

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FEDERAL TRADE COMMISSION	:	
Plaintiff,	:	CIVIL ACTION
	:	
	:	
v.	:	NO. 00-3281
	:	
	:	
MERCURY MARKETING OF	:	
DELAWARE, INC.,	:	
a corporation, and	:	
NEAL SAFERSTEIN, individually and as	:	
an officer of the corporation, et al	:	
	:	
Defendants.	:	

November 22, 2004

MEMORANDUM-ORDER

On September 29, 2003, I filed a memorandum and entered a preliminary injunction. The Court preliminarily enjoined certain deceptive conduct of defendants in attempting to sell internet-related services, in violation of the Stipulated Judgment and Consent Permanent Injunction Order entered March 1, 2001.¹ I thereafter held additional hearings as to Plaintiff's request for a permanent injunction, received additional memoranda on the issues and heard closing arguments of counsel on the necessity for a permanent injunction and the appropriate terms of such an injunction. Finally, at the request of counsel for interveners Mercantile Capital, LP and related entities (collectively referred to as Mercantile) I extended to the parties an

¹A more detailed factual and procedural history of this litigation may be found in the following documents of record:

- A - stipulated judgment and order for Permanent Injunction (Doc. # 16)
- B - Stipulation and Order Amending Judgment (Doc. # 19).
- C- Memorandum and Preliminary Injunction Order (Doc. # 53).
- D - Memorandum and Order regarding Intervention for Mercantile (Doc. # 85).

opportunity to submit proposed final orders. After careful consideration of all of the above, I reaffirm the ruling made of record at the close of oral argument, Plaintiffs have established by clear and convincing evidence that original defendants Mercury Marketing Inc. and Neal L. Saferstein individually and as an officer of Mercury have intentionally violated and are in willful contempt of the Stipulated Judgement and Consent Permanent Injunction entered in this matter on March 1, 2001. Defendants continued to engage in a telemarketing scheme designed to mislead unsuspecting small businesses into receiving its introductory internet package and without consent of the businesses to bill and collect monthly charges added to their telephone accounts.

The record discloses that over the course of several years Defendants employed up to one thousand telemarketers to computer dial small businesses and by way of false and misleading statements induce the persons answering the business telephones to agree to receive by mail an introductory packet addressed to the businesses. The evidence establishes that most often the person answering the telephone was not an authorized person to contract for the services. Moreover, Defendants intentionally provided an inadequate number of incoming telephone lines to accommodate the many businesses that attempted to reject the services. Defendants routinely billed and collected monthly fees from the small business victims. Moved to action by the many consumer complaints received the Federal Trade Commission filed this lawsuit to enjoin Defendants unlawful conduct. Defendants agreed to the entry of a Stipulated Judgment and Consent Permanent Injunction and since the effective date of the Injunction Order have by deceptive conduct violated the terms thereof. Notwithstanding the Provisions of the Consent decree Defendants continued their unlawful scheme merely adapting their practices to give the appearance of compliance while continuing to willfully violate the Consent Order. In this

proceeding the Federal Trade Commission has established by clear and convincing evidence that Defendants have intentionally and willfully violated the provisions of the Consent decree.

After the commencement of the Contempt proceedings, intervening Defendant Mercantile, a factor to whom Mercury is indebted, essentially took over the operation of Mercury and has established new management. The new management has taken steps to reconfirm the status of the accounts receivable of Mercantile and has undertaken a program to reimburse the businesses defrauded. Mercantile argues that its action makes unnecessary the Order of Disgorgement and other injunctive relief sought by the Federal Trade Commission. Mercantile's efforts have been constructive but insufficient to purge or remedy the contempt. Accordingly, I will enter an Order substantially as prayed for by the Federal Trade Commission directing the disgorgement of funds obtained by Mercury without authority; however, I will give Defendants an opportunity to attempt to more accurately establish the actual loss to the consumer victims and to the extent that the reconfirmation effort, if attempted, discloses a more appropriate disgorgement amount I will entertain a motion filed on behalf of the Defendants to modify the disgorgement Order.²

An appropriate Order follows.

²Counsel for the parties have submitted for the Court's consideration proposed Orders together with Requests for Findings of Fact and Conclusions of Law.

I find the evidence of record supports Findings of Fact submitted by Plaintiff as follows: #1 to #16, and #19 to #25.

All other requests of Plaintiff are denied as stated.

I find the evidence of record supports Finding of Fact submitted on behalf of Defendants as follows:#4.

All other requests of Defendants are denied as stated.

The facts herein found are incorporated by reference into this Memorandum-Order.

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	:	
Defendants.	:	

ORDER

On July 30,2003, Plaintiff, the Federal trade Commission (“FTC” or “Commission”) filed a Motion For An Order to Show Cause Why Defendants Should Not Be Held in Contempt in the above-captioned matter, and moved for a Temporary Restraining Order (“TRO”) pending resolution of the contempt proceeding. I denied the FTC’s motion for a TRO and instead held several days of hearing on its Motion for a Preliminary Injunction. A Preliminary Injunction was entered on December 29, 2003. The evidence received on the Motion for Preliminary Injunction became part of the record on final hearing. Fed. R. Civ. P. 65(a)(2). Before final hearing, the Mercantile entities were granted permissive joinder as defendants herein. After hearing and oral argument, I find that the Plaintiff has established by clear and convincing evidence the willful violation of the Stipulated Judgment and Consent Permanent Injunction Order and accordingly Defendants are in contempt thereof. The following is **ORDERED** this 22nd day of November,

2004:

1. All terms and conditions set forth in the original Stipulated Judgment and Order for Permanent Injunction, dated February 27, 2001, entered March 1, 2001 and the terms and conditions set forth in the Preliminary Injunction entered December 29, 2003, shall remain in full force and effect. The aforesaid Orders are not intended to be modified or changed by this order unless expressly so stated herein. In case of conflict between the provisions of the aforesaid orders and this permanent injunction order, the provisions of this permanent injunction order shall supercede the earlier provisions.

2. **IT IS FURTHER ORDERED** that Defendants, whether doing business in the name of Corporate Defendant or doing business under or through any trade name or other name, their successors and assigns, officers, agents, servants and employees, and those persons in active concert or participation with them who receive actual notice of this Contempt Order by personal service or otherwise, be and they are hereby restrained and enjoined from violating any provision of the aforesaid orders of 2001 and 2003.

3. **IT IS FURTHER ORDERED** that Defendants and their successors, assigns, officers, agents, servants, employees and those persons in active concert or participation with them, who receive actual notice of this Contempt Order by personal service or otherwise, are hereby restrained and enjoined from billing, causing to be billed, or allowing to be billed any customer enrolled after March 1, 2001, for any good and/or service without first obtaining the customer's express written agreement to the purchase of the good and/or service, and their express written authorization as to the method of payment.

4. **IT IS FURTHER ORDERED** that Defendants and their successors, assigns, officers, agents, servant, employees, and those persons in active concert or participation with them,

who receive actual notice of this Contempt Order by personal service or otherwise, are hereby restrained and enjoined from:

A. Using a negative option feature, as that phrase is defined in the FTC's Trade Regulation Rule entitled Telemarketing and Consumer Fraud and Abuse Prevention Act (hereinafter "TSR"), 16 C. F. R. Part 310;

B. Billing, causing to be billed, or allowing to be billed any past or future customer for any good and/or service without first obtaining the customer's express written agreement to the purchase of the good and/or service;

C. Billing, causing to be billed, or allowing to be billed any past or future customer in any manner other than direct billing;

D. Violating any provision of the FTC/s Telemarketing Sales Rule; and

E. Audio recording any conversation with a consumer, unless the audio recording is of the entire conversation.

5. IT IS FURTHER ORDERED that the Defendants and their successors are hereby jointly and severally ordered to disgorge \$58,249,441 to the Federal Trade Commission, to be used to compensate victims of Defendants' violation of the 2001 Order. Said disgorgement is stayed for a period of thirty days from the date of this Order to permit the Defendants to proceed in accordance with the agreed upon procedure set forth in paragraph IV of the Consent Order of 2001 in an attempt to obtain a more definite calculation of the amount subject to disgorgement. Any amount order to be disgorged shall be applied only to restitution of customers victimized by Defendants' fraudulent scheme and the payment of costs of this proceeding. The Court reserves the right to appoint a special Master, in place of an administrator, to supervise the procedure set forth

in paragraph IV of the Consent Order. The procedure set forth in the aforesaid paragraph IV may be changed or modified only by stipulation of the parties or Order of Court.

6. IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, who receive actual notice of this Contempt Order by personal service or otherwise, directly or through any corporation or other device, are restrained and enjoined from selling, renting, leasing, transferring or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any past, current or future customer; Provided however, that the Defendants may disclose such identifying information with respect to any customer who has accepted Mercury's services pursuant to the Reconfirmation Program, to any purchaser of Mercury or any portion of its stock or all or a substantial portion of its assets or to a law enforcement agency, or as required by any law, regulation or court order.

7. IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, who receive actual notice of this Contempt Order by personal service or otherwise, directly or through any corporation or other device, are hereby restrained and enjoined from transferring or in any way providing to any entity (other than a law enforcement agency or as required by any law, regulation or court order), directly or indirectly, any trade secrets or knowledge, whether recorded or otherwise, or any books, records, tapes, disks, accounting data, manuals, electronically stored or otherwise, data, banking records, invoices, telephone records, ledgers, payroll records, or other documents of any kind, including information stored in computer maintained form, in the possession,

custody, or control of the Defendants that are in any way related to the Defendant.

8. IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, who receive actual notice of this Contempt Order by personal service or otherwise, directly or through any corporation or other device, are hereby restrained and enjoined from destroying, erasing, mutilating or concealing, altering, transferring, or otherwise disposing of in any manner, directly or indirectly any documents including but not limited to any computer tapes, discs or other computerized records, books, written or printed records, correspondence, diaries, handwritten notes, telephone logs, telephone scripts, advertisements, receipt books, ledgers, personal and business cancelled checks and check registers, bank statements, appointment books, day books, documents or computerized records of any kind which relate to the business practices or finances of Defendants.

9. IT IS FURTHERED ORDERED that, in order to monitor Defendants' compliance with the 2001 Order and with this Contempt Order, the time periods provided in the 2001 Order Paragraph VII (Compliance Reporting by Defendants); Paragraph IX (Recordkeeping Provisions); and Paragraph X (Access to Business Premises), are hereby extended to a time period of 7 years from the date of this Contempt Order.

10. IT IS FURTHER ORDERED that a copy of this Contempt Order shall be provided to all agents, servants, employees of the corporate Defendant or any affiliated business, and to any other persons and entities subject in any part to Defendant Saferstein's direct or indirect control.

11. IT IS FURTHER ORDERED that copies of this Contempt Order may be served by

employees or agents of the Commission upon any financial institution or person that may be in possession of any assets, property, or property right of the corporate Defendant, or that may be subject to any provision of this Contempt Order.

12. **IT IS FURTHER ORDERED** that the Defendants, within ten (10) business days of receipt of this Contempt Order as entered by the Court, must submit to the Commission truthful sworn statements acknowledging receipt of this Contempt Order.

13. **IT IS FURTHER ORDERED** that nothing set forth in this Order is intended to affect the security interests and liens Mercantile claims to have upon Mercury's assets.

14. **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for all purposes.

BY THE COURT:

S/ Clifford Scott Green

CLIFFORD SCOTT GREEN, S.J.