

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

----- X
PEOPLE OF THE STATE OF NEW YORK :
By LETITIA JAMES, Attorney General of the State of :
New York, :

Petitioner, :

-against- : Index No.: 807970/2021

LEAR CAPITAL, INC. and KEVIN DEMERITT, :

Respondents. :

----- X

CONSENT ORDER AND JUDGMENT

Petitioner, the People of the State of New York, by Letitia James, Attorney General of the State of New York (the “NYAG”) commenced this special proceeding by Verified Petition on June 17, 2021 against Lear Capital, Inc. (“Lear”) and Kevin DeMeritt (“DeMeritt” and together with Lear, “Respondents”) alleging violations of the New York Executive Law § 63(12), New York General Business Law (“GBL”) § 349, GBL §§ 352 *et seq.* (the “Martin Act”), and GBL § 399-pp. On June 17, 2021, the NYAG also sought and obtained a temporary restraining order against Respondents preventing them from engaging in the business of offering, selling or purchasing commodities or securities, or providing investment advice, to or from the State of New York and from engaging in any conduct that would require registration under GBL § 359-e or GLB § 359-eee (which the Court subsequently modified on June 22, 2021), which remains in effect. On August 20, 2021, Respondents filed their Memorandum of Law in Opposition to Petitioner’s Verified Petition and Order to Show Cause and a Verified Answer and Affirmative

Defenses. On October 1, 2021, the NYAG filed its Reply. Collectively, the NYAG and Respondents are referred to herein as the “Parties.”

Upon reading and filing the foregoing, and the Stipulation and Consent, dated December 30, 2021, in which Respondents acknowledge receipt of the above-listed documents, Respondents consent to entry of this Consent Order and Judgment (the “Consent Order”) to fully and finally resolve the summary proceeding initiated by the NYAG, and waive notice of entry thereof,

NOW, on motion of the NYAG and on the above pleadings, and on the consent of Respondents, it is hereby

1. ORDERED, ADJUDGED AND DECREED that Respondents Lear and DeMeritt, as well as each of their agents, trustees, servants, employees, successors, heirs and assigns, or any other person under their direction and control, whether acting individually or in concert with others, or through any corporate or other entity or device through which they may now or hereafter act or conduct business in New York State, including businesses in which they have any legal or beneficial interest, are bound by the terms of this Consent Order.

2. ORDERED, ADJUDGED AND DECREED that the terms of this Consent Order shall apply to all of Lear’s business transactions with residents of the State of New York² (“New York Customers”).

² For the purposes of this Consent Order, a Lear customer who provides a New York address or uses a phone number with a New York area code to communicate with Lear shall be presumed to be a resident of the State of New York. If the customer has more than one residence, the customer’s physical residence at the time the customer transacts business with Lear shall ultimately control the determination of New York or non-New York residency. If the customer provides a telephone number with a New York area code, but a non-New York residential address, the customer’s residential address shall control for purposes of determining whether the customer is a New York resident. Lear shall not induce a customer to provide a non-New York address.

I. Monetary Compensation

3. ORDERED, ADJUDGED AND DECREED that Lear shall pay, monetary compensation in the principal amount of SIX MILLION DOLLARS (\$6,000,000.00) (the “Monetary Relief”) within thirty days of entry of this Consent Order to compensate Lear’s New York Customers in connection with Respondents’ alleged registration violations. Lear shall pay the Monetary Relief to an account designated by the NYAG, by wire transfer, with instructions to be provided by the NYAG.

4. ORDERED, ADJUDGED AND DECREED that, in its sole discretion, the NYAG may distribute Monetary Relief to Lear’s New York customers. The NYAG may determine who among Lear’s New York customers is eligible to receive compensation, and the amount of such compensation, and the NYAG may then distribute such compensation as it deems appropriate. While the NYAG retains such discretion, it is the NYAG’s intention to distribute all of the funds received to Lear’s New York customers. Any funds remaining after the NYAG has ceased efforts to distribute compensation (*e.g.*, uncashed checks) shall be retained by the State of New York.

II. General Injunction

5. ORDERED, ADJUDGED AND DECREED that Respondents shall not engage in conduct in violation of Executive Law § 63(12), GBL § 349, the Martin Act, and GBL § 399-pp and expressly agree and acknowledge that any such conduct is a violation of this Consent Order.

III. Non-Monetary Relief

A. Registration

6. ORDERED, ADJUDGED AND DECREED that Respondents and their salespersons shall maintain registration as telemarketers with the New York State Department of State as required by GBL § 399-pp.

7. ORDERED, ADJUDGED AND DECREED that Respondents and their salespersons conducting business with customers in New York shall register and maintain registration with the NYAG as commodity broker-dealers or commodity salespersons as required by GBL § 359-e(14). Pursuant to GBL 359-e(14)(h), to the extent that Lear and/or any of its sales representatives is registered with the NYAG as a commodity broker-dealer or as a commodity salesperson, respectively, Lear or its salesperson need not register as a commodity investment advisor if they render investment advice solely incidental to the conduct of Lear's business as a commodity broker-dealer or a commodity salesperson, respectively, and they receive no special compensation for such advice.

B. Clear and Conspicuous Disclosure

8. ORDERED, ADJUDGED AND DECREED that Lear shall (i) disclose its fee using clear and conspicuous language, as agreed upon in writing by the Parties, both in telephone calls, the purpose of which is to make an oral record of a New York Customer's transaction with Lear ("Recorded Confirmation"), and in the written invoice for the transaction; (ii) issue a written invoice for all New York sales transactions conducted by telephone that contains such agreed upon clear and conspicuous language identifying Lear's fee as a percentage of the price of the metals purchased; and (iii) take all additional measures agreed to among the Parties to ensure that clear and conspicuous disclosures are made to New York Customers.

C. Cancellation

9. ORDERED, ADJUDGED AND DECREED that for transactions with New York Customers conducted by telephone (i) where Lear's gross profit³ is greater than 10% or (ii) for any transaction involving an IRA, the Recorded Confirmation shall include an additional disclosure specifically concerning Lear's issuance of a written invoice and the customer's right to cancel the transaction (the "Additional Disclosure"). In the Additional Disclosure, the Lear sales representative must orally inform the customer that (i) Lear will issue a written invoice, by email, or overnight delivery service (*e.g.*, FedEx, UPS), after the telephone call containing the Recorded Confirmation has concluded,⁴ (ii) the customer should review the written invoice for accuracy, as it contains the terms specific to the transaction, and (iii) the customer shall have 24 hours from the time when Lear sends the email confirmation (attaching the written invoice) or the customer receives the written invoice sent by overnight carrier, to cancel the transaction for any reason without penalty, the instructions for which will be identified on the invoice.⁵

10. ORDERED, ADJUDGED AND DECREED that for transactions with New York Customers conducted by telephone (i) where Lear's gross profit is greater than 10% or (ii) for any transaction involving an IRA, Lear must send the customer a written invoice that shall conspicuously state (a) that the customer may cancel the transaction within 24 hours of Lear's sending the email confirmation (attaching the invoice) or the customer's receipt of the written

³ For example, if a customer's purchase price for the coin is \$100, and Lear's cost to acquire the coin is \$90, Lear's gross profit would be \$10 or 10%.

⁴ If the Recorded Confirmation is recorded too close in time for Lear to meet Lear's overnight delivery cutoff, and the invoice is to be issued by overnight carrier, Lear may issue the invoice by overnight carrier the next business day. Lear may delete reference to the invoice being issued by overnight carrier if the invoice is to be issued by email, and vice versa, to avoid confusion.

⁵ Lear may delete reference to the cancellation window running from receipt of the invoice by overnight carrier if the invoice is to be issued by email, and vice versa, to avoid confusion.

invoice sent by overnight carrier, and (b) a toll-free telephone number and email account maintained and reviewed by Lear for the customer to use if such customer wishes to cancel within the time period. The written invoice shall state in part, in no less than size 12 font, (including the bolded language in bold format) as follows: “**You have 24-hours to cancel your purchase without any penalty.** This deadline will run from when the email attaching your invoice is sent or the overnight delivery carrier (*e.g.* FedEx, UPS) delivers your invoice (if no email address was provided).”

11. ORDERED, ADJUDGED AND DECREED that Lear’s written invoice shall be delivered by email, or via overnight delivery service (*e.g.*, FedEx, UPS) if the customer does not provide an email address. If the written invoice is delivered by email, Lear shall attach the invoice to the email or include the invoice in the body of the email in a conspicuous manner (the form/process to be approved in writing by the NYAG), not solely via an electronic hyperlink contained within the email.

12. ORDERED, ADJUDGED AND DECREED that Lear shall establish and maintain a 24-hour cancellation period for New York Customers who make a transaction by telephone where (i) Lear’s gross profit is greater than 10%; or (ii) for all IRA transactions. The start time for purposes of calculating the 24-hour period shall be either the date and time of delivery indicated by the overnight carrier or the date and time on the timestamp of the email sent by Lear attaching the written invoice, provided the email is not returned to Lear as undeliverable within 24 hours. If the email is returned as undeliverable within such period, Lear shall provide a replacement invoice by overnight delivery, and the time period for calculating the 24-hour period shall run from the date and time of delivery indicated by the overnight carrier.

13. ORDERED, ADJUDGED AND DECREED that Lear shall establish, implement, and maintain a separate dedicated toll-free telephone number and email account, staffed by non-commissioned⁶ personnel, to field and respond timely to any and all transaction cancelation requests.

D. Complaint Database

14. ORDERED, ADJUDGED AND DECREED that Lear shall establish, implement, and maintain a dedicated toll-free telephone number and email account, staffed by non-commissioned⁷ personnel, to field and monitor any and all types of complaints from or on behalf of New York Customers.

15. ORDERED, ADJUDGED AND DECREED that Lear shall establish, implement, and maintain a complaint database where all complaints (whether oral or in writing) from or on behalf of New York Customers made to the dedicated toll-free telephone number and email account, or which are routed to the personnel responsible for monitoring such accounts, will be logged and stored in a searchable format. Such complaints shall be stored for no less than four years.

E. Employee Training

16. ORDERED, ADJUDGED AND DECREED that Lear shall provide biannual (*i.e.*, twice per year) training on all of the terms of this Consent Order to all employees with responsibility for implementing or adhering to any of these terms.

⁶ As used here, “non-commissioned” means that the personnel’s compensation shall not depend or in any way be calculated on the basis of the number or value of transactions canceled or not canceled.

⁷ As used here, “non-commissioned” means that the personnel’s compensation shall not depend or in any way be calculated on the basis of the number of complaints or value of associated transactions handled or resolved.

17. ORDERED, ADJUDGED AND DECREED that Lear's sales representatives shall uniformly use the term "fee" to describe the fee Lear charges the customer in conversations and correspondence with New York Customers. If asked about the "fee," Lear staff shall state that the "fee" is Lear's gross profit on the transaction. Lear shall cease use of the term "ask to cost fee" in oral and written communications with New York Customers.

IV. Cooperation and Other Terms

18. ORDERED, ADJUDGED AND DECREED that Respondents shall cooperate with the NYAG, including by promptly providing complete and accurate documents and information to the extent requested by the NYAG to administer and distribute the compensation ordered herein.

19. ORDERED, ADJUDGED AND DECREED that Respondents shall provide the NYAG with a complete and accurate list of New York Customers who transacted business with Lear from January 2014 through present, including their full name, address, email, phone numbers, amount purchased, sold or exchanged by customer, and fees charged by Lear on each transaction.

20. ORDERED, ADJUDGED AND DECREED that Respondents shall cooperate with any request by the NYAG for information about any New York Customer including by providing any documents, call recordings and information requested by the NYAG related to customer settlement, refund or reversal of a transaction with Lear.

21. ORDERED, ADJUDGED AND DECREED that Respondents shall provide the NYAG with a report of all complaints, made to Lear's dedicated complaint toll-free telephone number and complaint email address, related to New York Customers within the six-month period following the entry of this Consent Order. If the NYAG determines that this report shows

compliance problems by Lear, the NYAG shall inform Respondents of the same in writing and thereafter Respondents shall provide to the NYAG another compliance report six months later. Upon request, Respondents shall provide to the NYAG all recordings, written communications and documents related to any complaint regarding a New York Customer made to Lear or to the NYAG.

V. Miscellaneous

22. ORDERED, ADJUDGED AND DECREED that nothing contained in this Consent Order shall be construed to limit the rights of a person or an entity who is not a party to this action.

23. ORDERED, ADJUDGED AND DECREED that nothing in this Consent Order shall be construed as to deprive any party of any private right under the law.

24. ORDERED, ADJUDGED AND DECREED that if any clause, provision or section of this Consent Order shall, for any reason, be held illegal, invalid or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision or section of this Consent Order and this Consent Order shall be construed and enforced as if such illegal, invalid or unenforceable clause, section or provision had not been contained herein.

25. ORDERED, ADJUDGED AND DECREED that nothing in this Consent Order shall be construed as relieving Respondents of their obligation to comply with all state and federal laws and regulations, nor shall any of the terms of this Consent Order be deemed to grant Respondents permission to engage in any acts or practices prohibited by such laws and regulations.

26. ORDERED, ADJUDGED AND DECREED that any failure of the NYAG to exercise any right under this Consent Order shall not constitute a waiver of any rights of the NYAG hereunder.

27. ORDERED, ADJUDGED AND DECREED that all correspondence required herein shall be delivered or mailed to the following address, unless a different address is specified in writing by the party changing such address:

If to NYAG: Office of the Attorney General of the State of New York
Attn: Tanya Trakht, Assistant Attorney General
28 Liberty Street, 21st Floor
New York, New York 10005

If to Respondents: Kevin DeMeritt
Lear Capital, Inc.
1990 South Bundy Drive, Suite 600
Los Angeles, California 90025

With a copy to:

Seth E. Pierce
Mitchell Silberberg & Knupp LLP
2049 Century Park East, 18th Floor
Los Angeles, CA 90067

28. ORDERED, ADJUDGED AND DECREED that the Court hereby retains jurisdiction to enforce this Consent Order and any related agreements and all disputes arising thereunder, and the Court retains authority to decide all such disputes.

29. ORDERED, ADJUDGED AND DECREED that a violation by Respondents of any agreement with the NYAG as contemplated in this Consent Order shall be subject to remedies available for violation of this Consent Order.

30. ORDERED, ADJUDGED AND DECREED that the temporary injunctive relief in this Court's Order to Show Cause With Temporary Restraining Order dated June 17, 2021 (which the Court subsequently modified on June 22, 2021), is hereby superseded by the terms of

the permanent injunctive relief specified herein. Respondents may resume operations in New York consistent with the terms of this Consent Order.

DATED: BUFFALO, NEW YORK
DECEMBER 30, 2021


HON. DIANE Y. DEVLIN, JSC