

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WHENU.COM, INC., a Delaware
corporation,

Plaintiff,

vs.

THE STATE OF UTAH, a body politic,
OLENE S. WALKER, in her official
capacity as Governor of Utah, and MARK
SHURTLEFF in his official capacity as
Utah Attorney General,

Defendant.

**AFFIDAVIT OF
SHAWN A. SCHWEGMAN**

Civil No. 040907578
Judge: Honorable Joseph C. Fratto

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Shawn A. Schwegman, being first duly sworn, depose and state as follows:

1. I make this statement under penalty of perjury and from my own personal knowledge.

2. I am currently the Vice President of Technology for Overstock.com, Inc. ("Overstock") and have worked for Overstock for four years. I have been the Vice President of Marketing and the Chief Technology Officer for the company. I was also the Affiliate Manager (see paragraph 6) for Overstock for over two years.

3. Overstock is based in Salt Lake City and is an Internet leader in the sale of brand name consumer products at clearance prices. Overstock is publicly traded on NASDAQ. It has sold hundreds of thousands of items through the Internet to more than 3.5 million customers in its five years of business.

4. As an Internet merchant, Overstock's primary income comes from the sale of products over the Internet. The majority of Overstock's advertising and marketing dollars are spent online to drive traffic to our web site. Overstock has achieved its success in part because Overstock offers consumers a simple, convenient and efficient method for buying consumer products at significant discounts over the Internet. In support of this goal, Overstock has invested in excess of \$327 million in purchasing its core product inventory. In addition, Overstock has invested substantially in the information systems and Internet infrastructure necessary to support customer sales.

5. Overstock derives a substantial portion of its sales from Internet sales or e-commerce; therefore, great care and enormous efforts are undertaken by Overstock to present its web page content with a specific "look and feel" that will encourage site visitors to remain at the site to purchase Overstock products and to return to Overstock's web site for future purchases. Overstock deliberately designs its web site to display and advertise its products and related information in a manner that will be visually attractive and easy to navigate for site visitors. The web site is, in essence, Overstock's showroom. As a result of these design efforts, millions of customers have developed strong relationships with

Overstock and return to the Overstock.com web site repeatedly to purchase their consumer products. Overstock uses its web site to advertise and to sell exclusively its customer products. Overstock does not permit other advertisers on its web site. Moreover, Overstock's web site does not utilize pop-up advertisements.

6. Affiliates are generally small and extremely focused marketing companies that drive traffic to an online company. They receive a fee or commission for business generated from the traffic driven to Overstock's web site. Overstock is a leader in the industry in using affiliates. In November, 2002, I organized a meeting between the leading affiliate networks on the Internet in an attempt to draft a standard for the affiliate industry to address spyware. Spyware had become a major problem in the industry because spyware drove business away from Overstock's web site by allowing competitors' advertisements to appear over the top of Overstock's web page. Following that meeting, Linkshare (a major network for the affiliates) drafted a legal addendum to its agreement with participants, and Linkshare along with Befree, Commission Junction and Performics drafted a code of conduct to govern the major networks of the affiliates. These documents were the first industry steps against spyware, specifically in the world of affiliate marketing. Shortly thereafter WhenU was removed from Linkshare's affiliate network for violating the addendum.

7. Spyware has been nearly impossible to police prior to the enactment of the statute. We have seen the number of spyware applications on the Internet grow very rapidly

in the past year or so. As an industry leader, Overstock has spent countless hours attempting to resolve this difficult problem. I have personally spent in excess of 80 hours in the last three months dealing with spyware. This is time I should have spent focusing on growing our company. Last year I spent at least four weeks dealing with spyware and the year before almost six weeks.

8. In addition to lost time, spyware is negatively impacting our relationships with the more than 30,000 affiliate web sites that send us traffic. We pay these affiliates of Overstock a commission on any sale they direct to our web site. Our affiliates are upset because spyware diverts some of the traffic they send to us, which costs us sales and costs our affiliates lost commission on those sales. I would estimate the current loss of traffic as a result of these pop-up ads to represent potential sales of approximately \$15 million for 2003 and approximately \$15 million to the current date in 2004.

9. The scope of spyware applications and infections is voluminous. Consider two popular freeware applications which bundle spyware. Since the most recent version of Kazaa was released on November 19, 2003, it has been downloaded 348 million times. The ~~most recent version of Morpheus, released May 28, 2004, has been downloaded over 123~~ million times. Each application had some sort of spyware bundled with it. That means that in less than one year alone there were over 460 million pc's infected with some sort of spyware from those two popular applications available on the Internet.

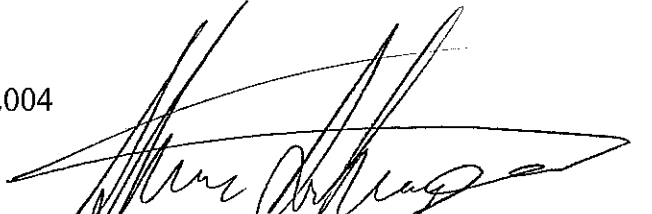
10. We are constantly scanning for spyware on our own corporate network.

Over the past year, there have been instances where Overstock pc's became infected with some sort of spyware.

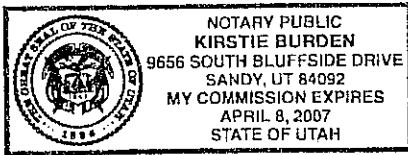
11. This calendar year we have spent over \$75,000 to obtain software to monitor our systems against spyware. We now have one person specifically employed to monitor spyware at a cost of over \$40,000.

12. Spyware poses a huge threat to our business that, if left unchecked, can jeopardize our long-term viability as a company. From our business perspective, spyware has the potential to steal away our customer. Overstock spends money online to drive potential customers to our site in the hopes that they will purchase from us. Our business, and every other online merchant, is in business to attract those customers and to sell to them. Spyware misdirects and misleads the user into diverting that user away from our site and possibly confusing the user in a belief that the pop-up is sponsored by our site or in some way associated with our company. Overstock.com is a registered trademark of Overstock and is prominently displayed on our web site and in all our advertisements. The pop-up advertisements displayed as a result of spyware applications blur our trademarks and dilute the mark's ability to identify Overstock as a source of goods and services. It also has confused, and will continue to confuse, Overstock's customers about the origin and sponsorship of the pop-up ads.

DATED this 3rd day of June, 2004


Shawn A. Schwegman

The foregoing instrument was acknowledged before me this 3rd day of June,
2004, by.




NOTARY PUBLIC