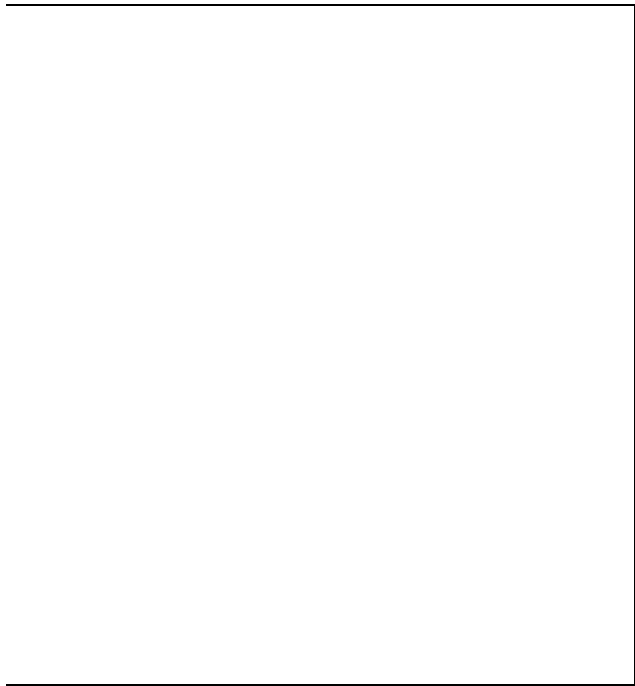


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1 I. INTRODUCTION

2 Defendants Publishers Business Services, Inc. and Ed Dantuma Enterprises, Inc. are
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1 promulgated pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act
2 (“Telemarketing Act”), 15 U.S.C. §§ 6101 *et seq.* Sections 13(b) and 19 of the FTC Act authorize
3 the FTC to it

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

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

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

10 Brenda Dantuma Schang is a Director of EDE and is the top-level manager in charge of
 11 the Corporate Defendants' Miami sales office. UF65, UF66. Her responsibilities include handling
 12 the Corporate Defendants' account payable, overseeing the Corporate Defendants' payroll,
 13 handling the Corporate Defendants' books and records, supervising the Corporate Defendants'
 14 Miami sales office, and handling correspondence between the Corporate Defendants and magazine
 15 publishers. UF67. She has worked for EDE and its predecessor for over thirty years. UF68.

16 Brenda Dantuma Schang has also worked in the Corporate Defendants' clerical department. UF70.
 17 She has signed numerous corporate filings on behalf of EDE, and is one of the four people who have
 18 signing authority over the companies' bank accounts. UF69, UF39.

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

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

28 1. Defendants' salespeople misrepresent that the purpose of their telemarketing
 call is to conduct a survey

Defendants' salespeople, representing themselves as "Publishers Business Services,"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 4. Defendants continue their confusing and de

1 Defendant's payment suggestions are acceptable. In what sounds like the end of the pitch, and as

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

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

7 At the conclusion of this conversation, the supervisor tells the consumer that "we'll be
8 calling you back shortly to confirm this with you." UF119. Within a day or two after that 4 .00 0.00 rg BT 4

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D. Defendants' collectors and customer service employees harass and threaten consumers in an attempt to extort hundreds of dollars for the magazine subscriptions. Regardless of whether or not PBS is able to scare a consumer into paying right away, it will not cancel an account, or the consumer's financial "obligation" on the account, and will continue to demand payment from the consumer. The only circumstance under which PBS will cancel an account and release the consumer from his or her financial "obligation" is if PBS learns that the consumer has filed a complaint with the Better Business Bureau, a state Attorney General, or another consumer advocacy agency. UF140. Otherwise Defendants have their collections department employees follow up on the invoices with a two-front attack: frequent abuse and harassing telephone calls and threatening demand letters to get consumers to pay.

1. Defendants' (1.)' 36.0000j 14.6400 0.0000 TD (to s)Tj 20.1600 0.0000 TD (

1 – “Your account is seriously past due, and must be paid in full immediately. If you fail to
2 pay this account in full, we will move forward reviewing our rights against you for all
3 monies due plus interest and costs, as provided by the agreement. ... PLEASE GOVERN
4 YOURSELF ACCORDINGLY. Very truly yours, John Carlton ... Please note: Pursuant to
5 the provisions of the Federal Fair Debt Collection Practices Act, ... you are advised that,
6 unless you dispute the validity of the foregoing debt or any portion thereof within thirty
7 (30) days after receipt of this letter, the debt is deemed to be undisputed. (s) 4.5600 0.0000 TD (

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

1 Defendants' extortionate conduct. UF161. Defendants have had hundreds of thousands of
2 "customers" since January 1, 2004. UF162. From 2004 through 2008, the Corporate Defendants
3 collected \$ from consumers in connection with "Publishers Business Services"
4 "sales" of new magazine subscriptions, and \$ in connection with "Subscription Order
5 Services" "sales" of magazine subscription renewals, for a total of \$ UF163.

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

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1 the magazines they are already receiving, and read the SOS script. UF222. The script implies that
2 the SOS salesperson is an employee of the magazine publisher or an employee of the company that
3 originally sold the subscription to the consumer and that SOS has a pre-existing business
4 relationship with the consumer (
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1 *Floersheim v. FTC*, 411 F.2d 874 (9th Cir. 1969), the Court found that substantial evidence
2 supported the FTC's determination that the appearance and prominent repetition of the words
3 "Washington DC." on debt-collecting forms from a private collections company created the
4 deceptive impression that the forms were a demand from the government even though the forms
5 contained a small print disclaimer informing recipients that such was not the case. *Id.* at 876-78.

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

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

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

24 2. Defendants have made material misrepresentations in violation of the FTC
25 act.

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

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

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

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28 ³ This definition excludes certain catalog sales not applicable here.

1 through the use of one or more telephones and involves more than one interstate telephone call .

2 Defendants are thus engaged in “telemarketing.”

3 A “person” is

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

9 4. Defendants have misrepresented the total cost of their magazine
subscriptions (Count Four)

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

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

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

1 get the consumer to agree to accept magazines. Likewise, Defendants' verification department
2 employees call consumers over and over again until the consumer agrees to go through the
3 verification recording process. Even worse, Defendants' collections department employees call
4 consumers repeatedly, threatening collection lawsuits, garnishment, a

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1 that "in proper cases the Commission may seek, and after proper proof, the court may issue, a
2 permanent injunction" against violations

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

5 3. The Court should order the Corporate Defendants to pay equitable monetary
6 relief in an amount equal to their gross revenues

7 Plaintiff also seeks monetary restitution for consumers injured by defendants' deceptive
8 practices. This court has broad authority under the FTC Act to "grant any ancillary relief

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B. Relief against the Individual Defendants

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

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

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

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

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

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

Defendant

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

11 The Individual Defendants' ^{WO} ~~in~~ ~~the~~ ~~case~~ ~~at~~ ~~0203TD0000000000040640023DM6,0009.1200(10)11.0000~~ ~~Brer~~

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