment . . . was false, misleading and deceptive" under § 349)); see also Rodriguez v. Lunch, No. 07 Civ. 9227 (SHS) (KNF), 2010 U.S. Dist. LEXIS 16622, at *29-30 (S.D.N.Y. Feb. 23, 2010) (Report & Recommendation) ("Given the New York attorney general's own conclusion, that IJLI and IJL New York City's practices violated NYGBL § 394-c(2), the plaintiffs' allegation, that IJLI and IJL New York City overcharged clients in violation of state law, satisfies the materially misleading element of the NYGBL § 349 claim.").

Defendants' collection of hundreds of thousands of dollars in upfront fees for work either not performed or performed in derogation of their contractual duties, and in direct violation of N.Y. Real Property Law Section 265-b, should be treated no differently than the imposition of other illegal fees. Real Property Law Section 265-b expressly forbids the acceptance of upfront fees prior to the completion of mortgage

modification services, even by registered mortgage brokers, licensed mortgage bankers, or registered loan servicers . See N.Y. Real Prop. L. § 265-b (2)(b); N.Y. Real Prop. L. § 265-b(1)(e)(vii); Rho Aff., Ex. 110 (Attorney General Standard Cease and Desist Letter for Violations of RPL § 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), *available at* http://www.ag.ny.gov/features/ foreclosure_rescue_scams/pdfs/Cease_and_Desist_Letter.pdf) ("Under [New York Real Property Law § 265-b], distressed property consultants, as defined by New York Real Property Law § 265-b(1)(e), must among other things: Not charge or collect upfront fees for consulting services prior to the full completion of such services. Under the 2009 Amendment, this prohibition on upfront fees was extended to apply to licensed mortgage bankers, registered mortgage brokers and registered loan servicers."); see also Schreiber v. Homesafe America, 2011 N.Y. Slip Op 31445U, at *3 (Sup. Ct. Nassau Cty. May 16, 2011) ("Pursuant to Real Property Law § 265-b(2) a 'distressed property consultant' is prohibited from charging 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 Cty. 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 their own sworn statements in Nassau County Supreme Court – readily confess that they violated Real Property Law Section 265-b. The Honorable Stephen A. Bucaria of Nassau County Supreme Court has likewise ruled that Defendants

Schreiber and Samuel violated Real Property Law Section 265-b by accepting upfront fees:

> Samuel frankly admits that, "We collected fees up front." (Aff. at ¶ 5) For his part, Schreiber asserts that he has issued $28,480 in "customer refunds" (Aff. at ¶ 11) but "almost 1,000 families . . . prepaid for loan modification services" (Reply aff at ¶ 2). Thus, the parties do not dispute that Home Safe flagrantly violated the statutory prohibition on accepting payment for consulting services before the services were complete.

Schreiber, 2011 NY Slip Op 31445U, at *3; see also Rho Aff., Ex. 21 at 4 – 5 (Samuel Memorandum) ("[T]he entire operation was illegal, and all of the funds deposited into HomeSafe's accounts were the result of an illegal agreement. It is these very funds obtained illegally that Plaintiff requests the Court to place in escrow for the return to the illegal corporation, HomeSafe, which continues to operate illegally."). Justice Bucaria, in light of Defendants' confessions to violating the law, referred the matter to the New York State Attorney General for further appropriate action. See id. at *4.

Defendants' admission that they violated Real Property Law Section 265-b establishes that their deceptive acts and false advertising were materially misleading. See Cohen, 498 F.3d at 126.[19]

[19] At least one other court has concluded that companies offering for-profit loan modification services can be found liable under Sections 349 and 350 of the GBL. In People v. Amerimod, the court ruled that the Attorney General had established violations under GBL §§ 349 and 350 because of "numerous advertisements falsely claim[ing] that Amerimod has successfully addressed 7,000 claims, and has a success rate of 90% to 100%." 2010 NY Slip Op 31360U, at *7-8. Similarly, here, Defendants claimed in their "Homeowner disclosure" form – which was included in the initial "enrollment package" filled out by consumers – that the company had "a very high rate of success" in obtaining mortgage modifications. See Rho Aff., Ex. 11. This claim, however, is entirely undermined by the Defendants' own admissions in sworn statements indicating their poor rate of success, and by Plaintiffs own allegations – which show that Defendants were unable to obtain a modification for any of these 10 clients.

In Amerimod, the court likewise noted that defendants' false claims in its advertising materials that it was licensed by a government agency rendered those advertisements materially misleading to consumers. See Amerimod, 2010 NY Slip Op 31360U, at *9.

Defendants' promises of a "100% Money Back Guarantee" on their website www.homesafeamerica.org, along with oral promises and written promises in form contracts used as part of the standard enrollment package, are likewise materially misleading. See Rho Aff., Exs. 2, 11; Complaint ¶ 221. It is well-established that failure to follow through on a money-back guarantee constitutes an actionable deceptive practice under GBL § 349. See, e.g., People v. Lipsitz, 663 N.Y.S.2d 468, 475 (Sup. Ct. N.Y. Cty. 1997) (holding that respondent magazine seller's practice of providing "no magazines, no service, no refunds" constituted "a deceptive and fraudulent practice clearly falling within the consumer fraud statutes.").

Finally, failing to deliver as promised is itself materially misleading. See, e.g., Lipsitz, 663 N.Y.S.2d at 475 ("A business practice of failing to deliver as promised is recognized as fraudulent and illegal conduct violating General Business Law § 349"; enjoining a magazine subscription salesperson from falsely advertising the quality of his services because "any impartial recipient of the advertising should have been entitled to expect to receive exactly the subscription paid for, with reasonably timely and complete delivery, accompanied by the promised wonderful customer service"). None of the Plaintiffs in this action obtained their money back from Homesafe, though many made explicit oral or written demands for a refund. See, e.g., Rho Aff., Exs. 75, 89; Shanahan Aff., Ex. 9.

In addition, Defendants were unable to obtain a mortgage modification for any of the fifteen Plaintiffs in this action. See, e.g. Complaint ¶ 232. Despite Defendants' promises that a typical mortgage modification takes less than 60 days, (Rho Aff., Ex. 12), Plaintiffs Moffett, Mook, and Thorpe have yet to receive word from their mortgage

servicer regarding whether they have been approved or denied for a mortgage modification. Plaintiffs Susan and Robert Moffett submitted their materials to Homesafe on January 8, 2010, and made their first upfront payment on January 19, 2010. It has been over 500 days since Susan and Robert Moffett paid Homesafe for their services – well in excess of the 60 days Defendants claimed in their deceptive materials as a typical timeframe for a mortgage modification. Complaint ¶¶ 245, 247, 251.

Without the above-described assurances, reasonable consumers – including Plaintiffs – would not have opted to employ the services of Defendants. See, e.g., Shanahan Aff. ¶ 7.

3. Plaintiffs Each Suffered an Injury as a Result of Defendants' Deceptive Acts

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 Section 349 of the GBL. 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, 94 N.Y.2d at 56)).

Here, Plaintiffs' losses extend beyond their initial payments made for retaining the services of Defendants. Plaintiffs have accumulated additional debt as a result of heeding Defendants' instructions to stop making payments on their mortgages. See, e.g., Thorpe Aff. ¶ 35 (stating that fees relating to late mortgage payments per Homesafe's instruction and resulting bankruptcy have exceeded $10,000). As described above,

Defendants' instruction to Plaintiffs to stop making payments on their mortgages (Rho Aff., Ex. 12) – a core element of the deceptive transactions at issue in this litigation – disqualified Plaintiffs from numerous federal assistance programs, severely limiting their ability to obtain a successful mortgage modification.

Further, Plaintiffs have seen their credit scores damaged as a result of Defendants' deceptive acts and practices, which will have far-reaching effects on their creditworthiness and overall financial well-being. Complaint ¶ 237 (Plaintiff Sweatt "has suffered a substantial decline in his credit rating due to Defendant's Homesafe's inaction and the resulting foreclosure. His credit score has decreased from approximately 620 to 340"). In the most tragic cases, Defendants' deceptive acts led inexorably to foreclosure proceedings on their victims' homes. Complaint ¶¶ 232, 282. As such, Plaintiffs were damaged by Defendants' deceptive acts in ways that are entirely independent of their initial payment of upfront fees.

4. Because Plaintiffs' Injuries Arose From Transactions in New York State, They May Assert Viable Claims Under Sections 349 and 350 of the GBL

By conducting their deceptive enterprise entirely from New York, Defendants subjected themselves to the prohibitions of Sections 349 and 350 of the GBL. 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."); see Goshen, 98 N.Y 2d at 325 (holding that GBL§ 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.[20] Pursuant to the Court of Appeals' ruling in Goshen, a plaintiff may assert claims under GBL § 349 so long as "the transaction in which the consumer is deceived . . . occur[s] in New York." Goshen, 98 N.Y.2d at 325.[21]

In this case, all of Plaintiffs' transactions occurred in New York. Defendants have operated exclusively in the State of New York: all corporate Defendants are incorporated in New York, all individual Defendants are residents of New York, all of Defendants' offices have been located in New York, all of Defendants' bank accounts

[20] 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 GBL § 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 GBL § 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. Cty. 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 GBL § 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. Cty. Dec. 8, 2009) (where defendant New York corporation "operates from a single office in New York," "solicited 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. Cty. 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. Cty. Mar. 12, 2008) (dismissing GBL §§ 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.").

[21] This same standard applies to claims asserted pursuant to GBL § 350. See Goshen, 98 N.Y.2d at 324 n.1 ("The standard for recovery under [GBL § 350], while specific to false advertising, is otherwise identical to [GBL § 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.").

have been based in New York, and all deceptive material sent to Plaintiffs and posted on Defendants' websites were drafted and edited in New York. See, e.g., Rho Aff., Ex. 9-10, 16-18, 24-25, 31-35. All of Defendants' deceptive communications – whether by phone, e-mail, or fax – originated in New York. Virtually every false and misleading statement that Defendants made to Plaintiffs were made in New York. See, e.g., Complaint ¶ 79 and Rho Aff., Ex. 40. All of Defendants' known websites were registered to Defendants' mailing address in New York. See, e.g., Rho Aff., Exs. 8-9. All of the "enrollment" documents sent to Plaintiffs included Defendants' return mailing address in New York.[22] See, e.g, Rho Aff., Exs. 10-14. All of Plaintiffs' payments to Defendants – whether by check, credit card, debit card, or wire transfer – were processed in New York. See, e.g., Complaint ¶ 79 and Rho Aff., Ex. 40. There is simply no question that Sections 349 and 350 of the GBL protect the Plaintiffs who do not reside in New York.

B. Irreparable Harm Will Occur Unless a Preliminary Injunction Is Granted

A preliminary injunction is available when plaintiffs can show that a defendant "threatens or is about to do, or is procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action." 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

[22] Similar acts by out-of-state plaintiffs have been deemed sufficient to state a viable Section 349 claim. See Telehublink, 301 A.D.2d 1006, 1009-10 (3d Dep't 2003) (holding defendants liable under Section 349 of the GBL 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").

continue in their course of unlawful conduct will irreparably injure citizens both inside and outside of the State of New York.[23]

1. Plaintiffs May Satisfy the Irreparable Injury Requirement by Demonstrating Irreparable Harm to Future Victims of the Scam

In cases brought under Sections 349(h) and 350, Plaintiffs may satisfy the irreparable injury requirement by demonstrating future injuries will accrue to the public. Because Plaintiffs are functioning as private attorneys general, they are broadly empowered to protect the general public against deceptive acts and practices, and false advertising. See Marcus, 158 A.D.2d at 105-06; State v. Colo. St. Christian College of the Church of the Inner Power, 346 N.Y.S.2d 482, 487 (Sup. Ct. N.Y. Cty. 1973) (quoting Cmte. on N.Y.S. Antitrust Law Report 6) (noting that Section 349 was designed to allow the Attorney General to provide "adequate consumer protection" and combat "persistent fraud").

Marcus v. Jewish Nat'l Fund stands for the proposition that future harm to the public at large is a sufficient basis for granting a preliminary injunction to private plaintiffs under Sections 349 and 350 of the GBL. In Marcus, supporters of certain

[23] Certain courts in New York have suggested that Section 349 of the GBL is such a broad remedial statute – similar in nature to federal regulatory statutes – that a showing of irreparable harm is not even necessary to obtain an injunction. See People v. P.U. Travel, 2003 N.Y. Misc. LEXIS 2010, at *8 (Sup. Ct. NY Cty. June 19, 2003) (declining to rule on the bottom-line requirements for a preliminary injunction under § 349, but explaining that "in 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. Cty. Jan. 28, 2010) (denying plaintiff's request for a preliminary injunction for failure to meet traditional New York preliminary injunction standard, but not considering the question of whether a showing of irreparable injury is required under the statute); see also People v. Bennett, 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 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").

groups whose aims included the development of Jewish life in both Israel and the territories acquired during the Six Day War (past the so-called "Green Line") asserted claims, inter alia, under Sections 349 and 350 of the GBL against a non-profit fundraising organization. Plaintiffs alleged that the defendant fundraising organization deceptively suggested in its advertising materials that it would distribute its donations to areas over the "Green Line" in Israel when it, in fact, did not distribute donations in this area. The defendant charity sought to dismiss the claims in the trial court and the plaintiffs cross-moved for an order pursuant to C.P.L.R. 6301 to enjoin defendant from making, publishing or distributing and disseminating any of the allegedly deceptive advertisements. The trial court granted the plaintiffs' motion for an injunction enjoining defendant from distributing the deceptive materials at issue.

On appeal, the First Department determined that the plaintiffs had stated a valid cause of action under Sections 349 and 350. See 158 A.D. 2d at 105. The court then ruled that plaintiffs had met all of the requisite elements for the issuance of a preliminary injunction, and in particular focused on the irreparable harm element:

> Clearly, if [defendant] were 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 that their donations would be allocated to territories across the Green Line and, thereby be irreparably injured.

Marcus, 158 A.D. 2d at 105-06. The Marcus court expressly considered the future harm that would accrue to the public were the defendant permitted to continue distributing its deceptive literature. The irreparable injury was, therefore, not tied directly to the

plaintiffs asserting claims. Rather, the court considered irreparable harm to the public a sufficient harm to warrant granting the preliminary injunction.[24]

There is no reason to deviate from Marcus in this case. Nor is there any reason to require a showing of future irreparable injury to Plaintiffs prior to granting a preliminary injunction when the law requires only a showing of irreparable injury to the public at large; such a requirement would fly in the face of the Legislature's stated reasons for enacting the statutes. See Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 352 (1999) (Bellacosa, J., dissenting in part) (reciting the legislative history of Section 349, which was designed to "strengthen the consumer protection powers of the Attorney General by enabling him to obtain injunctions against all deceptive and fraudulent practices" in order to provide consumers with an "honest market place" (quoting Governor's Mem. approving L 1970, chs 43 and 44, 1970 NY Legis Ann, at 472); see also Blue Cross & Blue Shield of New Jersey, Inc., 3 N.Y.3d at 205 ("Though originally intended to be enforced by the Attorney General . . . the statute was amended in 1980 to include a private right of action . . . . The amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement." (citing Assembly Mem. in Support, Bill Jacket, L 1980, ch. 346)).

Were Defendants permitted to continue their deceptive practices and false advertising, in violation of Sections 349 and 350, the public would suffer significant

[24] The court did not consider whether the irreparable harm requirement should apply. However, even Justice Kupferman in dissent agreed that private plaintiffs were empowered to act as private attorneys general to enforce the provisions of Sections 349 and 350, and dissented on separate grounds. Id. at 108 (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).

irreparable injuries. Like the donors in Marcus who made donations under the mistaken impression that they were being used toward a specific purpose, here Plaintiffs have suffered a panoply of injuries, including late payment fees, damaged credit ratings, and mortgage default. If Defendants' deceptive acts and practices are not enjoined, future victims will be placed in substantial risk of suffering these same injuries, for which no adequate remedy at law exists. These are precisely the kinds of irreparable injuries that Sections 349 and 350 were created to guard against and which warrant preliminary relief from this Court.

Finally, Marcus comports with the plain reading of Sections 349 and 350 of the GBL, which authorize that the deceptive conduct at issue – the Defendants' entire business model of accepting upfront fees, falsely promising a money back guarantee, falsely promising a swift modification process, and falsely pretending that work is being done that in fact is not occurring – may be enjoined by any person who has been the victim of the deceptive act or practice, or false advertising. Sections 349(h) and GBL 350-e do not require that a *future* harm accrue to the private plaintiff seeking injunctive relief. Rather, those provisions state plainly that "any 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." GBL § 349 (h) (emphasis added); see also GBL § 350-e ("Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice. . . ."). Accordingly, the plain meaning of the statutory text makes clear that past harm to a plaintiff is a sufficient basis for granting injunctive relief.

Were the statute read to require plaintiffs who have been harmed by deceptive acts or practices, or false advertising, to show that a future irreparable harm would accrue to them directly, Sections 349(h) and 350-e's private cause of action for injunctive relief would be rendered meaningless. It is a rare situation indeed where a consumer who has been deceived and already suffered a harm as a result of that deception can still show future irreparable harm after the fact. Given the statute's stated goal of protecting consumers, reading Sections 349 and 350 in this manner would be contrary to the intent of the legislature.

2. Absent A Preliminary Injunction, Future Victims Will Suffer Irreparable Injury to Their Creditworthiness

Under New York law, damage to one's creditworthiness or credit rating is an irreparable injury that justifies injunctive relief. 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). In Four Times Square, the mortgage held by plaintiffs on the Conde Nast Building at 4 Times Square required them to maintain certain levels of insurance coverage. After the events of September 11, 2001, the property's insurer proposed certain reductions in the holder's insurance coverage, which led the property's mortgage trustee and special servicer to declare an event of default. On appeal, the First Department reversed the trial court and deemed equitable relief proper to prevent the declaration of default. The court reasoned that "the threat to [plaintiff's] good will and creditworthiness is sufficient to establish irreparable injury warranting the granting of injunctive relief." Id. at 3.

So too with the injuries suffered by Plaintiffs. In case after case, Defendants' deception severely damaged Plaintiffs' credit ratings and overall creditworthiness. As part of their deceptive practices, Defendants explicitly instruct homeowners to stop making their monthly mortgage payments. See, e.g., Thorpe Aff. ¶ 16. This instruction, and Defendants' general inaction on behalf of homeowners, had a direct adverse impact on Plaintiffs' credit scores. See, e.g., Thorpe Aff. ¶ 32; Complaint ¶ 237).

In the worst cases, Plaintiffs faced foreclosure proceedings on their homes. Complaint ¶¶ 232, 282. Such injuries are not compensable by money damages, and no adequate remedy at law exists to make these victims whole. If Defendants are allowed to continue their deceptive practices, every homeowner they target in the future will be at great risk of suffering those same irreparable injuries.

3. Absent a Preliminary Injunction, Future Victims Will Suffer Irreparable Harm When Defendants Undermine Their Ability to Obtain Mortgage Modifications

A critical aspect of Defendants' deceptive scheme involves explicitly instructing homeowners – both in writing and orally – to stop making payments to their mortgage servicer or lender. In fact, Defendants impose a requirement upon all homeowners with whom they deceptively transact to stop making payments to their lender, as is stated in the "Client's Responsibilities" portion of the initial enrollment packages sent to homeowners. Thorpe Aff. ¶ 16. Defendant corporations likewise orally instruct their victims to stop making timely payments to their lender, causing them to fall significantly behind on their mortgage payments. Id. ¶ 32.

These instructions – which are a prerequisite to the deceptive transactions at issue in this case – cause devastating effects to Defendants' victims. Many standard form mortgage notes contain "acceleration" clauses which classify a borrower as in default

after even a single missed payment. 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).

Forcing homeowners into default likewise severely prejudices a borrower's ability to secure a mortgage modification, and those borrowers risk losing their ability to qualify for federal assistance with their home loans. 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" and that they "have not been more than 30 days late making a payment within the past 12 months." See Making Home Affordable, available at: http://www.makinghomeaffordable.gov/programs/Documents/MHA%20 Brochure.pdf.

Accordingly, by requiring that homeowners stop making their monthly payments for considerable periods of time – or, depending on the degree to which a borrower is already in arrears, for even a single month – Defendants will render future victims of their scam incapable of participating in the government's free assistance programs.

Defendants' requirement that their clients stop making their monthly payments will cause future victims of their scam irreparable harm that cannot be compensated by money damages. For this reason, Defendants' deceptive acts and practices must be enjoined by this Court.

C. The Balances of Equities Tips in Favor of Plaintiffs

Balancing the equities "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 186, 187 (1st Dep't 1993); City of New York v. Times' Up Inc., 11 Misc. 3d 1052A, at *13 (Sup. Ct. N.Y. Cty. 2006).

Here, the prejudice that Plaintiffs – and the public at large – will suffer absent a preliminary injunction is all too clear. Defendants freely admit that their "entire operation was illegal." There is simply no reason to allow Defendants to continue exploiting homeowners, nor is there any reason to permit Defendants' flagrant violations of Section 349 and 350 of the GBL to persist. Allowing these businesses to continue in any capacity creates an imminent risk of harm to consumers.

As has been amply demonstrated above, Defendants' entire organization is a sham. Accordingly, the prejudice that Defendants will suffer as a result of an injunction is minimal. Because their entire operation is per se illegal, the only harm that will directly accrue to Defendants as a result of an injunction is that they will be restrained from doing what is already forbidden: running an illegal company whose entire business model relies on deceiving unwitting consumers and providing no actual services in return.

Defendants Samuel and Schreiber must likewise be restrained from concealing their illicit operations under a new name by starting any new businesses related in any

way to the rendering of mortgage modification services. Any company with the imprimatur of Samuel or Schreiber – given their track record in the industry – must be viewed with great skepticism. This is particularly true given that Schreiber and Samuel were referred to the New York Attorney General's Office by a Justice of this Court for violations of Real Property Law Section 265-b.

Plaintiffs know all too well the personal and financial pain wrought by Homesafe America; they now seek an injunction in the hopes of preventing others from experience the same injuries they suffered. The balance of equities requires preliminary relief while the Court reaches its ultimate determination on the merits.

III. Plaintiffs Are Entitled to An Order of Attachment

The State of New York provides for the remedy of attachment in Sections 6201, 6210, 6211, 6212 and 6214(b) of the C.P.L.R. Section 6201 allows attachment when:

> 3. The defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiffs' favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts…
>
> [Id.]

See also Arzu v. Arzu, 579 N.Y.S.2d 322, 325 (1st Dep't 1993); First Nat'l Bank of Dansville v. Highland Hardwoods, 471 NYS.2d 360, 326 (3rd Dep't 1983); N.Y. Credit Men's Adjustment Bureau, Inc. v. Lubin, 464 N.Y.S.2d 9, 9 (1st Dep't 1993).

Section 6212(a) requires that a party moving for an order of attachment must show the existence of a cause of action, a likelihood of probable success on the merits, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. C.P.L.R. § 6212(a); Ford Motor Credit Co. v. Hickey Ford Sales Inc., 62 N.Y.2d 291, 301 (1984).

A. Defendants Have Dissipated or Assigned Plaintiffs' Property with the Intent to Defraud and Frustrate the Collection of Judgments in Plaintiffs' Favor

Under C.P.L.R. § 6201(3), a plaintiff must establish that the defendant has sought to hide or dispose of his or her assets. In the instant matter, Defendants Schreiber and Samuel, co-owners of Homesafe America, have recently concluded a litigation in which each has sworn, under penalties of perjury, that the other has systemically looted, concealed, and assigned hundreds of thousands of dollars of the enterprise's assets. The most egregious of these acts include:

- The wasting or depositing of over $46,000 of corporate assets in the Dominican Republic without a plausible business purpose;

- The looting of $175,000 from a fund "set aside…[for] customer refunds";
- The transfer of $50,000 in unreported profits;
- The disposal or assignment of all or almost all of Homesafe's remaining assets to another legal entity incorporated by Schreiber, United Legal Solutions;

As a result of this looting, Homesafe has been rendered inoperable and possibly insolvent. Meanwhile, Plaintiffs funds, which had been paid to this enterprise, remain unaccounted for.

Under C.P.L.R. § 6201(3), a plaintiff must also show that the defendant has sought to hide or dispose of his or her assets with the intent to defraud. Because "[f]raudulent intent, by its very nature, is rarely susceptible to direct proof," courts generally establish intent by inference from the circumstances of the allegedly fraudulent act. See Kreisler Borg Florman Gen. Constr. Co., Inc. v. Tower 56, LLC, 872 N.Y.S.2d 469, 471 (3rd Dep't 2009) (quoting Marine Midland Bank v. Murkoff, 508 N.Y.S.2d 17, 21 (2nd Dep't 1986)).

In the present case, however, the Court need not infer fraudulent intent; Defendants' acts vis-à-vis the corporation, each other, and the Plaintiffs are transparently, and irrefutably fraudulent. The Defendants themselves have admitted that they took Plaintiffs' funds in violation of the law and that their enterprise amounted to an "illegal operation." Samuel's own counsel compared the business to "a Ponzi scheme," and the Defendants who operated it, to "bookies." The court adjudicating the dispute between them refused to rule on their claims, citing the doctrine of *in pari delicto* and the need for a method for "reimbursing defrauded homeowners." And in an extraordinary move,

Judge Bucaria referred the case to the New York Attorney General for "appropriate action."

These facts (including those related to the underlying fraud, which are described in further depth in Part I of this memorandum) are more than sufficient to satisfy the standard for an attachment and temporary restraining order. Courts have repeatedly granted attachments in similar cases, where, as here, Defendants have obtained Plaintiffs' assets by way of fraud and then either transferred or dissipated those assets. See, e.g., Societe Generale Alsacienne De Banque v. Flemingdon Dev. Corp., 500 N.Y.S.2d 278 (2d Dep't 1986) (finding that passing of a bad check, making misrepresentations and other efforts to prevent Plaintiffs from collecting their rightful funds, including attempting to transfer funds after the service of an ex parte order of attachment, warranted the granting of an order of attachment); Mineola Ford Sales Ltd. v. Rapp, 661 N.Y.S.2d 281 (2d Dep't 1997) (finding that defendant-employee's falsification of business records, diversion of funds for her personal use, and failure to offer any reasonable explanation for plaintiffs' missing assets, created a sufficient evidentiary showing of fraudulent intent for the issuance of an order of attachment); Southeast Chrysler-Plymouth, Inc. v. Pieroni, 465 N.Y.S.2d 626 (4th Dep't 1993) (reaffirming an order of attachment on assets which the defendant had fraudulently obtained, transferred to another account, and failed to restore in spite of plaintiff's demands).

Additional circumstances surrounding the transactions only further establish the conclusion that Defendants acted with requisite intent for the issuance of an attachment, and that, absent such an order, Plaintiffs face the imminent threat of being unable to collect their claims.

First, prior to the transfers, Defendants had already taken grossly fraudulent measures to prevent Plaintiffs from recovering the money they were fraudulently induced to part with. For example, to prevent discovery of the fraud, Defendants advised Plaintiffs to cease communication with their mortgage lenders and to withhold payments so that an "expert" could more effectively negotiate a modification on their behalf. Defendants, meanwhile, failed in most cases to make even the most minimal effort to process the promised loan modification applications. Shortly thereafter, Defendants cut off communication with Plaintiffs, declined to take or return calls and emails, and, despite numerous requests to do so, refused to grant the refunds they had promised were "100% guaranteed." As a result, Plaintiffs not only failed to recover their money, but suffered terrible consequences to their credit and the state of their mortgage loans.

Second, as Defendants looted the corporation, they were aware of existing or imminent claims for refunds from Plaintiffs and similarly situated victims which far surpassed their capacity for reimbursement. Courts have recognized that transfers of assets made in these circumstances—i.e., when the transferor knows of actual or imminent creditors' claims, and is unable to pay them—is quintessential evidence of fraudulent intent. See, e.g., Pen Pak Corp. v. LaSalle Nat'l Bank, 658 N.Y.S.2d 407, 408 (2d Dep't 1997); Wall Street Associates v. Edward Brodsky et al., 684 N.Y.S.2d 244, 248 (1st Dep't 1999); First Am. Tit. Ins. Co. of NY v. Ankari, 2008 Slip Op 51092U, at *4 (Sup. Ct. N.Y. Cty. May 30, 2008); In re CIT Group/Commercial Services, Inc., v. 160-09 Jamaica Avenue Limited Partnership et al., 808 N.Y.S.2d 187, 190 (1st Dep't 2006) (recognizing that such transfers bear a "badge of fraud" that infers fraudulent intent). In the present case, the Defendants looted the corporation as they accumulated refund

liabilities, estimated in the millions of dollars, to approximately 900 victims, including Plaintiffs. Plaintiffs' repeated requests for refunds, coupled with the dearth of evidence of any intention or ability to achieve a modification on behalf of homeowners, establishes that Defendants knew such liability would inevitably come due. Meanwhile, the fund allegedly set aside to pay refunds, which Defendants ultimately also looted, contained only a fraction of the amount necessary to pay such claims.

Third, Defendants' fraudulent intent is further established by actions they took subsequent to the looting of corporate assets. Shortly after making the transfers, Defendants tried to sever their ties to Plaintiffs and other victims by attempting to re-assign or dispose of their unprocessed applications. In fact, in a desperate effort to transfer responsibility, Schreiber physically removed around 900 unprocessed loan files from his offices and brought them to Samuel's newly incorporated company. The next day, surely cognizant of the liability that these files represented, Samuel reciprocated the favor, depositing the same files and boxes outside of Schreiber's offices.

B. Plaintiffs Are Likely to Succeed on the Merits

In discussing their probability of success in the context of their application for preliminary injunction enjoining Defendants' fraudulent conduct, the Plaintiffs have also established its likelihood of success on the merits with respect to GBL §§ 349 and 350. Plaintiffs are likely to succeed on all other claims asserted in the Complaint. In particular, Defendants have already, through their own admissions, established liability under Real Property Law § 265-b.

C. The Amount Demanded of Defendants Exceeds All Counterclaims Known to the Plaintiffs

Plaintiffs seek to attach no less than $42,078 in assets, which to the Plaintiffs knowledge, exceed any counterclaims brought by Defendants.

D. Plaintiffs Face Imminent Irreparable Harm Absent a Temporary Restraining Order and Order of Attachment

Without the issuance of a temporary restraining order and order of attachment to prevent Defendants from continuing to dispose of, conceal, or reassign assets, Plaintiffs face the imminent risk of being unable to collect on their future judgment. Such an outcome would cause irreparable harm to Plaintiffs. See Brenntag Int'l Chems., Inc. v. Rapp, 175 F.3d 245, 249 (2d Cir. 1999) (irreparable harm exists when "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied"); Am. Medical and Life Ins. Co. v Crosssummit Enters., 2009 NY Slip Op 31187U at 7-8 (Sup. Ct. Nassau Cty. May 18, 2009). In the present case, there is more than a possibility that Plaintiffs' judgment will be uncollectable—*their property has already started to disappear*. Unless the Court grants immediate relief, it is a near certainty that it will continue to.

The relief necessary to prevent such an outcome is narrowly tailored. The amount Plaintiffs seek to attach amounts to only small a fraction of the estimated millions of dollars of total assets that Defendants have amassed through fraudulent and admittedly illegal means. The Plaintiffs have presented an overwhelmingly strong case that they are entitled to these assets, while the Defendants have demonstrated a brazen willingness to commit fraud in order to prevent Plaintiffs from reclaiming them. Because of this fraud, Plaintiffs have already suffered irreparable damages to their credit ratings and the state of their mortgages, many of which are past due or are already in foreclosure. Equity and justice demand that this Court intervene to prevent further unnecessary harm.

IV. Plaintiffs Require An Order For Expedited Discovery to Secure Access to Discoverable Materials

Plaintiffs seek limited, expedited discovery to ensure the preservation of highly relevant evidence and to establish facts necessary to obtain a preliminary injunction. Expedited discovery is particularly appropriate in this case, given Defendants' reckless disregard for record-keeping and document preservation.

Trial courts "have considerable discretion to supervise the discovery process." Parnes v. Parnes, 2011 NY Slip Op 136, at *2 (3rd Dep't Jan. 30, 2011); see also Auerbach v. Klein, 816 N.Y.S.2d 376, 377 (2d Dep't 2006) (holding that "the trial court is invested with broad discretion to supervise discovery"). Moreover, the rules governing discovery expressly permit trial courts to grant discovery on an expedited basis. See, e.g., C.P.L.R. § 3107 (authorizing courts to order that depositions be taken on less than 20 days' notice). In fact, the preservation of evidence is so important that the rules allow for courts to issue disclosure orders to preserve information even prior to the commencement of an action. See C.P.L.R. § 3102(c) (allowing disclosure before an action is commenced "to aid in bringing an action [or] to preserve information").

Pursuant to this broad discretion, New York courts routinely order expedited discovery, especially when the plaintiff seeks injunctive relief. See, e.g., In re Topps Co., Inc., 859 N.Y.S.2d 907 (Sup. Ct. N.Y. Cty. 2007) (explaining that expedited discovery was granted to provide shareholder plaintiffs the opportunity to obtain discovery necessary to proceed to preliminary injunction hearing); Home & City Sav. Bank v. Rose Assoc. I., L.P., 572 N.Y.S.2d 458, 460 n.1 (3rd Dep't 1991) (noting that the trial court "granted plaintiff's request for expedited discovery and invited submissions from the parties relating to the request for a preliminary injunction hearing" and recognizing that

the "need for expedited disclosure" was tied to request for preliminary injunction). In addition, courts are likely to order to expedited discovery when defendants have exclusive access to certain relevant information, including cases involving fraud and the breach of a fiduciary duty. Geddes v. Zeiderman, 644 N.Y.S.2d 729 (1st Dep't 1996); Halitzer v. Ginsberg, 436 N.Y.S.2d 738, 739 (1st Dep't 1981) (affirming trial court's order granting plaintiff priority to conduct depositions because knowledge of alleged fraud and breach of fiduciary duty was "peculiarly within the custody of defendant").

Here, the Court should exercise its discretion to order expedited discovery so that Plaintiffs can obtain additional information to prove its entitlement to injunctive relief before Defendants can destroy, damage, or hide relevant documents. Defendants have already tried to dispose of their records at least once: on February 28, 2011, Schreiber abandoned approximately 900 customer files in a public hallway outside Samuel's new office in Woodbury, New York. Rho Aff., Ex. 26 ¶ 32 – 34 (Schreiber Mar. Aff.) (noting that Samuel later dumped the same documents outside Homesafe's Levittown office building, where they were left unattended). It is unknown who now possesses the documents, where they are stored, and whether any other customer files were treated in a similarly negligent manner.

This complete lack of care for client files comports with Homesafe's overall approach to record-keeping. Schreiber describes Homesafe's financial records as being "in shambles" and "extremely disorganized." Id. ¶ 19. Moreover, Schreiber and Samuel appear to have both taken some of Homesafe's documents to their new, respective businesses: it appears that Schreiber took some Homesafe files to United Legal Solutions, (Rho Aff., Ex. 25 ¶ 49 (Samuel Aff.)), while Samuel took other documents to

Consumer First Corp. Rho Aff., Ex. 24 ¶ 12 (Schreiber Feb. Aff.). Given their affinity for creating new corporate entities, it is entirely possible that Schreiber or Samuel will attempt to move relevant documents from Homesafe to other sites or businesses they control in the future.

Many of the documents most relevant for this litigation are currently under Defendants' control. This is to be expected: in its "enrollment documents," Homesafe asked customers to authorize the company as their "designated Agent" and sought to restrict all contact between its customers and their mortgage servicers. Rho Aff., Exs. 10, 12. As a result, Plaintiffs cannot adequately assess their legal claims unless they are provided immediate access to relevant materials. Expedited disclosure will allow Plaintiffs to evaluate the work – or lack thereof – that Defendants performed for their customers.

The discovery that Plaintiffs seek on an expedited basis is extremely limited and is narrowly tailored to the specific issues that will be before the Court on Plaintiff's motion for preliminary injunction. The Document Requests are aimed at discovery highly relevant information that Plaintiffs cannot otherwise access, including information related to:

- Practices and procedures for document storage, management, and preservation at Homesafe and United Legal;
- The extent to which officers, employees, and independent contractors of Homesafe and United Legal were aware that the company was engaged in an "illegal" operation (Rho Aff., Ex. 21 at 5);
- Plaintiffs' client files, and the files of all other customers of Homesafe and United Legal, including any handwritten notations or internal documents relating to the processing of loan modifications;

- Homesafe's online marketing strategy, including internal memoranda and strategy documents;

- Bank and merchant account records indicating payments by Plaintiffs and other customers for Homesafe's services;

- Bank and merchant account records indicating the current state of Defendants' finances, including ability to satisfy judgment should Plaintiffs prevail in this matter.

Because the information sought in the Document Requests is limited in scope, Defendants should be able to collect and produce it in short order, with little burden.

Likewise, Plaintiffs do not seek a wide range of depositions at this point, but instead seek to depose only (i) Schreiber; (ii) Samuel; (iii) Angel Gonzalez, who was described as a member of Homesafe's "legal team," (Thorpe Aff., Ex. 10); (iv) Josef Dahara, who was similarly described a member of the "legal team," (Thorpe Aff., Ex. 10); (v) Anthony J. Blackwell, a non-party described as Homesafe's "in house counsel" (Rho Aff., Ex. 26 ¶ 30); and (vi) Darrell Keys, who submitted an affidavit in the Schreiber v. Homesafe litigation regarding the disposal of relevant evidence, (Rho Aff., Ex. 28). As such, any burden imposed on Defendants and Homesafe by the shortened schedule is negligible and is far outweighed by Plaintiffs' compelling need for the documents and information sought.

CONCLUSION

For the reasons set forth above, and based on the affidavits, affirmations and exhibits submitted herewith in support of its application for a temporary restraining order pending the hearing of Plaintiffs' motion for an order of attachment and for a preliminary injunction, Plaintiffs respectfully request that the Court grant its application in all respects.

Date: June 26, 2011
New York, NY

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