

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
CINDY COX,

Plaintiff,

Index No. _____/2014

-against-

ACCESSORY OUTLET,

Defendant.
-----X

CIVIL COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Cindy Cox, by and through her attorneys, hereby alleges as follows:

INTRODUCTION

1. Plaintiff Cindy Cox brings this action for damages under New York General Business Law § 349 (“Deceptive Practices Act”) against defendant Accessory Outlet for threatening to report a non-existent debt of \$250 to credit reporting agencies, to refer the debt to a collections agency, and to have Cox harassed “continuously” with calls to her home, cell, and work phones. Cox also seeks a declaratory judgment against Accessory Outlet to establish the invalidity of Cox’s alleged “debt” and the unenforceability of unconscionable contract terms that Accessory Outlet claims apply to her.

2. Cindy Cox purchased an iPhone case for \$39.94 from Accessory Outlet through its website. When Cox discovered after ten days that the order had not shipped, she contacted Accessory Outlet to request a cancellation or refund of the order, but Accessory Outlet refused. Cox responded that she would contact her credit card company. Accessory Outlet then demanded that Cox pay \$250 under its website’s “Terms of Sale” prohibiting “any complaint, chargeback, claim, dispute,” or threats to take any of these actions, within 90 days of purchase. The Terms of Sale also purport to prohibit Cox from complaining to the Better Business Bureau or making or

threatening to make “any public statement” regarding the order. But these terms are unenforceable, both because they are unconscionable as a matter of law and because Cox never agreed to them.

3. When Cox stated that she had not breached any contract, the company sent her threatening and misleading emails designed to intimidate her into paying the \$250 it claimed she owed. Accessory Outlet threatened to report the \$250 “debt” to credit reporting agencies and thereby to damage Cox’s credit score. Accessory Outlet also threatened to refer the “debt” to a collections agency, which it said would call Cox’s home, cell, and work phones “continuously.” Accessory Outlet told Cox that she was “playing games with the wrong people” and that it had enforced the Terms of Sale against “many individuals.”

4. As a result of Accessory Outlet’s actions, Cox suffered emotional distress, including fear and anxiety, and Cox continues to fear that Accessory Outlet will make good on its threats to harass her further and damage her credit.

5. In sum, Accessory Outlet attempted to use threats to extort money from a dissatisfied customer. Cox now seeks damages under the Deceptive Practices Act and a declaratory judgment to establish the invalidity of Accessory Outlet’s unconscionable Terms of Sale and the made-up “debt” it claims Cox owes.

PARTIES

6. Plaintiff Cindy Cox is a citizen of Wisconsin. She lives in Kenosha, Wisconsin, with her husband of 35 years. She is a disabled veteran of the United States Navy, and she is a substitute Educational Support Specialist for special-needs children in the Kenosha Unified School District.

7. Defendant Accessory Outlet is an online vendor doing business at www.accessoryoutletmall.com. According to its website, Accessory Outlet is a “Mobile Accessory wholesaler” selling accessories “for today’s newest and most advanced mobile, tablet, and audio devices.” The website does not indicate Accessory Outlet’s location.

JURISDICTION

8. Although plaintiff does not concede that she is bound by the Terms of Sale on Accessory Outlet’s website, defendant has consented to jurisdiction in New York by stating on its website in its Terms of Sale that “the sole forum for any dispute or claim related to any order or transaction with our website shall be New York.”

FACTUAL ALLEGATIONS

9. Cox placed an order for an iPhone case for \$39.94 via Accessory Outlet’s website on July 6, 2014.

10. Accessory Outlet’s website contains a paragraph entitled “Terms of Sale.” This paragraph reads in relevant part:

You agree to allow us 90 days from the date of delivery, or from the date of the transaction in cases where there is any delivery failure, to resolve any issue pertaining to any order, including, but not limited to: delivery issues, product issues, billing issues, or any dispute, issue, or problem with any order. You agree not to file any complaint, chargeback, claim, dispute, or make any public forum post, review, Better Business Bureau complaint, social media post, or any public statement regarding the order, our website, or any issue regarding your order, for any reason, within this 90 day period, or to threaten to do so within the 90 day period, or it is a breach of the terms of sale, creating liability for damages in the amount of \$250, plus any additional fees, damages – both consequential and incidental, calculated on an ongoing basis. This amount shall be collected using a collections agency or other recovery method(s) as needed, including, but not limited to, a civil action in New York to recover damages, wage garnishment, or other recovery/collections action. In cases of any breach of this agreement, the \$250 fee is collected independently, based solely on the breach of this contract, and may be done notwithstanding payment of any order, refund/cancellation of any order, or delivery or failure to deliver any order.

11. These Terms are accessible from a link at the bottom of Accessory Outlet's home page if the viewer scrolls to the bottom of the page.

12. Cox did not take any action to accept Accessory Outlet's Terms of Sale.

13. To place her order, Cox was not required to accept Accessory Outlet's Terms of Sale.

14. To place her order, Cox was not directed to or required to read the Terms of Sale.

15. When she placed her order, Cox had not read the Terms of Sale and was not aware of them.

16. The "checkout" page of Accessory Outlet's website contains a link titled "Terms of Service," which when clicked displays the following text:

By placing an order on our website, you agree to be bound by all terms and conditions contained in this agreement and in the return policy. You agree to provide us with accurate information for billing and shipping, and you affirm that you have authorization to use any payment form that is used on our website.

17. The "checkout" page also contains a link titled "Refund Policy," which when clicked displays the following text: "We offer exchange within 14 days as stated in our return policy. Certain items such as final sale, refurbished, or special order items, may be subject to further restrictions."

18. Other than a "Privacy Policy" link describing Accessory Outlet's cookies, use and transmission of data, and opt-in marketing program, the "checkout" page does not indicate that additional Terms of Sale exist or are accessible elsewhere on the website.

19. By making the Terms of Service and Refund Policy available to a customer as she completes her transaction, without noting the existence of the Terms of Sale, the website conveys the impression to a reasonable consumer that she has read all of the terms applicable to her purchase even if she has never read the Terms of Sale.

20. On July 10, 2014, Accessory Outlet sent Cox an email stating that her order had been shipped and providing Cox a U.S. Postal Service tracking number enabling her to track her package.

21. Cox checked the tracking number on the U.S. Postal Service's website, and that website indicated that the package had not been received by the U.S. Postal Service.

22. On July 16, Cox sent an email to Accessory Outlet through its website. In her email, Cox requested that Accessory Outlet cancel the order because the company had not yet shipped the item she had ordered.

23. That same day, Accessory Outlet emailed Cox back, stating that the item had been sent and could not be cancelled or returned.

24. After rechecking the tracking number on the U.S. Postal Service's website, Cox replied by email that she would contact her credit card company because it appeared that Accessory Outlet was lying about whether it had fulfilled her order.

25. Accessory Outlet emailed Cox back, stating that Cox would face a \$250 penalty for contacting her credit card company, that Accessory Outlet would send her account to a collections agency, and that "[t]his will put a negative mark on your credit for 7 years and will also result in calls to your home and/or work." The email continued: "Further, additional fees for any correspondence with your card issuer will also be billed to you on an hourly basis and a flat rate \$50 fee for the dispute or claim."

26. Cox replied by email that she had the right to contact her credit card company and told Accessory Outlet not to threaten her.

27. Accessory Outlet then responded by email that "[a]s of now," Cox owed the company "damages" and that the company would engage "multiple collections agencies."

Accessory Outlet's email further stated, "This will put a negative mark on your credit for 7 years and lower your [credit] score significantly." The email also informed Cox that "[c]alls to collect the additional fees will continuously be made to your home, cell, and/or work phones."

28. In a separate email sent shortly thereafter, Accessory Outlet elaborated that whether or not Cox's order arrived, "we are billing you am [sic] additional \$250 plus additional fees, billed by collections agency for breach of the sales contract. We will add on and [sic] additional fees on an ongoing basis as needed."

29. Cox felt frightened and intimidated by the emails from Accessory Outlet. She feared that the company would attempt to collect hundreds of dollars in penalties, would possibly succeed in doing so, would subject her to harassment, and would ruin her credit.

30. Cox replied by email that she would contact a lawyer and the Better Business Bureau if Accessory Outlet billed her additional fees.

31. The following day, July 17, Accessory Outlet sent Cox the following email:

Contact your lawyer, spend more time and money if you wish. You will be billed and the amount we will bill you for will continue to rise with every email and every second we dedicate to correspondence of any kind pertaining to your breach of the terms of sale. Thank you.

32. Also on July 17, Cox telephoned her credit card company to discuss the transaction. The credit card company representative offered to initiate a dispute regarding the transaction, but Cox said she would wait to see if the merchandise arrived.

33. That evening, Cox emailed Accessory Outlet to inform it that she had contacted her credit card company, which told her to let it know if she did not receive the merchandise. In the hope of deterring Accessory Outlet from damaging her credit, Cox quoted in her email a couple of sentences she found at the website www.ehow.com about legal liability for defamation. Cox also stated that she did not breach the contract and that she paid for the order.

34. Later that evening, Accessory Outlet responded via email as follows:

There is clear proof it was sent and left NY and we will have proof of delivery. The collections action is separate and based solely on breach of contract and will be done even though you paid for and received the merchandise due to your breach of the terms of sale. Read the agreement or have someone competent do so for you since your emails make it clear you did not read the agreement or do not understand the clauses contained therein. You also obviously do not know how to use the tracking or are ignoring it. Either way you will pay us \$250 on top of the order total or have continuous calls to your home, cell, and/or work phones to collect the debt due. You are playing games with the wrong people and have made a very bad mistake given the legally binding contract we have in place. One we have successfully enforced on many individuals the same we will do with you.

35. Cox became even more distressed upon reading Accessory Outlet's latest email, which insulted her, repeated the company's demand for \$250 and its threats of "continuous" harassment, and suggested (by referring to past enforcement practices) that the company had both the resources and will to retaliate against Cox. Cox found the use of the language, "You are playing games with the wrong people and have made a very bad mistake," particularly frightening.

36. Later on July 17, Accessory Outlet again emailed Cox, reiterating both that the "breach of contract" action was independent of whether Cox received the merchandise and that Accessory Outlet had been enforcing its Terms of Sale for "years."

37. On July 19, Cox received the iPhone case she had ordered from Accessory Outlet.

38. The case was defective because it was warped and would not snap closed.

39. The same day she received the product, Cox emailed Accessory Outlet through its website to complain about the defective merchandise.

40. Cox has received no reply to her July 19 email regarding the defective case.

41. On or about July 28, Cox received a phone call on her cell phone from the debt collector Dynamic Recovery Solutions (DRS). Because DRS did not say what debt it was trying

to collect, Cox assumed the call concerned the \$250 Accessory Outlet was demanding. As it turned out, DRS had called Cox by mistake. Nonetheless, in light of Accessory Outlet's threats to harass Cox and destroy her credit, the mistaken call was traumatic for Cox and left her in tears.

42. Cox continues to fear that Accessory Outlet will carry out its threats to collect penalties from her, harass her further, and ruin her credit.

43. Cox desires to post about Accessory Outlet on websites such as RipoffReport.com to warn other consumers about the company's intimidating tactics, the unreasonable terms it attempts to impose, and the shoddy product she received. Cox has not taken these steps because she fears that, if the Terms of Sale are enforceable, Accessory Outlet will further harass and threaten her and will claim she owes the company more money.

CAUSES OF ACTION

COUNT ONE: Declaratory Judgment, C.P.L.R. § 3001

44. There is an ongoing controversy between Cox and Accessory Outlet regarding whether Cox owes Accessory Outlet money pursuant to Accessory Outlet's Terms of Sale. Additionally, Accessory Outlet's insistence that the \$250 "debt" is valid and will be reported to credit reporting agencies has caused and is causing Cox emotional harm and threatens to cause injury to Cox's credit.

45. Cox has avoided warning other consumers about Accessory Outlet in online forums because of the Terms of Sale. If those terms were declared void, she would speak online about her experience with the company.

46. Cox seeks a declaratory judgment that her alleged debt arising out of Accessory Outlet's Terms of Sale, and any other alleged debts premised thereon, are null and void, for each of the following reasons:

- a. The Terms of Sale are void as unconscionable because they were hidden in a section of Accessory Outlet's website that a purchaser is neither required to view nor notified about before making a purchase, and because the terms are unreasonably favorable to Accessory Outlet, and
- b. The Terms of Sale are not binding on Cox because she never agreed to them.

COUNT TWO: Deceptive Practices Act, General Business Law § 349

47. Accessory Outlet "conduct[s]" a "business" or "furnish[es]" a "service" within the meaning of the Deceptive Practices Act, General Business Law § 349.

48. Accessory Outlet directs its activities to consumers as a whole, and accordingly, its business practices are consumer-oriented.

49. Accessory Outlet violated the Deceptive Practices Act by engaging in practices that were misleading in a material way, unfair, deceptive, and contrary to public policy and generally recognized standards of business. These acts and practices include the following:

- a. Accessory Outlet has charged or threatened to charge Cox \$250, plus a \$50 fee for the "dispute," additional fees for all of the time Accessory Outlet spends communicating with her, and undefined "additional fees on an ongoing basis as needed," even though Cox does not legally owe any of that money because (as alleged in Count One) the Terms of Sale under which she allegedly owes the money are unconscionable and because she never agreed to those Terms of Sale.

- b. Accessory Outlet threatened to report or has reported to credit reporting agencies a debt that Cox did not and does not owe.
- c. Accessory Outlet threatened that a collections agency would call Cox “continuously” at home and at work.
- d. Accessory Outlet threatened to take actions (including the initiation of collection activity) that it did not actually intend to take, in order to induce Cox to pay \$250 (or more) that she did not and does not owe, to defer or forgo consumer remedies that would have been available to her through her credit card company, and to refrain from publicly criticizing Accessory Outlet.
- e. Accessory Outlet exaggerated the nature and scope of its power over Cox by invoking contract terms that are unconscionable and to which Cox never agreed, and by using language that a reasonable person would perceive as threatening.

50. Accessory Outlet’s threats to collect money from Cox, harass Cox, and denigrate Cox’s credit have injured Cox, causing her to suffer emotional distress, including fear, anxiety, and insult.

51. Accessory Outlet knowingly and willfully violated New York’s prohibition on deceptive acts and practices by using threatening and demeaning language against Cox, imposing unconscionable Terms of Sale on Cox, making it difficult for consumers to find the Terms of Sale on its website, and (by its own acknowledgment) enforcing the Terms of Sale against consumers.

RELIEF REQUESTED

WHEREFORE, plaintiff prays that this Court:

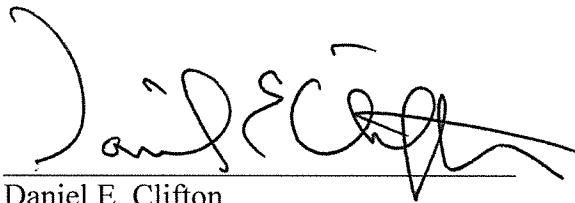
- A. Declare that Cindy Cox does not now, and never did, owe Accessory Outlet or any other party any money based on Accessory Outlet's Terms of Sale, Cox's failure to make payment allegedly owing under the Terms of Sale, Cox's acts of communicating with Accessory Outlet or any third party concerning Accessory Outlet, or the content of any of Cox's communication with Accessory Outlet or any third party concerning Accessory Outlet;
- B. Declare that Accessory Outlet's prohibition on "fil[ing] any complaint, chargeback, claim, dispute, or mak[ing] any public forum post, review, Better Business Bureau complaint, social media post, or any public statement regarding the order, our website, or any issue regarding your order, for any reason, within this 90 day period [after purchase], or to threaten to do so within the 90 day period" is void as unconscionable, or in the alternative is inapplicable to Cox because she never agreed to it;
- C. Enjoin Accessory Outlet from:
 - 1. enforcing its Terms of Sale against Cindy Cox,
 - 2. seeking to collect any money from Cindy Cox, and
 - 3. stating to any person or entity, including but not limited to a collections agency or a credit reporting agency, that Cindy Cox owes Accessory Outlet any debt.
- D. Order Accessory Outlet to inform any person or entity, including but not limited to a collections agency or a credit reporting agency, to which Accessory Outlet has

reported that Cindy Cox owes Accessory Outlet any debt, that the report was in error and that a debt was not and is not owed, and to take steps to cause Cindy Cox's credit reports to be corrected if an erroneous debt has been reported;

- E. Award Cox statutory damages of \$50 under General Business Law § 349;
- F. Award Cox treble damages under General Business Law § 349;
- G. Award Cox costs and reasonable attorneys' fees incurred in this action; and
- H. Grant such other relief as the Court may deem just and proper.

Plaintiff demands a trial by jury.

Dated: New York, New York
August 27, 2014



Daniel E. Clifton
LEWIS, CLIFTON & NIKOLAIDIS, P.C.
350 Seventh Avenue, Suite 1800
New York, NY 10001
(212) 419-1500
dclifton@lcnlaw.com

Scott Michelman (pro hac vice application to be filed)
Jehan A. Patterson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
smichelman@citizen.org

Attorneys for Plaintiff Cindy Cox