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11
 12 UNITED STATES DISTRICT COURT
 13 DISTRICT OF ARIZONA

14 UNITED STATES OF AMERICA,
 15 Plaintiff,
 16 v.
 17 BUSINESS RECOVERY SERVICES, LLC
 a limited liability company, and,
 18 BRIAN HESSLER
 individually, and as owner, officer,
 20 or manager of Business Recovery
 Services, LLC,
 21 Defendants.

No. 2:11CV00390 JAT

MEMORANDUM OF LAW IN
 SUPPORT OF PLAINTIFF'S MOTION
 FOR A PRELIMINARY INJUNCTION
 ORAL ARGUMENT REQUESTED

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1 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the United States seeks a
2 preliminary injunction enjoining Business Recovery Services and Brian Hessler
3 (“Defendants”) from continuing to violate Section 310.4(a)(3) of the Telemarketing Sales
4 Rule. Specifically, the United States asks that the Court issue a preliminary injunction
5 prohibiting Defendants from continuing their illegal practice of charging customers for the
6 recovery kits they sell until seven (7) business days after the money or other item they lost is
7 delivered to that customer.¹

8 **BACKGROUND**

9 The United States has filed a complaint challenging Defendants’ practices. The
10 complaint alleges both violations of the Telemarketing Sales Rule and the Federal Trade
11 Commission Act (“FTC Act”). Here, we seek a preliminary relief only to enjoin Defendants’
12 violations of Section 310.4(a)(3) of the Telemarketing Sales Rule.²

13 Recovery room scams are operated by deceptive telemarketers, who call consumers
14 that lost money in previous telemarketing transactions and offer recovery tools or services to
15 help these customers recover the money they lost. The Federal Trade Commission
16 recognized that these operations prey upon individuals who have already been victimized,
17 and that these customers typically pay the fee charged by the recovery service, and then find
18 that the company fails to perform as promised. The Federal Trade Commission saw the need
19 to protect consumers from recovery room scams that “falsely promise[] to recover the lost
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22 ¹ The proposed order also contains language designed to prevent Defendants from
23 destroying records and from selling their customer list. These provisions are necessary to
24 preserve Defendants’ records for this action and to protect these vulnerable consumers.

25 ² While Counts Two and Three of the Complaint allege statutory violations related to
26 the representations Defendants make about their recovery kit and recovery services, this Motion
27 deals solely with Defendants’ fee-collecting practices that violate the Telemarketing Sales Rule.
28 The other practices of the recovery industry generally, and Defendants’ practices in particular,
are presented to provide background and context for the rule provision implicated by this
Motion. This Motion is concerned with Section 310.4(a)(3) of the Telemarketing Sales Rule,
which deals with the question of when persons and corporations offering recovery services and
products may collect fees for their goods or services.

1 money, or obtain the promised prize, in exchange for a fee paid in advance.” 60 Fed. Reg.
2 43842-10 at 43854. As a result, the Federal Trade Commission included in the
3 Telemarketing Sales Rule a ban prohibiting any recovery service from asking for or
4 accepting payment for any goods or services that purport to help a consumer recover funds
5 paid in a previous telemarketing transaction until seven business days after the money or
6 other item they lost in that previous transaction is delivered to that customer. 16 C.F.R. §
7 310.4(a)(3).

8 Business Recovery Services (“Defendant BRS”) sells both a “Do-It-Yourself”
9 Business Recovery Kit (“recovery kit”) and recovery services to individuals who have lost
10 money to business opportunity and work-at-home scams.³ In doing so, Defendants charge
11 consumers prices ranging from \$99 to \$499 for each recovery kit before they provide any
12 goods or services.⁴ Some consumers have been charged while still on the phone call in
13 which the sale was made.⁵

14 Defendants sell their recovery kit and recovery services through telemarketing⁶ cold
15 calls.⁷ If potential customers⁸ do not answer their phone, Defendants leave message after
16 message offering their assistance in recovering money that is lost.⁹ In one of the messages
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18 ³ See page 1 of Exhibit B, a questionnaire completed by Mary Sidor.

19 ⁴ See page 2 of all customer questionnaires, attached in Exhibits B, C, D, E, F, G, H, I,
20 K, L, and M.

21 ⁵ See page 2 of Exhibit C, a questionnaire completed by customer Randall Toll.

22 ⁶ Telemarketing is defined in Section 310.2(cc) of the Telemarketing Sales Rule as “a
23 plan, program, or campaign which is conducted to induce the purchase of goods or services . . .
by use of one or more telephones and which involves more than one interstate telephone call.”

24 ⁷ See page 1 of all customer questionnaires, attached in Exhibits B, C, D, E, F, G, H, I,
25 K, L, and M.

26 ⁸ Customer is defined in Section 310.2(l) of the Telemarketing Sales Rule as “any person
who is or may be required to pay for goods or services offered through telemarketing.”

27 ⁹ See pages 1 and 2 of Exhibit D, a questionnaire completed by customer Joao Curalov.

1 left on customer Joao Curalov's answering machine, an employee of Defendant BRS stated
2 that "[w]e've already assisted clients in recovering thousands of dollars from Bankcard
3 Empire, so if you are interested in trying to get back the money that you put into this, call me
4 as soon as you can."¹⁰

5 Potential customers are led to believe that Defendants' recovery kits have been used
6 successfully by many other people who were defrauded in the same scheme where they lost
7 their money.¹¹ Some customers report that they were told that they "will definitely get all my
8 money back"¹² while others are promised that "[a]t the minimum we would recover the
9 money we spent on the purchase of [the] kits."¹³ Defendants immediately charge or bill the
10 consumer when the customer agrees to purchase the recovery kit.¹⁴ Customers who purchase
11 recovery kits find that the kit contains a variety of materials, including a list of the business
12 recovery kits Defendants sell, credit card authorization forms, publications produced by the
13 Federal Trade Commission on Business Opportunities, and instructions on how to use the
14 recovery kit.¹⁵ The portion of the recovery kit that customers use when they seek to recover
15 money they lost to business opportunity and work-at-home scams consists only of four form
16 letters, with blanks for customers to write down their personal information.¹⁶ These letters
17 are addressed to the Internal Revenue Service, a state attorney general's office, the Better
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20 ¹⁰ See Banks Declaration, attached as Exhibit A.

21 ¹¹ See page 2 of Exhibit E, a questionnaire completed by customer Joan Hagan.

22 ¹² See page 2 of Exhibit F, a questionnaire completed by customer Ra Nae Aaker.

23 ¹³ See page 2 of Exhibit G, a questionnaire completed by customer Kevin Gleske.

24 ¹⁴ See page 2 of Exhibit C, a questionnaire completed by customer Randall Toll.

25 ¹⁵ See page 3 of all customer questionnaires, attached in Exhibits B, C, D, E, F, G, H, I,
26 K, L, and M. Additionally, See pages 2 and 3 of Exhibit P, a screen shot of Defendants' website.

27 ¹⁶ See id.

1 Business Bureau, and the United States Postal Inspection Service.¹⁷

2 Customers complain that the recovery kit was “simplistic”¹⁸ and “overpriced for what
3 I actually received.”¹⁹ Customer Ra Nae Aaker stated that the “letters were a joke.”²⁰
4 Customer Joan Hagan noted that the form letters contained both typographical and
5 grammatical errors.²¹ After viewing the contents of the recovery kit, some customers
6 attempted to secure a refund from Defendants, however, Defendants denied these
7 requests.²² Defendants’ “In-Store Credit Policy,”²³ states:

8 First, there are NO REFUNDS! Although the “Do-It Yourself” Business Recovery
9 Kit(s) is/are customized for your use, there is a 30-Day In-Store Credit Policy. To
10 exercise this policy, the kit(s) can only be returned if there is a “valid” reason, as
11 determined by Business Recovery Services, LLC. “Valid” reasons are defined as
12 and are restricted to errors in the preparation of the “Do-It Yourself” Business
13 Recovery Kit(s) made by Business Recovery Services, LLC. However, before an In-
14 Store Credit could possibly be even considered, Business Recovery Services, LLC
15 shall be given two opportunities to correct any errors in the “Do-It-Yourself”
16 Business Recovery Kit(s). FAILURE and/or REFUSAL to pick-up your kit(s) WILL
17 NOT RESULT IN A REFUND. In addition, the acts of (1) CANCELLATION
18 AND/OR (2) RETURNING THE KIT(S) WILL NOT RESULT IN A REFUND.
19 However, you may be eligible for an IN-STORE CREDIT if you choose to return the
20 kit(s). In addition, I hereby waive any and all of my “right-of-rescission” rights.

To exercise this policy, you MUST call the Customer Service Telephone Number,
(480) 649-4251. In addition, you MUST RETURN THE KIT AND HIGHLIGHT
THE ERRORS BEFORE an In-Store Credit is issued. Failure to do so will result in
a denial of your request. For any legal disputes and/or lawsuits, the County of

21 ¹⁷ See id.

22 ¹⁸ See page 3 of Exhibit H, a questionnaire completed by customer Thomas Coyle.

23 ¹⁹ See page 3 of Exhibit I, a questionnaire completed by customer Catherine Hatch.

24 ²⁰ See page 3 of Exhibit F, a questionnaire completed by customer Ra Nae Aaker.

25 ²¹ See page 3 of Exhibit E, a questionnaire completed by customer Joan Hagan.

26 ²² See page 4 of Exhibit I, the questionnaire completed by customer Catherine Hatch.
27 Additionally, see pages 3-5 and 7-8 of Exhibit D, which contains documents submitted by
28 customer Joao Curalov.

²³ A copy of Defendants’ “In-Store Credit Policy” is attached as Exhibit J.

1 Maricopa in the State of Arizona shall have jurisdiction.

2 **In-store credits issued if you are not satisfied!**
3 **No Refunds!**
4

5 Because of Defendants' illegal business practice in which they charge customers
6 before even sending the recovery kit, Defendants are able to profit from these dissatisfied
7 customers. This is exactly the type of abusive sales practice that the Telemarketing Sales
8 Rule was intended to prohibit. Defendants do not even provide their customers with the
9 opportunity to view their recovery kit before their credit cards are charged, and then
10 Defendants "In-Store Credit Policy" prevents their customers from having any recourse
11 whatsoever. To date, Defendants have sold at least 4,721 recovery kits.²⁴ Defendants'
12 violations of the Telemarketing Sales Rule must be enjoined.

13
14 **LEGAL STANDARD**

15 The Federal Trade Commission Act provides for an injunction "[u]pon a proper
16 showing that, weighing the equities and considering the Commission's likelihood of ultimate
17 success, such action would be in the public interest[.]" 15 U.S.C. § 53(b). "Congress
18 intended this standard to depart from what it regarded as the then-traditional equity standard
19 . . . [as] the traditional standard was not 'appropriate for the implementation of a Federal
20 statute by an independent regulatory agency where the standards of the public interest
21 measure the propriety and the need for injunctive relief.'" FTC v. H.J. Heinz Co., 246 F.3d
22 708, 714 (D.C. Cir. 2001) (citing H.R.Rep. no. 93-624, at 31 (1971)).

23 The result is that this statute "places a lighter burden on the Commission than that
24 imposed on private litigants by the traditional equity standard; the Commission need not show
25 irreparable harm to obtain a preliminary injunction." F.T.C. v. Affordable Media, 179 F.3d

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²⁴ See Banks Declaration, attached as Exhibit A.

1 1228, 1233 (9th Cir. 1999) (quoting FTC v. Warner Communications, Inc., 742 F.2d 1156,
2 1159 (9th Cir. 1984)). “Under this more lenient standard, ‘a court must 1) determine the
3 likelihood that the Commission will ultimately succeed on the merits and 2) balance the
4 equities.’” Id. (quoting Warner Communications, Inc. at 1160). Additionally, when
5 considering the impact of any equities favoring defendants, this test dictates that “[w]hen the
6 Commission demonstrates a likelihood of ultimate success, a countershowing of private
7 equities alone does not justify denial of a preliminary injunction.” Warner Communications,
8 Inc., 742 F.2d at 1165 (citing Federal Trade Commission v. Weyerhaeuser Co., 665 F.2d
9 1072, 1083 (D.C. Cir. 1981)).

10 Here, it is likely that the United States will ultimately succeed on the merits of its claim
11 that Defendants are violating Section 310.4(a)(3) of the Telemarketing Sales Rule, and the
12 balance of the equities support granting an injunction. As a result, issuing a preliminary
13 injunction enjoining the defendants from violating Section 310.4(a)(3) of the Telemarketing
14 Sales Rule is in the public interest, just as it is when the FTC seeks such relief directly.
15 However, an injunction would be appropriate even if the Court were to apply the traditional
16 four-factor test when evaluating this Motion.²⁵

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18

ARGUMENT

19 Injunctive relief is warranted here, where the government is able to show that it is
20 likely to prevail on the merits and the equities support an injunction. This Memorandum will
21 address each factor separately. While the United States need only show that it is likely to
22 ultimately succeed on the merits and that the balance of the equities favors injunctive relief,

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24 ²⁵ A plaintiff seeking a preliminary injunction must traditionally “establish that he is
25 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
26 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
27 public interest.” Advertise.com, Inc. v. AOL Advertising, Inc., 616 F.3d 974, 976 (9th Cir.
28 2010) (quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 876
(9th Cir. 2009)); see also Winter v. Natural Resources Defense Counsel, Inc., 555 U.S. 7 (2008).

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1 the United States will nonetheless address the public interest in enjoining Defendants' illegal
2 business practices and the irreparable harm that results from Defendants' violations of the
3 Telemarketing Sales Rule.

4
5 **The United States Is Likely To Succeed On The Merits**

6 Congress directed the Federal Trade Commission to prescribe rules to prevent abusive
7 and deceptive telemarketing acts and practices pursuant to the Telemarketing Act. See 15
8 U.S.C. §§ 6101-6108. The Federal Trade Commission subsequently adopted the
9 Telemarketing Sales Rule in 1995, which was later amended. 16 C.F.R. Part 310. Pursuant to
10 Section 3© of the Telemarketing Act and Section 18(d)(3) of the FTC Act, a violation of the
11 Telemarketing Sales Rule constitutes an unfair or deceptive act or practice in or affecting
12 commerce, and therefore violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

13 The Telemarketing Sales Rule specifically states that it is a violation of the Rule for
14 any seller to:

15 request or receive payment of any fee or consideration from a person for goods
16 or services represented to recover or otherwise assist in the return of money or
17 any other item of value paid for by, or promised to, that person in a previous
telemarketing transaction, until seven (7) business days after such money or
other item is delivered to that person.

18 16 C.F.R. § 310.4(a)(3).

19 Defendants sell their recovery kits by requesting and receiving payment for the
20 recovery kit without even waiting until the recovery kit is delivered to the consumer, much
21 less waiting until seven business days after the return of any lost money to the consumer. The
22 evidence of this violation of the Telemarketing Sales Rule is indisputable. For example,
23 customer Randall Toll stated that his credit card was charged "before I got off of the phone

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1 call.”²⁶ Mr. Toll was unable to recover any money,²⁷ and under the Telemarketing Sales
2 Rule, he should not have ever been charged for the recovery kit.

3 Customer Joao Curalov’s credit card was charged for the recovery kits on October 10,
4 2009, when those recovery kits were not even delivered until October 14, 2009.²⁸ Mr.
5 Curalov was unable to successfully recover any of the money he lost in previous
6 telemarketing transactions,²⁹ and as a result, Defendants could not have ever legally charged
7 Mr. Curalov for their recovery kits. Similarly, customer Catherine Hatch’s Visa card was
8 charged \$500 on December 3, but the Priority Mail envelope that contained the two recovery
9 kits she ordered was not delivered until December 7, 2010.³⁰ Ms. Hatch has not yet recovered
10 any of the funds she lost in her previous telemarketing transactions,³¹ and as a result,
11 Defendants violated the Telemarketing Sales Rule when they charged her credit card for their
12 recovery kits.

13 A simple comparison of the date on the letters accompanying the recovery kits with the
14 date customers were charged for these kits shows that Defendants consistently charge
15 customers for recovery kits before the recovery kits are even received by these consumers.

16 For example:

- 17 • Defendants charged customer Kevin Gleske \$1,000 for recovery kits on

18 _____
19 ²⁶ See page 2 of Exhibit C, a questionnaire completed by customer Randall Toll.

20 ²⁷ See page 4 of Exhibit C.

21 ²⁸ See pages 9, 11, and 12 of Exhibit D, which contains a questionnaire, letter from
22 Business Recovery Service, “Virtual Terminal” receipt, Shipping Label Receipt, “Track &
23 Confirm” print-out from the United States Postal Service, and letter from the United States
Postal Service to Brian Hessler submitted by customer Joao Curalov.

24 ²⁹ See page 4 of Exhibit D.

25 ³⁰ See pages 6 and 7 of Exhibit I, which contains a questionnaire, credit card statement,
and Priority Mail envelope submitted by customer Catherine Hatch. See Exhibit N for the
26 “Track & Confirm” print-out from the United States Postal Service showing when the envelope
was delivered.

27 ³¹ See page 4 of Exhibit I.

1 November 19, 2009, which is the same as the date on the Business Recovery
2 Services letter enclosed with his recovery kit.³²

- 3 • Customer Mary Sidor was charged \$300 for a recovery kit on February 9, 2009,
4 when the Business Recovery Services letter accompanying her recovery kit was
5 dated February 10, 2009.³³
- 6 • David Nicholas found that Defendants charged his credit card on March 2,
7 2010, but the date on the Business Recovery Services letter accompanying his
8 recovery kit was March 3, 2010.³⁴
- 9 • Customer Paul Hallman's MasterCard was charged \$399 for Defendants'
10 recovery kit on September 9, 2009, which was the same date that was printed on
11 the Business Recovery Services letter enclosed within his recovery kit.³⁵
- 12 • Customer Terry Wilcox paid defendants \$300 on April 12, 2010, and the
13 Business Recovery Services letter accompanying his recovery kit was dated
14 April 13, 2010.³⁶

15 The United States mailed questionnaires to some of Defendants' customers, inquiring,
16 inter alia, "[d]id you pay for the product before you received it?" The returned questionnaires
17 unanimously state that customers who purchased the recovery kits were charged for their kits
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19 ³² See pages 6-8 of Exhibit G, which contains a questionnaire, a letter from Business
20 Recovery Services, and credit card statement submitted by customer Kevin Gleske.

21 ³³ See pages 6 and 7 of Exhibit B, which contains a questionnaire, a letter from Business
22 Recovery Services, and credit card statement submitted by customer Mary Sidor.

23 ³⁴ See pages 6 and 7 of Exhibit K, which contains a questionnaire, a letter from Business
24 Recovery Services, and credit card statement submitted by customer David Nicholas.

25 ³⁵ See pages 6 and 7 of Exhibit L, which contains a questionnaire, a letter from Business
26 Recovery Services, and purchase confirmation from Business Recovery Services submitted by
27 Paul Hallman.

28 ³⁶ See pages 6 and 7 of Exhibit M, which contains a questionnaire, a letter from Business
Recovery Services, and receipt from Business Recovery Services submitted by customer Terry
Wilcox.

1 when searching for any equities that might favor Defendants, it is important to remember that,
2 “[w]hen the Commission demonstrates a likelihood of ultimate success, a countershooting of
3 private equities alone does not justify denial of a preliminary injunction.” Warner
4 Communications, Inc., 742 F.2d at 1165 (citing Weyerhaeuser Co., 665 F.2d at 1083).
5 Because of the likelihood that the United States will prevail, any arguments defendants may
6 raise are insufficient.

7 Consumers have been harmed, and continue to be harmed by the practices defendants
8 use. The equities weigh strongly in favor of protecting these vulnerable consumers from
9 further victimization.

10
11 **It is in the Public Interest to Issue Injunctive Relief**

12 As discussed in the Legal Standard section, the United States does not have to show
13 that it is in the public interest to issue injunctive relief when seeking injunctive relief under
14 the FTC Act. See Affordable Media, 179 F.3d at 1233; Warner Communications, Inc., 742
15 F.2d at 1159. This standard requires only that the Court “1) determine the likelihood that the
16 Commission will ultimately succeed on the merits and 2) balance the equities.” Id.; see 15
17 U.S.C. § 53(b).

18 Nonetheless, there is great public interest in preventing illegal sales practices and the
19 violation of the Telemarketing Sales Rule. Additionally, the public interest is served where
20 the Federal Trade Commission is able to enforce the Telemarketing Sales Rule, and where
21 companies that are found to violate the Telemarketing Sales Rule are restrained from
22 continuing to commit these violations. The public interests that are implicated in this case
23 weigh strongly in favor of injunctive relief.

24
25 **Irreparable Harm Will Result If An Injunction Is Not Granted**

26 15 U.S.C. § 53(b) “places a lighter burden on the Commission than that imposed on
27 private litigants by the traditional equity standard; the Commission need not show irreparable
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1 harm to obtain a preliminary injunction.” F.T.C. v. Affordable Media, 179 F.3d 1228, 1233
2 (9th Cir. 1999) (quoting FTC v. Warner Communications, Inc., 742 F.2d 1156, 1159 (9th Cir.
3 1984)). While it is not necessary for the United States to show that irreparable harm would
4 result if an injunction is not granted, the evidence in this case demonstrates that the threat of
5 irreparable harm is present.

6 Violations of the Telemarketing Sales Rule constitute an unfair or deceptive act or
7 practice in or affecting commerce. 15 U.S.C. § 6102©; 15 U.S.C. § 57a(d)(3). As the Ninth
8 Circuit has noted, “irreparable injury must be presumed in a statutory enforcement action.”
9 United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 176 (9th Cir. 1987).
10 Violation of federal statutes that protect against the use of unfair and deceptive practices result
11 in irreparable harm. Defendants’ violations erode the public trust, victimize consumers, and
12 cannot be cured after the fact. These illegal practices should not be permitted to continue.

13 Additionally, Defendants’ customers will suffer irreparable harm if injunctive relief is
14 not granted. As detailed in the Background section above, Defendants rely upon their “In-
15 Store Credit Policy” to refuse to give refunds to customers who request their money back after
16 receiving the recovery kits. Additionally, Defendants even refuse to cancel orders and refund
17 money to customers who have not yet received their recovery kit, and ask for their orders to
18 be cancelled.³⁹ Essentially, as soon as customers order a recovery kit, their money is lost to
19 Defendants, and they find themselves without recourse, in violation of Section 310.4(a)(3) of
20 the Telemarketing Sales Rule.

21 It is well established that “[t]ypically, monetary harm does not constitute irreparable
22 harm.” California Pharmacists Ass’n v. Maxwell-Jolly, 563 F.3d 847, 851 (9th Cir. 2009)
23 (citing L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 634 F.2d 1197, 1202 (9th
24 Cir. 1980)). However, this doctrine only applies “where a remedy at law is adequate[.]”
25 California Pharmacists Ass’n, 563 F.3d at 852 (citing Kan. Health Care Ass’n v. Kan. Dep’t

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27 ³⁹ See Exhibit O, containing two complaints filed with the Federal Trade Commission.
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1 of Soc. & Rehab. Servs., 31 F.3d 1536, 1543 (10th Cir. 1994)). These principles support
2 equitable relief here because it is unlikely that Defendants will be able to refund these
3 customers in full, and as a result, adequate compensatory relief will not be available in the
4 course of litigation.

5
6 **CONCLUSION**

7 Here, it is likely that the United States will ultimately succeed on the merits, and the
8 balance of the equities support granting an injunction. As a result, issuing a preliminary
9 injunction enjoining the Defendants from violating the Telemarketing Sales Rule is in the
10 public interest. The United States would be entitled to a preliminary injunction even if the
11 Court were to apply the traditional four-factor test when evaluating this Motion.

12 For the foregoing reasons, the United States requests that its Motion for Preliminary
13 Injunction be granted, and that a preliminary injunction be ordered, barring Defendants from
14 charging consumers for their recovery kit(s) until seven (7) business days after the money or
15 other item they lost is delivered to that individual.

16 Respectfully submitted this 1st day of March, 2011.

17 Of Counsel:

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