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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT
10 (SOUTHERN DIVISION – SANTA ANA)

11
12 MONEX DEPOSIT COMPANY and
MONEX CREDIT COMPANY,

13 Plaintiffs,

14 vs.

15 JASON GILLIAM, STEVEN
16 BOWMAN, RICHARD GILLIAM,
and DOES 1-50,

17 Defendants.
18

Case No. 8:09-CV-00287-JVS-AN

**MEMORANDUM IN SUPPORT
OF APPLICATIONS FOR
TEMPORARY RESTRAINING
ORDER, FOR ORDER TO SHOW
CAUSE, AND FOR EARLY
DISCOVERY**

The Hon. James V. Selna

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 The Monex companies seek a temporary restraining order to enjoin
3 defendants' scheme to extort \$20 million from Monex. Monex sells precious
4 metals to investors, and over the past 20 years has had approximately 98,000
5 customers. Defendants, two of whom were former customers, operate a website
6 publishing false information about Monex. They have explicitly told Monex that
7 unless it meets their \$20 million demand, they will continue to use their website to
8 defame Monex and to deflect investors away from Monex and toward its
9 competitors. This past Thursday, March 19, defendants raised their original
10 demand of \$15 million to \$20 million. Defendant Richard Gilliam told a Monex
11 manager that, if Monex paid defendants the \$20 million, defendants would shut
12 down the website before publication of a major, negative news piece about Monex
13 which defendants shopped to the media and to which they contributed heavily.

14 Defendants admit that their scheme is successfully costing Monex
15 approximately \$1 million in revenue per week, an estimate they base on their
16 communications with Monex customers and potential customers who have viewed
17 their website. Defendants use their site, www.MonexFRAUD.com, to make false
18 accusations that Monex commits crimes, including a scheme to sell precious metals
19 to customers without delivering these metals to bank depositories, as required by
20 state law and by Monex's agreement with customers.

21 Defendants' website is the core of their extortion scheme. They have
22 manipulated web search results so that, when potential customers search Google
23 for the term "Monex," the MonexFRAUD site is listed just below the real Monex
24 site. Defendants apparently pay for their scheme in part with advertising revenue
25 generated by links from MonexFRAUD to websites operated by Monex's
26 competitors, to whom defendants deflect Monex's customers.

27 Defendants are not just internet flammers with a personal bone to pick with
28 Monex. They are con artists using the Internet to aim their libelous statements at

1 destroying Monex's reputation and reducing Monex's revenues for their
2 extortionate purposes. Defendants understand that customers who want to buy
3 precious metals will naturally go to Monex's competitors as customers are
4 unnerved by MonexFRAUD's calibrated allegations of company-wide fraud.

5 Defendants also have misappropriated Monex trade secrets as part of their
6 scheme. They obtained a trade-secret customer list and have refused Monex's
7 demands to return it. Defendants have displayed a page from a Monex customer
8 list on MonexFRAUD, thereby suggesting to website viewers that defendants have
9 the insider's track on Monex.

10 Defendants' scheme is working insofar as it keeps pressure on Monex by
11 continuing to damage its reputation and goodwill and by persuading customers not
12 to do business with Monex. After Monex refused to pay the earlier \$15 million
13 demand by defendants' first deadline, defendants carried through on their threats
14 by adding more defamatory material to the website. After Monex filed its
15 complaint, defendants published more defamatory statements.¹

16 In addition to defendants' admissions that they cost Monex substantial
17 revenues, many Monex customers and potential customers told Monex account
18 representatives that they will not do business with Monex because of what
19 MonexFRAUD says about Monex. Such harm is impossible to measure in dollars
20 because one cannot determine which potential customers never approached Monex
21 due to defendants' scheme. Because the harm cannot be quantified, it can never be
22 remedied. Therefore, unless the Court suspends operation of defendants'
23 extortionate scheme and website, Monex will suffer irreparable harm pending the
24 Court's decision on Monex's request for a preliminary injunction.

25
26 ¹ Since Monex filed its Complaint, defendants eliminated, at least temporarily, their
27 site's Google advertising links to Monex's competitors. (Declaration of Scott
28 Andrews ¶ 5, Ex. B.) Presumably, defendants understood that such revenue
generation further exposed the deceit of their criminal enterprise's masquerade as a
mere group of Internet citizens invoking First Amendment rights.

1 Monex expects defendants to argue first that a TRO suspending their website
2 is an unconstitutional prior restraint on speech. But the First Amendment does not
3 protect speech used for extortion, just as it does not protect defendants' fraudulent
4 representations to the public, perjury, or other criminal speech. *E.g., San Antonio*
5 *Cnty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1239 (9th Cir.
6 1997) (affirming preliminary injunction against defamatory and fraudulent speech);
7 see pp. 22–24 collecting cases. Defendants' second expected defense is that
8 defendants' communications with Monex were merely settlement discussions.
9 (Jason Gilliam Answer, Dkt. No. 5.) The explicitness of defendants' threats to
10 harm Monex outside of litigation disproves Gilliam's attempt to sanitize
11 defendants' bald threats as anything other than extortion.

12 Monex therefore asks the Court: (1) to enjoin temporarily defendants'
13 extortionate threats and scheme, (2) to order defendants immediately to remove
14 MonexFRAUD and any of their other anti-Monex sites from the web,² (3) to order
15 defendants to return to Monex every document that contains Monex trade secrets,
16 (4) to order defendants to stop using Monex proprietary information in any way,
17 (5) to order defendants to show cause why a preliminary injunction should not
18 issue, and (6) to order early and expedited discovery in preparation for the
19 preliminary injunction hearing.

20
21 ² To enjoin temporarily only defendants' *further* extortionate threats, without also
22 temporarily enjoining their website, will fail to stop defendants' extortion and the
23 resulting irreparable injury to Monex. Without ordering defendants' immediate
24 dismantling of the site, defendants will continue to use it to enforce defendants'
25 fresh extortionate threats, by continuing to injure Monex's reputation and to reduce
26 its business. For since defendants launched their extortion, all parts of their scheme,
27 most notably their website, have been continuously and irreparably harming Monex
28 and will continue to pressure Monex to pay defendants' extortion. Monex knows
this, as do defendants. An order temporarily closing down MonexFRAUD is
therefore essential to halt the harm to Monex, at least until a hearing on Monex's
request for a preliminary injunction. There is no question of such a TRO's
infringement on the First Amendment; once defendants began to use their website
to extort, they cancelled any First Amendment protection for their site. See
authorities collected below at pages 21–24. Monex's requested TRO leaves
defendants free to speak with government agencies.

1 **II. STATEMENT OF FACTS**

2 **A. The Immediate Catalyst For this Application for a TRO**

3 The events triggering this TRO application began February 12, when
4 defendant Bowman called Monex President Michael Carabini and set up a meeting
5 at Monex for the next day. (Declaration of Harvey Kochen ¶ 3.) Defendants'
6 website had been in operation some five months. On February 13, defendant Jason
7 Gilliam, the MonexFRAUD "web master," met with Mr. Carabini and Harvey
8 Kochen, the Monex compliance officer. He gave them a letter signed by defendant
9 Bowman. (*Id.* ¶ 5, Ex. A.) The letter contains threats to harm Monex and its
10 principals unless Monex pays defendants \$15 million. (*Id.*) Defendants wrote:

11 It has taken a period of 6 months to gather evidence,
12 witnesses, and testimony so that we are prepared to bring our
13 business with you to its final conclusion. [The letter then
14 threatens to reveal unspecified information about Monex to
15 CNN, MSNBC, and FOX, causing them to publicize Monex's
16 alleged failings.] . . . I want to bring to your attention
17 Michael that I have substantial evidence and testimony that
18 confirms that Monex is in fact reselling futures. Government
19 agencies are awaiting our cooperation with them to strengthen
20 their cases against you and Monex. There are five former
21 employees, all of which detest Monex, that are willing to
22 testify in open court, a process that only we through
23 MonexFRAUD.com are able to coordinate. [¶] . . . The
24 damage done by MonexFRAUD.com's marketing efforts is
25 nothing short of 10% of your total business, which translates
26 into millions of lost revenues to Monex every week. . . . The
27 result [of defendants' supposed investigation] is the
28 compilation of a devastating case against Monex that will
carry great weight across a number of legal venues, which
doesn't interest me However, we *will strongly consider*
cooperating with any and all federal agencies actively
investigating Monex, and its principals and employees
including, but not limited to Louis E. Carabini, Michael
Anthony Carabini, Gregory Walker, Michael Maroney, Ron
Smoler, Harvey Kochen, Terry Parsons, Dan Wales, Greg
Morton, Art Levine, Brandon Kennedy, and R.J. DeVogler.

1 We will also aid federal agencies in attaching to their
2 investigation individuals at supporting firms such as the
3 branch manager of Farmers & Merchants Long Beach
4 Office ¶¶ . . . ¶¶ I require \$10 million as a partial
5 recovery to distribute amongst the 234 people that were
6 defrauded by Monex, all its subsidiaries, and principals as
7 well as \$5 million to fulfill the promises made to me by Terry
8 Parsons, a now terminated employee of Monex.

9 (Id. [emphasis added].) Jason Gilliam also told Mr. Carabini and Mr. Kochen
10 during this meeting that he would continue to damage Monex on a daily basis
11 through his website and by drawing government regulators to this information
12 unless Monex met defendants' demands for payment. (Id. ¶ 6.)

13 Bowman later claimed to be a lawyer representing Monex customers but he
14 is not. (Declaration of Neil A. Goteiner ¶ 3.) Defendants have produced nothing to
15 confirm that they represent those 234 customers, the size of those customers'
16 trading losses, or any connection between those losses and the allegations against
17 Monex. (Id.) Also contrary to Bowman's representations, he was never a client of
18 Monex, notwithstanding his claim of speaking with a former Monex account
19 representative, Terry Parsons. (Declaration of Louis E. Carabini ¶ 30.)

20 Bowman and Jason Gilliam also spoke with Monex counsel on February 13,
21 making similar threats. (Goteiner Decl. ¶¶ 2-15.) In an email that evening, Jason
22 Gilliam reinforced the threats yet again by stating, "Since the principals of Monex
23 do not seem too impressed by the information they have received, I would advise
24 you to tell them to just relax and *let the clock run out till Wednesday*[, defendants'
25 deadline to pay them]." (Id. ¶ 16, Ex. C [emphasis added].)

26 Monex's outside counsel demanded that defendants end their extortionate
27 scheme and offered to provide information disproving defendants' assertions.
28 (Goteiner Decl. ¶¶ 24-25, 27, Exs. K-L, O.) Defendants refused to stop, triggering
the March 4 filing of the complaint. After receiving the complaint, defendants not

1 only declined to retract their extortion demands but escalated their efforts, costing
2 Monex still more revenue. (Andrews Decl. ¶ 9, Ex. F.)

3 This past Thursday, defendant Richard Gilliam, Jason Gilliam's father, met
4 with Mr. Kochen at Mr. Gilliam's request. (Kochen Decl. ¶¶ 9, 13.) Gilliam told
5 Mr. Kochen that a major news piece describing Monex negatively would be
6 published soon. (*Id.* ¶ 14.) Gilliam said that defendants would take down the
7 website prior to the publication if Monex would pay a higher demand, now \$20
8 million. (*Id.* ¶ 16.) He explained that, if the site were still available after people
9 had read or seen the news publication, they would be able to go to MonexFRAUD
10 and see additional negative claims about Monex there, thus magnifying the harm to
11 Monex that had been caused by the news piece. (*Id.* ¶ 17.) He said that, if the
12 website were down already when the news piece went out, the harm would be
13 limited to that caused by the article or broadcast. (*Id.*) Gilliam said that he would
14 distribute some of the money to 20 (not 234) customers working with defendants
15 and that defendants would then take a fee and any money left over. (*Id.* ¶ 18.)
16 Gilliam also said that he has a secret document that the IRS wants and which, he
17 claimed, would help the IRS in a tax case pending against Monex. (*Id.* ¶ 20.) He
18 said that if Monex pays the Gilliams \$20 million, he would not give the document
19 to the IRS and would give it instead to Monex. (*Id.*) Richard Gilliam said his son
20 was "committed to do this his whole life" unless Monex paid the \$20 million. (*Id.*
21 ¶ 21.) Defendants' continuing extortionate action triggered the instant application
22 for relief.

23 Monex provides additional information on defendants' extortion scheme
24 below but first reviews the factual background so the Court can put the scheme in
25 context.

26 **B. Monex and the Defendants**

27 Monex Deposit Company ("MDC") deals in precious metals. (Carabini
28 Decl. ¶ 4.) Its affiliate, Monex Credit Company ("MCC,") lends money to

1 customers for their purchases of metals from MDC. (*Id.* ¶¶ 5, 7.) Both companies
2 (collectively, “Monex”) are in Newport Beach, California. (*Id.* ¶¶ 3, 6.) They have
3 sold gold, silver, and other metals for about twenty years. (*Id.* ¶ 22.) The
4 companies have 208 employees. (*Id.* ¶ 9.) Over the past twenty years, Monex has
5 had approximately 98,000 customers. (*Id.* ¶ 8.)

6 Defendants Jason and Richard Gilliam invested in precious metals with
7 Monex. (*Id.* ¶ 10.) They lost approximately \$32,600 in the transactions. (*Id.*
8 ¶ 11.) They asked for a payment of \$5,580 from Monex to cover a portion of the
9 losses for which they said Monex was to blame. (*Id.*) Monex offered them half
10 that amount, \$2,790. (*Id.*) The Gilliams declined the offer. (*Id.*)

11 Defendant Steven Bowman claims that he was a member of a four-person
12 investment group which lost \$5 million trading with Monex. (Goteiner Decl. ¶ 3.)
13 But Monex has no record of ever doing business with Bowman and he has refused
14 to tell Monex who else was in the alleged investment group. (Carabini Decl. ¶ 30;
15 Goteiner Decl. ¶¶ 3, 17, Ex. D.)

16 **C. The Website’s Role In the Extortionate Scheme**

17 In August 2008, defendants, acting through Jason Gilliam, began publishing
18 the defamatory website, www.MonexFRAUD.com. It has been available on the
19 Internet ever since. Defendants’ website consistently places just after Monex’s
20 entry on a Google search-results page when a user searches for “Monex.”
21 (Andrews Decl. ¶ 6, Ex. C.) Jason Gilliam claims to be an “SEO” (search-engine
22 optimizer), *i.e.*, an expert in improving the placement of a website in search results.
23 (*Id.* ¶ 7, Ex. D.)

24 The core alleged facts and narratives on MonexFRAUD remain generally the
25 same, as does the format. Defendants claim that Monex is a “criminal” operating a
26 company-wide “fraud” on several levels. (*Id.* ¶¶ 9, 11, Exs. F, H.) They falsely
27 assert that Monex and its account representatives misrepresent material facts about
28 investing through Monex. (*Id.*)

1 They also falsely claim that Monex does not deliver metals to bank
 2 depositories for customers' benefit and does not transfer title to customer upon
 3 their purchase of precious metals. (*Id.* ¶ 11, Ex. H.) Defendants have no facts to
 4 support this fraudulent representation. Louis E. Carabini, President of Comco
 5 Management Corp., the general partner of Monex Deposit Company, submitted a
 6 declaration that refutes this allegation. (Carabini Decl. ¶¶ 15, 19–24, 26, 29.) This
 7 allegation also was the subject of a class action and the creation of a purported
 8 class of Monex customers who allegedly had paid storage charges for precious
 9 metals that Monex never delivered. (Goteiner Decl. ¶ 21, Ex. H.) The Quinn
 10 Emanuel law firm pursued this class action and discovery, which lasted five years.
 11 (*Id.*) At the end of the litigation (the settlement's final approval hearing was March
 12 16), Quinn Emanuel lawyers admitted under oath that this allegation was untrue
 13 and that Monex did, in fact, deliver the precious metals to the banks. (*Id.*)
 14 Although Monex sent the Quinn Emanuel lawyer's sworn declaration on this point
 15 to defendants, they continue to make this defamatory statement the core allegation
 16 in their scheme to scare Monex customers to move to its competitors. (*Id.*)

17 Defendants also allege that the National Futures Association ejected Monex
 18 for fraud. (Andrews Decl. ¶ 4, Ex. A.) No such thing happened. (Carabini Decl.
 19 ¶ 33.) They assert that the IRS charged Monex with tax evasion. (Andrews Decl. ¶
 20 4, Ex. A.) It didn't.³ They accuse Monex's founder of bribery. (*Id.* ¶ 8, Ex. E.)
 21 Again, false. More recently, they exploited the grave illness of a four-year-old
 22 child by falsely alleging that Monex is causing his death by having cheated Brad
 23 Shields, the boy's father, out of money earmarked for the son's health insurance
 24 premiums. (*Id.* ¶ 9, Ex. F.) An interview of the father revealed that, at the time of
 25 his investment, his income was \$150,000 a year, he owned real estate investments,

26 ³ An IRS complaint filed in this court against Monex (but not yet served), does not
 27 allege tax evasion. (Andrews Decl. ¶ 13, Ex. I.) It alleges Monex owes the IRS
 28 money on a default judgment entered 10 years ago against a predecessor company
 of Monex. (*Id.*)

1 he understood the risks involved, and he decided to invest despite his son's illness.
 2 (Goteiner Decl. ¶ 25.) After he suffered limited losses, he decided nevertheless to
 3 ride out the market in hopes that he would turn a profit. (*Id.*) Defendants refused
 4 to alter their website story to reflect the truth. (*Id.* ¶ 25, Ex. L.)

5 Defendants' fraudulent statements described above are only illustrative:
 6 defendants' website contains dozens of similarly defamatory allegations. (A more
 7 complete list takes up 55 paragraphs (¶¶ 37–91) of the Complaint.) As discussed
 8 below, Monex gave defendants information that disproves their calumny. But
 9 defendants nevertheless are proceeding with their scheme to use their website to
 10 extort money from Monex.

11 **D. Irreparable Injury Caused By Defendants' Website Scheme**

12 Defendants' false allegations are driving existing Monex customers away
 13 from Monex and causing potential investors not to trade with Monex. Jason
 14 Gilliam recently estimated on MonexFRAUD that the site had cost the company at
 15 least \$2 million in lost revenue over two weeks and, therefore, projected annual
 16 damage of \$52 million. (Andrews Decl. ¶ 7, Ex. D.) As he put it, "It wouldn't
 17 shock me to find out that in the last two weeks they'd lost \$5,000,000 in
 18 business. . . . But if we go with the minimum it's going to cost them
 19 \$52,000,000."⁴ (*Id.*) Jason Gilliam also said that many investors had emailed him,
 20 stating that they had been turned off to Monex by MonexFRAUD. (Goteiner Decl.
 21 ¶ 11; Andrews Decl. ¶ 7, Ex. D.)

22 ⁴ Jason and Richard Gilliam were responsible for their own losses at Monex. They
 23 claim that Monex did not tell them its commissions before they purchased silver.
 24 The standard commission rates, however, are disclosed in the account agreement.
 25 (Carabini Decl. ¶ 5, Ex. A.) In fact, for the Gilliams, Monex reduced the usual
 26 commission rates on most of their transactions. (Kochen Decl. ¶ 23.) They claim
 27 that Monex mismanaged their trading when, in fact, all customer transactions must
 28 be authorized by the customer; account representatives cannot make trades on their
 own discretion, as the account agreement states. (Carabini Decl. ¶ 13.) The
 Gilliams blame Monex for not having sold off their *entire* position when silver lost
 a certain amount of value. But, in fact, telephone recordings show that the Gilliams
 only placed orders for *part* of their existing silver holdings to be sold at that time.
 (Kochen Decl. ¶ 24.)

1 Bowman agreed with Jason Gilliam that their website cost Monex substantial
 2 revenues and would cost Monex far more unless it caved to defendants' demands.
 3 (Goteiner Decl. ¶ 10.) In addition to Bowman's claim in his initial extortion letter
 4 to Michael Carabini that MonexFRAUD had cut Monex's revenue by 10 percent
 5 (Kochen Decl. ¶ 5, Ex. A), Bowman also said that he was on 30 to 40 telephone
 6 calls during which potential Monex customers said they wouldn't invest in Monex
 7 after having read MonexFRAUD. (Goteiner Decl. ¶ 10.)

8 Dozens of customers and potential customers have told Monex account
 9 representatives that they won't do business with Monex because MonexFRAUD
 10 persuaded them to go elsewhere with their money. We submit the declarations of
 11 just two of Monex's 113 account representatives, Sid Hukic and Joe Vincent,
 12 summarizing their calls with customers who said MonexFRAUD had caused them
 13 to stop doing business with Monex. (*See, generally*, Declarations of Joe Vincent
 14 and Sid Hukic; Carabini Dec. ¶ 9.)⁵ Customers have posted messages in
 15 MonexFRAUD's "forum" section, stating that the website caused them not to
 16 purchase from Monex. (Andrews Decl. ¶ 7, Ex. D.) For example,
 17 "Bullionnewbie" wrote, "They lost my business as a result of this site. I'm sure
 18 they've lost others as well." (*Id.*)

19 Another indication of MonexFRAUD's influence is its substantial traffic.
 20 As of March 20, the site shows that it had received 47,163 "unique visitors." (*Id.*,

21 ⁵ These declarations have not identified the customers' names out of privacy
 22 concerns. Monex does not expect defendants to object because they have disclosed
 23 their success in scaring away Monex customers. If, however, the Court or
 24 defendants want more detail on these customers, Monex will disclose customer
 25 names and additional information subject to a protective order.

26 The Court can consider for this TRO application, for the truth of the matter
 27 asserted, the account representatives' summary of customers' statements. *See*
 28 *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The trial court
 may give even inadmissible evidence some weight [in considering whether to grant
 a preliminary injunction] when to do so serves the purpose of preventing
 irreparable harm before trial."); *RD Legal Funding, LLC v. Erwin & Balingit,*
LLP, Civil No. 08cv597-L(RBB), 2008 WL 3843511, *1 (S.D. Cal. 2008) (TRO
 proceeding).

1 ¶ 9, Ex. F.) Jason Gilliam claims on the site that people from 49 U.S. states and 47
2 nations have visited it. (*Id.* ¶ 7, Ex. D.)

3 For every person who tells Monex that the website drove him or her away,
4 there are undoubtedly many more who are reacting identically but not telling
5 Monex. There are probably still more who never contact Monex in the first place
6 because of MonexFRAUD's defamatory content. The company therefore has no
7 way of knowing how many people MonexFRAUD has scared off. The harm
8 inflicted on Monex, although significant, is thus impossible to measure precisely.

9 **E. Additional Facts About Defendants' Extortion**

10 Defendants refuse to provide information to legitimize their demands.
11 (Goteiner Decl. ¶¶ 3, 7, 15, 17–18, 20, Ex. G.) They refuse to say who are the 234
12 (or 20) people they represent. (*Id.* ¶¶ 3, 7, 15, 18.) Bowman will not provide a
13 physical or mailing address. He declines to say through whom he invested at
14 Monex. (*Id.* ¶ 17.) He claims to be a lawyer but there is no record of him on the
15 licensing rolls for Canada, where he lives, or California. (Andrews Decl. ¶ 12
16 [concerning license in California].) The president of Bowman's recent employer
17 accused him this month of stealing a computer. (Goteiner Decl. ¶ 28, Ex. P.)

18 On February 13, Bowman and Jason Gilliam spoke with Monex's counsel
19 and reiterated their threats and their then original demand for \$15 million. (*Id.*
20 ¶¶ 2–15.) Bowman admitted that those demands sounded like extortion. (*Id.* ¶ 9.)
21 Also in that call, Gilliam emphasized again the leverage he had over Monex by
22 claiming credit for an increase in the number of complaints about Monex to the
23 Better Business Bureau, from less than 20 (out of 98,000 customers) to 59. (*Id.*
24 ¶ 12.)

25 Later on February 13, Jason Gilliam sent his email giving Monex until the
26 following Wednesday to comply with defendants' demands. (*Id.* ¶ 16, Ex. C.) In
27 addition, Gilliam sent to Monex's counsel defendants' "Plan of Action Outline,"
28 which also had been provided with the original letter demanding \$15 million. (*Id.*

1 ¶¶ 2, 15, Exs. A–B.) The “Plan of Action Outline” threatens to use Monex FRAUD
 2 to “damage Monex marketing efforts,” to continue “to spread awareness of the
 3 Monex scam to the public,” and to build lawsuits against Monex. (*Id.*) In the same
 4 email, Mr. Gilliam threatened to provide information about Monex to the IRS, the
 5 SEC, the NFA, the CFTC, the FTC, the FCC, the U.S. Justice Department, the FBI,
 6 and the news media. (*Id.* ¶ 15, Ex. B.) In the same email, Gilliam threatened to
 7 sue Monex for more than \$1 billion. (*Id.* ¶ 15, Ex. B.)

8 On February 17, Monex’s counsel emailed defendants, explicitly confirming
 9 that their threats constituted extortion and refusing to pay. (*Id.* ¶ 18, Ex. E.)⁶
 10 Defendants were therefore well aware that Monex viewed their demands as illegal.
 11 Monex’s counsel also stated in that email that defendants had their facts wrong in
 12 alleging that Monex does not deliver customers’ precious metals to bank
 13 depositories and does not pass title to its customers upon purchase of metals. (*Id.*)
 14 In addition to warning defendants to conduct due diligence before defaming Monex
 15 further, the company’s counsel also offered to give defendants additional facts if
 16 they would share any information supporting their contentions about Monex. (*Id.*)

17 On the afternoon of February 18, Monex’s counsel again addressed
 18 defendants’ claim that Monex was selling precious metals but failing both to
 19 deliver them to independent depositories and to pass title to the customers. (*Id.* ¶
 20 21, Ex. H.) Monex’s attorneys emailed defendants, providing details of a five-year
 21 class action against Monex in Orange County Superior Court, including copies of
 22 the pleadings. (*Id.*) In that dispute, Quinn Emanuel Urquhart Oliver & Hedges

23 ⁶ Jason Gilliam responded to this email in the evening of February 17, claiming that
 24 Monex’s interpretation of defendants’ letter from Bowman was “flawed and
 25 inaccurate.” (Goteiner Decl. ¶ 19, Ex. F.) He claimed that the letter did not
 26 contain any threat or any offer to shut down the website if Monex would pay the
 27 \$15 million. (*Id.*) Gilliam, however, did not address the actual language of
 28 Bowman’s letter, Gilliam’s own February 13 email giving the deadline for
 payment, or Bowman’s refusal to state whom he represents until he heard directly
 from Monex’s principals that they were ready to “deal.” (*See id.* ¶¶ 2, 16, 20,
 Exs. A, C, G.). Richard Gilliam’s Thursday extortion demand further trumps
 Jason’s extortion denial. (*See Kochen Decl.* ¶¶ 13–22.)

1 LLP, on behalf of a class of customers, asserted that Monex was making just the
2 sort of misrepresentations that MonexFRAUD was alleging. (*Id.*) Many of those
3 claims were dropped. (*Id.*) At the time of the extortion demands, Quinn
4 Emanuel's clients and Monex were settling that case, which originally covered
5 approximately 100,000 Monex customers, for a fraction of nuisance value. (*Id.*)
6 (The payment to class members that was ultimately approved was only about
7 \$35,000 for a class of 92 customers allegedly charged excessive lease fees.
8 [Andrews Decl. ¶ 10, Ex. G.]) As part of that process, Quinn Emanuel had agreed
9 to decertification of a subclass purportedly consisting of customers misled by
10 Monex about bank depository storage charges. (Goteiner Decl. ¶ 21, Ex. H.)
11 Quinn based the subclass on the same allegations now leveled by MonexFRAUD:
12 that Monex failed to deliver customers' metals to depositories. (*Id.*) Quinn
13 conceded in this decertification agreement that there were no members in the
14 subclass and therefore that no one was ever misled by Monex's true statement that
15 the metals were delivered to the depositories and held for the benefit of the
16 purchasers. (*Id.*) The declaration of a Quinn Emanuel lawyer, which Monex gave
17 to defendants, swore that HSBC, one of Monex's depository banks, stored
18 substantial amounts of precious metals for Monex customers. (*Id.*) As Monex's
19 counsel noted to defendants, Quinn Emanuel had substantial motivation, as a class
20 fiduciary and for its own fees, to pursue the allegations aggressively and to recover
21 larger amounts for the class. (*Id.*) The Gilliams and Bowman nevertheless
22 threatened to sue HSBC, one of the Monex depository banks, and told Monex
23 about the threat. (*Id.* ¶ 15, Ex. B.) Defendants declined to address these facts
24 about the depositories in the ensuing email exchange. (*Id.* ¶ 23, Ex. J.)

25 On February 19, Bowman again refused to identify through whom he
26 supposedly had invested in Monex. (*Id.* ¶ 20, Ex. G.) He stated, "[W]e will reveal
27 ourselves only to the principles [sic] of Monex when we feel and are convinced
28 they are prepared to deal." (*Id.*) Bowman threatened that defendants "will

1 continue to damage the credibility of Monex every day until they reimburse the
2 money they stole from us.” (*Id.*)

3 Later on February 19, Bowman sent another message to Monex’s counsel
4 implying that, unless defendants were paid, they would give evidence to the IRS
5 that would be useful against Monex in the tax dispute pending before the Court.
6 (*Id.*) The email claimed that the evidence was a “silver bullet” for the IRS and that
7 the “IRS is currently unaware of this document’s existence. . . . If you are
8 interested in speaking to me on behalf of Monex . . . I am ready and willing.” (*Id.*)

9 Also in that email, Bowman said that he had Monex proprietary information,
10 particularly a Monex customer list for a former Monex broker. (*Id.*) Monex
11 demanded the return of the trade secret customer list. (*Id.* ¶ 26, Exs. M, N.) The
12 list has not been returned and defendants, by never responding, apparently have
13 refused to do so. (*Id.* ¶ 26.)

14 In response, Monex explained what was incorrect about defendants’ most
15 serious accusations and offered to provide documentation to back up its positions.
16 (*E.g., id.* ¶ 25, Ex. L.) It asked for defendants to take down MonexFRAUD, due to
17 its use to extort money from Monex, and to stop their threats to go to the regulatory
18 authorities. (*Id.* ¶¶ 24–25, Exs. K–L.) Defendants never did.

19 When Monex did not pay the extortion demand of \$15 million by
20 February 18, defendants began to carry through on their threats, as they had
21 promised. On February 21, MonexFRAUD published the false allegation that
22 Monex was causing the death of the four-year-old boy by duping his father, Brad
23 Shields. (Andrews Decl. ¶ 9, Ex. F.) Monex’s counsel responded the same day by
24 demanding that defendants close the website and end the rest of the extortionate
25 scheme. (Goteiner Decl. ¶ 24, Ex. K.) In the same email, counsel described how
26
27
28

1 35 of defendants' statements were defamatory. (*Id.*) Defendants gave no reason
2 why they believed the defamatory statements to be true.⁷

3 Defendants also carried out their threats by posting to the website a
4 misleadingly truncated recording of a Monex account representative. (Andrews
5 Decl. ¶ 14, Ex. J.) The truncation made it seem that the representative was
6 providing false information about the profitability of his customers' accounts. The
7 recording was made surreptitiously, in violation of anti-wiretap laws. *See* Cal.
8 Penal Code § 631, 18 U.S.C. § 2511. When Monex's counsel pointed out the false
9 innuendo and defamatory content of the posting, defendants did nothing to correct
10 it. (Goteiner Decl. ¶ 27, Ex. O.)⁸

11 Finally, Jason Gilliam carried out his threat to go to the IRS. He contacted
12 the assistant U.S. attorney representing the IRS in its dispute with Monex. (*Id.* ¶
13 29, Ex. Q.) Gilliam described to the AUSA the defendants' "silver bullet"
14 evidence against Monex. (*Id.*) The IRS asked to see the document but, apparently
15 to maintain their leverage, defendants refused and now say that they will not give it
16 to the IRS at all if Monex pays the \$20 million. (*Id.*; Kochen Decl. ¶ 20.)

17 On March 4, Monex filed a complaint against defendants in the Superior
18 Court of California for Orange County. Jason and Richard Gilliam were served. A
19 copy of the complaint and summons is being served on Mr. Bowman through
20 Canadian authorities. (*See, generally*, Affidavit of Nao Sakamoto.) On March 9,
21 Jason Gilliam filed a notice of removal to this court.

22
23 ⁷ After Monex's counsel interviewed Brad Shields, the undersigned sent a
24 February 23 email to defendants summarizing the interview, stating why
25 defendants' report on the story was defamatory, and demanding that defendants
26 shut down the site, or at least purge it of all defamatory material. (Goteiner Decl.
27 ¶ 25, Ex. L.)

28 ⁸ Defendants also tried to intimidate Monex and its counsel further by printing part
of a *Forbes* magazine article about Monex's undersigned counsel, without referring
to *Forbes*' subsequent clarification, or to readily available Supreme Court
pleadings. (Andrews Decl. ¶ 9, Ex. F [defendants' publication]; Goteiner Decl. ¶
27 [summarizing facts surrounding *Forbes* article and referring to the subsequent
Forbes piece].)

1 **III. ARGUMENT**

2 A TRO is necessary to stop the irreparable harm to Monex by requiring
3 defendants to cease their extortion, including shutting down MonexFRAUD,
4 stopping their threats to speak to government regulators (we have no problem with
5 defendants actually speaking to the regulators), and ceasing using Monex trade-
6 secret customer lists for any purposes, including any attempts to contact Monex
7 customers. Courts have held that, in unusual circumstances such as those here,
8 injunctions against such speech are appropriate. See pages 21–24, below.

9 **A. Defendants' Conduct and Surrounding Facts Meet TRO Criteria**
10 **for Enjoining Defendants' Website Pending the Preliminary**
11 **Injunction Hearing**

12 Courts grant TROs when: 1) the moving parties are likely to be harmed
13 immediately in ways that cannot be redressed by a post-trial remedy, 2) the parties
14 seeking the TRO have a reasonable probability of success in the action, 3) the
15 balance of equities tips in the plaintiffs' favor, and 4) the TRO is in the public
16 interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374, 172 L. Ed.
17 2d 249, 260 (2008). All those factors are present here.

18 **1. Monex Is Suffering Irreparable Harm Because Damage to**
19 **Its Reputation and Goodwill From Defendants' Extortion**
20 **Cannot Be Calculated or Remedied.**

21 Defendants' extortion scheme is causing Monex paradigmatically irreparable
22 and imminent harm — defendants operate the scheme continuously, and have
23 increased both their pressure and the amount they are demanding. Richard
24 Gilliam's demands last week to Mr. Kochen drive home the point: until Monex
25 pays defendants \$20 million — or the Court intervenes — they will continue to use
26 their website to hurt Monex's reputation and goodwill and to drive away an
27 undeterminable number of customers.⁹

28 ⁹ See *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir. 1996) (holding that harm is irreparable if it is not accurately measurable); *accord FoodComm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Situations in which harm is not measurable and therefore irreparable include: (1) harm causing "substantial loss of business," including loss of current or future market share,

1 A large percentage of Monex's customers almost certainly changed their
 2 minds about the company because of what they read on defendants' website. This
 3 conclusion is supported by defendants' admissions that they are driving away
 4 Monex's customers and the Monex account representatives' declarations that
 5 MonexFRAUD is scaring away customers and potential customers.

6 Of course, most potential customers whom defendants have soured on
 7 Monex do not inform Monex why they will not do business with Monex. And so
 8 Monex has no way to know how many of them are turned off because of
 9 MonexFRAUD. Even if we could know who those people are, it would be
 10 impossible to determine how much business they would have done with Monex.

11 Defendants' use of the Internet for this sort of factual allegation is of a
 12 singularly powerful medium for harming Monex, given how investors increasingly
 13 choose it over traditional media and use it interactively. Whenever a Monex
 14 customer or potential customer looks up "Monex," he or she sees MonexFRAUD
 15 on the same Google page. Furthermore, web-based defamation, unlike that in
 16 newspapers or on television, does not subside without active intervention. It is
 17 relentless and, therefore, a powerful extortion tool for defendants.

18 **2. Monex Has a Reasonable Probability of Succeeding On the**
 19 **Merits Because Its Claims Are Viable And Rest On Solid**
 20 **Evidence.**

21 Monex has a reasonable probability of prevailing on each of its claims. The
 22 merits of Monex's extortion claim are particularly relevant to Monex's application
 23 for temporary suspension of defendants' website. While the balance of hardships

24 *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Grand River Enter. Six*
 25 *Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2nd Cir. 2007); (2) loss of prospective
 26 customers, *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d
 27 832, 841 (9th Cir. 2001); (3) loss of goodwill, *id.*; *Rent-A-Center, Inc. v. Canyon*
 28 *Television & Appliance*, 944 F.2d 597, 603 (9th Cir. 1991); and (4) loss of
 reputation, *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Courts can grant
 TROs when the irreparable harm to the plaintiffs is both imminent and likely.
Winter, 129 S. Ct. at 374 (likelihood); *Midgett v. Tri-County Metro. Transp. Dist.*
of Or., 254 F.3d 846, 850-51 (9th Cir. 2001) (imminent); *Caribbean Marine Svcs.*
Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (imminent).

1 tips sharply in the movants' favor, as described below, Monex need only show that
2 "there is a fair chance of success on the merits" of the extortion claim. *Johnson v.*
3 *Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). Here, there is
4 exponentially more than a fair chance of success.

5 a. **The Extortion and Conversion Claims Are More**
6 **Than Reasonably Probable to Succeed.**

7 The elements of attempted civil extortion in California are 1) an attempt to
8 obtain of property 2) from another, 3) with his consent, 4) induced by a wrongful
9 use of force or fear, or under color of official right. *See* Cal. Pen. Code § 518 (civil
10 elements derived from Penal Code).¹⁰ The elements of attempted conversion are
11 1) an attempt to exercise control 2) wrongfully 3) over the personal property of
12 another. *Farmers Ins. Exch. v. Zerlin*, 53 Cal. App. 4th 445, 451, 61 Cal. Rptr. 2d
13 707, 709 (1997).

14 Here, defendants' own correspondence demonstrates that there is a
15 reasonable probability that Monex can prove all elements of attempted civil
16 extortion and conversion. Defendants attempted to force Monex involuntarily to
17 pay them \$20 million. They still are doing so by threatening Monex and carrying
18 through on their threats. The communications between defendants and Monex
19 demonstrate beyond cavil that defendants attempted to extort money from Monex.
20 It does not matter if material on defendants' web site is true or false; threats to
21 reveal either true or false negative information, absent a payment, constitute
22 extortion. *See People v. Choynski*, 95 Cal. 640, 642, 30 P. 791, 791 (1892)
23 (holding that the truth of falsity of the information threatened to be disclosed is
24 irrelevant to whether or not extortion was committed). That so much of the
25

26
27 ¹⁰ Civil extortion claims have been recognized in *Flatley v. Mauro*, 39 Cal. 4th 299,
28 305, 139 P.3d 2, 5 (2006) and *Family Planning Specialists Med. Grp., Inc. v.*
Powers, 39 Cal. App. 4th 1561, 1565, 46 Cal. Rptr. 2d 667, 669 (1995).

1 information is demonstrably false and is influencing customers only underlines the
2 irreparable injury and necessity of the TRO.¹¹

3 Defendants' extortion scheme ends defendants' anticipated claims that a
4 TRO amounts to an unconstitutional prior restraint on speech, as discussed at pages
5 21–24. This application is far more than an effort to stop defendants' defamation
6 and other torts, which would, absent the extortion scheme, come under closer
7 scrutiny. Instead, the central issue here is extortion; the other torts are merely
8 conduits through which defendants carry out their threats to harm Monex if Monex
9 refuses to pay. The requested TRO to shut down defendants' main extortion tool is
10 therefore proper and required to effectively enjoin the extortion scheme.

11 **b. The Attempted Defamation and Trade Libel Claims**
12 **Are Reasonably Probable to Succeed.**

13 Defendants' statements meet the California elements of defamation: 1)
14 publications that are 2) false and 3) defamatory, and that 4) have a natural tendency
15 to injure or that cause special damage. Cal. Civ. Code §§ 45–46. The statements
16 also constitute trade libel, which is any 1) false 2) disparagement of 3) the quality
17 of goods or services. *Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 572, 264
18 Cal. Rptr. 883, 896 (1989). The major difference between the two torts is that
19 defamation attacks a business's reputation while trade libel directly attacks the
20 quality of the goods and services it sells. Here, there is a reasonable probability
21 that Monex can prove all elements of defamation and trade libel. It is enough that
22 defendants have falsely asserted on their website, with references to letters and
23 other documents, that Monex does not deliver metals to bank depositories for the
24 benefit of Monex customers who purchased the metals, and also fails to deliver title
25 to them. These false "facts" about a core Monex scheme and fraud subject it to

26 ¹¹ The attempted conversion claim is reasonably probable to succeed because
27 conversion is available to seek the return of money, not just the more typical forms
28 of personal property. *See Haigler v. Donnelly*, 18 Cal.2d 674, 681, 117 P.2d 331,
335 (1941).

1 contempt, ridicule, and hatred in the eyes of the investing public. Those statements
2 also falsely disparage the quality of the goods and services offered by Monex,
3 especially given that their quality depends heavily on the company's integrity.

4 **c. The Misappropriation of Trade Secrets Claim Is**
5 **Reasonably Probable to Succeed.**

6 The elements of the types of trade-secret misappropriation that are relevant
7 here are either 1) acquisition of 2) another's trade secret 3) by a person 4) who had
8 reason to know that the secret was acquired by improper means or, alternatively,
9 1) use 2) of a another's trade secret 3) without consent 4) by a person 5) who used
10 improper means to acquire the secret or 6) knew the secret came from someone
11 who had obtained it improperly or who had a duty not to disclose it. Cal. Civ.
12 Code §§ 3426.1–3426.3.

13 Here, there is a reasonable probability that Monex can prove
14 misappropriation. On February 23, defendants conceded that they had customer
15 information that was Monex's property. That information, detailing the customers'
16 interactions with Monex, is valuable partly because it is kept secret from Monex's
17 competitors. Such information likely reached defendants from one of Monex's
18 former or current employees — the only people with access to the information
19 normally — who are under duties not to reveal that information.

20 **d. All Remaining Claims Are Reasonably Likely to**
21 **Succeed.**

22 Two means of defendants' extortion were to disrupt Monex's relationships
23 with customers and potential customers. Defendants bragged about their success in
24 committing this tort, publicizing the losses they had inflicted on Monex. These
25 admissions demonstrate that Monex probably will succeed in its intentional and
26 negligent interference claims, as well as its intentional interference with contractual
27 relations. Defendants' conduct was wrongful because it involved extortion,
28 defamation, trade libel, and other torts.

1 Monex also likely will succeed in its civil RICO claim given that the
2 extorting defendants probably derived income from the advertising links, used the
3 website to operate the pattern of racketeering activity, and participated in the
4 enterprise's activities. See 18 U.S.C. § 1961(1).

5 Similarly, Monex is reasonably likely to succeed on its cyberpiracy claim
6 given defendants' bad faith intent to use Monex's mark in their website in order to
7 1) capture ad revenue generated by click-through traffic to Monex's competitors
8 and 2) solicit contributions from people who mistakenly went to MonexFRAUD
9 while trying to go to the true Monex website.

10 All of these activities also establish defendants' unfair business practices, as
11 alleged in plaintiffs' ninth cause of action. Defendants are profiting from their
12 unlawful activities by increasing their ad revenues through use of fraudulent and
13 defamatory statements about Monex to drive customers to Monex's competitors.
14 Defendants also are apparently profiting by seeking contributions from their
15 website viewers.

16 **3. The Balance of Equities Tips in Monex's Favor Because The**
17 **Harm to Its Business Is Great and Defendants Will Suffer**
18 **No Legally Cognizable Harm by a TRO.**

19 The balance of equities tips deeply in Monex's favor. Defendants'
20 extortionate scheme is harming Monex daily as defendants admit, in an
21 unknowable magnitude. (See, generally, Hukic Decl., Vincent Decl.) Enjoining
22 defendants' extortionate scheme pending the outcome of the preliminary injunction
23 hearing will cause defendants no harm to any protected interest, First Amendment
24 or otherwise.¹²

25 ¹² The Fifth Circuit held that a court need not balance the hardships when the
26 defendants' conduct was willful. *United States v. Marine Shale Processors*, 81
27 F.3d 1329, 1359 (5th Cir. 1996). Here, defendants' extortion, defamation,
28 attempted conversion, trade libel, intentional interference with prospective
economic advantage, intentional interference with contractual relations, RICO
violations, and cyberpiracy were all intentional. The Court therefore may dispense
entirely with balancing the hardships.

1 A person has no free-speech right to engage in speech that is illegal. *Flatley*
 2 *v. Mauro*, 39 Cal. 4th 299, 320, 46 Cal. Rptr. 3d 606, 621–22 (2006) (holding that
 3 there are no anti-SLAPP protections for unlawful speech); *Aguilar v. Avis Rent A*
 4 *Car Sys., Inc.*, 21 Cal. 4th 121, 133–45, 87 Cal. Rptr. 2d 132, 141–50 (1999)
 5 (holding that unlawful discriminatory speech can be enjoined) (plurality opinion);
 6 *Sterling Trading, LLC v. United States*, 553 F. Supp. 2d 1152, 1162 (C.D. Cal.
 7 2008) (“Where the IRS has demonstrated, as it has here, that there is reason to
 8 suspect that the purportedly protected speech was made in the context of promoting
 9 an abusive tax scheme, that speech is no longer protected by the First
 10 Amendment.”) (internal quotation marks omitted). *Flatley* held that California’s
 11 anti-SLAPP protections are unavailable to extortionate speech because such speech
 12 is unlawful and therefore beyond First Amendment protection. 39 Cal. 4th at 320.
 13 Restrictions on unlawful speech are therefore perfectly consistent with the First
 14 Amendment and the California constitution’s free speech guarantee.¹³

15 Courts therefore can and do enjoin extortionate speech with TROs. *E.g.*,
 16 *Family Planning Specialists Med. Grp., Inc. v. Powers*, 39 Cal. App. 4th 1561,
 17 1565, 46 Cal. Rptr. 2d 667, 669 (1995) (enjoining distribution of flyer that was part
 18 of alleged extortion scheme); *Burnham Broad. Co. v. Williams*, 629 So.2d 1335,
 19 1341 (La. Ct. App. 1993) (holding that preliminary injunction against threats was
 20 proper because lower court had found that plaintiffs had made out a prima facie

21 ¹³ The U.S. Supreme Court also has so held. *E.g.*, *Pittsburgh Press Co. v. Human*
 22 *Rel. Comm’n*, 413 U.S. 376, 391, 93 S. Ct. 2553, 2561–62 (1973) (holding that order
 23 forbidding newspaper from publishing unlawful “help wanted” advertisements in
 24 gender-designated columns was not a prohibited prior restraint); *Paris Adult Theatre*
 25 *I v. Slaton*, 413 U.S. 49, 55, 93 S. Ct. 2628, 2634 (1973) (upholding statute
 26 authorizing injunction against exhibition of obscene materials because statute
 27 imposed no restraint on exhibition until after finding that the film was obscene and
 28 therefore not constitutionally protected); *Kinglsey Books, Inc. v. Brown*, 354 U.S.
 436, 445, 77 S. Ct. 1325, 1330 (1957) (upholding law allowing injunctions against
 speech adjudicated to be obscene); *Gompers v. Buck’s Stove & Range Co.*, 221 U.S.
 418, 438–39, 31 S. Ct. 492, 497 (1911) (holding that unlawful speech in boycott can
 be enjoined); *see also Near v. Minn.*, 283 U.S. 697, 715, 51 S. Ct. 625, 630 (1931)
 (“[T]he common law rules that subject the libeler to responsibility . . . are not
 abolished by the protection extended in our Constitutions.”).

1 case of extortion against defendants). Pennsylvania's intermediate appellate court
2 held that speech that shut down a shopping center in order to pressure the center
3 pay "reparations" constituted extortion and therefore was properly subject to a
4 preliminary injunction. *Rouse Phila. Inc. v. Ad Hoc '78*, 417 A.2d 1248, 1256, 274
5 Pa. Super. 54, 68–69 (Pa. Super. Ct. 1979); see also *Burnham Broad. Co.*, 629 So.
6 2d at 1341.

7 The Ninth Circuit has also upheld a preliminary injunction against the type
8 of defamatory speech present here — even without any allegation of other torts that
9 might justify the relief. In *San Antonio Community Hospital v. Southern California*
10 *District Council of Carpenters*, the court held that the First Amendment did not bar
11 a preliminary injunction against a union displaying a sign stating: "THIS
12 MEDICAL FACILITY IS FULL OF RATS." 125 F.3d 1230, 1239 (9th Cir.
13 1997). The court held that the statement was false (or as the court put it, a
14 "fraudulent misrepresentation[] of fact"), hurt the hospital's reputation, and caused
15 harm that was irreparable because it could not be measured. *Id.* at 1237–38 (the
16 court stated that "it is impossible to measure the number of potential patients who
17 were deterred from seeking medical care at the Hospital").¹⁴

18 Defendants' advertising links and their associated monetary gain make it
19 relevant here to consider cases in which preliminary injunctions issued against false
20 commercial speech by one competitor against another, see, e.g., *J.K. Harris & Co.*
21 *v. Kassel*, 253 F. Supp. 2d 1120, 1131 (N.D. Cal. 2003), against speech that
22 unlawfully harms a person's property interests, as by libeling goods or services or
23 by defaming a company's officers, *Montgomery Ward & Co. v. United Retail*,

24 ¹⁴ Other jurisdictions also have preliminarily enjoined defamation. See *Vondran v.*
25 *McLinn*, No. C 95-20296 RPA, 1995 WL 415153, at *4, *6 (N.D. Cal. July 5,
26 1995) (defamatory statements not protected from injunction by First Amendment,
27 particularly when adequate procedural protections are in place against erroneous
28 issuance of injunction); *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 983–
85 (D. Or. 1963); *Cochran v. Tory*, No. B159437, 2003 WL 22451378, at *2 (Cal.
Ct. App. 2003) (noting preliminary injunction by trial court) (unpublished);
Bingham v. Struve, 591 N.Y.S.2d 156, 159 (N.Y. App. Div. 1992).

1 *Wholesale & Dep't Store Employees of Am., CIO*, 79 N.E. 2d 46, 51, 400 Ill. 38, 47
 2 (Ill. 1948), and speech that reveals a trade secret, *DVD Copy Control Ass'n, Inc. v.*
 3 *Bunner*, 31 Cal. 4th 864, 886, 4 Cal. Rptr. 3d 69, 88 (2003).

4 Also, a speech injunction that is content neutral, as with extortion,¹⁵ is proper
 5 when it affects “no more speech than necessary to serve a significant government
 6 interest.” *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S. Ct.
 7 2516, 2525 (1994); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 372–
 8 74, 117 S. Ct. 855, 864–65 (1997). The Ninth Circuit has rejected First
 9 Amendment attacks on injunctions in trademark-related cases such as this one.
 10 *Dr. Seuss Enters., L.P. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1403,
 11 n.11 (9th Cir. 1997) (citing *Dallas Cowboys Cheerleaders, Inc. v. Pussycat*
 12 *Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979)).

13 Finally, the adversarial nature of a TRO proceeding done with notice to
 14 defendants protects the resulting injunction against charges that it violates free-
 15 speech rights.¹⁶ Here, defendants have an opportunity to present their arguments
 16 and evidence to the Court and the burden of proof remains with Monex. There are
 17 thus sufficient procedural safeguards under *Carroll v. President and*
 18 *Commissioners of Princess Anne* and *Freedman v. State of Maryland* (see n. 16).
 19 For all these reasons, the TRO can be entered without affecting any lawful speech
 20 protected by the First Amendment.

21 ¹⁵ A “content neutral” restriction is any restriction that is justified based on
 22 something *other* than the viewpoint expressed by the speaker. Rodney A. Smolla,
 23 1 Smolla and Nimmer on Freedom of Speech § 3:3 (2008). An injunction on
 24 extortionate speech is content neutral because it is justified by reference to the
 25 effect and intent of the speech, not the viewpoints expressed by the extortionist.

26 ¹⁶ A noncriminal process of prior restraints upon speech can avoid “constitutional
 27 infirmity” if has “procedural safeguards designed to obviate the dangers of a
 28 censorship system,” including putting the burden of proof on the party seeking the
 injunction and requiring a hearing at which both sides can present their cases.
Freedman v. State of Md., 380 U.S. 51, 58–59, 85 S. Ct. 734, 738–39 (1965); *see*
also Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181, 89
 S. Ct. 347, 351 (1968) (“[When injunctions against speech are allowed the] Court
 has insisted upon careful procedural provisions, designed to assure the fullest
 presentation and consideration of the matter which the circumstances permit.”).

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B. The Court Should Allow Early Discovery To Gather Evidence For A Preliminary Injunction Hearing

The requested preliminary injunction creates good cause to allow the parties expedited document and deposition discovery upon two days or greater notice, especially when as here there no prejudice results. *See, e.g., In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008); *Qwest Comms. Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Colo. 2003); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994) (citing with approval secondary source stating that good cause includes preliminary-injunction proceedings). Good cause also exists where there are claims of unfair competition. *Qwest Comms. Int'l, Inc.*, 213 F.R.D. at 419. Here, evidence is required on a number of issues, including the MonexFRAUD viewers' response to MonexFRAUD, the basis for defendants' allegations, defendants' revenues from MonexFRAUD, and defendants information on Monex's losses.

IV. CONCLUSION

For the reasons stated, Monex asks the Court to enter the proposed temporary restraining order, proposed order to show cause, and proposed order allowing early discovery.

Dated: March 22, 2009

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