

1 Plaintiff,)
2 [Redacted])
3 vs.)
4 Defendant,)
5 NIX SOLUTIONS,)
6 DASHA MASLOVA,)
7 ALEXANDER AVDEEV, IVAN)
8 TKACH, YURIY NESMIYAN,)
9 SERGEY MELNIK, OLEG)
10 IVANOV, VICTOR)
11 SHALNYEV, et al.)

**[COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF]**

INTRODUCTION

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16 **This is an action for damages resulting from negligence, and**
17 **defective and incomplete work performed by Defendant on behalf**
18 **of Plaintiff. Defendant operates a company under the name NIX**
19 **Solutions that provides web development services to clients on**
20 **an hourly or fixed fee basis. Plaintiff was a client of**
21 **Defendant.**

BACKGROUND

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25 **In early 2009, Plaintiff hired Defendant to develop and maintain**
26 **a new webcam website called [redacted]. Development took 6**
27 **months to complete, roughly 3 months longer than originally**
28 **quoted by Defendant, but that was fine with Plaintiff since**

1 Plaintiff believed it would translate into more website features
2 and a more robust website. On the day www.[redacted] launched to
3 the public, and virtually weekly until May 2012, it experienced
4 an abnormally high level of downtimes, crashes, bugs, and slow
5 speeds. Website bugs big and small arose daily and were
6 intractable - a "fixed" problem would re-appear weeks later.
7 Important new site features were constantly sacrificed while
8 resources were put toward staving off website malfunctions.

9
10 Based on promises made by Defendant, Plaintiff was confident
11 things would improve. [redacted] was a new and very small site
12 so growth pains were not part of the equation. Plaintiff hoped
13 it would be only a matter of time before all of [redacted]'s
14 problems would be resolved because the problems were impacting
15 Plaintiff's return on investment leading to complications in
16 funding and budgeting.

17
18 Various remedies were applied by Defendant but mostly failed.
19 Hundreds of hours of downtime and site malfunctions continued
20 relentlessly until around May 21, 2012 at which time most of the
21 problems finally appeared to be resolved. Only after expert
22 developers began working on [redacted] beginning in 2012 did
23 problems that plagued the site for years finally end. Some
24 issues that existed on [redacted] for years were now able to be
25 fixed within days.

26 Coincidentally, one of Defendant's main middle-level (non-
27 expert) developers named Yuriy Nesmiyan who had developed
28 [redacted] prior to 2012, mysteriously departed from Defendant's

1 company. Plaintiff didn't care to ask why since Mr. Nesmiyan was
2 relatively unsuccessful in curing chronic site problems during
3 his tenure.

4
5 By the time [redacted]'s stability problems seemed to be under
6 control, the damage had already been done. Years of site
7 crashes, slow speeds, serious bugs, and a lack of new features
8 had taken its toll. [redacted] was declining rapidly while
9 competitor sites, new and old, continued their rapid ascension.
10 One site barely over a year and a half old had grown to over 10
11 times the popularity of [redacted], even though [redacted] had a
12 two year head start.

13
14 The countless hours Plaintiff spent monitoring [redacted],
15 assisting with site troubleshooting, shifting goals and
16 strategies to accommodate site setbacks, dealing with customer
17 dissatisfaction, and the ultimate humiliation of watching newer
18 sites leapfrog [redacted] in success negatively affected
19 Plaintiff's personal health.

20
21 The last major development performed by Defendant on [redacted]
22 began in December 2011, known as the "tipping feature" and was
23 not completed until mid December 2012, approximately 8+ months
24 longer than estimated by Defendant. The launch of the tipping
25 feature was typical of all site feature launches for [redacted]
26 - it was met with a frustrating level of problems. The launch
27 was attempted twice but failed, required 15 hours of downtime,
28 lacked certain previously specified functionality, and caused an

1 avalanche of new critical bugs that negated any benefit the
2 feature provided to [redacted].
3

4 Development abruptly ended after the launch of the tipping
5 feature. On November 30, 2012, Defendant informed Plaintiff that
6 laws in the Ukraine had prohibited Defendant from developing
7 websites like [redacted] since 2009. Defendant was concerned
8 about facing penalties since authorities had recently audited
9 another development company resulting in penalties.
10

11 Therefore, a new development company called [redacted] was hired
12 by Plaintiff to carry on development duties. Still in the
13 process of acquainting themselves with the development code for
14 [redacted], [redacted] was burdened with tackling numerous
15 critical bugs left by Defendant, many which remain unresolved to
16 date (March 7, 2013).
17

18 Whether through neglect, incompetence, wilful intent, or a
19 combination thereof, Defendant's inability to develop and
20 maintain [redacted] in functioning order caused Plaintiff to
21 lose millions of dollars in revenue, irreparably harmed
22 [redacted]'s reputation, handicapped the site's potential, and
23 damaged Plaintiff's livelihood and physical health.
24
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26 RELEVANT FACTS

27 1. Defendant developed Plaintiff's website illegally
28 for 3 years

1
2 On November 30, 2012 Defendant sent an email informing Plaintiff
3 that [redacted] development would cease because of the
4 illegality of developing adult oriented websites in Defendant's
5 country. Defendant told Plaintiff that the law had been in
6 effect since 2009¹. The timing of the news couldn't have been
7 worse since Plaintiff had waited over a year for a single
8 important feature (the 'tipping feature') that wasn't yet
9 launched² and [redacted] was in rapid decline, in part due to a
10 lack of such features.

11
12 Plaintiff scrambled to find a new development company to take
13 over [redacted] development³. Defendant's short notice meant that
14 no newly hired development company would be able to quickly fix
15 critical problems on [redacted] arising from Defendant's launch
16 of the tipping feature in mid December 2012.

17
18 Defendant had a fiduciary duty to disclose its legal ability to
19 work on Plaintiff's website. The omission of Defendant's legal
20 standing with respect to Plaintiff's website suggests Defendant
21 did not have Plaintiff's best interest in mind and entered into
22 an agreement with Plaintiff in bad faith. Unbeknownst to
23 Plaintiff, [redacted] had been at risk of losing all
24 developmental support from Defendant at any moment over the

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1 course of 3 years which would have left Plaintiff's business and
2 livelihood in ruin.

3
4 Having to move development duties to a new company in haste
5 increased Plaintiff's costs, stalled new site feature
6 development, and allowed new critical bugs to persist for months
7 at a vulnerable stage in [redacted]'s chequered history⁴.

8
9 **2. Defendant used non-expert developers without**
10 **Plaintiff's knowledge**

11
12 The expectation for somebody hiring a company to develop a
13 complex website is that the company's best most knowledgeable
14 and experienced employees are going to be responsible for
15 developing it. When Plaintiff approached Defendant and provided
16 Defendant with the scope of the [redacted] project, Defendant
17 was eager to retain Plaintiff's business. However, Defendant did
18 not warn Plaintiff that Defendant had no intention of using
19 expert developers for [redacted] - (i.e. expert developers were
20 not going to write any of the code for [redacted] nor
21 troubleshoot any unforeseen problems the site might experience).
22 Instead, Defendant's middle-level developers were going to
23 handle all development duties⁵.

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1 Plaintiff was unaware of Defendant's two-tier development staff,
2 and had Plaintiff known, he would have opted for expert
3 development only, because the new site was crucial to the
4 viability of Plaintiff's online business.

5
6 Proper business practice is for contractors to inform clients of
7 their options, especially when the quality of the end product is
8 at stake and the product is very complex. Defendant omitted this
9 key information from Plaintiff fearing the higher cost for
10 expert development would dissuade Plaintiff from hiring
11 Defendant⁶. Unfortunately, Defendant's decision proved much more
12 costly to Plaintiff than expert development ever could have.

13
14 On November 8, 2011 Plaintiff was informed that experts had only
15 developed the architecture for [redacted], after Plaintiff
16 inquired about increased development fees quoted by Defendant
17 for development planned to start in 2012⁷. From the site launch
18 date in July 2009 to November 2011, the seemingly insurmountable
19 website problems never prompted Defendant to volunteer expert
20 services to Plaintiff⁸ who would demonstrate in mid 2012 that
21 they were capable of fixing those problems⁹.

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1 The revelation that Plaintiff's website which had suffered
2 embarrassing malfunctions for years, countless hours of
3 downtime, loss of traffic, credibility, and millions in
4 potential revenue could have been averted if not avoided had
5 Defendant put expert developers on the job was shocking.

6
7 One of Defendant's most frequent explanations for continuous
8 [redacted] malfunctions was that the website architecture was
9 very complex¹⁰. However, [redacted] was no more complex than any
10 of its competitor sites, yet those sites had not been plagued
11 with uptime and speed issues. Defendant was irresponsible,
12 negligent, and reckless by providing lower quality developers to
13 work on Plaintiff's complex site, and not volunteering to put
14 expert developers on the job after [redacted] launched and it
15 became abundantly clear that higher skilled developers were
16 needed to develop and maintain the site in working order.

17
18 **3. Defendant developed Plaintiff's website in expensive**
19 **uncommon programming language**

20
21 Plaintiff is not a developer or programmer and relied on the
22 expertise and wisdom of Defendant to decide the appropriate
23 computer language to use for developing [redacted]. In the past,
24 Plaintiff had great success operating websites developed in PHP
25 wherein malfunctions were such a rarity that the websites ran on
26 virtual auto-pilot over the course of years. Defendant suggested

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¹⁰

1 coding [redacted] using JAVA and being none the wiser, Plaintiff
2 accepted¹¹.

3
4 In hindsight Plaintiff recognizes that JAVA was not an ideal
5 choice. JAVA is commonly used in banking applications because it
6 is robust, however it is complicated, expensive, time-consuming
7 and expert consensus is that it is not as friendly for web-based
8 applications as other more popular languages/frameworks such as
9 .NET and PHP¹². Technicians at the hosting company previously
10 used by Plaintiff stated they would not have recommended JAVA
11 for a site like [redacted]¹³. More recently, Plaintiff's newly
12 hired development team, [redacted], said the same and also
13 stated that Plaintiff's largest competitor site is coded in .NET
14 which is what the newly hired team is re-coding [redacted] in.
15 According to [redacted], additional benefits of .NET include
16 decreased development time, less expensive development fees, and
17 better solutions for monitoring and fixing site problems when
18 they arise¹⁴.

19 Plaintiff questions the motive for Defendant to recommend using
20 JAVA when it is much less common for web-based applications than
21 other languages and frameworks¹⁵, and often more expensive to use
22 for development.

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2 Plaintiff constantly stressed the importance of time in getting
3 [redacted] up and running bug-free but it seems this did not
4 factor into Defendant's decision when choosing the programming
5 language used on [redacted] prior to or during [redacted]
6 development over the past 3 years.

7
8 **4. Defendant's management ignored Plaintiff's appeal**
9 **for assistance**

10
11 Plaintiff's primary contact on Defendant's development staff was
12 Dasha Maslova. Occasionally, Plaintiff also corresponded with
13 Defendant Sergey Melnik (Defendants salesperson who communicated
14 with Plaintiff before Plaintiff became a client of Defendant).

15
16 Attempting to find an explanation for the poor quality
17 development of [redacted] and whether there was a better path to
18 follow going forward, Plaintiff inquired and obtained from Mr.
19 Melnik via ICQ, the name and email address of Defendant's head
20 project manager, Ivan Tkach. Plaintiff sent emails to Mr. Tkach
21 asking him to look into the problems [redacted] had been
22 experiencing and for any insight or solutions he might recommend
23 or have available¹⁶. Defendant Ivan Tkach did not respond to any
24 of Plaintiff's emails for the entire year¹⁷. The only
25 communication Plaintiff had with Mr. Tkach occurred in December
26

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1 2012, after Plaintiff learned that Defendant would stop
2 [redacted] development. Mr. Tkach was brought into email
3 correspondence by Mrs. Maslova when explaining to Plaintiff the
4 reasons why development would cease.

5
6 Plaintiff was not a small fry in Defendant's Elance portfolio.
7 Plaintiff's [redacted] project valued it among the top 15 most
8 expensive projects developed by Defendant out of hundreds.
9 Defendants silence in granting Plaintiff the courtesy of an
10 email reply demonstrates that Defendants focus was not on client
11 satisfaction or business goals, but instead solely on receiving
12 ongoing payments for development.

13 14 5. Defendant illegally used Plaintiff's intellectual 15 property for commercial gain

16
17 In October 2009 Defendant Dasha Maslova emailed Plaintiff asking
18 whether Plaintiff was agreeable to allowing Defendant to include
19 [redacted] in Defendant's online portfolio¹⁸ - to showcase
20 Defendant's work to the public to attract new clients. Plaintiff
21 replied to Mrs. Maslova stating clearly that he was not
22 agreeable to having [redacted] posted in Defendant's online
23 portfolio. Mrs. Maslova replied acknowledging that Plaintiff's
24 wish to not have [redacted] included in Defendant's portfolio
25 would be followed, and that they were legally bound to
26 Plaintiff's request.

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1 Years later Plaintiff began browsing Defendant's website,
2 www.nixsolutions.com, and discovered that items from [redacted]
3 were being featured in Defendant's portfolio. Plaintiff emailed
4 Mrs. Maslova who had it swiftly removed¹⁹. The infringing
5 contents may have been on display on Defendant's site for years.
6

7 Coincidentally, 4 months later, when Plaintiff performed a
8 Google search using [redacted] keywords, Google results showed
9 both [redacted] results but also mirror results of the
10 [redacted] test server hosted by Defendant
11 (earth2.nixsolutions.com), in essence giving Defendant free
12 advertising to potentially hundreds of thousands, or even
13 millions, of [redacted] viewers.
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16 6. Defendant's poor development resulted in hundreds of 17 hours of downtime and slow speeds

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19 [redacted] routinely experiences more downtime in weeks than
20 other websites do in years. Site crashes and slow speeds have
21 left a bad impression on millions of viewers that have come and
22 gone over the past 3 years²⁰, many of whom have left to better
23 competitor websites. There isn't a single popular website on the
24 internet now or in the history of the internet that has
25 experienced a fraction of the downtime and speed problems
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28 ²⁰

1 experienced by [redacted], since sites cannot become popular
2 when they don't work.

3
4 From July 2009 to May 2012, [redacted] was unreliable and on the
5 verge of collapse at any moment²¹. Defendant's experts set out to
6 correct the site stability issue in early 2012 and managed to
7 get it under control some time in May 2012.

8
9 Defendant often attributed much of the site downtimes to
10 Plaintiff's hosting companies, however the two hosting companies
11 used over the years are known for their excellence in service.

12
13 The first company, www.realitychecknetwork.com (now called
14 serverstack.com), hosts the 60th largest website on the
15 internet, www.xvideos.com, and many other enormously popular
16 websites such as www xnxx.com. The second hosting company,
17 [www.\[redacted\].com](http://www.[redacted].com), is an industry leader. Both companies have
18 the capability to host just about any website successfully, and
19 certainly a webcam site. In fact, [redacted]'s President told
20 Plaintiff that [redacted] hosts some portions of one of
21 Plaintiff's biggest competitor sites.

22
23 What Realitychecknetwork and [redacted] had in common was
24 [redacted] - a site developed by Defendant that could barely
25 function for a week without crashing and never loaded as fast as
26 its competitors. No amount of time, funding, or hardware

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1 requested from and provided to Defendant could stem the tide of
2 cataclysmic site failures that would occur at every turn over
3 the course of [redacted]'s entire existence.

4
5 Imagine your Cable TV, telephone service, or internet service on
6 the blitz for an hour every few days or more than 14 hours in a
7 single day²², or the broadcast on your favourite TV channel
8 becoming slow for weeks and months at a time, or calls on your
9 telephone dropping just as often as those that allow you to chat
10 successfully. You would not hesitate to change your cable,
11 phone, and internet provider.

12
13 Switching providers of the previously mentioned services usually
14 involves setting up an appointment, cancelling contracts, new
15 hardware, and time to set it up in your home. But going from a
16 failing website to a successful equivalent is done at the click
17 of a mouse and takes seconds. [redacted]'s loss of traffic and
18 revenue to competitor websites is worse than Myspace's loss of
19 the same to Facebook, or Blackberry's loss of market share to
20 Apple in absolute terms. At least Myspace and Blackberry once
21 ruled their respective markets. Plaintiff's website couldn't
22 function reliably enough to gain market share let alone become a
23 leader.

24 If a new company in your major city offers cable TV, phone, or
25 internet service, but their service is poorer than all existing
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1 companies, they will not survive because they cannot compete
2 effectively in the existing market.

3
4 Keeping downtime and slow speeds to a minimum are critical to
5 success on the internet. Unfortunately, Defendant was incapable
6 doing either for [redacted] for years. Consequently, [redacted]
7 is losing business while old and new competitors flourish²³.

8
9 The following review described the state of [redacted] in early
10 May 2012 (three years after [redacted] launched):

11 "Rated as 2 out of 5. Ok community but not a lot to see"

12
13 "Although a very old website, they claim to have been online for 12 years
14 Www.[redacted].com I have never come across this website before. Seems more
15 like [competitor website] or even less of a place to have real shows.
16 Sometimes it is just a bunch of people showing off which means mostly guys
17 with cock-cams."

18 "On their blog the admin mentions they are considering adding tipping, but
19 look reluctant as they don't want to end up being like every other website.
20 Understandable concern yet at the same time it is tipping and other income
21 that drives the best performers to a cam website."

22 "Around 100 cams are online at a time, but really most are ugly old guys with
23 their cocks out. Sorry no offence but that's not too interesting to watch on
24 the whole."

25 "On the whole I found the website very slow and it was hard to find something
26 interesting to watch. There are neither shows to buy nor the hot teasers
27 like at the tip websites, nor tipping for specific things you want to see.
28 But if you are a true exhibitionist, or you are interested in them, then this
is a place to try. If you want to buy a show though then look elsewhere." ²⁴

29 The following quote is what a frequent [redacted] broadcaster
30 posted on her blog on November 26, 2012 after observing the

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1 first of two failed attempts by Defendant at launching the
2 "tipping feature" which took [redacted] offline for 15 hours.

3
4 "Simon [Site Administrator] are you there? I know you are busy and all
5 Administering your website Www.[redacted].com, oh wait you are not, because
6 if you were or whomever is supposed they'd notice the various problems that
7 the website is facing. This is nothing new and your clients/customers have
8 come to expect this low quality of service from you and many have wandered
elsewhere because of it. It wouldn't be so bad if you could blame it on
advancing technologies or new features for the website but that is the
problem. Little to nothing has changed or been added to the website in longer
than most would probably remember or care to remember, which I cannot say is
a good thing at all.

9 It seems every lengthy "Maintenance" period does not do anything other than
10 drive current users of the website away to any competing websites. Coupled
11 with performance issues and lack of any form of customer service it is a
12 miracle that there is a consistent client base of any kind. Understandable
13 that it is a free service and hasn't fallen into the "token-based-economy"
14 that similar websites have(yet). The inconsistencies in the service delivered
15 are detrimental to what little community base that exists on the website.
16 Individuals whom drive traffic and form the cornerstones of the website melt
17 away little by little until you've got the decaying wasteland that you're
18 starting to see. It isn't like the numbers do not exist out there as other
19 websites pull a considerably larger amount of traffic which would translate
20 into more ad revenue.

21 So Simon(admin) or whomever you are please stop fucking things up, because
22 I'm tired of opening the front page and being instantly bored because the
23 'quality' of what to be had there is no good for fapping much less for lulz
24 or any other activity and after a few moments I realize how dull it is as
25 your website. You could at least add a new post to your blog every now and
26 again, or maybe even update the layout to something current too. So much
27 wasted potential that a little investment and effort could turn into
28 something decent."²⁵

29
30
31 The user's criticisms outline succinctly all that has been wrong
32 [redacted] for years, all of which had been communicated by
33 Plaintiff to Defendant for years. All available metrics support
34 the user's criticisms.

35 While downtime and slow speeds were less of a problem after May
36 2012 until mid December 2012, [redacted] was already in decline.

25

1 No new features had been implemented in over a year, and the
2 tipping feature development which was supposed to begin in early
3 2012 was only getting started. Following the launch of the
4 tipping feature on December 19, 2012, [redacted] experienced
5 another series of crashes and slow speeds. An additional server
6 had to be set-up over the holiday season by Plaintiff's hosting
7 company to alleviate some of the problems²⁶.

8
9 Although downtime was a chronic problem for [redacted], less
10 than optimal effort was made by Defendant limit it. Downtime
11 resulting from Defendant's "upgrades" to [redacted] typically
12 required a 7 hour minimum of downtime. When server alerts were
13 set-up to notify Plaintiff and Defendant in real-time about
14 servers problems (i.e. crashes or slow speeds), Yuri Nesmiyan's
15 email address was the other party receiving the alerts besides
16 Plaintiff. After Mr. Nesmiyan's mysterious departure from NIX
17 Solutions in late 2011, Mr. Nesmiyan's email address was never
18 updated by Defendant to a current member of Defendant's
19 development team, even after Plaintiff made several requests for
20 it, so that Defendant would be immediately alerted to site
21 problems²⁷.

22
23 Noting the lack of support offered by Defendant on weekends,
24 Plaintiff requested that uploads/releases be performed on
25
26

27 ²⁶

28 ²⁷

1 Mondays or early in the week so that problems could not found
2 and addressed by Defendant before the weekend.

3
4 Temporary fixes such as server restarts, in themselves
5 inconvenienced users since it kicked broadcasters off their
6 webcams and often had to be repeated numerous times throughout a
7 day just to keep allow the website to remain up.

8
9 A lack of redundancy in the broadcast servers (4 broadcast
10 servers) meant that if there was a problem with one broadcast
11 server, all broadcasters on [redacted] could no longer
12 broadcast²⁸. On a site such as [redacted] where live broadcasting
13 is the lifeblood of the site, this problem was disastrous for
14 business.

15
16 In January 2010 Mrs. Maslova suggested two options to address
17 [redacted] problems. The first suggestion was to stop all
18 development and focus strictly on bug fixing. No timeline was
19 provided but the ominous warning that downtimes would still
20 occur for "some time" was enough for Plaintiff to forego that
21 suggestion. New development was necessary therefore halting
22 development for many more months, while still experiencing
23 crashes, would only jeopardize Plaintiff's business further. The
24 second suggestion was to use a "clone environment" - a testing
25 server set-up that is identical to the live site. This was the
26 first and only mention of a clone environment from Defendant

27
28
28

1 until April 2012. Mrs. Maslova rightly indicated that extra cost
2 would be factor. While Plaintiff was not opposed to the idea, he
3 was in no financial position to risk additional costs on servers
4 given the previous 5 month track record of [redacted] and the 6
5 months of development previous to that. Plaintiff was 11 months
6 into a live project, paying out thousands monthly in development
7 costs, hosting costs, [redacted] monthly prizes, and was not
8 able to achieve any return on investment.

9
10 Defendant had been using a single staging server from the start
11 of the project. Defendant's suggestion for Plaintiff to buy
12 extensive hardware for testing purposes was a risky and costly
13 endeavour that Defendant should have volunteered to shoulder.
14 After 5 months of broken promises to Plaintiff and a failing
15 site that was developed by Defendant, the onus was on Defendant
16 to correct the problems - not to recommend Plaintiff double up
17 on payments to move forward.

18
19 When a customer buys an product or service, and that product
20 fails to work or the service is poor, the seller does not ask
21 the buyer to pay more money for more products and services. The
22 seller fixes or replaces the product free of charge. In summary,
23 Plaintiff did not agree to the clone environment solution based
24 on 1) added cost and time 2) lack of faith in Defendant 3) risk
25 that it would not result in any improvements (*in mid December
26 2012, this risk would become a reality) 4) other pressing
27 development issues underway required in the short term.

1 Presumably Defendant has plenty of test servers available and at
2 a discounted rate due to the scale of Defendants business. A
3 development company employing 500 staff members should have
4 provided Plaintiff with better service and solutions, namely a
5 test environment they claimed was needed to fix problems that
6 were destroying their client's business for nearly half a year.

7
8 In May 2012, Defendant had resolved most of [redacted]'s most
9 severe speed and crashing problems. For a second time, Defendant
10 requested using a clone environment for upcoming development,
11 namely the "tipping feature" claiming there was no other way to
12 guarantee it would work. Plaintiff agreed to buy a clone
13 environment for this purpose while expressing reservations about
14 whether it would translate into noticeable improvements.

15
16 As Plaintiff suspected years earlier, the clone environment
17 proved to be a costly addition with negligible benefits. When
18 the tipping feature launched on December 19, 2012 it had already
19 failed to launch twice before, resulting in 15 hours of
20 downtime, caused slow speeds and crashes through to January 4,
21 2013²⁹, and left a trail of critical bugs in its wake - many that
22 have persisted for months and remain unresolved³⁰.

23
24 "John Wandishin, Vice President of Marketing, Brother International, has it
25 right. "When running a small business, time is the ultimate commodity,"
26 Wandishin said in announcing the survey results. "Small business owners are
27 looking for reliable equipment and services that help [save time]."

28
29

30

1 Ultimately, we want to spend more time addressing the core of our business,
not fixing our equipment."³¹

2 Plaintiff has rarely had the privilege of reliable services to
3 save time to focus on the core of his business. The recipe for a
4 successful website is timing, a good idea, and proper execution
5 of the idea. The timing for [redacted] couldn't have been
6 better. The market was wide open with only two other websites in
7 the niche. Plaintiff could parlay traffic from his existing
8 networks seamlessly into the new venture. Access to and buying
9 quality traffic was easier and less expensive. Budgeting would
10 take care of itself as the site grew and revenue grew,
11 promotional campaigns would increase in lockstep. The idea was a
12 slam dunk - existing websites were successful and growing
13 rapidly, as live social networking displaced static non-
14 interactive websites.

15
16 All of the aforementioned aspects of the business are completely
17 dependent on a website that is able to meet the challenge. When
18 a website doesn't work, all of the above become irrelevant, and
19 site success is not achievable.
20

21 7. Defendant's defective product and slow development

22
23
24 Abysmal uptime and speed issues are not the only problems to
25 plague [redacted]. Virtually every component of the [redacted]
26
27

28 ³¹

1 site has stopped working properly at some point. Additionally,
2 Defendant's response time has been slow and unacceptable for a
3 commercial enterprise. It would take thousands of pages to
4 review all issues, so instead a few randomly selected examples
5 will be elaborated upon.

6
7 Most of the bugs listed below would be fixed within a day or
8 several days at properly operated websites, whereas many of them
9 persisted for months and even years on [redacted].

10
11
12 **A) Disappearing webcam broadcasts**

13 On a webcam site such as [redacted], one expects to view
14 webcams. However on September 18, 2009, webcam broadcasts began
15 randomly disappearing and then re-appearing from the main page.
16 The problem is akin to having profiles on one's Facebook friends
17 list automatically disappear and later re-appear, or going to a
18 news site and have particular news stories appear only some of
19 the time. The issue is doubly problematic on sites delivering
20 live content such as [redacted], which changes from moment to
21 moment unlike static text or image based content. Unfortunately,
22 it would take Defendant until January 15, 2010 to fix the
23 problem³². The problem would return again on April 2010³³,
24 December 31, 2010, and ultimately be resolved in March 2011³⁴.

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1
2 **B) Error message that resembles a virus**

3 Receiving a strange random message prompting you to save a file
4 to your computer while visit a website is often and rightly
5 interpreted as red flag for a virus. Many people would assume
6 the site is transmitting a virus or that their system has
7 already been compromised. Viewers do not join sites that they do
8 not trust. On October 7, 2010, following 'upgrades' performed on
9 [redacted] by Defendant, viewers began receiving a "File Save
10 Prompt" message when browsing [redacted]. The problem would not
11 be fixed until January 25, 2011.³⁵

12
13 **C) Broadcast server crash domino effect**

14 [redacted] has 4 broadcasting servers. If one broadcasting
15 server fails, the other 3 should easily pick up the slack,
16 however this basic level of redundancy didn't exist for most of
17 [redacted]'s history. When one broadcasting server crashed, all
18 others crashed leaving [redacted] users without any way to
19 broadcast their webcams. Thus [redacted] experienced many hours
20 without any live content on the site. On February 18, 2011,
21 Plaintiff distressed by the lack redundancy witnessed for more
22 than a year, formally requested it be addressed. The issue was
23 resolved on March 29, 2011.³⁶

24
25 **D) Slow loading pages and content**

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1 [redacted] has historically been a very slow loading site. To
2 make matters worse, pages showcasing broadcasters' loaded slower
3 than just about all other pages on the site. Plaintiff noted the
4 issue on January 14, 2010³⁷ and January 13, 2011. Defendant argued
5 that "[the] problem is not problem of [redacted] site. Such
6 problem became, when your ISP had too small speed or servers had
7 high LA. When picture is loading too long, browser reset
8 connection and picture loaded partially or does not load at all.
9 So, we can't fix this problem"³⁸.

10
11 However Plaintiff uses high speed internet and has no speed
12 problems with his ISP. Pages on all other sites load fine for
13 Plaintiff. Merely browsing [redacted] would provide confirmation
14 of Plaintiff's observation. The issue was raised by Plaintiff
15 again on March 9, 2011 with no response³⁹, then on August 12,
16 2011⁴⁰ and again on Sept 19, 2011⁴¹. Despite the issue being
17 "closed" by Defendant on November 8, 2011, the problem persisted.
18 Plaintiff would ask Defendant about the issue in emails on March
19 26th, 2012⁴², until after March 28th, 2012. It took from the site

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1 launching date in July 2009⁴³ until sometime in April 2012 for
2 the problem to be fixed.

3
4 E) Main pages not displaying content properly

5 Between May 30, 2010 and Sept 15, 2010, broadcasts on [redacted]
6 would not display snapshots of the live broadcasts⁴⁴.

7
8 F) Four months to launch a blog using blog template

9 Although the original scope of the project included the
10 development of a blog, one was not created. Plaintiff cannot
11 recall the reason for this, but suspects it was to save time and
12 launch [redacted] sooner. Months after [redacted] was launched
13 to the public Plaintiff requested a blog be developed. Defendant
14 estimated the blog to take 16 hours to complete⁴⁵, which is a
15 reasonable amount of time.

16
17 The internet's most popular blog software used by those who want
18 full customization of their own blog is WordPress⁴⁶. Novices can
19 set up a WordPress blog within 20 minutes⁴⁷. Instead of using
20 WordPress, Defendant chose Roller, which was unfamiliar to
21 Plaintiff but Plaintiff recalls Defendant stating that Wordpress
22 was somehow incompatible with JAVA so it couldn't be used.

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1 Defendant used a Roller template which means they did not have
2 to create the blog at all⁴⁸; they merely had to customize it.
3 Customizations were minimal and included removing some default
4 features (feeds, calendar) while adding some (banner advertising
5 spot on the top, side, and bottom of the blog).

6
7 One purpose of the blog was for Plaintiff to communicate with
8 [redacted] viewers - to keep them updated on website changes,
9 and assure viewers that the chronic downtimes and site problems
10 were being addressed.

11
12 Development of the [redacted] blog began on October 23, 2009⁴⁹
13 and was not completed until February 2010, a period of 4 months
14 for a task that should not have taken longer than a day or two.
15 When the blog finally launched in February 2010, it would also
16 face problems of its own until October 5, 2010.⁵⁰

17
18 To this day, basic features like "Previous" and "Next" links
19 commonly found at the bottom of blogs are missing from the
20 [redacted] blog. Plaintiff long ago chose to forego any further
21 changes recognizing that changes could potentially introduce new
22 catastrophic bugs to [redacted] and require weeks of effort to
23 fix sacrificing valuable time needed for more urgent
24 development needs.

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1 G) Inability for [redacted] to promote sponsors effectively

2 Websites dependent upon sponsorship revenue need to be able to
3 effectively deliver sponsorship advertising. OpenX is a leading
4 robust ad management software⁵¹. Plaintiff requested installation
5 of OpenX on June 1st, 2011 and it was installed by Defendant on
6 June 8th, 2011. OpenX went live on [redacted] on June 27th, 2011
7 and immediately crashed. Various tests and "optimizations" were
8 conducted by Defendant throughout July. Plaintiff attempted to
9 use OpenX on [redacted] again on August 1st, 2011 and was met
10 with a script error message. Defendant responded to the issue on
11 September 6th, 2011. Likely having gotten distracted by other
12 staggering [redacted] problems, Plaintiff did not attempt to re-
13 launch OpenX again until March 27, 2012. It failed again.

14
15 In ICQ correspondence with Defendant on April 4th, 2012,
16 Defendant suggested that Plaintiff use the OpenX script in a way
17 it was not made to be used - to publish advertisements from
18 various sponsor campaigns under a single campaign. If Plaintiff
19 agreed to this obtuse "solution" it would make tracking campaign
20 statistics difficult if not impossible.

21
22 Moreover, such a solution didn't seem to address the underlying
23 problem. Whether advertisements were delivered under a single
24 campaign or multiple campaigns, the same number of
25 advertisements would be displayed and it was this load that had
26 been the cause of the OpenX crashes.

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1 Plaintiff rejected the solution put forth by Defendant's non-
2 expert developers, however to prove the point Plaintiff agreed
3 to give the idea a live test run. Unsurprisingly, when Plaintiff
4 obliged Defendant's bizarre solution, OpenX failed again.

5
6 Plaintiff made a suggestion in the interim - to place OpenX on
7 its own separate dedicated server so that at the very least,
8 OpenX crashes no longer resulted in [redacted] crashes. By the
9 hand of expert developers, Defendant would finally solve the
10 OpenX issue in May 10, 2012, nearly a year from the original
11 request⁵².

12
13 H) Paid subscribers without service

14 The foundation of any business is to ensure that customers get
15 what they've paid for. "Gold members" are [redacted] customers
16 who pay a monthly subscription fee of \$19.95 for access to
17 particular features on [redacted] - including private messaging,
18 viewing broadcasts in full screen - that non-subscribers do not
19 have access to.

20
21 [redacted]'s paid subscribers have often found themselves
22 without access to gold membership features. The problem was
23 noted on September 3, 2009.⁵³ It occurred again or was not yet
24 corrected and thus noted again on November 18, 2009⁵⁴ and was

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26 ⁵²

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28 ⁵⁴

1 purportedly resolved on December 16, 2009. The problem re-
2 appeared on March 18, 2010⁵⁵ and again on May 31, 2010⁵⁶, and yet
3 again on December 2, 2010⁵⁷. Defendant spent 45 hours to
4 investigating the issue noted on December 2, 2010 however it
5 remained and was noted on December 28, 2010⁵⁸ and again on
6 February 25, 2010⁵⁹ and would remain unsolved until some time
7 after April 1st, 2011. Each month some paid subscribers would
8 lose access to paid features for no apparent reason.

9
10 The problem would resurface in early January 2013 leaving over
11 two-thirds of paid subscribers without access to features they
12 paid for, and has yet to be resolved as of March 7, 2013.⁶⁰

13
14 I) Administrator privileges for everybody

15 Imagine logging into your Facebook account and being able to ban
16 other Facebook users. On April 17, 2010 ordinary [redacted]
17 users were suddenly equipped with administrative functions when
18 viewing broadcasts. Logged in [redacted] users could ban users
19 and stop broadcasts. Some troublesome users had a field day with
20 their new powers. The problem lasted two days.⁶¹

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1 J) Important feature a year long endeavour

2 On August 18, 2011, Plaintiff expressed desire for a "tipping
3 feature" on [redacted]. On November 15th, Defendant provided
4 Plaintiff with quote and time estimate - 106 hours of
5 development (two weeks with 8 hour days). Plaintiff promptly
6 pre-paid the fees to get development started. To speed up
7 development, two teams were enlisted - one team would focus on
8 [redacted] bug fixing while the other team would focus on new
9 development, namely the tipping feature.

10
11 As is the usual course of development, further details increased
12 development time in April 17 to a new quote of 186 hours. It
13 would actually take 480 hours to complete⁶². Although 480 hours
14 is only two months of full time development, the tipping feature
15 would not be delivered until December 19, 2012⁶³. To put this
16 into perspective, the time it took to develop and launch the
17 tipping feature (over 8 months) was greater than the time it
18 took to develop the entire [redacted] site (5 months).

19
20
21 K) Lagging broadcasts and ignored alerts

22 As early as October 13, 2009, the constant battle with
23 choppy/lagging webcam broadcasts had been brought to the
24
25
26

27 ⁶²

28 ⁶³

1 attention of Defendant. Dozens of emails concerning lagging
2 broadcasts often coinciding with [redacted] crashes were sent.⁶⁴

3
4 Server alerts called "cacti alerts" began in May 6, 2011 as a
5 means of notifying Plaintiff and Defendant to problems with
6 broadcasting servers, including but not limited to lagging cams.
7 The alerts were sent via email to Plaintiff and Defendant. The
8 alerts were received throughout May, June, and July however not
9 formally addressed until Plaintiff noted it on August 1, 2011⁶⁵
10 and action was taken and the issue resolved on August 17, 2011⁶⁶.

11
12 As mentioned previously, cacti alerts denote a range of
13 potential problems with broadcasting servers. When Yuri Nesmiyan
14 departed from NIX Solutions, Defendant never bothered to remove
15 his email address from receiving cacti alerts and updating it to
16 a member of their current team.⁶⁷

17
18 To the present day, Plaintiff and viewers observe that broadcast
19 speeds on [redacted] are slower than broadcast speeds on all
20 major competitor sites.⁶⁸

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1 **L) Languages changes**

2 [redacted] has been translated into twelve languages to make it
3 as inclusive to users worldwide as possible. As early as April
4 19, 2010, the language setting on [redacted] hasn't worked
5 properly. In the beginning, the default language set by a user
6 would randomly and unpredictably change to one of the other
7 thirteen language translations offered. The user would have to
8 manually set their preferred language to view [redacted] in that
9 language again. Fortunately, the problem is intermittent and
10 today while language settings still change for no apparent
11 reason, once the home page refreshes (it automatically refreshes
12 every 2 minutes) or the user clicks on a new page, the language
13 setting goes back to the user's original setting. However, the
14 problem still exists after three years. It's been investigated
15 many times by Defendant but has not been able to be fixed.⁶⁹

16
17 **8. DEFENDANT ABANDONED [REDACTED] IN DIRE CONDITION**

18
19 Following Defendant's upload of the tipping feature on December
20 19, 2012, [redacted] experienced a host of new crippling
21 malfunctions that Defendant would not fix. The unpreparedness of
22 Defendant ensured that [redacted] would crash and become slow
23 after December 19, 2012 through January 4, 2013 requiring
24 Plaintiff to scramble to get an additional server deployed to
25 alleviate the extra load caused by the tipping feature.⁷⁰

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1 The problems didn't stop there. The following are some of the
2 problems that were introduced on December 19, 2012 by
3 Defendant's "upgrade" and left by Defendant for Plaintiff's
4 newly hired development team to resolve:

5
6 A) [redacted] missing from search engines

7 Companies spend tens of thousands of dollars to get good search
8 engines rankings because search engine traffic is among the
9 highest quality traffic available on the internet (i.e. it
10 generates sales for businesses). On February 3, 2013, Plaintiff
11 decided to check Google listings for [redacted]. When Plaintiff
12 used keywords such as "[redacted]" and "[redacted]", Plaintiff's
13 site did not display in Google's search results as it should.
14 The site title and description were missing. For other keyword
15 search terms such as "free webcams", [redacted] listings were
16 very low or absent from search results entirely⁷¹.

17
18 Plaintiff inquired with [redacted], and learned that on December
19 28th, 2012, Defendant had apparently altered an important file
20 (called "robot.txt") on [redacted] servers making the site
21 unable to be crawled by search engines. By blocking search
22 engine crawling, [redacted] listings either disappeared from
23 search engine results or were compromised.⁷²

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1 Plaintiff immediately had [redacted] modify the robot.txt file
2 so that search engines could once again access [redacted]⁷³.
3 However as of March 26, 2013, [redacted] search engine results
4 still have not recovered to its former state. Its rankings are
5 also down having a PageRank of 2 when it had been 3 (the higher
6 the PageRank, the more traffic is received).

7
8 **B) Slow typing and missing characters in chat rooms**

9 Since December 19, 2012 viewers of [redacted] have been unable
10 to type messages inside chat rooms properly. When users try to
11 type messages in chat rooms, the typing reaction time is slower
12 than normal. It lags behind the user's typing speed whereas
13 normally typing response time is instant. Additionally,
14 characters that users have typed on their keyboard often go
15 missing from what is displayed in the chatroom. A user may type
16 "that's great" pushing all the right keys on their keyboard, but
17 the message produced in the chat room screen may be "hats gret".
18 As of March 26, 2013, the problem remains unresolved⁷⁴.

19
20 **C) Paid subscribers without access**

21 Out of approximately 850 paid subscribers, less than 560 have
22 access to their paid services⁷⁵. The problem extends to rebilling
23 members as well as brand new members who join and do not have
24 access they just paid for seconds earlier. This has resulted in

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1 user frustration, anger, cancellations, and Plaintiff's time
2 dealing with customer service arising from the problem. As of
3 March 26, 2013, the problem remains unresolved.

4
5 D) Security hole in chat room

6 A security hole was brought to the attention of Plaintiff by a
7 helpful [redacted] viewer. The security hole allows users to go
8 into chat rooms and "spoof" other users including the
9 broadcaster. Users can assume the identity of other users
10 including broadcasters allowing them to use moderator privileges
11 such as banning users from other user's chat rooms⁷⁶. This
12 security problem was resolved by new development company
13 [redacted] on February 18, 2013.

14
15 E) Mail sending error

16 Many users were suddenly unable to register an account on
17 [redacted] and unable to use the 'forgot password' utility if
18 they already had a registered account. Additionally, Plaintiff
19 could no longer reply to support inquiries from the
20 administration support section of [redacted]⁷⁷. Plaintiff's
21 replies to inquiries were not being received by users who
22 submitted the inquiries. Thousands of viewers could not register
23 an account on the site and answers to dozens of support emails
24 (such as gold members lacking gold access) never made it into

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26
27 ⁷⁶

28 ⁷⁷

1 users inboxes. The problem remains unresolved as of March 10,
2 2013.

3 Plaintiff also could no longer delete internal emails that were
4 responded to or archive them⁷⁸.

5
6 **F) Banned words no longer censored**

7 Words that Plaintiff had banned/censored on [redacted], were no
8 longer censored⁷⁹. Therefore censored text that users had spammed
9 (including other websites, hate speech, etc) on [redacted] pages
10 were now visible. This problem remains as of March 26, 2013.

11
12 **G) Banned users posts visible on Walls**

13 Users banned from [redacted] used to have their posting
14 histories automatically deleted. Those posting histories now
15 remained on [redacted] Walls for all to see⁸⁰. This problem
16 remains as of March 26, 2013.

17
18 **Problems specific to the uploaded 'tipping feature'**
19 **include:**

20
21 **H) Tipping panel that is not viewable by default**

22 The only webcam site that hides its tipping panel (the section
23 that shows you where to send tokens to performers) by default is
24

25
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1 [redacted]. This is clearly not the way it is supposed to work⁸¹.
2 Issue fixed by [redacted] on February 20, 2013.

3 I) Tipping panel that has no sound on it by default

4 The only webcam site that has sound turned off by default on its
5 tipping panel is [redacted]. Sounds are produced when viewers
6 send tips to performers or when performers reach their tip goal
7 (the total amount of tokens they've requested from viewers).
8 Sound is an enticing feature that makes the transaction more
9 exciting and also alerts all parties to the activity in cases
10 where some may not be viewing the chat room. This problem
11 remains as of March 26, 2013⁸².

12
13 J) Missing Payment Form required for broadcasters to receive
14 payments

15 In order to pay commissions to [redacted] performers, Plaintiff
16 requires payment details from performers (payee name, method of
17 payment such as check, wire transfer, and so on). The payment
18 form needed for performers to complete did not get developed by
19 Defendant⁸³. On February 18, 2013, [redacted] created and
20 launched the payment form, although there is no corresponding
21 backend for it yet as of March 26, 2013.

22
23 K) Inability to open some broadcaster's signed agreements
24
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1 Performers using the tipping feature must fill an agreement that
2 legally protects themselves and Plaintiff. Some of these
3 contracts submitted by performers could not be opened by
4 Plaintiff. When attempting to open some contracts, the page
5 simply would not load⁸⁴. The issue remains unresolved as of March
6 26, 2013.

7
8 L) Inability for some users to register tipping accounts due to
9 internal server error

10 Some broadcasters can't register to use the tipping feature
11 because the registration process gives them an "internal server
12 error" message⁸⁵. The entire launch of the tipping feature is
13 inconsequential to these users because they cannot take
14 advantage of it. This problem remains as of March 26, 2013.

15
16 M) No Support. Entire weekend of downtime (60+ Hours)

17 On the afternoon of Friday 22nd February 2013, [redacted]
18 crashed⁸⁶ and could not be brought back online by [redacted] nor
19 Plaintiff's new development team, [redacted], who were still
20 getting acquainted with Defendant's defective code. Realizing
21 that Defendant would be sleeping during this time, Plaintiff did
22 not contact Defendant and instead waited until the morning of
23 Saturday 23rd February (approx 6am EST) at which time Defendant
24 would likely be awake. When [redacted] called Defendant via

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1 Skype, Defendant's Skype changed to "offline" status (however
2 had "available" status on ICQ that was not contacted by
3 [redacted]), suggesting that Defendant was unconcerned or
4 uninterested in providing assistance to Plaintiff's team in a
5 critical moment in time⁸⁷. [redacted] struggled to find a
6 solution for the remainder of the weekend. [redacted] would
7 remain offline for approximately 60 hours and was finally back
8 online at approximately 11am EST on Monday 25th February 2013,
9 without help from Defendant.

10
11 [redacted] still struggles to upload fixes for site problems
12 left by Defendant due to as yet unknown conflicts in the code.
13 This has taken up resources and has been a disaster for customer
14 satisfaction and Plaintiff's business.

18 PLAINTIFF'S HISTORY

19
20 For the purpose of context, it is important to note that
21 Plaintiff's online businesses have been his sole source of
22 income since 1999. Plaintiff has operated a variety of websites
23 including picture and video posting sites, a dating site, a DVD
24 download membership site, and the current webcam site.

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1 Additionally, Plaintiff has operated an affiliate program for
2 one of his previous sites that successfully paid out hundreds of
3 thousands of dollars in commissions to affiliates. Plaintiff is
4 also an affiliate of websites operated by others.

5
6 Plaintiff has had his online businesses hosted by at
7 approximately 7 different web hosting companies, and has worked
8 with various designers, programmers, billing processing
9 companies, and development companies.

10 11 12 **PLAINTIFF'S DAMAGES**

13
14 Plaintiff's damages include the financial losses resulting from
15 poor site development performed by Defendant, punitive damages
16 for Defendants illegal use of Plaintiff's intellectual property,
17 punitive damages for Defendants non-disclosure of its legal
18 inability to develop [redacted] thereby entering into a contract
19 in bad faith and requiring costly transition of development
20 teams at a vulnerable time, and compensatory damages for the
21 consequences of and costs associated with fixing legacy problems
22 left by Defendant for Plaintiff to resolve.

23 24 **1. Loss of traffic due to site crashes, bugs, and slow** 25 **speeds**

26
27 **A) To calculate financial damage we can use traffic as a**
28 **reliable metric. First we must establish the value of traffic in**

1 the marketplace. Throughout the month of February 2013,
2 Plaintiff purchased traffic from a variety of sources including
3 Exoclick.com, one of the leading sources of industry traffic.⁸⁸
4 It cost Plaintiff \$15,413 to draw 131,705 new visitors' eyes to
5 the [redacted] site.⁸⁹ This works out to a cost of approximately
6 \$0.117 per visitor. Therefore purchasing 100,000 visitors would
7 cost approximately \$11,700.

8
9 Traffic to [redacted] has dropped more than 50% since its peak
10 in 2011.⁹⁰ Between October 2012 and December 2012 alone, traffic
11 dropped by 30% - 40% as noted by the largest 3rd party sponsor
12 purchasing advertising on [redacted]. In October the number of
13 unique visitors to [redacted] totalled 3,244,216 and that number
14 plunged to 2,118,735 in December. The total traffic lost within
15 a period of three months is 1,125,481 visitors which has a
16 market value of \$131,681 per month. If we compared traffic at
17 its height to present day figures, the value of traffic that's
18 been lost is even greater.⁹¹

19
20 If the current traffic level were to stabilize (although it is
21 actually eroding further each month), the value of lost traffic
22 on [redacted] for the year 2013 would be approximately
23 \$1,580,172. Conversely, continuing current traffic campaigns to
24

25 88

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28 91

1 help stave off seemingly immediate site death will cost
2 approximately \$300,000 per year minimum.

3
4 B) The above calculations take into account the erosion of
5 [redacted] traffic due to constant service interruptions, site
6 feature and design stagnation, and a wide variety of newer
7 better options for viewers (competitor sites). Missing from
8 those calculations is traffic that [redacted] never obtained due
9 to performance issues.

10
11 It's been noted many times that in addition to chronic crashes,
12 [redacted] has been slow to load for most of its history. In
13 fact, [redacted] and broadcasts on [redacted], and important
14 features on [redacted] (such as the tipping feature) remain
15 slower than on any competitor site to this day. According to
16 site optimization firm Strangeloopnetworks⁹²:

- 17
- 18 • 57% of users will abandon a site after waiting 3 seconds
- 19 for it to load
- 20 • 80% of those will never return
- 21 • 50% of them will tell others about their negative
- 22 experience
- 23 • 40% of them will visit a competitor
- 24
- 25
- 26
- 27

28 ⁹²

1 Furthermore, users who have fast connections to a site view many
2 more pages of the site while sites that load slowly for users
3 cause frustration and anger.⁹³
4

5 It's anybody's guess exactly how much traffic [redacted] has
6 lost resulting from slow loading, however it is likely
7 substantial, ranging in the millions.
8

9 C) Precipitous traffic statistics have a two-fold negative
10 impact on revenue. First, it ensures that fewer users are
11 available to become paid subscribers to [redacted]'s premium
12 offerings (i.e. gold memberships). Secondly, less traffic
13 results in less sponsorship revenue.
14

15 Within the past three months, [redacted] has seen a significant
16 drop in sponsorship revenue, all due to decreasing traffic
17 levels. One sponsor paying \$10,000 monthly reduced spending to
18 \$8000 in December after observing a 30% decline in traffic,
19 followed by another reduction to \$7000 for the months of January
20 and February 2013. The sponsor did not renew their sponsorship
21 in March 2013.⁹⁴
22

23 Likewise, another sponsor paying \$3500 per month dropped their
24 sponsorship in February 2013⁹⁵. Between these two sponsorships,
25

26 ⁹³

27 ⁹⁴

28 ⁹⁵

1 Plaintiff stands lose \$162,000 in revenue throughout the 2013
2 calendar year.

3
4 D) An additional method for approximating Plaintiff damages
5 using traffic as the key metric, that may also help to determine
6 the impact of factors noted in section B, is to perform basic
7 comparative analysis between [redacted] and competitor sites.
8 Over the past two years in which [redacted] continued to suffer
9 chronic problems, and stagnated, traffic levels began falling.
10 During the same period, all major competitor sites experienced
11 tremendous growth.⁹⁶

12
13 Averaging growth observed on competitor sites, we can make
14 confident projections about [redacted] had it functioned
15 normally from the beginning, like its competitors did.
16 [redacted] would have enjoyed at least a 10 fold growth spurt.
17 Rather than averaging less than 2000 viewers at any given
18 moment, it would very easily have attained 20,000 viewers, which
19 is a conservative estimate.

20
21 Conservative calculations based on a projection of [redacted]
22 ten times its current size, would look like this:

- 23
24 • A sponsor that paid \$10,000 monthly would be paying
25 \$100,000 monthly

26
27
28 ⁹⁶

- A sponsor that paid \$3500 monthly would be paying \$35,000 monthly
- Paid subscriptions may not rise in a linear fashion. Realistically we could expect 5 times as many gold users totalling 4250 users paying \$19.95 monthly

Total annual revenue would be approximately $(\$100,000 \times 12) + (\$35,000 \times 12) + (4250 \times \$19.95 \times 12) = \$1,705,787.50$

2. Loss of revenue as a consequence of slow development

Constant bug fixing and inefficient non-expert developers slowed progress on [redacted] development terribly. For example, the [redacted] blog took 4 months to develop when it should have taken less than a week, and the tipping feature required over 12 months because the first 5 months of 2012 had to focus on fixing legacy bugs. Had development followed a normal course, more features would exist today, and some of them would have had a direct impact on revenue.

Some of the features that could not be developed nor implemented due to slow development include:

A) Cascading billing

1 The addition of secondary billing processors to accept payments
2 that may have been rejected by [redacted]'s primary billing
3 processor would have increased revenue by as much as 20%. ⁹⁷
4 Total gross revenue for [redacted] as of March 2, 2013 is
5 \$576,297. ⁹⁸If we use a conservative estimate of a 10% increase
6 in revenue using a secondary billing processor, an additional
7 \$57,630 in revenue would have been generated.

8 B) Content Delivery Network (CDN)

9 Plaintiff did not have the opportunity to investigate using a
10 CDN which is a "large distributed system of servers in multiple
11 data centers" whose purpose is to "serve content to end-users
12 with high availability and high performance." ⁹⁹ The [redacted]
13 site did not perform properly on a single network with enough
14 consistency needed to generate capital required to explore a
15 CDN. It is not easy to ascertain a dollar amount loss for not
16 having a CDN in place, however it is one of many things that
17 would have increased viewership and therefore revenue.

18
19 C) Mobile-friendly version of [redacted]

20 Currently [redacted] utilizes flash technology for broadcasting
21 webcams, however mobile iOS products distributed by Apple are
22 incompatible with flash.¹⁰⁰ If a mobile version of [redacted]
23 were using html5 technology, viewers using mobile iOS products
24

25 ⁹⁷

26 ⁹⁸

27 ⁹⁹

28 ¹⁰⁰

1 would be able to view [redacted] broadcasts. The mobile market
2 is booming and Adobe has ended its support for flash on all
3 mobile technologies.

4
5 D) Webcam software business

6 Turnkey business software helps entrepreneurs focus on their
7 business. Plaintiff had entertained the idea of selling versions
8 of the [redacted] source code to individuals and companies
9 interested in launching their own webcam sites instantly.
10 Plaintiff believes webcam software based off the [redacted]
11 model could be leased or sell for as much as \$50,000 per site
12 for full ownership rights. However, Plaintiff's own site
13 wouldn't work properly so leasing or selling versions of it was
14 not an ethical option.

15
16 E) Affiliate program

17 A full-fledged affiliate program with a [redacted] ten times its
18 current popularity may have earned \$1.5 million in revenue
19 within the past five months, considering that a competitor site
20 just over 1.5 years old was able to pay out \$6 million in
21 affiliate commissions.¹⁰¹

22
23 F) More competitive features

24 There are many other improvements that should have been made to
25 [redacted] that time constraints did not allow for. Features
26 that would have been developed if time permitted include the
27

28

¹⁰¹

1 ability for broadcasters to record and sell their own video
2 broadcasts, paid private and group chat¹⁰², a tipping button for
3 broadcasters to receive tips even when they're not broadcasting,
4 'follow' links that users can click to be notified via email and
5 SMS when the broadcaster's they're following are live, and so
6 on.

7 8 3) Damaged reputation, loyalty, branding

9 [redacted] viewer loyalty has been tested throughout the years.
10 When [redacted] launched, it was one of only two sites of its
11 kind online. The novelty of [redacted] as the 'new kid on the
12 block' naturally ingratiated itself to viewers seeking an
13 alternative to the competition.

14
15 Viewers endured years of critical failures, slow speeds, and a
16 lack of enticing features - much like Plaintiff - in the hope
17 that the site would eventually hit its stride. All the while,
18 Plaintiff signalled warnings that a day would come when
19 [redacted] would have to face new competitors¹⁰³, urging
20 Defendant to fix [redacted] as soon as possible. Just as
21 Plaintiff had anticipated changes in online social networking
22 and the growth of the untapped webcam niche, Plaintiff also
23 understood that other keen entrepreneurs would come to the same
24 realization and soon throw themselves into market with
25 tremendous vigour. Defendants anti-business attitude did not
26

27 ¹⁰²

28 ¹⁰³

1 allow for heeding the warnings or recognizing their
2 significance.¹⁰⁴

3
4 [redacted] obtained a satisfactory level of stability in mid
5 2012, but it was too little too late. Unable to gain traction in
6 the previous years followed by at least a year and a half of no
7 new features, [redacted] was clearly on the decline. With new
8 competitor sites emerging, viewers had a greater variety of
9 options and all but the most loyal have bailed on [redacted].
10 The positive spirit that viewers and Plaintiff once held about
11 [redacted] and its potential in its early years has been
12 replaced with extreme cynicism¹⁰⁵, and an exodus to other sites.
13 Today, [redacted] languishes on the internet sidelines as a
14 dying boutique site.

15
16
17 **4) Costs to fix existing problems**

18 Plaintiff must bear three costs with respect to his newly hired
19 development company.

20
21 **A) Cost of fixing broken features of the current site**

22 Defendant left [redacted] in poor condition for Plaintiff's new
23 development team to fix. The cost to fix bugs created by
24 Defendant on December 19, 2012 is currently \$4000 per month and
25 as of March 2, 2013 only half of the bugs have been fixed.

26
27 _____
28 ¹⁰⁴

¹⁰⁵

1 Perhaps it will require \$12,000 or more to fix the problems, and
2 more valuable time.¹⁰⁶

3
4 **B) Cost of re-coding [redacted] into .NET framework**

5 [redacted] is coded in JAVA which is a poor choice for a webcam
6 site. The cost to re-code [redacted] to use a .NET framework is
7 \$8,000 per month. [redacted] estimates it will take three months
8 in total, which would mean a cost of \$24,000, assuming the
9 estimate is correct.¹⁰⁷ The .NET framework will increase
10 performance, increase speed of future development, increase
11 uptime during maintenance and upgrades, decrease development
12 costs (JAVA is more expensive), and allow developers to locate
13 and fix bugs quicker.¹⁰⁸

14
15 **C) Cost and time for coding features that should already exist**

16 An affiliate program, cascading billing, and iOS compatibility
17 are among some of the features that will require investing money
18 and perhaps more importantly at this point, time. These are
19 features that under normal circumstances, Plaintiff would have
20 already had developed and operating for quite awhile.

21
22 **5) Lost productivity, mental and physical health**

23 Plaintiff has suffered intense physical stress since [redacted]
24 launched. Beyond monitoring the site for crashes and
25

26 ¹⁰⁶

27 ¹⁰⁷

28 ¹⁰⁸

1 malfunctions and assisting in troubleshooting for chronic
2 issues, Plaintiff has had to communicate with Defendant on their
3 terms and time schedules. Plaintiff is located in North America
4 (EST) while Defendant is located in Ukraine. The different time
5 zone has meant Plaintiff waking for 4:00am EST (the start of
6 Defendant's work day) for years at a time in order to correspond
7 with Defendant in real-time often concerning pressing issues
8 unfolding on the same morning, or the previous day. Those
9 familiar with shift work may sympathize with Plaintiff's
10 sleeping schedule and its health consequences.

11
12 Plaintiff's mental health has also taken a hit. Dealing with
13 verbal abuse from unhappy viewers and customers¹⁰⁹, while
14 simultaneously watching helplessly as [redacted] falls behind
15 current and new competitor sites has been humiliating.

16
17 It's important to note that Plaintiff operates other businesses
18 and the time consuming process of managing [redacted] (due to
19 development mismanagement) has taken time away from Plaintiff's
20 other ventures, costing Plaintiff more money. Lastly, the return
21 on Plaintiff's investment has been so low that he has been
22 unable to hire assistance necessary to alleviate some of the
23 load needed to efficiently operate [redacted].

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1 Insomnia, untimely customer support, chronic sinus colds,
2 headaches, and a prescription for Cialis¹¹⁰ are some of the
3 tangible results of Plaintiff's damaged mental and physical
4 health.

5
6 **6) Punitive damages**

7 Defendant exposed Plaintiff's entire business to serious yet
8 avoidable risks by agreeing to develop Plaintiff's site when it
9 was not legally viable to do so in Ukraine. Defendant also
10 benefited from Plaintiff's intellectual property without
11 Plaintiff's consent.

12
13 Plaintiff recognizes the importance of protecting his business
14 from acts of infringement, and filed for a trademark on
15 12/11/2011 which was successfully registered on July 31, 2012
16 (serial number 85492429).¹¹¹

17
18 Plaintiff's complaint against Defendant underscores the need to
19 enforce legal agreements. The minimum requirement for parties
20 engaged in transactions on the Elance platform is respect for
21 the law. There is a reasonable expectation that developers will
22 abide by the laws in their home country to minimize risks to
23 themselves and their clients' businesses. When developers
24 demonstrate egregious unprofessional conduct, it breeds client
25 mistrust. If parties to binding agreements are allowed to play
26

27 ¹¹⁰

28 ¹¹¹

1 by their own rules without regard for the law, recklessness
2 prevails, and businesses are destroyed.

3
4 Defendants actions have not only jeopardized Plaintiff's
5 business; they have given Elance and Arbitrators the opportunity
6 to set a precedent for breaching obligations to client and the
7 law.

11 CONCLUSION

12
13 [redacted] was a once in a lifetime opportunity for Plaintiff.
14 It had all the hallmarks for destined success - it was the right
15 idea at the right time. Plaintiff reasonably but incorrectly
16 thought that when paying for development from Defendant, that
17 the product he paid for would be delivered. However, Defendant
18 provided slow, bug-addled, non-expert development lacking
19 adequate support. Thus [redacted] could not gain traction and
20 lost out to competing sites that had the benefit of competent
21 developers to create rich functioning bug-free sites.

22
23 Moreover, Defendant's actions throughout the course of
24 development demonstrated a brazen lack of respect for the rule
25 of law, for Plaintiff's intellectual property, and for
26 Plaintiff's business goals. The consequences have cost Plaintiff
27 millions of dollars in revenue, valuable time, health, and
28 irreparably damaged Plaintiff's business and livelihood.

1
2
3
4 **PRAYER FOR RELIEF**
5

6 **WHEREFORE, Plaintiff demands:**
7

8 **A. A temporary restraining order and preliminary injunction,**
9 **restraining Defendants, each of them, their agents and servants**
10 **from infringing Plaintiff's Registered Mark.**

11 **B. A temporary restraining order and preliminary injunction,**
12 **restraining Defendants, each of them, their agents and servants**
13 **from destroying or secreting any documents, evidence, equipment,**
14 **products or any other item relating to Plaintiff's complaint.**
15

16 **C. A temporary restraining order and preliminary injunction,**
17 **restraining Defendants, each of them, their agents and servants**
18 **from selling, distributing, copying, or profiting from**
19 **Plaintiff's intellectual property.**
20

21 **D. A temporary restraining order and preliminary injunction,**
22 **restraining Defendants, each of them, their agents and servants**
23 **from engaging any acts of unfair trade practices and acts of**
24 **unfair competition, relating to Plaintiff's intellectual**
25 **property.**
26

27 **E. Damages in the amount of all gains, profits, and advantages**
28 **derived by Defendants by their copyright and trademark**

1 infringement and negligence in handling Plaintiff's website and
2 all of each Plaintiff's lost revenue arising therefrom,
3 equalling \$6 million.

4
5 F. For any further relief consistent with proof and that the
6 Arbitrator(s) deems just and proper.

7
8 Dated: March 26, 2013

Respectfully Submitted,

9 By: [REDACTED]