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9 and EARTHLINK INC.

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 SANTA ANA DIVISION

13 MARK MISHAK, dba INEEDATV.COM,
14 Plaintiff,

15 v.

16 GOOGLE, INC., AMERICAN ONLINE,
17 INC., NETSCAPE, INC., MICROSOFT
18 NETWORK, INC., ASK JEEVES, INC.
19 EXCITE, INC., WEBCRAWLER, INC.,
20 YAHOO, INC., CONVERSA, INC., LYCOS,
21 INC., HOTBOT INC., ALTAVISTA INC.,
22 CRAIGSLIST INC., RESPOND INC.,
23 INFOSEEK INC., YELLOW PAGES INC.,
24 PLANETSEARCH INC., PRONET INC.,
25 NORTHERNLIGHT INC., LUCKYSURF
26 INC., COMFIND INC., LIQUIDPRICE INC.,
27 EARTHLINK INC., DOES 1-100,

28 Defendants.

Case No. CV07-8258 CAS (JCRx)

**NOTICE OF MOTION AND MOTION
FOR RULE 11 SANCTIONS**

Date: March 31, 2008
Time: 10:00 a.m.

Date Comp. Filed: December 20, 2007

Trial Date: None

Defendants Google Inc. ("Google"), IAC Search & Media, Inc. ("Ask"), Lycos, Inc.
("Lycos"), and Earthlink, Inc. ("Earthlink")¹ HEREBY GIVE NOTICE to all parties and their

¹ It is unclear whether Plaintiff believes he has served each of the parties hereto. The original complaint was simply mailed to Google, Lycos, Earthlink, and Ask. Lycos is headquartered in Massachusetts, where (unlike in California) mail service of a summons on a corporation is valid. Google, Ask, and Earthlink are not in Massachusetts, and thus have not been served. We have repeatedly offered to accept service by means of Rule 4(d) waivers, but Plaintiff has not responded to that offer. Google, Ask, and Earthlink thus appear specially for the purpose of bringing this motion, reserving objections to any purported service of the summons in this matter. It is also unclear whether the First Amended Complaint ("FAC") is in fact filed; Plaintiff

1 attorneys of record that on March 31, 2008, at 10:00 a.m., or as soon thereafter as counsel may
2 be heard in the above-captioned Court, located at 312 N. Spring Street, Los Angeles, CA 90012,
3 they will, and hereby do, move this Court for an order dismissing this matter with prejudice and
4 ordering Defendant Mark Mishak and his counsel Roger Agajanian to pay all attorneys fees and
5 costs incurred by any Defendant hereto..

6 Defendants' motion is brought under Federal Rule of Civil Procedure 11 and relevant
7 case law, on the ground that there is no factual or legal basis for the claims set forth in Mr.
8 Mishak's complaint, and that Mr. Mishak's counsel failed to make reasonable investigation of
9 the facts and law prior to filing either the original Complaint or the First Amended Complaint.
10 The motion is based upon this Notice and memorandum of points and authorities; the
11 Declarations of Michael H. Page and Heather Wilburn, filed herewith; the pleadings, records,
12 and papers previously on file in this action; and such argument and evidence as may be presented
13 at the hearing on the Motion.

14 This motion is made following conferences of counsel pursuant to L.R. 7-3 which took
15 place on January 23, 2008 and February 7, 2008, followed by service of a draft of this motion
16 pursuant to Fed. R. Civ. P. 11 on February 12, 2008. Since that time, Plaintiff has ignored
17 repeated emails and messages seeking to meet and confer further.

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25 attempted to e-file that document as nine separate docket entries (Docket #s 11-19) rather than
26 file a hardcopy as required, and apparently has not responded to the Court's Notice of
27 Deficiencies (Docket #20). We proceed herein on the assumption that the FAC is on file.
28

I. Introduction and Factual Summary

This complaint is why Rule 11 was written. Plaintiff Mark Mishak and his counsel Roger Agajanian have now **twice** filed complaints in this matter that consist entirely of an extraordinary series of outright lies, grandiose fictions, and incoherent drivel, coupled with wholesale copying of irrelevant factual and legal claims from an unrelated case. One hardly knows where to begin.

In his original Complaint the Plaintiff, Mark Mishak, purported to operate “ineedatv.com,” “the nation’s largest and most respected and trusted direct-to-consumer retailer of televisions, and personal appliances in the United States.” Complaint, ¶62.² Ineedatv.com, Mishak averred, “has thousands of customers nationwide and generates annual revenues in excess of hundreds of thousands.” Complaint, ¶49; *cf.* First Amended Complaint (“FAC”) ¶43 (“many customers nationwide and generates annual revenues according to proof at trial”). Mishak further claims that “[t]he company estimates that, each day, it receives in excess of thirty thousand (30,000) ‘hits’ or visits by customers to its Internet websites and processes hundreds of thousands of Internet transactions every year.” Complaint, ¶52; FAC ¶46.

The Court will be forgiven, however, if it is unfamiliar with this giant of Internet commerce. Ineedatv.com **does not exist**. Mr. Mishak once operated an obscure website at ineedatv.com, which appears to have offered internet buying services, but that website ceased operations, at the latest, in December, 2004. *See* Declaration of Michael H. Page (“Page Decl.”), Exh. J (printouts from Internet Archive).³ Similarly, the toll-free number Mishak claims to operate no longer exists. Complaint, ¶36; FAC ¶30; Page Decl. ¶17.⁴ Ineedatv.com is a complete figment.

Pursuant to Rule 11, Google on February 12, 2008 served Mr. Mishak’s counsel with a draft of this motion. That draft, submitted herewith as Exhibit F to the Declaration of Michael H.

² For the Court’s convenience, copies of the Complaint and First Amended Complaint are submitted herewith as Exhibits K and L of the Declaration of Michael H. Page.

³ Moreover, there is serious doubt that ineedatv.com was ever a going concern. In today’s electronic world, the mark of true obscurity is a company or individual that cannot be found on Google. And yet a search for “ineedatv” finds no relevant links other than to copies of this lawsuit.

⁴ Mishak, however, falsely purports to *currently* spend “thousands per year in maintaining,

Page, identified the nonexistence of the Plaintiff's business as one obvious Rule 11 problem. But that was only the beginning. As set forth below, Mishak's Complaint consisted almost entirely of outright falsehoods. Contrary to his claims, no one had ever used his purported trademarks as keywords on the Google system. Similarly, contrary to his allegations, neither Mishak nor his counsel had ever contacted Google in any manner. He has no website, no products, no trademark, no customers, no competitors. As set forth below, the list of Mishak's inventions went on and on.

Mishak has now filed a First Amended Complaint. That amendment, unfortunately, fixes virtually nothing in the original. The only substantive changes are (1) that Mishak has altered a few words to admit in some places (but not others) that his business does not exist and has not existed since 2002, and (2) Mishak has removed a few of the more than 20 defendants. But the rest of the Complaint is entirely unchanged, and violates Rule 11 at every turn.

For example, Mishak continues to allege that his (nonexistent) customers are being diverted by his (nonexistent) competitors. These unnamed competitors, Mishak claims, are piggybacking on Mishak's "extensive and pervasive advertising" (Complaint, ¶62; FAC ¶56) by purchasing Mishak's alleged trademarks as advertising keywords on Google's search engine.⁵ Complaint, ¶6; FAC ¶6.

Such an allegation, even if true, would not support a cause of action: registering words as trademarks does not confer "rights in gross" preventing anyone else from using those words (such as "need" or "TV"), as keywords or otherwise. Numerous courts have addressed the question whether use of a trademark as a Google keyword violates the Lanham Act, and have ruled in Google's favor. Other such cases remain pending. But the Court will not have an opportunity to reach such intriguing trademark law questions in this case, because once again Mishak is simply making it up.

enhancing, and updating its website." Complaint, ¶53; FAC ¶47.

⁵ Google's AdWords system provides keyword-targeted advertising. In an oversimplified nutshell, advertisers choose specific words (such as "TV") as keywords. When a user's search query (such as "Color TVs" or "I need a TV") contains the keyword, the advertiser's ad is displayed alongside Google's other search results. The actual system, of course, is far more complex, but those complexities are irrelevant here.

1 Not surprisingly, online electronic retailers are not spending their advertising dollars
 2 bidding on the name of a nonexistent company as a keyword. In fact, although untold thousands
 3 of Google advertisers have bid on literally millions of different keywords, not a single advertiser
 4 has **ever** used “ineedatv,” or “ineedatv.com as a keyword. **Not once.** Declaration of Heather
 5 Wilburn (“Wilburn Decl.”), ¶1.

6 Mishak’s purported evidence to the contrary is nothing of the sort. Exhibit 2 to the
 7 Complaint is described by Mishak as “a INEEDATV.COM tracking for just one week from 1-8-
 8 06 to 1-14-06.” Complaint, ¶36; FAC ¶30. In fact, it is nothing of the sort. Instead, it appears to
 9 be a screenshot of a single search for the phrase “I Need A TV” on the AltaVista search engine.
 10 Put aside the fact that, contrary to Mishak’s allegations, AltaVista has nothing to do with
 11 Google.⁶ It is, in fact, a direct competitor of Google’s. Put aside, also, the fact that Mishak now
 12 avers that INEEDATV.COM was forced out of business in 2002, **four years** before this
 13 purported “tracking.” But more to the point, one need only look at the search results to see that
 14 Mishak’s contentions are incorrect: AltaVista, like Google, highlights in bold the words in its
 15 search results that match the keywords contained in the user’s query. When a query includes a
 16 keyword, an advertisement can be triggered regardless whether the query also contains other
 17 words. Thus, for example, when one bids on the word “computer,” one’s ad can appear in
 18 response to a query for either “computer” or “Apple Computer.”⁷ And if someone bids on the
 19 keyword “TV,” (not surprisingly, a common keyword for electronics retailers), that ad will
 20 appear in response to the query “I Need a TV.” As can be seen by the ads in Exhibit 2, the
 21 keyword that matched was “TV,” not “ineedatv.”

22 The next key allegation in Mishak’s Complaint is that Google has continued to allow
 23 Mishak’s “competitors” to purchase “ineedatv.com” as a keyword notwithstanding Mishak’s
 24 demands that it cease: “Defendants repeatedly have ignored MISHAK’s demands to cease all
 25

26 ⁶ “On information and belief, the Non-Google Defendants pay Google in exchange for Google
 27 providing [sic] to its web searching platform.” Complaint at ¶66; FAC ¶60.

28 ⁷ Each search engine typically allows variations, such as the option of requiring an “exact
 match,” (such that “computer” would not match “computers” or “computer sales,”), but the
 default is to match any word in a query.

1 unauthorized use of the MISHAK Marks . . . “ (Complaint ¶89; FAC ¶82); “Defendants’
 2 repeated failure to comply with MISHAK’s demands manifests their intent to continue to
 3 wrongfully compete” Complaint ¶90; FAC ¶83. This allegation is essential to any claim
 4 against Google: Even if Mishak’s business existed, and even if his competitors were misusing
 5 his trademarks, he still could not begin state a derivative claim against Google without evidence
 6 that Google had been put on notice of his complaints and had refused to take action.⁸ And here
 7 again, Mishak is simply making it up. Google is unaware of **any** communication, of **any** sort,
 8 from Mishak or anyone related to him to Google or any other defendant in advance of this
 9 lawsuit. Wilburn Decl. ¶2. And despite repeated requests that he provide copies of any such
 10 demands we might have overlooked, Mishak has failed to produce them. Page Decl., ¶4 and
 11 Exhs. A, B.

12 Each of these problems is fundamental, and each consists of outright falsehoods
 13 concerning information uniquely in Mishak’s own control. Mishak cannot possibly have alleged
 14 that he is “the nation’s largest and most respected and trusted direct-to-consumer retailer of
 15 televisions” by mistake. Allegations that he has spent untold thousands on advertising, or that he
 16 has made numerous complaints to Google, or that his competitors are diverting customers he
 17 does not have, are not things one says by accident. They are deliberate, outright lies to this
 18 Court. They are, moreover, all statements that were brought to Mr. Agajanian’s attention, both
 19 informally and formally (by way of service of a Rule 11 draft motion), and were nonetheless
 20 deliberately repeated verbatim in an amended pleading.

21 They are not, however, the extent of Mishak’s—and his counsel’s—misconduct and
 22 misrepresentations here. The by-no-means-exhaustive list of flatly false allegations also
 23 includes:

- 24 • Defendants all operate search engines (Complaint ¶2; FAC ¶2). In fact, many of the
 25 original defendants do not operate search engines at all, such as Craigslist, Conversa,
 26

27
 28 ⁸ To be quite clear, this would not be a sufficient condition, only a necessary one: permitting use
 of an existing trademark as a keyword is not actionable even with notice.

1 Luckysurf, and Comfind.⁹

- 2 • “All Defendants listed above sell advertising space on the search result pages known as
3 Banner Ads. . . . These ads are often animated and whimsical.” Complaint ¶2; FAC ¶2.
4 In fact, most do not use banner ads at all, including Google.
- 5 • Each Defendant is a Delaware Corporation doing business in California. Complaint,
6 ¶¶8-30; FAC ¶¶8-24. Mishak has simply cut-and-pasted the same allegations, without
7 any prefiling investigation into publicly-available information. In fact, some of the
8 Defendants Mishak named do not even exist (for example, Netscape) and others are
9 foreign (for example, Conversa). Notwithstanding notice of this issue, Mishak has
10 replead his complaint against the nonexistent Netscape, and has again alleged that each
11 defendant is a Delaware corporation operating in California.
- 12 • “Mishak has continually used said mark by predominantly displaying it on the packaging
13 . . . for Mishak’s products.” Complaint ¶37; FAC ¶31. What products? As far as we
14 can discover, they do not exist and never did.
- 15 • Exhibit 1 is Mishak’s trademark registration. Complaint ¶38; FAC ¶32. Exhibit 1 is a
16 copyright registration, and cannot support a trademark claim.
- 17 • “The name and mark MISHAK comprises a distinctive part of MISHAK’s corporate title
18 and trade name, which trade name has been prominently displayed by MISHAK upon its
19 **home decorating products** and relates [sic] services” Complaint ¶39; FAC ¶33.
20 Mishak is not in the home decorating business. We can explain this one, however:
21 several years ago, a company named American Blind & Wallpaper Factory sued Google
22 (unsuccessfully) in the Southern District of New York. This allegation (and virtually all
23 of the Complaint and FAC) is copied verbatim from that complaint, with the names (but
24 not the description of American Blind’s business) replaced. Page Decl., Exh. I
25
26
27

28 ⁹ Having been informed of this, Mishak for some reason deleted two of these four from the FAC (LuckySurf and Conversa), but left the other two as defendants.

(“American Blind Complaint”).¹⁰

- The MISHAK marks have become “famous” and “distinguish MISHAK and its products and services from competitors”; “the MISHAK Marks have acquired an outstanding tracking (Exhibit 1).” Complaint, ¶43; FAC ¶37. As noted above, neither MISHAK products nor ineedatv.com exist. We do not know precisely what an “outstanding tracking” is, but Exhibit 1 isn’t one. It is a printout of an AltaVista search page, apparently from years after Mishak now claims to have been driven out of the business he simultaneously claims is active and famous. The factual allegations in this paragraph have no relevance to Mishak, and are simply copied verbatim from the American Blind Complaint, replacing the word “celebrity” in the original with “tracking” in the copy.
- All Defendants “pay Google in exchange for Google providing [sic] to its web searching platform.” Complaint, ¶66; FAC ¶60. Although some of the defendants are Google partners, others are (quite famously) Google’s competitors: Microsoft (deleted from the FAC), Yahoo!, and AltaVista, for examples.
- The Use of Meta Tags (Complaint, ¶¶67-71; FAC ¶¶61-65). Neither Google nor any of its partners makes any use of metatags, and Mishak makes no allegation that any of his imagined “competitors” has ever included “ineedatv” as a metatag on its website.¹¹
- Injury to Business Reputation and Dilution—GBL 360-1 (Complaint at 21). Mishak, for reasons surpassing understanding, includes in his California federal complaint a New York statutory claim, without any allegations that relate to that state. Why? Because the entirety of Mishak’s First through Sixth Causes of Action are simply copied, verbatim save for replacing the names, from American Blind & Wallpaper’s New York Complaint. In fact, virtually all of Mishak’s **factual** allegations all also copied

¹⁰ This similarly explains why the citizenship and location of some defendants is plead with detail, while most are simply alleged to be Delaware corporations operating in California. The former are copied verbatim from the American Blind complaint, while the latter are Mr. Agajanian’s work.

¹¹ Mishak and his counsel could easily have determined this: metatags are visible using any browser, simply by selecting “View Source” or “View HTML.”

1 wholesale from that complaint, including all of his allegations concerning searches he
 2 purports to have conducted on Google. He (or his counsel) has simply copied the same
 3 detailed recitations of particular search results from that complaint, and has then
 4 replaced the “American Blind” terms with ellipses! *Compare* American Blind
 5 Complaint ¶49 with Complaint ¶74; FAC ¶68.

6 II. Argument

7 Federal Rule of Civil Procedure 11 requires that every pleading be signed by an attorney
 8 of record or by the party. Fed. R. Civ. P. 11(a). Further, in relevant part, the rule requires the
 9 following:

10 By presenting to the court (whether by signing, filing, submitting, or later
 11 advocating) a pleading, written motion, or other paper, an attorney or
 12 unrepresented party is certifying that to the best of the person's knowledge,
 information, and belief, formed after an inquiry reasonable under the
 circumstances,--

13 (1) it is not being presented for any improper purpose, such as to harass or to
 14 cause unnecessary delay or needless increase in the cost of litigation;

15 (2) the claims, defenses, and other legal contentions therein are warranted by
 16 existing law or by a nonfrivolous argument for the extension, modification, or
 reversal of existing law or the establishment of new law; [and]

17 (3) the allegations and other factual contentions have evidentiary support or, if
 18 specifically so identified, are likely to have evidentiary support after a reasonable
 opportunity for further investigation or discovery; . . .

19 Fed. R. Civ. P. 11(b). *See also Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1098
 20 (10th Cir. 2003) (“Rule 11 required that an attorney in every case must investigate claims before
 21 filing a complaint.”); *White v. General Motors Corp., Inc.*, 908 F.2d 675, 681 (10th Cir. 1990)
 22 (noting that “[f]ailing to investigate the facts of a claim before filing a complaint is
 23 sanctionable”). Sanctions may be imposed on the “attorneys, law firms, or parties that have
 24 violated [Fed. R. Civ. P. 11(b)].” Fed. R. Civ. P. 11(c). The Supreme Court has explained that
 25 the “central purpose of Rule 11 is to deter baseless filings in District Court and thus . . .
 26 streamline the administration and procedure of the federal courts Although the Rule must be
 27 read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy . . . any
 28 interpretation must give effect to the Rule’s central goal of deterrence.” *Cooter & Gell v.*

1 *Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Designed for deterrence, the Rule is governed by an
 2 objective standard of reasonableness; no showing of subjective intent or bad faith is required.
 3 *Truesdell v. S. Cal. Permanente Medical Group*, 209 F.R.D. 169, 173-74 (C.D. Cal. 2002).

4 When, as here, a “complaint is the primary focus of Rule 11 proceedings, a district court
 5 must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually
 6 baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and
 7 competent inquiry before signing and filing it.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127
 8 (9th Cir. 2002) (internal quotations and citation omitted). Courts use “the word ‘frivolous’ to
 9 denote a filing that is both baseless and made without a reasonable and competent inquiry.”
 10 *Levinson v. Baldwin*, No. 03-16532, 425 F.3d 671 (9th Cir. 2005) (citing *Moore v. Keegan*
 11 *Mgmt. Co.*, 78 F.3d 431, 434 (9th Cir. 1996)).

12 This is perhaps the most extreme violation of Rule 11 imaginable. This is not a case of
 13 getting a fact or two wrong at the margins. Rather, virtually every factual allegation contained in
 14 the First Amended Complaint is wildly, outrageously, dramatically false.

15 More importantly, most of those falsehoods cannot be anything other than deliberate and
 16 knowing. It is inconceivable that a plaintiff who now admits he has not operated his business for
 17 five years could mistakenly aver that he is **currently** receiving thousands of hits a day to a
 18 website that does not exist, that he is **currently** earning thousands of dollars a year, that he
 19 **currently** sells products branded with his purported marks, that his nonexistent competitors are
 20 interfering with his nonexistent business, or that he has raised those nonexistent complaints to
 21 Google and been ignored. Moreover, every single one of those failings was identified to
 22 plaintiff’s counsel via Google’s draft Rule 11 motion, and plaintiff’s counsel nonetheless
 23 proceed to file a First Amended Complaint repeating and realleging the same falsehoods. If this
 24 were a *pro se* complaint scrawled on a napkin, this Court would find it sanctionable.

25 But both the Complaint and the First Amended Complaint were signed and filed **by a**
 26 **member of the bar**. This Court cannot allow such conduct. It was counsel, not the client, that
 27 **twice** copied verbatim the factual allegations contained in the *American Blind* case. It was
 28 counsel, not the client, that **twice** filed wide ranging allegations concerning the ineedatv.com

1 website without even going so far as to see if it existed. It was counsel, not the client, who **twice**
2 filed allegations against more than a score of corporations without even the most cursory inquiry
3 into their operations, relationships, or citizenship. And it was counsel that **twice** signed the
4 complaint.

5 Before bringing this motion, the undersigned counsel made repeated attempts to explain
6 the problems of this complaint to Mr. Agajanian. We wrote and called repeatedly, and were
7 repeatedly assured that Mr. Agajanian would consult with his client and decide whether his
8 Complaint needed to be dismissed. Each time Mr. Agajanian promised to get back to us, we
9 waited patiently, to no avail. In our first conversation, Mr. Agajanian professed surprise at the
10 news that his client's business did not exist, and professed to have relied on his client's
11 representations in filing his complaint. Page Decl., ¶4. Rule 11, however, does not allow an
12 attorney to file without inquiry.

13 In our second conversation, Mr. Agajanian admitted that he was now aware that the
14 factual allegations in his complaint were false, and once again requested a few days (to February
15 11, 2008) to decide whether to dismiss the complaint, promising to respond by then. Page Decl.
16 ¶10. As usual, that date came and went, requiring the service of the draft of this motion on
17 February 12, 2008. Mr. Agajanian thereafter continued to ignore repeated attempts to reach him
18 by phone and by email, and filed the FAC on February 27, 2008. Since that date, we have
19 continued to attempt to reach Mr. Agajanian to discuss this matter, and have been entirely
20 ignored, leaving us no choice but to file this motion. Page Decl. ¶12-14.

21 **III. Conclusion**

22 More than a score of separate corporations have already been put to the considerable
23 expense of reviewing the complaint, retaining counsel, clearing conflicts, attempting to negotiate
24 with Plaintiff, drafting responsive pleadings when Plaintiff refused to dismiss, drafting this
25 motion, reviewing the FAC, and finally revising and filing this motion. All of this has been
26 occasioned by a member of the bar who filed a complaint without so much as taking ten seconds
27 to visit his own client's purported website to find out if it even existed, and who continues to
28 leave the FAC on file when he knows it to be entirely, utterly false.

1 Such conduct needs to be deterred, by dismissing the First Amended Complaint with
2 prejudice, and by ordering Plaintiff and his counsel to pay all fees and costs incurred to date by
3 each defendant.

4 Dated: March 7, 2008

KEKER & VAN NEST, LLP

5
6 By: /Michael H. Page/
7 MICHAEL H. PAGE
8 Attorneys for Defendants
9 GOOGLE, INC., IAC SEARCH &
10 MEDIA, INC (f/k/a ASK JEEVES, INC.),
11 LYCOS, INC., and EARTHLINK INC.
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