

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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APR 15 2003

MICHAEL W. ...
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

JAMES D. THOMPSON and
SUSAN B. GERMEK,

Defendants.

Case No.

03C 2541

JUDGE LINDBERG

MAGISTRATE JUDGE DENLOW

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission") for its Complaint alleges as follows:

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" (the "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 Illinois 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.

DEFENDANTS

5. At all times material to this Complaint, acting alone or in concert with others, Defendant James D. Thompson (“Thompson”) has formulated, directed, controlled, or participated in the deceptive acts and practices set forth in this Complaint. Thompson transacts or has transacted business in the Northern District of Illinois and throughout the United States.

6. Acting alone or in concert with others, Defendant Susan B. Germek (“Germek”) has formulated, directed, controlled, or participated in deceptive acts and practices set forth in this Complaint. Germek transacts or has transacted business in the Northern District of Illinois and throughout the United States.

COMMERCE

7. At all times material to this Complaint, Defendants have 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.

DEFENDANTS' BUSINESS ACTIVITIES

8. Since at least early 1999, Thompson has opened multiple accounts on Internet auction Web sites to sell merchandise. Beginning in or around August 2002, Germek assisted Thompson in opening additional Internet auction accounts. Many of these accounts have been opened using personal information of third parties – including name, address and, in some cases, credit card information – without those third parties' authorization or knowledge. Defendants have also opened bank accounts and postal mail boxes for use in conjunction with their Internet auction transactions using personal information of third parties without their authorization.

9. 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.

10. Defendants have offered various merchandise for sale on Internet auction Web sites, including computer equipment and software, electronics equipment, purses and die-cast cars.

11. Defendants have accepted payment from consumers who have successfully bid for the merchandise they offered for sale on Internet auction Web sites.

12. In numerous instances, after receiving payment from the auction winner, Defendants have failed to provide the offered merchandise. Further, in numerous instances, Defendants have failed to inform consumers that the merchandise they paid for will not be delivered on time, if at all, and have failed to offer them a refund.

13. Defendants have defrauded numerous consumers, causing tens of thousands of dollars in consumer injury. Moreover, third parties whose personal information was misappropriated by Defendants for use in conjunction with this scheme have suffered injury. For example, some of these third parties have been wrongly accused of defrauding consumers, some have had unauthorized charges placed on their credit cards and others have had to spend considerable time undoing the actions taken with their misappropriated identities.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

COUNT I

14. In the course of offering merchandise for sale via Internet auction web sites, Defendants have represented, expressly or by implication, that the consumers who submit the highest bids for their merchandise and send them the agreed-upon payment will receive the offered merchandise.

15. In truth and in fact, in numerous instances, consumers who submit the highest bids for Defendants' merchandise and send them the agreed-upon payment do not receive the offered merchandise.

16. Therefore, Defendants' representations set forth in Paragraph 14 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

17. Defendants have opened accounts in consumers' names, without their authorization, at Internet auction web sites and used those accounts to conduct Internet auction transactions.

18. Defendants' practice set forth in Paragraph 17 causes or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and that is not reasonably avoidable by consumers.

19. Defendants' practice, as alleged in Paragraph 17, is unfair and violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE MAIL OR TELEPHONE ORDER MERCHANDISE RULE

20. 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.

21. 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).

22. 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).

23. 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).

24. 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).

25. 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 III

26. In numerous instances, Defendants have solicited orders for the sale of merchandise to be ordered by the buyer indirectly through the telephone without a reasonable basis to expect that they 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 IV

27. 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, Defendants have 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 V

28. In a numerous instances, Defendants have 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

29. Consumers throughout the United States have suffered substantial monetary loss and other injury as a result of Defendants' unlawful acts or practices. Absent injunctive relief by this Court, Defendants may continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

30. 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.

31. 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 Defendants' violations of the Mail or Telephone Order Merchandise Rule.

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff 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 Plaintiff such temporary and preliminary injunctive and ancillary relief as 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, including, but not limited to, temporary and preliminary injunctions and an order freezing Defendants' assets;

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

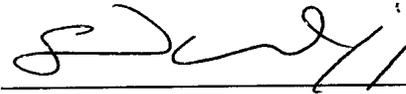
3. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the Mail or Telephone Order Merchandise Rule, including but not limited to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten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

Dated: April 15, 2003

Respectfully submitted,

William E. Kovacic
General Counsel

A handwritten signature in black ink, appearing to read 'S. Wernikoff', written over a horizontal line.

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