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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 _____) Case No.
12 FEDERAL TRADE COMMISSION,)
13 Plaintiff,) COMPLAINT FOR INJUNCTION AND
14 v.) OTHER EQUITABLE RELIEF
15 AUCTIONSAVER, LLC;)
16 RICHARD PHIM;)
17 CARMAN LEE CALDWELL;)
18 SHADE DELMER,)
19 aka SHANE DELMER; and)
NAOMI RUTH ANDERSON,)
20 Defendants.)
_____)

21 Plaintiff, the Federal Trade Commission ("Commission"), by
22 its undersigned attorneys, alleges:

23 1. This is an action under Sections 13(b) and 19 of the
24 Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and
25 57b, to secure preliminary and permanent injunctive relief,
26 rescission of contracts, restitution, disgorgement, and other
27 equitable relief for Defendants' violation of Section 5(a) of the
28 FTC Act, 15 U.S.C. § 45(a), and Defendants' violations of the

1 FTC's Trade Regulation Rule entitled "Mail or Telephone Order
2 Merchandise Rule" (the "Rule"), 16 C.F.R. Part 435, in connection
3 with the sale of computers, computer hardware, computer
4 peripherals, computer software, and consumer electronics over the
5 Internet.

6 **JURISDICTION AND VENUE**

7 2. This Court has jurisdiction over this matter pursuant to
8 15 U.S.C. §§ 45(a), 53(b), 57b, and 28 U.S.C. §§ 1331, 1337(a) and
9 1345.

10 3. Venue in the United States District Court for the
11 Central District of California is proper under 15 U.S.C. § 53(b),
12 and 28 U.S.C. §§ 1391(b) and (c).

13 **PLAINTIFF**

14 4. Plaintiff Federal Trade Commission is an independent
15 agency of the United States Government created by statute.
16 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a) of the
17 FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive
18 acts or practices in or affecting commerce. The Commission also
19 enforces the Mail or Telephone Order Merchandise Rule, 16 C.F.R.
20 Part 435. The Commission may initiate federal district court
21 proceedings by its own attorneys to enjoin violations of the
22 FTC Act and the Rule and to secure such equitable relief as may be
23 appropriate in each case, including restitution for injured
24 consumers. 15 U.S.C. §§ 53(b) and 57b.

25 **DEFENDANTS**

26 5. Defendant Auctionsaver, LLC ("Auctionsaver") is a
27 California limited liability company with its offices and
28 principal place of business located at 9630 Black Mountain Road,

1 Suite K, San Diego, California. Auctionsaver transacts or has
2 transacted business in the Southern District of California.

3 6. Defendant Richard Phim is an individual who has done
4 business under, or has managed or controlled companies that have
5 done business under, the names "Tarian Computers," "Tarian
6 Enterprises," "Auction Saver," "Auctionsaver," "Tec Computers,"
7 and "Tecresale." Defendant Phim is a general partner of Defendant
8 Auctionsaver. At all times material to this Complaint, acting
9 alone or in concert with others, he has formulated, directed,
10 controlled, or participated in the acts and practices set forth in
11 this Complaint. Defendant Phim resides in and transacts or has
12 transacted business in the Southern District of California.

13 7. Defendant Carman Lee Caldwell is an individual who has
14 done business under, or has managed or controlled companies that
15 have done business under, the names "Tarian Computers," "Tarian
16 Enterprises," "Auction Saver," "Auctionsaver," "Tec Computers,"
17 and "Tecresale." Defendant Caldwell is a general partner of
18 Defendant Auctionsaver. At all times material to this Complaint,
19 acting alone or in concert with others, he has formulated,
20 directed, controlled, or participated in the acts and practices
21 set forth in this Complaint. Defendant Caldwell resides in and
22 transacts or has transacted business in the Southern District of
23 California.

24 8. Defendant Delmer is an individual who has done business
25 under, or has managed or controlled companies that have done
26 business under, the names "Tarian Computers," "Tarian
27 Enterprises," "Auction Saver," "Auctionsaver," "Tec Computers,"
28 and "Tecresale." At all times material to this Complaint, acting

1 alone or in concert with others, he has formulated, directed,
2 controlled, or participated in the acts and practices set forth in
3 this Complaint. Defendant Delmer resides in and transacts or has
4 transacted business in the Southern District of California.

5 9. Defendant Anderson is an individual who has worked with
6 and for the other Defendants. She has handled calls from
7 consumers and made misrepresentations as alleged below. At all
8 times material to this Complaint, acting alone or in concert with
9 others, she has formulated, directed, controlled, or participated
10 in the acts and practices set forth in this Complaint. Defendant
11 Anderson resides in and transacts or has transacted business in
12 the Southern District of California.

13 **COMMERCE**

14 10. At all times material to this Complaint, Defendants have
15 been engaged in the business of offering for sale and selling
16 computers, computer hardware, computer peripherals, computer
17 software, and consumer electronics, through Internet auction
18 sites, in or affecting commerce, as "commerce" is defined in
19 Section 4 of the FTC Act, 15 U.S.C. § 44.

20 **DEFENDANTS' BUSINESS ACTIVITIES**

21 11. Beginning in 1998 and continuing through at least 1999,
22 Defendants offered computers, computer hardware, computer
23 peripherals, computer software, and consumer electronics
24 (hereinafter "computer-related products") for sale on the Internet
25 at auction house web sites.

26 12. An Internet auction house is an online forum that
27 facilitates communications between would-be buyers and sellers of
28 goods and services. Sellers use the auction house's web site to

1 advertise the goods and services they seek to sell. Auctions are
2 conducted on the auction house's web site with would-be buyers
3 sending bids through electronic mail to the web site. At the
4 conclusion of the auction, buyers and sellers typically
5 communicate with each other via electronic mail about the terms of
6 payment and delivery and then complete their commercial
7 transactions through the U.S. mail system.

8 13. Defendants have placed advertisements offering computer-
9 related products on the websites of Internet auction houses.
10 Examples of such products include hard disk drives, DVD drives,
11 chips, video cards, monitors, software, digital cameras, digital
12 camcorders, and digital stereo receivers. Defendants have placed
13 these advertisements under various company names, including but
14 not limited to Tarian Computers, Tarian Enterprises, Auction
15 Saver, Auctionsaver, Tec Computers, and Tecresale.

16 14. Consumers have placed bids for Defendants' merchandise
17 which Defendants have accepted. Defendants have further accepted
18 payment from those consumers who have successfully bid for the
19 goods Defendants offered for sale on the Internet at auction house
20 web sites. In a number of instances, Defendants have failed to
21 provide either the promised merchandise or a refund to those
22 consumers whose bids they have accepted and from whom they have
23 received payment. They have also failed, upon learning of their
24 inability to ship consumers merchandise in a timely manner, to
25 allow consumers the option of canceling their orders.

1 mail or telephone, unless, at the time of the solicitation, the
2 seller has a reasonable basis to expect that it will be able to
3 ship any ordered merchandise to the buyer within the time stated
4 on the solicitation, or, if no time is stated, within thirty days
5 of the completion of the order. 16 C.F.R. § 435.1(a)(1).

6 21. The Rule requires that the seller follow certain
7 procedures if merchandise ordered through the mail or by telephone
8 will not be shipped within the applicable time limit.
9 Specifically, the Rule requires that, when there is a shipping
10 delay, the seller must, prior to the expiration of the applicable
11 time, offer the buyer an option either to agree to the delay or to
12 cancel the order and receive a prompt refund (as defined in 16
13 C.F.R. § 435.2(f)). 16 C.F.R. § 435.1(b)(1).

14 22. The Rule also requires that a seller deem an order
15 canceled and make a prompt refund to the buyer whenever the seller
16 has failed to ship within the specified time period and has failed
17 to offer the consumer the option to consent to further delay or to
18 cancel the order. 16 C.F.R. § 435.1(c).

19 23. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C.
20 § 57a(d)(3), and 16 C.F.R. § 435.1, violations of the Rule
21 constitute unfair or deceptive acts or practices in or affecting
22 commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C.
23 § 45(a).

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1 **DEFENDANTS' VIOLATIONS OF THE MAIL OR TELEPHONE ORDER**

2 **MERCHANDISE RULE**

3 **COUNT II**

4 24. In a number of instances, Defendants have solicited
5 orders for the sale of merchandise to be ordered by the buyer
6 indirectly through the telephone without a reasonable basis to
7 expect that they would be able to ship any ordered merchandise to
8 the buyer within the time stated in the solicitation, or, if no
9 time was clearly and conspicuously stated, within thirty days of
10 receipt of a properly completed order, thereby violating 16 C.F.R.
11 § 435.1(a)(1).

12 **COUNT III**

13 25. In a number of instances, after soliciting orders for
14 the sale of merchandise ordered by the buyer indirectly through
15 the telephone and being unable to ship merchandise within the
16 applicable time as set out in Section 435.1(a)(1) of the Rule,
17 Defendants have violated the Rule by failing to offer to the
18 buyer, clearly and conspicuously and without prior demand, an
19 option either to consent to a delay in shipping or to cancel the
20 order and receive a prompt refund, thereby violating 16 C.F.R.
21 § 435.1(b)(1).

22 **COUNT IV**

23 26. In a number of instances, Defendants have failed to make
24 a "prompt refund," as that term is defined in 16 C.F.R.
25 § 435.2(f), to buyers when such refunds were required by Section
26 435.1(c) of the Rule, thereby violating 16 C.F.R. § 435.1(c).

1 **CONSUMER INJURY**

2 27. Consumers throughout the United States have suffered
3 substantial monetary loss as a result of Defendants' unlawful acts
4 or practices. In addition, Defendants have been unjustly enriched
5 as a result of their unlawful practices. Absent injunctive relief
6 by this Court, Defendants are likely to continue to injure
7 consumers and harm the public interest.

8 **THIS COURT'S POWER TO GRANT RELIEF**

9 1. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
10 empowers the Court to grant injunctive and other equitable
11 ancillary relief, including consumer redress, disgorgement, and
12 restitution, to prevent and remedy violations of any provision of
13 law enforced by the Commission.

14 2. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes
15 this Court to award such relief as is necessary to redress the
16 injury to consumers or others resulting from Defendants'
17 violations of the Mail or Telephone Order Merchandise Rule,
18 including the rescission and reformation of contracts and the
19 refund of monies.

20 3. The Court, in the exercise of its equitable
21 jurisdiction, may award other ancillary relief to remedy injury
22 caused by Defendants' violations.

23 **PRAYER FOR RELIEF**

24 Wherefore, Plaintiff requests that this Court, as authorized
25 by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and
26 57b, and pursuant to its own equitable powers:
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1 1. Permanently enjoin Defendants from violating the FTC Act
2 and the Mail or Telephone Order Merchandise Rule, as alleged
3 herein;

4 2. Award such relief as the Court finds necessary to
5 redress injury to consumers resulting from Defendants' violations
6 of the FTC Act and the Mail or Telephone Order Merchandise Rule,
7 including, but not limited to, rescission of contracts, the refund
8 of monies paid, and the disgorgement of ill-gotten monies; and

9 3. Award Plaintiff the costs of bringing this action, as
10 well as such other and additional equitable relief as the Court
11 may determine to be just and proper.

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13 DATE: _____

Respectfully submitted,

14 DEBRA A. VALENTINE
15 General Counsel

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17 John D. Jacobs
18 Attorneys for Plaintiff