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 CLERK U.S. DISTRICT COURT
 CENTRAL DIST. OF CALIF.
 LOS ANGELES, CALIF.

10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 CHARLES SMITH,
 17 DAMIEN SMITH, and
 18 KYMBERLI SMITH,
 individually, and
 19 d/B/a SALESCO,

20 Defendants.

) Civil No.

01-10962 NM (PJW)

) CONSENT DECREE AND
) ORDER FOR INJUNCTIVE AND
) OTHER RELIEF

21
 22 WHEREAS plaintiff, the United States of America, has
 23 commenced this action by filing the Complaint herein; defendants
 24 have waived service of the Summons and Complaint and any right to
 25 be represented by counsel; and the parties have agreed to
 26 settlement of this action upon the following terms and
 27 conditions, without adjudication of any issue of fact or law,
 28

1 without admitting liability for any of the matters alleged in the
2 Complaint;

3 THEREFORE, upon stipulation of plaintiff and defendants, it
4 is hereby ORDERED, ADJUDGED, and DECREED as follows:

5 1. This Court has jurisdiction of the subject matter and
6 of the parties.

7 2. The Complaint states a claim upon which relief may be
8 granted against the defendants under Sections 5(a)(1),
9 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission
10 Act, 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a) and 57b.

11 DEFINITIONS

12 3. For the purposes of this Consent Decree, the term
13 "Rule" means the Federal Trade Commission's Trade Regulation Rule:
14 Concerning Mail or Telephone Order Merchandise, 16 C.F.R. Part
15 435, or as the Rule may hereafter be amended. A copy of the Rule
16 is attached hereto as "Appendix A" and incorporated herein as if
17 fully set forth verbatim.

18 4. The term "materially different" merchandise means
19 merchandise that differs from the promoted or advertised
20 merchandise in brand, wattage, model, design, style, size, fit,
21 color, pattern, fabric, condition (e.g., new, refurbished or
22 used), value, quality, promoted end-use, number of features, or
23 in any other manner, that is likely to affect a consumer's choice
24 of or conduct regarding the merchandise.

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28 Consent Decree, Page 2 of 10

CIVIL PENALTY

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2 5. Defendants shall pay to plaintiff a civil penalty,
3 pursuant to section 5(m)(1)(A) of the Federal Trade Commission
4 Act, 15 U.S.C. § 45(m)(1)(A), in the amount of two hundred
5 thousand dollars (\$200,000). Based on sworn representations in
6 defendant Charles Smith's financial statements dated June 20 and
7 July 10, 2001, defendant Damien Smith's financial statement dated
8 June 19, 2001, and defendant Kymberli Smith's financial statement
9 dated June 20, 2001, collectively referred to as the "Financial
10 Statements," payment of the foregoing monetary settlement is
11 waived except for fifteen thousand dollars (\$15,000.00),
12 contingent upon the accuracy and completeness of the Financial
13 Statements. Defendants are jointly and severally liable for
14 payment of the civil penalty.

15 6. Defendants shall make the payment required by Paragraph
16 5 within five (5) days of the date of entry of this Consent
17 Decree in accordance with the instructions provided by the Office
18 of Consumer Litigation, Civil Division, U.S. Department of
19 Justice, Washington, D.C. 20530, for appropriate disposition.

20 7. In the event of any default in payment, which default
21 continues for ten (10) days beyond the due date of payment, the
22 entire unpaid penalty, together with interest, as computed
23 pursuant to 28 U.S.C. § 1961, from the date of default to the
24 date of payment, shall immediately become due and payable.

25 8. The plaintiff's agreement to this Consent Decree is
26 expressly premised upon the truthfulness, accuracy, and
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1 completeness of the financial condition of defendants, as
2 represented in the Financial Statements referenced above, which
3 contain material information upon which the plaintiff relied in
4 negotiating and agreeing to the waiver of all but \$15,000 of the
5 \$200,000 monetary civil penalty stated in the Consent Decree.
6 If, upon motion by the Federal Trade Commission, this Court finds
7 that defendants made any material misrepresentation in or
8 omission from the Financial Statements, the entire remaining
9 amount of the \$200,000 suspended judgment entered against
10 defendants will be immediately due and payable. In connection
11 with any such motion, the only issue will be whether the
12 financial information defendants provided in the Financial
13 Statements was fraudulent, misleading, inaccurate or incomplete
14 in any material respect. For purposes of this paragraph, and any
15 subsequent proceedings to enforce payment, including but not
16 limited to a nondischargeability complaint filed in bankruptcy
17 proceeding, defendants waive any right to contest any of the
18 allegations of plaintiff's Complaint.

19 **CONSUMER REDRESS**

20 9. Defendants shall, within fifteen (15) business days
21 after service of this Consent Decree, compile from their
22 regularly kept business records and from any other information
23 made available to them by Plaintiff, a list containing, for each
24 buyer who ordered merchandise by mail, telephone, facsimile or by
25 Internet after January 1, 1999, to the date of entry of this
26 Consent Decree, and who was entitled to a refund, as "refund" is

1 defined in 16 C.F.R. § 435.2(e) of the Rule, his or her name,
2 last known address, and the difference between what the buyer
3 paid for the merchandise and the amount, if any, defendants
4 refunded to the buyer. Defendants shall, within thirty (30)
5 business days after service of this Consent Decree, reimburse
6 each buyer on this list the difference between the amount
7 the buyer paid and the amount (if any) defendants refunded.

8 INJUNCTION

9 10. Defendants, their successors and assigns, and their
10 officers, agents, servants, employees and attorneys, and all
11 other persons in active concert or participation with them who
12 receive actual notice of this Consent Decree by personal service
13 or otherwise, are hereby enjoined from violating, directly or
14 through any corporation, subsidiary, division or other device,
15 any provision of the Rule, including but not limited to:

- 16 a. Soliciting orders for the sale of merchandise by mail,
17 telephone, facsimile or Internet unless they have a
18 reasonable basis to expect that they can ship such
19 merchandise within the time stated in the solicitation
20 or, if no time is stated clearly and conspicuously in
21 the solicitation, within thirty (30) days after receipt
22 of a properly completed order, as required by 16 C.F.R.
23 § 435.1(a)(1);
- 24 b. Failing to offer to the buyer, clearly and
25 conspicuously and without prior demand, an option
26 either to consent to a delay in shipping or to cancel

1 the order and receive a prompt refund, as required by
2 16 C.F.R. § 435.1(b)(1);

3 c. Failing, within a reasonable time after first becoming
4 aware of their inability to ship in the time set forth
5 in section 435.1(a)(1) of the Rule, and in no event
6 later than that time, to offer the buyer an option
7 either to consent to a delay in shipping or to cancel
8 the order and receive a prompt refund, as required by
9 16 C.F.R. § 435.1(b)(1); and

10 d. Failing to deem an order canceled and to make a prompt
11 refund, as "refund" and "prompt refund" are defined in
12 Sections 435.2(e)-(f) of the Rule, to buyers who are
13 entitled to such refunds under 16 C.F.R. § 435.1(c).

14 11. In situations in which defendants have determined that
15 they are unable to ship the merchandise ordered by the buyer,
16 they are enjoined from shipping merchandise materially different
17 from the merchandise depicted or described in the defendants'
18 advertising for the merchandise, in lieu of making a prompt
19 refund to the buyer, as required by 16 C.F.R. § 435.1(c)(4),
20 unless:

21 a. Prior to the time for making such required refund,
22 defendants offer the option to receive the substitute
23 merchandise and inform the buyer that, unless the buyer
24 expressly agrees to the substitution within the time
25 for making a prompt refund, in that time a refund will
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1 be issued automatically and without prior request of
2 the buyer;

3 b. Within the time for making a prompt refund, defendants
4 obtain the express consent of the buyer to receive the
5 substitute merchandise;

6 c. Defendants ship the substitute merchandise within the
7 time agreed to by the buyer at the time the buyer
8 agrees to receive the substitute merchandise or, if no
9 time is expressly agreed to, within the Rule's
10 applicable time for shipment of the merchandise
11 originally ordered, as set forth in Section 435.1(a) of
12 the Rule; and

13 d. At the time of shipping the substitute merchandise,
14 defendants offer the buyer the right to return the
15 substitute merchandise at defendants' expense within a
16 reasonable time for a full and timely refund.

17 12. In the event the Rule is hereafter amended or modified,
18 defendants' compliance with that Rule as so amended or modified
19 shall not be deemed a violation of this injunction.

20 COMPLIANCE

21 13. Defendants Charles Smith, Damien Smith and Kymberli
22 Smith shall, within thirty (30) days of the entry of this Consent
23 Decree, provide a copy of this Consent Decree and the Business
24 Guide to the Federal Trade Commission's Mail or Telephone Order
25 Merchandise Rule (Jan. 1995) ("Business Guide") to each of their
26 supervisory or managerial agents, servants, employees and

1 attorneys who are engaged in defendants' mail, telephone,
2 facsimile or Internet order sales business, secure from each such
3 person a signed statement acknowledging receipt of a copy of this
4 Consent Decree and Business Guide, and shall, within ten (10)
5 days of complying with this paragraph, file an affidavit with the
6 Associate Director, Division of Enforcement, Bureau of Consumer
7 Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW,
8 Washington, D.C. 20580, setting forth the fact and manner of
9 their compliance, including the name and title of each person to
10 whom a copy of the Consent Decree and Business Guide has been
11 provided.

12 14. For a period of three (3) years from the date of entry
13 of this Consent Decree, the defendants shall maintain and make
14 available to the Federal Trade Commission, within fourteen (14)
15 days of the date of receipt of a written request, business
16 records demonstrating compliance with the terms and provisions of
17 this Consent Decree.

18 15. For a period of three (3) years from the date of entry
19 of this Consent Decree, each defendant shall notify the
20 Commission's Associate Director for Enforcement within thirty
21 (30) days of any change in his or her affiliation with, or change
22 in his or her active participation in the management or direction
23 of, any business which is engaged in the sale or distribution of
24 merchandise covered by the Rule. Provided, however, that with
25 respect to any change in his or her affiliation or participation,
26 as aforesaid, about which defendant learns less than thirty (30)

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28 Consent Decree, Page 8 of 20

1 days prior to the date such action is to take place, defendant
2 shall notify the Commission's Associate Director for Enforcement
3 as soon as practicable after obtaining such knowledge.

4 16. One hundred twenty (120) days after entry of this
5 Consent Decree, defendants shall provide a written report to the
6 Federal Trade Commission, sworn to under penalty of perjury,
7 setting forth in detail the manner and form in which defendants
8 have complied and are complying with this Consent Decree. This
9 report shall include but not be limited to:

- 10 a. a specimen copy of each delay option notice used for
11 purposes of complying with any provision of the Rule,
12 and a statement setting forth in detail the procedures
13 in place and method for providing such notices to
14 consumers in a timely fashion;
- 15 b. a specimen copy of each notice used for complying with
16 Paragraphs 10 and 11 of this Consent Decree;
- 17 c. a specimen copy of each advertisement or telemarketing
18 script that contains a shipping or delivery
19 representation, and all procedures for making a
20 shipping or delivery representation to the buyer;
- 21 d. a statement setting forth in detail defendants'
22 procedures for providing prompt refunds to buyers
23 pursuant to the Rule;
- 24 e. a statement setting forth in detail the basis for
25 claiming that defendants will ship merchandise;
- 26
27

1 Decree to apply to the Court at any time for such further orders
2 or directives as may be necessary or appropriate for the
3 interpretation or modification of this Consent Decree, for the
4 enforcement of compliance therewith, or for the punishment of
5 violations thereof.

6 JUDGMENT IS THEREFORE ENTERED in favor of plaintiff and
7 against defendants, pursuant to all the terms and conditions
8 recited above.

9 Dated this _____ day of _____, 2001.

10
11 _____
12 UNITED STATES DISTRICT JUDGE

13 The parties hereby consent to the terms and conditions of
14 the Consent Decree as set forth above and consent to the entry
15 thereof. Defendants waive any rights that may arise under the
16 Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the
17 investigation and prosecution of this action.

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FOR THE UNITED STATES OF AMERICA:

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FOR THE FEDERAL TRADE COMMISSION:

Elaine D. Kolish

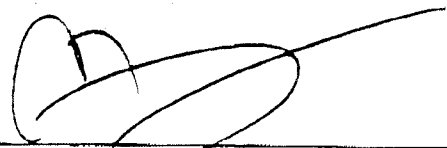
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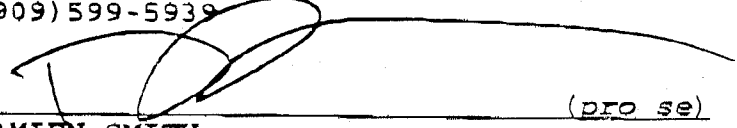
FOR THE DEFENDANTS:

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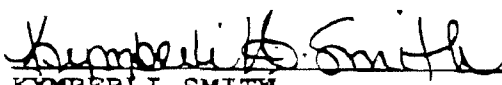
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Federal Trade Commission

§ 435.1

IF THE DEBTOR SHALL AMOUNTS PAID BY THE UNDER.

constitute or contain a negotiable instrument, or contain any waiver, limitation, term, or condition which has the effect of limiting a consumer's right to assert against any holder of the contract all legally sufficient claims and defenses which the consumer could assert against the seller of goods or services purchased pursuant to the contract.

date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

full or partial payment or lease, the proceeds of money loan (as purchase defined herein), unless credit contract made in such purchase money the following provision point, bold face, type:

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless

NOTICE OF THIS CONSUMER ACT IS SUBJECT TO ALL DEFENSES WHICH THE DEBTOR ASSERT AGAINST THE GOODS OR SERVICES OF THE PROCEEDS HEREOF. UNDER BY THE DEBTOR. CEED AMOUNTS PAID BY UNDER.

[42 FR 19490, Apr. 14, 1977, as amended at 42 FR 46510, Sept. 16, 1977]

(i) the seller has a reasonable basis for so informing the buyer and

PART 435—MAIL OR TELEPHONE ORDER MERCHANDISE

(ii) the seller informs the buyer of the reason or reasons for the delay.

- Sec. 435.1 The rule. 435.2 Definitions. 435.3 Limited applicability. 435.4 Effective date of the rule.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

18, 1975; 40 FR 58131, Dec.

AUTHORITY: 15 U.S.C. 57a; 5 U.S.C. 552.

SOURCE: 58 FR 49121, Sept. 21, 1993, unless otherwise noted.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

tion of sellers taking or open end consumer credit before November 1, 1977 elements of § 435.2(a).

§ 435.1 The rule.

In connection with mail or telephone order sales in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act or practice for a seller:

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

er who has taken or re- open end consumer credit e November 1, 1977, shall m the requirements of 18 with respect to such con- the contract does not ers' claims and defenses. s. The following defini- this exemption: ment definitions con- R 433.1.

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(i) Within that time clearly and conspicuously stated in any such solicitation, or

consumer credit con- mer credit contract pur- "open end credit" is ex- credit"; consumer cred- an account pursuant to which a creditor may per- to make purchases or from time to time, di- the creditor or indirectly edit card, check, or other plan may provide. The include negotiated ad- an open-end real estate letter of credit.

(ii) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. Provided, however, where, at the time the merchandise is ordered the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have 50 days, rather than 30 days, to perform the actions required in § 435.1(a)(1)(ii) of this part.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of

which does not cut off rms and defenses: A con- contract which does not

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping

429 APPENDIX A

the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment, or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, That where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the

buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1) (ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date: Provided, however, That where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite

revised shipping date. That the buyer the definite date to inform the buyer so consented to cancel the order after the date or an definite revised shipping date.

(iii) Paragraph shall not apply to a seller, pursuant to paragraph (b)(1)(iv) of this section, previously consented to by the buyer to a further delay beyond the definite revised shipping date.

(3) Where the seller exercises an option to cancel a seller's order prior to the buyer's consent to the seller's option or to cancellation of the order.

Nothing in this section shall prohibit a seller from being unable to ship the merchandise set forth in this section, provided that the seller has expressly consented to a further delay beyond the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite

(3) Where the seller exercises an option to cancel a seller's order prior to the buyer's consent to the seller's option or to cancellation of the order.

Nothing in this section shall prohibit a seller from being unable to ship the merchandise set forth in this section, provided that the seller has expressly consented to a further delay beyond the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

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§ 435.3

however. That where the seller receives notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, receipt of a properly completed order shall mean the time at which:

(i) The seller receives notice that a check or money order for the proper amount tendered by the buyer has been honored.

(ii) The buyer tenders cash in the proper amount, or

(iii) The seller receives notice that the buyer qualifies for a credit sale.

(e) *Refund* shall mean:

(1) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order;

(2) Where there is a credit sale:

(i) And the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(f) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (e) (1) or (2)(iii) of this section, a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to refund vests under the provisions of this part;

(2) Where a refund is made pursuant to paragraph (e)(2) (i) or (ii) of this section, a refund sent to the buyer by first class mail within one (1) billing cycle from the date on which the buyer's

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right to refund vests under the provisions of this part.

(g) The *time of solicitation* of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser,

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

(58 FR 49121, Sept. 21, 1993, as amended at 60 FR 56960, Nov. 13, 1995)

§ 435.3 Limited applicability.

(a) This part shall not apply to:

(1) Subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part.

(2) Orders of seeds and growing plants.

(3) Orders made on a collect-on-delivery (C.O.D.) basis.

(4) Transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled "Use of Negative Option Plans by Sellers in Commerce," 16 CFR part 425.

(b) By taking action in this area:

(1) The Federal Trade Commission does not intend to preempt action in the same area, which is not inconsistent with this part, by any State, municipal, or other local government. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

(2) This part does supersede those provisions of any State law, municipal

Federal

ordinance which apply to the extent that they do not provide for equal rights or remedies. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

(c) If an applicable State law, municipal ordinance, or other local regulation is not in compliance with this part, the applicability of this part, to the extent that it does not provide for equal rights or remedies, shall supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

§ 435.4 Eff

The original effective date of this part, October 1, 1993, is amended to become effective on the date of publication of this part, becoming

PART 435

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ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part. This part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this part but requiring that a buyer be given notice of this right in a language, form, or manner which is different in any way from that required by this part. In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

other promotion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for any franchisor or franchise broker:

(a) To fail to furnish any prospective franchisee with the following information accurately, clearly, and concisely stated, in a legible, written document at the earlier of the "time for making of disclosures" or the first "personal meeting":

(1)(i) The official name and address and principal place of business of the franchisor, and of the parent firm or holding company of the franchisor, if any;

(ii) The name under which the franchisor is doing or intends to do business; and

(iii) The trademarks, trade names, service marks, advertising or other commercial symbols (hereinafter collectively referred to as "marks") which identify the goods, commodities, or services to be offered, sold, or distributed by the prospective franchisee, or under which the prospective franchisee will be operating.

(2) The business experience during the past 5 years, stated individually, of each of the franchisor's current directors and executive officers (including, and hereinafter to include, the chief executive and chief operating officer, financial, franchise marketing, training and service officers). With regard to each person listed, those persons' principal occupations and employers must be included.

(3) The business experience of the franchisor and the franchisor's parent firm (if any), including the length of time each: (i) Has conducted a business of the type to be operated by the franchisee; (ii) has offered or sold a franchise for such business; (iii) has conducted a business or offered or sold a franchise for a business (A) operating under a name using any mark set forth under paragraph (a)(1)(iii) of this section, or (B) involving the sale, offering, or distribution of goods, commodities, or services which are identified by any mark set forth under paragraph

1983, as amended at 60
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(c) If any provision of this part, or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

§ 436.4 Effective date of the rule.

The original rule, which became effective 100 days after its promulgation on October 23, 1975, remains in effect. The amended rule, as set forth in this part, becomes effective March 1, 1994.

PART 436—DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING AND BUSINESS OPPORTUNITY VENTURES

- Sec.
- 436.1 The Rule.
- 436.2 Definitions.
- 436.3 Severability.

AUTHORITY: 38 Stat. 717, as amended, 15 U.S.C. 41-58.

SOURCE: 43 FR 59614, Dec. 21, 1978, unless otherwise noted.

§ 436.1 The Rule.

In connection with the advertising, offering, licensing, contracting, sale, or

REASONS FOR SETTLEMENT

This statement accompanies the Consent Decree and Order for Injunctive and Other Relief executed by defendants Charles Smith, Damien Smith, and Kymberli Smith. The Consent Decree enjoins defendants from violating the Mail or Telephone Order Merchandise Rule ("Rule"), 16 C.F.R. Part 435, with respect to merchandise ordered by mail or telephone, including merchandise ordered via the Internet. The Consent Decree suspends payment of all but \$15,000 of a \$200,000 civil penalty because of the defendants' inability to pay, but requires them to pay redress to consumers whose Rule-required refunds they discounted.

Pursuant to Section 5(m)(3) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(m)(3), the Commission hereby sets forth its reasons for settlement by entry of a Consent Decree for Injunctive and Other Relief:

On the basis of the allegations contained in the Complaint, the Commission believes that the payment of \$200,000 in civil penalties by the defendants Charles Smith, Damien Smith, and Kymberli Smith, doing business as Salesco, constitutes an appropriate amount on which to base the settlement. However, on the basis of defendants' sworn financial statements to the Commission, the Commission believes that, because of defendants' inability to pay, suspension of the payment of all but \$15,000 of \$200,000 in civil penalties is appropriate. The amount of the penalty should assure compliance with the law by defendants and by others who engage in practices covered by the Mail or Telephone Order Merchandise Rule ("Rule"). Moreover, the provisions enjoining defendants from failing to comply with the Rule with respect to merchandise ordered by mail, telephone, or via the Internet, including enjoining them from unilaterally substituting merchandise that is materially different from the ordered merchandise or discounting Rule-required refunds, should assure their future compliance with the law. At the same time, the requirement that they pay redress to all consumers whose Rule-required refunds they discounted should remedy the harm they did to consumers. Additionally, with the entry of the Consent Decree, the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by the entry of the attached Consent Decree is justified and well within the public interest.

APPENDIX B

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