

ROBERT L. PITMAN
United States Attorney
Western District of Texas

Assistant United States Attorney
Congress Avenue, Suite 1000
Austin, Texas 78701
Texas Bar No.
(512) 916-5858
(512) 916-5854 (fax)

**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.

CONSENT DECREE AND
ORDER FOR INJUNCTIVE RELIEF,
CONSUMER REDRESS, CIVIL
PENALTIES, AND OTHER RELIEF

WHEREAS plaintiff, the United States of America, has commenced this action by filing the Complaint herein; defendant has waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law and without defendant admitting liability for any of the matters alleged in the Complaint;

THEREFORE, upon stipulation of plaintiff and defendant, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. This Court has jurisdiction of the subject matter and of the parties.
2. The Complaint states a claim upon which relief may be granted against the defendant under Sections 5(a)(1), 5(m)(1)(A), 13(b), and 16(a) of the Federal Trade Commission 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).

DEFINITIONS

3. “Clear(ly) and conspicuous(ly)” shall mean as follows:
 - a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement if the claim triggering the disclosure is presented by both audio and visual means. In any claim presented solely through visual or audio means, the disclosure may be made through the same means in which the claim is presented. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - c. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

4. In the case of advertisements disseminated by means of an interactive electronic medium, such as software, the Internet, and online services, a disclosure made “through the use of a hyperlink” shall mean a hyperlink that in itself is clear and conspicuous, is clearly identified as a

hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page, online service page or other electronic page, and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

5. For the purposes of this Consent Decree, the term "Mail Order Rule" means the Federal Trade Commission's Trade Regulation Rule Concerning Mail or Telephone Order Merchandise, 16 C.F.R. Part 435, or as the Rule may hereafter be amended.

6. "Eligible person" shall mean each consumer who:

- a. purchased an i-opener directly from Netpliance between November 1, 1999 and March 31, 2000;
- b. did not activate his/her Internet account with defendant; and
- c. was back billed for Internet service from the time he/she received the i-opener.

7. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

INJUNCTION

8. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or affecting commerce, are hereby enjoined from making any representation, in any manner, expressly or by implication:

- a. That such product and a computer are equivalent in their ability to provide access to content available on the Internet;
- b. That such product or service provides access to all of the Internet's content, including all of the entertainment and information available on the Internet; or

c. Regarding any other characteristic relating to access to the Internet's content or functionality provided by such product or service, unless the representation is true.

9. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or affecting commerce, are hereby enjoined from making any representation, in any manner, expressly or by implication, about the price or cost to consumers of such product or service, unless they disclose, clearly and conspicuously:

- a. the dollar amounts of any and all fees, charges, and other costs consumers are required to pay for such service;
- b. when defendant will require the consumer to pay for such service; and
- c. that consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone service charges to access the service, if that is the case; and a means for each consumer to ascertain whether he or she would incur such costs or charges to access the service and the amount of any such costs or charges.

Provided, however, that in the case of advertisements disseminated through an interactive electronic medium, such as software, the Internet or other online services, defendant may make the disclosures required by this Paragraph through the use of a hyperlink. For Paragraph 9.c., any such hyperlink must be labeled: "Significant Phone Charges May Apply. Click Here."

10. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or

affecting commerce, are hereby enjoined from misrepresenting, in any manner, expressly or by implication, the price or any terms and conditions of sale of such product or service.

11. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or affecting commerce, are hereby enjoined from making any representation, in any manner, expressly or by implication, that consumers can use the product or service to access the Internet, unless they disclose, clearly and conspicuously, that consumers can access the Internet with the product or service only through defendant's Internet service, if that is the case.

12. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or affecting commerce, are hereby enjoined from misrepresenting, in any manner, expressly or by implication, that consumers owe money to defendant for purchasing or agreeing to purchase such good or service.

13. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of the i-opener or any Internet or other online access product or service, in or affecting commerce, are hereby enjoined from billing or receiving money from any consumer, without authorization, including but not limited to charging or debiting such consumer's credit card or debit card accounts without that consumer's express verifiable authorization.

14. Defendant, its successors and assigns, and its officers and agents, servants,

employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined from:

- a. failing to comply, when applicable, with the requirements of Section 166 of the Truth in Lending Act, 15 U.S.C. § 1666(e) and 12 C.F.R. § 226.12(e)(1); and
- b. misrepresenting any consumer's right under the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f.

15. Defendant, its successors and assigns, and its officers and agents, servants, employees and attorneys, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, are hereby enjoined from violating, directly or through any corporation, subsidiary, division or other device, any provision of the Mail Order Rule, including but not limited to:

- a. failing to timely offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the order and receive a prompt refund, as required by 16 C.F.R. § 435.1(b)(1); and
- b. failing to deem an order canceled and make a prompt refund to buyers who are entitled to such refunds under the Rule, as required by 16 C.F.R. § 435.1(c).

16. In the event the Mail Order Rule is hereafter amended or modified, defendant's compliance with that Rule as so amended or modified shall not be deemed a violation of this injunction. A copy of the Mail Order Rule is attached hereto as Appendix A and incorporated herein as if fully set forth verbatim.

CONSUMER REDRESS

17. Defendant shall, in accordance with this Paragraph, provide refunds to eligible persons.

- a. Within thirty (30) days of the date of entry of this Consent Decree,

defendant shall compile a list containing the following information:

- i. the name and last known address of each eligible person described in Definition 6;
- ii. the total amount defendant back billed each eligible person described in Definition 6 for Internet service;
- iii. whether each person described in subparagraph 17.a.i. has been reimbursed, in whole or in part, for payment of the amounts described in subparagraph 17.a.ii.;
- iv. the amount (if any) of the reimbursement described in subparagraph 17.a.iii.; and
- v. the amounts set out in subparagraph 17.a.ii. minus the amount set out in subparagraph 17.a.iv.

In addition, defendant shall retain a National Change of Address System (“NCOA”) licensee to update this list by processing the list through the NCOA database.

- b. Within sixty (60) days of the date of entry of this Consent Decree, defendant shall send via first-class mail, postage prepaid, a Notice of Refund in the form set forth in Appendix B to each consumer whose name appears on the list required by Paragraph 17.a. of this Consent Decree and who has not been reimbursed in the amounts described in this subpart. Prior to sending the Notice of Refund, defendant shall credit each eligible person’s credit or debit card account the amount set out in subparagraph 17.a.v. Alternatively, defendant shall include with the Notice of Refund a refund check for the relevant amount.
- c. No information other than that contained in Appendix B shall be included in or added to the Notice of Refund, nor shall any other material be transmitted therewith, except for a refund check, if appropriate. The envelope containing the Notice of Refund shall be in the form set forth in

Appendix C. For each mailing returned by the U.S. Postal Service as undeliverable for which defendant thereafter obtains a corrected address, defendant shall, within fifteen (15) business days after receiving the corrected address, send a Notice of Refund and, if necessary, a refund check, to the corrected address.

- d. For a period of one hundred twenty (120) days from the date of entry of this Consent Decree, defendant shall comply with the procedures set out in Paragraph 17.b. of this Consent Decree with regard to each eligible person who was not reimbursed pursuant to Paragraph 17.b and who contacts defendant or the Commission in any manner. Each mailing shall be made within fifteen (15) days after defendant receives such person's name and address.
- e. For a period of one hundred twenty (120) days from the date of entry of this Consent Decree, defendant shall provide, and adequately staff during ordinary business hours, a toll-free telephone number to answer questions and provide information relating to this refund program.

CIVIL PENALTY

18. Defendant Netpliance, Inc., its successors and assigns, shall pay to plaintiff a civil penalty, pursuant to section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A), in the amount of \$100,000.

19. Defendant shall make the payment required by Paragraph 18 within five (5) days of the date of entry of this Consent Decree by electronic fund transfer in accordance with the instructions provided by the Office of Consumer Litigation, Civil Division, U.S. Department of Justice, Washington, D.C. 20530, for appropriate disposition.

20. In the event of any default in payment, which default continues for ten days beyond the due date of payment, the entire unpaid penalty, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable.

COMPLIANCE

21. Defendant Netpliance, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this Consent Decree, maintain and upon request make available to the Federal Trade Commission for inspection and copying all advertisements and promotional materials containing the representation.

22. Within one hundred fifty (150) days of the date of entry of this Consent Decree, defendant shall furnish to Commission staff the following:

- a. A computer print-out copy of the list required by Paragraph 17.a. of this Consent Decree, as well as the list in computer readable form (as set forth in Appendix D);
- b. In computer readable form (as set forth in Appendix D) and in computer print-out form, a list of the names and addresses of each customer who was sent a Notice of Refund pursuant to Paragraph 17.b. of this Consent Decree, and for each name included on the list, either (a) the amount, check number and mailing date of the refund check; or (b) the amount credited to the credit card account and the mailing date of the Notice of Refund;
- c. In computer readable form (as set forth in Appendix D) and in computer print-out form, a list of the names and addresses of all consumers who contacted defendant or were referred to defendant by the Commission in accordance with Paragraph 17.d. of this Consent Decree;
- d. Copies of all correspondence and other communications to, from, or concerning all consumers who requested a refund but were refused, and the reason(s) for denying the refund;
- e. All copies of the Notice of Refund returned to defendant as undeliverable; and
- f. All other documents and records evidencing efforts made and actions taken by defendant to identify, locate, contact and provide refunds to consumers

requesting a refund.

23. Defendant Netpliance, Inc. and its successors and assigns shall, within thirty (30) days of entry of this Consent Decree, provide a copy of this Consent Decree and the Business Guide to the Federal Trade Commission's Mail or Telephone Order Merchandise Rule (Jan. 1995) ("Business Guide") to each of its current supervisory or managerial agents, servants, employees and attorneys who are engaged in defendant's mail, telephone, facsimile or Internet order sales business, and shall secure from each such person a signed and dated statement acknowledging receipt of this Consent Decree and the Business Guide, and shall, within ten (10) days of complying with this paragraph, file an affidavit with the Regional Director, Western Region, Federal Trade Commission, 901 Market Street, San Francisco, CA 94103, setting forth the fact and manner of its compliance, including the name and title of each person to whom a copy of the Consent Decree and Business Guide has been provided.

24. For a period of five (5) years from the date of entry of this Consent Decree, defendant, its successors and assigns, shall maintain and make available to the Federal Trade Commission, within thirty (30) days of the date of receipt of a written request, business records demonstrating compliance with the terms and provisions of this Consent Decree.

25. For a period of twenty (20) years from the date of entry of this Consent Decree, defendant Netpliance, its successors and assigns, shall notify the Regional Director, Western Region, Federal Trade Commission, 901 Market Street, San Francisco, CA 94103, at least thirty (30) days prior to any change in defendant's business, including, but not limited to, merger, incorporation, dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other change in corporate status which may affect defendant's obligations under this Consent Decree. Provided, however, that, with respect to any proposed change in the corporation about which defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

26. One hundred fifty (150) days after entry of this Consent Decree, defendant shall provide a written report to the Federal Trade Commission, signed by an officer of the defendant,

setting forth in detail the manner and form in which the defendant has complied and is complying with this Consent Decree. This report shall include but not be limited to:

- a. a specimen copy of each delay option notice used to comply with any provision of the Mail Order Rule, and a statement setting forth in detail the procedures in place for providing such notices;
- b. a specimen copy of each advertisement or telemarketing script containing a shipping representation;
- c. a statement setting forth in detail defendant's procedures for providing prompt refunds pursuant to the Mail Order Rule; and
- d. a statement setting forth in detail the basis for claiming that defendant will be able to ship merchandise:
 - i. within the time stated in any advertisement;
 - ii. within thirty (30) days, where no time is stated clearly and conspicuously in any advertisement.

Defendant shall mail this written notification to: Regional Director, Western Region, Federal Trade Commission, 901 Market Street, San Francisco, CA 94103.

27. Defendant is hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the Federal Trade Commission its taxpayer identifying number (social security number or employer identification number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of its relationship with the government.

CONTINUING JURISDICTION

28. This Court shall retain jurisdiction of this matter for the purposes of enabling any of the parties to this Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the enforcement of compliance therewith, or for the punishment of violations thereof.

JUDGMENT IS THEREFORE ENTERED in favor of plaintiff and against defendant,
pursuant to all the terms and conditions recited above.

Dated this ____ day of _____, 2001.

UNITED STATES DISTRICT JUDGE

The parties, by their respective counsel, hereby consent to the terms and conditions of the Consent Decree as set forth above and consent to the entry thereof. Defendant waives any rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the investigation and prosecution of this action.

FOR THE UNITED STATES OF AMERICA:

STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division
U.S. Department of Justice

ROBERT L. PITMAN
United States Attorney
Western District of Texas

Assistant United States Attorney
Congress Avenue, Suite 1000
Austin, Texas 78701
(512) 916-5858
(512) 916-5854 (fax)

EUGENE THIROLF
Director
Office of Consumer Litigation

ELIZABETH STEIN
Attorney
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

FOR THE FEDERAL TRADE COMMISSION:

JEFFREY KLURFELD
Regional Director
Western Region
Federal Trade Commission

LINDA K. BADGER
KERRY O'BRIEN
Attorneys
Western Region
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
(415) 356-5266
(415) 356-5242 (facsimile)

FOR THE DEFENDANT:

NETPLIANCE, INC.,

By:

KENT SAVAGE
President

Attorney for Defendant
CHARLES L. FREED, ESQ.
Thompson Hine & Flory LLP
1920 N Street, N.W.
Washington, D.C. 20036-1601
(202) 331-8800
(202) 331-8330 (facsimile)

APPENDIX A

NOTICE OF REFUND

Dear [NAME]:

The Federal Trade Commission recently challenged certain of our billing practices. Specifically, the FTC alleged that for a certain period of time, Netpliance had not adequately informed customers that they would be billed for Internet service immediately upon receipt of their i-openers, rather than when the device and service were actually used.

Our records show that you were back-billed for Internet service charges during a time period when you had not activated your i-opener. Although Netpliance has not admitted any wrongdoing, Netpliance has agreed to settle its dispute with the FTC by providing full refunds to certain Netpliance customers.

Accordingly, we are pleased [to enclose a refund check] [to send this notice that we have credited your credit card or debit card] to reimburse you.

If you have any questions, please call 1-800-xxx-xxxx.

Sincerely,

[Netpliance, Inc.]

Netpliance, Inc.

[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[Address or address window]

ATTENTION: NOTICE OF REFUND ENCLOSED

SUBMISSION OF MAGNETICALLY-RECORDED INFORMATION

Magnetic media shall be submitted in the following forms and formats:

- (A) Magnetic storage media. The FTC will accept: (1) 9-track computer tapes recorded in ASCII or EBCDIC format at either 1600 or 6250 BPI; (2) 5.25-inch microcomputer floppy diskettes recorded in high or low densities; (3) 3.5-inch microcomputer floppy diskettes recorded in high or low densities; (4) CD-readable disks formatted to ISO 9660 specifications; (5) QIC-80 magnetic tapes formatted to Travan®-1, 2120 Ximat XL, or 2120 Ximat specification, uncompressed; (6) 5.25-inch ISO-standard rewritable optical disks with 512 sectors, formatted to 1.2 gigabytes; or (7) Iomega ZIP® disk. The FTC will accept 4mm & 8mm DAT and other cassette, mini-cartridge, cartridge, and DAT/helical scan tapes by pre-authorization only. In all events, files provided on 4mm DAT cassettes must not be compressed or otherwise altered by proprietary backup programs. Files provided on 8mm DAT cassettes must not be compressed or otherwise altered by proprietary backup programs but may be accepted with files compressed using TAR or CPIO, or created using DD copy or ufsdump.
- (B) File and record structures.
- (1) Magnetically-recorded information from centralized non-microcomputer-based systems.
- (a) File structures. The FTC will accept sequential files only. All other file structures must be converted into sequential format.
- (b) Record structures. The FTC will accept fixed length records only. All data in the record is to be provided as it would appear in printed format: *i.e.*, numbers unpacked, decimal points and signs printed.

- (2) Magnetically-recorded information from microcomputers.

Microcomputer-based word-processing documents should be in DOS-text (ASCII), WordPerfect, or Microsoft Word format. Spreadsheets should be in Microsoft Excel (.xls), or Lotus-compatible (.wk1) format. Database files should be in Microsoft Access (.mdb), or dBase-compatible (.dbf) format. Database or spreadsheet files also may be submitted after conversion to ASCII delimited, comma separated format, with field names as the first record. Graphic images must be in TIFF 4 format, compressed and unencrypted. Other proprietary software formats for word processing documents, spreadsheets, databases, graphics and other data files will be accepted by pre-authorization only. For microcomputer files that are too large for one disk, files may be provided in a proprietary backup program format with prior authorization only or in compressed PKZip® format.

(C) Documentation. Brief documentation of each file on tape or disk must be provided.

- (1) Files provided on disk must be accompanied by the following information: (a) full pathname and (b) the disk on which the file resides. Where necessary, paths that must be created in order to successfully read submitted files on FTC equipment also must be provided
- (2) Files provided on tape must be accompanied by the following information: (a) filename; (b) the tape on which the file resides; (c) the position of the file on the tape. For sequential database files, the documentation also must include (a) the number of records contained in the file; (b) the length and block size of each record; and (c) the record layout, including (i) the name of each element, (ii) the respective element size in bytes, and (iii) the element's data type. The documentation should be included in the same package as the tape, along with a printout of the first 100 records in report format.

(D) Shipping. Magnetic media must be shipped clearly marked: **MAGNETIC MEDIA DO NOT X-RAY.**