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13  
 14 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

15  
 16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 PUBLISHERS BUSINESS SERVICES, INC.,  
 20 a corporation; ED DANTUMA  
 ENTERPRISES, INC., a corporation, also dba  
 21 PUBLISHERS DIRECT SERVICES and  
 PUBLISHERS BUSINESS SERVICES;  
 22 PERSIS DANTUMA; EDWARD  
 DANTUMA; BRENDA DANTUMA  
 23 CHANG; DRIES DANTUMA; DIRK  
 DANTUMA; AND JEFFREY DANTUMA,  
 24 individually and as officers or managers of  
 Publishers Business Services, Inc., or Ed  
 25 Dantuma Enterprises, Inc.,

26 Defendants.  
 27  
 28

Case no. 2:08-cv-00620-PMP-PAL

MEMORANDUM OF POINTS AND  
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1 **I. INTRODUCTION**

2 Defendants **Publishers Business Services, Inc.** and **Ed Dantuma Enterprises, Inc.** are  
3 telemarketers selling magazine subscriptions. Their *modus operandi* is to target busy consumers at  
4 their place of employment, pretend they are conducting a telephone survey, lure the consumers into  
5 thinking that they will receive magazine subscriptions as a “thank you” for participating in the  
6 survey, and then demand hundreds of dollars in payment for the magazines afterward, upon threat  
7 of damaging the consumers’ credit ratings. Defendants **Edward F. Dantuma** and **Persis**  
8 **Dantuma**, and their adult children **Dirk Dantuma**, **Jeffrey Dantuma**, **Brenda Dantuma Schang**,  
9 and **Dries Dantuma** have continued to operate this scam, in blatant disregard for two stipulated  
10 federal court injunctions that have been entered against them and a 1971 Federal Trade  
11 Commission Order expressly prohibiting this conduct, and despite thousands of consumer  
12 complaints and investigations by various state Attorneys General.

13 Plaintiff FTC respectfully requests that the Court enter summary judgment, or in the  
14 alternative summarily adjudicate issues for which there are no genuine issues of material fact,  
15 against Defendants, for their violations of the Federal Trade Commission Act and the FTC’s  
16 Telemarketing Sales Rule. Because of Defendants’ demonstrated unwillingness to telemarket in a  
17 legal manner, and to sell magazine subscriptions in a non-deceptive way, the FTC further requests  
18 that the Court exercise its equitable powers in granting final relief by permanently enjoining  
19 Defendants from engaging in telemarketing and in marketing magazine subscriptions, imposing a  
20 monetary judgment equal to the amount of money Defendants have taken from consumers pursuant  
21 to their deceptive and abusive telemarketing scheme, and imposing the other equitable relief  
22 requested in the proposed judgment which accompanies this motion.

23 **II. FACTS**

24 **A. The Parties**

25 1. Plaintiff Federal Trade Commission

26 Plaintiff **Federal Trade Commission** (“FTC”) enforces Section 5(a) of the FTC Act, 15  
27 U.S.C. § 45(a), which prohibits unfair or deceptive acts and practices in or affecting commerce.  
28 The FTC also enforces the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, as amended,



1 promulgated pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act  
2 (“Telemarketing Act”), 15 U.S.C. §§ 6101 *et seq.* Sections 13(b) and 19 of the FTC Act authorize  
3 the FTC to initiate federal district court proceedings such as this case, to seek permanent relief to  
4 enjoin violations of the FTC Act and the TSR, and to secure such other equitable relief as may be  
5 appropriate, including consumer redress. 15 U.S.C. §§ 53(b) and 57b; *see also FTC v. H.N. Singer,*  
6 *Inc.*, 668 F.2d 1107, 1110-13 (9th Cir. 1982).

7           2.       The Corporate Defendants

8           Defendant **Publishers Business Services, Inc.** (“**PBS, Inc.**”) and Defendant **Ed Dantuma**  
9 **Enterprises, Inc.** (“**EDE**”), are operated together as one business under the trade names  
10 “Publishers Business Services,” “Publishers Direct Services” (“**PDS**”), and “Subscription Order  
11 Services” (“**SOS**”) (collectively, “**PBS**” or “**the companies**”). Undisputed Fact (“UF”) 1, UF2.<sup>1</sup>  
12 The companies are owned, operated, and managed by the Dantuma family. UF3, UF4, UF5, UF6.

13           PBS maintains offices in Altamonte Springs (a suburb of Orlando), and Miami, Florida, and  
14 Toledo, Ohio. UF7. It also maintains a “virtual” office (receptionist and mail forwarding services)  
15 in Henderson, Nevada, and holds itself out to the public as operating from this Henderson address.  
16 UF8, UF9. Until around June 2008, PBS also maintained an office in St. Paul, Minnesota. UF11.

17           PBS has five sales departments devoted to making outbound telemarketing calls to  
18 consumers to sell *new* magazine subscription packages under the trade name “Publishers Business  
19 Services”: three in its Altamonte Springs headquarters, one each in the Miami and Toledo offices,  
20 and until last year, one in St. Paul as well. UF12. PBS has two sales departments devoted to  
21 making outbound telemarketing calls to consumers to sell magazine subscription *renewals* under  
22 the trade name “Subscription Order Services”: one in the Miami office and one in the Altamonte  
23 Springs headquarters. UF16. In addition, PBS has verification, collections, customer service,  
24 clerical, and administrative departments, all located at its Altamonte Springs headquarters. UF17.

25           3.       The Individual Defendants

26           Defendant **Edward Dantuma**, along with his wife, defendant **Persis Dantuma**, and their

27 <sup>1</sup> The FTC’s Undisputed Facts are set forth in the “Concise Statement of Undisputed Material  
28 Facts in Support of the FTC’s Motion for Summary Judgment, or in the Alternative, for Summary  
Adjudication of Issues,” filed concurrently with this motion.

1 adult children, defendants **Dirk Dantuma, Jeff Dantuma, Brenda Dantuma Schang, and Dries**  
2 **Dantuma** (collectively, the “**Dantuma family**”), manage and direct PBS’s business affairs and  
3 day-to-day operations.

4 **Edward Dantuma** is the sole owner and President of EDE. UF25. He has been in the  
5 magazine subscription sales business for over fifty years, starting in door-to-door sales, then  
6 owning a “Keystone Readers Service” franchise for twenty-five years, and later operating as EDE,  
7 PDS, and PBS. UF26. Each of the top-level PBS managers (his adult children Jeffrey Dantuma,  
8 Brenda Schang, and Dries Dantuma) reports to him, and all top-level decisions are either made by  
9 him or with his authorization. UF27, UF29. He is one of the four people (along with his wife  
10 Persis Dantuma, daughter Brenda Dantuma Schang, and son Dries Dantuma) who has signing  
11 authority over PBS’s bank accounts. UF39. He has also signed numerous corporate filings on  
12 behalf of EDE. UF30.

13 **Persis Dantuma** is the Vice President of EDE, and the owner, President, and sole officer  
14 and director of PBS, Inc. UF32, UF33. As President of PBS, Inc., many consumers direct their  
15 complaints about PBS’s business practices to her. UF34. Persis Dantuma handles the companies’  
16 corporate filings, manages their books and records, and is one of the four people who has signing  
17 authority over their bank accounts. UF35, UF36, UF39. Persis Dantuma is aware that the  
18 Corporate Defendants receive complaints from consumers. UF38. She has the authority to allow a  
19 customer order to be cancelled and to allow a refund to be given to a customer. UF37.

20 **Dirk Dantuma** is a Director of EDE and has been involved with his father’s magazine  
21 subscription businesses for most of the past forty years. UF41, UF42. From 1968 through around  
22 1980, he worked off and on for his father’s magazine subscription businesses as a salesperson,  
23 “closer,” collector, and customer service representative. UF43. From 1985 to around 2000 or  
24 2001, he was the general manager of the companies’ St. Paul sales office. UF44. He reviews the  
25 Corporate Defendants’ scripts for compliance with court orders. UF47. He also provides the  
26 Corporate Defendants with the “lead” cards from which Defendants make their telemarketing calls.  
27 UF48. He is the person responsible for escalated customer complaints and is the point of contact  
28 for Corporate Defendants’ legal issues. UF49, UF46. He is the person who deals with the

1 Corporate Defendants' audits for the Audit Bureau of Circulation. UF50. In all of these  
2 capacities, Dirk Dantuma has direct knowledge of both PBS's business practices and that many  
3 consumer complaints have been made against PBS about these business practices.

4 **Jeffrey Dantuma** is a Director of EDE and is the top-level manager in charge of the  
5 Corporate Defendants' three Altamonte Springs sales departments, as well as the sales offices in  
6 Toledo, and until the office was closed last year, St. Paul. UF56, UF57, UF58, UF59. He has  
7 worked for his father's magazine subscription businesses for most of the past forty years. UF62,  
8 UF59, UF57, UF58, UF60, UF63. Through the years, he has worked for EDE as a salesperson, and  
9 supervisor for the verification and collections departments. UF63.

10 **Brenda Dantuma Schang** is a Director of EDE and is the top-level manager in charge of  
11 the Corporate Defendants' Miami sales office. UF65, UF66. Her responsibilities include handling  
12 the Corporate Defendants' account payable, overseeing the Corporate Defendants' payroll,  
13 handling the Corporate Defendants' books and records, supervising the Corporate Defendants'  
14 Miami sales office, and handling correspondence between the Corporate Defendants and magazine  
15 publishers. UF67. She has worked for EDE and its predecessor for over thirty years. UF68.  
16 Brenda Dantuma Schang has also worked in the Corporate Defendants' clerical department. UF70.  
17 She has signed numerous corporate filings on behalf of EDE, and is one of the four people who has  
18 signing authority over the companies' bank accounts. UF69, UF39.

19 **Dries Dantuma** is a Director and the General Manager of EDE's Altamonte Springs office.  
20 UF73, UF74. He is the top-level manager in charge of the companies' verification, collections,  
21 and customer service departments. He is one of the four people who has signing authority over the  
22 companies' bank accounts. UF39. He has worked for the Corporate Defendants (and their  
23 predecessor) for over twenty years. UF77. In these capacities, he has directly participated in every  
24 aspect of the companies' deceptive and abusive practices. UF 73, UF74, UF 75, UF76, UF78,  
25 UF79, UF80.

26 **B. Defendants use deceptive and abusive business practices to telemarket new  
27 magazine subscriptions**

- 28 1. Defendants' salespeople misrepresent that the purpose of their telemarketing  
call is to conduct a survey  
Defendants' salespeople, representing themselves as "Publishers Business Services,"

1 contact consumers by calling hundreds of thousands of businesses each month and engaging  
 2 whoever answers the phone. UF81, UF83, UF84, UF85. Defendants' sales pitch, read from a sales  
 3 script which Defendants have authorized, is riddled with deceptive representations. The pitch  
 4 starts with a request to take part in a short "survey." UF88. Consumers are told that if they  
 5 participate in the survey, "*we have a small surprise for you, nothing big[,] but it's nice.*" UF89.  
 6 The "survey," purportedly made on behalf of PBS's "advertisers," consists of five questions:

7 *How long have you been employed at \_ [name of employer inserted here,] more or less*  
 8 *than 1 year? Now just for our advertisers information, may I ask your age & what you do at*  
 9 *\_? What do you most often use money order, credit card, or check? Do you do much*  
 10 *reading in your spare time? Which publications are you currently receiving?* UF90.

11 Contrary to the salesperson's representation that the survey questions are being asked "for our  
 12 advertisers [sic] information," Defendants are not asking these survey questions on behalf of any  
 13 advertiser or publisher. UF91.

14 2. Defendants' salespeople say that they are offering magazines to consumers  
 15 as a "thank you" for participating in the survey

16 At the end of the survey, the consumer is told, "*I want to thank you for helping me and with*  
 17 *our best wishes you will receive the next 60 issues of [5 magazines identified here].*" UF92. The  
 18 salesperson then assures the consumer of the legitimacy of this offer, saying:

19 *Now, let me assure you that there is no catch involved, however, [sic] there is an sound*  
 20 *business reason behind the whole thing. The publishers have authorized us to send the*  
 21 *magazines I have mentioned to assure their advertisers that their ads will be read.* UF93.

22 The salesperson then provides further assurance, stating: "*Now you will receive a guarantee*  
 23 *stating that everything I am promising you is correct*" and "*Now we're not going to ask you to buy*  
 24 *[] any cash subscriptions or anything like that.*" UF94. Defendants' telemarketing pitch leaves  
 25 consumers with the impression that they are being offered a "free gift." UF95.

26 3. After luring consumers with free magazines as "bait," Defendants begin  
 27 their deceptive "switch" – introducing the idea that the consumer will need  
 28 to pay a nominal shipping and handling cost – as part of their multi-step  
attempt to trap consumers into non-cancellable, long-term magazine  
subscription contracts

After these deceptive assurances, the script shifts in direction and begins to introduce the  
 idea that the consumer will need to pay a nominal amount to "defray" or "cover" Defendants' cost  
 in providing what are otherwise free subscriptions:

*Now the only thing we have been asking people like yourself is to thank us in return by*

1 *helping defray the cost of getting them out to you, and I'm sure that you wouldn't mind*  
 2 *that, because it's only \$2.76 cents [sic] a week which covers all 6 of the publications and*  
 3 *there is absolutely no other charge and it's payable by the month.* UF96.

4 The salesperson then reinforces the idea how great Defendants' offer is by pointing out that, "*Most*  
 5 *people I've talked to today have been more than happy to go along with this and I'm sure that you*  
 6 *too will agree that 6 magazines is quite a lot for just \$2.76 cents [sic] a week, right! [sic]*" UF97.

7 Defendants' salespeople make this representation to the consumer regardless of whether the  
 8 salesperson has actually spoken to any other consumers that day, and regardless of how many  
 9 consumers have actually accepted Defendants' offer. UF98.

10 Defendants' representations leave consumers with the net impression that the magazines  
 11 they are being offered are "free," and that they are being asked to pay only a nominal fee to cover  
 12 "shipping and handling." UF99.

- 13 4. Defendants continue their confusing and deceptive "switch" – suggesting  
 14 that the nominal shipping and handling payments be paid on a monthly,  
 15 rather than weekly, basis – to trap consumers into non-cancellable, long-  
 16 term magazine subscription contracts

17 Up to this point, the salesperson's discussion of "cost" has been couched in terms of pocket  
 18 change – two or three dollars per week. UF100. At this point, the salesperson introduces the idea  
 19 that Defendants will allow the consumer, for the consumer's convenience, to lump these small  
 20 weekly amounts together and make the payments on a monthly basis:

21 *"Now we don't collect the \$2.76 cents [sic] each week[. T]hat would be sort of a nuisance[.*  
 22 *S]o what we do is send you a small supply of self-addressed envelopes and you can send it*  
 23 *in by our monthly honor plan, or faster if you like. Most people send it in two months at a*  
 24 *time since it is such a small amount."* UF100.

25 Defendants convey the impression that the consumer will only be making a small number of  
 26 payments, since the consumer will only be receiving a "small supply" of return envelopes. UF101.  
 27 Further, in invoking a "monthly honor plan" and allowing the consumer to "*send it in ... faster if*  
 28 *you like,*" Defendants convey the impression that they are extending their trust to the consumer in  
 allowing the consumer to make the payments only once a month, rather than every week, and that  
 this suggested payment plan is both desirable to the consumer and to be undertaken on a voluntary  
 basis. UF101. Defendants' salespeople's statement, that "*most people send it in two months at a*  
*time since it is such a small amount,*" reinforces the idea that the amount that Defendants are  
 asking the consumer to "defray" or "cover" is "such a small amount" and that "most people" find

1 Defendants' payment suggestions acceptable. In what sounds like the end of the sales pitch, and as  
2 further assurance as to the above-board nature of Defendants' offer, the salesperson represents next  
3 that "you will receive a written guarantee to assure you what I have told you is correct." UF102.

4 5. Consumers think that the end of this call is the end of the transaction, but it  
5 is actually only the first part of Defendants' careful plan to trap consumers  
6 into non-cancellable, long-term magazine subscription contracts

6 After this, the salesperson wraps up her portion of the call by asking for the consumer's  
7 non-work telephone number, "in case we cannot contact you at work," and offering two additional  
8 free magazines ("we are sending out [Details/Gourmet] to your business at no extra charge").  
9 UF103.

10 Consumers believe that this call represents the entire understanding (or agreement) between  
11 them and Defendants: that this involves pocket change each week, to be paid monthly, and that  
12 there is either no long-term obligation or no obligation at all. UF104.

13 There are three key points to note about Defendants' business practices up to this point in  
14 the transaction: First, by design, Defendants' telemarketing scheme typically reaches busy multi-  
15 tasking workers – such as the office receptionist whose job is to field numerous calls or the store  
16 clerk tasked with greeting walk-in customers or ringing up purchases – who may not be in a  
17 position to be in hyper-vigilant mode during Defendants' telephone call, ready to detect  
18 Defendants' bait and switch tactics. UF105.

19 Second, at no point during this transaction does Defendants' salesperson disclose to the  
20 consumer: (1) the total amount of money (hundred of dollars, but most commonly \$717.60) that  
21 Defendants will later claim the consumer agreed to pay; (2) the monthly payment (varies, but most  
22 commonly around \$29) that Defendants will later claim the consumer agreed to pay; (3) the  
23 number of months (varies, but most commonly 24 months) for which Defendants will later claim  
24 the consumer agreed to pay; (4) the length of the magazine subscription term (five years' worth of  
25 magazines); or (5) that the subscription offer is not cancellable. UF106.

26 Finally, a number of consumers inform Defendants' salesperson during this initial call that  
27 they are *not* agreeing to accept the magazines or to make any payments, but instead, will review  
28 the written materials that the salesperson stated would be sent to the consumer. UF107. Moreover,

1 in some instances, Defendants' salespeople make misrepresentations which are not contained in the  
2 script, such as stating that the consumer may review the written materials before committing to  
3 anything, or that the subscriptions may be cancelled. UF108.

4 6. After the end of this conversation, Defendants lull the consumer in two  
5 follow-up conversations under the guise of "double-checking" the  
6 consumer's information, and then "spring" their trap – selectively recording  
7 only part of the second conversation – which Defendants later use, out of  
8 context, to make it appear that the consumer has agreed to a non-cancellable,  
9 long-term magazine subscription contract

10 At the end of this conversation, consumers believe they have been told all of the terms of  
11 Defendants' offer. UF109. In fact, however, Defendants lead consumers through two more steps  
12 to accomplish the "switch" portion of their "bait and switch": first, "double-checking" information  
13 with the salesperson's "supervisor," and second, "verifying" the information with an "account  
14 manager" in a follow-up call, only a portion of which is tape-recorded. UF110. In characterizing  
15 these two steps as "confirmation" and "verification" calls, Defendants lead the consumers to  
16 believe that these are ministerial steps in which Defendants will *reiterate* what the consumers have  
17 already been told, and to *confirm* the information that the consumers have already provided. In  
18 reality, Defendants have carefully designed these two steps to maximize the likelihood of creating  
19 an audio-recording in which the consumer appears to be agreeing to onerous new material terms,  
20 even though, in reality, they are not.

21 In the first step, the salesperson's supervisor states the purpose of her involvement as  
22 "double-check[ing] all of the information we have on your order to make sure everything is  
23 correct." UF113. She reviews the consumer's address information, and then, under the pretext of  
24 "reviewing" the "order" information, states – for the first time – the monthly cost: "Now, just as  
25 [salesperson's name] told you, it's all [#] publications for just \$\_\_ cents [sic] a week, which is  
26 [\_\_] a month." UF114. The supervisor discloses the subscription term length for the first time as  
27 well ("Now instead of paying [\$] each month for the full [] months, "). UF115. In addition, the  
28 supervisor makes a "soft" request for "doubled-up" payments ("we ask that you send it in two  
months at a time, which is \$[] for the first [] and nothing the remaining [] months, do you see how  
that works?"), which echoes a throw-away comment that the initial salesperson made earlier  
("most people send it in two months at a time since it is such a small amount"). UF116.

1 Consumer declarations show that Defendants proceed with the “sale” even when consumers  
2 explicitly refuse to accept Defendants’ subscription offer. UF117. Further, they show that the  
3 supervisor’s portion of the call reinforces the impression the consumers form, based on the initial  
4 salesperson’s earlier representations, that the magazines are free upon payment of nominal  
5 shipping and handling charges, and that any “new” terms that the supervisor mentions in this part  
6 of the call are voluntary and not a mandatory part of Defendants’ offer. UF118.

7 At the conclusion of this conversation, the supervisor tells the consumer that “we’ll be  
8 calling you back shortly to confirm this with you.” UF119. Within a day or two after that, the  
9 consumer typically receives that call – the second half of Defendants’ “switch” – also at the  
10 consumer’s place of business while the consumer is working, from a verification department  
11 employee, who identifies herself as a “Publishers Business Services account manager.” UF120.  
12 The “account manager” thanks the consumer “*for doing the survey and the magazine order with us*  
13 *a little while ago,*” and tells the consumer that the purpose of recording the conversation is to  
14 “*quickly tape verify the information with you.*” UF121. These representations not only *fail to alert*  
15 the consumer that new material terms are about to be introduced by the supervisor or the account  
16 manager, but in fact *lull* the consumer into thinking that no new material terms will be introduced.

17 Defendants’ company-authorized verification scripts show that only part of the account  
18 manager’s call with the consumer is recorded. UF112, UF122. Notably, the first part of the  
19 account manager’s spiel, in which she lulls the consumer into thinking no new terms will be  
20 introduced, is *not* recorded. UF112, UF122.

21 In this second call, the account manager converts the sales supervisor’s “soft” request for  
22 the consumer to *voluntarily* “double up” his monthly payments into a material *mandatory* term,  
23 which Defendants later try to hold over consumers in their attempts to collect payment:

24 *Your payment plan and total cost as explained to you and also listed on your order will be*  
25 *\$ \_\_/per month for only the first \_\_ months and you will pay nothing the remaining \_\_*  
*months. Do you see how that works Mr./Mrs. \_\_?* UF123.

26 This account manager “verification” call is also the first time that Defendants make any  
27 attempt to disclose that they have a non-cancellation policy:

28 *It does cost our company a great deal of time and money to enter the order for you, and*  
*because of this we do ask that you will take the magazines for the full term and make the*



1           *monthly payments as agreed. This order cannot be cancelled during the term of the*  
2           *agreement, however it will cancel automatically after that, is that acceptable to you*  
          *Mr./Mrs. \_\_? UF124.*

3           The pacing of the verification call is rapid-fire, approximately 90 seconds in duration, and includes  
4           verification of the consumer's address, a listing of magazines, a repeat of the survey ("*and how*  
5           *long have you been employed at \_\_? And would you say that your monthly income is more than*  
6           *\$1,000 per month? And your home phone # is \_\_. Are you renting, buying? Are you married or*  
7           *single?*"), and the introduction of the new material terms. UF125. Many consumers, having been  
8           told that the purpose of this call is nothing more than to "verify" information that was previously  
9           provided, do not realize that this is an attempt by Defendants to bind them to new, previously  
10          undisclosed, material terms. UF126.

11          Defendants' verification employees speak so quickly that to the extent a listener is looking  
12          out for disclosure of new terms, these new terms are, at best, difficult to absorb, and at worst,  
13          unintelligible. UF128, UF129. Further, like the first call (in which the consumer speaks with the  
14          salesperson and supervisor), the verification call is made to the consumer at his or her place of  
15          employment, where the consumer is juggling between performing his or her work-related tasks and  
16          taking Defendants' calls, and many consumers are consequently unable to listen to Defendants'  
17          verification employee with the heightened attentiveness required to detect Defendants' bait and  
18          switch. UF130.

19          These verification recordings comprise of only a portion of the telephone conversations  
20          between Defendants' employees and the consumers. The recordings do *not* include the assurances  
21          by the salesperson, supervisor, and "account manager" that the two follow-up conversations are  
22          only for the purpose of "verifying" previously-discussed information. UF111, UF112, UF122.  
23          They also do *not* include the consumer's conversation with the salesperson, the consumer's follow-  
24          up conversation with the sales supervisor to "confirm" information, and any questions asked or off-  
25          script statements made during these two conversations. UF111, UF112, UF122.

1           **C. Consumers do not learn that they have been ensnared until Defendants**  
2           **confront them with the “verification recordings” which Defendants have**  
3           **carefully engineered to make it sound like the consumer has agreed to the new**  
4           **onerous and material terms**

5           Defendants send written information about the subscription package, including an  
6           “invoice” demanding payment, to the consumer approximately one day after their “verifier”  
7           obtains the verification recording from the consumer. UF131. Consumers typically respond to the  
8           written invoice by either, (1) ignoring the invoice, since it is so different from what the consumer  
9           agreed to that it obviously must have been a clerical error on PBS’s part, or (2) contacting PBS to  
10          fix the obvious error. UF132. Those who ignore the invoice soon receive a call from PBS’s  
11          “Collections Department,” and both categories of consumers soon learn – for the first time – PBS  
12          is trying to force them to accept onerous new material terms (non-cancellable, five-year contract  
13          for hundreds of dollars with mandatory “doubled-up” monthly payments). UF133.

14          Whether it is the consumers or PBS who initiates the follow-up call, the consumers soon  
15          learn that they have been ensnared by Defendants’ bait and switch scam. UF134. PBS tells the  
16          consumers they must pay because PBS has a “verification recording” “proving” the consumer  
17          agreed to a non-cancellable 60 month magazine subscription contract for hundreds of dollars (most  
18          commonly, \$717.60). UF135. PBS makes this misrepresentation even though: the initial sales call  
19          made no mention of the non-cancellable nature of the offer, the 60 month subscription term, and  
20          the total price; the initial sales call portrayed the cost as a nominal shipping and handling charge;  
21          and PBS’s employees have repeatedly represented to the consumer that the verification call is  
22          nothing more than “verifying” the information discussed in the initial sales call.

23          PBS also tells the consumers that the order may not be cancelled because it has already paid  
24          the magazine publishers for the consumers’ subscriptions. UF136. This representation is false  
25          because: (1) PBS are only authorized to order shorter-term subscriptions for their customers (they  
26          later *extend* the subscriptions for only those consumers whom they are able to successfully trick or  
27          scare into paying), (2) Defendants do not even submit the shorter-term subscription orders to the  
28          magazine publishers until two weeks after they mail the invoices to the consumers, and (3)  
29          Defendants pay only a small percentage of the subscription price to the magazine publishers (and  
30          keep most of the subscription fee as profit). UF137. UF138. UF139.

1           **D. Defendants' collectors and customer service employees harass and threaten**  
 2           **consumers in an attempt to extort hundreds of dollars for the magazine**  
 3           **subscriptions**

4           Regardless of whether or not PBS is able to scare a consumer into paying right away, it will  
 5           not cancel an account, or the consumer's financial "obligation" on the account, and will continue to  
 6           demand payment from the consumer. The only circumstance under which PBS will cancel an  
 7           account and release the consumer from his or her financial "obligation" is if PBS learns that the  
 8           consumer has filed a complaint with the Better Business Bureau, a state Attorney General, or  
 9           another consumer advocacy agency. UF140. Otherwise, Defendants have their collections  
 10          department employees follow up on the invoices with a two-front attack: frequent abusive and  
 11          harassing telephone calls and threatening demand letters to get consumers to pay.

12           1.       Defendants make abusive and harassing collection calls

13           Defendants subject consumers who continue to refuse to pay or insist on their right to  
 14           cancel to frequent abusive and harassing phone calls at work, even after the consumers tell  
 15           Defendants not to call them at their place of work. UF141. They call the consumers at home and  
 16           at work, daily, sometimes for several weeks in a row. UF142. The collectors harass consumers on  
 17           these collection calls. UF143. In the collection calls, Defendants' collection and customer service  
 18           employees verbally threaten consumers with lawsuits, garnishments, other collection actions, and  
 19           damage to their credit histories, to scare the consumers into paying all or some part of the total  
 20           "contract" price. UF144. In some of these collection calls, Defendants' employees represent or  
 21           imply that they are calling from a law firm or other outside collection agency. UF145.

22           2.       Defendants send consumers threatening demand letters

23           In their demand letters, Defendants make repeated threats to report the consumer's  
 24           purported "delinquencies" to the credit reporting agencies bureaus, including:

25           – "Your credit is your most valued possession. *As a member of credit bureaus, we have*  
 26           *agreed to report all serious delinquencies! ... If payment is received immediately, we will*  
 27           *not be forced to submit your name to your Local Credit Bureau.*" UF146.

28           – "In as much as their [sic] previous attempts to make satisfactory arrangements for  
 payment on your account, *you leave us no alterative but to ask for the balance of your*  
*account as stated on your contract with us. ... If we do not hear from you we must proceed.*  
 Very truly yours, James Laurence, Credit Supervisor ... CREDIT BUREAU MEMBER"  
 UF147.

1 – “Your account is seriously past due, and must be paid in full immediately. *If you fail to*  
 2 *pay this account in full, we will move forward reviewing our rights against you for all*  
 3 *monies due plus interest and costs, as provided by the agreement. ... PLEASE GOVERN*  
 4 *YOURSELF ACCORDINGLY.* Very truly yours, John Carlton ... Please note: Pursuant to  
 the provisions of the Federal Fair Debt Collection Practices Act, ... you are advised that,  
 unless you dispute the validity of the foregoing debt or any portion thereof within thirty  
 (30) days after receipt of this letter, we will assume the debt to be valid.” UF148.

5 – “*we will cease collection activity on this account [if you make the requested payment]*”  
 6 UF149.

7 – “*In the event you should choose not to accept this settlement, we will move forward*  
 8 *reviewing our rights against you for all monies due plus interest and costs, as provided by*  
*the agreement.* Bob Callahan, Publishers Business Services Legal Department” UF150.

9 Many consumers end up paying PBS for the magazine subscriptions, not because they think  
 10 they owe the debt, but because they see it as the only way to stop PBS’s threats and/or to preserve  
 11 their credit. UF151.

### 12 3. Defendants’ threats are material misrepresentations

13 Defendants are not a member of any credit bureau. UF152. In addition, Defendants do not:  
 14 submit consumer account “delinquencies” to any credit bureau, send delinquent accounts to any  
 15 outside collection agencies, take any steps to garnish a consumer’s wages, or sue consumers for  
 16 non-payment. UF153, UF154, UF155, UF156. “James Laurence,” “Bob Callahan,” and the other  
 17 names signed on Defendants’ collection letters are not real people; they are all “desk names” so  
 18 that Defendants’ collectors will know the account status (e.g., 2-month “delinquency,” 3-month  
 19 “delinquency,” etc.) of the consumer who is calling. UF157. Defendants do not have a “legal  
 20 department” or “Credit Supervisor.” UF158, UF159. Finally, Defendants misrepresent the  
 21 applicability and import of the Fair Debt Collection Practices Act.<sup>2</sup> UF160. In short, Defendants’  
 22 threats are also material misrepresentations designed to trick the consumers into paying.

### 23 **E. Consumers suffer both monetary and non-monetary injury as a result of** 24 **Defendants’ conduct**

25 Individual consumers have paid hundreds of dollars to Defendants in an attempt to stop

26 <sup>2</sup> The Fair Debt Collection Practices Act provides that if a consumer sends a third-party debt  
 27 collector a letter, within 30 days after receiving the written notice of the debt, stating that he does  
 28 not owe any or all of the money, or asking for verification of the debt, that collector must stop  
 contacting the consumer. The collector can begin contacting the consumer again if it sends the  
 consumer written verification of the debt, like a copy of a bill for the amount the consumer owes.

1 Defendants' extortionate conduct. UF161. Defendants have had hundreds of thousands of  
2 "customers" since January 1, 2004. UF162. From 2004 through 2008, the Corporate Defendants  
3 collected \$ [REDACTED] from consumers in connection with "Publishers Business Services"  
4 "sales" of new magazine subscriptions, and \$ [REDACTED] in connection with "Subscription Order  
5 Services" "sales" of magazine subscription renewals, for a total of \$ [REDACTED] UF163.  
6 During that same time period, the Corporate Defendants have issued refunds in the total amount of  
7 \$265,244.25. UF163.

8 Defendants' frequent and harassing telemarketing and collection calls have also caused  
9 other adverse consequences for consumers at work and at home. Consumers have reported that  
10 Defendants' frequent sales calls to them at their place of business were annoying and negatively  
11 distracted them from their work. UF170. Consumers have also reported that Defendants'  
12 collection calls to their home or cell phone numbers were frequent and annoying, and made outside  
13 of the permissible daytime hours in which collection calls may legally be made. UF171.  
14 Moreover, in order to extricate themselves from Defendants' scam, consumers must devote a  
15 significant amount of time contacting the company and filing complaints to get Defendants'  
16 abusive collection efforts to stop. UF172.

17 **F. Defendants knowingly operate their business as a deceptive and abusive "bait-**  
18 **and-switch" scam**

19 1. Defendants intentionally make misrepresentations in their initial sales pitch  
20 to consumers

21 Many of the statements in the script that Defendants use for the initial sales pitch are false.  
22 UF173. Defendants know that these statements are false but direct their employees to read these  
23 scripts "word-for-word" anyway. UF174, UF178. Defendants are also aware that their salespeople  
24 make misrepresentations that are not on the scripts (UF179) and condone these practices (UF193).

25 2. Defendants intentionally design their sales pitch so that it will be confusing  
26 to consumers

27 Defendants enforce a policy of dodging consumers' questions with non-sequitur responses  
28 or repeating earlier portions of the script in order to avoid directly answering the consumers'  
29 questions. UF194. Defendants' intentionally confusing statements, coupled with the fact that the  
30 "account manager" speaks so fast during the verification recording, makes it difficult for  
31 consumers to "catch" the new terms that Defendants are trying to sneak by them. UF195, UF128.

1           3.       Defendants target consumers who are more likely to be too busy or too  
2                    inexperienced to realize they are being scammed

3           By design, Defendants' telemarketing scheme reaches consumers at work to maximize the  
4           likelihood that the consumers will be too busy to pay close attention to Defendants' sales pitch.  
5           UF196. Defendants further hone their mark by targeting consumers who are receptionists, store  
6           clerks, and other types of employees who must handle their office's telephone calls while also  
7           juggling face-to-face customer interactions. UF197. They also intentionally target companies  
8           whose employees are more likely to be younger and less experienced. UF198.

8           4.       Defendants make repeated calls to consumers to harass them into listening to  
9                    the sales pitch

10          Defendants' employees call the same consumers over and over until they agree to accept  
11          magazine subscriptions. UF199. Both the salespeople, who make the initial telemarketing call,  
12          and the verifiers, who make the follow-up partially-recorded call, routinely engage in this practice.  
13          UF200. Consumers continue to receive calls even after clearly stating they are refusing the offer.  
14          UF201. Some consumers agree to accept magazines because it is the only way they can get PBS to  
15          stop calling them. UF202.

15          5.       Defendants lie to consumer protection agencies and other consumer  
16                    advocates about their business practices

17          Only when consumer protection agencies and the Better Business Bureau contact  
18          Defendants to mediate a consumer complaint do Defendants stop their collection activity. UF140.  
19          PBS routinely responds to these complaints by sending the mediating agency a computer-generated  
20          form letter which falsely claims that the terms of the order were clearly explained, that the  
21          consumer agreed to those terms, and that the consumer agreed to pay by check, but which  
22          nonetheless agrees to cancel the consumer's account. UF203. Defendants use the same form letter  
23          to respond to most consumer complaints, even though Defendants' own business records show that  
24          the letter grossly misrepresents the consumer's experience with PBS. UF204.

24          6.       Defendants continue their deceptive and abusive business practices despite  
25                    court orders which prohibited them from engaging in these practices

26          Defendants continue to use the same sales practices that Edward Dantuma used in the  
27          1960s when he sold magazine subscriptions through his "Keystone Readers' Service" franchise.  
28          *These sales practices were specifically prohibited* in a 1971 Federal Trade Commission decision

1 and order issued against Perfect Film and Chemical Corporation, Perfect Subscription Company,  
2 and Keystone Readers' Service, Inc., and a related 1980 modifying order. UF205, UF206, UF207.

3 In addition, Defendants have continued these deceptive and abusive business practices  
4 despite settlements with the States of Idaho, Wisconsin, and Illinois, in which Defendants agreed to  
5 stop the same deceptive and abusive business practices at issue in this FTC lawsuit, as well as the  
6 stipulated preliminary injunction entered into in this case. UF208, UF209. Several states have also  
7 investigated Defendants' business practices. UF210.

8 Rather than correct their deceptive and abusive business practices, Defendants' response to  
9 these injunctions and settlements has been to make false assurances that they will stop their illegal  
10 conduct and to continue their deceptive and abusive business practices through new corporate  
11 entities. UF211, UF212, UF213.

12 7. Defendants condone, and even reward, employees who engage in deceptive  
13 and abusive practices

14 Defendants reward employees who generate high sales, even if the employees engaged in  
15 even more egregious deceptive and abusive practices (such as making misrepresentations, dodging  
16 consumers' questions, and going "off-script") to generate those sales. UF215. This is the case  
17 even where Defendants have documented proof of an employee's violations over the course of  
18 years. UF216. The fact that an employee can engage in the same violative conduct year after year  
19 shows that Defendants condone these business practices. UF217. The fact that Defendants pay  
20 employees more for generating high sales, and ignore the fact that their employees engaged in  
21 deception to achieve those high sales, shows that they not only condone, but actually reward, these  
22 bad business practices. UF219.

23 **G. Defendants' "Subscription Order Service" is also a scam**

24 In addition to the new magazine subscriptions that Defendants sell through "PBS,"  
25 Defendants also sell subscription "renewals" under the fictitious business names "Subscription  
26 Order Service" and "SOS." UF220. Defendants use deceptive business practices to generate these  
27 subscription renewal sales as well. UF221, UF222, UF223. Defendants start with information  
28 they collect from their PBS "survey" calls (*"Which publications are you currently receiving?"*).  
UF221. Defendants' SOS employees then call consumers who have provided information about

1 the magazines they are already receiving, and read the SOS script. UF222. The script implies that  
2 the SOS salesperson is an employee of the magazine publisher or an employee of the company that  
3 originally sold the subscription to the consumer and that SOS has a pre-existing business  
4 relationship with the consumer (“*I’m with the company that services [the particular magazine] ....*  
5 *and because we consider you to be a preferred customer we are going to extend your [magazine*  
6 *name] at today’s rate.”). UF223. From 2004 through 2008, Defendants have collected  
7 \$ [REDACTED] from consumers in connection with their “Subscription Order Services” “sales” of  
8 magazine subscription renewals. UF163.*

9 **H. Defendants are engaging in these deceptive and abusive practices as a**  
10 **“common enterprise”**

11 The Dantuma family operates the Corporate Defendants, EDE and PBS, Inc., together as a  
12 common enterprise. UF229. Both are controlled by Edward Dantuma and operated with the  
13 assistance of his wife Persis Dantuma and children (Dirk, Jeffrey, and Dries Dantuma, and Brenda  
14 Dantuma Schang). UF230. UF3-6. UF25-80. All of PBS, Inc.’s work is performed by EDE  
15 employees. UF231, UF234. The two companies share office space, a common officer, trade  
16 names, business telephone numbers, and business website. UF233. As discussed in Section III.D.,  
17 *infra*, the legal effect of their operation of the two corporate Defendants as a common enterprise is  
18 that each Defendant should be held liable for the deceptive acts and practices of the others.

19 **III. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON ALL COUNTS OF**  
20 **THE AMENDED COMPLAINT**

21 **A. Legal standard for granting summary judgment**

22 As the moving party, the FTC “must initially identify those portions of the pleadings,  
23 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
24 which it believes demonstrate the absence of a genuine issue of material fact.” *FTC v. Stefanichik*,  
25 559 F.3d 924, 927 (9th Cir. 2009) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))  
26 (internal quotation marks and citation omitted). The Court must draw all reasonable inferences in  
27 favor of the non-moving party. *See F.D.I.C. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir.  
28 1992), *rev’d on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of  
demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty*  
*Lobby, Inc.*, 477 U.S. 242, 257 (1986).



1 “Once the moving party meets its initial burden, ... the burden shifts to the non-moving  
 2 party to set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there  
 3 is a genuine issue for trial.” *Stefanchik*, 559 F.3d at 927-28 (quoting *Horphag Research Ltd. v.*  
 4 *Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted)).  
 5 “[M]ere disagreement or the bald assertion that a genuine issue of material fact exists” does not  
 6 preclude the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989)  
 7 (citing *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d  
 8 1466, 1468 (9th Cir. 1987)). Furthermore, conclusory or speculative testimony is insufficient to  
 9 raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural*  
 10 *Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1995). “Finally, if the factual context makes the  
 11 non-moving party’s claim implausible, that party must come forward with more persuasive  
 12 evidence than would otherwise be necessary to show that there is a genuine issue for trial.”  
 13 *Franciscan Ceramics*, 818 F.2d at 1468 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
 14 475 U.S. 574 (1986)).

15 **B. The Court should enter summary judgment on Counts One and Two (alleging**  
 16 **violations of the FTC Act)**

17 1. Legal standard for finding representations, omissions, or practices deceptive  
 18 under the FTC Act

19 Section 5 of the FTC Act prohibits unfair and deceptive acts and practices in or affecting  
 20 commerce. 15 U.S.C § 45. “An act or practice is deceptive if ‘first, there is a representation,  
 21 omission, or practice that, second, is likely to mislead consumers acting reasonably under the  
 22 circumstances, and third, the representation, omission, or practice is material.’” *FTC v. Gill*, 265  
 23 F.3d 944, 950 (9th Cir. 2001) (citations omitted).

24 “A solicitation may be likely to mislead by virtue of the net impression it creates even  
 25 though the solicitation also contains truthful disclosures.” *FTC v. Cyberspace.com, LLC*, 453 F.3d  
 26 1196, 1200 (9th Cir. 2006). Thus, in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35  
 27 (D.C. Cir. 1985), the Court found an advertisement’s description of cigarette tar content to be  
 28 deceptive even though fine print in the corner of the advertisement truthfully explained how the tar  
 content was measured. The *Brown & Williamson* court reasoned that, under the circumstances,  
 consumers were unlikely to read the fine print in the corner of the ad. *Id.* at 42-43. Similarly, in

1 *Floersheim v. FTC*, 411 F.2d 874 (9th Cir. 1969), the Court found that substantial evidence  
2 supported the FTC's determination that the appearance and prominent repetition of the words  
3 "Washington D.C." on debt-collecting forms from a private collections company created the  
4 deceptive impression that the forms were a demand from the government even though the forms  
5 contained a small print disclaimer informing recipients that such was not the case. *Id.* at 876-78.

6 In addition, under the FTC Act, a principal is liable for misrepresentations made by its  
7 agents regardless of any efforts of the principal to prevent such misrepresentations. *FTC v.*  
8 *Southwest Sunsites*, 785 F.2d 1431, 1438-39 (9<sup>th</sup> Cir. 1986), *Goodman v. FTC*, 244 F.2d 584, 592-  
9 93 (9th Cir. 1957). Thus, Defendants are liable for misrepresentations that their salespeople, sales  
10 supervisors, verifiers ("account managers"), and collectors make, even if these misrepresentations  
11 were not authorized.

12 If consumers are likely to have chosen differently but for the deception, the  
13 misrepresentation is material. *In the matter of Southwest Sunsites Inc.*, 105 F.T.C. 7, 149 (1985),  
14 *aff'd*, 785 F.2d 1431 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986). "Express claims or  
15 deliberately-made implied claims used to induce the purchase of a particular product or service are  
16 presumed to be material." *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999)  
17 (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083  
18 (1995).

19 The FTC is not required to prove that individual consumers relied on the deceptive acts or  
20 practices. *FTC v. Figgie Int'l*, 994 F.2d 595, 605-06 (9th Cir. 1993). It is also not required that  
21 Defendants made the misrepresentations with an intent to defraud or deceive, or in bad faith. *See,*  
22 *e.g., Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC v. World Travel*  
23 *Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

24 2. Defendants have made material misrepresentations in violation of the FTC  
25 Act in their initial telemarketing calls (Count One)

26 The undisputed facts show that Defendants induce consumers to agree to accept magazine  
27 subscriptions by making numerous misrepresentations which, taken together, create the net  
28 impression that the magazine subscriptions are free, upon payment of nominal shipping and  
handling charges. *See* Sections II.B. and II.G., *supra*. As discussed in Section II.B., *supra*,

1 Defendants do this by targeting consumers whose job responsibilities include answering busy  
2 phone lines, making calls to the consumers while the consumers are at work, pretending that they  
3 are calling to conduct a survey, and tricking the consumers into agreeing to the second follow-up  
4 conversation, of which only part is recorded, which purports to bind the consumers to an onerous  
5 long-term, non-cancellable contract for hundreds of dollars. Like the deceptive advertising in  
6 *Brown & Williamson*, 778 F.2d at 42-43, and *Floersheim*, 411 F.2d at 876-78, Defendants’  
7 telephone solicitation is designed to *minimize* the likelihood that consumers will understand the  
8 material terms. By making these misrepresentations, Defendants have engaged in deceptive acts or  
9 practices in violation of Section 5 of the FTC Act. Thus, summary judgment should be granted in  
10 the FTC’s favor on Count One of the Amended Complaint.

11 3. Defendants have made material misrepresentations in violation of the FTC  
12 Act in their subsequent communications with consumers (Count Two)

13 As discussed in Sections II.C. and II.D., *supra*, after the telephone solicitation, Defendants  
14 make additional misrepresentations to scare consumers into paying hundreds of dollars for what  
15 were supposed to be free magazines:

16 – Defendants send consumers invoices which claim that the consumers owe hundreds of  
17 dollars (typically \$717.60) for the magazine subscriptions. This representation is false; consumers  
18 agreed to receive magazine subscriptions based on the belief that they were free or being offered  
19 for a nominal cost.

20 – When consumers contact Defendants to contest the invoice, Defendants represent that the  
21 consumers entered into “binding contracts” to purchase the magazines at the high prices, and that  
22 they have verification recordings which “prove” that the consumers agreed to the charges. These  
23 representations are also false; the recordings capture only a small part of the conversations between  
24 PBS and the consumers, and the consumer’s statements on the recording are taken out of context.

25 – Defendants represent that they have already submitted orders for the five-year  
26 subscriptions to the magazine publishers and have already paid hundreds of dollars to the magazine  
27 publishers for these subscriptions, and thus, the subscriptions cannot be cancelled. In fact,  
28 Defendants enter only one- or two-year subscriptions, and pay only a small percentage of the  
subscription fee to the publishers. Defendants keep most of the subscription fee as profit.

1 – Defendants claim that the only way for the consumers to be release from the “binding  
2 contract” is to pay a “cancellation fee,” which has typically been in the range of \$125-\$150. In  
3 fact, Defendants routinely release consumers from their obligations under the “contract” if the  
4 consumers have submitted or threaten to submit written complaints to consumer protection  
5 agencies.

6 – Defendants threaten consumers with additional misrepresentations in their collection  
7 calls, including that they have a “legal department” and “credit supervisor,” that they are members  
8 of and will send derogatory information about a consumer’s credit to the credit reporting agencies,  
9 that they will take steps to garnish a consumer’s wages or arrest a consumer, and that they will  
10 send delinquent accounts to any outside collection agencies. As discussed in Section II.D., *supra*,  
11 these are representations are all false.

12 These misrepresentations have caused many consumers to pay money to Defendants.  
13 Defendants are liable for these misrepresentations whether or not they authorized their employees  
14 to make them. In routinely making these material misrepresentations, Defendants have engaged in  
15 deceptive acts or practices in violation of Section 5 of the FTC Act. Thus, summary judgment  
16 should be granted in the FTC’s favor on Count Two of the Amended Complaint.

17 **C. The Court should enter summary judgment as to Counts Three through Six**  
18 **(alleging violations of the TSR)**

19 1. Defendants are subject to the TSR because they are “sellers” and  
20 “telemarketers” engaged in “telemarketing” to “customers,” as those terms  
21 are defined in the TSR  
22 Counts Three through Six of the Complaint allege that Defendants violated various  
23 provisions of the TSR, as discussed in greater detail below. These provisions of the TSR apply to  
24 the Defendants because they are “sellers” or “telemarketers” engaged in “telemarketing” to  
25 “customers” as those terms are defined in the TSR.

26 “Telemarketing” is “a plan, program, or campaign which is conducted to induce the  
27 purchase of goods or services or a charitable contribution, by use of one or more telephones and  
28 which involves more than one interstate telephone call.” 16 C.F.R. § 310.2(cc).<sup>3</sup> Defendants’  
business is a plan, program, or campaign to induce consumers to purchase magazine subscriptions

<sup>3</sup> This definition excludes certain catalog sales, not applicable here.

1 through the use of one or more telephones and involves more than one interstate telephone call.  
2 Defendants are thus engaged in “telemarketing.”

3 A “person” is “any individual, group, unincorporated association, limited or general  
4 partnership, corporation, or other business entity.” 16 C.F.R. § 310.2(v). A “customer” is “any  
5 person who is or may be required to pay for goods or services offered through telemarketing.” 16  
6 C.F.R. § 310.2(l). Every consumer that Defendants solicits by telephone is a “customer.”

7 A “seller” is “any person who, in connection with a telemarketing transaction, provides,  
8 offers to provide, or arranges for others to provide goods or services to the customer in exchange  
9 for consideration.” 16 C.F.R. § 310.2(z). Each Defendant is a “person” who has provided or  
10 offered to provide, or arranged for others to provide, magazine subscriptions to a customer in  
11 exchange for consideration. Both corporate Defendants provide and offer to provide magazine  
12 subscriptions to customers in exchange for consideration. All of the Individual Defendants have  
13 arranged for the Corporate Defendants to provide these subscriptions to customers in exchange for  
14 consideration. Each of the Defendants is thus a “seller.”

15 A “telemarketer” is “any person [including corporate entities] who, in connection with  
16 telemarketing, initiates or receives telephone calls to or from a customer or donor.” 16 C.F.R.  
17 § 310.2(bb). Both corporate Defendants are thus “telemarketers.”

18 2. Defendants are subject to the TSR because they do not fall within the TSR’s  
19 “business-to-business” exemption  
20 Defendants have structured their business so that they call consumers *at work* in an attempt  
21 to fall within the “business-to-business” exemption of the TSR. That exemption provides that the  
22 TSR does not apply to “*telephone calls between a telemarketer and any business, except calls to*  
23 *induce the retail sale of nondurable office or cleaning supplies.*” 16 C.F.R. § 310.6(b)(7). As  
24 discussed in Sections II.B.1., II.B.6., and II.F.3., *supra*, however, Defendants’ telemarketing calls  
25 target the individual consumers themselves, not the businesses that the consumers work for. Thus,  
26 Defendants’ telemarketing activity does not fall within the TSR’s “business-to-business”  
27 exemption, and Defendants are required to comply with the TSR.

28 3. Defendants have failed to disclose to consumers the purpose of their  
telemarketing calls (Count Three)  
Section 310.4(d)(2) of the Telemarketing Sales Rule requires telemarketers, in an outbound

1 telephone call to induce the purchase of goods or services, to disclose truthfully, promptly, and in a  
2 clear and conspicuous manner to the person receiving the call, that the purpose of the call is to sell  
3 goods or services. 16 C.F.R. § 310.4(d)(2). As discussed in Sections II.B. and II.G., *supra*,  
4 Defendants fail to disclose the true purpose of the call – to sell non-cancellable, long-term  
5 magazine subscriptions – at any point during the initial telemarketing call. In fact, Defendants  
6 expressly misrepresent that the purpose of the call is to conduct a “survey.” Thus, the Corporate  
7 Defendants are in violation of TSR Section 310.4(d)(2), and summary judgment should be granted  
8 in the FTC’s favor on Count Three of the Amended Complaint.

9           4.     Defendants have misrepresented the total cost of their magazine  
10           subscriptions (Count Four)  
11           Section 310.3(a)(2)(i) of the TSR prohibits sellers and telemarketers from misrepresenting,  
12 directly or by implication, in the sale of goods or services, the total costs to purchase, receive, or  
13 use, and the quantity of, any goods or services that are the subject of a sales offer. 16 C.F.R.  
14 § 310.3(a)(2)(i). On its face, this rule requires that the “total cost” of the magazine subscription  
15 package be disclosed.

16           As discussed in Section II.B.5., *supra*, Defendants do not disclose at any point during the  
17 Defendants’ initial telemarketing call the total cost (hundreds of dollars, and most commonly,  
18 \$717.60) of the magazine subscription package. Moreover, Defendants do not disclose  
19 information that consumers would need (not only the weekly cost, but also the number of weeks or  
20 months of payment and the fact that the “contract” will be non-cancellable) to calculate the total  
21 cost. Thus, it is not possible for even a consumer capable of lightning-fast math calculations to  
22 figure out the total cost during the initial telemarketing call.

23           As discussed in Section II.B.6., *supra*, even in the follow-up conversation that consumers  
24 have with the salesperson’s “supervisor,” there is no disclosure that the total cost is hundreds of  
25 dollars (most commonly, \$717.60), that the consumer is being asked to enter into a “contract,” or  
26 that the contract is “non-cancellable.” Moreover, assuming *arguendo*, that the supervisor’s  
27 disclosures did somehow provide enough information for a consumer to calculate the total cost,  
28 these disclosures must be viewed as legally insufficient because the disclosures come after  
Defendants misrepresent that the purpose of this “supervisor” call is solely to “verify” previously-

1 discussed information.

2 Finally, as discussed in Sections II.B.6. and II.C., *supra*, the follow-up verification call with  
3 the “account manager” also fails to adequately disclose total cost. Defendants’ “account  
4 managers” did not disclose the total cost to consumers prior to June 2008. Even for those “sales”  
5 made after June 2008 (when Defendants modified their verification call scripts to disclose the total  
6 cost), however, these disclosures are legally insufficient because the disclosures are preceded by  
7 Defendants’ misrepresentation that the purpose of this “verification call” is only to “verify”  
8 previously-discussed information. In short, Defendants systematically fail to disclose total cost in  
9 violation of TSR Section 310.3(a)(2)(i), and summary judgment should be granted in the FTC’s  
10 favor on Count Four of the Amended Complaint.

11 5. Defendants have made false and misleading statements to induce payment  
12 for goods or services (Count Five)

13 Section 310.3(a)(4) of the TSR prohibits sellers and telemarketers from making a false or  
14 misleading statement to induce any person to pay for goods or services. 16 C.F.R. § 310.3(a)(4).  
15 As discussed in Sections II.B., II.C., and II.D., *supra*, Defendants make numerous  
16 misrepresentations, including lying about the purpose of the telemarketing call, falsely implying  
17 that the magazine subscriptions are free and consumers will pay only a nominal amount, falsely  
18 claiming that the consumers must pay Defendants because the consumers entered into a “contract,”  
19 and falsely claiming that consumers must pay for all of the magazines for the entire five-year term  
20 because Defendants have already paid that amount to the magazine publishers. These  
21 misrepresentations are violations of TSR Section 310.3(a)(4). Thus, summary judgment should be  
22 granted in the FTC’s favor on Count Five of the Amended Complaint.

23 6. Defendants have engaged in a pattern of abusive calls (Count Six)

24 Section 310.4(b)(1)(i) of the TSR prohibits telemarketers from causing any telephone to  
25 ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to  
26 annoy, abuse, or harass any person at the called number. 16 C.F.R. § 310.4(b)(1)(i). As discussed  
27 in Section II.F.4., *supra*, Defendants’ employees are not trained on how to properly handle  
28 consumers’ do-not-call requests, and in fact are told to ignore such requests. Defendants’  
salespeople call the same consumers over and over again with their fake “survey” call until they

1 get the consumer to agree to accept magazines. Likewise, Defendants' verification department  
 2 employees call consumers over and over again until the consumer agrees to go through the  
 3 verification recording process. Even worse, Defendants' collections department employees call  
 4 consumers repeatedly, threatening collection lawsuits, garnishment, and even arrest, in order to  
 5 scare the consumers into agreeing to pay. Consumer declarations corroborate that consumers  
 6 received these repeated abusive telephone calls, and that Defendants' employees were rude and  
 7 abusive. Defendants engage in these practices in violation of TSR Section 310.4(b)(1)(i), and the  
 8 Court should grant summary judgment in the FTC's favor on Count Six of the Amended  
 9 Complaint.

10 **D. As a common enterprise, the Corporate Defendants are liable for the deceptive  
 11 and abusive acts and practices of each other**

12 Defendants which act jointly as a common enterprise are jointly liable for the violations of  
 13 each other. Courts have found common enterprises in a variety of FTC actions under Section 13(b)  
 14 where there has been common corporate control, shared office space, shared employees and  
 15 officers, interrelated funds, and other factors. *See, e.g., FTC v. J.K. Publ'ns*, 99 F. Supp. 2d 1176,  
 16 1202 (C.D. Cal. 2000); *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760 at \*8, 1997-1 Trade Cas. (CCH)  
 17 ¶ 71,713 (S.D. Fla. 1996). Indeed, where "the same individuals were transacting an integrated  
 18 business through a maze of interrelated companies[,] . . . 'the pattern and frame-work of the whole  
 19 enterprise must be taken into consideration'" and the companies may be held jointly liable as a  
 20 common enterprise. *J.K. Publ'ns*, 99 F. Supp. 2d at 1202 (quoting *Delaware Watch Co. v. FTC*,  
 21 332 F.2d 745, 746 (2d Cir. 1964)). As discussed in Section II.H., *supra*, Defendants are operating  
 22 as a common enterprise. Thus, the Defendants should be held jointly liable for each other's  
 23 violations of the FTC Act and TSR.

24 **IV. THE COURT SHOULD ORDER EQUITABLE RELIEF, INCLUDING  
 25 PERMANENT BANS AND A MONETARY JUDGMENT, AGAINST EACH  
 26 DEFENDANT**

27 **A. Relief against the Corporate Defendants**

- 28 1. The proposed permanent injunctions which prohibit the Corporate Defendants from engaging in telemarketing and the sale of magazine subscriptions are appropriate

This Court has the authority to grant the permanent injunction and other equitable relief sought by the FTC. The second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), states



1 that “in proper cases the Commission may seek, and after proper proof, the court may issue, a  
2 permanent injunction” against violations of “any provision of law enforced by the Federal Trade  
3 Commission.” Any matter involving a violation of a law that the FTC enforces qualifies as a  
4 “proper case” for injunctive relief under Section 13(b). *FTC v. H.N. Singer*, 668 F.2d at 1112-13.

5 Strong injunctive provisions are necessary to protect the public against future fraud by  
6 Defendants. They have demonstrated an unwillingness to change their magazine sales practices to  
7 comply with the law, despite court injunctions dating back to 1971. They have demonstrated the  
8 same unwillingness to change their telemarketing practices to comply with the law, choosing  
9 instead to continue their same deceptive and abusive telemarketing practices through new  
10 corporate entities. Their illegal conduct has cheated thousands of consumers out of millions of  
11 dollars. To prevent such illegal acts in the future, Section I of the proposed “Final Judgment and  
12 Order for Permanent Injunction and Other Equitable Relief” lodged concurrently herewith  
13 (“proposed Final Judgment”), would permanently ban Defendants from engaging in telemarketing.  
14 Section II of the proposed Final Judgment would permanently ban Defendants from selling  
15 magazine subscriptions. Section III of the proposed Final Judgment would prohibit Defendants  
16 from misrepresenting, or assisting others in making material misrepresentations in connection with  
17 the sale of magazine subscriptions, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.  
18 Section IV of the proposed Final Judgment would prohibit Defendants from violating the TSR, 16  
19 C.F.R. Part 310.

20 2. The proposed compliance monitoring and record keeping provisions are  
21 appropriate

22 Sections IX through XIII of the proposed Final Judgment contain compliance monitoring  
23 and record keeping provisions that are necessary for the FTC to monitor and ensure compliance  
24 with the order. Courts have routinely included such provisions in permanent injunctions issued  
25 under Section 13(b) of the FTC Act. *See e.g., FTC v. Think Achievement*, 144 F. Supp. 2d 1013,  
26 1018 (N.D. Ind. 2000) (records retention, notification of changed employment or residence, access  
27 to premises and monitoring), *aff’d*, 312 F.3d 259 (7th Cir. 2002); *SlimAmerica*, 77 F. Supp. 2d at  
28 1276 (holding that record keeping and monitoring provisions were appropriate to permit  
Commission to police defendants’ compliance with order); *FTC v. US Sales Corp.*, 785 F. Supp.

1 737, 753-54 (N.D. Ill. 1992) (monitoring); *FTC v. Sharp*, 782 F. Supp. 1445, 1456-57 (D. Nev.  
2 1991) (monitoring provisions); *FTC v. Alliance Communications, Inc.*, 1996 U.S. Dist LEXIS  
3 20373 at \*5-7, 1997-1 Trade Cas. (CCH) ¶ 71,685 (S.D.N.Y. 1996) (monitoring and reporting  
4 requirements).

5 3. The Court should order the Corporate Defendants to pay equitable monetary  
6 relief in an amount equal to their gross revenues  
7 Plaintiff also seeks monetary restitution for consumers injured by defendants' deceptive  
8 practices. This court has broad authority under the FTC Act to "grant any ancillary relief  
9 necessary to accomplish complete justice," including the power to order restitution. *Stefanchik*,  
10 559 F.3d at 931 (quoting *Pantron I*, 33 F.3d at 1102). The Court has also broad discretion in  
11 granting equitable monetary relief. *Id.* (citing *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237  
12 F.3d 1154, 1163 (9th Cir. 2001)). In addition, Section 19(b) of the FTC Act, 15 U.S.C. § 57b,  
13 authorizes this Court to grant relief as it finds necessary to redress injury to consumers resulting  
14 from violations of a Trade Regulation Rule, including the FTC's TSR. Congress provided that  
15 such relief may include, but should not be limited to, "rescission or reformation of contracts, the  
16 refund of money [and] return of property." *Id.* at 57b(b).

17 The proper measure of recovery for defrauded consumers is the full amount of the purchase  
18 price or payment — less any refunds — even though that amount may exceed the amount of the  
19 defendants' unjust enrichment. *Figgie Int'l*, 994 F.2d at 606-07; *US Sales Corp.*, 785 F. Supp. at  
20 753. Furthermore, for the reasons set forth below, defendants should be held jointly and severally  
21 liable for the amount of consumer injury in this case, as provided in Section VIII of the proposed  
22 Final Judgment. *See Sharp*, 782 F. Supp. at 1449. As discussed in Section II.E., *supra*, from 2004  
23 to 2008, the Corporate Defendants took a total of \$ [REDACTED] from consumers through their  
24 deceptive and abusive telemarketing practices. During the same time period, the Corporate  
25 Defendants issued refunds in the total amount of \$265,244.25. Monetary judgment should thus be  
26 entered against Corporate Defendants in amount of \$ [REDACTED].  
27  
28

1           **B. Relief against the Individual Defendants**

- 2           1.       The Court should impose the same permanent bans, injunctions, compliance  
3                   monitoring, and record keeping provisions, against the Individual  
4                   Defendants because they directly participated in or had authority to control  
5                   the companies' deceptive and abusive acts and practices

6           Each of the Individual Defendants are also liable for injunctive relief for the law violations  
7           committed by the Corporate Defendants because of their roles as corporate officers, directors, and  
8           top-level managers, and their day-to-day involvement in running the companies.

9           “An individual will be liable for corporate violations of the FTC Act if (1) he participated  
10           directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the  
11           misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations, or  
12           was aware of a high probability of fraud along with an intentional avoidance of the truth.”

13           *Stefanchik*, 559 F.3d at 931 (citing *Cyberspace.com*, 453 F.3d at 1202). An individual's status as a  
14           corporate officer gives rise to a presumption of liability to control a small, closely held corporation.  
15           *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973). In particular, assuming the  
16           duties of a corporate officer is probative of an individual's participation or authority. *FTC v.*  
17           *Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170-71 (9th Cir. 1997); *FTC v. Amy Travel*, 875  
18           F.2d 564, 573 (7th Cir. 1989); *FTC v. Medicor*, 217 F. Supp. 2d 1048, 1055 (C.D. Cal. 2002); *J.K.*  
19           *Publ'ns*, 99 F. Supp. 2d at 1203-4.

20           That each of the Individual Defendants is aware that PBS is engaged in deceptive and  
21           abusive practices is evidenced by the fact that each was named as a defendant in the Illinois  
22           Attorney General's 1991 federal court action alleging the same deceptive and abusive business  
23           practices at issue here, and that each of them was a party to the settlement of that action, in which  
24           they agreed to stop the deceptive and abusive practices. Moreover, they continue to operate PBS  
25           using the same deceptive and abusive practices despite their agreement, in the stipulated  
26           preliminary injunction that Defendants entered into with the FTC in this case, to stop.

27           Moreover, as the companies' top-level managers, the Individual Defendants have the  
28           authority to control PBS's deceptive and abusive acts and practices.

            Defendants' knowledge of the deceptive and abusive nature of PBS's practices is also  
            evidenced by the fact that they have their employees use the deceptive sales scripts. These scripts

1 are used at Edward Dantuma's direction. As top-level managers for the PBS's sales departments,  
2 defendants Dirk and Jeffrey Dantuma, and Brenda Dantuma Schang have each instructed the  
3 salespeople under their supervision to read the deceptive sales scripts "word-for-word." As the top-  
4 level manager for PBS's verification department, Dries Dantuma has likewise instructed the  
5 verifiers under his supervision to read the deceptive verification scripts "word-for-word." This  
6 alone establishes that the Individual Defendants directly participated in the deceptive acts and  
7 practices. In addition, they structured their employees' compensation to reward high sales volume  
8 with no penalty for making additional misrepresentations; by doing so, they have allowed, and  
9 even encouraged, their employees to make even more egregious misrepresentations to generate  
10 sales.

11 The Individual Defendants' intimate and direct participation in the companies' affairs and  
12 their continued refusal to correct their bad practices, coupled with either their knowledge of the  
13 bad acts and practices or their authority to control them, provides overwhelming justification for  
14 holding them liable for the companies' bad practices and imposing the permanent injunctive relief  
15 requested by the FTC.

16 2. The Court should impose the same monetary judgment on the Individual  
17 Defendants as the Corporate Defendants  
18 Individual corporate officers and owners may be held personally liable for redress if they  
19 "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent  
20 conduct, that the misrepresentations were the type upon which a reasonable and prudent person  
21 would rely, and that consumer injury resulted." *FTC v. Affordable Media, LLC*, 179 F.3d 1228,  
22 1234 (9th Cir. 1999) (*citing Publ'g Clearing House*, 104 F.3d at 1171). The knowledge  
23 requirement can be satisfied if "the individuals had actual knowledge of material  
24 misrepresentations, [were] recklessly indifferent to the truth or falsity of a misrepresentation, or  
25 had awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.*  
26 Accordingly, an individual may be held personally liable for restitution without a showing of an  
27 actual intent to defraud consumers. *Id.*

28 Courts have considered a variety of factors in determining whether an individual defendant  
had knowledge of the underlying corporate fraud. Such factors include an individual's active role

1 in developing deceptive materials used to market to consumers, such as telemarketing scripts, and  
2 responsibility for corporate financial matters. *See, e.g., FTC v. Cyberspace.com, LLC*, 2002 U.S.  
3 Dist LEXIS 25565 at \*17-19, 2003-1 Trade Cas. (CCH) ¶ 73,960 (W.D. Wash. 2002), *aff'd*, 453  
4 F.3d 1196 (9th Cir. 2006); *Amy Travel*, 875 F.2d at 574 (telemarketing scripts); *FTC v. Am.*  
5 *Standard Credit Sys.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994) (developing deceptive marketing  
6 materials); *FTC v. World Media Brokers*, 415 F.3d 758, 765-66 (7th Cir. 2005) (responsibility for  
7 corporate financial matters). Knowledge may also be inferred in part from an individual's  
8 awareness of consumer complaints. *Cyberspace.com*, 453 F.3d at 1202; *FTC v. Bay Area Bus.*  
9 *Council, Inc.*, 423 F.3d 627, 637-38 (7th Cir. 2005); *Amy Travel*, 875 F.2d at 574.

10 As discussed in Section II.F., *supra*, each of the Individual Defendants knows that PBS's  
11 acts and practices are deceptive and abusive. As discussed in Section III.B., *supra*, the  
12 misrepresentations are the type upon which a reasonable and prudent person would rely, and  
13 consumer injury has resulted. Thus, the Court should hold the Individual Defendants personally  
14 liable for redress, and they should be held jointly and severally liable with the Corporate  
15 Defendants for the \$ [REDACTED] monetary judgment.

## 16 V. CONCLUSION

17 The uncontroverted facts show that Defendants knowingly sell magazine subscriptions to  
18 consumers through the use of deceptive and abusive telemarketing practices in violation of both  
19 the FTC Act and the FTC's Telemarketing Sales Rule. The Court should thus grant summary  
20 judgment and the relief requested in the proposed Final Judgment. To the extent that the Court  
21 determines that summary judgment resolving all issues is not appropriate, Plaintiff requests that the  
22 Court summarily adjudicate all issues for which it finds no genuine issue of material fact.

23  
24 Dated: July 31, 2009

Respectfully submitted,

25 /s/ Faye Chen Barnouw  
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