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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES SMITH, DAMIEN SMITH, and KYMBERLI SMITH, individually, and d/b/a SALESCO, Defendants.	Civil No. 01-10962 NM (PJWx) COMPLAINT FOR CIVIL PENALTIES, INJUNCTIVE AND OTHER RELIEF

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("Commission"), for its Complaint alleges the following:

1. Plaintiff brings this action under Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a)

and 57b to obtain monetary civil penalties, redress, and injunctive and other relief for defendants' violations of the Commission's Trade Regulation Rule Concerning the Sale of Mail or Telephone Order Merchandise (the "Rule"), 16 C.F.R. Part 435, and injunctive relief for violations of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and under 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a) and 57b. This action arises under 15 U.S.C. § 45(a)(1).

3. Venue in the Central District of California is proper under 15 U.S.C. § 53(b) and under 28 U.S.C. §§ 1391(b-c) and 1395(a).

DEFENDANTS

4. Defendant Charles Smith, together with the other defendants named herein, does business as Salesco, an unincorporated entity, within the Central District of California at 949 N. Cataract Ave., Suite F, San Dimas, California 91773. Charles Smith resides at 1890 Fernridge Dr., San Dimas, California 91773. In connection with the matters alleged herein, Charles Smith resides and transacts business in the Central District of California.

5. Defendant Damien Smith, a son of defendant Charles Smith, together with the other defendants named herein, does business as Salesco within the Central District of California at

949 N. Cataract Ave., Suite F., San Dimas, California 91773. Damien Smith resides at 1677 Grasscreek Dr., San Dimas, California 91773. In connection with the matters alleged herein, Damien Smith resides and transacts business in the Central District of California.

6. Defendant Kymberli Smith, the wife of Charles Smith, together with the other defendants named herein, does business as Salesco within the Central District of California at 949 N. Cataract Ave., Suite F., San Dimas, California 91773. Kymberli Smith resides at 1890 Fernridge Dr., San Dimas, California 91773. In connection with the matters alleged herein, Kymberli Smith resides and transacts business in the Central District of California.

DEFENDANTS' COURSE OF CONDUCT

7. Since 1995 defendants have offered for sale and sold by mail, telephone and via the Internet, automobile accessories, including audio equipment, seat belt extensions, canopies, chrome plated wheels, dashboards, seats, carpet kits and car covers, to buyers throughout the United States. Defendants solicit these sales on their Internet website, www.Salesco.com.

8. Included on their Internet website were the statements, as follows:

- "Some items are similar to those pictured or described, and Salesco reserves the right to upgrade or substitute an item of equal or greater value."

- "Including but not limited to custom wheels, wheel adapters and spacers, carpet kits, custom seats, seat covers, canopies, and other special order items are subject to a 20% cancellation charge or forfeiture of your deposit. Timeliness of the delivery does not waive any charges."

9. Throughout 1999 and continuing thereafter, in the course of soliciting orders for merchandise by mail, telephone or via the Internet, defendants have routinely promised buyers that "in-stock" merchandise will be shipped in seven calendar days.

10. At all times material herein, defendants have failed to create any system or procedure for knowing whether "in-stock" merchandise was in fact in stock at the time they made the 7-day shipment representations to buyers.

11. In numerous instances the merchandise was not in fact in stock and was not shipped to buyers within the promised shipment time.

12. Throughout 1999 and continuing thereafter, in the course of soliciting orders by mail, telephone and via the Internet, defendants have routinely promised buyers that merchandise drop-shipped by defendants' suppliers or manufacturers will be shipped to buyers within 10 calendar days.

13. At all times material herein, defendants have failed to create any system or procedure for determining whether their suppliers or manufacturers in fact shipped within the promised 10-day shipment time.

14. In numerous instances defendants' suppliers or manufacturers did not in fact ship within the promised shipment time.

15. Throughout 1999 and continuing thereafter, in the course of soliciting orders for merchandise by mail, telephone and via the Internet, defendants have routinely promised buyers that, with respect to merchandise made or finished on defendants' premises, the merchandise will be shipped within a specified time depending on the nature of the merchandise involved in each sale.

16. In numerous instances defendants did not in fact ship the merchandise made or finished on defendants' premises within the promised shipment time.

17. When defendants did not ship the merchandise within the promised shipment times, they also did not, within those times, notify the buyers of the delay.

18. Throughout 1999 and continuing thereafter, in numerous instances when defendants were unable to ship the merchandise within the stated time, they shipped merchandise that was different from what the buyer ordered without obtaining prior authorization from the buyer to make the substitution. The merchandise they shipped differed in material ways including, but not limited to, brand, wattage, model, number of features, pattern, color, quality of material, condition (used or refurbished instead of new), size (or fit), value and quality.

19. Throughout 1999 and continuing thereafter, in numerous instances when defendants failed to ship the merchandise in the

time they promised, they charged a 20% cancellation or restocking fee when buyers cancelled their orders.

THE RULE

20. The Rule was promulgated by the Commission on October 22, 1975, under the FTC Act, 15 U.S.C. § 41 *et seq.* and became effective February 2, 1976. On September 21, 1993, the Rule was amended under Section 18 of the FTC Act, 15 U.S.C. § 57a, and the amendments took effect on March 1, 1994. The Rule applies to orders placed by mail, telephone, facsimile transmission or on the Internet.

VIOLATIONS OF THE RULE

21. At all times material hereto, defendants have engaged in the sale of merchandise ordered by mail, telephone or on the Internet, in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

22. In numerous instances, defendants have violated Section 435.1(a) of the Rule by soliciting mail, telephone, or Internet orders for merchandise when they had no reasonable basis to expect that they would be able to ship the merchandise within the time stated in their solicitations.

23. In numerous instances, after having solicited mail, telephone, or Internet orders for merchandise and received "properly completed orders," as that term is defined in Section 435.2(d) of the Rule, and having been unable to ship the merchandise to the buyer within the Rule's applicable time, as

set forth in Section 435.1(a)(1) of the Rule (the "applicable time"), defendants:

a. Violated Section 435.1(b)(1) of the Rule by failing, within the applicable time, 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 order and receive a prompt refund;

b. Having failed within the applicable time to ship or to offer the buyer the option to either consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund:

(1) Violated Section 435.1(c)(5) of the Rule by failing to deem the order canceled and to make a prompt refund to the buyer;

(2) Violated Sections 435.1(c)(4) and (5) of the Rule by shipping, without obtaining the prior authorization of the buyer, merchandise that was materially different from what the buyer ordered, thereby failing to deem the order canceled and to make a prompt refund to the buyer; and

c. Violated Sections 435.1(c) of the Rule by failing to make a refund, as the term "refund" is defined in section 435.2(e)of the Rule, to the buyer, consisting of the amount tendered or the charge incurred by the buyer.

24. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

CIVIL PENALTIES, CONSUMER REDRESS AND INJUNCTIVE RELIEF

25. Defendants have violated the Rule as described above with knowledge as set forth in Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

26. Each sale or attempted sale during the five years preceding the filing of this Complaint in which defendants have violated the Rule in one or more of the ways described above constitutes a separate violation for which plaintiff seeks monetary civil penalties.

27. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and Section 1.98(d) of the FTC's Rules of Practice, 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of not more than $11,000 for each such violation of the Rule.

28. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes the court to award such relief as is necessary to redress the injury to consumers or others resulting from defendants' violation of the Rule.

29. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), this Court is authorized to issue a permanent injunction against

defendant's violating the FTC Act and provide such other equitable relief as is necessary to redress injury to consumers or others resulting from defendants' violations of the FTC Act.

PRAYER

WHEREFORE, plaintiff requests this Court, pursuant to 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b) and 57b, and the Court's own equitable powers to:

(a) Enter judgment against defendants and in favor of plaintiff for each violation alleged in this Complaint;

(b) Award plaintiff monetary civil penalties from defendants for each violation of the Rule;

(c) Permanently enjoin defendants from violating the Rule;

(d) Permanently enjoin defendants from failing to provide all outstanding refunds, promptly and in full, to each consumer who is entitled to such refund under the Rule;

(e) Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from defendants' violations of the FTC Act, including but not limited to rescission of contracts, refund of monies paid, and disgorgement of ill-gotten gains; and

(f) Award plaintiff such additional relief as the Court may deem just and proper.

Dated:

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