

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PATRICK O'TOOLE
United States Attorney

Assistant United States Attorney
880 Front Street
Room 6293
San Diego, CA 92101-8893
(619) 557-5610

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

_____)	
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No.:
v.)	
)	
MICRO STAR SOFTWARE, INC., and)	
STEPHEN BENEDICT,)	
)	
Defendants.)	
_____)	

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 (“FTC” or “Commission”), for its complaint, alleges that:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101, et seq., and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to obtain monetary civil penalties and injunctive and other relief for Defendants' violations of Section 5 of the FTC Act, the FTC's Trade Regulation Rule entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310, and the Unordered Merchandise Statute.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1339, 1345, and 1355 and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 57b, and 6105(b).

3. Venue in the United States District Court for the Southern District of California is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c), and 1395(a).

DEFENDANTS

1 **DEFENDANTS' COURSE OF CONDUCT**

2 **Continuity Program for Computer Products and Services**

3 7. Defendants develop and sell computer programs and provide computer technical support
4 services.

5 8. Since June 1994, in connection with the sale, offering for sale, or distribution of its computer
6 programs and its technical support services, the Defendants have operated the Crystal Vision continuity
7 program which ships computer programs on a monthly basis and provides computer technical support
8 services to its members.

9 **Telemarketing Calls**

10 Introductory 30-day Trial Offer

11 9. In numerous instances since June 1994, the Defendants have marketed memberships in their
12 continuity program through outbound telemarketing calls made to

13 ~~But 401 Tw 2.6215 D. develop calls State in Benedict m sell coms icomputerl Visio calls made toscriptedus76.fasis~~

14 Cont9 Tw ich94, t86 look atoll ryof-3g,

15 8. 76 Tw (422emcal support) Tj T* -0.35, dreeg-3-ernehe Defend,

16
17
18
19
20
21
22
23
24
25
26
27
28

1 And for the refundable \$19.95 - did you want to use Visa, MasterCard, Discover, Amex, or debit
2 card? We take all five.”

3 14. If consumers accept the trial offer, the Defendants charge \$19.95 to consumers’ debit or
4 credit card accounts and send consumers the catalog and the introductory package of computer
5 programs. If consumers call within the 30-day trial period, they can obtain a refund of the \$19.95.

6 Non-Refundable Membership Fee and Automatic Enrollment in Continuity Program

7 15. The Defendants do not clearly and conspicuously disclose to consumers, however, that
8 consumers must contact the Defendants to avoid further obligations. Defendants do not disclose that if
9 consumers fail to contact the Defendants within the 30-day trial period to cancel, the Defendants will
10 also charge a \$49.95 non-refundable membership fee to the debit or credit card accounts consumers
11 provided to pay \$19.95 for the 30-day trial period, and will automatically enroll consumers in the
12 continuity program. The Defendants merely state that “[o]ur service has a one time set up fee of only
13 \$49.95, *but you can read about it with your package.*”

14 16. After consumers agree to pay for the trial offer, the Defendants state: “And just let us
15 know in 30 days if you’re not interested in the service and you won’t be billed the one time set-up fee
16 or receive any future shipments.” This statement still does not adequately disclose, before consumers
17 also charge fundable membership fee to the debit et-up fee

18
19
20
21
22
23
24
25
26
27
28

1 for a 30-day trial period, that consumers must contact the Defendants to seek a refund within each 30-
2 day trial period or incur a non-refundable financial obligation, that consumers must pay for shipping to
3 return monthly packages of computer programs if they decide not to purchase them, and consumers'
4 right to cancel their memberships.

5 Post-Sale Disclosures Are Not Clear and Conspicuous

6 25. The disclosures made in the brochure are also not clear and conspicuous. Consumers
7 must unfold the tri-fold brochure to find these disclosures, which are located on an interior third page.
8 In addition, nothing on the packaging in which consumers receive the introductory shipment alerts
9 consumers that important membership terms are included inside the package.

10 26. Consumers who have not received the material terms and conditions of membership, either
11 during telemarketing calls or in the post-sale disclosures, therefore have no reason to believe that
12 subsequent periodic shipments are anything other than unordered merchandise which they may keep as
13 a gift or

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 provide refunds of membership fees to consumers after the initial 30-day trial period, but they are often
2 only partial refunds. Consumers have therefore paid full or partial membership fees even though the
3 Defendants did not clearly and conspicuously disclose the non-refundable nature of the fee or that
4 consumers had to contact the Defendants to avoiding incurring financial obligation for the fee.

5 31. The Defendants also inform consumers who call to request a refund for a subsequent
6 monthly shipment after the 30-day trial period relating to that shipment has elapsed that the \$19.95 is
7 not refundable. The Defendants sometimes provide refunds of the \$19.95 monthly fee after the 30-day
8 trial period relating to that shipment, but they are often only partial refunds. Consumers have therefore
9 paid full or partial fees for monthly shipments even though the Defendants did not clearly and
10 conspicuously disclose all material terms and conditions of membership in the continuity program,
11 including that monthly fees are non-refundable after 30 days.

12 **THE FTC ACT**

13 32. Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), provides that “unfair or deceptive
14 acts or practices in or affecting commerce, are hereby declared unlawful.”

15 33. Misrepresentations or omissions of material fact constitute deceptive acts or practices
16 prohibited by Section 5(a) of the FTC Act.

17 **FTC ACT VIOLATIONS**

18 **COUNT I**

19 34. In numerous instances since June 1994, in connection with the sale, offering for sale, or
20 distribution of computer programs and services through the Crystal Vision Software Services continuity
21 program, as described in paragraphs 7 through 31 above, Defendants have represented, expressly or
22 by implication, that consumers who agree to their offers will receive a package of computer programs
23 for a 30-day trial period.

24 35. Defendants have failed to disclose or to disclose adequately to consumers material terms
25 and conditions, including:

- 26 a. that consumers must contact Defendants within an initial trial period to prevent
27 automatic enrollment in the Crystal Vision continuity program and the payment of a
28 membership fee;

- 1 b. that the Defendants periodically ship merchandise for a trial period to Crystal Vision
2 continuity program members without any further action by consumers and automatically
3 charge consumers' debit or credit card accounts \$19.95 for each shipment of
4 merchandise consumers receive;
- 5 c. that consumers must contact the Defendants to seek a refund for shipments before the
6 trial period relating to that shipment elapses;
- 7 d. that consumers must pay for shipping to return packages of computer programs if they
8 decide not to purchase them; and
- 9 e. consumers' right to cancel their memberships.

10 36. As a result of the representation set forth in paragraph 34, Defendants' failure to disclose
11 or to disclose adequately the material information set forth in paragraph 35 is a deceptive act or
12 practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

13 **COUNT II**

14 37. In numerous instances since June 1994, in connection with the sale, offering for sale, or
15 distribution of computer programs and services through the Crystal Vision Software Services continuity
16 program, as described in paragraphs 7 through 31 above, Defendants have represented, expressly or
17 by implication, that consumers who accept packages of computer programs for 30-day trial periods
18 incur no risks or obligations.

19 38. In truth and in fact, consumers who accept packages of computer programs for 30-day
20 trial periods must affirmatively contact the Defendants:

- 21 a. to prevent the Defendants from enrolling consumers in the Crystal Vision continuity
22 program and charging consumers a non-refundable \$49.95 membership fee;
- 23 b. to prevent the Defendants from periodically shipping additional merchandise for which
24 Defendants automatically charge consumers' debit or credit card accounts \$19.95 for
25 each shipment;
- 26 c. to request refunds of \$19.95 for each shipment made by Defendants before the trial
27 period relating to that shipment elapses; and
- 28

1 d. to avoid paying for shipping to return packages of computer programs if they decide
2 not to purchase them.

3 39. Therefore, the representation set forth in paragraph 37 is false and misleading and
4 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

5 **COUNT III**

6 40. In numerous instances since June 1994, in connection with the telemarketing of computer
7 programs and services through the Crystal Vision Software Services continuity program, as described
8 in paragraphs 7 through 31 above, the Defendants have represented to consumers, expressly or by
9 implication, that consumers have purchased or agreed to purchase goods or services from the
10 Defendants, and therefore owe money to the Defendants.

11 41. In truth and fact, in numerous instances, consumers did not purchase or agree to purchase
12 goods or services from the Defendants, and therefore do not owe money to the Defendants.

13 42. Therefore, the representations set forth in paragraph 40 are false and misleading and
14 constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

15 **TELEMARKETING SALES RULE**

16 43. Pursuant to the Telemarketing Act, on August 16, 1995, the FTC promulgated the
17 Telemarketing Sales Rule, 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed. Reg.
18 43842 (Aug. 23, 1995). The Rule became effective on December 31, 1995, and has since that date
19 remained in full force and effect.

20 44. The Telemarketing Sales Rule prohibits deceptive and abusive telemarketing acts or
21 practices. Specifically, the Telemarketing Sales Rule contains the following provisions:

22 Sec. 310.3 Deceptive telemarketing acts or practices.

23 (a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or
24 practice and a violation of this Rule for any seller or telemarketer to engage in the following
conduct:

25 (1) Before a customer pays for goods or services offered, failing to disclose, in a clear
26 and conspicuous manner, the following material information:

27 * * * * *

28 (ii) All material restrictions, limitations, or conditions to purchase, receive, or
use the goods or services that are the subject of the sales offer;

1 (iii) If the seller has a policy of not making refunds, cancellations, exchanges, or
2 repurchases, a statement informing the customer that this is the seller's policy;
3 or, if the seller or telemarketer makes a representation about a refund,
4 cancellation, exchange, or repurchase policy, a statement of all material terms
5 and conditions of such policy;

6 * * * * *

7 45. The Telemarketing Sales Rule's Statement of Basis and Purpose explains that, "[t]he
8 Commission intends that the disclosures be made before the consumer divulges to a telemarketer or
9 seller credit card or bank account information. Thus, a telemarketer or seller who fails to provide the
10 disclosures until the consumer's payment information is in hand violates the Rule." 60 Fed. Reg. 43842,
11 43846 (Aug. 23, 1995).

12 46. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section
13 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales Rule are unfair
14 or deceptive acts or practices in or affecting commerce, in violation of Section 5(a)(1) of the FTC Act,
15 15 U.S.C. § 45(a)(1).

16 47. Defendants are telemarketers or sellers engaged in telemarketing within the meaning of the
17 Telemarketing Sales Rule, 16 C.F.R. §§ 310.2(r) and (u).

18 **TELEMARKETING SALES RULE VIOLATIONS**

19 **COUNT IV**

20 48. In numerous instances since June 1994, in connection with the telemarketing of computer
21 programs and services through the Crystal Vision Software Services continuity program, as described
22 in paragraphs 7 through 31 above, the Defendants have failed to disclose, in a clear and conspicuous
23 manner, before a consumer pays, all material restrictions, limitations, or conditions to purchase, receive,
24 or use the goods or services that are the subject of the sales offer, including, without limitation:

- 25 a. that consumers must contact Defendants within an initial trial period to prevent
26 automatic enrollment in the Crystal Vision continuity program and the payment of a
27 membership fee;
- 28 b. that the Defendants periodically ship merchandise for a trial period to Crystal Vision
continuity program members without any further action by consumers and automatically

1 charge consumers' debit or credit card accounts \$19.95 for each shipment of
2 merchandise consumers receive;

3 c. that consumers must contact the Defendants to seek a refund for shipments before the
4 trial period relating to that shipment elapses;

5 d. that consumers must pay for shipping to return packages of computer programs if they
6 decide not to purchase them; and

7 e. consumers' right to cancel their memberships.

8 49. The Defendants have failed to disclose the required information before consumers divulge
9 to the telemarketers their credit card or bank account information and have further failed to disclose the
10 required information in a clear and conspicuous manner at any time during the telemarketing sales calls,
11 thereby violating Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule.

12 **COUNT V**

13 50. In numerous instances since June 1994, in connection with the telemarketing of computer
14 programs and services through the Crystal Vision Software Services continuity program, as described
15 in paragraphs 7 through 31 above, the Defendants have failed to disclose, in a clear and conspicuous
16 manner, before a consumer pays, that the Defendants have a policy of not making full refunds of the
17 \$49.95 membership fee after the initial trial period.

18 51. The Defendants have failed to disclose this refund policy before consumers divulge to the
19 telemarketers their credit card or bank account information and have further failed to disclose this
20 required information in a clear and conspicuous manner at any time during the telemarketing sales calls,
21 thereby violating Section 310.3(a)(1)(iii) of the Telemarketing Sales Rule.

22 **THE UNORDERED MERCHANDISE STATUTE**

23 52. The Unordered Merchandise Statute, 39 U.S.C. § 3009 (1970) generally prohibits
24 shipping unordered merchandise, unless such merchandise is clearly and conspicuously marked as a
25 free sample, or is merchandise mailed by a charitable organization soliciting contributions. The statute
26 also prohibits billing and sending dunning communications to recipients of unordered merchandise.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
221

1 § 45(m)(1)(A), Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §
2 2461 note, as amended by the Debt Collection Improvement Act of 1996, Pub.L. 104-134, and
3 Federal Trade Commission Rule 1.98(d), 16 C.F.R. § 1.98(d), 61 Fed. Reg. 54548 (Oct. 21, 1996),
4 authorize the Court to award monetary civil penalties of not more than \$11,000 for each such violation
5 of the Telemarketing Sales Rule that occurred after November 20, 1996.

6 59. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant
7 injunctive and other ancillary relief, including consumer redress, disgorgement, and restitution to prevent
8 and remedy any violations of any provision of law enforced by the Commission.

9 60. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the
10 Telemarketing Act, 15 U.S.C. § 6105(b), authorize the Court to grant to the FTC such relief as the
11 Court finds necessary to redress injury to consumers or other persons resulting from Defendants'
12 violations of the Telemarketing Sales Rule, including the rescission and reformation of contracts and the
13 refund of money.

14 **PRAYER FOR INJUNCTIVE AND MONETARY RELIEF**

15 WHEREFORE, Plaintiff requests that this Court, pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53b,
16 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equity
17 powers:

18 (1) Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in this
19 Complaint;

20 (2) Enjoin Plaintiff from recommitting the same violations; and award Plaintiff such relief as the Court may deem just and equitable.

1 option plan covered by the Negative Option Rule on all packages shipped by the Defendants to
2 consumers;

3 (5) Award Plaintiff such other and additional relief as the Court may deem just and proper.
4
5
6
7

8 DATED:

9 Of Counsel:

FOR THE UNITED STATES OF AMERICA:

10 ELAINE D. KOLISH
11 Associate Director for Enforcement
12 Bureau of Consumer Protection
13 Federal Trade Commission

ROBERT MCCALLUM
Assistant Attorney General
Civil Division
U.S. Department of Justice

13 JAMES REILLY DOLAN
14 Assistant Director for Enforcement
15 Bureau of Consumer Protection
16 Federal Trade Commission

PATRICK O'TOOLE
United States Attorney

15 EDWIN RODRIGUEZ
16 ROBIN ROSEN SPECTOR
17 Attorneys
18 Division of Enforcement
19 Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3147

By: _____
Assistant United States Attorney (Bar No. _____)
880 Front Street
Room 6293
San Diego, CA 92101-8893
(619) 557-5610

EUGENE M. THIROLF
Director
Office of Consumer Litigation

Attorney
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001