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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Federal Trade Commission,

Plaintiff,

v.

National Foreclosure Relief, Inc.,
a corporation;

David Ealy,
an individual;

Chele Stone, a/k/a Chele Medina,
an individual; and

Hugo Tapia,
an individual,

Defendants.

Case No.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER, ETC.

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2 **FEDERAL CASES**

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5 FSLIC v. Sahni, 868 F.2d 1096 (9th Cir. 1989) 22, 24

6 FTC v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999) 25

7 FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir.), cert. denied, 493 U.S. 954, 107
8 L. Ed. 2d 352, 110 S. Ct. 366 (1989) 23-24

9 FTC v. Freecom Communications, Inc., 401 F.3d 1192 (10th Cir. 2005) 24

10 FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982) 18

11 FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994) 20

12 FTC v. Publishing Clearing House, 104 F.3d 1168 (9th Cir. 1997) 23, 24

13 FTC v. USA Bevs., Inc., 2005 U.S. Dist. LEXIS 39075 (S.D. Fla. 2005) 22

14 FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984) 18

15 FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989) 19, 20, 21

16 Porter v. Warner Holding Co., 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) 19

17 Resort Car Rental System v. FTC, 518 F.2d 962 (9th Cir.), cert. denied, 423 U.S. 827 (1975) 20

18 SEC v. First Financial Group, 645 F.2d 429 (5th Cir. 1981) 23

19 SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963) 23

20 SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972) 21

21 Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993) 20

22 U.S. v. Laerdal Manufacturing, 73 F.3d 852 (9th Cir. 1995) 19

23 United States v. Diapulse Corp. of America, 457 F.2d 25 (2d Cir. 1972) 21

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2 F.R.Civ.P. 1, 26(b)(2), 30(a), 34(b) 19

3 15 U.S.C. § 45 1, 20

4 15 U.S.C. § 53(b) 1, 2, 17

5 S. Rep. 103-130, 103d Cong., 1st Sess. (1993), *reprinted in* U.S.C.C.A.N. (1994)

6 at 1790-91 18-19

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1 **I. INTRODUCTION¹**

2 Defendants callously take advantage of consumers who are behind on their
3 mortgage payments and facing foreclosure. Defendants promise to save consumers
4 from foreclosure, charging their desperate clients an up-front fee of hundreds and
5 sometimes thousands of dollars at a time when they have little or money to spare.
6 Defendants’ “Fresh Start” program, however, is often nothing more than a dead end
7 for consumers in financial distress. After taking their clients’ money, Defendants do
8 little to help their clients, and the efforts they take, if any, are often either too little or
9 too late. Many consumers lose their homes. Other consumers are able to save their
10 homes only through their own efforts. Adding insult to injury, after having failed to
11 deliver on their promise of foreclosure relief, Defendants then fail to honor their
12 refund policy.

13 Defendants’ deceptive conduct violates Section 5 of the Federal Trade
14 Commission Act (FTC Act), 15 U.S.C. § 45. Plaintiff brings this action under
15 Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), which
16 authorizes the Court to issue injunctive and other equitable relief—including
17 temporary and ancillary relief—for violations of the FTC Act. Plaintiff asks the
18 Court to issue a temporary restraining order, including an order freezing the
19 Defendants’ assets and appointing a temporary receiver.

20 **II. PARTIES**

21 **A. Plaintiff**

22 Plaintiff FTC is an independent agency of the United States Government
23 created by statute. 15 U.S.C. §§ 41-58. The FTC is charged, *inter alia*, with
24 enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits
25 unfair and deceptive acts or practices in or affecting commerce. The FTC is

26
27 ¹ In support of its TRO application Plaintiff is concurrently filing three
28 volumes of consumer declarations; declarations from four former employees of
NFR; declarations of two FTC investigators; and various other declarations.

1 authorized to initiate federal district court proceedings, by its own attorneys, to enjoin
2 violations of the FTC Act, and to secure such equitable relief as may be appropriate
3 in each case, including restitution and disgorgement. 15 U.S.C. § 53(b).

4 **B. Defendants**

5 **National Foreclosure Relief, Inc.** (NFR) is a Nevada corporation that has
6 been in business since approximately May 2006. (Gale ¶ 5, Att. 2; Stahl ¶12, Att. 7
7 at ¶ 2.2) NFR's principal place of business at 1505 E. 17th St. in Santa Ana,
8 California. (Stahl Att. 7 at ¶ 2.2; ¶¶ 9-11, Atts. 2-3)

9 As of approximately one year ago, NFR was generating approximately
10 \$140,000 per week in sales (Morales ¶ 35), which would translate to approximately
11 \$7.2 million per year. In MoneyGram payments alone, NFR received \$2,623,195.26
12 in the two-year period leading up to July 23, 2008. (Segura ¶ 16)

13 **David Ealy** has been the President of NFR since the company's inception in
14 2006. (Gale ¶¶ 6-9; Stahl Att. 7 at ¶ 2.5) Ealy is also a director and a shareholder of
15 NFR. Id.

16 **Chele Stone** is NFR's Vice President of Operations. (Marshall ¶ 5; Trenkle ¶
17 5) Stone was a director of NFR between May 8, 2006 and May 30, 2007. (Gale ¶ 5)
18 Stone is also a shareholder of NFR. (Morales ¶¶ 32, 34) Stone previously served as
19 Chief Executive Officer, Chief Financial Officer, and Secretary, as well as a director,
20 of Housing Assistance Services, Inc. (HAS) (Stahl ¶ 11.c-d, Atts. 4-5; Diehl ¶ 16), a
21 foreclosure-rescue company that the California Attorney General sued in 2004 (Diehl
22 ¶ 4, Att. 1).

23 **Hugo Tapia** has been NFR's corporate treasurer since June 30, 2006, and the
24 corporate secretary since November 26, 2007. (Gale ¶¶ 6-9) Tapia has also been a
25 director of NFR since May 30, 2007. (Id. ¶¶ 7-9) Tapia is also a shareholder of
26 NFR. (Morales ¶¶ 33-34)

1 **III. DEFENDANTS’ FRAUDULENT PRACTICES**

2 **A. Defendants’ Initial Solicitation of Consumers**

3 NFR generates calls by mailing postcards and flyers to consumers. (See, e.g.,
4 Marshall ¶ 6; Trenkle ¶ 12; consumers Brown ¶ 2-3; Gilligan ¶ 3; Hommel ¶ 4;
5 Howard ¶ 5, 8 Att. 1; Kyte ¶ 3 & Att. 1; Myrick ¶¶ 2-3; Rosener ¶ 3-4, Att. 1; Sayti
6 ¶ 3, Att. 1; Smoke ¶ 3; Steffens ¶ 5; T. Stenzel ¶ 2, Att. 1; Vasquez ¶ 4)

7 These mail solicitations convey that NFR is aware that the consumer has fallen
8 behind on his mortgage payments and may be facing foreclosure. (See consumers
9 Gilligan Att. 1, Howard Att. 1, Kyte Att. 1, Stenzel Att. 1) NFR’s flyer notes the
10 name of consumer’s lender and the scheduled date of a foreclosure sale. It then
11 describes NFR’s “Fresh Start Program”: “This program is for borrowers who are in
12 foreclosure and not able to bring their loan current.” (Sayti Att. 1)

13 Many of NFR’s postcards advise consumers that NFR is a lender and will help
14 the consumer avoid foreclosure by obtaining a new loan for the consumer, for which
15 he is “pre-approved.” (Gilligan Att. 1; Howard Att. 1; Kyte Att. 1; Stenzel Att. 1)
16 These postcards further include a “Prescreen & Opt Out Notice,” referring to the
17 “lender’s requirements for credit,” which furthers the impression that NFR is a
18 lender. (Gilligan, Howard, Kyte, Stenzel)

19 Another version of NFR’s postcard poses as a “Notice of HUD Rights.”
20 (See Rosener Att. 1; see also Dinogan ¶ 8; Hommel ¶ 4; Magby ¶ 8) Instead of
21 referring to arranging a new loan, it advises consumers that NFR’s program “may
22 allow the foreclosure to be stopped in this early stage and the past due payments to be
23 placed at the end of the loan or paid over time.” (Rosener Att. 1) It further declares
24 in capital letters: “WE GUARANTEE OUR PROGRAM.”

25 NFR’s flyer takes a somewhat different tack, claiming that NFR will stop
26 foreclosure by “rewriting” the consumer’s existing loan. “Under the Fresh Start
27 Program, you will be able to resume your mortgage payment, plus a small ‘catch up’
28

1 payment.” (Sayti Att. 1) In bold, capital underlined letters, the flyer further assures
2 consumers: “**WE GUARANTEE OUR PROGRAM.**”

3 **B. Telephone Sales Pitch**

4 When consumers call the telephone number provided on the mail solicitations,
5 they speak to a sales representative in NFR’s sales department. The sales department
6 consists of approximately 15 to 20 sales reps, who work on commission. (Marshall
7 ¶¶ 34, 38; Morales ¶ 6) NFR provides scripts to its sales reps. (Marshall ¶ 34)

8 1. The Setup

9 During the sales call, NFR first obtains information about the consumer’s
10 mortgage and the consumer’s financial situation. (See, e.g., consumers Collins ¶ 3,
11 Dinogan ¶¶ 5, 7, Gilligan ¶ 5, R. Hinkey ¶ 7, Hommel ¶¶ 5, 7, Jackson ¶¶ 4-5, Kyte ¶
12 5, Meador ¶ 7, Myrick ¶ 4, Rosener ¶ 7, Sayti ¶ 5, Steffens ¶ 5, T. Stenzel ¶ 11; FTC
13 Inv. Gale Att. 7 at 24:24 - 26:9, Gale Att. 8 at 60:5-12, 62:22 - 63:12, Stahl Att. 1 at
14 11:9-22, 26:16 - 27:3, 29:17 - 34:7)

15 2. NFR Claims it Will “Stop Foreclosure”

16 First and foremost, NFR explicitly represents to consumers that if the
17 consumer “qualifies” for NFR’s program and enrolls, NFR will stop or prevent
18 foreclosure and save the consumer’s home. (See consumers Brown ¶ 3; Collins ¶¶ 3-
19 4; ¶ Dinogan ¶ 5; Grieve ¶¶ 5-7; R. Hinkley ¶ 10; Howard ¶ 8.g; Jackson ¶ 5; Kyte ¶
20 5; Magby ¶ 4(c),(g); Meador ¶¶ 7-8; Rosener ¶ 5; Sayti ¶ 4; Smoke ¶ 4; Vasquez ¶ 5).

21 NFR sales reps were recorded making this claim in undercover calls
22 conducted by FTC investigators posing as prospective customers of NFR. In one
23 undercover call, an NFR sales rep told the investigator: “[W]hat we're stopping is you
24 losing your home. So, you know, you keep your home.” (Gale ¶¶ 11-14, Att. 7 at
25 27:17-19) A sales rep told the same investigator in another call that he was “100
26 percent positive” that the investigator’s house would not be lost. (Gale Att. 8 at
27 73:20- 74:1) In another call, an investigator was told that “once we get the loan
28 reinstated . . . we can basically stop the foreclosure process” (Stahl ¶¶ 5-8, Att. 1 at

1 16:4-7), and “we would be working directly with [your lender] to lock you into an
2 affordable plan to help you get caught up on the loan and prevent the home from
3 being sold” (id. at 12:21-25).

4 To induce confidence that NFR will deliver on its promises, NFR assures
5 consumers that they can now relax and rely on NFR to save them from their dire
6 financial straits. (See consumers Dinogan ¶ 5 (was promised that he could just relax
7 and everything would go smoothly, and the next thing he knew everything would be
8 fixed); R. Hinkley ¶ 12 (was told NFR was there to help people, not rip them off); T.
9 Stenzel ¶ 22 (was told it was all taken care of and under control, and that he should
10 relax); see also Marshall Att. 2 [script] at 27: “You are now in good and safe hands.”)

11 3. NFR Claims It Will Obtain an Affordable Solution

12 In explaining to consumers how NFR will stop foreclosure, sales reps may
13 describe one of several approaches or methods.

14 In most cases NFR advises the consumer that it will seek a repayment plan or a
15 loan modification from the consumer’s lender.² The script, for example, states: “The
16 moment you sign up with us, we start negotiating for you to get your lender to offer
17 you a workable repayment plant that gets you caught up and saves your home.”
18 (Marshall Att. 2 at 23) In describing to consumers what this means, NFR typically
19 represents that the consumer will have to pay only a portion of his past-due payments
20 in an up-front payment, and then will be required to pay the remainder of the
21 delinquent amount either (1) at the end of the loan term (Henry ¶ 5; R. Hinkley ¶ 10;
22 Magby ¶ 4; Hommel ¶¶ 5-6; Steffens ¶ 8; see also Dinogan ¶ 5; Gines ¶ 5 (up-front
23 payment only); Rosener ¶ 5; T. Stenzel ¶¶ 7-8 (no up-front payments, all past due
24

25 ² Despite the reference in some of NFR’s postcards to obtaining a new loan,
26 only two declarants were told that NFR would obtain a new loan. (See Sayti ¶ 5,
27 Gilligan ¶ 6) In contrast, NFR sales reps declared outright that NFR would *not* be
28 obtaining a refinanced loan in two undercover calls (Gale Att. 8, 67:20-22; Stahl
Att. 1, 12:21-25), and in one consumer call (T. Stenzel ¶ 8)

1 payments moved to end of loan term)), or (2) over time (i.e., added to the consumer’s
2 regular monthly payments for some number of months) (see Jackson ¶ 5; Kyte ¶ 5;
3 Rosener ¶ 5; T. Stenzel ¶¶ 7-8).

4 Plaintiff’s investigators received similar types of explanations in their
5 undercover calls. For example, an FTC investigator was told in one call that:

6 “[W]hat we’ll do is we’ll go in and we’ll negotiate for you to come in with a
7 small percentage of what you’re behind and then the remainder of what you
8 still owe, they’ll rewrite back into the loan and work out some type of
9 affordable plan for you to get caught up on that amount, okay?”

10 “One of the main plans they’re going to try to work out is going to be a loan
11 modification, and that’s where they take at least between 60 and 70 percent of
12 the past due amount that you’re behind right now, they rewrite it back into the
13 loan, and then with the loan modification, what they’ll do is they’ll just spread
14 out that amount through the remaining payments for the life of the loan.”

15 (Gale Att. 7 at 26:15 - 27:14) In another undercover call, when asked whether NFR
16 would obtain a lower monthly payment or a delayed payment, the sales rep stated:

17 “Both. Actually, a lower one and that you are not actually held accountable for
18 paying the full amount that you’re delinquent on top of the late fees and the
19 attorney fees that have already been calculated onto your file. So, what will
20 happen is you’re only going to be raising a portion of the money that you’re
21 delinquent. The remainder of the money is going to be placed on the back of
22 the loan into a repayment plan or a loan modification for you, sir.”

23 (Gale Att. 8 at 67:23 - 68:11)

24 While the descriptions vary, the central message of the sales pitch is always the
25 same—that the consumer will find NFR’s solution to be affordable. As explained
26 below, in some cases, sales reps cite specific payment amounts that the consumer’s
27 lender will accept or offer, as if NFR knows in advance exactly what the consumer’s
28 lender will accept. In other cases, sales reps do not cite specific payment amounts,

1 but assure consumers that the amounts will be affordable. In other cases, sales reps
2 promise that the consumer will have lower monthly payments.

3 a. Specific Payment Amounts

4 In explaining the payments that consumers will have to make to their lenders,
5 NFR frequently cites a specific payment amount to the consumer. For example,
6 consumer Esperanza Gines and her husband were over \$10,000 in arrears when she
7 called NFR. The sales rep told her that NFR would arrange a deal in which she
8 would get out of arrears by making an up-front payment of \$5,000 to her lender, and
9 would then resume making her regular monthly mortgage payments. (Gines ¶ 6)
10 Other declarants were similarly quoted specific amounts that their lenders would
11 accept to get them out of arrears. (See Henry ¶ 5; R. Hinkley ¶ 10; Hommel ¶ 5;
12 Jackson ¶ 5; Kyte ¶ 5; Magby ¶ 4; Steffens ¶ 5; T. Stenzel ¶ 20.)

13 b. Affordable Payment Amounts

14 In other instances, instead of citing specific payment amounts, NFR simply
15 assures the consumer that NFR will work out an arrangement with an up-front or
16 monthly payments that the consumer will find “affordable.” A sales script from
17 February 2008 (Marshall ¶ 34, Att. 2) is instructive. The script (*id.* at 23) directs
18 NFR sales reps to make the following claims:

19 “The moment you sign up with us, we start negotiating for you to get (your
20 lender) to offer you a workable repayment plan that gets you caught up and
21 saves your home. . . . We work for you to get the lender to give you the best
22 plan that fits your financial situation, one that you can keep up with so you
23 don't end up back in trouble a few months down the line. The Fresh Start
24 program comes with a guarantee of service so there is no risk for those that
25 qualify. That gives you some peace of mind, doesn't it?”

26 Plaintiff's undercover calls confirms NFR's emphasis on obtaining an
27 affordable plan. For example, in one call an NFR sales rep stated:
28

1 “We'll structure an affordable payment plan to help you get caught back up on
2 the loan with that mortgage company. So you would be staying with Wells
3 Fargo. We wouldn't be refinancing you or anything like that. We would be
4 working directly with them to lock you into an affordable plan to help you get
5 caught up on the loan and prevent the home from being sold.”

6 (Stahl ¶¶ 5-8, Att. 1 at 12:17-25) In another call, Plaintiff's investigator was assured
7 that NFR would

8 “negotiate for you to come in with a small percentage of what you're behind
9 and then the remainder of what you still owe, they'll rewrite back into the loan
10 and work out some type of affordable plan for you to get caught up on that
11 amount, okay?”

12 (Gale ¶¶ 11-14, Att. 7 at 26:21 - 27:1) He later explained:

13 “The only thing that I think that we can do right now is -- and to be honest with
14 you, is to put you under the Fresh Start Program and, basically, what that will
15 require from you -- I've got to go over your income and expenses, I got to go
16 over your hardship. Basically, we're going to put you in a program that you're
17 going to be able to afford.” (Id. at 36:1-7)

18 Similarly, in another undercover call, the sales rep declared: "We're going to
19 the races and we're going to get you on a program that's tailored to fit your income
20 needs." (Gale ¶¶ 15-20, Att. 8 at 73:17-19)

21 Similar statements were made to the consumer declarants. (See R. Hinkley ¶
22 10; Howard ¶ 8.b; Myrick ¶¶ 4-5; T. Stenzel ¶¶ 7, 11)

23 c. lower payment amounts

24 In yet other instances, NFR assures consumers that the relief that NFR will
25 obtain will include lower monthly mortgage payments. (See Collins ¶ 3; Dinogan
26 ¶ 5; Gilligan ¶ 6; Henry ¶5; Howard ¶ 8; Magby ¶ 4; Meador ¶¶ 7, 12; Sayti ¶ 5; T.
27 Stenzel ¶¶ 7-8)

1 4. NFR Claims It Will Immediately Start Negotiations

2 To persuade consumers that NFR will in fact bring a halt to the foreclosure
3 process, NFR promises consumers that it will begin negotiations with the consumer's
4 lender immediately. (Marshall Att. 2 [script] at 23; consumers Gilligan ¶ 10; Gines ¶
5 9-10; Grieve ¶ 6; R. Hinkley ¶¶ 14, 20; Howard ¶ 8.d.; Jackson ¶ 5; Kyte ¶ 5 Rosener
6 ¶ 9; Steffens ¶ 5; T. Stenzel ¶ 12; FTC Investigator Gale Att. 7, 50:18 - 51:6; Att. 8,
7 72:15-18) Indeed, NFR advises consumers that they need to act quickly and implores
8 them to sign up immediately so that NFR can get right to work. (Consumers Dinogan
9 ¶¶ 5, 7; Grieve ¶¶ 8-9; Henry ¶ 7; Jackson ¶ 5; Meador ¶ 10; Rosener ¶ 9; Steffens ¶
10 6; T. Stenzel ¶ 12; FTC Investigator Stahl Att. 1, 11:4-6)

11 5. NFR Guarantees Its Service

12 Consistent with its postcards, NFR assures consumers during the sales pitch
13 that NFR's guarantees its service. (Marshall Att. 2 [script] at 23 ("The Fresh Start
14 program comes with a guarantee of service so there is no risk for those that qualify.
15 That gives you some peace of mind, doesn't it?")); FTC Inv. Stahl Att. 1 at 35:22-24,
16 36:4-8, 37:20-23, 42:7; Gale Att. 7 at 43:7-13; Att. 8 at 66:13-21; consumers
17 Dinogan ¶ 5; Howard ¶ 8.g; Magby ¶ 4g; Myrick ¶ 5; Rosener ¶ 6; Sayti ¶ 4)

18 Similarly, NFR sales reps in Plaintiff's three undercover calls affirmed that
19 NFR's service is guaranteed. (Stahl Att. 1 at 35:22-24, 36:4-8, 37:20-23, 42:7; Gale
20 Att. 7 at 43:7-13; Att. 8 at 66:13-21) Consumer declarants were also told that NFR's
21 service was guaranteed. (Dinogan ¶ 5; Howard ¶ 8.g; Magby ¶ 4g; Myrick ¶ 5;
22 Rosener ¶ 6; Sayti ¶ 4)

23 6. NFR Claims It Has Expertise That Consumers Can Trust

24 NFR makes a number of additional claims during the sales pitch that are
25 designed to instill a sense of confidence in the consumer that NFR can and will get
26 the job done. For example, NFR claims that it can work out arrangements that would
27 be unavailable to the consumer acting on his own. (Gines ¶ 9; Magby ¶ 4; Sayti ¶ 5;
28 Howard ¶ 8.f.; T. Stenzel ¶ 9 (sales rep stated he personally knew the president of the

1 consumer's lender and that they played golf together.). According to NFR's script,
2 NFR tells consumers various reasons as to why the company is able to obtain
3 superior results: "We know the special programs that are not available to the general
4 public" (Marshall Att. 2 at 23); "We work with lenders like [the consumer's lender]
5 everyday" (id.); "We know the rules and the key people who can approve the best
6 programs over there" (id.); "We have a 7-year relationship with key people at
7 [consumer's lender] and know how to get to the decision maker and get the best deals
8 for our people" (id. at 21). (See also Stahl Att. 1 at 10:20-22 (NFR has a "seven-year
9 relationship" with Wells Fargo); id. at 14:22 - 15:12 (NFR deals "directly with the
10 investor"); id. at 21:1-6 ("the customer service that you're going to get from us is
11 usually going to be a little bit higher because that's what our business is based on.
12 And . . . on top of that, we have a reputation that we have to uphold in order to keep
13 that bank approved with us"); Gale Att. 8 at 67:10-19 (sales rep states that "we have
14 more knowledge than you," "we know all of the new programs that all of the banks
15 have released").)

16 In addition, NFR attempts to make its business sound like a lender with power
17 over the fate of the consumer's loan by telling consumers that their files will be
18 approved and negotiated by NFR's "underwriters": (Marshall Att. 2 [script] at 24-25;
19 FTC Investigators: Gale Att. 7, 38:20 - 40:11 ("If I get you an approval, I got to take
20 your information and I got to take it to the underwriter that deals with your bank . . .
21 that knows whether or not you're going to get some type of a program or not or
22 whatever . . . they say, okay, look, we're going to be able to get him . . . this kind of
23 program . . . the person [at Wells Fargo] that deals with us -- she has only one contact
24 person and that's it"; also confirming that "underwriter" means "negotiator"); Gale
25 Att. 8 at 66:13-16, 69:15-20, 71:21-25; Stahl Att. 1 at 12:16-19, 14:5-13)

26 7. NFR Claims It Will Grant Full Refunds

27 In many instances NFR explicitly claims that consumers can get their money
28 back if NFR fails to stop foreclosure. In other instances, NFR strongly implies that it

1 will provide refunds by assuring consumers that its service is “guaranteed” or “risk
2 free.”

3 One consumer declarant, for example, asked the NFR sales rep if NFR would
4 refund the \$1,300 fee if nothing could be done to stop the foreclosure of her home.
5 The sales rep assured her that NFR’s program was guaranteed to save her house from
6 foreclosure, and said that the guarantee meant that she absolutely would receive a full
7 refund if they failed. (Dinogan ¶ 8) A sales rep told another declarant that NFR
8 guaranteed that it would be successful in stopping the foreclosure and getting her a
9 lower monthly payment, or it would refund her money. She specifically asked about
10 the refund policy, and the sales rep was “very clear” that she could get her money
11 back if NFR was unable to deliver on its promises of stopping the foreclosure
12 proceedings and getting her a lower monthly payment that she could afford. Other
13 consumers had similar experiences. (See, e.g., Magby ¶ 4; Grieve ¶¶ 5-7; Gilligan ¶
14 7; Henry ¶ 5; Myrick ¶ 5; Steffens ¶ 5; T. Stenzel ¶¶ 14, 16.)

15 C. Enrollment Process

16 When consumers express interest in enrolling, sales representatives advise
17 them that the consumer’s file will have to be approved by one of NFR’s
18 “underwriters.” (See discussion supra.) Placing the consumer on hold, the sales rep
19 then seeks approval not from an “underwriting department” (there is none), but from
20 the sales manager or Defendant Chele Stone. (Marshall Att. 2 [script] at 25 (directing
21 sales rep to submit info. to sales mgr. for approval]; Morales ¶ 7)

22 Upon approval, consumers are required to remit NFR’s fee immediately, which
23 they can pay by debit card, credit card, MoneyGram, wire transfer, or by providing
24 their checking account information. (Marshall Att. 2 at 25; Frost ¶ 16; see also, e.g.,
25 consumers Collins ¶ 6; Gilligan ¶ 8; Henry ¶ 7; Jackson ¶ 7; Kyte ¶ 6; Meador ¶¶ 11,
26 13; Myrick ¶ 7; Sayti ¶ 8; Steffens ¶ 5; T. Stenzel ¶ 14; Vasquez ¶ 6) NFR’s fee
27 varies from client to client, but appears to range primarily between \$300 and \$1,400,
28 often around \$800-900. (\$800-900: see Brown ¶ 10, Gilligan ¶ 7, Gines ¶ 8, Grieve ¶

1 7, Henry ¶ 7, Smoke ¶ 8; see also Sayti ¶ 8 (\$500), S. Stenzel ¶ 7 (\$1,400), and
2 Myrick ¶¶ 7, 12 (\$2,980).

3 NFR then faxes various enrollment documents to the consumer. In addition to
4 signing and returning the enrollment documents, consumers are also instructed to
5 provide various financial documents to NFR, such as mortgage and bank statements,
6 an income and expense worksheet, and tax returns. (Marshall Att. 2 at 25-26)

7 **D. Post Enrollment**

8 After consumers enroll and their paperwork is processed, the consumer's file is
9 forwarded to NFR's negotiations department, which has approximately seven to nine
10 employees. (Morales ¶¶ 5, 9) Files are distributed on a random basis. (Id. ¶ 10)
11 None of the negotiators specialize in any particular lender, and no lender deals with
12 only one specific negotiator. (Id.) The negotiators do not have any "special"
13 contacts at the lenders (Frost ¶ 32), and in fact have to make numerous calls to
14 lenders just to get someone to call them back (Morales ¶¶ 15, 19) While the sales
15 reps claim that NFR knows "all of the new programs that all of the banks have
16 released" (Gale Att. 8 at 67:10-17), and assure consumers they know what kind of
17 deal the consumer's lender will offer even before speaking with the lender, there are
18 no "preset" programs, and there is no way to know ahead of time what proposals
19 lenders will make (Morales ¶ 21). There is actually very little negotiating. (Id. at ¶¶
20 13,18-19, 23) After receiving a consumer's paperwork, the lender eventually makes
21 an offer, which is typically a "take it or leave it" proposal. (Id. at ¶¶ 23-24)

22 1. NFR Does Not Contact Consumers' Lenders For Weeks

23 After a consumer enrolls, days and weeks pass before his file is assigned to a
24 negotiator. (Frost ¶ 28; Marshall ¶ 16; Morales ¶ 12; Trenkle ¶ 22) In some cases no
25 work is done on the consumer's file for months. (Marshall ¶ 17; Frost ¶ 28;
26 consumers Brown ¶¶ 10-13; R. Hinkley ¶¶ 7, 24; Hommel ¶¶ 9, 15; T. Stenzel ¶¶ 23-
27 26) NFR's neglect and delay stems at least in part from the fact that negotiators have
28 too many files to handle and are unable to attend to new files as they are assigned.

1 (Marshall ¶ 14; Morales ¶¶ 11-12; Frost ¶ 28 (Defendant Stone stated that “files sat
2 around without being worked on because NFR had too much work and not enough
3 qualified employees to do the negotiating”)) When negotiators work on a file and
4 finally make initial contact with a consumer’s lender,³ there is then further delay, as
5 lenders are difficult to reach, they need time to review their borrowers’ files, and they
6 take their time in proposing a deal. (Morales ¶¶ 18-20)

7 When consumers call to inquire about the status of negotiations, they often are
8 unable to reach a live person who can tell them anything about their file, even after
9 repeated attempts. (Frost ¶ 29; Marshall ¶ 23; consumers Brown ¶ 12; R. Hinkley ¶
10 21; Howard ¶¶ 14-19; Jackson ¶ 8; Rosener ¶ 11; Smoke ¶ 9; Steffens ¶ 9; Vasquez ¶
11 8) If they are able to reach a live person, they may receive assurances that
12 negotiations are proceeding smoothly and everything is under control (Magby ¶
13 6)—even when no negotiations are taking place at all (Gines ¶¶ 15-16; Collins ¶¶ 10-
14 12; Howard ¶¶ 14-19).

15 Ultimately, as explained below, many consumers lose their homes, and many
16 other consumers who do not lose their homes avoid foreclosure only through their
17 own efforts.

18 2. NFR Does Not Stop Foreclosure

19 In many instances consumers lose their homes. (Marshall ¶¶ 17, 21, 26, 29;
20 Frost ¶ 28; Trenkle ¶ 27) Consumer declarant Lawrence Steffens, for example, was
21 told a month after enrolling that NFR was working on his case, but then later
22 discovered to his horror that his home had actually been sold at a sheriff’s sale just
23 two weeks after he had enrolled with NFR. (Steffens ¶¶ 7, 9, 11) NFR promised
24 declarant Michael Jackson that it would prevent a foreclosure sale that was scheduled
25 to take place a month later, and urged him to pay NFR’s fee immediately so that they

26
27 ³ Negotiators often speak to the lender’s loan-servicing agent. (Morales
28 ¶ 14) Lenders and services are collectively referred to in this memorandum as
lenders.

1 could stop the foreclosure. After paying his fee, however, he was no longer able to
2 reach anyone at NFR, and two weeks later his lender told him that they had not heard
3 from NFR. His home was sold on the courthouse lawn as scheduled a month later.
4 Jackson ¶¶ 4-8. NFR guaranteed Melencio Dinogan that they would stop the
5 foreclosure process and that he could relax and rest assured that everything would go
6 smoothly. Dinogan ¶¶ 5-6. However, after Mr. Dinogan paid NFR his \$1,300 fee, he
7 was no longer able to communicate with NFR, despite repeated attempts, until four
8 months later when he was finally connected to someone who told him his lender
9 would not agree to a deal and was proceeding with foreclosure. *Id.* ¶¶ 10-12. He
10 then discovered that his house had already been sold, and was then forced to move
11 out. *Id.* ¶ 14. Minerva Vasquez paid \$600 for NFR's service based on the claim that
12 NFR would help her avoid foreclosure and losing her home. Shortly thereafter her
13 lender notified her that foreclosure proceedings had begun. She called NFR, but no
14 one would return her calls, and she heard nothing more from NFR. Ten months after
15 enrolling, her house was finally foreclosed on and sold.⁴

16 NFR failed to live up to its promise in other cases as well. NFR guaranteed
17 Daniel Gilligan that they would stop foreclosure by getting him a plan with lower
18 monthly payments and no up-front payment. A month later, NFR informed him he
19 would need to pay his lender \$1,200 the next day, and that his monthly payments
20 would increase by \$300-400. He could not afford the proposed plan and was left to
21 deal with foreclosure on his own. (Gilligan ¶¶ 6, 13-14) NFR told James Hommel
22 they would stop foreclosure by obtaining plan in which he would have two months to
23 pay his lender \$5,000. Shortly over two months later, Mr. Hommel found a Notice of
24

25 ⁴ See also Declaration of Susan Kyte, who was finally presented with a deal
26 on the day before the scheduled sale date of her home. Even though she faxed her
27 acceptance of the proposed plan to NFR the same day, her lender sold her home the
28 following day because NFR failed to forward her signed agreement to her lender.
An NFR representative laughed at her. Kyte ¶¶ 5, 9-15

1 Trustee's Sale taped to his front door. When he called his lender, he discovered that
2 they had not heard from NFR. Mr. Hommel was left to work out a deal himself with
3 his lender. (Hommel ¶¶ 5, 15) Other consumers had similar experiences. (See
4 Grieve ¶¶ 5, 6, 11-14; Henry ¶¶ 5, 11, 15; R. Hinkley ¶¶ 7-8, 24-26; Magby ¶¶ 4-5, 7,
5 10; Smoke ¶¶ 5-11; see also Marshall ¶ 19-22, Morales ¶ 26-27, Trenkle ¶ 30 (NFR
6 promised relief it was unable to deliver).)

7 Even when NFR's failure to stop foreclosure does not lead to consumers'
8 losing their homes, consumers suffer other injury. They not only lose the fee they
9 paid to NFR (see discussion infra), but they also accrue additional arrears, as well as
10 penalties, late fees, and attorneys fees and costs. (Trenkle ¶ 26)

11 3. NFR Does Not Grant Full Refunds

12 NFR receives a high volume of refund requests. (Marshall ¶ 28; Frost ¶ 36)
13 However, despite its guarantee and its promises to provide refunds, NFR is tight
14 fisted in responding to refund requests. While NFR represents that signing up for its
15 service is "risk free," in fact NFR routinely denies its clients' requests for refunds,
16 unless the consumer complains to the Better Business Bureau (in which case NFR
17 typically issues only half of the consumer's fee). (Morales ¶ 33 (Tapia was
18 unsympathetic, hard core and tight when it came to refunds; told Morales to shine
19 consumers on); Marshall ¶¶ 30-33; Frost ¶ 38; Trenkle ¶ 39)

20 NFR denied Lawrence Steffens's refund request even though his house had
21 been sold less than two weeks after he had enrolled in NFR's program and NFR had
22 failed to start negotiations with his lender. (Steffens ¶¶ 5,11-12) NFR denied Gloria
23 Magby's refund request after NFR obtained an offer that would have required her to
24 pay \$5,000 more in an up-front payment to her lender than NFR had previously told
25 her she would have to pay. (Magby ¶¶ 4, 7) NFR initially denied Debra Grieve's
26 refund request even though they failed to call her lender until the day before her
27 foreclosure sale and was unable to reach a deal; they gave her a refund only after she
28 complained to the BBB. (Grieve ¶¶ 5-6, 11-13, 15-17) Other consumers had similar

1 experiences. (Collins ¶¶ 3, 6-8, 10-11, 13-14; Dinogan ¶¶ 5, 8, 11-14; Gilligan ¶¶ 6,
2 13-16; Gines ¶¶ 5-6, 9, 13, 16, 18, 21-23; Henry ¶¶ 5, 11-13; R. Hinkley ¶¶ 10, 15,
3 21-22, 24-25, 28-31; Hommel ¶¶ 5-6, 13-23; Kyte ¶¶ 5, 10-19; Rosener ¶¶ 5, 11-17)

4 **E. State Regulation of Foreclosure Consultants**

5 Because of the potential for foreclosure consultants (like NFR) to wreak
6 devastating harm on consumers, various states (e.g., California, Colorado, Illinois,
7 Indiana, Maryland, Minnesota, Missouri, New Hampshire and Rhode Island) have
8 enacted laws that are specifically focused such businesses. These statutes typically
9 prohibit foreclosure consultants from demanding or collecting payment before all
10 promised services have been completed (e.g., Cal. Civ. Code § 2945.4, Minn. Stat.
11 § 325N.04), and from failing to provide consumers with a notice of their right under
12 the statute to cancel the contract (e.g., Cal. Civ. Code § 2945.3 and Minn. Stat.
13 § 325N.03(c) and (e)).

14 **F. Defendants' History with Law Enforcement**

15 Defendants have been involved in two prior enforcement actions. The first
16 was an action by California Attorney General (CAG) against Housing Assistance
17 Services, Inc. (HAS) (Stahl ¶ 11.c-d, Atts. 4-5), which appears to be a predecessor to
18 NFR. A stipulated final judgment was eventually entered in settlement of the
19 charges. (Diehl ¶ 12) The judgment prohibited HAS, *inter alia*, from failing to
20 provide the required notice of cancellation right and collecting payment in advance of
21 completing all promised services, as well as from “implying that any governmental
22 agency is somehow connected with, approves, or endorses the defendants.” (*Id.* ¶ 13)

23 CAG later found it necessary to negotiate an amended final judgment, and
24 Chele Stone handled much of the negotiations on behalf of HAS. (*Id.* ¶¶ 15-16) The
25 amended judgment, which was entered June 2, 2006, banned CAG from selling
26 foreclosure consulting services in California. (*Id.* ¶ 18) NFR's Articles of
27 Incorporation were filed on May 8, 2006. (Gale ¶ 5)

1 The Minnesota Attorney General (MAG) sued NFR on April 2008. (Stahl ¶
2 12, Att.6) Minnesota’s complaint made allegations that NFR had violated Minnesota
3 law by engaging in conduct that was similar to the conduct alleged in CAG’s
4 complaint in NFR. On September 18, 2008, a Stipulation and Consent Judgment
5 between NFR and Minnesota was entered in the action. (Id., Att. 7) The stipulation
6 is signed on NFR’s part by David Ealy, Todd Lemkau, Hugo Tapia, Chele Stone,
7 Edward McCrink, Jr., and Justin Oddy (id. at 83), who are identified as “owners,
8 officer, directors, and/or managers” (id. at 73). The judgment bans NFR from
9 engaging or participating in the foreclosure-consultant business in Minnesota. (Id. at
10 76-77)

11 **IV. ARGUMENT: THE COURT SHOULD ENTER THE REQUESTED**
12 **RELIEF**

13 Plaintiff asks the Court to enter a temporary restraining order that freezes
14 Defendants’ assets, appoints a temporary receiver over Defendants, and orders
15 Defendants to show cause why a preliminary injunction should not be entered and a
16 permanent receiver should not be appointed. The requested relief, which is
17 authorized under Section 13(b) of the FTC Act, is warranted, since Plaintiff is likely
18 to succeed on the merits; irreparable injury to consumers and to the Court’s ability to
19 provide effective final relief to consumers is likely to result if the requested order is
20 not entered; and the equities balance in Plaintiff’s favor.

21 **A. The Court is Authorized to Grant the Requested Relief**

22 Section 13(b) of the FTC Act authorizes this Court to issue the temporary and
23 preliminary relief that Plaintiff seeks. First, Section 13(b) expressly authorizes the
24 issuance of a permanent injunction. The second proviso of Section 13(b) of the FTC
25 Act, 15 U.S.C. § 53(b), states that "in proper cases the Commission may seek, and,
26
27
28

1 after proper proof, the court may issue, a permanent injunction."⁵ A routine fraud
2 case such as this one, replete with misrepresentations of material facts in violation of
3 Section 5(a) of the FTC Act, qualifies as a "proper case" for injunctive relief under
4 Section 13(b). FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111-13 (9th Cir. 1982).
5 The Court therefore has the authority to issue a permanent injunction.

6 The authority to issue a permanent injunction includes the authority to grant
7 ancillary and preliminary equitable relief. The Court may exercise the full breadth of
8 its equitable authority in a Section 13(b) action because Congress "did not limit that
9 traditional equitable power" when it invoked that power in passing the FTC Act.
10 Singer, 668 F.2d at 1113. Thus, under Section 13(b), the Court may order ancillary
11 equitable remedies, such as rescission of contracts and restitution, as well as whatever
12 additional temporary or preliminary relief is necessary to preserve the possibility of
13 effective final relief. Id. at 1113-14. Preliminary relief may include an order freezing
14 assets, a temporary restraining order enjoining practices and permitting expedited
15 discovery, and an order appointing a receiver to ensure that assets are protected from
16 dissipation. See, e.g., Singer, 668 F.2d at 1113-1114; FTC v. U.S. Oil & Gas Corp.,
17 748 F.2d 1431, 1432 (11th Cir. 1984);⁶ see also S. Rep. 103-130, 103d Cong., 1st
18

19 ⁵ Section 13(b) of the FTC Act authorizes the issuance of injunctive relief in
20 two different situations. Because the Commission proceeds here under the second
21 proviso of Section 13(b), the standard that is prescribed in the statute (which
22 relates to the issuance of temporary relief in aid of administrative proceedings)
23 does not apply. FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982);
FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984).

24 ⁶ In fact, in many previous routine Section 13(b) cases in this district, this
25 Court has entered temporary restraining orders ex parte and without notice granting
26 the full panoply of relief requested here. See Certification and Declaration of
27 Plaintiff's Counsel, ¶ 14, listing, inter alia, the following recent examples: FTC v.
28 Edebitpay, LLC, CV-07-4880 ODW; FTC v. Group C Marketing, Inc., CV-06-
6019 GHK; FTC v. Universal Premium Services, CV-06-0849 SJO; and FTC v.
Connelly, SACV- 06-701 DOC.

1 Sess. (1993), *reprinted in* U.S.C.C.A.N. (1994) at 1790-91 ("Section 13 of the FTC
2 Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC
3 can go into court *ex parte* to obtain an order freezing assets, and is also able to obtain
4 consumer redress"). District courts are also authorized to depart from normal
5 discovery procedures and to fashion discovery by order to meet discovery needs in
6 particular cases. F.R.Civ.P. 1, 26(b)(2), 30(a), 34(b).

7 The exercise of this broad, equitable authority is particularly appropriate
8 where, as here, the public interest is at stake. Porter v. Warner Holding Co., 328 U.S.
9 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); U.S. v. Laerdal Mfg., 73 F.3d 852,
10 857 (9th Cir. 1995); FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir.
11 1989).

12 **B. A Preliminary Injunction Against NFR is Warranted**

13 Traditionally, a plaintiff may obtain a preliminary injunction if it shows either:
14 (1) a combination of probable success on the merits and the possibility of irreparable
15 injury, or (2) that serious questions are raised and the balance of hardships tips in its
16 favor. United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir.
17 1987). These are not two separate tests: "These two formulations represent two
18 points on a sliding scale in which the required degree of irreparable harm increases as
19 the probability of success decreases." Id.

20 Under the first of these formulations, where the government moves for
21 injunctive relief in a statutory enforcement action, it need not show irreparable injury
22 if it shows a likelihood of success on the merits, in which case harm to the public
23 interest is presumed. Id.; World Wide Factors, 882 F.2d at 347 ("the district court
24 need only to find some chance of probable success on the merits," citing Odessa
25 Union); and FTC v. Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999).
26 Thus, a preliminary injunction may be granted if the district court determines that the
27 FTC has a likelihood of success on the merits.
28

1 Under the second formulation of the sliding-scale test, a district court may
2 grant a preliminary injunction even absent a showing of a likelihood of success on the
3 merits if the moving party shows "that his cause presents serious questions of law
4 worthy of litigation." Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524,
5 1528 (9th Cir. 1993). In weighing the public and private equities, the public interest
6 should receive greater weight (World Wide Factors, Ltd., 882 F.2d at 347),
7 particularly where the evidence demonstrates that a defendant's business is rooted in
8 deception, for a "court of equity is under no duty to protect illegitimate profits or
9 advance business which is conducted [illegally]" CFTC v. British American
10 Commodity Options Corp., 560 F.2d 135, 143 (2d Cir. 1977), cert. denied, 438 U.S.
11 905 (1978) (internal citations omitted).

12 1. Plaintiff is Likely to Succeed on the Merits

13 Plaintiff alleges that Defendants have violated Section 5(a) of the FTC Act, 15
14 U.S.C. § 45(a), which prohibits "unfair or deceptive acts or practices in or affecting
15 commerce." A violation of Section 5(a) is properly found upon a showing that "first,
16 there is a representation, omission, or practice that, second, is likely to mislead
17 consumers acting reasonably under the circumstances, and third, the representation,
18 omission, or practice is material." FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th
19 Cir. 1994). See also Resort Car Rental System v. FTC, 518 F.2d 962, 964 (9th Cir.),
20 cert. denied, 423 U.S. 827 (1975) (advertising that induces consumer response
21 through deception violates FTC Act).

22 a. Defendants Have Misrepresented that They Will Stop Foreclosure

23 Count 1 of the Complaint alleges that Defendants have misrepresented that
24 they will stop foreclosure. Defendants make this representation in their written
25 advertisements as well as in their sales pitches. As discussed above, after paying
26 hundreds or even thousands of dollars to Defendants, and trusting Defendants to save
27 their homes, many consumers nonetheless lose their homes to foreclosure. In many
28 other instances, it is not Defendants who save consumers from foreclosure, but the

1 consumers themselves, after finding that Defendants have failed to negotiate any
2 resolution or have failed to obtain the relief that they promised.

3 b. Defendants Have Misrepresented that They Will Grant Full
4 Refunds

5 Count 2 of the Complaint alleges that Defendants have misrepresented that
6 Defendants will give full refunds to consumers if Defendants fail to stop foreclosure.
7 In addition to providing a guarantee, Defendants in numerous instances explicitly
8 promise that the consumer will be entitled to a full refund if Defendants fail to
9 provide a satisfactory plan to save the consumer's home from foreclosure. However,
10 even when consumers lose their homes, or NFR fails to contact their lenders, or NFR
11 obtains a plan that requires substantially larger payments than it had promised to
12 secure for the consumer, NFR refuses to provide full refunds. Instead, consumers
13 who trusted NFR to save their homes are left without the large sum of money they
14 paid to NFR and without the relief that NFR had promised them in their hour of
15 desperation.

16 2. The Equities Balance in the Commission's Favor

17 The public equities in this case overwhelmingly warrant preliminary and
18 ancillary injunctive relief. The proposed TRO and preliminary injunction would
19 prohibit Defendants from engaging in deceptive and otherwise unlawful conduct in
20 operating their businesses. Defendants' past conduct demonstrates that they will not
21 stop their deceptive practices absent a definitive order to do so. Moreover, the
22 conduct prohibitions contained in the proposed TRO would work no hardship on
23 Defendants, as they have no right to engage in practices that violate the law. See
24 World Wide Factors, 882 F.2d at 347; United States v. Diapulse Corp. of America,
25 457 F.2d 25, 29 (2d Cir. 1972).

1 **C. An Asset Freeze, Temporary Receiver, and Immediate Access to the**
2 **Corporate Business Premises Are Necessary to Prevent Dissipation**
3 **of Assets and to Preserve the Possibility of Effective Final Relief for**
4 **Consumers**

5 Defendants' assets should be frozen. In the Ninth Circuit, an asset freeze may
6 be imposed when the *possibility* of dissipation of assets exists. FSLIC v. Sahni, 868
7 F.2d 1096, 1097 (9th Cir. 1989).⁷ Where the defendants have committed fraud, a
8 court may conclude there is a likelihood that assets will be dissipated. SEC v. Manor
9 Nursing Ctrs., Inc., 458 F.2d 1082, 1106 (2d Cir. 1972). The magnitude of the
10 defendant's ultimate liability also warrants the entry of an asset freeze. FTC v. USA
11 Bevs., Inc., 2005 U.S. Dist. LEXIS 39075 at *24-25 (S.D. Fla. 2005) ("The scope of
12 the monetary liability for Defendants' unlawful conduct is enormous and provides
13 considerable motivation for defendants to place their assets beyond the Court's
14 reach").

15 In this case, an asset freeze is warranted because defendants' business is
16 permeated by fraud, and because defendants face a potential liability of over \$10
17 million, giving them ample motivation to hide their funds. Moreover, if Defendants'
18 potential liability exceeds the amount of assets in their possession, any expenditure
19 by Defendants will dissipate the already insufficient pool of assets that are available
20 to redress the consumer injury they have caused. A TRO that freezes Defendants'
21 assets would preserve the possibility of full and effective relief for defrauded
22 consumers by preserving the status quo pending a hearing on the preliminary

23
24 ⁷ In Sahni, the Ninth Circuit reversed a district court's denial of an asset
25 freeze where the district court had required a showing that asset dissipation was not
26 only possible but likely. 868 F.2d at 1097. The court held that "[s]o long as the
27 district court continued to believe that FSLIC was likely to succeed on the merits,
28 the court should only have required FSLIC to show a possibility of dissipation of
assets." Id. Requiring a showing of a "likelihood" of dissipation "placed an
unnecessarily heavy burden on FSLIC." Id. at 1097.

1 injunction. At a minimum a temporary asset freeze should be imposed until it can be
2 determined whether Defendants have sufficient assets to cover their potential
3 liability.

4 As another means to maintain the status quo, Plaintiff seeks the appointment of
5 a temporary receiver, who will locate and preserve corporate assets and records to
6 obviate the threat of destruction, dissipation, or concealment, and will examine
7 whether the defendants' business can be run both profitably and legally. In cases
8 involving fraud, a temporary receiver is particularly appropriate to maintain the status
9 quo. SEC v. First Financial Group, 645 F.2d 429, 438-39 (5th Cir. 1981); see also
10 SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963) ("It is hardly conceivable that
11 the trial court should have permitted those who were enjoined from fraudulent
12 misconduct to continue in control of [the corporate defendant's] affairs for the benefit
13 of those shown to have been defrauded. In such cases the appointment of a
14 trustee-receiver becomes a necessary implementation of injunctive relief"). A
15 receiver is necessary here because, as shown above, Defendants' business is
16 permeated by fraud. Furthermore, given current computer technology, records and
17 assets can be destroyed or concealed at the touch of a button unless a third party takes
18 immediate possession of the business.

19 **D. A Preliminary Injunction and Asset Freeze Should Be Issued**
20 **Against the Individual Defendants**

21 The preliminary injunction and asset freeze should extend to the individual
22 Defendants, since the individual Defendants formulated and controlled NFR's
23 deceptive conduct, and they knew or should have known that NFR's representations
24 were deceptive.

25 If a business is liable for violating Section 5, an individual defendant may be
26 held liable for injunctive relief if the FTC shows that the individual defendant
27 participated directly in the practices or acts or had authority to control them. FTC v.
28 Publishing Clearing House, 104 F.3d 1168, 1170 (9th Cir. 1997); FTC v. Amy Travel

1 Service, Inc., 875 F.2d 564, 573 (7th Cir.), cert. denied, 493 U.S. 954, 107 L. Ed. 2d
2 352, 110 S. Ct. 366 (1989); FTC v. Freecom Communications, Inc., 401 F.3d at
3 1204. "Authority to control the company can be evidenced by active involvement in
4 business affairs and the making of corporate policy, including assuming the duties of
5 a corporate officer." Amy Travel at 573.

6 As officers, owners, and directors, Defendants Ealy, Stone⁸ and Tapia have the
7 authority to control NFR. They also are active in NFR's business affairs, managing
8 the day-to-day operations of NFR. (Morales ¶¶ 30-34; Frost ¶ 21) They also all
9 signed the stipulated consent judgment with the MAG on behalf of NFR.
10 Accordingly, they are liable for violating Section 5 and are subject to a preliminary
11 injunction.

12 The individual defendants' assets should also be frozen, since these defendants
13 are likely to be held liable for monetary relief. An individual who is liable for
14 injunctive relief under Section 13(b) of the FTC Act is also liable for monetary relief
15 if the individual had sufficient "knowledge" of the deception. Publishing Clearing
16 House, 104 F.3d at 1171; Freecom at 1207; Amy Travel at 573-74.

17 The requisite degree of knowledge can be demonstrated by showing actual
18 knowledge of material misrepresentations, reckless indifference to the truth or falsity
19 of the misrepresentations, or an awareness of a high probability of fraud along with
20 an intentional avoidance of the truth; the Commission need not show intent to
21 defraud. Publishing Clearing House at 1171. In short, the issue is whether the
22 individual Defendants "knew or should have known of the entity's
23 misrepresentations." Freecom at 1203.

24 The extent of an individual's involvement in the business affairs of a company
25 engaged in deception "is sufficient to establish the requisite knowledge for personal
26

27 ⁸ Stone was a director of NFR between May 8, 2006 and May 30, 2007.
28 (Gale ¶ 5)


1 restitutionary liability." FTC v. Affordable Media, LLC, 179 F.3d 1228, 1235 (9th
2 Cir. 1999). The individual Defendants have the requisite degree of knowledge. As
3 noted above, each of these defendants is actively involved in running the company,
4 which suffices to establish monetary liability. In addition, it is clear that NFR's
5 deceptive conduct is part of a concerted scheme to defraud rather than the result of
6 negligence or the bad acts of a rogue salesman. The deception is built into the script,
7 which includes a number of blatantly false claims, as described above. The company
8 receives numerous complaints and refund requests from clients complaining that
9 NFR failed to provide the relief that was promised to them. (Marshall ¶ 19-22;
10 Morales ¶ 26-27; Trenkle ¶ 30) These complaints and refund requests are handled in
11 the small office that these defendants share. (Morales ¶¶ 30, 33; Marshall ¶¶ 30-31;
12 Frost ¶¶ 36, 38) All the defendants are well aware that consumers are irate over
13 NFR's failure to deliver, yet they refuse to sanction refunds, and continue to allow
14 consumers to be told that they will receive an affordable plan. The individual
15 Defendants are not only aware of NFR's deceptive conduct but condone it.

16 **V. CONCLUSION**

17 For the foregoing reasons, Plaintiff respectfully requests that the Court issue a
18 temporary restraining order, including an asset freeze, the appointment of a
19 temporary receiver, and an order to show cause why a preliminary injunction should
20 not be issued and a permanent receiver should not be appointed.

21
22 Respectfully submitted,

23 Dated: Feb. 1, 2009

24 
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