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Amalia Rodriguez-Mendoza
District Clerk
Travis District

CAUSE NO. _____

<p>STATE OF TEXAS,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>ALPHA RED, INC., BRANCH SOFTWARE, INC., and JAMES R. McCREARY, Individually,</p> <p style="text-align: center;">Defendants.</p>
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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

_____ **JUDICIAL DISTRICT**

**PLAINTIFF'S ORIGINAL PETITION
AND REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff, STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbott, complains of ALPHA RED, INC., BRANCH SOFTWARE, INC., and JAMES R. McCREARY, Individually, Defendants, and for cause of action would respectfully show as follows:

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. Proc. 190.2(b)(3); 190.3(a).

JURISDICTION

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the State of Texas and in the public interest under the authority granted him by Section 17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. Section 17.41 *et seq.* (Vernon 2002 and Supp 2007) ("DTPA") upon the ground that the Defendants have engaged in false, deceptive and misleading acts

and practices in the course of trade and commerce as defined in, and declared unlawful by Sections 17.46(a) and (b) of the DTPA.

DEFENDANTS

3. Defendant Branch Software, Inc (“Branch”) is a Texas corporation. Branch may be served through its registered agent, James R. McCreary, at his residence located at 103 South Seasons Trace Circle, The Woodlands, Texas 77382.

4. Defendant Alpha Red, Inc. (“Alpha”) is a Texas corporation. Alpha may be served through its registered agent, Christopher Carlson, at 440 Louisiana, Suite 1900, Houston, Texas 77002.

5. Defendant James R. McCreary (“McCreary”), an individual, is the Chief Executive Officer of Alpha and Director of Branch. McCreary may be served with process at his residence at 103 South Seasons Trace Circle, The Woodlands, Texas 77382. As Chief Executive Officer, McCreary directed and controlled the acts and practices of both Branch and Alpha, including those acts and practices alleged herein.

VENUE

6. Venue for this cause of action lies in Travis County, Texas, because, under § 17.47(b) of the DTPA, venue is proper because Defendants have done business in the county of suit.

PUBLIC INTEREST

7. Because Plaintiff STATE OF TEXAS has reason to believe that Defendants have engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe that Defendants have caused, and will continue to cause damage to residents of the State of Texas and cause adverse effects to legitimate business enterprises that conduct their trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection and Public

Health Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

8. Defendants have at all times described below engaged in conduct which constitutes trade and commerce as those terms are defined in the DTPA Section 17.45(6).

ACTS OF AGENTS

9. Whenever it is alleged in this Petition that Defendants did any act, it is meant that:
- A. Defendants performed or participated in the act, or
 - B. Defendants' officers, agents, or employees, performed or participated in the act on behalf of and under the authority of the Defendants.

NOTICE BEFORE SUIT

10. The Consumer Protection Division informed Defendants of the alleged unlawful conduct described below at least 7 days before filing suit as required by DTPA Section 17.47(a).

STATEMENT OF FACTS

11. From the Web site registrycleanerxp.com, Defendants advertise and sell RegistryCleanerXP, a software product purported to repair and prevent registry errors on consumers' personal computers. Defendants have sold RegistryCleanerXP throughout the United States, including in Travis County, Texas.

12. When consumers visit the RegistryCleanerXP Web site, they are first informed that the RegistryCleanerXP software program will fix registry errors caused by software errors and malicious entries, thus improving a computer's speed, eliminating computer crashes, and optimizing the computer's internet connection.

13. As an incentive to buy the product, the Web site contains the words "Get A Free Scan," prompting consumers to click on a hyperlink that commences a free download of a limited version of the RegistryCleanerXP software to the consumers' computers.

14. Upon clicking on the "Scan Now" link located on the Web site and running the RegistryCleanerXP program, consumers are confronted with a screen that directs them to "Click on the 'Scan Registry' button to analyze your system."

15. After clicking on the "Scan Registry" button, the program appears to scan the computer's registry. In less than a minute, the results suggest that the program has scanned 17,405 registry keys and discovered 43 errors. Also, another message box appears, stating that RegistryCleanerXP discovered 43 critical errors and that the "Fix Errors" button, a feature that is only available after purchase, should be clicked to repair the errors.

16. The results of the "Free Scan," however, are exactly the same for every computer the software scans. Despite the fact that the software never even scans the computer registry, in each case the program states that it has discovered 43 critical errors. This is true whether or not any registry errors exist. The RegistryCleanerXP "Free Scan" uses these false results to induce consumers into purchasing the full version of the product.

17. Further, even after consumers spend approximately \$40 purchasing the full version of the program from Defendants, RegistryCleanerXP fails to fulfill the promises stated on registrycleanerxp.com. RegistryCleanerXP does not scan the registry of the user's computer at all, much less fix any registry errors. Further, the full version of RegistryCleanerXP does not improve a computer's speed, eliminate computer crashes, or optimize the computer's internet connection.

CONSUMER PROTECTION AGAINST COMPUTER SPYWARE ACT VIOLATION

18. The State adopts by reference the information contained in paragraphs 1-17 and alleges that Defendants, induced the owner or operator of a computer in this state, of which Defendants are not the owner or operator, to install a computer software component to the computer by intentionally misrepresenting the extent to which the installation is necessary for security or privacy reasons, to open or view text, or to play a particular type of musical or other content. TEX. BUS. & COM. CODE ANN. § 48.055 (1);

DECEPTIVE TRADE PRACTICES ACT VIOLATIONS

19. The State adopts by reference the information contained in paragraphs 1-18 and further alleges that Defendants, in the course and conduct of trade and commerce, have directly and indirectly engaged in false, misleading, and deceptive acts and practices declared to be unlawful by the DTPA Sections 17.46(a) and (b), including

- A. engaging in false, misleading, or deceptive acts or practices in the conduct of trade or commerce. TEX. BUS. & COM. CODE ANN. §§ 17.46 (a);
- B. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not. TEX. BUS. & COM. CODE ANN. § 17.46 (b)(5);
- C. advertising goods or services with the intent not to sell them as advertised. TEX. BUS. & COM. CODE ANN. § 17.46 (b)(9);
- D. failing to disclose information concerning goods or services which was known at the time of the transaction when failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have

entered had the information been disclosed. TEX. BUS. & COM. CODE ANN. § 17.46
(b)(24).

INJURY TO CONSUMERS

20. Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award of damages.

APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

21. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated and will continue to violate the laws of the State of Texas as alleged in this Petition. Unless enjoined by this Honorable Court, Defendants will continue to violate the laws of the STATE OF TEXAS and cause loss and damage to the people of this State. Therefore, Plaintiff requests a Temporary Injunction and Permanent Injunction be issued.

PRAAYER FOR RELIEF

22. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, Defendants' successors, assigns, officers, agents, servants, employees, and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

- A. Offering for sale or selling any good which includes or installs any software which violates the Spyware Act, including but not limited to
 - i. intentionally misrepresenting that any computer software program can

- fix registry errors;
 - ii. intentionally misrepresenting that any computer software program can fix or remove malicious entries designed to exploit; and
 - iii. intentionally misrepresenting that any computer contains registry or other errors; and
 - iv. intentionally misrepresenting that any software program has actually fixed or removed errors.
- B. Using false, misleading, or deceptive acts or practices to distribute software;
- C. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, including but not limited to the following:
 - i. representing that any software program has detected errors on any user's computer that it has not actually detected;
 - ii. representing that any software program can repair or has repaired errors on any user's computer that it cannot repair or has not repaired; and
 - iii. representing that any software program can optimize the performance of any user's computer when the software program cannot perform such optimization.
- D. Advertising goods with the intention not to sell them as advertised, including but not limited to advertising that any software program can perform any function that Defendants know it cannot perform.

23. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:
- A. Adjudge civil penalties in favor of Plaintiff STATE OF TEXAS of not more than \$100,000 against the Defendants per violation of the Spyware Act pursuant to Tex. Bus. & Com. Code §48.102(a);
 - B. Adjudge civil penalties in favor of Plaintiff STATE OF TEXAS of not more than \$20,000 against the Defendants per violation of the DTPA pursuant to Tex. Bus. & Com. Code §17.47(c);
 - C. Award such relief as this Court finds necessary to redress injury to consumers resulting from Defendants' violations of the DTPA, including but not limited to reformation or rescission of contracts, disgorgement of ill-gotten gains, and cancellation of purported debts.
 - C. Award the State of Texas attorney's fees and costs pursuant to TEX. GOVT. CODE §402.006(c) for bringing this action.
 - D. Award any such other and additional relief to which the State may show itself entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

JEFF L. ROSE
Deputy First Assistant Attorney General

PAUL CARMONA
Chief, Consumer Protection & Public Health
Division



COREY DAVID KINTZER

State Bar Number 24046219

C. BRAD SCHUELKE

State Bar Number 24008000

Assistant Attorneys General

Consumer Protection & Public Health Division

Post Office Box 12548

Austin, Texas 78711-2548

Telephone 512-463-2185

Facsimile 512-473-8301

ATTORNEYS FOR PLAINTIFF,

THE STATE OF TEXAS