

1 Fredric A. Cohen, Esq.
 CHENG COHEN LLC
 2 1101 West Fulton Market, Suite 200
 Chicago, IL 60607
 3 Telephone: (312) 243-1701
 Facsimile: (312) 277-3961
 4 *(Application to be Admitted Pro Hac Vice to be Filed)*

5
 6 Charles G. Miller (State Bar No. 39272)
 C. Griffith Towle (State Bar No. 146401)
 BARTKO, ZANKEL, TARRANT & MILLER
 7 A Professional Corporation
 900 Front Street, Suite 300
 8 San Francisco, California 94111
 Telephone: (415) 956-1900
 9 Facsimile: (415) 956-1152

10 Attorneys for Plaintiff
 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 Corporation,
 19
 Defendant.
 20

) No. C 07-3759 JCS
)
) **NOTICE OF MOTION AND**
) **MOTION FOR TEMPORARY**
) **RESTRAINING ORDER AND**
) **ORDER TO SHOW CAUSE RE**
) **PRELIMINARY INJUNCTION;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**

BARTKOZANKEL
 Bartko-Zankel-Tarrant-Miller, Lovitt & Hanson, Inc. of Counsel
 900 Front Street, Suite 300
 San Francisco, CA 94111
 Phone (415) 956-1900 • Fax (415) 956-1152

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANT IAC SEARCH & MEDIA, INC:

3 PLEASE TAKE NOTICE that plaintiff Hostway Corporation (“Hostway”) hereby
4 applies for a temporary restraining order restraining defendant IAC Search & Media, Inc.
5 (“defendant”), and its agents, servants, employees and attorneys, and all those in active concert or
6 participation with defendant or them, from terminating the March 2, 2007 Advertising Services
7 and Search Services Syndication Agreement (the “Syndication Agreement”), including but not
8 limited to terminating, limiting or interfering with in any manner the Advertising Services and
9 Search Services provided by defendant to Hostway pursuant to the Agreement as identified in Exh.
10 A thereto (*i.e.*, the so-called advertising feed). Hostway further seeks an order to show cause why
11 a preliminary injunction should not be granted enjoining defendant, its agents, servants, employees
12 and attorneys and those in active concert or participation with defendant or them, from committing
13 such acts.

14 This motion is made on the grounds that Hostway will suffer irreparable injury
15 before the matter can be heard on regular notice because said acts of defendant threatens
16 immediate and irreparable damage to Hostway in that such acts would: (i) destroy Hostway’s
17 numerous customer relationships that Hostway has developed related to the Syndication
18 Agreement and the goodwill associated with those relationships; (ii) ruin Hostway’s reputation as
19 a reliable, high-quality provider of advertising and search services; (iii) effectively cause Hostway
20 to be excluded from the advertising and search services businesses indefinitely; and (iv) cause
21 Hostway to lose the entirety of its investment in its advertising and search services business.

22 This motion is based on the Complaint on file herein, and the Declaration of Namit
23 Merchant and Memorandum of Points and Authorities filed concurrently herewith, and on such
24 other matters and evidence as the Court considers.

BARTKOZANKEL
Bartko-Zankel, Foran, Miller, Lovitt & Hanson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Hostway Corporation ("Hostway") submits the following memorandum in support of its motion to enjoin defendant IAC Search & Media, Inc. ("defendant" or "IAC") from terminating the Advertising Services and Search Services Syndication Agreement dated as of March 2, 2007 (the "Syndication Agreement"), including but not limited to terminating, limiting or interfering with in any manner the Advertising Services and Search Services provided by defendant to Hostway pursuant to the Agreement as identified in Exh. A thereto (i.e., the so-called advertising feed).

II. STATEMENT OF FACTS

Hostway is in the business of providing web-hosting and related services to its customers across the country and abroad. (See Declaration of Namit Merchant ("Merchant Decl.") at ¶ 3.)

On March 2, 2007, Hostway entered into an Advertising Services and Search Services Syndication Agreement (the "Syndication Agreement" or "Agreement") with defendant. Hostway entered into the Syndication Agreement for the purpose of offering its web-hosting customers advertising and search services, including the ability to search for, identify and post, related and appropriate advertising links on customers' websites, drive web traffic to advertised sites, and thereby generate incremental revenue for Hostway's web-hosting customers. (See Merchant Decl. at ¶¶ 8-11.)

In anticipation of the Syndication Agreement and since entering into it, Hostway has spent thousands of engineering hours and millions of dollars to optimize its systems to select and channel relevant and appropriate advertised sites for its customers, and to monetize web traffic driven to such sites by Hostway's customers' websites. (See Merchant Decl. at ¶ 13 and Exh. 1 thereto.)

Hostway has contracted with numerous customers or syndication partners, (including Comcast, Qwest and Cablevision) to provide them with advertising and search services

BARTKOZANKEL
Bartko-Zankel-Torram-Miller | Lawfi & Thomson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152

1 made available to Hostway under the Syndication Agreement. (See Merchant Decl. at ¶¶7, 8
2 & 23.)

3 The Syndication Agreement is for an initial two-year term. While either party may
4 elect to prevent the Agreement’s automatic renewal for successive one-year renewal periods by
5 sending advance written notice to that effect, the Agreement may be terminated during the initial
6 two-year term only in the event of a material breach. Specifically, section 8.2 of the Syndication
7 Agreement provides that:

8 This Agreement may be terminated if either party fails to cure any
9 material breach of this Agreement within fourteen (14) days after
10 such material breach is conveyed in reasonable detail in writing to
11 the other party.

12 The Syndication Agreement also provides for immediate termination upon written
13 notice under certain limited circumstances set forth in section 8.3 of the Agreement. (See Exh. 1 to
14 Merchant Decl.)

15 Hostway has performed all of its obligations under the Syndication Agreement.
16 (See Merchant Decl. at ¶¶16, 17 & 22.)

17 Pursuant to a letter dated July 17, 2007, defendant purported to terminate the
18 Syndication Agreement “as a result of several breaches of the agreement by Hostway and other
19 reasons as described” in the letter. (See Exh. 2 to Merchant Decl.) This letter was the first time
20 that defendant had claimed that Hostway had breached -- let alone materially breached -- the
21 Syndication Agreement in any respect. (See Merchant Decl. at ¶ 16.)

22 The first purported “breach” claimed in the July 17 letter was Hostway’s supposed
23 breach of section 3.7, which requires Hostway “to integrate the Ask.com search box as the default
24 search box” for certain of Hostway’s customers and “to engage in certain promotional efforts” on
25 defendant’s behalf. Hostway disputes that it has failed to perform its obligation under section 3.7
26 of the Agreement, and the July 17 letter altogether fails to explain why it is that defendant believes
27 Hostway has failed to perform under the Agreement. (See Merchant Decl. at ¶ 17 and Exh. 2.)
28 However, even assuming that Hostway had not met its obligations under section 3.7 of the
Syndication Agreement (which it denies), defendant’s purported termination of the Syndication

BARTKOZANKEL
Bartko-Zankel-Torrom-Miller, Lovitt & Thomson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152

1 Agreement on that basis without providing Hostway at least 14 days to cure such default is
2 wrongful and in violation of the express terms of section 8.2 of the Agreement as set forth above.

3 The second purported "breach" alleged in the July 17 letter was defendant's
4 "belief" that Hostway had disclosed confidential information of defendant and of a customer of
5 defendant (and a competitor of Hostway) in an effort to convince the competitor's customers to
6 use Hostway's services. (See Merchant Decl. at ¶ 19 and Exh. 2 thereto.) The July 17 letter does
7 not indicate what confidential information defendant "believes" has been disclosed or even the
8 basis of defendant's supposed belief. Moreover, the Syndication Agreement's confidentiality
9 provisions concern confidential information of defendant and of Hostway, not information relating
10 to any competitor of Hostway or any other third party. In any event, Hostway has not disclosed
11 any confidential information of defendant or otherwise violated the confidentiality provisions of
12 the Syndication Agreement. (See Merchant Decl. at ¶ 19.) Therefore, defendant's purported
13 termination of the Agreement on this basis is also wrongful and in violation of the Syndication
14 Agreement.

15 The final purported basis for termination stated in the July 17 letter was that an
16 employee of Hostway -- who formerly had been employed by the same competitor whose
17 confidential information Hostway supposedly disclosed -- allegedly encouraged customers of his
18 former employer to switch to Hostway. The July 17 letter states that defendant's continued
19 offering of services to Hostway under the Syndication Agreement would "disparage" defendant
20 because of the alleged conduct of the competitor's former employee. (See Exh. 2 to Merchant
21 Decl.) The July 17 letter does not provide any factual support for its accusation. Put simply, the
22 claim is nothing more than a makeweight argument and their erstwhile termination of the
23 Agreement on this basis is also wrongful.

24 Each and every one of the three stated bases for termination is factually groundless,
25 contrary to the express terms of the Syndication Agreement and pretextual. Hostway believes the
26 defendant has sought wrongfully, and in violation of the Syndication Agreement's express terms,
27 to terminate the Syndication Agreement and to deprive Hostway of its rights thereunder, solely
28

BARTKOZANKEL
Bartko-Zankel-Torrom-Miller | Lovitt & Thomson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111

Phone (415) 956-1900 • Fax (415) 956-1152

BARTKOZANKEL
 Bartko-Zankel-Torrem-Miller | Lovitt & Hanson, Inc. of Counsel
 900 Front Street, Suite 300
 San Francisco, CA 94111
 Phone (415) 956-1900 • Fax (415) 956-1152

1 because Hostway’s competitor has demanded that defendant terminate its contractual relationship
 2 with Hostway and has threatened to terminate its own relationship with defendant (which is far
 3 more lucrative to defendant than its relationship with Hostway) if defendant fails to do so.
 4 Hostway believes that for this reason alone, and not because of any purported breach of the
 5 Agreement by Hostway, defendant sent the July 17 letter purporting to terminate the Syndication
 6 Agreement.

7 If the Agreement is terminated, Hostway will suffer immediate and irreparable
 8 damage. More particularly, such termination would: (i) destroy Hostway’s numerous customer
 9 relationships that Hostway has developed related to the Syndication Agreement and the goodwill
 10 associated with those relationships; (ii) ruin Hostway’s reputation as a reliable, high-quality
 11 provider of advertising and search services; (iii) effectively cause Hostway to be excluded from the
 12 advertising and search services businesses indefinitely; and (iv) cause Hostway to lose the entirety
 13 of its investment in its advertising and search services business. (See Merchant Decl. at ¶¶ 23-25.)

14 **III. LEGAL ARGUMENT**

15 A. Applicable Legal Standard -- Preliminary Injunction

16 It is well-settled that the basis for preliminary injunctive relief in the federal courts
 17 is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456
 18 U.S. 305, 312 (1982); *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1984).

19 In this Circuit, a plaintiff is entitled to injunctive relief if it establishes (i) “either a
 20 likelihood of success on the merits and the possibility of irreparable injury or (ii) that serious
 21 questions going to the merits were raised and the balance of hardship tips sharply in its favor.”
 22 *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d, 1510, 1517 (9th Cir. 1992); *see also Dept. of Park &*
 23 *Rec. for State of Cal.*, 448 F.3d 1118, 1123 (9th Cir. 2006) [same].¹ “These two formulations
 24 represent two points in a sliding scale in which the required degree of irreparable harm increases as
 25 the probability of success decreases.” *Arcamuzi v. Continental Airlines, Inc.*, 819 F.2d 935, 937

27 _____
 28 ¹ A “serious question” means questions that involve a “fair chance [of success] on the
 merits.” *Sierra Online, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

1 (9th Cir. 1987), citing *Oakland Tribune Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376
2 (9th Cir. 1985.

3 These tests have been described as essentially the same and as representing the
4 “opposite ends of the single-continuum in which the required showing of harm varies inversely
5 with the required showing of meritoriousness.” *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d
6 1215, 1217 (9th Cir. 1987). Put another way, “[the] critical element in determining the test to be
7 applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the
8 plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when
9 the balance tips less decidedly.” *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir.
10 1988).

11 B. Hostway is Likely to Succeed on the Merits Because the Purported
12 Termination of the Syndication Agreement is Wrongful

13 Under the 9th Circuit’s sliding scale test for preliminary injunctions, the party
14 seeking provisional injunctive relief must, as a “irreducible minimum . . . demonstrate a fair
15 chance of success on the merits, or questions serious enough to require litigation.” *Arcamuzi*,
16 *supra*, 819 F.2d at 937. Hostway’s “fair chance of success” here is easily demonstrated.

17 As explained above in more detail and in the accompanying Declaration of Namit
18 Merchant, defendant’s purported termination of the Syndication Agreement is wrongful and
19 entirely pretextual. Defendant will presumably claim otherwise. Nevertheless, for purposes of this
20 motion, Hostway has more than established a fair chance of success on the merits.

21 To briefly recap, defendant purported to terminate the Syndication Agreement on
22 three bases. Individually and collectively, defendant’s claims are meritless.

23 The first ground (Hostway’s purported failure to perform its obligations under
24 section 3.7 of the Agreement) is simply false. (*See* Merchant Decl. at ¶¶ 16, 17 & 22.) Moreover,
25 defendant was contractually required to provide Hostway with 14 days written notice of any
26 material breach of this provision and an opportunity to cure any such breach pursuant to section
27 8.2 of the Agreement. Even assuming that Hostway breached section 3.7 of the Agreement and
28

BARTKOZANKEL
Bartko-Zankel-Taromi-Miller | Lovitt & Hanson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152

BARTKOZANKEL
Bartko-Zankel-Torrey-Miller | Lawfi & Hanson, Inc. of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152

1 that its breach was “material” (which it denies), it is undisputed that defendant failed to provide the
2 requisite notice and opportunity to cure.²

3 The second claimed basis for the termination (defendant’s “belief” that Hostway
4 improperly disclosed defendant’s confidential information and the confidential information of a
5 competitor) is also false. As an initial matter, the Syndication Agreement’s requirements
6 regarding the disclosure of confidential information only applies to the parties to the Agreement.
7 (See Exh. 2 to Merchant Decl. at section 9.) In other words, even if Hostway disclosed the
8 “confidential information” of one of its competitors, it would not be a breach of the confidentiality
9 provisions in the Agreement. Remarkably, the July 17 letter fails to set forth any factual support
10 for defendant’s “belief” that Hostway disclosed any of defendant’s confidential information.
11 Regardless, Hostway has not disclosed any of defendant’s information. (See Merchant Decl. at ¶
12 19.)

13 The third and final basis for the termination is equally spurious. Defendant claims
14 that Hostway has encouraged customers of one of its competitors to “breach their agreements”
15 with the competitor and that such conduct -- which Hostway denies -- somehow disparages
16 defendant (not the competitor). This assertion is absurd on its face.

17 As indicated in Mr. Merchant’s Declaration, it is Hostway’s belief that the real
18 reason defendant is attempting to terminate the Agreement is that one of its largest customers (a
19 competitor of Hostway) is pressuring it to do so. In all events, it is clear that the purported
20 termination of the Syndication Agreement is devoid of any merit and that Hostway has far more
21 than a fair chance of prevailing on its claims against defendant.

22 C. Hostway Will Suffer Irreparable Harm Unless the Termination of the
23 Syndication Agreement is Enjoined

24 If the termination of the Syndication Agreement is not enjoined -- in particular the
25 “Advertising Services” and “Search Services” provided by defendant to Hostway pursuant to the
26 Agreement -- Hostway will suffer enormous and irreparable harm.

27 ² In fact, the July 17 letter was the first claim of any sort made by defendant that Hostway
28 had breached the Agreement in any respect. (See Merchant Decl. at ¶ 17.)

1 First and fundamentally, if the Agreement is terminated, Hostway will suffer a
 2 significant and potentially ruinous loss of business. (See Merchant Decl. at ¶¶ 23-25.) As the
 3 Supreme Court has stated, a “substantial loss of business (and perhaps even bankruptcy) absent
 4 injunctive relief qualifies as irreparable injury.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932
 5 (1975). Second, and similarly, the inevitable and significant damage to Hostway’s goodwill if the
 6 Agreement is terminated constitutes irreparable harm for purposes of supporting a preliminary
 7 injunction. See, e.g. *Rent-a-Center, Inc., v. Canyon Television & Appliance*, 944 F.2d 597, 603
 8 (9th Cir. 1991) ([“W]e have also recognized that intangible injuries, such as damage to ongoing
 9 recruitment efforts and goodwill, qualify as irreparable harm”), citing *Regents of Univ. of Cal. v.*
 10 *American Broadcasting Cos.*, 747 F.2d 511, 519-20 (9th Cir. 1984) [enjoining defendant school
 11 from refusing to televise the broadcast of a college football game where the plaintiff school cited
 12 “the impairment of their ongoing recruitment programs; the dissipation of alumni and community
 13 goodwill and support garnered over the years; placement of plaintiffs’ teams at a significant
 14 disadvantage for purposes of national ranking; the deprivation of the opportunity to showcase
 15 rivalries of unique tradition and moment in the ‘industry’; and a reduction in the attractiveness of
 16 the Pac-10-Big Ten Conference ‘product’ which would doom the Pac-10-Big Ten’s efforts to
 17 compete in the market.”]. Finally, if the Syndication Agreement is terminated, Hostway’s
 18 reputation with its customers will be irreparably damaged. Such damage to reputation has also
 19 been found to support injunctive relief. See, e.g., *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir.
 20 1987).

21 D. The Balance of Hardships Tips Firmly in Hostway’s Favor

22 As indicated above, the harm to Hostway if the Agreement is terminated will be
 23 immediate and catastrophic. Such damage would include (i) the destruction of Hostway’s
 24 numerous customer relationships that Hostway has developed related to the Syndication
 25 Agreement and the goodwill associated with those relationships; (ii) the destruction of Hostway’s
 26 reputation as a reliable, high-quality provider of advertising and search services; the exclusion of
 27 Hostway from the advertising and search services businesses indefinitely; and (iii) the elimination
 28

1 of Hostway's entire investment in its advertising and search services business. (See Merchant
2 Decl. at ¶¶ 23-25.)

3 In stark contrast, defendant will suffer no -- or at most little -- harm if it is
4 compelled to honor its contractual obligations during the pendency of a temporary restraining
5 order and, if appropriate as Hostway believes, a preliminary injunction. Furthermore, any harm
6 that defendant may suffer can be adequately protected against by a bond. See, e.g. *Ohio Oil Co. v.*
7 *Conway*, 279 U.S. 813, 815 (1929).

8 Under these circumstances, the balance of harm tips decidedly in Hostway's favor
9 and supports the issuance of the requested relief.

10 **IV. CONCLUSION**

11 Unless enjoined, the purported termination of the Syndication Agreement will
12 inflict irreparable harm on Hostway's business. Such damage cannot be measured or compensated
13 for by an eventual award of money damages. Coupled with this significant threat of irreparable
14 harm is the compelling evidence that Hostway will prevail on the merits of its claims at trial and
15 the absence of any harm to defendant. For all of the foregoing reasons and those set forth in the
16 accompanying Declaration of Namit Merchant, Hostway respectfully request that the Court enjoin
17 the termination of the Syndication Agreement.

18
19 DATED: July 23, 2007

20 BARTKO, ZANKEL, TARRANT & MILLER
21 A Professional Corporation

22
23 By: C. Griffith Towle
24 C. Griffith Towle
25 Attorneys for Plaintiff
26 HOSTWAY CORPORATION
27
28

BARTKOZANKEL
Bartko, Zankel, Tarrant-Miller, Lovitt & Hanson, Inc., of Counsel
900 Front Street, Suite 300
San Francisco, CA 94111
Phone (415) 956-1900 • Fax (415) 956-1152