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**SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK**

-----X
**THE PEOPLE OF THE STATE OF NEW YORK,
by ELIOT SPITZER, Attorney General of the
State of New York,**

Petitioner,

- against -

**NETWORK ASSOCIATES, INC.
D/B/A MCAFEE SOFTWARE**

Respondent.

-----X
**MEMORANDUM OF LAW
IN SUPPORT OF PETITION OF ATTORNEY GENERAL**

PRELIMINARY STATEMENT

Software maker Network Associates, Inc. (“Network Associates” or “the company”) misleads its consumers by placing written restrictions on their software purchases. Namely, the company tells consumers, either in form License Agreements or on the face of the software diskette, that:

- “Rules and regulations” prohibit consumers from “disclos[ing] the results of any benchmark test” (i.e., product test), absent “written approval” and
- Those “rules and regulations” also prohibit them publish[ing] review of this product,” absent “prior consent.”

(Hereinafter, the “Censorship Clause.”)

This Censorship Clause is unenforceable, illegal and deceptive. First, it is by its

own terms an illegal restrictive covenant, which violates public policy and thus Executive Law § 63(12). Under New York law, a restriction that broadly chills or restricts important rights -- here, of free speech and fair use -- without a legitimate purpose, will be struck down. This Censorship Clause restricts consumers and the media alike from reviewing the software or disclosing important design or product flaws. Yet it serves no legitimate purpose, such as protecting trade secrets or confidential material.

The Censorship Clause is also a deceptive practice, contrary to New York GBL § 349 and Executive Law § 63(12). Specifically, it misinforms consumers that the company's prohibition against publication of reviews or benchmark tests (itself an illegal restriction) reflects existing "rules and regulations." Of course, no "rules and regulations" actually exist, under federal or state law -- a fact that most attorneys, including those who drafted the Censorship Clause, surely know. Misinforming consumers about their legal rights in this way is a deceptive practice, forbidden by New York GBL § 349 as well as Executive Law § 63(12).

Finally, the Censorship Clause is also void and deceptive because it conflicts with the License Agreement contained with the company's boxed software. The boxed License Agreement, which is by its own terms the "entire Agreement between the parties," omits the Censorship Clause. Yet the company then places that very Clause on the face of the software diskette -- even though it is by the very terms of the License Agreement void and unenforceable. This, too, is an independent deceptive practice, prohibited by GBL § 349 and Executive Law § 63(12).

The Attorney General seeks to enjoin all of these acts, by its authority granted under GBL § 349 and Executive Law § 63(12). The unacceptable alternative to such an injunction is that

large companies, aided by the courts, shall in their sole discretion eliminate speech criticizing or reporting flaws in software and other products. No court in the United States can or ought enforce such a vast prior restraint on consumers, reviewers, and the media at large.

Accordingly, the Attorney General asks this court to grant the relief requested in the accompanying Verified Petition, enjoining Network Associates from enforcing or disseminating the Censorship Clause, or from representing to consumers in any manner that they are restricted from criticizing, commenting on, or reviewing Network Associates' mass-marketed software.

FACTUAL BACKGROUND

1. Parties and Software At Issue

Network Associates is a Delaware limited liability company, with a principal place of business in Santa Clara, California. See accompanying Affirmation with Exhibits of Assistant Attorney General Kenneth M. Dreifach ¶ 8 (hereinafter "Dreifach Affirmation"). The company develops and widely markets a range of packaged security software products, such as anti-virus and firewall software programs. It sells these products to the general public in New York and elsewhere, both in boxed versions, available in stores and through the mail, and by making the software available for purchase by download from the Internet.

Among Network Associates' most popular products are its "VirusScan" anti-virus software programs, which the company distributes through its McAfee product group. See Dreifach Affirmation ¶ 8. These anti-virus software products are among the top selling software programs worldwide: during 1999, Network Associates' VirusScan 4.0 Classic, with an average retail price of \$32.97, sold over 660,000 units, making it the tenth highest selling retail software package worldwide. See id. Another of the company's popular products has been its "Gauntlet"

software, which offers firewall protection for computer systems.

2. **The Censorship Clause**

Network Associates places on the face of its VirusScan software diskette a warning to consumers that they do not have the right, *inter alia*, to “publish reviews” concerning the software. The company tells its consumers that so-called “rules and regulations” govern this prohibition, namely that:

Installing this software constitutes your acceptance of the terms and conditions of the license agreement in the box. Please read the license agreement before installation. Other rules and regulations of installing this software are:

- * * *
2. The customer shall not disclose the results of any benchmark test to any third party without Network Associates’ prior written approval.
 3. The customer will not publish reviews of this product without prior consent from Network Associates, Inc.

(“Censorship Clause”) (emphasis added); see Dreifach Exh. ¶ 10. Nowhere does the company indicate where these so-called “rules and regulations” might be found.

Network Associates also placed this Censorship Clause onto the download page of the company’s web site, accessible to consumers who download software from its web site. See Affidavit of Ann Bednarz ¶ 5 and attachments (annexed as Exh. 3 to Dreifach Aff.), in which Network Associates confirmed that the Censorship Clause is “printed on our product CD, as well as on the download page on our web site.” See generally Dreifach Aff. ¶¶ 17-19.

3. **Preclusive Effect of License Agreement**

Network Associates’ License Agreement reveals yet another level of deception, as the Agreement included with boxed versions of Network Associates’ software actually precludes the

company's enforcement of the Censorship Clause.

Specifically, the License Agreement in the boxed software packaging states: "This Agreement sets forth all rights for the user of the Software and is the entire agreement between the parties." See Dreifach Affirmation ¶ 13.¹ (Emphasis added.) It continues, "This Agreement supersedes any other communications with respect to the Software and Documentation. This Agreement may not be modified except by a written addendum issued by a duly authorized representative of McAfee." Id. Identical, or virtually identical, clauses appear on the installed CD disk (i.e., on the computer screen upon installation) of other Network Associates products. See also License Agreements annexed as Exh. 5 to Dreifach Aff., at ¶ 11 of each (copies of two other Network Associates software programs, McAfee Office and Netshield for Security Suite, printed from installed diskettes provided by Network Associates during discovery).

In turn, there is not a word in the Agreement restricting a consumer's right to publish reviews of the software or results of benchmark tests. Network Associates' representations to consumers that such restrictions apply – when Network Associates' own License Agreement says they cannot – therefore is untrue on its face.

4. Network Associates' Deceptive Use and Enforcement of The Censorship Clause

Network Associates has used the Censorship Clause, and the perceived leverage that the

¹ In order to best consolidate the factual issues before this Court, Petitioner refers in these papers primarily to the Licensing Agreement and Censorship Clause pertaining to respondent's "VirusScan" and "Gauntlet" software. In responding to both subpoena and letter requests, respondent has declined to produce a full list of software titles sold pursuant to these Clauses (a declination which, for purposes of our pre-petition investigation, the Attorney General did not find it necessary to contest).

However, the Attorney General's arguments herein, factual and legal, apply to every piece of mass-marketed software sold by Network Associates with the Censorship Clause. Likewise, the relief sought applies to every such piece of software, for identical reasons.

Clause provides, to chill speech and attempt to intimidate its critics. The Clause is by its very terms designed to deter consumers and journalists from criticizing the company's software, falsely leading them to believe that unspecified "rules and regulations" are legal and credible. In addition, Network Associates has reinforced the Clause with follow-up letters aimed at silencing specific critics. Though the company denies ever doing so, it plainly has on at least one occasion -- in July 1999, when it cited the Clause in an effort to force the online magazine Network World to retract a software review. See Dreifach Aff. ¶¶ 17-19 (attaching Affidavit of Network World Senior Writer Ann Bednarz).

Network World's review, titled Wanted: Safety plus simplicity, had criticized certain features of the company's Gauntlet firewall software. See Dreifach Aff. ¶ 17. When it learned of the review, Network Associates wrote Network World and demanded "that the information on Gauntlet be stripped from [Network World's] online version of this review and from any reprints" and that "a correction/retraction [be] printed in the next issue" of the magazine. Id. ¶ 18.

Network World responded by defending its right to publish product reviews (and the substance of its conclusions), but Network Associates persisted. In a second e-mail, the company warned Network World that the magazine had "willfully violated our license agreement, particularly since [the reviewer] was informed that we were not participating." See id. ¶ 19.

Network Associates cited the full text of the Censorship Clause, and informed Network World that this Censorship Clause reflected the "rules and regulations of installing this software." See id. Fortunately, Network World, a relatively large and prestigious organization, was not intimidated by Network Associates' efforts to silence it, and its 1999 review of Gauntlet software has remained on its web site.

5. Network Associates' Non-Compliance With Discovery Requests

Network Associates may have intimidated other specific critics into silence, by threatening to enforce the Censorship Clause. Because the company has not complied fully with the Attorney General's requests for such documentation, only a Court-ordered accounting of such tactics will reveal the full extent of its behavior. For instance, the company failed to produce even the Network World correspondence (which we discovered independently), though such correspondence plainly was covered by the Attorney General's subpoenas. See Dreifach Aff. ¶¶ 20-21. The company instead has misrepresented, in writing, that no such documents exist. See Dreifach Aff. ¶ 22.

Even worse, Network Associates' counsel conveyed in a September 18, 2001 letter to the Attorney General the company's "assurance that it no longer imposes the regulations that have been at issue," and stated, "[n]or does it plan to resurrect those regulations at any time in the future." See Dreifach Aff. ¶ 23, attaching letter from Andrew Bridges to Kenneth M. Dreifach (p. 3 of letter). This "assurance" to the Attorney General, too, is inaccurate: as of January 2, 2002, the License Agreement on the download page for VirusScan software still stated, "You shall not disclose the results of any benchmark test that you make of the Software to any third parties without McAfee' [sic] prior written consent," see Exh. 1- at ¶ 5, License Agreement for VirusScan software, downloaded on January 2, 2002, from Network Associates' McAfee.com web site) – virtually identical to the part of the Censorship Clause that was the subject of the Attorney General's March 30, 2001 inquiry letter (see Exh. 8 hereto), and is at issue herein.

ARGUMENT

I.

THE ATTORNEY GENERAL PROPERLY IS PROCEEDING UNDER EXECUTIVE LAW § 63(12) AND GBL § 349 TO REMEDY UNLAWFUL AND DECEPTIVE PRACTICES

The Attorney General is proceeding under New York’s Executive Law § 63(12), designating this a Special Proceeding, and seeking the plenary, broad injunctive relief that section permits. Section 63(12) is specifically designed to provide an expeditious means for the Attorney General to enjoin a wide range of illegal, fraudulent, or deceptive conduct, including Network Associates’ misrepresentations to consumers regarding their right to comment on the company’s software.

The Attorney General may bring a special proceeding under § 63(12) against any person or business that commits repeated or persistent “fraud or illegality” in transacting business. “It is well settled that . . . proof of scienter is not necessary” to establish a violation under Executive Law § 63(12). Lefkowitz v. Bull Investment Group, Inc., 46 A.D.2d 25 (3d Dep’t. 1974), appeal denied, 35 N.Y.2d 647 (1975). Further, the terms “fraud” and “illegality” are both broadly defined under the statute. Section 63(12) defines “fraud” as:

any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual Clauses.

This definition goes well beyond that of common law fraud. In People v. Federated Radio Corp., 244 N.Y. 33, 38-39 (1926), the Court of Appeals emphasized:

In a broad sense the term [fraud] includes all deceitful practices contrary to the plain rules of common honesty The words “fraud” [or “fraudulent”] in this connection, should therefore be given a wide meaning, so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the

purchasing public come within the purpose of the law.

Accord Bull Investment, 46 A.D.2d 25. It is well settled that violations of NY GBL § 349, which prohibits “deceptive acts or practices in the conduct of any business,” are remediable by the Attorney General in a § 63(12) proceeding. See People v. Allied Marketing Group, Inc., 220 A.D.2d 370 (1st Dep’t. 1995).²

Likewise, courts have defined “illegality” broadly under § 63(12), holding that the section permits the Attorney General to enjoin any act that violates any law or regulation, whether statutory in nature or based under common law. See generally State v. Schenectady Chem., Inc., 103 A.D.2d 33 (3d Dep’t 1984) (permitting Attorney General’s claims for, inter alia, common law nuisance); State of New York v. Ole Olson, 35 N.Y.2d 979 (1975) (permitting nuisance action); Oncor Communications, Inc. v. State of New York, 218 A.D.2d 60 (3d Dep’t 1996) (permitting Attorney General to investigate alleged Federal common law violations, under Section 63(12)).³

As discussed below, Network Associates has violated both the “illegality” and “fraud” prohibitions under § 63(12). First, the company’s Censorship Clause is an illegal, unenforceable restrictive covenant, invalid as against public policy. Moreover, the company has compounded this very illegality by explicitly misinforming consumers that non-existent “rules and regulations”

² Accord People v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 733 (3d Dep’t 1996); State of New York v. Lipsitz, 174 Misc. 2d 571 (Sup. Ct. N.Y. Co. 1997); State of New York v. British & American Casualty Co., 133 Misc. 2d 352 (Sup. Ct. N.Y. Co. 1986).

³ For a broad range of statutory violations remediable under § 63(12), see, e.g., State v. Princess Prestige, 42 N.Y.2d 104 (1977) (enjoining violations of Personal Property Law, At. 10-A); State v. Ford Motor Co., 136 A.D.2d 154 (3d Dep’t.) (violation of New York Lemon Law), aff’d, 74 N.Y.2d 495 (1989); Lefkowitz v. Scottish-American Ass’n, Inc., 52 A.D.2d 528 (1st Dep’t.) (enjoining violations of regulations of the Civil Aeronautics Board), appeal dismissed, 39 N.Y.2d 1057 (1976); State v. Phase II Systems, Inc., 109 Misc.2d 598 (Sup. Ct. N.Y. Co. 1981) (enjoining violations of General Business Law §359-fff); People v. Ackerman, 24 Misc. 2d 83 (Sup. Ct. N.Y. Co. 1960) (enjoining violations of New York City and New York State laws).

actually justify the Censorship Clause, and thus has further violated § 63(12) prohibition against fraud, and GBL § 349's prohibition against deceptive business practices.

II.

THE CENSORSHIP CLAUSE IS AN ILLEGAL, INVALID, UNENFORCEABLE RESTRICTIVE COVENANT

The Censorship Clause's restriction against publication of "product reviews" or "the results of benchmark tests" is neither legal nor enforceable. Rather, it is an invalid restrictive covenant, which infringes on the fundamental public policy favoring free comment on products and product defects, yet serves no legitimate countervailing business purpose. As such, it violates Executive Law § 63(12)'s proscription against "illegal" acts, see supra pp. 8-9.

A. Applicable Standard for Restrictive Covenants Under New York Law

New York's courts have struck down restrictive covenants in a variety of circumstances, where they infringe on important public policies without an overriding basis. See, e.g., Cohen v Lord, Day & Lord, 75 N.Y.2d 95, 96 (1989) (voiding a law partnership agreement which conditioned payment of earned but uncollected partnership revenues upon a withdrawing partner's obligation to refrain from competing with the former law firm); Crane Neck Ass'n v. New York City/Long Island Cty. Services Grp., 61 N.Y.2d 154 (1984) (voiding restrictive covenant prohibiting community residences for mentally disabled, in view of "long-standing public policy favoring the establishment of such residences"); Matter of Silverberg (Schwartz), 75 A.D.2d 817 (2d Dep't 1980) (voiding restrictive covenant whereby one attorney restricted another's practice by precluding him from representing former clients of a mutual partnership, because public policy and legal ethics prohibited lawyers from trafficking in clients).

Restrictive covenants in License Agreements, as here, are illegal and invalid where they impose restrictions that go further than necessary to protect a licensor's trade secrets, goodwill, or proprietary or confidential information. See Mathias v. Jacobs, 167 F.3d 606 (S.D.N.Y. 2001); DAR & Assoc., Inc. v. Uniforce Serv., Inc., 37 F. Supp. 2d 192, 197 (E.D.N.Y. 1999). To be upheld, the restrictive covenant not only must protect a company's "legitimate business interests," but it must be "reasonable" in the "degree of hardship" it imposes. See Mathias, 167 F.3d at 610-11, 2001 U.S. Dist. LEXIS 15533 at *8; DAR, 37 F. Supp. at 197. As discussed infra, the Censorship Clause not only is unreasonably restrictive, but it protects no legitimate business interests.

B. The Censorship Clause Is An Invalid and Illegal Restrictive Covenant

The Censorship Clause fails even the most threshold test for restrictive covenants, as it serves no "legitimate business interests" of Network Associates, protecting neither confidences nor intellectual property. See Mathias, supra. Its supposed prohibitions against publishing "product reviews" or "the results of benchmark tests" apply entirely to publicly marketed information and products – nothing even arguably confidential or proprietary.

For instance, far from enjoying trade secret protection, Network Associates' VirusScan software is available off-the-shelf and is sold to hundreds of thousands of consumers each year. Nothing marketed to, and shared by, millions of people legally or logically can be termed "proprietary" or "secret." See Hudson Hotels Corp. v. Choice Hotels Int'l, Inc., 995 F.2d 1173, 1177 (2d Cir. 1993) ("Once Hudson marketed the Microtel concept, therefore, it could not constitute a protectible trade secret because, from that time forward, it could not be used secretly

and continuously in its business.”).⁴ Nor, for that matter, does copyright law provide any legitimate basis – much less a blanket justification – for the Censorship Clause. To the contrary, the fair use doctrine of copyright law squarely protects product reviews.⁵

Balanced against this lack of any legitimate purpose, the Censorship Clause imposes an unreasonable hardship on the public interest. See Mathias, supra. By admonishing all software purchasers (hundreds of thousands, at very least) against publishing reviews of product test results absent the company’s “prior consent” or “written approval,” the Censorship Clause chills free speech. Likewise, when real or potential critics such as Network World are threatened, see supra pp. 5-6, the public’s right to communicate and learn about products they own and operate is endangered.

There is obviously a significant public benefit to such open discourse, whether in the form of product reviews or other critiques. Reporting on consumer products “enables citizens to make better informed purchasing decisions by providing information about consumer product.” Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 280 (3d Cir. 1980) (citations omitted). It also makes it more likely that software defects will become publicly known. Such disclosure is particularly vital in the case of security software like VirusScan and Gauntlet, on which consumers and businesses

⁴ Accord Eagle Comtronics, Inc. v. Pico, Inc., 89 A.D.2d 803 (4th Dep’t) (cable television device could not be trade secret because any purported secrecy “was lost when it was placed upon the market”), appeal denied, 58 N.Y. 2d 601 (1982); see also Brandwynne v. Combe Int’l Ltd., 74 F. Supp. 2d 364, 378 (S.D.N.Y. 1999) (concepts and products were not trade secrets because “they would have certainly have entered the public domain when the product was placed on sale and disclosed to the public in a marketing campaign”).

⁵ See generally Harper & Row v. Nation Enterprises, 471 U.S. 539, 564-65 (1985) (“even substantial quotations might qualify as fair use in a review of a published work”). Indeed, the preamble to Section 107 of the Copyright Act specifically mentions permitting “criticism [and] comment” as among the core purposes of the fair use doctrine. See 17 U.S.C. § 107.

rely to protect computers from viruses, hackers, and cyber-terrorists.

In sum, the public interest is harmed by Network Associates' effective and attempted censorship of negative commentary, without any arguable justification. Under the restrictive covenant analysis of Mathias and DAR, any attempt by Network Associates, now or in the future, to use a blanket restriction to silence consumers from reviewing or criticizing its products is unenforceable and illegal. It therefore also violates Executive Law § 63(12), and should be enjoined by this court.

III.

THE CENSORSHIP CLAUSE VIOLATES GBL § 349 AND EXECUTIVE LAW § 63(12)

As if the very terms of the Censorship Clause were not sufficiently illegal and overreaching, Network Associates compounds its deception through further misrepresentations. The company misinforms consumers that the Clause reflects so-called “rules and regulations” that apply when they “install[] this software” – a representation on the face of the company’s boxed software, and on the download page of its web site. See Dreifach Aff. ¶¶ 10-11. The Censorship Clause is a plainly deceptive statement of law and fact; as Network Associates’ lawyers surely knew when they drafted the Agreement, no such restrictive “rules and regulations” actually exist, under federal or state law.

Network Associates misrepresents consumers’ rights in yet another way when it sells its software. Namely, the Censorship Clause is absent from, and thus precluded by, the boxed License Agreement, which presents itself as the “entire agreement between the parties.” See supra p. 5 (emphasis added). By nonetheless placing the Clause on the face of its diskettes,

Network Associates fundamentally misstates consumers' rights under the License Agreement and the law.

Network Associates' misrepresentations to consumers regarding their rights violate GBL § 349's proscription against deceptive practices. As the court in Baker v. Burlington Coat Factory Warehouse, 175 Misc.2d 951, 956 (Yonkers City Ct. 1998) recognized, representations that "unfairly chill the consumer's enthusiasm to enforce a statutory right" violate New York's proscription against deceptive business practices. The company's misrepresentations regarding illusory "rules and regulations" that supposedly justify the Censorship Clause have precisely such a chilling effect. See generally Baker, 175 Misc.2d at 956 (holding that defendant's "failure to inform consumers of their statutory right to a cash or credit card charge refund," and its statement on signs and receipts that there were "No Cash Refunds or Charge Credits," violated GBL § 349).

Similarly, in BNI New York Ltd. v. DeSanto, 177 Misc.2d 9, 13 (Yonkers City Ct. 1998), the court held that defendant's use of an unenforceable "fees are non-refundable" clause was a deceptive practice in violation of GBL § 349. There, as here, the illegal and deceptive "purpose of these clauses is to intimidate and frighten consumers into foregoing their right" – there, to "withdraw from a worthless transaction," and here, to comment publicly on software without obtaining the manufacturer's consent. Id.

Other courts have confirmed that such misrepresentations of law or consumers' rights are deceptive and illegal. See, e.g., State of New York v. Ruiz, No. 400893/01 (Sup. Ct. N.Y. Co., June 8, 2001) (Tab A hereto) (deceptive practice for defendant implicitly to represent to consumers that illegal toy guns were in fact legal); Filpo v. Credit Express Furniture, N.Y.L.J.

Aug. 26, 1997 p. 26, col. 4 (Tab B) (failure to inform consumer of statutory rescission rights was deceptive practice) (Yonkers City Ct. 1997); Lefkowitz v. E.F.G. Baby Products Co., Inc., 40 A.D.2d 364 (3d Dep't 1973) (company's misrepresentation to its consumers of their rights under New York's Personal Property law constituted "fraud" for purposes of Executive Law 63(12)). See also Garrison Contractors, Inc. v. Liberty Mutual Ins. Co., 927 S.W.2d 296, 300 (Tex. Ct. App. 1996) ("Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve is an actionable deceptive act or practice" under Texas Deceptive Practices Act), aff'd, 966 S.W. 2d 482 (Tex. 1998).

In sum, Network Associates' Censorship Clause deceptively warns its consumers not to violate "rules and regulations" that (1) do not exist, (2) by their own terms would constitute illegal and unenforceable restrictive covenants, and (3) were never presented in, and are therefore barred by, the company's boxed software License Agreement. Accordingly, Network Associates has engaged in unlawful, fraudulent and deceptive acts in violation of NY GBL § 349 and Executive Law § 63(12), and should be enjoined from continuing to do so.

IV.

THE ATTORNEY GENERAL IS ENTITLED TO INJUNCTIVE RELIEF, COSTS AND CIVIL PENALTIES

1. Injunctive Relief is Appropriate

Executive Law § 63(12) authorizes the Attorney General to initiate special proceedings for injunctive relief, restitution, costs, and in cases of violations of GBL § 349, civil penalties. Where the evidence supports the relief requested and there are no triable issues of fact, courts routinely grant permanent injunctive relief in cases brought pursuant to § 63(12). The court's

injunctive powers under § 63(12) are extremely broad. See State of New York v. Princess Prestige Co., Inc., 42 N.Y.2d 104, 108 (1977); State of New York v. Daro Chartours, Inc., 72 A.D.2d 872 (3d Dep't 1979); Scottish-American Ass'n, 52 A.D.2d at 528; State of New York v. Midland Equities of New York, Inc., 117 Misc.2d 203 (Sup. Ct. N.Y. Co. 1982); State of New York v. Management Transition Resources, Inc., 115 Misc.2d 489 (Sup. Ct. N.Y. Co. 1982).

Here, the Court should enjoin respondent from engaging in the deceptive acts and practices alleged in the Verified Petition. Namely, respondent should be enjoined from representing to consumers – regardless of the form or procedure employed – that consumers are required to obtain Network Associates' written consent prior to reviewing, criticizing or commenting on Network Associates' mass-marketed products. Equally important, respondent should be enjoined from attempting in any way – whether through letter, lawsuit, or otherwise – to enforce the Censorship Clause as it appears on the face on consumers' software diskettes already in circulation.

2. The Attorney General is Entitled to Penalties, Pursuant to GBL § 350-d

The court is also authorized to award penalties pursuant to GBL § 350-d, which imposes a \$500 penalty for each violation of GBL § 349, providing:

Any person, firm, corporation or association or agent or employee thereof who engages in any of the acts or practices stated in this article to be unlawful shall be liable for a civil penalty of not more than five hundred dollars for each violation, which shall accrue to the state of New York and may be recovered in a civil action brought by the attorney-general (Emphasis added.)

Because each of respondent's consumer transactions involved multiple violations of GBL § 349, the court may impose the maximum penalty for each improper consumer transaction and each improper advertisement. See generally State v. Lipsitz, 174 Misc.2d 571, (holding, in

Internet consumer fraud case, that “[p]ursuant to General Business Law § 350-d, a penalty of \$500 may be fixed for each violation of sections 349 and 350 of the General Business Law and specifically for each improper advertisement and each improper consumer transaction”). Accord Allied Marketing, 220 A.D.2d 370; People v. Helena VIP Personal Introduction Service of New York, Inc., N.Y.L.J., January 17, 1992, p.26 col. 3 (Sup. Ct. N.Y. Co.), aff’d, 199 A.D.2d 186 (1st Dep’t 1993); State v. Hotel Waldorf-Astoria, 67 Misc. 2d 90 (Sup. Ct. N.Y. Co. 1971).

Here, each diskette sold with the Censorship Clause constitutes a separate violation. A penalty of 50 cents (\$.50) for each piece of software sold with that representation, which is far less than the maximum amount authorized by statute, is a fair and reasonable penalty for respondent’s deceptive practices, and sufficient to deter future similar illegal conduct.

3. The Attorney General is Entitled To Costs Pursuant to CPLR § 8303(a)(6)

Finally, pursuant to Executive Law § 63(12), the Attorney General is entitled to an award of \$2,000 in costs against respondent, pursuant to CPLR § 8303(a)(6). Courts routinely grant these costs which, unlike the civil penalties payable to the State, help pay the costs incurred by the Attorney General in investigating the case. See, e.g., Daro Chartours, 72 A.D.2d at 873; Lipsitz, 174 Misc.2d at 584; State v. Camera Warehouse, 130 Misc.2d 498 (Sup. Ct. Dutchess Co. 1985); Midland Equities, 117 Misc.2d at 208; see also People v. Autosure, 131 Misc.2d 546 (Sup. Ct. N.Y. Co. 1986) (awarding costs under § 8303(a)(6) even where court found respondent’s acts unintentional). Such costs are particularly appropriate here, where respondent’s non-compliance with discovery extended and complicated the Attorney General’s investigation.

4. A Full Accounting is Required and Warranted

In order to assess penalties, it is necessary to determine the number of instances in which

Network Associates presented the Censorship Clause in the course of selling its software products. While the Attorney General has requested this information, and Network Associates long ago agreed to provide it, it has not done so. See Dreifach Aff. ¶ 24. Accordingly, this Court should order that the company perform a full accounting to determine how many times it presented the Censorship Clause to any user, whether by Internet, mail, or within a boxed software package. Courts commonly order an accounting under Executive Law § 63(12) and GBL § 349. See, e.g., People v. World Interactive Gaming Corp., 185 Misc. 2d 852, 865 (Sup. Ct. N.Y. Co. 1999); Lipsitz, 174 Misc. 2d at 584; People v. 21st Century Leisure Spa Int'l Ltd., 153 Misc. 2d 938, 944 (N.Y. Co. 1991).

CONCLUSION

At bottom, this case is about ownership: who “owns” the right to share public ideas regarding a mass-marketed product. According to Network Associates, the company alone holds this right, and enjoys exclusive discretion to restrict public criticism of its products. This position is as illogical as it is without legal foundation. A consumer’s or reviewer’s right to criticize a product -- particularly a product as crucial as anti-virus or firewall software -- cannot be subject to a manufacturer’s prior restraint. This would permit a manufacturer unilaterally to squelch important criticism of its own products. Nor, of course, can a company falsely inform consumers that “rules and regulations” afford it this right.

For the reasons set forth herein, the Verified Petition should be granted in its entirety, including petitioner’s request for injunctive relief, civil penalties, costs, and such other and further relief as this Court deems appropriate.

Dated: February ____, 2002
New York, New York

Respectfully submitted,

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