

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

FEDERAL TRADE COMMISSION,)	
and)	
STATE OF WISCONSIN,)	
Plaintiffs,)	Civil Action No.
v.)	
)	
DANIEL B. LUBELL, <i>et al.</i> ,)	
Defendants.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER
FREEZING ASSETS, PERMITTING EXPEDITED DISCOVERY AND
ORDERING DEFENDANTS TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Dated: December_____, 1996

Respectfully submitted,

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Plaintiffs, the Federal Trade Commission ("FTC" or "the Commission") and the State of Wisconsin, bring this action to halt defendants' violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310. The defendants trick people into making expensive international telephone calls promising they can enter a Hawaiian vacation sweepstakes or learn secret information about how to fly free on commercial airlines. Not only do defendants misrepresent the information they will provide to people who call their advertised numbers, they fail to disclose important information, such as the cost of the call and the true subject matter of the call, before callers have incurred a charge. Unsuspecting adults, and even children, have fallen prey to defendants' deceptive telemarketing scheme.

The FTC and Wisconsin seek preliminary and permanent injunctive relief, rescission, restitution or damages for consumers who have been defrauded by defendants' deceptive representations, or, in the alternative, disgorgement of defendants' ill-gotten gains. Plaintiffs request that this Court issue an ex parte temporary restraining order with an asset freeze and other ancillary relief to immediately halt defendants' unlawful business practices, and to preserve assets for restitution to consumers.

I. THE DEFENDANTS

Defendant Daniel B. Lubell owns, operates and controls Mercantile Messaging. Lubell started the business, which he calls an "information service" that advertises by nationwide telemarketing,¹ on January 1, 1996. Lubell claimed, in a June 1996 letter² to a United States Postal Inspector who questioned him about his business practices, "Due to state laws on telemarketing, I am not currently operating my business in Iowa." That was and is untrue. At least until October 24, 1996, Mercantile Messaging used two post office boxes in Bettendorf, Iowa, as its

¹ Exh. 1, ¶ 8, Attachment F, p. 38, BBB Business Questionnaire completed by Lubell.

² Exh.3, ¶ 2, Attachment A, p.2, Lubell letter to Inspector John Skoglund.

business addresses.³ Furthermore, a consumer in Ames, Iowa received an E-mail advertising message on September 24, 1996, giving Mercantile Messaging's address--"Box 734, Bettendorf, IA 52722"-- as the address for a sweepstakes entry blank.⁴ Lubell has not only operated his business in Iowa from its inception to the present, he has advertised and promoted his information program in Iowa, in Wisconsin⁵ and nationwide.⁶

Lubell's recorded messages have provided consumers who called his information line an additional address: 4343 16th Street, Suite 153, Moline, Illinois 61265⁷. That address is a mail drop at Mailboxes and Parcel Depot, the "suite" number being the mail box number.⁸

In November, 1996, Lubell founded defendant Mercantile Messaging, L.L.C. in Illinois.⁹ Its address is 1800 3rd Avenue, Suite 418, Rock Island, Illinois 61201."¹⁰ On the registration form for the company, Lubell listed only himself as the manager and identified it as a telemarketing business.¹¹ Mercantile Messaging, L.L.C. refunded the cost of at least one telephone call made in June 1996, before the limited liability company was organized or

³ See Exh. 1, ¶ 8, Attachment F, p. 38, BBB Business Questionnaire, ¶ 6, Attachments C and D, pp.34-35, postal box applications; Exh. 13, p.2, E-mail advertising message; Exh. 2, ¶ 3, Attachment B, p.7, transcript of outbound telemarketing message. See also Exh. 1, ¶ 2.

⁴ Exh. 13, p.2.

⁵ Exh. 20, ¶ 6,7, declaration of Barbara Matthews, Wisconsin Attorney General's Office.

⁶ See Exhs. 4-15 for declarations of consumers who received defendants' advertising telephone calls and E-mails.

⁷ See, e.g., Exh. 1, Attachment B, p.31, transcript of Mercantile Messaging's international information message, recorded on October 24, 1996.

⁸ Exh. 1, ¶ 11.

⁹ Exh. 1, ¶ 13, Attachment H, p.41.

¹⁰ Exh. 10, ¶ 5, Attachment C, p.6.

¹¹ The registered agent of Mercantile Messaging, L.L.C. is a person named Terry Smith who is the owner of Mailboxes and Parcel Depot at 4343 16th Street in Moline, Illinois, the business that has provided Lubell's mail drop. Exh. 1, ¶ 11, ¶ 13, Attachment H, p.41.

defendants acquired an Illinois address. The above-noted facts demonstrate that the limited liability company founded in Illinois in November 1996 is merely a continuation of Mercantile Messaging of Bettendorf, Iowa, and that Lubell, who resides in Bettendorf, Iowa, owns, controls and operates these entities as a single, ongoing enterprise.

II. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES VIOLATE SECTION 5 OF THE FTC ACT

Defendants have repeatedly deceived consumers in three primary ways in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Defendants represent that by placing a call to a specified number, a consumer may enter a sweepstakes and hear about a secret method of flying free on commercial airlines. Defendants also represent that they do not charge consumers for this information. These representations are false. Furthermore, they fail to disclose that if consumers attempt to take advantage of defendants' "secret system" they must buy a ticket and incur other, incidental costs.

Defendants promote an information program about how to fly free on commercial airlines. They advertise this program by calling consumers with unsolicited recorded telephone messages,¹² and by sending unsolicited E-mail messages on the Internet.¹³ Defendants entice consumers to respond to their solicitations by offering an alluring Hawaiian vacation they might win. In their recorded advertising telephone message to consumers, defendants excitedly state:

. . . If our computer read your telephone number¹⁴ and if you know the answer to our trivia question,¹⁵ then you definitely are a finalist in our fabulous, eight day, seven night Hawaiian sweepstakes for two. Just think about that, you and a friend or loved one enjoying the beautiful beaches of Waikiki. And call me now at area code (011) followed by 592-592-123. At the same

¹² Exh. 2, ¶ 2, Attachment B, p.7, "Transcript of Outbound Telemarketing Message."

¹³ Exhs. 13 and 14.

¹⁴ Defendants' autodialers read back the number they just dialed.

¹⁵ For example, what is the name of the Tonight Show host? Jay Leno, or David Letterman or Jerry Springer?

time, you will receive other valuable things, such as how to use a traveler's secret system to fly for free. So call me back immediately at area code (011) 592-592-123. . . .¹⁶

The recorded advertising message discloses neither the destination of these calls nor their cost.¹⁷

Nothing in the advertising call suggests that its purpose is to get people to make a costly international telephone call and listen to defendants' recorded information message for 15 minutes. Moreover, the information defendants sell by phone, which they refer to in the call as a "secret system to fly for free," is largely publicly available information about consumers' rights, under Department of Transportation regulations, to compensation if they are bumped from oversold flights.¹⁸

Unlike the recorded advertising call, which briefly mentions the secret method of free travel and concentrates on the sweepstakes, defendants' E-mail advertisement states explicitly that callers will obtain information about free air travel.¹⁹ The E-mail messages state that the call to obtain this information goes to Guyana, but do not disclose how long the information message is nor what the cost will be. In the E-mail, defendants state "I won't charge you anything for this information, all you have to do is pay for the cost of the call to my telephone number in Guyanna [sic]."

Consumers who make the call in response to defendants' telephone or E-mail solicitations must listen to about 15 minutes of repetitive talk about how travelers can take advantage of the airlines' practice of overbooking,

¹⁶ In other versions, the message urged listeners to call a number with an "809" prefix. See Exh. 15, ¶ 2, declaration of Dr. Cribbs.

¹⁷ The only reference to destination or cost occurs at the beginning and end of the automated advertising call message when the recorded voice says, "in the advertised call, international long distance toll rates apply." At the end of the automated call, the voice adds, "average length of call: 15 minutes." Exh. 2, Attachment B, p.7. Consumers have complained that they did not understand or hear this message. See, e.g. Exh. 12, ¶ 2, declaration of Juanita Walker.

¹⁸ 14 C.F.R. Part 250. Under these regulations, all airlines are required to prominently post notices of passengers' rights in the event flights are oversold. These notices must be at all airlines' ticketing counters and boarding gates, and on all airline tickets. 14 C.F.R. § 250.11.

¹⁹ Exhs. 13 and 14.

salted here and there with exhortations to hang on for the sweepstakes information.²⁰ At the very end, they are told that, to enter the sweepstakes, they must mail their answer to the trivia question to the same address given in defendants' solicitations as the non-purchase alternative method of entering the sweepstakes. Thus, contrary to their expectations from the solicitations, consumers learn nothing new about how to enter the sweepstakes from their expensive international telephone call.²¹

Children, adults unfamiliar with Caribbean area codes, and adults who had never made an international call were not alerted by the 011 international access code or the 809 area code that they were dialing out of the country.²² To compound the problem, defendants' advertising message falsely designates "011" as an "area code". Defendants' rapidly read statement that "in the advertised call, international toll rates apply" does nothing to clarify the cost, which is never disclosed in either the recorded telemarketing call or the E-mail messages.

In fact, of the eight calls to defendants' international numbers detailed in the plaintiffs' exhibits, six of the callers paid approximately \$2.30 per minute, which would be over \$30 for the entire call, to defendants' information lines.²³

A. Defendants misrepresent that consumers may enter a sweepstakes by calling one of their phone numbers.

Defendants' automated telephone calls or E-mails to consumers, represent that, by calling the number given, one can learn about and enter a sweepstakes. The telephone message makes every caller a finalist in the sweepstakes

²⁰ Exh. 1, Attachment B, pp.17-33; Exh. 2, Attachment B, pp.8-17 are scripts of defendants' 15-minute information message.

²¹ See, e.g., Exh. 12, ¶ 2, and Exh. 15, ¶ 3.

²² Exhs. 5,7,11 (children's declarations); Exhs. 8, 12 and 15 (adults' declarations).

²³ See Exh. 1, ¶ 10, chart of costs. The exact cost per minute may depend on the individual caller's long distance carrier, his or her individual calling plan, and the time of day and day of the week the call was placed.

and says, "call me now at area code (011) followed by 592-592-123." ²⁴ Defendants' E-mail states, in relevant part, "I am so convinced that you should have this information [about flying for free] that I am even running a sweepstakes for a trip for two to Hawaii. *You can get all the information when you call . . .*"²⁵ Both the telephone and E-mail messages state the listener may send an envelope to Box 734, Bettendorf, Iowa 52722 for a free entry form. Neither state that the only way to enter the sweepstakes in by mail.

The final several minutes of the 15-minute information call for which consumers are charged gives virtually the same information about the sweepstakes as the telephone and E-mail solicitations. The information message tells consumers to send in an 8.5 by 11 self-addressed and stamped envelope to "Free Travel, P.O. Box 734, Bettendorf, IA 52722" to obtain a travel report defendants offer callers, and ends with:

And now, what you have been waiting for--our Hawaiian sweepstakes. Now, when you send in for your report, you must also correctly answer our trivia question in order to be eligible for this sweepstakes. . . . So, when you send in for your free travel report, simply stick in the 8.5 by 11, self addressed, stamped envelope, the answer to our trivia question. ²⁶

The message gives listeners no other method of entry into the sweepstakes other than by mail.

Defendants' representation that a consumer can enter their sweepstakes by placing a call is false. Even consumers who call defendant's stated telephone number, incurring substantial costs for the call, must still enter by mail.

B. Defendants fail to disclose that consumers who attempt to use their "secret" information about how to fly for free on commercial airlines will incur costs.

Defendants' E-mail messages state:

²⁴ Exh. 2, ¶ 2, Attachment B, p.7.

²⁵ Exh. 13, Attachment A.

²⁶ Exh. 2, ¶ 2, Attachment B, page 16-17, script of 15-minute information message. See also FTC Exh. 1, Attachment B, p.31 for a similar version using defendants' Moline address.

I needed to tell you that using my new method I have figured out how to fly on the airlines for free. Believe me, this is something that the airlines DO NOT want you to find out. . . .²⁷

Defendants' outbound recorded telephone message states:

At the same time [you learn about entering the sweepstakes] you will receive other valuable things, such as how to use a traveler's secret system to fly for free.²⁸

In fact, defendants do not tell callers how to fly for free. The messages merely recite that, after incurring at least the cost of a ticket for a flight that is oversold, one may be able to receive travel in compensation for being "bumped" from the flight. Most of the information is widely available, being nothing more than a protracted description of the airlines' policies under DOT regulations dealing with bumping passengers from oversold flights.²⁹ Thus defendants fail to disclose material information that consumers will incur costs if they attempt to use defendants' "secret system."

C. Defendants misrepresent that they do not charge for the information they provide.

Defendants' E-mail solicitations state that "I won't charge you anything for this information." In fact, the consumer does pay defendants for the information. Lubell has admitted to a U.S. Postal Inspector that a portion of the charges the consumer pays the foreign carrier for transmission of the call is paid to defendants by the foreign carrier as compensation for Lubell's contribution to the scheme -- the "information" he provides the consumer.³⁰ Thus, defendants' representation that they do not charge for the information they offer is false.

²⁷ Exh. 13 and 14.

²⁸ Exh. 2, ¶ 2, Attachment B, p.7.

²⁹ See note 13, *supra*. 14 C.F.R. Part 250.

³⁰ Exh. 3, Attachment A, p.2, letter to Postal Inspector Skoglund.

III. DEFENDANTS VIOLATE THE TELEMARKETING SALES RULE BY FAILING TO MAKE THE REQUIRED DISCLOSURES IN THEIR TELEMARKETING SOLICITATIONS.

Defendants' solicitation telephone calls to consumers violate the Telemarketing Sales Rule³¹ because they fail to provide disclosures required by the Rule. 16 C.F.R. §§ 310.3(a)(1)(i) and 310.4(d)(2) and (3). Section 310.3(a)(1)(i) requires that a telemarketer disclose, in a clear and conspicuous manner, the total cost to purchase what he is selling. The cost disclosure must be made before a customer pays for the goods or services to be purchased. As can be seen from the script of defendants' solicitation call attached to this memorandum,³² defendants' messages say nothing about the cost of the call.

Section 310.4(d)(2) and (3) of the Rule requires that a telemarketer in an outbound telephone call "disclose promptly and in a clear and conspicuous manner" "[t]hat the purpose of the call is to sell goods or services" and "[t]he nature of the goods and services." The solicitation call script shows that defendants' message never makes clear disclosures to consumers that they are buying largely public information about airlines' overbooking practices and not information about flying free or entry into a sweepstakes.

IV. THIS COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b)(second proviso), provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Courts have routinely held that it is appropriate to invoke the remedies of Section 13(b) in cases such as this where there is evidence of persistent and ongoing deception. FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991).³³ Moreover, in a Section 13(b) permanent injunction action, the court is empowered to exercise the full breadth of its equitable authority and may impose such additional relief as is necessary to provide a complete remedy for the

³¹ The Telemarketing Sales Rule, 16 C.F.R. Part 310, is attached as Exh. 16.

³² Exh. 2, ¶ 2, Attachment B, p.7, script of telemarketing call.

³³ Accord, FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1026 (7th Cir. 1988); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982).

violations found. Security Rare Coins, 931 F.2d at 1315.³⁴ Accordingly, the courts may issue a preliminary injunction, including an asset freeze, during the pendency of an action for a permanent injunction.³⁵ FTC v. U.S. Oil & Gas, 748 F.2d 1431 (11th Cir. 1984).³⁶

Section 19(b) of the FTC Act also authorizes this Court to grant such equitable relief as it finds necessary to redress injury to consumers resulting from violations of the Commission's rules, including the Telemarketing Sales Rule. 15 U.S.C. § 57b(b). See H.N. Singer, 668 F.2d at 1110, 1113.

The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6103(a), authorizes the State of Wisconsin to bring this action on behalf of its residents who are, or may be, threatened by unlawful telemarketing. This Court is authorized by that provision to enjoin such telemarketing, obtain damages, restitution or other compensation for Wisconsin residents, and to provide such other relief as seems appropriate.

V. THE EVIDENCE PRESENTED JUSTIFIES ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

“[I]n determining whether to grant a preliminary injunction under Section 13(b), a district court must: (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities.” FTC v.

³⁴ Because the public interest is implicated, this Court's equitable powers “assume an even broader and more flexible character.” Donovan v. United States Postal Serv., 530 F. Supp. 894, 900 (D.D.C. 1981)(quoting Mitchell v. Demario Jewelry, 361 U.S. 288, 291 [1960]).

³⁵ The Commission has obtained similar relief in jurisdictions throughout the United States, including the 8th Circuit. See FTC v. Joseph Hayes, et al., Civil No. 4:96CV02162 (SNL)(E.D. Mo. Nov. 4, 1996)(Exh. 17); FTC v. T.G. Morgan, Inc. and Michael W. Blodgett, Civil No. 4-91-638 (DEM)(D.Minn 1991)(Exh. 18); FTC v. Security Rare Coin & Bullion Corp., Civil No. 3-86-1067 (D. Minn. 1986)(Exh. 19). See also, e.g., FTC v. 9013-0980 Quebec, Inc., Civil No. 1:96 CV 1567 (N.D. Ohio 1996); FTC v. Multinet Marketing, LLC, Civil No. 3-96-CV 1998-H (N.D. Tex. 1996); FTC v. Windward Marketing, Ltd., Civil No. 1:96-CV-0615-FMH (N.D. Ga. 1996).

³⁶ Accord, FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 571-72 (7th Cir.), cert. denied, 493 U.S. 954 (1989); FTC v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982).

University Health Inc., 938 F.2d 1206, 1217 (11th Cir. 1991). See also World Travel Vacation Brokers, 861 F.2d at 109; FTC v. World Wide Factors, 882 F.2d at 344, 346 (9th Cir. 1989).

A. The Commission has Demonstrated a Strong Likelihood of Success on the Merits.

1. Defendants Violate Section 5 of the FTC Act.

Section 5 of the FTC Act forbids "unfair or deceptive acts or practices." 15 U.S.C. § 45(a).

A deceptive act or practice in violation of Section 5 is established when it is shown that the defendants made a material representation or omission that was likely to mislead consumers acting reasonably under the circumstances. FTC v. Atlantex Assocs., 1987-2 Trad Cas. (CCH) ¶ 67,788 at 59,252 (S.D. Fl. 1987) *aff'd*, 872 F.2d 966 (11th Cir. 1989); FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994); see FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988). Express claims used to induce the purchase of a product or service are presumed to be material. Thompson Medical Co., Inc., 104 F.T.C. 648, 816 (1984) *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). When claims at issue are express, "it is appropriate to infer that reasonable consumers interpret them to mean what they say." Atlantex at 59,254. Implied false claims or omissions are material when they go to the heart of the solicitation or the characteristics of the product or services being offered. Southwest Sunsites, Inc., 105 F.T.C. 7, 149 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). The exhibits in support of the Commission's motion for a temporary restraining order provide ample proof that the defendants misrepresent how consumers can enter their sweepstakes, that they have a secret method of flying free on the airlines, and that they do not charge for this spurious information.

Plaintiffs' present as evidence defendants' own transcript of their advertising call, their E-mail, and the consumer declarations in the attached exhibits to demonstrate that defendants persuade consumers to call their international numbers by representing that those who call will be entered in defendants' sweepstakes. This representation is false. Everyone who wishes to enter must do so by mail. This representation is material because it is likely to influence consumers' decision to call defendants' telephone numbers. It is one of only two reasons

defendants suggest for calling their numbers, the other being to obtain information about how to fly free. Consumers reasonably interpret defendants' representations to mean that one can enter the sweepstakes by calling, thus, this representation is deceptive, in violation of Section 5 of the FTC Act.

Defendants' E-mails, and the transcript of their advertising call, amply demonstrate that defendants offer consumers information about how to fly free on commercial airlines. The transcripts of defendants' 15-minute information message, presented in plaintiffs' exhibits show clearly that to attempt to benefit from defendants' "secret system" of obtaining bump awards, consumers must, at a minimum, purchase an airline ticket for a flight from which to be bumped. Yet, in defendants' advertising call, where the chance to learn how to fly free is an inducement to call defendants' telephone numbers, defendants fail to disclose the material fact that consumers must first incur costs, including the cost of an airline ticket, and may, even then, not attain their goal of being bumped from the flight or getting compensated. The omission of facts concerning undisclosed costs is material when those facts, as here, go to the heart of the solicitation. The omitted information is clearly likely to influence consumers' decision to call defendants' numbers. Defendants' failure to disclose material information is deceptive, in violation of Section 5.

The representation that defendants do not charge for their information is express, and therefore presumed material. Consumers reasonably interpret defendants' representation at face value. There is no hint in the solicitations that would lead a reasonable consumer to conclude that defendants receive a payment from the call they urge consumers to make. Lacking truthful information, consumers cannot know that defendants' compensation is increased by stringing out their information by endless repetition. Therefore, defendants' representations that they do not charge for the information they offer is deceptive, in violation of Section 5.

2. Defendants violate the Telemarketing Sales Rule.

Defendants fall within the definition of "telemarketer," a person who, through telemarketing, initiates or receives telephone calls to or from customers. 16 C.F.R. § 310.2(t). Their business is "telemarketing" as defined by § 310.2(u) of the Rule: it is 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." Consumers who are lured into calling Mercantile Messaging information lines are "customers" under the Rule since they may be required to pay for goods or services offered through telemarketing. 16 C.F.R. § 310.2(i). Since defendants are covered by the Rule, they must make the disclosures required by the Rule.

The Telemarketing Sales Rule requires that telemarketers disclose the cost of any purchase before consumers pay. Under their telemarketing scheme, because consumers incur charges for the international call and defendants' information program by dialing the number designated, defendants' only opportunity to disclose the cost of the international call they urge consumers to make is during their recorded advertising call. The Rule also requires that telemarketers promptly disclose that the purpose of the call is to sell something, in this case, information, and the nature of the goods or services being sold. Similarly, defendants' only opportunity to comply with the Rule is to make the disclosures in their advertising calls. It is clear from defendants' own script of his telemarketing call, attached as plaintiffs' exhibit, that defendants do not make these required disclosures. Their failure to do so has caused injury to consumers who called their international telephone lines unaware they were making an expensive purchase of information and unaware they would not learn how to fly free or enter the sweepstakes by doing so.

3. Lubell is Individually Liable for Monetary Relief

In a case brought by the FTC, an individual defendant is directly liable for his own violations of Section 5 of the FTC Act and the Telemarketing Sales Rule. He is also liable for the corporate defendant's violations if the Commission demonstrates that: (1) the corporate defendant violated the FTC Act or Rule; (2) the individual defendant participated directly in the wrongful acts or practices or the individual defendant had authority to control

the corporate defendant;³⁷ and (3) the individual defendant had some knowledge of the wrongful acts or practices. FTC v. Jordan Ashley, 1994-1 Trade Cas. (CCH) ¶ 70,570 at 72,096 (S.D. Fla. 1994)(citing Amy Travel, 875 F.2d at 573); Kitco of Nevada, 612 F. Supp. at 1292.

By his own admission, in letters to the Iowa Attorney General's Office,³⁸ Daniel B. Lubell is responsible for the content of the advertising telephone call to consumers, his is the voice consumers hear in the recorded messages, he is the person paid by foreign telephone companies for the information he provides through their lines, he is the person who decides to provide refunds to consumers who complain, and he sets the policy of the business. This Court can conclude that Lubell is the person in complete charge of Mercantile Messaging, whether it operates as a sole proprietorship or a limited liability company. According to all business documents presented here as exhibits, Lubell is the sole owner and manager of his business. Lubell, therefore, should be liable for his own law violations as well as the unlawful activity of the limited liability company defendant.

B. The Balance of Public Equities Mandates Preliminary Injunctive Relief

Injunctive relief in this matter would serve the public interest. Plaintiffs' evidence demonstrates that defendants' practices are not isolated occurrences. Mercantile Messaging has operated as a telemarketing enterprise for nearly a year and has the capability to reach enormous numbers of consumers through autodialed recorded telephone calls and E-mail messages that advertise defendants' international telephone numbers. Lubell's patently false statement to the postal inspector, that he was not operating in Iowa due to its telemarketing laws, followed by his subsequent move, at least partially, into Illinois, shows Lubell's inclination to avoid oversight of his business,

³⁷ An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. "A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception." Standard Education, Inc. v. FTC, 475 F.2d 401, 403 (D.C. Cir.), cert. denied, 414 U.S. 828 (1973). A similar or stronger presumption should arise in the context of a limited liability company such as Mercantile Messaging L.L.C..

³⁸ Exh. 12, Attachment C, page 7.

which is highly portable and does not require a permanent office location or expensive office staff and equipment. Given this pattern of repeated law violations, and Lubell's ability to move his business from place to place, it is reasonable to conclude that the defendants' deceptive conduct is likely to continue unless enjoined. See CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir.), cert. denied, 442 U.S. 921 (1979).

Moreover, although the financial injury to individual consumers is not great, the potential aggregate of the monetary loss to consumers is huge. Indeed, since consumers may lose no more than \$30 each, many doubtless accept the loss stoically and do not complain. However, consumers who cannot pay an extra \$30, or those who object on principle to paying for spurious information, do not enjoy the protections of the domestic 900-number pay-per-call system. For example, basic telephone service can not be terminated if consumers do not pay their 900-number bill. Any consumer who fails to pay for international telephone calls made from his or her phone, may in fact suffer the loss of telephone service. Given the widespread, ongoing pattern of deception perpetrated by Lubell through his various companies, and the very mobile character of his business, it is reasonable to conclude that, unless restrained, the defendants will continue to defraud consumers throughout the country and, via Internet E-mail, even more widely.

C. An Asset Freeze is Warranted to Preserve Assets for Consumer Redress

To preserve the possibility of consumer redress, the Commission seeks an immediate asset freeze to prevent concealment or any dissipation of assets pending final resolution of this litigation. The standard for granting an asset freeze is whether the FTC "has shown a likelihood of success on the merits and a possibility of dissipation [of assets]." FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989). The documentation submitted with this Memorandum amply demonstrates that the Commission is likely to succeed on the merits. The same materials demonstrate that the possibility of dissipation of assets exists in this case. Where, as here, business operations are permeated by fraud, there is a strong likelihood that assets may be dissipated during the pendency of the legal proceedings. See, e.g., International Control Corp. v. Vesco, 490 F.2d 1334, 1347 (2d Cir.), cert. denied, 417 U.S.

932 (1984); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972). Mindful of this, courts have ordered such relief solely on the basis of pervasive fraudulent activities such as those found in this case. See, e.g., H.N. Singer, 668 F.2d at 1113; Kitco of Nevada, 612 F. Supp. 1282. A freeze of Lubell's individual assets is also warranted because he controls the daily activities of the business and has directly participated in and formulated the fraudulent schemes described herein. Amy Travel Service, 875 F.2d at 572-76; World Travel Vacation Brokers, 861 F.2d at 1031.

VII. CONCLUSION

The defendants in this action have caused and are likely to cause injury to consumers through their deceptive practices in violation of Section 5(a) of the FTC Act and the Telemarketing Sales Rule. This Court should issue the requested temporary restraining order with asset freeze, as well as the requested preliminary injunction, to halt those practices and to help assure the possibly of effective final relief in the form of monetary redress to consumers.

Respectfully submitted,

Dated: December _____, 1996

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