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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 SOUTHERN DIVISION

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 AMERICAN MORTGAGE  
CONSULTING GROUP, LLC, a  
California Limited Liability Company,  
19 also d.b.a. American Mortgage Group  
and American Mortgage Consulting;

20 HOME GUARDIAN MANAGEMENT  
SOLUTIONS, LLC, a California  
21 Limited Liability Company, also d.b.a.  
Home Guardian Solutions; and

22 MARK NAGY ATALLA, d.b.a. Home  
Guardian Solutions, Home G Solutions  
23 Firm, and Home G Solutions Group,  
24

25 Defendants.

Case No.

MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF PLAINTIFF'S *EX PARTE*  
APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER WITH ASSET FREEZE  
AND OTHER EQUITABLE  
RELIEF AND ORDER TO SHOW  
CAUSE

[FILED UNDER SEAL]

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1 **I. INTRODUCTION**

2 Since early 2011, Defendants have preyed upon distressed homeowners,  
3 promising substantially lower monthly mortgage payments in exchange for an  
4 up-front fee of \$1,495 to \$4,495. Despite failing to secure the promised  
5 modification, Defendants refuse to refund the fee. Defendants violate nearly every  
6 provision of the Mortgage Assistance Relief Services Rule (“MARS Rule”), which  
7 outlaws advance fees and various deceptive practices.<sup>1</sup>

8 The FTC moves for an *ex parte* temporary restraining order (“TRO”) to stop  
9 Defendants’ nationwide loan modification scam. The FTC’s proposed TRO would  
10 freeze and preserve Defendants’ assets for restitution to injured consumers, appoint  
11 a temporary receiver over the Corporate Defendants, and permit limited expedited  
12 discovery. This relief is necessary to prevent ongoing injury to consumers,  
13 destruction of evidence, and dissipation of assets, and to preserve the Court’s  
14 ability to provide effective final relief to consumers.

15 **II. DEFENDANTS**

16 The two Corporate Defendants, American Mortgage Consulting Group, LLC  
17 (“AMC”), and Home Guardian Management Solutions, LLC (“HGS”), are  
18 California limited liability companies. Individual Defendant Mark Atalla formed

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19  
20 <sup>1</sup> The FTC enforces both the MARS Rule, 16 C.F.R. Part 322, effective  
21 December 29, 2010 (except for the advance fee ban, which went into effect  
22 January 31, 2011), and Regulation O, 12 C.F.R. Part 1015, which replaced the  
23 MARS Rule effective December 30, 2011. The Rule was promulgated pursuant to  
24 the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, § 626, 123 Stat. 524,  
25 678, as clarified by the Credit Card Accountability Responsibility and Disclosure  
26 Act of 2009, Pub. L. No. 111-24, § 511, 123 Stat. 1734, 1763-64, and amended by  
the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of

27 For ease of reference, we here cite only the applicable sections of 16 C.F.R.  
28 Part 322. For conduct after December 30, 2011, the applicable section is the  
parallel provision of 12 C.F.R. Part 1015, but the language is the same.

1 and owns both. Both have operated the same mortgage scam.<sup>2</sup> HGS began  
2 operating by March 2011.<sup>3</sup> By October 2011, it had earned an “F” rating from the  
3 Better Business Bureau.<sup>4</sup> Atalla formed AMC in November 2011.<sup>5</sup> The two  
4 companies used the same addresses,<sup>6</sup> commingled monies in a corporate bank  
5 account,<sup>7</sup> and used the same account—sometimes the same phone number—for  
6 telephone service,<sup>8</sup> and used virtually identical contract forms and other  
7 documents.<sup>9</sup> As an AMC representative told an FTC investigator posing as a  
8 prospective customer, HGS and AMC are “sister companies.”<sup>10</sup>

9 Individual Defendant Mark Nagy Atalla (“Atalla”) owns, directs, and  
10 controls the Corporate Defendants. He is listed as a “Member” in corporate  
11 formation papers for both companies and is CEO and 100% owner of AMC.<sup>11</sup> He  
12  
13  
14

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15  
16 <sup>2</sup> Compare Ex. 1, 4-11, 13-14, and 18 (HGS) with Ex. 3, 12, 15, and 17 (AMC)  
17 and Ex. 16, pp. 342-43, ¶¶ 19-24, pp. 490-503 (undercover recording of AMC).

18 <sup>3</sup> Ex. 16, p. 340, ¶ 15.a (transactions in March 2011 generated complaints).

19 <sup>4</sup> *Id.* at pp. 341-42, ¶ 17.

20 <sup>5</sup> *Id.* at p. 338, ¶ 5.a. The change was announced to HGS employees in late  
21 December, *id.* at p. 354, ¶ 48, when a bank account in the new corporate name was  
22 opened. *Id.* at pp. 349-50, ¶ 34. HGS stopped taking consumer calls in December.  
23 Its phones were disconnected in January 2012. Consumer emails to HGS began  
24 bouncing back soon after. Ex. 18, p. 653, ¶ 13. See Ex. 9, p. 200, ¶ 11 (discovered  
25 HGS line no longer in service in February 2012).

26 <sup>6</sup> Ex. 16, pp. 356-57, ¶¶ 52-56.

27 <sup>7</sup> *Id.* at p. 349, ¶ 33.d.

28 <sup>8</sup> *Id.* at pp. 357-58, ¶ 57.

<sup>9</sup> *Id.* at pp. 358-59, ¶ 58.

<sup>10</sup> *Id.* at p. 343, ¶ 22 (response to investigator’s query about HGS).

<sup>11</sup> *Id.* at pp. 337, 349, ¶¶ 4.b, 34.b.

1 is a signatory on both companies' bank accounts.<sup>12</sup> He has paid for the telephone  
2 service for both companies<sup>13</sup> and for Internet domain name registration and email  
3 accounts for americanmortgageconsulting.com, while another Atalla company,  
4 Newport Mortgage Group, Inc., paid for services for homeguardiansolutions.com.<sup>14</sup>

5 Atalla directly participates in Defendants' sales practices, using the alias  
6 "Mark Carter" with HGS consumers and "Mark Sharp" with AMC consumers.<sup>15</sup>

### 7 **III. DEFENDANTS' ILLEGAL BUSINESS PRACTICES**

#### 8 **A. Defendants' Representations and Fees**

9 Since at least March 2011, Defendants have marketed and sold mortgage  
10 assistance relief services<sup>16</sup> to consumers nationwide.<sup>17</sup> Defendants have diverted  
11 consumers from authentic, government-affiliated programs by engaging in a course  
12 of conduct to advertise, market, promote, offer to sell, and sell to consumers  
13 purported mortgage assistance relief services. Defendants have marketed and sold  
14 their services to homeowners who are in financial distress, behind on their  
15 mortgage loans, or in danger of losing their homes to foreclosure.<sup>18</sup>

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17 <sup>12</sup> This includes accounts in both corporate names and one titled, "Mark N. Atalla,  
18 sole prop, dba Home G Solutions Firm." *Id.* at pp. 348-51, ¶¶ 33.a, 34.a, 37, 39.  
19 Atalla owns that dba. *Id.* at pp. 338-39, ¶ 7.a.

20 <sup>13</sup> *Id.* at pp. 346-47, ¶¶ 30.b, 31.

21 <sup>14</sup> *Id.* at pp. 344, 345, 351, ¶¶ 27.a, 28.b, 38.c.

22 <sup>15</sup> *Id.* at pp. 359-60, ¶¶ 59-64.

23 <sup>16</sup> The MARS Rule defines "Mortgage Assistance Relief Service" as "any service,  
24 plan, or program, offered or provided to the consumer in exchange for  
25 consideration, that is represented, expressly or by implication, to assist or attempt  
26 to assist the consumer with any of" various activities related to home mortgages,  
including negotiating a modification of any term of a dwelling loan and stopping or  
preventing foreclosure sale of the consumer's dwelling. 16 C.F.R. § 322.2 (i).

27 <sup>17</sup> Ex. 16, p. 340, ¶¶ 14-15; p. 361, ¶¶ 65-66.

28 <sup>18</sup> Ex. 1, pp. 27-28, ¶ 7; Ex. 5, pp. 87-88, ¶ 4; Ex. 7, p. 126, ¶ 3; Ex. 8, p. 140, ¶ 2;  
Ex. 11, p. 239, ¶ 2; Ex. 13, p. 277, ¶ 4; Ex. 14, p. 305, ¶ 2.



1 Typically, Defendants’ representatives contact consumers by telephone and  
2 inquire whether the consumer has a home mortgage that he or she would like to  
3 modify to reduce the monthly payment. If the consumer indicates interest, the  
4 caller solicits information about the consumer’s financial situation, telling the  
5 consumer that if he or she qualifies for a loan modification, Defendants will  
6 contact the consumer’s lender and negotiate a loan modification that will reduce  
7 the interest rate significantly and reduce the monthly payment by hundreds of  
8 dollars.<sup>19</sup>

9 Within a few days after taking the consumer’s “prequalification”  
10 information,<sup>20</sup> Defendants contact the consumer again by telephone or email to  
11 congratulate him or her on being approved for a loan modification. The  
12 congratulatory email or phone call creates the impression that the loan  
13 modification is virtually certain.<sup>21</sup> The contract sent to consumers at about the  
14 same time also assures consumers that they will receive a loan modification:

15 Because we pre-qualify you for a program BEFORE we accept your  
16 money we both avoid loss of precious time and resources. You can be  
17 sure that when we take you on as a client we are convinced that we  
18 can get your lender to offer you a solution to your problem.<sup>22</sup>

19 In some instances, Defendants expressly affirm that a favorable loan  
20 modification is highly likely. For example, HGS representative Randall Walker

21 \_\_\_\_\_  
22 <sup>19</sup> See, e.g., Ex. 3, p. 76; Ex. 11, p. 248; Ex. 18, p. 648, ¶ 2.

23 <sup>20</sup> Defendants’ emails tell consumers that the purpose of the prequalification is so  
24 Defendants’ underwriters can “review and give . . . a final answer whether”  
25 Defendants can “help” the consumer. See, e.g., Ex. 8, p. 152.

26 <sup>21</sup> Ex. 1, p. 28, ¶¶ 9-10, pp. 35-37; Ex. 3, p. 71, ¶ 4, p. 74; Ex. 8, p. 142, ¶ 9,  
27 pp. 161-62; Ex. 10, p. 215, ¶7, p. 218; Ex. 12, p. 260, ¶ 11, p. 264; Ex. 13, p. 277,  
28 ¶ 6, p. 283; Ex. 14, pp. 305-06, ¶ 4, p. 308; Ex. 15, pp. 323-24, ¶ 7, p. 327; Ex. 18,  
p. 649, ¶ 4, pp. 666, 691.

<sup>22</sup> See, e.g., Ex. 1, p. 43; Ex. 3, p. 76.

1 sent Sharon Backlund a “Congratulations on your approval” email, then called her  
2 with the “good news” that she had “qualified” for HAMP and that HGS “could get  
3 a favorable HAMP modification” for her. He assured Backlund that because she  
4 “qualified” for their program, there was “virtually no chance that [she] would not  
5 get a modification.”<sup>23</sup> Defendants told other consumers that the loan modification  
6 was “guaranteed” or “certain.”<sup>24</sup> Sometimes Defendants refer to their “track  
7 record” of past success.<sup>25</sup> Defendants’ “approval” emails to consumers also state  
8 that the forms attached to the email will “complete your modification.”<sup>26</sup>

9 Defendants’ forms typically consist of forms authorizing Defendants to  
10 negotiate with the consumer’s lender and debit his or her bank account for the  
11 service fee, and two contractual documents that Defendants require consumers to  
12 sign, a “Loan Approval Disclosure & Agreement” (“Loan Agreement”) and a  
13 “Legal Team-Client Fee Agreement” (“Fee Agreement”). The Loan Agreement  
14 sets forth the specific terms of the consumer’s new loan, including interest rate and  
15 monthly payment, together with the current interest rate and monthly payment, so  
16 that the reduction in interest rate and monthly payment can be easily calculated.  
17 This document reinforces the oral claims of certainty by stating: “The vast  
18 majority of our clients obtain the solution they contract for.”<sup>27</sup> In numerous  
19 instances, Defendants also tout these terms to consumers by phone.<sup>28</sup>

20 Defendants often tell consumers that their up-front service fee has been, or  
21 will be, significantly reduced by the amount of a “Home Saver” government grant

22 <sup>23</sup> Ex. 1, pp. 28-29, ¶¶ 10-12.

23 <sup>24</sup> Ex. 4, p. 84, ¶ 3; Ex. 9, p. 199, ¶ 6; Ex. 12, pp. 260-61, ¶ 12.

24 <sup>25</sup> Ex. 1, pp. 26-27, ¶ 4; Ex. 5, p. 87, ¶ 3; Ex. 15, pp. 322-23, ¶ 4. *See* Ex. 6,  
25 p. 110, ¶ 9; Ex. 8, p. 141, ¶ 6.

26 <sup>26</sup> *See, e.g.*, Ex. 14, p. 308; Ex. 15, p. 327; Ex. 18, p. 666.

27 <sup>27</sup> *See, e.g.*, Ex. 3, p. 76; Ex. 11, p. 248.

28 <sup>28</sup> *See, e.g.*, Ex. 1, pp. 27-28, ¶ 7; Ex. 3, p. 71, ¶ 4; Ex. 4, p. 84, ¶ 3; Ex. 15, p. 88,  
¶ 5.

1 that Defendants will obtain or have obtained for them. Defendants create the  
2 impression that Defendants are associated with the federal government by stating  
3 that the federal government pays Defendants to help homeowners or that  
4 Defendants obtain these grants from the government on consumers' behalf.<sup>29</sup>  
5 Defendants solicit a net amount from consumers (after deduction of any purported  
6 government grant) ranging from \$1,495 to \$4,495 per mortgage to be modified.<sup>30</sup>  
7 Consumers are willing to pay the fee because they expect to recover the amount  
8 within a few months from the savings on their monthly mortgage payment.<sup>31</sup>

9 In some instances, Defendants make claims that they are affiliated or  
10 associated with the consumer's lender. For example, an HGS representative told  
11 Virginia Brown that HGS was affiliated with her lender and, therefore, that it could  
12 secure modification of her mortgage.<sup>32</sup> Defendants told another consumer that  
13 HGS "worked with most major lenders to obtain lower mortgage payments for  
14 homeowners."<sup>33</sup> The Loan Agreement itself bolsters these claims by stating that  
15 the interest rate and monthly payment for the new loan are "based on the  
16 relationship we have with your lender."<sup>34</sup>

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18  
19 <sup>29</sup> Ex. 3, p. 71, ¶ 4, p. 76; Ex. 5, p. 88, ¶ 7, p. 100; Ex. 12, pp. 259-60, ¶ 8, p. 266;  
20 Ex. 13, p. 276, ¶ 3, p. 285; Ex. 14, p. 305, ¶ 3, p. 310; Ex. 17, p. 627, ¶ 4; Ex. 18,  
21 p. 648, ¶ 2.

22 <sup>30</sup> Ex. 1, pp. 28-29, ¶ 11, p. 43; Ex. 3, p. 71, ¶ 4, p. 76; Ex. 4, p. 84, ¶ 3; Ex. 5,  
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25 ¶ 4, p. 248; Ex. 12, p. 261, ¶ 14, p. 266; Ex. 13, p. 276, ¶ 3, p. 285; Ex. 14,  
26 pp. 305-06, ¶ 4, p. 310; Ex. 15, pp. 323-34, ¶ 7, p. 329; Ex. 17, p. 627, ¶ 4,  
27 pp. 632-37; Ex. 18, pp. 648, 650, ¶¶ 2, 4.

28 <sup>31</sup> See, e.g., Ex. 3, p. 71, ¶ 4; Ex. 12, p. 261, ¶ 14.

<sup>32</sup> Ex. 4, p. 84, ¶ 2.

<sup>33</sup> Ex. 10, pp. 214-15, ¶ 4.

<sup>34</sup> See, e.g., Ex. 1, p. 43; Ex. 3, p. 76; Ex. 5, p. 100; Ex. 12, p. 266.

1 Defendants further represent that the consumer will receive legal  
2 representation. In their Fee Agreement, Defendants claim they are “a California  
3 Professional Legal Team” that “will provide legal services to” the consumer and  
4 “use its’ [sic] best efforts to negotiate and counsel Client in Real Estate matters  
5 related to a Loan Modification of residential property.”<sup>35</sup> The Fee Agreement also  
6 says that the “Legal Team” reserves the “right to associate or bring in an additional  
7 [sic] Attorneys/Legal Teams.”<sup>36</sup> These documents are sent to consumers with a  
8 transmittal sheet stating that they are from the “Legal Department.”<sup>37</sup> Emails  
9 Defendants send consumers also refer to HGS or AMC as a “law office.”<sup>38</sup> In  
10 addition, AMC representative Mark Sharp told Joseph Krawczyk that “AMC’s  
11 legal department would be able to start negotiations” with Krawczyk’s lender.<sup>39</sup>  
12 Contrary to these claims, however, we are aware of no evidence that Defendants  
13 provide legal representation.

14 Defendants also represent that, in the unlikely event that the loan  
15 modification described in the Loan Agreement is not obtained, consumers will  
16 receive a full refund of Defendants’ fee. For example, when Sharon Backlund  
17 asked her HGS representative about HGS’s refund policy, he told her she would  
18 get a full refund if the loan modification did not come through, emphasizing that  
19 “if for some reason HGS couldn’t get a loan modification for [her] then he would  
20 personally submit [her] refund request and make sure that it was approved.”<sup>40</sup>  
21 Similarly, HGS’s representative told Robert Carey that if he did not get the  
22 mortgage modification, “there was a full money-back refund policy” and that this

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23 <sup>35</sup> See, e.g., Ex. 12, p. 269; Ex. 14, p. 312.

24 <sup>36</sup> See, e.g., Ex. 12, p. 270; Ex. 14, pp. 313-14.

25 <sup>37</sup> See, e.g., Ex. 12, p. 265; Ex. 14, p. 309.

26 <sup>38</sup> See, e.g., Ex. 12, p. 264; Ex. 14, p. 308.

27 <sup>39</sup> Ex. 12, pp. 259-60, ¶ 8.

28 <sup>40</sup> Ex. 1, p. 29, ¶ 12. See also Ex. 7, p. 126, ¶ 3.

1 “guarantee was stipulated in the contract that [he] would sign.”<sup>41</sup> Indeed, the Loan  
2 Agreement sent to all consumers includes an underlined statement, “The service  
3 fee is refundable in the event” that Defendants are “not able to perform as listed  
4 above or perform any services that are beneficial to borrower.” The same  
5 document also contains what is headed a “MONEY BACK GUARANTEE,” which  
6 states that when “things do not work out as all intend,” Defendants will “promptly  
7 provide a refund.”<sup>42</sup> Consumers relied on these promises.<sup>43</sup>

8 In numerous instances, Defendants instruct consumers, orally and/or in  
9 writing, not to communicate with their lender while Defendants are in the process  
10 of negotiating the loan modification.<sup>44</sup> Defendants tell consumers to forward all  
11 communications from the lender to Defendants and otherwise to ignore them.<sup>45</sup>

12 B. Defendants Fail to Deliver Loan Modifications or Provide Refunds

13 Despite the promises, consumers who pay fees to Defendants do not obtain  
14 loan modifications or have their mortgage payments substantially reduced.<sup>46</sup> In  
15 numerous instances, soon after consumers pay Defendants’ fee, Defendants stop  
16 taking their calls or replying to emails.<sup>47</sup> Consumers who do reach Defendants

17 \_\_\_\_\_  
18 <sup>41</sup> Ex. 5, p. 89, ¶ 9.

19 <sup>42</sup> See, e.g., Ex. 3, p. 76; Ex. 5, p. 100.

20 <sup>43</sup> See, e.g., Ex. 1, p. 29, ¶ 12; Ex. 5, p. 89, ¶ 9; Ex. 6, p. 110, ¶ 7.

21 <sup>44</sup> Ex. 1, p. 29, ¶ 13; Ex. 3, pp. 70-71, ¶ 3; Ex. 4, p. 84, ¶3; Ex. 5, p. 89, ¶ 10,  
22 p. 103; Ex. 6, p. 109, ¶ 5; Ex. 7, p. 126, ¶ 3; Ex. 10, p. 215, ¶ 6, p. 229; Ex. 12,  
p. 259, ¶ 6; Ex. 13, p. 279, ¶ 10.

23 <sup>45</sup> Ex. 5, p. 103; Ex. 10, p. 229; Ex. 18, p. 683.

24 <sup>46</sup> Ex. 1, p. 32, ¶ 21; Ex. 5, pp. 92-93, ¶ 23; Ex. 6, pp. 111-12, ¶ 12; Ex. 7, p. 127,  
25 ¶¶ 6-7; Ex. 8, p. 144; ¶¶ 17-18; Ex. 9, p. 200, ¶¶ 10-11; Ex. 10, p. 217, ¶ 14; Ex.  
11, p. 242, ¶ 10; Ex. 13, p. 281, ¶¶ 17-18; Ex. 18, pp. 653-54, ¶ 14.

26 <sup>47</sup> Ex. 4, pp. 84-85, ¶¶ 3-6 (HGS representatives did not return calls after  
27 receiving payment); Ex. 5, pp. 91-92, ¶¶ 17-23 (after numerous calls and emails,  
28 “[w]e never heard back from HGS”); Ex. 6, pp. 110-11, ¶ 10 (after acknowledging  
his fee, “no one at HGS answered the phones or replied to my emails”); Ex. 7,

1 may be reassured that their files are being handled.<sup>48</sup> Sometimes consumers learn  
2 from their lenders that the lenders have never been contacted by Defendants.<sup>49</sup> In  
3 other instances, consumers learn from their lenders that Defendants did contact the  
4 lender, but failed to follow up.<sup>50</sup> When consumers do not obtain loan  
5 modifications, Defendants do not provide the promised refunds to consumers.<sup>51</sup>  
6 Defendants typically provide no explanation for their failure to provide either the  
7 loan modification or a refund.<sup>52</sup>

### 8 C. Defendants Fail to Make the Required Disclosures

9 Defendants make numerous written or oral statements directed at specific  
10 consumers and designed to sell their services. Defendants do not disclose  
11 information needed to prevent deception and assist consumers in making informed  
12 decisions.<sup>53</sup> Defendants do not disclose consumers' right to stop doing business  
13 with Defendants at any time without having to pay them. Defendants do not  
14 disclose that they are not associated with the government and that their services are

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15 p. 127, ¶ 6 (“After HGS cashed the final payment check, I never heard from HGS  
16 again”); Ex. 10, pp. 216-17, ¶¶ 10-14 (no response to calls or emails beginning one  
17 month after payment); Ex. 17, p. 628, ¶ 5 (“Once AMG got our money, they  
18 stopped taking our calls”).

19 <sup>48</sup> See, e.g., Ex. 8, pp. 143-44, ¶¶ 12, 14; Ex. 9, pp. 199-200, ¶¶ 8-10; Ex. 11,  
20 p. 241, ¶ 7; Ex. 13, p. 280, ¶ 12.

21 <sup>49</sup> Ex. 8, p. 144, ¶ 17; Ex. 11, p. 242, ¶ 9; Ex. 13, p. 281, ¶ 17; Ex. 14, pp. 306-07,  
22 ¶ 7.

23 <sup>50</sup> See, e.g., Ex. 1, pp. 58-60; Ex. 9, pp. 199-200, ¶ 8; Ex. 18, pp. 651-53, ¶¶ 7-14.

24 <sup>51</sup> Ex. 1, p. 34, ¶ 27; Ex. 4, p. 85, ¶ 6; Ex. 5, pp. 92-93, ¶ 23; Ex. 6, pp. 110-11,  
25 ¶ 10; Ex. 7, p. 127, ¶ 7; Ex. 8, p. 145, ¶ 20; Ex. 9, p. 200, ¶ 11; Ex. 10, p. 217, ¶ 14;  
26 Ex. 11, p. 242, ¶ 11; Ex. 13, p. 282, ¶ 21; Ex. 14, pp. 306-07, ¶ 7; Ex. 17, p. 628,  
27 ¶¶ 5-6; Ex. 18, p. 653, ¶ 14.

28 <sup>52</sup> Ex. 16, pp. 340-41, ¶ 16.

<sup>53</sup> See MARS Rule, Statement of Basis and Purpose, 75 Fed. Reg. 75092, 75111  
(Dec. 1, 2010) (rationale for required disclosures). The Rule's disclosure  
requirements are discussed in Part IV.C.1.b below.

1 not approved by the government or the consumer's lender. And Defendants do not  
2 disclose that even if the consumer uses the Defendants' service, the consumer's  
3 lender may not agree to change the loan.<sup>54</sup>

#### 4 **IV. LEGAL ARGUMENT**

##### 5 **A. Jurisdiction and Venue**

6 Subject matter jurisdiction is proper pursuant to 28 U.S.C. §§ 1331, 1337(a),  
7 and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b). Venue is  
8 proper under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. §§ 53(b). The  
9 Defendants reside, or have transacted business, in this District. The Court should  
10 issue a TRO to prevent continued harm, dissipation of assets, and destruction of  
11 evidence, and to preserve the Court's ability to provide effective and final relief to  
12 the injured. Section 13(b) of the FTC Act authorizes the Court to grant this relief.

##### 13 **B. Section 13(b) of the FTC Act Authorizes the Requested Relief**

14 The Court may grant temporary, preliminary, and permanent relief pursuant  
15 to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), 28 U.S.C. § 1651(a), and Fed.  
16 R. Civ. P. 65(b). Section 13(b) of the FTC Act authorizes a district court to grant  
17 permanent injunctions to enjoin violations of the FTC Act in "proper cases."<sup>55</sup> Any  
18 case alleging that a person is violating or about to violate a provision of law  
19 enforced by the FTC is a proper case for which injunctive relief may be sought.<sup>56</sup>

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20 <sup>54</sup> None of the consumer declarants' paperwork from Defendants included the  
21 required disclosures. See Ex. 1, p. 31, ¶ 16; Ex. 7, p. 127, ¶ 4.

22 <sup>55</sup> As in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110 (9<sup>th</sup> Cir. 1982), a case may  
23 be brought under second proviso of § 13(b), and need not be conditioned on first  
24 proviso requirement that the FTC bring an administrative proceeding. See *FTC v.*  
25 *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11<sup>th</sup> Cir. 1984) ("Congress did not  
26 limit the court's powers under the final proviso of 13(b)").

26 <sup>56</sup> *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086-87 (9<sup>th</sup> Cir. 1985); *Singer*,  
27 668 F.2d at 1113 (9<sup>th</sup> Cir. 1982). In addition to the FTC's authority to enforce  
28 Section 5 of the FTC Act and its own Rules, such as the MARS Rule, 16 C.F.R.  
Part 322, Congress granted the FTC authority to enforce the Bureau of Consumer

1 In actions under Section 13(b), the district court may exercise the full breadth of its  
2 equitable authority, imposing additional relief, such as consumer restitution, if  
3 necessary, to accomplish complete justice.<sup>57</sup> Incident to its authority to issue  
4 permanent injunctive relief, this Court has inherent equitable power to grant all  
5 preliminary relief necessary to effectuate ultimate relief.<sup>58</sup>

6 C. The FTC Meets the Applicable Standard for Injunctive Relief

7 The evidence submitted by the FTC meets the standard for issuing a TRO  
8 and a preliminary injunction. Section 13(b) of the FTC ACT allows a district court  
9 to grant the Commission a TRO or preliminary injunction “[u]pon a proper  
10 showing that, weighing the equities and considering the Commission’s likelihood  
11 of ultimate success, such action would be in the public interest.”<sup>59</sup> In statutory  
12 enforcement cases where the government has met the likelihood of success  
13 prong of the preliminary injunction test, irreparable injury is presumed because the  
14 passage of the statute implies a finding by Congress that violations will harm the  
15 public.<sup>60</sup> Thus, the FTC need not prove irreparable harm.<sup>61</sup> The court must merely  
16  
17

18 Financial Protection’s Regulation O. 12 U.S.C. § 5538(a)(1) and (a)(3).

19 <sup>57</sup> *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9<sup>th</sup> Cir. 1989)  
20 (affirming district court’s power to freeze assets and appoint a receiver); *Singer*,  
21 668 F.2d at 1113 (preliminary injunction with asset freeze affirmed).

22 <sup>58</sup> *FTC v. Stefanchik*, 559 F.3d 924, 931 (9<sup>th</sup> Cir. 2009) (“The district court has  
23 broad authority under the FTC Act ‘to grant any ancillary relief necessary to  
24 accomplish complete justice’”); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9<sup>th</sup>  
25 Cir. 1994); *Singer*, 668 F.2d at 1113.

26 <sup>59</sup> 15 U.S.C. § 53(b).

27 <sup>60</sup> *U.S. v. Nutri-cology, Inc.*, 982 F.2d 394, 398 (9<sup>th</sup> Cir. 1992).

28 <sup>61</sup> *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9<sup>th</sup> Cir. 1999); *FTC v.*  
*Warner Commc’ns, Inc.*, 742 F.2d 1156, 1159 (9<sup>th</sup> Cir. 1984); *U.S. v. Odessa*  
*Union Warehouse Co-op*, 833 F.2d 172, 175 (9<sup>th</sup> Cir. 1987) (agency enforcing  
statute authorizing injunction “not required to show irreparable injury”).



1 “1) determine the likelihood that the Commission will ultimately succeed on the  
2 merits and 2) balance the equities.”<sup>62</sup>

3 1. The FTC is Likely to Succeed on the Merits

4 The FTC’s evidence shows a substantial likelihood that the FTC will  
5 ultimately succeed in proving Defendants have violated Section 5 of the FTC Act  
6 as well as the MARS Rule and that redress to injured consumers is necessary.

7 a. Defendants violate Section 5 of the FTC Act

8 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or  
9 deceptive acts or practices in or affecting commerce.” An act or practice is  
10 “deceptive” within the meaning of Section 5 if first, there is a representation,  
11 omission, or practice that, second, is likely to mislead consumers acting reasonably  
12 under the circumstances, and third, the representation, omission, or practice is  
13 material to the consumer’s payment decision.<sup>63</sup>

14 A misleading impression “is material if it ‘involves information that is  
15 important to consumers and, hence, likely to affect their choice of, or conduct  
16 regarding, a product.’”<sup>64</sup> A finding of deception normally justifies an inference of  
17 materiality.<sup>65</sup> Express claims are presumed material, so consumers are not required  
18 to question their veracity in order to be deemed reasonable.<sup>66</sup> Implied claims are  
19 also presumed material if there is evidence that the seller intended to make the  
20

21  
22 <sup>62</sup> *Affordable Media*, 179 F.3d at 1233.

23 <sup>63</sup> *Stefanchik*, 559 F.3d at 928; *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1199  
(9<sup>th</sup> Cir. 2006); *FTC v. Gill*, 265 F.3d 944, 950 (9<sup>th</sup> Cir. 2001).

24 <sup>64</sup> *Cyberspace.com*, 453 F.3d at 1201 (quoting *Cliffdale Assoc., Inc.*, 103 F.T.C.  
25 110, 165 (1984)).

26 <sup>65</sup> *FTC v. Colgate-Palmolive*, 380 U.S. 374, 391-92, 85 S. Ct. 1035, 1046 (1965);  
*American Home Prod. Corp. v. FTC*, 695 F.2d 681, 688 n. 11 (3<sup>rd</sup> Cir. 1982);  
27 *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9<sup>th</sup> Cir. 1978).

28 <sup>66</sup> *Pantron*, 33 F.3d at 1095-96.

1 claim<sup>67</sup> or if the claims go to the heart of the solicitation or the central  
2 characteristics of the product or service offered.<sup>68</sup>

3 A claim is deemed made if consumers, acting reasonably, would interpret  
4 the statements to contain that message.<sup>69</sup> A solicitation capable of being  
5 interpreted in a misleading way is construed against the maker of the solicitation.<sup>70</sup>  
6 In determining what messages may reasonably be ascribed to a statement or  
7 statements, the court is to consider the overall net impression.<sup>71</sup>

8 Here, Defendants violate Section 5(a) by making false claims to induce  
9 consumers to purchase mortgage assistance relief services. Defendants  
10 misrepresent—orally, by email, and in contract documents—that they generally will  
11 obtain mortgage loan modifications for consumers that will make consumers’  
12 payments substantially more affordable.<sup>72</sup> These representations are false because  
13 Defendants do not obtain the promised loan modifications for consumers.<sup>73</sup>

14 Defendants also misrepresent that they will refund the consumer’s fee if  
15 Defendants fail to obtain the promised mortgage loan modification. The promise  
16 to pay a full refund in the purportedly unlikely event that the loan modification

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17  
18 <sup>67</sup> *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992).

19 <sup>68</sup> *Southwest Sunsites, Inc.*, 105 F.T.C. 7, 149 (1985), *aff’d*, 785 F.2d 1431, 1436  
20 (9<sup>th</sup> Cir. 1986). *See also FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 604 (9<sup>th</sup> Cir. 1993)  
(no loophole for implied deceptive claims).

21 <sup>69</sup> *Kraft, Inc.*, 114 F.T.C. 40, 52 (1991).

22 <sup>70</sup> *Simeon Mgmt*, 579 F.2d at 1146 (quoting *Resort Car Rental Sys., Inc. v. FTC*,  
518 F.2d 962, 964 (9<sup>th</sup> Cir. 1975)).

23 <sup>71</sup> *Stefanchik*, 559 F.3d at 928; *Cyberspace.com*, 453 F.3d at 1200 (solicitation  
24 may be likely to mislead by virtue of its net impression). Advertising’s tendency  
25 to deceive must be viewed as a whole, without emphasizing isolated words or  
26 phrases apart from their context. *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489,  
1496 (1<sup>st</sup> Cir. 1989).

27 <sup>72</sup> *See* notes 19-28 and accompanying text *supra*.

28 <sup>73</sup> *See* notes 46-50 and accompanying text *supra*.

1 doesn't come through is made both orally and in writing.<sup>74</sup> However, the promised  
2 refunds are not paid.<sup>75</sup> In some cases, Defendants simply stop communicating with  
3 consumers.<sup>76</sup> In at least one other instance, Defendants claimed that some  
4 condition, not disclosed when the refund promise was made, had not been met.<sup>77</sup>

5 b. Defendants violate the MARS Rule

6 Defendants violate virtually every provision of the MARS Rule. They  
7 collect advance fees and make representations prohibited by the Rule. They also  
8 fail to make the required Rule disclosures.

9 Section 322.5(a) of the MARS Rule (effective January 31, 2011), prohibits  
10 providers from requesting or receiving payment of any fee until the provider has  
11 delivered an offer of mortgage relief from the consumer's lender or servicer and  
12 the consumer has signed an agreement accepting this offer. Defendants requested  
13 and received up-front fees after this date.<sup>78</sup> Consequently, Defendants are in  
14 violation of Section 322.5(a) of the Rule.

15 Section 322.3(a) of the MARS Rule (this and all other provisions effective  
16 December 29, 2010) prohibits mortgage assistance relief service providers from  
17 representing that consumers should not contact or communicate with their lenders.  
18 Defendants repeatedly give that instruction during their telephone sales pitches<sup>79</sup>

19  
20  
21 <sup>74</sup> See notes 40-43 and accompanying text *supra*.

22 <sup>75</sup> See note 51 and accompanying text *supra*.

23 <sup>76</sup> See note 47 and accompanying text *supra*.

24 <sup>77</sup> Ex. 1, p. 32, ¶ 23 (refund denied because consumer "hadn't requested it  
25 properly"). Later, Defendants said the refund was denied because the consumer  
26 had contacted an attorney. Ex. 16, p. 341, ¶ 16.c.

27 <sup>78</sup> See note 30 and accompanying text *supra*.

28 <sup>79</sup> Ex. 1, p. 29, ¶ 13; Ex. 3, pp. 70-71, ¶ 3; Ex. 4, p. 84, ¶ 3; Ex. 5, p. 89, ¶ 10;  
Ex. 6, p. 109, ¶ 5; Ex. 7, p. 126, ¶ 3; Ex. 10, p. 215, ¶ 6; Ex. 12, p. 259, ¶ 6; Ex. 13,  
p. 279, ¶ 10.

1 and in writing.<sup>80</sup> Consequently, Defendants are in violation of Section 322.3(a) of  
2 the MARS Rule.

3 Section 322.3(b)(1) of the MARS Rule prohibits companies from  
4 misrepresenting the likelihood of negotiating, obtaining, or arranging any  
5 represented service or result. Defendants claim that they will obtain loan  
6 modifications for consumers.<sup>81</sup> In numerous instances, they do nothing for  
7 consumers except take their money.<sup>82</sup> Consequently, they are in violation of  
8 Section 322.3(b)(1) of the Rule.

9 Section 322.3(b)(3) of the MARS Rule prohibits a mortgage assistance relief  
10 service provider from misrepresenting that it is affiliated with, endorsed or  
11 approved by, or otherwise associated with the government or the maker, holder, or  
12 servicer of the consumer's dwelling loan. Defendants create the impression that  
13 they are associated with the federal government by stating that the government  
14 pays Defendants to help homeowners or by stating that Defendants obtain grants  
15 from the government on consumers' behalf.<sup>83</sup> In addition, in some cases,  
16 Defendants claim to be affiliated or associated with the consumer's lender.<sup>84</sup> For  
17 these reasons, Defendants are in violation of Section 322.3(b)(3) of the Rule.

18 Section 322.3(b)(6) of the MARS Rule prohibits companies from  
19 misrepresenting the terms or conditions of any refund including the likelihood of  
20 obtaining a full or partial refund, or the circumstances in which a full or partial  
21 refund will be granted, for a mortgage assistance relief service. While Defendants  
22  
23

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24 <sup>80</sup> Ex. 5, p. 103; Ex. 10, p. 229.

25 <sup>81</sup> See notes 19-28 and accompanying text *supra*.

26 <sup>82</sup> See notes 46-50 and accompanying text *supra*.

27 <sup>83</sup> See note 29 and accompanying text *supra*.

28 <sup>84</sup> See notes 32-34 and accompanying text *supra*.

1 guarantee refunds,<sup>85</sup> they do not provide them.<sup>86</sup> Thus, Defendants are in violation  
2 of Section 322.3(b)(6) of the Rule.

3 Section 322.3(b)(8) of the MARS Rule prohibits misrepresenting that the  
4 consumer will receive legal representation. That claim is made, both expressly and  
5 implicitly, in Defendants' legal fee agreements, loan agreements, email messages,  
6 and transmittal sheets.<sup>87</sup> Since there is no evidence that Defendants provide legal  
7 representation, they are in violation of Section 322.3(b)(8) of the Rule.

8 Section 322.3(c) of the MARS Rule requires that any company making  
9 representations about the benefits, performance, or efficacy of its services must  
10 have "competent and reliable evidence" supporting these representations.  
11 Defendants make such representations both in their contract documents and by  
12 phone. For example, the Loan Agreement, beneath the summary of "Loan Terms"  
13 to be included in the modified loan, states: "The vast majority of our clients obtain  
14 the solutions they contract for."<sup>88</sup> Unless Defendants possess competent and  
15 reliable evidence to establish that the vast majority of their clients do indeed obtain  
16 loan modifications with the terms listed on their Loan Agreement, they violate  
17 Section 322.3(c) of the Rule.<sup>89</sup> Our evidence that the various claims are false  
18 establishes that the FTC is likely to succeed on the failure to substantiate count.

19 Finally, Defendants fail to make disclosures required by the Rule. Section  
20 322.4(b) of the MARS Rule requires providers to disclose the following statements  
21 in their consumer-specific commercial communications:

- 22 • "You may stop doing business with us at any time. You may accept or reject  
23 the offer of mortgage assistance we obtain from your lender [or servicer]. If

24 <sup>85</sup> See notes 40-43 and accompanying text *supra*.

25 <sup>86</sup> See note 51 and accompanying text *supra*.

26 <sup>87</sup> See notes 35-39 and accompanying text *supra*.

27 <sup>88</sup> See, e.g., Ex. 1, p. 28, ¶ 9, p. 43.

28 <sup>89</sup> Defendants have the burden of proof on this issue. *Pantron*, 33 F.3d at 1101.

1 you reject the offer, you do not have to pay us. If you accept the offer, you  
2 will have to pay us (insert amount or method for calculating the amount) for  
3 our services.”

- 4 • “(Name of company) is not associated with the government, and our service  
5 is not approved by the government or your lender.”
- 6 • “Even if you accept this offer and use our service, your lender may not agree  
7 to change your loan.”

8 Defendants have not made any disclosures required by the Rule.<sup>90</sup>

9 Consequently, Defendants are in violation of Sections 322.4(a)(1) and (2),  
10 322.4(b), and 322.4(c) of the MARS Rule.

11 c. AMC and HGS are jointly and severally liable

12 Corporate Defendants AMC and HGS are jointly and severally liable for the  
13 consumer injury that they have caused because they have operated as a common  
14 enterprise.<sup>91</sup> To determine whether a common enterprise exists, “the pattern and  
15 frame-work of the whole enterprise must be taken into consideration.”<sup>92</sup> A host of  
16 factors may demonstrate the existence of a common enterprise including: common  
17 control, shared officers, shared office space, commingling of funds, unified  
18 advertising and whether business was transacted through a maze of interrelated  
19 companies.<sup>93</sup> No one factor is dispositive, and all factors need not be present to  
20 justify a finding of common enterprise.<sup>94</sup>

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21 <sup>90</sup> See note 54 and accompanying text *supra*.

22 <sup>91</sup> *FTC v. J.K. Publ’ns, Inc.*, 99 F.Supp.2d 1176, 1202 (C.D. Cal. 2000).

23 <sup>92</sup> *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2<sup>nd</sup> Cir. 1964).

24 <sup>93</sup> See *FTC v. Neovi, Inc.*, 598 F.Supp.2d 1104, 1116 (S.D. Cal. 2008); *J.K.*  
25 *Publ’ns*, 99 F.Supp.2d at 1201-02; see also *FTC v. Network Servs. Depot, Inc.*,  
26 617 F.3d 1127, 1142-43 (9<sup>th</sup> Cir. 2010) (“entities constitute a common enterprise  
27 when they exhibit... strongly interdependent economic interests or the pooling of  
assets and revenues”).

28 <sup>94</sup> *FTC v. Kennedy*, 574 F.Supp.2d 714, 722 (S.D. Tex. 2008) (FTC need not prove

1 Here, the evidence supports a finding that Defendants AMC and HGS  
2 operate as a common enterprise. Atalla owns both AMC and HGS and acts as  
3 signatory on both corporations' bank accounts.<sup>95</sup> As a sales representative, he has  
4 played the same role with both companies, just using a different name.<sup>96</sup> AMC and  
5 HGS have shared the same addresses<sup>97</sup> and commingled funds.<sup>98</sup> Finally, they have  
6 engaged in the same scam, including using identical contract documents, form  
7 email messages, and other documents, modifying only the company logo, name,  
8 address, phone number, website name, and email addresses.<sup>99</sup>

9 d. Atalla is liable for the Corporate Defendants' practices

10 The FTC is likely to succeed in demonstrating that Defendant Mark Nagy  
11 Atalla is individually liable for the practices of Corporate Defendants AMC and  
12 HGS, and thus that he should be subject to the TRO and asset freeze.

13 An individual may be subject to injunctive relief for the corporate  
14 defendants' violations of the FTC Act if he either (a) participated in the challenged  
15 conduct or (b) had authority to control it.<sup>100</sup> An individual is liable for restitution  
16 based on corporate misconduct if he had actual knowledge of material  
17 misrepresentations, was recklessly indifferent to the falsity of the  
18 misrepresentations, or was aware of a high probability of fraud and intentionally  
19 avoided the truth.<sup>101</sup> An individual's "degree of participation in business affairs is  
20

21 \_\_\_\_\_  
22 "any particular number of entity connections or any specific connection").

23 <sup>95</sup> See notes 11-12 and accompanying text *supra*.

24 <sup>96</sup> Ex. 16, pp. 359-60, ¶¶ 59-64.

25 <sup>97</sup> See note 6 and accompanying text *supra*.

26 <sup>98</sup> See note 7 and accompanying text *supra*.

27 <sup>99</sup> See notes 2 and 9 and accompanying text *supra*.

28 <sup>100</sup> *Cyberspace.com*, 453 F.3d at 1202.

<sup>101</sup> *Network Servs. Depot*, 617 F.3d at 1138-39.

1 probative of knowledge.”<sup>102</sup> The FTC does not need to prove subjective intent to  
2 defraud.<sup>103</sup>

3 Under this test, Defendant Atalla is individually liable for the Corporate  
4 Defendants’ deceptive acts. First, Atalla has authority to control the Corporate  
5 Defendants. He is designated as a “Member” in the limited liability company  
6 formation papers for both companies. He is CEO and 100% owner of AMC. He is  
7 signatory on the checking accounts into which consumer funds have been  
8 deposited, including not only the corporate accounts but also an individual account  
9 titled, “Mark N. Atalla, sole prop, dba Home G Solutions Firm” and owns that  
10 assumed business name. He also pays for telephone service for numbers used by  
11 both companies and internet-related services to both companies.<sup>104</sup>

12 Second, Atalla had knowledge of the unlawful practices—in fact, he directly  
13 participated in them. He directly solicited unlawful advance fees,<sup>105</sup> even though  
14 he knew they were illegal.<sup>106</sup> He also made specific claims about the favorable  
15 loan terms consumers would receive. For example, using the “Mark Carter” alias  
16 when representing HGS and “Mark Sharp” for AMC, Atalla promised consumers a  
17 mortgage loan interest rate of 3% or less, resulting in a reduction in the monthly  
18 payment of hundreds of dollars.<sup>107</sup> Carter/Sharp also sent documents to consumers  
19

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20 <sup>102</sup> *Affordable Media*, 179 F.3d at 1234-35.

21 <sup>103</sup> *Id.*

22 <sup>104</sup> See note 8 and accompanying text *supra*.

23 <sup>105</sup> As “Mark Carter”: Ex. 9, p. 197, ¶ 3, pp. 203, 205, 210; Ex. 10, p. 215, ¶¶ 5-6;  
24 Ex. 13, pp. 277-78, ¶ 6, pp. 283, 285-88; Ex. 14, pp. 305-06, ¶ 4, pp. 308, 310-11.  
25 As “Mark Sharp”: Ex. 3, pp. 70-71, ¶¶ 3-4, pp. 74-76; Ex. 12, pp. 258-61, ¶¶ 2-8,  
26 12-13, pp. 264-66; Ex. 15, p. 323, ¶ 6; Ex. 17, pp. 627-28, ¶¶ 3-4, pp. 630-32.

26 <sup>106</sup> Ex. 15, p. 325, ¶ 13 (“Sharp” admitted advance fees for loan modifications are  
27 illegal in California, where the business is located).

28 <sup>107</sup> Ex. 3, pp. 74-76 (Sharp emailed contract with 3% rate); Ex. 9, p. 197, ¶ 2  
(Carter promised 3% rate); Ex. 12, pp. 258-60, ¶¶ 4, 7, 11, pp. 264-66 (Sharp



1 that contained misrepresentations, including emails claiming that consumers were  
2 “approved” for a loan modification and contract documents misrepresenting the  
3 likelihood of receiving a modification with the new loan terms listed.<sup>108</sup>

4 Defendant Atalla is individually liable based either on his direct  
5 participation in the corporate misdeeds or based on his authority to control the  
6 Corporate Defendants and his knowledge of their misrepresentations.

## 7 2. The Equities Tip Decidedly in the FTC’s Favor

8 In balancing the equities, the “public interest should receive greater weight”  
9 than private interests.<sup>109</sup> This is particularly true where a defendant’s business is  
10 rooted in deception, for “[a] court of equity is under no duty ‘to protect illegitimate  
11 profits or advance business which is conducted [illegally].’”<sup>110</sup>

12 The public interest in halting Defendants’ violations and preserving assets  
13 for monetary remedy far outweighs any interest of Defendants in continuing to  
14 mislead consumers. Defendants have no legitimate interest in continuing to  
15 deceive consumers and violate federal law.<sup>111</sup> Compliance with the law is not an  
16 unreasonable burden.<sup>112</sup> The equities strongly favor the proposed TRO.

17 \_\_\_\_\_  
18 promised 3%); Ex. 17, p. 627, ¶ 3, p. 632 (Sharp orally promised 2.0-2.5%;  
19 contract he sent said 3%).

20 <sup>108</sup> Ex. 3, p. 72, ¶ 6, pp. 74-76; Ex. 10, pp. 214-15, ¶ 7, pp. 218-19; Ex. 12,  
21 pp. 264-66; Ex. 13, pp. 277-78, ¶ 6, pp. 283-85; Ex. 15, p. 323, ¶ 7, pp. 327-29;  
22 Ex. 17, pp. 627-28, ¶¶ 3-4, pp. 630-32; Ex. 18, pp. 649-50, ¶ 4, pp. 668-69.

23 <sup>109</sup> *Affordable Media*, 179 F.3d at 1236; *Warner Commc’ns*, 742 F.2d at 1165.

24 <sup>110</sup> *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2<sup>nd</sup> Cir.  
25 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7<sup>th</sup> Cir. 1940)).

26 <sup>111</sup> *FTC v. Sabal*, 32 F.Supp.2d 1004, 1009 (N.D. Ill. 1998) (citing *World Wide*  
27 *Factors*, 882 F.2d at 347).

28 <sup>112</sup> *World Wide Factors*, 882 F.2d at 347 (affirming the district court’s finding that  
“there is no oppressive hardship to defendants in requiring them to comply with the  
FTC Act, refrain from fraudulent representation or preserve their assets from  
dissipation or concealment”).

1 a. A TRO will stop ongoing fraud

2 Given the pervasive nature of the fraudulent activity, absent injunctive relief  
3 there is a strong likelihood that future law violations will occur,<sup>113</sup> injuring  
4 consumers who are particularly vulnerable with bogus charges of \$1,495-4,495.<sup>114</sup>  
5 Defendants have no legitimate interest in continuing to violate the MARS Rule and  
6 the FTC Act by collecting unlawful advance fees and deceiving consumers.<sup>115</sup>  
7 Thus, the public interest requires that Defendants be prohibited from making false  
8 or deceptive statements in their business operations. As noted above, the FTC  
9 need not show that injury will be irreparable to justify a TRO or preliminary  
10 injunction, but given the risk that the Defendants have not retained sufficient  
11 resources to fully redress consumer injury, the injury from continued fraud is likely  
12 to be irreparable.

13 b. The requested relief should be issued *ex parte*

14 The proposed TRO, enjoining unlawful conduct and destruction of business  
15 records, freezing assets, appointing a receiver, and providing immediate access to  
16 Defendants' business premises to the receiver and the FTC, should be issued *ex*  
17 *parte*. A TRO may be granted without notice if it appears notice will result in  
18 irreparable injury and the applicant certifies the reason why. Fed. R. Civ. P. 65(b).  
19 It is particularly appropriate where giving notice could result in an inability to  
20 provide any relief at all.<sup>116</sup> *Ex parte* TROs are granted in such cases to serve the  
21 "underlying purpose of preserving the status quo and preventing irreparable harm  
22

23 \_\_\_\_\_  
24 <sup>113</sup> "A large-scale systematic scheme tainted by fraudulent and deceptive practices"  
25 gives rise to the "reasonable expectation of continued violations." *FTC v.*  
*Southwest Sunsites*, 665 F.2d 711, 723 (5<sup>th</sup> Cir. 1982).

26 <sup>114</sup> See note 30 and accompanying text *supra*.

27 <sup>115</sup> *Sabal*, 32 F. Supp. 2d at 1009.

28 <sup>116</sup> *In re Vuitton et Fils S.A.*, 606 F.2d 1, 4-5 (2<sup>nd</sup> Cir. 1979).

1 just so long as is necessary to hold a hearing, and no longer.”<sup>117</sup> A request for *ex*  
2 *parte* relief can be justified, for example, by showing a likelihood that the  
3 defendants will dissipate assets in the absence of such relief.<sup>118</sup>

4 The factual basis for requesting *ex parte* relief is set forth in the Declaration  
5 of Maxine Stansell, filed concurrently with this Application for TRO. The FTC’s  
6 experience shows that defendants engaged in fraudulent schemes similar to  
7 Defendants will often withdraw funds from bank accounts and move or shred  
8 documents upon learning of impending legal action.<sup>119</sup> District courts therefore  
9 have regularly granted the FTC *ex parte* relief in similar cases. Issuing the TRO *ex*  
10 *parte* in this case is indispensable to preserving the status quo and securing full and  
11 effective relief pending a hearing on the preliminary injunction.

12 D. An Asset Freeze is Needed to Preserve Assets for Consumer Redress

13 To preserve the availability of funds for injured consumers, the FTC  
14 requests that the Court issue an *ex parte* order requiring the preservation of assets  
15 and evidence. Such an order is well within the Court’s authority.<sup>120</sup> An asset  
16 freeze is appropriate once the Court determines that the FTC is likely to prevail on  
17 the merits and restitution would be an appropriate final remedy.<sup>121</sup>

18 “A party seeking an asset freeze must show a likelihood of dissipation of the  
19 claimed assets, or other inability to recover monetary damages, if relief is not  
20 granted.”<sup>122</sup> An asset freeze is justified if a defendant’s business is permeated with

21 \_\_\_\_\_  
22 <sup>117</sup> *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9<sup>th</sup> Cir. 2006) .

23 <sup>118</sup> *See Affordable Media*, 179 F.3d at 1236-37.

24 <sup>119</sup> *See* Rule 65 Declaration, pp. 4-7, ¶¶ 12-13 (citing numerous instances of such  
25 conduct).

26 <sup>120</sup> *Singer*, 668 F.2d at 1113 (§ 13(b) provides a basis for an asset freeze).

27 <sup>121</sup> *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7<sup>th</sup> Cir.  
1988).

28 <sup>122</sup> *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9<sup>th</sup> Cir. 2009).

1 fraud.<sup>123</sup> As the Ninth Circuit has observed in upholding an asset freeze, an  
2 individual who has “impermissibly awarded himself” funds that are not rightfully  
3 his “is presumably more than capable of placing assets in his personal possession  
4 beyond the reach of a judgment.”<sup>124</sup> Here, an asset freeze is necessary to preserve  
5 assets for consumer redress. Absent a court order, Atalla is likely to continue to  
6 use corporate funds obtained from consumers for his personal expenses, including  
7 rent on his penthouse, restaurant and bar tabs, and hotel charges.<sup>125</sup>

8 E. A Receiver Will Halt the Injury and Locate and Preserve Business  
9 Assets and Records

10 The FTC seeks appointment of a temporary receiver over the Corporate  
11 Defendants. This Court has inherent power to appoint a receiver incident to its  
12 statutory authority to issue permanent injunctions under Section 13(b) of the FTC  
13 Act.<sup>126</sup> A receiver is necessary when a corporate defendant has defrauded the  
14 public.<sup>127</sup>

15 With Defendants in control of their business, evidence will likely be  
16 destroyed and the fruits of their fraud will be dissipated. A neutral receiver would  
17 prevent further harm to consumers and would locate and secure assets and records  
18 but without disrupting any legitimate business activity. A receiver also would help

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20 <sup>123</sup> See, e.g., *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2<sup>nd</sup> Cir.  
21 1972); *SEC v. R.J. Allen & Assoc., Inc.*, 386 F.Supp. 866, 881 (S.D. Fla. 1974).

22 <sup>124</sup> *Johnson*, 572 F.3d at 1085.

23 <sup>125</sup> Atalla treats corporate funds as personal, paying his penthouse rent and other  
24 personal expense from corporate accounts, Ex. 16, pp. 351-52, ¶¶ 39, 43.

25 <sup>126</sup> *U.S. Oil & Gas*, 748 F.2d at 1432. See, e.g. *FTC v. Advanced Mgmt. Servs.*  
26 *NW, LLC*, CV-10-148-LR (E.D. Wa. May 10, 2010) (*ex parte* TRO with asset  
freeze and two receivers).

27 <sup>127</sup> *SEC v. First Fin. Grp. of Texas*, 645 F.2d 429, 438 (5<sup>th</sup> Cir. 1981) (“hardly  
28 conceivable that the trial court should have permitted those who were enjoined  
from fraudulent misconduct to continue in control of [the corporate defendant]”).

1 assess the extent of the fraud, trace its proceeds, prepare an accounting, and make  
2 an independent report of Defendants' activities to the Court.

3 F. Immediate Access and Limited Expedited Discovery are Appropriate

4 The proposed TRO directs the receiver to provide both the FTC and  
5 Defendants with reasonable access to Corporate Defendants' premises (which may  
6 be necessary to prepare for a preliminary injunction hearing). The TRO provides  
7 the receiver and the FTC with immediate access to quickly and efficiently locate  
8 assets Defendants have wrongfully taken from consumers, identify possible  
9 additional defendants, locate documents pertaining to Defendants' business, and  
10 locate Defendants, should they attempt to evade service. The business premises to  
11 which the receiver and the FTC would have immediate access include a  
12 telemarketing room and private mail boxes that Defendants have used at three  
13 commercial mail receiving agencies.<sup>128</sup> In addition, the FTC seeks permission to  
14 conduct depositions with forty-eight hours' notice and to issue requests (or  
15 subpoenas) for production of documents on five days' notice for these purposes.  
16 District courts may depart from normal discovery procedures,<sup>129</sup> particularly as  
17 preliminary relief in a case involving the public interest.<sup>130</sup>

18 **V. CONCLUSION**

19 Defendants have caused and likely will continue to cause substantial public  
20 injury by violating the FTC Act and the MARS Rule. The FTC respectfully

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21 <sup>128</sup> Ex. 16, pp. 339-40, 357, 361-63, ¶¶ 10-12, 54-56, 67; Ex. 19, p. 707. In a  
22 recent visit to the site of the telemarketing room, FTC staff observed that it was  
23 signed, "Newport Group," similar to the name of another company owned by  
24 Atalla, Newport Mortgage Group, Inc. Ex. 19, p. 707. The asset freeze in the  
25 proposed TRO would include not only Defendants but also accounts in the name of  
Newport Mortgage Group to the extent Defendant Atalla is a signatory.

26 <sup>129</sup> See Fed. R. Civ. P. 26(d), 30(a)(2), 33(a), and 34(b) (courts may alter standard  
provisions).

27 <sup>130</sup> Equitable powers are broader if the public interest is involved. *Porter v.*  
28 *Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 1089 (1946).

1 requests the proposed TRO to protect the public from further harm and help ensure  
2 effective relief for those harmed.

3 Dated: September 18, 2012

Respectfully submitted,

*Maxine R. Stansell*

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