

**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,

VERIFIED PETITION

Index No. _____

- against -

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

Respondent.

The People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, allege upon information and belief that:

INTRODUCTION

1. Petitioners bring this summary proceeding (a) to enjoin respondent from engaging in deceptive practices in the sale of computer software, including from making misrepresentations to consumers that, *inter alia*, there exist “rules and regulations” against reviewing, criticizing or commenting on Network Associates’ mass-marketed software; and (b) to recover costs and penalties as authorized by statute, and such other relief as requested herein.

JURISDICTION AND PARTIES

2. Petitioners are the people of the State of New York, by their attorney, Eliot Spitzer, Attorney General of the State of New York.

3. The Attorney General brings this summary proceeding pursuant to his authority under Executive Law § 63(12) and General Business Law (“GBL”) § 349, and his common law authority, to enjoin respondent from engaging in deceptive, fraudulent, and illegal practices, in the marketing and sale of computer software.

4. GBL § 349 empowers the Attorney General to seek injunctive relief and restitution when any person or entity has engaged in deceptive acts or practices in the conduct of any business. GBL § 350-d empowers the Attorney General to seek civil penalties in the amount of \$500.00 for each violation of GBL § 349. Executive Law §§ 63(12) and 63(15) empower the Attorney General to seek injunctive relief, restitution, damages, and costs when any person or business entity has engaged in or otherwise demonstrated repeated fraudulent or illegal acts in the transaction of business. Finally, CPLR § 8303 entitles the Attorney General to \$2000.00 in costs, when it prevails on its claims.

5. At all times relevant, Network Associates, Inc. (“Network Associates” or “respondent”) has conducted business in the State of New York under the name Network Associates.

6. Pre-litigation notice as provided for in N.Y. GBL § 349 has been given, by certified mail delivered on five or more days notice to respondent’s designated attorney. *See* Tab A hereto.

**NETWORK ASSOCIATES’
REPEATED AND PERSISTENT PATTERN
OF MISREPRESENTATIONS TO CONSUMERS**

Background

7. Network Associates is a limited liability company having its principal place of

business at 3965 Freedom Circle, Santa Clara, CA 95054.

8. Respondent sells and markets a range of packaged software products, including McAfee anti-virus and firewall software, through Network Associates' McAfee product group. Its anti-virus software products are among the top selling software programs worldwide. For instance, 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. Another of the company's popular software packages is its "Gauntlet" firewall software.

9. Network Associates markets its software products both by selling them directly over the Internet, available for downloading by consumers (including New York residents), and by selling boxed versions through the mail and at physical retail locations (including stores in New York).

The Censorship Clause

10. Network Associates has placed on the face of many, if not all, of its software diskettes, including its VirusScan 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:

1. 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.

(Hereinafter the “Censorship Clause”) (emphasis added). Nowhere does this Clause indicate what particular “rules and regulations” it is referring to. This Censorship Clause appears on other Network Associates software product diskettes, as well.

11. Network Associates also has placed this Censorship Clause onto the download page of the company’s web site, accessible to consumers who download software from its web site.

Even the Network Associates License Agreement Precludes the Censorship Clause

12. Network Associates’ boxed License Agreements, which are packaged or otherwise disseminated with their products, reveal yet another level of deception, in that those Agreements (directly contrary to what respondent tells consumers) preclude the company’s enforcement of the Censorship Clause.

13. Specifically, the Network Associates License Agreement (including but not limited to the VirusScan License Agreement), states: “This Agreement sets forth all rights for the user of the Software and is the entire agreement between the parties.” 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 diskettes (i.e., on the computer screen upon installation) of other Network Associates products, and in License Agreements for other Network Associates software products.

14. In turn, there is not a word in the License Agreement restricting a consumer’s right

to publish reviews of the software or results of benchmark tests. Network Associates' representation to consumers that such restrictions apply – when Network Associates' own License Agreement says they cannot – therefore is untrue on its face.

Respondent's Deceptive Use of the Censorship Clause

15. On its face, the Censorship Clause is designed to mislead consumers, by leading them to believe that credible and legal “rules and regulations” justify the restrictions embodied in the Clause. In fact, no such rules and regulations exist.

16. In addition to misleading consumers in this way, on at least one occasion, Network Associates has attempted to use its baseless Censorship Clause to bully reviewers out of criticizing the company's software.

17. For instance, in July 1999, Network Associates cited the Censorship Clause in communications with Network World, an online magazine, when the magazine published a review of the company's “Gauntlet” firewall software. In a succession of e-mails, Network Associates demanded -- based on the Censorship Clause -- that the magazine print “a correction/retraction.” The company's executives (copying its then-Vice President of Legal Affairs, Rich Hornstein) warned Network World that it had breached the Censorship Clause, and thus “willfully violated our license agreement, particularly since [the reviewer] was informed that we were not participating.”

The Censorship Clause Harms Consumers and the Public Interest

18. Consumers rely on Network Associates' security software to protect their computers from viruses, hackers, and cyber-terrorists. It is imperative that discussion of such

software be open and free – as is the public’s right to comment on any consumer product. Moreover, protecting the rights of watchdog groups, consumer rights groups, and the media to publish product reviews and results of product testing is fundamental to the development of safe and efficient products. It is thus essential, as a matter of public policy, that the industry, media and public alike be unfettered in their exercise of such legal rights.

19. By contrast, the Censorship Clause protects no legitimate business interest. The mass-marketed software at issue does not, for instance, contain trade secrets or proprietary information. Nor, for that matter, does copyright law provide any basis for the Clause, as product reviews obviously are fair use under copyright law.

20. The Censorship Clause therefore is by its own terms is illegal and unenforceable restrictive covenant.

**FIRST CAUSE OF ACTION
(DECEPTIVE ACTS AND PRACTICES)**

21. Petitioner repeats, realleges and incorporates paragraphs one through twenty contained herein.

22. By engaging in the acts and practices described above, Respondent repeatedly and persistently has engaged in deceptive business practices in violation of GBL § 349.

23. GBL § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in [New York].”

24. Respondent’s violations of GBL § 349 constitute repeated and persistent illegal conduct in violation of Executive Law § 63(12).

**SECOND CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW
SECTION 63(12) -- FRAUD**

25. Petitioner repeats, realleges and incorporates paragraphs one through twenty-four contained herein.

26. Executive Law § 63(12) authorizes the Attorney General to seek injunctive relief whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business.

27. By the acts and practices described in this Petition, Respondent has engaged in repeated and persistent fraud in violation of Executive Law § 63(12).

**THIRD CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW
SECTION 63(12) -- ILLEGALITY**

28. Petitioner repeats, realleges and incorporates paragraphs one through twenty-eight contained herein.

29. Executive Law § 63(12) authorizes the Attorney General to seek injunctive relief whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business.

30. By the acts and practices described in this Petition, Respondent has engaged in repeated and persistent illegality in violation of Executive Law § 63(12), by entering into, or purporting to enter into, or by advising consumers that they have entered into, illegal restrictive covenants contrary to New York law.

WHEREFORE, Petitioners request that this court grant relief pursuant to Executive Law § 63(12) and General Business Law § 349, against respondent by issuing an Order and Judgment as follows:

permanently enjoining respondent from further engaging in any of the fraudulent, deceptive, and/or illegal acts and practices alleged in the Verified Petition, and;

- i. directing respondent to provide Petitioners with a sworn, certified statement indicating the number of (a) Network Associates software disks sold to consumers containing the misrepresentations at issue herein, and (b) instances in which Network Associates software purchased and downloaded from the Internet was distributed pursuant to the misrepresentations at issue herein;
- ii. directing that a money judgment in civil penalties pursuant to G.B.L. § 350-d be entered against respondent in favor of the State of New York, based upon the sum of Fifty Cents (\$.50), per each instance of a deceptive or unlawful act or practice;
- iii. directing that a money judgment be entered against respondent in favor of Petitioners in the sum of Two Thousand Dollars (\$2,000) in costs against respondent, pursuant to C.P.L.R. § 8303(a)(6);
- iv. directing respondent to notify Petitioners within thirty (30) days prior to making any representation to consumers, whether in the form of a License Agreement, advertisement, or otherwise, that in any way relates to the right to review, test, or criticize, any of respondent's software

products; and

v. granting Petitioners such other and further relief as this Court finds
just and proper.

DATE: February 6, 2002
New York, New York

**ELIOT SPITZER
ATTORNEY GENERAL
OF THE STATE OF NEW YORK**

By: Kenneth M. Dreifach
Assistant Attorney General In Charge
Internet Bureau
Attorney for Petitioner
120 Broadway, 3rd Floor
New York, New York 10271
(212) 416-8456
(212) 416-8369

VERIFICATION

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

KENNETH M. DREIFACH, being duly sworn, deposes and says: He is an Assistant Attorney General, in charge of the Internet Bureau, in the office of Eliot Spitzer, Attorney General of the State of New York, and is duly authorized to make this verification.

He has read the foregoing Petition and knows the contents thereof, that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

The reason this verification is not made by Petitioners is that Petitioners are a body politic. The Attorney General is their statutory representative.

Kenneth M. Dreifach