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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
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10 ZANGO, INC.,

11 Plaintiff,

12 v.

13 PC TOOLS PTY LTD.,

14 Defendant.

CASE NO. C07-0797-JCC

ORDER

15 **I. INTRODUCTION**

16 This matter comes before the Court on Plaintiff's Motion for a Temporary Restraining Order
17 ("TRO") (Dkt. No. 6), Defendant's Opposition thereto (Dkt. No. 19), and Plaintiff's Reply (Dkt. No.
18 24).

19 **II. BACKGROUND AND FACTS**

20 The facts are largely undisputed. Plaintiff Zango is an Internet company that "provides consumers
21 free access to a large catalog of online videos, games, music, tools and utilities" sponsored by
22 advertisements. (Pl.'s Mot 3.) Plaintiff Zango also offers a "premium version" of its software that
23 provides the same content without advertisements for a fee.

24 Defendant PC Tools offers software called "Spyware Doctor," which detects and, in some cases
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1 deletes, potentially harmful software (“malware”) on its users’ computers. Defendant’s anti-malware
2 software classifies potentially dangerous or annoying software into various categories. From least risk to
3 greatest, those classifications are: “Potentially Unwanted Applications” (“PUAs”), “low,” “medium,”
4 “elevated,” and “high.” (Risk Levels (Dkt. 22-2).)

5 From 2004 to May 2007, Defendant classified all of Plaintiff’s software as malicious with “high”
6 or “elevated” risk. (Def.’s Opp’n 5.) Plaintiff and Defendant had been engaged in ongoing discussions
7 during that time regarding possible reclassification. (*Id.*)

8 On March 29, 2007, one version of Defendant’s Spyware Doctor software known as Starter
9 Edition was added to Google Pack, which aggregates a number of software applications and offers them
10 for free over the popular Google website. (Pl.’s Mot 4.) Google Pack is widely distributed, and Plaintiff
11 alleges that millions of users have downloaded and installed Defendant’s software from Google. (*Id.*)
12 Plaintiff Zango alleges that Starter Edition of Spyware Doctor interferes with its software in the following
13 ways:

14 . . . Starter Edition is disabling Zango installations to the point that existing,
15 consensually installed Zango software already resident on a consumer’s computer no
16 longer functions. Further testing revealed that while the Starter Edition software prevents
17 the display of advertisements from Zango on behalf of Zango’s advertising partners (which
18 is the primary source of Zango revenue), some existing Zango customers nonetheless are
19 still able to access the content in Zango’s catalog (i.e., the movies, games, screensavers,
20 and the like). Starter Edition software damages the Zango application immediately upon
21 installation, without giving any specific notice whatsoever to Zango customers or
22 providing any opportunity for Zango customers to consent or intervene.

19 (*Id.*)

20 On approximately May 14, 2007 and prior to the filing of this lawsuit, Defendant reclassified three
21 of Plaintiff’s software programs (Seekmo Search Assistant, Zango Search Assistant, and Hotbar) as
22 “PUAs”—Spyware Doctor’s lowest possible classification for potential malware. (Def.’s Opp’n 7.)
23 Around that time, Defendant changed the latest version of its software such that “PUAs” would no longer
24 automatically be removed by its automatic scanning function. (*Id.*) After this change, these three
25 programs were no longer automatically detected and removed by Defendant’s software, though they may

1 still be identified and removed manually. (Def.'s Opp'n 19.) Plaintiff contends that this change did not
2 provide it with all of the relief it seeks because: (1) prior versions of the software without the new
3 changes are "still available across the internet, even if not from Google," (2) Plaintiff has recently
4 purchased software called "Cyberhawk" from another company that Spyware Doctor also blocks, (3) the
5 new version of Spyware Doctor prevents an upgrade to the "premium version" of Plaintiff's software,
6 and (4) the mere identification of Plaintiff's software harms its reputation. (Pl.'s Reply 5-6.)

7 While Plaintiff does not dispute that its previous business practices may have been harmful, it
8 argues that it has substantially revamped its software in the past eighteen months, in part due to a
9 settlement with, and oversight by, the Federal Trade Commission ("FTC"). (Pl.'s Reply 2-3) Plaintiff
10 recently settled a formal complaint with the FTC in which it agreed to pay a \$3 million fine. The FTC
11 press release described Plaintiff's alleged previous practices and the current settlement as follows:

12 . . . Zango often used third parties to install adware on consumers' computers. The
13 adware, including programs named Zango Search Assistant, 180Search Assistant,
14 Seekmo, and n-CASE, monitors consumers' Internet use in order to display targeted
15 pop-up ads. It has been installed on U.S. consumers' computers more than 70 million
16 times and has displayed more than 6.9 billion pop-up ads. The FTC alleges that Zango's
17 distributors – third-party affiliates who often contracted with numerous sub-affiliates –
18 frequently offered consumers free content and software, such as screensavers,
19 peer-to-peer file sharing software, games, and utilities, without disclosing that
20 downloading them would result in installation of the adware. In other instances, Zango's
21 third-party distributors exploited security vulnerabilities in Web browsers to install the
22 adware via "drive-by" downloads. As a result, millions of consumers received pop-up ads
23 without knowing why, and had their Internet use monitored without their knowledge.

24 In addition, the agency alleges that Zango deliberately made it difficult to identify,
25 locate, and remove the adware once it was installed. For example, Zango failed to label its
26 pop-up ads to identify their origin, named its adware files with names resembling those of
core systems software, provided uninstall tools that failed to uninstall the adware, gave
confusing labels to those uninstall tools, and installed code on consumers' computers that
would enable the adware to be reinstalled secretly when consumers attempted to remove
it.

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28 The settlement bars Zango from using its adware to communicate with consumers'
29 computers – either by monitoring consumers' Web surfing activities or delivering pop-up
30 ads – without verifying that consumers consented to installation of the adware. It bars
31 Zango, directly or through others, from exploiting security vulnerabilities to download
32 software, and requires that it give clear and prominent disclosures and obtain consumers'
33 express consent before downloading software onto consumers' computers. It requires that
34 Zango identify its ads and establish, implement, and maintain user-friendly mechanisms

1 consumers can use to complain, stop its pop-ups, and uninstall its adware. It also requires
2 that Zango monitor its third-party distributors to assure that its affiliates and their
3 sub-affiliates comply with the FTC order. Finally, Zango will give up \$3 million in
ill-gotten gains to settle the charges. The settlement contains standard record keeping
provisions to allow the FTC to monitor compliance.

4 FTC Press Release: Zango, Inc. Settles FTC Charges: Will Give Up \$3 Million in Ill-Gotten Gains for
5 Unfair and Deceptive Adware Downloads, November 3, 2006, *available at*
6 <http://www.ftc.gov/opa/2006/11/zango.shtm> (last visited June 4, 2007).¹

7 Plaintiff currently seeks “a temporary restraining order, and, ultimately, a preliminary injunction,
8 compelling PC Tools to immediately remove Zango’s software programs from the Spyware Doctor
9 detection database.” (Pl.’s Mot. 3.)

10 **III. ANALYSIS**

11 The standard to obtain a temporary restraining order is the same as that to obtain a preliminary
12 injunction. *See Graham v. Teledyne-Continental Motors, Div. of Teledyne Indus., Inc.*, 805 F.2d 1386,
13 1388 (9th Cir. 1986). To obtain either form of relief, a plaintiff must satisfy either the “traditional” or
14 “alternative” test. Under the traditional test, the Court must find that: (1) the moving party will suffer
15 irreparable injury if the relief is denied, (2) the moving party will probably prevail on the merits, (3) the
16 balance of potential harm favors the moving party, and (4) the public interest favors granting relief.
17 *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). The alternative test requires the Court to find: (1) a
18 combination of probable success and the possibility of irreparable injury; or (2) that serious questions are
19 raised and the balance of hardships tips sharply in its favor. *Id.* Under this last part of the alternative test,
20 “even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an
21 irreducible minimum that there is a fair chance of success on the merits.” *Johnson v. Cal. St. Bd. of*

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24 ¹ Due to the time constraints involved, the Court may consider this press release even if it does
25 not conform to the rules of evidence. *See Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394
26 (9th Cir. 1984).

1 *Accountancy*, 72 F.3d 1427, 1430 (9th Cir.1995). The two prongs of the alternative test are not separate
2 inquiries, but rather “extremes of a single continuum.” *Clear Channel Outdoor, Inc. v. City of Los*
3 *Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). “[T]he less certain the district court is of the likelihood of
4 success on the merits, the more plaintiffs must convince the district court that the public interest and
5 balance of hardships tip in their favor.” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d
6 914, 918 (9th Cir. 2003).

7 **A. Likelihood of Personal Jurisdiction**

8 “Where a challenge to jurisdiction is interposed on an application for a preliminary injunction the
9 plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate
10 success upon the question of jurisdiction when the action is tried on the merits.” *Enterprise Intern., Inc.*
11 *v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 471 (5th Cir. 1985) (internal citations
12 omitted). Here, the Court finds that there is a reasonable probability that the Court has personal
13 jurisdiction over Defendant due to the continuous and systemic business activity it conducts in the forum
14 state.

15 **B. Irreparable Harm**

16 The Court finds that Plaintiff has demonstrated some degree of irreparable harm. Spyware
17 Doctor’s categorization of Plaintiff’s software as potential malware threatens Plaintiff’s reputation.
18 Further, the software blocks, and in some cases removes, copies of Plaintiff’s software. (Pl.s Mot. 11-12.)

19 The Court finds, however, that the magnitude of the harm is significantly less than suggested by
20 Plaintiff. Defendant has recently reclassified Plaintiff’s software as a “PUA” and modified its spyware
21 software to allow for “PUAs” to avoid being detected and removed by Defendant’s auto-scan. Though
22 the software apparently blocks an upgrade to the “premium version” of Plaintiff’s software, Plaintiff
23 concedes that the bulk of its customers use the free, advertising-sponsored version. (*Id.*)

24 Further, some of the irreparable injury Defendant is suffering does not appear to be redressible by
25 the relief sought. While it may be true that previous versions of Spyware Doctor generally available on

1 the Internet have not implemented the most-recent changes, Plaintiff only seeks a TRO or preliminary
2 injunction in which Defendant will “eliminate all references to Zango’s products . . . from all products,
3 definition files, and scanning databases *sold, marketed, distributed or otherwise made available by PC*
4 *Tools*, and provide all existing PC Tools customers, partners, or others utilizing PC Tools’ definition files
5 with an updated set of files consistent with the foregoing.” (Proposed TRO 4 (Dkt. No. 11) (emphasis
6 added).) In the absence of any evidence to the contrary, the Court is forced to assume for purposes of
7 this time-sensitive motion that Defendant is only distributing the most recent version of its software, that
8 it already has provided an updated version of its newest release to its business partners (as it apparently
9 has done with Google) and, to the extent previous versions of its software are generally available over the
10 Internet, they are not on websites controlled by Defendant. (*See* Pl.’s Mot. 3.) Thus, it is unclear how the
11 proposed modification to the current database could retroactively alter programs generally available on
12 the Internet which it apparently does not distribute. Accordingly, much of this identified harm is not
13 relevant to the instant inquiry because it is not harm that can be rectified by the proposed injunction.

14 Moreover, though Spyware Doctor also apparently blocks “Cyberhawk” applications that
15 Defendant recently purchased from a third party, the exact nature of this software has not been
16 substantially briefed by either party and thus the amount of injury is speculative at this time.

17 In short, although the Court finds that Plaintiff is suffering some degree of irreparable harm, it is
18 satisfied that the remedial action Defendant already took has significantly minimized the amount of such
19 harm.

20 **C. Likelihood of Success on the Merits**

21 Plaintiff’s complaint alleges (1) tortious interference with contract, (2) a violation of the
22 Washington Consumer Protection Act (“CPA”), and (3) trade libel. (Compl. 6-7 (Dkt. No 1 at 15-16).)
23 Although Plaintiff also alleges general “injunctive relief” and “unjust enrichment” as separate causes of
24 action, it does not argue that these are independent of the three other claims, and the Court will not treat
25 them as such. The Court finds that Plaintiff is unlikely to prevail on the merits of any of these three

1 claims.

2 “[T]ortious interference arises from either the defendant’s pursuit of an improper objective of
3 harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff’s contractual or
4 business relationships.” *Pleas v. City of Seattle*, 774 P.2d 1158, 1163 (Wash. 1989). The Court finds it
5 unlikely that Plaintiff will be able to demonstrate that Defendant’s conduct in attempting to protect its
6 customers from what it perceives to be potentially harmful or annoying software stems from an
7 “improper” motive or uses any “wrongful” means. Its classification is not unreasonable given Plaintiff
8 Zango’s past conduct and in light of other companies’ similar classification of Plaintiff’s software.

9 To state a claim under the Washington Consumer Protection Act, a plaintiff must prove five
10 elements: (1) unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest
11 impact, (4) injury to plaintiff in his or her business or property, and (5) causation. *Hangman Ridge*
12 *Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531 (Wash. 1986). The Court finds it unlikely that
13 Plaintiff will be able to prove that Defendant’s software was unfair or deceptive, given that users
14 knowingly download its software to avoid potential malware. In so doing, users rely on Defendant’s
15 expertise in identifying and blocking such software. There is nothing in this case to suggest that this trust
16 has been abused, as is evident by the fact that many similarly situated companies likewise block Zango’s
17 software. Further, allowing Defendant to exercise such judgment to avoid the well-documented harm of
18 malware is decidedly in the public interest.

19 The Court also finds it unlikely that Plaintiff will prevail on its trade libel claim, assuming such a
20 cause of action even exists in Washington. “To establish a claim of product disparagement, also known as
21 trade libel, a plaintiff must allege that the defendant published a knowingly false statement harmful to the
22 interests of another and intended such publication to harm the plaintiff’s pecuniary interests.” *Auvil v. CBS*
23 *60 Minutes*, 67 F.3d 816, 820 (9th Cir. 1995). The Court has serious questions as to whether Plaintiff can
24 demonstrate that any classification by Defendant is false, that its classification is a statement of fact rather
25 than non-actionable opinion, or that Defendant had the requisite intent for this tort.


1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff's motion is DENIED

3 SO ORDERED this 5th day of June, 2007.

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John C. Coughenour
United States District Judge

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26 ORDER – 9