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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

No. CIV S-12-0781 KJM-EFB

vs.

NAFSO VLM, INC.; et al.,

ORDER

Defendants.

\_\_\_\_\_ /  
On March 28, 2012, the Federal Trade Commission (“FTC,” “Commission” or “plaintiff”) filed a motion for a temporary restraining order (ECF 6)<sup>1</sup> seeking to enjoin defendants’ allegedly illegal conduct, disable their websites and domain registrations, and also seeking preservation of records and expedited discovery. (Mem. P&A at 1, ECF 6-1.) For the following reasons, plaintiff’s motion is granted in part and denied in part, with a hearing set on a shortened schedule for consideration of the FTC’s request for a preliminary injunction.

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<sup>1</sup> The court notes that plaintiff’s motion is twenty-nine (29) pages long, thereby exceeding the undersigned’s standing order placing a limit of twenty (20) pages on memoranda of points and authorities in support of motions, unless advance approval to exceed the limit is obtained. (ECF 4-1.) Counsel is directed to strictly comply with the Federal Rules of Civil Procedure, Local Rules, and the court’s standing order in the future. Counsel is cautioned that failure to obtain the court’s permission prior to filing documents in excess of court-mandated page limits is sanctionable in accordance with Local Rule 110 and can result in an order striking documents with leave to refile compliant documents or the court’s ignoring all excess pages.

1 I. STANDARD

2 Plaintiff's motion is brought in accordance with section 13(b) of the Federal  
3 Trade Commission Act, 15 U.S.C. § 53(b), which is effectively divided into two segments. The  
4 first states:

5 Upon a proper showing that, weighing the equities and considering  
6 the Commission's likelihood of ultimate success, [an action for  
7 temporary restraining order or preliminary injunction] would be in  
8 the public interest, and after notice to the defendant, a temporary  
9 restraining order or a preliminary injunction may be granted  
10 without bond: *Provided, however*, That if a complaint is not filed  
11 within such period (not exceeding 20 days) as may be specified by  
12 the court after issuance of the temporary restraining order or  
13 preliminary injunction, the order or injunction shall be dissolved  
14 by the court and be of no further force and effect.

11 This first proviso of section 13(b) thus "places a lighter burden on the Commission than that  
12 imposed on private litigants by the traditional equity standard; the Commission need not show  
13 irreparable harm to obtain a preliminary injunction." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d  
14 1156, 1159 (9th Cir. 1984).

15 The FTC seeks preliminary injunctive relief based upon the court's inherent  
16 equitable powers in accordance with section 13(b)'s second proviso, which states: "[I]n proper  
17 cases the Commission may seek, and after proper proof, the court may issue, a permanent  
18 injunction." Thus, under the second proviso, the FTC is not required to initiate administrative  
19 proceedings. *See FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) ("[Section]  
20 13(b) gives the Commission the authority to seek, and gives the district court the authority to  
21 grant, permanent injunctions in proper cases even though the Commission does not contemplate  
22 any administrative proceedings."). Moreover, the lighter burden for granting preliminary  
23 injunctive relief is inapplicable to section 13(b)'s second proviso.<sup>2</sup> *See generally, id.* (citing to

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24  
25 <sup>2</sup> Although the FTC explicitly states it is relying upon the second proviso and therefore  
26 "its complaint is not subject to the procedural and notice requirements in the first proviso," the  
FTC asks that the court apply the "weighing the equities and considering the Commission's  
likelihood of ultimate success" standard applicable to the first proviso. (Mem. P&A at 15 n.4.)

1 first proviso of section 13(b) in finding that the FTC must meet only the lighter burden); *but see*  
2 *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (applying lighter burden in  
3 a second proviso context).<sup>3</sup> Where the FTC seeks preliminary injunctive relief in accordance  
4 with the second proviso, as here, the court must analyze the FTC’s request in accordance with  
5 the equitable standard set forth in Federal Rule of Civil Procedure 65(b). *Id.* at 1111 (“It is clear  
6 that, because the district court has the power to issue a permanent injunction to enjoin acts or  
7 practices that violate the law enforced by the Commission, it also has authority to grant whatever  
8 preliminary injunctions are justified by the usual equitable standards and are sought in  
9 accordance with Rule 65(a). (citation omitted)”); *see, e.g., FTC v. Evans Prods. Co.*, 775 F.2d  
10 1084, 1088 (9th Cir. 1985) (applying Rule 65 standard); *see also FTC v. Weyerhaeuser Co.*, 665  
11 F.2d 1072, 1081-82 (D.C. Cir. 1981) (discussing statutory history in context of amendment to  
12 proviso one of section 13(b), whereby public interest standard rather than traditional equity  
13 standard was codified as the applicable standard). Indeed, plaintiff’s proposed order references  
14 Rule 65 as the basis for its motion. (*See* ECF 6-18 at 1, 2 (stating in relevant part that plaintiff  
15 “has filed . . . a motion for temporary restraining order . . . pursuant to Rule 65(b),” and  
16 proposing a finding of “good cause to believe that consumers will suffer immediate and  
17 continuing harm unless Defendants are immediately restrained.”).)

18 Under Rule 65, a temporary restraining order may be issued upon a showing “that  
19 immediate and irreparable injury, loss, or damage will result to the movant before the adverse

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21 The lighter burden, however, appears properly reserved for use in assessing applications for  
22 temporary restraining orders and preliminary injunctions when an administrative proceeding, a  
necessary safeguard when applying such a lenient standard, is pending or imminent.

23 <sup>3</sup> The *Affordable Media* case on its face appears to create an ambiguity in the law, in that  
24 it applies the lighter burden to a second proviso case. However, in *Affordable Media*, the court  
25 relied on *FTC v. Warner Communications, Inc.*, 742 F.2d at 1159, which applied the lighter  
26 burden to a first proviso case. *See also FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47  
(9th Cir. 1989) (applying lighter burden in apparent second proviso case without clearly  
distinguishing under which proviso request for injunctive relief was brought). In this court’s  
view, the *Singer* case cited in the body of this order represents the weight of Ninth Circuit  
authority.

1 party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The purpose of such an order is  
2 to preserve the status quo and to prevent irreparable harm “just so long as is necessary to hold a  
3 hearing, and no longer.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439  
4 (1974). In determining whether to issue a temporary restraining order, a court applies the factors  
5 that guide the evaluation of a request for preliminary injunctive relief: whether the moving party  
6 “is likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of  
7 preliminary relief, . . . the balance of equities tips in [its] favor, and . . . an injunction is in the  
8 public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374  
9 (2008); *see Stuhlbarg Int’l. Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7  
10 (9th Cir. 2001) (analyses for temporary restraining order and preliminary injunction  
11 “substantially identical”). A plaintiff must satisfy all four prongs of this test. *See Alliance for*  
12 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Furthermore, “[i]ssuing a  
13 preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the  
14 Supreme Court’s] characterization of injunctive relief as an extraordinary remedy that may only  
15 be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S. Ct.  
16 at 375-76. Rather, “plaintiffs seeking preliminary relief [must] demonstrate that irreparable  
17 injury is *likely* in the absence of an injunction.” *Id.* at 375 (emphasis in original). “In each case,  
18 courts ‘must balance the competing claims of injury and must consider the effect on each party  
19 of the granting or withholding of the requested relief.’” *Id.* at 376 (quoting *Amoco Prod. Co. v.*  
20 *Gambell*, 480 U.S. 531, 542 (1987)). The Ninth Circuit employs the “serious questions” test,  
21 which states “‘serious questions going to the merits’ and a balance of hardships that tips sharply  
22 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also  
23 shows that there is a likelihood of irreparable injury and that the injunction is in the public  
24 interest.” *Wild Rockies*, 632 F.3d at 1135.

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1 II. ANALYSIS

2 Plaintiff contends that, since at least January 2011, defendants have marketed  
3 auto loan modification services via the internet and telemarketing, whereby they promise to  
4 modify consumers' auto loans to make their monthly payments more affordable after they have  
5 been paid an up-front fee. (Mem. P&A at 3-4.) However, in most cases "Defendants fail to  
6 obtain the promised auto loan modifications, and in some instances, consumers get their cars  
7 repossessed. Many consumers discover that Defendants never even contacted their lenders.  
8 Many consumers also report that the Defendants fail to honor their refund policies." (*Id.* at 4.)  
9 Plaintiff contends it is likely to succeed on the merits and that the equities weigh in favor of  
10 granting immediate relief. However, plaintiff does not contend that there is likely to be  
11 irreparable harm in the absence of preliminary relief, which is a necessary element for granting a  
12 temporary restraining order under Rule 65, *see Wild Rockies*, 632 F.3d at 1135, and in fact  
13 disavows its need to demonstrate irreparable injury (Mem. P&A at 17). Plaintiff furthermore  
14 does not indicate how the issuance of a temporary restraining order will preserve the status quo.

15 At the same time, the court recognizes the immediate need to order defendants to  
16 preserve records, including electronic records. The court has broad equitable powers when the  
17 public interest is implicated by a proceeding. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398  
18 (1946); *see also Evans Prods.*, 775 F.2d at 1088 ("Courts have inherent equitable powers to  
19 grant ancillary relief . . ."). Accordingly, the court with this order enjoins defendants from  
20 destroying evidence pending the resolution of this action. The court also grants plaintiff's  
21 request for expedited discovery. "A court may authorize discovery before the Rule 26(f)  
22 conference for the parties' convenience and in the interests of justice." *Megaupload, Ltd. v.*  
23 *Universal Music Group, Inc.*, No. 11-cv-6216 CW (JSC), 2012 U.S. Dist. LEXIS 8531, at \*4  
24 (N.D. Cal. Jan. 25, 2012). The court analyzes requests for expedited discovery according to a  
25 good cause standard, whereby it considers the following factors: "(1) whether a preliminary  
26 injunction is pending; (2) the breadth of the discovery requests; (3) the purposes for requesting

1 the expedited discovery; (4) the burden on the defendants to comply with the requests; and  
2 (5) how far in advance of the typical discovery process the request was made.” *Id.* at \*5 (internal  
3 quotation omitted). Here, plaintiff seeks limited expedited discovery “to identify possible  
4 additional defendants, locate documents pertaining to Defendants’ businesses, and locate  
5 Defendants, should they attempt to evade service.” (Mem. P&A at 28.) The court finds good  
6 cause exists, as the need for this expedited discovery outweighs any potential prejudice to the  
7 responding party, a hearing on plaintiff’s request for preliminary injunction is pending, and this  
8 request is limited and does not place a heavy burden on defendants. *See Megaupload*, 2012 U.S.  
9 Dist. LEXIS 8531, at \*5. Good cause also exists as plaintiff alleges that “there is ongoing harm  
10 [and that] the evidence sought is in danger of destruction or loss.” *Id.* at 6.

11 Accordingly, IT IS HEREBY ORDERED:

- 12 1. Plaintiff’s motion for a temporary restraining order is DENIED.
- 13 2. However, plaintiff’s motion is GRANTED insofar as it requests that the court  
14 order defendants to preserve records, including electronic records, and evidence  
15 and allow plaintiff to conduct limited expedited discovery.
  - 16 a. Defendants and their successors, assigns, officers, agents, servants,  
17 employees, and attorneys, and those persons or entities in active concert or  
18 participation with any of them who receive actual notice of this order by  
19 personal service, facsimile transmission, email, or otherwise, whether  
20 acting directly or through any corporation, subsidiary, division, or other  
21 device, are hereby temporarily restrained and enjoined from destroying,  
22 erasing, mutilating, concealing, altering, transferring, or otherwise  
23 disposing of, in any manner, directly or indirectly, any documents that  
24 relate to the business practices, or business or personal finances, of any  
25 defendant.

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b. Plaintiff may conduct expedited discovery in advance of the pending hearing on its request for preliminary injunction. Such discovery shall be limited to identifying possible additional defendants, locating documents pertaining to defendants' businesses, and locating defendants, should they attempt to evade service.

3. A hearing on plaintiff's request for a preliminary injunction is set for April 11, 2012 at 1 p.m. Any opposition shall be filed no later than April 6, 2012 and any reply shall be filed no later than April 9, 2012. Plaintiff shall notify defendants of this hearing and briefing schedule.

IT IS SO ORDERED.

DATED: March 29, 2012.

  
UNITED STATES DISTRICT JUDGE