

CAUSE NO. _____

STATE OF TEXAS,

Plaintiff,

v.

**DANIEL JOHN McLAUGHLIN, Individually
and d/b/a NEXUSMEDIA**

Defendant.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

_____ **JUDICIAL DISTRICT**

**PLAINTIFF'S ORIGINAL PETITION
AND REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff, STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbot, complains of DANIEL JOHN McLAUGHLIN d/b/a NEXUSMEDIA, Defendant, and for cause of action would respectfully show as follows:

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. Proc. 190.2(b)(3); 190.3(a).

JURISDICTION

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the State of Texas and in the public interest under the authority granted him by Section 17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. Section 17.41 *et seq.* (Vernon 2002 and Supp 2007) ("DTPA") upon the ground that the Defendant has engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by Sections

17.46(a) and (b) of the DTPA.

DEFENDANT

3. Defendant Daniel John McLaughlin d/b/a Nexusmedia is an individual doing business in Texas as Nexusmedia. Defendant may be served with process at his residence, 4023 Pemberton Dr.; Charlotte, NC 28210.

VENUE

4. Venue for this cause of action lies in Travis County, Texas, because, under § 17.47(b) of the DTPA, venue is proper because Defendant has done business in the county of suit.

PUBLIC INTEREST

5. Because Plaintiff STATE OF TEXAS has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe that Defendant has caused, and will continue to cause damage to residents of the State of Texas and cause adverse effects to legitimate business enterprises that conduct their trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

6. Defendant has at all times described below engaged in conduct which constitutes trade and commerce as those terms are defined in the DTPA Section 17.45(6).

ACTS OF AGENTS

7. Whenever it is alleged in this Petition that Defendant did any act, it is meant that:
- A. Defendant performed or participated in the act, or
 - B. Defendant's officers, agents, or employees, performed or participated in the act on

behalf of and under the authority of the Defendant.

NOTICE BEFORE SUIT

8. The Consumer Protection Division informed Defendant of the alleged unlawful conduct described below at least 7 days before filing suit as required by DTPA Section 17.47(a).

STATEMENT OF FACTS

9. Defendant sells computer screensavers nationwide through his Internet Web site, www.nexusmedia.net, including in Travis County, Texas. Defendant represents at his Web site that “Our screensavers are guaranteed! No Spyware, Adware, Malware, Popups, or Popunders.”

10. In fact, since at least May 2006, Defendant has intentionally bundled with his screensavers, the My Search Toolbar.¹ Despite his assertions to the contrary, Defendant knows that the My Search Toolbar is identified by many antispyware programs as spyware or adware. Nevertheless, when consumers go to download a screensaver to their computer, Defendant also causes the My Search Toolbar to be downloaded to the consumer’s computer. Defendant does not disclose the presence of the toolbar or provide the consumers with the opportunity to opt-out of the installation of the toolbar, because Defendant knows that given the opportunity, consumers would not install the toolbar.²

11. Defendant also represents at his Web site:

A Special Note for Parents

NexusMedia is a G-rated site. The only thing that could be remotely questioned

¹ The My Search Toolbar is a search tool program that attaches itself to a consumer’s Web browser, e.g., Internet Explorer.

When used, the toolbar sends information to My Search servers, including the user’s ID and search query. The toolbar also received updates from My Search.

² Indeed, in response to an email from the owner of the My Search toolbar, Defendant stated that users will opt-out of the toolbar if provided the opportunity, which will lead to decreased revenue.

is our one nude art screensaver. These [sic] are very tasteful classic art from some of the world's greatest artist [sic].

12. In fact, Defendant's screensavers contain at least seventy (70) nude and semi-nude images of women. **(See Exhibit A, Affidavit of Gary Adkins).**

VIOLATIONS OF THE DTPA

13. The State adopts by reference the information contained in paragraphs 1-12 and alleges that Defendant, in the course and conduct of trade and commerce, has directly and indirectly engaged in false, misleading, and deceptive acts and practices declared to be unlawful by the DTPA Sections 17.46(a) and (b), to wit:

- A. Defendant, as alleged and detailed above, has engaged in false, misleading, or deceptive acts or practices in the conduct of trade or commerce. TEX. BUS. & COM. CODE ANN. §§ 17.46 (a);
- B. Defendant, as alleged and detailed above, has represented that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(5);
- C. Defendant, as alleged and detailed above, has represented that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, when they are of another. TEX. BUS. & COM. CODE ANN §§ 17.46 (b)(7);
- D. Defendant, as alleged and detailed above, advertised goods or services with the intent not to sell them as advertised. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(9);

- E. Defendant, as alleged and detailed above, failed to disclose information concerning goods or services which was known at the time of the transaction when failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(24).

INJURY TO CONSUMERS

14. Defendant has, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award of damages.

APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

15. Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the laws of the State of Texas as alleged in this Petition. Unless enjoined by this Honorable Court, Defendant will continue to violate the laws of the STATE OF TEXAS and cause loss and damage to the people of this State.

Therefore, Plaintiff requests a Temporary Injunction and Permanent Injunction be issued.

PRAYER FOR RELIEF

16. WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendant, Defendant's successors, assigns, officers, agents, servants, employees, and attorneys and any other person in active concert or participation with Defendant from engaging in the following acts or practices:

- A. Using false, misleading, or deceptive acts or practices to distribute software;

- B. Misrepresenting that goods or services sold or distributed by Defendant have characteristics, or benefits which they do not have, including misrepresenting that nexusmedia.net and its screensavers are G-rated or otherwise appropriate for children and misrepresenting that nexusmedia.net and its screensavers are spyware and adware free;
 - C. Misrepresenting that goods or services sold or distributed by Defendant are of a particular standard or grade, if they are another, including misrepresenting that nexusmedia.net and its screensavers are G-rated or spyware and adware free;
 - D. Causing confusion about the existence of adware, spyware or any other software in Defendant's screensavers;
 - E. Failing to clearly and conspicuously disclose the existence of software bundled with Defendant's screensavers;
 - F. Failing to clearly and conspicuously disclose that Defendant's screensavers contain adult content that is inappropriate for children.
 - G. Failing to obtain consumers' consent via express opt-in method before installing third-party software.
17. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:
- A. Adjudge civil penalties in favor of Plaintiff STATE OF TEXAS of not more than \$20,000 against the Defendant per violation of the DTPA pursuant to Tex. Bus. & Com. Code §17.47(c);
 - B. Award such relief as this Court finds necessary to redress injury to consumers resulting from Defendant's violations of the DTPA, including but not limited to reformation or rescission of contracts, disgorgement of ill-gotten gains, and

cancellation of purported debts.

- C. Award the State of Texas attorney's fees and costs pursuant to TEX. GOVT. CODE §402.006(c) for bringing this action, as well as such other and additional equitable relief as this Court may determine to be just and proper.

Respectfully submitted,

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