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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 CENTRAL DIVISION

11 03 - 3 1 8 0 **GAF** (CWx)

12 NEW.NET, INC., a Delaware
corporation,

13 Plaintiff,

14 v.

15 LAVASOFT; an entity of unknown
16 form; NICOLAS STARK
COMPUTING AB, an entity of
17 unknown form, and DOES 1-25,
inclusive,

18 Defendants.

CASE NO.

NEW.NET, INC.'S COMPLAINT
FOR:

- 15 (1) FALSE ADVERTISING
(15 U.S.C. § 1125(a));
- 16 (2) UNFAIR COMPETITION
(Cal. Bus. & Prof. Code § 17200);
- 17 (3) TRADE LIBEL;
- 18 (4) TORTIOUS INTERFERENCE
WITH PROSPECTIVE
ECONOMIC ADVANTAGE;
- 19 (5) DECLARATORY RELIEF.

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1 Plaintiff New.net Incorporated (“New.net”), a leading domain name
2 registry and provider of domain name extensions, brings this action in response to
3 the false, misleading, and improper targeting of New.net’s client software (referred
4 to as the “NewDotNet Client”) by the “Ad-Aware” software program distributed
5 by Lavasoft. Ad-Aware improperly and falsely targets the NewDotNet Client as a
6 “Data Miner,” and prompts the computer user to remove the NewDotNet Client, as
7 it would for unauthorized or harmful software found on a user’s computer.
8 However, as New.net and independent parties have established, the NewDotNet
9 Client is not data mining software, nor is it any variety of illicit and undesirable
10 software commonly known as “malware,” “spyware,” “adware,” “foistware,” or
11 “hijackware.” Users only believe the NewDotNet Client to be harmful because the
12 Ad-Aware software prompts the user about the NewDotNet Client. Further,
13 Defendants’ assertion that the New.net Client is “unauthorized” is incorrect. The
14 NewDotNet Client is distributed with clear disclosures to end- users, and requires
15 every user to accept industry-standard terms of agreement before it is installed.
16 Moreover, the Ad-Aware software attempts to remove the NewDotNet Client from
17 a user’s computer, rather than using the uninstall functionality incorporated into
18 the NewDotNet Client. As a result of Ad-Aware’s technically flawed attempts to
19 uninstall the NewDotNet Client, user’s computers have lost network access,
20 resulting in customer complaints. New.net brings this action to stop Defendants’
21 continued, unlawful, and improper targeting of New.net’s software, in the face of
22 clear evidence that it is not harmful.

23 JURISDICTION AND VENUE

24 1. This is a civil action for false advertising under the Lanham Act
25 (15 U.S.C. § 1125(a)); unfair competition under California Business and
26 Professions Code Section 17200; trade libel; and tortious interference with
27 prospective economic advantage under California law.
28

1 the owner, operator, and alter ego of Lavasoft, and is liable for all acts and
2 omissions of Lavasoft alleged herein.

3 8. Does 1-25, inclusive, are sued herein under fictitious names
4 inasmuch as their true names and capacities are presently unknown to New.net.
5 New.net will amend this Complaint to designate the true names and capacities of
6 these parties when the same have been ascertained. New.net is informed and
7 believes, and on that basis alleges, that Does 1 through 25, inclusive, were agents
8 or alter-egos of Lavasoft and/or Stark, or are otherwise responsible for all of the
9 acts hereinafter alleged. New.net is informed and believes, and on that basis
10 alleges, that the actions of Does 1 through 25, inclusive, as alleged herein, were
11 duly ratified by Lavasoft and/or Stark, with each Does acting as the agent of
12 Lavasoft and/or Stark, within the scope, course, and authority of the agency.
13 Lavasoft, Stark, and Does 1 through 25, inclusive, are collectively referred to
14 herein as the "Defendants."

15 GENERAL ALLEGATIONS

16 9. New.net is a leading domain name registry and provider of
17 innovative Internet navigation solutions. New.net's NewDotNet Client software
18 allows users to enable individual computers to access the website names and email
19 addresses that are within the domain namespace that New.net has launched as well
20 as New.net's other industry-leading search and navigation services.

21 10. Lavasoft is the self proclaimed "industry leader and most
22 respected provider of anti Trackware solutions." Among its "anti Trackware
23 solutions" is Ad-Aware, a software product that purports to be designed to
24 "provide continuous protection from known Datamining, aggressive advertising,
25 Parasites, Scumware, Keyloggers, selected traditional Trojans, Dialers, Malware,
26 Browser hijackers, and tracking components." When a user installs Ad-Aware, the
27 software targets "unauthorized" programs on the user's system. It then labels the
28 program and gives the user an option to remove the unauthorized program.

1 11. Data Mining is the practice of massaging data to keep track of
2 and extract value from the numbers, statistics, and information found within a
3 database and to predict what a customer will do next. Data mining software keeps
4 track of and stores information gathered from Web site logs and databases and uses
5 this information to create a “user profile” which is compared with recorded
6 behavior to divide the users into groups and to predict their behavior. After
7 accumulating this information, the data mining program can be used to send
8 targeted online ads to a browser based on the results in the database. Data mining
9 software is commonly used by retail and marketing companies to find customers
10 with common interests.

11 12. In addition to wrongfully targeting the NewDotNet Client, Ad-
12 Aware, due to a programming flaw, crashes users’ Internet connection if they elect
13 to remove the NewDotNet Client (because Ad-Aware fails to use the simple
14 uninstall function included in the NewDotNet Client). Many users, after having
15 been prompted by the Ad-Aware software that the NewDotNet Client is
16 “unauthorized” and have followed the Ad-Aware prompt to remove the
17 NewDotNet Client, have concluded (incorrectly) that New.net caused the
18 interruption. Despite knowing about the programming error in Ad-Aware,
19 Defendants have done nothing to remedy the allegations being made against
20 New.net and its product.

21 13. On March 12, 2003, New.net wrote to Defendants demanding
22 that they stop targeting the NewDotNet Client as being unauthorized. In that letter,
23 New.net referred Defendants to a third-party analysis of the Ad-Aware software
24 entitled “Is New.Net Spyware, adware, etc. . . .?” The article discussed findings of
25 an independent study, which concluded New.net was not “spyware, adware or
26 anything similar” and that “NN [New.net] being targeted as spyware/adware is
27 garbage.”

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1 14. Having not received a response to its March 12, 2003 letter,
2 New.net wrote another letter to Lavasoft on April 4, 2003 enclosing a draft of this
3 complaint and requesting a response.

4 15. Lavasoft finally responded to New.net's letters on April 10,
5 2003. Lavasoft requested additional time to respond to New.net's letters. In hopes
6 of finding a consensual resolution, New.net agreed to Lavasoft's request for
7 additional time.

8 16. Over the next four weeks, Lavasoft repeatedly failed to deliver
9 any meaningful response to New.net's concerns, and essentially engaged in a
10 campaign to stall and delay New.net from seeking relief, all under the guise of
11 trying to resolve this matter amicably.

12 17. Lavasoft's bad faith delaying tactics were evidenced by its
13 conduct during an April 28, 2003 teleconference between New.net and Lavasoft
14 representatives (and counsel), which New.net requested in a final attempt to
15 resolve this matter prior to litigation. Even though New.net had convened the
16 teleconference so that it could finally engage in dialogue with Lavasoft on the
17 issues posed in New.net's letter (and in this Complaint), Lavasoft steadfastly
18 refused to engage in *any* discussions. Each time, Lavasoft merely "stonewalled"
19 New.net and simply referred to an upcoming written report, which Lavasoft
20 assured New.net would set forth Lavasoft's position in detail.

21 18. Lavasoft finally provided its long-awaited report on April 30,
22 2003. That report is rife with factual errors, wholly self-serving, and fails to
23 provide a legally sufficient justification for Lavasoft's conduct. It is apparent that
24 Lavasoft never had any intention of engaging in good faith discussion with
25 New.net to resolve this issue.

26 19. Despite New.net's clear, written articulation, on numerous
27 occasions, of the reasons why Lavasoft's conduct is wrongful and inappropriate,
28 and despite New.net's multiple efforts to resolve this matter short of litigation,

1 Lavasoft continues to distribute the offending Ad-aware software product, and has
2 made no real attempt to remedy its unlawful and damaging conduct.

3 20. New.net has been seriously damaged by Defendants' activities,
4 and unless such activities are enjoined, New.net and its goodwill and reputation
5 will suffer irreparable injury that cannot be adequately calculated or compensated
6 in money damages.

7 **FIRST CLAIM FOR RELIEF**

8 **FALSE ADVERTISING**

9 **(Lanham Act- 15 U.S.C. § 1125(a))**

10 21. New.net realleges and incorporates by reference the allegations
11 in paragraphs 1 through 20, as set forth herein.

12 22. Defendants' Ad-Aware software is designed and advertised
13 specifically to target and identify specified forms of software on a user's computer.
14 Specifically, Ad-Aware targets and purports to provide protection from
15 "Datamining, aggressive advertising, Parasites, Scumware, Keyloggers, selected
16 traditional Trojans, Dialers, Malware, Browser hijackers, and tracking
17 components." As such, when Ad-Aware is installed it immediately seeks out these
18 unauthorized programs and notifies the user for removal.

19 23. New.net has spent considerable time, effort, and intellectual
20 capital in not having the NewDot Net Client associated with this type of
21 "unauthorized" software. New.net has achieved this by having the NewDotNet
22 Client distributed with very clear disclosures to the user, and requires every user to
23 accept industry-standard terms of agreement before it is installed.

24 24. Despite this, Ad-Aware currently targets and identifies the
25 NewDotNet Client as a "Data Miner." Ad-Aware then gives users the option to
26 remove the NewDotNet Client (and implicitly to do away with the harmful effects
27 of a data miner).

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1 25. To compound matters, due to a programming flaw in the Ad-
2 Aware program, when a user agrees to remove the NewDotNet Client, Ad-Aware
3 causes the user's internet service to crash (because Ad-Aware fails to use the
4 simple uninstall function included in the NewDotNet Client). In part, because Ad-
5 Aware already had labeled the NewDotNet Client as a Data Miner, and because
6 Ad-Aware fails to utilize the uninstall feature in the NewDotNet Client, many
7 users conclude that the New.net software caused their internet connection to be
8 disrupted.

9 26. Defendants' conduct, particularly in targeting the NewDotNet
10 Client (and also in creating a flawed method of removing the software from users'
11 computers), constitutes false and/or misleading advertising to the consuming
12 public within the meaning of the Lanham Act.

13 27. By committing these acts, Defendants willfully have caused
14 New.net's software and company to be falsely associated and confused with
15 harmful and unauthorized software, such as the varieties advertised by Defendants:
16 "Scumware," "Keyloggers," "Malware," "Browser hijackers," and "tracking
17 components." By labeling the NewDotNet Client a "Data Miner" and thereby
18 associating it with other unauthorized or harmful programs, Defendants have
19 misrepresented New.net and its software to the public.

20 28. Defendants' willful conduct renders this case an exceptional
21 case pursuant to 15 U.S.C. § 1117(a) such that New.net is entitled to reasonable
22 attorneys' fees.

23 29. Defendants' acts of false advertising and misrepresentation
24 have caused and, if not preliminarily and permanently enjoined, will continue to
25 cause, New.net to suffer irreparable harm.

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1 SECOND CLAIM FOR RELIEF

2 UNFAIR COMPETITION

3 (Cal. Bus. & Prof. Code § 17200)

4 30. New.net realleges and incorporates by reference the allegations
5 in paragraphs 1 through 29, as set forth herein.

6 31. Defendants, falsely target and label the NewDotNet Client as an
7 unauthorized and harmful program, thereby harming New.net's reputation, and
8 prompting users to remove the software (through a flawed method programmed by
9 Defendants) constitutes unfair and fraudulent conduct under California law.

10 32. Defendants' unfair and fraudulent business practices have
11 impaired New.net's goodwill and have otherwise adversely affected New.net's
12 business and reputation. Defendants' conduct also violates federal and state
13 statutory law, as set forth herein. These acts constitute unfair competition and
14 unfair business practices under California Business and Professions Code Section
15 17200.

16 33. Absent injunctive relief, New.net has no means by which to
17 control Defendants' unlawful and confusing targeting of New.net's software as
18 unauthorized or harmful. New.net is thus entitled to injunctive relief prohibiting
19 Defendants from continuing such acts of unfair competition. New.net also is
20 entitled to disgorgement of Defendants' profits.

21 THIRD CLAIM FOR RELIEF

22 TRADE LIBEL

23 34. New.net realleges and incorporates by reference the allegations
24 in paragraphs 1 through 33, as set forth herein.

25 35. Through the conduct described above, Defendants have made
26 false and disparaging statements about New.net's software.

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1 36. Defendants publish their false and disparaging statements about
2 the NewDotNet Client to all computer users that install and use the Ad-Aware
3 software product.

4 37. By publishing and distributing these false and disparaging
5 statements about New.net's product, Defendants have caused substantial harm to
6 New.net, including injury to New.net's reputation and direct financial injury. As
7 such, New.net seeks an injunction against Defendants to prohibit this harmful
8 conduct, and is entitled to an award of compensatory damages against Defendants,
9 in an amount to be ascertained at trial.

10 **FOURTH CLAIM FOR RELIEF**
11 **TORTIOUS INTERFERENCE WITH**
12 **PROSPECTIVE ECONOMIC ADVANTAGE**

13 38. New.net realleges and incorporates by reference the allegations
14 in paragraphs 1 through 37, as set forth herein.

15 39. Defendants knew, or should have known, that New.net's
16 business is based, in part, on its ability to attract and retain customers and users of
17 the NewDotNet Client.

18 40. Nevertheless, Defendants have intentionally targeted and
19 labeled New.net's product in a false and disparaging manner, and have
20 programmed the Ad-Aware product to remove the NewDotNet Client from users
21 computers in a manner that creates a negative user experience, which users
22 wrongfully conclude is caused by New.net, when it was in fact caused by
23 Defendants' Ad-Aware product.

24 41. As a result of this wrongful and unprivileged conduct,
25 Defendants have tarnished New.net's reputation and product, and have interfered
26 with New.net's relationship with prospective customers, and its ability to offer the
27 broadest scope of services.

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1 42. As a direct and proximate result of Defendants' interference
2 with New.net's economic interests and relationships, New.net has suffered
3 damages in an amount to be proved at trial. New.net is entitled to compensation
4 for all detriment proximately caused by Defendants' interference, including
5 general and consequential damages with interest. New.net is also entitled to
6 injunctive relief to avoid further irreparable harm.

7 **FIFTH CLAIM FOR RELIEF**

8 **DECLARATORY RELIEF**

9 **(Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202)**

10 43. New.net realleges and incorporates by reference the allegations
11 in paragraphs 1 through 42, as set forth herein.

12 44. Pursuant to Rule 57 of the Federal Rules of Civil Procedure and
13 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights or legal relations of
14 any party in any case involving an actual controversy.

15 45. An actual controversy has arisen and now exists between
16 New.net and Defendants, in that New.net contends that Defendants' Ad-Aware
17 product wrongfully targets and mischaracterizes New.net's NewDotNet Client.

18 46. New.net is informed and believes, and on that basis alleges, that
19 Defendants dispute New.net's position.

20 47. New.net therefore requests and is entitled to a judicial
21 determination as to the rights and obligations of the parties, and such a judicial
22 determination of these rights and obligations is necessary and appropriate at this
23 time.

24 **WHEREFORE**, New.net prays for the following relief:

- 25 1. That the Court enter a judgment in favor of New.net and against
26 Defendants on all counts alleged herein;
- 27 2. That the Court enter a judgment that Defendants have:
- 28 a) Falsely advertised the NewDotNet Client software;

1 b) Committed unfair business practices in connection with
2 wrongfully targeting and labeling the NewDotNet Client software;

3 c) Committed trade libel of New.net by publishing false and
4 disparaging statements about the NewDotNet Client software; and

5 d) Interfered in New.net's prospective economic advantage.

6 3. That the Court issue a preliminary and, thereafter, permanent
7 injunction against Defendants, and their officers, agents, servants, employees, and
8 all others in active concert or participation with them with notice, enjoining and
9 restraining them from the following:

10 a) Targeting, identifying, and/or labeling New.net's
11 software, particularly the NewDotNet Client software, as any of the
12 following: "Data Miner," "Scumware," "Keyloggers," "Malware,"
13 "Browser hijackers," "tracking components" or any other false description or
14 characterization;

15 b) Distributing software which identifies, targets, and/or
16 labels New.net's software, particularly the NewDotNet Client software, as
17 any of the following: "Data Miner," "Scumware," "Keyloggers,"
18 "Malware," "Browser hijackers," "tracking components" or any other false
19 description or characterization; and

20 c) Distributing software that causes user's Internet
21 connections to be interrupted and/or disrupted as a result of attempts to
22 uninstall New.net's NewDotNet client software; and

23 d) Assisting, aiding or abetting any other person or entity in
24 engaging in or performing any of the activities referred to in subparagraph
25 (a) through (c) above.

26 4. That the Court order the recall of all of Defendants' software
27 and materials which violate the foregoing currently in distribution channels; that
28 Defendants be required to turn over for impound, during the pendency of this

1 action, all infringing materials in their custody and control; and that Defendants
2 turn over all matters used to make the infringing materials.

3 5. That the Court issue a declaratory judgment that Defendants are
4 not authorized to target, identify, and/or label New.net's software, particularly the
5 NewDotNet Client software, as any of the following: "Data Miner," "Scumware,"
6 "Keyloggers," "Malware," "Browser hijackers," "tracking components" or any
7 other false description or characterization.

8 6. That the Court order Defendants to pay to New.net general,
9 special, actual and/or statutory damages, according to proof at trial.

10 7. That the Court order Defendants to pay restitution of their
11 profits from the above-described activities.

12 8. That the Court order Defendants to pay to New.net both the
13 costs of this action and reasonable attorneys' fees incurred by New.net in
14 prosecuting this action.

15 9. For interest at the legal rate.

16 10. For such other and further relief as the Court may deem just and
17 proper.

18 Dated: May 6, 2003

Respectfully submitted,

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Daniel Scott Schechter
David M. Simonds

21
22 By 

Daniel Scott Schechter
Attorneys for Plaintiff
New.net, Inc.