

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel.
THOMAS J. MILLER,
ATTORNEY GENERAL OF IOWA,
99AG25112,

Plaintiff,

v.

XENTEL, INC.,
a Delaware corporation,

Defendant.

Equity No. 47655

PETITION IN EQUITY

CLERK DISTRICT COURT
POLK COUNTY IA
03 NOV 18 AM 8:40

The State of Iowa ex rel. Attorney General Thomas J. Miller, through Assistant Attorney General Steve St. Clair, states as follows for its cause of action against the above-named defendant.

INTRODUCTION

1. Xentel, Inc. (hereafter "Xentel") is a professional fundraiser that uses misleading telemarketing pitches designed to exploit the public's support for firefighters in order to line its own pockets. Xentel's telemarketers trick Iowans into believing that the callers are themselves firefighters, that donations will benefit local firefighters, and that most or all of the money donated goes to help firefighters. In fact, Xentel's callers are professional telemarketers, not firefighters; little or no support typically goes to a donor's local fire department; and about 75% of the money is kept by Xentel and never supports any firefighters. In effect, Xentel uses some carefully crafted deceptions, coupled with the justifiably positive public image of the firefighting profession, to divert to its own benefit charitable dollars that might otherwise go to far worthier recipients, including local fire departments.

VENUE

2. Venue is proper in Polk County, Iowa, because the defendant has engaged and, upon information and belief, continues to engage in the activities that are the subject of this Petition in Polk County, Iowa. Moreover, upon information and belief the defendant does business in Polk County and one or more victims of the practices in question reside in Polk County. Iowa Code § 714.16 (10) (2003).

PARTIES

3. The Iowa Attorney General is authorized to bring this action on behalf of the State of Iowa by Iowa Code §§ 714.16 (7) and 714.16A(1) (2003).

4. Xentel, Inc. is a for-profit Delaware corporation, with its U.S. headquarters in Ft. Lauderdale, Florida, and with corporate and solicitation offices in Arizona, Colorado, Florida, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania and Wisconsin. Xentel is a professional fundraiser, and solicits donations from Iowa residents, directly and indirectly, pursuant to a contract between Xentel and the Iowa Professional Fire Fighters Association.

JURISDICTION

5. The Iowa Consumer Fraud Act, Iowa Code § 714.16 (2)(a) (2003) (“the Consumer Fraud Act”) provides in pertinent part:

The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

6. Iowa Code § 714.16(1) provides the following definitions:

(f) "Deception" means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

(n) "Unfair practice" means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.

7. Iowa Code § 714.16 (7) provides, in pertinent part:

Except in an action for the concealment, suppression, or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction, to allege or to prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth.

8. In describing remedies under the Consumer Fraud Act, Iowa Code subsection 714.16(7)

provides in pertinent part as follows:

If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice. The court may make orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices, or which are necessary to restore to any person in interest any moneys ... which have been acquired by means of a practice declared to be unlawful by this section ...

In addition to the remedies otherwise provided for in this subsection, the attorney general may request and the court may impose a civil penalty not to exceed forty thousand dollars per violation against a person found by the court to have engaged in a method, act, or practice declared unlawful under this section; provided, however, a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person. In addition, on the motion of the attorney general or its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of intentional violation of a ... permanent injunction issued under authority of this section.

9. Iowa Code §§ 714.16A(1) & (3) (2003) provide, respectively:

If a person violates section 714.16, and the violation is committed against an older

person, in an action by the attorney general, in addition to any other civil penalty, the court may impose an additional civil penalty not to exceed five thousand dollars for each such violation.

As used in this section, "*older person*" means a person who is sixty-five years of age or older.

FACTUAL ALLEGATIONS

10. Xentel has contracted to perform fundraising services for the non-profit Iowa Professional Fire Fighters Association (hereafter "IPFF") since at least 1999. Prior to that time, The Gehl Group, Inc. ("The Gehl Group") served as IPFF's professional fundraiser; however, Xentel purchased the assets of The Gehl Group in or about the early months of 1999, and in so doing assumed the IPFF's solicitation contract. Xentel has continued to solicit donations for IPFF under a succession of solicitation contracts extending to the present. A solicitation contract for calendar year 2003 was signed by Joseph E. Gehl as president of Xentel on January 1, 2003.

- 11. In April of 1997 a Consent Judgment was entered in Polk County District Court resolving a consumer fraud lawsuit brought by the Iowa Attorney General against The Gehl Group. Joseph E. Gehl signed the Consent Judgment on behalf of The Gehl Group. The judgment enjoined The Gehl Group, its partners, its successors in interest, and all other entities acting in concert or participating with The Gehl Group, who have actual or constructive notice of the injunction, from, *inter alia*:

a) soliciting any contributions, or selling any ticket to an event, in or from the State of Iowa in violation of Iowa Code § 714.16;

b) misrepresenting directly or by implication the amount or percentage of proceeds to be received by an organization, or stating or implying that a significant portion, or a significant percentage, of proceeds from sales or from donations will be used for a particular purpose or will go to or benefit a particular entity, unless true;

c) misrepresenting directly or by implication the affiliation or status of the solicitor, including

but not limited to misrepresenting that the solicitor is employed or affiliated with the organization for which funds are being solicited.

12. Under the terms of its current solicitation contract with IPFF, Xentel is authorized to solicit charitable donations in IPFF's name through telephone calls and direct mail, and in exchange IPFF receives \$12,000.00 monthly. Xentel keeps all donations in excess of that amount. IPFF purportedly uses contributions to benefit fire fighters and to promote fire safety, as well as for its own expenses.

13. According to financial disclosure forms filed annually with the Iowa Attorney General's Office, Xentel collected more than \$591,811.21 in donations on behalf of IPFF in calendar year 2002, and of that amount \$144,000.00, or 24 %, was ultimately directed to the IPFF for its various expenses and activities. Thus, Xentel received \$447,811.21, or 76%, of the money donated by Iowans in response to the solicitations of funds for fire fighters.

- 14. Since the Fall of 2002 Xentel personnel have made at least three fundraising calls to an undercover telephone line in the Consumer Protection Division of the Iowa Attorney General's office. This undercover opportunity was created when an elderly West Des Moines woman's phone number was changed, to protect her from fraudulent telemarketing calls that had been victimizing her. The woman's former phone number was then assigned to the Consumer Protection Division, and the calls were tape-recorded by investigators who posed as the woman.

15. The three taped Xentel calls referred to above were made by three different Xentel telemarketers. All three of the taped telemarketers sought to create the misleading impression that the call was actually placed by fire fighters, through such phrases and statements as the following (emphasis supplied):

a) Stating "*I'm with the Iowa Professional Fire Fighters.*"

b) Referring to the purported activities of the IPFF as if the person making the call was himself or herself directly involved in such activities, through such phrases as “we lobby for better fire prevention and protection laws” for fire fighters, and “the fire fighters are holding a rock show ... *We're* holding it over there at Vets ...”.

c) Urging the prospective donor to check the batteries on the smoke detectors, with such wording as “we suggest” that batteries be checked twice a year, and “do that for *us*.”

16. All three of these taped Xentel telemarketers sought to create the false impression that the donations would directly benefit local fire fighters in West Des Moines, Iowa, the place of residence of the elderly Iowan whom they thought they were calling, through such phrases and statements as the following (emphasis supplied):

a) “[The donation check] goes right to them in West Des Moines, in fact, probably *right in your neighborhood* somewhere.”

b) In response to the question whether the West Des Moines fire fighters were involved in the organization: “Absolutely ... it’s an organization of all the professional fire fighters and paramedics in the state of Iowa.”

c) “If you could just be kind enough to help *your* fire fighters out ...”

d) “This is Steve from Xentel, calling on behalf of *your* Iowa fire fighters ...”

17. In fact, however, neither the West Des Moines Fire Department nor any individual fire fighters in that department are members of IPFF, and the city of West Des Moines receives no portion of the donations split between Xentel and IPFF.

18. When asked how much of the money donated would go to the fire fighters or programs supporting fire fighters, all three of the Xentel telemarketers sought to create the false impression that most or all of the money donated went to fire fighters or programs supporting fire fighters. That false impression was promoted through such representations as the following:

a) “When you send off your check or money order you’re making that out right to the Iowa Professional Fire Fighters and they control 100% of the funds.”

b) "All of it [the donation] goes to the fire fighters."

c) "You make your check right out to the Iowa Professional Fire Fighters Association, and they disburse it however they see fit."

19. Upon information and belief, the deceptions exhibited by the three taped telemarketers referred to above are representative of many telemarketing contacts of Iowa residents by Xentel fundraisers, and Xentel has misled many Iowans as to the caller's connection to fire fighters, the extent to which donations would be applied locally, and the overall proportion of donated funds that would go to fire fighters and fire safety efforts.

20. Complaints from Iowans further indicate a pattern of deception and abuses, as well as other unfair and unlawful practices:

a) The fire chief in a small Central Iowa community received a Xentel/IPFF fundraising call in December 2002. The caller claimed that a portion of the donation would come back to the local fire department, a claim the fire chief knew to be false from personal experience. When the chief identified himself and challenged the Xentel representative's claim, she immediately terminated the call.

b) A Des Moines woman received a Xentel/IPFF fundraising call in November 2002. When she declined to make a donation, she heard the Xentel representative utter the words "cheap bastard" before disconnecting. Extremely upset, the Des Moines woman used her caller I.D. to call the number of the person who had just called, and she reached Xentel. The Xentel representative who answered refused her request to speak to a supervisor, but did take her complaint. The Des Moines woman insisted on receiving a follow-up contact from the company regarding her complaint, but never did.

c) The fire chief in a Des Moines-area suburb received a Xentel/IPFF fundraising call in July of 2002. The Xentel telemarketer falsely claimed that donated funds would go to the local fire department. When the fire chief requested the name and phone number of the caller's supervisor, the caller claimed not to know that information, then hung up.

d) A Muscatine woman received a letter in November 2000 intended for her father, thanking him for supporting the Iowa Professional Fire Fighters through his November 17, 2000 purchase of two tickets to an upcoming charity event. The letter included the tickets, and an invoice for \$30.00. However, the woman knew that no such purchase had occurred, as her father had died about a year earlier, in December of 1999.

e) The fire chief in a city in Northern Iowa taped a Xentel/IPFF fundraising call in about April 2000. The caller said that the donation would be used in the fire chief's own community ("it's something you can see being used right down the street"). When the fire chief asked how much of a \$50 donation would go to the chief's own community, the caller explained that 60 % of the donation "goes locally" ("what it comes down to is about 60/40, which is huge because 60 % stays locally no matter what"). When the fire chief identified himself, challenged the accuracy of those representations and asked for the Xentel telemarketer's name, the telemarketer hung up without providing it.

21. A fundraising script used by Xentel in 2002 claimed that the "most popular" levels of donation (through ticket purchases) were \$100 and \$50. Upon information and belief, donations at lower levels were then and are now more frequent.

22. Neither all nor any part of the application for injunctive relief herein has been previously presented to and refused by any court or justice. Iowa R. Civ. P. 1.1504.

23. In an action by the state, no security shall be required of the state. Iowa R. Civ. P. 1.207.

COUNT I

CONSUMER FRAUD ACT VIOLATIONS

24. Paragraphs 1 through 23 are incorporated herein by reference.

25. Defendant's fundraising practices violate the prohibition of Iowa Code § 714.16(2)(a) against misleading, deceptive, unfair, and omissive acts and practices, and otherwise violate that provision of Iowa law.

26. Although it is not necessary to establish reliance, damages or intent to deceive to obtain injunctive relief or reimbursement under the Consumer Fraud Act (see paragraph 7 above), establishing these factors, particularly intent, is nevertheless relevant *inter alia* to the Court's determination of the appropriate scope of injunctive relief and the appropriate amount of civil penalties. Those acts and practices of Defendant in violation of subsection (2)(a) of the Consumer Fraud Act as alleged in this Count did in fact induce reliance on the part of consumer victims, did

in fact cause damage to consumers, and/or were in fact intentional.

COUNT II

CONSUMER FRAUDS COMMITTED AGAINST OLDER PERSONS

27. Paragraphs 1 through 23 above are incorporated herein by reference.

28. On information and belief, many of the Consumer Fraud Act violations for which the Defendant is responsible were committed against older persons and give rise to the additional civil penalty provided for in section 714.16A.

COUNT III

VIOLATIONS OF CONSUMER FRAUD INJUNCTION

29. Paragraphs 1 through 23 are incorporated herein by reference.

30. Upon information and belief, Xentel is a successor in interest of The Gehl Group and is otherwise covered by the injunction referred to in paragraph 11 above, and Xentel has repeatedly and intentionally violated that injunction.

PRAYER

Plaintiff prays the Court grant the following relief:

A. Pursuant to Iowa Code § 714.16(7), and upon further request by Plaintiff addressed to the Court, enter a temporary restraining order and preliminary injunction restraining Defendant and its directors, officers, principals, partners, employees, agents, servants, representatives, subsidiaries, affiliates, successors, assigns, merged or acquired predecessors, parent or controlling entities, and all other persons, corporations and other entities acting in concert or participating with Defendant who have actual or constructive notice of the Court's injunction from engaging in the deceptive, misleading, omissive, or unfair practices alleged in this Petition or otherwise violating the Iowa

Consumer Fraud Act.

B. Pursuant to Iowa Code § 714.16(7), after trial on the merits, make permanent the above-described injunction, expanding its provisions as necessary by including *inter alia* such “fencing in” provisions as are reasonably necessary to ensure that Defendant and other enjoined persons and entities do not return to the unlawful practices alleged herein, or commit comparable violations of law.

C. Pursuant to Iowa Code § 714.16(7), enter judgment against Defendant for amounts necessary to restore to Iowa consumers all money acquired by means of acts or practices that violate the Consumer Fraud Act.

D. Pursuant to Iowa Code § 714.16(7), enter judgment against Defendant for such additional funds as are necessary to ensure complete disgorgement of all ill-gotten gain traceable to the unlawful practices alleged herein.

E. Pursuant to Iowa Code § 714.16(7), enter judgment against Defendant for up to \$40,000.00 for each separate violation of the Consumer Fraud Act.

F. Pursuant to Iowa Code § 714.16A, enter judgment against Defendant for an additional civil penalty not to exceed \$5,000.00 for each violation of the Consumer Fraud Act committed against an older person.

G. Pursuant to Iowa Code § 714.16(7), enter judgment against Defendant for a civil penalty of not more than \$5,000.00 for each day of an intentional violation of the Consumer Fraud Act injunction referred to in paragraph 11 above.

H. Award Plaintiff interest as permitted by law.

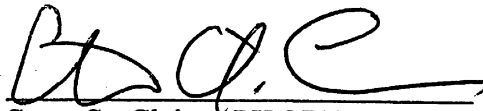
I. Pursuant to Iowa Code § 714.16(11), enter judgment against Defendant for attorney fees,

state's costs and court costs.

J. Grant such additional relief as the Court deems just and equitable.

Respectfully submitted,

Thomas J. Miller
Attorney General of Iowa

A handwritten signature in black ink, appearing to read "S. St. Clair", written over a horizontal line.

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