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 HOSTWAY CORPORATION

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN FRANCISCO DIVISION

15 HOSTWAY CORPORATION, an Illinois  
 Corporation,

16 Plaintiff,

17 v.

18 IAC SEARCH & MEDIA, INC., a Delaware  
 19 Corporation,

20 Defendant.

No. C 07-3759 JCS

21  
 22 **SUPPLEMENTAL DECLARATION**  
 23 **OF NAMIT MERCHANT IN**  
 24 **SUPPORT OF PLAINTIFF**  
 25 **HOSTWAY CORPORATION'S**  
 26 **MOTION FOR TEMPORARY**  
 27 **RESTRAINING ORDER AND**  
 28 **ORDER TO SHOW CAUSE RE**  
**PRELIMINARY INJUNCTION**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

<b>HOSTWAY CORPORATION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No. C 07-3759 JCS</b>
	)	
<b>IAC SEARCH &amp; MEDIA, INC.,</b>	)	
	)	
<b>Defendant.</b>	)	

**SUPPLEMENTAL DECLARATION OF NAMIT MERCHANT**

1. My name is Namit Merchant. I make this supplemental declaration in response to certain things stated in the declarations of Andrew Moers, Dmitriy Ryaboy and Scott Hayashida, filed by IAC.

2. Mr. Moers in his declaration (at ¶ 9) says that we were supposed to implement the search box on or before the Launch Date, which he says was March 14, 2007. The Launch Date is actually defined (in § 2.1) as 15 business days after the agreement's Effective Date (March 2, 2007), "assuming XML implementation details have been received" by Hostway from IAC. Paragraph 4 of Mr. Hayashida's declaration confirms that IAC did not even provide me with the necessary XML feed ID link that is required to implement the search box until April 24, 2007 – some seven weeks after the Syndication Agreement was signed and about a full month after the Launch Date. Furthermore, the e-mail Mr. Hayashida refers to shows that on April 27 he instructed us not to use the new feed IDs until there was a change in the technical implementation. This change wasn't completed until May 17<sup>th</sup>. In other words, the actual XML implementation wasn't available for integration with a search box until May 17.

3. Mr. Hayashida's suggestion (at ¶ 5 of his declaration ) that I "stalled" him by telling him in an April 25, 2007 e-mail that I would get him more information in a few weeks is contradicted by the very e-mail stream he relies on. That e-mail stream shows that Hostway was working diligently on implementation of the Syndication Agreement, including implementation of the search box.

4. Mr. Hayashida's statement (in ¶ 6 of his declaration) that on May 16, 2007 he "gave further notice to Hostway that it was in breach" of the Syndication Agreement is wrong. First, his use of the word "further" suggests he had previously given notice to Hostway "that it was in breach" of the agreement. I never received any such notice from Mr. Hayashida, and I am not aware of anyone at Hostway who did. Second, the May 16 e-mail that Mr. Hayashida relies on says nothing of the sort. Instead, with regard to implementation of the search box all it says is: "2. Implement the Ask search box on Hostway hosted pages. Last we discussed you mentioned that this would be done by June." I responded by telling Mr. Hayashida that "2. That project hasn't been picked up yet due to other high priority issues on the domain monetization side." Mr. Hayashida then asked: "2. When can we get this started?" He never said Hostway was in breach of the Syndication Agreement. This e-mail stream too shows that we were working hard on implementing the Syndication Agreement, that there were several projects we were working on with IAC, and that IAC never said anything that suggested that we were in breach of the agreement or that they were putting us "on notice" that we were in breach and needed to cure within 14 days.

5. Mr. Moers in his declaration says that he was told by someone at Directi – he doesn't say by whom – that I have been "courting" Directi customers. What I have

been doing is competing on behalf of my employer, Hostway, with Hostway's competitor, Directi. That should come as no surprise to Mr. Moers because, as the Syndication Agreement shows, it was specifically anticipated that Hostway would compete with Directi for customers. Just by way of example, §1 of Exhibit B to the agreement talks about how revenues from former Directi customers will be treated. Hostway does compete with Directi and other competitors for syndication customers, and visa versa.

6. Having said that, the statement attributed by Mr. Moers to unidentified Directi employees to the effect that I have told Directi customers that they can violate exclusivity provisions of contracts is false. I do know the terms of IAC's deal with Directi because I used to work at Directi and I dealt with the IAC arrangement. And I of course know the terms of IAC's deal with Hostway. However, I have never disclosed to anyone the actual terms of IAC's deal with Directi. (I notice that Mr. Moers is careful to avoid saying that I had).

7. Mr. Moers says at ¶ 20 of his declaration that similarities in keywords generated by the Directi system and by the Hostway system "suggest[] to Directi" that Hostway is either using the Directi system or copying Directi's keywords. To me it is as suggestive that Directi is using Hostway's system. Hostway is not using and has not used any proprietary Directi system.

8. I don't know what the unidentified Directi employees referred to in ¶ 23 of Mr. Moers' declaration said to him. What I do know is that I took no proprietary information of Directi, not source code and not any keyword database, when I left.

9. Prior to reading Mr. Moers' declaration I had never before heard the claim from IAC that Hostway breached on the basis that some traffic produced from sites hosted by Hostway was "fraudulent." I can't tell from reading Mr. Moers' declaration whether he is claiming (or whether Directi, our competitor to whom Mr. Moers attributes it, is claiming) that the 5.6% of traffic referred to is truly fraudulent, meaning the product of somebody sitting at a site and repeatedly clicking on an ad in order to generate revenue for the domainer (and every one else in the chain, including IAC), whether just some portion of that 5.6% is fraudulent, or whether any of it is truly fraudulent. This traffic is usually the product of "bots," not of somebody sitting at a site at clicking repeatedly on an ad. "Bots" are programs that search engines (like Google for example) launch for the purpose of indexing the web. Bots visits sites and click on links. In the syndication or parking business, this sort of traffic isn't intended to generate revenues so we track it and try to limit it, but it will always exist. For example, after we began implementing the Syndication Agreement, I asked IAC to run a spam report so I could see what percentage of traffic was spam. The report IAC generated for me for April 2007 is attached to my supplemental declaration as Exhibit 1. It shows spam rates of up to 5.28%. This report was unremarkable because spam rates in that range are ordinary and not unusual. I have not seen any subsequent report, but obviously the declaration of Mr. Ryaboy is inconsistent with this report provided to me by IAC.

10. I am not a lawyer so I can't respond to Mr. Moers' claim that we're violating third parties' rights by placing ads on certain websites. No one at IAC ever raised this complaint before. What I do know is that IAC gave us its Ask TM List, a list

of websites that we could not place ads on. The websites referred to in Mr. Moers' declaration are not on that list.

11. We are working diligently to implement a search box and I believe that Hostway will have fully implemented the search box function by July 31, 2007.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 26, 2007.

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NAMIT MERCHANT

# **EXHIBIT 1**

Date	Queries	Matched queries	Coverage	Spam queries	Spam impressions	Spam impressions	Clicks	Spam clicks	Total Clicks	Spam %	CTR	CPC	Estimated gross revenue	RPM
4/1/2007	2,414	1,917	79.41%	0	11,299	0	610	34	644	5.28	31.82%	\$0.27	\$ 163.37	\$ 67.68
4/2/2007	3,515	2,942	83.70%	7	17,859	60	959	22	981	2.24	32.60%	\$0.33	\$ 314.45	\$ 89.46
4/3/2007	6,252	5,232	83.69%	0	34,594	0	1,445	57	1,502	3.79	27.62%	\$0.38	\$ 555.87	\$ 88.91
4/4/2007	9,576	7,201	75.20%	0	48,049	0	2,344	53	2,397	2.21	32.55%	\$0.38	\$ 901.40	\$ 94.13
4/5/2007	11,764	8,228	69.94%	0	51,745	0	2,441	63	2,504	2.52	29.67%	\$0.38	\$ 932.08	\$ 79.23
4/6/2007	14,549	9,459	65.02%	2	55,828	2	2,661	72	2,733	2.63	28.13%	\$0.38	\$ 1,018.28	\$ 69.99
4/7/2007	15,144	9,518	62.85%	0	55,633	0	2,709	110	2,819	3.90	28.46%	\$0.26	\$ 709.49	\$ 46.85
4/8/2007	13,370	8,671	64.85%	3	49,037	11	2,399	89	2,488	3.58	27.67%	\$0.29	\$ 693.24	\$ 51.85
4/9/2007	17,101	12,410	72.57%	17	74,424	83	3,553	109	3,662	2.98	28.63%	\$0.34	\$ 1,219.62	\$ 71.32
4/10/2007	18,550	13,387	72.17%	13	79,136	38	3,726	111	3,837	2.89	27.83%	\$0.30	\$ 1,118.20	\$ 60.28
4/11/2007	27,222	17,215	63.24%	9	93,780	47	4,846	149	4,995	2.98	28.15%	\$0.25	\$ 1,195.82	\$ 43.93
4/12/2007	38,581	23,771	61.61%	8	127,239	49	6,918	335	7,253	4.62	29.10%	\$0.28	\$ 1,905.19	\$ 49.38
4/13/2007	41,638	25,158	60.42%	9	131,508	71	7,144	280	7,424	3.77	28.40%	\$0.28	\$ 2,030.33	\$ 48.76
4/14/2007	40,074	23,994	59.87%	17	120,850	106	7,240	221	7,461	2.96	30.17%	\$0.23	\$ 1,645.26	\$ 41.06
4/15/2007	36,581	22,515	61.55%	19	115,760	163	6,573	208	6,781	3.07	29.19%	\$0.24	\$ 1,572.25	\$ 42.98
4/16/2007	46,043	29,424	63.91%	12	158,341	99	8,157	260	8,417	3.09	27.72%	\$0.28	\$ 2,253.27	\$ 48.94
4/17/2007	42,648	26,903	63.08%	12	141,057	93	7,683	247	7,930	3.11	28.56%	\$0.27	\$ 2,041.72	\$ 47.87
4/18/2007	41,555	25,629	61.68%	16	132,219	115	7,546	259	7,805	3.32	29.44%	\$0.27	\$ 2,038.76	\$ 49.06
4/19/2007	38,928	23,197	59.59%	12	116,995	94	6,637	214	6,851	3.12	28.61%	\$0.25	\$ 1,649.24	\$ 42.37
4/20/2007	44,353	27,908	62.92%	15	144,219	98	8,165	272	8,437	3.22	29.26%	\$0.26	\$ 2,152.30	\$ 48.53
4/21/2007	43,400	26,838	61.84%	36	134,709	276	8,661	276	8,937	3.09	32.27%	\$0.24	\$ 2,069.38	\$ 47.68
4/22/2007	42,953	26,832	62.47%	54	135,419	306	8,549	229	8,778	2.61	31.86%	\$0.23	\$ 1,932.75	\$ 45.00
4/23/2007	54,180	35,346	65.24%	22	187,330	156	10,581	378	10,959	3.45	29.94%	\$0.26	\$ 2,698.46	\$ 49.81
4/24/2007	51,850	33,584	64.77%	26	178,481	178	10,057	367	10,424	3.52	29.95%	\$0.26	\$ 2,616.29	\$ 50.46
4/25/2007	69,484	38,783	55.82%	20	191,567	133	11,283	297	11,580	2.56	29.09%	\$0.22	\$ 2,526.83	\$ 36.37
4/26/2007	73,297	40,846	55.73%	16	199,873	126	11,689	319	12,008	2.66	28.62%	\$0.23	\$ 2,739.32	\$ 37.37
Total									5,031	159,607	3.15			