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7 THOUGHT CONVERGENCE, INC. and NAME
INTELLIGENCE, LLC
8

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CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

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12 THOUGHT CONVERGENCE, INC.,
a Delaware Corporation and NAME
13 INTELLIGENCE, LLC, a Delaware
limited liability company,

14 Plaintiffs,

15 v.

16 JAY WESTERDAL, an individual;
17 PER WESTERDAL, an individual;
RAY BERO, an individual;
18 CAMERON JONES, an individual;
and NAME INTELLIGENCE, INC., a
19 Washington corporation;
DOTMOVIE, an unknown entity,

20 Defendants.
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Case No. CV-03088-R (AJWx)

**SECOND AMENDED
COMPLAINT FOR:**

- 1) **BREACH OF SECURITIES
EXCHANGE AGREEMENT;**
 - 2) **BREACH OF EMPLOYMENT,
NON-COMPETE AND
INFORMATION AND
INVENTION AGREEMENTS;**
 - 3) **BREACH OF FIDUCIARY
DUTY;**
 - 4) **BREACH OF THE COVENANT
OF GOOD FAITH AND FAIR
DEALING; AND**
 - 5) **ACCOUNTING**
- DEMAND FOR JURY TRIAL**

1 Plaintiffs Thought Convergence, Inc. (“TCI”) and Name Intelligence, LLC
2 (“NIL” and collectively with TCI, “Plaintiffs”), hereby demand a jury trial on their
3 Complaint and allege as follows:

4 **INTRODUCTION**

5 1. This case concerns a blatant breach of contract by the sellers of an
6 internet business to TCI, the breach of an employment agreement, noncompete and
7 inventions agreement by one of sellers’ principals, Jay Westerdal, and Mr.
8 Westerdal’s breach of fiduciary duties owed to Plaintiffs. Following the
9 acquisition, Mr. Westerdal failed to assist the business in any meaningful way, used
10 company assets as his own personal bank account and began developing a
11 competing business in violation of his duties and contractual obligations to
12 Plaintiffs. Plaintiffs have suffered untold damage by virtue of these breaches,
13 creating substantial offsets to the purchase price for the business. By this action,
14 Plaintiffs are exercising their right to set-off the amounts to which they are entitled
15 by virtue the claims described herein against the Second Post-Closing Payment due
16 to Name Intelligence, Inc. (“NII”), if any.

17 **JURISDICTION AND VENUE**

18 2. Jurisdiction is based on 28 U.S.C. §1332(c) as Plaintiffs and
19 Defendants are citizens of different states and the amount in controversy exceeds
20 \$75,000 exclusive of interest and costs.

21 3. Venue is proper in this Court pursuant to 28 U.S.C. §1391(2) as a
22 substantial amount or part of the events or omissions giving rise to the claim
23 occurred in this district. Venue is also proper in this Court pursuant to Section 7.11
24 of the Securities Exchange Agreement, which requires that any action arising out of
25 or relating to the agreement be brought in the State of California, County of Los
26 Angeles.

27 **PARTIES**

28 4. Plaintiff TCI is, and at all times herein mentioned was, a corporation

1 duly organized pursuant to the laws of the state of Delaware, with its principal place
2 of business in Los Angeles, California. TCI is an industry-leading provider of
3 domain management, monetization, sales and development tools and technologies
4 for premium domain owners and aggregators of high quality domain portfolios.

5 5. Plaintiff Name Intelligence, LLC (“NIL”) is, and at relevant times
6 herein mentioned was, a limited liability company organized in the state of
7 Delaware with citizenship in California.

8 6. On information and belief, Defendant Mr. Jay Westerdal (“J.
9 Westerdal”) is an individual residing in Mercer Island, Washington. J. Westerdal
10 was the co-founder, former CEO and President of NII, and, prior to his termination
11 in May 2009, was the Chief Product Officer of NIL and TCI and is a member of the
12 TCI board of directors.

13 7. On information and belief, Defendant Mr. Per Westerdal (“P.
14 Westerdal”) is an individual residing in Bellevue, Washington.

15 8. On information and belief, Defendant Mr. Ray Bero (“R. Bero”) is an
16 individual residing in Seattle, Washington.

17 9. J. Westerdal, P. Westerdal, R. Bero and C. Jones were each controlling
18 shareholders of NII (the “Shareholders”).

19 10. On information and belief, Defendant NII is, and at all times herein
20 mentioned was, a corporation duly organized pursuant to the laws of the state of
21 Washington, with its principal place of business in Bellevue, Washington.

22 11. On information and belief, DotMovie is a business entity with a
23 website located at www.dotmovieregistry.com (“DotMovie”). On information and
24 belief, DotMovie has its principle place of business in Mercer Island, Washington
25 and J. Westerdal is its CEO and founder.

26 12. TCI is informed and believes, and on that basis alleges, that the
27 Defendants named herein are the partners, joint venturers, alter egos, agents,
28 principals, representatives, employees, servants, successors or predecessors of the

1 other Defendants, each and all of them, with respect to the matters alleged herein.
2 The Defendants named herein acted within the course and scope of their authority
3 as such partners, joint venturers, alter egos, agents, principals, representatives,
4 employees, servants, successors or predecessors, and with the consent, ratification
5 and approval of their co-Defendants in doing the things alleged herein.

6 **THE TRANSACTION**

7 13. In late 2007, representatives of TCI's predecessor in interest
8 approached J. Westerdal concerning the potential acquisition of NII's businesses,
9 Name Intelligence, LLC and Spry.Com, Inc. ("Spry" and together with NIL, the
10 "NIL Businesses").

11 14. The NIL Businesses consisted of online tools for domain data
12 aggregation, analysis and management, and a virtual private server web hosting
13 services business.

14 15. During the negotiations, J. Westerdal detailed how the NIL Businesses
15 would be complementary to TCI's business operations and assured TCI that the NIL
16 Businesses would be immediately accretive to TCI's bottom line. J. Westerdal also
17 promised that the NIL Businesses were growing year to year, and set for
18 "immediate and explosive growth." Likewise, J. Westerdal assured TCI that the
19 second and third installments of the agreed upon purchase price (as described
20 below) would be "easily paid by the net profits" of the NIL Businesses as reflected
21 in the Financial Statements of the NIL Businesses. Indeed, as a member of TCI's
22 board of directors, an officer, a founder and an employee of the new entity, J.
23 Westerdal promised his continued full-time "best business efforts" to make this
24 happen. J. Westerdal's assurances and promises in this regard materially induced
25 TCI not only to acquire the NIL businesses, but also to pay the purchase price
26 sought by J. Westerdal.

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1 Invention Agreement”).⁵ The foregoing agreements are collectively referred to
2 herein as the “Transaction Documents.”⁶

3 20. As part of the purchase of the NIL Businesses, Shareholders made
4 certain representations and warranties concerning the transaction. Among others,
5 Shareholders represented and warranted as follows:

6 3.24 Full Disclosure. None of the representations or
7 warranties made by the Company herein or in the Disclosure
8 Schedule, the other Transaction Documents or any certificate
9 furnished by the Company pursuant to this Agreement, when
10 all such documents are read together in their entirety, contains
11 or will contain any untrue statement of material fact, or omits
12 to state any material fact necessary in order to make the
statements contained herein or therein, in light of the
circumstances under which made, not misleading.

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15 21. Shareholders also covenanted to, among other things, the following:

16 5.1 Expenses. Whether or not the Transaction is
17 consummated, except as otherwise provided herein, all fees
18 and expenses incurred in connection with the Transaction,
19 including, but not limited to, all legal, accounting, financial,
20 advisory, consulting and all other fees and expenses of third
21 parties incurred by a party in connection with the negotiation
22 and effectuation of the terms and conditions of such
23 Transaction Documents and the Transaction, shall be the
24 obligation of the respective party incurring such fees and
expenses; provided, that Shareholders shall pay all fees and
expenses of the Company or Shareholders incurred in
connection or with, or otherwise arising as a result of, the
Transaction Documents and the Transaction....

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27 ⁵ A true and correct copy of the Information and Invention Agreement is attached
hereto as Exhibit E.

28 ⁶ Except where otherwise noted, capitalized terms shall have the same meaning
specified in the Transaction Documents.

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5.9 Confidentiality and Assignment Agreements.

Shareholders shall take all commercially reasonable measures to obtain confidentiality and assignment agreements in the form acceptable to Parent from each of the current and former employees of the Company who prior to the Closing Date have not signed a form of such agreement...

5.10 Third Party Consents. If any of the Required Consents as defined and set forth in Schedule 3.3 are not obtained and delivered by the Company or Shareholders immediately prior to or as of the Closing, but notwithstanding, the Transaction contemplated hereunder is consummated, following the Closing, Shareholders shall take all commercially reasonable measures to obtain such Required Consents from third parties...

22. In addition to the representations, warranties and covenants, J. Westerdal also agreed to devote his full attention to the business operations after the acquisition and not to compete with TCI.

23. Specifically, in the Offer Letter J. Westerdal agreed that:

Obligations to the Company. During your Employment, you shall devote your full business efforts and time to the Company. During your Employment, without prior written approval of the Company's Chief Executive Officer, you shall not render services in any capacity to any other person or entity and shall not act as a sole proprietor or partner of any other person or entity or own more than five percent of the stock of any other corporation.

24. Likewise in the Noncompetition Agreement, J. Westerdal acknowledged and agreed that:

C. As a condition to its willingness to close the Exchange pursuant to the Exchange Agreement, Thought Convergence has required that Stockholder agree, and Stockholder has agreed, to the noncompetition and nonsolicitation covenants

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and the confidentiality agreements provided in this Agreement.

D. By his signature below, Stockholder acknowledges and agreed that (a) his execution and delivery of this Agreement is a material inducement for Thought Convergence to enter into the Exchange Agreement and consummate the transactions contemplated thereby and (b) he will receive material financial benefits and other goods and valuable consideration from the Exchange.

1. Noncompetition.

(b) During the period which shall commence at the Closing (as defined in the Exchange Agreement) . . . Stockholder shall not (i) enter into, participate in, provide advisory services in connection with, or otherwise assist with or be interested economically in the Restricted Business (as defined below) anywhere in the Business Area (as defined below), (ii) directly or indirectly (including without limitation, through any Affiliate (as defined below) of Stockholder, own, manage, operate, control or otherwise engage or participate in, or be connected as an owner, partner, principal, creditor, salesman, guarantor, advisor, member of the board of directors of, employee of or consultant in . . . (B) any entity or business, division, group, or other subset of any business, engaged (or to Stockholders' knowledge, planning to engage) in the Restricted Business in the Business Area or (iii) make preparations to provide assistance to any Restricted Business or to form a Restricted Business in the Business Area, including but not limited to any research or development efforts aimed at ultimately benefiting a Restricted Business.

25. Finally, in the Information and Invention Agreement, J. Westerdal agreed that:

2. Duties. I will perform for the Company such duties as may be designated by the Company from time to time or that are otherwise within the scope of the Relationship and not contrary to the instructions from the Company. During the Relationship, I will devote my entire best business efforts to the interests of the Company and will not

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engage in other employment or in any activities detrimental to the best interests of the Company without the prior written consent of the Company.

(d) **Assignment of Company Inventions.** I agree that I will promptly make full written disclosure to the Company, will hold in trust for the sole right and benefit of the Company, and hereby assign to the Company, or its designee, all my right, title and interest throughout the world in any and all Company Inventions. I further acknowledge that all Company Inventions that are made by me (solely or jointly with others) within the scope and during the period of the Relationship are “works made for hire” (to the greatest extent permitted by applicable law) and are compensated by my salary. I hereby waive and irrevocably quitclaim to the Company or its designee any and all claims, of any nature whatsoever, that I now have or may have for infringement of any and all Company Inventions.⁷

26. On May 2, 2008, the transaction closed and TCI began operating the NIL Businesses as a subsidiary of TCI.

J. WESTERDAL AND DEFENDANTS’ BREACH

27. Following the transaction close and the integration of the NIL Businesses into TCI, TCI began to uncover material differences between the representations made and the reality of the NIL Businesses.

28. For example, despite assertions that the NIL Businesses were growing year over year and set for explosive and immediate growth, the NIL Businesses produced flat revenues for all of 2008.

29. Additionally, despite Shareholders’ assertions that the net profits from the NIL Businesses would pay for the second and third installments of the purchase price, the net profits were severely deficient to meet that obligation.

⁷ Company Invention is defined in 4. (c) of the agreement as “an and all Inventions that I may solely or jointly author, discover, develop conceive, or reduce to practice during the period of the Relationship . . .”

1 30. Likewise, TCI discovered that NII and the Shareholders failed to honor
2 the representations, warranties and covenants in the Securities Exchange
3 Agreement and its incorporated exhibits. By way of example, TCI discovered that
4 J. Westerdal was shirking his responsibilities, duties and obligations to TCI. J.
5 Westerdal failed to keep regular business hours, failed to attend strategy and other
6 business meetings and failed to manage employees and clients. Instead, J.
7 Westerdal would take extended vacations and brag to third parties that he need not
8 attend to his duties as Chief Product Officer of TCI.

9 31. J. Westerdal also used company assets as his own personal bank
10 account, loaning himself money and giving himself raises without authorization.
11 When challenged, J. Westerdal informed TCI that the purpose of the loan and raise
12 was to bolster his application for a bank loan to purchase his primary residence.

13 **TCI's PERFORMANCE AND SET-OFF RIGHTS**

14 32. As a result of the breaches alleged herein, TCI was, and is, entitled to
15 set-off the damages it has suffered against the Post Closing Payments due NII
16 pursuant to the Securities Exchange Agreement.

17 33. On that basis, on or about May 8, 2009, TCI wire transferred \$4
18 million to NII and transferred \$1.5 million into an interest bearing escrow account
19 pending a determination on the set-off amount against the Post Closing Payments.

20 34. TCI continued to investigate the amounts of its set-off claims between
21 May 8, 2009 and May 26, 2009. That investigation revealed that much of the
22 misconduct, while egregious and startling, was difficult to monetize and continues
23 to be a moving and growing target. While the amount of set-off is likely to be well
24 in excess of \$1.5 million, a final determination will require additional time and the
25 retention of consultants and experts in order to fix an amount to its substantial
26 claims.

27 35. TCI also had no desire to break-up the recovery of funds between set-
28 offs and other sources of repayment based on the tortious activity of J. Westerdal.

1 conditions, covenants and promises required pursuant to the Securities Exchange
2 Agreement, or are otherwise excused from said performance based on the breaches
3 alleged herein.

4 42. Shareholders have violated their contractual obligations under the
5 Securities Exchange Agreement by, among other things:

6 a) using TCI funds to make payments to employees under the Stock
7 Right Cancellation Agreements between NII and such employees;

8 b) using TCI funds to pay NII's attorney fees related to the acquisition
9 and attorneys fees related to litigation with Stephen Douglas;

10 c) breaching the representation and warranty in Section 3.28 of the
11 Exchange Agreement that none of the Shareholder Domain Names (as defined in
12 the Exchange Agreement) were acquired using any of the assets of NII;

13 d) breaching the covenant in Section 5.9 of the Exchange Agreement
14 to use commercially reasonable efforts to obtain confidentiality and assignment
15 agreements from current and former employees that had not signed such an
16 agreement as of the closing date; and

17 e) breaching the covenant in Section 5.10 of the Exchange Agreement
18 to use commercially reasonable efforts to obtained all required consents from third
19 parties.

20 f) breaching the representation and warranty in Section 3.24 of the
21 Exchange Agreement, by J. Westerdal shirking his responsibilities, duties and
22 obligations to TCI, including without limitation, failing to keep regular business
23 hours, failing to attend strategy and other business meetings and failing to manage
24 employees and clients. J. Westerdal would instead take extended vacations and
25 brag to third parties that he need not attend to his duties as Chief Product Officer of
26 TCI.

27 43. As a consequence of Shareholders' breach, Plaintiffs have suffered
28 damage in an amount to be proven at trial.

1 48. In the Noncompetition Agreement, J. Westerdal agreed that breach of
2 “the provisions of this Agreement (including but not limited to those set forth in
3 Section 1(b) below) would cause irreparable harm to Company and Thought
4 Convergence, which harm will not be adequately and fully redressed by the
5 payment of damages to Company and Thought Convergence.”

6 49. As a consequence of J. Westerdal’s breaches, Plaintiffs have suffered
7 damages in an amount to be proven at trial.

8 50. As a consequence of J. Westerdal’s breaches, Plaintiffs are also
9 entitled to injunctive relief, enjoining J. Westerdal from wrongfully competing
10 against TCI.

11 **THIRD CLAIM FOR RELIEF**

12 Breach of Fiduciary Duty

13 (Against J. Westerdal)

14 51. Plaintiffs reallege and incorporate by reference paragraphs 1 through 50
15 above as though fully set forth herein.

16 52. J. Westerdal was at all relevant times an officer and board of director
17 member of TCI and NIL. As such, J. Westerdal owed TCI and NIL duties of
18 loyalty and fiduciary duties to, among other things, act in good faith and in a
19 manner that benefits TCI and NIL and not to act for those whose interests,
20 including J. Westerdal’s own, conflict with TCI and NIL. Due to such duties, J
21 Westerdal was and is prohibited from competing with TCI and NIL or attempting to
22 appropriate TCI’s or NIL’s business or profits for his own personal benefit.

23 53. By the actions alleged herein, J. Westerdal breached that duty of
24 loyalty and fiduciary duty to TCI and NIL.

25 54. In addition, J. Westerdal breached his fiduciary duties to TCI and NIL
26 by meeting with NIL Businesses’ employees and falsely informing them, among
27 other things, that (i) TCI would be unable to make payroll; (ii) TCI was insolvent;
28 and (iii) J. Westerdal would get his company back.

1 55. J. Westerdal further breached his fiduciary duties by disclosing TCI
2 and NIL confidential information to the public.

3 56. As a consequence of J. Westerdal's breach, Plaintiffs have suffered
4 damages in an amount to be proven at trial.

5 57. J. Westerdal engaged in the foregoing conduct maliciously and with
6 the intent of injuring TCI and NIL and/or with knowing indifference to the
7 likelihood that this conduct would injure TCI and NIL. Plaintiffs therefore request
8 an award of exemplary damages in an amount sufficient to punish J. Westerdal for
9 his conduct.

10 **FOURTH CLAIM FOR RELIEF**

11 Breach of the Covenant of Good Faith and Fair Dealing
12 (Against NII and Shareholders)

13 58. Plaintiffs reallege and incorporate by reference paragraphs 1 through 57
14 above as though fully set forth herein.

15 59. California law implies a covenant of good faith and fair dealing in all
16 contracts between parties entered in the State of California.

17 60. As a result of the actions set forth hereinabove, Defendants breached
18 the covenant of good faith and fair dealing implied in the Transaction Documents,
19 and as a result thereof, Plaintiffs are entitled to damages as prayed.

20 **FIFTH CLAIM FOR RELIEF**

21 Accounting

22 (Against NII and J. Westerdal)

23 61. Plaintiffs reallege and incorporate by reference paragraphs 1 through
24 60 above as though fully set forth herein.

25 62. J. Westerdal covenanted in the Securities Exchange Agreement that he
26 expended \$430,000 in connection with the legitimate business expenses for the
27 Company.

28 63. Plaintiffs are entitled to an Accounting to determine if those

1 expenditures were in fact legitimate business expenses.

2 64. Plaintiffs seek an Order from the Court for such an accounting, access
3 to J. Westerdal's book and records, and the issuance of tax and financial
4 information concerning those expenditures.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs pray for the following relief:

- 7 1. Judgment in favor of Plaintiffs as to all causes of action;
- 8 2. Compensatory damages, as well as incidental and consequential
9 damages in a sum according to proof, but not less than \$1.5 million;
- 10 3. For an injunction, enjoining J. Westerdal from wrongfully competing
11 against TCI or NIL, or disclosing confidential information or otherwise breaching
12 his obligations and duties to TCI and NIL and mandating that J. Westerdal assign
13 all interest, right and title to the DotMovieRegistry.com business, including without
14 limitation the DotMovieRegistry.com domain name any domain names related
15 thereto;
- 16 4. For an Order that an appropriate accounting be made, access be
17 provided to all appropriate books and records of J. Westerdal and J. Westerdal's
18 financial and tax documents be issued;
- 19 5. For an award of reasonable attorneys' fees as authorized by section
20 7.12 of the Securities Exchange Agreement and applicable statutory provisions;
- 21 6. For costs of suit herein incurred, and
- 22 7. For such other and further relief as the Court deems proper.
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1 Dated: January 13, 2010

KENT B. GOSS
CHRISTOPHER J. CHAUDOIR
ORRICK HERRINGTON & SUTCLIFFE LLP

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CHRISTOPHER J. CHAUDOIR
Attorneys for Plaintiff
THOUGHT CONVERGENCE, INC. and
NAME INTELLIGENCE, INC.

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DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.

Dated: January 13, 2010

KENT B. GOSS
CHRISTOPHER J. CHAUDOIR
ORRICK HERRINGTON & SUTCLIFFE LLP

Christopher Chaudoir/wsc

CHRISTOPHER J. CHAUDOIR
Attorneys for Plaintiff
THOUGHT CONVERGENCE, INC. and
NAME INTELLIGENCE, INC.

PROOF OF SERVICE

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 777 South Figueroa Street, Suite 3200, Los Angeles, California 90017. On January 19, 2010, I served the following document(s):

SECOND AMENDED COMPLAINT

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- By depositing a true and correct copy of the document(s) listed above with Fed Ex in Los Angeles, California, enclosed in a sealed envelope.
- (by Electronic Mail), I caused such documents to be transmitted by electronic mail to the offices of the addressee.

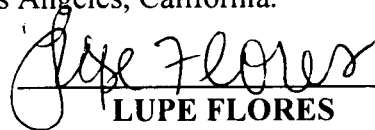
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*Attorneys for Defendants and
 Counterclaimants*
**JAY WESTERDAL, and NAME
 INTELLIGENCE INC. and
 Defendant PER WESTERDAL**

I am employed in the county from which the mailing occurred. On the date indicated above, I placed the sealed envelope(s) for collection and mailing at this firm's office business address indicated above. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the firm's correspondence would be deposited with the United States Postal Service on this same date with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2010 at Los Angeles, California.



LUPE FLORES

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PROOF OF SERVICE BY HAND DELIVERY

I declare I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is USA Network, Inc., 800 West 1st Street, Suite 200-B, Los Angeles, California 90012.

On January 19, 2010, I served the following document(s):

SECOND AMENDED COMPLAINT

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below:

Robert L. Wallan
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Mariah L. Brandt
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Fax: (213) 629-1033

Attorneys for Defendants and Counterclaimants
JAY WESTERDAL and NAME
INTELLIGENCE INC. and
Defendant PER WESTERDAL

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2010, at Los Angeles, California.

Jeffrey Lopez

J2
USA Network, Inc.