

Defendants' Acts

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2 59. Google and the other listed defendants have sold many keywords comprised, in
3 whole or in part, of the MISHAK Marks, to competitors of MISHAK.

4 60. After repeated requests, Google and the other listed defendants have not agreed
5 to stop selling certain of the MISHAK Marks as keywords to MISHAK's competitors. Google
6 et. al. refuses, however, to cease selling other keywords comprised, in whole or in part, of the
7 MISHAK Marks that, for whatever reason, Google et. al. unilaterally has deemed less worthy of
8 recognition and protection. Specifically, Google et. al. continue to sell, over MISHAK's
9 objections, certain combinations of words within the MISHAK Marks to MISHAK's
10 competitors. Consequently, Google permits the purchase of MISHAK Marks to trigger these
11 competitor's links to appear in Google's and other listed defendants' search results when a
12 consumer types in one of the MISHAK Marks.
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14 61. For example, Google and the other listed defendants continues to sell to
15 MISHAK's competitors the keywords.....Accordingly, if a consumer using Google's et. al.'s
16 search engine types "....." in the search window, competitors who have purchased "....." or even
17 just "... " can still appear at the top or in the margins of the results page. Similarly, it is possible
18 for a consumer who types "... " or "...." in the Google search window to be directed to a
19 "results" web page that displays MISHAK's competitors products and services at the top or in
20 the margins.

21 62. In each of these examples, by the operation and design of Google's and the other
22 listed defendants' search engine, consumers who specifically intend and desire to find
23 MISHAK's products and services are instead diverted to search "results" web pages that list
24 MISHAK's competitor's products and services. This result is intended, both by Google et. al.
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1 and its customers who purchase keywords consisting of the MISHAK Marks. Google sells, and
2 it's customers hope to purchase, the possibility that they will intercept consumers who, due to
3 MISHAK's extensive and pervasive advertising resulting in invaluable goodwill, are trying to
4 find the nation's largest and most respected and trusted direct-to-consumer retailer of televisions,
5 and personal appliances in the United States.

6 63. Once intercepted, consumers may click on MISHAK's competitors' links and
7 thus be directed to the competitors' websites. Consumers may not realize that they have
8 unwittingly "clicked" on competitors' websites. Once there, the consumer, having been
9 distracted, may not ever return to MISHAK's website. Even if the consumer appreciates the
10 diversion, he or she will have to spend time and energy to backtrack or otherwise find MISHAK.

11 64. Through this practice, Google et. al. traffic in the infringement and dilution of
12 MISHAK Marks. Google et. al. have knowingly sold the MISHAK Marks and included them in
13 Google's search engine for Google et. al.'s own profit and to increase the competitive advantage
14 of MISHAK's competitors. This practice began after the MISHAK Marks were registered and/or
15 became famous and distinctive.
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17 The Business of The Other Defendants

18 65. AOL, Ask Jeeves, Earthlink, and Netscape et.al. (hereinafter collectively referred
19 to as the "Non-Google Defendants") each operates a website that includes a search engine for
20 locating websites and information on the internet.

21 66. On information and belief, the Non-Google Defendants pay Google in exchange
22 for Google providing to its web searching platform. By utilizing the Google web searching
23 platform, the Non-Google Defendants display virtually the same results of search queries as
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1 those displayed by Google. On information and belief, each of the Non-Google Defendants also
2 profit every time an Internet user clicks on any of the links provided by these search results.

3 **The Use of Meta Tags**

4 67. Meta Tags are keywords embedded into the codes of a web page and are read by
5 search engines in order to identify the searchers of those pages on the internet that are relevant to
6 that search.

7 68. Upon the request by a searcher for a specific keyword, the search engine will spew
8 out a list of sites prioritized by, among other things, whether or not the keyword typed by the
9 searcher appears in a site's meta tags.

10 69. However, when one of those key words is a trademark owned by a competitor, an
11 action for trademark infringement will lie for either dilution or infringement.

12 70. This is what the defendants and each of them has done to Plaintiff. They have piggy
13 backed off the hard work and good will of a very small but successful entrepreneur, MISHAK,
14 drawing customers away from their intended target.

15 71. This is not unlike a competitor standing out in front of a business establishment
16 during a sale and diverting those customers away to the competitor's business location. The
17 online /cyberspace conduct is the same.

18 **Harm To Plaintiff**

19 72. MISHAK has not given the Defendants permission or a license to utilize the
20 MISHAK Marks for the promotion or sale of its competitor's products.

21 73. Defendants and certain of MISHAK's competitors seek to exploit the hard-earned
22 popularity and success of MISHAK and the products and services sold by MISHAK, under the
23 famous MISHAK Marks. In an attempt to illegally capitalize on the MISHAK Marks,
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1 Defendants have permitted certain of MISHAK's competitors to bid on advertising so their
2 websites are listed in a position above or next to MISHAK's link when a consumer types a
3 search query identical or substantially similar to the MISHAK Marks.

4 74. For example, a consumer can run a search on Google's search engine for
5 ".....", on of MISHAK's registered marks with the obvious intent of locating and visiting
6 MISHAK's website. Nonetheless, the first link shown on the Google search "results" page may
7 be for one of MISHAK's competitors, such as Similarly, if a consumer types "...." in the
8 Google search bar, they may be directed to a "results" page in which the first two companies
9 listed at the top are direct competitors-.....- as are at least six of the eight companies-.....-
10 listed along the margin. Search Google for "ineedatv.com" – a domain name owned by and
11 registered to MISHAK – and the consumer is directed to search "results" that list "...." And "..."
12 at the top of the page. If the consumer clicks on any of these competing websites, Google will be
13 entitled to a fee from these competitors. In addition, these competitors will have obtained a
14 customer, or potential customer, solely as a result of the goodwill and reputation associated with
15 MISHAK and its products and services.
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17 75. A similar, though different and possibly more confusing, search "result" occurs
18 when a consumer uses one of the Non-Google Defendants' websites to conduct a Google
19 "powered" or "enhanced" search (i.e., where Google provides the underlying search engine). For
20 example, a consumer who conducts a search for "MISHAK" from Netscape's website is
21 confronted misleadingly with a host of competitor's advertisements. Some competitor's are
22 called "Sponsored Links," while others are given priority treatment with graphics at the very top
23 of the search "results" page. Again, this diversion and confusion is the intended result- allowing
24 MISHAK's competitor's to intercept consumers looking for MISHAK.
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1 76. The Defendants' search engines are designed and intended to divert and lure
2 consumers from the websites that they intend to visit – e.g., the MISHAK websites – to other
3 websites owned by competing advertisers such as “.....” By design, the Defendants profit when
4 consumers click on competitors' links and visit an advertiser's site. None of this revenue,
5 however, is paid to the own of the trademark for whom the consumer was searching. Thus,
6 Defendants and their advertisers are free-riding on the goodwill and reputation of trademark
7 owners such as MISHAK.

8 77. Defendants' search engines are inherently deceptive and mislead consumers into
9 believing falsely that the website links to which they are directed via manipulated search
10 “results” links are sponsored or authorized by and/or originating with the trademark owner for
11 which the user was searching.

12 78. The manipulated search “results” engineered by the Defendants fail to inform the
13 consumers that the companies listed herein may have no relationship with – and, indeed, may
14 directly compete with – the trademark owner for which the user was searching.

15 79. The manipulated search engine “results”, which are in fact advertisements sold by
16 the Defendants based on a search utilizing the MISHAK Marks, dilute the ability of the
17 MISHAK Marks to identify MISHAK as a source of its goods and services.

18 80. In some cases, the competitor companies listed at the top or in the margins of
19 these manipulated search engine “results” are nebulously identified as “Sponsored Links.” This
20 designation is as, if not more, confusing to consumers because the Defendants do not indicate by
21 whom these links supposedly are “sponsored.” Consumers may believe falsely that MISHAK or
22 other mark holders “sponsor” or otherwise are affiliated with these links.
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1 81. Moreover, the “Sponsored Links” are deliberately designed to be virtually
2 indistinguishable from the legitimate mark holders’ website links. The actual links to the
3 “Sponsored Links” are not a different color, nor are they a different typeface or font size. No
4 meaningful effort is made to conspicuously separate the truth from the paid advertisements.
5 Specifically, the Defendants could, but do not, advise the consumer that the so-called
6 “Sponsored Links” are in fact paid advertisement that are neither sponsored by, or affiliated with
7 the trademark owner for which the user was searching.

8 82. MISHAK’s current customers have been and will likely continue to be confused
9 about the origin and sponsorship of the companies other than MISHAK listed by the Defendants
10 in their deceptive search engine “results.”

11 83. Confusion regarding the companies identified under Defendants’ search engine
12 “results” implies an affiliation with MISHAK that has damaged and will continue to damage
13 Plaintiff’s reputation and customer relationships.

14 84. Upon information and belief, Defendants caused these advertisements to appear
15 under on the search “results” pages with the intent to infringe and to cause advertisers to infringe
16 on MISHAK’s Marks. Alternatively, Defendants acted in reckless disregard for MISHAK’s
17 Marks.

18 85. In short term, Defendants’ actions steal customers from MISHAK’s website,
19 divert consumers to inferior products and services, erode the distinctiveness of MISHAK’s
20 Marks, and impair MISHAK’s honest and good faith efforts to promote and sell its products and
21 services on the Internet.
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1 in paragraphs 1 through 90 with the same force and effect as if here fully set forth.

2 92. Defendants' unauthorized and willful use of copies, variations, reproductions,
3 simulations or colorable imitations of MISHAK's registered marks among the MISHAK Marks
4 in connection with the advertising, offering for sale and sale of Defendants' keyword advertising
5 services constitutes use in commerce which infringes MISHAK's exclusive rights in its
6 federally-registered marks and is likely to cause confusion, mistake, or deception as to the source
7 of the services advertised by Defendants.

8 93. The aforesaid acts of Defendants, namely, the unauthorized and willful use of
9 copies, variations, reproductions, simulations or colorable imitations of MISHAK's registered
10 marks in connection with the sale of keyword advertising, constitutes trademark infringement in
11 violation of *Section 32(1) of the Lanham Act, 15 U.S.C. 1114(1)*.

12 94. The aforesaid acts of Defendants have caused and, unless said acts are restrained
13 by this Court, will continue to cause MISHAK to suffer irreparable injury.

14 95. MISHAK has no adequate remedy at law.

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16 **SECOND CAUSE OF ACTION**

17 *Lanham Act – False Representation*

18 96. MISHAK incorporates herein by reference each and every allegation contained in
19 paragraphs 1 through 95 with the same force and effect as if here fully set forth.

20 97. Use by Defendants of copies, variations, reproductions, simulations or colorable
21 imitations of the MISHAK Marks on and in connection with keyword advertising conveys the
22 misleading commercial impression to the public that the advertisers other than MISHAK listed
23 in the Defendants manipulated search "results" pages, or their products, are approved by,
24 sponsored by or are somehow affiliated or connected with MISHAK.
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1 98. The aforesaid acts of Defendants, namely, the use of copies, variations,
2 reproductions, simulations or colorable imitations of the MISHAK Marks on and in connection
3 with keyword advertising, constitutes a false designation of origin and false description and
4 representation, in violation of *Section 43(a)* of the *Lanham Act, 15 U.S.C. 1125(a)*.

5 99. The aforesaid acts of Defendants have caused and, unless said acts are restrained
6 by this Court, will continue to cause MISHAK to suffer irreparable injury.

7 100. MISHAK has no adequate remedy at law.

8 **THIRD CAUSE OF ACTION**

9 *Lanham Act – Dilution*

10 101. MISHAK incorporates herein by reference each and every allegation contained in
11 paragraphs 1 through 100 with the same force and effect as if here fully set forth.

12 102. Use by Defendants of copies, variations, reproductions, simulations or colorable
13 imitations of the MISHAK's registered marks among the MISHAK Marks in connection with
14 the advertising, offering for sale and sale of Defendants' keyword advertising services has and
15 will continue to lessen the capacity of MISHAK's famous and distinctive MISHAK Marks to
16 distinguish MISHAK's products and services from those of others, and has diluted the distinctive
17 quality of MISHAK's famous and distinctive MISHAK Marks.

18 103. The aforesaid acts of Defendants constitute dilution in violation of *Section 43(c)*
19 of the *Lanham Act, 15 U.S.C. 1125(c)*.

20 104. The aforesaid acts of Defendants have caused and, unless acts are restrained by
21 this Court, will continue to cause MISHAK to suffer irreparable injury.

22 85. MISHAK has no adequate remedy at law.
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FOURTH CAUSE OF ACTION

Injury to Business Reputation and Dilution – GBL 360-1

106. MISHAK incorporates herein by reference each and every allegation contained in paragraphs 1 through 105 with the same force and effect as if here full set forth.

107. The unauthorized use by Defendants of copies, variations, reproductions, simulations or colorable imitations of MISHAK's registered marks among the MISHAK Marks in connection with the advertising, offering of sale and sale of Defendants' keyword advertising services will dilute or tarnish MISHAK's business reputation and/or the effectiveness of the well-known, famous and distinctive MISHAK Marks.

108. The aforesaid acts of Defendants constitute dilution and injury to MISHAK's business and reputation in violation of *New York General Business Law 360-1*.

109. The aforesaid acts of Defendants have caused and, unless said acts are restrained by this Court, will continue to cause MISHAK to suffer irreparable injury.

110. MISHAK has no adequate remedy at law.

FIFTH CAUSE OF ACTION

Common Law – Trademark Infringement and Unfair Competition

111. MISHAK incorporates herein by reference each and every allegation contained in paragraphs 1 through 110 with the same force and effect as if here full set forth.

112. The aforesaid acts of Defendants constitute trademark infringement and unfair competition in violation of MISHAK's rights under the common law of the State of California.

113. The aforesaid acts of Defendants have caused and, unless said acts are restrained by this Court, will continue to cause MISHAK to suffer irreparable injury.

114. MISHAK has no adequate remedy at law.

SIXTH CAUSE OF ACTION

Tortious Interference With Prospective Economic Advantage

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3 115. MISHAK incorporates herein by reference each and every allegation contained in
4 paragraphs 1 through 114 with the same force and effect as if here fully set forth.

5 116. Many of the Plaintiff's customers regularly purchase products from MISHAK's
6 website, and are repeat customers. It is probable that such customers and others will continue to
7 seek to visit MISHAK's website and purchase Plaintiff's goods and services in the future.

8 117. Upon information and belief, Defendants were aware of the existence of
9 Plaintiff's reasonable expectation of future transactions with Plaintiff's returning customers, as
10 well as consumers who may be attracted to Plaintiff's goods and services as a result of Plaintiff's
11 goodwill and extensive advertising and promotion.

12 118. Absent Defendants' intentional and improper interference through their deceptive
13 and manipulated search engine "results," it is reasonably certain that Plaintiff would realize
14 additional sales from existing customers and/or new customers.

15 119. Defendants have intentionally and improperly interfered with Plaintiff's future
16 and prospective sales through the Defendants' conduct; namely, their deceptive and manipulated
17 search engine "results" that divert consumers from Plaintiff's websites.

18 120. The aforesaid acts of Defendants have caused and, unless said acts are restrained
19 by this Court, will continue to cause MISHAK to suffer irreparable injury.

20 21 121. MISHAK has no adequate remedy at law.

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