

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



attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and Defendants further waive any rights to attorneys' fees that may arise under said provision of law.

9. Entry of this Order is in the public interest.

DEFINITIONS

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

1. "**Defendants**" means the Corporate Defendant and Individual Defendant. The "Corporate Defendant" is Mercury Marketing of Delaware, Inc. (Mercury), a Delaware corporation. The "Individual Defendant" is Neal D. Saferstein, individually and as an officer of the Corporate Defendant.

2. "**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. Defendant's browser cache, ad history, and other data compilations from which information can be obtained are also included.

telephone bill, or otherwise;

5. The means by which a consumer may cancel Defendants' services without incurring any cost or obligation (if applicable, such as when a free-trial period is offered);

6. The date by which or time period within which a consumer must cancel Defendants' services to avoid being charged for the next month's service; and

7. Defendants' toll-free telephone number.

III.

BILLING AND REFUNDS

IT IS FURTHER ORDERED that, in connection with the advertising, promotion, marketing, offering for sale, sale, or provision of any Internet-related service, Defendants, 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, are permanently restrained and enjoined from:

A. Billing or causing any consumer to be billed prior to:

1. Three (3) days after the expiration of any free-trial period; and

2. Delivery of a sample web page and explanatory materials to the consumer, including written materials containing the disclosures required under Paragraph I.B. of this Order; and

B. Failing to credit a consumer's account, issue a refund check, or make a request for credit through the appropriate billing agency or local exchange carrier ("LEC"), as the case may be, within seven (7) business days from the receipt of any valid cancellation or refund request.

IV.

CONSUMER REDRESS

IT IS FURTHER ORDERED that Defendants shall engage one or more independent third-parties (collectively, "Administrator"), approved by the Commission's representatives, to administer a notification program as described below, at Defendants' expense:

A. Within thirty (30) days following entry of this Order, Defendants shall provide the Administrator and the undersigned counsel for the Commission with an affidavit or declaration that includes a list of the name and last known address and telephone number, including the Billing Telephone Number ("BTN"), of every consumer qualified to receive a notification, as described below. Consumers qualified to receive a notification include all consumers who were either (i) being billed for Mercury's services through a local exchange carrier ("LEC") as of June 28, 2000, or (ii) have been billed through a LEC between June 28, 2000, and the date the Defendants signed this Order, with the exception of any consumer:

1. for whom a full credit has been transmitted directly or through the LEC billing system for all charges for Mercury's Internet-related services; or

2. whom Mercury has fully reimbursed by check for all charges for Mercury's Internet-related services; or

3. who has, after the expiration of the fifteen-day free trial period, engaged their website administration feature or has requested that Mercury engage their website administration feature; or

4. who has, after the expiration of the fifteen-day free trial period, engaged their e-mail

3. Defendants shall place an additional One Hundred Twenty-Five Thousand Dollars (\$125,000) in escrow within sixty-five (65) days of entry of the Stipulated Judgment.

L. The escrow accounts established pursuant to Paragraph IV.K., above, shall be maintained or terminated in accordance with the following conditions only:

1. Commission counsel shall, within fifteen (15) business days of receipt of the report of the Administrator required by Paragraph IV.I., above, notify Defendants and the escrow agent either that: (a) the escrow should be terminated and all funds in the escrow accounts should be returned to Defendants; or (b) the Commission is moving the court to require Defendants to show cause why they should not be held in contempt for their failure to comply with this Paragraph IV., in which case the escrow accounts must be maintained until such time as the Court rules otherwise; or

2. If Defendants have not complied fully with Paragraphs IV.A-J., above, within two hundred and fifty (250) days of entry of this Order, the Commission shall have the right to petition the court to order that funds necessary to provide consumer redress consistent with Paragraphs IV.A-J, above, shall be paid directly to the Commission from the escrow accounts, in addition to whatever other legal remedies are available to the Commission.

V.

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, within five (5) business days of receipt of this Order as entered by the Court, Defendants shall submit to the Commission a truthful sworn statement, in the form shown on Appendix A, that shall acknowledge receipt of this Order.

VI.

DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall, in connection with any business that any Defendant directly or indirectly manages, controls, or has a majority ownership interest in, that is engaged in the advertising, promotion, marketing, offering for sale, sale or provision of any Internet-related service, or assisting others engaged in these activities:

A. Provide:

1. a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from, each officer and director, and each individual serving in a management capacity within ten (10) business days after receipt of this Order, and thereafter immediately upon employing any such person; and
2. an accurate summary of Paragraphs I and II of the Order that conforms to the model set forth in Appendix B to, and obtain a signed and dated acknowledgment of receipt of same from, all persons involved in responding to consumer complaints or inquiries, all persons involved in verifying sales or taping customers agreeing to purchase Defendants' services, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, within ten (10) business days after receipt of this Order, and thereafter immediately upon employing any such person;

Provided, however, that the Defendants shall, upon the request of any person who has received a summary pursuant to this Paragraph, promptly provide such person with a copy of the complete Order.

B. Maintain for a period of three (3) years after creation, and upon reasonable notice make available to representatives of the Commission, the original signed and dated acknowledgments of receipt of either a copy of this Order or a copy of the summary required by Paragraph VI.A.,

above.

VII.

COMPLIANCE REPORTING BY DEFENDANTS

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

A. For a period of five (5) years after the date of entry of this Order, the Defendants shall notify the Commission in writing of the following:

1. Any changes in the residence, mailing addresses and telephone numbers of the Individual Defendant, within ten (10) days of the date of such change;
2. Any changes in the employment status (including self-employment) of the Individual Defendant, within ten (10) days of such change. Such notice shall include the name and address of each business that the Individual Defendant is affiliated with or employed by, a statement of the nature of the business, and a statement of the Individual Defendant's duties and responsibilities in connection with the business or employment;

Action No. 00-3281 and mail them to:

John M. Mendenhall, Esq. or Regional Director
Federal Trade Commission - East Central Region
1111 Superior Ave. East, Suite 200
Cleveland, Ohio 44114

E. For the purposes of this Paragraph, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" include any individual or entity for whom the Individual Defendant performs services as an employee, consultant, or independent contractor; and

F. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate with Craig A. Waldman, Esq., Clifford Chance Rogers & Wells LLP, New York, New York, or Arthur G. Jakoby, Esq., Herrick Feinstein LLP, New York, New York, or such other counsel as may be identified by Defendants.

VIII.

MONITORING COMPLIANCE OF SALES PERSONNEL

IT IS FURTHER ORDERED that, in connection with any business that any Defendant directly or indirectly manages, controls or has a majority ownership interest in that is engaged in the advertising, promotion, marketing, offering for sale, sale or provision of any Internet-related service, or assisting others engaged in these activities, 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 Order by personal service or otherwise, are hereby permanently restrained and enjoined from:

A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and independent contractors engaged in sales or other customer service functions comply with Paragraph I of this Order. Such steps shall include adequate monitoring of sales presentations or other calls with customers, and shall also include, at a minimum, the following:

1. Listening to the oral representations made by persons engaged in sales or other customer service functions;
2. Establishing a procedure for receiving and responding to consumer complaints;
3. Ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved;
4. Failing promptly to investigate fully any consumer complaint received by any business to which this Paragraph applies; and
5. Failing to take corrective action with respect to any sales person whom any Defendant determines is not complying with this Order, which may include training, disciplining, and/or terminating such sales person;

Provided, however, that this Paragraph does not authorize or require a Defendant to take any action that violates any federal, state, or local law.

IX.

RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, in connection with any business that any Defendant directly or indirectly manages, controls or has a majority ownership interest in, that is engaged in the advertising, promotion, marketing, offering for sale, sale or provision of any Internet-related services, or assisting others engaged in these

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with the provisions of this Order. Appropriate counsel may be present during such interviews.

Provided, however, that upon application of the Commission for good cause shown, the Court may enter an *ex parte* order granting immediate access to Defendants' business premises for the purposes of inspecting and copying all documents relevant to any matter contained in this Order.

XI.

AUTHORITY TO MONITOR COMPLIANCE

IT IS FURTHER ORDERED that the Commission is authorized to monitor Defendants' compliance with this Order by all lawful means, including but not limited to the following:

A. The Commission is authorized, without further leave of Court, to obtain discovery from any

