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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA

Plaintiff,

v.

NETPLIANCE, INC.,
a Delaware corporation,

Defendant.

CIVIL NO.

COMPLAINT FOR
CIVIL PENALTIES, INJUNCTIVE
AND OTHER RELIEF

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“Commission”), for its Complaint alleges that:

1. Plaintiff brings this action under Sections 5(a)(1), 5(m)(1)(A), 13(b), and 16(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), and 56(a), and § 108(c) of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1607(c), to obtain (a) injunctive or other relief for defendant’s deceptive practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); (b) monetary civil penalties and injunctive and other relief for defendant’s violations of the Commission’s Trade Regulation Rule Concerning the Sale of Mail or Telephone Order Merchandise (the “Mail Order Rule” or “Rule”), 16 C.F.R. Part 435; and (c) injunctive or other relief for defendant’s violations of the TILA, 15 U.S.C. §§ 1601-1667f, and

its implementing Regulation Z, 12 C.F.R. § 226.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and under 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 1607(c).

3. Venue in the Western District of Texas is proper under 15 U.S.C. § 53(b) and under 28 U.S.C. §§ 1391(b-c) and 1395(a).

THE DEFENDANT

4. Defendant Netpliance, Inc. is a Delaware corporation with its principal office or place of business at 7501B North Capital of Texas Highway, Austin, Texas 78731. Netpliance, Inc. transacts business in the Western District of Texas.

COMMERCE

5. At all times relevant to this complaint, the acts and practices of defendant alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANT’S COURSE OF CONDUCT

6. Defendant has manufactured, advertised, labeled, offered for sale, sold, and distributed products and services to the public, including a device for Internet access called the “i-opener,” and Internet services.

7. Defendant sells the i-opener and Internet services directly over the Internet and via telephone. It also sells these products and services through retailers.

8. Defendant has disseminated or has caused to be disseminated advertisements for the i-opener, including but not necessarily limited to the attached Exhibits A through G. These advertisements contain statements about the performance of the i-opener and the cost of accessing the Internet with the i-opener, which are likely to influence a consumer’s decision to purchase the i-opener. These advertisements contain statements and depictions such as:

a. **Give Them the Internet!**

Imagine family or friends unwrapping the i-opener -- the all-in-one total Internet experience *without a computer*. Instant e-mail to stay in touch. Complete access

to the World Wide Web including information, popular destinations and shopping. Just plug it in, and you're online. Simple and affordable -- as low as \$199!
(Exhibit A., Holiday Gift Guide that appeared in People Magazine on 11/29/99)

b. **Using a computer to get online is so 90's.**

Introducing i-opener, the all-in-one Internet appliance.

Now you can enjoy Internet access and email in a whole new way.

The sleek new i-opener fits anywhere in your home and puts you online with the push of a single button. One button Internet access, news, shopping, weather and email ready and waiting for you.

With no computer hassles, software to load or boot-up delays, the Internet can now become a very convenient part of your life for as little as **\$199**.

(Exhibit C, Full page advertisement that appeared in Access Magazine, New York Times, USA Today, USA Weekend, and Wall Street Journal on in January 2000)

c.

Dialogue

[Y]ou can purchase your i-opener today for
the amazing low price of just \$99.

Graphics

\$99 + s/h

Even the most expensive home computer system can't bring you i-opener's simplicity, compact size, and convenient features.

HOME
COMPUTER



| | | |
|----------------------|---|---|
| email | T | T |
| full internet access | T | T |
| simple to use | | T |
| compact size | | T |
| e-mail waiting light | | T |
| Instant on | | T |
| LineSaver | | T |
| Automatic updates | | T |

Buy now, and put the Internet anywhere in your home. Just plug it in, and turn it on, and you're online in minutes. And pay just \$21.95 each month for i-opener's innovative Internet service.

Buy Your i-opener for Only \$99

Put the Internet anywhere in your home
Buy Your i-opener for Only \$99

Low monthly service charge of \$21.95

If you are not satisfied with your i-opener for any reason, return it within 30 days for a full refund.

[A very fine on-screen disclosure in white print states: "Additional service fees required when out of network area."]

(Exhibit D, Infomercial that aired in March 2000)

- d. **If You Want Your Mom
To Stop Calling,
Buy Her An i-opener.
Introducing i-opener.**

It Comes Right To Your Mom's Door. She Just Plugs It In And Turns It On. Instantly Your Mom Is Connected To E-Mail, The Internet And A Whole Lot More. And With Just The Touch Of A Button, She Can Write To You, Family And Friends, Do The Shopping, Check The News And Weather, Even Order A Pizza. It's That Easy. Because, After All, It's Not A Computer, It's An i-opener. So This Mother's Day, Give Your Mom A Whole New Way To Stay In Touch, Without Ever Picking Up A Telephone.

Only \$99.*

**E-Mail ! News ! Sports ! Entertainment ! Finance ! Weather
! Shopping**

[A very fine print disclosure, in approximately 4-point type, at the very bottom of the ad states:

*“*Plus \$21.95 monthly service charge. Long distance service or toll charges may apply in some areas.”]*

(Exhibit E, Full page magazine advertisement that appeared in Entertainment Weekly, Newsweek, New York Times Magazine, Parade, People, Time, Time Digital, and US News in May 2000)

e. **The Internet Can Be Big And Overwhelming.**

Here's A Security Blanket.

Introducing i-opener.

No matter where you go on-line, i-opener will make you feel right at home. Instantly you can connect to whatever you want to do. Press the News key and read the daily news. Press the Mail key and send a letter to a friend. You can even check your local five-day forecast at the touch of a button. “This is the greatest product since sliced bread,” exclaimed one i-opener fan. “It's so simple and so much fun...I couldn't be more pleased.” And knowing you can get anything

you want from the Internet won't just make your life easier, it will help you sleep at night.

**E-Mail ! News ! Sports ! Entertainment ! Finance ! Weather
! Shopping ! Travel ! Food**

(Exhibit F, Full page advertisement that appeared in Parade in June and July 2000)

9. In its advertisements for the i-opener, defendant has directed consumers to call a toll-free telephone number or visit the defendant's Web site to place an order. For such direct sales, defendant asks consumers for their credit card numbers and defendant bills a charge directly to consumers' credit card accounts.

10. Between November 1999 and March 2000, defendant told numerous consumers who purchased the i-opener over the telephone that they would not be charged for Internet service until they had actually activated their Internet account with defendant. Contrary to this representation, on or around March 2000, defendant charged consumers who had not activated their Internet accounts for Internet access based on the date consumers purchased the i-opener.

11. On or around July 1, 2000, defendant started representing to consumers that they had only 30 days to dispute a charge to their credit card accounts for services rendered by the defendant. For example, Defendant's "Membership Agreement" for Internet service contains the following statements:

"You authorize Netpliance to charge your credit card account number for any Service charges.... You have thirty (30) days to dispute a charge posted to your account; otherwise you agree that (1) the charge is valid; and (2) no refund or adjustment will be given."

(Exhibit H. Page from defendant's Web site posted on or around July 1, 2000

<http://www.netpliance.com/store/terms_sale.asp>)

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12. Since November 1999, defendant has represented to consumers on its Web site and over the telephone the length of time during which it expects to deliver the i-opener.

13. In numerous instances between December 1999 and April 2000, defendant failed to ship merchandise within the stated time and either failed to send delay notices or sent untimely delay notices to the affected consumers. As a result, these consumers were not properly informed about their right to cancel the order and receive a prompt refund.

14. Defendant also has represented, through advertisements and over the telephone, that, if consumers are not satisfied with the i-opener for any reason, they can return the i-opener within 30 days and receive a full refund. Over the telephone, defendant also has frequently offered to refund shipping and handling charges incurred by consumers returning the i-opener to defendant. These returns were to be reflected as credits to the consumers' credit card accounts.

15. In numerous instances, defendant has failed to credit a consumer's credit card account within seven business days after accepting the return of the i-opener.

SECTION 5 OF THE FTC ACT

16. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that unfair or deceptive acts or practices in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, are unlawful. Misrepresentations and omissions of material facts made to induce a reasonable consumer to purchase products or services are deceptive acts or practices that are prohibited by Section 5(a) of the Act. Section 5(a) also prohibits a practice as unfair if it causes or is likely to cause substantial consumer injury, which is not reasonably avoidable by consumers themselves; and is not outweighed by countervailing benefits to consumers or competition.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

COUNT I

17. In numerous instances, defendant has represented, expressly or by implication, that:

- a. The i-opener provides access to all of the Internet's content, including all of the entertainment and information available on the Internet.
- b. The i-opener is equivalent to a personal computer with respect to its Internet-related performance.

18. In truth and in fact:

- a. The i-opener does not provide access to all of the Internet's content, including all of the entertainment and information available on the Internet. For example, i-opener users are unable to access files on Web pages that use popular formats or programming languages, including popular Internet technologies for Web site audio, video, interactivity, and multimedia used for online entertainment and information communication.
- b. The i-opener is not equivalent to a personal computer with respect to its Internet-related performance. For example, i-opener users are unable to download, store, or run software available on the Internet, display certain Web pages, play certain Web files, send photographs via e-mail, or create or host their own web pages.

19. Therefore, the representations set forth in Paragraph 17 are deceptive acts or practices in violation of Section 5 of the FTC Act.

COUNT II

20. In numerous instances, defendant has represented, expressly or by implication, that the total cost to access the Internet with the i-opener is the initial price of the i-opener.

21. In numerous instances, defendant has failed to disclose or failed to disclose adequately that:

- a. consumers are required to subscribe to defendant's Internet service at an additional cost of \$21.95 per month;
- b. defendant will charge consumers' credit cards \$21.95 for Internet service, not when consumers activate the service, but two days after defendant ships the i-opener to consumers;
- c. defendant does not provide local access telephone numbers for its Internet service in all areas and, therefore, that many consumers must either pay long distance telephone charges or surcharges of \$5.95 per hour to access its Internet service. Indeed, because the i-opener automatically connects to the Internet six times per day, these customers may incur telephone charges or

surcharges of \$60 or more per month without ever connecting to the Internet on their own.

These facts would be material to a consumer's decision to purchase the i-opener.

22. In light of the representation contained in Paragraph 20, the failure to disclose the facts contained in Paragraph 21 is a deceptive act or practice in violation of Section 5 of the FTC Act.

COUNT III

23. In numerous instances, the defendant has represented, expressly or by implication, that consumers can use the i-opener to access the Internet.

24. In numerous instances, defendant has failed to disclose to consumers that they can access the Internet only by using the defendant's Internet service. Consumers cannot access the Internet with the i-opener through another Internet service provider if they so choose, or in the event defendant ceases providing Internet service in the future. This fact would be material to a consumer's decision to purchase the i-opener.

25. In light of the representation contained in Paragraph 23, the failure to disclose that consumers can access the Internet only by using the defendant's Internet service is a deceptive act or practice in violation of Section 5 of the FTC Act.

COUNT IV

26. In numerous instances, in the course of billing, attempting to collect, and collecting money from consumers for Internet service, defendant has represented, expressly or by implication, that consumers owe money to defendant for Internet service based upon the date they received the i-opener.

27. In truth and in fact, some consumers did not purchase or agree to purchase Internet service from defendant based upon the date they received the i-opener. Defendant had represented to these consumers that it would not bill them for Internet service until they actually had activated their Internet account with defendant. Therefore, these consumers do not owe this money to defendant.

28. Therefore, the representation set forth in Paragraph 26 is a deceptive act or practice

in violation of Section 5 of the FTC Act.

COUNT V

29. On or around March 2000, defendant charged or debited the accounts of certain consumers who had purchased the i-opener for Internet service based upon the date they received the device.

30. These consumers had not contacted, been contacted by, purchased from, agreed to purchase from, or agreed to be billed by defendant for Internet service based upon the date they received the device. Therefore, these consumers could not reasonably avoid defendant's billing for Internet service which consumers did not purchase.

31. Defendant's practice of charging and debiting consumers' credit or debit card accounts without authorization caused or was likely to cause substantial consumer injury to consumers not outweighed by countervailing benefits to consumers or competition.

32. Therefore, defendant's practice as alleged in Paragraph 29 is unfair and violates Section 5 of the FTC Act.

COUNT VI

33. Through the means described in Paragraph 11, defendant has represented, expressly or by implication, that consumers have 30 days to dispute a charge to their credit card accounts for services rendered by defendant.

34. In truth and in fact, Section 226.13 of Regulation Z, 12 C.F.R. § 226.13, which implements Section 166 of the TILA, 15 U.S.C. § 1666, provides that:

- a. Consumers have 60 days to file a written notice disputing credit card charges or asserting a billing error to a creditor; and
- b. Creditors shall not accelerate any part of a consumer's indebtedness or restrict or close a consumer's account solely because the consumer has exercised in good faith rights provided by the section.

Therefore, the representation set forth in Paragraph 33 was, and is, false or misleading.

THE MAIL ORDER RULE

35. The Mail Order Rule was promulgated by the Commission on October 22, 1975, under the FTC Act, 15 U.S.C. § 41 *et seq.*, and became effective February 2, 1976. The Commission amended the Rule on September 21, 1993, under Section 18 of the FTC Act, 15 U.S.C. § 57a, and these amendments became effective on March 1, 1994. The Rule applies to orders placed by telephone, facsimile transmission, or on the Internet.

VIOLATIONS OF THE MAIL ORDER RULE

COUNT VII

36. In numerous instances between December 1999 and April 2000, after having solicited mail orders and telephone orders for merchandise and received “properly completed orders,” as that term is defined in Section 435.2(d) of the Mail Order Rule, 16 C.F.R. § 435.2(d), and having been unable to ship some or all of the ordered merchandise to the buyer within the Mail Order Rule's applicable time, as set forth in Section 435.1(a)(1) of the Mail Order Rule, 16 C.F.R. § 435.1(a)(1) (the “applicable time”), defendant has:

- a. Violated Section 435.1(b)(1) of the Rule by failing to offer to the buyer, clearly and conspicuously and without prior demand, and in a timely fashion, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund; and
- b. Violated Section 435.1(c) of the Rule by failing to deem an order canceled and make a prompt refund to buyers who are entitled to such refunds under the Rule.

37. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.”

38. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Mail Order Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

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THE TRUTH IN LENDING ACT

39. As used in reference to the TILA, the term “creditor” is defined in Section 103(f) of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1602(f), and in Section 226.12(a)(17)(ii) of Regulation Z, 12 C.F.R. § 226.12(a)(17)(ii). Creditors are required to comply with the applicable provisions of that Act and Regulation.

40. Section 226.12(e) of Regulation Z, 12 C.F.R. § 226.12(e), which implements Section 166 of the TILA, 15 U.S.C. § 1666e, provides that:

“When a creditor other than a card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer’s credit card account, that creditor shall, within seven business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer’s normal channels for credit statements.”

TRUTH IN LENDING ACT VIOLATION

COUNT VIII

41. Defendant is a creditor, as that term is defined in Section 103(f) of the TILA, 15 U.S.C. § 1602(f), and in Section 226.12(a)(17)(ii) of Regulation Z, 12 C.F.R. § 226.12(a)(17)(ii).

42. In numerous instances, defendant has accepted the return of property and has failed to transmit credit statements to the card issuer through the card issuer’s normal channels for credit statements within seven business days from accepting the return of property and, therefore, violated Section 166 of the TILA and Section 226.12(e) of Regulation Z, 12 C.F.R. § 226.12(e).

CIVIL PENALTIES AND INJUNCTION

43. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to issue a permanent injunction to prevent and remedy any violations of any provision of law enforced by the Commission.

44. Defendant has violated the Mail Order Rule as described above with knowledge as set forth in Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

45. Each sale or attempted sale between December 1999 and April 2000, in which defendant has violated the Mail Order Rule in one or more of the ways described above constitutes

a separate violation for which plaintiff seeks monetary civil penalties.

46. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and Section 1.98(d) of the FTC's Rules of Practice, 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of not more than \$11,000 for each such violation of the Mail Order Rule.

PRAYER

WHEREFORE, plaintiff requests this Court, as authorized by Section 13(b), 15 U.S.C. § 53(b), Section 108(c) of the TILA, 15 U.S.C. § 1607(c), and pursuant to its own equitable powers:

- (1) Enter judgment against defendant and in favor of plaintiff for each violation alleged in this Complaint;
- (2) Award plaintiff monetary civil penalties from defendant for each violation of the Mail Order Rule;
- (3) Enjoin defendant from violating Section 5(a) of the FTC Act, the Mail Order Rule, the TILA, and Regulation Z as alleged herein;
- (4) Award plaintiff such additional relief as the Court may deem just and proper.

DATED:

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