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THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY

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IN THE THIRD JUDICIAL DISTRICT COURT

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,**

Defendants.

**AFFIDAVIT OF
STEPHEN H. URQUHART**

Civil No. 040907578

Honorable Joseph C. Fratto

Stephen H. Urquhart, being first duly sworn, hereby deposes and states as follows:

1. I am over 18 years of age and have personal knowledge of the facts contained in this affidavit. I submit this Affidavit in opposition to the Motion for Preliminary Injunction filed by plaintiff WhenU.com.

2. I am a member of the Utah House of Representatives, and I am chair of the House Committee on Public Utilities and Technology. In the 2004 general legislative session, I was the House sponsor of 4HB323, now known as the Spyware Control Act (the "Act").

3. While no individual member can speak for the House or the Legislature as a whole, given the collaborative nature of the process and the majority requirements for binding policy decisions, I can and will describe my efforts and set forth my observations regarding passage of the Act. Because my conversations with individual legislators and vote tallies on the bill suggest that legislators and the legislature as a whole agree with my observations, I believe I can shed insight on the intent of the legislature and the purpose of the Act.

4. The practice of the legislature sometimes is to expressly state the intent and purpose of legislation in the actual provisions of the bill or law. Such statements, however, lack binding effect and add little to the substance of the bill. Thus, in preparing 4HB323, I thought it would be better to simply spell out what practices would be prohibited, rather than express such intent in general language. Therefore, I intentionally did not include purpose and intent language in the bill itself.

5. Inasmuch as the intent and purpose of the Act are not expressly stated, I find it presumptuous for Plaintiff in this action to attempt to supply an intent and then argue that such intent was not met. The intent is simply to do what the bill does. If, in this case, it encourages WhenU and other spyware companies to adequately inform computer users about their products,

to make the products more easily removable, and to stop context-triggered pop-overs, I would agree that was the intent of the bill.

6. My intentions in sponsoring 4HB323 were two-fold: (i) to protect consumers, and (ii) to further economic development in Utah. My determination, and I believe the determination of the Legislature, was that the practices targeted by the bill are injurious to individuals and to businesses in Utah.

7. Spyware (under which definition I would include WhenU's Save and SaveNow software) improperly burdens individuals in a number of ways. For one, the spyware business model is set up to place undue burden and expense on computer users. Rather than spyware companies spending money for expensive servers, they tie up users' computing resources by dumping their software onto Utah computers. This slows down computers, leading to consumer complaints to computer manufacturers, Internet service providers (ISPs) and to technicians.

8. Also, the downloads of spyware to the user's computer open up security vulnerabilities to the data and information on the user's computer.

9. Further, spyware programs frustrate users by interrupting them with pop-over advertisements and by causing them to lose control over what software is on their PCs.

10. Talking with users, ISPs, and technicians, I concluded that these burdens improperly interfere with Utahns' computing and Internet browsing experiences. I concluded that spyware companies are involved in a type of arms race – downloading their software on computers faster than those users learn about spyware and ways to prevent it from interfering with their machines and browsing experiences.

11. Spyware also improperly burdens Utah businesses. Utah businesses spend fortunes developing and branding websites and driving business to those websites. To me, that is akin to a business opening shop, advertising and driving business to its shop in the brick and mortar world. In the brick and mortar world, a small degree of privacy exists in the shop. Once a consumer comes into the shop, competitors cannot camp out at the cash register and hawk their wares. Outside the shop, it is a dog-eat-dog world. Inside the shop, though, commerce has always received a degree of privacy. My conclusion was that commerce demands that Utah businesses have a similar degree of privacy in Internet transactions. That is why my bill allows context-triggered pop-under advertisements, but not pop-over advertisements.

12. In sponsoring 4HB323, I spent about one hundred hours before and during the session researching spyware, reading everything I could find on the issue. As part of that research, I met several times with WhenU's lobbyists. I also met at length, in person, with WhenU CEO Avi Naider during the session. Mr. Naider argued that his company's software was akin to sandwich board advertising outside of stores or coupons printed on the back of grocery store receipts.

13. I disagree with WhenU's analogies. The sandwich boards are OUTSIDE the store; they do not interfere with the small degree of privacy that exists inside the store (which I liken to being "inside" a company's website). The grocery store coupons also are within the small degree of privacy. It is not an Albertson's coupon on the back of a Harmon's receipt. Were Albertson's to develop a technology to make its coupons appear on the back of Harmon's receipts – in the brick and mortar world – policy makers would have little trouble concluding that

was not acceptable. Albertson's is entitled to the small degree of privacy in its store, as Harmon's is in its store – as Overstock.com or 1-800Contacts.com would be on their websites.

14. Given these burdens to Utahns, I designed 4HB323 to address three issues: (i) disclosure, (ii) removal, and (iii) context-triggered advertising.

15. First, computer users are improperly burdened by spyware. Computer users largely do not know what spyware is, why it is on their computers, or how to get it off their computers. I concluded that spyware preys upon this ignorance through download procedures that are sneaky and misleading. For example, to read WhenU's disclosures as presented in one of WhenU's major distribution methods, a user would need to "page down" 44 times. Most users will not go through such a cumbersome process. Even if they were to do so, the average user would not understand the disclosures. Therefore, I concluded that adequate disclosure was not occurring under many spyware companies' business plans.

16. To address disclosure, I designed provisions that will better inform users what they are getting into. Our legislature undertakes these types of consumer protection measures in many contexts.

17. Second, I concluded that many spyware programs are difficult for users to remove from their computers. The Act addresses this by requiring easy and independent removal.

18. Third, as discussed above, spyware unfairly burdens Utah businesses by improperly poaching sales at the point of purchase through confusion and context-based triggering. The bill addresses this issue by prohibiting context-triggered pop-over advertisements. By contrast, pop-unders, to me, are akin to standing outside the store with a sandwich board.

19. I have read Plaintiff's affidavits and disagree that 4HB323 received inadequate legislative attention. Personally, I do not believe I have ever spent so much time on any one bill. I believe I spoke with every member of the Public Utilities and Technology Committee about this issue at least once outside of committee, making sure they understood the issue and the bill. I met several times with representatives of the computing, Internet, and information technology industry, personally and telephonically. I know there was no shortage of efforts being spent lobbying against the bill. I am personally aware of at least 6 lobbyists that were actively lobbying legislators to defeat the bill. The fact is that legislators were convinced that spyware is parasitic and requires regulation. This is evidenced by the fact that the Act passed the House with a vote of 67 – 0 and the Senate with a vote of 26 – 0.

20. Lastly, I note that the enforcement provisions of the bill are intentionally narrow. On one hand, this is an acknowledgment that certain types of spyware, such as Trojans and keyloggers, possibly can be prevented under existing law. On the other hand, the narrow enforcement provisions are a precautionary measure. Since I had the benefit of reading several court decisions that helped flesh out some facts and principles relating to spyware and its relation to businesses, I felt comfortable establishing policy in this arena.

21. Where the common law had not been developed in any meaningful way in the arena of spyware vis-à-vis computer users, I thought it better to allow our competent division of consumer protection to take some time to study this issue before enacting policy. This first step, nevertheless, will help individual Utahns by slowing the flow of spyware downloads onto Utah computers.

