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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

FTC'S OPPOSITION TO  
 "DEFENDANTS' MOTION FOR  
 SUMMARY JUDGMENT"

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1 **I. INTRODUCTION**

2 Defendants have engaged, and continue to engage, in telemarketing acts and practices in  
 3 which they trick and bully as many consumers as they can into buying expensive long-term  
 4 magazine subscriptions. They use sales tactics which the Courts have recognized for decades as  
 5 deceptive, abusive, and violative of the FTC Act, and which are clear violations of the FTC's  
 6 Telemarketing Sales Rule. They use these deceptive and abusive sales tactics even though they  
 7 have been specifically prohibited – by this Court, the federal district court for the Central District  
 8 of Illinois, and the Federal Trade Commission – from continuing in their use of these tactics. The  
 9 Court should reject Defendants' spurious legal arguments, as well as the controverted  
 10 representations of fact supporting their summary judgment motion.<sup>1</sup>

11 Defendants' summary judgment motion must be denied because the FTC's evidence  
 12 establishes that the "facts" supporting Defendants' summary judgment motion are disputed.  
 13 Moreover, Defendants' evidence does not controvert the material facts supporting the FTC's cross-  
 14 motion for summary judgment. Thus, the Court should grant the FTC's cross-motion for summary  
 15 judgment.

16 **II. THE MISREPRESENTATIONS THAT DEFENDANTS MAKE IN THEIR "LEAD CALL" VIOLATE  
 THE FTC ACT (COUNT ONE)**

17 **A. Defendants may not use deceptive "door opener" sales tactics in their lead call**

18 Defendants characterize their sales pitch as a "three-phase process," involving a "lead call"  
 19 and "verification call" to potential customers, and then a "ten business-day internal control period."  
 20 In the lead call, a potential customer typically speaks to a PBS salesperson and then a PBS "shift  
 21 supervisor." (Doc. #99 at 3:16-18.) In their lead call, Defendants' salespeople make numerous  
 22 representations, including that Defendants: (1) are conducting a "survey,"<sup>2</sup> (2) want to offer free

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23 <sup>1</sup> In opposing Defendants' summary judgment motion, the FTC relies on the evidence filed in  
 24 support of the FTC's summary judgment motion (including doc. #5-7, 19-20, 46, 74, 92-98, and  
 25 100-104), the FTC's Concise Statement of Undisputed Material Facts (doc. #90), and new  
 26 evidence obtained since the filing of the summary judgment motion (SJ Exhibits 48 through 69).  
 This new evidence is filed concurrently herewith as "Exhibits in Support of FTC's Opposition to  
 Defendants' Summary Judgment Motion."

27 <sup>2</sup> See, e.g., the evidence cited in FTC's Undisputed Fact ("UF") 88 and UF90; see also doc.  
 28 #100-2 at pp.703, 704, 705 ("We have been asked to contact a few business people in your area  
 and I just wanted to ask you a few questions on your personal buying habits ..."). See also FTC's  
 UF121 (Defendants' verifier expressly characterizes the first call as a "survey").

1 magazines as “nice surprise” to “thank” the potential customer for answering the survey,<sup>3</sup> and then  
 2 (3) ask the customer to agree to “cover” or “defray” the shipping and handling costs for what are  
 3 otherwise “free” magazines.<sup>4</sup> Defendants are not a survey company and are not collecting survey  
 4 responses on behalf of any advertiser or publisher. *See* FTC’s UF91. In their summary judgment  
 5 motion, Defendants are asking the Court to disregard the misrepresentations that their salespeople  
 6 make in the “lead call,” on the rationale that the “lead calls” is nothing more than a “non-material”  
 7 “door-opener”<sup>5</sup> to determine whether a potential customer is interested in hearing more about the  
 8 offer.

9 The case law is clear, however, that Defendants are in fact liable for the misrepresentations  
 10 their salespeople make in the lead call. A sales representative may not misrepresent “the purpose  
 11 of [his or her] initial contact with customers.” *FTC Policy Statement on Deception*, appended to  
 12 *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 176 (1984) (citing *Encyclopaedia Britannica*, 87 F.T.C.  
 13 421, 497 (1976), *aff’d*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), *modified*,  
 14 100 F.T.C. 500 (1982). The FTC Act is violated when the seller “induces the first contact through  
 15 deception, even if the buyer later becomes fully informed [of the actual contract terms] before  
 16 entering the contract.” *Resort Car Rental System v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (*citing*  
 17 *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961)).

18 ***B. The “false surveys” that Defendants use have long been held to be a deceptive***  
 19 ***door-opening tactic***

20 The surveys with which Defendants begin their sales pitch are false surveys. Defendants’  
 21 salespeople falsely represent that they are conducting the survey on behalf of their advertisers.

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22 <sup>3</sup> *See, e.g.*, FTC’s UF89; *see also* doc. #100-2 at pp.703, 704, 705 (“... I just wanted to ask you a  
 23 few questions on your personal buying habits and if you could help me we have a small surprise  
 24 for you, nothing big but it’s nice”).

25 <sup>4</sup> *See, e.g.*, doc. #100-2 at pp.704, 706 (“The only thing we have been asking people like  
 26 yourself is to thank us in return by helping to *defray* the cost of getting them out to you.”) and  
 27 p.703 (“The only thing we have been asking people like yourself is to help *cover* the cost ...”)  
 28 (emphasis added).

<sup>5</sup> The term “deceptive door openers” is a reference to the days when salesmen went  
 “door-to-door” and used various ruses to persuade potential customers to open their front door and  
 let the salesmen into their home on the principle that once the salesman was “in,” it was easier to  
 make a sale.

1 FTC's UF91. In fact, the purpose of the lead call is to gauge a potential customer's interest in  
2 Defendants' magazine subscription offer. *See* doc. #99 at Section II.C.

3 The courts have long recognized "false surveys" – such as the ones Defendants use – as a  
4 fraudulent method to induce a first contact with a potential customer. *Grolier v. FTC*, 699 F.2d  
5 983, 987 (9<sup>th</sup> Cir. 1983) ("[f]alse surveys ... whose only purposes were to ensnare potential  
6 customers" violate the FTC Act); *see also Encyclopaedia Britannica*, 87 F.T.C. 421, 1976 FTC  
7 LEXIS 474, \*169 (1976) (misrepresenting the purpose of a sales call is "neither novel nor lawful").

8 Likewise, Defendants have, or should have, long recognized the illegality of using false  
9 surveys in their sales practices.<sup>6</sup> In 1971, the FTC issued a Consent Order requiring magazine  
10 sales franchise company "Keystone Readers' Service" to, among other things, cease  
11 misrepresenting that the purpose of their sales visits to potential customers is to conduct such  
12 surveys. *See* SJ Exhibit 42 Attachment 12 (doc. #97-2 at pp.849-864). In 1998, Defendants  
13 entered into a federal consent decree with the Illinois Attorney General in which they agreed to a  
14 similar provision, specifically "to be permanently enjoined from ... making false and/or misleading  
15 statements regarding why the telephone solicitation was being made." *See* first Gale declaration  
16 Exhibit 13 (doc #7-3 at p.498). Defendant Edward Dantuma is, or should be, aware of the  
17 illegality of using false surveys, given that he owned his Keystone Readers Service franchise at the  
18 time the FTC Consent Order was issued. *See* FTC's UF26; *see also* Dirk Dantuma declaration ¶ 6  
19 (doc. #99-3). Likewise, all of the Defendants are, or should be, aware of the illegality of falsely  
20 claiming that they are conducting a survey, given that Defendant Ed Dantuma Enterprises, Inc.,  
21 and each of the individual Defendants were named as parties in the Illinois action. *See* first Gale  
22 declaration Exhibit 13 (doc. #7-3 at pp.473-503).

23 Defendants' surveys fall within the same category as the "false surveys" described in  
24 *Grolier* and *Encyclopaedia Britannica*. Defendants' use of false surveys in their sales pitch is a  
25  
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27  
28 <sup>6</sup> The fact that Defendants knew or should have known of the illegality is a sufficient basis for  
the Court to impose liability on the individual Defendants for the wrongdoing of their companies.  
*FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (citing *Cyberspace.com*, 453 F.3d at 1202).



1 sufficient ground upon which the Court may deny Defendants', and grant the FTC's, summary  
2 judgment motion as to Count One of the FTC's amended complaint.

3 ***C. Defendants' offer of free magazines upon payment of "shipping and handling"  
4 fee is deceptive because the fee is in reality the price of the magazines***

5 In addition to using false surveys, Defendants also use the long-criticized sales practice of  
6 falsely claiming that they are offering a free product for which they ask the potential customer to  
7 pay for ancillary services. The FTC's evidence shows that Defendants falsely imply (and  
8 sometimes expressly misrepresent) that they are offering the magazine subscriptions for free, and  
9 that all the potential customer has to pay for is the nominal shipping and handling.<sup>7</sup> Defendants  
10 concede that such representations are material. (Doc. #99 at 12:22-26.) As Defendants admit in  
11 their deposition testimony and discovery responses, Defendants have no intention of offering free  
12 magazine subscriptions to consumers. *See, e.g.*, FTC's UF174, UF175, UF176. Thus, Defendants'  
13 representations are false.

14 These misrepresentations violate Section 5 of the FTC Act. The Supreme Court denounced  
15 this sales practice as "contrary to decent business standards" and "evil" over seventy years ago in  
16 the context of door-to-door book sales:

17  
18 <sup>7</sup> *See, e.g.*, SJ Exhibit 43 (verification recording for consumer Biren Mistry) (filed under seal);  
19 and doc. #102 at p.735 (SJ Exhibit 42 Attachment 8, transcript of verification recording for  
20 consumer Biren Mistry):

21 Biren Mistry: But um I wasn't aware that this was a subscription...

22 PBS: Well you're getting the magazines at no cost you're only really paying for the  
23 shipping to have them sent to you did they explain that to you?

24 ...

25 Biren Mistry: It's [unintelligible] just right now you just said it was a subscription and then  
26 I wasn't aware it was a subscription.

27 PBS: ... it's an order but it's like you're not paying for the magazines you're only going to  
28 be paying for the shipping costs to have them sent to you ... (Emphasis added.)

*See also* SJ Exhibit 43 (verification recording for consumer Adillia Colberg) (filed under seal); and  
doc. #102 at p.744 (SJ Exhibit 42 Attachment 8, transcript of verification recording for consumer  
Adillia Colberg) (PBS: "you're paying shipping and handling only") (emphasis added); SJ Exhibit  
43 (verification recording for consumer Valerie Connelly) (filed under seal); and doc. #102 at  
p.747 (SJ Exhibit 42 Attachment 8, transcript of verification recording for consumer Valerie  
Connelly) ("Valerie Connelly: what am I paying for though I don't understand. PBS: You're  
paying the shipping and handling") (emphasis added). *See also* FTC's UF99, UF118.

1 The practice of promising free books where no free books were intended to be  
 2 given, and the practice of deceiving unwary purchasers into the false belief that  
 3 loose-leaf supplements alone sell for \$69.50, when in reality both books and  
 4 supplement regularly sell for \$69.50, are practices contrary to decent business  
 5 standards. To fail to prohibit such evil practices would be to elevate deception in  
 6 business and to give to it the standing and dignity of truth.  
 7 *FTC v. Standard Education Society*, 302 U.S. 112, 116-117 (1937) (emphasis added). Other cases  
 8 in which this sales practice, with slight variations, has been condemned include *In re*  
 9 *Crowell-Collier Publishing Company*, 70 F.T.C. 977 (1966), *Basic Books, Inc. v. FTC*, 276 F.2d  
 10 718 (7th Cir. 1960); *In re American Marketing Associates, Inc.*, 73 F.T.C. 213 (1968); *FTC v.*  
 11 *Mary Carter Paint Co.*, 382 U.S. 46 (1965); and *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171  
 12 (1st Cir. 1973).

13 Defendants' use of this deceptive sales tactic is clearly a violation of the FTC Act and  
 14 provides another basis upon which the Court may deny Defendants', and grant the FTC's,  
 15 summary judgment motion as to Count One of the amended complaint.

16 ***D. A sales pitch is deceptive if it can be viewed in both a deceptive and non-deceptive***  
 17 ***light***

18 A seller is responsible for all reasonable meanings conveyed by their ads. *FTC Policy*  
 19 *Statement on Deception*, appended to *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 178 (1984), as adopted  
 20 in *Pantron I Corp.*, 33 F.3d 1088, 1096 n.19 (9<sup>th</sup> Cir. 1994). To be considered reasonable, the  
 21 interpretation or reaction to a sales pitch does not have to be the only one. *In re Sears, Roebuck &*  
 22 *Co.*, 95 F.T.C. 406, 511 (1980), 1980 FTC LEXIS 87 at \*202, *aff'd* 676 F.2d 385 (9th Cir. 1982).  
 23 Indeed, "an interpretation may be reasonable even though it is not shared by the majority of  
 24 consumers in the relevant class, or even by particularly sophisticated consumers. A  
 25 [representation] that misleads a significant minority of consumers is deceptive." *FTC Policy*  
 26 *Statement on Deception*, appended to *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 174 (1984), as adopted  
 27 in *Pantron I Corp.*, 33 F.3d 1088, 1096 n.19 (9<sup>th</sup> Cir. 1994). *See also Rhodes Pharmacal Co., Inc.*  
 28 *v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955) ("Advertisements which are  
 capable of two meanings, one of which is false, are misleading. ... Advertisements which create a  
 false impression, although literally true, may be prohibited.").

Defendants argue that the Court should consider only the most favorable plausible  
 interpretation of Defendants' sale pitch, and set forth at length what they consider that

1 interpretation of their sales pitch to be. In contrast to Defendants' interpretation, the FTC's  
2 evidence shows that many consumers in fact interpret Defendants' sales pitch to be a survey  
3 accompanied by an offer of a free gift. *See generally* SJ Exhibits 27-40 (doc. #5, #5-2, doc. #96),  
4 and SJ Exhibits 48-60 (filed concurrently with this Opposition). These consumers' interpretation  
5 is reasonable. *See* doc. #88 Section II.B.

6 Furthermore, as discussed in the *FTC Policy Statement on Deception*, the fact that some  
7 consumers are not misled by Defendants' sales pitch does not make the interpretation of those  
8 consumers who are victimized "unreasonable." It is reasonable for potential customers who are  
9 presented with Defendants' sales pitch to come away from the sales pitch believing they have been  
10 offered free magazines; under the case law, Defendants must be held liable for that deceptive  
11 interpretation. In short, the *FTC Policy Statement on Deception* makes clear that Defendants' non-  
12 deceptive interpretation, even if plausible, cannot shield them from liability, because consumers  
13 come away from the sales pitch believing they are getting a free gift for which they will incur no  
14 financial obligation. *See, e.g.*, FTC's UF99.

15 ***E. Defendants' sale pitch must be evaluated by the "net impression" it leaves with***  
16 ***consumers, not by the literal "truth or falsity" of selected phrases in the sales***  
***pitch***

17 Defendants argue, without support, that their sales pitch is not deceptive because "[t]hose in  
18 the business of selling goods are permitted to engage potential customers and present their offers in  
19 an attractive light" (doc. #99 at 11:22-24), and therefore their "pitches and sales commentary" are  
20 "non-material" and "non-actionable" (doc. #99 at 11:22, 25). In fact, the case law holds the  
21 opposite: the tendency of a solicitation to deceive "must be judged by viewing it as a whole,  
22 without emphasizing isolated words or phrases apart from their context." *Removatron Int'l Corp.*  
23 *v. FTC*, 884 F.2d 1489, 1496 (1<sup>st</sup> Cir. 1989). *See also Kalwajtys v. FTC*, 237 F.2d 654, 656 (7<sup>th</sup>  
24 Cir. 1956) ("statement may be deceptive even if the constituent words may be literally or  
25 technically construed so as to not constitute a misrepresentation"). It is the net impression  
26 conveyed by a solicitation, "not its literal truth or falsity," that determines whether it is deceptive.  
27 *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200, 1201 (9<sup>th</sup> Cir. 2000). Thus, the Court should  
28 reject Defendants' attempt to downplay their sales pitch as "nonmaterial, non-actionable sales  
commentary." (Doc. #99 at 11:25. *See also* Doc. #99 at 12:6, 17:15, 17:25, 17:27, 18:22)

1 Defendants further argue that they adequately disclose the cost of the magazine  
 2 subscriptions by having their salespeople truthfully describe it as “\$2.76 per week,” and having  
 3 their shift supervisors describe it as “\$11.96 each month for the full 60 months” and “\$29.90” for  
 4 “two months at a time.” As discussed above, that those dollar amounts may be literally true does  
 5 not diminish the fact that Defendants’ sales pitch leaves many potential customers with the net  
 6 impression, based on Defendants’ other representations, that they will receive free magazines upon  
 7 payment of nominal shipping and handling fees. *See, e.g.*, FTC’s UF99.

8 ***F. Defendants’ “verification recordings” and “internal control period” are illusory***  
 9 ***safeguards which do not cure the misrepresentations that Defendants make in***  
 10 ***their lead call***

11 ***1. Defendants’ “verification recordings”***

12 Defendants argue that the verification scripts and recordings show that they tell consumers  
 13 about the five-year length of the subscriptions, Defendants’ non-cancellation policy, and the total  
 14 costs of the magazine offer, and therefore, Defendants have adequately disclosed those terms.  
 15 However, the verification scripts themselves show that the recordings consist of only *a portion* of  
 16 the conversation between the verifier and the potential customer.<sup>8</sup> Importantly, these recordings do  
 17 not include the first part of the verifier’s spiel, in which the verifier lulls the potential customer into  
 18 thinking that no new information about the free magazine offer will be introduced. Those  
 19 unrecorded portions of Defendants’ sales pitch (described in SJ Exhibits 15-40, 48-62) are relevant  
 20 to the Court’s determination of the net impression that is conveyed by the sales pitch.

21 Moreover, the verification recordings themselves show that Defendants’ verifiers routinely  
 22 *fail* to make the disclosures set forth in the verification script. For example, instead of disclosing  
 23 that the total cost is \$897 (“eight hundred ninety seven dollars”), verifiers represent the total cost to  
 24 be “*eight ninety seven*,” which a reasonable consumer could (and consumers do in fact) interpret to  
 25 mean \$8.97.<sup>9</sup> Defendants’ verifiers’ total cost disclosure for its other magazine subscription  
 26 packages (e.g., the \$720, \$540, and \$717.60 packages) is similarly deceptive because Defendants’

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27 <sup>8</sup> As discussed in the FTC’s summary judgment motion, the verification recording also does not  
 28 include the “lead call,” during which the salesperson’s and shift supervisor’s misrepresentations  
 occur. *See* doc. #88 at Section II.B.6.; *see also* FTC’s UF111, UF112, UF122.

<sup>9</sup> *See, e.g.*, Benjamin O’Brien declaration ¶ 8; Heather O’Brien declaration ¶ 6.

1 verifiers fail to say the words “hundred” and “dollars” in those purported disclosures as well.<sup>10</sup>  
 2 Even when a consumer asks about the total cost directly, the verifier dodges the question to make it  
 3 difficult for the consumer to understand the total cost of the offer.<sup>11</sup> The recordings also show that  
 4 Defendants do not make their non-cancellation policy clear.<sup>12</sup>

5 At a minimum, the FTC’s evidence *disputes* Defendants’ assertion that the verification call  
 6 adequately discloses the material terms. Thus, Defendants’ motion for summary judgment on this  
 7 point should be denied. Moreover, because the FTC’s evidence is undisputed that Defendants’  
 8 verification recordings, in the context of the entire sales pitch, is inadequate and misleading, the  
 9

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10  
 11 <sup>10</sup> See, e.g., SJ Exhibit 43 (verification recording of Daylinn Hartshaw) (filed under seal) and  
 12 doc. #102 at p.781 (SJ Exhibit 42 Attachment 8, transcript of verification recording of Daylinn  
 13 Hartshaw) (“Your payment plan total cost of five forty”); SJ Exhibit 43 (verification recording for  
 14 consumer Liza Boquiren) (filed under seal) and doc. #102 at p.738 (SJ Exhibit 42 Attachment 8,  
 15 transcript of verification recording for consumer Liza Boquiren) (“it’s twenty-four per month for  
 16 the first thirty and nothing for the remaining thirty”); SJ Exhibit 43 (verification recording for  
 17 consumer Tess McKinley) (filed under seal) and doc. #102 at p.742 (SJ Exhibit 42 Attachment 8,  
 18 transcript of verification recording for consumer Tess McKinley) (“you’ll pay it up in the first  
 19 twenty-four, which is twenty-nine ninety per month for the first twenty-four, nothing in the  
 20 remaining thirty-six”); SJ Exhibit 43 (verification recording for consumer James Krause) (filed  
 21 under seal) and doc. #102 at p.789 (SJ Exhibit 42 Attachment 8, transcript of verification recording  
 22 for consumer James Krause) (“your payment plan and total cost of the seven seventeen sixty as  
 23 explained to you and also listed on the order’ll be twenty-nine ninety a month for the first twenty-  
 24 four months nothing thirty-six (sic)”); SJ Exhibit 43 (verification recording for consumer Peter  
 25 Harris) (filed under seal) and doc. #102 at p.779 (SJ Exhibit 42 Attachment 8, transcript of  
 26 verification recording for consumer Peter Harris) (“seven seventeen sixty”).

27 <sup>11</sup> See, e.g., FTC’s UF194; SJ Exhibit 43 (verification recording for consumer Thomas  
 28 Hamilton) (filed under seal); and doc. #102 at p.775 (transcript of verification recording for  
 consumer Thomas Hamilton) (Q: “what’s gonna be the total cost, like when I’m all done paying  
 for it?” A: “I couldn’t give you the whole total ah, it’s twenty-nine ninety a month for twenty  
months.”).

24 <sup>12</sup> See, e.g., SJ Exhibit 43 (verification recording for consumer Linda Nielsen) (filed under seal)  
 and doc. #102 at p.822 (transcript of verification recording for consumer Linda Nielsen) (PBS:  
 25 “and we do have a non-cancellation policy during the term and it cancels automatically at the end,  
 26 okay? LINDA NIELSEN: “Okay. [Pause] Oh, I like that idea, so you don’t get stuck paying. PBS:  
 27 Right, right.”); SJ Exhibit 43 (verification recording for consumer Michael Truiano) (filed under  
 28 seal) and doc. #102 at p.832 (transcript of verification recording for consumer Michael Truiano)  
 (PBS: “the order is not cancelled during the first term, it cancels automatically at the end for you  
 and it takes 8-10 weeks to get your services started, okay Mike?” MICHAEL TRUIANO: “I’m  
 sorry can you repeat that last part again?” PBS: “It takes 8-10 weeks to get your service started.”).

1 Court may grant the FTC's summary judgment motion as to Count One of the amended complaint  
2 on this ground as well.

3 2. *Defendants' "ten-business day internal control period"*

4 Defendants tout the fact that they maintain a "ten-business day internal control period" as  
5 an additional safeguard, to "make sure the customer understands the terms of the order" and "give  
6 the customer another opportunity to cancel before PBS enters the order with the publishers and  
7 pays the publishers for the magazines." (Doc.99 at 7:17-21.) But Defendants' scripts do not  
8 include any such disclosure (*see, e.g.*, doc #100-2 (SJ Exhibit 42 Attachment 5, lead scripts; SJ  
9 Exhibit 42 Attachment 6, sales supervisor scripts; and SJ Exhibit 42 Attachment 7, verifier scripts),  
10 and Defendants present no evidence which would even suggest that they inform their potential  
11 customers of this 10-day waiting period at any point before the 10-day period expires.<sup>13</sup> So it  
12 remains unclear how a consumer would know that if they want to cancel their "order," they need to  
13 do it within ten days of the telemarketing call. Defendants also do not provide all of their potential  
14 customers with a call-back telephone number which would allow the potential customer to cancel  
15 their "order" within the ten-day window.<sup>14</sup> Moreover, because of the way Defendants have  
16 structured their sales pitch, many consumers are not even aware that they have an "order," much  
17 less the terms of the order, until they receive their first invoice. *See, e.g.*, FTC's UF132.  
18 Defendants' invoice makes *no mention* of a ten-day cancellation period, and in fact represents the  
19 opposite ("We also have a non cancellation (sic) policy during the term of this agreement."). *See,*  
20 *e.g.*, SJ Exhibit 42 Attachment 2 (doc. #97-2 at pages 524-584, and doc. #100-1). Finally, the  
21 undisputed evidence shows that Defendants *refuse* to cancel such orders even where the customer  
22 attempts to cancel the order *within* the ten-day internal control period. *See, e.g.*, FTC's UF138, SJ  
23 Exhibit 42 at ¶ 28.a.

24  
25 <sup>13</sup> Defendants' correspondence with consumers shows that the first mention of this "ten day  
26 internal control period" is in the form letter that Defendants use in responding to consumer  
27 complaints facilitated by the Better Business Bureau and state and local consumer protection  
agencies. *See, e.g.*, SJ Exhibit 42 Attachment 17 at pp.935-938, 940-943.

28 <sup>14</sup> *See, e.g.*, SJ Exhibit 49 (James Cox declaration ¶ 5); SJ Exhibit 50 (Darla Elder declaration  
¶ 8); SJ Exhibit 52 (Kristal Hall declaration ¶¶ 5, 7); SJ Exhibit 53 (Nicole Hays declaration ¶ 3);  
SJ Exhibit 42 Attachment 2 (invoices) (doc #97-2 at pp.524, 525, 527, 530, 534).

1 **G. The existence of “satisfied” customers does not excuse Defendants from liability**  
 2 **for their deceptive practices**

3 Defendants argue that only a small percentage of their “customers” complain, and that  
 4 therefore, Defendants’ sales practices cannot be found to be deceptive. However, the existence of  
 5 “satisfied” customers does not absolve Defendants from liability for their deceptive practices:

6 The fact that [a seller who has engaged in deceptive practices] had satisfied  
 7 customers [is] entirely irrelevant. ... [The seller] cannot be excused for the deceptive  
 8 practices ..., and be insulated from action by the [FTC] in respect to them, by  
 9 showing that others, even in large numbers, were satisfied with the treatment [the  
 10 sellers] accorded them.

11 *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960).

12 Moreover, the fact that a consumer does not submit a written complaint about Defendants  
 13 does not necessarily mean that the consumer is “satisfied” with his or her experience with PBS.  
 14 Defendants point to consumers who responded their First Payment Coupon survey as “satisfied  
 15 customers.”<sup>15</sup> The face of these First Payment Coupons shows, however, that many of these  
 16 consumers were dissatisfied.<sup>16</sup> Other consumers whom Defendants have identified as “satisfied”  
 17 are likewise actually dissatisfied with their interactions with Defendants.<sup>17</sup>

18 **III. THE MISREPRESENTATIONS THAT DEFENDANTS MAKE IN THEIR SUBSEQUENT**  
 19 **COMMUNICATIONS WITH CONSUMERS VIOLATE THE FTC ACT (COUNT TWO)**

20 Defendants argue that they cannot be found liable under Count Two of the amended  
 21 complaint on the ground that they have “business policies” which “expressly forbid employees to  
 22 represent to customers either that they are in breach of a contract, or that they cannot cancel their  
 23 orders,” and they “automatically honor[] any request for cancelation made within the internal  
 24

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25 <sup>15</sup> See e.g., SJ Exhibit 4 (EDE ROG 16) (Defendants’ take the position that consumers who “are  
 26 paying for and receiving magazines” and consumers “who renew their magazine subscriptions  
 27 and/or add-on to their current subscription(s)” are “satisfied” customers).

28 <sup>16</sup> See SJ Exhibit 42 Attachment 13 at pp.889-893; see also SJ Exhibit 40 (declaration of First  
 Payment Coupon survey respondent Everal Toomer).

<sup>17</sup> See, e.g., SJ Exhibit 60 (Danielle Shepard declaration ¶¶ 5) (“I have been thoroughly  
 dissatisfied with my interactions with Publishers Business Services. I feel like I was forced into  
 paying something that I never agreed to and did not want.”) and SJ Exhibit 41 (Juliana Blatz  
 DuRivage declaration ¶¶ 5, 7 (Danielle Shepard was a consumer on Defendants’ list of “satisfied  
 customers” for April 2007); SJ Exhibit 36 (Leslie Narramore declaration) and SJ Exhibit 41  
 (Juliana Blatz DuRivage declaration ¶¶ 8, 8.b. (Leslie Narramore was a consumer on Defendants’  
 list of “satisfied customers” for April 2008)).

1 control period.” (Doc. #99 at 16:8-11.) The Court should reject Defendants’ argument for several  
2 reasons.

3 **A. Defendants’ business policies do not shield them from liability arising out of their**  
4 **employees’ misrepresentations and threats**

5 First, Defendants cannot shield themselves from liability solely by adopting policies which  
6 prohibit illegal conduct. It is well established that an employer is liable for its employee’s  
7 misrepresentations, even if these actions are contrary to employer’s official policy. “A corporation  
8 which sends out salesmen to promote its product from door to door is unquestionably responsible  
9 for the representations they make.” *In re the Crowell-Collier Publishing Company*, 70 F.T.C. 977  
10 (1960), citing *International Art Co. v. FTC*, 109 F.2d 393, 396 (7<sup>th</sup> Cir. 1940); *Perma-Maid Co. v.*  
11 *FTC*, 121 F.2d 282, 284 (6<sup>th</sup> Cir. 1941). In *International Art Co.*, the Seventh Circuit found that:

12 [t]he agent was clothed with apparent, and we think, real authority to speak and act  
13 for and on behalf of the principal, and the latter is bound thereby. *We know of no*  
14 *theory of law by which the company could hold out to the public these salesmen as*  
15 *its representatives, reap the fruits from their acts and doings without incurring such*  
16 *liabilities as attach thereto.*

17 *International Art Co. v. FTC*, 109 F.2d 393, 396 (7<sup>th</sup> Cir. 1940) (emphasis added).

18 Defendants cite to their written policies, including a “Collection Guidelines” manual (doc.  
19 #99 at 16:12-20), which expressly forbid employees to represent to customers either that they are  
20 in breach of a contract,<sup>18</sup> or that they cannot cancel their orders, as support for their argument that  
21 they have not engaged in deceptive practices in violation of Section 5 of the FTC Act. Defendants

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22 <sup>18</sup> In fact, Defendants’ collection letters show that their actual business practices contradict this  
23 policy. Defendants routinely send out collection letters which characterize the order as an  
24 enforceable “contract” or “agreement,” and which expressly threaten to report to credit bureaus the  
25 consumer’s failure to pay PBS. (See Doc. #88 at Section II.D.). In these collection letters,  
26 Defendants refer to the consumer’s “delinquent magazine account” (James Laurence letter), “the  
27 balance of your account as stated on your contract with us” (James Laurence letter), “all monies  
28 due plus interest and costs, as provided by the agreement” (John Carlton and Bob Callahan letters).  
See SJ Exhibit 23 (Crystal Matthews deposition, deposition exhibit 1p.326); SJ Exhibit 30 (Kristy  
DeRuijter declaration ¶ 8, declaration Exhibit 1 p.416); SJ Exhibit 23 (Crystal Matthews deposition,  
deposition exhibit 1 at p.324-a) for copies of the “James Laurence” letter. See SJ Exhibit 23  
(Crystal Matthews deposition exhibit 1 p.327), SJ Exhibit 30 (Kristy DeRuijter declaration ¶ 8,  
DeRuijter exhibit 2 p.417); SJ Exhibit 23 (Crystal Matthews deposition, deposition exhibit 1 at  
p.324-a) for copies of the “John Carlton” letter. See SJ Exhibit 23 (Crystal Matthews deposition  
exhibit 1 at p.328-329) for copy of the “Bob Callahan” letter.



1 do not proffer any evidence which would show the stringency with which Defendants enforce these  
2 policies or that their employees actually comply with the policies. Like the principal in  
3 *International Art*, Defendants in this case have reaped the monetary benefits of their employees'  
4 misrepresentations, and therefore should be held liable for these actions.

5 ***B. Regardless of their business policies, Defendants' employees engaged in deceptive  
and abusive collection practices***

6 Second, even if we assume for purposes of this Opposition that Defendants both had  
7 meaningful policies in place and took effective steps to enforce these policies, the FTC's evidence  
8 shows that Defendants' employees nonetheless did in fact engage in deceptive and abusive  
9 collection practices, including falsely threatening consumers with legal action and negative credit  
10 repercussions if the consumers refused to pay.

11 "Section 5 [of the FTC Act] is violated where an interstate seller of goods uses threats of  
12 legal proceedings in an attempt to coerce his customers to pay for goods which have been placed  
13 into the recipient's hands through practices which are unfair and deceptive." *In re Wilson Chemical*  
14 *Co., Inc.*, 64 F.T.C. 168 (1964), 1964 FTC Lexis 117 at \*36. It is also a violation of Section 5 for a  
15 company to threaten to sue in an attempt to coerce payment where the company has no intent of  
16 ever commencing legal proceedings because "[t]hese practices have the tendency and capacity to  
17 mislead persons receiving the threats." *Id.*, 1964 FTC Lexis 117 at \*37.

18 Defendants' collection practices are similar to those condemned in *Wilson Chemical Co.*  
19 and *In re Encyclopaedia Britannica*, 87 F.T.C. 421, 1976 FTC LEXIS 474, \*180-182 (1976).  
20 Specifically, Defendants send consumers collection letters (FTC'S UF146, UF147, UF148, UF149,  
21 UF150), including from PBS's fictitious "Legal Department" and "Credit Supervisor," demanding  
22 payment and threatening more aggressive collection action and harm to consumers' credit ratings.<sup>19</sup>  
23 Defendants also engage consumers in the collection and "customer service" calls in which  
24 Defendants' employees make misrepresentations, such as that the consumer may not cancel the  
25 subscription orders, that PBS has verification recordings which "prove" that the consumer agreed

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26  
27 <sup>19</sup> Defendants admit that "PBS does not hire outside collection companies, nor does it report  
28 delinquent accounts to the credit bureaus or initiate legal proceedings against customers with  
delinquent accounts." Dries Dantuma declaration ¶ 31 (doc. #99-10). Thus, Defendants'  
representations to the contrary are false.

1 to make payments, that the consumer must pay because PBS has already paid for the magazine  
2 subscriptions on the consumer's behalf, and that failure to pay for the subscriptions will result in  
3 lawsuits, garnishments, other collection actions, and damage to the consumer's credit histories.  
4 (*See* Doc. #99 at Section II.D.1.; FTC's UF133, UF135, UF136, UF141, UF142, UF143, UF144,  
5 UF145, UF191, UF192.)

6 Defendants assert without specificity that they have policies and procedures in place to  
7 ensure that their employees do not "abuse or harass" customers;<sup>20</sup> however, they do not dispute that  
8 they send out these collection letters or that they respond to cancellation requests with a protocol to  
9 "save" the "order." These collection acts and practices are an integral part of Defendants' scheme  
10 to bully consumers to pay hundreds of dollars for magazine subscription packages on terms the  
11 consumers never agreed to. They are clear violations of Section 5 of the FTC Act.

12 **C. *Defendants' actual business practices do not conform to the "business policies"***  
13 ***described in their motion***

14 Third, the FTC's evidence shows that Defendants' actual business practices are far different  
15 from the practices described in their motion:

16 – Defendants claim that "*PBS automatically honors any request for cancellation made*  
17 *within the internal control period.*" (Doc. #99 at 16:10-11.) This claim is contradicted by  
18 Defendants' own "Collection Guidelines," which instructs collectors to respond to a consumer's  
19 request to cancel by initiating a "save order" protocol. (Doc. #99-10 and #99-11, Dries Dantuma  
20 declaration Exhibit 3.)

21 – Defendants claim that "*Upon the customer's request, PBS will play the tape recording*  
22 *of the customer's verbal agreement to pay for the subscriptions monthly.*" (Doc. #99 at 16:21-22.)  
23 In fact, the tape recording does not contain the consumer's "verbal agreement" because the  
24 consumer has been tricked into participating in this recorded conversation in which the consumer  
25 appears to agree, but in fact has not agreed, to Defendants' invoice terms. (Doc. #88 at Section  
26 II.B.6.)

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27 <sup>20</sup> Defendants do not explain what they consider to be "abuse" and "harassment." Based on their  
28 employees' documented pattern of conduct, it appears that Defendants define those terms a lot  
more narrowly than what is considered to be abuse and harassment under the TSR and by the  
reasonable consumer.

1           – Defendants claim that “*If a mistake has occurred, and the customer did not agree to*  
2 *pay, PBS cancels the account immediately.*” (Doc. #99 at 16:22-23.) The FTC’s evidence shows  
3 that even in some instances where it is obvious from the verification recording that the consumer  
4 did not understand or agree to the terms, the account is not cancelled immediately. *See* doc. #97-2  
5 (third Gale declaration ¶¶ 54.b., c., 56.b., c., 57.a., b., 59.b., discussing “bad tapes” pertaining to  
6 consumers Andrea Wong, minor M.R., Jacob Roostad, Paul Eads, Denise Dominguez, Patricia  
7 Hall, and Crystal Matthews).

8           – Defendants claim that “*If a customer desires to cancel despite having agreed to pay,*  
9 *PBS will try to save or modify the order to satisfy the customer*” (doc. #99 at 16:23-24) and “*If this*  
10 *does not work, PBS cancels the account and ceases all charges*” (doc. #99 at 16:24-25). The  
11 FTC’s evidence shows that in this situation, Defendants typically proceed by sending collection  
12 letters and making repeated and harassing collection calls to the consumer. Thus, Defendants’  
13 claim that they try to “save or modify the order to satisfy the customer” is disputed. These  
14 collection efforts do not cease until at least seven or eight months have passed. *See, e.g.,* doc. #5  
15 pp.62-81 (Crystal Matthews declaration).

16           – Finally, Defendants claim that “[*W*]hen PBS is faced with a request for cancellation,  
17 *PBS seeks to preserve its business relationships through truthful reminders about the low cost of*  
18 *the subscriptions, and the customer’s verbal agreement to pay.*” (Doc. #99 at 17:8-10.) The  
19 FTC’s evidence shows that these magazine subscriptions are not discounted or otherwise “low  
20 cost.”<sup>21</sup> Furthermore, as discussed above, the FTC’s evidence shows that many consumers have  
21 not verbally agreed to pay and have been tricked into participating in a recording which falsely  
22 portrays them as having agreed.

23  
24  
25           <sup>21</sup> Defendants describe their magazine subscriptions are “low-cost” (doc. #99 at 14:6, 14:23,  
26 17:9, 27:21) but provide no support for this characterization. Moreover, the FTC’s evidence shows  
27 that Defendants’ prices are not cheaper, and typically *substantially more expensive* than magazine  
28 subscriptions available on the open market. *See* SJ Exhibit 67 (Fourth Gale Declaration ¶¶ 2-8).  
Moreover, Defendants concede that they are not able to negotiate discounts with magazine  
publishers, and that prices are set unilaterally by the publishers. *See* SJ Exhibit 63 (Brenda  
Dantuma Schang deposition transcript (vol.1) at 36:12-25 and 37:1-7).

1 In short, the FTC's evidence controverts the facts that Defendants set forth in support of  
 2 their claim that they have business policies in place to prevent deception. Thus, the Court must  
 3 deny Defendants' summary judgment motion as to Count Two of the amended complaint.

4 **IV. DEFENDANTS ARE LIABLE FOR THEIR VIOLATIONS OF EACH OF THE TSR COUNTS  
 (COUNTS THREE THROUGH SIX)**

5 **A. *Defendants do not qualify for the business-to-business exemption because they  
 are selling magazines to individual consumers, not businesses***

6 A threshold issue that must be addressed in evaluating the parties' cross-motions as to  
 7 Counts Three through Six of the amended complaint is whether Defendants' acts and practices are  
 8 exempt from the FTC's Telemarketing Sales Rule ("TSR") under the TSR's "business-to-business"  
 9 exemption. The "business-to-business" exemption provides that:

10 The following acts or practices are exempt from [the TSR]: ... *Telephone calls  
 11 between a telemarketer and any business, except calls to induce the retail sale of  
 nondurable office or cleaning supplies ....*

12 16 C.F.R. § 310.6(b)(7) (emphasis added). Defendants take the position that they may telemarket  
 13 to individual consumers without having to comply with the TSR as long as they make their  
 14 telemarketing calls to the consumers at their work telephone number and do not sell nondurable  
 15 office or cleaning supplies. As discussed below, Defendants' reading of the business-to-business  
 16 exemption is contradicted by both a plain reading and the legislative history of the exemption, and  
 17 therefore Defendants should be held liable for all telemarketing calls that they make in violation of  
 18 the TSR.

19 *1. The plain meaning of the "business-to-business" exemption is that only  
 20 telephone calls between a telemarketer and a business are exempt*  
 21 "As a general interpretative principle, 'the plain meaning of a regulation governs.'" *SAFE*  
 22 *Air For Everyone v. U.S. EPA*, 488 F.3d 1088, 1097 (9<sup>th</sup> Cir. 2007) (quoting *Wards Cove Packing*  
 23 *Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9<sup>th</sup> Cir. 2002)). If the meaning of the  
 24 regulation is ambiguous, the Court shall defer to the agency's interpretation of its regulation.  
*Wards Cove Packing Corp.*, 307 F.3d at 1219.

25 The plain language of Section 310.6(b)(7) of the TSR provides that a telephone call is  
 26 exempt from the TSR if it is "between" a "telemarketer" and "any business." This is narrower than  
 27 the interpretation that Defendants propose ("anytime a telemarketer calls a business, i.e. dials a  
 28 business's phone number, that call is exempt from the TSR as long as the telemarketer is not

1 *attempting to induce the retail sale of non-durable office or cleaning supplies,*” doc. #99 at 23:16-  
 2 18). Clearly, a telemarketer’s call to an individual at his or her business telephone *number* is not  
 3 the same as a telemarketing call *between* the telemarketer and the *business* itself.<sup>22</sup> The term “*any*  
 4 *business*” in the exemption language, “[*t*]elephone calls between a telemarketer and any business”  
 5 thus refers to telemarketing calls made to solicit business from the business entities themselves,  
 6 rather than from the individuals employed by the business entity.

7 2. *The exclusion of telemarketing calls relating to the “retail sale of*  
 8 *nondurable office or cleaning supplies” from the business-to-business*  
 9 *exemption also shows that the exemption is intended to apply only to B2B*  
 10 *calls*

11 The business-to-business exemption includes an exclusion for telemarketing calls relating  
 12 to the “*retail sale of nondurable office or cleaning supplies*” (the “exclusion”). 16 C.F.R.  
 13 § 310.6(b)(7). Examples of “nondurable office and cleaning supplies” include paper, pencils,  
 14 solvents, copying machine toner, and ink.<sup>23</sup>

15 Under Defendants’ proposed interpretation of the business-to-business exemption,  
 16 telemarketers can telemarket to individual consumers at work without complying with the TSR, as  
 17 long as they are not hawking “nondurable office or cleaning supplies.” Defendants’ interpretation  
 18 would lead to the nonsensical result that the TSR protects consumers from deceptive and abusive  
 19 telemarketing calls only if: (1) the consumer is called at home, or (2) the consumer is called  
 20 anywhere (including at work) as long as the telemarketer is selling nondurable office or cleaning  
 21 supplies. Defendants provide no explanation why, when a consumer receives a telemarketing call  
 22 at work, the TSR would protect the consumer if the call relates to the sale of nondurable office and  
 23 cleaning supplies, but not if it relates to the sale of any other products, such as the magazine  
 24

25 <sup>22</sup> The manner in which the TSR defines the term “person” also supports the plain meaning of  
 26 the business-to-business exemption. That definition expressly distinguishes between the concepts  
 27 “business entities” (including unincorporated associations, limited or general partnerships,  
 28 corporations, or other business entities) and “individuals.” 16 C.F.R. § 310.2(v).

<sup>23</sup> See, e.g., “Complying with the Telemarketing Sales Rule,” publicly available at  
<http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm> (attached to FTC’s Compendium  
 of federal materials, filed concurrently herewith).

1 subscriptions sold by Defendants.<sup>24</sup> In short, Defendants' interpretation of the exclusion does not  
2 make sense.

3 In contrast, the exclusion does make sense under the FTC's interpretation of the business-  
4 to-business exemption. It is well documented that the FTC proposed this exclusion in recognition  
5 of a proliferation of telemarketing "toner-phoner" scams that have targeted small businesses.<sup>25</sup> The  
6 Statement of Basis and Purpose accompanying the Final Rule amplifies the FTC's rationale for the  
7 exclusion:

8 [T]elephone calls to sell nondurable office and cleaning supplies are the only business-to-  
9 business contacts that are not exempt from this Rule. *The Commission believes that the*  
10 *conduct prohibitions and affirmative disclosures mandated by the Final Rule are crucial to*  
*protect businesses – particularly small businesses and nonprofit organizations – from the*  
*harsh practices of some unscrupulous sellers of those products."*

11 Statement of Basis and Purpose, 60 F.R. 43842 at \*43862 (emphasis added).

12 3. *The FTC's plain meaning reading of the exemption is consistent with*  
13 *industry usage of the term "business-to-business"*

14 Moreover, the FTC's plain meaning reading of the exemption language is consistent with  
15 commonly accepted industry definitions. The term "business-to-business" (also referred to as  
16 "B2B") refers to commercial transactions between businesses (e.g., sales by supplier to wholesaler,  
17 or by wholesaler to retailer). B2B sales are often contrasted with "business to consumer"

18  
19 <sup>24</sup> In fact, the TSR has previously been enforced against deceptive telemarketing of magazine  
20 subscriptions against Defendants themselves, in connection with Defendants' former practice of  
21 beginning their sales pitch with a "door opener" which offered consumers the chance to enter a  
22 sweepstakes. See May 30, 2000 "Comments and Recommendations of Attorneys General"  
23 submitted by the National Association of Attorneys General, at page 7 fn.4 (recommending  
24 additional changes to the TSR to make clear that this practice is prohibited by the TSR) (attached  
25 to FTC's Compendium of federal materials).

26 <sup>25</sup> See, e.g., Prepared Statement of the Federal Trade Commission on Office Supply Fraud  
27 Before the Committee on Small Business, United States Senate (publicly available at  
28 <http://www.ftc.gov/os/2000/03/officesuptest.htm>) (attached to FTC's Compendium of federal  
materials). See also transcript of July 27-28 Telemarketing Sales Rule Review Forum at 258:4-8  
(publicly available at <http://www.ftc.gov/bcp/rulemaking/tsr/tsragenda/tsrtranscript2.pdf>) ("MS.  
SEALS [representing the National Association of Attorneys General]: This is a question to the  
Commission. I'm presuming that the nondurable office supply coverage was based on a history of  
the fact that toner-phoner type cases were plentiful to find. MS. HARRINGTON [representing  
FTC]: Yes.") (attached to FTC's Compendium of federal materials).

1 transactions (also referred to as “B2C”), which are transactions between businesses to individual  
2 customers (e.g., sales by a retailer to the general public). B2B transactions are distinguishable  
3 from B2C transactions in terms of both type of order (B2B orders are often repeat or “standing”  
4 orders for the same products, in the same amounts, at fairly regular intervals), and method of  
5 payment (B2B payments are often made through lines of credit and “open” orders, rather than  
6 made with a check, money order, or credit card).

7 4. *The FTC’s plain meaning reading of the exemption is consistent with the*  
8 *FTC’s published regulatory intent*

9 Under the case law, if the Court concludes that the TSR’s language does not plainly include  
10 Defendants’ conduct within its reach, it should consider the FTC’s published regulatory intent.  
11 “The plain language of a regulation ... will not control if ‘clearly expressed [administrative] intent  
12 is to the contrary or [if] such plain meaning would lead to absurd results.’” *SAFE Air For Everyone*  
13 *v. US EPA*, 488 F.3d 1088, 1097 (9<sup>th</sup> Cir. 2007) (quoting *Dyer v. United States*, 832 F.2d 1062,  
14 1066 (9<sup>th</sup> Cir. 1987)).

15 The notice requirements of the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1),  
16 553(b), requires that some indication of the regulatory intent that overcomes plain language must  
17 be referenced in the published notices that accompanied the rulemaking process. *SAFE Air For*  
18 *Everyone v. US EPA*, 488 F.3d 1088, 1097-98 (9<sup>th</sup> Cir. 2007). *See also Webb v. Smart Document*  
19 *Solutions, LLC*, 499 F.3d 1078, 1085 (9<sup>th</sup> Cir. 2007). Consistent with that requirement, the FTC  
20 has published its regulatory intent regarding the TSR’s business-to-business exemption in its  
21 February 1995 *Notice of Proposed Rulemaking*, June 1995 *Revised Notice of Proposed*  
22 *Rulemaking*, and August 1995 *Statement of Basis and Purpose and Final Rule*. The FTC’s intent  
23 that the business-to-business exemption refer to telephonic contacts between businesses is  
24 expressly stated in each of these statements.

25 The February 1995 *Notice of Proposed Rulemaking* describes the proposed “business-to-  
26 business” exemption as “*telephonic contacts between businesses*” (60 F.R. 8313 at \*8320), and  
27 further explains that:

28 the proposed rule covers all outbound telephone calls intended to induce payment  
for goods or services, *except* for calls made by a person who engages in fewer than  
ten telephone sales each year, or *for telephonic contacts made from one business to*

1 *another that do not involve the sale of office or cleaning supplies or certain*  
2 *charitable solicitations.*

3 *Id.* at \*8320-21 (emphasis added).

4 Moreover, the FTC's intent that the proposed "business-to-business" exemption apply to  
5 transactions between the businesses themselves (as opposed to calls that telemarketers make to  
6 individuals at their place of business) is further evidenced by the issues on which the FTC  
7 requested comment:

8 The Commission seeks comments on various aspects of the proposed rule. Without  
9 limiting the scope of issues it seeks comment on, the Commission is particularly  
10 interested in receiving comments on the questions that follow: ...

11 43. The proposed rule also exempts *telephonic contacts between*  
12 *businesses*, except such contacts involving the sale of office or  
13 cleaning supplies or certain charitable solicitations.

14 ...  
15 b. Are there other types of goods or services sold in  
16 business-to-business contacts which should not be  
17 exempted from the rule?

18 *Id.* at \*8322, \*8327 (emphasis added).

19 The *Revised Notice of Proposed Rulemaking*, published in June 1995 at 60 F.R. 30406, also  
20 makes clear that the purpose of the business-to-business exemption was to exempt B2B  
21 transactions while prohibiting office supply scams directed at small businesses. As reflected in the  
22 *Revised Notice of Proposed Rulemaking*, the changes that commenters requested to the proposed  
23 "business-to-business" exemption fell within four categories: (1) expanding the exemption to  
24 include entities other than businesses (such as governmental agencies and educational institutions);  
25 (2) clarifying the type of office supplies excluded from the exemption; (3) expanding the  
26 exemption by eliminating the exclusions to the exemption; and (4) reducing the scope of the  
27 exemption by adding additional categories of goods and services to the exclusion to the exemption.  
28 *Id.* at \*30423. These comments show that industry commenters also understand the business-to-  
business exemption to apply only to telemarketing calls intended to generate transactions between  
businesses. The comments also highlight another absurdity that would result if the Court adopted  
Defendants' proposed reading: why would the TSR protect consumers who work for a government  
agency or educational institution, but not consumers who work for a business?<sup>26</sup>

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<sup>26</sup> Thus, under *SAFE Air For Everyone*, 488 F.3d 1088, even if the Court accepts Defendants'



1 In fact, in proposing revised TSR language, the FTC expressly referred to the reason why  
2 nondurable office or cleaning supply telemarketing calls should not be exempt from the TSR. In  
3 publishing the revised version of the proposed “business-to-business” exemption, the FTC declined  
4 to expand the exemption, noting that it “has extensive enforcement experience pertaining to  
5 *deceptive telemarketing directed to businesses*” and thus “*it does not believe that an across-the-*  
6 *board exemption for business-to-business contacts is appropriate.*” 60 F.R. 30406 at \*30423.  
7 This is another “clear expression” of the FTC’s intent that the business-to-business exemption is to  
8 not impede legitimate transactions between businesses. *SAFE Air For Everyone v. US EPA*, 488  
9 F.3d 1088, 1097 (9<sup>th</sup> Cir. 2007).

10 Finally, the FTC’s clearly expressed administrative intent that the business-to-business  
11 exemption covers only telemarketing “directed to businesses” is reiterated in the “Statement of  
12 Basis and Purpose and Final Rule” published on August 23, 1995 in the Federal Register:

13 The Commission believes that *Congress did not intend that every business use of*  
14 *the telephone be covered by this Rule.* Nevertheless, the Commission’s extensive  
15 enforcement experience pertaining to *deceptive telemarketing directed to*  
16 *businesses, particularly office and cleaning supply scams*, amply demonstrate that  
17 an across-the-board exemption for business-to-business contacts is inappropriate.  
18 *The Commission recognizes that there may have been past problems with*  
19 *telemarketing sales of products other than office or cleaning supplies to businesses.*  
20 However, *the Commission’s enforcement experience against deceptive*  
21 *telemarketers indicates that office and cleaning supplies have been by far the most*  
22 *significant business-to-business problem area*; such telemarketing falls within the  
23 definition of deceptive telemarketing acts or practices. Therefore, the Commission  
24 has decided not to expand the list of business-to-business telemarketing activities  
25 excluded from the exemption. The Commission will reconsider that position if  
26 additional *business-to-business telemarketing activities* become problems after the  
27 Final Rule has been in effect.

28 60 F.R. 43842 at \*43961 (emphasis added).

These published notices make it clear that the business-to-business exemption applies to  
telemarketing calls made to solicit business from businesses, and does not cover Defendants’  
telemarketing calls to individual consumers.

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argument that the exemption plainly means that telemarketing calls to individual consumers are not  
subject to the TSR if the calls are made to the consumers at work, Defendants’ interpretation must  
still be rejected because it would lead to an absurd result.

1 5. *The FTC's plain meaning reading of the exemption is consistent with the*  
2 *published notices and comments relating to the 2003 TSR amendments*

3 The notice and comment proceedings relating to the 2003 amendments to the TSR similarly  
4 show that the FTC, other law enforcement agencies, and the business sector commonly understand  
5 the business-to-business exemption to apply to telemarketing calls made with the intent to generate  
6 a B2B transaction. The FTC specifically noted in the January 30, 2002 *Notice of Proposed*  
*Rulemaking*, 67 F.R. 4492, that:

7 [T]he Commission also is cognizant of the increasing emergence of fraudulent  
8 *telemarketing scams that target businesses*, particularly small businesses, for certain  
9 kinds of fraud. *The Commission receives a high number of complaints about such*  
10 *business-to-business telemarketing frauds*, and has brought numerous law  
11 enforcement actions against them, both under the Rule and section 5 of the FTC  
12 Act. Currently, the Rule makes the business-to-business exemption unavailable to  
13 telemarketers of nondurable office or cleaning supplies.

14 67 F.R. 4492 at \*4531.

15 Public comments from industry representatives show that they also recognized that  
16 telemarketing to a business and telemarketing to individual consumers are substantially different  
17 because business customers are more sophisticated than individual consumers and do not need the  
18 same level of disclosures that individual consumers do. For example, the January 30, 2002 *Notice*  
19 *of Proposed Rulemaking* cites to the comments submitted by the Electronic Retailing Association,  
20 which:

21 praised the business-to-business exemption, noting that in business-to-business  
22 transactions, telemarketers are selling to *'uniquely sophisticated' purchasers who*  
23 *are skilled in evaluating and negotiating competing offers*. ERA also noted that  
24 *business purchasers would 'find a seller's rote adherence to the requirements of the*  
25 *TSR annoying and disruptive to ordinary business negotiations.'*

26 67 F.R. 4492 at \*4531 (emphasis added).

27 Likewise, public comments from state and local law enforcement similarly recognized that  
28 the business-to-business exemption was intended to apply to B2B transactions. In the *Notice of*  
*Public Rulemaking*, the FTC noted that law enforcement took the position that the business-to-  
business exemption was too broad and prevented them from prosecuting many non-toner-phoner  
telemarketing scams which target small businesses. 67 F.R. 4492 at \*4531.

1           6.       *The FTC's plain meaning reading of the exemption is consistent with*  
 2                    *Congressional intent*

3           The FTC's reading of the "business-to-business" exemption is also consistent with  
 4           Congressional intent, as expressed in the Telemarketing and Consumer Fraud Abuse Prevention  
 5           Act, 15 U.S.C. § 6101 *et seq.* ("Telemarketing Act"), the statute pursuant to which the FTC  
 6           implemented the TSR. Congress explicitly states that the purpose of the Telemarketing Act is to  
 7           "offer consumers necessary protection from telemarketing deception and abuse." 15 U.S.C.  
 8           § 6101(5). In Section 6102 of the Telemarketing Act, Congress directs the FTC to prescribe rules<sup>27</sup>  
 9           which, *inter alia*, protect the reasonable consumer from abusive telemarketing acts and practices,  
 10          including "a pattern of unsolicited telephone calls which the reasonable consumer would consider  
 11          coercive or abusive of such consumer's right to privacy," 15 U.S.C. § 6102(3)(A), and require  
 12          telemarketers to "promptly and clearly disclose to the person receiving the call that the purpose of  
 13          the call is to sell goods or services" or to make "such other disclosures as the Commission deems  
 14          appropriate, including the nature and price of the goods or services," 15 U.S.C. § 6102(3)(C). The  
 15          Telemarketing Act does not limit these protections to consumers only when they receive  
 16          telemarketing calls at home, as opposed to while they are at work. *See generally* 15 U.S.C. § 6101  
 17          *et seq.*<sup>28</sup>

17           7.       *Defendants do not qualify for exemption even under their own proposed*  
 18                    *reading of the business-to-business exemption*

19          Moreover, Defendants' argument must fail even if the Court accepts Defendants' proposed  
 20          reading of the "business-to-business" exemption ("anytime a telemarketer calls a business, *i.e.*  
 21          *dials a business's phone number, that call is exempt from the TSR as long as the telemarketing is*  
 22          *not attempting to induce the retail sale of non-durable office or cleaning supplies," doc. #99 at*  
 23          23:16-18). Contrary to Defendants' assertion that they "only call[] businesses" (doc. #99 at  
 24          23:22), the FTC's evidence shows that Defendants also call consumers' home telephone numbers  
 25          and personal cell phone numbers as part of their telemarketing campaign. *See, e.g.,* FTC's UF142.

26          <sup>27</sup> This instruction is the basis for the FTC's implementation of the TSR.

27          <sup>28</sup> *See also* Notice of Proposed Rulemaking, 67 FR 4492 at \*4530 ("A review of the legislative  
 28          history of the Telemarketing Act indicates that *the implicit concern behind the Act was with*  
 29          *deceptive solicitations that directly target an individual consumer or address (e.g., outbound*  
 30          *telemarketing calls or direct mail solicitations that induce the consumer to call a telemarketer) ...").*

1 Because those calls are not made to a business's phone number, Defendants' telemarketing  
 2 campaign falls outside of even their own contorted interpretation of the "business-to-business"  
 3 exemption. Thus, Defendants are subject to the TSR even under their own logic.<sup>29</sup>

4 ***B. Defendants violate the TSR by failing to disclose the seller's identity and purpose***  
 5 ***of their telemarketing calls truthfully, promptly, and in a clear and conspicuous***  
 6 ***manner (Count Three)***

7 Section 310.4(d)(2) of the TSR requires telemarketers, in an outbound telephone call to  
 8 induce the purchase of goods or services, to disclose, truthfully, promptly, and in a clear and  
 9 conspicuous manner to the person receiving the call, that the purpose of the call is to sell goods or  
 10 services. 16 C.F.R. § 310.4(d)(2). This rule codifies the case law regarding the illegality of  
 11 deceptive "door openers."<sup>30</sup>

12 Defendants claim, without pointing to specific script language, that they "promptly and  
 13 clearly disclose[] that the call is being made for the purpose of selling magazines" (doc. #99 at  
 14 27:12-13) and "the lead call unmistakably communicates to customers that PBS is selling  
 15 magazines" (doc. #99 at 27:17-18). Defendants' evidence in support of this claim is nothing more  
 16 than a conclusory, self-serving, and unsupported assertion, which is controverted by Defendants'

17 <sup>29</sup> The Court should reject Defendants' argument that the FTC's interpretation of the business-  
 18 to-business exemption requires a "backward-looking factual analysis," as a red herring.  
 19 Defendants' scripts require their salespeople to ask whether the consumer would like to receive the  
 20 magazines at home or at work and to ask for the consumer's home telephone number. Thus, it is  
 21 clear that the purpose of their telemarketing calls is not to induce a B2B transaction. Defendants  
 22 do not ask to speak with the person at the business who has authority to purchase products or enter  
 into contracts on behalf of the business. Their business model is premised on intentionally trying  
 to reach the busy receptionist or store clerk working at the business and selling to that person, not  
 to the business itself.

23 <sup>30</sup> See 1995 Statement of Basis and Purpose accompanying the TSR. 60 F.R. 43842 (1995):  
 24 [T]he legislative history of the Telemarketing Act noted the problem of deceptive  
 25 telemarketers contacting potential victims under the guise of conducting a poll,  
 26 survey, or other type of market research. To address these problems, the  
 27 Commission believes that in any multiple purpose call where the seller or  
 28 telemarketer plans, in at least some of those calls, to sell goods or services, *the*  
*disclosures required by this section of the Rule must be made 'promptly,' during the*  
*first part of the call, before the non-sales portion of the call takes place. Only in*  
*this manner will the Rule assure that a sales call is not being made under the guise*  
*of a survey research call, or a call for some other purpose.*

60 FR 43842 at \*43856 (emphasis added).

1 own sales scripts, as well as the other evidence presented by the FTC. As discussed in Section  
2 II.B., *supra*, Defendants begin their sales pitch with a request that the consumer take a survey, and  
3 mention magazines in the context of thanking the consumer for answering Defendants' survey  
4 questions. *See* FTC's UF88, UF89, UF92, UF94, UF95. The evidence shows Defendants' use of  
5 deceptive door openers leave many consumers with the net impression that they will receive free  
6 magazines and fail to impress upon consumers that Defendants are selling long-term magazine  
7 subscriptions. *See, e.g.*, FTC's UF95.

8 Defendants' use of these deceptive door openers is a sufficient basis for denying  
9 Defendants', and granting the FTC's, summary judgment motion as to Count Three of the amended  
10 complaint.

11 ***C. Defendants violate the TSR by misrepresenting the total costs to purchase or***  
12 ***receive their magazines (Count Four)***

13 Section 310.3(a)(2)(i) of the TSR prohibits sellers and telemarketers from misrepresenting,  
14 directly or by implication, in the sale of goods or services, the total costs to purchase, receive, or  
15 use, and the quantity of, any goods or services that are the subject of a sales offer. 16 C.F.R.  
§ 310.3(a)(2)(i).

16 First, Defendants' employees misrepresent to consumers that there is no cost to receive the  
17 magazine subscriptions, and that all they are asking the consumers to pay is nominal shipping and  
18 handling charges. *See, e.g.*, FTC's UF96, UF99. As discussed above, Defendants admit that the  
19 money they ask consumer for is not to cover "shipping and handling," but rather is the retail  
20 purchase price of the magazine subscriptions. *See, e.g.*, FTC's UF173.

21 Second, Defendants' salespeople misrepresent the number of payments under Defendants'  
22 payment plan. Defendants' scripts state that the consumer will receive "60 issues" of specified  
23 magazines. *See* SJ Exhibit 42 Attachment 5 at p.719. *See also* doc. 99-4 Exhibit 2 to Jeff  
24 Dantuma declaration; SJ Exhibit 42 Attachment 5 at pp. 703-706, 709-718, 720-722. If each of  
25 these magazines were published monthly, a consumer who is able to meaningfully absorb the terms  
26 of Defendants' offer would be able to correctly conclude that this is five years' worth of  
27 magazines. However, some of these magazines are weekly or bi-weekly, not monthly,  
28 publications. *U.S. News & World Report*, for example, was published weekly (around 52

1 issues/year) through the end of 2008, and published 32 issues in 2008. See SJ Exhibit 67 (Fourth  
2 Gale declaration ¶ 6.a.vii). *Rolling Stone* is published bi-weekly. See SJ Exhibit 67 (Fourth Gale  
3 declaration ¶ 4.a.v). Sixty issues of weekly magazines at \$2.76 per week is substantially less  
4 (\$2.76 x 60 weeks = \$165.60) than sixty issues of monthly magazines (\$2.76 x 260 weeks =  
5 \$717.60). Likewise, 60 issues of a bi-weekly magazine at \$2.76 per week is also substantially less  
6 (\$2.76 x 130 weeks = \$358.80) than sixty issues of monthly magazines. A consumer who is  
7 familiar with the frequency with which *U.S. News & World Report* and *Rolling Stone* are published  
8 could reasonably conclude from Defendants' representations (assuming that the consumer is able  
9 to otherwise meaningfully understand the terms of Defendants' offer) that the total costs of  
10 Defendants' offer is less than the \$717.60 (or \$720 or \$897 or \$540, depending on the package  
11 being offered) to which Defendants later claim consumers agreed.

12 Third, Defendants' salespeople's representation that the consumer will receive "60 issues"  
13 of specified magazines is false in another respect as well. The invoices that Defendants send to  
14 consumers show that the consumers' "orders" contain magazine subscriptions which are not 60  
15 issues long. Many of these orders include, for example, 90 issues of *Inc.* magazine. (See, e.g., SJ  
16 Exhibit 67 ¶¶5, 5.a., 6, 6.a.vi., 7, 7.a.iv.) This is a 9-, not 5-year, subscription. These orders also  
17 include 52 issues of *U.S. News & World Report* and 130 issues of *Rolling Stone*. Defendants'  
18 misrepresentation that consumers will receive "60 issues" of specified magazines is another reason  
19 why it is impossible for consumers to correctly determine the total cost of Defendants' offer.

20 Fourth, in many instances, Defendants also expressly misstate the total cost, omitting  
21 crucial words like "hundreds" and "dollars" from their purported disclosures, so that it sounds to  
22 the consumer that the total costs are \$8.97 (rather than \$897), \$7.17 (rather than \$717.60), \$7.20  
23 (rather than \$720), or \$5.40 (rather than \$540). See Section II.F.1, *supra*.

24 In short, Defendants' own scripts show that their sales pitch misrepresents both the total  
25 costs of the magazine subscriptions and quantity of magazines being offered. The Court should  
26 thus deny Defendants', and grant the FTC's, summary judgment motion with respect to Count Four  
27 of the amended complaint.  
28

1           ***D. Defendants violate the TSR by making false and misleading statements to induce***  
2           ***consumers to pay for magazine subscriptions (Count Five)***

3           Section 310.3(a)(4) of the TSR prohibits sellers and telemarketers from making a false or  
4           misleading statement to induce any person to pay for goods or services. 16 C.F.R. § 310.3(a)(4).  
5           The misrepresentations that Defendants make to induce payment for the magazine subscriptions  
6           include: pretending that the purpose of their telemarketing call is to conduct a survey (*see, e.g.*,  
7           FTC’s UF88), describing the magazines as a gift (*see, e.g.*, FTC’s UF89, UF92, UF93, UF94,  
8           UF95), falsely describing the payment as covering “shipping and handling” (*see, e.g.*, FTC’s  
9           UF96, UF99), falsely claiming that consumers are obligated to pay because the consumers entered  
10          into a “contract” or “agreement” (*see, e.g.*, FTC’s UF135), and falsely claiming that Defendants  
11          have already paid magazine publishers for all of the five-year subscriptions (*see, e.g.*, FTC’s  
12          UF136, UF137, UF138, UF139). Defendants’ assertion to the contrary, that they have not made  
13          false or misleading statements to induce consumer to pay for magazine subscriptions, is conclusory  
14          and unsubstantiated. The Court should thus deny Defendants’, and grant the FTC’s, summary  
15          judgment motion on Count Five of the amended complaint.

15           ***E. Defendants violate the TSR by causing telephones to ring and engaging***  
16           ***consumers in telephone conversation repeatedly and continuously with the intent***  
17           ***to annoy, abuse, or harass the person at the called number (Count Six)***

18          Section 310.4(b)(1)(i) of the TSR prohibits telemarketers from “causing any telephone to  
19          ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to  
20          annoy, abuse, or harass any person at the called number.” 16 C.F.R. § 310.4(b)(1)(i).

21          Defendants assert that they should not be liable under Section 310.4(b)(1)(i) of the TSR  
22          because: (1) their company policy prohibits collectors from using abusive language, harassing  
23          customers, and threatening customers with legal proceedings or adverse credit repercussions;  
24          (2) Defendants’ computer system tracks collectors’ calls to prevent them from calling “non-  
25          answering customers multiple times a day”; and (3) for those customers who do answer  
26          Defendants’ collection call, Defendants’ system places a “hold” “for a certain period of time  
27          depending on the outcome of the call.” (Doc. #99 at 29:6-12.)

28          None of these defenses is sufficient to shield Defendants from liability. First, as discussed  
in Section III.A., *supra*, Defendants are liable for their employees’ actions, even if the employees

1 did not act according to company policy. Second, as discussed in Section III.C., *supra*, the FTC's  
2 evidence shows that despite whatever policies and systems Defendants may have in place, their  
3 collectors do in fact: (1) threaten consumers with legal proceedings; (2) threaten consumers with  
4 adverse credit repercussions; (3) make repeated calls to consumers, even after being asked to stop  
5 calling; and (4) use threats and abusive language in the calls. *See* FTC's UF133, UF141, UF142,  
6 UF143, UF144, UF145, UF170.<sup>31</sup> Third, Defendants do not address the calling practices of their  
7 non-collector employees, such as their salespeople and verifiers. The FTC's evidence shows that  
8 Defendants' salespeople and verifiers call consumers repeatedly, even when the consumers state  
9 they are not interested in Defendants' magazine subscription offer. *See* FTC's UF170, UF199,  
10 UF200, UF201, UF202. Finally, the FTC's evidence shows that consumers who were subjected to  
11 Defendants' repeated telephone calls found them to be annoying and harassing. *See, e.g.*, FTC's  
12 UF171, UF172, UF202.

13 Thus, the Court should deny Defendants', and grant the FTC's, summary judgment motion  
14 on Count Five of the amended complaint.

15 **V. CONCLUSION**

16 The Court should deny Defendants' motion for summary judgment as to all Counts of the  
17 amended complaint because the FTC's evidence shows that there are genuine issues of material  
18 fact relating to Defendants' motion. Furthermore, because the material facts supporting the FTC's  
19 summary judgment motion show that Defendants engaged in telemarketing acts and practices  
20 which violate the FTC Act and the FTC's TSR, the Court should enter judgment against  
21 Defendants and grant the permanent injunctions, monetary relief, and other ancillary equitable  
22 relief requested by the FTC in connection with the FTC's summary judgment motion.

23 Dated: November 23, 2009

Respectfully submitted,

24 /s/ Faye Chen Barnouw  
25 FAYE CHEN BARNOUW  
26 RAYMOND E. McKOWN  
27 MARICELA SEGURA  
Attorneys for Plaintiff FTC

28 <sup>31</sup> The FTC's evidence also controverts Defendants' assertion that they terminate employees who violate these policies. *See* FTC's UF215, UF216, UF217, UF218, UF219.