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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 NUTRACLICK, LLC, a limited
20 liability company, also d/b/a Force
21 Factor;

22 DANIEL WALLACE, individually and
23 as an officer of NutraClick, LLC; and

24 PATRICK CARROLL, individually
25 and as an officer of NutraClick, LLC;

26 Defendants.
27
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Case No. 2:20-cv-08612

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

1 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

2 1. The FTC brings this action under Sections 5(a), 5(m)(1)(A), 16(a),
3 and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a),
4 45(m)(1)(A), 56(a), 57b; Section 5 of the Restore Online Shoppers’ Confidence
5 Act (“ROSCA”), 15 U.S.C. § 8404; and the Telemarketing and Consumer Fraud
6 and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, to
7 obtain permanent injunctive relief, rescission or reformation of contracts,
8 restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other
9 equitable relief for Defendants’ acts or practices in violation of Section 4 of
10 ROSCA, 15 U.S.C. § 8403, and the FTC’s Telemarketing Sales Rule (“TSR”), 16
11 C.F.R. Part 310, in connection with their deceptive marketing of their negative
12 option program.

13 **JURISDICTION AND VENUE**

14 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§
15 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(m)(1)(A), 57b, 6102(c), 6105(b),
16 and 8404(a).

17 3. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), (c)(2).

18 **PLAINTIFF**

19 4. The FTC is an independent agency of the United States Government
20 created by statute. 15 U.S.C. §§ 41-58. The FTC enforces ROSCA, 15 U.S.C.
21 §§ 8401-8405, which prohibits the sale of goods or services on the internet through
22 negative option marketing without meeting certain requirements to protect
23 consumers. A negative option is an offer in which the seller treats a consumer’s
24 silence as consent to be charged for goods or services. The FTC also enforces the
25 Telemarketing Act, 15 U.S.C. §§ 6101-6108. Pursuant to the Telemarketing Act,
26 the FTC promulgated and enforces the TSR, 16 C.F.R. Part 310, which prohibits
27 deceptive and abusive telemarketing acts or practices in or affecting commerce.
28

1 **COMMERCE**

2 9. At all times material to this Complaint, Defendants have maintained a
3 substantial course of trade in or affecting commerce, as “commerce” is defined in
4 Section 4 of the FTC Act, 15 U.S.C. § 44.

5 **DEFENDANTS’ BUSINESS ACTIVITIES**

6 **Overview**

7 10. Defendants enroll consumers in paid “VIP Membership” programs by
8 enticing them with “free samples” of their dietary supplements or beauty products.
9 After a “Free Trial” typically described as 18 days or 34 days in duration (the
10 “Free Trial Period”), acceptance of these free samples converts to paid
11 memberships, unless consumers affirmatively cancel their memberships.

12 11. From September 2016 until after learning of the FTC’s investigation
13 in May 2019, Defendants violated ROSCA and the TSR in connection with their
14 sales activities by failing to clearly and conspicuously disclose that consumers who
15 received free samples must call at least *one day before* the end of the advertised
16 Free Trial Period to avoid being charged for the monthly membership program,
17 which includes a one-month supply of the sampled product.

18 12. Defendants Wallace and Carroll (the “Individual Defendants”) are
19 NutraClick’s sole officers and had authority to control, and knowledge of,
20 NutraClick’s failure to clearly and conspicuously disclose its billing practice.

21 **Related FTC Actions**

22 13. In September 2016, the FTC brought a lawsuit against NutraClick in
23 this District, alleging that it failed to disclose material terms of its membership
24 programs. *FTC v. NutraClick, LLC*, No. 2:16-cv-06819-DMG (C.D. Cal.).
25 Individual Defendants were not parties to the lawsuit.

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1 14. The FTC and NutraClick settled the lawsuit, resulting in the Court’s
2 entry of an Order for Permanent Injunction and Monetary Judgment (the
3 “Permanent Injunction”).

4 15. The allegations in this Complaint are related to a concurrent civil
5 contempt action in which the FTC charges Defendants with violations of the
6 Permanent Injunction.

7 **Terms of Defendants’ Membership Programs**

8 16. Defendants sell products under various brand names, including Force
9 Factor, Peak Life, Stages of Beauty, and ProbioSlim, and operate “VIP
10 Membership” programs for their product lines.

11 17. The terms of Defendants’ membership programs are materially
12 identical across all of their product lines, typically varying only in the length of the
13 advertised Free Trial Period and the amount of the monthly recurring charge.

14 18. Consumers enroll in Defendants’ membership programs by signing up
15 for a “free sample” of a NutraClick product and paying a small charge, typically
16 \$4.99, to cover shipping and handling. Consumers may use the “free sample”
17 during the Free Trial Period, typically advertised as 18 days or 34 days in duration.

18 19. However, before learning of the FTC’s investigation in May 2019,
19 Defendants typically charged consumers’ accounts for the membership program
20 during the Free Trial Period, at 4:00 a.m. Eastern Time on the last day of the Free
21 Trial Period. The charge typically ranged from \$70-80, depending on the product
22 shipped to the consumer.

23 20. After learning of the FTC’s investigation, Defendants changed their
24 billing practice to charge consumers’ accounts for the membership program at 4:00
25 a.m. on the day after the Free Trial Period ends.

26 21. Defendants continue charging consumers approximately every 30
27 days for the membership program until consumers call to cancel.
28

**Defendants’ Failure to Disclose Early Billing Practice
To Online Enrollees**

22. Defendants advertise and sell their products on the internet through their mobile and desktop websites. Defendants direct consumers to these websites through television, radio, text messages, and internet advertisements. These advertisements offer a free “trial supply” or “free sample” of Defendants’ products.

23. When a consumer orders a free sample for the Free Trial Period, NutraClick enrolls them in one of its “VIP Membership” programs described in Paragraphs 16-21.

24. Consumers order the free sample by submitting their shipping information via a “Customer Information Page” and then submitting their billing information via a “Checkout Page.”

25. Defendants’ mobile and desktop Customer Information Pages promoting their products display the last day of the Free Trial Period, and state that the monthly VIP membership fee will be charged “after” the trial.

26. For example, Figure 1 on the following page shows Defendants’ desktop Customer Information Page for the ProbioSlim product. This page indicates that consumers will receive an “18-Day Free Trial” with the advertised product. It also states that consumers will be “charged *after* the trial” (italics added, red circle added for emphasis below). Similar text appeared on Defendants’ mobile internet Customer Information Pages.

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Figure 1 – Desktop Customer Information Page for ProbioSlim

WHERE SHOULD WE SHIP YOUR SAMPLE?

First Name

Address

Last Name

City

Phone

State

Email

ZIP

FORCE FACTOR

CLICK HERE
TO CALCULATE SHIPPING & HANDLING

WARNING: This special offer could end any day. Samples are going **FAST**. Get yours before it's too late!

18-Day Free Trial Ends May 21, 2019. **Monthly VIP Membership of \$69.99 + \$4.99 S&H and applicable sales tax, charged after the trial, until you cancel.** To cancel, simply call 1-800-647-7303. For returns policy, visit www.forcefactor.com/returns.

27. Before Defendants learned of the FTC’s investigation in May 2019, the statement that the “monthly VIP membership” fee will be charged “after” the Free Trial Period was false. In fact, Defendants charged consumers the monthly membership fee (or caused this fee to be charged) at 4:00 a.m. on the last day of the advertised Free Trial Period, rather than after the Free Trial End Date. As a result, consumers were required to call Defendants one day before the end of the Free Trial Period to avoid the membership charge.

28. Similarly, during that same time, Defendants’ desktop and mobile Checkout Pages did not correct the false statement on their Customer Information Pages and did not otherwise clearly and conspicuously disclose that consumers were required to call Defendants one day before the end of their Free Trial Period to avoid the membership charge.

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1 29. For example, Figure 2 below shows Defendants’ desktop Checkout
 2 Page for the ProbioSlim product. A checkbox text disclosure restates that the
 3 duration of consumers’ Free Trial Period is 18 days and states that consumers must
 4 call “within” that time to avoid the membership charge. It represents that the
 5 consumer will be sent a one-month supply of a product “beginning 18 days from
 6 now” at their expense, *unless* the consumer cancels within 18 days.

7 **Figure 2 – Desktop Checkout Page for ProbioSlim**

8

9 **FINAL STEP**

10  All information entered in the form below is secured using industry-standard 256-bit SSL encryption. Please fill out all the required fields to complete your order.

11 I understand that unless I cancel within 18 days by calling 1-800-647-7303, I will be sent a one-month supply of ProbioSlim
 for just \$69.99 + \$4.99 S&H and applicable sales tax beginning 18 days from now and every 30 days thereafter.

12 * **Credit Card Number** * **Expiration Date** * **Security code**
 The digits on the front of your card The date your credit card expires (or "CVC" or "CVV")

13 01 - Jan / 2019 [What is this?](#)

14

15

16 **RUSH MY SAMPLE**

17

18 30. Before February 2018, the mobile internet version of Defendants’
 19 Checkout Page also contained the checkbox text disclosure depicted in Figure 2.

20 31. In February 2018, Defendants changed the mobile internet version of
 21 their Checkout Page to remove the checkbox text disclosure depicted in paragraph
 22 29 and replaced it with text representing consumers would be charged “after” the
 23 Free Trial Period.

24 **Defendants’ Failure to Disclose Early Billing Practice**
 25 **To Phone Enrollees**

26 32. Defendants also sell their membership programs by phone to
 27 consumers across the United States. Defendants respond to consumer calls
 28

1 prompted by Defendants’ television and radio advertisements, text messages, and
2 internet advertisements such as those described above, and by calling consumers
3 who input information into Customer Information Pages, but do not complete
4 Checkout Pages.

5 33. Defendants’ telemarketers enroll consumers in Defendants’
6 membership programs described above in Paragraphs 16-21. Defendants have
7 required their telemarketers to read written telemarketing scripts verbatim to
8 consumers.

9 34. From September 2016 to at least May 2019, Defendants’
10 telemarketers failed to clearly and conspicuously disclose that consumers were
11 required to call at least one day before the end of their Free Trial Period to avoid a
12 monthly membership charge.

13 35. For example, one of Defendants’ telemarketing scripts stated, in
14 pertinent part:

15
16 You’ll receive your free sample of [product] in about 3-5
17 days. Now, once you’ve started using [product] and are
18 seeing the results, you’ll likely want to continue, so do
19 nothing, and in 18 days, we will ship you a full 1 Month
20 Supply of [product] for just \$69.99 plus \$4.99 shipping
and handling billed to the same credit card you are using
today.

21 36. From September 2016 to at least May 2019, Defendants’
22 telemarketers did not clearly identify when consumers would be charged. For
23 example, Defendants’ telemarketers and telemarketing scripts did not clearly
24 identify whether consumers’ Free Trial Period commenced from the date of the
25 enrollment phone call, the date of receipt of the product, “[o]nce [consumers] start
26 using [the product],” or when consumers “are feeling the results.”

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1 delivery ships.” *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1071 (C.D.
2 Cal. 2018).

3 43. Individual Defendants were aware, or should have been aware, of the
4 class action lawsuit described in paragraph 41, the contents of the webpages at
5 issue in that lawsuit, and the above-quoted statement of the Court indicating that a
6 NutraClick subsidiary’s webpage did not instruct consumers they were required to
7 cancel their enrollments at least one day before the Free Trial End Date to avoid a
8 charge for a program membership.

9 **VIOLATIONS OF THE RESTORE ONLINE**

10 **SHOPPERS’ CONFIDENCE ACT**

11 44. In 2010, Congress passed the Restore Online Shoppers’ Confidence
12 Act, 15 U.S.C. §§ 8401-8405, which became effective on December 29, 2010.
13 Congress passed ROSCA because “[c]onsumer confidence is essential to the
14 growth of online commerce. To continue its development as a marketplace, the
15 Internet must provide consumers with clear, accurate information and give sellers
16 an opportunity to fairly compete with one another for consumers’ business.” 15
17 U.S.C. § 8401(2).

18 45. Section 4 of ROSCA, 15 U.S.C. § 8403, generally prohibits charging
19 consumers for goods or services sold in transactions effected on the internet
20 through a negative option feature, as that term is defined in the TSR, 16 C.F.R. §
21 310.2(w), unless the seller (1) clearly and conspicuously discloses all material
22 terms of the transaction before obtaining the consumer’s billing information; (2)
23 obtains the consumer’s express informed consent before making the charge; and
24 (3) provides a simple mechanism to stop recurring charges. 15 U.S.C. § 8403.

25 46. The TSR defines a negative option feature as a provision in an offer or
26 agreement to sell or provide any goods or services “under which the customer’s
27 silence or failure to take an affirmative action to reject goods or services or to
28

1 cancel the agreement is interpreted by the seller as acceptance of the offer.” 16
2 C.F.R. § 310.2(w).

3 47. As described in Paragraphs 16-31, Defendants have advertised and
4 sold products, in transactions effected on the internet, through a negative option
5 feature as defined by the TSR. 16 C.F.R. § 310.2(w).

6 48. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, a violation of
7 ROSCA is a violation of a rule promulgated under Section 18 of the FTC Act, 15
8 U.S.C. § 57a.

9 **COUNT I**

10 **Failure to Disclose All Material Terms for Online Sales**

11 49. In numerous instances, Defendants, as described in Paragraphs 16-31,
12 in connection with charging or attempting to charge consumers for Defendants’
13 products sold through a negative option feature on the internet, failed to clearly and
14 conspicuously disclose all material terms of the transaction, such as the billing date
15 that consumers would be charged for a monthly membership, before obtaining
16 consumers’ billing information.

17 50. Therefore, Defendants’ acts or practices set forth in Paragraph 49
18 violate Section 4 of ROSCA, 15 U.S.C. § 8403.

19 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

20 51. In 1994, Congress directed the FTC to prescribe rules prohibiting
21 abusive and deceptive telemarketing acts or practices pursuant to the
22 Telemarketing Act, 15 U.S.C. §§ 6101-6108. The FTC adopted the original
23 Telemarketing Sales Rule in 1995, extensively amended it in 2003, and amended
24 certain sections thereafter. 16 C.F.R. Part 310.

25 52. A “seller” means any person who, in connection with a telemarketing
26 transaction, provides, offers to provide, or arranges for others to provide goods or
27 services to a customer in exchange for consideration. 16 C.F.R. § 310.2(dd).
28

1 53. A “telemarketer” means any person who, in connection with
2 telemarketing, initiates or receives telephone calls to or from a customer or donor.
3 16 C.F.R. § 310.2(ff).

4 54. “Telemarketing” means a plan, program, or campaign which is
5 conducted to induce the purchase of goods or services or a charitable contribution,
6 by use of one or more telephones and which involves more than one interstate
7 telephone call. 16 C.F.R. § 310.2(gg).

8 55. Defendants are subject to the TSR because they are “seller[s]” or
9 “telemarketer[s]” engaged in “telemarketing” as defined by the TSR, 16 C.F.R. §
10 310.2(dd), (ff), and (gg).

11 56. The TSR generally prohibits obtaining a customer’s consent to pay for
12 goods or services sold through a negative option feature, as that term is defined in
13 the TSR, 16 C.F.R. § 310.2(w), unless the seller or telemarketer discloses
14 truthfully, in a clear and conspicuous manner, “all material terms and conditions of
15 the negative option feature, including, but not limited to, the fact that the
16 customer’s account will be charged unless the customer takes an affirmative action
17 to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and
18 the specific steps the customer must take to avoid the charge(s).” 16 C.F.R. §
19 310.3(a)(1)(vii).

20 57. As stated in Paragraph 45, the TSR defines a negative option feature
21 as a provision in an offer or agreement to sell or provide any goods or services
22 “under which the customer’s silence or failure to take an affirmative action to
23 reject goods or services or to cancel the agreement is interpreted by the seller as
24 acceptance of the offer.” 16 C.F.R. § 310.2(w).

25 58. As described in Paragraphs 32-37, Defendants have advertised and
26 sold products through a negative option feature by telephone as defined by the
27 TSR. 16 C.F.R. § 310.2((w)).
28

1 64. Defendants' violations of ROSCA and the TSR were committed with
2 the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C.
3 § 45(m)(1)(A).

4 **PRAYER FOR RELIEF**

5 Wherefore, Plaintiff FTC, pursuant to Section 19 of the FTC Act, 15 U.S.C.
6 § 57b, Section 5 of ROSCA, 15 U.S.C. § 8404, and Section 6(b) of the
7 Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equitable powers,
8 requests that the Court:

- 9 A. Award such relief as the Court finds necessary to redress injury to
10 consumers resulting from Defendants' violations of ROSCA and the
11 TSR, including, but not limited to, rescission or reformation of
12 contracts, restitution, the refund of monies paid, and disgorgement of
13 ill-gotten monies;
- 14 B. Enter a permanent injunction to prevent future violations of ROSCA
15 and the TSR by Defendants; and
- 16 C. Award Plaintiff the costs of bringing this action, as well as such other
17 and additional relief as the Court may determine to be just and proper.
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- 19
- 20

21 Dated: September 21, 2020

Respectfully submitted,

22 ALDEN F. ABBOTT
23 General Counsel

24 

25 Brian M. Welke
26 Delilah Vinzon (Local Counsel)

27 Attorneys for Plaintiff
28 FEDERAL TRADE COMMISSION