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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Federal Trade Commission,

Plaintiff

v.

Lead Express, Inc., et al.,

Defendants

Case No.: 2:20-cv-00840-JAD-NJK

**Order Granting Motion for
Default Judgment, Directing Final
Judgment Against La Posta Tribal
Lending Enterprise, and Closing Case**

[ECF No. 91]

The Federal Trade Commission (FTC) brings this action against numerous defendants—corporations, individuals, and the La Posta Tribal Lending Enterprise (TLE)—for violations of various federal laws, rules, and regulations arising out of payday-lending schemes.¹ Good-faith negotiations led to stipulated preliminary injunctions between the FTC and each defendant, as well as settlements with all defendants except the TLE.² When talks broke down, the TLE notified the FTC that it would cease operations and dissolve in accordance with tribal and common law.³ Default was then entered against the TLE,⁴ and the FTC now moves for default judgment.⁵ Because its claim satisfies the seven-factor analysis laid out by the Ninth Circuit in *Eitel v. McCool*,⁶ I grant its motion, permanently enjoin the TLE from consumer lending, award the FTC \$5,073,597 in disgorgement damages, and close this case.

¹ ECF No. 1 (complaint).

² ECF Nos. 34–37 (stipulations to enter preliminary injunctions); 44–47 (orders granting preliminary injunctions); 94 (stipulation to enter consent judgments); 95 (order granting consent judgments).

³ ECF Nos. 92–8 (correspondence between the FTC and the TLE regarding the TLE’s dissolution); 92–7 (Tribal Resolution closing the TLE and repealing its authorizing ordinance).

⁴ ECF No. 90 (clerk’s entry of default).

⁵ ECF No. 91 (the FTC’s default-judgment motion).

⁶ *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986).

1 **Background**⁷

2 The TLE—also doing business as Harvest Moon Financial, Gentle Breeze Online, and
 3 Green Stream Lending—is a tribal lending enterprise chartered under the laws of the La Posta
 4 Band of Diegueño Mission Indians (the Tribe).⁸ Since at least 2011, acting alone or in concert
 5 with others, the TLE advertised, marketed, distributed, or sold the extension of credit in the form
 6 of high-fee, short-term loans to consumers throughout the United States and participated in the
 7 collection on those loans.⁹ Prior to its dissolution on October 22, 2020,¹⁰ the TLE transacted
 8 business in this district and throughout the United States.¹¹

9 This payday-lending scheme involved the TLE and its co-defendants telling consumers
 10 that their loan obligations would be repaid using a fixed number of specific-amount payments.¹²
 11 In reality, defendants initiated repeated finance-charge-only withdrawals, without ever crediting
 12 those withdrawals to consumers' principal balances;¹³ they only stopped when consumers took
 13 last-resort actions like closing their bank accounts or reporting them to law enforcement.¹⁴ This
 14 led many consumers to pay significantly more than what defendants represented they would
 15 pay.¹⁵ In numerous instances, defendants made it difficult, if not impossible, for consumers to

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 17 ⁷ These well-pled facts are deemed true by virtue of the TLE's default. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (per curiam); Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”).

18 ⁸ ECF Nos. 1 at ¶ 14; 3-7 at 24.

19 ⁹ ECF No. 1 at ¶¶ 14, 19.

20 ¹⁰ ECF No. 92-7.

21 ¹¹ ECF No. 1 at ¶ 14.

22 ¹² *Id.* at ¶ 20.

23 ¹³ *Id.*

¹⁴ *Id.* at ¶¶ 43–44.

¹⁵ *Id.* at ¶ 20.

1 obtain copies of their loan agreements or contact defendants to discuss the loan terms or pay off
2 their loans.¹⁶ Defendants also routinely made unauthorized electronic fund transfers from
3 consumers' bank accounts, failed to make required credit-transaction disclosures, and unlawfully
4 used remotely created checks to process payments for loans offered through telemarketing.¹⁷

5 The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission
6 Act (FTCA),¹⁸ Section 6(b) of the Telemarketing and Consumer Fraud and Abuse Prevention
7 Act (Telemarketing Act),¹⁹ Section 108(c) of the Truth in Lending Act (TILA),²⁰ and Section
8 918(c) of the Electronic Fund Transfer Act (EFTA).²¹ It seeks temporary, preliminary, and
9 permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of
10 monies paid, disgorgement of ill-gotten monies, and other equitable relief for defendants' acts or
11 practices in violation of Section 5(a) of the FTCA,²² the FTC's Telemarketing Sales Rule
12 (TSR),²³ TILA²⁴ and its implementing Regulation Z,²⁵ and EFTA²⁶ and its implementing
13 Regulation E,²⁷ in connection with the payday-lending scheme.

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16 ¹⁶ *Id.* at ¶¶ 20, 40.

17 ¹⁷ *Id.* at ¶ 21.

18 ¹⁸ 15 U.S.C. §§ 53(b), 57b.

19 ¹⁹ 15 U.S.C. § 6105(b).

20 ²⁰ 15 U.S.C. § 1607(c).

21 ²¹ 15 U.S.C. § 1693o(c).

22 ²² 15 U.S.C. § 45(a).

23 ²³ 16 C.F.R. Part 310.

24 ²⁴ 15 U.S.C. §§ 1601–1666j.

25 ²⁵ 12 C.F.R. Part 1026.

26 ²⁶ 15 U.S.C. §§ 1693–1693r.

27 ²⁷ 12 C.F.R. Part 1005.

1 On May 19, 2020, I granted in part the FTC’s ex parte motion for a temporary restraining
 2 order with asset freeze against all defendants.²⁸ On June 19, 2020, I granted stipulated
 3 preliminary injunctions against all defendants, continuing the terms of the TRO and asset freeze
 4 and appointing a receiver over some defendants.²⁹ Due to ongoing settlement negotiations
 5 among the parties, I thrice extended the defendants’ deadline to answer or otherwise respond to
 6 the complaint.³⁰ Settlement talks between the TLE and the FTC broke down, and instead of
 7 filing a response by the extended deadline, on October 22, 2020, the Tribe dissolved the TLE.³¹
 8 Three weeks later, the Clerk of the Court entered default against the TLE.³² The FTC now
 9 moves for entry of default judgment,³³ the TLE has responded,³⁴ and the FTC has replied.³⁵

10 Discussion

11 Federal Rule of Civil Procedure 55(b)(2) permits a plaintiff to obtain default judgment
 12 from the court if the clerk previously entered default based on defendant’s failure to defend.³⁶
 13 The court has discretion to enter a default judgment,³⁷ which is guided by the seven *Eitel* factors:

14 (1) the possibility of prejudice to the plaintiff; (2) the merits of
 15 plaintiff’s substantive claim; (3) the sufficiency of the complaint;

16 ²⁸ ECF No. 13 (order granting in part TRO); *see also* ECF No. 3 (TRO motion).

17 ²⁹ ECF Nos. 44–47.

18 ³⁰ ECF Nos. 40, 68, 75.

19 ³¹ ECF No. 84-1 at 3 ¶ 11.

20 ³² ECF No. 90.

21 ³³ ECF No. 91.

22 ³⁴ Although the TLE submitted its response in the form of a letter, I construe it as a response
 23 brief. ECF No. 92. This district’s local rules require that all case-related correspondence with
 the court “be styled as a motion, stipulation, or notice,” and not as “letters, emails, or facsimiles.”
 L.R. IA 7-1(b). The TLE is advised to comply with this and all other local rules in the future.

24 ³⁵ ECF No. 93.

25 ³⁶ *See* Fed R. Civ. P. 55(b)(2).

26 ³⁷ *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).

1 (4) the sum of money at stake in the action; (5) the possibility of a
2 dispute concerning material facts; (6) whether the default was due
3 to excusable neglect; and (7) the strong policy underlying the
Federal Rules of Civil Procedure favoring decisions on the
merits.³⁸

4 As default has already been entered in this case, I must take all the complaint's factual
5 allegations as true, except those relating to damages.³⁹ "[N]ecessary facts not contained in the
6 pleadings, and claims [that] are legally insufficient, are not established by default,"⁴⁰ and the
7 court can consider additional proof of facts or damages to ensure that default judgment is
8 appropriate.⁴¹

9 **I. Possibility of prejudice to the plaintiff**

10 The first *Eitel* factor asks whether the plaintiff will suffer prejudice if a default judgment
11 is denied.⁴² Although the record shows that the TLE began negotiations with the FTC in good
12 faith and initially sought an amicable resolution, it is clear that the parties were at an impasse as
13 early as last fall.⁴³ And rather than try to resolve the dispute through the judicial process, the
14 TLE decided to dissolve in an attempt to cut off this litigation.⁴⁴ Because the TLE has indicated
15 that it does not intend to engage in this matter any further, absent default judgment, the FTC will
16 suffer prejudice as it will have no other means to resolve its claims. I find that this factor favors
17 granting default judgment.

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³⁸ *Eitel*, 782 F.2d at 1471–72.

20 ³⁹ See *TeleVideo Sys.*, 826 F.2d at 917–18.

21 ⁴⁰ *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

22 ⁴¹ See Fed. R. Civ. P. 55(b)(2).

23 ⁴² Cf. *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616–17 (9th Cir. 2016).

⁴³ See ECF No. 92-8.

⁴⁴ See *id.* at 3.

1 **II. The claims’ merits and the complaint’s sufficiency**

2 The second and third *Eitel* factors focus on whether the plaintiff has stated meritorious
3 claims under which it can recover.⁴⁵ In its complaint, the FTC alleges that the TLE, acting in
4 common enterprise with its co-defendants, deceptively marketed and serviced payday loans to
5 consumers nationwide.⁴⁶ In so doing, the TLE violated Section 5 of the FTCA, the TSR, TILA
6 and Regulation Z, and EFTA and Regulation E by: (1) misrepresenting the payment terms of
7 their payday loans, (2) failing to make accurate TILA and Regulation Z disclosures, (3) failing to
8 obtain consumers’ written authorization for recurring electronic-fund transfers, and (4)
9 unlawfully using remotely created checks.⁴⁷ The FTC’s complaint also lays out that these
10 violations entitle it to injunctive and monetary relief.⁴⁸ I find that its claims are sufficiently pled.

11 Taking those well-pled allegations as true,⁴⁹ I also find that the FTC’s claims have merit.
12 Section 5 of the FTCA prohibits “unfair or deceptive acts or practices in or affecting
13 commerce.”⁵⁰ An act or practice is deceptive if it involves a material representation or omission
14 that is likely to mislead consumers acting reasonably under the circumstances.⁵¹ The TSR
15 prohibits sellers and telemarketers from “misrepresenting, directly or by implication, any
16 material aspect of the performance, efficacy, nature, or central characteristic of goods or services
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18 ⁴⁵ See *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).

19 ⁴⁶ *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142–43 (9th Cir. 2010) (holding that a
20 “common enterprise” exists and can be held jointly liable for violations of the FTCA when there
are “strongly interdependent economic interests” among the companies and “all of the companies
were beneficiaries of and participants in a shared business scheme”).

21 ⁴⁷ ECF No. 1 at ¶¶ 50–52, 59–62, 72–75, 80–81.

22 ⁴⁸ *Id.* at ¶¶ 83–84.

23 ⁴⁹ *TeleVideo Sys.*, 826 F.2d at 917–18.

⁵⁰ 15 U.S.C. § 45(a).

⁵¹ See, e.g., *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

1 that are the subject of a sales offer.”⁵² The TSR also proscribes sellers and telemarketers from
2 “creating or causing to be created, directly or indirectly, a remotely created payment order as
3 payment for goods or services offered or sold through telemarketing.”⁵³ The FTC has
4 sufficiently shown that the TLE misrepresented the cost of the payday loans they offered to
5 consumers via telemarketing and accepted remotely created checks for payment, violating these
6 prohibitions.⁵⁴

7 TILA and Regulation Z require lenders of closed-end credit to clearly and conspicuously
8 disclose certain repayment terms to consumers in a manner that consumers may keep with them
9 before extending credit.⁵⁵ Advertisements for closed-end credit must also clearly and
10 conspicuously disclose certain repayment terms.⁵⁶ EFTA and Regulation E require written
11 consumer authorization prior to electronic fund transfers from consumers’ accounts.⁵⁷ The FTC
12 has sufficiently shown that the TLE failed to make required disclosures to consumers or obtain
13 required authorizations, violating these requirements.⁵⁸ These two factors weigh in favor of
14 granting default judgment.

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⁵² 16 C.F.R. § 310.3(a)(2)(iii).

20 ⁵³ 16 C.F.R. § 310.4(a)(9); *see* 16 C.F.R. § 310.2(cc).

21 ⁵⁴ ECF Nos. 1 at ¶¶ 50–52, 59–60, 61–62; 3 at 20–35, 41–42.

22 ⁵⁵ 15 U.S.C. §§ 1631(a), 1638(b)(1); 12 C.F.R. §§ 1026.17, 1026.18.

23 ⁵⁶ 15 U.S.C. §§ 1664(a), 1664(d); 12 C.F.R. § 1026.24(d).

⁵⁷ 15 U.S.C. § 1693e(a); 12 C.F.R. § 1005.10(b).

⁵⁸ ECF Nos. 1 at ¶¶ 72–75, 80–81; 3 at 35–41.

1 **III. Sum of money at stake**

2 Under the fourth *Eitel* factor, courts consider the amount of money at stake in relation to
3 the seriousness of the defendant’s conduct.⁵⁹ Here, the declaration attached to the FTC’s motion
4 for default judgment shows that the TLE was unjustly enriched in the amount of \$5,073,597 by
5 taking advantage of numerous consumers across the country.⁶⁰ Although this factor generally
6 counsels against granting default judgments with large monetary awards,⁶¹ district courts have
7 the power to order all necessary “equitable monetary relief,” including disgorgement and
8 restitution.⁶² Because the FTC seeks disgorgement of the TLE’s payday-lending-related profits
9 in the three years prior to the FTC’s complaint, I find that this factor favors granting a default
10 judgment against the TLE.

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15 ⁵⁹ See *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 617 (9th Cir. 2016) (upholding district court’s
16 examination of damages, which involved a determination of whether plaintiff “only seeks contractual
17 damages directly proportional to [defendant’s] breach of the contracts”) (internal quotation marks
18 and citation omitted); see also *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065,
19 1071 (D. Ariz. 2006) (“[Courts consider] the amount of money at stake in relation to the seriousness
20 of [defendant’s] conduct.”).

21 ⁶⁰ ECF No. 91-1. The FTC’s complaint and default-judgment motion sought a monetary
22 judgment of \$9,609,310, but that amount did not reflect the proper, shorter statute of limitations.
23 See ECF No. 97 at 2.

⁶¹ See *Eitel*, 782 F.2d at 1472.

⁶² *Stefanchik*, 559 F.3d at 931; see also *Liu v. SEC*, 140 S. Ct. 1936, 1943–44 (2020) (affirming
that disgorgement of profits is an equitable remedy); *FTC v. Bronson Partners, LLC*, 654 F.3d
359, 372–73 (2d Cir. 2011) (“disgorgement is a distinctly public-regarding remedy . . . to deter
violations of the laws by depriving violators of their ill-gotten gains” (cleaned up)); *FTC v.*
Febre, 128 F.3d 530, 537 (7th Cir. 1997); see also *SEC v. JT Wallenbrock & Assoc.*, 440 F.3d
1109, 1113 (9th Cir. 2006) (“the district court has broad equity powers to order the disgorgement
of ‘ill-gotten gains’”); *FTC v. BurnLounge, Inc.*, 584 F. App’x. 315, 318 (9th Cir. 2014)
(disgorgement should include “all gains flowing from the illegal activities”).

1 **IV. Possibility of dispute over material facts**

2 The fifth *Eitel* factor considers whether, given that all the complaint’s allegations are
3 taken as true,⁶³ disputes regarding material facts could arise. A fact is material if it could affect
4 the outcome of the case.⁶⁴ In its response brief, the TLE challenges the FTC’s default-judgment
5 motion on three issues. First, the TLE complains that the FTC did not inform the court that the
6 TLE had “participated in good faith settlement discussions” with the FTC, and that this
7 participation shows that the TLE had reason not to “answer or otherwise defend” against the
8 claims.⁶⁵ Consequentially, the TLE does not allege that it *had* answered or defended in a manner
9 that would preclude entry of default judgment. The FTC’s failure to mention settlement
10 negotiations is immaterial because those talks did not result in a settlement. When negotiations
11 ended, the TLE had the opportunity to answer, and it did not do so.

12 Second, the TLE suggests that this court does not have jurisdiction to issue a judgment
13 against it because the TLE has dissolved.⁶⁶ Although neither the FTC nor the TLE offer
14 relevant, binding authority on this question,⁶⁷ I conclude that judgment can be entered against the
15 TLE despite its dissolution. The TLE was an “unincorporated business entity” wholly owned by
16 the Tribe and structured to “conduct business, hold and maintain assets” in its own name and not

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18 ⁶³ *TeleVideo Sys.*, 826 F.2d at 917–18.

19 ⁶⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

20 ⁶⁵ ECF No. 92 at 1–3.

21 ⁶⁶ *See id.* The TLE vaguely references that it was “prepared to move . . . for dismissal based on its sovereign immunity” in this litigation but instead sought to settle. *Id.* at 3. But because the TLE does not affirmatively raise this argument, I need not decide it.

22 ⁶⁷ ECF Nos. 91 at 23 (the FTC citing unpublished district-court cases about dissolved
23 *corporations* under *state law*); 92 at 4–6 (the TLE citing Supreme Court and Ninth Circuit cases about dissolved *corporations* at *common law*); 93 at 4–5 (the FTC citing unpublished district-court cases and Ninth Circuit cases about *unincorporated* entities in the context of *diversity jurisdiction*).

1 the Tribe's.⁶⁸ However, the TLE and the FTC agree that this entity was an “arm” or agency of
2 the Tribe.⁶⁹ The FTC argues that other district courts have entered default judgments against
3 dissolved state-law-based corporations, and that as an arm of the Tribe, the TLE cannot be
4 “dissolved for purposes of ceasing this litigation or stripping this Court of jurisdiction.”⁷⁰ The
5 TLE, too, argues by analogy to corporations, contending that the principle that all pending
6 litigation abates when common-law corporations cease to exist should apply to the TLE.

7 At common law, and unlike a corporation, an unincorporated entity does not exist
8 separate and apart from the individuals who compose it; it “therefore lack[s] the capacity to be
9 sued in its own name[.]”⁷¹ Rule 17(b)(3)(A) abrogates that common-law understanding in the
10 context of a suit to “enforce a substantive right” arising under federal law.⁷² Because the FTC
11 seeks to enforce rights established under federal law, the pre-dissolution TLE was a proper
12 defendant in this case, and the TLE's mid-litigation dissolution does not change that. Any
13 analogy to a corporation—by either party—is unavailing. A court cannot treat as a corporation
14 an entity that is formally and undisputedly unincorporated.⁷³ The TLE is neither a state-law-
15 authorized corporation that continues to exist for a set number of years post-dissolution, nor a
16 common-law corporation that ceases to exist immediately, ending all pending litigation. As an

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19 ⁶⁸ ECF No. 92-7 at 2.

20 ⁶⁹ *Id.* at 3; ECF No. 93 at 5 n.4.

21 ⁷⁰ ECF No. 93 at 5.

22 ⁷¹ *Strotek Corp. v. Air Transp. Ass'n. of Am.*, 300 F.3d 1129, 1133 n.2 (9th Cir. 2002).

23 ⁷² *See* Fed. R. Civ. P. 17(b)(3)(A); *Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen*, 387 U.S.
556, 559 (1967).

⁷³ *Cf. Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002),
as amended on denial of reh'g (July 29, 2002) (rejecting argument that an entity “should be
deemed a corporation notwithstanding its formally unincorporated status”).

1 unincorporated arm of a tribe that still exists, the TLE continues to exist, if only for purposes of
2 this litigation.

3 The TLE’s third argument is that the monetary judgment sought by the FTC is excessive
4 because the TLE’s assets are “less than \$150,000” and during settlement negotiations the FTC
5 said “it would be satisfied with the seizure” of all the TLE’s bank accounts.⁷⁴ The TLE does not
6 dispute the amount of ill-gotten gains alleged by the FTC, it just argues that the FTC would not
7 be able to recover against it for more than its paltry assets. That may be so, but, as with the
8 TLE’s other two issues, this does not raise a disputed issue of material fact. And because the
9 TLE has not raised any in opposition to the FTC’s default-judgment motion, I find it unlikely
10 that such issues will arise later. This factor therefore weighs in favor of granting default
11 judgment.

12 **V. Defendant’s excusable neglect**

13 The next *Eitel* factor looks to whether the TLE’s default may have resulted from
14 excusable neglect. I find that it did not. The TLE concedes that it willingly participated in
15 settlement discussions after properly being served with process, stipulated to a preliminary
16 injunction, and was in consistent contact with the FTC.⁷⁵ The TLE could have avoided default
17 by responding to the complaint by the deadline set by this court or requesting an extension to
18 prepare an answer once it knew a settlement was out of reach. Instead, it chose to dissolve. That
19 decision was not one of excusable neglect. So, this factor weighs in favor of default judgment.

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23 ⁷⁴ ECF No. 92 at 6–7; *see also* ECF No. 92-5.

⁷⁵ *See* ECF No. 92.

1 **VI. Policy considerations**

2 Under the seventh and final *Eitel* factor, default judgments are generally disfavored
3 because “[c]ases should be decided upon their merits whenever reasonably possible.”⁷⁶
4 However, the TLE’s decision to dissolve, rather than appear and defend, precludes adjudication
5 on the merits. And while this factor usually weighs against entry of default judgment, it does not
6 preclude me from entering one and is outweighed by the other factors here. Under these
7 circumstances, default judgment is warranted. The FTC is entitled to a default judgment against
8 the TLE on all its claims.

9 **Conclusion**

10 **IT IS THEREFORE ORDERED** that the FTC’s motion for default judgment
11 **[ECF No. 91] is GRANTED.** The Clerk of the Court is directed to **ENTER JUDGMENT** in
12 favor of the Federal Trade Commission and against the La Posta Tribal Lending Enterprise and
13 **CLOSE THIS CASE.** And with good cause appearing and no just reason for delay, under
14 Federal Rule of Civil Procedure 54(b), the Clerk is directed to immediately enter this order as a
15 final judgment as to La Posta Tribal Lending Enterprise on the following terms:

16 **I. Definitions**

17 For this order, the following definitions apply:

- 18 • “Consumer” means any Person.
- 19 • “Clear(ly) and conspicuous(ly)” means that a required disclosure is difficult to miss
20 (i.e., easily noticeable) and easily understandable by ordinary consumers, including in
21 all the following ways:
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23 ⁷⁶ *Eitel*, 782 F.2d at 1472 (citing *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985)).

- 1 ○ In any communication that is solely visual or solely audible, the disclosure
2 must be made through the same means through which the communication is
3 presented. In any communication made through both visual and audible
4 means, such as a television advertisement, the disclosure must be presented
5 simultaneously in both the visual and audible portions of the communication
6 even if the representation requiring the disclosure is made in only one means.
- 7 ○ A visual disclosure, by its size, contrast, location, the length of time it appears,
8 and other characteristics, must stand out from any accompanying text or other
9 visual elements so that it is easily noticed, read, and understood.
- 10 ○ An audible disclosure, including by telephone or streaming video, must be
11 delivered in a volume, speed, and cadence sufficient for ordinary consumers
12 to easily hear and understand it.
- 13 ○ In any communication using an interactive electronic medium, such as the
14 Internet or software, the disclosure must be unavoidable.
- 15 ○ The disclosure must use diction and syntax understandable to ordinary
16 consumers and must appear in each language in which the representation that
17 requires the disclosure appears.
- 18 ○ The disclosure must comply with these requirements in each medium through
19 which it is received, including all electronic devices and face-to-face
20 communications.
- 21 ○ The disclosure must not be contradicted or mitigated by, or inconsistent with,
22 anything else in the communication.
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1 ○ When the representation or sales practice targets a specific audience, such as
2 children, the elderly, or the terminally ill, “ordinary consumers” includes
3 reasonable members of that group.

- 4 • “Corporate Defendants” means Lead Express, Inc.; Camel Coins, Inc.; Sea Mirror,
5 Inc.; Naito Corp.; Kotobuki Marketing, Inc.; Ebisu Marketing, Inc.; Hotei Marketing,
6 Inc.; Daikoku Marketing, Inc.; and each of their subsidiaries, affiliates, successors,
7 and assigns.
- 8 • “Debt” means any obligation or alleged obligation of a Consumer to pay money,
9 whether such obligation has been reduced to judgment.
- 10 • “Debt Collection Activities” means any activities to collect or attempt to collect,
11 directly or indirectly, a Debt owed or due, asserted to be owed or due.
- 12 • “Defendants” means the TLE and all other defendants in this matter, individually,
13 collectively, or in any combination.
- 14 • “Payment Schedule” means the number, amounts, and due dates or period of
15 payments scheduled to repay a loan or other extension of credit.
- 16 • “Person” means a natural person, an organization or other legal entity, including a
17 corporation, partnership, sole proprietorship, limited liability company, association,
18 cooperative, or any other group or combination acting as an entity.
- 19 • “Receiver” means the receiver appointed in Section XI of the Stipulated Preliminary
20 Injunction as to the Corporate Defendants entered by the Court on June 19, 2020, in
21 this matter,⁷⁷ and any deputy receivers that shall be named by the Receiver.
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⁷⁷ ECF No. 44.

- 1 • “TLE” means La Posta Tribal Lending Enterprise, also doing business as Harvest
2 Moon Financial, Green Stream Lending, and Gentle Breeze Online, and its successors
3 and assigns.

4 **II. Injunctive relief**

5 **IT IS FURTHER ORDERED** that the TLE, its officers, agents, and employees, and all
6 other Persons in active concert or participation with them, who receive actual notice of this order
7 by personal service or otherwise, whether acting directly or indirectly, in connection with the
8 advertising, marketing, promoting, or offering of any loan or other extension of credit, are
9 **permanently restrained and enjoined** from:

- 10 • Misrepresenting or assisting others in misrepresenting, expressly or by implication:
- 11 ○ the number of payments any Person will withdraw from any Consumer’s bank
 - 12 accounts;
 - 13 ○ the total payments that any Person will withdraw from any Consumer’s bank
 - 14 accounts;
 - 15 ○ the amount of interest and principal payments that any Person will withdraw
 - 16 from any Consumer’s bank accounts, or that such payments consist of both
 - 17 interest and principal repayment;
 - 18 ○ the Payment Schedule;
 - 19 ○ the total amount a Consumer will owe;
 - 20 ○ the interest rate(s), annual percentage rate(s), or finance charge(s), and
 - 21 whether they are fixed or variable;
 - 22 ○ whether the loan has a prepayment penalty or whether refinancing may trigger
 - 23 a prepayment penalty and/or other fees; or

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- any other material fact;
- Violating the Truth in Lending Act⁷⁸ or Regulation Z;⁷⁹
- When extending a fixed amount of credit that a Consumer is to repay in one or more installment(s), failing to disclose in writing (electronic or hard-copy) and in a form the Consumer may keep, Clearly and Conspicuously, before the Consumer signs the credit agreement, the following information in a manner accurately reflecting the terms of the legal obligation between the parties:
 - the amount financed;
 - the finance charge;
 - the annual percentage rate;
 - the Payment Schedule; and
 - the total of payments;
- Stating in any advertisement for any loan or other extension of credit, expressly or by implication:
 - the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing Clearly and Conspicuously all the following terms:
 - the amount or percentage of the down payment;
 - the terms of repayment; and

⁷⁸ 15 U.S.C. §§ 1601–1667.

⁷⁹ 12 C.F.R. Part 226.

- 1 ▪ the annual percentage rate, using the term “annual percentage rate” or
2 the abbreviation “APR.” If the annual percentage rate may be
3 increased after consummation of the credit transaction, that fact must
4 also be disclosed; or

- 5 ○ a rate of finance charge without stating the rate as an “annual percentage rate”
6 or the abbreviation “APR,” using that term.

7 **IT IS FURTHER ORDERED** that the TLE, its officers, agents, and employees, and all
8 other persons in active concert or participation with any of them, who receive actual notice of
9 this order, whether acting directly or indirectly, are hereby **permanently restrained and**
10 **enjoined** from misrepresenting, or assisting others in misrepresenting, expressly or by
11 implication:

- 12 • Any aspect of any Debt Collection Activity, including but not limited to (a) that
13 Consumers owe a Debt; (b) that Consumers can be arrested, prosecuted, or
14 imprisoned for failing to pay any Debt; or (c) that any Person will or can take formal
15 legal action against Consumers who do not pay any Debt, including but not limited to,
16 filing suit or garnishment; and
- 17 • Any fact material to Consumers concerning any product or service, such as the total
18 costs; any material restrictions, limitations, or conditions; or any material aspect of its
19 performance, efficacy, nature, or central characteristics.

20 **IT IS FURTHER ORDERED** that the TLE, its officers, agents, and employees, and all
21 other persons in active concert or participation with any of them, who receive actual notice of
22 this order, whether acting directly or indirectly, are hereby **permanently restrained and**
23 **enjoined** from:

- 1 • Making electronic fund transfers from a Consumer’s deposit, savings, or asset
2 account on a recurring basis without:
- 3 ○ obtaining a written authorization signed or similarly authenticated from the
4 Consumer for preauthorized electronic fund transfers from the Consumer’s
5 account, which written authorization must (a) be readily identifiable as such
6 and (b) the terms of the preauthorized transfer, including the amount of each
7 transfer and the dates on which each transfer will be made, are clear and
8 readily understandable; and
- 9 ○ providing to the Consumer a copy of a written authorization signed or
10 similarly authenticated from the Consumer for preauthorized electronic fund
11 transfers from the Consumer’s account; or
- 12 • Violating the Electronic Fund Transfers Act⁸⁰ or Regulation E;⁸¹
- 13 • Failing to provide sufficient customer information to enable the FTC to administer
14 efficiently consumer redress. If a representative of the FTC requests in writing any
15 information related to redress, that the TLE must provide it, in the form prescribed by
16 the FTC, within 14 days;
- 17 • Disclosing, using, or benefitting from customer information, including the name,
18 address, telephone number, email address, social security number, other identifying
19 information, or any data that enables access to a customer’s account (including a
20 credit card, bank account, or other financial account), that any Defendant obtained
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23 ⁸⁰ 15 U.S.C. §§ 1693–1693r.

⁸¹ 12 C.F.R. Part 205.

1 prior to entry of this order in connection with the marketing and extension of loans;
2 and

- 3 • Failing to destroy such customer information in all forms in their possession, custody,
4 or control within 30 days after receipt of written direction to do so from a
5 representative of the FTC.
- 6 • Provided, however, that customer information need not be disposed of, and may be
7 disclosed, to the extent requested by a government agency or required by law,
8 regulation, or court order.

9 **IT IS FURTHER ORDERED** that the TLE, its officers, agents, and employees, and all
10 other persons in active concert or participation with any of them, who receive actual notice of
11 this order, whether acting directly or indirectly, in connection with the advertising, marketing,
12 promoting, offering for sale, or selling of any product or service through telemarketing, are
13 hereby **permanently restrained and enjoined** from:

- 14 • Creating or causing to be created, directly or indirectly, a remotely created payment
15 order, including a remotely created check, as payment for such good or service;
16 • Violating the FTC's Telemarketing Sales Rule.⁸²

17 **III. Monetary relief**

18 **IT IS FURTHER ORDERED** that:

- 19 • All Consumer Debt for loans issued by the TLE before the May 19, 2020, Temporary
20 Restraining Order issued in this case⁸³ ("Existing Debt") is hereby deemed paid in
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23 ⁸² 16 C.F.R. Part 310.

⁸³ ECF No. 13.

1 full to the extent the amount paid by consumers on such Existing Debt exceeds the
2 amount financed plus one finance charge (the “Paid in Full Debt”).

- 3 • The TLE must not collect upon or make any attempt to collect upon; must not sell,
4 assign, or otherwise transfer; and must not report to any consumer reporting agency,
5 any Paid in Full Debt.
- 6 • The TLE must assign and transfer to the Receiver any Existing Debt that is not Paid
7 in Full Debt.

8 **IT IS FURTHER ORDERED** that:

- 9 • **Judgment in the total disgorgement amount of \$5,073,597, is entered in favor of**
10 **the FTC and against the TLE, jointly and severally with any other defendant**
11 **against whom judgment may be entered, with post-judgment interest at the legal**
12 **rate.**
- 13 • This monetary judgment is enforceable against any asset, real or personal, whether
14 located within the United States or outside the United States, owned jointly or singly
15 by, on behalf of, for the benefit of, in trust by or for, or as a deposit for future goods
16 or services to be provided to, any Corporate Defendant, whether held as tenants in
17 common, joint tenants with or without the right of survivorship, tenants by the
18 entirety, and/or community property.
- 19 • In partial satisfaction of the judgment against the TLE, any Defendant, financial
20 institution, or any other Person, whether located within the United States or outside
21 the United States, that holds, controls, or maintains accounts or assets of, on behalf
22 of, for the benefit of, or as a deposit for future goods or services to be provided to,
23 any Receivership Entity, whether real or personal, whether located within the United

1 States or outside the United States, must, within 10 business days from receipt of a
2 copy of this order, transfer to the Receiver or his designated agent, such account or
3 asset, including, but not limited to:

- 4 ○ First National Bank Albany/Breckenridge must, upon written direction of the
5 Receiver, transfer to the Receiver all funds, if any, in the following accounts:

6 (1) account number xxxx8448 in the name of La Posta Tribal Lending
7 Enterprise; (2) account number xxxx3141 in the name of Gentle Breeze, a
8 division of La Posta Tribal Lending Enterprise; (3) account number xxxx3507
9 in the name of Gentle Breeze, a division of La Posta Tribal Lending
10 Enterprise; (4) account number xxxx3568 in the name of Gentle Breeze, a
11 division of La Posta Tribal Lending Enterprise; (5) account number xxxx3263
12 in the name of Harvest Moon Financial, a division of La Posta Tribal Lending
13 Enterprise; (6) account number xxxx3629 in the name of Harvest Moon
14 Financial, a division of La Posta Tribal Lending Enterprise; (7) account
15 number xxxx3690 in the name of Harvest Moon Financial, a division of La
16 Posta Tribal Lending Enterprise; (8) account number xxxx3202 in the name of
17 Green Stream, a division of La Posta Tribal Lending Enterprise; (9) account
18 number xxxx3751 in the name of Green Stream, a division of La Posta Tribal
19 Lending Enterprise; (10) account number xxxx3812 in the name of Green
20 Stream, a division of La Posta Tribal Lending Enterprise; and (11) any other
21 account held in the name of the TLE;

- 22 ○ PeopleFirst Bank must, upon written direction of the Receiver, transfer to the
23 Receiver all funds, if any, in the following accounts: (1) account number

1 xxxx5760 in the name of Gentle Breeze; (2) account number xxxx5728 in the
2 name of Green Stream Lending; (3) account number xxxx5784 in the name of
3 Harvest Moon Financial; (4) account number xxxx5752 in the name of Gentle
4 Breeze; (5) account number xxxx5736 in the name of Green Stream Lending;
5 (6) account number xxxx5776 in the name of Harvest Moon Financial; and (7)
6 any other account held in the name of the TLE;

7 ○ First Dakota National Bank must, upon written direction of the Receiver,
8 transfer to the Receiver all funds, if any, in the following accounts: (1)
9 account number xxxx9782 in the name of La Posta Tribal Lending Enterprise;
10 (2) account number xxxx9322 in the name of La Posta Tribal Lending
11 Enterprise d/b/a/ Gentle Breeze; (3) account number xxxx8212 in the name of
12 La Posta Tribal Lending Enterprise d/b/a Green Stream Lending; (4) account
13 number xxxx9232 in the name of Harvest Moon Financial, a division of La
14 Posta Tribal Lending Enterprise; and (5) any other account held in the name
15 of the TLE;

16 ○ CNB Bank & Trust, N.A. must, upon written direction of the Receiver,
17 transfer to the Receiver all funds, if any, in the following accounts: (1)
18 account number xxxx4144 in the name of La Posta Tribal Lending Enterprise
19 d/b/a Gentle Breeze; and (2) any other account held in the name of the TLE;

20 ○ North American Banking Company must, upon written direction of the
21 Receiver, transfer to the Receiver all funds, if any, in the following accounts:
22 (1) account number xxxx6427 in the name of Gentle Breeze; (2) account
23 number xxxx6468 in the name of Green Stream Lending; (3) account number

1 xxxx6443 in the name of Harvest Moon Financial; (4) account number
2 xxxx6435 in the name of Gentle Breeze; (5) account number xxxx6476 in the
3 name of Green Stream Lending; (6) account number xxxx6450 in the name of
4 Harvest Moon Financial; (7) account number xxxx6708 in the name of Gentle
5 Breeze, a division of La Posta Tribal Lending Enterprise; (8) account number
6 xxxx6690 in the name of Green Stream Lending, a division of La Posta Tribal
7 Lending Enterprise; (9) account number xxxx6682 in the name of Harvest
8 Moon Financial, a division of La Posta Tribal Lending Enterprise; and (10)
9 any other account held in the name of the TLE; and

- 10 ○ Chippewa Valley Bank must, upon written direction of the Receiver, transfer
11 to the Receiver all funds, if any, in the following accounts: (1) account
12 number xxxx6738 in the name of La Posta Tribal Lending Enterprise d/b/a
13 Gentle Breeze; (2) account number xxxx6720 in the name of La Posta Tribal
14 Lending Enterprise d/b/a Gentle Breeze; (3) account number xxxx6746 in the
15 name of Harvest Moon Financial, a division of La Posta Tribal Lending
16 Enterprise; (4) account number xxxx6753 in the name of Harvest Moon
17 Financial, a division of La Posta Tribal Lending Enterprise; and (5) any other
18 account held in the name of the TLE.

- 19 • The asset freeze is modified to permit the transfers identified in this section.
20 • The TLE relinquishes dominion and all legal and equitable right, title, and interest in
21 all assets transferred under this order and may not seek the return of any assets.
22 • All money paid to the FTC under this order may be deposited into a fund
23 administered by the FTC or its designee to be used for equitable relief, including

1 consumer redress and any attendant expenses for the administration of any redress
2 fund. If a representative of the FTC decides that direct redress to consumers is
3 wholly or partially impracticable or money remains after redress is completed, the
4 FTC may apply any remaining money for such other equitable relief (including
5 consumer information remedies) as it determines to be reasonably related to
6 Defendants' practices alleged in the Complaint. Any money not used for such
7 equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants
8 have no right to challenge any actions the FTC or its representatives may take under
9 this subsection.

10 **IV. Order acknowledgments, compliance reporting and monitoring, and recordkeeping**

11 **IT IS FURTHER ORDERED** that the TLE must obtain acknowledgments of receipt of
12 this order:

- 13 • The TLE, within 7 days of entry of this order, must submit to the FTC an
14 acknowledgment of receipt of this order sworn under penalty of perjury.
- 15 • For 5 years after entry of this order, the TLE must deliver a copy of this order to: (1)
16 all principals, officers, and directors; (2) all employees having managerial
17 responsibilities for conduct related to the subject matter of the order, and all agents
18 and representatives who participate in conduct related to the subject matter of the
19 order; and (3) any business entity resulting from any change in structure as set forth
20 in the next subsection. Delivery must occur within 7 days of entry of this order for
21 current personnel. For all others, delivery must occur before they assume their
22 responsibilities.

- 1 • From each individual or entity to which the TLE delivered a copy of this order, the
2 TLE must obtain, within 30 days, a signed and dated acknowledgment of receipt of
3 this order.

4 **IT IS FURTHER ORDERED** that the TLE must make timely submissions to the FTC:

- 5 • One year after entry of this order, the TLE must submit a compliance report, sworn
6 under penalty of perjury. The report must (a) identify the primary physical, postal,
7 and email address and telephone number, as designated points of contact, which
8 representatives of the FTC may use to communicate with it; (b) identify all of its
9 businesses by all of their names, telephone numbers, and physical, postal, email, and
10 Internet addresses; (c) describe the activities of each business, including the products
11 and services offered, the means of advertising, marketing, and sales, and the
12 involvement of any other Defendant; (d) describe in detail whether and how the TLE
13 is in compliance with each section of this order; and (e) provide a copy of each order
14 Acknowledgment obtained under this order, unless previously submitted to the FTC.
- 15 • For 20 years after entry of this order, the TLE must submit a compliance notice,
16 sworn under penalty of perjury, within 14 days of any change in: (a) any designated
17 point of contact; or (b) its structure or any entity that it has any ownership interest in
18 or controls directly or indirectly that may affect compliance obligations arising under
19 this order, including: creation, merger, sale, or dissolution of the entity or any
20 subsidiary, parent, or affiliate that engages in any acts or practices subject to this
21 order.
- 22
- 23

- 1 • The TLE must submit to the FTC notice of the filing of any bankruptcy petition,
2 insolvency proceeding, or similar proceeding by or against it within 14 days of its
3 filing.
- 4 • Any submission to the FTC required by this order to be sworn under penalty of
5 perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by
6 concluding: “I declare under penalty of perjury under the laws of the United States of
7 America that the foregoing is true and correct. Executed on: _____” and supplying
8 the date, signatory’s full name, title (if applicable), and signature.
- 9 • Unless otherwise directed by a FTC representative in writing, all submissions to the
10 FTC under this order must be emailed to DEbrief@ftc.gov or sent by overnight
11 courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau
12 of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW,
13 Washington, DC 20580. The subject line must begin: FTC v. Lead Express,
14 X200033.

15 **IT IS FURTHER ORDERED** that, for the purpose of monitoring the TLE’s compliance
16 with this order, including the financial representations upon which part of the judgment was
17 suspended and any failure to transfer any assets as required by this order:

- 18 • Within 14 days of receipt of a written request from a representative of the FTC, the
19 TLE must submit additional compliance reports or other requested information,
20 which must be sworn under penalty of perjury; appear for depositions; and produce
21 documents for inspection and copying. The FTC is also authorized to obtain
22 discovery, without further leave of court, using any of the procedures prescribed by
23

1 Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33,
2 34, 36, 45, and 69.

- 3 • For matters concerning this order, the FTC is authorized to communicate directly
4 with the TLE. The TLE must permit representatives of the FTC to interview any
5 employee or other person affiliated with it who has agreed to such an interview. The
6 person interviewed may have counsel present.
- 7 • The FTC may use all other lawful means, including posing, through its
8 representatives as consumers, suppliers, or other individuals or entities, to the TLE or
9 any individual or entity affiliated with it, without the necessity of identification or
10 prior notice. Nothing in this order limits the FTC's lawful use of compulsory process
11 under Sections 9 and 20 of the FTCA.⁸⁴

12 **IT IS FURTHER ORDERED** that the TLE must create the following records for 20
13 years after entry of the order, and retain each such record for 5 years:

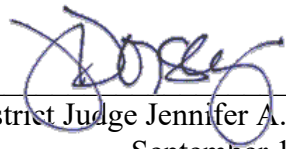
- 14 • Accounting records showing the revenues from all products or services sold;
15 • Personnel records showing, for each person providing services, whether as an
16 employee or otherwise, that person's: name; addresses; telephone numbers; job title
17 or position; dates of service; and (if applicable) the reason for termination;
18 • Records of all Consumer complaints and refund requests, whether received directly or
19 indirectly, such as through a third party, and any response;

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⁸⁴ 15 U.S.C. §§ 49, 57b-1.

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- All records necessary to demonstrate full compliance with each provision of this order, including all submissions to the FTC; and
- A copy of each unique advertisement or other marketing material.



U.S. District Judge Jennifer A. Dorsey
September 13, 2021