

1 JOHN D. JACOBS
Cal. Bar No. 134154
2 BARBARA Y.K. CHUN
Cal. Bar No. 186907
3 Federal Trade Commission
10877 Wilshire Blvd., Ste. 700
4 Los Angeles, CA 90024
(310) 824-4360 (Jacobs); -4312 (Chun)
5 (310) 824-4380 (fax)
6 Attorneys For Plaintiff
Federal Trade Commission
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 _____) Case No. 00CV 2125-L(JFS)
11 FEDERAL TRADE COMMISSION,)
12 Plaintiff,)
13 v.)
14 AUCTIONSAVER, LLC;)
15 RICHARD PHIM;)
16 CARMAN LEE CALDWELL;)
17 SHADE DELMER;)
18 aka SHANE DELMER; and)
19 NAOMI RUTH ANDERSON,)
20 Defendants.)
21)
22)
23)
24)
25)
26)
27)
28)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR ENTRY OF DEFAULT
JUDGMENT AGAINST DEFENDANTS
AUCTIONSAVER, LLC, SHADE DELMER,
aka SHANE DELMER, AND NAOMI RUTH
ANDERSON; DECLARATIONS OF JOHN
D. JACOBS, WADE DUDLEY AND ANN
STAHL IN SUPPORT
Date: February 25, 2002
Time: 10:30 am
Ctrm: 11, 2d Fl.
Judge: Lorenz

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. HISTORY OF THE CASE 1

III. THE COURT SHOULD ENTER THE PROPOSED JUDGMENT 3

 A. Entry of Default By the Clerk Was Proper 3

 B. Entry of Default Judgment By this Court is Warranted 4

 1. The Court Is Authorized to Enter a
 Default Judgment 4

 2. A Default Judgment is Warranted In This Case 4

 C. The Order Proposed by Plaintiff Should Be Entered 15

 1. The Proposed Monetary Relief is Reasonable 15

 2. The Proposed Order for Permanent Injunction is
 Reasonable 16

 D. Defendants Are Not Exempted from Default Judgment 17

IV. CONCLUSION 17

1 **I. PRELIMINARY STATEMENT**

2 Plaintiff Federal Trade Commission ("FTC" or "Commission")
3 seeks judgment after default against Defendants Auctionsaver, LLC
4 ("Auctionsaver"), Shade Delmer, aka Shane Delmer, and Naomi Ruth
5 Anderson, including a permanent injunction and restitution in the
6 amount of \$77,045.32, or as the Court finds necessary to redress
7 injury to consumers resulting from Defendants' violations.

8 A default judgment is the most appropriate resolution of the
9 FTC's suit against these Defendants. They have not and will not
10 defend against the FTC's charges. Continued litigation of the
11 FTC's charges against these Defendants would be fruitless.

12 Further, the proposed default judgment is justified. The
13 evidence establishes that Defendants violated Section 5(a) of the
14 Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and
15 the FTC's Trade Regulation Rule entitled "Mail or Telephone Order
16 Merchandise Rule" (or "Rule"), 16 C.F.R. Part 435. A permanent
17 injunction and restitution of \$77,045.32 are necessary and
18 appropriate relief for these violations.

19 **II. HISTORY OF THE CASE**

20 The FTC filed its Complaint on October 20, 2000, alleging
21 that the Defendants had violated Section 5(a) of the FTC Act, 15
22 U.S.C. § 45(a), and the FTC's Mail or Telephone Order Merchandise
23 Rule. The Complaint seeks permanent injunctive relief and other
24 equitable relief with respect to the Defendants' violations, as
25 authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C.
26 §§ 53(b), 57b. The alleged violations include misrepresenting
27 that consumers who offered the highest bids and sent Defendants
28 the agreed-upon payment for the computer-related products pursuant

1 to those bids would receive the promised merchandise; soliciting
2 orders for the sale of merchandise to be ordered by the buyer
3 indirectly through the telephone without a reasonable basis to
4 expect that Defendants would be able to ship the ordered
5 merchandise to the buyer within the time stated in the
6 solicitation, or if no time was clearly and conspicuously stated,
7 within thirty days of receipt of a properly completed order;
8 failing to offer to the buyer, clearly and conspicuously and
9 without prior demand, an option either to consent to a delay in
10 shipping or to cancel the order and receive a prompt refund; and
11 failing to make a "prompt refund," as defined in 16 C.F.R.
12 § 435.2(f), when such refunds were required.

13 The Summons and Complaint have been served on these three
14 Defendants, as shown by the returns of service and Plaintiff's
15 November 21, 2001 Request for Entry of Default by Clerk Against
16 Defendants Richard Phim; Carman Lee Caldwell; Shade Delmer, aka
17 Shane Delmer; and Naomi Ruth Anderson.

18 On November 9, 2000, the Summons and Complaint were served on
19 Auctionsaver pursuant to Federal Rule of Civil Procedure 4(h)(1)
20 by personal delivery of a copy of the Summons and Complaint to its
21 registered agent, Ned Lynch.

22 Service of the Summons and Complaint on Shade Delmer, aka
23 Shane Delmer, was effected by mailing a copy of the Summons and
24 Complaint to Defendant Delmer by certified U.S. Mail on January
25 31, 2001, in accordance with 15 U.S.C. § 53(c)(3), and also by
26 leaving a copy of the Summons and Complaint at his residence on
27 February 16, 2001, as authorized by 15 U.S.C. § 53(c)(2).

28

1 On February 16, 2001, the Summons and Complaint were served
2 on Naomi Ruth Anderson by personal delivery pursuant to Federal
3 Rule of Civil Procedure 4(e)(2).

4 None of the Defendants has filed or served an answer or any
5 other pleading responsive to the Complaint. See Jacobs Decl. at
6 ¶ 2. The twenty-day time limit for each Defendant to answer or
7 file a responsive pleading expired more than nine months ago.

8 On January 8, 2001, Plaintiff filed a Request for Entry of
9 Default by Clerk Against Defendant Auctionsaver. On January 9,
10 2001, the Clerk entered default against Defendant Auctionsaver.

11 On November 21, 2001, Plaintiff filed a Request for Entry of
12 Default By Clerk Against Defendants Richard Phim; Carman Lee
13 Caldwell; Shade Delmer, aka Shane Delmer; and Naomi Ruth Anderson,
14 for failure to answer within the required time. The Clerk of the
15 Court entered defaults against these Defendants on November 28 and
16 November 29, 2001.¹

17 **III. THE COURT SHOULD ENTER THE PROPOSED JUDGMENT**

18 **A. Entry of Default By the Clerk Was Proper**

19 The Clerk of the Court properly entered default against all
20 Defendants. Pursuant to Federal Rule of Civil Procedure 55(a),
21

22 ¹Plaintiff is not seeking default judgments against
23 Defendants Phim and Caldwell at this time as settlement appears
24 imminent with these two defendants. Plaintiff's counsel has
25 reached an agreement in principle with them as to the terms of a
26 proposed settlement and has just received their signatures on a
27 proposed stipulated final judgment. After the holidays,
28 Plaintiff's counsel will draft and forward a recommendation to the
Commission that the proposed judgment be accepted as settlement of
all charges against these two defendants. If the recommendation
is approved, Plaintiff's counsel will then sign the stipulation
and lodge it with the Court. Plaintiff's counsel anticipates that
the Commission will vote on the proposed settlement within
approximately six weeks after Plaintiff's counsel has forwarded
the recommendation.

1 when it has been established "by affidavit or otherwise" that a
2 Defendant has failed to defend against a complaint, the clerk of
3 the court is required to enter the Defendant's default. Fed. R.
4 Civ. P. 55(a). The declarations of John D. Jacobs submitted in
5 conjunction with Plaintiff's January 8, 2001 request for entry of
6 default against Defendant Auctionsaver and its November 21, 2001
7 request for entry of default against Defendants Phim, Caldwell and
8 Anderson establish that Defendants have failed to plead, defend,
9 or otherwise respond to the Summons within the time prescribed by
10 the Federal Rules, thereby making entry of default proper.

11 **B. Entry of Default Judgment By this Court is Warranted**

12 1. The Court Is Authorized to Enter a Default
13 Judgment

14 Following the entry of default against a Defendant, the
15 plaintiff may apply for a judgment based upon such default. New
16 York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996);
17 Fed. R. Civ. P. 55(b) (2).

18 2. A Default Judgment is Warranted In This Case

19 Default judgments are usually disfavored. Pena v. Seguros La
20 Comercial, S. A., 770 F.2d 811, 814 (9th Cir. 1985). Nonetheless,
21 the trial court has the discretion to grant an application for
22 default judgment when warranted. See Moore's Federal Practice
23 ¶ 55-05[2], at 55-24 to 55-26. Factors to consider when
24 determining whether to grant default judgment include the
25 following: (1) the possibility of prejudice to plaintiff if relief
26 is denied; (2) the merits of plaintiff's substantive claim;
27 (3) the sufficiency of the Complaint; (4) the amount of money at
28 stake; (5) the possibility of dispute as to any material facts in

1 the case; (6) whether default resulted from excusable neglect; and
2 (7) the policy favoring resolution of cases on the merits. Eitel
3 v. McCool 782 F.2d 1470, 1471-72 (9th Cir. 1986); United States v.
4 Boyce, 148 F. Supp. 2d 1069, 1093 (S.D. Cal. 2001).

5 The factors set forth in Eitel strongly weigh in favor of
6 granting default judgment here. First, the FTC, and the public
7 interest which it is charged to protect, will be prejudiced if
8 relief is denied because Plaintiff will be unable to redress the
9 harm Defendants caused to consumers by Defendants' unlawful acts.
10 Further, a judgment is necessary to award injunctive relief
11 necessary to deter future law violations.

12 The second and third factors also weigh in favor of granting
13 default judgment. "The second and third Eitel factors require
14 that plaintiffs' allegations state a claim upon which plaintiffs
15 may recover." Board of Trustees of the Northern California Sheet
16 Metal Workers v. Peters, 2000 U.S. Dist. LEXIS 19065, *3-4, citing
17 Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir 1978).

18 Plaintiff's Complaint in this case does in fact state a claim upon
19 which Plaintiff may recover.

20 In determining whether a complaint alleges facts which
21 constitute a claim upon which relief can be granted, the Court
22 must presume that all factual allegations in the complaint are
23 true and make all reasonable inferences in favor of the
24 complainant. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
25 Moreover, the allegations in the complaint are to be liberally
26 construed. Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir.
27 1983). Thus, a complaint states a claim unless it is apparent
28 beyond doubt that the plaintiff cannot prove any set of facts

1 which would entitle it to relief. Conley v. Gibson, 355 U.S. 41,
2 45-46 (1957).

3 The Court is authorized to grant relief in this case pursuant
4 to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and
5 57b. Under Section 13(b) of the Act, 15 U.S.C. § 53(b), the
6 Commission may bring suit in a United States District Court when
7 it has reason to believe: (1) there has been or there is about to
8 be a violation of any law enforced by the Commission; and (2) it
9 would be in the public interest to enjoin such a violation. 15
10 U.S.C. § 53(b) (1)-(2). Section 13(b) also gives the court
11 authority to issue a permanent injunction and any ancillary relief
12 necessary to accomplish complete justice (e.g., consumer redress,
13 rescission, restitution and disgorgement of profits). FTC v. H.N.
14 Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982). The
15 Commission's Complaint alleges that the defendants have violated
16 Section 5(a) of the FTC Act (see ¶¶ 17, 23) and the Commission's
17 Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435 (see
18 ¶¶ 24-26); pursuant to Section 18(d) (3) of the FTC Act, 15 U.S.C.
19 § 57a(d) (3), and 16 C.F.R. § 435.1, violations of the Rule also
20 constitute violations of Section 5(a) of the FTC Act. Section
21 5(a) of the FTC Act is a provision of law enforced by the
22 Commission. See Section 5(a) (2) of the FTC Act, 15 U.S.C.
23 § 45(a) (2); FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001). The
24 Complaint further alleges that the public interest would be harmed
25 absent an injunction. See ¶ 27. The prerequisites for seeking
26 relief under Section 13(b) are therefore met.

27 The Court is also authorized to grant relief in this case
28 pursuant to Section 19(b) of the FTC Act, 15 U.S.C. § 57b(b).

1 Section 19(b) authorizes this Court "to grant such relief as the
2 court finds necessary" to redress injury to consumers resulting
3 from violations of a Commission rule respecting unfair or
4 deceptive practices. Congress has provided that such relief may
5 include, but should not be limited to, "rescission or reformation
6 of contracts, the refund of money [and] return of property...."
7 Id. The Complaint alleges violations of the Mail or Telephone
8 Order Merchandise Rule, which is a Commission rule respecting
9 unfair or deceptive practices. This case is thus properly before
10 the Court.

11 Moreover, the Complaint states facts which, if taken as true,
12 constitute violations of Section 5 of the FTC Act and the Rule.
13 The facts upon which the Commission bases its allegations that
14 Defendants have violated the FTC Act and the Rule are described in
15 detail in the section of the Complaint entitled "Defendants'
16 Business Activities" (¶¶ 11-14). In addition, each count includes
17 a summary of the facts upon which the count is based.

18 Count I of the Complaint (¶¶ 15-17) alleges that Defendants
19 violated Section 5(a) of the FTC Act. Section 5(a) of the FTC Act
20 prohibits unfair or deceptive acts and practices in or affecting
21 commerce. 15 U.S.C. § 45(a). A violation of Section 5(a) is
22 established upon a showing that "first, there is a representation,
23 omission, or practice that, second, is likely to mislead consumers
24 acting reasonably under the circumstances, and third, the
25 representation, omission, or practice is material." FTC v.
26 Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994) (quoting and
27 adopting standard in Cliffdale Assocs., 103 F.T.C. 110, 164-65
28 (1984)). See also Resort Car Rental System v. FTC, 518 F.2d 962,

1 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975) (advertising
2 that induces consumer response through deception violates FTC
3 Act).

4 Count I of the Complaint alleges that the Defendants
5 misrepresented a material fact. Specifically, it alleges that
6 Defendants represented, in the course of offering computer-related
7 products for sale via Internet auction houses, that consumers who
8 offered the highest bids and sent Defendants the agreed-on payment
9 for the merchandise pursuant to those bids would receive the
10 promised merchandise (¶ 15). Whether consumers would actually
11 receive merchandise in return for their payment is indisputably
12 the most material aspect of their decision to send money to the
13 Defendants. The Complaint further alleges that consumers who
14 offered the highest bids and sent Defendants the agreed-on payment
15 for the computer-related products pursuant to those bids did not
16 receive the promised merchandise (¶ 16), and that the Defendants'
17 representation was therefore false and misleading (¶ 17). The
18 violative conduct is described further in Paragraphs 11 through 14
19 of the Complaint. The Complaint therefore sufficiently alleges a
20 violation of Section 5(a) of the FTC Act and sets forth a claim
21 upon which relief may be granted pursuant to Section 13(b).

22 Count II of the Complaint (¶ 24) alleges that Defendants
23 violated Section 435.1(a)(1) of the Rule. That section prohibits
24 a seller from soliciting any order for the sale of merchandise to
25 be ordered by the buyer through the mail or telephone, unless, at
26 the time of the solicitation, the seller has a reasonable basis to
27 expect that it will be able to ship any ordered merchandise to the
28 buyer within the time stated on the solicitation, or, if no time

1 is stated, within thirty days of the completion of the order. 16
2 C.F.R. § 435.1(a)(1). Count II alleges that, in a number of
3 instances, Defendants have solicited orders for the sale of
4 merchandise to be ordered by the buyer indirectly through the
5 telephone without a reasonable basis to expect that they would be
6 able to ship any ordered merchandise to the buyer within the time
7 stated in the solicitation, or, if no time was clearly and
8 conspicuously stated, within thirty days of receipt of a properly
9 completed order. The violative conduct is described further in
10 Paragraphs 11 through 14 of the Complaint. The Complaint
11 therefore sufficiently alleges a violation of Section 435.1(a)(1)
12 of the Rule and Section 5(a) of the FTC Act and thus sets forth a
13 claim upon which relief may be granted pursuant to Sections 13(b)
14 and 19.

15 Count III of the Complaint (¶ 25) alleges that Defendants
16 violated Section 435.1(b)(1) of the Rule. That section requires
17 that sellers follow certain procedures if merchandise ordered
18 through the mail or by telephone will not be shipped within the
19 applicable time limit. Specifically, the Rule requires that, when
20 there is a shipping delay, the seller must, prior to the
21 expiration of the applicable time, offer the buyer an option
22 either to agree to the delay or to cancel the order and receive a
23 prompt refund (as defined in 16 C.F.R. § 435.2(f)). 16 C.F.R.
24 § 435.1(b)(1). Count III of the Complaint alleges that, in a
25 number of instances, after soliciting orders for the sale of
26 merchandise ordered by the buyer indirectly through the telephone
27 and being unable to ship merchandise within the applicable time as
28 set out in Section 435.1(a)(1) of the Rule, Defendants have

1 violated the Rule by failing to offer to the buyer, clearly and
2 conspicuously and without prior demand, an option either to
3 consent to a delay in shipping or to cancel the order and receive
4 a prompt refund. The violative conduct is described further in
5 Paragraphs 11 through 14 of the Complaint. The Complaint
6 therefore sufficiently alleges a violation of Section 435.1(b) (1)
7 of the Rule and Section 5(a) of the FTC Act and thus sets forth a
8 claim upon which relief may be granted pursuant to Sections 13(b)
9 and 19.

10 Count IV of the Complaint (§ 26) alleges that Defendants
11 violated Section 435.1(c) of the Rule. That section requires that
12 a seller deem an order canceled and make a prompt refund to the
13 buyer whenever the seller has failed to ship within the specified
14 time period and has failed to offer the consumer the option to
15 consent to further delay or to cancel the order. 16 C.F.R.
16 § 435.1(c). Count IV alleges that, in a number of instances,
17 Defendants have failed to make a "prompt refund," as that term is
18 defined in 16 C.F.R. § 435.2(f), to buyers when such refunds were
19 required by Section 435.1(c) of the Rule. The violative conduct
20 is described further in Paragraphs 11 through 14 of the Complaint.
21 The Complaint therefore sufficiently alleges a violation of
22 Section 435.1(c) of the Rule and Section 5(a) of the FTC Act and
23 thus sets forth a claim upon which relief may be granted pursuant
24 to Sections 13(b) and 19.

25 Moreover, while no evidence need be considered in determining
26 whether the Complaint allegations are true (Televideo Sys. Inc. v.
27 Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) ("[t]he general
28 rule of law is that upon default the factual allegations of the

1 Complaint, except those relating to the amount of damages, will be
2 taken as true"), Plaintiff has in fact submitted evidence that
3 strongly corroborates the Complaint allegations. On September 7,
4 2001, Plaintiff filed eight consumer declarations in support of
5 its Ex Parte Application for Order Authorizing Service of Summons
6 and Complaint by Publication on Defendant Richard Phim. (See
7 docket entry no. 34.) These declarations demonstrate that
8 Defendants engaged in the violations as alleged and show that the
9 substantive merits of the FTC's case are strong.

10 With respect to the fourth Eitel factor, the amount of
11 redress and disgorgement that the FTC seeks, \$77,045.32, is
12 reasonable. Under Sections 13(b) and 19 of the FTC Act, 15 U.S.C.
13 §§ 53(b) and 57b, the FTC is entitled to equitable monetary
14 relief, including but not limited to, consumer redress and/or
15 disgorgement and money necessary for paying attendant
16 administrative expenses. FTC v. H.N. Singer, Inc., 668 F.2d 1107,
17 1112-13 (9th Cir. 1982). As set forth in greater detail below,
18 \$77,045.32 represents the minimum estimated amount of consumer
19 injury that resulted from Defendants' violations. The FTC seeks
20 redress for all of the funds that were paid to Defendants by
21 consumers who did not receive the merchandise for which they had
22 paid. The \$77,045.32 figure is thus a reasonable measure of
23 redress owed to consumers.

24 With respect to the fifth Eitel factor, there is little if
25 any possibility of dispute as to any material facts in this case.
26 First, there is no genuine possibility of dispute when defendants
27 have failed to answer the complaint and default has been entered
28 by the clerk. SEC v. Abacus Int'l Holding Corp., 2001 U.S. Dist.

1 LEXIS 12635 at *9 (N. D. Cal. 2001) ("The law is clear that upon
2 entry of default all well-pleaded factual allegations set forth in
3 the complaint will be taken as true, except those pertaining to
4 damages. Televideo Systems v. Heidenthal, 826 F.2d 915, (9th Cir.
5 1987); Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986)"). Cf. Eitel,
6 782 F. 2d at 1472 (denial of motion for default judgment upheld
7 when defendant had filed answer disputing material facts in
8 complaint). None of the Defendants has filed any document
9 disputing any fact, or, for that matter, filed any document at
10 all. Nor has any of the defendants communicated any dispute of
11 the facts to Plaintiff's counsel. Jacobs Decl. at ¶ 3.

12 Second, the allegations of material fact in the Complaint
13 appear to be true. Defendant Caldwell told Plaintiff's counsel
14 that Defendants had failed for the period of time in question to
15 deliver merchandise that consumers had ordered and paid for. Id.
16 at ¶ 4.f-g. Consumer declarations (see docket entry no. 34) filed
17 with Plaintiff's motion to serve Defendant Phim by publication
18 firmly establish that these consumers paid Defendants for
19 merchandise and that Defendants did not provide these consumers
20 with the merchandise for which they had paid.

21 Accordingly, there is and will be no dispute as to any
22 material fact in this case, and if a default judgment is not
23 entered, the FTC will be proceeding against Defendants who will
24 not defend themselves.

25 Sixth, Defendants' failure to answer was not a result of
26 excusable neglect, but rather the result of an intentional
27 decision not to defend. The Summons and Complaint were served on
28 Defendant Auctionsaver's registered agent, Ned Lynch, more than

1 one year ago. Defendant Auctionsaver is owned by Defendant Phim
2 and/or Defendant Caldwell, as described at pp. 13-14 in the
3 Memorandum of Points and Authorities in support of Plaintiff's
4 application for an order approving service of the Summons and
5 Complaint on Defendant Phim by publication (docket entry no. 33)
6 and in the accompanying Declaration of John D. Jacobs (docket
7 entry no. 35) at ¶¶ 53-54, Exhs. 1-2. Mr. Lynch has represented
8 Defendants Phim and Caldwell in settlement negotiations. Jacobs
9 Decl. at ¶¶ 5-6. However, at no time has Mr. Lynch, as either the
10 registered agent for Auctionsaver or the attorney for
11 Auctionsaver's owners, made any reference to any desire or
12 intention on the part of the company to defend or even settle this
13 lawsuit. Id. at ¶ 6. Defendant Auctionsaver's failure to answer
14 clearly is not merely the result of excusable neglect.

15 Defendant Delmer was served with the Summons and Complaint
16 almost eleven months ago. Plaintiff's counsel also sent him a
17 letter in March 2001 seeking a prompt response and advising him
18 that he would be subject to entry of default, and entry of
19 judgment by default, if he failed to file and serve an answer by
20 March 8, 2001. Jacobs Decl. at ¶ 7, Exh. 1. Plaintiff's counsel
21 has also served on Defendant Delmer all papers that Plaintiff has
22 filed in this action. Id. at ¶ 7. Defendant Delmer is therefore
23 clearly aware of this lawsuit and the need to defend himself.
24 Nonetheless, Defendant Delmer has never called or written a letter
25 to Plaintiff's counsel. Id. His failure to do so by this late
26 date cannot be characterized as excusable neglect.

27 Defendant Anderson was personally served with the Summons and
28 Complaint over ten months ago. Plaintiff's counsel called and

1 briefly spoke to Defendant Anderson twice in January 2001, and,
2 when advised that she did not have time to speak, requested that
3 she call Plaintiff's counsel back at a more convenient time to
4 discuss the lawsuit further. Id. at ¶ 8. In March 2001,
5 Plaintiff's counsel calendared the deposition of Defendant
6 Anderson and sent her a notice as well as a letter. Id., Exh. 2.
7 In April 2001, Plaintiff's counsel sent a letter to Defendant
8 Caldwell and Defendant Anderson to confirm the date for their
9 depositions (which were later canceled), requesting that the
10 Defendants call Plaintiff's counsel to discuss the deposition as
11 well as the possibility of settlement, and advising them that if
12 no settlement were reached, Plaintiff would seek a judgment that
13 would expressly find that each of them had violated the law as
14 alleged in the Complaint. Id., Exh. 3. Plaintiff's counsel has
15 also served on Defendant Anderson all papers that Plaintiff has
16 filed in this action. Defendant Anderson is therefore clearly
17 aware of this lawsuit and the need to defend herself.

18 Nonetheless, Defendant Anderson has never called Plaintiff's
19 counsel back to discuss the lawsuit or written a letter to
20 Plaintiff's counsel. Id. at ¶ 8. Defendant Anderson's failure to
21 answer or defend is clearly the result of a conscious choice.

22 Finally, the policy favoring resolution of cases on the
23 merits should be given little weight in this matter. Defendants
24 have failed to defend themselves in an action which alleges a
25 prima facie case of violations of the FTC Act and the Mail or
26 Telephone Order Merchandise Rule supported by substantial evidence
27 already presented to the Court. In cases such as this one,
28 default judgment is appropriate. See Televideo Systems, 826 F.2d

1 at 917-18 (holding that plaintiff had exceeded requirements for
2 entry of default judgment by providing evidence of prima facie
3 case of entitlement to judgment).

4 **C. The Order Proposed by Plaintiff Should Be Entered**

5 Plaintiff has lodged a proposed judgment and order that
6 includes both monetary and injunctive provisions. The proposed
7 provisions are reasonable and warranted and should therefore be
8 entered by the Court.

9 1. The Proposed Monetary Relief is Reasonable

10 The proposed order includes a monetary judgment in the amount
11 of \$77,045.32 (Section IV). This amount reflects the total amount
12 of money paid by consumers who complained to various organizations
13 that they had purchased merchandise over the Internet from
14 Defendants but had not received the merchandise. See Dudley Decl.
15 (\$75,752.32 paid by consumer complainants); Stahl Decl. (\$1,293.00
16 paid by consumer complainants). This figure therefore likely
17 underestimates the amount of actual monetary injury that resulted
18 from Defendants' violations since not all consumers may have
19 complained. More comprehensive evidence of the total amount of
20 consumer injury does not appear to be available. See Jacobs Decl.
21 9. While the proposed judgment amount may not reflect the entire
22 amount of consumer injury, it reflects the minimum amount by which
23 Defendants were unjustly enriched and which is necessary to
24 redress consumer injury. Pursuant to Section V of the proposed
25 order, money collected under the judgment would be used as
26 consumer redress or disgorgement.

27 The FTC is entitled to equitable monetary relief, including
28 consumer redress and/or disgorgement, under Sections 13(b) and 19

1 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b. Singer, 668 F.2d at
2 1112-13; FTC v. Magui Publishers, Inc., 1991-1 Trade Cas. (CCH)
3 ¶ 69,425, 65,728 (C.D. Cal. 1991), aff'd mem, 9 F.3d 1551 (9th
4 Cir. 1994).

5 Accordingly, the proposed monetary judgment for \$77,045.32
6 should be entered.

7 2. The Proposed Order for Permanent Injunction is
8 Reasonable

9 In addition to a provision requiring payment of redress, the
10 proposed order also includes injunctive provisions prohibiting the
11 type of conduct alleged in the Complaint. The proposed injunctive
12 provisions would permanently enjoin the defendants from
13 participating in the selling of items through Internet auction
14 sites (Section I), from making misrepresentations in the sale of
15 any good or service (Section II), and from violating the Mail and
16 Telephone Order Sales Rule (Section III). The proposed Order also
17 allows the FTC to monitor Defendants' compliance with the Order
18 through various other record keeping and reporting provisions.

19 Permanent injunctive relief is authorized by Sections 13(b)
20 and 19 of the FTC Act. 15 U.S.C. § 53(b) and 57b; Singer, 668
21 F.2d at 1112-13. Moreover, courts in the Ninth Circuit have
22 ordered outright prohibitions on engaging in various fields or
23 business activities in a number of litigated actions. See, e.g.,
24 FTC v. Gill, 71 F. Supp. 2d 1030, 1049 (C.D. Cal. 1999), aff'd,
25 265 F.3d 944, 957-59 (9th Cir. 2001), reh'g denied (ban on credit
26 repair); FTC v. Publishing Clearing House, Inc., 1995-1 Trade Cas.
27 (CCH) ¶ 71,006 (D. Nev. 1995), aff'd, 104 F.3d 1168 (9th Cir.
28 1997) (ban on prize-promotion telemarketing); FTC v. NCH, Inc.,

1 1995-2 Trade Cas. (CCH) ¶ 71,113 (D. Nev. 1995), aff'd, 106 F.3d
2 407 (9th Cir. 1997) (ban on prize-promotion telemarketing); FTC v.
3 Wetherill, 1993-1 Trade Cas. (CCH) ¶ 70,276 (C.D. Cal. 1993) (ban
4 on all future telemarketing).

5 **D. Defendants Are Not Exempted from Default Judgment**

6 Federal Rule of Civil Procedure 55(b)(2) prohibits entry of a
7 default judgment against an infant or incompetent person unless
8 represented in the action by a guardian or other such
9 representative. Fed. R. Civ. P. 55(b)(2). Moreover, the
10 Soldiers' and Sailors' Civil Relief Act of 1940 requires Plaintiff
11 to file an affidavit setting forth facts showing that Defendants
12 are not in military service. 50 U.S.C. app. § 520. None of the
13 individual Defendants is an infant, incompetent person, or
14 exempted under the Soldiers' and Sailors' Civil Relief Act of
15 1940. Jacobs Decl. at ¶ 10.

16 **IV. CONCLUSION**

17 For the foregoing reasons, the FTC respectfully requests that
18 its application for default judgment be granted and its proposed
19 Final Judgment and Order for Permanent Injunction be entered.

20
21 Dated: December __, 2001

22 _____
23 John D. Jacocbs
24 Barbara Y.K. Chun
25 Attorneys for Plaintiff
26 FEDERAL TRADE COMMISSION
27
28

1 CERTIFICATE OF SERVICE

2 1. My name is Barbara Y.K. Chun. I am an attorney
3 representing plaintiff Federal Trade Commission in this action.
4 My business address is 10877 Wilshire Blvd., Suite 700, Los
5 Angeles, California 90024.

6 2. On December __, 2001, I served a true and correct copy
7 of the foregoing document, captioned "MEMORANDUM OF POINTS AND
8 AUTHORITIES IN SUPPORT OF APPLICATION FOR ENTRY OF DEFAULT
9 JUDGMENT AGAINST DEFENDANTS AUCTIONSAYER, LLC, SHADE DELMER, aka
10 SHANE DELMER, AND NAOMI RUTH ANDERSON; DECLARATIONS OF JOHN D.
11 JACOBS, WADE DUDLEY AND ANN STAHL IN SUPPORT," on each of the
12 Defendants in this matter by causing it to be deposited it in the
13 U.S. mail, postage prepaid, in Los Angeles, California, addressed
14 as follows:

15 Ned Lynch, Esq.
16 6540 Lusk Blvd., C-111
17 San Diego, CA 92121
Attorney for Defendants Phim and Caldwell;
Registered Agent for Defendant Auctionsaver

18 Naomi Ruth Anderson
19 231 Davidson St
Chula Vista, CA 91910

20 Shade, aka Shane, Delmer
21 6176 Paseo Tienda
Carlsbad, CA 92009

22 I certify that the foregoing is true and correct.

23 Executed on December __, 2001, at Los Angeles, California.
24

25
26 _____
Barbara Y.K. Chun
27
28