

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Civ. No.: 13-CV-590

**ADVERT MARKETING, INC.,
SCOTT A. DALRYMPLE, and
ROBERT JERROLD WENCE,**

Defendants.

**PRELIMINARY INJUNCTION ORDER
WITH OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("Commission"), having filed its Complaint for a Permanent Injunction and Other Equitable Relief in this matter, under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and having filed its Motion for a Temporary Restraining Order with Other Equitable Relief, and an Order to Show Cause Why a Preliminary Injunction Should Not Issue ("Motion for TRO") under 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 of such motion, and now being advised in the premises, finds that:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and there is also good cause to believe it will have jurisdiction over the parties.
2. Venue lies properly with this Court.

3. There is good cause to believe that Defendants Advert Marketing, Inc., Scott A. Dalrymple, and Robert Jerrold Wence ("Defendants") have engaged in, and are likely to engage in, acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and that the Commission is likely to prevail on the merits of this action.

4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary restitution will occur from the sale, transfer, or other disposition or concealment by Defendants of assets or records unless Defendants are immediately restrained and enjoined by order of this Court. Therefore, there is good cause for the entry of the ancillary relief contained in this Order, including an order preserving Defendants' assets and prohibiting the Defendants from destroying records.

5. Weighing the equities and considering the Commission's likelihood of ultimate success, this Preliminary Injunction is in the public interest.

6. No security is required of any agency of the United States for the issuance of a preliminary injunction. *See* Fed. R. Civ. P. 65(c).

DEFINITIONS

For purposes of this Preliminary Injunction ("Order"), the following definitions shall apply:

A. "**Asset**" or "**Assets**" means any legal or equitable interest in, right to, or claim to, any real or personal property, including, but not limited to, "goods," "instruments," "equipment," "fixtures," "general intangibles," "inventory," "checks," or "notes" (as these terms are defined in the Uniform Commercial Code), lines of credit, chattels, leaseholds, contracts, mail or other

deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and all cash, wherever located.

B. **"Assisting others"** includes, but is not limited to: (1) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (2) formulating or providing, or arranging for the formulation or provision of, any sales script or other marketing material; (3) providing names of, or assisting in the generation of, potential customers, including, but not limited to, the sending of text messages or email messages; (4) verifying, processing, fulfilling, or arranging for the fulfillment of orders; (5) performing or providing marketing, billing, or collection services of any kind, including, but not limited to, creating, hosting, or maintaining websites, or recruiting affiliates; or (6) acting as an officer or director of a business entity.

C. **"Corporate Defendant"** means Advert Marketing, Inc.

D. **"Defendants"** means Advert Marketing, Inc., Scott A. Dalrymple, and Robert Jerrold Wence, and each of them, by whatever names each might be known, as well as their successors and assigns, whether acting directly or through any corporation, subsidiary, division, or other device, including, but not limited to, fictitious business names.

E. **"Document"** or **"Documents"** means any materials listed 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, into reasonably usable form through detection devices. A draft or nonidentical copy is a separate Document within the meaning of the term.

F. **"Electronic data host"** means any person or entity that stores, hosts, or otherwise maintains electronically stored information or computer equipment.

G. **"Individual Defendants"** refers to Defendants Scott A. Dalrymple and Robert Jerrold Wence.

H. **"Internet service provider"** means a company that provides third parties with access to the Internet.

I. **"Material"** means likely to affect a person's choice of, or conduct regarding, goods or services.

J. **"Person"** means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

K. **"Plaintiff"** means the Federal Trade Commission ("Commission" or "FTC").

L. **"Unauthorized or unsolicited commercial electronic text message"** means an unauthorized or unsolicited text message the primary purpose of which is a commercial advertisement or promotion of a commercial product or service (including the content on an Internet website operated for commercial purposes).

ORDER

I. PROHIBITED BUSINESS ACTIVITIES RELATING TO ANY PRODUCT, SERVICE, OR PROGRAM

IT IS THEREFORE ORDERED that Defendants, their members, officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service, facsimile transmission,

email, or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product, service, or program, are preliminarily restrained and enjoined from:

A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication, any material fact, including, but not limited to, that consumers have won a contest or have been specifically selected to receive a gift or prize that is "free" or without cost or obligation;

B. Failing to disclose, or disclose adequately, to consumers the material terms and conditions of any offer, including, but not limited to:

1. that consumers must pay money or other consideration to receive the gift or prize; and
2. the costs and obligations to receive the gift or prize.

II. PROHIBITION ON MAKING UNAUTHORIZED OR UNSOLICITED COMMERCIAL ELECTRONIC TEXT MESSAGES

IT IS FURTHER ORDERED that Defendants, their members, officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product, service, or program, are preliminarily restrained and enjoined from making, initiating, or procuring the transmission of, unauthorized or unsolicited commercial electronic text messages to mobile telephones and other wireless devices.

III. PROHIBITION ON DISCLOSING CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, and their members, officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or indirectly, are preliminarily restrained and enjoined from:

A. Selling, renting, leasing, transferring, or otherwise disclosing the name, address, birth date, telephone number, email address, Social Security number, Social Insurance number, credit card number, bank account number, or other financial or identifying personal information of any person from whom or about whom any Defendant obtained such information in connection with activities alleged in Plaintiff's Complaint; and

B. Benefitting from or using the name, address, birth date, telephone number, email address, Social Security number, Social Insurance number, credit card number, bank account number, or other financial or identifying personal information of any person from whom or about whom any Defendant obtained such information in connection with activities alleged in Plaintiff's Complaint.

Provided, however, that Defendants may disclose such financial or identifying personal information to a law enforcement agency or as required by any law, regulation, or court order.

IV. POSTING NOTICE OF LAWSUIT ON AND PRESERVING WEBSITES

IT IS FURTHER ORDERED that, immediately upon service of the Order upon them, Defendants, and their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by

personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, and any other person or entity served with a copy of this Order, shall:

A. Immediately take whatever action is necessary to ensure that any website used by any Defendant for the advertising, marketing, promotion, offering for sale, or sale of any product, service or program shall prominently display the following statement:

The Federal Trade Commission ("FTC") has filed a lawsuit against Advert Marketing, Inc., Scott A. Dalrymple, and Robert Jerrold Wence, alleging that they have engaged in deceptive and unfair practices relating to the advertising, marketing, promotion, offering for sale, or sale of products, services or programs, including purportedly "free" merchandise such as \$1000 gift cards. The United States District Court for the Southern District of Texas has issued a preliminary injunction prohibiting the alleged practices. You may obtain additional information directly from the FTC at www.ftc.gov.

Each website carrying this message shall also provide a hypertext link to the FTC's home page at www.ftc.gov, or another website designated by counsel for the Commission;

B. Prevent the destruction or erasure of any website used by Defendants for the advertising, marketing, promotion, offering for sale, sale, or provision of any product, service, or program by preserving such websites in the format in which they are maintained currently, except for the notice required by Subparagraph A of this Paragraph; and

C. Immediately notify counsel for the Commission of all websites operated or controlled by Defendants.

ASSET AND RECORD RETENTION

V. ASSET PRESERVATION

IT IS FURTHER ORDERED that:

A. Defendants, their members, officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or indirectly, are restrained and enjoined from directly or indirectly selling, transferring, alienating, liquidating, encumbering, pledging, loaning, assigning, concealing, dissipating, converting, withdrawing, or making any other disposition of any assets or any interest therein, wherever located, including any assets outside the territorial United States, that are owned, controlled, or held by, or for the benefit of, in whole or in part, Defendants, or in the actual or constructive possession of Defendants, other than those assets that are used for actual, ordinary, and necessary business expenses that Defendants reasonably incurs.

B. The assets affected by this Paragraph shall include both existing assets and assets acquired after the effective date of this Order.

C. To the extent that Defendants withdraw, transfer, encumber, or otherwise dissipate assets pursuant to Paragraph V.A of this Order, they shall provide an accounting of their expenses to counsel for the Commission for each calendar month.

VI. FINANCIAL STATEMENTS AND ACCOUNTING

IT IS FURTHER ORDERED that within 5 calendar days after entry of this Order Defendants shall each provide to counsel for the Commission:

A. A completed financial statement accurate as of the date of entry of this Order, in the form provided as **Attachment A** for individuals and **Attachment B** for businesses, as the case may be, signed under penalty of perjury. The financial statements shall include assets held outside the territory of the United States, shall be accurate as of the date of the entry of this Order, and shall be verified under oath. Defendants shall attach to these completed financial statements copies of all local, state, provincial, and federal income and property tax returns, with attachments and schedules, as called for by the instructions to the financial statements; and

B. A detailed accounting, verified under oath, of:

1. the names of all products, services or programs advertised, marketed, promoted, offered for sale, sold, or distributed since January 1, 2011;
2. gross revenues and net profits (in U.S. Dollars) obtained from the advertising, marketing, promotion, offering for sale, or sale of each product, service, or program identified in Subparagraph IV.B.1 above, from inception of the advertising, marketing, promotion, offering for sale, or sale of that product, service, or program through the date of entry of this Order; and
3. the name, address, telephone number, email address, website address, and contact person of each entity or person that: (i) supplied, manufactured, formulated, or created any product, service, or program that is advertised, marketed, promoted, offered for sale, sold, or distributed by or on behalf of Defendants, (ii) provided any order fulfillment services of any

kind, including, but not limited to, drop shipping, mailing, or distributing products, for or on behalf of Defendants, or (iii) paid Defendants, whether directly or indirectly, related to Defendants' advertisement, marketing, promotion, offering for sale, or sale of any product, service, or program.

RECORD KEEPING PROVISIONS

VII. PRESERVATION OF RECORDS AND EQUIPMENT; REPORT OF NEW BUSINESS ACTIVITY

IT IS FURTHER ORDERED that Defendants and their officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are preliminarily restrained and enjoined from:

A. Failing to create and maintain books, records, accounts, bank statements, current accountants' reports, general ledgers, general journals, cash receipts ledgers, cash disbursements ledgers and source documents, documents indicating title to real or personal property, and any other data which, in reasonable detail, accurately, fairly, and completely reflect Defendants' incomes, and the disbursements, transactions, dispositions, and uses of Defendants' assets;

B. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents, including electronically-stored materials and any data on mobile devices or other equipment used in sending commercial electronic text messages, that relate in any way to: the business practices or business or personal finances of Defendants; the business practices or finances of entities directly or indirectly under

the control of Defendants; or the business practices or finances of entities directly or indirectly under common control with any other Defendant;

C. Selling, transferring, destroying, damaging, altering, concealing, or otherwise disposing of, in any manner, directly or indirectly, any equipment used in sending commercial electronic text messages; and

D. Creating, operating, or exercising any control over any business entity, whether newly-formed or previously inactive, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing the Commission with a written statement disclosing: (1) the name of the business entity; (2) the address, telephone number, email address, and website address of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

VIII. IDENTIFICATION OF ELECTRONIC DATA HOSTS, TELEPHONE NUMBERS AND INTERNET SERVICE PROVIDERS

IT IS FURTHER ORDERED that Defendants shall:

A. Provide counsel for the Commission, within 5 business days of entry of this Order, with a sworn statement disclosing the name and location of any electronic data host, and the location of computer equipment, related to Defendants' initiation, procurement, or transmission of commercial electronic text messages, and describing, to the extent known, the make(s) and model(s) of the computer equipment, as well as the operating system(s) in use, and the number, size, and capacity of any mass storage arrays or devices;

B. Serve this Order on any such electronic data host, and inform any such electronic data host that:

1. Any data that they host, store, or otherwise maintain that is related to Defendants' initiation, procurement, or transmission of commercial electronic text messages is the subject of litigation involving the Commission; and

2. The electronic data host has a duty to preserve all records related to Defendants' initiation, procurement, or transmission of commercial electronic text messages;

C. Provide counsel for the Commission, within 5 business days of receipt of a copy of this Order, with a sworn statement disclosing the identity of any Internet service provider and attaching the account records for each Defendant identifying the IP addresses and hosts accessing any of Defendants' accounts for the last 3 years; and

D. Provide counsel for the Commission, within 5 business days of receipt of a copy of this Order, with a sworn statement identifying, by telephone number, telephone service provider, and dates of service, each telephone number used by Defendants or their officers, agents, servants, employees, affiliates, or any other persons in active concert or participation with any of them, to send commercial electronic text messages to any consumer since January 1, 2011.

IX. CONSUMER CREDIT REPORTS

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

NOTIFICATION PROVISIONS

X. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to each affiliate, sales entity, successor, assign, member, officer, employee, agent, servant, attorney, subsidiary, division, and representative of any of the Defendants, and, within 10 calendar days from the date of entry of this Order, each Defendant shall serve on the Commission an affidavit identifying the name, title, address, telephone number, date of service, and manner of service of each person or entity Defendants served with a copy of this Order in compliance with this provision.

XI. CORRESPONDENCE WITH AND NOTICE TO PLAINTIFF

IT IS FURTHER ORDERED that, for purposes of this Order, all correspondence and pleadings to the Commission shall be addressed to:

James E. Elliott
Federal Trade Commission
Southwest Region
1999 Bryan Street, Suite 2150
Dallas, Texas 75201-6808
Office: (214) 979-9373
Fax: (214) 953-3079
Email: jelliott@ftc.gov

XII. ACKNOWLEDGMENT OF RECEIPT OF PRELIMINARY INJUNCTION


IT IS FURTHER ORDERED that each Defendant, within 5 business days of receipt of this Preliminary Injunction as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of the Preliminary Injunction.

XIII. RETENTION OF JURISDICTION

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

IT IS SO ORDERED.

ENTERED: this 18th day of March 2013, at Houston, Texas.



**UNITED STATES DISTRICT JUDGE
KEITH P. ELLISON**