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

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

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I. Introduction..... 1.

II. The misrepresentations that Defendants make in their “lead call” violate the FTC Act (Count One)..... 1.

 A. Defendants may not use deceptive “door opener” sales tactics in their lead call. . . 1

 B. The “false surveys” that Defendants use have long been held to be a deceptive door-opening tactic. 2.

 C. Defendants’ offer of free magazines upon payment of “shipping and handling” fee is deceptive because the fee is in reality the price of the magazines. 4

 D. A sales pitch is deceptive if it can be viewed in both a deceptive and non-deceptive light. 5.

 E. Defendants’ sale pitch must be evaluated by the “net impression” it leaves with consumers, not by the literal “truth or falsity” of selected phrases in the sales pitch 6.

 F. Defendants’ “verification recordings” and “internal control period” are illusory safeguards which do not cure the misrepresentations that Defendants make in their lead call. 7.

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1. The plain meaning of the “business-to-business” exemption is that only telephone calls betw11.0400 0.0000 TD (tha)Tj_17.7600 0.0000 TD (t on)Tjg0000

TABLE OF AUTHORITIES

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Basic Books, Inc. v. FTC, 276 F.2d 718 (7th Cir. 1960).5, 10

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Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961). 2

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FTC v. Mary Carter Paint Co., 382 U.S. 46 (1965).. 5

FTC v. Standard Education Society, 302 U.S. 112 (1937).. 5

FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009).. 3

Grolier v. FTC, 699 F.2d 983 (9th Cir. 1983).3

International Art Co. v. FTC, 109 F.2d 393 (7th Cir. 1940).11

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¹ In opposing Defendants' summary judgment motion, the FTC relies on the evidence filed in support of the FT

1 magazines as “nice surprise” to “thank” the potential customer for answering the survey,³ and then
2 (3) ask the customer to agree to “cover” or “defray” the shipping cost.

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22 ³ See, e.g., FTC’s UF89; see also doc. #1002 at pp. 703, 704, 705 (“... I just wanted to do 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 ⁴ See, e.g., doc. #1002 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...”)
(emphasis added).

28 ⁵ 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

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The fact that Defendants knew or should have

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See, e.g., SJExhibit 43 (verification recording for cons

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 looseleaf supplements alone sell for \$6950, 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 deviate 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. 23 (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 Defendant's 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 (9th 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 s
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1 interpretation of their sales pitch to be. In contrast to Defendants' interpretation, the FTC

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27 ⁸ 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.

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¹⁰ See, e.g., SJ Exhibit 43 (verification recording of Daylinn Hartshaw) (filed under ~~sal~~) and doc. #102 at ~~781~~ (SJ Exhibit 42 Attachment 8, transcript of verification recording of Daylinn Hartshaw) (“Your payment plan total ~~cost~~ of five forty”); SJ Exhibit 43 (verification recording of consumer Liza Boquiren) (filed under ~~sal~~) and doc. #102 at ~~738~~ (SJ Exhibit 42 Attachment 8, transcript of verification recording of consumer Liza Boquiren) (“it’s twenty-four per month for the first thirty and nothing for the remaining thty”); SJ Exhibit 43 (verification recording of consumer Tess McKinley) (filed under ~~sal~~) and doc. #102 at ~~742~~ (SJ Exhibit 42 Attachment 8, transcript of verification recording for consumer Tess McKinley) (“you’ll pay it up in the first twenty-four, which is twenty-nine ninety per month for the first twenty-four, nothing in the remaining thity-six”); SJ Exhibit 43 (verification recording of consumer James Krause) (filed under ~~sal~~) and doc. #102 at ~~789~~ (SJ Exhibit 42 Attachment 8, transcript of verification recording for consumer James Krause) (“your payment plan and total of the ~~seven seven~~ ~~seventen~~ ~~sixty~~ as explained to you ~~and also~~ listed on the order I be twenty-nine ninety a month ~~for the~~ first twenty-four months nothing thty-six (sic)”); SJ Exhibit 43 (verification recording of consumer Peter Harris) (filed under ~~sal~~) and doc. #102 at ~~779~~ (SJ Exhibit 42 Attachment 8, transcript of verification recording for consumer Peter Harris) (“seven ~~seventen~~ sixty”).

¹¹ See, e.g., FTC’s UF194; SJ Exhibit 43 (verification recording of consumer Thomas Hamilton) (filed under ~~sal~~); and doc #102 at p.775 (transcript of verification recording of

1 Court may grant the FC's summary judgment motion as to Count One of the amended complaint
2 on

25 ¹³ Defendant's 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
28 agencies. *See, e.g.*, SJ Exhibit 42 Attachment 17 (pp. 935-938, 940-943).

¹⁴ *See, e.g.*, SJ Exhibit 49 (James Cox declaration ¶ 5); SJ Exhibit 50 (Darla Eder 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).

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¹⁵ See e.g., SJExhibit 4 (EDE ROG 16) (Defendants' take the position that consumers who "are paying for and receiving magazine's and consumers "who renew their magazine subscriptions and/or add-on to their current subscription(s)" are "satisfied" customers).

¹⁶ See SJExhibit 42 Attachment 13 at pp.889-893, see also SJ Exhibit 40 (declaration of First Payment Coupon survey respondent Everal Toomer).

¹⁷ See, e.g., SJExhibit 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 SJExhibit 41 (Juliana Blatz DuRivage declaration ¶¶ 5, 7 (Danielle Shepard was a consumer on Defendants list of "satisfying some12

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¹⁸ In fact, Defendants' collection letters show that their actual business practices contradict this policy. Defendants routinely send out collection letters which characterize the order as a enforceable "contract" or "agreement," and which explicitly threaten to report to credit bureaus the consumer's failure to pay PBS. (See Doc. #88 at Section II.D.). In these collection letters, Defendants refer to the consumer's "delinquent magazine account" (James Laurenc letter), "the balance of your account as stated on your contract with us" (James Laurenc letter), "all monies 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 1 p.326); SJ Exhibit 30 (Kristy DeRuiter declaration ¶, declaration Exhibit 1 p.416); SJ Exhibit 23 (Crystal Matthews deposition, deposition exhibit SJ Exhibit 23 (Crystal M

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
 6 and abusive collection practices

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

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

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

27 ¹⁹ 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 Dartuma declaration ¶ 31 (doc. #99-10). Thus, Defendants'
 representation to the contrary is 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 I.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;²⁰ 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.)

27 ²⁰ Defendants do not explain what they consider to be "abuse" and "harassment." Based on their
 28 employee's documented pattern of conduct, it appears that Defendants define those terms not
 more narrowly than what is considered to be abuse and harassment under the FR and by the
 reasonable consumer.

1 – Defendants claim that “*If a mistake has occurred, and the customer did not agree to*
2 *pay*”

25 ²¹ Defendants describe their magazine subscriptions as “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 cheap, and typically *substantially more expensive* than magazine
28 subscriptions available on the open market. See SJ Exhibit 67 (Fourth Gale Declaration ¶¶ 28).
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).

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In short, the FTC's evidence controverts the facts that Defendant set forth in support of

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.²² 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.^{3600eTD /F28 12.0000 Tf rTD (rketer an)Tj 43.44002 m00 0.0}

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25 ²² 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).

²³ 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 Defendants²⁴ 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 "tonephoner" sales that have targeted small businesses²⁵ 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
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19 ²⁴ 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 ²⁵ 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/agenda/transcript2.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 tonephoner 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 (9th Cir. 2007) (quoting *Dyer v. United States*, 832 F.2d 1062,
 1066 (9th Cir. 1987)).

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

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

27 the proposed rule covers all outbound telephonic calls intended to induce payment
 28 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

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Thus, under *SAFE Air For Everyone*, 488 F.3d 1088, evenif th

1 In fact, in proposing revised TSR, the Commission stated that telemarketing calls to individual consumers are not
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27 argument that the exemption plainly means that telemarketing calls to individual consumers are not
28 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*
7 *Rulemaking*, 67 F.R. 4492, that:

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

1 6. *The FTC's plain meaning reading of the exemption is cons*
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26 ²⁷ This instruction is the basis for the FTC's implementation of the TSR.

27 ²⁸ 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*
deceptive solicitations that directly target an individual consumer or address (e.g., outbound
telemarketing calls or direct mail solicitations that induce the consumer to call a telemarketer ...").

1 Because these calls are not made to a business's phone number, Defendant's 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.²⁹

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."³⁰

12 Defendants claim, without pointing to specific script language that they "promptly and
 13 clearly disclose[d] that the call is being made for the purpose of selling magazines" (doc. #99 at
 14 27:12-13) and "the lead call unmistakably communicated 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 ²⁹ 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 Defendant's 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
 23 into contact on behalf of the business. Their business model is premised on intentionally trying
 24 to reach the busy receptionist or store clerk working at the business and selling to that person, not
 25 to the business itself.

26 ³⁰ See 1995 Statement of Basis and Purpose accompanying the TSR. 60 F.R. 43842 (1995):
 27 [T]he legislative history of the Telemarketing Act noted the problem of deceptive
 28 telemarketers contacting potential victims under the guise of conducting a poll,
 survey, or other type of market research. To address these problems, the
 Commission believes that in any multiple purpose call where the seller or
 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 Defendant's 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 Defendant's use of these deceptive door openers is sufficient basis for denying
9 Defendant's and granting the FTC's summary judgment motion as to Count Three of the amended
10 complaint.

11 C. Defendants violate the TRS by misrepresenting the total costs to purchase or
12 receive their magazines (Count Four)
13 Section 310.3(a)(2)(i) of the TRS 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, Defendant's 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. 703-6, 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 at

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³¹ The FTC's evidence also controverts Defendant's assertion that they terminate employees who violate these policies. *See* FTC's