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20 UNITED STATES DISTRICT COURT  
21 DISTRICT OF NEVADA

22 FEDERAL TRADE COMMISSION,  
23  
24 Plaintiff,  
25  
26 v.  
27  
28 INFUSION MEDIA, INC., *et al.*,  
29  
30 Defendants.

Civil Action No.

PLAINTIFF FTC'S  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF ITS EX PARTE  
MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER AND OTHER  
EQUITABLE RELIEF

[FILED UNDER SEAL]

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1 **I. INTRODUCTION**

2 Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), asks this Court to  
3 bring the defendants’ deceptive scheme to an immediate halt. The defendants, operating as a  
4 common enterprise under names including Google Money Tree, induce consumers to purchase a  
5 work-at-home “kit” for a nominal cost of \$1.97 or \$3.88, but then initiate recurring unauthorized  
6 charges of \$72.21 to consumers’ financial accounts. Defendants market their work-at-home kits  
7 online by making eye-catching claims about the income their kits will generate for consumers  
8 and by using prominently the “Google” name and logo to cloak their venture in a false aura of  
9 legitimacy. These representations are false, but together with the nominal cost for the Google  
10 Money Tree kit, they lull consumers into believing there is little risk in ordering. Hidden,  
11 however, on “terms and conditions” pages that can only be reached by inconspicuous hyperlinks  
12 are disclosures that the purchase of a kit will trigger recurring charges of \$72.21. Through this  
13 scheme, the defendants have extracted millions of dollars from consumers across the country.

14 The defendants have continued their scheme unabated despite more than a thousand  
15 consumer complaints including 250 in the last month alone, several administrative citations from  
16 Utah’s Division of Consumer Protection, and even in the face of a lawsuit filed earlier this year  
17 by the Texas Attorney General.

18 The defendants’ scheme violates Section 5 of the Federal Trade Commission Act (“FTC  
19 Act”), 15 U.S.C. § 45(a), which prohibits deceptive acts or practices in or affecting commerce,  
20 and both Section 907(a) of the Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. § 1693e(a),  
21 and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), which collectively regulate the  
22 requirements for preauthorized electronic fund transfers from a consumer’s bank account. To  
23 stop the defendants’ unlawful activities and preserve assets for consumer redress, the  
24  
25  
26

1 Commission has commenced this action<sup>1</sup> seeking, pursuant to Section 13(b) of the FTC Act,  
2 15 U.S.C. § 53(b), an *ex parte* temporary restraining order (“TRO”) with an order to show why a  
3 preliminary injunction should not issue. The proposed TRO would enjoin the defendants’  
4 unlawful practices, freeze the defendants’ assets, appoint a temporary receiver for all corporate  
5 defendants, provide immediate access to the defendants’ business premises to preserve and  
6 collect records, and provide for certain expedited discovery. Such an order is necessary to stop  
7 ongoing harm to the public as well as to prevent the dissipation of assets and the destruction of  
8 records, thereby preserving the Court’s ability to provide effective final relief to the victims of  
9 Defendants’ unlawful scheme.

## 10 II. FACTS

11 Infusion Media, Inc., West Coast Internet Media, Inc., Two Warnings, LLC, Two Part  
12 Investments, LLC, and Platinum Teleservices, Inc., (collectively, “Corporate Defendants”)  
13 operate as a common enterprise to induce consumers to provide credit or debit account  
14 information that the defendants use to make unauthorized charges or debits to the consumers’  
15 financial accounts. *See infra* Section III.B.1. The Corporate Defendants are controlled and  
16 operated by Jonathan Eborn, Stephanie Burnside, Michael McLain Miller, and Tony Norton  
17  
18

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19  
20 <sup>1</sup> The Commission has filed, under seal, a Complaint for Injunctive and Other Equitable  
21 Relief, a Motion for an *Ex Parte* Temporary Restraining Order, and supporting papers and  
22 exhibits. The Commission submits four volumes of exhibits in support of this Motion, including  
23 sworn declarations from eighteen victims of Defendants’ scheme, investigators employed by the  
24 FTC and the Utah Department of Commerce’s Division of Consumer Protection, and the  
25 Managing Counsel for Trademarks at Google Inc. In this Memorandum, references to exhibits  
26 appear as “Ex. [number],” and, where appropriate, include citations to specific paragraphs (“¶”) and pertinent attachments (“Att. [letter]”). Attachments to exhibits containing multiple pages are cited by page numbers which have been shortened for ease of reference. For example, “Attachment A, page Menjivar 000028” is shortened to “Att. A at 30.” Transcripts of oral communications are cited by page and line number. For example, citation to 25:3–27:12, refers to transcript Page 25, Line 3 through Page 27, Line 12.

1 (collectively, “Individual Defendants”). *See infra* Section III.B.2.<sup>2</sup>

2 **A. Defendants’ Business Practices**

3 **1. Signing Up for Google Money Tree**

4 Defendants sell their work-at-home kits through sign-up websites which bear names  
5 including “Google Money Tree,” “Google Pro,” “Internet Income Pro,” and “Google Treasure  
6 Chest” (collectively, “Google Money Tree”). The websites differ in aspects of their text and  
7 appearance, but all feature eye-catching income claims, make conspicuous use the “Google”  
8 name and/or logo, and prominently advertise the only cost as a small shipping and handling fee.  
9 Defendants’ websites also hide significant and recurring costs related to a Google Money Tree  
10 purchase in a separate and inconspicuously-linked “terms and conditions” page.

11 To purchase from a Google Money Tree sign-up website, consumers pass through the  
12 following three areas: (1) an initial sign-up page, presenting claims about the product and  
13 requiring the consumer to enter name and contact information to continue; (2) a payment  
14 information page, presenting additional claims and testimonials about the product and requiring  
15 the consumer to enter financial account information to complete the transaction, and (3) a  
16 confirmation page welcoming the consumer to Google Money Tree.<sup>3</sup> The only cost associated  
17 with the Google Money Tree kit mentioned on any of these pages is a modest shipping and  
18 handling fee.<sup>4</sup>

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19  
20 <sup>2</sup> Corporate Defendants and Individual Defendants are collectively referred to as  
21 “Defendants.”

22 <sup>3</sup> Ex. 21, Declaration of FTC Investigator Roberto Menjivar (“Menjivar”), ¶¶ 29–32,  
23 49–52.

24 <sup>4</sup> *Id.*, Att. E at 76–80, Att. L at 298–303. *E.g.*, Ex. 3, Declaration of Consumer Omaid  
25 Fishman (“Fishman”), ¶ 5 (“[E]verything I had seen on the Google Money Tree website led me  
26 to believe that the product only cost \$3.88 and I would only be charged \$3.88.”); Ex. 4,  
Declaration of Consumer Terri Hicks (“Hicks”), ¶ 4 (“I remember specifically there was no  
mention anywhere on the website about any fee except for the \$3.88.”); Ex. 9, Declaration of

1 Defendants' initial sign-up and payment information pages promote the Google Money  
2 Tree kit with lavish income claims, such as the following:

- 3 • **Learn How A Stay At Home Mom,  
4 With No Experience, Earned  
5 \$107,389 in Six Months Just  
6 Filling Out Forms & Doing  
7 Searches On Google & Yahoo!;**<sup>5</sup>
- 8 • **Learn how to make \$107,389 in Six Months  
9 Just filling out forms and doing searches on Google and Yahoo;**<sup>6</sup> and
- 10 • **[M]ake over \$100,000 in the next 6 months working from home.**<sup>7</sup>

11 Defendants' initial sign-up and payment information pages also include numerous  
12 testimonials of individuals who claim to have profited from the Google Money Tree kit.<sup>8</sup>

13 Among these is the following:

14 **Want Proof? Look at my sales for the first part of May this  
15 year. Keep in mind, I started in this system PART TIME in  
16 March. It is so easy, I can't believe I didn't think of it before! If  
17 you have access to a computer (doesn't have to be your own),  
18 and can follow instructions . . . YOU CAN DO THIS TOO!**

19 A chart adjacent to this testimonial purports to reflect the individual's daily "sales" for a two-

20 \_\_\_\_\_  
21 Consumer Judith Kamienski ("Kamienski"), ¶ 5 ("I had not seen anything on the website to  
22 make me think that the opportunity cost more than \$1.97"); Ex. 10, Declaration of Consumer  
23 Roger Kidneigh ("Kidneigh"), ¶ 5 ("[E]very I saw on the website indicated that the cost was  
24 only \$3.88."); Ex. 17, Declaration of Consumer Linda Stokes ("Stokes"), ¶ 4 ("Everything I saw  
25 on the website stated that the Google Money Tree CD would cost only \$3.88.").

26 <sup>5</sup> Ex. 21 (Menjivar), Att. B at 31 (initial sign-up page), Att. L at 298 (initial sign-up  
page). The identical claim, with slightly different formatting, is made on other initial sign-up  
pages. *Id.*, Att. A at 11, Att. C at 47, Att. D at 64.

<sup>6</sup> *Id.*, Att. C at 44 (initial sign-up page); Att. E at 76 (initial sign-up page); Att. E at 77  
(payment information page).

<sup>7</sup> *Id.*, Att. D at 63 (initial sign-up page).

<sup>8</sup> *See, e.g., id.*, ¶¶ 7, 14, 17 (noting testimonials on initial sign-up pages), Att. E at 77  
(payment information page presenting two testimonials), Att. L at 301-02 (payment information  
page presenting five testimonials).

1 week period in May.<sup>9</sup> The lowest daily total is \$681.48, with the highest \$3,473.72. These  
 2 figures, when totaled, indicate to consumers that they can earn \$25,000 in only fourteen days.

3 The various earnings claims and testimonials on the Google Money Tree sign-up  
 4 websites give consumers the impression that they are being sold an opportunity to earn  
 5 substantial income.<sup>10</sup> As explained *infra* Section II.A, however, the “kits” provided by  
 6 Defendants do not provide consumers with a coherent plan for earning *any* income, let alone  
 7 substantial income by “just filling out forms and doing searches on Google and Yahoo.”<sup>11</sup>

8 In addition to extravagant earnings claims, Defendants’ sign-up websites also make  
 9 conspicuous use of the “Google” name in spite of having no affiliation to Google Inc.<sup>12</sup> For  
 10 example, these pages have included logos for Google Money Tree and Google Treasure Chest in  
 11 which the appearance of the term “Google” is strikingly similar to or identical to the logo of  
 12

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13 <sup>9</sup> *Id.*, Att. A at 12, Att. B at 31–32, Att. C at 48, Att. D at 66, Att. E at 77.

14 <sup>10</sup> Ex. 2, Declaration of Consumer Kristen Dunn (“Dunn”), ¶ 2 (“I could at least make a  
 15 few hundred dollars a week with the information”); Ex. 4 (Hicks), ¶ 3 (“The CD seemed like a  
 16 good idea because . . . the consumer testimonials stated that there was a great deal of money that  
 17 could be earned, that the work was easy and no previous experience was required”); Ex. 7,  
 18 Declaration of Consumer Amy James (“A. James”), ¶ 3 (“I got the impression you could earn  
 19 money from home”); Ex. 8 (Kamienski), ¶ 3 (earnings claims were “impressive”); Ex. 15,  
 Declaration of Consumer Pamela Novack (“Novack”), ¶ 3 (“I thought it would be an interesting  
 and easy way to make money”); Ex. 16, (Stokes), ¶ 3 (statements on the website “gave me the  
 impression that you could make a pretty good living with Google Money Tree”).

20 <sup>11</sup> Ex. 4, Declaration of Consumer Evelyn Holmes (“Holmes”), ¶¶ 13–14 (“The actual CD  
 21 that I received . . . has no clear plan for making money”; Ex. 10 (Kidneigh), ¶ 12 (“The CD did  
 22 not give any step-by-step process for making money or working from home; it just rambled. I  
 23 thought it was useless.”); Ex. 16, Declaration of Consumer Laurie Roerink (“Roerink”), ¶ 10  
 (“[The CD] contained a random assortment of PDF files . . . . Many of the files seemed  
 24 unrelated to starting a business . . . . The files that did appear to be related to creating a business  
 25 were very technical. There was no step-by-step guide and they were clearly not for newcomers  
 to this business as I has expected.”); Ex. 17, (Stokes), ¶ 7 (“The main problem with the CD was  
 that there were no clear instructions on what to do to make money with Google Money Tree.”).

26 <sup>12</sup> Ex. 19, Declaration of Rose A. Hagan, Google Inc. (“Hagan”) ¶ 6.

1 Google Inc.<sup>13</sup> Although Defendants' sign-up websites include a statement that Defendants are  
 2 not affiliated with, endorsed by, or associated with "Google," this statement appears only in  
 3 small type and at the bottom of the page.<sup>14</sup>

4 The prominent use of the Google name and logo on Defendants' websites creates for  
 5 many consumers the impression that the Google Money Tree work-at-home program is either  
 6 offered by Google Inc. or in some way affiliated with Google Inc.<sup>15</sup> Indeed, the belief that  
 7 Google Money Tree was being offered by Google Inc. or by an affiliate of Google Inc. is a  
 8 repeated theme in the more than 1,400 complaints regarding Google Money Tree that consumers  
 9 have registered with the Commission, other law enforcement agencies, and the Better Business  
 10 Bureau of Southern Nevada ("BBB").<sup>16</sup> In fact, some dissatisfied consumers have taken their

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11  
 12 <sup>13</sup> Ex. 21 (Menjivar), Att. C at 44 (initial sign-up page), Att. D at 63 (initial sign-up  
 13 page), Att. E at 77 (payment information page). Google Inc. has sent cease-and-desist letters  
 14 concerning the similarity between Google Inc.'s trademarked logo and the logos appearing on  
 15 Google Money Tree websites. Ex. 19 (Hagan), ¶ 7.

16 <sup>14</sup> Ex. 21 (Menjivar), Att. C at 44, Att. D at 66, Att. E at 77.

17 <sup>15</sup> Ex. 1, Declaration of Consumer James Dawe ("Dawe"), ¶ 5 ("I thought that Google  
 18 Treasure Chest was part of the company Google"); Ex. 2 (Dunn), ¶ 3 ("[I] thought the offer was  
 19 affiliated with Google"); Ex. 3 (Fishman), ¶ 5 ("I thought Google Money Tree was affiliated  
 20 with Google"); Ex. 5 (Holmes), ¶ 9 ("I believed that Google Pro was being offered by Google,  
 21 the company responsible for the Internet search engine"); Ex. 7 (A. James), ¶¶ 3, 5 ("The  
 22 website used the name 'Google' throughout, which made me think that Google was offering the  
 23 work-at-home opportunity."); Ex. 7, Declaration of Consumer Michael James ("M. James"), ¶ 3  
 24 (same); Ex. 10 (Kidneigh), ¶ 4 ("Because the website used the word 'Google' in the name of the  
 25 product . . . and also used a font that seemed to me the same as the font used by the Google  
 search engine, I believed that Google Money Tree was being offered by Google"); Ex. 11,  
 Declaration of Consumer Catherine Lusk ("C. Lusk"), ¶ 2 ("I assumed the CD offer was  
 affiliated with Google because of the name . . . [and] the colors and font of the Goo[g]le  
 Treasure Chest logo were very similar to those of the Google logo"); Ex. 14 (Novack), ¶ 3 ("it  
 seemed to be associated with Google"); Ex. 16, (Stokes), ¶ 5 (believed Google Money Tree "was  
 offered by Google, or by a company that was partnered with Google. . . . I assumed that Google  
 Money Tree had Google's permission to use that name.").

26 <sup>16</sup> Ex. 23, Declaration of FTC Investigator Sheryl Drexler ("Drexler") ¶¶ 37-41.

1 complaints about Google Money Tree to Google Inc., believing that Google Inc. is responsible  
2 for Google Money Tree.<sup>17</sup>

3 At least some versions of Defendants' initial sign-up and payment information pages  
4 also include statements that purchasers of the Google Money Tree kit will receive, without  
5 charge, trial access to members-only areas of one of Defendants' websites and that consumers  
6 "can stay a member at the discounted price of seventy two dollars and twenty cents per month  
7 for life."<sup>18</sup> Critically, this statement that consumers "can" pay \$72.21 monthly fees for a  
8 membership includes no suggestion that consumers will be automatically charged \$72.21  
9 monthly fees unless they take affirmative action to avoid them. Thus, even consumers who read  
10 this statement would not be warned about the risk of automatic charges.<sup>19</sup> Moreover, many  
11 consumers may never notice the content of this statement,<sup>20</sup> as it is not conspicuously placed or  
12  
13  
14

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15 <sup>17</sup> Ex. 19 (Hagan), ¶ 7.

16 <sup>18</sup> Ex. 21 (Menjivar), Att. B at 32 (initial sign-up page), Att. D at 65 (initial sign-up  
17 page), Att. E at 77 (payment information page), Att. L at 298 (initial sign-up page).

18 <sup>19</sup> *E.g.*, Ex. 7 (A. James), ¶¶ 7-9 ("it talked about how much access to the members-only  
19 website normally cost. . . . [but] did not say that Google Money Tree would automatically charge  
20 my credit card for access to the members-only website").

21 <sup>20</sup> *See, e.g.*, Ex. 1 (Dawe), ¶ 10 ("I do not recall seeing any terms and conditions page or  
22 anything that said I would be charged \$72.21."); Ex. 4 (Hicks), ¶ 6 ("I had not seen any fine print  
23 and that I had not authorized the charge of \$72.21"); Ex. 8 (Kamienski), ¶ 10 ("I was shocked  
24 when I saw the \$72.21 debit, as I had not known about or agreed to a \$72.21 charge"); Ex. 9  
25 (Kidneigh), ¶ 9 ("At no point in my dealings with Google Money Tree did I receive any written  
26 notice that the company intended to charge my credit card for recurring fees of \$72.21"); Ex. 6,  
Declaration of Consumer Richard Imperato ("Imperato"), ¶ 5 ("At the time I purchased Google  
Pro, I did not see anything on the website stating that Google Pro would take \$72.21 from my  
bank account."); Ex. 17 (Stokes), ¶ 4 ("I did not see anything on the website stating that I would  
be charged \$72.21").

1 emphasized on Defendants' webpages<sup>21</sup> and the membership fee is not stated in numerals (*i.e.*,  
2 "\$72.21"), but is instead written out as "seventy two dollars and twenty one cents," which  
3 blends into the surrounding text.

4 Other statements on Defendants' websites similarly stress the "free" membership without  
5 any discussion of subsequent costs. For example, one version of Defendants' payment  
6 information pages displays a logo at the top of the page stating "FREE ACCESS / Google  
7 Money Tree / Membership Website." The same page presents a list of "What You Get" with  
8 your Google Money Tree order that includes "Exclusive Access to Google Money Tree  
9 Membership Site."<sup>22</sup>

10 The payment information pages at which consumers finalize their orders create a clear  
11 impression that the shipping and handling fee is the only charge that will be applied to  
12 consumers' accounts. For example, one version of Defendants' payment information page states

13 **JUST ONE MORE STEP**  
14 **Just pay a small shipping charge of \$3.88**  
15 **and your Google Pro Kit will be on it's [sic] way!**  
16 **•••**  
17 **You are purchasing: Google Pro Kit**  
18 **Your credit card will be billed: \$3.88**<sup>23</sup>

19 Similarly, another of Defendants' payment information pages states

20 **Google Money Tree Kit: FREE**  
21 **Shipping & Handling: \$3.88**  
22 **Enter your Shipping Payment Information Below**<sup>24</sup>

23 These representations were critical to many Google Money Tree consumers' decision to

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24 <sup>21</sup> Ex. 21 (Menjivar), Att. B at 32 (statement appears on second page of printout, typeface  
25 is smaller than surrounding type and not bold), Att. D at 65 (statement appears on second page of  
26 five-page printout), Att. E at 78 (typeface is smaller than surrounding type and not bold).

<sup>22</sup> *Id.*, Att. E at 77.

<sup>23</sup> *Id.*, Att. L at 301.

<sup>24</sup> *Id.*, Att. E at 77.

1 buy. Indeed, many consumers signed up for a kit specifically because they perceived little risk  
2 in trying such a low-priced item.<sup>25</sup>

3 To obtain a “kit,” consumers must (1) add credit or debit account information to the  
4 contact and shipping information they have already provided; (2) check a box adjacent to the  
5 statement “I agree to the Terms and Conditions”;<sup>26</sup> and (3) click a button with a label such as  
6 “I’m ready to order!” or “Ship My Kit.”<sup>27</sup>

7 Upon successful completion of the payment information page, at least some consumers  
8 are taken to a confirmation page welcoming them to Google Money Tree and providing login  
9 information for the members-only areas of one of Defendants’ websites.<sup>28</sup> Some consumers also  
10 or alternatively receive a confirmation e-mail containing the same information.<sup>29</sup> (Other  
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14 <sup>25</sup> Ex. 1 (Dawe), ¶ 4 (“For only \$1.99, I was willing to take a chance”); Ex. 2 (Dunn), ¶ 3  
15 (“for only about \$4, it seemed like it was very low risk.”); Ex. 3 (Fishman), ¶ 5 (“if I wasn’t  
16 happy with the kit, \$3.88 would not be a big loss”); Ex. 4 (Hicks), ¶ 3; Ex. 5 (Holmes), ¶ 8 (“The  
17 main reason that I decided to try Google Pro was the low price”); Ex. 6 (Imperato), ¶ 4; Ex. 7 (A.  
18 James), ¶ 5 (“Because the kit was only \$3.88, I thought there was very low risk”); Ex. 9  
19 (Kamienski), ¶ 4; Ex. 10 (Kidneigh), ¶ 6 (“the \$3.88 price was low enough that I was willing to  
20 take a gamble on Google Money Tree”); Ex. 11 (C. Lusk), ¶ 3; Ex. 16 (Roerink), ¶ 4; Ex. 17  
21 (Stokes), ¶ 5 (“The low price was important to my decision to buy, because I was risking only a  
22 few dollars on the purchase”); Ex. 18, Declaration of Consumer Nancy Stover (“Stover”), ¶ 3.

23 <sup>26</sup> In, both of the FTC’s undercover purchases from Google Money Tree, the investigator  
24 was required to check the “I agree to the Terms and Conditions” box. It is unclear to the FTC  
25 whether, at other times, this box may have been pre-checked for consumers.

26 <sup>27</sup> Ex. 21 (Menjivar), ¶¶ 29–32, 49–52.

<sup>28</sup> *Id.*, ¶¶ 32, 52; Ex. 3 (Fishman), ¶ 7 (consumer presented with confirmation page, but  
login information did not work for consumer); Ex. 16 (Roerink), ¶ 7.

<sup>29</sup> Ex. 21 (Menjivar), ¶¶ 36, 56, Att. F at 360; Ex. 6 (Imperato), ¶ 6; Ex. 14, Declaration  
of Consumer Cynthia Murphy (“Murphy”), ¶ 5.

1 consumers, however, never receive any access to the members-only website.)<sup>30</sup> Like the initial  
 2 sign-up and payment information pages, the confirmation page and confirmation e-mail contain  
 3 no indication that the “free trial” of website access is a “negative option” and that consumers  
 4 will incur monthly fees of \$72.21 unless they cancel the membership.<sup>31</sup> Consumers who pay by  
 5 debit card do not receive from Google Money Tree a copy of any writing that purportedly  
 6 evidences the consumer’s assent to authorize Google Money Tree to make recurring debits from  
 7 the consumer’s bank accounts,<sup>32</sup> as is required by law.

## 8                   2.        Unauthorized Charges and Debits by Google Money Tree

9                   Approximately seven to ten days after a consumer places his order for a Google Money  
 10 Tree kit, Defendants use the consumer’s payment information to charge either the consumer’s  
 11 credit card or debit the consumer’s bank account in the amount of \$72.21.<sup>33</sup> Unsurprisingly,

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13                   <sup>30</sup> Ex. 1 (Dawe) ¶ 7; Ex. 3 (Fishman), ¶ 8 (login information provided on confirmation  
 14 page did not work for consumer); Ex. 13, Declaration of Consumer Laura McDonald  
 (“McDonald”), ¶ 3 (after completing order page, the screen went blank and consumer never  
 15 received an e-mail confirmation of her order); Ex. 15 (Novack), ¶¶ 5–9 (consumer did not  
 receive login information and was not even aware of membership website).

17                   <sup>31</sup> See Ex. 21 (Menjivar), Att. F at 215, Att. L at 303.

18                   <sup>32</sup> Ex. 1 (Dawe) ¶ 9; Ex. 3 (Fishman) ¶ 9; Ex. 5 (Holmes) ¶ 16; Ex. 6 (Imperato) ¶ 5;  
 Ex. 8 (Kamienski) ¶ 10; Ex. 11 (C. Lusk) ¶ 15; Ex. 13 (McDonald) ¶ 11; Ex. 16 (Roerink) ¶ 14.

19                   <sup>33</sup> Ex. 1 (Dawe), ¶ 9; Ex. 2 (Dunn), ¶ 7; Ex. 3 (Fishman), ¶ 11; Ex. 4 (Hicks), ¶ 5; Ex. 5  
 20 (Holmes), ¶ 11; Ex. 6 (Imperato), ¶ 8; Ex. 7 (A. James), ¶ 13; Ex. 8 (M. James), ¶ 6; Ex. 9  
 21 (Kamienski), ¶ 9; Ex. 10 (Kidneigh), ¶ 8; Ex. 11 (C. Lusk), ¶ 11; Ex. 13 (McDonald), ¶ 4; Ex. 14  
 22 (Murphy), ¶ 7; Ex. 15 (Novack), ¶ 8; Ex. 16 (Roerink), ¶ 11; Ex. 17 (Stokes), ¶ 8; Ex. 18  
 (Stover), ¶ 7; Ex. 21 (Menjivar) ¶¶ 43–44.

23                   Some consumers have also been subjected to fees beyond the \$72.21 that also appear to  
 24 be attributable to Google Money Tree. See, e.g., Ex. 12 (McDonald), ¶¶ 8–10 (describing  
 25 unauthorized \$24.87 debit for “Grant Spring” or “GrantSpring”); Ex. 14 (Novack), ¶¶ 13–16  
 26 (describing two unauthorized charges of \$38.84 for “SafeLock ID”); Ex. 17 (Stover), ¶¶ 13–14  
 (describing unauthorized \$24.87 charge marked “A1 Member”). Although the \$72.21 fee  
 described throughout this Memorandum is the most commonly reported unauthorized charge, the

1 many consumers were unaware that they might be charged this fee before finding the charge on  
 2 their credit card or bank account statements, a theme that is repeated in consumer complaints  
 3 registered with the FTC, other law enforcement agencies, and the BBB.<sup>34</sup>

4 Upon discovering the unauthorized charges, many consumers call one of the toll-free  
 5 numbers appearing on the Google Money Tree websites or a number appearing on the  
 6 consumer's credit card or bank statement listed in connection with the charge. Defendants tell  
 7 the consumers who call that the charges were disclosed in the terms and conditions page of  
 8 Defendants' sign-up websites, and that the consumers had therefore agreed to them.<sup>35</sup> For many  
 9 consumers, this is the first that they have become aware of Defendants' terms and conditions  
 10 pages, which they did not encounter or read before completing their purchase.<sup>36</sup> In fact,  
 11 consumers are able to complete a purchase without ever viewing a terms and conditions page.<sup>37</sup>

12 When consumers call Defendants to complain about the unauthorized \$72.21 charge,  
 13 most are initially told that their memberships will be canceled and they will not incur additional

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 15  
 16  
 17 Commission's complaint also seeks relief for consumers who were victims of other unauthorized  
 charges. *See* Complaint ¶¶ 18, 49(a).

18 <sup>34</sup> Ex. 23 (Drexler), ¶¶ 37–42.

19  
 20 <sup>35</sup> Ex. 1 (Dawe), ¶ 10; Ex. 6 (Imperato) ¶ 9; Ex. 8 (M. James) ¶ 7; Ex. 10 (Kidneigh) ¶ 10;  
 Ex. 13 (McDonald), ¶ 6; Ex. 14 (Murphy), ¶ 8; Ex. 15 (Novack), ¶ 15; Ex. 15 (Stokes), ¶ 10. *See*  
 21 *also* Ex. 21 (Menjivar), Att. H at 4:20–6:7 (undercover FTC investigator told that charges were  
 disclosed in terms and conditions), Att. I, 6:2–7:11 (same), Att. N, 11:2–8 (same).

22  
 23 <sup>36</sup> Ex. 2 (Dunn), ¶ 4; Ex. 3 (Fishman), ¶ 6; Ex. 5 (Hicks), ¶ 4; Ex. 6 (Imperato), ¶ 5; Ex. 7  
 (A. James), ¶ 6; Ex. 8 (M. James), ¶ 3; Ex. 9 (Kamienski), ¶ 5; Ex. 10 (Kidneigh), ¶ 5; Ex. 11 (C.  
 24 Lusk), ¶ 10; Ex. 13 (McDonald), ¶ 3; Ex. 14 (Murphy), ¶ 4; Ex. 16 (Roerink), ¶ 16; Ex. 17  
 (Stokes), ¶ 6; Ex. 18 (Stover), ¶ 4.

25  
 26 <sup>37</sup> Ex. 21 (Menjivar) ¶¶ 29–32, 49–52 (describing the steps taken during undercover  
 purchases of Google Money Tree kits).

1 charges, but that prior charges will not be refunded.<sup>38</sup> Some consumers—often those who are  
 2 especially insistent on a refund and those who indicate that they will report Google Money Tree  
 3 to a bank, Better Business Bureau, or government agency—are told that they can receive a  
 4 partial refund,<sup>39</sup> or that they can receive a refund only if they return their Google Money Tree  
 5 kits.<sup>40</sup> Some consumers who return their kits as per Defendants’ requests still do not receive  
 6 their refunds, finding themselves caught in a loop in which their inquiries are always met with a  
 7 claim that the refund will require a few more days to process.<sup>41</sup>

### 8 **3. Defendants’ Terms and Conditions Pages**

9 Unlike the initial sign-up pages and payment information pages described above, which  
 10 a consumer must pass through to purchase a Google Money Tree kit, there is no requirement  
 11 that a consumer pass through the website’s terms and conditions page, which contain critical  
 12 information about the fees that Defendants charge to consumers’ financial accounts.<sup>42</sup> Instead, a  
 13 consumer will reach the content of a terms and conditions page only if he notices and voluntarily  
 14 chooses to click on a hyperlink to that page.

15 The terms and conditions pages are hyperlinked in two places from Defendants’ sign-up  
 16 websites, and each link is inconspicuously presented. The first link can be accessed by clicking

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17  
 18 <sup>38</sup> Ex. 1 (Dawe), ¶ 10; Ex. 6 (Imperato), ¶ 10; Ex. 8 (M. James), ¶ 7; Ex. 10 (Kidneigh),  
 19 ¶ 10; Ex. 13 (McDonald), ¶ 6; Ex. 14 (Murphy), ¶ 8; Ex. 15 (Novack), ¶¶ 9–11; Ex. 16  
 (Roerink), ¶ 15.

20 <sup>39</sup> Ex. 2 (Dunn), ¶ 9; Ex. 3 (Fishman), ¶ 16; Ex. 17 (Stokes), ¶ 10. *See also* Ex. 21  
 21 (Menjivar), Att. H at 7:15–8:6.

22 <sup>40</sup> Ex. 1 (Dawe), ¶ 12; Ex. 2 (Dunn), ¶ 9; Ex. 5 (Holmes), ¶ 17; Ex. 16 (Roerink), ¶ 15.  
 23 *See also* Ex. 21 (Menjivar), Att. H at 7:15–8:6 (undercover FTC investigator told he must return  
 CD for full refund, despite having not received the CD), Att. N at 13:7–14:3 (same).

24 <sup>41</sup> Ex. 2 (Dunn), ¶¶ 11–13; Ex. 9 (Kamienski), ¶ 15–23; Ex. 11 (C. Lusk), ¶¶ 12–17.

25 <sup>42</sup> Ex. 21 (Menjivar) ¶¶ 29–32, 49–52 (describing the steps taken during undercover  
 26 purchases of Google Money Tree kits).

1 on the words “Terms and Conditions” in the phrase “I agree to the Terms and Conditions” on  
 2 the payment information page. These words, however, are not underlined to signify that they  
 3 serve as a hyperlink.<sup>43</sup> The other link to Defendants’ terms and conditions pages appears at the  
 4 very bottom of Defendants’ sign-up website pages next to a link labeled “Privacy Policy.” For  
 5 some versions of these pages, consumers would have to scroll through the equivalent of two to  
 6 three printed pages to reach the terms and conditions link at the page bottom.<sup>44</sup>

7 The “terms and conditions” pages of Defendants’ sign-up websites state material terms  
 8 of Defendants’ offer that are not presented on the initial sign-up pages, payment information  
 9 pages, or order confirmation page:

- 10 • that consumers must affirmatively act within seven days of their purchase to  
 11 cancel their “free trial membership” in one of Defendants’ websites to avoid a  
 12 recurring monthly membership fee of \$72.21;
- 13 • that the membership fee will be charged to the credit or debit account used by the  
 14 consumer to pay the shipping and handling charge; and
- 15 • that Defendants will continue to charge \$72.21 to the consumers’ accounts on a  
 16 monthly basis until the consumers cancel their website memberships.<sup>45</sup>

17 Because visiting the “terms and conditions” page is not a required step in the purchase  
 18 process, many consumers complete the purchase of a Google Money Tree kit without ever  
 19 seeing the “terms and conditions” page.<sup>46</sup> Even if a consumer did encounter the terms and

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20  
 21 <sup>43</sup> *Id.*, Att. E at 77, Att. L at 301.

22 <sup>44</sup> *Id.*, Att. B at 31–33.

23 <sup>45</sup> *Id.*, Att. B at 20–24, Att. C at 36–39, Att. D at 55–57; Att. E at 70–72; Att. L at  
 24 292–93.

25 <sup>46</sup> Ex. 2 (Dunn), ¶ 4; Ex. 3 (Fishman), ¶ 6; Ex. 4 (Hicks), ¶ 4; Ex. 6 (Imperato), ¶ 5; Ex. 7  
 26 (A. James), ¶ 6; Ex. 9 (Kamienski), ¶ 5; Ex. 10 (Kidneigh), ¶ 5; Ex. 12 (McDonald), ¶ 3; Ex. 14  
 (Murphy), ¶ 4; Ex. 15 (Novack), ¶ 4; Ex. 16 (Roerink), ¶ 16; Ex. 17 (Stokes), ¶ 6; Ex. 18

1 conditions page prior to purchasing Google Money Tree, he or she may not notice the terms  
 2 concerning the \$72.21 membership fee,<sup>47</sup> which appear under the misleadingly innocuous  
 3 heading “Shipping & Other Fees.”<sup>48</sup> In addition, the amount of the membership fee is not stated  
 4 in numerals (*i.e.*, “\$72.21”), but is instead written out as “seventy two dollars and twenty one  
 5 cents,”<sup>49</sup> which blends into the surrounding text.

6 The information that Defendants have hidden away on their terms and conditions pages  
 7 is vital to consumers’ understanding of the consequences of purchasing a Google Money Tree  
 8 kit: consumers are emphatic that they would not have ordered the Google Money Tree kit if  
 9 they had known they would incur \$72.21 charges.<sup>50</sup>

#### 10 4. The Google Money Tree Kit

11 In spite of being charged for both the advertised price of the kit and subsequent  
 12 unauthorized charges, some consumers never receive any product shipment from Google Money  
 13  
 14  
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16 (Stover), ¶ 4.

17 <sup>47</sup> *E.g.*, Ex. 5 (Holmes), ¶ 7 (“I remember seeing and reviewing a separate page of the  
 18 Google Pro website that was called ‘terms and conditions.’ After looking at that page, I still  
 19 believed that the only charge for Google Pro was the \$3.88 shipping and handling fee.”).

20 <sup>48</sup> Ex. 21 (Menjivar), Att. A at 2, Att. B at 20, Att. C at 36, Att. D at 55 , Att. E at 70,  
 Att. L at 292.

21 <sup>49</sup> *Id.*, Att. A at 2, Att. B at 20, Att. C at 36, Att. D at 55 , Att. E at 70, Att. L at 292.

22 <sup>50</sup> *E.g.*, Ex. 1 (Dawe) ¶ 10 (“If I had seen anything stating that I would be charged  
 23 \$72.21, I never would have given my debit card number to Google Treasure Chest”); Ex. 6  
 24 (Imperato), ¶ 5 (“If Google Pro had told me at the time of purchase that it intended to debit my  
 25 bank account for \$72.21, I would have cancelled immediately.”); Ex. 9 (Kamienski), ¶ 10 (“If I  
 26 had seen anything stating I would be charged \$72.21, I would not have agreed to the order.”);  
 Ex. 16 (Roerink), ¶ 14 (“If I had been told that Google Money Tree would charge me a \$72.21  
 monthly fee, I never would have ordered their product in the first place.”).

1 Tree.<sup>51</sup> Those who do receive only a computer CD, the contents of which do not meet their  
2 expectations of a “kit” presenting a method for earning substantial income by working at home.

3 For example, one consumer has described her CD as containing “a random assortment of  
4 PDF files.”<sup>52</sup> Many of the files seemed to her unrelated to starting a business, with titles that  
5 included “Delicious Diabetic Recipes,” “Vintage Crochet Patterns,” and “55 Ways to Have Fun  
6 with Google.”<sup>53</sup> This consumer found the files that were related to creating a business “very  
7 technical” and “not for newcomers to this business,” in contrast to her expectation from  
8 Defendants’ websites that the kit was recommended for those with no prior experience.<sup>54</sup>  
9 Critically, “[t]here was no step-by-step guide” explaining how to use the kit to earn income.<sup>55</sup>

10 Other consumers have echoed aspects of these comments, noting that the CD did not  
11 give a step-by-step process to guide the user or other clear instructions for earning income with  
12 Google Money Tree,<sup>56</sup> that the CD “just rambled” and was “useless,”<sup>57</sup> and that the CD’s  
13 contents were “gobbledygook.”<sup>58</sup> The CD’s contents varied so sharply from consumers’  
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17 <sup>51</sup> Ex. 3 (Fishman), ¶ 8; Ex. 8 (M. James), ¶ 7; Ex. 13 (McDonald), ¶ 3; Ex. 14 (Murphy),  
18 ¶ 13; Ex. 15 (Novack), ¶ 17. The Commission made two undercover buys of Google Money  
19 Tree kits but did not receive a product shipment from the first. Ex. 21 (Menjivar) ¶ 45.

20 <sup>52</sup> Ex. 16 (Roerink), ¶ 10.

21 <sup>53</sup> *Id.*, ¶ 10.

22 <sup>54</sup> *Id.*, ¶ 10.

23 <sup>55</sup> *Id.*, ¶ 10.

24 <sup>56</sup> Ex. 4 (Holmes), ¶¶ 13–14; Ex. 10 (Kidneigh), ¶ 12; Ex. 17 (Stokes), ¶ 7.

25 <sup>57</sup> Ex. 10 (Kidneigh), ¶ 12.

26 <sup>58</sup> Ex. 17 (Stokes), ¶ 7.

1 expectations that many never even attempted to use it to earn income or work from home.<sup>59</sup>

2 Similarly, the contents of the CD received by the FTC through an undercover buy were  
3 voluminous and unorganized, as demonstrated by a partial review of the CD conducted by an  
4 FTC paralegal specialist.<sup>60</sup> When the CD was inserted into the CD drive of a computer, a menu  
5 window appeared with six buttons.<sup>61</sup> The menu window did not present any instructions on how  
6 to use or navigate the CD, and none of the buttons on the menu window was marked  
7 “instructions,” “directions,” or with any similar indication that the button would provide  
8 guidance for using or navigating the CD.<sup>62</sup>

9 Clicking on the buttons on the menu window provided no greater insight concerning the  
10 use or navigation of the CD. For example, clicking on the button labeled “View eBooks”  
11 opened a folder directory showing 157 PDF files.<sup>63</sup> The files of this folder are listed in  
12 alphabetical order, and, as with the menu window, no directions or instructions are apparent.<sup>64</sup>  
13 During the FTC’s review of the CD, a virus protection program reported that two “Trojan  
14 Horse” programs had been found in the eBooks folder.<sup>65</sup> (A “Trojan Horse” is a type of  
15 malicious content that may cause loss or theft of data.)<sup>66</sup>

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16  
17 <sup>59</sup> Ex. 4 (Holmes), ¶¶ 13–14; Ex. 6 (Imperato), ¶ 13; Ex. 10 (Kidneigh), ¶ 12; Ex. 16  
18 (Roerink), ¶ 10; Ex. 17 (Stokes), ¶ 7.

19 <sup>60</sup> The details of this review, including various screen captures, are recounted in Ex. 22,  
20 Declaration of Samuel Jacobson (“Jacobson”).

21 <sup>61</sup> *Id.*, ¶ 5–6 & Att. B.

22 <sup>62</sup> *Id.*, ¶ 5–6 & Att. B.

23 <sup>63</sup> *Id.*, ¶ 7 & Att. C.

24 <sup>64</sup> *Id.*, ¶ 7 & Att. C.

25 <sup>65</sup> *Id.*, ¶ 16 & Att. V.

26 <sup>66</sup> *Id.*, ¶ 17 & Att. W.

1 In reviewing the CD, the FTC viewed the contents presented by clicking each button on  
2 the main menu window and other selected files and folders. Some buttons led to folders  
3 containing ZIP files, which are files containing one or more files that have been compressed to  
4 reduce their size.<sup>67</sup> On some occasions, the uncompressed contents of the ZIP files themselves  
5 contained ZIP files.<sup>68</sup>

6 The FTC's paralegal specialist did not uncompress all ZIP files found on the CD or view  
7 the contents of every subfolder encountered.<sup>69</sup> In each folder directory that the FTC did view,  
8 however, no directions or instructions appeared automatically, the contents of the folder were  
9 presented in alphabetical order, and those contents did not include files with names containing  
10 the words "instructions," "directions," or similar terms.<sup>70</sup>

11 Based on this review of the CD, the FTC's paralegal specialist identified almost 700 files  
12 representing more than 640 megabytes of data.<sup>71</sup> As these figures do not include subfolders that  
13 the FTC did not visit and ZIP files that the FTC did not uncompress, the true volume of the CD  
14 exceeds these figures.

##### 15 **5. Defendants Hold Google Money Tree Out As a Nevada Entity**

16 Defendants have listed addresses in Las Vegas on the "contact us" pages of their  
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21 <sup>67</sup> *E.g., id.*, ¶¶ 9 & Att. G, 10 & Att. K.

22 <sup>68</sup> *E.g., id.*, ¶ 9(f)-(g) & Att. H.

23 <sup>69</sup> *Id.*, ¶ 15.

24 <sup>70</sup> *E.g., id.*, ¶¶ 6 & Att. B, 7 & Att. C, 9 & Att. G, 10 & Att. K, 13 & Att. P.

25 <sup>71</sup> *Id.*, ¶ 15.

1 websites,<sup>72</sup> have used the same addresses as the return addresses on their CD mailers,<sup>73</sup> have also  
 2 told consumers who call Defendants' toll-free numbers that Google Money Tree is located in  
 3 Las Vegas.<sup>74</sup> In truth, the Las Vegas addresses are merely mail drops and not Defendants' actual  
 4 business premises.<sup>75</sup>

#### 5 **B. The Defendants**

6 Defendants **West Coast Internet Media, Inc., Two Part Warnings, LLC, Two Part**  
 7 **Investments, LLC, and Platinum Teleservices, Inc.,** are organized under the laws of Nevada  
 8 and all list Las Vegas addresses of their corporate filings.<sup>76</sup> Defendant **Infusion Media, Inc.,** is  
 9 a Utah corporation.<sup>77</sup>

10 Defendant **Jonathan Eborn** is listed on public records as the director of Infusion Media,  
 11 Inc., a manager of Two Warnings, LLC, and Two Part Investments, LLC, and the president and  
 12 secretary of West Coast Internet Media, Inc.<sup>78</sup>

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14 <sup>72</sup> *E.g.*, Ex. 21 (Menjivar), Att. A at 7, Att. B at 28.

15 <sup>73</sup> *E.g.*, Ex. 16 (Roerink) ¶ 8; Ex. 22 (Jacobson), Att. A (CD received from FTC  
 16 undercover buy).

17 <sup>74</sup> Ex. 3 (Fishman), ¶ 17 (“I asked for contact information for Google Money Tree and I  
 18 was told I could write to them at 2375 East Tropicana Avenue in Las Vegas, Nevada, 89119. He  
 19 told me that this was their corporate headquarters.”); Ex. 15 (Novack) (customer service “told  
 20 me that the company was located at 5940 South Rainbow Boulevard in Las Vegas, NV 89118”).

21 <sup>75</sup> Ex. 23 (Drexler), ¶¶ 33–34 (identifying 2375 East Tropicana Avenue, Las Vegas,  
 22 Nevada, and 5940 South Rainbow Boulevard, Las Vegas, Nevada, as mail drops). Mail received  
 23 for Google Money Tree at these addresses is forwarded to 405 East 12450 South, Draper, Utah.  
*Id.*, ¶ 33–34. Defendants have also used a mail drop at 970 W. Broadway, Jackson, Wyoming, to  
 create further confusion regarding their true identities and locations. *Id.*, ¶ 32.

24 <sup>76</sup> *Id.*, ¶¶ 5–14.

25 <sup>77</sup> *Id.*, ¶ 16.

26 <sup>78</sup> *Id.*, ¶¶ 11–13.

1 Defendant **Stephanie Burnside** is the treasurer and director of West Coast Internet  
 2 Media, Inc., and was, during at least part of the operation of the Google Money Tree scheme, a  
 3 manager of Two Warnings, LLC, and Two Part Investments, LLC.<sup>79</sup>

4 Defendant **Michael McLain Miller** is an officer of Infusion Media, Inc, a manager of  
 5 Two Warnings, LLC, and Two Part Investments, LLC, and was, during at least part of the  
 6 operation of the Google Money Tree scheme, the director of Infusion Media, Inc.<sup>80</sup>

7 Defendant **Tony Norton** is the president, secretary, treasurer, and director of Platinum  
 8 Teleservices, Inc.,<sup>81</sup> and also manages Platinum Teleservices.<sup>82</sup>

### 9 III. LEGAL ARGUMENT

10 To put an immediate stop to Defendants' ongoing deceptive practices and to preserve the  
 11 possibility of effective final relief, the Commission requests the issuance of an *ex parte* TRO  
 12 with provisions for asset and document preservation, the appointment of a receiver, expedited  
 13 discovery, immediate access to Defendants' business premises and records, and an order to  
 14 show cause why a preliminary injunction should not issue. As shown below, the Court has the  
 15 authority to enter the relief sought, the evidence demonstrates that the Commission is likely to  
 16 succeed on the merits, and the equities weigh in favor of the requested relief.

#### 17 A. Section 13(b) of the FTC Act Authorizes this Court to Grant the 18 Requested Relief

19 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), gives the Commission authority to  
 20 seek, and the district court authority to grant, both a permanent injunction against violations of

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21  
 22 <sup>79</sup> *Id.*, ¶¶ 6–8.

23 <sup>80</sup> *Id.*, ¶¶ 6–7, 16.

24 <sup>81</sup> *Id.*, ¶ 9.

25 <sup>82</sup> Ex. 20, Declaration of Ao Pauga, Utah Department of Commerce, Division of  
 26 Consumer Protection (“Pauga”), ¶¶ 6–7.

1 any provisions of law enforced by the Commission and “any ancillary relief necessary to  
2 accomplish complete justice.” *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir.  
3 1982). This ancillary relief can include, among other remedies, an *ex parte* temporary  
4 restraining order, a preliminary injunction, an asset freeze, and the appointment of a receiver.  
5 *E.g.*, *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1232 & n.2 (9th Cir. 1999) (*ex parte* TRO  
6 and preliminary injunction including asset freeze); *FTC v. Am. Nat’l Cellular, Inc.*, 810 F.2d  
7 1511, 1512 (9th Cir. 1987) (TRO and preliminary injunction including asset freeze and  
8 appointment of a receiver). On numerous occasions, courts of this district have acted under the  
9 authority of Section 13(b) to grant preliminary relief similar to that sought here.<sup>83</sup>

10 In determining whether to grant preliminary relief under Section 13(b), a court must  
11 consider two factors: (1) the Commission’s likelihood of ultimate success, and (2) whether the  
12 public equities outweigh any private equities. *Affordable Media*, 179 F.3d at 1233. Unlike  
13 private litigants, the Commission does not need to prove irreparable injury, *FTC v. Warner*  
14 *Comm’ns, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984), which is presumed in a statutory  
15 enforcement action, *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989).  
16 Because irreparable injury is presumed, the burden of establishing success of the merits is  
17 decreased, and the district court “ ‘need only to find some chance of probable success on the

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19 <sup>83</sup> *E.g.*, *FTC v. ERG Ventures, LLC*, No. 06-00578 (D. Nev. Oct. 31, 2006) (McKibben,  
20 J.) (granting *ex parte* TRO including asset freeze); *FTC v. Nat’l Vending Consultants, Inc.*, No.  
21 05-0160 (D. Nev. Feb. 8, 2005) (Jones, J.) (granting *ex parte* TRO including asset freeze,  
22 immediate access, and receiver); *FTC v. Global Net Solutions, Inc.*, No. 05-0002 (D. Nev. Jan. 3,  
23 2005) (Pro, J.) (granting *ex parte* TRO including asset freeze and immediate access); *FTC v. 3rd*  
24 *Union Card Servs., Inc.*, No. 04-0712 (D. Nev. May 25, 2004) (Jones, J.) (granting *ex parte* TRO  
25 including asset freeze); *FTC v. Tyme Lock 2000, Inc.*, No. 02-1078 (D. Nev. Aug. 19, 2002)  
26 (Mahan, J.) (granting *ex parte* TRO including asset freeze, receiver, and immediate access); *FTC*  
*v. Elec. Processing Servs., Inc.*, No. 02-500 (D. Nev. Apr. 11, 2002) (Hicks, J.) (granting *ex*  
*parte* TRO including asset freeze and immediate access); *FTC v. Nat’l Audit Defense Network,*  
*Inc.*, No. 02-0131 (D. Nev. Feb. 1, 2002) (George, J.) (granting *ex parte* TRO including asset  
freeze, immediate access, and receiver); *FTC v. BTV Indus.*, No. 02-0437 (D. Nev. Apr. 16,  
2002) (Hicks, J.) (granting *ex parte* TRO including asset freeze).

1 merits' " in order to award preliminary relief. *Id.* (quoting *United States v. Odessa Union*  
 2 *Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987)). In addition, when weighing the equities,  
 3 the public interest should receive greater weight than private interests. *Id.*

4 The evidence in the record amply demonstrates that the Commission is likely to succeed  
 5 on the merits of its claims that Defendants have violated Section 5(a) of the FTC Act, 15 U.S.C.  
 6 § 45(a), Section 907(a) of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693e(a),  
 7 and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b).

8 **1. The FTC Has Demonstrated a Likelihood of Success in**  
 9 **Establishing that Defendants Have Violated Section 5 of the**  
 10 **FTC Act**

11 Section 5(a) of the FTC Act empowers to Commission to prevent "deceptive acts or  
 12 practices in or affecting commerce." 15 U.S.C. § 45(a). An act or practice is deceptive if "first,  
 13 there is a representation, omission, or practice that, second, is likely to mislead consumers acting  
 14 reasonably under the circumstances, and third, the representation, omission, or practice is  
 15 material." *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Pantron I Corp.*, 33 F.3d  
 16 1088, 1095 (9th Cir. 1994) (quoting and adopting the standard set forth in *In re Cliffdale*  
 17 *Assocs.*, 103 F.T.C. 110, 164–65 (1984)).<sup>84</sup> A misrepresentation may be either express or  
 18 implied. *FTC v. Figgie Int'l*, 994 F.2d 595, 604 (9th Cir. 1993) ("[N]othing in statute or case  
 19 law . . . protects from liability those who merely imply their deceptive claims . . ."). A  
 20 representation, omission, or practice is material if it " 'involves information that is important to  
 21 consumers and, hence, likely to affect their choice of, or conduct regarding, a product.' " *FTC*  
 22 *v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs.*, 103

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23  
 24 <sup>84</sup> Under Section 5, the Commission is not required to prove that a defendant intended to  
 25 deceive consumers, nor is a defendant's good faith a defense to liability. *FTC v. World Travel*  
 26 *Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. NCH, Inc.*, 1995-2 Trade  
 Cas. (CCH) ¶ 71,113, at 75,346 (D. Nev. 1995) (O'Connor, J.); *FTC v. Pioneer Enters., Inc.*,  
 1992-2 Trade Cas. (CCH) ¶ 70,043, at 69,156 (D. Nev. 1992) (George, J.).

1 F.T.C. at 165).<sup>85</sup>

2 Here, Defendants' engage in three deceptive practices: (1) the failure to disclose  
3 adequately the terms of their website membership; (2) the presentation of false or  
4 unsubstantiated income claims; and (3) the false representation that Defendants are affiliated  
5 with Google Inc.

6 **i. Defendants' Failure to Disclose Adequately the Terms**  
7 **of Their Website Membership Deceived Consumers**

8 The failure to disclose material information may cause an advertisement to be deceptive.  
9 *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978). Moreover, as the following  
10 cases show, courts have held in various contexts that an inconspicuous disclosure does not  
11 remedy the deceptiveness of a material omission.

12 In *Cyberspace.com*, for example, the court considered checks for small amounts sent to  
13 consumers that included small-print disclosures on the back revealing that cashing or depositing  
14 the check would result in the placement of monthly fees for Internet service on the consumers'  
15 telephone bills. 453 F.3d at 1198–99. The front of the check lacked any indication that by  
16 cashing the check, the consumer was contracting to pay a monthly fee. *Id.* at 1200–01. Because  
17 perusal of the check would reveal no obvious indication that a contract was in the offing, the net  
18 impression of the check was deceptive, despite the disclosure on the check's back. *Id.* Other  
19 courts have reached similar results. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35,  
20 43 (D.C. Cir. 1985) (advertisement's description of cigarette tar content was deceptive despite  
21 fine print disclosure at the bottom of the ad); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal.

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22  
23 <sup>85</sup> The Commission need not prove actual reliance by each individual consumer. *Figgie*  
24 *Int'l*, 994 F.2d at 605. Requiring such proof would defeat the intent of the FTC Act and would  
25 frustrate prosecutions of large consumer redress actions. *Id.* Instead, a presumption of actual  
26 reliance arises once the Commission has proved that the defendant made material  
misrepresentations, that they were widely disseminated, and that consumers purchased the  
defendant's product. *Id.* at 605–06.

1 1999) (disclaimers in a contract for credit repair services were insufficient to counteract  
2 advertising claims about the service).

3 Count I of the Complaint alleges that Defendants failed to disclose adequately to  
4 consumers the material terms of their offer. In particular, Defendants represent through their  
5 websites that consumers can order a work-at-home kit and will incur only a small charge for  
6 shipping and handling, while failing to disclose adequately the existence and cost of the  
7 continuity program in which Defendants enroll consumers.

8 As outlined above in Section II.A.1, Defendants' initial payment pages and payment  
9 information pages are devoid of any indication that consumers will be automatically enrolled in  
10 a continuity program and that their financial account information will be used to pay monthly  
11 charges in the amount of \$72.21. *See supra* note 4. To the contrary, Defendants' payment  
12 information pages contain numerous representations that consumers are buying only a kit and  
13 that their financial account information will be used only to pay a modest shipping and handling  
14 charge. *See supra* notes 22–25 and accompanying text. Based on these representations,  
15 consumers believe that they are agreeing to total charges of less than \$4.00.

16 Critical information on the monthly charges (and how to avoid them) is hidden on a  
17 separate terms and conditions page accessible only by inconspicuous hyperlinks. *See supra*  
18 notes 33–37, 46–49 and accompanying text. These omissions were material to consumers, who  
19 never would have bought Google Money Tree had they known about the \$72.21 fees, *see supra*  
20 note 50, and consequently demanded refunds. Consumer declarations, the more than 1,400  
21 complaints regarding Google Money Tree that consumers have registered with the Commission,  
22 other law enforcement agencies, and the BBB,<sup>86</sup> and extraordinarily high chargebacks of Google  
23  
24  
25

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26 <sup>86</sup> Ex. 23 (Drexler) ¶¶ 37–41.

1 Money Tree credit card transactions<sup>87</sup> all amply demonstrate that the omission of this  
2 information was material to consumers' decision to order Google Money Tree and that  
3 Defendants' failure to adequately disclose this information misled them. As such, the  
4 Commission has demonstrated a likelihood of success on the merits of Count I of the Complaint.  
5 *See FTC v. Direct Mktg. Concepts, Inc.*, No. 04-11136, 2004 U.S. Dist. LEXIS 11628 (D. Mass.  
6 June 23, 2004) (issuing preliminary injunction requiring clear and conspicuous disclosures of  
7 material terms of a continuity program before the consumer consents to any purchase).

8 **ii. Defendants' Representations Regarding Income Are**  
9 **False or Unsubstantiated**

10 Misrepresentations regarding the profit potential of a business opportunity are both likely  
11 to deceive and material, and violate Section 5(a). *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp.  
12 2d 502, 529 (S.D.N.Y. 2000); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y.  
13 1998); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985).

14 In addition, advertising that lacks a reasonable basis is also deceptive. FTC Policy  
15 Statement on Deception, 103 F.T.C. 174, 175 n.5 (appended to *In re Cliffdale Associates, Inc.*,  
16 103 F.T.C. 110 (1984)). As such, advertisers violate Section 5(a) when they lack substantiation  
17 for claims about the performance of their product. *E.g., FTC v. US Sales Corp.*, 785 F. Supp.  
18 737, 748-50 (N.D. Ill. 1992) (defendant lacked sufficient substantiation for advertised claims  
19 that its service provides information about how and where to buy quality automobiles at  
20 tremendous savings).

21 Count II of the Complaint alleges that Defendants' representations regarding the income  
22 consumers are likely to earn with Google Money Tree are false or unsubstantiated. As discussed  
23 in Section II.A.1, Defendants' websites present lavish claims about the income consumers can

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24  
25 <sup>87</sup> *Id.*, ¶ 38 (reflecting that deceived consumers sought reversals of Defendants' credit  
26 card charges in such excessively high numbers that inquiries were made by Visa U.S.A., Inc.'s  
"Merchant Chargeback Monitoring Program").

1 and have earned by using their kit, including claims of more than \$100,000 earned over six  
2 months. *See supra* notes 5–11 and accompanying text.

3 In truth, however, many consumers who pay for a Google Money Tree kit never receive  
4 one, and those who do find it to be uninformative, disorganized, and useless for earning income  
5 from home. *See supra* notes 51–59. While Defendants’ websites promote an opportunity to  
6 earn income “just filling out forms and doing searches,” the Google Money Tree “kit” presents  
7 no such method for earning income. Indeed, the Commission’s own review of a Google Money  
8 Tree CD obtained in an undercover buy reveals that its contents are both voluminous and  
9 entirely unguided, *see* Section II.A.4, presenting nothing more than a mish-mash of  
10 miscellaneous information. Through this evidence, the Commission has demonstrated a  
11 likelihood of success on the merits of Count II of the Complaint.

12 **iii. Defendants Falsely Represent That They Are Affiliated**  
13 **with Google Inc.**

14 Count III of the Complaint alleges that Defendants falsely represent, expressly or by  
15 implication, that they are affiliated with Google Inc. The evidence demonstrates that Defendants  
16 make prominent use on their websites of the “Google” name and logo, *see supra* note 13, which  
17 has unquestionably had an effect on consumers. Consumer declarants state that Google Money  
18 Tree’s use of the “Google” name and logo led them to believe that Google Inc. was affiliated  
19 with the work-at-home kits, *see supra* note 15, and that this belief was an important factor in  
20 their decision to purchase a Google Money Tree kit.<sup>88</sup> The declarants’ impression of an

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21 <sup>88</sup> Ex. 1 (Dawe), ¶ 5 (“I wouldn’t have considered purchasing the Google Treasure Chest  
22 information if I thought it wasn’t a part of the company Google.”); Ex. 2 (Dunn), ¶ 3; Ex. 4  
23 (Fishman), ¶ 5 (“Another reason that I decided to order was because I thought Google Money  
24 Tree was affiliated with Google, which I think of as a legitimate company that would be unlikely  
25 to be running a scam.”); Ex. 5 (Holmes), ¶ 9 (“I also decided to order . . . in part because I  
26 believed that Google Pro was being offered by Google . . . a legitimate company with a good  
reputation”); Ex. 7 (A. James), ¶ 5 (“[B]ecause the website had ‘Google’ throughout the page, I  
thought that I was purchasing a kit through a company that I know and trust.”); Ex. 9  
(Kamienski), ¶ 4 (“One of the main reasons I decided to sign up was because I understood this to

1 affiliation between Google Money Tree and Google Inc. is echoed in many of the 1,400  
2 consumer complaints registered against Google Money Tree.<sup>89</sup>

3 In truth, Google Money Tree has no affiliation with Google Inc. To the contrary, Google  
4 Inc., has sent Google Money Tree letters demanding that Google Money Tree cease using the  
5 Google trademark.<sup>90</sup>

6 Although Defendants have tried to insulate themselves from liability for their  
7 misrepresentations by placing a disclosure of non-affiliation on their websites, *see supra* note 14,  
8 that disclosure appears only in small type at the bottom of the page and is transparently  
9 ineffective in countering the impression left by the websites' promiscuous use of the "Google"  
10 name and logo. As discussed *supra* Section III.A.1.i, an inconspicuous disclosure is no cure to a  
11 deceptive practice.

12 In sum, Defendants' representations of an affiliation with Google Inc. are false, likely to  
13 mislead consumers (and have in fact misled many consumers), and material. The Commission  
14 has therefore demonstrated a likelihood of success on the merits of Count III of the Complaint.

15 **2. The FTC Has Demonstrated a Likelihood of Success in**  
16 **Establishing that Defendants Have Violated the Electronic**  
**Fund Transfer Act and Regulation E**

17 The Electronic Fund Transfer Act and its implementing Regulation E regulate the  
18 circumstances under which a merchant may make regularly recurring debits from a consumer's  
19 bank account. The EFTA and Regulation E require that, before a merchant can make such

20  
21 \_\_\_\_\_  
22 be a[n] opportunity to work for Google, a company that I think of as reputable and  
23 trustworthy."); Ex. 10 (Kidneigh), ¶ 6; Ex. 16 (Roerink), ¶ 4 (decided to purchase in part because  
24 "I thought that Google Money Tree was part of Google, Inc., a company I trusted"); Ex. 17  
(Stokes), ¶ 5 ("I think of Google as an upstanding company and I had more confidence in Google  
Money Tree because I thought Google was standing behind that product.").

25 <sup>89</sup> Ex. 23 (Drexler) ¶¶ 37-41.

26 <sup>90</sup> Ex. 19 (Hagan) ¶¶ 6-7.

1 recurring debits, it must obtain a written authorization signed or similarly authenticated by  
2 the consumer. 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b). For an authorization to be valid,  
3 the terms of the preauthorized transfer must be “clear and readily understandable” and the  
4 authorization “should evidence the consumer’s identity and assent to the authorization.” Federal  
5 Reserve Board’s Official Staff Commentary to Regulation E, 12 C.F.R. Part 205, Supp I, ¶ 10(b),  
6 comments (5)&(6). Moreover, a copy of the authorization is to be provided to the consumer.  
7 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b). These protections ensure that consumers’ consent  
8 to recurring debits will be knowing and informed. A consumer’s rights under the EFTA cannot  
9 be waived. 15 U.S.C. § 1693i.

10 Defendants are plainly aware of the EFTA’s requirements because they include language  
11 on their terms and conditions pages in an attempt to circumvent them. Defendants’ language  
12 states that “[i]f you choose to sign up for this product and pay the recurring monthly charges  
13 using a debit card you hereby provide pre-authorization and consent that googlemoneytree.com  
14 may charge seventy two dollars and twenty one cents on a monthly basis.”<sup>91</sup> It additionally  
15 states that the terms and conditions page itself will serve as the consumer’s copy of the  
16 authorization.<sup>92</sup>

17 Defendants’ attempts to evade EFTA’s requirements fail for several reasons. First, the  
18 language purporting to be the terms of a preauthorized transfer is not “clear” because it is buried  
19 in a “terms and conditions” page separate from the page on which the consumer actually  
20 provides financial account information and authorizes a transaction. The only price that is  
21 “clear” to the consumer on the payment information page is the shipping and handling fee,  
22 which is accordingly the only debit that the consumer actually authorizes. Second, the terms and  
23

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24 <sup>91</sup> Ex. 21 (Menjivar), Att. A at 2, Att. E at 70. *See also id.*, Att. B at 20 (same language  
25 for internetincomeinitiative.com), Att. D at 55 (same language for googletreasurechest.com), Att.  
L at 292 (same language for internetincomeinitiative.com).

26 <sup>92</sup> *Id.*, Att. A at 2, Att. B at 20, Att. C at 36, Att. D at 55, Att. E at 70, Att. L at 292.

1 conditions page cannot serve as the consumer's "copy" of the authorization because it is not  
 2 signed or similarly authenticated by the consumer and does not evidence the consumer's identity  
 3 and assent to the transfers. Lastly, to the extent that Defendants' language is intended as a  
 4 waiver of consumers' EFTA rights, such waivers are flatly prohibited under 15 U.S.C. § 1693f.

5       Declarations demonstrate that consumers who purchased a Google Money Tree kit using  
 6 a debit card were not authorizing recurring debits from their bank accounts and never received a  
 7 copy of any purported authorization for such debits.<sup>93</sup> In light of this evidence, and in light of  
 8 the facial inadequacy of Defendants' attempted evasions of the EFTA's requirements, the  
 9 Commission has clearly demonstrated a likelihood of success on Count IV of the Complaint.

### 10                   **3.       The Equities Weigh Heavily in Favor of the Requested Relief**

11       Since the Commission has demonstrated a likelihood of success on the merits of every  
 12 count contained in the Complaint, injunctive relief here is warranted because the public equities  
 13 outweigh the private equities. These public equities include the protection of innocent consumer  
 14 and the preservation of defendants' assets for consumer redress. *World Wide Factors*, 882 F.2d  
 15 at 347.

16       Defendants have operated this fraudulent scheme since September 2008, in the process  
 17 illegally pocketing millions of dollars from thousands of consumers.<sup>94</sup> Moreover, Defendants  
 18 have continued their activities in the face of official action by state law enforcement authorities.

19       In the first week of April 2009, the Utah Department of Commerce's Division of  
 20 Consumer Protection ("Utah DCP") issued four administrative citations with potential fines

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23       <sup>93</sup> Ex. 1 (Dawe) ¶ 9; Ex. 3 (Fishman) ¶ 9; Ex. 5 (Holmes) ¶ 16; Ex. 6 (Imperato) ¶ 5;  
 24 Ex. 8 (Kamienski) ¶ 10; Ex. 11 (C. Lusk) ¶ 15; Ex. 13 (McDonald) ¶ 11; Ex. 16 (Roerink) ¶ 14.

25       <sup>94</sup> Records obtained by the FTC indicate that through Visa credit card charges alone, and  
 26 during only the limited period of September 2008 through February 2009, Defendants took in  
 more than \$7.4 million. Ex. 23 (Drexler), ¶ 26.

1 totaling \$30,000 concerning unauthorized charges related to Google Money Tree.<sup>95</sup> The  
2 administrative citations were served by mail to various addresses,<sup>96</sup> including several that have  
3 been presented on Defendants' websites as mailing addresses for Google Money Tree.<sup>97</sup>

4 In addition, on April 23, 2009, the Texas Attorney General filed suit against Infusion  
5 Media, Inc., and Jonathan Eborn concerning unauthorized charges related to Google Money  
6 Tree.<sup>98</sup> The complaint in that action alleges that Texas consumers were subjected to  
7 unauthorized charges and seeks civil penalties, consumer redress, and permanent injunctive  
8 relief.<sup>99</sup>

9 Absent injunctive relief, there is a strong likelihood that future violations will occur.  
10 Here, the public's interest in immediately halting this unlawful scheme and preventing the  
11 victimization of additional innocent consumers far outweighs any limited interest Defendants  
12 may have in continuing to operate their scam. *See World Wide Factors*, 882 F.2d at 347  
13 (affirming the district court's finding that " 'there is no oppressive hardship to defendants in  
14 requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve  
15 their assets from dissipation or concealment.' ").

## 16 **B. The Liability of Defendants**

### 17 **1. Corporate Defendants Operate as a Common Enterprise**

18 Defendants run their scheme using a series of corporations and limited liability  
19 companies operated as a common enterprise. Participants in a common enterprise are held  
20

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21 <sup>95</sup> *Id.*, Att. O at 114, 117, 119, 122.

22 <sup>96</sup> *Id.*, Att. O at 115, 117, 119, 122.

23 <sup>97</sup> *Id.*, Att. A at 7, Att. B at 28, Att. D at 60.

24 <sup>98</sup> *Id.* Att. P.

25 <sup>99</sup> *Id.*, Att. P.

1 jointly and severally liable for violations of the FTC Act. *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp.  
 2 2d 1176, 1202 (C.D. Cal. 2000); *FTC v. Wolf*, 1997-1 Trade Cas. (CCH) ¶ 71,713, at 79,080  
 3 (S.D. Fla. 1997). To determine the existence of a common enterprise, a court may consider  
 4 factors including whether the entities are under common control, whether the entities share  
 5 officers or office space, and whether business is transacted “through a maze of interrelated  
 6 companies.” *E.g., Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *J.K. Publ'ns*, 99 F.  
 7 Supp. 2d at 1202; *Wolf*, 1997-1 Trade Cas. (CCH) at 79,080.

8 Here, Defendants have used different entity names for various aspects of the Google  
 9 Money Tree operation:

- 10 • Internet domains at which consumers sign up for Google Money Tree were  
 11 registered under the name West Coast Internet Media, Inc.;<sup>100</sup>
- 12 • Merchant accounts set up to permit the purchase of Google Money Tree by Visa  
 13 credit cards was established under the names Two Part Warnings, Inc., and Two  
 14 Part Investments, Inc.;<sup>101</sup>
- 15 • Telephone service for certain telephone numbers used in connection with Google  
 16 Money Tree operations were established under the name Infusion Media, Inc.,  
 17 although the signage and individuals present on the premises with these numbers  
 18 identify the business operating there as Platinum Teleservices, Inc.;<sup>102</sup> and

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19  
 20 <sup>100</sup> Ex. 21 (Menjivar), ¶¶ 5, 12, 16, 24, 25, 29, 49 (identifying Google Money Tree sign-  
 21 up websites at the domains deliciousdownloads.com, safedownloadarea.com, and  
 22 redtomorrowfield.com); Ex. 23 (Drexler), ¶ 23 (identifying West Coast Internet Media, Inc., as  
 the registrant for these domains).

23 <sup>101</sup> Ex. 23 (Drexler), ¶¶ 24, 29, 31.

24 <sup>102</sup> Ex. 23 (Drexler), ¶¶ 20–21 (discussing telephone service established under the name  
 25 Infusion Media, Inc., for the address 405 East 12450 South, Draper, Utah, and those numbers’  
 26 connection to consumer complaints about Google Money Tree); Ex. 20 (Pauga), ¶¶ 6–7  
 (describing visit to 405 East 12450 South, Draper, Utah).

- Internet domains for Defendants' membership websites are registered under the name Infusion Media, Inc.<sup>103</sup>

These entity names, however, trace back to the same handful of individuals. Except for Platinum Teleservices, Inc., each of these entities has two of the Defendants Jonathan Eborn, Stephanie Burnside, or Michael McLain Miller as officers or directors.<sup>104</sup>

The addresses claimed by the Corporate Defendants further suggest their intertwined nature. Most notably, the premises used by Platinum Teleservices, Inc.,<sup>105</sup> is the same as the billing address used by Infusion Media, Inc., for telephone service and Internet hosting service connected to Google Money Tree.<sup>106</sup> Also, many of the "business addresses" claimed in various documents by the Corporate Defendants are simply the respective residences of Defendants Miller and Eborn.<sup>107</sup>

As Defendants' operations satisfy the factors used to determine a common enterprise, each of the Corporate Defendants is liable for all Google Money Tree violations.

## 2. The Individual Defendants Are Liable and Subject to Monetary and Injunctive Relief

In order to obtain injunctive and monetary relief against individuals for injury to consumers resulting from a company's conduct, the Commission must establish that the individuals both (1) participated directly in the unlawful acts or practices or had authority to

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<sup>103</sup> Ex. 21 (Menjivar), ¶¶ 3–4, 10–12, 21–22 (identifying Google Money Tree membership websites at the domains googlemoneytree.com, internetincomeinitiative.com, and googletreasurechest.com); Ex. 23 (Drexler), ¶ 22 (identifying Infusion Media, Inc., as the registrant for these domains).

<sup>104</sup> Ex. 23 (Drexler), ¶¶ 14, 18.

<sup>105</sup> Ex. 20 (Pauga), ¶ 6.

<sup>106</sup> Ex. 23 (Drexler), ¶ 20.

<sup>107</sup> *Id.*, ¶ 4.

1 control them; and (2) had some knowledge of these acts or practices. *FTC v. Publ'g Clearing*  
2 *House, Inc.*, 104 F.3d 1168, 1170–71 (9th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d  
3 564, 573 (7th Cir. 1989). Authority to control the company can be demonstrated by “active  
4 involvement in business affairs and the making of corporate policy, including assuming the  
5 duties of a corporate officer.” *Amy Travel*, 875 F.2d at 573. The Commission may satisfy the  
6 knowledge requirement by showing either actual knowledge of the misrepresentations, reckless  
7 indifference to the truth or falsity of the misrepresentations, or an awareness of a high  
8 probability of fraud coupled with an intentional avoidance of the truth. *Publ'g Clearing House*,  
9 104 F.3d at 1171; *Amy Travel*, 875 F.2d at 574. The degree of participation in business affairs is  
10 probative of knowledge. *Id.*; *FTC v. Sharp*, 782 F. Supp. 1445, 1450 (D. Nev. 1991) (Pro, J.). In  
11 order to establish individual liability, the Commission need not show that the individual intended  
12 to defraud consumers. *Publ'g Clearing House*, 104 F.3d at 1171.

13 Individual defendants Jonathan Eborn, Stephanie Burnside, Michael McLain Miller, and  
14 Tony Norton represent all officers and directors of the five corporate defendants and  
15 indisputably had authority to control those companies' unlawful activities, thus satisfying the  
16 first prong of the test for individual liability.

17 In addition, each individual must have either been aware of Google Money Tree's  
18 deceptive practices or aware of a high probability of fraud coupled with an intentional avoidance  
19 of the truth. Given the volume of consumers who have complained about Google Money Tree to  
20 law enforcement and the BBB, no collection of officers could be unaware that Corporate  
21 Defendants are at least likely to be engaging in deceptive practices.<sup>108</sup> Indeed, Better Business  
22 Bureau reports for “Google Money Tree” and the similar names under which Defendants have  
23  
24

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25 <sup>108</sup> This is especially true for Defendant Norton, who manages the customer service call  
26 center for Google Money Tree calls. Ex. 20 (Pauga), ¶¶ 6–7.

1 conducted business reflect a rating of “F,” the lowest possible rating.<sup>109</sup> Deceived consumers  
2 sought reversals of Defendants’ credit card charges in such excessively high numbers that letters  
3 were sent from Visa U.S.A., Inc.’s “Merchant Chargeback Monitoring Program,”<sup>110</sup> a flag of  
4 fraud that could not have been innocently overlooked by the Individual Defendants.

5 If this were somehow insufficient, however, the Individual Defendants would all  
6 unquestionably have been put on notice of these fraudulent practices by the enforcement actions  
7 that have been taken by the Utah DCP and the Texas Attorney General. *See supra* notes 98-102  
8 and accompanying text.

9 Because both prongs of the test for individual liability are satisfied, each individual  
10 defendant is properly subject to injunctive and monetary relief.

11 **C. An *Ex Parte* TRO Including Additional Equitable Relief is Necessary**  
12 **to Preserve the Possibility of Effective Final Relief**

13 As part of the permanent relief in this case, the Commission seeks restitution for the  
14 consumer victims of Google Money Tree. To preserve the possibility of such relief, the  
15 Commission seeks a TRO with an immediate freeze of Defendants’ assets, the appointment of a  
16 temporary receiver, access to defendants’ business premises and records, and expedited  
17 discovery. Absent such relief, there is a substantial risk that defendants will continue to operate  
18 their fraudulent scheme, dissipate their assets, and destroy documents to preclude satisfaction of  
19 any final order requiring monetary relief.

20 **1. The Proposed TRO Should Be Entered *Ex Parte***

21 Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a  
22 clear showing that “immediate and irreparable injury, loss, or damage will result” if notice is  
23 given to defendants. Proper situations for *ex parte* relief include situations where notice would

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24  
25 <sup>109</sup> Ex. 23 (Drexler), ¶ 42.

26 <sup>110</sup> *Id.*, ¶ 38.

1 “render fruitless further prosecution of the action.” *In re Vuitton et Fils*, 606 F.2d 1, 5 (2d Cir.  
2 1979). Consumer fraud cases such as this fall within the category of situations where *ex parte*  
3 relief is not only appropriate, but necessary to preserve the possibility of full and effective final  
4 relief. As discussed *supra* note 83 and its accompanying text, courts of this district have on  
5 numerous occasions entered *ex parte* temporary restraining orders in FTC enforcement actions.

6 As set forth in the Certification of Plaintiff’s Counsel in Support of *Ex Parte* Motion for  
7 Temporary Restraining Order Pursuant to Rule 65(b), in the Commission’s experience,  
8 defendants involved in similar scams have secreted assets and destroyed documents upon  
9 learning of an impending federal action. A suspicion that Defendants here might do the same  
10 seems particularly justified given their continued fraud in spite of law enforcement actions  
11 against them and the efforts they have taken to conceal their identities and locations.

12 Consequently, providing notice of this action would likely impair the Commission’s  
13 ability to secure relief for consumers because of the very real possibility that Defendants will  
14 dissipate assets and/or destroy documents—a result that would cause immediate and irreparable  
15 harm. It is therefore appropriate for this Court to grant the requested relief *ex parte*. See *AT&T*  
16 *Broadband v. Tech Comm’n., Inc.*, 381 F.3d 1309, 1319 (11th Cir. 2004) (holding that *ex parte*  
17 relief is appropriate where either the defendant or persons involved in similar activities have  
18 concealed evidence or disregarded court orders in the past).

19 **2. An Asset Freeze and the Appointment of a Temporary**  
20 **Receiver Are Necessary to Preserve the Possibility of Effective**  
21 **Final Relief**

22 A freeze of Defendants’ assets is appropriate here to ensure that funds do not disappear  
23 during the course of this action. An asset freeze should be imposed where the movant has shown  
24 that there exists a likelihood of success on the merits and that there is “a possibility of the  
25 dissipation of assets” in the absence of an injunction. *Fed. Savs. & Loan Ins. Corp. v. Sahni*, 868  
26 F.2d 1096, 1097 (9th Cir. 1989) (emphasis added); accord *FTC v. Sage Seminars*, 1995-2 Trade  
Cas. (CCH) ¶ 71,256, at 76,116 (N.D. Cal. 1995). Defendants who have engaged in fraudulent

1 violations may be considered likely to waste assets prior to resolution of the action. *SEC v.*  
2 *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

3 Here, Defendants' violations concern pervasive fraud and have continued in the face of  
4 hundreds of consumer complaints and official action by state law enforcement authorities. In  
5 addition, Defendants have previously taken steps to conceal their identities and locations. These  
6 factors are sufficient to demonstrate at least "a possibility" that Defendants would dissipate  
7 assets without the protection of an immediate asset freeze.

8 The appointment of a receiver for the Corporate Defendants is also critical. In cases in  
9 which a corporate defendant, through its management, has defrauded members of the public, "it  
10 is likely that in the absence of the appointment of a receiver to maintain the status quo, the  
11 corporate assets will be subject to diversion and waste" to the detriment of the fraud's victims.  
12 *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981). As noted *supra* note 83, courts of  
13 this district have appointed temporary receivers for corporate defendants in numerous FTC  
14 enforcement actions.

15 Appointment of a receiver is particularly appropriate here because Defendants' deceptive  
16 scheme demonstrates such an indifference to the law that both the individuals and the  
17 corporations may reasonably be expected to frustrate the FTC's law enforcement efforts by  
18 destroying evidence and concealing or dissipating assets. A receiver can monitor the use of  
19 Defendants' assets, marshal and preserve records, identify assets, determine the size and extent  
20 of the fraud, and identify additional consumers who were injured.

21 The Commission recommends that the Court appoint Robert G. Wing, Esq., as temporary  
22 receiver for the Corporate Defendants. Mr. Wing's qualifications are set forth in the  
23 Commission's Recommendation for Temporary Receiver, filed simultaneously with this Motion.

24 **3. Expedited Discovery and Prompt Access to Records Are**  
25 **Essential**

26 In order to locate assets wrongfully obtained from defrauded consumers, the Commission

1 respectfully requests that this Court permit expedited discovery, including immediate access to  
2 defendants' business premises and records, and order financial reporting by defendants.

3 District courts are authorized to depart from normal discovery procedures and fashion  
4 discovery by order to meet discovery needs in particular cases. Fed. R. Civ. P. 1, 26(d), 34(b).  
5 Moreover, the prompt and full disclosure of the scope and financial status of defendants'  
6 business operations is necessary to ensure that the Court is fully advised regarding (1) the full  
7 range and extent of defendants' law violations; (2) the identities of injured consumers; (3) the  
8 total amount of consumer injury; and (4) the nature, extent and location of defendants' assets.  
9 For these reasons, the proposed Order requires that defendants produce certain financial records  
10 and information on short notice, and requires financial institutions served with the order to  
11 disclose whether they are holding any of defendants' assets.

12 This requested relief is necessary to identify and preserve assets defendants wrongfully  
13 obtained from consumers. Any hardship on Defendants caused by the relief sought would be  
14 temporary and is greatly outweighed by the public's interest in preserving evidence and assets  
15 obtained through Defendants' unlawful practices.

16 **IV. CONCLUSION**

17 For these reasons, the FTC respectfully requests that the Court grant its motion for an *ex*  
18 *parte* TRO with an asset freeze, appointment of a temporary receiver, and other equitable relief.

19  
20 Dated: June 22, 2009

Respectfully submitted,

21 

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