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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Whaleco Incorporated, ) No. CV-23-02332-PHX-SPL  
9 )  
10 Plaintiff, ) **ORDER**  
11 vs. )  
12 dltemuapp.com, et al, )  
13 Defendants. )  
14 \_\_\_\_\_ )

15 Before the Court is Plaintiff Whaleco Inc.’s *Ex Parte* Emergency Motion for  
16 Temporary Restraining Order (“TRO”) and, Upon Notice and Hearing, Motion for  
17 Preliminary Injunction. (Doc. 2).

18 **I. BACKGROUND**

19 Plaintiff offers a shopping website and software application under the TEMU  
20 trademark, logo, and/or orange color scheme. On November 7, 2023, Plaintiff filed a  
21 Verified Complaint alleging that Defendants registered websites with domain names that  
22 infringe on the TEMU trademark. (Doc. 1). These domain names have been registered as:  
23 <dltemuapp.com>, <temudl.net>, <temu-win.com>, <istemusafe.pro>, <temuapp.info>,  
24 <temumodapk.com>, and <temu.markets> (the “Domain Names”). Plaintiff seeks this  
25 TRO to “hold and lock” the registrations, unmask the registrant of the Domain Names, and  
26 to suspend services to the websites associated with the Domain Names. For the following  
27 reasons, the Court grants this request in part.

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1           **II.     LEGAL STANDARD**

2           A party seeking injunctive relief under Rule 65 of the Federal Rules of Civil  
3 Procedure must show that: (1) it is likely to succeed on the merits; (2) it is likely to suffer  
4 irreparable harm in the absence of injunctive relief; (3) the balance of equities tips in its  
5 favor; and (4) an injunction is in the public interest.<sup>1</sup> *Winter v. Nat. Res. Def. Council, Inc.*,  
6 555 U.S. 7, 20 (2008); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir.  
7 2014); *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105-06 (9th Cir. 2012); *Stuhlbarg Int’l Sales*  
8 *Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Where a  
9 movant seeks a mandatory—rather than a prohibitory—injunction, the request for  
10 injunctive relief is “subject to a heightened scrutiny and should not be issued unless the  
11 facts and law clearly favor the moving party.” *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399,  
12 1403 (9th Cir. 1993).<sup>2</sup>

13           Unlike a preliminary injunction, *see* Fed. R. Civ. P. 65(a), a TRO may be entered  
14 “without written or oral notice to the adverse party,” Fed. R. Civ. P. 65(b). A TRO may  
15 issue, *ex parte*, only where: “(A) specific facts in an affidavit or a verified complaint clearly  
16 show that immediate and irreparable injury, loss, or damage will result to the movant before  
17 the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in  
18 writing any efforts made to give notice and the reasons why it should not be required.” Fed.  
19 R. Civ. P. 65(b). Further, the Court may issue a TRO only if the movant “gives security in  
20 an amount that the court considers proper to pay the costs and damages sustained by any

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21           <sup>1</sup> The Ninth Circuit observes a “sliding scale” approach, in that these elements “are  
22 balanced, so that a stronger showing of one element may offset a weaker showing of  
23 another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus,  
24 by example, an injunction can issue where there are “serious questions going to the merits’  
and a balance of hardships that tips sharply towards the plaintiff . . . so long as the plaintiff  
also shows that there is a likelihood of irreparable injury and that the injunction is in the  
public interest.” *Id.* at 1135.

25           <sup>2</sup> “A mandatory injunction orders a responsible party to take action,” while “a  
26 prohibitory injunction prohibits a party from taking action and preserves the status quo  
27 pending a determination of the action on the merits.” *Marlyn Nutraceuticals, Inc. v. Mucos*  
28 *Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (internal quotation marks  
omitted). “The ‘status quo’ refers to the legally relevant relationship between the parties  
before the controversy arose.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060–61  
(9th Cir. 2014).

1 party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The  
2 Court may waive the bond “when it concludes there is no realistic likelihood of harm to  
3 the defendant from enjoining his or her conduct.” *Barahona-Gomez v. Renno*, 167 F.3d  
4 1228, 1237 (9th Cir. 1999).

### 5 **III. DISCUSSION**

#### 6 **A. The *Winter* Factors**

##### 7 **i. Likelihood of Success on the Merits**

8 Plaintiff’s claims are likely to succeed on the merits. Plaintiff alleges several federal  
9 and state law claims for trademark infringement, cybersquatting, and trademark dilution.  
10 The Court begins with addressing Plaintiff’s trademark infringement claims.

11 Plaintiff alleges trademark infringement claims under the Lanham Act, 15 U.S.C.  
12 §§ 1114 and 1125, and Arizona common law. To prevail on its trademark infringement  
13 claims, Plaintiff must prove: (1) that it has a protectible ownership interest in the marks;  
14 and (2) that Defendants’ use of the mark is likely to cause consumer confusion, thereby  
15 infringing upon Plaintiff’s rights to the marks. *Dep’t of Parks & Recreation for State of*  
16 *California v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006). Plaintiff alleges  
17 that its affiliate, Five Bells Limited Company, granted it an exclusive license to use the  
18 TEMU trademark and logo. (Doc. 1 at 9–10; Doc. 1-1 at 35–77). Additionally, Plaintiff  
19 has shown that there is a likelihood that consumers may mistake the Domain Names for  
20 the TEMU website and software application because the word “temu” is used in all of the  
21 Domain Names and the websites include the TEMU trademark, logo, and/or orange color  
22 scheme. (Doc. 2 at 9). *See AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir.  
23 1979) (addressing non-inclusive factors to consider when analyzing a likelihood of  
24 confusion).

25 Plaintiff also raises a cybersquatting claim under the Anti-cybersquatting Consumer  
26 Protection Act, 15 U.S.C. § 1125, which requires Plaintiff to prove Defendants had “a bad  
27 faith intent to profit from that mark” and “registers, traffics in, or uses a [protected] domain  
28 name.” *Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1006 (9th Cir. 2023) (quoting §

1 1125(d)(1)(a)). As discussed above, Plaintiff has shown that the Domain Names were  
2 registered using a protected domain name. Moreover, there is sufficient evidence to show  
3 that Defendants acted in bad faith. *See* 15 U.S.C. § 1125(d)(1)(a) (listing several factors  
4 for bad faith). Defendants registered multiple domain names using the TEMU trademark  
5 shortly after the TEMU trademark received national attention when it was aired as an  
6 advertisement during the February 2023 Super Bowl. (Doc. 1 at 7). Moreover, the  
7 webpages connected to the Domain Names display that they are affiliated with the TEMU  
8 website and software application, indicating an attempt to profit from their success.  
9 Accordingly, it is likely that Defendants acted in bad faith when registering the Domain  
10 Names.

11 Finally, Plaintiff alleges trademark dilution claims under 15 U.S.C. § 1125 and  
12 Arizona common law. “A successful claim for federal trademark dilution requires that a  
13 plaintiff prove that: (1) it owns a famous trademark; (2) the famous mark is distinctive; (3)  
14 the defendant is using or has used in commerce an identical or nearly identical trademark;  
15 (4) the defendant began using the mark after the mark became famous; and (5) the  
16 defendant’s use of the mark is likely to cause dilution by blurring or tarnishment.”  
17 *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 940 (S.D. Cal. 2013). Plaintiff alleges  
18 that Defendants began using the Domain Names after the TEMU trademark became  
19 famous. The earliest date for the registration of the Domain Names is August 2023 which  
20 is several months after the TEMU website and software application were nationally  
21 advertised during the February 2023 Super Bowl. (Doc. 2 at 11–12). Moreover, Plaintiff  
22 argues that its trademark is likely to be diluted because the Domain Names use the TEMU  
23 mark and brand which is likely to confuse consumers and deteriorate its association with  
24 genuine and legitimate services. (*Id.* at 9–10). The Court finds that Plaintiff’s dilution claim  
25 will likely succeed on the merits.

## 26 **ii. Irreparable Harm**

27 Plaintiff alleges that the Domain Names were created to “get consumers to  
28 unwittingly befall to identify theft, malware, or the other malfeasances” that would

1 ultimately leave consumers to believe that Plaintiff is responsible. (Doc. 2 at 14). This  
2 satisfies the irreparable harm requirement. *See Adidas Am., Inc. v. Skechers USA, Inc.*, 890  
3 F.3d 747, 757 (9th Cir. 2018) (“‘Evidence of loss of control over business reputation and  
4 damage to goodwill [can] constitute irreparable harm,’ so long as there is concrete evidence  
5 in the record of those things.” (quotation and citation omitted) (alterations in original)).

### 6 **iii. Balance of Hardships and Public Policy**

7 Plaintiff’s brand reputation coupled with the potential risks of harm to the public  
8 outweigh the possible hardship that Defendants may suffer from having its Domain Names  
9 temporarily suspended. Accordingly, the Court finds that Plaintiff has sufficiently met all  
10 four prong elements that are required for a TRO to issue.

### 11 **B. Ex Parte TRO against Defendants**

12 Plaintiff requests that the TRO issue against Defendants *without notice*, which  
13 creates an additional level of analysis for the Court. The Court finds that the applicable  
14 requirements are met. First, Plaintiff filed a verified complaint. (Doc. 1). Plaintiff also filed  
15 this Motion that—as discussed above—clearly shows that there is immediate and  
16 irreparable harm because the Domain Names are actively misleading consumers to believe  
17 that the websites are associated with Plaintiff. As to the second requirement, Plaintiff’s  
18 counsel submitted a Declaration (Doc. 2-1 at 2–4) in which she certifies that she attempted  
19 to locate the identity of the registrants associated with the Domain Names. (*Id.* at 3). She  
20 explained that the Domain Names were registered through the domain name registrar  
21 Namecheap and are privately protected by Withheld for Privacy, a private registration  
22 service. (*Id.*). After reviewing the Namecheap Court Order & Subpoena Policy via  
23 Namecheap’s website, Plaintiff’s counsel discovered that “Namecheap will not disclose  
24 the identity of a customer who is protected by privacy services offered by Namecheap  
25 unless specifically required by U.S. court order, subpoena or other regulation to which we  
26 are subject.” (*Id.*; Doc. 2-1 at 38). Plaintiff’s counsel attests that there are no other  
27 alternative means of obtaining the registrant’s contact information without a Court order.  
28 (*Id.*). Plaintiff’s counsel also suggests that if Defendants receive notice, “the registrant

1 could sell and/or transfer the [Domain Names] to other persons, or move the [Domain  
2 Names] to another registrar outside of this Court’s jurisdiction.” (*Id.* at 3–4). All told, the  
3 Court is satisfied that Plaintiff has complied with Rule 65(b)’s requirements for an *ex parte*  
4 TRO against Defendants.

5 The Court also finds that it does not appear that Defendants would lose revenue  
6 earned directly from the Domain Names, as they are not commercial websites. Therefore,  
7 the Court determines that a minimal bond of \$1,000 is appropriate.

### 8 **C. *Ex Parte* TRO against Non-Parties<sup>3</sup>**

9 In addition to Defendants, Plaintiff also seeks to require non-party NameCheap to  
10 immediately “mak[e] the domain names non-transferrable” and “prevent[] any websites  
11 associated with the domain name from resolving when queried by a browser.” (Doc. 10-1  
12 at 3). Plaintiff also requests that the Court orders non-parties NameCheap and Withheld for  
13 Privacy to “unmask the registrant’s identity and reveal all contact information provided by  
14 the registrant in registering the [Domain Names].” (*Id.*). Further, Plaintiff requests that this  
15 information be provided “within five (5) business days from the date of service in this  
16 Order.” (*Id.*). Plaintiff’s Motion did not address the Court’s authority to issue a mandatory  
17 TRO against non-parties NameCheap and Withheld for Privacy. Thus, the Court will not  
18 hold the non-parties responsible for Defendants actions. *See Fornix Holdings LLC v.*  
19 *Unknown Party*, No. CV-22-00494-PHX-DLR, 2022 WL 992546, at \*2 (Apr. 1, 2022)  
20 (finding “the Court cannot bind [non-parties, including Namecheap,] to a TRO absent them  
21 being named parties” without allegations that they “knew of the defendant’s allegedly  
22 infringing conduct and nevertheless continued to provide services that facilitated that  
23 infringement.”); *Boyko v. Kondratiev*, No. CV-23-01186-PHX-DLR, 2023 WL 5017198,  
24 at \*4 (D. Ariz. July 14, 2023) (“This Court previously has rejected the argument that  
25 domain registrars necessarily act in concert or participation with a client who uses a domain  
26 to commit intellectual property violations.”); *see Petroliam Nasional Berhad v.*

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28 <sup>3</sup> Plaintiff indirectly requests a TRO against non-parties through its proposed order.  
(Doc. 10-1).

1 *GoDaddy.com, Inc.*, 737 F.3d 546, 551 (9th Cir. 2013). Accordingly, Plaintiff's request to  
2 issue an ex parte TRO against non-parties NameCheap and Withheld for Privacy is denied.

3 Accordingly,

4 **IT IS ORDERED:**

5 1. **TRO**: That Plaintiff's Motion for Temporary Restraining Order (Doc. 2) is **granted**  
6 **in part**. Defendants and their agents, servants, employees, and attorneys, and any  
7 other person or entity, acting in active concert with Defendants or under Defendants  
8 direction, with notice of this Order shall:

- 9 i. be enjoined from taking any actions to transfer the Domain Names  
10 (<dltemuapp.com>, <temudl.net>, <temu-win.com>,  
11 <istemusafe.pro>, <temuapp.info>, <temumodapk.com>, and  
12 <temu.markets>) from its current registrar, NameCheap to any other  
13 registrar;
- 14 ii. be enjoined from operating the Domain Names (<dltemuapp.com>,  
15 <temudl.net>, <temu-win.com>, <istemusafe.pro>,  
16 <temuapp.info>, <temumodapk.com>, and <temu.markets>);
- 17 iii. be enjoined from using the TEMU trademark, logo, and/or orange  
18 color scheme in any domain names including the Domain Names  
19 (<dltemuapp.com>, <temudl.net>, <temu-win.com>,  
20 <istemusafe.pro>, <temuapp.info>, <temumodapk.com>, and  
21 <temu.markets>) at issue in this case and;
- 22 iv. suspend the Domain Names (<dltemuapp.com>, <temudl.net>,  
23 <temu-win.com>, <istemusafe.pro>, <temuapp.info>,  
24 <temumodapk.com>, and <temu.markets>).

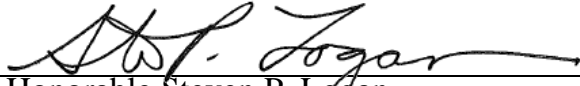
25 2. **TRO Against Non-Parties**: The Court denies any TRO requests against non-parties  
26 NameCheap and Withheld for Privacy.

27 3. **Preliminary Injunction**: The Court withholds ruling on whether Plaintiff's Motion  
28 should be granted to the extent it seeks a preliminary injunction.

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- 4. **Notice**: That, no later than close of business on **November 13, 2023**, Plaintiff must provide Defendants with a copy of the following and file proof of such notice with the Court: (1) the Verified Complaint (Doc. 1); (2) the Motion for TRO and attachments (Doc. 2); and (3) this Order. To ensure that Defendants receive timely notice of this Order, Plaintiff may provide this notice via electronic mail.<sup>4</sup>
- 5. **Hearing**: That a Preliminary Injunction Hearing is set for **November 21, 2023 at 9:00 a.m.**, before the Honorable Judge Steven P. Logan, United States District Judge, in the Sandra Day O'Connor United States Courthouse, located at 401 West Washington Street, Phoenix, Arizona 85003, 5<sup>th</sup> Floor, Courtroom 501.
- 6. **Briefing**: That Defendants shall have until the close of business on **November 16, 2023** to file any Response to Plaintiff's Motion; Plaintiff shall have until the close of business on **November 20, 2023** to file any Reply in support of their Motion.
- 7. **Evidence**: That the parties shall attach any evidence supporting the arguments for the Court's consideration (including any exhibits and affidavits) to the briefing.
- 8. **Warning**: If Defendants do not respond to the Motion for a TRO/Preliminary Injunction or fail to appear at the above-scheduled hearing, the Court will deem such failure as consent to granting the motion, see LRCiv 7.2(i).

Dated this 9th day of November, 2023.

  
\_\_\_\_\_  
Honorable Steven P. Logan  
United States District Judge

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<sup>4</sup> To the extent that Plaintiff is seeking alternative service under Rule 4.1(k), the Court finds this request to be premature.