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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *AmcDaniel* DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FEDERAL TRADE COMMISSION,)	Case No. 00cv2125 L(JFS)
)	[Amended Proposed]
Plaintiff,)	FINAL JUDGMENT AND ORDER FOR
v.)	PERMANENT INJUNCTION AS TO
AUCTIONS AVER, LLC;)	DEFENDANTS AUCTIONS AVER, LLC,
RICHARD PHIM;)	SHADE DELMER, aka SHANE DELMER,
CARMAN LEE CALDWELL;)	AND NAOMI RUTH ANDERSON
SHADE DELMER,)	
aka SHANE DELMER; and)	
NAOMI RUTH ANDERSON,)	
Defendants.)	

Plaintiff Federal Trade Commission ("Commission" or "FTC") filed a Complaint for a permanent injunction and other equitable relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b. The Complaint charges Defendants with violations of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a), and the Commission's Trade Regulation Rule entitled "Mail or Telephone Order Merchandise Rule" (the "Rule"), 16 C.F.R. Part 435.

ENTERED ON 3-15-02

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ORIGINAL

1 On January 9, 2001, the Clerk of Court entered default against
2 Defendant Auctionsaver, LLC. On November 28 and 29, 2001, the
3 Clerk of Court entered default against the remaining defendants.
4 The Commission subsequently filed an Application for Entry of
5 Default Judgment Against Defendants Auctionsaver, LLC, Shade
6 Delmer, aka Shane Delmer, and Naomi Ruth Anderson ("Default
7 Defendants"). The Court has granted the Commission's Application.
8 Accordingly, the Court hereby finds and orders as follows:

9 FINDINGS

10 1. This is an action by the Commission instituted under
11 Sections 13(b) and 19 of the FTC Act in connection with
12 Defendants' advertising, sale, and offering for sale of computer-
13 related products and consumer electronics. The Complaint seeks
14 permanent injunctive relief against Defendants.

15 2. This Court has jurisdiction of the subject matter of
16 this case and over each of Default Defendants. Venue in the
17 Southern District of California is proper.

18 3. The Complaint states a claim upon which relief may be
19 granted against each of the Default Defendants under Sections
20 5(a), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b) and
21 57b, and Sections 435.1(a)(1), 435.1(b)(1), and 435.1(c) of the
22 Commission's Mail and Telephone Order Merchandise Rule, 16 C.F.R.
23 §§ 435.1(a)(1), 435.1(b)(1), and 435.1(c).

24 4. The Commission has the authority under Sections 13(b)
25 and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, to seek the
26 relief it has requested.

1 5. The activities of the Default Defendants charged in the
2 Complaint are in or affecting commerce, as defined in Section 4 of
3 the FTC Act, 15 U.S.C. § 44.

4 6. In numerous instances, Default Defendants have
5 misrepresented, directly or indirectly, in connection with the
6 advertising, sale, and offering for sale of computer hardware and
7 consumer electronics, that consumers who offered the highest bids
8 and sent defendants the agreed-on payment for the merchandise
9 pursuant to those bids would receive the promised merchandise.
10 The Default Defendants are therefore jointly and severally liable
11 for violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

12 7. Default Defendants, directly or indirectly, have
13 solicited numerous orders for the sale of merchandise to be
14 ordered by the buyer indirectly through the telephone without a
15 reasonable basis to expect that Defendants would be able to ship
16 any ordered merchandise to the buyer within the time stated in the
17 solicitation, or, if no time was clearly and conspicuously stated,
18 within thirty days of receipt of a properly completed order.
19 Default Defendants are therefore jointly and severally liable for
20 violating Section 435.1(a)(1) of the Rule, 16 C.F.R.
21 § 435.1(a)(1).

22 8. In a number of instances, beginning in approximately
23 August or September 1999, after soliciting orders for the sale of
24 merchandise ordered by the buyer indirectly through the telephone
25 and being unable to ship merchandise within the applicable time as
26 set out in Section 435.1(a)(1) of the Rule, Default Defendants,
27 directly or indirectly, failed to offer to the buyer, clearly and
28 conspicuously and without prior demand, an option either to

1 consent to a delay in shipping or to cancel the order and receive
2 a prompt refund. Default Defendants are therefore jointly and
3 severally liable for violating Section 435.1(b)(1) of the Rule, 16
4 C.F.R. § 435.1(b)(1).

5 9. In a number of instances, Default Defendants failed to
6 make a "prompt refund," as that term is defined in 16 C.F.R.
7 § 435.2(f), to buyers when such refunds were required by Section
8 435.1(c) of the Rule. Defendants Auctionsaver, Anderson and
9 Delmer are therefore jointly and severally liable for violating
10 Section 435.1(c) of the Rule, 16 C.F.R. § 435.1(c).

11 10. Entry of this Order is in the public interest.

12 DEFINITIONS

13 A. The term "**document**" is synonymous in meaning and equal
14 in scope to the usage of the term in Federal Rule of Civil
15 Procedure 34(a), and includes writings, drawings, graphs, charts,
16 photographs, audio and video recordings, computer records, and
17 other data compilations from which information can be obtained and
18 translated, if necessary, through detection devices into
19 reasonably usable form. A draft or non-identical copy is a
20 separate document within the meaning of the term.

21 B. The terms "**Named Defendant**" and "**Named Defendants**" refer
22 to Auctionsaver, LLC, Richard Phim, Carman Lee Caldwell, Shade
23 Delmer, aka Shane Delmer, and Naomi Ruth Anderson.

24 C. The term "**Default Defendants**" means **Named Defendants**
25 Auctionsaver, LLC, Shade Delmer, aka Shane Delmer, and Naomi Ruth
26 Anderson.

27 D. The terms "**Defendant**" and "**Defendants**" refer to the
28 **Named Defendants** and their agents, servants, employees, attorneys,

1 and all persons or entities directly or indirectly under the
2 control of any of them, and all other persons or entities in
3 active concert or participation with any of them who receive
4 actual notice of this Order by personal service or otherwise, and
5 each such person.

6 ORDER

7 I.

8 **PROHIBITION ON INTERNET AUCTION SALES**

9 **IT IS THEREFORE ORDERED** that each of the **Default Defendants**,
10 and his or her agents, servants, employees, attorneys, and all
11 persons or entities directly or indirectly under the control of
12 any of the **Default Defendants**, and all other persons or entities
13 in active concert or participation with any of the **Default**
14 **Defendants**, who receive actual notice of this Order by personal
15 service or otherwise, and each such person, whether acting
16 directly or through any corporation, limited liability company,
17 subsidiary, division or other device, are hereby permanently
18 restrained and enjoined from advertising, marketing, promoting,
19 offering for sale, or selling, and from assisting any other person
20 in the advertising, marketing, promoting, offering for sale, or
21 selling, of any product or service on any Internet auction site,
22 including but not limited to any auction site operated or offered
23 by or through Ebay.com, Yahoo.com, Amazon.com, 321gone.com,
24 Edeal.com, and hagggle.com.

25 / / /

1 II.

2 PROHIBITED MISREPRESENTATIONS

3 IT IS FURTHER ORDERED, in connection with the advertising,
4 marketing, promoting, offering for sale, or sale of **any** good or
5 service, regardless of whether the Internet is involved, that:

6 A. Each of the **Default Defendants**, and each of the **Default**
7 **Defendants'** agents, servants, employees, and attorneys, and all
8 persons or entities directly or indirectly under the control of
9 any of the **Default Defendants**, and all other persons or entities
10 in active concert or participation with any of the **Default**
11 **Defendants**, who receive actual notice of this Order by personal
12 service or otherwise, and each such person, whether acting
13 directly or through any corporation, limited liability company,
14 subsidiary, division or other device, are hereby permanently
15 restrained and enjoined from misrepresenting, expressly or by
16 implication, that such good or service will be delivered or
17 provided to any consumer upon receipt of payment from the
18 consumer; and

19 B. Each of the **Default Defendants**, and each of the **Default**
20 **Defendants'** agents, servants, employees, attorneys, and all
21 persons or entities directly or indirectly under the control of
22 any of the **Default Defendants**, and all other persons or entities
23 in active concert or participation with any of the **Default**
24 **Defendants**, who receive actual notice of this Order by personal
25 service or otherwise, and each such person, whether acting
26 directly or through any corporation, limited liability company,
27 subsidiary, division or other device, are hereby permanently
28 restrained and enjoined from misrepresenting, expressly or by

1 implication, any other fact material to a consumer's decision to
2 buy or accept the good or service from any of the **Defendants**.

3 **III.**

4 **PROHIBITION ON VIOLATING MAIL AND TELEPHONE ORDER SALES RULE**

5 **IT IS FURTHER ORDERED**, in connection with any sales in which
6 the buyer has ordered merchandise from any of the **Defendants** by
7 mail or telephone, including by fax or over the Internet, that
8 each of the **Default Defendants**, and their agents, servants,
9 employees, and attorneys, and all persons or entities directly or
10 indirectly under the control of any of the **Default Defendants**, and
11 all other persons or entities in active concert or participation
12 with any of the **Default Defendants**, who receive actual notice of
13 this Order by personal service or otherwise, and each such person,
14 whether acting directly or through any corporation, limited
15 liability company, subsidiary, division or other device, are
16 hereby permanently restrained and enjoined from:

17 1. Violating Section 435.1(a)(1) of the Rule, 16
18 C.F.R. § 435.1(a)(1), by soliciting orders for the sale of
19 merchandise to be ordered by the buyer through the mails or by
20 telephone without a reasonable basis to expect that **Defendants**
21 will be able to ship any ordered merchandise to the buyer within
22 the time stated in the solicitation, or, if no time has been
23 clearly and conspicuously stated, within thirty days of receipt of
24 a properly completed order;

25 2. Violating Section 435.1(b)(1) of the Rule, 16
26 C.F.R. § 435.1(b)(1), by failing to offer to the buyer, clearly
27 and conspicuously and without prior demand, an option either to
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1 consent to a delay in shipping or to cancel the order and receive
2 a prompt refund;

3 3. Violating Section 435.1(c) of the Rule, 16 C.F.R.
4 § 435.1(c), by failing to make a "prompt refund," as that term is
5 defined in 16 C.F.R. § 435.2(f), to buyers when such refunds are
6 required by Section 435.1(c) of the Rule; and

7 4. Violating or assisting others in violating any
8 other provision of the Rule, 16 C.F.R. Part 435.

9 A copy of the Rule is appended to this Order as Attachment A
10 and is incorporated herein as if fully rewritten. In the event
11 that the Rule is amended by the Commission in a manner which would
12 create a new or different standard applicable to the **Default**
13 **Defendants'** obligations under this Order, compliance with the Rule
14 as so amended shall not be deemed a violation of this Order.

15 **IV.**

16 **MONETARY JUDGMENT**

17 **IT IS FURTHER ORDERED** that judgment is hereby entered against
18 Defendant Auctionsaver, LLC, Defendant Shade Delmer, aka Shane
19 Delmer, and Defendant Naomi Ruth Anderson, jointly and severally,
20 in the amount of \$77,045.32 (SEVENTY-SEVEN THOUSAND FORTY-FIVE
21 DOLLARS AND THIRTY-TWO CENTS).
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V.

USE OF CONSUMER REDRESS AND DISGORGEMENT FUNDS

IT IS FURTHER ORDERED that all funds collected from the judgment herein shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable, or funds remain after redress is completed, the Commission may apply any remaining funds toward such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Paragraph.

VI.

RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Order, each of the individual **Default Defendants**, in connection with any business where the defendant individually or jointly with any other individual defendant is the majority owner of the business or directly or indirectly manages or controls the business, and where the business either (i) is engaged in the advertising, marketing, sale or offering for sale of any good or service via the Internet, or (ii) accepts orders for merchandise over the telephone, by mail,

1 or by fax, with such merchandise to be shipped to the customer, is
2 hereby restrained and enjoined from:

3 A. Failing to create the following records:

4 1. Accounting records that, in reasonable detail,
5 accurately and fairly reflect the cost of goods or services sold,
6 revenues generated, and the disbursement of such revenues;

7 2. Personnel records accurately reflecting the name,
8 address, and telephone number of each person employed in any
9 capacity by such business, including as an independent contractor;
10 that person's job title or position; the date upon which the
11 person commenced work; and the date and reason for the person's
12 termination, if applicable. The businesses subject to this
13 Paragraph shall retain such records for any terminated employee
14 for a period of three (3) years following the date of termination;

15 3. Customer records containing the names, addresses,
16 phone numbers, dollar amounts paid, quantity of items or services
17 purchased, and description of items or services purchased, to the
18 extent such information is obtained in the ordinary course of
19 business;

20 4. Complaint and refund requests (whether received
21 directly, indirectly or through any third party) and any responses
22 to those complaints or requests;

23 B. Failing to retain, for a period of two years, all
24 records required to be created pursuant to part A of this Section;
25 and

26 C. Failing to retain, for a period of two (2) years after
27 the last date of dissemination, copies of all sales scripts,
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1 training materials, advertisements, or other marketing materials
2 utilized.

3 VII.

4 COMPLIANCE REPORTING

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

7 A. Each of the individual **Default Defendants** shall, for a
8 period of five (5) years from the date of entry of this Order,
9 notify the Commission of:

10 1. Any changes in his or her residence, mailing
11 address, and telephone numbers, within ten (10) business days of
12 the date of such change; and

13 2. Any changes in his or her employment status
14 (including self-employment) within ten (10) days of such change.
15 Such notice shall include the name and address of each business
16 that the defendant is affiliated with or employed by, a statement
17 of the nature of the business, and a statement of the defendant's
18 duties and responsibilities in connection with the business or
19 employment;

20 B. Defendant Auctionsaver, LLC, shall, for a period of five
21 (5) years from the date of entry of this Order, notify the
22 Commission of any proposed change in the structure of Defendant
23 Auctionsaver, LLC, such as dissolution, assignment, sale, merger,
24 creation or dissolution of subsidiaries, proposed filing of a
25 bankruptcy petition, or change in the company name or address, or
26 any other change that may affect compliance obligations arising
27 out of this Order, thirty (30) days prior to the effective date of
28 any proposed change; provided, however, that, with respect to any

1 proposed change about which the defendant learns less than thirty
2 (30) days prior to the date such action is to take place, the
3 defendant shall notify the Commission as soon as is practicable
4 after learning of such proposed change.

5 C. One hundred eighty days after the date of entry of this
6 Order, each of the **Default Defendants** shall provide a written
7 report to the Commission, sworn to under penalty of perjury,
8 setting forth in detail the manner and form in which the defendant
9 has complied and is complying with this Order. This report shall
10 include but not be limited to:

- 11 1. The defendant's then current residence address and
12 telephone number(s);
- 13 2. The defendant's then current employment, business
14 addresses and telephone numbers, a description of
15 the business activities of each such employer, and
16 the defendant's title and responsibilities for each
17 employer;
- 18 3. A statement describing the manner in which The
19 defendant has complied and is complying with
20 Paragraph I of this Order;

21 D. Upon written request by a representative of the
22 Commission, **Default Defendants** shall submit additional written
23 reports (under oath, if requested) and produce documents on
24 fifteen days' notice with respect to any conduct subject to this
25 Order; and

26 E. For purposes of this Section, the term "employment"
27 includes the performance of services as an employee, consultant,
28 or independent contractor; and "employers" include any individual

1 or entity for whom the defendant performs services as an employee,
2 consultant or independent contractor.

3 . VIII.

4 ACCESS TO BUSINESS PREMISES

5 IT IS FURTHER ORDERED that, for a period of five (5) years
6 from the date of entry of this Order, for the purpose of further
7 determining compliance with this Order, each of the **Default**
8 **Defendants** shall permit representatives of the Commission, within
9 three (3) business days of receipt of written notice from the
10 Commission:

11 A. Access during normal business hours to any office, or
12 facility storing **documents**, of any business where the defendant,
13 individually or in combination with any of the other **Defendants**,
14 owns a majority interest in the business or directly or indirectly
15 manages or controls the business. In providing such access, the
16 defendant shall permit representatives of the Commission to
17 inspect and copy all **documents** relevant to any matter contained in
18 this Order; and shall permit Commission representatives to remove
19 **documents** relevant to any matter contained in this Order so that
20 the **documents** may be inspected, inventoried, and copied.
21 Provided, however, that any documents removed must be returned
22 within five business days; and

23 B. To interview the officers, directors, and employees,
24 including all personnel involved in responding to consumer
25 complaints or inquiries, and all sales personnel, whether
26 designated as employees, consultants, independent contractors or
27 otherwise, of any business to which Paragraph A of this Section
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1 applies, concerning matters relating to compliance with the terms
2 of this Order. The person interviewed may have counsel present.
3 *Provided* that, upon application of the Commission and for good
4 cause shown, the Court may enter an *ex parte* order granting
5 immediate access to all premises at which the defendant conducts
6 business or stores **documents**, for the purposes of inspecting and
7 copying all **documents** relevant to any matter contained in this
8 Order.

9 **IX.**

10 **FTC'S AUTHORITY TO MONITOR COMPLIANCE**

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

14 A. The Commission is authorized, without further leave of
15 this Court, but on notice to the defendant as required by the
16 Federal Rules of Civil Procedure, to obtain discovery from any
17 person in the manner provided by Chapter V of the Federal Rules of
18 Civil Procedure, Fed. R. Civ. P. 26-37, including the use of
19 compulsory process pursuant to Federal R. Civ. P. 45, for the
20 purpose of investigating the defendant's compliance with any
21 provision of this Order;

22 B. The Commission is authorized, without the necessity of
23 prior notice, to use representatives posing as customers or
24 prospective customers of the defendant, the defendant's employees,
25 or any other entity managed or controlled in whole or in part by
26 the defendant.

27 C. Nothing in this Order shall limit the Commission's
28 lawful use of compulsory process, pursuant to Sections 9 and 20 of

1 the FTC Act, 15 U.S.C. §§ 49, 57b-1, for the purpose of
2 investigating compliance with this Order, Section 5 of the FTC
3 Act, 15 U.S.C. § 45, or the Rule, 16 C.F.R. Part 435.

4 X.

5 ORDER DISTRIBUTION

6 IT IS FURTHER ORDERED that, for a period of five (5) years
7 from the date of entry of this Order, each of the **Default**
8 **Defendants** shall:

9 A. Immediately provide a copy of this Order to, and obtain
10 a signed and dated acknowledgment of receipt of the same, from
11 each officer, director and managing agent of any company or other
12 business entity which is directly or indirectly owned, operated or
13 controlled by the defendant and which (i) is engaged in the
14 advertising, marketing, sale or offering for sale of any good or
15 service via the Internet, or (ii) accepts orders for merchandise
16 over the telephone, by mail, or by fax, with such merchandise to
17 be shipped to the customer; and

18 B. Maintain, and upon reasonable notice make available to
19 the FTC's representatives, the original and dated acknowledgments
20 of the receipts required by this Section of this Order.

21 XI.

22 NOTICES

23 IT IS FURTHER ORDERED that for purposes of this Order,
24 **Default Defendants** shall, unless otherwise directed by the
25 Commission's authorized representatives, mail all written
26 notifications to the Commission to:

1 ASSISTANT REGIONAL DIRECTOR
2 Federal Trade Commission
3 Western Region-Los Angeles
4 10877 Wilshire Blvd., Ste. 700
5 Los Angeles, CA 90024
6 Re: FTC v. Auctionsaver, LLC

7 **XII.**

8 **INDEPENDENCE OF OBLIGATIONS**

9 **IT IS FURTHER ORDERED** that each of the obligations imposed by
10 this Order is independent of all other obligations under the
11 Order, and that the expiration of any requirements imposed by this
12 Order shall not affect any other obligation arising under this
13 Order.

14 **XIII.**

15 **COSTS AND ATTORNEYS FEES**

16 **IT IS FURTHER ORDERED** that each party to this Order bear its
17 own costs and attorneys fees incurred in connection with this
18 action.

19 **XIV.**

20 **CONTINUED JURISDICTION**

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

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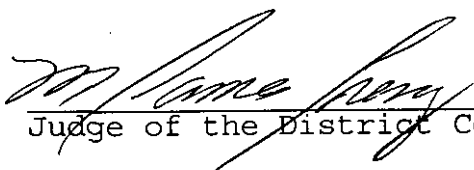
XV.

ENTRY BY CLERK

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Order.

IT IS SO ORDERED.

Dated: 3/13/02



Judge of the District Court

Presented by:

John D. Jacobs
Barbara Y.K. Chun
Federal Trade Commission
10877 Wilshire Blvd., #700
Los Angeles, CA 90024
(310) 824-4343 voice
(310) 824-4380 fax

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

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless (1) the seller has a reasonable basis for so informing the buyer and (ii) the seller informs the buyer of the reason or reasons for the delay.

(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.

(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.

(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.

(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

PART 435—MAIL OR TELEPHONE ORDER MERCHANDISE

Sec.

435.1 The rule.

435.2 Definitions.

435.3 Limited applicability.

435.4 Effective date of the rule.

AUTHORITY: 15 U.S.C. Sta. 5 U.S.C. 552.

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

§ 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:

(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:

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

(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)(i) of this part.

(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

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 (b)(2) 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) (i) or (ii) 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: Provided, however, That where the seller offers the buyer the option to consent to an indefinite delay the offer 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 old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

Nothing in paragraph (b) of this section shall prevent a seller, where it is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with 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 has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller

(1) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(1) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to and further delay.

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) 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 compliance, in the ordinary course of business, with any requirement of paragraphs (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

§ 435.2 Definitions.

For purposes of this part:

(a) *Mail or telephone order sales* shall mean sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment or the method used to solicit the order.

(b) *Telephone* refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.

(c) *Shipment* shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(d) *Receipt of a properly completed order* shall mean, where the buyer tenders full or partial payment in the proper amount in the form of cash, check, money order, or authorization from the buyer to charge an existing charge account, the time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order. Provided,