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10 Attorneys for Plaintiff
11 United States of America

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 E-BABYLON, INC.,
19 a corporation,
20 MICHAEL ZAYA,
21 individually and as an
22 officer of the corporation,
23 and
24 AIDIN YOUSIF,
25 individually and as an
26 officer of the corporation,
27 Defendants.

02-0 6561 DT (3425x)

Civil Action No. _____

CONSENT DECREE AND
ORDER FOR INJUNCTIVE
RELIEF, CIVIL PENALTIES,
AND OTHER RELIEF

26 WHEREAS plaintiff, the United States of America, has
27 commenced this action by filing the Complaint herein; defendants

28 Consent Decree, Page 1 of 24

Docketed
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2002
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

3

1 provided further, that in any advertisement
2 disseminated by means of an interactive electronic
3 medium such as software, the Internet, or online
4 services, a disclosure made through the use of a
5 hyperlink will not be deemed "clear and conspicuous"
6 unless the hyperlink itself is clear and conspicuous,
7 is clearly identified as a hyperlink, is labeled to
8 convey the nature and relevance of the information it
9 leads to, is on the same Web page, online service page,
10 or other electronic page and proximate to the
11 triggering representation, and takes the consumer
12 directly to the disclosure on the click-through
13 electronic page or other display window or panel. The
14 audio disclosure must be delivered in a volume and
15 cadence sufficient for an ordinary consumer to hear and
16 comprehend it. The visual disclosure must be of a size
17 and shade, and shall appear on the screen for a
18 duration, sufficient for an ordinary consumer to read
19 and comprehend it; and

20 b. In a print advertisement or any print promotional
21 or marketing material, the disclosure shall be in a
22 type size and location sufficiently noticeable for an
23 ordinary consumer to read and comprehend it, and in
24 print that contrasts with the background against which
25 it appears.

1 The disclosure must be in understandable language and syntax.
2 Nothing contrary to, inconsistent with, or in mitigation of the
3 disclosure shall be used in any advertisement, promotional or
4 marketing material.

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

11 5. "Eligible person" means each consumer who:

12 a.

- 13 i. Purchased, from January 1, 2001 until the
14 date of entry of this Consent Decree, any
15 product that was subject to a 'money-back
16 guarantee' or other refund offer; and
17 ii. Contacted defendants, after receiving the
18 product, for the purposes of taking advantage
19 of any such 'money-back guarantee' or other
20 refund offer, but did not receive a refund;

21 or

22 b. Purchased, but did not receive, any product from
23 defendants.

24 6. "Commerce" means that term as defined in Section 4 of
25 the Federal Trade Commission Act, 15 U.S.C. § 44.

INJUNCTION

1
2 7. Defendant E-Babylon, Inc., its successors and assigns,
3 and defendants Michael Zaya and Aidin Yousif, and all persons in
4 active concert or participation with any one or more of them who
5 receive actual notice of this Consent Decree by personal service
6 or otherwise, in connection with the manufacturing, labeling,
7 advertising, promoting, offering for sale, sale, or distribution
8 of inkjet printer cartridges or other computer-related product,
9 in or affecting commerce, are hereby enjoined from making any
10 representation, in any manner, expressly or by implication, that
11 such product is a new, brand-name product, unless the
12 representation is true.

13 8. Defendant E-Babylon, Inc., its successors and assigns,
14 and defendants Michael Zaya and Aidin Yousif, and all persons in
15 active concert or participation with any one or more of them who
16 receive actual notice of this Consent Decree by personal service
17 or otherwise, in connection with the manufacturing, labeling,
18 advertising, promoting, offering for sale, sale, or distribution
19 of any product, in or affecting commerce, are hereby enjoined
20 from misrepresenting, by act or omission, any guarantee of
21 satisfaction or refund offer in connection with the promotion,
22 advertising, offering for sale, sale or distribution of any
23 product.

24 9. Defendant E-Babylon, Inc., its successors and assigns,
25 and defendants Michael Zaya and Aidin Yousif, and all persons in
26 active concert or participation with any one or more of them who

1 receive actual notice of this Consent Decree by personal service
2 or otherwise, in connection with the manufacturing, labeling,
3 advertising, promoting, offering for sale, sale, or distribution
4 of any product, in or affecting commerce, are hereby enjoined
5 from offering any money-back guarantee or other refund offer
6 unless:

- 7 a. They provide, within twenty-four hours of
8 receiving a request from a purchaser of any product,
9 all information necessary for the purchaser to return
10 the product for the purposes of obtaining a refund; and
11 b. They provide the full refund of the purchase price
12 of a product, as well as any shipping, insurance,
13 handling charges, or any other fee or charge paid by
14 the consumer, within seven (7) business days of the
15 defendant's receipt of the returned product and the
16 consumer's request for a refund pursuant to any
17 guarantee of satisfaction or refund offer made by
18 defendants; provided, however, that defendants may
19 exclude shipping, insurance, handling charges, or any
20 other fee or charge paid by the consumer from the terms
21 of any guarantee of satisfaction or refund offer if
22 such exclusion is clear, conspicuous, and in close
23 proximity to the guarantee of satisfaction or refund
24 offer.

25 10. Defendant E-Babylon, Inc., its successors and assigns,
26 and defendants Michael Zaya and Aidin Yousif, and all persons in
27

1 active concert or participation with any one or more of them who
2 receive actual notice of this Consent Decree by personal service
3 or otherwise, are hereby enjoined from violating, directly or
4 through any corporation, subsidiary, division or other device,
5 any provision of the Mail Order Rule, including but not limited
6 to:

7 a. Soliciting orders for the sale of merchandise by
8 mail, telephone, facsimile or Internet unless they have
9 a reasonable basis to expect that they can ship such
10 merchandise within the time stated in the solicitation
11 or, if no time is stated clearly and conspicuously in
12 the solicitation, within thirty (30) days after receipt
13 of a properly completed order, as required by 16 C.F.R.
14 § 435.1(a)(1);

15 b. failing to offer to the buyer, clearly and
16 conspicuously and without prior demand, an option
17 either to consent to a delay in shipping or to cancel
18 the order and receive a prompt refund, as required by
19 16 C.F.R. § 435.1(b)(1);

20 c. failing, within a reasonable time after first
21 becoming aware of their inability to ship in the time
22 set forth in Section 435.1(a)(1) of the Mail Order
23 Rule, and in no event later than that time, to offer
24 the buyer an option either to a delay in shipping or to
25 cancel the order and receive a prompt refund, as
26 required by 16 C.F.R. § 435.1(b)(1); and

1 d. failing to deem an order canceled and to make a
2 prompt refund, as "refund" and "prompt refund" are
3 defined in Sections 435.2(e)-(f) of the Mail Order
4 Rule, to buyers who are entitled to such refunds under
5 16 C.F.R. § 435.1(c).

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

9 **CONSUMER REDRESS**

10 12. Defendant E-Babylon, Inc., its successors and assigns,
11 and defendants Michael Zaya and Aidin Yousif shall, in accordance
12 with this Paragraph, provide refunds to eligible persons who are
13 entitled to such refunds.

14 a. Within ten (10) days of the date of entry of this
15 Consent Decree, defendants shall provide, via email, to
16 each eligible person described in Definition 5(a), all
17 information necessary for the eligible person to return
18 the product for a refund.

19 b. Within seven (7) days of the receipt of the
20 returned product from each eligible person described in
21 Definition 5(a), defendants shall reimburse such
22 eligible person by either:

23 i. Mailing a refund check for the relevant
24 amount; or

25 ii. Crediting the relevant amount to the eligible
26 person's credit or debit card account.

1 c. Within seven (7) days of the date of entry of this
2 Consent Decree, defendants shall reimburse each
3 eligible person described in Definition 5(b) by either:

4 i. Mailing a refund check for the relevant
5 amount; or

6 ii. Crediting the relevant amount to the eligible
7 person's credit or debit card account.

8 d. For a period of sixty (60) days from the date of
9 entry of this Consent Decree, defendants shall comply
10 with the procedures set out in Paragraphs 12 (a-c) of
11 this Consent Decree with regard to each eligible person
12 who was not appropriately reimbursed and who contacts
13 defendants or the Commission in any manner.

14 **CIVIL PENALTY**

15 13. Defendant E-Babylon, Inc., its successors and assigns,
16 and defendants Michael Zaya and Aidin Yousif shall pay to
17 plaintiff a civil penalty, pursuant to section 5(m)(1)(A) of the
18 Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the
19 amount of forty thousand dollars (\$40,000). Defendants are
20 jointly and severally liable for payment of the civil penalty.

21 14. Defendants shall make the payment required by Paragraph
22 13 within five (5) days of the date of entry of this Consent
23 Decree in accordance with the instructions provided by the Office
24 of Consumer Litigation, Civil Division, U.S. Department of
25 Justice, Washington, D.C. 20530, for appropriate disposition.

26 15. In the event of any default in payment, which default

1 continues for ten (10) days beyond the due date of payment, the
2 entire unpaid penalty, together with interest, as computed
3 pursuant to 28 U.S.C. § 1961, from the date of default to the
4 date of payment, shall immediately become due and payable.

5 COMPLIANCE

6 16. Defendant E-Babylon, Inc., its successors and assigns,
7 and defendants Michael Zaya and Aidin Yousif, shall, for five (5)
8 years after the last date of dissemination of any representation
9 covered by this Consent Decree, maintain and upon request make
10 available to the Federal Trade Commission for inspection and
11 copying:

- 12 a. All advertisements and promotional materials
13 containing the representation;
- 14 b. All materials that were relied upon in
15 disseminating the representation; and
- 16 c. All tests, reports, studies, surveys,
17 demonstrations, or other evidence in their possession
18 or control that contradict, qualify, or call into
19 question the representation, or the basis relied upon
20 for the representation, including complaints and other
21 communications with consumers or with governmental or
22 consumer protection organizations.

23 17. Defendant E-Babylon, Inc., shall deliver a copy of this
24 Consent Decree to all current and future principals, officers,
25 and directors, and to all current and future managers, employees,
26 agents, and representatives having responsibilities with respect

1 to the subject matter of this Consent Decree, and shall secure
2 from each such person a signed and dated statement acknowledging
3 receipt of the Consent Decree. Defendant shall deliver this
4 order to current personnel within thirty (30) days after the date
5 of service of this order, and to future personnel within thirty
6 (30) days after the person assumes such position or
7 responsibilities.

8 18. Defendant E-Babylon, Inc., shall deliver a copy of the
9 Business Guide to the Federal Trade Commission's Mail or
10 Telephone Order Merchandise Rule (Jan. 1995) ("Business Guide")
11 to all current principals, officers, directors, managers,
12 employees, agents, and representatives who are engaged in
13 defendants' mail, telephone, facsimile or Internet order sales
14 business, and shall secure from each such person a signed and
15 dated statement acknowledging receipt of the Business Guide.
16 Defendant shall deliver the Business Guide to current personnel
17 within thirty (30) days after the date of service of this order,
18 and to future personnel within thirty (30) days after the person
19 assumes such position or responsibilities.

20 19. For a period of five (5) years from the date of entry
21 of this Consent Decree, defendant E-Babylon, Inc., its successors
22 and assigns, and defendants Michael Zaya and Aidin Yousif, shall
23 maintain and make available to the Federal Trade Commission,
24 within fourteen (14) business days of the date of receipt of a
25 written request, business records demonstrating compliance with
26 the terms and provisions of this Consent Decree.

1 20. For a period of twenty (20) years from the date of
2 entry of this Consent Decree, defendant E-Babylon, Inc., its
3 successors and assigns, shall notify the Regional Director,
4 Western Region, Federal Trade Commission, 901 Market Street, San
5 Francisco, CA 94103, at least thirty (30) days prior to any
6 merger, incorporation, dissolution, assignment, sale resulting in
7 the emergence of a successor corporation, creation or dissolution
8 of a subsidiary or parent, or any other changes in the corporate
9 status which may affect its obligations under this Consent
10 Decree; **provided, however,** that with respect to any proposed
11 change in the corporation about which E-Babylon, Inc., learns
12 less than thirty (30) days prior to the date such action is to
13 take place, defendant shall notify the Commission's Regional
14 Director, Western Region, as soon as practicable after obtaining
15 such knowledge.

16 21. For a period of three (3) years from the date of entry
17 of this Consent Decree, each individual defendant shall notify
18 the Regional Director, Western Region, Federal Trade Commission,
19 901 Market Street, San Francisco, CA 94103 within thirty (30)
20 days of any change in his affiliation with, or change in his
21 active participation in the sale or distribution of merchandise
22 covered by this Consent Decree; **provided, however,** that with
23 respect to any change in his affiliation or participation, as
24 aforesaid, about which any individual defendant learns less than
25 thirty (30) days prior to the date such action is to take place,
26 the defendant shall notify the Commission's Regional Director,

1 Western Region, as soon as practicable after obtaining such
2 knowledge.

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

9 a. a specimen copy of each delay option notice used
10 to comply with any provision of the Mail Order Rule,
11 and a statement setting forth in detail the procedures
12 in place for providing such notices;

13 b. a specimen copy of each advertisement or
14 telemarketing script containing a shipping or delivery
15 representation;

16 c. a statement setting forth in detail the basis for
17 claiming that defendants will be able to ship
18 merchandise:

19 i. within the time stated in any advertisement
20 or representation to the buyer before or at
21 the time of sale; or

22 ii. Within thirty (30) days, where no time is
23 stated clearly and conspicuously in any
24 advertisement or is made to the buyer before
25 or at the time of sale;

26 d. a statement setting forth in detail defendants'
27

1 procedures for providing prompt refunds pursuant to the
2 Mail Order Rule;

3 e. a statement setting forth in detail the manner in
4 which defendants determined the identities of all
5 eligible persons;

6 f. a specimen copy of each email message used to
7 comply with Provision 12.a of this Consent Decree;

8 g. a list of all eligible persons who were contacted
9 under Provision 12.b of this Consent Decree, all
10 correspondence between defendants and such eligible
11 persons, and the amount of and date of any refund paid
12 to each eligible person; and

13 h. a list of all eligible persons for whom defendants
14 provided a refund under Provision 12.c of this Consent
15 Decree, and the amount and date of each such refund.

16 Defendants shall mail this written report to: Regional Director,
17 Western Region, Federal Trade Commission, 901 Market Street, San
18 Francisco, CA 94103.

19 23. Defendants are hereby required, in accordance with 31
20 U.S.C. § 7701, to furnish to the Federal Trade Commission their
21 taxpayer identifying number (social security number or employer
22 identification number), which shall be used for purposes of
23 collecting and reporting on any delinquent amount arising out of
24 this Consent Decree.

1
2 24. This Court shall retain jurisdiction of this matter for
3 the purposes of enabling any of the parties to this Consent
4 Decree to apply to the Court at any time for such further orders
5 or directives as may be necessary or appropriate for the
6 interpretation or modification of this Consent Decree, for the
7 enforcement of compliance therewith, or for the punishment of
8 violations thereof.

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

12 Dated this 22 day of July, 2002.

13
14 **DICKRAN TEVRIZIAN**

15 UNITED STATES DISTRICT JUDGE

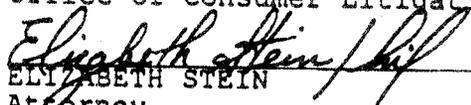
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17 The parties, by their respective counsel, hereby consent to
18 the terms and conditions of the Consent Decree as set forth above
19 and consent to the entry thereof. Defendants waive any rights
20 that may arise under the Equal Access to Justice Act, 28 U.S.C.
21 § 2412, concerning the investigation and prosecution of this
22 action.

23 FOR THE UNITED STATES OF AMERICA:

24 ROBERT D. MCCALLUM, JR.
25 Assistant Attorney General
26 Civil Division
27 U.S. Department of Justice

1 DEBRA W. YANG
2 United States Attorney
3 Central District of California
4 LEON W. WEIDMAN
5 Assistant United States Attorney
6 Chief, Civil Division

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16 EUGENE THIROLF
17 Director
18 Office of Consumer Litigation
19 
20 ELIZABETH STEIN
21 Attorney
22 Office of Consumer Litigation
23 Civil Division
24 U.S. Department of Justice
25 Washington, D.C. 20530
26 (202) 307-0486

27 FOR THE FEDERAL TRADE COMMISSION:

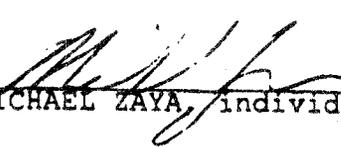
18 
19 JEFFREY KLURFELD
20 Regional Director
21 Western Region
22 Federal Trade Commission

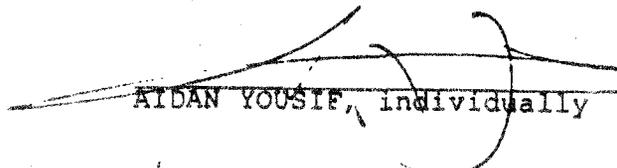
23 
24 MATTHEW D. GOLD
25 LINDA K. BADGER
26 Attorneys
27 Western Region
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 848-5100
(415) 848-5142 (fax)

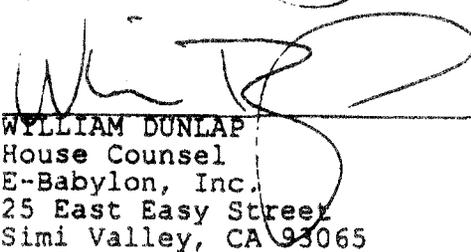
1 FOR THE DEFENDANTS:

2 E-BABYLON, INC.

3
4 
5 MICHAEL ZAYA
6 President

7
8 
9 MICHAEL ZAYA, individually

10
11 ~~~~
12 AIDAN YOUSIF, individually

13
14 
15 WILLIAM DUNLAP
16 House Counsel
17 E-Babylon, Inc.
18 25 East Easy Street
19 Simi Valley, CA 93065
20 (805) 581-0900
21 (805) 583-3001 (fax)

22 Attorney for Defendants
23
24
25
26
27

APPENDIX A

FEDERAL TRADE COMMISSION RULE CONCERNING
MAIL OR TELEPHONE ORDER MERCHANDISE

16 C.F.R. PART 435

Federal Trade Commission

§ 435.1

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. 18, 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 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

Appendix A

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

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

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

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

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

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

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

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

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

revised shipping date: 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.

(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 the solicitation in question forms an insubstantial part.

(58 FR 49121, Sept. 21, 1993, as amended at 60 FR 66950, 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 provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

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

§ 436.4 Effective date of the rule.

The original rule, which became effective 100 days after its promulgation on October 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: 38 Stat. 717, as amended, 15 U.S.C. 41-58.

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

§ 436.1 The Rule.

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

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":

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

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

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

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

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

CERTIFICATE OF CORPORATE RESOLUTION

I, Peter Babilo, the undersigned Secretary of E-Babylon, Inc., a California corporation with its office and principal place of business located at 25 East Easy Street, Simi Valley, CA 93065, do hereby certify that a meeting of the Board of Directors of said corporation was duly held on the Seventh day of June, 2002, a quorum being present, and that the following resolution was adopted, and is now in full force and effect, to wit:

RESOLVED, that the Consent Decree proposed to be entered in United States of America v. E-Babylon, Inc., *et al.*, in the District Court for the Central District of California, in the form and upon the terms and conditions consented to on behalf of this corporation by Michael Zaya, President and Chief Executive Officer, which provides for, among other things, a civil penalty in the amount of \$40,000, hereby is, in all respects, ratified, confirmed and approved.

IN WITNESS WHEREOF, I have hereunto subscribed my name on this Seventh day of June, 2002.



Peter Babilo
Secretary
E-Babylon, Inc.
25 East Easy Street
Simi Valley, CA 93065.

[Corporate Seal]

REASONS FOR SETTLEMENT

This statement accompanies the Consent Decree executed by defendants E-Babylon, Inc., Michael Zaya, and Aidin Yousif, in settlement of an action brought to recover penalties and other equitable relief from the defendants for engaging in acts or practices in violation of the Commission's Mail or Telephone Order Merchandise Rule (the "Rule"), 16 C.F.R. Part 435.

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 and injunction:

On the basis of the allegations contained in the attached Complaint, the Commission believes that the payment of \$40,000 in civil penalties by the defendants constitutes an appropriate amount upon which to base a settlement. The amount should assure compliance with the law by defendants and by others who engage in practices covered by the Rule. Further, defendants are permanently enjoined from engaging in acts or practices that are prohibited by the Rule. With the entry of such Consent Decree the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by entry of the attached Consent Decree with E-Babylon, Inc., Michael Zaya, and Aidin Yousif is justified and well within the public interest.