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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MAXTHEATER, INC., a Washington
corporation, and

THOMAS L. DELANOY,
individually and as an officer
of MaxTheater, Inc.,

Defendants.

NO. 05-CV-0069-LRS

Temporary Restraining
Order and Order to
Show Cause

Plaintiff, the Federal Trade Commission ("FTC" or the
"Commission"), having filed its complaint for injunctive and
other equitable relief in this matter pursuant to Section 13(b)
of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
§ 53(b), and having moved ex parte for a temporary restraining
order and for an order to show cause why a preliminary injunction
TRO and Order to Show Cause

1 should not be granted pursuant to Rule 65(b) of the Federal Rules
2 of Civil Procedure, and the Court, having considered the
3 complaint, declarations, exhibits, and memorandum of law filed in
4 support thereof, finds that:

5 1. This Court has jurisdiction over the subject
6 matter of this case, and there is good cause to believe
7 that it will have jurisdiction over all parties hereto;

8 2. There is good cause to believe that defendants
9 MaxTheater, Inc. and Thomas L. Delanoy have engaged and
10 are likely to engage in acts or practices that violate
11 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and
12 that the plaintiff is therefore likely to prevail on
13 the merits of this action. The evidence set forth in
14 the Commission's Memorandum of Points and Authorities
15 in Support of its Ex Parte Motion for TRO
16 ("Memorandum"), and in the accompanying declarations
17 and exhibits, demonstrates that there is good cause to
18 believe that immediate and irreparable damage to the
19 Court's ability to grant effective final relief will
20 result from the sale, transfer, or other disposition or
21 concealment by defendants of their assets or business
22 records, unless the defendants are immediately
23 restrained and enjoined by Order of this Court;

24 3. Commission has not provided notice to the
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1 defendants due to the likelihood that advance notice of
2 this action will cause the defendants to evade service
3 of process and abscond with or destroy evidence. There
4 is good cause for relieving the Commission of the duty
5 to provide defendants with prior notice of the
6 Commission's motion.

- 7 4. Weighing the equities and considering the
8 plaintiff's likelihood of ultimate success, a temporary
9 restraining order requiring an immediate accounting of
10 assets, preserving business records, and providing
11 other equitable relief is in the public interest; and
12 5. Fed. R. Civ. P. 65(c) does not require security of
13 the United States or an officer or agency thereof for
14 the issuance of a restraining order.
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16 DEFINITIONS

17 For the purpose of this temporary restraining order
18 ("Order"), the following definitions shall apply:
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- 20 A. "Affiliate marketer" or "sub-affiliate marketer"
21 means any person who provides or has provided the
22 defendants with, or who refers or has referred to
23 the defendants, actual or potential customers,
24 whether pursuant to the defendants' "Affiliate
25 Program" or otherwise.
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1 B. "Assets" means any legal or equitable interest
2 in, right to, or claim to any real or personal
3 property of any defendant, or held for the benefit
4 of any defendant, wherever located, including, but
5 not limited to, "goods," "instruments,"
6 "equipment," "fixtures," "general intangibles,"
7 "inventory," "checks," "notes" (as these terms are
8 defined in the Uniform Commercial Code), chattels,
9 leaseholds, contracts, mails, other deliveries,
10 shares of stock, lists of participants,
11 intellectual property, accounts, credits,
12 receivables, cash, and trusts, including, but not
13 limited to any other trust held for the benefit of
14 any defendant, any defendant's minor children, or
15 any defendant's spouse.

16 C. "Defendants" means MaxTheater, Inc. and Thomas L.
17 Delanoy also doing business as "SpywareAssassin,"
18 "SpywareAssassin.com," "CCSecured" and
19 "CCSecured.com," and their officers, agents,
20 directors, employees, salespersons, independent
21 contractors, attorneys, subsidiaries, affiliate
22 marketers, sub-affiliate marketers, affiliates,
23 successors, and assigns.

24 D. "Document" is synonymous in meaning and equal in
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1 scope to the usage of the term in Federal Rule of
2 Civil Procedure 34(a), and includes writing,
3 drawings, graphs, charts, Internet sites, Web
4 pages, Web sites, electronic correspondence,
5 including e-mail and instant messages,
6 photographs, audio and video recordings, computer
7 records, whether active or inactive, and any other
8 data complications from which information can be
9 obtained and translated, if necessary, through
10 detection devices into reasonably usable form. A
11 draft or non-identical copy is a separate document
12 within the meaning of the term.

13 E. "Plaintiff" means Federal Trade Commission.

14 F. "Spyware," which includes "adware," is defined by
15 the defendants in their marketing media as including
16 programs that "secretly install on your computer
17 without your permission or knowledge" and may cause
18 "pop ups," banner advertisements, and other extraneous
19 ads, send "spam" e-mail messages, hijack search
20 engine links or home pages, track online activity,
21 allow others to remotely access a computer, record
22 private information or steal passwords. It also
23 includes "adware, keyloggers, trojans, hijackers,
24 dialers, viruses, spam, and general ad serving."
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1 G. "Anti-spyware' product" means any product,
2 however denominated, including but not limited to
3 "SpywareAssassin," that does or purports to
4 identify, monitor, remove, block, or otherwise
5 prevent spyware from residing on a computer.
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7 **CONDUCT PROHIBITIONS**

8 **I.**

9 **IT IS THEREFORE ORDERED** that the defendants, and those
10 persons in active concert or participation with them who receive
11 actual notice of this Order by personal service or otherwise, are
12 temporarily restrained and enjoined from directly or indirectly
13 misrepresenting, expressly or by implication, that they have
14 scanned or otherwise examined a computer and that they have
15 detected that spyware already resides on a computer.
16

17 **II.**

18 **IT IS FURTHER ORDERED** that the defendants, and those
19 persons in active concert or participation with them who receive
20 actual notice of this Order by personal service or otherwise, are
21 temporarily restrained and enjoined from directly or indirectly
22 misrepresenting, expressly or by implication, that an "anti-
23 spyware" product identifies, monitors, removes, blocks, or
24 otherwise prevents spyware from residing on a computer.
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1 FINANCIAL REPORTS AND ACCOUNTING

2 III.

3 IT IS FURTHER ORDERED that defendants Thomas Delanoy
4 and MaxTheater, Inc., within one (1) day of the show cause
5 hearing, shall:

6 A. Provide the Commission with completed financial
7 statements, verified under oath and accurate as of the date of
8 entry of this Order, on the forms attached to this Order as
9 Attachment A for individual defendant Thomas Delanoy and
10 Attachment B for corporate defendant MaxTheater, Inc.;

11 B. Provide the Commission with a full accounting,
12 verified under oath and accurate as of the date of entry of this
13 Order, of all payments, transfers, or assignments of assets made
14 by defendants Thomas Delanoy and MaxTheater, Inc. in the amount
15 of \$500 or more since January 1, 2003. Such statement shall
16 include: (1) the amount transferred or assigned; (2) the name,
17 address, and telephone number of each transferor or assignor; (3)
18 the name, address, and telephone number of each transferee or
19 assignee; (4) the date of the assignment or transfer; and (5) the
20 type and amount of consideration for any payment;

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23 C. Provide the Commission with a statement, verified
24 under oath and accurate as of the date of entry of this Order,
25 detailing the name, address, and telephone number for each
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1 accountant, financial planner, investment advisor, stock broker,
2 or other person who provided financial, business, or tax advice
3 or services since January 1, 2003;

4 D. Provide the Commission with a full accounting,
5 verified under oath and accurate as of the date of entry of this
6 Order, of all funds, documents, and assets outside of the United
7 States that are (1) titled in the name, individually or jointly,
8 of defendants Thomas Delanoy and MaxTheater, Inc.; or (2) held by
9 any person or entity for the benefit of defendants Thomas Delanoy
10 and MaxTheater, Inc.; or (3) under the direct or indirect
11 control, whether jointly or singly, of defendants Thomas Delanoy
12 and MaxTheater, Inc.;

13 E. Provide the Commission access to all records of
14 accounts or assets of defendants Thomas Delanoy and MaxTheater,
15 Inc. held by financial institutions located outside the
16 territorial United States by signing the Consent to Release of
17 Financial Records attached to this Order (Attachment C); and

18 F. Provide the Commission with a completed statement,
19 verified under oath and accurate as of the date of entry of this
20 Order, detailing the number and identity of members of the public
21 who purchased from the defendants, whether directly, or through
22 affiliate marketers or sub-affiliate marketers, any "anti-
23 spyware" products, including their name, address, and e-mail
24 address, and the total funds received from such purchasers.
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PRESERVATION OF RECORDS

IV.

IT IS FURTHER ORDERED that the defendants, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby temporarily restrained and enjoined from destroying, erasing, mutilating, concealing, altering, transferring, writing over, or otherwise disposing of, in any manner, directly or indirectly, any documents or records of any kind that relate to the business practices or business or personal finances of defendants MaxTheater and Thomas L. Delanoy, including but not limited to, computerized files, storage media (including but not limited to floppy disks, hard drives, cd-ROMS, zip disks, punch cards, magnetic tape, backup tapes, and computer chips) on which information has been saved, any and all equipment needed to read any such material, contracts, accounting data, correspondence, advertisements (including, but not limited to, advertisements placed on the World Wide Web or the Internet), FTP logs, Service Access Logs, USENET Newsgroups postings, World Wide Web pages, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or

1 personal income or property tax returns, and other documents or
2 records of any kind that relate to the business practices or
3 business or personal finances of the defendants.

4 **RECORD KEEPING/BUSINESS OPERATIONS**

5 **V.**

6 **IT IS FURTHER ORDERED** that defendants Thomas Delanoy
7 and MaxTheater, Inc. are hereby temporarily restrained and
8 enjoined from:

9 **A.** Failing to create and maintain documents that, in
10 reasonable detail, accurately, fairly, and completely reflect
11 their incomes, disbursements, transactions, and use of money; and

12 **B.** Creating, operating, or exercising any control
13 over any business entity, including any partnership, limited
14 partnership, joint venture, sole proprietorship or corporation,
15 without first providing Plaintiff Commission with a written
16 statement disclosing: (1) the name of the business entity; (2)
17 the address and telephone number of the business entity; (3) the
18 names of the business entity's officers, directors, principals,
19 managers and employees; and (4) a detailed description of the
20 business entity's intended activities.

21 **DISTRIBUTION OF ORDER BY DEFENDANTS**

22 **VI.**

23 **IT IS FURTHER ORDERED** that the defendants Thomas
24 Delanoy and MaxTheater, Inc. shall immediately provide a copy of
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1 this Order to each affiliate marketer, sub-affiliate marketer,
2 affiliate, subsidiary, division, sales entity, successor, assign,
3 officer, director, employee, independent contractor, client
4 company, agent, attorney, spouse and representative of the
5 defendants, and shall, within ten (10) days from the date of
6 entry of this Order, provide the Commission with a sworn
7 statement that the defendants have complied with this provision
8 of the Order, which statement shall include the names and
9 physical addresses, and e-mail addresses of each such person or
10 entity who received a copy of the Order.

SERVICE OF ORDER

VII.

14 IT IS FURTHER ORDERED that copies of this Order may be
15 served by any means, including facsimile transmission, upon any
16 financial institution or other entity or person that may have
17 possession, custody, or control of any documents of any
18 defendant, or that may otherwise be subject to any provision of
19 this Order. Service upon any branch or office of any financial
20 institution shall effect service upon the entire financial
21 institution.

CONSUMER CREDIT REPORTS

VIII.

24 IT IS FURTHER ORDERED that pursuant to Section 604(1)
25 of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), any
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1 consumer reporting agency may furnish a consumer report
2 concerning defendants Thomas Delanoy and MaxTheater, Inc. to
3 Plaintiff Commission.

4 SERVICE OF PLEADINGS

5 IX.

6 IT IS FURTHER ORDERED that plaintiff shall serve on
7 defendants Thomas Delanoy and MaxTheater, Inc., copies of this
8 Order, complaint, and supporting memoranda, affidavits and other
9 evidence, by the United States Marshal's office, or, if not
10 practicable, by any other permissible means. Defendants Thomas
11 Delanoy and MaxTheater, Inc. shall serve on the Commission all
12 memoranda, affidavits and other evidence on which the defendants
13 intend to rely at the preliminary injunction hearing set in this
14 matter not later than 4:00 p.m. (Eastern Standard time) on the
15 third day prior to the hearing date.

17 DURATION OF TEMPORARY RESTRAINING ORDER

18 X.

19 IT IS FURTHER ORDERED that the Temporary Restraining
20 Order granted herein shall expire on MARCH 15, 2005 at 1:00 P.M.,
21 unless within such time, the Order, for good cause shown, is
22 extended for an additional period not to exceed ten (10) days, or
23 unless it is further extended pursuant to Federal Rule of Civil
24 Procedure 65.

1 ORDER TO SHOW CAUSE REGARDING

2 PRELIMINARY INJUNCTION

3 XI.

4 IT IS FURTHER ORDERED, pursuant to Federal Rule of
5 Civil Procedure 65(b), that each of the Defendants shall appear
6 before this Court on the 15TH day of MARCH, 2005, at 1:00 P.M.,
7 in at the Thomas S. Foley U.S. Courthouse, 920 W. Riverside,
8 Spokane, Washington, to show cause, if there is any, why this
9 Court should not enter a Preliminary Injunction, pending final
10 ruling on the Complaint against the defendants, enjoining them
11 from further violations of Section 5(a) of the Federal Trade
12 Commission Act, 15 U.S.C. § 45(a) and imposing such additional
13 relief as may be appropriate.
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16 SERVICE UPON PLAINTIFF

17 XII.

18 IT IS FURTHER ORDERED that, with regard to any
19 correspondence or pleadings related to this Order, service on the
20 Commission shall be performed by overnight mail delivery to the
21 attention of Mona Spivack at the Federal Trade Commission, 600
22 Pennsylvania Avenue, NW, Room H-238, Washington, DC 20580, (202)
23 326-3795.
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25 RETENTION OF JURISDICTION


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XIII.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes. No security is required of any agency of the United States for the issuance of a restraining order. Fed. R. Civ. P. 65(c).

IT IS SO ORDERED.

DATED this 7th day of March, 2005, at 8:50 a.m..



LONNY R. SUKO
UNITED STATES DISTRICT JUDGE