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IAC SEARCH & MEDIA, INC.
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 HOSTWAY CORPORATION, an Illinois
Corporation,,
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13 Plaintiff,
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15 v.
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IAC SEARCH & MEDIA, INC., a Delaware
Corporation,
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18 Defendant.
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Case No. C 07-3759 JCS

**DECLARATION OF ANDREW
MOERS IN SUPPORT OF
DEFENDANT IAC SEARCH &
MEDIA, INC.'S OPPOSITION TO
PLAINTIFF'S TEMPORARY
RESTRAINING ORDER**

Date: July 27, 2007

Time: 3:30 p.m.

Place: Courtroom A, 15th Floor
The Hon. Joseph C. Spero

Complaint filed: July 23, 2007

1 I, Andrew Moers, declare as follows:

2 1. I am a Senior Vice President of Business Development at IAC Search & Media
3 ("Ask"), defendant in this action, and I have worked at the company since May, 2000. I make
4 this declaration on personal knowledge, except as otherwise expressly stated. If called as a
5 witness, I could and would testify competently to the matters stated in this declaration.

6 Background

7 2. In my capacity as Senior Vice President of Business Development, I participated
8 in the negotiation of the March 2, 2007 Advertising Services and Search Services Syndication
9 Agreement ("Agreement") between Ask and Hostway Corporation ("Hostway"), a copy of which
10 is attached as Exhibit 1 to the Complaint for Breach of Contract, Injunctive Relief, and Damages..
11 Also in my capacity as Senior Vice President of Business Development, I supervise the business
12 relationship between Ask and Hostway.

13 3. Ask is primarily an internet search company. In addition, Ask enters into
14 agreements with other companies to display their advertisements on various websites. The
15 advertisers pay Ask on a per-click basis, or when an individual user "clicks" on the
16 advertisements. Ask enters into many agreements that provide it with a "click-stream," or source
17 of additional web traffic and advertising revenue.

18 4. Hostway has a syndication or "parking" business. What this means is that
19 Hostway has business relationships with various websites which it "parks," meaning it is
20 permitted to display advertising on such sites. Under the Agreement, Ask sends Hostway
21 advertisements (referred to as an "advertising feed"), and Hostway displays these advertisements
22 on its customer websites. Also under the Agreement, Hostway is supposed to promote and
23 display certain Ask content on its customer websites, as well as on Hostway's own website.

24 5. Based on my or my team's interactions with Hostway and information received
25 from third parties, Ask concluded that Hostway was in breach of the Agreement and that Ask
26 should terminate the Agreement. On July 17, 2007, Senior Vice President and General Counsel
27 of Ask, Daniel E. Caul, therefore sent John Lee of Hostway a letter describing certain of the
28 breaches and informing Hostway of the termination of the Agreement.

1 6. After receiving Mr. Caul's letter of July 17, 2007, Mr. Lee of Hostway contacted
2 me requesting that we postpone the termination of service to Hostway under the agreement.
3 Several days of discussions between us ensued. Ask continued to provide services under the
4 agreement while these discussions occurred, notwithstanding the termination letter. On Sunday,
5 July 22, Mr. Lee and I orally agreed that Ask would continue the advertising feed to Hostway for
6 two additional weeks (that is, until August 3, 2007). A draft agreement to this effect was sent to
7 Mr. Lee by Ask that same day.

8 7. Mr. Lee never signed the agreement, however, and on Monday, July 23, 2007,
9 Hostway's attorneys filed the Motion for Temporary Restraining Order.

10 8. The facts relating to each of Hostway's breaches of the Agreement described in the
11 July 17, 2007 letter are as follows:

12 Breach of Section 3.7

13 9. As stated in the July 17, 2007 letter, Hostway has breached—and continues to
14 breach—section 3.7 of the Agreement. Section 3.7 requires Hostway (a) to integrate the Ask
15 search box as the default search box for users of the Hostway Site Builder product, (b) to make
16 the Ask search box available to Hostway's retail and non-retail hosting clients, and (c) to include
17 the Ask search box and a link to the download of the Ask search toolbar on the
18 www.hostway.com web site. Section 3.7.1 requires that this be done "on or before the Launch
19 Date," which occurred on or about March 14, 2007, the first date on which Hostway generated
20 revenue from the Ask advertising services.

21 10. That Hostway would implement the Ask.com search box and toolbar feature on
22 these sites was one of the primary reasons Ask entered into the Agreement, given Ask's focus on
23 increasing its share of the internet search market, and it is the reason that an entire section of the
24 Agreement is devoted to the topic.

25 11. Starting in April 2007, soon after we entered into the Agreement, my team
26 communicated to Hostway in writing the importance and necessity of implementing the search
27 box and toolbar feature. We have been as clear as possible in conveying our demand to Hostway
28 regarding this implementation, but Hostway has still failed to accomplish it. Several e-mail

1 messages between my team and Hostway are attached as exhibits to the declaration of Scott
 2 Hayashida, which is also being filed in support of Ask's opposition to the Motion for Temporary
 3 Restraining Order.

4 12. To date, Hostway has not implemented the search box and toolbar feature as
 5 required by the Agreement. In coming to this conclusion, I have reviewed the home page and
 6 approximately 100 pages on the www.hostway.com web site, the Site Builder demo on the
 7 Hostway site, and the home pages of certain Hostway customers.

8 13. Attached hereto as Exhibit 1 are true and correct copies of sample pages from the
 9 Hostway site. These pages show that Hostway has not included the Ask search box or a link to
 10 the download of the Ask search toolbar on the www.hostway.com web site.

11 14. Attached hereto as Exhibit 2 is a true and correct copy of the Site Builder demo
 12 taken from the Hostway website. This exhibit shows that Hostway has not integrated the Ask
 13 search box as the default search box for users of the Hostway Site Builder product.

14 15. Finally, we do not believe that Hostway promoted the search box to their non-
 15 retail hosting customers because Hostway has never asked us for our approval of the layout of the
 16 applicable web page, which was a pre-requisite to such promotion.

17 Breach of Section 8.3

18 16. As also stated in the July 17, 2007 letter, Hostway has breached section 8.3 of the
 19 Agreement. Section 8.3 allows for immediate termination of the Agreement by Ask if Hostway
 20 engages in certain conduct, and Hostway has engaged in this conduct in a number of ways.

21 Section 8.3(d):

22 17. This section allows for immediate termination of the Agreement by Ask if
 23 Hostway's "use of the Ask Services . . . disparages the business of Ask or a third-party supplier."
 24 Hostway is breaching this section by disparaging both Ask and its third-party supplier
 25 Directi/Skenzo ("Directi"). Like Hostway, Directi supplies Ask with a click-stream by displaying
 26 advertisements that Ask provides it on websites which it "parks." This in turn supplies Ask with
 27 advertising revenue.

1 18. I have been informed by Directi employees that Namit Merchant, the current
2 executive in charge of Hostway's "parking" business and a former employee of Directi, is
3 courting Directi customers for Hostway. Mr. Merchant is doing this by telling Directi's
4 customers that the exclusivity provisions in their agreements with Directi can be violated (which
5 is false), and by telling them that he knows the business terms between Directi and Ask, between
6 Hostway and Ask, and between Directi and the customers, and because of that, he can offer them
7 business terms that he knows will be better than those received by Directi. Subsequently, some of
8 these Directi customers have changed a portion of their websites "parked" by Directi to be
9 "parked" by Hostway, thereby breaching their exclusivity provisions with Directi.

10 19. Hostway's conduct, through Mr. Merchant, disparages Directi in that Directi's
11 reputation is discredited when its customers are falsely informed that they need not abide by the
12 terms of their agreements with Directi. Also, Hostway's conduct disparages Ask in that Ask's
13 reputation in the internet advertising arena is built on its relationships with companies like
14 Directi, and its being associated with Hostway and its disparaging conduct detracts from this
15 reputation.

16 Section 8.3(b).

17 20. This section allows for the immediate termination of the Agreement by Ask if
18 Hostway "otherwise breaches the intellectual property rights of Ask or its third party suppliers." I
19 have been informed by Directi employees that Hostway is violating Directi's intellectual property
20 rights by copying the tagline on a site template and by substantially copying Directi's keyword
21 lists. Directi has developed a proprietary system for determining what keyword links to place on
22 a particular "parked" website. There is a substantial similarity in the keywords generated by the
23 Hostway system and the Directi system – approximately 85% of the key words are identical
24 according to Directi – suggesting to Directi that Hostway is either using all or a portion of the
25 proprietary Directi system and/or keyword database or is otherwise copying Directi's keywords.

26 21. Attached hereto as Exhibit 3 are true and correct copies of site templates of
27 Hostway and Directi, respectively. This Exhibit shows that Hostway copied the tagline of the
28 Directi template.

22. Attached hereto as Exhibit 4 are true and correct copies of sample website pages generated from publicly available systems that create sample pages from website "parking" providers. This Exhibit shows examples of sample pages from Hostway and Directi, demonstrating that Hostway's keywords are substantially similar to the keywords employed by Directi.

23. I have also been informed by Directi employees that when Mr. Merchant left Directi, it is likely that he took with him certain proprietary source code and the Directi keyword database.

Section 8.3(e).

24. This section allows for the immediate termination of the Agreement by Ask if Ask "in its sole discretion, determines that traffic from the Site(s) has been produced by fraudulent means." As set out in the declaration of Dmitriy Ryaboy, which is also being filed in support of Ask's opposition to the Motion for Temporary Restraining Order, Hostway is breaching this section because a certain percentage of the traffic from the Hostway websites is fraudulent.

Breach of Section 9.5

25. The third breach described in the July 17, 2007 letter is Hostway's breach of section 9.5 of the Agreement. Section 9.5 provides that the terms of the Agreement remain confidential, and, pursuant to section 8.3, breach of this section allows for immediate termination of the Agreement.

26. As I stated above, I have been informed by employees of Directi that Mr. Merchant of Hostway is courting potential website customers by informing them that he knows the business terms between Directi and Ask, between Hostway and Ask, and between Directi and the customer, and because of that, he can offer them business terms that he knows will be better than those received from Directi. This is a direct reference to the confidential terms of the Agreement, and a breach of section 9.5.

Other Breaches

27. The breaches described in the July 17, 2007 letter are just a subset of Hostway's breaches of the Agreement. Other sections that Hostway has breached—and continues to breach—are as follows:

- a. Hostway is breaching Section 2.5.14 of the Agreement by displaying advertisements from Ask on websites that violate third-party rights, such: www.verizo.com, wwwexpida.com, www.amazonbuys.com, www.dell.com.be and ameircawest.com, which obviously violate other companies' trademarks. Attached hereto as Exhibit 5 is a true and correct list of domain sites hosted by Hostway containing well known third party trademarks or misspellings thereof.
- b. Hostway is breaching Sections 3.3 and 7.1 of the Agreement by displaying the Ask logo without prior approval by Ask. Attached hereto as Exhibit 6 is a true and correct copy of the website www.searchpro.com, owned and operated by Hostway and displaying the Ask logo. Ask has not approved such use of its logo by Hostway.

Harm to Ask

28. Ask is being continuously harmed by Hostway in several ways. Beyond the breaches of the Agreement described above, Hostway's conduct is also putting at risk Ask's business relationship with Directi. Ask generates a significant amount of revenue from Directi.

29. Further, Ask is losing revenue and losing potential gains in search market share from Hostway's failure to implement the Ask search box and toolbar feature.

Lack of Harm to Hostway

30. In my position of Senior Vice President of Business Development at Ask I am generally familiar with the marketplace for website "parking" services. In that market place there are numerous providers of advertising services similar to those being provided by Ask to Hostway under the Agreement. The other providers enter into agreements with customers similar to Hostway in the ordinary course of business. Some of the other providers are Google, Yahoo!, Kanoodle, Enhance Interactive, Miva, GoClick, Marchex, 7Search, Casale, and Looksmart. On

1 information and belief, it would be a relatively easy matter for Hostway to substitute other
2 services in place of the Ask services.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct.

5 Executed this 25th day of July, 2007, at New York, New York.

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