



1 modification and loan refinancing services.

2 Defendant Infinity is a California corporation that has been doing business in the mortgage  
3 and lending industry since 2001. It is undisputed that the company has a California finance license  
4 and a real estate license. In addition, up until 2008, Infinity had an A+ rating with the Better  
5 Business Bureau. However, when the current mortgage crisis hit, Infinity entered the loan  
6 modification market, receiving approval from the United States Department of Housing and Urban  
7 Development (“HUD”) to represent borrowers in the Hope for Homeowners Program. Infinity  
8 marketed the Hope for Homeowners’ program, as well as other non-governmental loan modification  
9 programs, until February 2009. The FTC alleges that in marketing these programs, the Defendants  
10 engaged in deceptive practices by guaranteeing successful modifications, taking consumers’ up-front  
11 fees of \$995, promising refunds in the event of failure to obtain modifications, and then doing little  
12 or nothing to help consumers and rarely refunding monies paid. After ceasing to offer loan  
13 modifications, the FTC alleges that Defendants proceeded to market a very similar deceptive scheme  
14 under the guise of promised loan refinancing. However, again, Defendants promised success, took  
15 flat fees of \$995, and then did barely anything to provide services for consumers. In addition, the  
16 FTC contends that any disclaimers, either included in consumer contracts or, for example, on  
17 Defendants’ websites, did not correct the deception inherent in other representations made by  
18 Defendants with respect to their offered services. The FTC contends that Defendants are still  
19 engaging in unlawful loan refinancing and will likely reenter the modification business.

20 Thus, upon filing its complaint, the FTC also sought to have this Court enter the instant  
21 Application, essentially shutting down Defendants’ business and providing for other ancillary relief  
22 such as asset freezes and expedited discovery. In support of its Application, the FTC filed, among  
23 other things, fifteen consumer declarations, declarations of two FTC investigators, a declaration of  
24 a Better Business Bureau representative, and over one-hundred consumer complaints filed against  
25 Defendants. Defendants oppose the Application. In arguing that the FTC’s position has no merit,  
26 Defendants offer an alternative request to the Court denying the FTC’s Application in its entirety.  
27 Specifically, Defendants ask that the Court deny the TRO but issue an Order to Show Cause Why  
28 a Preliminary Injunction Should Not Issue, in order to allow the parties to engage in full and

1 thorough briefing and a hearing before this matter is resolved.

## 2 **II. Legal Standard**

3 Generally, courts grant equitable relief in the event of irreparable injury and the inadequacy  
4 of legal remedies. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); *see also*  
5 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798 (1982) (“[T]he basis for  
6 injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal  
7 remedies.”). Plaintiffs must satisfy additional requirements in order to be granted preliminary relief.  
8 Plaintiffs have the burden of showing that they are entitled to preliminary relief. The “traditional  
9 test” requires non-governmental plaintiffs to demonstrate (1) a strong likelihood of success on the  
10 merits; (2) a significant threat of irreparable injury; (3) greater hardship to Plaintiffs than  
11 Defendants; and (4) that the public interest favors granting the injunction. *See American*  
12 *Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983).

13 The standard for governmental plaintiffs, such as the FTC, is different. Plaintiff FTC avers  
14 that it moves for a TRO pursuant to the final proviso of Section 13(b) of the Federal Trade  
15 Commission Act. Under that proviso, the FTC “may seek, and, after proper proof, the court may  
16 issue a permanent injunction.” 15 U.S.C. § 53(b). Inherent in the ability of the Court to provide  
17 final, permanent injunctive relief is the Court’s power to grant preliminary and ancillary relief upon  
18 a proper showing. *See F.T.C. v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (9th Cir. 1984)  
19 (“Congress did not limit the court’s powers under the final proviso of § 13(b) and as a result this  
20 court’s inherent equitable powers may be employed to issue a preliminary injunction, including a  
21 freeze of assets, during the pendency of an action for permanent injunctive relief.”). In addition,  
22 because the FTC seeks to vindicate the public interest, it need not prove irreparable harm; injury to  
23 the public from deceptive practices is presumed. *FTC v. Affordable Media, LLC*, 179 F.3d 1228,  
24 1233 (9th Cir. 1999) (citing *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1159 (9th Cir.  
25 1984)). Thus, to award such relief here, the Court must “‘1) determine the likelihood that the [FTC]  
26 will ultimately succeed on the merits and 2) balance the equities.’” *Id.* (quoting *Warner*, 742 F.2d  
27 at 1160).

### 1 III. Discussion

2 Plaintiff FTC takes issue with two mortgage programs offered by Defendants: (1) offered  
3 loan modifications; and (2) offered loan refinancings. However, for the reasons that follow, the  
4 Court finds it unnecessary to issue a temporary restraining order at this time and instead sets this  
5 matter for a preliminary injunction hearing in order to provide Defendants a more full opportunity  
6 to respond to the allegations in the complaint and Application.

7 To begin, Section 13(b) cannot be used to remedy past violations of Section 5 of the FTC  
8 Act. *F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985). Indeed, the statutory  
9 language provides for preliminary injunctive relief when an individual or entity “is violating, or is  
10 about to violate” any law enforced by the FTC. *Id.*; *see also*, 15 U.S.C. § 53(b)(1); *Evans Products*  
11 *Co.*, 775 F.2d at 1087 (“The sparse legislative history indicates that Congress only contemplated  
12 ongoing or future violations which required the ‘quick handling’ that an injunction could provide.”).  
13 In the instant matter, there is no dispute that Defendants have ceased offering loan modification  
14 services and offered such services primarily between November 2008 and February 2009. However,  
15 the issue is whether the alleged deceptive modification services are “likely to recur,” and therefore  
16 still support emergency relief. *Id.* at 1088.

17 The FTC relies on a single taped conversation between an undercover Federal Trade  
18 Investigator and an Infinity agent to support its position that Infinity will likely offer its allegedly  
19 questionable loan modification services in the future. *See* Declaration of Brent D. McPeek in Supp.  
20 of Pl.’s App. (McPeek Decl.). In that conversation, the FTC Investigator McPeek represents that  
21 he is seeking a loan modification. While the Infinity representative indicates that the company is  
22 no longer offering such services and directs McPeek to contact other companies, the representative  
23 also tells McPeek to call back in a month, implying that loan modification services might be  
24 available at that time. McPeek Decl., Exh. B 10:21-24. At such a nascent stage in this litigation and  
25 without implying how the Court may resolve this issue upon a preliminary injunction hearing, this  
26 single equivocal statement by a representative who may or may not still work for Infinity does not  
27 support the issuance of a TRO based on alleged misrepresentations connected to Defendants’ past  
28 offering of loan modification services. In addition, while the FTC represents that Defendants have

1 only refunded approximately seventy-thousand dollars to its customers who purport to have been  
2 wronged by the loan modification program, Defendant Zamani alleges that in fact the company has  
3 provided refunds approximating two-hundred-and-eighty-eight-thousand dollars. Furthermore,  
4 while providing customer declarations that indicate dissatisfaction with the Defendants, the FTC  
5 concedes that Defendants have likely provided successful services to some of its customers. While  
6 providing some successful services is not reason alone to deny a TRO when potentially deceptive  
7 advertising practices are being used, this fact among many others militates against issuing a TRO  
8 before a more thorough briefing and hearing take place.

9         With respect to allegations that the Defendants' loan refinancing program is deceptive, here  
10 too, the Court is not ready to issue the extraordinary remedy of a TRO. For example, Defendants  
11 represent that as of May 2009, they have ceased collecting up-front fees of any kind for their  
12 advertised services, a primary concern for the FTC. In addition, Defendants represent that they no  
13 longer conduct radio advertising and only operate a single website, [www.askigs.com](http://www.askigs.com), advertising  
14 traditional home mortgage lending and refinancing. Defendants also allege to have terminated  
15 employees who improperly represented the Infinity programs and allegedly issued repeated emails  
16 to employees to ensure compliance with lawful procedures. Furthermore, while the FTC makes  
17 repeated arguments that any disclaimers provided by the Defendants with respect to their offered  
18 programs are inadequate, the Court cannot find that the disclaimers, in light of the other changes  
19 Infinity has made in response to customer complaints, demonstrate the need for an immediate TRO,  
20 especially as Defendants have seemingly (and successfully) offered such loan services for eight  
21 years prior to the instant mortgage crisis.

22         In addition, the Courts finds it unnecessary to provide the ancillary relief requested by the  
23 FTC at this point. While the Court refrains from addressing each area of ancillary relief, the request  
24 for an asset freeze warrants discussion, especially as the FTC seeks to freeze individual Defendant  
25 Zamani's assets. First, the FTC argues for an asset freeze based on the standard articulated by the  
26 Ninth Circuit in *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989), in which the court held that  
27 the FSLIC was only required "to show a possibility of dissipation of assets." However, the Ninth  
28 Circuit has quite recently issued a decision overruling the *Sahni* standard (in response to recent

1 Supreme Court precedent), holding that a party “must show a likelihood of dissipation of the  
2 claimed assets, or other inability to recover monetary damages, if relief is not granted.” *Johnson*  
3 *v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). While the Court recognizes that the *Johnson*  
4 Court only dealt with private litigants and the FTC is held to a lesser showing of irreparable harm,  
5 the instant Court remains concerned about the continuing viability of the *Sahni* decision with respect  
6 to asset freezes, even where a government entity like the FTC seeks such relief. Second, the FTC  
7 has not clearly shown that there is a even a possibility of dissipation of assets or that the assets in  
8 question will be insufficient to satisfy a future judgment in this case absent ancillary relief. *See*  
9 *Evans Products Co.*, 775 F.2d at 1089. Any such allegations are rather conclusory.

10 While the Court does not ignore the very real possibility that legal wrongdoing was  
11 perpetrated by the Defendants, this is also not a situation in which a company new to the mortgage  
12 industry, and seemingly in response to the present mortgage and lending crisis, came on scene and  
13 started offering specious programs in order to capitalize on a climate of desperation and fear.  
14 Instead, Infinity had been in existence since 2001, had an A+ rating from Better Business Bureau  
15 when it decided to join the Hope for Homeowners Program (a rating that has only recently dropped  
16 due to the events detailed in the instant dispute), and has seemingly made efforts to remedy customer  
17 dissatisfaction without knowing that it was under investigation by the FTC. This background does  
18 not suggest any extreme danger to the public or the FTC’s ability to litigate this case if a final  
19 decision on these issues is reserved until the completion of a preliminary injunction hearing.

20 Again by denying the TRO, the Court makes no final determinate that preliminary equitable  
21 relief is not warranted in the instant matter. Instead, before issuing an order that will likely  
22 permanently shut down a company and in light of the specific facts presently before the Court, the  
23 Court finds the wisest course to allow this matter to proceed to a fully briefed preliminary injunction  
24 hearing.

#### 25 **IV. Disposition**

26 For the foregoing reasons, the Court hereby DENIES Plaintiffs’ Application for a TRO and other  
27 ancillary relief with the exception that the Court hereby GRANTS the FTC’s Order to Show Cause  
28 Why a Preliminary Injunction Should Not Issue (“OSC”) and sets the following briefing schedule

1 and hearing date:

- 2 1. Plaintiff's brief in support of a preliminary injunction and ancillary relief is due by
- 3 Monday, September 7, 2009, at 9:00 a.m.
- 4 2. Defendants' opposition, if any, is due by Monday, September 14, 2009, at 9:00 a.m.
- 5 3. Plaintiff's reply is due by Friday, September 18, 2009, at 5:00 p.m.
- 6 4. The hearing on the OSC is set for Thursday, September 24, 2009, at 8:30 a.m.

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8 DATED: September 2, 2009

  
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DAVID O. CARTER  
United States District Judge

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