

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE**

EBF PARTNERS, LLC d/b/a EVEREST  
BUSINESS FUNDING, a Delaware limited  
liability company,

Plaintiff,

vs.

CAPSULE MEDIA GROUP, LLC, a  
California limited liability company,

Defendant.

Civil Action No. 19-CV-01424-MN

**DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR TEMPORARY  
RESTRAINING ORDER ON NOTICE AND PRELIMINARY INJUNCTION**

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### **PRELIMINARY STATEMENT**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Defendant Capsule Media Group, LLC (“Capsule”) respectfully moves for the entry of a Temporary Restraining Order and Preliminary Injunction against Plaintiff, EBF Partners, LLC d/b/a Everest Business Funding (“EBF”).

EBF is attempting to unjustly enrich itself (and has already partially done so) at Capsule’s expense and in violation of the ISO Agent Sales Agreement (the “Agreement”) between EBF and Capsule. EBF improperly terminated the Agreement and blocked Capsule from the computer portal (the “Portal”) that provides the critical information necessary for Capsule to renew each merchant with EBF. Failure to obtain injunctive relief will result in the irreparable loss of Capsule’s clients and loss of revenue that will be impossible to recover at the end of this litigation should Capsule succeed. Without injunctive relief, Capsule will continue to suffer irreparable harm to its business.

### **SUMMARY OF ARGUMENT**

Capsule brings this Motion to preserve the status quo so that it does not lose its valuable referrals during the pendency of this action. Capsule has lost, and is continuing to lose, commissions on merchant cash advance renewals (“Renewals”). Unlike Capsule, EBF is the purchaser and not the referrer of merchant cash advances, and accordingly will not be able to renew Capsule referred merchants with anywhere near the success rate that can be achieved by Capsule. Once EBF improperly terminated the Agreement and refused to provide Capsule with information about its referred merchants, Capsule could no longer solicit those merchants to renew their cash advances. Without the ability to solicit, the commissions, Capsule’s recovery will be miniscule compared to what it could recover if it

could continue soliciting the merchants when they are up for Renewal. Therefore, waiting until the end of this litigation to receive commissions for Renewals will result in significant losses of commissions that Capsule could have received either from EBF or from another underwriter to whom Capsule could recommend these merchants. With every day that passes, Capsule loses potential Renewals that could result in commissions.

Accordingly, EBF should either (i) be ordered to return Capsule to the status quo prior to its improper termination by providing Capsule access to the Portal so that Capsule can solicit Renewals and earn its commissions (while earning EBF a profit as well) or (ii) be enjoined from Renewals with any Capsule referred merchant until after the Lock Out Period (as defined below). Alternatively, EBF should be ordered to inform Capsule when Capsule referred merchants are approaching and have reached complete repayment of their merchant cash advance or when the merchants have requested a pay-off letter. Capsule can then timely contact the merchants and offer them funding from underwriters other than EBF.

Capsule will be irreparably harmed from the loss of the Capsule referred merchants' renewal transactions, on which it spent substantial money and sales time to subscribe. Only the relief requested in this Motion can ensure that its hard work and investment is not lost.

#### **NATURE AND STAGE OF THE PROCEEDINGS**

On July 25, 2019, after EBF improperly terminated the Agreement, Capsule's counsel contacted EBF's counsel and demanded that EBF either continue paying Capsule's commission or agree in writing to not fund those merchants for thirty (30) days after pay-off, allowing other cash advance companies to make offers to that merchant. Declaration of Daniel Katz, Esquire ("Katz Decl.") ¶ 2. To facilitate this, Capsule further demanded that Everest send it the zero balance letters and pay-off letters, as had been promised by Shruga Braun on July 12,

2019 and July 15, 2019 orally and over email and to provide Capsule with access to the portal so that it can confirm that no new renewals were made without commission payments to Capsule.

*Id.*

On July 29, 2019, EBF's counsel responded that EBF would not provide any zero balance letters, which would inform EBF when the funding was up for renewal. *Id.* at ¶ 3. Further, EBF refused to agree to pay commission on future renewals. *Id.*

Capsule's counsel sent multiple emails to EBF's counsel in an attempt to continue the dialogue. On August 1, 2019, however, EBF simply filed the instant action, without warning. *Id.* at ¶ 4. On August 7, 2019, Capsule's counsel emailed EBF's counsel requesting a telephonic meet-and-confer to discuss the filing of the instant Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"). *Id.* at ¶ 5. The parties' counsel met and conferred by telephone on August 7, 2019. *Id.* at ¶ 6. Counsel for Capsule detailed the arguments why EBF should cease its conduct. Despite these arguments, EBF's counsel stated that it would not agree to do so. *Id.* In an email exchange shortly before the call, counsel for Capsule agreed to accept service of the complaint on behalf of Capsule and respond to the complaint within sixty (60) days.

Capsule now brings its Motion in advance of filing its answer, counterclaims or other response, because it seeks immediate relief and because Capsule reserves its right to challenge jurisdiction. *See, e.g., Temsa Ulasim Araclari Sanayi Ve Ticaret A.S. v. CH Bus Sales, LLC*, 2018 WL 4905593, at \*1 (D. Del. Oct. 9, 2018) (moving to enjoin arbitration pursuant to Fed. R. Civ. P. 65 following removal and prior to answering the complaint).

## **FACTUAL BACKGROUND**

### **A. The Capsule Business**

Capsule is in the business of referring merchants seeking to sell portions of their future revenue stream (at a discount) (the “Capsule Business”) to purchasers of such revenue streams (“Purchasers”). Declaration of Eitan Zimmerman (“Zimmerman Decl.”) ¶ 2. Capsule is a seasoned referral company and has provided thousands of merchant referrals to more than ten separate Purchasers, including EBF. *Id.* Capsule’s substantial skill, effort, and capital investment in its business make it a leader in this referral space. *Id.*

Capsule spends approximately \$200,000 per month (or approximately \$3,000 per lead) in advertising and marketing costs. *Id.* at ¶ 3. The Capsule Business is not generally profitable unless and until Capsule receives commissions on subsequent revenue EBF purchases (“Renewals”). *Id.* This is because the commissions earned on the amount of initial revenue EBF purchases (“Initial Fundings”) often only cover the overhead of the Capsule Business. *Id.* at ¶ 4. Accordingly, Renewal commissions are a vital component of the Capsule Business. *Id.* at ¶ 5. To ensure it can obtain Renewal commissions, Capsule carefully monitors the progress of each merchant transaction, in this case via the EBF Portal, and exerts great effort to procure Renewals. *Id.* Without the commissions from Renewals, Capsule would operate at a continuous loss. *Id.*

### **B. The Terms of the Agreement and EBF’s Breach**

Pursuant to the Agreement, Capsule refers merchants to EBF in exchange for a commission from EBF for the Initial Funding of the merchants referred by Capsule (“Capsule Referred Merchant” or “Merchant”) as well as a commission from EBF based upon the amount of the Renewal. *Id.* at ¶ 6; Paragraph 2(A). Specifically, Paragraph 2 of the Agreement



states that Capsule is unequivocally entitled to commissions, which are to be paid by EBF “within one (1) business day after the purchase price for the purchased amount is paid by EBF to the [merchant].” *Id.* Nothing in the Agreement limits the one-day trigger for commission payments. *Id.*

Nearly all merchants require additional funding promptly upon payment in full of the purchase price (*i.e.* a zero-balance owed to the Purchaser (a “Zero-Balance”). *Id.* at ¶ 7. Often, merchants will request pay-off letters with the amount necessary to obtain a Zero-Balance (a “Payoff Letter”). *Id.* Through the Portal, Capsule is made aware of a merchant approaching a Zero-Balance or requesting a Payoff Letter each of which is an indication to commence efforts toward a Renewal. *Id.* at ¶ 8.

Over the past several months, Capsule began referring fewer and fewer merchants to EBF. *Id.* at ¶ 9. As such, EBF determined that it could effectively steal the Renewal commissions from Capsule by terminating the Agreement, however improperly, and then blocking Capsule’s access to the Portal and refusing to provide the relevant information to Capsule outside of the Portal (the “Information Blackout”). *Id.* On July 12, 2019, EBF did so by calling Capsule’s managing partner, Eitan Zimmerman, and informing him that EBF was terminating the Agreement (the “Improper Termination”). *Id.* at ¶ 10. Once a referral source ceases to provide EBF with new referrals, EBF, often with impunity from smaller referral companies, fabricates a basis for termination of the applicable agreement, blocks access to the Portal, and steals the renewal commissions. *Id.* at ¶ 11.

The Agreement provides that Capsule may not contact a Capsule Referred Merchant regarding obtaining funding from Purchaser (other than EBF) for a period of 30 days following that merchant obtaining a Zero-Balance with EBF (the “Lock Out Period”). *Id.* at

¶ 12. Thus, as a direct result of the Improper Termination and Information Blackout, Capsule is without recourse to effectuate Renewals (or provide alternative funding to its clients). *Id.* This is because without access to the Portal, Capsule does not know when a Merchant is up for Renewal, and pursuant to the Lockout Period. Capsule cannot contact the Merchant even if it so knew. *Id.*

Due to the fact that identifying and referring merchants to Purchasers requires significant sales skill as well as a substantial economic investment per merchant, Capsule will lose out on the vast majority of the Renewal funding opportunities before the conclusion of this action. *Id.* at ¶ 13. Moreover, EBF itself has stated that it does not intend to seek Renewals from Capsule Referred Merchants, yet it continues to block Capsule from reaching out to those Merchants to provide Renewals elsewhere. *Id.* at ¶ 14. Without access to the Merchants, EBF will be irreparably harmed.

### **ARGUMENT**

The issuance of a temporary restraining order or preliminary injunction requires that Capsule show: (1) it is likely to succeed on the merits; (2) denial will result in irreparable harm to Capsule; (3) granting the injunction will not result in irreparable harm to EBF; and (4) granting the injunction is in the public interest. *Temsa Ulasim Araclari Sanayi Ve Ticaret A.S. v. CH Bus Sales, LLC*, 2018 WL 4905593, at \*2 (D. Del. Oct. 9, 2018); *TP Grp.–CI, Inc. v. Vetecnik*, 2016 WL 5864030, at \*1 (D. Del. Oct. 6, 2016).

#### **A. Capsule Is Likely to Succeed on Its Claim That It Is Entitled to Commissions After Termination of the Agreement, Regardless Whether the Termination Was Proper Under the Agreement**

“To satisfy [the] requirement [of a likelihood of success on the merits] for preliminary relief, the movant need only prove a ‘prima facie case,’ not a ‘certainty’ she’ll win.” *Issa v. Sch.*

*Dist. of Lancaster*, 2017 WL 393164, at \*6 (3d Cir. Jan. 30, 2017) (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001)). That is, “the movant need only show a ‘reasonable probability’ of success.” *Id.* (quoting *Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980)). Capsule easily satisfies that standard here.

Capsule reserves its right to challenge EBF’s termination of the Agreement because Capsule can conclusively show that each reason given by EBF for the termination fails to meet the “detrimental” standard in the Agreement. That said, this issue is not relevant to the Motion before the Court today. The Court must grant this Motion because Capsule is entitled to the commissions outlined in the Agreement for its referrals regardless of a termination of the Agreement. Zimmerman Decl., Ex. 1 ¶ 2(A). Because Capsule is entitled to its commissions, the Court must prevent EBF from allowing the commissions to dissipate.

**i. Nothing in the Agreement Limits EBF’s Obligation to Pay Renewal Commissions to Capsule**

As an initial matter, the Agreement obligates EBF to pay Capsule commissions on all Renewals. *See* Zimmerman Decl., Ex. 1 ¶ 2(A) and Schedule A. Nothing in the Agreement states that Renewal commissions terminate upon the termination of the Agreement. Rather, EBF is required to pay Capsule commission “within one (1) business day after the Initial Funding or the Renewal. Zimmerman Decl., Ex. 1 ¶ 2(A).

**ii. Even If EBF’s Obligations Were Affected by Its Termination, the Agreement is Silent As To Whether Commissions Survive Termination of the Agreement**

Even if Paragraph 2(A) could somehow be limited by the termination of the Agreement, the Agreement, which is governed under Delaware law, is silent as to whether the commissions survive the termination of the Agreement. Zimmerman Decl., Ex. 1 at, ¶ 5.

Under Delaware law, where a contract is silent on an issue, the court may resort to extrinsic evidence to ascertain the parties' intent. *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at \*41 (Del. Ch. May 13, 2013) ("The LLC Agreement is silent on this matter, and so it is necessary to look to extrinsic evidence to determine the parties' intent."); *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del.1997) ("Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."). When "considering extrinsic evidence, the Court should uphold, 'to the extent possible, the reasonable shared expectations of the parties at the time of contracting.'" *S'holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at \*16 (Del. Ch. Mar. 15, 2017). Further, "[i]n giving effect to the parties' intentions, it is generally accepted that the parties' conduct before any controversy has arisen is given great weight." *Id.*

Where there is an ambiguity or contractual silence on an issue the Court will examine the extrinsic evidence presented by the parties "which may include statements and conduct of the parties, business circumstances surrounding the execution of the contract, any course of dealing between the parties, and any usage of trade or industry custom." *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at \*19 (Del. Ch. Mar. 30, 2017) (internal citations omitted). Finally, the Court should, "where possible, avoid an interpretation that would render any provision illusory or meaningless." *Id.*

While further discovery may be necessary to cover all parol evidence regarding the intent of the parties for payment of commissions after termination, the following parol evidence strongly favors Capsule's position.

First, the industry standard requires the payment of commissions on Renewals after termination of an agreement between a referral service and a Purchaser. Zimmerman Decl. ¶ 15. Capsule has been in the Capsule Business for over four years, referring over 1,500 merchants for over \$40,000,000. *Id.* at ¶ 16. Capsule has worked with over ten different Purchasers. *Id.* The agreements with all such Purchasers provide for payment of Renewal commissions after termination of the agreement. *Id.* at ¶ 17; Ex. 2.

Second, EBF's interpretation of the Agreement simply makes no sense. If EBF is able to terminate the Agreement at any time it so chooses and it does not have to pay commissions on Renewals, there is no incentive to prevent EBF from simply terminating the Agreement (as it did) once it obtained a critical mass of referred merchants. It could then keep all of those referrals and sell Renewals without ever having to pay Capsule commissions on the Renewals. EBF's interpretation renders the commission payment terms of the Agreement illusory and meaningless.

Third, EBF itself was equivocal on its obligations regarding Capsule Referred Merchants after termination of the Agreement. In an email between EBF and Capsule's representative, Eitan Zimmerman, after the Improper Termination, Mr. Zimmerman sought confirmation of what EBF had told him on the telephone call implementing the Improper Termination.

"Please confirm what you told me on the phone. ***You guys will not be funding any of our current deals for renewal.*** Further, you will be assisting in getting me Pay off letters and ZBL's [Zero Balance Letters] in order to move them from ebf."

*Id.* at ¶ 18 & Ex. 3.

Contrary to EBF's initial position, relayed orally to Mr. Zimmerman, an EBF representative stated:

“[a]s far as renewals, I had asked my Executive if we will be funding your renewals, he had thought I was asking if we would be paying you on renewals from here on out, to which he responded no. However, deals that are performing in Everest ***will be renewed*** if the Merchant follows up with us.”

*Id.*, Ex. 3.

In short, EBF itself was unsure how to handle payment of commissions after termination. However, once given the opportunity to review their obligations under the Agreement, EBF chose to unjustly withhold payment of Renewal commissions related to Capsule Referred Merchants. It is clear from the above parol evidence that Capsule is entitled to payment of Renewal commissions.

Furthermore, case law supports Capsule’s position as well. In *Silver Lake Office Plaza, LLC v. Lanard & Axilbund, Inc.*, the Court held that though the contract was silent, the contract language indicated that renewals on brokerage commissions would be paid even after the termination of the agreement because “[t]he obligations created by the Agreements will end when Plaintiffs cease to renew them.” 2014 WL 595378, at \*8 (Del. Super. Ct. Jan. 17, 2014). The Court explained that “[i]t appears unreasonable to the Court that the Defendant would be entitled only to renewals, extensions, and expansions during the sixteen months of the Agreements and tail period.” *Id.*

Similarly, in *Gallagher v. Holcomb & Salter*, the court allowed commissions for renewal of insurance premiums to be paid after the termination of the contract. 1991 WL 158969, at \*3 (Del. Ch. Aug. 16, 1991), *aff’d sub nom. New Castle Ins., Ltd. v. Gallagher*, 692 A.2d 414 (Del. 1997).

Such commissions after termination are permitted because Capsule is the “procuring cause” of the transaction, and without Capsule, no Initial Funding (let alone Renewal) would ever have occurred. *See, e.g., Great Lakes Steel Corp. v. Baysoy*, 52 Del. 340, 157

A.2d 902 (1960) (finding to recover commissions from his principal, broker must have been procuring cause of sale, that is, his efforts must have brought parties together and led directly to consummation of transaction). Capsule must be compensated for its efforts.

Here, as described above, a reasonable person in the referral business would expect to continue being paid on Renewals after the term of the agreement if he was paid on such renewals during the term of the agreement. Moreover, the industry standard, and Capsule's own veteran experience in the industry confirms this position. As such, Capsule will succeed on the merits of its claim to the Renewal commissions regardless of the status of the termination of the Agreement.

### **iii. The Agreement Must Be Read Against the Drafting Party**

Even if the Agreement is silent as to Capsule's entitlement to Renewal commissions after termination, that silence must be read in Capsule's favor, as it is the non-drafting party. "If the contractual language at issue is ambiguous and if the [defendant] did not negotiate for the agreement's terms, we apply the contra proferentem principle and construes the ambiguous terms against the drafter. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013). Here, EBF uses its own form agreement and did not allow Capsule to negotiate the Agreement's terms. Zimmerman Decl. at ¶ 21. As such, where the Agreement is silent as to EBF's obligations to pay Renewal commissions after termination, such silence must be construed in Capsule's favor.

In short, Capsule will likely succeed on the merits of its claim that it is entitled to Renewal commissions regardless of EBF's termination of the Agreement. Nothing in the Agreement limits payment of the commissions, the Agreement is silent as to EBF's obligations to Capsule after termination and the Agreement must be read against EBF, as the

drafting party. However, merely obtaining commissions for Renewals made by EBF at the conclusion of this lawsuit will not suffice. Capsule must have access to Capsule Referred Merchants in order to solicit them to be funded either by EBF or another Purchaser. Otherwise, as discussed further, Capsule will be irreparably harmed even if it succeeds in this action.

**B. Capsule Will Suffer Irreparable Harm If the Temporary Restraining Order and Preliminary Injunction Are Not Entered**

If this Motion is not granted, Capsule will suffer irreparable harm. This Motion does not seek payment of Renewal commission with respect to Capsule Referred Merchants. Rather, Capsule seeks to access to the Portal so it can solicit Renewals with Capsule Referred Merchants. In the alternative, Capsule seeks to enjoin EBF from funding Capsule Referred Merchants until after the Lock Out Period so that EBF is not benefiting from Capsule's efforts without compensating Capsule.

Left alone, EBF would squander the Renewal opportunities such that by the conclusion of the action, very few commissions would have accrued to Capsule. As EBF's own ISO Relations manager stated in an email to Mr. Zimmerman, "deals that are performing in Everest will be renewed *if the Merchant follows up with us.*" (emphasis added). Zimmerman Decl. ¶ 19; Ex. 3.

As any experienced sales-based business knows, to ensure that merchants renew, Capsule must follow up with the Capsule Referred Merchants and not stand by idly while waiting for a Capsule Referred Merchant to request a Renewal from EBF. *Id.* at ¶ 22. Capsule can only be guaranteed a return on its investment if it is permitted to actively solicit the referrals it brought to EBF. *Id.* The loss of the prospective Renewals irreparably harms Capsule. *Merrill Lynch, Pierce, Fenner Smith, Inc. v. Price*, 1989 WL 108412, at \*2-4 (Del.



Ch. Sept. 13, 1989) (concluding that irreparable harm had been shown in that damages resulting from solicitation of plaintiff's customers are incalculable because one cannot know how customers would have behaved in the absence of defendant's solicitation); *see also Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (holding that a loss of customers and, consequently, future profits is an irreparable harm sufficient to justify issuance of injunctive relief); *ZRII v. Wellness Acquisition Group*, 2009 WL 2998169, at \*13 (Del. Ch. Sep. 21, 2009) ("Further, the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief."); *Singh v. Envt'l. Assocs., Inc.*, 2003 WL 21039115, at \*9 (Del. Ch. May 21, 2003) (loss of customers recruited by former employer was impossible to calculate and constituted irreparable harm in context of a request for injunctive relief).

Moreover, if Capsule is not permitted to solicit Renewals or find other funding for the Merchants, its damages would be nearly impossible to quantify. Zimmerman Decl. ¶ 23. This is because it is impossible to quantify which Merchants would have signed up had Capsule solicited them and which ones would not. *Id.*; *Roseton OL, LLC v. Dynegy Holdings Inc.*, 2011 WL 3275965, at \*17 (Del. Ch. Jul. 29, 2011) (Irreparable harm found "in cases where an after-the-fact attempt to quantify damages would 'involve [a] costly exercise[ ] in imprecision' and would not provide full, fair, and complete relief for the alleged wrong") quoting *N.K.S. Distributors, Inc. v. Tigani*, 2010 WL 2367669, at \*5 (Del. Ch. Jun. 7, 2010).

**C. The Threatened Injury to Capsule Far Outweighs Any Harm that the Temporary Restraining Order and Preliminary Injunction May Impose on EBF.**

Put simply, if the Court grants this Motion, there will be no harm imposed on EBF. In fact, EBF will actually gain a financial benefit because Capsule will be able to procure

Renewals with Capsule Referred Merchants at a higher success rate than EBF would if EBF even attempted to obtain the Renewals. Zimmerman Decl. ¶ 20. This is particularly true given that EBF admitted in its email to Mr. Zimmerman that it will only renew those merchants that follow up with EBF on their own. Zimmerman Decl. ¶ 19. The more Renewals Capsule obtains, the more money EBF will make.

EBF's only claim to harm as a result of the Court granting this Motion could be that, but for the Court granting this Motion, EBF would be able to keep the Renewal commissions owed to Capsule. But this argument immediately fails. EBF is not entitled to the Renewal commissions on Capsule Referred Merchants. Accordingly, there is no legal harm to EBF.

**D. The Temporary Restraining Order and Preliminary Injunction Sought by Capsule Are in the Public Interest**

The public has a clear interest in the enforcement of the contractual obligations of parties to contracts. “[T]he wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations.” *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005). The public interest also favors an injunction because Capsule is likely to prevail on the right to pursue Renewals and obtain Renewal commissions and the Renewals will be squandered, without the relief sought by this Motion, causing irreparable harm to Capsule. See Arguments Parts A and B. “[I]f a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994).

**CONCLUSION**

Based on the foregoing, Capsule respectfully requests the Court enter an order that (1) EBF return Capsule to the status quo prior to termination by returning Capsule's access to the Portal and allowing Capsule to directly solicit Capsule Referred Merchants; or, in the alternative (2) that EBF is enjoined from renewing Capsule Referred Merchants until after the Lock Out Period.

OF COUNSEL:

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