

**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,)	
	)	Civil Action No.
v.)	
)	
DANIEL B. LUBELL,)	
individually, and as the manager of the	)	<u>EX PARTE</u> TEMPORARY
limited liability company named below, and d/b/a	)	RESTRAINING ORDER
MERCANTILE MESSAGING and	)	AND
D B & L, Inc.,	)	ORDER FOR
2943 Oxford Drive	)	EXPEDITED DISCOVERY
Bettendorf, Iowa 52722;	)	AND
	)	ORDER TO SHOW CAUSE
and	)	WHY A PRELIMINARY
	)	INJUNCTION SHOULD
MERCANTILE MESSAGING, L.L.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., and having moved ex parte for a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, and the Court having considered the complaint, declarations, exhibits, and memorandum of law filed in support thereof, and now being advised in the premises finds, that:

1. This Court has jurisdiction of the subject matter of this case and there is good cause to believe it will have jurisdiction of all parties hereto.
2. There is good cause to believe that the Commission will ultimately succeed in establishing that defendants 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., have engaged in and are likely to engage in practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310.
3. There is good cause to believe that immediate and irreparable harm will result from defendants' ongoing violations of Section 5(a) of the FTC Act and the Telemarketing Sales Rule, and that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary redress will occur from the sale, transfer, assignment, or other disposition or concealment by defendants of their assets or records unless defendants are

4. Weighing the equities and considering the Commission's likelihood of success in its causes of action, this Temporary Restraining Order is in the public interest.

5. No security is required of any agency of the United States for the issuance of a restraining order. Fed. R. Civ. P. 65(c).

ORDER

Definitions

For purposes of this temporary restraining order, the following definitions shall apply:

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real and personal property, including but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, receivables, and all cash, wherever located.
2. "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.
3. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations

from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

4. "Financial institution" means any bank, savings and loan institution, credit union, or any financial depository of any kind, including but not limited to any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, or precious metal dealer.
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.

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that, in connection with telemarketing or in connection with advertising, offering for sale, or selling information, defendants are hereby temporarily restrained and enjoined from:

- A. Misrepresenting, either directly or by implication, that by placing a call to a specified telephone number, a consumer may enter a sweepstakes or other prize promotion.
- B. Representing, either directly or by implication, 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, without having to enter by mail or to use any other means of entry; and
 - 2. Defendants clearly and conspicuously disclose, before the consumer places a call to the specified telephone number, that the consumer need not call the number to enter the sweepstakes.
- C. Representing, directly or by implication, 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 the consumers will incur in order to take advantage of the information offered by defendants.
- D. Misrepresenting, directly or by implication, that defendants do not charge or do not otherwise receive consideration for the information provided over the specified telephone numbers.

II. PROHIBITED TELEMARKETING ACTIVITIES

IT IS FURTHER ORDERED that, in the course of telemarketing, defendants are hereby temporarily restrained and enjoined from violating the Telemarketing Sales Rule, 16 C.F.R. Part 310, **PROVIDED**, that for purposes of this Order, the customer shall be deemed to have paid for goods or services under Section 310.3 of the Rule when the customer places a call to a telephone number for which there is a per-minute or per-call toll or other charge.

III. ASSET FREEZE

IT IS FURTHER ORDERED that defendants are hereby temporarily restrained and enjoined from:

- A. Directly or indirectly transferring, selling, liquidating, encumbering, pledging, loaning, assigning, concealing, dissipating, converting, withdrawing, or otherwise disposing of all assets that are: (1) owned or controlled, directly or indirectly, by any defendant, in whole or in part; (2) in the actual or constructive possession of any defendant; or (3) owned, controlled by, or in the actual or constructive possession of any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by, or under common control with any defendant, including but not limited to, any assets held by, for, or under the name of any defendant at any financial institution.
- B. Opening or causing to be opened any safe deposit boxes titled in the name of any defendant, or subject to access by any defendant; and

- C. Incurring charges or cash advances on any credit card issued in the name, singly or jointly, of any defendant.

IV. B

1. The identification number of each such account or asset titled in the name, individually or jointly, of any of the defendants, or held on behalf of, or for the benefit of, any of the defendants;
 2. The balance of each such account, or a description of the nature and value of such asset as of the time this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other asset was remitted; and
 3. The identification of any safe deposit box that is either titled in the name, individually or jointly, of any defendant, or is otherwise subject to access by any defendant; and
- B. Upon request of the Commission, promptly provide the Commission with copies of account applications, account statements, signature cards, transfers to and from the accounts which occur after the date of this order, currency transaction reports, 1099 forms, and safe deposit logs. Any such financial institution, account custodian, or other aforementioned entity may arrange for the Commission to obtain copies of any such records which the Commission seeks, provided that such institution may charge a reasonable fee not to exceed fifteen cents per page copied.

VI. RECORDKEEPING

IT IS FURTHER ORDERED that defendants are hereby temporarily restrained and enjoined from:

- A. Failing to create and maintain books, records, and accounts which, in reasonable detail, accurately, fairly, and completely reflect the incomes, disbursements, transactions, and the use of monies by any of the defendants; and
- B. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any contracts, accounting data, correspondence, advertisements, computer tapes, discs, or other computerized records, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state, or local business or personal income or property tax returns, and any other documents or records of any kind which relate to the business practices or business or personal finances of any of the defendants from January 1, 1996, to the present time.

VII. FINANCIAL STATEMENT

IT IS FURTHER ORDERED that not less than three (3) days prior to the scheduled date and time for the hearing on a preliminary injunction in this matter, but in any event prior to any hearing regarding modification of the asset freeze provisions of this Order, each defendant shall provide the Commission with a completed financial statement, on the forms attached to this

Order, for such defendant individually and for each defendant corporation, accurate as of the date of service of this Order upon said defendant. Service of this statement shall be performed in accordance with Section XV of this Order.

VIII. PROVISION OF SWORN STATEMENT

IT IS FURTHER ORDERED that within three (3) business days of being served with a copy of this Order, each defendant shall prepare and deliver to the Commission a sworn statement providing the following information for the period of time between January 1, 1996, and the present:

- A. A list of all international, pay-per-call, or other tolled telephone numbers advertised or promoted directly or indirectly by defendants from January 1, 1996, to the present, and all the revenue generated from such numbers for defendants. The statement shall also include any relevant area codes and access codes, and shall identify the country in which each telephone number terminates.
- B. The number, frequency, and average duration of calls to any international, pay-per-call, or other tolled telephone number advertised or promoted directly or indirectly by defendants.
- C. A list of the names, addresses, and telephone numbers of:
 - 1. All consumers who have placed calls to any international, pay-per-call, or other tolled telephone number advertised or promoted directly or indirectly by defendants;

2. All consumers who have complained about or asked to be reimbursed for the cost of calls placed to any international, pay-per-call, or other tolled telephone number advertised or promoted directly or indirectly by defendants; and
3. All consumers who have received refunds from defendants for calls placed to any international, pay-per-call, or other tolled telephone number advertised or promoted directly or indirectly by defendants, and the amount of such refunds.
4. All consumers who have won anything in any prize promotion advertised, promoted, or conducted by defendants.

Service of this statement on the Commission shall be performed in accordance with Section XV of this Order.

IX. PROVISION OF BUSINESS RECORDS

IT IS FURTHER ORDERED that within three (3) business days of receiving a copy of this Order, each defendant shall deliver to the Commission the following business records for the period of time between January 1, 1996, and the present:

- A. All contracts or agreements between any defendant or business entity named in the Commission's complaint and any information service provider, service bureau, or any other entity providing access to telephone service or voice storage, including Beylen, in effect at any time during the relevant period;
- B. All contracts or agreements between any defendant or business entity and any international telephone service in effect at any time during the relevant period;

- C. Examples of each script for defendants' advertising outbound telemarketing calls and E-mails used at any time during the relevant period;
- D. Examples of each script for defendants' information messages used at any time during the relevant period;
- E. All contracts or agreements between any defendant or business entity named in the complaint and any provider of autodialing machines or services in effect at any time during the relevant period;
- F. All documents rel-2 uin e8 Twe8 Twe8

contractors, and shall, within three (3) days from the date of service of this Order, provide plaintiffs with a sworn statement that defendants have complied with this provision of the Order. Service of this statement shall be performed in accordance with Section XV of this Order.

XI. EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that in anticipation of the preliminary injunction hearing in this matter, plaintiffs are granted leave, pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, to take the deposition of any person at any time after the date of this Order, and that two (2) days notice shall be deemed sufficient for such depositions; and that pursuant to Rule 36, defendants' response to any request for admissions served by the plaintiffs shall be within five (5) days after service of the request.

XII. WITNESS TESTIMONY

IT IS FURTHER ORDERED that if any party intends to present the testimony of any witness at the hearing on a preliminary injunction in this matter, that party shall, at least one (1) day prior to the scheduled date and time of the hearing, serve on counsel for the other party a statement of the name, address, and telephone number of any such witness, and either a summary of the witness' expected testimony, or the witness' affidavit revealing the substance of such witness' expected testimony. Service on the Commission shall be performed in accordance with Paragraph XV of this order.

XIII. SERVICE OF PLEADINGS

IT IS FURTHER ORDERED that defendants shall serve all memoranda, affidavits, and other evidence on which they intend to rely at the preliminary injunction hearing scheduled in this matter no less than one (1) day prior to the scheduled hearing. Service on the Commission shall be performed in accordance with Paragraph XV of this Order.

XIV. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order and all other process or summons in this action may be served by any means, including facsimile transmission, by employees or agents of the Commission upon any financial institution or person that may have possession, custody or control of any documents or assets of the defendants, or that may be subject to any provision of this Order. Consistent with Section 3413(e) of the Right to Financial Privacy Act, 12 U.S.C. § 3413(e), a financial institution in receipt of this Order is not required to notify defendants of such receipt.

XV. SERVICE ON THE COMMISSION

IT IS FURTHER ORDERED that service of documents on the Commission by defendants shall be by delivery to Patricia S. Howard at the Federal Trade Commission, Room 238, 6th Street and Pennsylvania Avenue, N.W., Washington, DC 20580, or by facsimile transmission to 202-326-3395. Service shall be performed prior to 4:45 p.m. (Eastern Time) on the date due.

XVI. CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), any credit reporting agency may furnish to the Commission a credit report concerning any defendant.

XVII. DURATION OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire ten (10) days after entry, unless, within such time, the Order, for good cause shown, is extended for an additional period not to exceed ten (10) days, or unless it is extended with consent of the parties.

XVIII. ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED, pursuant to Federal Rule of Civil Procedure 65(b), that each of the named defendants shall appear before this Court on the ____ day of _____, 19____, at _____ o'clock ____m., to show cause, if there is any, why this court should not enter a preliminary injunction, pending final ruling on the Complaint against defendants, enjoining them from further violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310, continuing the freeze of their assets, and imposing such additional relief as may be appropriate.

XIV. RETENTION OF JURISDICTION

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

SO ORDERED, this ____ day of _____, 19____, at _____ o'clock ____m.

United States District Judge