UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FEDERAL TRADE COMMISSION, 6th and Pennsylvania Avenue, N.W. Washington, DC 20580, and STATE OF WISCONSIN, 123 West Washington Avenue Madison, Wisconsin 53702, Plaintiffs, v. DANIEL B. LUBELL, individually, and as the manager of the limited liability company named below, and d/b/a MERCANTILE MESSAGING and D B & L, Inc., 2943 Oxford Drive Bettendorf, Iowa 52722, and MERCANTILE MESSAGING, L.L.C., an Illinois limited liability company, 1800 3rd Avenue, Suite 418 Rock Island, Illinois 61201, Defendants.	Civil Action No. **COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF**

Plaintiffs, the Federal Trade Commission ("FTC" or "the Commission"), and the State of Wisconsin, for their complaint allege:

1. The Commission brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and under the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101, et seq., to secure preliminary and permanent injunctive relief, rescission of contracts, restitution, disgorgement, and other equitable relief for defendant's deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Commission's Telemarketing Sales Rule ("the Telemarketing Rule" or "the Rule"), 16 C.F.R. Part 310.

2. The State of Wisconsin brings this action under Section 4(a) of the Telemarketing Act, 15 U.S.C. § 6103(a).

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1367, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), 6103(a) and 6105(b).

4. Venue in the United States District Court for the Southern District of Iowa is proper under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. §§ 53(b) and 6103(e).

PLAINTIFFS

5. Plaintiff, the Federal Trade Commission, is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 et seq. The Commission is charged, inter alia, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, as well as enforcement of the Telemarketing Sales Rule, 16 C.F.R. Part 310. The Commission is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, including violations of the

Commission's Telemarketing Sales Rule, in order to secure such equitable relief as may be appropriate in each case. 15 U.S.C.§§ 53(b), 57b, and 6105(b).

6. Plaintiff, the State of Wisconsin, is one of the fifty sovereign states of the United States. James Doyle is the duly elected and qualified Attorney General acting for plaintiff, and brings this action in his official capacity. The State of Wisconsin is authorized to initiate federal district court proceedings to enjoin telemarketing that violates the FTC's Telemarketing Sales Rule and, in each such case, to obtain damages, restitution and other compensation on behalf of residents of the State of Wisconsin, and to obtain such further and other relief as the court may deem appropriate. 15 U.S.C. § 6103(a).

DEFENDANTS

7. Defendant Daniel B. Lubell has conducted business as Mercantile Messaging and as D B & L, Inc., a lapsed Iowa corporation. In November 1996, he organized and registered an Illinois limited liability company called Mercantile Messaging, L.L.C. Lubell is named as the manager of that company. He resides and has transacted business within the Southern District of Iowa. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices set forth in this complaint.

8. Mercantile Messaging, L.L.C. is a limited liability company, registered in Illinois. Its principal place of business is 1800 3rd Avenue, Suite 418, Rock Island, Illinois 61201. Lubell and Mercantile Messaging, L.L.C. also use the address 4343 16th Street, Suite 153, Moline, Illinois 61265, which is the address of a mailbox company called Mailboxes & Parcel Depot.

COMMERCE

9. At all times relevant to this complaint, defendants have maintained a substantial course of trade, advertising, offering for sale and selling information via international telephone lines, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' COURSE OF BUSINESS

10. Since at least January 1996, defendants have offered consumers information about free accommodations in Hawaii or a sweepstakes to win a free vacation in Hawaii, and free or discount travel. To obtain this information, defendants direct consumers to call a specified telephone number.

11. Defendants' solicitations identify Mercantile Messaging of Bettendorf, Iowa, as the caller. One of defendants' messages urges consumers interested in winning a Hawaiian vacation for two and learning about "how to fly for free," to call "area code" 011-592-592-123. Another of defendants' messages offers consumers free accommodations in Hawaii if they return the telephone call. Others of defendants' messages direct consumers to call "area code" 011-592-1820 or (809) 563-9642. These messages do not disclose that consumers who dial the specified number and listen to defendants' information incur a significant charge on their telephone bill for a lengthy international call (to Guyana for the "011" call, or to the Caribbean for the "809" call). Instead, they contain a rapidly-delivered statement that "in the advertised call, international long distance toll rates apply. Average length of call: 15 minutes." In numerous instances, consumers do not understand that this statement refers to the call they are being invited to make.

12. In most of defendants' solicitations, defendants offer a method of participating by mail in the sweepstakes at Hawaiian Sweepstakes, Box 734, Bettendorf, IA 52722. Defendants' messages do not inform consumers that the sole method of entry in the sweepstakes is by mail, or that even those who call the stated telephone number must still enter by mail. The messages do not disclose to consumers that calling the stated telephone number neither enters them in the sweepstakes nor provides them any additional information about how to enter.

13. Consumers who call any of the advertised international telephone numbers hear a 15-minute, repetitive, recorded message that promises to provide information about the travel sweepstakes but, in fact, mainly provides information concerning airline bumping on oversold flights and how that practice may be used by consumers to obtain free airline tickets. The listener must stay on the line until the end of the message to hear, finally, that he or she may obtain additional information about free and discount travel, and participate in the sweepstakes, by sending a self-addressed, stamped envelope to Box 734, Bettendorf, Iowa 52722, or 4343 16th Street, Suite 153, Moline, Illinois 61265. The call costs as much as $2.33 per minute, or over $30 for the entire message, which defendants do not disclose to consumers at any time.

14. The charges consumers pay for calls to defendants' Guyanese or Caribbean telephone lines include an amount that the foreign telephone company forwards to defendants. Defendants receive compensation from the telephone company in Guyana or the Caribbean of 37 cents per minute for whatever length of time each consumer stays on the line.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

15. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that unfair or deceptive acts or practices in or affecting commerce are unlawful. Misrepresentations and omissions of

material facts made to induce a reasonable consumer to purchase products or services, including the purchase of information, are deceptive acts or practices that are prohibited by Section 5(a) of the Act.

COUNT I
(By Plaintiff Federal Trade Commission)

16. In the course of advertising, offering for sale, or selling information, defendants represent to consumers, directly or by implication, that by placing a call to a specified number, a consumer may enter defendants' purported sweepstakes.

17. In truth and in fact, a consumer cannot enter defendants' purported sweepstakes by placing a call to the specified number. The sole method of entry in defendants' purported sweepstakes is by mail, and even consumers who call defendants' stated telephone number, incurring substantial costs for the call, must still enter by mail.

18. Therefore, defendants' representations, as set forth in paragraph 16, above, are false and deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

COUNT II
(By Plaintiff Federal Trade Commission)

19. In numerous instances, in the course of advertising, offering for sale and selling information, defendants have represented, directly or by implication, that consumers who call their specified numbers will receive information about how to fly free on commercial airlines.

20. Defendants have failed to disclose the material fact that, in order to benefit from such information, consumers must first incur costs, including the cost of an airline ticket, with no assurance that they will then be able to obtain the equivalent of a free ticket.

21. In view of defendants' representations that consumers will receive information about how to fly free, as set forth in paragraph 19, above, defendants' failure to disclose the material information set forth in paragraph 20 is deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

COUNT III
(By Plaintiff Federal Trade Commission)

22. In numerous instances, in the course of advertising, offering for sale or selling information, defendants have represented, directly or by implication, that they do not charge for the information they provide.

23. In truth and in fact, defendants do charge for the information they provide. Defendants sell information for a fee paid by consumers to defendants through the telephone billing and collection process. The foreign telephone carrier pays defendants a portion of the revenues it receives from consumers for calls placed to defendants' international telephone lines.

24. Therefore, defendants' representations, as set forth in paragraph 23, above, are false and deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

THE FTC'S TELEMARKETING SALES RULE

25. Defendants are "sellers" or "telemarketers" engaged in "telemarketing," as those terms are defined in the Telemarketing Sales Rule, 16 C.F.R. §§ 310.2(r), (t) and (u).

26. In the Telemarketing Act, Congress directed the FTC to prescribe rules prohibiting abusive telemarketing acts or practices, including the following:

> A requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or

> services and make such other disclosures as the Commission deems appropriate.

15 U.S.C. § 6102(a)(3)(C). On August 16, 1995, the FTC promulgated the Telemarketing Sales Rule, 16 C.F.R. Part 310. The Rule became effective on December 31, 1995.

27. The Telemarketing Sales Rule requires a telemarketer making outbound calls to orally "disclose promptly and in a clear and conspicuous manner . . . (1) [t]he identity of the seller; (2) [t]hat the purpose of the call is to sell goods or services; (3) [t]he nature of the goods or services; and (4) [t]hat 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. . . ." 16 C.F.R. § 310.4(d).

28. The Telemarketing Sales Rule also requires a telemarketer "[b]efore a customer pays for goods or services offered . . . to disclose, in a clear and conspicuous manner . . .[t]he total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer. . . ." 16 C.F.R. § 310.3(a)(1)(i).

29. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales Rule constitute deceptive or unfair acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

DEFENDANTS' VIOLATIONS OF THE TELEMARKETING SALES RULE

COUNT IV
(By Plaintiffs Federal Trade Commission and the State of Wisconsin)

30. In the course of telemarketing, in numerous instances since December 31, 1995, defendants have failed to disclose in their outbound automated telephone calls that the purpose of the call is to sell information about travel sweepstakes and other free and discount travel.

31. Defendants' failure to make the "required oral disclosures" in outbound telephone calls is an "abusive telemarketing act or practice" in violation of Section 310.4(d)(2) and (3) of the Telemarketing Sales Rule, 16 C.F.R. § 310.4(d)(2) and (3).

COUNT V
(By Plaintiffs Federal Trade Commission and the State of Wisconsin)

32. In the course of telemarketing, in numerous instances since December 31, 1995, defendants have failed to disclose, in a clear and conspicuous manner, before a customer pays for goods or services offered, the total costs to purchase, receive, or use, and the quantity of, goods or services that are the subject of the sales offer.

33. Defendants' failure to disclose in their solicitations the total cost of the information telephone call is a "prohibited deceptive act or practice" in violation of Section 310.3(a)(1)(i) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(1)(i).

CONSUMER INJURY

34. Consumers in many areas of the United States, including in the State of Wisconsin, have suffered monetary loss as a result of defendants' unlawful acts or practices. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

35. Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), empower this Court to grant injunctive and other ancillary relief, including consumer redress, disgorgement and restitution, to prevent and remedy any violations of any provision of law enforced by the FTC.

36. This Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Sections 4(a) and 6(b) of the Telemarketing Act, 15 U.S.C. §§ 6103(a) and 6105(b), and pursuant to its own equitable powers:

1. Award plaintiffs such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief;

2. Permanently enjoin defendants from violating the FTC Act and the Telemarketing Sales Rule, as alleged herein;

3. Award such relief as the Court finds necessary to redress injury to consumers resulting from defendants' violations of the FTC Act and the Telemarketing Sales Rule, including, but not limited to, rescission of contracts, the refund of monies paid, damages, restitution and the disgorgement of ill-gotten gains; and

4. Award plaintiffs the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: December_____, 1996

Respectfully submitted,
STEPHEN CALKINS
General Counsel

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Patricia S. Howard
Adam G. Cohn
Attorneys for the Plaintiff
Federal Trade Commission
Room 238
6th and Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-2321; (202) 326-3395 (fax)

JAMES E. DOYLE
Attorney General of Wisconsin

____

James D. Jeffries
Assistant Attorney General
Attorney for the Plaintiff
State of Wisconsin
123 West Washington Avenue
Madison, Wisconsin 53702
(608) 267-8901; (608) 267-2778 (fax)

____

Christopher D. Hagen
Assistant United States Attorney
Southern District of Iowa
(515) 284-6257; (515) 284-6492 (fax)