

§§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101, et seq. On December 17, 1996, the Court issued an *ex parte* Temporary Restraining Order, which was extended by agreement of the parties until April 28, 1997.

The parties have conferred through counsel and have agreed to the entry of this Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief ("Order") by this Court in order to resolve all matters of dispute between and among them in this action. Each of the defendants and the Commission and the State of Wisconsin consent to the entry of this Order without trial or final adjudication of any issue of law or fact herein, and the defendants, without admitting liability, agree that entry of this Order by the Court and its filing by the Clerk will constitute notice to them of the terms and conditions of the Order.

The Commission and the State of Wisconsin and the defendants hereby request the Court to enter this Order. The Court, being advised in the premises, finds:

1. This Court has jurisdiction of the subject matter of this case and of all the parties hereto.
2. The complaint states a claim upon which relief may be granted against all the defendants under Sections 5, 13(b) and 19 of the FTC Act, 15 U.S.C. § § 45, 53(b) and 57b.
3. The acts and practices of the defendants alleged in the complaint are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies. All relief set forth in this Order is remedial in nature and is not a fine, penalty, punitive assessment, or forfeiture.
5. The defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order.
6. The defendants waive any claim that they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order. Each settling party shall bear its own costs and attorneys' fees.
7. Entry of this Order is in the public interest.

Definitions

For purposes of this Order, the following definitions shall apply:

1. "Defendants" means Daniel B. Lubell, individually and as the manager of Mercantile Messaging, L.L.C., doing business as Mercantile Messaging and D B & L Inc., and Mercantile Messaging, L.L.C., and each of them and their successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.
2. "Goods or services" includes, but is not limited to, telephone-billed purchases, as defined below.

3. “Outbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services.
4. “Prize Promotion” means: (1) a sweepstakes or other game of chance; or (2) an oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.
5. "Telemarketing" means a 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. The term does not include the solicitation of sales through the mailing of a catalog which: Contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.
6. “Telemarketer” means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.
7. “Telephone-billed purchase” means any purchase that is completed solely as a consequence of the completion of a non-900-number call or a subsequent dialing, touch

tone entry, or comparable action of the caller. Such term includes completion of a call to an international or other non-900-number where a domestic or foreign common carrier or some other entity pays to the defendant, directly or through any intermediary, any portion of the monies paid by the caller for the transmission of the call. Such term does not include a purchase by a caller pursuant to a presubscription or comparable arrangement as defined in the Commission's Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. § 308.2(e).

ORDER

I.

IT IS THEREFORE ORDERED that, in connection with soliciting any telephone-billed purchase, defendants are hereby permanently restrained and enjoined from making, or assisting in the making of, directly or by implication, orally or in writing, any statement or representation of material fact that is false or misleading, including, but not limited to:

- A. Representing that by placing a call to a specified telephone number, a consumer may enter a sweepstakes or other prize promotion, unless:
 - 1. Defendants provide a mechanism whereby callers may enter the purported sweepstakes or prize promotion by placing the telephone call to the specified number; and
 - 2. Defendants clearly and conspicuously disclose, in the manner required by Paragraph II. A. of this Order, before the consumer places a call to the specified

telephone number, that the consumer need not call the number to enter the sweepstakes.

- B. Representing that by calling a specified telephone number, a consumer will receive information about how to fly at no expense on commercial airlines, unless defendants also clearly and conspicuously disclose any costs that consumers will incur in order to take advantage of the information offered by defendants.
- C. Misrepresenting that defendants do not charge or do not otherwise receive consideration for the information provided over their specified telephone numbers.

PROVIDED that nothing herein shall be deemed to waive or supersede the application of State of Wisconsin or other state law regulating telephone-billed purchases.

II.

IT IS FURTHER ORDERED that, in the course of telemarketing, including soliciting telephone-billed purchases, defendants are hereby permanently restrained and enjoined from violating or assisting others to violate any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to:

- A. In any outbound telephone call, failing to disclose promptly and in a clear and conspicuous manner, as required by 16 C.F.R. § 310.4(d), the following information:
 - 1 The identity of the seller;
 - 2. The nature of the goods or services; and

3. That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called.

B. Failing to disclose, in any advertisement or solicitation for a telephone-billed purchase, in a clear and conspicuous manner, before the customer pays for goods or services, as required by 16 C.F.R. § 310.3(a)(1)(i), the total cost to purchase, receive or use the goods or services and the quantity of any goods or services that are the subject of the sales offer.

For purposes of this sub-paragraph, with respect to any telephone-billed purchase:

1. "before the customer pays for goods or services" shall mean before a caller places the call which will result in the telephone-billed purchase;
2. "quantity of any goods or services" shall mean the total number of minutes a caller would have to stay on the line to hear all of the information or entertainment that is the subject of the sales offer, if that figure can be determined; and
3. "total cost to purchase, receive or use the goods or services" shall include:
 - (a) A statement that "International long distance telephone charges to [*insert country of call termination*] apply"; and
 - (b) Either:
 - (i) a statement that "This call may cost you as much as [*insert the maximum possible per-minute charge*] per minute"; or
 - (ii) a stated range of possible costs per-minute for the call, where the maximum possible per-minute charge is disclosed at least as

prominently as any lower estimate of possible charges, and there is a clear and conspicuous disclosure of the following statement: "To determine your exact per-minute charges, contact your long distance carrier."

- C. Failing to disclose, within the first 15 seconds of each call that will result in a telephone-billed purchase, and before any other information or entertainment is provided, in an introductory disclosure message in the same language as that principally used in the message that follows, clearly, in a slow and deliberate manner and in reasonably understandable volume, the information specified in subparagraphs II.A.1, B.3(a) and (b) of this Order.
- D. Nothing herein shall be deemed to waive or supersede the application of State of Wisconsin or any other state law regulating prize promotions.

III.

IT IS FURTHER ORDERED that:

- A. Richard I. Vesole, escrow agent for funds placed by the defendants into account #4030678099, located at Norwest Bank, as ordered by this Court on December 26, 1996, and modified by Order on January 16, 1997, shall transfer One Hundred Thousand Dollars (\$100,000.00) to the Federal Trade Commission, on or before 10 days from the date of entry of this Order. When that transfer is complete, the escrow agent may close the account and disperse any remaining funds as he sees fit. With the transfer of the funds and the closing of the account, Mr. Vesole is released from his agency.

- B. Defendant Daniel B. Lubell shall transfer Eleven Thousand Dollars (\$11,000.00) to the Federal Trade Commission, on or before 10 days from the date of entry of this Order. Lubell may elect to use for this purpose funds previously frozen by this Court in account #615016030 located at Firststar Bank Iowa, in which case Firststar Bank is herewith ordered to assist with the transfer. Lubell may elect to use other funds for this payment to the Commission.
- C. The freeze of the defendants' funds ordered by this Court on December 17, 1996, shall be lifted upon entry of this Order and the completed transfer of the funds to the Commission pursuant to Parts A. and B. of this Paragraph.
- D. The total payment of One Hundred Eleven Thousand Dollars (\$111,000.00) under the terms of this Paragraph shall fully satisfy all monetary claims asserted by the Federal Trade Commission and the State of Wisconsin against the defendants. Payments made under this Paragraph shall be used, where practicable, to provide redress to persons who purchased information via defendants' international telephone numbers, and to pay any attendant expenses of distribution of redress funds. The Commission and the State of Wisconsin, in their sole discretion, may use a designated agent to administer consumer redress. If the Commission and the State of Wisconsin determine, in their sole discretion, that redress to consumers is wholly or partially impractical, any funds not so used shall be designated as disgorgement and paid to the United States Treasury and the State of Wisconsin in a manner agreed between the Commission and the State. The defendants

shall be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution.

- E. The Court's approval of this Order is expressly premised upon the truthfulness, accuracy and completeness of the financial statements provided by the defendants to the Commission and the State of Wisconsin on or about January 17, 1997. If, upon motion by either the Commission or the State of Wisconsin, this Court finds that the financial statements failed to disclose, or materially misrepresented the value of any asset, the plaintiffs may request that the Order herein be reopened for the purpose of requiring additional restitution; provided, however, that in all other respects this Order shall remain in full force and effect unless otherwise ordered by this Court; and provided further, that proceedings instituted under this section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings the plaintiffs may initiate to enforce this Order. Solely for the purposes of reopening or enforcing this Paragraph of this Order, the defendants waive any right to contest any of the allegations in the complaint filed in this matter.

IV.

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Order, (1) in connection with defendant Mercantile Messaging LLC's business or any business owned, controlled or managed by defendant Daniel B. Lubell, and (2) where the business engages in, or assists in telemarketing, and/or the solicitation of telephone-billed purchases, defendants are hereby restrained and enjoined from failing to create and maintain for a period of three (3) years following the date of such creation:

- A. Books, records and accounts of such business that, in reasonable detail, accurately and fairly reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Records that reflect, for every consumer complaint or refund request received from any consumer to whom any of the above-referenced business(es) has sold, invoiced or sent any goods or services, or from whom the above-referenced business(es) accepted money, whether received directly or indirectly or through any third party:
 - 1. the consumer's name, address, telephone number and the dollar amount paid by the consumer;
 - 2. the written complaint or refund request, if any, and the date of the complaint or refund request;
 - 3. the basis of the complaint and the nature and result of any investigation conducted concerning the validity of the complaint;
 - 4. each response from the business(es) and the date of the response;

5. any final resolution and the date of the resolution; and
 6. in the event of a denial of a refund request, the reason for such denial.
- C. Representative written and, if distributed in audio format, audiotaped copies of all solicitations, advertisements, or other marketing materials actually used.
 - D. The number, frequency, and average duration of calls to any international, or other non-900-number tolled telephone numbers advertised or promoted directly or indirectly by defendants.
 - E. All documents relating to the carrying out of any prize promotion or purported sweepstakes conducted by defendants in connection with solicitations of telephone-billed purchases.
 - F. All documents maintained in compliance with Section 310.5 of the Telemarketing Sales Rule, 16 C.F.R. § 310.5.

V.

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

- A. For a period of three (3) years from the date of the entry of this Order, defendant Lubell shall notify the Commission and the State of Wisconsin, in writing, within thirty (30) days, of any changes in his employment status or his residential or business mailing addresses or telephone numbers that have occurred since agreeing in writing to the entry of this Order;
- B. For a period of three (3) years from the date of the entry of this Order, defendant Lubell shall notify the Commission and the State of Wisconsin, in writing, within thirty (30) days

of its start in business, of the name, address and telephone number of any new telemarketing business venture or other new business venture involved in soliciting telephone-billed purchases in which he is involved as owner, officer, director, manager, consultant, independent contractor or employee; and

- C. For a period of three (3) years from the date of the entry of this Order, defendant Mercantile Messaging LLC shall notify the Commission and the State of Wisconsin in writing within thirty (30) days of any changes in its corporate status or addresses that have occurred since agreeing in writing to the entry of this Order.

VI.

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this order, for the purpose of determining or securing compliance with this Order, the defendants, their successors and their assigns shall permit representatives of the Commission, and/or the State of Wisconsin within five (5) business days of receipt of written notice from the Commission:

- A. Access during normal business hours to any office, or facility storing documents, of Mercantile Messaging LLC or any business where
1. a defendant is the owner of the business or otherwise directly or indirectly manages or controls the business, and where
 2. the business engages in telemarketing, and/or the solicitation of any telephone-billed purchases.

- B. To inspect and copy all documents relevant to any matter contained in this Order, provided that the Commission and/or the State of Wisconsin will each pay its own copying costs; and
- C. To interview and/or depose the officers, directors, and employees, including all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Paragraph V. A., above, applies, concerning matters relating to compliance with the terms of this Order. If defendants have used their best efforts to ensure the cooperation of the persons enumerated above, failure by the enumerated persons to cooperate with such interviews and depositions shall not be ascribed to defendants. The person interviewed and/or deposed and the defendants may have counsel present.

PROVIDED that, the Commission and the State of Wisconsin may otherwise monitor the defendants' compliance with this Order at any time by all lawful means available, including the taking of depositions, subpoenas or other requests for the production of documents, and the use of investigators posing as consumers.

VII.

IT IS FURTHER ORDERED that where required by this Order, written notice to the plaintiffs shall be effected by serving papers on the Commission, by personal delivery or certified mail, addressed to: Associate Director, Federal Trade Commission, Division of Marketing Practices, Sixth Street and Pennsylvania Avenue, N.W., Room 238, Washington, DC 20580. The

Commission shall forward copies of all notices so served to the Office of the Attorney General, State of Wisconsin, 123 West Washington Avenue, Madison, Wisconsin 53702.

VIII.

IT IS FURTHER ORDERED that, to the extent that this Order may conflict with any federal law or regulation which is later enacted or amended, such law and not this Order shall apply where such a conflict exists. For the purposes of this Order, a conflict exists if the conduct prohibited by this Order is required by such federal law or if conduct required by this Order is prohibited by such federal law. This Order shall be subject to amendment or termination on the motion of any party in the event there has been a change of circumstances necessitating an amendment or termination. This Court shall retain jurisdiction of this matter for the purposes of construction, modification and enforcement of this Order. By signing below, the Commission, the State of Wisconsin and the defendants hereby stipulate and agree to the entry of the foregoing Order, which shall satisfy all monetary claims of the plaintiffs in this action against the defendants.

By:

Patricia S. Howard
Attorney for the Plaintiff
Federal Trade Commission

James D. Jeffries
Attorney for the Plaintiff
State of Wisconsin

Christopher D. Hagen
Assistant United States Attorney
Southern District of Iowa

By:

Daniel B. Lubell, individually and on behalf of the
corporate defendant Mercantile Messaging, L.L.C.

Richard I. Vesole
Attorney for the Defendants

Douglas J. Wood
Hall Dickler Kent Friedman & Wood LLP
Attorney for the Defendants

SO ORDERED, this ____ day of _____, 19__.

United States District Judge