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Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the United States seeks  
preliminary injunction enjoining Business Recovery Services and Brian Hessler

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

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

14 Defendants sell their recovery kit and recovery services through telemarketing  
15 calls.<sup>7</sup> If potential customers do not answer their phone, Defendants leave message after  
16 message offering their assistance in recovering money that is lost. Some of the messages

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18 <sup>3</sup> See page 1 of Exhibit B, a questionnaire completed by Mary Sidor.

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

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

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

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

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

27 <sup>9</sup> See pages 1 and 2 of Exhibit D, a questionnaire completed by customer Joao Curcio.

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

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

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

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

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

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

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

27 <sup>16</sup> Seeid.

1 Business Bureau, and the United States Postal Inspection Service.<sup>17</sup>

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

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

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

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20 <sup>17</sup> Seid.

21 <sup>18</sup> See page 3 of Exhibit H, a questionnaire completed by customer Thomas Coyle.

22 <sup>19</sup> See page 3 of Exhibit I, a questionnaire completed by customer Catherine Hatch.

23 <sup>20</sup> See page 3 of Exhibit F, a questionnaire completed by customer Ra Nae Aaker.

24 <sup>21</sup> See page 3 of Exhibit E, a questionnaire completed by customer Joan Hagan.

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

27 <sup>23</sup> A copy of Defendants’ “In-Store Credit Policy” is attached as Exhibit J.



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

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

### 17 18 ARGUMENT

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

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

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

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

- 3 • Customer Mary Sidor was charged \$300 for a recovery kit on February 9, 2009,  
4 when the Business Recovery Services letter accompanying her recovery kit was  
5 dated February 10, 2009.
- 6 • David Nicholas found that Defendants charged his credit card on March 2,  
7 2010, but the date on the Business Recovery Services letter accompanying his  
8 recovery kit was March 3, 2010.
- 9 • Customer Paul Hallman's MasterCard was charged \$399 for Defendants'  
10 recovery kit on September 9, 2009, which was the same date that was printed  
11 the Business Recovery Services letter enclosed within his recovery<sup>35</sup> kit.
- 12 • Customer Terry Wilcox paid defendants \$300 on April 12, 2010, and the  
13 Business Recovery Services letter accompanying his recovery kit was dated  
14 April 13, 2010.<sup>36</sup>

15 The United States mailed questionnaires to some of Defendants' customers, inquiring  
16 inter alia, "[d]id you pay for the product before you received it?" The returned questionnaires  
17 unanimously state that customers who purchased the recovery kits were charged for their kits.

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19 <sup>32</sup> See pages 6-8 of Exhibit G, which contains a questionnaire, a letter from Business  
20 Recovery Services, and credit card statement submitted by customer Kevin Gleske.

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

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

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

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

1 before they received them from Defendants<sup>37</sup>.

2 The evidence detailed above clearly demonstrates that Defendants do not wait seven  
3 business days after the money or other items these individuals lost in their previous  
4 transactions are recovered before they charge their customers. Instead, Defendants charge  
5 their customers' credit cards prior to even sending out the recovery kit. This is a violation of  
6 Section 310.4(a)(3) of the Telemarketing Sales Rule, and as a result, the United States will  
7 succeed on the merits of this claim.

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9 **The Equities Support Granting Injunctive Relief**

10 The equities do not favor allowing Defendants to continue their current behavior. The  
11 Telemarketing Sales Rule was implemented to prevent deceptive telemarketers from further  
12 victimizing individuals who have already lost money to other fraudulent telemarketing scams.  
13 The Telemarketing Sales Rule requires those selling recovery products and services to wait  
14 seven business days after their customers successfully recover the money or items they lost  
15 before charging that customer. The impetus behind this provision was to protect consumers  
16 from recovery scams which would either deliver shoddy recovery products or promise  
17 recovery services and then disappear with the customer's money. Customer complaints about  
18 the quality of Defendants' recovery kit demonstrate why the Telemarketing Sales Rule is a  
19 critical safeguard for consumers. Defendants' illegal business practices eliminate this  
20 safeguard and prevent customers from having any recourse when their recovery kits are  
21 delivered and they find that they have been defrauded, yet<sup>38</sup> again.

22 No equities favor permitting defendants to continue their illegal practices. However,

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<sup>37</sup> See Banks Declaration, attached as Exhibit A.

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<sup>38</sup> Count Two and Count Three of the Complaint allege violations of the Telemarketing  
26 Sales Rule and FTC Act related to the representations Defendants make about their recovery  
27 and recovery services. However, no judicial determination regarding those counts is required  
to resolve the instant motion in the government's favor.

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

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

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

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

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

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

15 U.S.C. § 53(b) “places a lighter burden on the Commission than that imposed on  
private litigants by the traditional equity standard; the Commission need not show irreparable

1 harm to obtain a preliminary injunction.” F.T.C. v. Affordable Medicines, 749 F.3d 1228, 1233  
 2 (9th Cir. 1999) (quoting FTC v. Warner Communications, Inc., 742 F.2d 1156, 1159 (9th Cir.  
 3 1984)). While it is not necessary for the United States to show that irreparable harm would  
 4 result if an injunction is not granted, the evidence in this case demonstrates that the threat of  
 5 irreparable harm is present.

6 Violations of the Telemarketing Sales Rule constitute an unfair or deceptive act or  
 7 practice in or affecting commerce. 15 U.S.C. § 6102©; 15 U.S.C. § 57a(d)(3). As the Ninth  
 8 Circuit has noted, “irreparable injury must be presumed in a statutory enforcement action.”  
 9 United States v. Odessa Union Warehouse Co., 838 F.2d 172, 176 (9th Cir. 1987).

10 Violation of federal statutes that protect against the use of unfair and deceptive practices results  
 11 in irreparable harm. Defendants’ violations erode the public trust, victimize consumers, and  
 12 cannot be cured after the fact. These illegal practices should not be permitted to continue.

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

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

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

5  
6 **CONCLUSION**

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

12 For the foregoing reasons, the United States requests that its Motion for Preliminary  
13 Injunction be granted, and that a preliminary injunction be ordered, barring Defendants from  
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