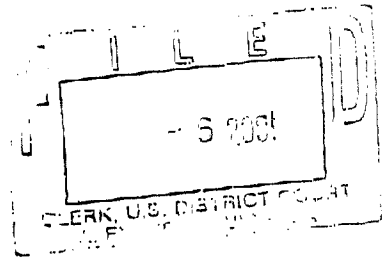


PAUL J. McNULTY
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff

v.

PET EXPRESS, INC.
a corporation
d/b/a EPET.NET, LLC, and

JONATHAN KROEGER
individually,

Defendants.

Civil Action No. 01-1844-A

**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 that:

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 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 Eastern District of Virginia is proper under 15 U.S.C. § 53(b) and under 28 U.S.C. §§ 1391(b-c) and 1395(a).

DEFENDANTS

4. Defendant Pet Express, Inc. is a Delaware Subchapter S corporation with its principal place of business located within the Eastern District of Virginia at 7703 Ridgecrest Drive, Alexandria, VA 22308. Defendant was incorporated in 1996 and has transacted business continuously in the Eastern District of Virginia since then.

5. Defendant Jonathan Krocger is the President of Pet Express, Inc. and is responsible for its day-to-day operations. He has formulated, directed, or controlled the acts or practices of Pet Express, Inc., including the various acts and practices set forth herein. His business and home address is the same as that of the corporate defendant. In connection with the matters alleged herein, Jonathan Krocger transacts business in the Eastern District of Virginia.

DEFENDANTS' COURSE OF CONDUCT

6. From January 1997 through September 2000, defendants offered for sale and sold by mail, telephone, and the Internet premium brands of dog or cat food to consumer and business

customers throughout the United States. Defendants solicited these sales on their Internet website, found first at www.PetXpress.com and later at www.EPet.net. The majority of defendants' sales were to consumers or businesses ordering six or twelve month supplies of pet food for serial delivery.

7. Since 1997 defendants have represented that they shipped merchandise to reach the customer within two business days of one of three dates chosen by the customer, either the 5th, 15th, or 25th of the month. Defendants represented that orders received five business days or more prior to the requested delivery date would be delivered by that date; orders received less than five business days prior to the requested delivery time would be delivered on the requested day the following month.

8. Throughout 1999 and continuing thereafter, defendants experienced processing delays, computer failures and supplier problems. In numerous instances, defendants failed to ship some or all of the first installments and some or all of subsequent installments of pet food within the stated time.

9. Throughout 1999 and continuing thereafter, when merchandise was not shipped within the stated time, defendants' only attempt to communicate with the customer was to note the delay on the customer's order status section of their website. In all instances in which defendants failed to ship merchandise or the first installment of merchandise ordered for serial delivery, they thereby did not, within the stated time, offer the buyer an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund.

10. In numerous instances consumers paid for merchandise they never received at all, or paid for and received only the initial installments of merchandise they ordered for serial

delivery. Many of these consumers have never received appropriate refunds from the defendants.

THE RULE

11. 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. With respect to merchandise ordered for serial delivery (such as magazine sales), Section 435.3(a)(1) of the Rule provides that the Rule applies only to the initial shipment.

VIOLATIONS OF THE RULE

12. At all times material hereto, defendant has 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.

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

14. In numerous instances, after having solicited mail, telephone, or Internet orders for the sale of merchandise and received "properly completed orders," as that term is defined in Section 435.2(d) of the Rule, 16 C.F.R. § 435.2(d), and having been unable to ship some or all of the merchandise or some or all of the first installment of merchandise ordered for serial

delivery, to the buyer within the Rule's applicable time, as set forth in Section 435.1(a)(1) of the Rule, 16 C.F.R. § 435.1(a)(1) (the "applicable time"), defendants have:

- 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 buyer's order and receive a prompt refund; and
 - b. Violated Section 435.1(c) of the Rule by failing to deem an order canceled and to make a prompt refund to buyers entitled to such refund under the Rule.
15. 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).

VIOLATIONS OF SECTION 5(a)(1) OF THE FTC ACT

16. Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), provides that unfair or deceptive acts or practices in or affecting commerce are unlawful.

17. Defendants advertise, offer for sale, sell and distribute dog or cat food for serial delivery in commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

18. Defendants have disseminated or have caused to be disseminated advertising on their website for their products. This advertising contained the following statements regarding their shipment of merchandise ordered for serial delivery:

- a. "We are authorized dealers of 22 premium & super premium brands of food, including Hill's Science Diet, Iams, Pro Plan, Nutro and Nature's Recipe."
- b. "Pet Express will guarantee that your shipment will arrive within 2 business days of the stated time."

c. "And did we mention that Pet Express **never runs out of your food?** Have you ever made a special trip to the pet store, only to find out they've run out of your pet's preferred food? That will never happen with home delivery from Pet Express." (Emphasis in original.)

19. Through the use of the statements contained in the advertising quoted in paragraph 18, and other statements not specifically set forth herein, defendants have represented, directly or by implication, that they would deliver merchandise ordered for serial delivery to the purchaser within two business days of the time he or she requested delivery, and that delivery within that time was guaranteed.

20. Defendants did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph 19 at the time the representations were made. Therefore, the representations in paragraph 19 above were and are deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CIVIL PENALTIES, CONSUMER REDRESS AND INJUNCTIVE RELIEF

21. 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).

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

23. 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.

24. 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.

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

- (1) Enter judgment against defendants and in favor of plaintiff for each violation alleged in this Complaint;
- (2) Award plaintiff monetary civil penalties from defendants for each violation of the Rule;
- (3) Permanently enjoin defendants from violating the Rule;
- (4) Permanently enjoin defendants from violating Section 5(a) of the FTC Act;
- (5) 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;
- (6) 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

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

DATED:

FOR THE UNITED STATES OF AMERICA:

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Assistant Attorney General
Civil Division
U.S. Department of Justice

PAUL J. McNULTY
United States Attorney
Eastern District of Virginia

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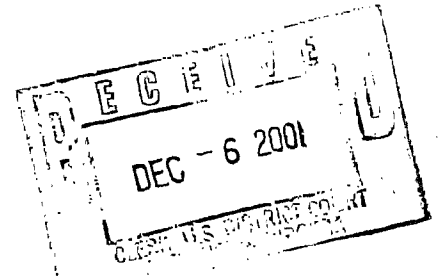
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

_____)
UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
PET EXPRESS, INC.)
a corporation)
d/b/a EPET.NET, LLC, and)
)
JONATHAN KROEGER)
individually,)
)
Defendants.)
_____)

Civil Action No. 01-1844-A

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

WHEREAS plaintiff, the United States of America, has commenced this action by filing the Complaint herein; defendants have waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law, without admitting liability for any of the matters alleged in the Complaint;

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

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

DEFINITION

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

CIVIL PENALTY

4. Defendant Pet Express, Inc., its successors and assigns, and defendant Jonathan Kroeger shall pay to plaintiff a civil penalty, pursuant to section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of one hundred thousand dollars (\$100,000.00). Defendants are jointly and severally liable for payment of the civil penalty. Based on defendants' sworn representations in their financial statements dated January 6 and March 2, 2001, filed with the Federal Trade Commission, payment of the monetary civil penalty is suspended, contingent upon the accuracy and completeness of both financial statements.

5. Plaintiff's agreement to this consent decree is expressly premised upon the truthfulness, accuracy, and completeness of the financial condition of defendants, as represented

in the financial statements referenced above, which contain material information upon which the plaintiff relied in negotiating and agreeing to suspend the civil penalty stated in the consent decree. If, upon motion by the plaintiff, this Court finds that either defendant made any material misrepresentation in or omission from either of the financial statements, the entire amount of the \$100,000.00 suspended judgment entered against defendants will be immediately due and payable. In connection with any such motion, the only issue shall be whether the financial information either defendant provided in either of the financial statements was fraudulent, misleading, inaccurate or incomplete in any material respect. For purposes of this paragraph, and any subsequent proceedings to enforce payment, including but not limited to a nondischargeability complaint filed in any bankruptcy proceeding, defendants waive any right to contest any of the allegations of plaintiff's Complaint.

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

CONSUMER REDRESS

7. Defendant Pet Express, Inc., its successors and assigns, and defendant Jonathan Kroeger shall, within fifteen (15) business days after service of this Order, compile from their regularly kept business records and from any other information made available to them by Plaintiff, a list containing, for each buyer who ordered and paid for but did not receive shipment of any item of merchandise by the date of service of this Order, his or her name, last known address, the total purchase price paid for all items of merchandise ordered, including all charges

for shipping and handling costs and applicable taxes, and the pro rata price of all items ordered but not shipped. Defendants shall, within thirty (30) business days after service of this order, reimburse each buyer on this list the full pro rata price of the unshipped items.

INJUNCTION

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

- a. Soliciting orders for the sale of telephone or mail order merchandise unless they have a reasonable basis to expect that they can ship such merchandise within the time stated in the solicitation or, if no time is stated clearly and conspicuously in the solicitation, within thirty (30) days after receipt of a properly completed order, as required by 16 C.F.R. § 435.1(a)(1);
- b. Failing 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, as required by 16 C.F.R. § 435.1(b)(1);
- c. Failing, within a reasonable time after first becoming aware of their inability to ship, and in no event later than the time set forth in 16 C.F.R. § 435.1(a)(1), to offer the buyer an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1); and
- d. Failing to deem an order canceled and to make a prompt refund to buyers who are entitled to such refunds under the Rule, as required by 16 C.F.R. § 435.1(c).

9. In the event the Mail Order Rule is hereafter amended or modified, defendants' compliance with that Rule as so amended or modified shall not be deemed a violation of this injunction.

10. Defendants, their successors and assigns, and their officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the solicitation of any sale of merchandise ordered by mail, telephone, facsimile or via the Internet, for serial delivery, in or affecting commerce, are hereby enjoined from representing, expressly or by implication, the serial shipment or serial delivery time for the merchandise unless, at the time of soliciting the sale, they have a reasonable basis to expect that they can ship the merchandise in the time represented.

COMPLIANCE

11. Defendant Pet Express, Inc., shall, within thirty (30) days of the entry of this Consent Decree, provide a copy of this Consent Decree and the Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule (Jan. 1995) ("Business Guide") to each of its supervisory or managerial agents, servants, employees and attorneys who are engaged in defendant's mail, telephone, facsimile or Internet order sales business, secure from each such person a signed statement acknowledging receipt of a copy of this Consent Decree and Business Guide, and shall, within ten (10) days of complying with this paragraph, file an affidavit with the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, D.C. 20580, setting forth the fact and manner of their compliance, including the name and title of each person to whom a copy of the Consent Decree and Business Guide has been provided.

12. For a period of five (5) years from the date of entry of this Consent Decree, the corporate defendant, its successors and assigns, shall maintain and make available to the Federal Trade Commission, within seven (7) days of the date of receipt of a written request, business records demonstrating compliance with the terms and provisions of this Consent Decree.

13. For a period of twenty (20) years from the date of entry of this Consent Decree, the corporate defendant, its successors and assigns, shall notify the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., NW, Washington, D.C. 20580, at least thirty (30) days prior to any merger, incorporation, dissolution, assignment, sale resulting in the emergence of a successor corporation, creation or dissolution of a subsidiary or parent, or any other changes in corporate status which may affect defendant's obligations under this Consent Decree. *Provided, however,* that with respect to any proposed change in the corporation about which defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission's Associate Director for Enforcement as soon as practicable after obtaining such knowledge.

14. For a period of five (5) years from the date of entry of this Consent Decree, the individual defendant shall notify the Commission's Associate Director for Enforcement within thirty (30) days of any change in his affiliation with, or change in his active participation in the management or direction of, any business which is engaged in the sale or distribution of merchandise covered by the Rule. Provided, however, that with respect to any change in his affiliation or participation, as aforesaid, about which defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission's Associate Director for Enforcement as soon as practicable after obtaining such knowledge.

15. One hundred twenty (120) days after entry of this Consent Decree, defendants shall provide a written report to the Federal Trade Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which defendant has complied and is complying with this Consent Decree. This report shall include but not be limited to:

- a. a specimen copy of each delay option notice used for purposes of complying with any provision of the Rule, and a statement setting forth in detail the procedures in place and method for providing such notices to consumers in a timely fashion;
- b. a specimen copy of each advertisement or telemarketing script that contains a shipping or delivery representation;
- c. a statement setting forth in detail defendant's procedures for providing prompt refunds pursuant to the Rule;
- d. a statement setting forth in detail the basis for claiming that defendant will ship merchandise, or the initial shipment of merchandise ordered for serial delivery:
 - i. within the time stated in any advertisement;
 - ii. within thirty (30) days, where no time is stated clearly and conspicuously in any advertisement;
- e. a statement setting forth in detail the basis for any serial shipment or serial delivery representation; and
- f. a statement setting forth in detail the manner and form in which defendant has satisfied all redress obligations required by this Order, including, but not limited to, a copy of the list compiled pursuant to Paragraph 7 of this Order, and the amount of redress paid to each consumer on this list.

Defendants shall mail this written report to: the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

16. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the Federal Trade Commission their taxpayer identifying numbers (employer identification number and Social Security number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of their relationship with the government.

CONTINUING JURISDICTION

17. This Court shall retain jurisdiction of this matter for the purposes of enabling any of the parties to this Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the enforcement of compliance therewith, or for the punishment of violations thereof.

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

Dated this ____ day of _____, 2001.

UNITED STATES DISTRICT JUDGE

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

FOR THE UNITED STATES OF AMERICA:

ROBERT D. McCALLUM
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PAUL J. McNULTY
United States Attorney
Eastern District of Virginia

12/06/01 By: Constance H. Fungale

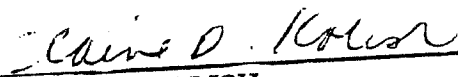
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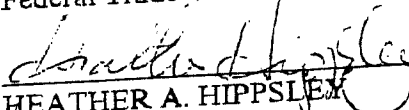
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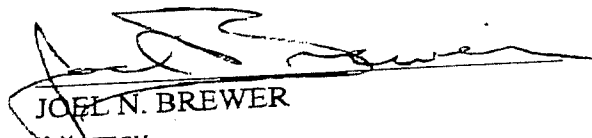
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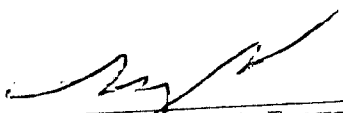


JONATHAN KROEGER
Individually

PET EXPRESS, INC.

By: 

JONATHAN KROEGER
President
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APPENDIX A

16 CFR Ch. I (1-1-00 Edition)

§ 433.3

SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

[40 FR 53506, Nov. 18, 1975; 40 FR 58131, Dec. 15, 1975]

§ 433.3 Exemption of sellers taking or receiving open end consumer credit contracts before November 1, 1977 from requirements of § 433.2(a).

(a) Any seller who has taken or received an open end consumer credit contract before November 1, 1977, shall be exempt from the requirements of 16 CFR part 433 with respect to such contract provided the contract does not cut off consumers' claims and defenses.

(b) *Definitions.* The following definitions apply to this exemption:

(1) All pertinent definitions contained in 16 CFR 433.1.

(2) Open end consumer credit contract: a consumer credit contract pursuant to which "open end credit" is extended.

(3) "Open end credit": consumer credit extended on an account pursuant to a plan under which a creditor may permit an applicant to make purchases or make loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide. The term does not include negotiated advances under an open-end real estate mortgage or a letter of credit.

(4) Contract which does not cut off consumers' claims and defenses: A consumer credit contract which does not 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.

[42 FR 19490, Apr. 14, 1977, as amended at 42 FR 46510, Sept. 15, 1977]

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. 57a; 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:

(i) 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)(ii) 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 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:

(i) 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

§ 435.1

Federal Trade Commission

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.

(i) 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 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 auto-

matically 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

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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

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

(ii) 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.

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(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, 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 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

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the solicitation in question forms an insubstantial part.

[58 FR 49121, Sept. 21, 1993, as amended at 60 FR 56950, 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 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 provi-

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sions, 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.

(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.

§ 435.4 Effective date of the rule.

The original rule, which became effective 100 days after its promulgation on October 22, 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: 18 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 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

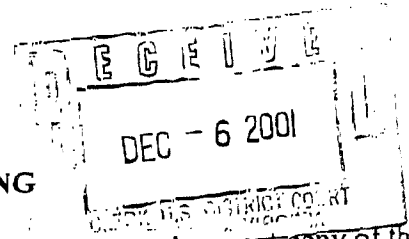
REASONS FOR SETTLEMENT

This statement accompanies the Consent Decree and Order for Injunctive and Other Relief executed by defendants Pet Express, Inc., and Jonathan Kroeger. The Consent Decree enjoins Defendants from violating the Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435, with respect to single shipments or first installments of merchandise ordered for serial delivery, and requires them to have a reasonable basis for their shipment representations for subsequent shipments of merchandise ordered for serial delivery. The Consent Decree suspends payment of a \$100,000 civil penalty because of the defendants' inability to pay, but requires them to pay redress to consumers who paid for but never received merchandise from them.

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, and on the basis of defendants' sworn financial statements to the Commission, the Commission believes that, because of their inability to pay, suspension of the payment of \$100,000 in civil penalties by Pet Express, Inc., and Jonathan Kroeger is appropriate. At the same time, the requirement that they pay redress to all consumers who paid for merchandise they never received should remedy the harm they did to consumers. Further, the provisions enjoining defendants from failing to comply with the Mail or Telephone Order Merchandise Rule with respect to single shipments or first installments of merchandise ordered for serial delivery, and from failing to substantiate their shipment representations for subsequent shipments of merchandise ordered for serial delivery, should assure their future compliance with the law. 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.



CERTIFICATE OF MAILING

By its undersigned attorney, the United States certifies that a true and correct copy of the foregoing Complaint for Civil Penalties, Injunctive and Other Relief and proposed Consent Decree and Order for Injunctive and Other Relief, (Defendant having waived service of Summons and Complaint), were mailed to Defendant Jonathan Kroeger and Defendant's counsel at the below addresses by U.S. Mail, postage prepaid, on December 6th, 2001.

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