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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** **H&R BLOCK, INC., a foreign corporation; H&R BLOCK SERVICES, INC., a foreign corporation; H&R BLOCK ENTERPRISES, INC., a foreign corporation; H&R BLOCK TAX SERVICES, INC., a foreign corporation; BLOCK FINANCIAL CORPORATION, a foreign corporation; HRB ROYALTY, INC., a foreign corporation; and DOES 1 through 50, inclusive,** Defendants.	CASE NO.: [Action filed on February 8, 2006] **PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS & AUTHORITIES; SUPPORTING DECLARATION OF SETH E. MERMIN; AND DECLARATION RE NOTICE OF SETH E. MERMIN** Hearing Date: February 9, 2006

EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiff, the People of the State of California, through Bill Lockyer, Attorney General, by Seth E. Mermin, Deputy Attorney General, applies to this Court for a temporary restraining order and an order to show cause why a preliminary injunction should not issue that would prevent the above-named Defendants and their agents, employees, officers, representatives, successors, partners,

assigns, and all persons acting in concert or participating with them, from participating in, aiding, abetting, conspiring in or otherwise furthering the collection or attempted collection of any debt in violation of the provisions of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.), the Rosenthal Fair Debt Collection Practices Act (Civil Code § 1788 et seq.), and/or the Unfair Competition Law (UCL) (Business and Professions Code § 17200 et seq.).

The specific injunctive language requested is set forth in the Proposed Order lodged with this application.

This application is made on the grounds that Defendants have engaged in and remain engaged in unlawful, unfair, or deceptive business practices, specifically by participating in, aiding, abetting, conspiring in and otherwise furthering the collection of debts from their tax preparation clients in a manner that fails to provide those clients with notice of the amount of the debt they are alleged to owe and to whom they are alleged to owe it before they are subscribed to a process which results in the payment of the purported debt. Defendants offer to arrange a "refund anticipation loan" (RAL) or related product for their tax preparation clients, but the loan agreement requires the clients to authorize in advance the collection of any debt that they may owe to Defendants, Defendants' partner banks, or "other" RAL lenders. These practices violate the California Rosenthal Fair Debt Collection Practices Act (Civil Code § 1788 et seq.) and the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) and, therefore, Business and Professions Code section 17200.

This application is based on the application itself, the complaint, the memorandum of points and authorities, the declaration of Seth E. Mermin, the declaration regarding notice of Seth E. Mermin, the proposed temporary restraining order and order to show cause re preliminary injunction, and such evidence and argument as may be presented at the time of the hearing or of which the Court may take judicial notice. Plaintiff has not previously applied for similar relief.

Pursuant to California Rule of Court 379(b), the following names, addresses, and telephone numbers for Defendants are known to Plaintiff:

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1. H & R Block, Inc.
4400 Main Street
Kansas City, Missouri 64111

2. H&R Block Services, Inc.
4400 Main Street
Kansas City, Missouri 64111

3. H&R Block Enterprises, Inc.
4400 Main Street
Kansas City, Missouri 64111

4. H&R Block Tax Services, Inc.
4400 Main Street
Kansas City, Missouri 64111

5. Block Financial Corporation
4400 Main Street
Kansas City, Missouri 64111

6. HRB Royalty, Inc.
4400 Main Street
Kansas City, Missouri 64111

To the best of Plaintiff's knowledge, Corporate Counsel for each of these Defendants is

Steven A. Christiansen, Esq.
4400 Main St.
Kansas City, Missouri 64111
(816) 932-8492 (phone)
(816) 753-8628 (fax)

To the best of Plaintiff's knowledge, each of these Defendants is or will be represented for purposes of this action by

Jeffrey L. Bleich
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DATED: _____, 2006

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Deputy Attorney General

By: _____
SETH E. MERMIN

Attorneys for Plaintiff,
The People of the State of California

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, the People of the State of California, seeks to enjoin Defendants from participating in a scheme that takes advantage of low-income taxpayers by getting them to "agree" to having their tax refunds seized to pay off "any delinquent debt" *before* telling them how much they supposedly owe, or to whom. This scheme violates the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) (FDCPA), which requires both prior notice and that the notice not be overshadowed or contradicted by other messages. (*Swanson v. Southern Oregon Credit Serv., Inc.* (9th Cir. 1988) 869 F.2d 1222, 1225). The FDCPA prohibits "requiring a payment that would eliminate the debt before the debtor can challenge the validity of that debt." (*Terran v. Kaplan* (9th Cir. 1997) 109 F.3d 1428, 1434.) Because a violation of the FDCPA is by definition "unlawful" under the Unfair Competition Law (UCL), preliminary injunctive relief under the UCL is in order. (Bus. & Prof. Code §§ 17200, 17203; *Saunders v. Super. Ct.* (1994) 27 Cal. App. 4th 832, 838-839.)

Defendants (collectively "H&R Block" or "Block" or "the company") are widely known for preparing tax returns and offering tax advice. Less well known is Block's participation in and facilitation of an unlawful debt collection program. Block aggressively advertises its ability to procure money swiftly for its clients, primarily through loans against clients' anticipated tax refunds. Taxpayers – especially low-income taxpayers – come to Block seeking that quick access to money at tax time. (Declaration of Seth E. Mermin [Mermin Decl.], ¶ ¶ 6, 15, Exhs. 5, 14.) If Block or any other participant in the scheme claims that a taxpayer owes delinquent debt, however, the expectation of a quick loan is a chimera. The loan application is denied (though the client is still charged a fee), and just applying for the loan has (according to the application form) bound the clients to a collection process under which their tax refunds will be diverted and seized to pay off their purported debts.

This process violates the FDCPA. Section 1692g of the Act requires that a debt collector must provide a taxpayer, either in its initial communication or within five days thereafter, a written "validation" notice containing, inter alia, (1) the amount of the debt; (2) the name of the creditor; and (3) a statement that the consumer has thirty days to dispute the validity of the debt. "[The

notice] must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency." (*Swanson, supra*, 869 F.2d at p. 1225.) "A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." (*Russell v. Equifax A.R.S.* (2d Cir. 1996) 74 F.3d 30, 35.) Here, the initial communication with the consumer is an application for a refund-based loan (or related product). The form, content and use of this document all patently overshadow and contradict any subsequent validation notice.

Once the application is signed and Block has sent the tax return to the IRS (with the lender designated as the recipient of the tax refund), the refund will inexorably be sent to and remain under the control of the lender/debt collector for distribution to whichever of the participating creditors may lay claim to it. If consumers have applied for a loan, they cannot stop the seizure of their refund even if they cancel the loan.

This scheme plainly contradicts and overshadows the message that taxpayers may challenge the validity of debts they are claimed to owe. Even if the debt collector provides a validation notice subsequently, the application's purported agreement to the collection of any such debt has already contradicted, and would continue to overshadow, such a notice.

The debt collection operation here is barred by the federal FDCPA and California's Rosenthal Fair Debt Collection Practices Act (Rosenthal FDCPA) for the additional reasons that it includes "deceptive or misleading" representations to consumers as well as "unfair or unconscionable" debt collection practices. (15 U.S.C. §§ 1692e, 1692f; Civ. Code § 1788.17.) These representations and practices are also judged by how they would be perceived by the "least sophisticated consumer." (*Terran, supra*, 109 F.3d at p.1431.)

The lending bank may be the "debt collector," but Block is deeply involved in fostering and facilitating the unlawful scheme: Block personnel offer their clients the option of loans from the lender/debt collector against anticipated refunds, supply the lender's loan application to the clients, obtain the clients' signatures, deliver the loan applications to the lender, and, in most cases, receive the loan proceeds for delivery to the clients.

Violations of the federal and state FDCPAs in turn violate California's Unfair Competition

Law. Pursuant to Business and Professions Code section 17203, the People seek to restrain and enjoin Defendants' continuing participation in these unlawful, unfair, fraudulent, and deceptive debt collection practices pending the hearing on the order to show cause and during the pendency of this lawsuit.

II. FACTUAL BACKGROUND

H&R Block is in the business of providing tax preparation services and tax advice to its clients. The company holds itself out to clients and potential clients as a trusted advisor. (See, e.g., Mermin Decl., ¶ 4, Exh. 3.) It "promise[s] to take the time to understand your individual needs, offer personalized advice and provide you every advantage for today and tomorrow through a long-term relationship." (Mermin Decl., ¶ 5, Exh. 4.)

A. Refund Anticipation Loans

Block touts its ability to get money back fast to its clients. It aggressively markets refund anticipation loans (RALs), especially the so-called "Instant Money" same-day loan. (See e.g., Mermin Decl., ¶ 6, 7, Exhs. 5, 6.) A RAL is a loan offered to H&R Block clients based on and secured by their anticipated tax refund. Toward the end of Block's "tax interview" with a client, if Block's "tax professional" has determined that a client is entitled to a federal tax refund, that "trusted" expert offers the client (using Block software on the computer screen) the option of applying for a RAL. (Mermin Decl., ¶ 8, Exh. 7.)

Block is prohibited by law from providing its own refund anticipation loans. (IRS Publication 1345, *Handbook for Authorized IRS e-File Providers*, available at www.irs.gov/efile, at p. 44.) Though the loan is technically offered by Block's partner bank, it is the Block tax professional who provides and completes the loan application with the client, offers whatever review, if any, of its terms the client receives, obtains the client's signature, and submits the completed application to the bank. (Mermin Decl., ¶ 9, Exh. 8.) In most cases, Block also delivers the proceeds of the loan by a check to the client at the Block office. (Mermin Decl., ¶ 10, Exh. 9.) As a general matter, the client who applies for and receives a RAL has no direct contact with the lender – only with Block. Loan charges for a RAL include various fees, including a so-called "account fee" and interest.

Once Block has submitted its client's loan application, Block's partner bank determines

whether to approve or deny the loan. If the lender approves the RAL application, the loan proceeds generally arrive in approximately 2 days. "Instant Money" RAL proceeds generally arrive the same day the application is made. (Mermin Decl., ¶ 2, Exh. 1.) Receiving one's refund directly from the IRS generally takes some 8-15 days (if the refund is received by direct deposit) or 21-28 days (if the refund check is sent by mail). (Mermin Decl., ¶ 11, Exh. 10.)

Whether or not the loan is approved, once the tax return is sent to the IRS and the loan application is sent to the lender, the lender is irrevocably designated with the IRS as the recipient of the client's tax refund. The lender establishes a so-called "account" in the client's name for the sole purpose of securing the loan by receipt of the client's tax refund from the IRS. The client cannot make deposits or withdraw funds from this collection "account." Once the refund is received, the bank repays any charges or fees owed itself or others, forwards the remainder to the client (generally through Block), and closes the "account." (Mermin Decl. ¶ 2, Exh. 1.)

B. Refund Anticipation Checks

Generally, H&R Block requires payment of tax preparation and other fees at the time of the tax interview. H&R Block allows clients to defer payment of those fees either if they get a RAL, or if they pay the charge for a "refund anticipation check" (RAC). With a RAC, Block defers receipt of payment until the IRS issues the clients' refunds, generally 8-15 days after the tax interview. (Mermin Decl., ¶ 11, Exh. 10.)

Following preparation of a tax return that shows the client is entitled to a tax refund, Block presents clients with the option of a RAC. Block's "tax pro" completes the RAC application form with the client, obtains the client's signature, and submits the application to the partner bank. The bank sets up the temporary "account." When the bank receives the client's refund from the IRS, it pays from it all fees for tax preparation and other Block services as well as the fees for the RAC itself, before distributing the remainder, either via Block (if provided by check) or to the client's own bank account (if by direct deposit). (Mermin Decl. ¶ 3, Exh. 2.) Clients receive money from the RAC about 8-15 days after Block submits their return and RAC application, the same amount of time that it would have taken to receive their tax refund directly (and without the RAC fee) from the IRS by direct deposit. (Mermin Decl., ¶ 11, Exh. 10.)

C. The Automatic Debt Collection Process

Every RAL and every RAC application Block presents to its clients also contains what purports to be an agreement by the client to allow unspecified pre-existing debts to be collected by Block's partner bank from the tax refund proceeds. The agreement purports to allow collection of all debts (even those that can no longer be collected through legal process) other than debts discharged in bankruptcy. (See Mermin Decl., ¶¶ 2, 3, Exhs. 1, 2.)

Neither the bank/debt collector nor Block discloses to a RAL or RAC applicant whether that applicant is actually considered to owe any such debt, and if so to whom, before the taxpayer signs the application and the tax return is sent to the IRS. Yet by submitting the application, the taxpayer becomes irrevocably bound to have the IRS deliver the tax return to the bank/debt collector. Even if consumers cancel the loan, they cannot get their refund sent to them directly. (Mermin Decl., ¶ 2, Exh. 1.) The RAL or RAC program thus becomes an elaborate and inescapable debt-collection process. By signing the application, taxpayers are bound to have automatically deducted from their tax refund when it arrives in the temporary "account" whatever amount is claimed to be owed to H&R Block, or its partner bank, or any other participating RAL lender or tax preparer with whom the taxpayers may have dealt in the past.

If applicants for a RAL are claimed to owe past RAL debt, the loan is denied. Instead of receiving loan proceeds in one to two days, these taxpayers now receive a RAC instead, and must therefore wait for some 8-15 days for their refunds to arrive from the IRS. They are still treated, however, as bound by the terms of the loan application, including payment of a fee for the collection account (the "RAC fee"), and the amount of the alleged previous debt is still deducted from their refund when it arrives from the IRS in the that "account." The clients then receive in a RAC (for which they did not apply) whatever, if anything, remains of their tax refund after deductions for alleged past debts, Block fees, and the RAC fee. (Mermin Decl., ¶ 3, Exh. 2.)

Taxpayers may therefore not only obtain an amount far less than they anticipated, but also obtain it up to two weeks after the time it was anticipated – a period that may occasion missed deadlines for rent, utilities, or other payments. (Mermin Decl., ¶ 12, Exh. 11.) It is also the *same* time period in which the taxpayers could have received their refunds directly from the IRS by direct

deposit if they had a bank account, without paying any loan fees and without being subjected to extraordinary debt collection measures. (Mermin Decl. ¶ 11, Exh. 10.) If the partner bank later provides "notice" to clients of the amount of their alleged debt or the creditor to whom it is supposedly owed, that notice is provided only after the taxpayers have already committed irrevocably to the bank's seizing their tax refund in the temporary "account" and determining whether to "repay" itself or another alleged creditor from the refund. (Mermin Decl., ¶ 2, Exh. 1.)

Applicants for a RAC who are purported to owe delinquent debt face a similar dilemma. Once they have submitted their application, there is simply no way for them to prevent their refund from being seized. As with a RAL, at no time before actually applying for a RAC and thereby irrevocably triggering the collection process are H&R Block clients so much as informed whom it is they supposedly owe a debt, or what the amount of that debt might be. (Mermin Decl., ¶ 3, Exh. 2.)

H&R Block benefits from the debt collection process not only through recovering its own alleged past-due tax preparation fees and other charges, but also – because it has in the past purchased up to a 49.99% interest in its clients' RALs – through the recovery of the unrepaid balance of those loans. (Mermin Decl., ¶ 14, Exh. 13.) Thus, in addition to the "license fees" for RALs and RACs it has already received from the bank, Block is able to recover its portion of the RAL fee as well as the outstanding unrepaid loan proceeds. (*Ibid*.)

The RAL and RAC applications given to Block's clients have contained, to varying degrees, generic notices that Block or its partner banks "may be acting as a debt collector." (See Mermin Decl., ¶¶ 2, 3, Exhs. 1, 2.) Some of these notices have named other banks that may also be involved. (*Ibid*.) But according to Block's own documents, Block's clients have not been offered more than this generic warning amidst the welter of papers and provisions involved in the tax preparation and RAL or RAC application processes. For instance, neither the documents that Block gives its clients, nor the trusted "tax professionals" who provide confidential advice to clients, directly alert customers with delinquent debt that they should not apply for a RAL because they will not receive one – only a RAC and a debt collection process. (Mermin Decl., ¶¶ 2, 3, 9, Exhs. 1, 2, 8.)

The RAL and RAC application forms portray the automatic debt collection process as a benefit to the clients, who – the forms state – agree to the process in exchange for "the ease and

convenience" of this manner of paying their debt. (See Mermin Decl., ¶¶ 2, 3, Exhs. 1, 2.) The forms offer no other reason why a taxpayer would benefit.

The lack of disclosure about the claimed debts before clients have "agreed" to pay them is compounded by the demographic background of those clients. Seventy percent of the Block's RAL and RAC clients are eligible for the federal Earned Income Tax Credit (EITC), as compared with some seventeen percent of the population as a whole that receives the EITC. (Mermin Decl., ¶ 15, Exh. 14; Wu & Fox, *Another Year of Losses: High-Priced Refund Anticipation Loans* (Nat. Consumer Law Ctr. 2006), available at http://www.consumerlaw.org/action_agenda/refund_anticipation/content/2006RALReport.pdf, p. 9.) That is, the advertisements, other solicitations and loan applications are targeted to members of the "working poor" whose average education level and lack of financial sophistication make them less likely than the population at large to understand the implications of generic statements about debt collection or the consequences of the process to which they are agreeing. (See Berube & Kornblatt, *Step in the Right Direction* (Brookings 2005), available at http://www.brookings.edu/ metro/pubs/20050412_eitcdecline.pdf, pp. 2-4; Wu & Fox, *Tax Preparers Peddle High Priced Tax Refund Loans* (Nat. Consumer Law Ctr. 2002), available at http:/www.consumerlaw.org/action_agenda/refund_anticipation/content/ RAL_ final.pdf).

D. Tax Season 2005 and Current Practices

Beginning before the 2005 tax season, Plaintiff communicated concerns to Block about various of Block's business activities, including the collection activities at issue here. In 2005, Block made a number of changes, including temporarily changing the debt collection program. Under the revised program, applicants for a RAL were still denied, and their refund was still directed to the bank's "account"; however, the third-party debts these taxpayers purportedly owed were not automatically deducted from their refund amounts. Instead, when the alleged debtors came back to the Block office to pick up their RAC checks, they were informed of the amount of the debt and identity of the creditor, and were generally provided with two checks made out in their name. One check was in the amount of the debt(s) which the taxpayer purportedly owed, the other for the remainder of the refund (if any). The taxpayers were given, as they had not been in previous years, the opportunity to *choose* the "ease and convenience" of the debt-collection process by signing the

debt-check over to the partner bank and sending it in the addressed, stamped envelope provided. (Mermin Decl., ¶ 16, Exh. 15.)

Defendants have abandoned that process for 2006. (Mermin Decl., ¶ 17, Exh. 16.) Instead, H&R Block has reverted to a system under which taxpayers who seek a RAL or RAC have their refunds seized if they are alleged to owe delinquent debt. (*Ibid*.)

III. DISCUSSION

Defendants are participating in, aiding and abetting, and conspiring in an unlawful debt collection regime in defiance of the explicit dictates of California and federal law. With respect to debts from prior years purportedly owed to Block or RAL lenders other than the bank/debt collector, the first contact between the debt collector and Block's clients is via the RAL or RAC applications which Block provides. Those applications do not give notice of the debt the Block clients supposedly owe, to whom it is owed, or of their right to contest the debt. Block knows the terms of those agreements contradict and overshadow any subsequently provided notices, yet continues to participate in and carry out agreements fostering these unlawful debt collection practices.

A. The Temporary Restraining Order and Preliminary Injunction Seek Nothing More Than Compliance with the Law

These practices violate both the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) and California's Rosenthal FDCPA (Civil Code § 1788.17), and therefore the state's Unfair Competition Law (Bus. & Prof. Code § 17200 et seq.) as well.

1. Defendants Are Violating the Federal FDCPA

The purpose of the federal FDCPA is to "eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses." (15 U.S.C. § 1692(e); *Alkan v. Citimortgage, Inc.* (N.D. Cal. 2004) 336 F.Supp.2d 1061, 1064-1065.) The act "is remedial in nature, [so] its terms must be construed in liberal fashion" to protect the consumer. (*N.C. Freed Co. v. Board of Governors*, (2d Cir. 1973) 473 F.2d 1210, 1214; *Bracken v. Harris & Zide, L.L.P.* (N.D. Cal. 2004) 219 F.R.D. 481, 484.) The federal FDCPA imposes strict liability upon debt collectors. (15 U.S.C. § 1692k(c); *Russell*,

supra, 74 F.3d at pp. 33-34; *Irwin v. Mascott* (N.D.Cal. 2000) 112 F.Supp.2d 937, 958.) The protections offered by the Act cannot be waived. (*Spears v. Brennan* (Ind. App. 2001) 745 N.E.2d 862, 876.) In addition, the Act's provisions apply regardless of whether the consumer actually owes the alleged debt. (*Baker v. G.C. Services Corp.* (9th Cir. 1982) 677 F.2d 775, 777.)

a. Section 1692g: Validation

Section 1692g of the federal FDCPA provides that either in its initial communication or "[w]ithin five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall" provide written notice containing

> (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector....

Block's clients receive none of these items during their visit to a Block office, despite the fact that upon completing their "tax interview" and applying for a RAL or a RAC they have in essence agreed to "repay" any tax-preparation-related debt they may be claimed to owe.

Under the federal FDCPA, the standard to be applied is particularly solicitous of the consumer. The provisions of the FDCPAs are interpreted from the perspective of the "least sophisticated debtor," a standard "lower than" that of the "reasonable debtor." (*Swanson, supra*, 869 F.2d at p. 1227.) In the context of section 1692g, "an objective standard, measured by how the 'least sophisticated consumer' would interpret the notice received from the debt collector, is applied." (*Russell, supra*, 74 F.3d at p. 34.) The "unsophisticated consumer is to be protected against confusion, whatever form it takes." (*Bartlett v. Heibl* (7th Cir. 1997) 128 F.3d 497, 500.) To comport with the federal FDCPA, "[a] debt validation notice . . . must be effective." (*Avila v. Rubin* (7th Cir. 1996) 84 F.3d 222, 226.) The manner in which it is presented may not "eviscerate its message." (*Ibid*.) It must be designed to inform "the uninformed, the naive, the trusting." (*Ibid*.) This inquiry into "confusion," "overshadowing" or "contradiction" is a question of law. (*Terran, supra*, 109 F.3d at p. 1432.)

To be effective, a validation notice "must not be overshadowed or contradicted by other messages or notices appearing in the initial communication from the collection agency."

(*Swanson, supra*, 869 F.2d at p. 1225; accord *Graziano v. Harrison* (3d Cir. 1991) 950 F.2d 107, 111; *Miller v. Payco-General American Credits, Inc.* (4th Cir. 1991) 943 F.2d 482, 484-485.) "A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." (*Russell, supra*, 74 F.3d at p. 35.) Subsequent communications may not contradict the fundamental message of the validation notice: that an alleged debtor has 30 days in which to contest the validity of the asserted debt. (See, e.g., *id.* at pp. 34-35; *Barrientos v. Law Offices of Mark L. Nichter* (S.D.N.Y. 1999) 76 F.Supp.2d 510, 513.)

The situation in this case is still more egregious than those that courts have found contradict or overshadow the validation notice. Unlike those cases, here the collection takes place even *before* the validation notice is sent. Such an arrangement violates the fundamental premise of section 1692g: that all debtors are entitled to know the amount of the debt they are alleged to owe and to whom they are alleged to owe it before they can be required to pay the debt. Seizing the debt before issuing the required notices turns this premise on its head. (*Swanson, supra*, 869 F.2d at p. 1225.)

Plainly the "least sophisticated debtor" would experience "confusion" (*Bartlett, supra*, 128 F.3d at p. 500) if faced with a validation notice regarding a purported debt when the funds to pay the debt were already under the control of the debt collector. After all, the initial communication from the debt collector – the application – has required the alleged debtor to sign a document stating that "I authorize and direct payment" of "any delinquent debt." (Mermin Decl., ¶¶ 2, 3, Exhs. 1, 2.) It is similarly plain that a subsequent message to that unsophisticated debtor that he or she has 30 days in which to contest the validity of a debt is overshadowed and contradicted by the fact that money in the amount of the debt has already been seized. (Mermin Decl., ¶ 17, Exh. 16.) As noted, "requiring a payment that would eliminate the debt before the debtor can challenge the validity of that debt directly conflicts with the protections for debtors" set forth in the Act. (*Terran, supra*, 109 F.3d at p. 1434.)

b. Section 1692e and 1692f: Deception and Unfairness

Defendants' collect-first, inform-later collection scheme violates not only the validation notice provisions of section 1692g of the federal FDCPA, but also sections 1692e and 1692f of

the Act.

Section 1692e forbids the use of "deceptive or misleading representation or means in connection with the collection of any debt." Section 1692e(10) of the federal FDCPA specifically prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Practices that violate section 1692g also run afoul of section 1692e(10). (See, e.g., *Russell, supra,* 74 F.3d at p. 35; *Barrientos, supra,* 76 F.Supp. at p. 513.) Defendants' failure adequately to inform their clients that they are considered debtors and that their tax refunds will be seized constitutes a "deceptive means to collect or attempt to collect any debt." Because Block holds itself out as a trusted advisor on tax and financial matters, its active participation and financial interest in the debt-collection scheme are that much more egregious.

Section 1692f prohibits "unfair or unconscionable means to collect or attempt to collect on a debt." As with 1692e, a practice need not be among those specifically enumerated in order to be deemed unfair under the Act. (15 U.S.C. § 1692f; *Adams v. Law Offices of Stuckert and Yates* (E.D.Pa. 1996) 926 F.Supp. 521.) The use of a debt collection program that involves placing alleged debtors' tax refunds into a collection process without first advising those clients that they are believed to be debtors constitutes just such an "unfair or unconscionable means" of debt collection. Similarly, it is unfair for a debt collector first to take possession of an alleged debtor's money via a RAL or RAC and only then to allow the debtor to "contest" the validity of the debt. Indeed, the debt collection scheme faced by Block's clients is *per se* unfair. Thousands of Block's clients with alleged delinquent debt have applied for RALs, in the presence and with the assistance of a trusted "tax professional," despite the certainty (had their status as alleged debtors been revealed) that the loan would be denied. (Mermin Decl., ¶ 18, Exh. 17.) To these clients there was no benefit whatsoever, only loss: of part or all of the money they expected to receive as an advance on their refund, of the non-refundable "account" fee, and of the hope and expectation that they could receive money in a day or two. It is self-evident that these clients were not adequately notified of the debt they allegedly owed or the consequences of applying for a RAL. In such circumstances, the RAL application is a manifestly "unfair or

unconscionable" contract.

2. Defendants Are Violating the Rosenthal FDCPA

The federal FDCPA specifically saves from preemption state laws, like the Rosenthal FDCPA, that afford consumers a protection "greater than the protection provided by" the federal Act. (15 U.S.C. § 1692n; *Alkan*, *supra*, 336 F.Supp.2d at p. 1034-1035.)

The state fair debt collection law has as its purpose "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts . . . ." (Civ. Code § 1788.1.) To that end, section 1788.13(i) of the Civil Code provides that "[n]o debt collector shall collect or attempt to collect a consumer debt by means of . . . . [t]he false representation of the true nature of the business or services being rendered by the debt collector." But Block's partner lenders, with Block's active assistance, have offered RALs to alleged debtors while in effect operating a "bait-and-switch": instead of the loan they thought they were signing up for, Block's clients in fact are subscribing to be victims of an unfair debt collection scheme.

Section 1788.17 of the Civil Code provides that "every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of" the federal FDCPA, with exceptions for certain initial notice and validation requirements. Defendants' violations of sections 1692e and 1692f of the federal FDCPA therefore constitute violations of the Rosenthal FDCPA as well. In addition, Block's facilitation of its partner banks' collection of their own debts (as opposed to collecting debts for other lenders or tax preparers) is subject to the state FDCPA, which it is not under the federal Act.

3. Block Plays an Intrinsic Role in the Debt Collection Scheme

Because H&R Block participates in, knowingly facilitates, and agrees to debt collection by its partner banks for moneys owed to those banks, and collection of Block's own debts in the form of past-due fees and its share of its clients' RALs, Defendants are subject to both the federal and the state FDCPA regimes at least as an aider-and-abettor and/or co-conspirator with its partner banks, other RAL lenders, and other commercial tax preparers in implementing the collusive debt collection scheme.

a. Aiding and abetting

A party who aids and abets deceptive or unlawful conduct or furnishes the means for its accomplishment is equally liable with those who directly perpetrate the misconduct. (See *People* v. *Bestline Products, Inc.* (1972) 61 Cal.App.3d 879, 918.) Aiding and abetting "occurs when one helps another commit a prohibited act." (*Janken* v. *GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 77.) Liability is imposed on an entity that aids and abets another's wrongful conduct if the entity "(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*Saunders, supra,* 27 Cal.App.4th at 846 [Unfair Competition Law action].) "Aiding and abetting requires not agreement, but simply assistance." (*Janken, supra,* 46 Cal.App.4th at 78.)

H&R Block is legally responsible for its partner lenders' wrongful conduct under both prongs of aider and abettor liability. Block knew of the debt collection scheme and, as set forth above, provided substantial assistance in effecting its objectives.

b. Conspiracy

If two or more parties agree to perform a wrongful act, liability is placed on all of them regardless of who actually commits the wrongful conduct. (See, e.g., *Wyatt* v. *Union Mortgage Co.* (1979) 24 Cal.3d 773, 784; *Saunders, supra,* 27 Cal.App.4th at 845 ["alleging a conspiracy fastens liability on those who agree to the plan to commit the wrong as well as those who actually carry it out."]; *Bestline Products, supra,* 61 Cal.App.3d at 918 [civil conspiracy rule applied to unlawful and deceptive business practice action filed by the Attorney General].)

Block and its partner lenders have entered into a series of agreements implementing the debt collection scheme. (See Mermin Decl., ¶ 2, 3, 14, 19, Exhs. 1, 2, 13, 18.) Block has not only agreed to the scheme, but has effectuated it – by taking the primary role in inducing its RAL and RAC clients to subject themselves to the debt collection process and in carrying out that process. Block is, therefore, liable as a co-conspirator.

B. Defendants' Unlawful Conduct Should Be Enjoined

Defendants' conduct violates the Unfair Competition Law. Section 17200 of the Business and Professions Code defines "unfair competition" to include any unlawful, unfair or fraudulent business act or practice. An unlawful business act or practice includes any activity that is forbidden by law, "be it civil or criminal, federal, state or municipal, statutory or regulatory, or court-made [law]." (*Saunders, supra*, 27 Cal. App. 4th at pp. 838-839.) That is, section 17200 "borrows" violations of other laws and makes them actionable as unlawful business practices. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 566.) In addition, the UCL independently encompasses within its scope unfair business practices involving the collection of debts. (See, e.g., *Bondanza v. Peninsula Hospital & Medical Center* (1979) 23 Cal.3d 260, 267.) Because Defendants have failed and continue to fail to give their clients the information and opportunity to contest alleged debts as mandated by the state and federal FDCPAs, Defendants are in ongoing violation of the UCL. (See *State Farm Fire & Casualty Co. v. Super. Ct.* (1996) 45 Cal.App.4th 1093, 1102-1103.)

Business and Professions Code section 17203 specifically empowers a court to enjoin any act of unfair competition or the making of any untrue or misleading statements. This section provides that a court may issue such orders "as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition."

In the absence of such a statute, a court determining whether to issue a temporary restraining order or preliminary injunction analyzes (1) the likelihood that the plaintiff will succeed on the merits at trial and (2) the interim harm that the plaintiff will suffer if the injunction is not issued, compared to the interim harm that the defendant will suffer if it is. (6 Witkin, Cal. Procedure (4th ed. 1997 & 2005 Supp.) Provisional Remedies, § 296, p. 236.)

In a public action brought under the Unfair Competition Law, like this one, however, the prime consideration is whether there is a reasonable probability that the People will prevail on the merits. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21.) The harm is presumed. Where, as here, a statute specifically provides for injunctive relief, "[o]nce a governmental entity establishes that it will probably succeed at trial, a presumption should arise that public harm will result if an injunction does not issue." (*IT Corp. v. County of Imperial*

(1983) 35 Cal.3d 63, 72.) The Legislature has already determined that UCL violations harm the public interest and that an injunction is the proper way to protect against that harm. Thus, if the People show that it is reasonably probable that they will prevail on the merits, they need not prove harm. Instead, the burden is on the defendants to show that they would suffer irreparable harm. (*Ibid*.)

Here, it is more than reasonably probable that the People will prevail. Defendants' violation of the laws governing fair debt collection practices and unfair competition is overt and longstanding. The state and federal FDCPAs prohibit precisely the contradictory, overshadowing, collect-first/ inform-later tactics employed by Defendants, and a violation of those Acts is by definition a violation of the UCL. On the other hand, Defendants cannot point to any cognizable "harm" – much less irreparable harm – that they would suffer from simply being made to comply with the law.

IV. CONCLUSION

Once a trial court invokes its equitable jurisdiction, it is within the court's broad discretion to determine the scope or type of relief that should be granted. (*People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 775.) Such relief may be as "varied and diversified as the means that have been employed by the defendant to produce the grievance complained of." (*Wickersham v. Crittenden* (1892) 93 Cal. 17, 32; see *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 770.)

Plaintiff respectfully seeks a temporary restraining order, followed by a preliminary injunction, that requires Defendants to comply with California and federal law.

Dated: February __, 2006

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