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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., & NEAL D.
SAFERSTEIN,
Defendants.

SEP 10 2003
DEC 20 2003
By MICHAEL J. ... Dep. Clerk

Preliminary Injunction

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. On August 6, 2003, this Court denied without prejudice the FTC’s Motion for a TRO and instead set a hearing on August 26, 2003, on the FTC’s motion for preliminary relief. Said hearing was postponed at defendants request, and ultimately held on September 10, 2003. The Court, having considered the evidence presented at the hearing, and the motions, memoranda and supplemental memoranda of law and various exhibits and affidavits filed in support thereof, now finds that:

1. This Court has jurisdiction of the subject matter of this case and of all parties hereto.
2. The Commission has established by clear and convincing evidence that Defendants Mercury Marketing of Delaware, Inc. (“Mecury”) and Neal D. Saferstein have violated,

and continue to violate, the Stipulated Final Judgment and Order for Permanent Injunction (“2001 Order”) entered by this Court on March 1, 2001.

3. There is good cause to believe that if this Interim Relief is not entered, immediate and irreparable damage to the Commission’s ability to obtain effective final relief for consumers harmed by the Defendants’ violations of the 2001 Order will occur from the continued violations of the 2001 Order, from the Defendants’ billing practices.

IT IS THEREFORE ORDERED that Defendants Neal D. Saferstein and Mercury, whether doing business in the corporate name or doing business under any trade name or other name, including, but not limited to, GoInternet.net, Mercury Internet Services, Mercury Communications, Mercury, MIS, Mercury Internet Service Wireless, Venus Voice Mail, or Mercury Technologies, 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 Interim Relief by personal service or otherwise, be and hereby are restrained and enjoined from violating any provision of the 2001 Order.

IT IS FURTHER ORDERED that, in the telemarketing or sale of any good or service, 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 Interim Relief 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 Regulation Rule entitled Telemarketing and Consumer Fraud and Abuse Prevention Act (hereinafter “TSR”), 16 C.F.E. Part 310;
- B. Billing any customer for any good and/or service without first obtaining the customer’s

written agreement to the purchase of the good and/or service, and the express written authorization as to the method of payment; and

C. Violating any provision of the FTC's Telemarketing Sales Rule.

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 Defendants who receive actual notice of this Order by personal service or otherwise, directly or through any corporation or other device, be and are hereby preliminarily restrained and enjoined from destroying, erasing, mutilating, 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, copies of federal, state or local business or personal income or property tax returns, and other documents or computerized records of any kind which relate to the business practices or finances of Defendant Mercury.

IT IS FURTHER ORDERED that Defendant Saferstein shall immediately provide a copy of this Interim Relief to his agents, servants, employees, including all employees of Defendant Mercury and any affiliated business, and other persons and entities subject in any part to his direct or indirect control.

IT IS FURTHER ORDERED that all terms and provisions of the Stipulated Final Judgment and Order for a Permanent Injunction ("2001 Order") entered by this Court on March 1, 2001, not expressly modified or changed by this Preliminary Injunction shall remain in full

force and effect.

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

SO ORDERED, this 29th day of Dec., 2003 at 3⁰ o'clock.

BY THE COURT:


CLIFFORD SCOTT GREEN, S.J.

12-31-03
pa attached

ENTERED
DEC 31 2003
CLERK OF COURT

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

FEDERAL TRADE COMMISSION,
Plaintiff,

CIVIL ACTION

RECEIVED

JAN 05 2004

v.

NO. 00-3281

EAST CENTRAL
REGION

MERCURY MARKETING OF
DELAWARE, INC., & NEAL D.
SAFERSTEIN,

Defendants.

Oct 29 2003
MICHAEL J. ...
By _____ Dep. Clerk

MEMORANDUM

GREEN, S.J.

December 29, 2003

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), filed a motion for an Order to Show Cause why the Defendants, Mercury Marketing of Delaware, Inc. and Neal D. Saferstein ("Mercury"), should not be held in contempt for violating a March 1, 2001 Stipulated Judgment and Order ("Order"). The FTC sought a temporary restraining order ("TRO"), a preliminary injunction, and final injunctive relief. The court denied the request for TRO, but scheduled a hearing on the Motion for an Order to Show Cause and on Preliminary Injunctive Relief ("the hearing"). Starting on September 10, 2003, such hearing was held and both parties presented evidence. It is agreed that the case is within this Court's jurisdiction and venue is appropriate in this district. Upon consideration of the evidence presented, the motions and memoranda filed, and for the following reasons, the court will grant Plaintiff's motion in part.

I. BACKGROUND

In June 2000, the Federal Trade Commission filed a complaint alleging that Defendants violated Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §28, by engaging in deceptive practices in the sale of Internet-related services, specifically for unauthorized billing. (Pl. Proposed Findings at 2). On March 1, 2001, this Court entered a Stipulated Judgment and Order for Permanent Injunction (“2001 Order” or the “Consent Decree”) in which Defendant Mercury agreed to various conduct prohibitions and mandates.

Among those actions are:

- 1) Mercury must not make false or misleading statements or misrepresentations of material fact;
- 2) Mercury must not fail to clearly disclose, prior to charging consumers for any Internet-related goods or services, all material terms of the transactions;
- 3) Mercury must not send a bill, or cause a bill to be sent to consumers without express, verifiable authorization;
- 4) Mercury must audio record any purchase with clear and conspicuous disclosures of all material terms of Defendants’ offer and the consumer’s express agreement to those terms, which terms are consistent with any material terms previously disclosed to consumers.

Compliance reporting was also mandated by the Order; however, receipt of numerous consumer complaints following the entry of the Order prompted the FTC to begin a contempt investigation in June of 2002 to determine whether Mercury was in violation of the Order. After a lengthy investigation with which Mercury cooperated, the FTC filed this contempt proceeding.

Presently before the court is FTC's request for injunctive relief to prevent allegedly continuing violations of the stipulated judgment and order. The FTC seeks to enjoin Defendants from: (1) Billing consumers without their authorization, using a negative option feature, as that phrase is defined in the FTC's Regulation Rule entitled Telemarketing and Consumer Fraud and Abuse Prevention Act (hereinafter "TSR"), 16 C.F.R. Part 310;¹ (2) Billing customers by any method other than by sending the customer a bill or invoice to the customer (direct billing); and (3) Violating any provision of the FTC's Telemarketing Sales Rule. FTC also seeks to require the express, written authorization of customers prior to billing them for services. (Pl. Proposed Conclusions of Law ¶ 12.)

To ensure that the Defendants comply, Plaintiff requests "the appointment of a receiver "because of the continuing fraud in defendants' business operations, notwithstanding the 2001

¹ 16 C.F.R. Part 310.3 reads in pertinent part:

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct: (1) Before a customer pays for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:...(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s). (2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:... (ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s)."

16 CFR 310.2 defines a negative option feature to mean that "in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or a charitable contribution."

Order, and the likelihood that this fraud will continue until a final resolution of the FTC's present motion," and an asset freeze on corporate defendant's assets "to ensure the availability of funds for consumer redress." Id.

Defendants contend that the evidence is insufficient to permit the Court to find that there is a reasonable likelihood of success on the merits by clear and convincing evidence. Defendants claim, "the FTC must show that 'the Defendants have violated a specific and definite order of the court'" in order to prove contempt. Defendants contend the conduct the FTC believes is deceptive and misleading is not part of the original settlement. (Def. Reply at 1.) In addition, Defendants assert the relief requested by Plaintiffs will in effect shut down the company. (Id. at 6).

For the reasons set forth below, the Court concludes the Plaintiff is entitled to preliminary injunctive relief at least in part. There is a reasonable likelihood that the FTC will succeed in proving contempt as it relates to deception by defendants and do so by clear and convincing evidence. Based upon the evidence presently of record, the court finds that the sales practices and procedures utilized are deceptive to those that the defendants solicit to receive a welcome package and information by failing to fairly disclose a purchase is taking place, to be paid for by automatic charges to consumers' phone service, unless the customer takes affirmative action to reject the purchase of E-mail and internet services.

II. DISCUSSION

Through several days of hearings both sides offered evidence; however, the court understands that the evidentiary record will not be complete until after final hearing.

Accordingly, the court declines at this time to make permanent findings of facts as submitted by the parties. Nonetheless, on the temporary injunction hearing record presently before the court there is sufficient evidence to support the finding that the plaintiff has satisfied its burden of persuasion by clear and convincing evidence that the FTC has a reasonable likelihood of success on the merits. There is clear and convincing evidence that defendants' telemarketers purposely mislead consumers into receiving goods and services without clearly disclosing that defendants will charge the consumer's telephone bill after a 15-18 day trial period unless and until the consumer affirmatively notifies defendants of his rejection of the service. The evidence clearly reveals telephone sales pitches that are cleverly scripted so as to conceal that the consumer will be financially obligated 15 days after receiving the material from defendants. This failure to fully and adequately disclose the true proposed terms of the transaction can only be characterized as misleading and in violation of the stipulated order. Thus a preliminary finding that defendants are in contempt of the order is warranted.

Defendants argue that they have 700 to 800 telemarketers who solicit customers around the clock resulting in 1600 to 1700 sales a day and that the infractions cited by FTC are minimal. Admittedly, defendants have a large operation and one should expect occasional violations. However, the scope of violations must be judged on the entire record. As plaintiff points out, defendants have been on notice of the magnitude of the problem. Since the entry of the stipulated order defendants have been warned and challenged on many fronts. SBC, a regional phone company, has ceased collecting charges on behalf of defendants based upon the receipt of thousands of complaints. The Attorneys General of at least five states have filed lawsuits against defendants in an attempt to protect the citizens of their states. Additionally, other state boards

have similarly complained. Now, based on thousands of citizen complaints, the FTC seeks to enforce the stipulated order by these contempt proceedings. Clearly the problem is not de minimus as defendants urge.

Notwithstanding that a preliminary injunction is an extraordinary remedy, to be granted only in limited circumstances, the evidence of record clearly supports a preliminary injunction to prevent the public from continuing to be deceived and deprived of funds in an unauthorized way. The remedy is appropriate here where: (1) there is high likelihood that Plaintiff will succeed on the merits; (2) the injunction is limited and tailored to prevent the unauthorized conduct of defendants from continuing; considering the effort heretofore by Federal and State agencies to prevent unauthorized billing, an injunction is necessary; (3) the preliminary injunction will not prevent the continued operation of defendants business in a legitimate way. Indeed, it will only prevent defendants from charging for goods and services not expressly authorized in writing by the party to be charged; (4) the injunction will protect the public from continuing fraudulent solicitations and forced purchases.

In enjoining sales not based on written authorization we aid both the public and the defendants honest endeavors. At this time, the court declines plaintiff's request for the appointment of a receiver and the freezing of defendants' assets. The evidence of record does not support either the appointment of a receiver or a freezing of defendants' assets. Indeed, a security deposit required by the stipulated order has not been exhausted and if necessary can be ordered replenished. The injunction prohibits only the unauthorized conduct while preserving

the status quo. Defendants have proposed certain alternate remedies as appropriate.² The voluntary adoption of these proposals by defendants will be relevant to the scope of final hearing and final order.

An appropriate Order follows.

²Defendant urged the following less drastic remedies than proposed by the Plaintiff:

- A modification of the sales and verification scripts to ensure that the person who accepts service is qualified to do so on behalf [of] the business, and that the person understands the fees that Mercury will charge for its services;
- The implementation of a system of compensation that does not reward TSRs solely on the basis of the TSR's volume of sales;
- An increase in monitoring and disciplinary actions to ensure that TSRs comply with the sales script;
- Authorization to ITPV [defendant's appointed monitor] to immediately terminate monitored sales that it identifies as problematic;
- A six-month moratorium on contacting potential customers when IPTV has rejected a sale to the customer; and
- Notification of the business owner, after completion of a sale, of the services charged by Mercury.