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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10	_____)	Case No. '00CV 2125--L(JFS)
11	FEDERAL TRADE COMMISSION,)	
12	Plaintiff,)	MEMORANDUM OF POINTS AND
13	v.)	AUTHORITIES IN SUPPORT OF
14	AUCTIONS AVER, LLC;)	PLAINTIFF'S EX PARTE
15	RICHARD PHIM;)	APPLICATION FOR ORDER
16	CARMAN LEE CALDWELL;)	AUTHORIZING SERVICE OF SUMMONS
17	SHADE DELMER,)	BY PUBLICATION ON DEFENDANT
18	aka SHANE DELMER; and)	RICHARD PHIM
19	NAOMI RUTH ANDERSON,)	
20	Defendants.)	
21	_____)	

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION 1

4 II. FACTS 2

5 A. Plaintiff's Efforts to Serve Defendant Phim 2

6 1. Pre-Complaint Efforts 2

7 2. Post-Complaint Efforts 4

8 a. Serving Defendant Auctionsaver 4

9 b. Negotiating with Defendant Caldwell 4

10 c. Attempting to contact Defendants
Anderson and Delmer 4

11 d. Attempting to contact Defendant Phim
through relatives 5

12 e. Other efforts 6

13 B. The Defendants' Business 7

14 III. THE COURT SHOULD ALLOW SERVICE BY PUBLICATION 14

15 A. Publication of the Summons is an Authorized Means of
16 Service 14

17 1. Service May Be Accomplished Pursuant to California
18 Law 14

19 2. Service by Publication is an Authorized Means of
20 Service in California 14

21 B. Service by Publication on Defendant Phim
22 is Warranted 15

23 1. Service by Publication is Warranted When Other
24 Authorized Means of Service Are Ineffective and
25 When a Cause of Action Exists 15

26 2. Defendant Phim cannot with reasonable diligence be
27 served in any other authorized manner 16

28 3. A Cause of Action Exists Against Defendant Phim 17

a. The defendants have violated Section 5(a)
of the FTC Act 18

b. Defendant Phim is liable for the defendants'
violations 19

c. The defendants have violated the
Commission's Mail Order Merchandise Rule . 21

d. Defendant Phim is liable for the defendants'
violations 23

1 C. Conclusion 23
2 IV. THE PROPOSED ORDER 23
3 V. CONCLUSION 24

TABLE OF AUTHORITIES

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
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1 **I. INTRODUCTION**

2 Plaintiff Federal Trade Commission (Plaintiff or Commission)
3 seeks an order approving service of the Summons and Complaint by
4 publication on Defendant Richard Phim, pursuant to Rule 4(e)(1) of
5 the Federal Rules of Civil Procedure and Section 415.50 of the
6 California Code of Civil Procedure. Service on a defendant by
7 publication is warranted when no other authorized manner of
8 service is sufficient to effect service on the defendant and a
9 cause of action exists against the defendant. Plaintiff has used
10 reasonable diligence to effect service on Defendant Phim, but
11 Plaintiff's efforts have proved unsuccessful. Defendant Phim is
12 aware that he is a defendant in this lawsuit and that Plaintiff is
13 attempting to serve him with the Summons and Complaint. The only
14 reason he has not yet been served is that he is intentionally
15 evading service.

16 Plaintiff also has a cause of action against Defendant Phim.
17 Defendant Phim has violated Section 5(a) of the Federal Trade
18 Commission Act, 15 U.S.C. § 45(a), as well as the Federal Trade
19 Commission's trade regulation rule entitled Mail or Telephone
20 Order Merchandise Rule, in connection with the sale of computer-
21 related parts and products over Internet auction sites. Defendant
22 Phim and the other defendants failed to deliver merchandise that
23 they had promised to deliver to consumers who had paid the
24 defendants for the merchandise. They also failed to provide
25 refunds to these consumers, leaving these consumers with neither
26 their money nor the merchandise they had ordered from the
27 defendants.

28 Accordingly, service by publication is warranted.

1 **II. FACTS**

2 A. Plaintiff's Efforts to Serve Defendant Phim

3 1. Pre-Complaint Efforts

4 Before filing the Complaint on October 20, 2000, Plaintiff's
5 counsel attempted to reach each of the defendants, including
6 Defendant Phim, to discuss the possibility of settlement.
7 Plaintiff's counsel sent a letter to Defendant Phim¹ at the
8 address which, based on the following factors, appeared to be the
9 most likely residential address for Defendant Phim: it was the
10 address that Defendant Phim had provided on a bankruptcy petition
11 he filed in January 2000,² it was the address on file with the
12 California Department of Motor Vehicles,³ and it was the most
13 recent address available at that time on Lexis.⁴ The letter was
14 returned, undelivered, with the notation "Attempted, Not Known."⁵
15 Plaintiff's counsel spoke with the attorney who had represented
16 Defendant Phim in the bankruptcy as well as in a private lawsuit
17 cited in Defendant Phim's bankruptcy petition.⁶ The lawyer was
18 not able to provide any information on Defendant Phim's

19
20 ¹ Declaration of John D. Jacobs ("Jacobs Decl."), filed
21 concurrently herewith, at ¶ 10. All other declarations filed in
22 support of this application and cited herein are bound together in
23 a single volume entitled "Consumer Declarations Filed in Support
of Plaintiff's Ex Parte Application." Each consumer declaration
is tabbed at the front and labeled with the consumer's name.

24 ² Id. at ¶ 5.

25 ³ Id. at ¶ 9.

26 ⁴ Id. at ¶ 4.

27 ⁵ Id. at ¶ 10.

28 ⁶ Id. at ¶ 12.

1 whereabouts.⁷ Plaintiff's counsel then sent a letter to Defendant
2 Phim in care of the attorney,⁸ but, almost two months later, the
3 attorney stated that he had had no contact with Defendant Phim
4 after receiving the letter.⁹ In addition to speaking to the
5 lawyer representing Defendant Phim in the private lawsuit,
6 Plaintiff's counsel spoke to the lawyer of the opposing party.¹⁰
7 The lawyer was unaware of Defendant Phim's whereabouts.¹¹
8 Plaintiff's counsel searched public record information pertaining
9 to Defendant Phim that was available on Lexis and then sent
10 letters addressed to Defendant Phim at addresses produced by those
11 searches.¹² Those letters were returned undelivered.¹³ Plaintiff's
12 counsel also sent letters addressed to Defendant Phim in care of
13 relatives whose addresses were produced by those searches.¹⁴ Those
14 letters were returned undelivered.¹⁵ Plaintiff's counsel tried
15 calling telephone numbers produced by those searches.¹⁶ The
16 numbers had been disconnected.¹⁷ Plaintiff's counsel also

17 ⁷ Id.

18 ⁸ Id. at ¶ 13.

19 ⁹ Id. at ¶ 17.

20 ¹⁰ Id. at ¶ 11.

21 ¹¹ Id.

22 ¹² Id. at ¶ 10.

23 ¹³ Id.

24 ¹⁴ Id. at ¶¶ 14, 15.

25 ¹⁵ Id.

26 ¹⁶ Id. at ¶ 16.

27 ¹⁷ Id.

1 attempted to find and speak with the other defendants.¹⁸

2 Plaintiff's counsel was unable to locate them as well.¹⁹

3 2. Post-Complaint Efforts

4 Plaintiff's counsel has continued to try to locate Defendant
5 Phim after filing the Complaint.²⁰

6 a. Serving Defendant Auctionsaver

7 Plaintiff's counsel attempted to flush out Defendant Phim by
8 serving the Summons and Complaint on the registered agent for
9 Defendant Auctionsaver, LLC, which is owned by Defendant Phim and
10 Defendant Caldwell.²¹ No one responded, however, and default has
11 been entered.²²

12 b. Negotiating with Defendant Caldwell

13 Plaintiff's counsel has also diligently attempted to obtain
14 information as to Defendant Phim's whereabouts from Defendant
15 Caldwell. Taking many turns, these efforts spanned more than five
16 months, but ultimately proved fruitless.²³

17 c. Attempting to contact Defendants

18 Anderson and Delmer

19 Plaintiff's counsel has left messages for Defendant Anderson,
20 who appears to reside with Defendant Caldwell and to be friends

21
22 ¹⁸ Id. at ¶ 2.

23 ¹⁹ Id..

24 ²⁰ Id. at ¶ 17.

25 ²¹ Id. at ¶ 18.

26 ²² Id. at ¶ 19.

27
28 ²³ These efforts are described in detail in Jacobs Decl.
¶¶ 21, 27-28, and 38-51.

1 with Defendant Phim, but she has refused to return those calls.²⁴
2 Plaintiff's counsel has sent a letter to Defendant Delmer asking
3 that he call Plaintiff's counsel.²⁵ He has failed to respond.²⁶

4 d. Attempting to contact Defendant Phim
5 through relatives

6 Plaintiff's counsel has spoken to Defendant Phim's sister,
7 and she was unable to provide any information as to Defendant
8 Phim's whereabouts.²⁷ In a Lexis search, Plaintiff's counsel also
9 found that Defendant Phim's name was associated with the address
10 of a house that relatives of Defendant Phim had purchased in June
11 2000,²⁸ and sent a copy of the Summons and Complaint to that
12 address.²⁹ The envelope was returned with a handwritten note on
13 the front stating, "Richard Phim did not, does not, and will not
14 live here."³⁰ Plaintiff's counsel went to that address.³¹ No one
15 answered the door.³² Plaintiff's counsel sent a letter to
16 Defendant Phim's relatives requesting that they call or write to
17
18

19
20 ²⁴ Id. at ¶ 26.

21 ²⁵ Id. at ¶ 35.

22 ²⁶ Id.

23 ²⁷ Id. at ¶¶ 41-43.

24 ²⁸ Id. at ¶ 22.

25 ²⁹ Id. at ¶ 23.

26 ³⁰ Id.

27 ³¹ Id. at ¶ 30.

28 ³² Id.

1 Plaintiff's counsel concerning Defendant Phim's whereabouts.³³

2 They have failed to respond.³⁴

3 e. Other efforts

4 Plaintiff's counsel spoke again to the lawyer for the party
5 who had sued Defendant Phim in a private lawsuit.³⁵ The lawyer was
6 unaware of Defendant Phim's whereabouts and stated that Defendant
7 Phim had been defaulted for failing to appear at a hearing on an
8 OSC.³⁶

9 Plaintiff's counsel called the office of the Registrar of
10 Voters for San Diego County.³⁷ No one by the name of Richard Phim
11 is registered to vote.³⁸ Plaintiff's counsel called directory
12 assistance in the San Diego area seeking any listing under the
13 name Richard Phim.³⁹ The phone company responded with a statement
14 that this customer had requested that his number not be provided.⁴⁰
15 Plaintiff's counsel searched "people finder" type directories
16 available for free on the Internet.⁴¹ These directories had no
17 listing for Richard Phim.⁴²

18 ³³ Id. at ¶ 36.

19 ³⁴ Id. at ¶ 36.

20 ³⁵ Id. at ¶ 31.

21 ³⁶ Id.

22 ³⁷ Id. at ¶ 32.

23 ³⁸ Id.

24 ³⁹ Id. at ¶ 34.

25 ⁴⁰ Id.

26 ⁴¹ Id.

27 ⁴² Id.

1 B. The Defendants' Business

2 In approximately early 1998, Defendant Phim and Defendant
3 Caldwell went into business together selling computers to
4 consumers.⁴³ The defendants initially sold fully assembled
5 computers and did business under the name "TEC Computers."⁴⁴
6 According to Defendant Caldwell, he and Defendant Phim stopped
7 selling fully assembled computers in April or May 1999 and moved
8 into selling computer parts, largely because providing customer
9 service or technical support for computer sales was too costly or
10 difficult.⁴⁵ They also started selling their products on Internet
11 auction sites, such as amazon.com, yahoo.com, ebay.com, and
12 edeal.com.⁴⁶ The defendants branched out into selling a variety of
13 computer-related products and consumer electronics, often for
14 hundreds of dollars each.⁴⁷

15 In selling merchandise on Internet auction sites, the
16 defendants would take bids on their products for a specified
17 number of days.⁴⁸ The defendants appear to have offered products
18

19
20 ⁴³ Jacobs Decl. at ¶ 52.a.

21 ⁴⁴ Id.

22 ⁴⁵ Id.

23 ⁴⁶ Id. at ¶ 52.g; see also, e.g., Cates Decl. ¶ 2; Justice
Decl. ¶ 2, Exh. 1; Mellor Decl. ¶ 2; Spingelt Decl. ¶ 2.

24 ⁴⁷ See, e.g., Cates Decl. ¶¶ 2-3 (digital video camera for
25 \$750); Clevenger Decl. ¶ 2 (variety of computer parts); Justice
Decl. ¶ 2 (CPU for \$635); Mellor Decl. ¶ 2 (CD-ROM for \$175);
26 Shpigel Decl. ¶¶ 2-3 (digital camera for \$612); Spingelt Decl. ¶ 2
27 (PDA for \$350); Thiessen Decl. ¶¶ 2-3 (\$700 for digital
camcorder); Zinkgraf Decl. ¶¶ 2-4 (digital camera for \$660).

28 ⁴⁸ See Justice Decl. ¶ 2, Exh. 1; Mellor Decl. ¶ 2, Exh. 1.

1 under different names, including "Tecresale."⁴⁹ (The solicitations
2 do not appear to have made any representation as to the expected
3 time within which the winner could expect to receive the
4 merchandise.)⁵⁰ Consumers who bid on the defendants' products
5 interpreted the defendants' solicitations on the auction sites to
6 mean that if they won the auction and paid the defendants' for the
7 merchandise, then the defendants would deliver the merchandise
8 that the consumer had won and paid for.⁵¹

9 At the conclusion of the bidding for any particular product,
10 the auction site would typically notify the consumer who had won
11 the bidding.⁵² The defendants would then send an e-mail to the
12 consumer congratulating him on his winning bid and instructing the
13 consumer to provide a complete shipping address and wait for
14 additional instructions.⁵³ These e-mails were typically sent from
15 "TEC Auctions <auction@tecresale.com>," i.e., from an e-mail
16 address with a domain name of tecresale.com and a sender who chose
17 to identify itself as "TEC Auctions."⁵⁴ These e-mails were
18 typically "signed" by "Lee Caldwell" of "TEC Computers."⁵⁵ At the

19
20 ⁴⁹ See id.

21 ⁵⁰ Id.

22 ⁵¹ See Cates Decl. ¶ 2; Shpigel Decl. ¶ 2; Spingelt Decl.
23 ¶ 2; Thiessen Decl. ¶ 2; Zinkgraf Decl. ¶ 2.

24 ⁵² See Cates Decl. ¶ 2; Mellor Decl. ¶ 3; Spingelt Decl. ¶ 3;
25 Thiessen Decl. ¶ 3; Zinkgraf Decl. ¶ 3.

26 ⁵³ See Cates Decl. ¶ 3, Exh. 1; Justice Decl. ¶ 2; Mellor
27 Decl. ¶ 4, Exh. 2; Shpigel Decl. ¶ 3, Exh. 1; Spingelt Decl. ¶ 3;
28 Thiessen Decl. ¶ 3; Zinkgraf Decl. ¶ 4, Exh. 1.

27 ⁵⁴ Id.

28 ⁵⁵ Id.

1 end of each message, the e-mails advised consumers who wanted to
2 receive daily e-mails with "links to every auction we have on the
3 Internet" to "please email auction@tecresale.com and ask to
4 subscribe to the AuctionSaver Update."⁵⁶ These e-mails did not
5 state any time in which consumers could expect to receive their
6 merchandise.⁵⁷

7 Upon receipt of the required information, the defendants
8 would send the consumer an e-mail confirming the auction agreement
9 and providing instructions on how to proceed with the
10 transaction.⁵⁸ These e-mails would confirm the purchase price,
11 including shipping and any other charges, and instruct the
12 consumer to send a check or money order to the defendants.⁵⁹ The
13 defendants typically directed consumers to make their checks
14 payable to "AUCTION SAVER" or "TEC COMPUTERS" and to mail them to
15 "AUCTIONSAYER" OR "TEC COMPUTERS" at the defendants' address at
16 9630 Black Mountain Rd., Suite K, in San Diego.⁶⁰ As with the
17 initial e-mails, these e-mails were also sent from "TEC Auctions
18
19
20
21

22 ⁵⁶ Id.

23 ⁵⁷ Id.

24 ⁵⁸ See Cates Decl. ¶ 3, Exh. 2; Clevenger Decl. ¶ 3, Exh. 2;
25 Mellor Decl. ¶ 4, Exh. 3; Shpigel Decl. ¶ 3, Exh. 2; Spingelt
26 Decl. ¶ 3, Exh. 1; Thiessen Decl. ¶ 4, Exh. 1; Zinkgraf Decl. ¶ 5,
Exh. 3.

27 ⁵⁹ Id.

28 ⁶⁰ Id.

1 <auction@tecreale.com>" and were signed by "TEC Computers."⁶¹

2 Again no shipping date was mentioned in these e-mails.⁶²

3 Upon receipt of payment, the defendants typically sent
4 consumers an e-mail, from "TEC Auctions <auction@tecreale.com",
5 confirming that payment had been received.⁶³ The defendants
6 represented in these e-mails that the consumer's product would be
7 shipped within fourteen days of the date on which payment had been
8 received, as noted in the e-mail, or, if the consumer had paid by
9 personal or company check, within twenty-four days.⁶⁴ These e-
10 mails were signed by Lee Caldwell of TEC Computers.⁶⁵

11 It appears that through July 1999 the defendants were able to
12 ship product without substantial delays. However, beginning with
13 orders placed in approximately August 1999, the defendants stopped
14 shipping product to consumers who had been promised the
15 merchandise and had paid for it.⁶⁶ On September 20 and 21, 1999,
16 the defendants sent e-mails to customers in which the defendants
17 stated that they were "working to resolve a database problem."⁶⁷

18 ⁶¹ Id.

19 ⁶² Id.

20 ⁶³ See Cates Decl. ¶ 3, Exh. 3; Clevenger Decl. ¶ 4, Exh. 4;
21 Justice Decl. ¶ 3, Exh. 3; Mellor Decl. ¶ 6, Exh. 7; Shpigel Decl.
22 ¶ 4, Exh. 3; Spingelt Decl. ¶ 7, Exh. 6; Thiessen Decl. ¶ 5, Exh.
2; Zinkgraf Decl. ¶ 6, Exh. 4.

23 ⁶⁴ Id.

24 ⁶⁵ Id.

25 ⁶⁶ See Cates Decl. ¶¶ 3-6; Clevenger Decl. ¶¶ 3-9; Justice
26 Decl. ¶ 3-6; Shpigel Decl. ¶¶ 3-8. See also Jacobs Decl. ¶ 52.e-
27 f.

28 ⁶⁷ See Cates Decl. ¶ 4, Exh. 4; Clevenger Decl. ¶ 5, Exh. 5;
Justice Decl. ¶ 4, Exh. 4; Mellor Decl. ¶ 5, Exh. 4; Shpigel Decl.

1 They requested the consumer to reply immediately if the consumer
2 had been "the winner of an auction that ended prior to (before)
3 Wednesday, September 13, 1999" and had not received the product or
4 notification that the product had been shipped.⁶⁸ The e-mail asks
5 consumers to choose one of two responses in replying: (1) to
6 cancel the obligation for a full refund, or (2) not to cancel the
7 auction obligation.⁶⁹ Consumers were told that if they chose not
8 to cancel, the order would be re-entered "as if the auction bid
9 was accepted today,"⁷⁰ implying that the fourteen or twenty-four
10 day period would begin running on the date on which the defendants
11 had sent this e-mail (or at least no later than the date of the
12 consumer's reply).

13 On September 23 and 24, 1999, the defendants sent customers
14 an e-mail with an update on the database problem. The e-mail
15 stated that the defendants did not know when the problem would be
16 resolved, but that product would be shipped within fourteen (or
17 twenty-four) days if consumers notified the defendants that they
18 wanted to proceed with the transaction.⁷¹

21 _____
22 ¶ 6, Exh. 5; Spingelt Decl. ¶ 5, Exh. 3; Thiessen Decl. ¶ 6, Exh.
23 3; Zinkgraf Decl. ¶ 7, Exh. 5.

24 ⁶⁸ Id.

25 ⁶⁹ Id.

26 ⁷⁰ Id.

27 ⁷¹ See Cates Decl. ¶ 5, Exh. 6; Clevenger Decl. ¶ 6, Exh. 6;
28 Justice Decl. ¶ 5, Exh. 5; Mellor Decl. ¶ 5, Exh. 5; Shpigel Decl.
¶ 6, Exh. 6; Spingelt Decl. ¶ 6, Exh. 5; Thiessen Decl. ¶ 7;
Zinkgraf Decl. ¶ 7, Exh. 6.

1 Some consumers asked to cancel their transactions,⁷² while
2 others requested to continue with their transactions.⁷³ The
3 defendants failed to send product or refunds to consumers
4 regardless of the option they had chosen.⁷⁴

5 Defendant Caldwell told Plaintiff's counsel that the problem
6 with fulfilling orders arose from the defendants' decision to
7 begin accepting payment by credit card in late August or early
8 September, in combination with a database problem.⁷⁵ According to
9 Defendant Caldwell, they began having difficulties meeting their
10 obligations because when they started accepting credit cards, they
11 would immediately ship product to consumers who had paid by credit
12 card, but they never received any actual payment from the credit
13 card processor.⁷⁶ Sometime between September 10 and September 15,
14 Caldwell said, the defendants had still not received any money
15 from the credit card transactions and concluded that there was a
16 problem.⁷⁷

17 In the midst of experiencing their difficulties in providing
18 consumers with the goods they had promised to provide, the
19 defendants nonetheless continued to offer merchandise on Internet

20
21 ⁷² See Shpigel Decl. ¶ 6; Thiessen Decl. ¶ 6, Exh. 3;
Zinkgraf Decl. ¶ 7.

22 ⁷³ See Cates Decl. ¶ 4, Exh. 5; Clevenger Decl. ¶ 5; Justice
23 Decl. ¶ 4; Spingelt Decl. ¶ 5, Exh. 4.

24 ⁷⁴ See Cates Decl. ¶ 6; Clevenger Decl. ¶ 9; Justice Decl.
25 ¶ 6; Mellor Decl. ¶ 7; Shpigel Decl. ¶ 6; Spingelt Decl. ¶¶ 7-8;
Thiessen Decl. ¶¶ 7-8; Zinkgraf Decl. ¶ 7.

26 ⁷⁵ Jacobs Decl. ¶ 52.e-f.

27 ⁷⁶ Id.

28 ⁷⁷ Id. at ¶ 52.f.

1 auction sites and to accept orders. Declarations from consumers
2 show that the defendants continued to take orders and solicit
3 payment through at least September 30, 1999--i.e., for at least
4 ten days after they had notified consumers of the problem, and at
5 least one month after the onset of delays in fulfilling orders
6 that had been placed in August.⁷⁸ According to Defendant Caldwell,
7 the defendants should have stopped accepting credit card payments
8 after two days, when they first saw that there was a problem.⁷⁹ He
9 said that he had too big of any ego to do so, however, because he
10 had overcome other problems and thought he could fix this problem
11 as well.⁸⁰ He conceded that they had just allowed the problem to
12 go on for too long.⁸¹

13 Evidence of Defendant Phim's ownership and control of the
14 defendants' business includes certified copies of business records
15 filed with the California Secretary of State and the San Diego
16 County Recorder/Clerk, in addition to Defendant Caldwell's
17 account. Defendant Phim registered the names "Auction Saver and
18 TEC Computers" in a fictitious business name statement he filed on
19 June 1, 1999 with the San Diego County Recorder.⁸² According to
20 documents on file with the California Secretary of State,
21 Defendants Phim and Caldwell are the only managers of
22 "AuctionSaver, LLC," a California limited liability company that
23

24 ⁷⁸ See Clevenger Decl. ¶¶ 2-3, Exh. 3;

25 ⁷⁹ Jacobs Decl. ¶ 52.g.

26 ⁸⁰ Id.

27 ⁸¹ Id.

28 ⁸² Id. at ¶ 53, Exh. 1.

1 filed its Articles of Organization on May 26, 1999;⁸³ Defendant
2 Phim signed the Statement of Information that AuctionSaver, LLC
3 filed with the Secretary of State.⁸⁴

4 **III. THE COURT SHOULD ALLOW SERVICE BY PUBLICATION**

5 A. Publication of the Summons is an Authorized Means of 6 Service

7 The Federal Rules of Civil Procedure provide that service of
8 a summons may be accomplished pursuant to state law, and
9 California law authorizes service by publication in appropriate
10 circumstances.

11 1. Service May Be Accomplished Pursuant 12 to California Law

13 Rule 4(e)(1) of the Federal Rules of Civil Procedure provides
14 that service of a summons upon an individual may be effected
15 pursuant to the law of the state in which the district court is
16 located. Service of the summons in actions filed in the Southern
17 District of California may therefore be effected pursuant to
18 California law. Lazo v. United States, 1998 U.S. Dist. LEXIS
19 15303, at *11 (S.D. Cal., 1998).

20 2. Service by Publication is an Authorized Means of 21 Service in California

22 California law authorizes service of the summons by
23 publication in appropriate circumstances. Cal. Code Civ. Proc.
24 § 415.50; Vorburg v. Vorburg (1941), 18 Cal. 2d 794 , 797.

27 ⁸³ Id. at ¶ 54, Exh 2.

28 ⁸⁴ Id.

1 Accordingly, this Court may allow service by publication in
2 accordance with California law. Butler v. McKey, 138 F.2d 373,
3 376 (9th Cir. 1943).

4 B. Service by Publication on Defendant Phim is Warranted
5 Service of the summons on Defendant Phim by publication is
6 warranted and necessary because reasonable diligence has proved
7 insufficient in effecting service by other authorized means and a
8 cause of action exists against Defendant Phim.

9 1. Service by Publication is Warranted When Other
10 Authorized Means of Service Are Ineffective and
11 When a Cause of Action Exists

12 Section 415.50(a) of the California Code of Civil Procedure
13 provides that a summons may be served by publication if the
14 plaintiff provides an affidavit showing that (a) "the party to be
15 served cannot with reasonable diligence be served in another
16 manner specified in this article," and (b) "a cause of action
17 exists against the party upon whom service is to be made."
18 Quaranta v. Merlini, 192 Cal. App. 3d 22, 26-28, n.5 (1987).

19 The other manners of service specified in the same article
20 (i.e., Article 3) are set forth in Sections 415.10, 415.20, 415.30
21 and 415.40 of the Cal. Code of Civ. Proc. Section 415.10
22 authorizes service by personal delivery of a copy of the summons
23 and complaint to the defendant. Section 415.20 authorizes service
24 by leaving a copy of the summons and complaint at the defendant's
25 dwelling house, usual place of abode, or usual place of business
26 with a person at least 18 years of age. Section 415.30 authorizes
27 service of the summons and complaint by mailing them to the
28 defendant, together with a notice, a form for acknowledgment of

1 receipt, and a return envelope. Section 415.40 provides for
2 service upon persons located outside the state.

3 Evidence that a plaintiff has in good faith conducted "a
4 thorough, systematic investigation and inquiry" but has
5 nonetheless failed to ascertain a defendant's whereabouts is
6 sufficient to establish that the defendant cannot be served with
7 reasonable diligence by other authorized means. Judicial Council
8 Com., Deering's Ann. Code Civ. Proc. (1991 ed.), § 415.50, p. 676.
9 Determining whether a plaintiff has searched with reasonable
10 diligence turns on whether the plaintiff "took those steps which a
11 reasonable person who truly desired to give notice would have
12 taken under the circumstances." Donel, Inc. v. Badalian (1978),
13 87 Cal. App. 3d 327, 333. Merely searching telephone directories
14 is insufficient; a plaintiff must at least take the step or steps
15 that hold the most promise for locating the defendant, such as
16 contacting the defendant's attorney. Id. at 333-34.

17 2. Defendant Phim cannot with reasonable
18 diligence be served in any other authorized
19 manner

20 Plaintiff has in good faith conducted "a thorough, systematic
21 investigation and inquiry" and has taken steps that a reasonable
22 person who truly desired to give notice would have taken under the
23 circumstances, but has nonetheless failed to ascertain the
24 whereabouts of Defendant Phim. Plaintiff has searched tax
25 records, property transfer records, voter registration records,
26 other public records, DMV records, and telephone directories.
27 Plaintiff has sent mail to Defendant Phim at the addresses
28 produced by searches of those records. Plaintiff has sent mail to

1 Defendant Phim in care of his relatives. Plaintiff has
2 communicated with Defendant Phim through Defendant Caldwell.
3 Plaintiff has notified Defendant Phim of this lawsuit by e-mail.
4 Plaintiff has served the Summons and Complaint on Defendant Phim's
5 company. Plaintiff has made inquiries with the attorney who
6 serves as the registered agent of Defendant Phim's company, who is
7 also representing Defendant Phim in a pending private lawsuit and
8 who represented him in filing a bankruptcy petition. Plaintiff
9 contacted the attorney of the opposing party in the pending
10 lawsuit. Plaintiff's counsel traveled from Los Angeles to San
11 Diego and knocked on the door at the best address available for
12 Defendant Phim. These steps are not mere perfunctory attempts to
13 satisfy the statutory requirements. They reflect a thorough and
14 systematic campaign to locate and serve Defendant Phim.

15 The failure of these exhaustive efforts to locate Defendant
16 Phim demonstrate that he cannot be served by any other manner of
17 service authorized by California law--i.e., by personal delivery
18 of a copy of the Summons and Complaint, by leaving a copy of the
19 Summons and Complaint at Defendant Phim's dwelling house, usual
20 place of abode, or usual place of business, by mailing the Summons
21 and Complaint to Defendant Phim, or by serving him outside the
22 state. Moreover, Defendant Phim is on notice of the lawsuit and
23 is clearly averse to service. He cannot be found and does not
24 want to be found. Defendant Phim is not amenable to service by
25 any means other than service by publication.

26 3. A Cause of Action Exists Against Defendant Phim

27 Causes of action exist against Defendant Phim for
28 (a) violating Section 5(a) of the FTC Act, by making

1 misrepresentations to consumers, and (b) violating the
2 Commission's Mail or Telephone Order Merchandise Rule, 16 C.F.R.
3 Part 435, by, *inter alia*, (i) soliciting orders for merchandise
4 without a reasonable basis to expect that the defendants would be
5 able to ship the merchandise to the buyer within the time stated
6 in the solicitation, and (ii) failing to make a prompt refund in
7 circumstances when prompt refunds were required.

8 a. The defendants have violated Section 5(a) of
9 the FTC Act

10 Section 5(a) of the FTC Act prohibits deceptive acts and
11 practices in or affecting commerce. FTC v. Pantron I Corp., 33
12 F.3d 1088 (9th Cir. 1994). Misrepresentations or omissions of
13 material facts made to induce the purchase of goods or services
14 constitute deceptive acts or practices that violate Section 5(a)
15 of the FTC Act. See, e.g., FTC v. Figgie Int'l, Inc., 994 F.2d
16 595, 603-04 (9th Cir. 1993), cert. denied, 510 U.S. 1110, 114
17 S.Ct. 1051, 127 L.Ed.2d 373 (1994); FTC v. World Travel Vacation
18 Brokers, 861 F.2d 1020, 1029 (7th Cir. 1988); see also Resort Car
19 Rental System v. FTC, 518 F.2d 962, 964 (9th Cir.), cert. denied,
20 423 U.S. 827 (1975).

21 As alleged in Count I of the Complaint, the defendants have
22 misrepresented that the consumers who offered the highest bids and
23 sent Defendants the agreed-on payment for the merchandise pursuant
24 to those bids would receive the promised merchandise. The
25 defendants made this representation in their solicitations for
26 bids on Internet auction sites and in the e-mails they sent to the
27 consumers who had submitted winning bids. Consumers sent the
28 defendants money in reliance on this representation.

1 In numerous instances, the representation was false. The
2 defendants took money from consumers to whom they had promised to
3 deliver merchandise, and then failed to deliver that merchandise.
4 The defendants continued to make this misrepresentation even after
5 they were aware of the significant likelihood that they would not
6 be able to provide consumers with the promised merchandise.

7 b. Defendant Phim is liable for the defendants'
8 violations

9 While the defendants' failure to adhere to formalities in
10 conducting their business is an inconvenience in analyzing
11 liability, it is clear that the misrepresentations that were made
12 to consumers were made either by Defendant Phim's own sole
13 proprietorship or by the limited liability company of which he was
14 one of two stakeholders--i.e., TEC Computers, Auction Saver, or
15 Auctionsaver, LLC. Defendant Phim is liable for the
16 misrepresentations of any of these entities.

17 Defendant Phim himself declared that he was the registered
18 owner of the business operating under the names TEC Computers and
19 Auction Saver. Because this business is nothing other than
20 Defendant Phim, Defendant Phim himself is liable for the
21 business's violations.

22 Defendant Phim is also liable for any violations committed by
23 Auctionsaver, LLC. An individual is liable for a corporation's
24 violations of Section 5(a) of the FTC Act if the Commission shows
25 "1) that the corporation committed misrepresentations or omissions
26 of a kind usually relied on by a reasonably prudent person,
27 resulting in consumer injury, and 2) that [the individual]
28 participated directly in the acts or practices or had authority to

1 control them." FTC v. Publishing Clearing House, Inc., 104 F.3d
2 1168, 1170 (9th Cir. 1997). Assumption of the role of president
3 of a corporation and authority to sign documents on behalf of the
4 corporation demonstrate the requisite control over the
5 corporation. Id.; see also FTC v. Amy Travel Service, Inc., 875
6 F.2d 564, 573-74 (7th Cir.), cert. denied, 493 U.S. 954, 107 L.
7 Ed. 2d 352, 110 S. Ct. 366 (1989); FTC v. Sharp, 782 F. Supp.
8 1445, 1450 (D.Nevada 1991).

9 The first prong of the Publishing Clearing House test is
10 easily met. Consumers had no reason to doubt that the defendants
11 would provide the promised product upon receipt of payment.
12 Providing merchandise in return for payment is standard commercial
13 behavior. Consumers would not have sent money to the defendants
14 if they had not relied upon the defendants' representations that
15 the merchandise would be delivered. Consumers did in fact send
16 the defendants money and received nothing in return, thus
17 suffering substantial economic injury.

18 The second prong is also satisfied. Defendant Phim signed
19 Auctionsaver's Statement of Information on behalf of Auctionsaver
20 and admitted in that document that he was one of the two members
21 and managers of Auctionsaver, LLC. In light of this fact, and as
22 one of the two founders, stakeholders and official managers of
23 Auctionsaver, LLC (and as the sole owner of TEC Computers), under
24 Publishing Clearing House he presumptively had the requisite
25 authority to control the representations that were being made to
26 consumers.⁸⁵

27
28 ⁸⁵ Moreover, if the more stringent standard for liability of
corporate officers is applied to Defendant Phim with respect to

1 c. The defendants have violated the Commission's
2 Mail Order Merchandise Rule

3 The Commission's Mail or Telephone Order Merchandise Rule, 16
4 C.F.R. Part 435 (the Rule), prohibits applies to sales in which
5 the buyer has ordered merchandise from the seller by mail or
6 directly or indirectly by telephone, such as by fax machines and
7 computers. 16 C.F.R. §§ 435.1 and 435.2(a) and (b).

8 The Rule prohibits a seller from soliciting any order for the
9 sale of merchandise to be ordered by the buyer through the mail or
10 telephone, unless, at the time of the solicitation, the seller has
11 a reasonable basis to expect that it will be able to ship any
12 ordered merchandise to the buyer within the time stated on the
13 solicitation, or, if no time is stated, within thirty days of the
14 completion of the order. 16 C.F.R. § 435.1(a)(1).

15 At the time the defendants solicited orders for their
16 merchandise, the defendants did not state any time in which the
17 merchandise would be shipped. The defendants did not mention any
18 expected shipment date until after payment had been received from
19 consumers. The Rule thus prohibited them from soliciting any
20 order for the sale of merchandise to be ordered by the buyer over
21 the Internet unless if, at the time of the solicitation, they did
22 not have a reasonable basis to expect that they would be able to
23 ship any ordered merchandise to the buyer within thirty days.

24 When the defendants started experiencing difficulty in
25 fulfilling orders, they lost any reasonable basis to expect that
26 they would be able to ship any ordered merchandise to their

27 _____
28 his sole proprietorship, he unquestionably had the authority to
control the representations made by the company he owned.

1 customers within thirty days. They certainly had lost adequate
2 grounds to believe that they could ship product within thirty days
3 by the time they sent their e-mails on September 20, 1999 that
4 notified their customers of a database problem. At that time,
5 orders from consumers who had won bids in August had still not
6 been fulfilled.

7 The defendants therefore violated Section 435.1(a)(1) of the
8 Rule.

9 The Rule also requires that a seller deem an order canceled
10 and make a prompt refund to the buyer whenever the seller has
11 failed to ship within the specified time period and has failed to
12 offer the consumer the option to consent to further delay or to
13 cancel the order. 16 C.F.R. § 435.1(c). More specifically,
14 pursuant to Section 435.1(c)(1), a seller is required to "deem an
15 order cancelled and to make a prompt refund to the buyer whenever
16 the seller receives, prior to the time of shipment, notification
17 from the buyer cancelling the order pursuant to any option,
18 renewed option or continuing option under this part." Under this
19 section, the seller also must deem an order cancelled if it fails
20 to obtain consent again after a revised shipment date has been
21 accepted by the consumer and not met by the seller.

22 The defendants violated this provision of the Rule by failing
23 to provide refunds to consumers who asked to cancel their
24 transactions in response to the defendants' September 20, 1999 e-
25 mail notification, and by failing within fourteen (or twenty-four
26 days) after to ship product to, or obtain renewed consent from,
27 the consumers who consented to continue with the transaction
28 treating the order date as the date of the defendants' e-mail.

1 d. Defendant Phim is liable for the defendants'
2 violations

3 Defendant Phim is liable for the defendants' violations of
4 the Rule on the same grounds as he is liable for the defendants'
5 violations of Section 5(a) of the FTC Act. In fact, pursuant to
6 Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), and 16
7 C.F.R. § 435.1, Defendant Phim has, by violating the Rule, also
8 violated Section 5(a) of the FTC Act.

9 C. Conclusion

10 Service by publication is an allowable means of serving a
11 defendant in appropriate cases and Plaintiff has shown that this
12 is in appropriate case. The Court should therefore authorize
13 Plaintiff to serve Defendant Phim by publication.

14 **IV. THE PROPOSED ORDER**

15 Section 415.50 of the Cal. Code of Civil Procedure provides
16 that, when authorizing service of a summons by publication, "the
17 court shall order the summons to be published in a named
18 newspaper, published in the state, that is most likely to give
19 actual notice to the party to be served." It further provides
20 that the publication "shall be made as provided by Section 6064 of
21 the Government Code, unless the court, in its discretion, orders
22 publication for a longer period." Section 6064 of the Government
23 Code provides that "publication of notice pursuant to this section
24 shall be once a week for four successive weeks."

25 Because Defendant Phim operated his business in San Diego,
26 has in the past resided in San Diego, and appears at least to
27 still maintain ties to San Diego, Plaintiff proposes that the
28 summons be published in the San Diego Union-Tribune.

1 **V. CONCLUSION**

2 Plaintiff should be authorized to serve the summons on
3 Defendant Phim by publication of the summons in the San Diego
4 Union-Tribune once a week for four weeks. Plaintiff's affidavits
5 demonstrate that Defendant Phim cannot with reasonable diligence
6 be served by any other authorized means and that a cause of action
7 exists against him.

8
9 Dated: March ____, 2001 Respectfully submitted,

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11 _____
12 John D. Jacobs
13 Attorney for Plaintiff
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