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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
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SEAR 5009 Summons Iss.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

BINH "ERIC" MAI and JANE DOE MAI,
and the marital community composed
thereof; CUONG HUY MAI and JANE DOE
MAI, and the marital community composed
thereof; LOUIS FAGEOL and JANE DOE
FAGEOL, and the marital community
composed thereof; and
ATCCOMPUTERS.COM, LLC;

Defendants.

No. **009 0474** RAJS

COMPLAINT FOR DAMAGES AND
EQUITABLE RELIEF



09-CV-00474-CMP

Plaintiff Microsoft Corporation ("Microsoft") brings this action against BINH "ERIC" MAI, CUONG HUY MAI and LOUIS FAGEOL, along with their spouses and marital communities, and ATCCOMPUTERS.COM, LLC ("defendants").

I. JURISDICTION AND VENUE

1. This is a Complaint for an injunction, damages and other appropriate relief to remedy defendants' scheme of deceitfully obtaining and improperly reselling Microsoft's Academic Edition software products. Through their scheme, defendants improperly obtained and improperly resold thousands of copies of Microsoft software defendants obtained through

COMPLAINT FOR DAMAGES AND
EQUITABLE RELIEF - 1

ORIGINAL

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1 participation in the Microsoft Authorized Education Reseller Program. These academic
2 versions of software, obtained by defendants at a significant discount, were to be distributed
3 only to qualified students, educational faculty and staff members. Instead, defendants sold
4 them to retail customers at significant profit.

5 2. In this action, Microsoft asserts claims for breach of contract, fraud, rescission,
6 and other tort claims, and seeks return of the software, disgorgement of proceeds from
7 defendants' sales, damages and attorneys' fees, in addition to injunctive relief.

8 3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. The
9 matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,
10 and is between citizens of different States.

11 4. The Court has personal jurisdiction over defendants, who have engaged in
12 business activities in and directed to Washington, have committed a tortious act within the
13 state, and have purposefully availed themselves of the opportunity to conduct commercial
14 activities in this forum.

15 5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a), because
16 substantial part of the events or omissions giving rise to the claims pled herein occurred in the
17 Western District of Washington.

18 II. THE PARTIES

19 6. Plaintiff Microsoft is a Washington corporation with its principal place of
20 business in Redmond, Washington.

21 7. Defendant BINH "ERIC" MAI is an individual who, upon information and belief,
22 resides in San Diego, California. All acts of Binh "Eric" Mai alleged herein were undertaken
23 on behalf of himself and on behalf of the marital community composed of himself and
24 defendant Jane Doe Mai. Binh "Eric" Mai is the CEO of the business known and operated as
25 "ATC Computer.com" and is an officer of ATCCOMPUTERS.COM, LLC.
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1 8. Defendant CUONG HUY MAI is an individual who, upon information and
2 belief, resides in San Diego, California. All acts of Cuong Huy Mai alleged herein were
3 undertaken on behalf of himself and on behalf of the marital community composed of himself
4 and defendant Jane Doe Mai. Cuong Huy Mai is the President of the business known and
5 operated as "ATC Computer.com" and is an officer of ATCCOMPUTERS.COM, LLC.

6 9. Defendant LOUIS FAGEOL is an individual who, upon information and belief,
7 resides in San Diego, California. All acts of Louis Fageol alleged herein were undertaken on
8 behalf of himself and on behalf of the marital community composed of himself and defendant
9 Jane Doe Fageol. Louis Fageol is an officer of the business known and operated as "ATC
10 Computer.com" and is an officer of ATCCOMPUTERS.COM, LLC.

11 10. Defendant ATCCOMPUTERS.COM, LLC is a California limited liability
12 company, which does business as "ATC Computers.com."

13 11. The actions alleged herein to have been undertaken by defendants were
14 undertaken by each defendant individually, were actions that each defendant caused to occur,
15 were actions that each defendant authorized, controlled, directed, or had the ability to
16 authorize, control or direct, and/or were actions in which each defendant assisted, participated
17 or otherwise encouraged, and are actions for which each defendant is liable. Each defendant
18 aided and abetted the actions of the defendants set forth below, in that each defendant had
19 knowledge of those actions, provided assistance and benefited from those actions, in whole or
20 in part. Each of the defendants was the agent of each of the remaining defendants, and in
21 doing the things hereinafter alleged, was acting within the course and scope of such agency
22 and with the permission and consent of other defendants.

23 **III. MICROSOFT'S "AUTHORIZED EDUCATION RESELLER" PROGRAM**

24 12. Microsoft is in the business of, among other things, producing and distributing
25 software and other computer solutions to customers. As part of its support for education,
26

1 Microsoft permits qualified educational users to obtain special discounts on boxed, retail
2 versions of Microsoft software. These educational users may obtain, at substantial discount,
3 Academic Edition full packaged product ("FPP"). The Academic Edition FPP is the same
4 powerful, fully-functional software as the regular retail version. The only differences are the
5 Academic Edition label and the discount price.

6 13. Academic Edition FPP is distributed only through channels authorized by
7 Microsoft. One primary means of distribution is through software retailers who are qualified
8 as a Microsoft Authorized Education Reseller ("AER"). Microsoft AERs are specially trained
9 and authorized to sell Academic Edition software to qualified educational users. AERs obtain
10 Academic Edition FPP from Microsoft's authorized distributors at substantial discounts, and
11 are required to distribute Academic Edition FPP only to qualified education users.

12 14. Enrollment in the Microsoft Authorized Education Reseller program requires
13 certain express representations and acceptance of the Microsoft Authorized Education
14 Reseller Agreement (the "AER Agreement"), as well as the provision of certain identification
15 and qualification data.

16 15. The AER program requires that Academic Edition FPP be provided only to
17 qualified educational users for personal use only, and limits the frequency of sales to any one
18 educational user. Paragraph 3 of the AER Agreement specifies:

19 You are authorized to distribute AE Product only to Qualified Educational Users
20 (QEUs) for their end use but not for such QEUs to resell. You shall not distribute
21 more than one (1) copy of each AE Full Packaged Product to any individual end user
22 in any twelve (12) month period. You shall comply with all other requirements
concerning the distribution of AE Product that may be established by Microsoft as part
of the AER program from time to time.

23 16. The AER program requires that AERs are responsible for validating and
24 recording proof that a purchaser is a qualified educational user. Paragraph 2 of the AER
25 Agreement also specifies:

26 You are fully responsible for validating QEU eligibility prior to any

1 distribution of AE Product. QEU status validation must be via either (a) a valid
2 academic purchase order or (b) proof of qualifying enrollment or employment in the
3 case of distribution to QEUs who either are students enrolled at an educational
4 institution or are faculty or staff employed by an educational institution. Proof of
5 qualifying enrollment or employment must be by an original or copy of either a
6 current identification card from the educational institution or other official document
7 (or electronic confirmation) from the educational institution verifying that the
8 individual is an enrolled student or is employed by the institution at the time of
9 purchase.

10 17. The AER program establishes limitations on an AER's marketing of Academic
11 Edition software, and prohibits the marketing of Academic Edition software to the general
12 public. Paragraph 6 of the AER Agreement specifies:

13 If You market AE Product, You shall do so only in catalogues or direct mail to QEUs
14 (and/or their parents or legal guardians if the QEU is a minor) or in publications
15 dedicated to QEUs-only (and/or their parents or legal guardians if the QEU is a
16 minor). You shall not market AE Product or otherwise promote and advertise AE
17 Product availability to the general public. However, You may market AE Product via
18 the world wide web, in which case You shall do so in accordance with Microsoft's
19 AER Internet Promotion Usage Guidelines, which may be found at
20 <http://members.microsoft.com/aerprogram> or such other location as Microsoft may
21 designate. In addition, You shall not display AE Product in a retail setting unless your
22 primary line of business is education sales.

23 18. Under the AER program, Microsoft is entitled to undertake periodic inspections
24 of an AER's books and records to audit an AER's compliance with program requirements.
25 Paragraph 8 of the AER Agreement specifies:

26 Compliance Verification. During the Term and for two (2) years after its termination
or expiration, You must keep all usual and proper books and records relating to your
performance of this Agreement, including but not limited to, distribution of all AE
Product.

During the same period, Microsoft's audit team, which may include third-party
auditors to assist, may conduct audits, at Microsoft's cost, of such books and records
reasonable to verify your compliance with this Agreement. Any audit will be
conducted with reasonable notice during your normal business hours and in a manner
that does not interfere unreasonably with your normal business activities.

19. In the event an AER distributes product to anyone other than qualified education
users or otherwise breaches the AER Agreement, the AER is required to "reimburse

1 Microsoft for the difference between the estimated retail prices for all AE Products so
2 distributed and the estimated retail price for non-AE Product versions of the same product or
3 license titles, without prejudice to any of Microsoft's other legal or equitable rights or
4 remedies.”

5 **IV. DEFENDANTS' UNLAWFUL CONDUCT**

6 20. Defendants have engaged in a scheme to defraud Microsoft and to obtain
7 thousands of copies of Microsoft's Academic Edition FPP software which, upon information
8 and belief, defendants have then sold at retail to members of the general public and other
9 unqualified purchasers.

10 21. In order to accomplish their fraudulent scheme, defendants knowingly made false
11 and misleading representations to Microsoft, registered multiple times to for the AER
12 program, and executed the AER Agreement.

13 22. Defendants first applied for the AER program and executed the AER Agreement
14 on or about February 28, 2005. Defendants executed the AER in succeeding years, on or
15 about the following dates: January 2, 2007, January 17, 2008, and November 11, 2008.

16 23. Each time defendants applied for the AER program and executed the AER
17 Agreement, they represented that:

- 18 a. They were acquiring the services and program materials for sale to qualified
19 education users only in compliance with the AER program;
- 20 b. They had completed the necessary training to become an AER; and
- 21 c. The software they received would not be resold, transferred or assigned to any
22 third party other than a qualified education user.

23 24. The foregoing representations were false, and were knowingly made by
24 defendants to deceive Microsoft into providing defendants with thousands of copies of
25 Microsoft's Academic Edition FPP software.
26

1 25. To perpetuate their scheme, defendants intentionally failed to advise Microsoft of
2 their true intentions and other material facts. Among other things, defendants failed to
3 reveal:

- 4 a. That they had no intention of abiding by the terms governing the use and
5 distribution of the software, and had not previously abided by those terms;
- 6 b. That they had established a business to commercially distribute, and were in
7 the process of commercially distributing, the software to the general public;
- 8 c. That they had no intention of validating the eligibility of the software
9 purchasers, and had previously not validated such eligibility;
- 10 d. That they had no intention of recording proof that a purchaser was a qualified
11 educational user, and had historically never recorded such proof; and
- 12 e. That they had no intention of abiding by the program limitations on marketing
13 Academic Edition software, and historically had been marketing Academic
14 Edition software to the general public.

15 26. After enrolling in the AER program, defendants placed orders and obtained
16 thousands of copies of Academic Edition FPP software at discounted prices. Defendants
17 marketed this software to the general public and other unqualified purchasers in violation of
18 the AER Agreement and, upon information and belief, sold the software to unqualified
19 purchasers, failed to validate and record proof that purchasers were qualified educational
20 users, and took other actions in violation of the AER Agreement.

21 27. Microsoft is informed and believes, and on that basis alleges, that defendants
22 have made substantial profits through their scheme.

23 28. Since July 1, 2008 defendants have acquired at least 14,542 copies of Academic
24 Office Pro software, at a discount of over \$5 million from retail price. Defendants have also
25 acquired significant quantities of other Academic Edition FPP software at discounted prices.
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1 By distributing that software to unqualified purchasers and otherwise breaching the AER
2 Agreement, defendants are liable to Microsoft for this discounted amount.

3 29. Defendants have refused to permit Microsoft access to their books and records,
4 and have refused to allow Microsoft to audit their compliance with the AER requirements.
5 Despite their purported agreement to permit Microsoft to conduct an audit on March 24, 2009,
6 defendants abandoned their physical location, absconded with all remaining software
7 products, and failed to provide Microsoft with contractually required access to their records.

8 FIRST CLAIM FOR RELIEF

9 (Breach of Contract)

10 30. Microsoft realleges and incorporates by this reference each and every allegation
11 set forth in paragraphs 1 through 29 above.

12 31. By registering for the AER program and by subscribing to the AER Agreement
13 defendants entered into binding contracts with Microsoft.

14 32. By the actions alleged above, defendants have breached the terms of the AER
15 Agreement and the license agreements accompanying the Academic Edition FPP software.

16 33. As a result of defendants' actions, Microsoft has been damaged in an amount to
17 be proven at trial, but no less than \$5,000,000.

18 34. Defendants' actions entitle Microsoft to damages, the return of all software
19 provided to defendants, to restitution for the value of such software that is not returned, and to
20 disgorgement of all proceeds obtained through or as a result of defendants' unauthorized sale
21 or transfer of the software.

22 35. Microsoft is entitled to appropriate injunctive relief requiring defendants to
23 assemble and return the software, precluding defendants from enrolling in any Microsoft
24 program in the future, requiring defendants to provide an accounting of all software products,
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1 sales and transfers, and requiring defendants to make available to Microsoft all books and
2 records relating to the sale or disposition of all software provided under the AER program.

3 SECOND CLAIM FOR RELIEF

4 (Conversion)

5 36. Microsoft realleges and incorporates by this reference each and every allegation
6 set forth in paragraphs 1 through 35 above.

7 37. Defendants have willfully interfered with and converted Microsoft's property,
8 without lawful justification, as a result of which Microsoft has been deprived of possession
9 and use of its property.

10 38. As a result of defendants' actions, Microsoft has been damaged in an amount to
11 be proven at trial.

12 THIRD CLAIM FOR RELIEF

13 (Fraud)

14 39. Microsoft realleges and incorporates by this reference each and every allegation
15 set forth in paragraphs 1 through 38 above.

16 40. Defendants, knowingly and with intent to deceive, made false and misleading
17 material representations of existing fact to Microsoft, and knowingly omitted material facts
18 which were required to make their representations truthful, intending that Microsoft would
19 rely upon them. Microsoft was unaware of the falsity of these representations, and rightfully
20 relied on these representations to its detriment.

21 41. As a result of defendants' actions, Microsoft has been damaged in an amount to
22 be proven at trial.

23 42. Defendants' actions entitle Microsoft to damages, to the return of all software
24 provided to defendants, to restitution for the value of such software that is not returned, to
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1 disgorgement of all proceeds obtained through or as a result of defendants' unauthorized sale
2 or transfer of the software.

3 43. Microsoft is entitled to appropriate injunctive relief requiring defendants to
4 assemble and return the software, precluding defendants from enrolling in any Microsoft
5 program in the future, requiring defendants to provide an accounting of all software products,
6 sales and transfers, and requiring defendants to make available to Microsoft all books and
7 records relating to the sale or disposition of all software obtained under the AER program.

8
9 FOURTH CLAIM FOR RELIEF

10 (Negligent Misrepresentation)

11 44. Microsoft realleges and incorporates by this reference each and every allegation
12 set forth in paragraphs 1 through 43 above.

13 45. Defendants, negligently made false and misleading material representations of
14 existing fact to Microsoft, and negligently omitted material facts which were required to make
15 their representations truthful, intending that Microsoft would rely upon them. Microsoft was
16 unaware of the falsity of these representations, and rightfully relied on these representations to
17 its detriment.

18 46. As a result of defendants' actions, Microsoft has been damaged in an amount to
19 be proven at trial.

20 47. Defendants' actions entitle Microsoft to damages, to the return of all software
21 provided to defendants, to restitution for the value of such software that is not returned, and to
22 disgorgement of all proceeds obtained through or as a result of defendants' unauthorized sale
23 or transfer of the software.

24 48. Microsoft is entitled to appropriate injunctive relief requiring defendants to
25 assemble and return the software, precluding defendants from enrolling in any Microsoft
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1 program in the future, requiring defendants to provide an accounting of all software products,
2 sales and transfers, and requiring defendants to make available to Microsoft all books and
3 records relating to the sale or disposition of all software provided under the AER program.

4 FIFTH CLAIM FOR RELIEF

5 (Fraud in the Inducement)

6 49. Microsoft realleges and incorporates by this reference each and every allegation
7 set forth in paragraphs 1 through 48 above.

8 50. Defendants, knowingly and with intent to deceive, made false and misleading
9 material representations of existing fact to Microsoft, and knowingly omitted material facts
10 which were required to make their representations truthful, intending that Microsoft would
11 rely upon them to enter into the AER Agreement. Microsoft was unaware of the falsity of
12 these representations, and rightfully relied on these representations in entering into the
13 aforementioned agreements, and providing software to defendants.

14 51. As a result of defendants' actions, Microsoft has been damaged in an amount to
15 be proven at trial.

16 52. Defendants' actions entitle Microsoft to rescission of the AER Agreement, to
17 damages, to the return of all software provided to defendants, to restitution for the value of
18 such software that is not returned, and to disgorgement of all proceeds obtained through or as
19 a result of defendants' unauthorized sale or transfer of the software.

20 SIXTH CLAIM FOR RELIEF

21 (Unjust Enrichment)

22 53. Microsoft realleges and incorporates by this reference each and every allegation
23 set forth in paragraphs 1 through 52 above.

