

1           86. College students are generally interested in completing traffic  
2 school as quickly and cheaply as possible. [Designated Maronick Depo., 137:23-  
3 138:19.]

4  
5           87. A California resident with a traffic ticket would first and  
6 foremost want a traffic school that would mask the points from his/her driving  
7 record. [11/6 RDT 160:19-161:18 (Creditor).]

8  
9           88. Convenience is also an important factor for consumers in  
10 choosing a traffic school course. [11/6 RDT 161:19-23 (Creditor).]

11  
12           89. Other traffic schools' search engine listings prominently  
13 including price (e.g., Go to Traffic School - Starting at \$14.50; Traffic School -  
14 Starting at \$9.95; \$14.80 Online California; Traffic School - \$10 Special, etc.) and  
15 selection of names for their courses (e.g., "LowestPriceTrafficSchool.com," "Cheap  
16 School") strongly suggest that price is another critical factor. [TE 67; 11/7 RDT  
17 41:19-42:13.]

18  
19           90. A visitor that clicks on the DMV.ORG advertisement of I Drive  
20 Safely must click through at least 5 additional pages once on the I Drive Safely  
21 website before making a purchase. [Lahoti Trial Decl., ¶ 9; TE 648.]

22  
23           91. "Conversion rate" is a commonly used phrase within the online  
24 industry that refers to the percentage of visitors to a particular webpage that take  
25 measurable action (i.e. click on an advertisement, ultimately purchase a product sold  
26 by the advertiser). [Moretti Trial Decl., ¶ 18.]

27

28

1           92.   Conversion rates can be calculated in at least two different ways:  
2 (a) sales derived from a particular webpage divided by the number of times that  
3 page has been viewed; or (b) sales derived from a particular webpage divided by the  
4 number of unique visits to that page. [11/7 RDT 215:7-16 (Moretti).]  
5

6           93.   The conversion rate for unique visitors to the TrafficSchool.com  
7 website is approximately 10 to 15 percent (% that purchase). [11/7 RDT 10:3-6  
8 (Creditor).]  
9

10          94.   The TrafficSchool.com advertisements on DMV.ORG in 2003  
11 (placed through the Overture Ad program) were not profitable, suggesting that the  
12 DMV.ORG website was not compelling any significant number of consumers to  
13 purchase traffic school services advertised thereon. [11/7 RDT 70:7-12; 73:4-13;  
14 73:20-74:9; 75:18-76:4 (Kramer); TE 688.]  
15

16          95.   In a May 2006 email, Plaintiffs' principal, Chris Kramer,  
17 described the traffic from DMV.ORG as "unqualified," meaning that he believed  
18 traffic from the DMV.ORG website did not convert to a sufficient number of sales  
19 to be profitable. [11/7 RDT 83:24-84:2; 84:21-85:12 (Kramer); TE 45.]  
20

21          96.   The conversion rate for California traffic school advertisements  
22 on DMV.ORG is 3.25 percent when calculating sales as a percentage of page views  
23 (or approximately 7.5 percent if using unique visitors as the denominator). [Moretti  
24 Trial Decl., ¶¶ 19-21; 11/7 RDT 206:19-207:20 (Moretti).]  
25

26          97.   The conversion rate for California drivers education  
27 advertisements on DMV.ORG is 0.83 percent when calculating sales as a percentage  
28

1 of page views (or an estimated 1.5 to 1.75 percent if using unique visitors as the  
2 denominator). [Moretti Trial Decl., ¶¶ 19-21; 11/7 RDT 219:8-220:12 (Moretti).]  
3

4 98. The fact that conversion rates for DMV.ORG are lower than the  
5 conversion rates for TrafficSchool.com tends to negate Plaintiffs' allegation that  
6 DMV.ORG derives a material advantage from the alleged perceived affiliation of  
7 DMV.ORG with a state motor vehicle department.  
8

9 **Causation/Injury: Explanations for Plaintiffs' Alleged Injury**  
10

11 99. TrafficSchool.com was one of the first online traffic school  
12 course providers, but there are now many other competitors – some courts have  
13 approved six online providers while other courts have approved as many as 40 in  
14 California. [11/6 RDT 174:19-25, 177:22-178:7 (Creditor).]  
15

16 100. The barriers to entry into the online traffic school market are  
17 relatively low for an existing classroom traffic school provider. [11/6 RDT 175:6-  
18 176:8.]  
19

20 101. In a July 2007 Yahoo! search result for the search term "traffic  
21 school" there were approximately 30 results, none of which are for  
22 TrafficSchool.com and six of which are TrafficSchool.com competitors in  
23 California, demonstrating increased competition for TrafficSchool.com. [11/6 RDT  
24 178:14-181:12 (Creditor); TE 67.]  
25

26 102. Plaintiffs' search engine advertising expenditures declined from  
27 \$170,000 in 2004 to less than \$100,000 in 2006, while at the same time their radio  
28

1 advertising expenditures increased from nothing in 2004 to \$160,000 in 2006. [11/6  
2 RDT 183:10-184:12 (Creditor).]

3  
4 103. Plaintiffs' principal, Eric Creditor, acknowledged that a possible  
5 reason for the decline in TrafficSchool.com's search engine marketing expenditures  
6 could stem from the fact that other competitors bid more for keywords. [11/6 RDT  
7 184:17-22 (Creditor).]

8  
9 104. In 2007, Plaintiffs have reduced their marketing expenditures to  
10 pay for this litigation. [Creditor Decl., ¶ 24.]

11  
12 105. The first month in which the TrafficSchool.com website  
13 experienced a negative trend in regard to the number of visits to the website  
14 occurred in June 2005, the same month in which the DriversEdDirect.com website  
15 went live. [11/7 RDT 53:23-54:5 (Kramer); TE 28.]

16  
17 106. The drop in the number of traffic school courses  
18 TrafficSchool.com sold in Texas and Florida correlates with TrafficSchool.com's  
19 transition in each state, in different years, from receiving a referral fee from the  
20 provider of the traffic school courses in those states to actually selling the course  
21 and collecting consumer dollars and instead paying the traffic schools for  
22 fulfillment. [11/6 RDT 163:19-166:6, 166:25-168:12 (Creditor); TE 26.]

23  
24 107. DriversEdDirect's business was in fact in an upward trend at the  
25 time that it initiated contact with defendants to advertise on DMV.ORG.  
26 [Designated Leach Depo., 30:18-31:14.]

27  
28

1                   108. Plaintiffs presented no expert testimony correlating any decline  
2 in their businesses to the DMV.ORG website.

3  
4                                   **Other Motives For Plaintiffs' Suit**

5  
6                   109. In February 2006, DriversEdDirect initiated negotiations with  
7 Online Guru to advertise on the DMV.ORG website with the apparent intent to  
8 become a long-term partner with DMV.ORG. [11/7 RDT 78:14-21, 80:12-19  
9 (Kramer).]

10  
11                   110. But even at the time that DriversEdDirect initiated contact with  
12 DMV.ORG, DriversEdDirect's owners harbored animosity toward Defendant Raj  
13 Lahoti and DMV.ORG. [11/6 RDT 196:18-199:18 (Creditor); TE 43.]

14  
15                   111. In April 2006, during the time DriversEdDirect was negotiating  
16 with Online Guru to advertise on DMV.ORG, Kramer emailed internally, "We  
17 shouldn't deal with people who jerk us around or lead us on" and that he would  
18 rather notify the various Dives of the DMV.ORG website, and that they ought to  
19 discuss a "strategy" for this. [11/7 RDT 81:23-82:14 (Kramer); TE 43.]

20  
21                   112. In a May 2006 email, Kramer again raised the strategy of  
22 contacting the state motor vehicle departments regarding DMV.ORG explaining it  
23 as "Sort of a 'if you can't join 'em, shut 'em down' approach." [11/7 RDT 83:24-  
24 84:2, 86:24-87:4, 89:7-89:9; TE 45.]

1                    **Unclean Hands: Plaintiffs' Website Practices and Domains**

2  
3                    113. Plaintiffs' DriversEdDirect.com website uses various state indicia  
4 without license to do so, such as images of state license plates, logos, and state seals.  
5 [11/7 RDT 57:22-60:18 (Kramer); TEs 72-74.]  
6

7                    114. TrafficSchool.com uses the term "Official" prominently in its  
8 sponsored advertising listings, arguably to improve its own click-through rate by  
9 suggesting a government affiliation. [11/7 RDT 61:5-62:20 (Kramer); TE 69.]  
10

11                    115. TrafficSchool.com owns and operates the  
12 FloridaTrafficSchool.com domain and uses the site to promote courses sold on  
13 TrafficSchool.com and DriversEdDirect.com. [11/7 RDT 17:5-12 (Creditor).]  
14

15                    116. The Florida TrafficSchool.com homepage has a picture of a  
16 police officer, though it is not endorsed by the Florida police department, and has a  
17 link for "Florida DHSMV resources" and to a "DHSMV Website guide," which link  
18 to Plaintiffs' DrivingLinks.com website, not the official Florida Department of  
19 Highway Safety and Motor Vehicles. [11/7 RDT 17:17-25, 20:9--21:24 (Creditor);  
20 TE 610.]  
21

22                    117. There are no disclaimers on the FloridaTrafficSchool.com  
23 website specifying that the website is not affiliated with any government agency.  
24 [11/7 RDT 20:4-8 (Creditor).]  
25

26                    118. TrafficSchool.com has a referral agreement with  
27 LowestPriceTrafficSchool.com, which refers California residents to  
28

1 TrafficSchool.com, but TrafficSchool.com is not the lowest priced traffic school in  
2 California. [11/7 RDT 63:11-16; 65:25-66:22, 68:3-6 (Kramer); TE 611.]  
3

4 119. TrafficSchool.com's LowestPriceTrafficSchool advertisements  
5 would lead a reasonable consumer to presume that TrafficSchool.com offered the  
6 lowest priced traffic schools in California.  
7

8 120. Plaintiffs' also created a website, DrivingLinks.com, which in  
9 their own words "mirrors" the concept and content of the DMV.ORG website.  
10 [Designated Kramer Depo., 250:22-251:5; Trial Exhibit 45.]  
11

12 121. Plaintiffs transferred the DrivingLinks.com domain name from  
13 TrafficSchool.com to "DrivingLinks.com," a fictional entity, just prior to the launch  
14 of the DrivingLinks.com website, arguably to mask the site's affiliation with  
15 plaintiffs' business. [11/6 RDT 202:24-205:5 (Creditor); Designated Creditor  
16 Depo., 51:4-23.]  
17

18 122. DrivingLinks.com does not expressly state on its website the fact  
19 that it is controlled by TrafficSchool.com. [11/6 RDT 205:6-24 (Creditor);  
20 Designated Kramer Depo., 246:15-249:4.]  
21

22 123. There are at least 19 references to the "DMV" or "Department of  
23 Motor Vehicles" on a single webpage of the DrivingLinks.com website. [11/6 RDT  
24 208:5-209:18 (Creditor); Designated Creditor Depo., 271:15-272:9; TE 20  
25 (DEF00990-91).]  
26

27 124. DrivingLinks.com is similar to DMV.ORG with regard to its  
28 content, but contains no disclaimers as to the lack of affiliation between

1 DrivingLinks.com and the state motor vehicle departments. [11/6 RDT 205:25-  
2 206:25 (Creditor); Designated Creditor Depo., 270:14-20, 272:16-20; TE 20  
3 (DEF00990-91).]  
4

5 125. Although the California Department of Motor Vehicles does not  
6 license online traffic schools, such as TrafficSchool.com, to provide online traffic  
7 school, Plaintiffs have registered and used certain domains containing the term  
8 "dmv," including dmvapprovedtrafficschool.com and cadmvtrafficschool.com.  
9 [11/6 RDT 151:20-152:24, 154:19-155:18, 155:24-156:18, 157:23-158:6, 158:14-  
10 159:2 (Creditor); TE 89, 90.]  
11

12 126. The use of the phrase "DMV approved" affirmatively suggests  
13 that TrafficSchool.com is a DMV approved online traffic school when in fact it is  
14 not approved by the California Department of Motor Vehicles.  
15

16 127. Plaintiffs have also registered, but cannot say whether they have  
17 used, the following additional domains: dmvlicenser renewal.com;  
18 dmvregistrationrenewal.com; dmvrenewals.com; internetdmv.com; dmvi.com; and  
19 trafficschool.us. [11/6 RDT 211:14-212:20 (Creditor); TE 690.]  
20

21 128. Plaintiffs registered the domains Online-DMV.ORG and  
22 Internet-DMV.ORG in August 2006 during the term of their advertising agreement  
23 with DMV.ORG. At trial, Plaintiffs could not identify a business purpose for  
24 registering the domains. [11/6 RDT 212:21-214:1 (Creditor); TE 691.]  
25  
26  
27  
28



1 Statute of Limitations/Laches:

2 Plaintiffs' Knowledge Of DMV.ORG and Acquiescence

3  
4 129. Plaintiffs learned of and visited the DMV.ORG website in March  
5 2002 and had no objections to the use of the DMV.ORG domain at that time. [11/6  
6 RDT 187:2-188:5; TE 32; Ravi Lahoti Trial Decl., ¶ 4; Designated Kramer Depo.,  
7 p. 214:6-16.]

8  
9 130. Shortly after learning of DMV.ORG in March 2002, Plaintiffs  
10 registered the domain DrivingLinks.com (March 12, 2002) and initiated contact with  
11 Ravi Lahoti to recover a domain name. Plaintiffs assertion that these events were  
12 mere coincidence is not credible. Rather, it tends to show that Plaintiffs actively  
13 investigated the DMV.ORG website at this time. [11/6 RDT 200:19-202:23  
14 (Creditor); 11/7 RDT 68:7-70:6 (Kramer); TEs 20 (DEF00982), 32.]

15  
16 131. Plaintiffs also visited the DMV.ORG website in 2003, at which  
17 time they complained to the Overture advertising network, which placed  
18 TrafficSchool.com advertisements on DMV.ORG, due to the large amount click-  
19 through charges they were incurring for traffic from their advertisements on  
20 DMV.ORG. [11/7 RDT 73:4-74:3 (Kramer); TE 33; Designated Kramer  
21 Depo., 214:20-215:13; 216:25-217:4; 226:19-21.]

22  
23 132. In February 2006, DriversEdDirect initiated negotiations with  
24 Online Guru to advertise on the DMV.ORG website. [11/7 RDT 78:14-21, 80:12-  
25 19 (Kramer).]

1 133. DriversEdDirect sought to be "DMV.ORG's premiere California  
2 online driver's ed program and behind-the-wheel provider in Los Angeles." [11/7  
3 RDT 80:6-16 (Kramer); TE 36.]  
4

5 134. Creditor approved an email to Defendant Raj Lahoti, which  
6 states in part: "you do a fantastic job marketing DMV.ORG, and you spend a lot of  
7 money marketing your site." [11/6 RDT 192:25-194:9 (Creditor); TE 45.]  
8

9 135. DriversEdDirect eventually entered a written agreement with  
10 Online Guru in June 2006, and DriversEdDirect advertisements were test marketed  
11 on DMV.ORG in July 2006. [11/6 RDT 191:17-19, 199:16-200:8 (Creditor); TE  
12 37.]  
13

14 136. Creditor had no problem with DMV.ORG recommending  
15 DriversEdDirect in the summer of 2006, and DriversEdDirect paid DMV.ORG for  
16 the referrals it received in connection with the advertisement of its driver's education  
17 courses. [11/6 RDT 200:5-12 (Creditor).]  
18

19 **Statute of Limitations/Laches:**

20 **Plaintiffs Delay and Prejudice to Defendants**

21  
22 137. Although Plaintiffs have been aware of DMV.ORG since 2002,  
23 and had antipathy towards DMV.ORG from the beginning, they did not file suit  
24 until over four years later in November 2006. [11/6 RDT 187:2-188:5; TE 32; Ravi  
25 Lahoti Trial Decl., ¶ 4; Designated Kramer Depo., p. 214:6-16; Plaintiffs'  
26 Complaint.]  
27  
28

1                   138. Online Guru advertises DMV.ORG through pay-per-click  
2 marketing on search engines such as Yahoo! and Google. Online Guru has spent  
3 over \$10,000,000 on search engine marketing to promote DMV.ORG since 2002.  
4 [Raj Lahoti Trial Decl., ¶ 5.]

5  
6                   139. Online Guru has spent over \$500,000 on content development of  
7 the site since 2002. [Raj Lahoti Trial Decl., ¶ 6.]

8  
9                   140. Through Online Guru's marketing efforts, people have come to  
10 know DMV.ORG, refer to it as a good resource for DMV information, and nearly  
11 70,000 websites link to DMV.ORG. [11/7 RDT 153:3-154:5 (Raj).]

12  
13                   141. Online Guru's business would suffer greatly if it was required to  
14 change the DMV.ORG domain name as it could take two to three years to build a  
15 new brand and recognition. [11/7 RDT 155:7-156:15, 157:5-25 (Raj).]

16  
17                   142. Requiring users to acknowledge upon arriving to DMV.ORG  
18 that the website they are visiting is not affiliated with a governmental agency (i.e., a  
19 splash page) would have a material impact on the website because splash pages are  
20 uncommon, they disrupt a visitor's flow, and actually confuse visitors. [11/7 RDT  
21 158:12-159:13 (Raj).]

22 ////

23  
24  
25  
26  
27  
28

1 **CONCLUSIONS OF LAW**

2  
3 **Plaintiffs Do Not Have Standing**

4  
5 1. **“Whenever it appears by suggestion of the parties or otherwise**  
6 **that the court lacks jurisdiction of the parties or otherwise that the court lacks**  
7 **jurisdiction of the subject matter, the court shall dismiss the action.” Fed.R.Civ.P.**  
8 **Rule 12(h)(3).**

9  
10 2. Plaintiffs lack standing under Article III of the Constitution  
11 because any loss they may have incurred is de minimus in light of the insignificant  
12 nature of their referral business. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603,  
13 F.2d 263, 289 (2<sup>nd</sup> Cir. 1979) (plaintiff not entitled to judgment since it had only  
14 proved de minimus injury); *Shimkus v. Hickner*, 417 F.Supp.2d 884, 905 (E.D.  
15 Mich. 2006) (de minimus loss insufficient to confer standing); FRCP R. 12(h)(3)  
16 (“Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the  
17 court shall dismiss the action”); *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235, 1240  
18 (2006) (“The objection that a federal court lacks subject matter jurisdiction may be  
19 raised by a party, or by a court on its own initiative, at any stage in litigation, even  
20 after trial and the entry of judgment.”).

21  
22 3. In a false advertising case under 15 U.S.C. § 1125(a)(1)(B), the  
23 plaintiff must allege “a discernibly competitive injury” in order to have standing.  
24 *Waits v. Frito Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992).

25  
26 4. “In the ‘traditional sense,’ ‘competitors are persons endeavoring  
27 to do the same thing and each offering to perform the act, furnish the merchandise,  
28 or render the service better or cheaper than his rival.” *Summit Technology, Inc. v.*

1 High-Line Medical Instruments, Co., 933 F.Supp. 918, 939 (C.D. Cal. 1996). If  
2 parties who are not in direct competition are deemed to be competitors, then "any  
3 two parties with some economic nexus or whose conduct has some economic effect  
4 upon the other, could be construed as 'competitors,'" contrary to Ninth Circuit law.  
5 Sugai Products, Inc. v. Kona Kai Farms, Inc., 1997 WL 824022 \*11 (D.Hawai'i  
6 1997) (quoting Summit Technologies v. High-Line Medical Instruments, Co., 933  
7 F.Supp. 918 (C.D. Cal. 1996).

8  
9 5. Plaintiffs lack standing under the Lanham Act because, given the  
10 insignificant nature of their referral business, they do not vie with defendants for the  
11 same dollars from the same consumer group in any meaningful sense. Kournikova  
12 v. General Media Communications, Inc., 278 F.Supp.2d 1111, 1117 (C.D. Cal.  
13 2003) ("the Court must determine whether or not the two parties vie for the same  
14 dollars from the same consumer group, and whether the conduct of the defendant, if  
15 true, could be said to create 'competitive injury'"); Conte Bros. Auto, Inc. v. Quaker  
16 State-Slick 50, Inc., 165 F.3d 221, 223 (3rd Cir. 1998) (upholding dismissal of  
17 Lanham Act false advertising claim for lack of standing where retailer of engine  
18 additives held not to compete with manufacturer of similar product); FRCP R.  
19 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject  
20 matter, the court shall dismiss the action"); Arbaugh v. Y & H Corp., 126 S.Ct.  
21 1235, 1240 (2006) ("The objection that a federal court lacks subject matter  
22 jurisdiction may be raised by a party, or by a court on its own initiative, at any stage  
23 in litigation, even after trial and the entry of judgment.").

24  
25 **Plaintiffs' False Advertising Claim Fails**

26  
27 6. To prevail on a false advertising claim, a plaintiff must prove:  
28 (a) defendant made a false or misleading statement in a commercial advertisement

1 about the nature, characteristics, qualities, or geographic origin of their own or  
2 another's product; (b) the statement actually deceived or has the tendency to deceive  
3 a substantial segment of reasonably prudent consumers; (c) the deception is  
4 material, in that it is likely to influence the purchasing decision; and (d) plaintiff has  
5 been (or is likely to be) injured by the conduct. 15 U.S.C. § 1125(a)(1)(B);  
6 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); Int'l  
7 Ass'n of Machinists v. Winship Green Nursing Ctr., 103 F.3d 196, 201 (1st Cir.  
8 1996).

*(only applicable to  
"falsity by" necessary  
implication")*

10 7. When evaluating an alleged false advertisement, the  
11 advertisement must be considered in its full context rather than dissecting it into its  
12 component parts. Southland Sod Farms, 108 F.3d at 1139; and Avis Rent A Car  
13 System, Inc. v. Hertz Corp., 782 F.2d 381, 385 (2d Cir. 1986) (courts must  
14 "consider the advertisement in its entirety and not ... engage in disputatious  
15 dissection"); and FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (view  
16 the "entire mosaic" not "each tile separately"). An analysis of DMV.ORG therefore  
17 cannot be broken out into consideration of the domain and search engine search  
18 results separately from the content on the website.

20 8. Plaintiffs' false advertising claim fails as a matter of law as  
21 DMV.ORG makes no express claim that it is affiliated, endorsed, or sponsored by  
22 any government entity. Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425  
23 F.Supp.2d 402, 417 (S.D.N.Y. 2006) ("false advertising claims based on allegations  
24 of implied governmental approval have not been allowed, for 'the law does not  
25 impute representations of government approval . . . in the absence of explicit  
26 claims").

1           9.     The DMV.ORG website is not literally false, as it provides  
2 driving and motor-vehicle related information and expressly disclaims any  
3 affiliation with any government entity.  
4

5           10.    Defendants' DMV.ORG website was and is not misleading  
6 because the numerous conspicuous disclaimers on the website dispel any likelihood  
7 of consumer confusion. *Taubman v. Webfeats*, 319 F.3d 770, 777 (6th Cir. 2003)  
8 (Defendant's disclaimer on its website, [www.shopsatwillowbend.com](http://www.shopsatwillowbend.com), indicating  
9 that it was not the official website for Plaintiff's mall, "The Shops at Will Bend,"  
10 negated likelihood of consumer confusion; appellate court reversed preliminary  
11 injunction entered by district court).  
12

13           11.    Plaintiffs have failed to show that DMV.ORG was or is  
14 materially misleading in that they have produced no reliable evidence demonstrating  
15 that approval by or affiliation with an official motor vehicles department for traffic  
16 school and/or drivers education would be material to the purchasing decision.  
17 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9<sup>th</sup> Cir. 1997)  
18 (listing, as an element of a false advertising claim, that the deception is material in  
19 that it is likely to influence the purchasing decision).  
20

21           12.    Plaintiffs have failed to show that DMV.ORG was or is likely to  
22 mislead an appreciable number of reasonably prudent consumers in comparison to  
23 the significant traffic on DMV.ORG. *Nutri/System, Inc. v. Con-Stan Industries,*  
24 *Inc.*, 809 F2d 601 (9<sup>th</sup> Cir. 1987) (misdirected letters and checks deemed  
25 insignificant in comparison to volume of the parties businesses); *Amf, Inc. v.*  
26 *Sleekcraft Boats*, 599 F2d 341, 353 (9<sup>th</sup> Cir. 1979) (excluding from consideration  
27 "the wholly indifferent"); *Int'l Ass'n of Machinists v. Winship Green Nursing Ctr.*,  
28 103 F.3d 196, 201 (1<sup>st</sup> Cir. 1996) (the law has long demanded a showing that the

1 allegedly infringing conduct carries with it a likelihood of confounding an  
2 appreciable number of reasonably prudent purchasers exercising ordinary care);  
3 A&H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc., 57 F.Supp.2d 155 (E.D.  
4 Pa. 1999) (isolated evidence of actual confusion insufficient to establish confusion.).

5  
6 13. Plaintiffs must prove "a logical causal connection between the  
7 alleged false advertising and [their] own sales position." A "mere subjective believe  
8 that [they] will be injured" is insufficient. Century 21 Real Estate Corp. v. Re/Max  
9 South County, 882 F.Supp. 915, 924-25 (C.D. Cal. 1994). Plaintiffs have failed to  
10 provide any evidence whatsoever of a "causal connection" between the decline in  
11 their businesses and the DMV.ORG website.

### 12 13 **Equitable Defenses Bar Plaintiffs' Claims**

14  
15 14. Plaintiffs' causes of action do not raise allegations concerning a  
16 threat to public safety and well being, and are therefore subject to equitable  
17 affirmative defenses. Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829,  
18 841 (9<sup>th</sup> Cir. 2002) (affirming summary judgment against plaintiff's false advertising  
19 claim based on laches, finding that "the public's interest will trump laches only when  
20 the suit concerns allegations that the product is harmful or otherwise a threat to  
21 public safety and well being").

22  
23 15. The limitation periods on a false advertising claim is the  
24 analogous state statute of limitations. "The analogous limitations period is  
25 California's period for fraud, which is three years." Jarrow Formulas, Inc. v.  
26 Nutrition Now, Inc., 304 F.3d 829, 838 (9<sup>th</sup> Cir. 2002).



1           16.    The defense of laches bars an action for equitable relief where  
2 the defendant can show unreasonable delay in bringing suit plus either acquiescence  
3 in the act about which plaintiff complains or prejudice to the defendant resulting  
4 from the delay. Transworld Airlines v. American Coupon Exchange, 913 F.2d 676,  
5 696 (9th Cir. 1990). Plaintiffs' causes of action are therefore barred by the doctrine  
6 of laches because:

- 7
- 8           (a)    In waiting over four years after learning of the DMV.ORG  
9 website to bring this action, Plaintiffs have unreasonably  
10 delayed. Grupo Gigante SA DE CV v. Dallo & Co., Inc., 391  
11 F3d. 1088, 1101, 1105 (9th Cir. 2004) (four year delay in  
12 asserting trademark rights after learning of infringing use  
13 constituted unreasonable delay)
- 14
- 15           (b)    Plaintiffs acquiesced to the conduct about which they complain  
16 in seeking to advertise and actually advertising their services on  
17 the DMV.ORG website.
- 18
- 19           (c)    Given Defendants' significant investment of time and money in  
20 the DMV.ORG website, Defendants will be prejudiced if  
21 Plaintiffs are permitted to proceed with this lawsuit, as they will  
22 be worse off than they would have been had Plaintiffs brought  
23 this lawsuit in a timely fashion. Transworld Airlines v.  
24 American Coupon Exchange, 913 F.2d 676, 696 (9th Cir. 1990)  
25 (laches is designed to prevent a defendant from being worse off  
26 than he would have been if plaintiff had enforced his rights in a  
27 timely fashion"); Grupo Gigante, 391 F.3d at 1105 (defendant  
28 made the required showing of prejudice by proving that it built a

1 valuable business around its trademark during the four years that  
2 the plaintiff delayed the exercise of its legal rights).

3  
4 17. The doctrine of unclean hands precludes relief to a party that has  
5 acted improperly. Urecal Corp. v. Masters, 413 F.Supp. 873, 875 (N.D. Ill. 1976).  
6 "It is the age-old policy of courts of equity to require that he who sues seeking  
7 equity must . . . come into court with 'clean hands' as respects that controversy."  
8 Hall v. Wright, 125 F.Supp. 269, 273 (S.D. Cal. 1954). The doctrine of unclean  
9 hands applies to Lanham Act cases. Japan Telecom, Inc. v. Japan Telecom Am.,  
10 Inc., 287 F.3d 866, 870 (9<sup>th</sup> Cir. 2002) (expressly recognizing the availability of the  
11 unclean hands defense to false affiliation claims); Emco, Inc. v. Obst, 2004 U.S.  
12 Dist. LEXIS 12118, \*12 (C.D. Cal. May 7, 2004) (holding that the unclean hands  
13 doctrine provides a defense to false advertising claims under the Lanham Act);  
14 Haagen Dazs v. Frusen Gladje, Ltd., 493 F.Supp. 73, 75-76 (S.D.N.Y. 1980)  
15 (Plaintiff, who engaged in conduct similar to defendant, may not secure equitable  
16 relief simply because defendants' hands may be a shade or two less clean").

17  
18 18. In light of Plaintiffs' DrivingLinks.com website (which was  
19 designed to "mirror" DMV.ORG), their FloridaTrafficSchool.com website,  
20 LowestPriceTrafficSchool.com advertisements, and registration and use of domains  
21 containing the "dmv" moniker, Plaintiffs are guilty of unclean hands and therefore  
22 are not entitled to relief.

23  
24 **Plaintiffs Are Not Entitled To Any Monetary Recovery**

25  
26 19. To recover any monetary remedy, plaintiffs must demonstrate a  
27 causal connection between the alleged false advertising and their purported injury.  
28 Century 21 Real Estate Corp. v. Re/Max South County, 882 F.Supp. 915, 924-25

1 (C.D. Cal. 1994) (plaintiff's false advertising claim failed since it could not prove "a  
2 logical causal connection between the alleged false advertising and its own sales  
3 position"); Nikkal Industries Ltd. v. Salton, Inc., 735 F.Supp. 1227, 1238 (S.D.N.Y.  
4 1990) (verdict for defendant; plaintiff failed to prove lost sales were the result of  
5 defendant's advertisements rather than other factors such as its marketing strategy  
6 and increased competition). Plaintiffs have failed to provide any evidence  
7 demonstrating that DMV.ORG has caused them injury. And there are other  
8 plausible explanations (e.g. increased competition, transitions in Plaintiffs' business,  
9 shifts in Plaintiffs' marketing expenditures, etc.) for the decline in Plaintiffs' sales.  
10 Accordingly, Plaintiffs are not entitled to any monetary award.

11  
12           20. An accounting of profits is to "constitute compensation not a  
13 penalty," and is not available as a matter of right, but is subject to principles of  
14 equity. 15 U.S.C. 1117; Maier Brewing Co. v. Fleischman Distilling, 390 F.2d 117,  
15 120 (9<sup>th</sup> Cir. 1968). Courts evaluating whether an accounting of profits is  
16 appropriate have taken into consideration the intent of the alleged wrongdoer,  
17 requiring willful and deliberate wrongdoing. Maier Brewing Co., 390 F.2d at 124;  
18 Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 961 (D.C. Cir. 1990);  
19 Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 919 (Fed. Cir. 1984).  
20 Plaintiffs are not entitled to an accounting of Defendants' profits because they have  
21 offered no evidence demonstrating that Defendants' intended to mislead consumers  
22 and Defendants' conduct suggests otherwise.

23  
24           21. An award of attorneys fees is available only in "exceptional"  
25 circumstances. 15 USC 1117(a). "While the term 'exceptional' is not defined in the  
26 statute, generally a trademark case is exceptional for purposes of an award of  
27 attorneys' fees when the infringement is malicious, fraudulent, deliberate or willful."  
28 Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1409 (9th Cir. 1993).

1 Plaintiffs have produced no evidence demonstrating any intent to deceive and the  
2 facts are to the contrary – Online Guru has placed numerous disclaimers on  
3 DMV.ORG and voluntarily added further disclaimers reinforcing the nature of the  
4 website since inception of this suit. Accordingly, Plaintiffs are not entitled to their  
5 attorneys fees.

6  
7 Respectfully submitted,

8  
9 Dated: November 16 2007

10 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

11  
12 By

  
13 BRIAN M. DAUCHER

14 Attorneys for Defendants  
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