

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
Atlanta Division

APR 23 2003

LUTHER D. THOMAS, Clerk
By: *ah*
Deputy Clerk

_____)
FEDERAL TRADE COMMISSION,)
)
Plaintiff,)
)
v.)
)
MORGAN ENGLE,)
)
Defendant.)
_____)

Case No.

1:03-CV-1072

JEC

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission"), for its complaint alleges:

1. The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, to secure preliminary and permanent injunctive relief, rescission of contracts, restitution, disgorgement, and other equitable relief for Defendant's violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's "Mail or Telephone Order Merchandise Rule", 16 C.F.R. Part 435.

JURISDICTION AND VENUE

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

3. Venue in the United States District Court for the Northern District of Georgia is proper under 28 U.S.C. § 1391(b), and 15 U.S.C. § 53(b).

PLAINTIFF

4. Plaintiff, FTC, is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 et seq. The FTC is charged, inter alia, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, as well as enforcement of the Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435. The FTC is authorized to initiate federal district court proceedings to enjoin violations of the FTC Act in order to secure such equitable relief as may be appropriate in each case, and to obtain consumer redress. 15 U.S.C. §§ 53(b) and 57b.

DEFENDANT

5. Defendant Morgan Engle ("Engle"), an individual, conducts business from his residential address of 1211 Crestwood, Atlanta, Georgia 30316. Defendant Engle offers laptop computers and musical equipment for sale over the Internet, including Internet auction web sites. At all times material to this complaint, acting alone or in concert with others, Defendant Engle has formulated, directed, controlled, or participated in the deceptive acts and practices set forth in this complaint.

Defendant Engle transacts or has transacted business in the Northern District of Georgia.

COMMERCE

6. At all times material to this complaint, Defendant Engle has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANT'S BUSINESS ACTIVITIES

7. Since at least 2001, Defendant Engle has offered laptop computers and musical equipment for sale over the Internet and at Internet web sites.

8. An Internet auction web site is an online forum that facilitates communications between would-be buyers and sellers of merchandise. Sellers use the Internet auction web site to advertise the merchandise they seek to sell. Auctions are conducted on the Internet auction web site with would-be buyers sending bids through electronic mail to the web site. Buyers "win" by submitting the highest bid before the auction concludes. At the conclusion of the auction, buyers and sellers typically communicate with each other via electronic mail about the terms of payment and delivery. Once the terms are agreed upon, the buyer sends the payment to the seller, usually in the form of a personal check or money order, and the seller ships the merchandise to the buyer.

9. In addition to offering merchandise via Internet auction web sites, Defendant Engle goes outside the Internet auction process to personally contact consumers who bid on his merchandise, via electronic mail, and negotiates with those consumers on an agreed price for the merchandise he offers.

10. Defendant Engle accepts payment from consumers who have successfully bid for the merchandise he offers for sale on Internet auction web sites and consumers he contacts via electronic mail to negotiate a price for his merchandise. Thus far, consumers have each paid between \$300 and \$2,045 to Defendant Engle for the merchandise they have ordered from him.

11. In numerous instances, after receiving payment from auction winners or consumers who otherwise agreed to purchase his merchandise, Defendant Engle fails to provide the offered merchandise. Further, in numerous instances, Defendant Engle tells consumers that the merchandise is being shipped, when, in fact, it is not.

12. Consumers are forced to e-mail Defendant Engle many times, inquiring as to the whereabouts of their ordered laptops or musical equipment and often demanding a refund. In numerous instances, after promising to refund consumers' money, Defendant Engle fails to promptly do so, or provides consumers with checks that are returned for insufficient funds, or provides a refund

only after the consumer has filed a complaint against Defendant Engle with a governmental agency or the Better Business Bureau.

13. Defendant Engle has defrauded numerous consumers, causing thousands of dollars in consumer injury.

VIOLATION OF SECTION 5 OF THE FTC ACT

COUNT I

14. In the course of offering laptop computers or musical equipment for sale via the Internet, including Internet auction web sites, Defendant Engle represents, expressly or by implication, that the consumers who submit the highest bids for or otherwise agree to purchase his merchandise and send him the agreed-upon payment will receive the offered merchandise.

15. In truth and in fact, in numerous instances, the consumers who submit the highest bids for or otherwise agree to purchase Defendant Engle's merchandise and send him the agreed-upon payment do not receive the offered merchandise.

16. Therefore, Defendant's representation set forth in Paragraph 14 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE MAIL OR TELEPHONE ORDER MERCHANDISE RULE

17. The FTC promulgated the Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435, on October 22, 1975 ("the

Rule"), and revised the Rule on September 21, 1993. The revised Rule became effective on March 1, 1994, and has remained in full force and effect since that time.

18. The Rule applies to sales in which the buyer has ordered merchandise from the seller by mail or directly or indirectly by telephone, such as by fax machines and computers.

16 C.F.R. §§ 435.1 and 435.2 (a) and (b).

19. The Rule prohibits a seller from soliciting any order for the sale of merchandise to be ordered by the buyer through the mail or 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 within the time stated on the solicitation, or, if no time is stated, within thirty days of the completion of the order. 16 C.F.R. § 435.1(a)(1).

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

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

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

VIOLATIONS OF THE MAIL OR TELEPHONE ORDER MERCHANDISE RULE

COUNT II

23. In numerous instances, Defendant Engle has solicited orders for the sale of merchandise to be ordered by the buyer indirectly through the telephone or the Internet without a reasonable basis to expect that he will be able to ship any ordered merchandise to the buyer within the time stated in the solicitation, or, if no time was clearly and conspicuously stated, within thirty days of receipt of a properly completed order, thereby violating 16 C.F.R. § 435.1(a)(1).

COUNT III

24. In numerous instances, after soliciting orders for the sale of merchandise ordered by the buyer indirectly through the

telephone and being unable to ship merchandise within the applicable time as set out in Section 435.1(a)(1) of the Rule, Defendant Engle has violated the Rule by 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, thereby violating 16 C.F.R. § 435.1(b)(1).

COUNT IV

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

CONSUMER INJURY

26. Consumers in many areas of the United States have suffered substantial monetary loss as a result of Defendant's unlawful acts or practices. These consumers have each paid between \$300.00 and \$2045.00 to Defendant Engle for laptop computers or musical equipment that they never received. Absent injunctive relief by this Court, Defendant Engle is likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

27. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary

relief, including redress, disgorgement and restitution, to prevent and remedy any violations of any provision of law enforced by the FTC.

28. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes the Court to grant such relief as the Court finds necessary to redress injury to consumers or other persons resulting from Defendant's violations of the Mail or Telephone Order Merchandise Rule.

29. This Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by Defendant Engle's law violations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FTC requests that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and pursuant to its own equitable powers:

1. Award the Commission all temporary and preliminary injunctive and ancillary relief, including, but not limited to, an order freezing Defendant Engle's assets, that may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief;

2. Permanently enjoin Defendant Engle from violating the FTC Act and the Mail or Telephone Order Merchandise Rule as alleged herein;

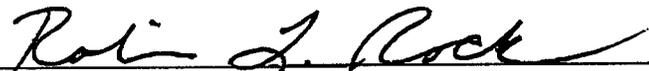
3. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendant Engle's violations of the FTC Act and the Mail or Telephone Order Merchandise Rule, including but not limited to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten monies; and

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

Respectfully submitted,

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