

File No. CT-2016-

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
April 15, 2016 CT-2016-003	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 6

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

**PROPOSED NOTICE OF APPLICATION UNDER SS. 75, 76 AND 77
OF THE *COMPETITION ACT***

TAKE NOTICE THAT:

1. The Applicant, CarGurus, Inc. (“**CarGurus**”), will make an application to the Competition Tribunal (“**Tribunal**”) pursuant to section 75, 76 and 77 of the *Competition Act* (the “**Act**”) for:
 - (a) an Order pursuant to section 75(1) of the Act requiring the Respondent to accept the Applicant as a customer within 15 days of the Tribunal’s order, on the same standard trade terms applicable to other Digital Marketplaces;

- (b) an Order pursuant to section 76(2) of the Act prohibiting the Respondent from continuing to engage in the practices that form the basis of this Application;
- (c) an Order pursuant to section 76(2) of the Act requiring the Respondent to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other Digital Marketplaces;
- (d) an Order pursuant to section 76(8) of the Act prohibiting the Respondent from continuing to engage in the practices that form the basis of this Application;
- (e) an Order pursuant to section 76(8) of the Act requiring the Respondent to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other Digital Marketplaces;
- (f) an Order pursuant to section 77(2) of the Act prohibiting the Respondent from continuing to engage in exclusive dealing;
- (g) an Order pursuant to section 77(2) of the Act requiring the Respondent to accept the Applicant as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other Digital Marketplaces;
- (h) an Order expediting the hearing of the within Application;
- (i) an Order for costs, if the within Application is opposed; and
- (j) such further and other orders as the Applicant may request and the Tribunal deems just.

AND TAKE NOTICE THAT:

2. The person against whom the orders are sought is the Respondent, Trader Corporation ("**Trader**"). The Respondent's address is set out below.
3. The Applicant will rely on the Statement of Grounds and Material Facts attached as Schedule "A" hereto; the Affidavit of Martha Blue, sworn April 14, 2016; and such further and other grounds and material facts as counsel may advise and the Tribunal may permit.
4. A concise statement of the economic theory of the case is contained in Schedule "B" hereto.
5. The Applicant requests that the within Application be heard in the English language.
6. The Applicant requests that the documents for this Application be filed in electronic form.

DATED at Toronto this 15th day of April, 2016.



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SCHEDULE “A” – STATEMENT OF GROUNDS AND MATERIAL FACTS**PART 1 - THE APPLICATION IN A NUTSHELL**

1. CarGurus and Trader compete by offering Digital Marketplaces that allow consumers to search Vehicle Listings from automobile dealers and private sellers for new and used vehicles for sale. Trader is dominant in two relevant markets: (1) the downstream market for Digital Marketplaces in Canada; and (2) the upstream market for the supply of Vehicle Listings to Digital Marketplaces.
2. Trader is engaged in anticompetitive conduct in order to shut CarGurus out of the Digital Marketplaces market:
 - (a) Trader discriminates against CarGurus in respect of Vehicle Listings that Trader administers by refusing to syndicate those listings on usual trade terms made available to other Digital Marketplaces;
 - (b) Trader refuses to syndicate to CarGurus Vehicle Listings from dealers who request that Trader do so;
 - (c) Trader instructs third parties not to syndicate to CarGurus by threatening to otherwise cut off its syndication to these third parties; and
 - (d) Trader improperly asserts copyright and has commenced litigation over thousands of non-copyrightable photographs, in an attempt to litigate CarGurus out of the market for Digital Marketplaces for Vehicle listings.

Alternatively, even if Trader’s copyright assertions are upheld, Trader’s refusal to supply its copyrighted photographs in listings is also violating the Act since:

- (e) such a refusal is more than the mere exercise of copyright because of its cumulative effect on Trader’s market power in the provision of Digital Marketplaces.

Collectively, the above conduct is referred to below as “**Trader’s Conduct**”.

3. CarGurus is directly and substantially affected by Trader's Conduct. CarGurus is currently being denied access to at least 42.5% of Vehicle Listings in Canada, representing listings that dealers cannot syndicate to CarGurus without Trader's permission, which permission Trader is refusing to grant (likely the number is higher). Its revenues are being drastically harmed, which harm will only continue to grow given that network effects are critical in this market. By rendering CarGurus unable to effectively compete, Trader is simultaneously preventing or lessening competition, denying dealers and consumers the innovation and choice that CarGurus offers and ensuring that dealers and consumers use Trader's higher-cost, less innovative vehicle listing services.
4. Trader's Conduct violates sections 75, 76 and 77 of the Act. CarGurus respectfully seeks an order granting access to those listings that Trader effectively controls and that are necessary for competition.

PART 2 - FACTS

A The Parties

5. CarGurus owns and operates websites that enable potential purchasers of automobiles to research and compare listings for used and new automobiles within a geographic area, and to contact sellers. In the context of this application, such websites are referred to as "**Digital Marketplaces**".
6. CarGurus announced the launch of its Canadian website, <http://www.ca.cargurus.com> (the "**CarGurus Website**") on May 26, 2015. CarGurus' U.S. website, <http://www.cargurus.com> (the "**CarGurus U.S. Website**"), launched in 2007. CarGurus' business is further described below.

7. Trader operates websites in Canada—autotrader.ca (English-language) and autohebdo.com (French-language) (collectively, the “**Trader Website**”)—that are Digital Marketplaces which directly compete with the CarGurus Website. Trader is the dominant Digital Marketplace in Canada. Trader’s business is further described below.

B Digital Marketing of Automobiles for Sale in Canada

8. Over the last few decades, the consumer purchase path in the automotive industry has transformed. Today, the path increasingly begins online, and while most consumers do not buy vehicles online, they often conduct research and price evaluations before visiting sellers. Consumers use Digital Marketplaces to acquire information about vehicle availability, features and prices, quickly and at a low (or no) cost.
9. When researching online, consumers want information tailored to their needs while searching for a new or used automobile, and use online channels to narrow their search. At the same time, they expect that in accessing a given Digital Marketplace, they will see as much vehicle inventory as is available in the market, so that they may conduct accurate, comparative research. Consumers have come to expect this, given their experiences using Digital Marketplaces for travel, real estate and other purchases. If a consumer thinks that a Digital Marketplace only lists a fraction of available inventory, he or she is more likely to use another, more comprehensive, alternative.
10. Information about specific makes and models of automobiles is commonly available online from original equipment manufacturers (“**OEMs**”). In the automobile industry, OEMs include branded automotive companies, most of whom operate their own websites. For example, General Motors Canada operates a website at <http://www.gm.ca>.

11. Information about automobiles available for sale is also commonly provided by dealers.
The Canadian automotive market is comprised of two categories of dealers:
 - (a) dealers franchised by OEMs to sell their new and used automobiles ("**franchised dealers**"); and
 - (b) non-franchised, independent dealers who sell used automobiles ("**independent dealers**").
12. CarGurus estimates that there are approximately 6,000 to 8,000 dealers across Canada.
13. In addition, there are a large number of private sellers who want to advertise their automobiles for sale online.
14. Other "offline" means to make consumers aware of vehicle pricing and availability, such as TV and newspaper advertising, are not comparable to, nor a substitute for, online resources, given the limitations of such traditional media.. While some consumers may also use such media to inform themselves, increasingly, they are relying on online sources of information.
15. A number of businesses provide services to OEMs, dealers and private sellers to make it easier to disseminate vehicle listing information to consumers. For example, there are a number of suppliers of online support services to OEMs and dealers, including Trader and a U.S.-based company called Dealer Dot Com, Inc. ("**DDC**").
16. One of the many services that Trader, DDC and others offer to OEMs and dealers in the United States and Canada is website development and hosting. Trader and DDC offer joint website development and web hosting to OEMs and dealers under Trader's dealerSMARTsolutions products. For the purpose of this Application, companies that offer website development and hosting will be referred to as "**Enhanced Services Providers**".

17. In Canada, roughly 1,500 dealers have their websites hosted on the servers maintained by DDC. These websites display Vehicle Listings that are also syndicated to Digital Marketplaces.
18. In addition to OEMs' and dealers' own websites, consumers also look to Digital Marketplaces for comparative and unbiased information.
19. Typically, the information available on Digital Marketplaces includes, for each vehicle, the make, model, year, Vehicle Information Number ("**VIN**"), mileage, price, photographs, and other details about the car, such as the type of transmission and engine size. This collection of information is displayed in a "**Vehicle Listing**".
20. In some cases, the price of the vehicle is not provided because the dealer wants to be able to negotiate it. However, it is uncommon to market a vehicle without photographs.
21. Trader and CarGurus are direct competitors in that they both operate Digital Marketplaces that aggregate information from OEMs, dealers and private sellers and make it accessible to consumers through search engines on their respective websites in Canada, the Trader Website and the CarGurus Website.
22. Through these Digital Marketplaces, Trader and CarGurus do not sell automobiles; rather, they connect buyers and sellers so that transactions may be conducted directly.

C Trader is the Dominant Digital Marketplace in Canada and the Dominant Supplier of Vehicle Listings to Digital Marketplaces

23. There are approximately 10 businesses in Canada that operate Digital Marketplaces.
24. Trader is the dominant Digital Marketplace in Canada and the dominant supplier of Vehicle Listings to Digital Marketplaces. On its website, Trader self-describes as "the leading digital player in Canadian automotive, boasting the top marketplaces

autoTRADER.ca (which generates 14 million visits each month), autoHEBDO.net, and the popular car buyer information site Autos.ca". There are a number of ways to track market share, including the number of dealers and their Vehicle Listings, inventory, and daily views:

- (a) **Dealers:** Trader's website indicates that it has a relationship with 6197 dealers in Canada. Assuming an estimate of 8,000 dealers in Canada, Trader has a relationship with 77% of the new and used automotive dealers in Canada. If there are fewer than 8,000 dealers in Canada, Trader has an even larger market share.
 - (b) **Vehicle Listings:** CarGurus believes that Trader has the exclusive control of an estimated 42.5% of all Vehicle Listings in Canada. This estimate is based on CarGurus' internal analysis of Vehicle Listings that CarGurus cannot obtain from any source other than, or without the consent of, Trader. In fact, Trader-controlled inventory may be higher if all or part of the other 57.5% of inventory from Feed Providers includes Vehicle Listings from Trader.
 - (c) **Website Visits:** In terms of customer traffic, ComScore data shows that of all the Digital Marketplaces that present only new and used car listings (unlike, for example, Kijiji.ca Cars and Vehicles, which also displays listings for spare parts and accessories), Trader is by far the largest, enjoying four times the number of unique visitors as the next largest competitor.
25. Trader has admitted its dominance as a major supplier of Vehicle Listings in Canada in an affidavit filed in support of an application it filed against CarGurus in the Ontario Superior Court of Justice for alleged copyright infringement (Court File No. CV-15-11232-00CL) (the "**Trader Application**"), wherein Roger Dunbar (Vice President of Marketing at Trader) states at paragraph 11 of his affidavit that "Trader is at the center of the car buying process in Canada, connecting consumers, dealers and original equipment manufacturers (also known as "OEMs" or car manufacturers)."
26. Because of Trader's dominance in this downstream market, dealers and automobile sellers believe they need to have their listings on the Trader Website, and enter into

agreements with Trader whereby the dealers and sellers give up to Trader any rights in Vehicle Listings. This grants Trader access to a massive database of unique listings over which it has absolute control.

D Network Effects in Digital Marketplaces

27. Digital Marketplaces are a two-sided platform, in that they connect two distinct groups of users: sellers of vehicles and potential buyers of vehicles. Each group benefits from an increase in the size of the group on the other side of the platform.
28. Consumers who use Digital Marketplaces for Vehicle Listings expect to be able to access comprehensive listings. There are two elements to comprehensiveness. The first is that consumers want to know that they are accessing as many Vehicle Listings as are available for the geographic area they are interested in. As well, they expect the information that comprises the Vehicle Listing to be as complete as possible. This ensures that the consumer has confidence that in conducting research, he or she is being afforded the opportunity to conduct thorough comparisons and effective research.
29. If a consumer has doubts about the comprehensiveness of the Vehicle Listings at a given Digital Marketplace, that consumer is more likely to choose to use an alternative, more comprehensive, Digital Marketplace. In a two sided market like this (with dealers on one side, populating the Digital Marketplace with vehicles, and consumers on the other side, seeking to conduct market research), a drop in the number of consumers using the site will have a concomitant effect on the number of dealers who will be willing to use the site.
30. Comprehensive Vehicle Listings are critical to the success of a Digital Marketplace: there is a direct correlation between Vehicle Listings, website traffic, “**leads**” to dealers

(inquiries from consumers to specific dealers about specific Vehicle Listings, containing the consumer's name and basic contact information) and resulting revenue for the Digital Marketplace.

31. In terms of website traffic, Vehicle Listings have a multiplier effect. If on the first visit to a Digital Marketplace, a consumer is presented with a comprehensive Vehicle Listings inventory, the consumer is more likely to have a positive experience. As a result of that positive experience, the consumer is more likely to return to the website and refer others to that website.
32. For CarGurus, more visitors to the CarGurus Website results in more leads to dealers (i.e. potential customers are directed to the dealer and its Vehicle Listings). Leads are the only tangible way that CarGurus can show dealers that the CarGurus Website adds value to their businesses.
33. There are other benefits to having comprehensive inventory. Visitors stay on the CarGurus Website for longer when there is, for example, a higher number of photographs of vehicles. This in turn increases page views, which in turn assists to attract further Vehicle Listings, advertisers, and improve search results rankings.
34. Trader's dominance and status as a major Digital Marketplace for Vehicle Listings allows it to benefit from powerful network effects. In the Trader Application, Roger Dunbar acknowledges that "Trader's marketplaces ...benefit from powerful network effects" and states that "[t]he size of Trader's visitor base draws more dealers (and their vehicle inventories) to Trader's marketplaces, whose listings in turn draw more consumers."
35. As described below at paragraphs 109-113, CarGurus is suffering from the inverse of these network effects, caused by Trader's refusal to allow CarGurus access on usual

trade terms to what Trader has designated as “Trader Inventory”, which includes the following (collectively, “**Inventory**”):

- (a) Vehicle Listings on dealer websites that are hosted using dealerSMARTsolutions products;
 - (b) Vehicle Listings containing photographs allegedly taken using Trader’s “**Capture Service**” (as defined by Lucian Neacsu, Director of Operations for Trader, in his Trader Application affidavit); and
 - (c) Vehicle Listings syndicated by Trader (i.e. fed by Trader to third parties pursuant to written agreements).
36. CarGurus is unaware of anyone other than Trader in Canada who seeks to assert copyright over photographs they have been asked by a dealer to take.
37. The market power that Trader enjoys in the upstream market due to its exclusive rights is being used to lessen competition in the downstream market, by hindering CarGurus’ ability to present to consumers comprehensive Vehicle Listings.

E Vehicle Photographs Are an Essential Input to Digital Marketplaces

38. Photographs are a key feature for how dealers and sellers present and market their vehicles online, as acknowledged by Trader in the Trader Application. Evidence filed by Trader in the Trader Application demonstrates that buyer interest in a Vehicle Listing is much higher if even a single photograph is included.
39. The harm that CarGurus’ Canadian business has sustained as a result of the removal of Inventory, described at paragraphs 109-113 below, demonstrates that these photographs are an essential input for a Digital Marketplace to be an effective competitor.

F CarGurus' U.S. Business is Innovative and Consumer-Focused

40. In the U.S., the inventory on CarGurus' website is primarily populated by obtaining data feeds of Vehicle Listings from third parties, such as DDC, who receive Vehicle Listings from dealers directly (collectively, "**Feed Providers**"). CarGurus also used to populate its site by crawling websites for additional Vehicle Listings, though it does not do so any more. Both DDC and Trader, in addition to being Enhanced Service Providers, are also Feed Providers.
41. In the U.S., some Feed Providers take photographs of vehicle inventory for dealers ("**capture services**"). Some dealers also take photographs of the vehicles themselves. These photographs are then used in Vehicle Listings. CarGurus does not offer capture services.
42. In the U.S., regardless of who takes the photograph, the prevailing industry view is that dealers own the photographs in the Vehicle Listings. If dealers do not want their Vehicle Listings displayed on the CarGurus U.S. Website, the Vehicle Listings are removed by CarGurus upon request, in accordance with the notice and takedown provisions in the *Digital Millennium Copyright Act*.
43. Take down requests in the U.S., however, are very rare because CarGurus provides a valuable service to dealers. In particular, the more often dealer inventory is presented to potential buyers, the greater the number of leads to the dealers; the greater the number of leads, the greater the likelihood of a resulting sale.
44. There are several ways in which CarGurus' Digital Marketplace is innovative and distinguishes itself from others in the U.S. (and in Canada as discussed in the next section):

- (a) **Clean Interface.** The CarGurus U.S. Website provides a clean (i.e. uncluttered) interface for users. The website is efficient, effective and easy to use.
- (b) **Mathematical algorithms to produce Instant Market Value (“IMV”).** CarGurus developed a mathematical algorithm to analyze and compare prices and features on automobiles for sale. The algorithm looks at each individual Vehicle Listing on a CarGurus website and gives an analysis for the consumer as to whether the associated price is “fair”, “good”, “great” or “over-priced” relative to other Vehicle Listings in the market. In other words, CarGurus does the analysis for the consumer rather than the consumer having to research whether the price offered for a particular car by a particular dealer is a good deal. Unlike other sites, like Trader’s, CarGurus embeds this feature into its website. CarGurus was the first Digital Marketplace in the U.S. to apply a comparative analysis to individual Vehicle Listings. Components of CarGurus’ mathematical algorithm are the subject of two pending patents in the U.S.
- (c) **Search Engine.** The CarGurus U.S. Website is a search engine and not merely a classified site. CarGurus tries to index and provide consumers with the entirety of vehicle inventory available for purchase listed online and in the market.
- (d) **Consumer-Focused Site.** CarGurus is a consumer-focused site even though its revenue is generated from dealers. CarGurus tracks how long vehicles have been on dealers’ lots, dealers’ reputations, consumer feedback on dealers, fraud detection, and dealers who may be trying “bait and switch” techniques. CarGurus gathers a great deal of information from Vehicle Listings to rank vehicles using its IMV, providing the best potential matches to consumers. CarGurus tries to create a fair and transparent marketplace to help consumers make good purchasing decisions. CarGurus believes what is good for the consumer is also good for the dealer, and will result in a less complicated transaction with a more satisfied consumer. Consumers who visit dealers with a third party price validation are often more ready to purchase a vehicle and less likely to haggle.
- (e) **Price Drop Feature.** CarGurus tracks the price history of Vehicle Listings posted on a CarGurus website and alerts users who have signed up for such alerts to drops in price for specific vehicles being tracked by those users. Notably, in response to this innovation, Trader began offering this service in September 2015.
- (f) **Traffic.** As of March 2016, CarGurus operates the largest Digital Marketplace in the U.S. by average daily unique visitors. By driving traffic to the CarGurus U.S. Website, CarGurus, in turn, drives more consumers to dealers.

- (g) **Pricing for Dealers.** CarGurus sends leads to dealers free of charge. As explained below, CarGurus uses leads to demonstrate its value to dealers and encourage them to purchase advertising packages from CarGurus. For example, if the CarGurus U.S. Website has generated numerous leads to dealers, they may be more inclined to purchase additional dealer services that typically generate more leads.

45. The CarGurus U.S. Website also offers a discussion platform for car enthusiasts and automotive experts, who submit questions, offer insight, gather and share information and provide reviews of vehicles and dealers. This platform also helps make the website a destination for consumers interested in purchasing new and used vehicles.

G CarGurus' Launch in Canada

46. On May 26, 2015, CarGurus announced the launch of the Canadian CarGurus Website.
47. Given the success of CarGurus in the U.S., CarGurus believed that it could effectively compete in the Canadian marketplace by replicating the innovative features that it had developed for the U.S. market, as discussed above.
48. For example, the CarGurus Website is similarly clean, efficient, and operates as a search engine rather than merely a classified site. CarGurus was the first Digital Marketplace in Canada to employ and embed into its website an analysis and ranking of individual Vehicle Listings based on pricing, features, and IMV.
49. At launch, CarGurus populated the CarGurus Website primarily with inventory from data feeds. At that time, CarGurus would also crawl certain dealer websites for additional Vehicle Listings. CarGurus now relies on data feeds exclusively.
50. At launch and thereafter, CarGurus obtained data feeds from 25 Feed Providers, on an Opt-In or Opt-Out basis:

- (a) “Opt-Out” Feed Providers obtain the consent of participating dealers to feed data to CarGurus (and other Digital Marketplaces) by using an “opt-out” mechanism. Prior to beginning to send a data feed to CarGurus, the Feed Provider advises its dealers that it will be pushing their Vehicle Listings to CarGurus on a “go-live date” and allows dealers multiple opportunities to “opt out”..
 - (b) “Opt-In” Feed Providers obtain the consent of their dealers to feed data to CarGurus (and other Digital Marketplaces) by using an “opt-in” mechanism. If a dealer wants to have its Vehicle Listings pushed to CarGurus through the Feed Provider’s data feed, it must contact the Feed Provider and “opt in”. If at any time a dealer no longer wishes to have its Vehicle Listings included in the CarGurus data feed, it can contact the Feed Provider, who removes it from the data feed.
51. Feed Providers have an interest in having their syndicated Vehicle Listings appear on as many Digital Marketplaces as possible. As such, subject to one exception in Canada, CarGurus does not pay Feed Provider for data feeds.
52. With either of these two options, dealers can still have their Vehicle Listings removed from the CarGurus Website by contacting CarGurus to request a “dealer block”.
53. A “**dealer block**” means that a dealer has contacted CarGurus and asked that its Vehicle Listings be removed from the CarGurus Website. If CarGurus receives Vehicle Listings pertaining to a dealer who has asked to be blocked, it will not post those Vehicle Listings on the CarGurus Website.
54. Generally, CarGurus does not know the origin of the content in the Vehicle Listings provided by Feed Providers. In every case, CarGurus relies on the Feed Provider to have obtained the consent of the dealers to share their Vehicle Listings with CarGurus on either the Opt-In or Opt-Out bases discussed above. To the extent that there are duplicative Vehicle Listings from Feed Providers, CarGurus de-duplicates the data feeds by using the VIN assigned to each vehicle.

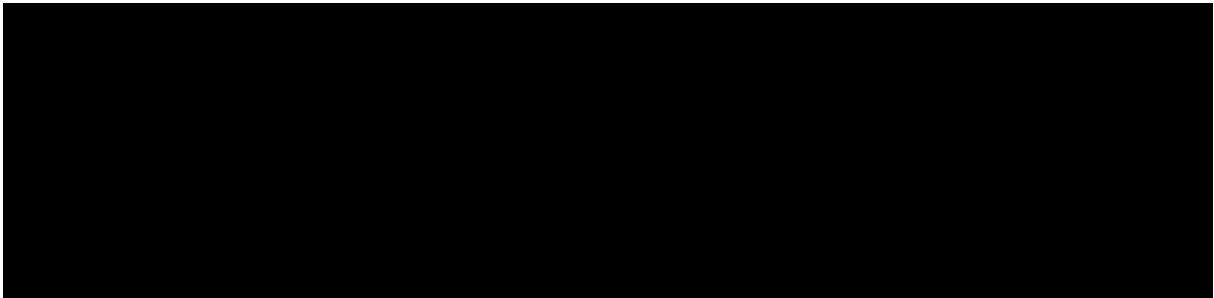
55. As mentioned above, at the time of launch CarGurus was still obtaining some Vehicle Listings by crawling dealer websites. The benefit for dealers was clear: as in the U.S., this would generate greater publicity for Vehicle Listings and increase the number of leads, all at no cost to dealers. Of course, if for whatever reason, a dealer wanted CarGurus to take down its listings, CarGurus would implement a dealer block. CarGurus has since ceased crawling dealer websites.

H CarGurus' Revenue Model Depends on Generating Leads to Dealers

56. CarGurus' revenue model begins by generating leads to dealers. Leads are intended to demonstrate to dealers the value of having Vehicle Listings on the CarGurus Website. CarGurus does not charge dealers for leads sent to them, but uses the leads to promote its enhanced advertising packages to dealers, which in turn generates revenue. This no-cost model has been welcomed in the U.S., as is seen by CarGurus' ability to become, as of March 2016, the largest Digital Marketplace in the U.S.
57. A lead begins when a visitor wants to contact a dealer through the CarGurus Website. The visitor must either (1) fill out an online form to send an email to the dealer via CarGurus; or (2) call the dealer using a phone number on the CarGurus Website. (If the dealer has purchased an advertising package from CarGurus, which also features the dealer's address, then a visitor can click a URL to contact the dealer directly, or visit the dealership.)
58. At the bottom of those leads sent by email, there is an invitation to dealers to contact CarGurus about entering into a paying relationship for enhanced advertising services on the CarGurus Website.
59. CarGurus effectively offers three tiers of advertising packages to dealers:

- (a) **Basic** – This is the free, no-cost package whereby CarGurus posts Vehicle Listings on the CarGurus Website, tracks leads, and provides the dealer with anonymized leads and a means for communicating with the potential consumer through CarGurus. The dealer is limited to 12 photographs per Vehicle Listing.
 - (b) **Enhanced Placement** – This is the package whereby CarGurus posts the dealer’s Vehicle Listing on the CarGurus Website, tracks leads, and provides the dealer with leads that contain consumer contact information and a means for consumers to communicate directly with the dealer. CarGurus additionally posts on the CarGurus Website certain dealer content, such as its trademark, name and contact information, phone number, directions, and a link to its primary website and/or vehicle details page (“**VDP**”), so that this content may be viewed by consumers. The dealer may upload more than 12 photographs per Vehicle Listing.
 - (c) **Featured Placement** – This package is the same as the Enhanced Placement, with CarGurus additionally showcasing dealer inventory at the top of search results pages in “Featured Listings” slots.
60. There is a direct correlation between Vehicle Listings and leads and CarGurus’ ability to identify prospective new dealers for CarGurus’ enhanced advertising packages.
61. Beginning in the Fall of 2015, CarGurus started to send all dealers with Vehicle Listings on the CarGurus Website monthly reports of how many leads a dealer received as a result of its Vehicle Listings on the CarGurus Website.
62. If a dealer received a material number of leads from CarGurus, beginning in September 2015, CarGurus had a salesperson contact the dealer to see if it was interested in entering into a paying relationship for enhanced Vehicle Listings and advertising on the CarGurus Website.

63.



64. As of December 12, 2015, CarGurus had 39 Canadian dealers who were paying an average of \$400/month each for advertising packages. The total revenue for that month was approximately \$16,000.
65. The number of Canadian dealers with advertising packages increased to 137 as of March 31, 2016, with dealers paying an average of \$500 /month. The total revenue for March was approximately \$80,000.
66. CarGurus' total revenue from Canadian dealers to March 31, 2016 is approximately [REDACTED], well below the [REDACTED] CarGurus projected it would have generated in this time period

I Trader's Exclusivity Provision Prevents DDC From Sending Vehicle Listings to CarGurus

67. On October 10, 2013, DDC and CarGurus entered into a Referral and License Agreement (the "**DDC Agreement**"), which grants CarGurus the rights to publish Canadian DDC Inventory on the CarGurus Website. "**DDC Inventory**" is defined in the DDC Agreement as "new and used car inventory from DDC Customers, excluding inventory from OEM programs that DDC is not permitted to provide to Vendor", and includes make, model, mileage, year, where the car is located, specifications and photographs.
68. The DDC Agreement specifically refers to the U.S. and Canada. CarGurus received and continues to receive DDC Inventory with respect to the U.S. However, DDC has informed CarGurus that it can no longer send CarGurus any Vehicle Listings with which Trader has any involvement (i.e., Inventory), including the following:
- (a) those on dealer websites that are hosted using dealerSMARTsolutions products;

- (b) those containing photographs allegedly taken using Trader's Capture Service (as defined by Lucian Neacsu, Director of Operations for Trader, in his Trader Application affidavit); and
 - (c) those syndicated by Trader (i.e. fed by Trader to third parties pursuant to written agreements).
69. DDC said that, in respect of Canada, it could not provide CarGurus with Inventory because of DDC's "exclusive" agreement with Trader covering Canada.
70. In the Trader Application, Trader seeks a declaration that CarGurus has infringed Trader's claimed copyright in 144,974 photographs (which are alleged to relate to 19,258 unique vehicles). Of those photographs, CarGurus has determined that approximately 103,000 photographs were obtained by CarGurus from dealer websites hosted by DDC. Trader has also referenced 72,882 "new" photographs that it alleges have been infringed by CarGurus in the reply affidavit of D'Arcy Woodburn-Davis in the Trader Application.
71. DDC does not claim ownership of any of the copyright on the websites it hosts in the U.S. or Canada.
72. CarGurus did not know that Trader claimed ownership of the alleged copyright in the vehicle photographs that were included in the Inventory. Rather, CarGurus thought that it was each dealership that owned any copyright in each Vehicle Listing, which is the typical situation in the U.S.
73. Accordingly, CarGurus believed that if any Canadian dealer objected to the posting of the dealer's Vehicle Listings on the CarGurus Website, CarGurus would be contacted by the dealer (or by DDC), and would remove the content in the same manner as content is removed in the U.S. as discussed in paragraphs 42-43 above.

J Trader Refuses to Syndicate to CarGurus on Usual Trade Terms

74. In June 2015, DDC advised CarGurus that it was getting pressure from Trader to stop CarGurus from “whatever [CarGurus was] doing” by either using its relationship with CarGurus or through technological means.
75. CarGurus received a letter dated June 10, 2015 from Trader’s then-intellectual property counsel. The letter referred to CarGurus scraping the Trader Website. CarGurus has never done that.
76. On June 18, 2015, Martha Blue and Sam Zales of CarGurus spoke by conference call with Allen Wales, Roger Dunbar, and Robert Rath of Trader.
77. On July 7, 2015, Trader sent CarGurus a document called the Data Feed Agreement (hereinafter the “**Syndication Agreement**”).
78. When Ms. Blue reviewed the Syndication Agreement, she found a number of terms to be of great concern to CarGurus as they were designed to prevent CarGurus from effectively competing with Trader in the Canadian marketplace. For this reason, CarGurus could not accept these terms.
79. In particular, Section 2.6.1 of the Syndication Agreement would require that leads to dealers from CarGurus Website visitors go through Trader, so that the leads are attributable to Trader. This would suggest to the dealer that the lead is coming from Trader and not CarGurus, which aside from harming CarGurus’ business by suggesting to the dealers that CarGurus is providing no value, is false and misleading. Moreover, by insisting that all leads be sent via Trader, the lead volume that Trader could claim to be sending to dealers would be erroneously inflated.

80. As was described above, lead attribution is critical. If a dealer is under the impression that Trader, and not CarGurus, is the source of the lead, the dealer will have little incentive to enter into a paying relationship with CarGurus; it would assume that CarGurus is ineffective at connecting it with consumers.
81. Moreover, section 2.6.1 would require CarGurus to put an indexable link back to the listing on the Trader Website. This is contrary to Google's policy regarding "unnatural" links. In particular, Trader wanted CarGurus to link back to the Vehicle Listing on the Trader Website and ensure that the link is crawlable by Google and does not have a no-follow tag on it. This practice signals to Google that it should give that target website a higher ranking in Google searches. Google has forbidden doing this as part of an exchange agreement because it would allow companies to artificially increase their rankings in Google's search engine. If CarGurus engaged in such linking back, Google could impose penalties on the CarGurus Website, with the ultimate penalty being de-indexing of the CarGurus Website from Google's search engine.
82. Section 2.6.2 of the Syndication Agreement would have also required CarGurus to contact dealers through phone numbers and emails that Trader provided to CarGurus, that CarGurus use Trader email addresses and phone numbers for sending leads to dealers (no matter what the dealer requests), and that CarGurus allow Trader to intercept and track CarGurus' emails and phone calls to dealers. All of these requirements would significantly harm CarGurus' business by giving Trader intelligence about CarGurus' business.
83. At a minimum, it would give Trader insight into the number of leads CarGurus generates, conversations CarGurus' users have with dealers, the inventory that CarGurus was able

to generate leads on, and CarGurus' relative value to a dealer compared to theirs. The anticompetitive effects of allowing Trader access to this information are clear.

84. These terms are clearly designed to stifle competition.

85. CarGurus did not receive any further communication from Trader between July 7, 2015 and December 1, 2015.

K Trader Alleges Copyright Infringement, Causing CarGurus to Remove Vehicle Photographs

86. On December 2, 2015, CarGurus' counsel received a letter from Trader's counsel, which alleged that CarGurus copied and is communicating to the public at least 150,000 photographs owned by Trader.

87. CarGurus did not know until this time that Trader claimed copyright ownership in photographs on dealer websites, nor did CarGurus know that these photographs were allegedly taken by Trader employees and contractors.

88. Since the December 2 letter did not identify the dealers or VINs associated with the photographs at issue, CarGurus did not know which photographs on the CarGurus Website were alleged to infringe.

89. Accordingly, on the evening of December 8, 2015, CarGurus removed all photographs from the CarGurus Website for Vehicle Listings that were not obtained from Feed Providers. This resulted in the removal of over 1 million photographs.

90. CarGurus decided to remove these photographs without having any proof that Trader's employees or contractors took the photographs or that Trader owns the rights in these photographs.

91. The request for Trader to provide a list of the dealers whose photographs CarGurus allegedly copied was repeated by email sent on December 17, 2015 from CarGurus' counsel to Trader's counsel. No response was received until Trader served most of its evidence in the Trader Application on December 22, 2015.

L Trader Prevents Dealers and Feed Providers from Syndicating to CarGurus

92. As indicated above, it is common for dealers and Feed providers to syndicate their Vehicle Listings to as many Digital Marketplaces as possible, with a view to gaining as much visibility for those listings as possible.
93. Trader has told dealers and Feed Providers not to syndicate Inventory to CarGurus, on the basis that Trader's prior consent is required. Trader refuses to provide that consent.
94. As a result, and as will be explained further below, Feed Providers (including Carpages.ca and DDC) have cancelled certain data feeds to CarGurus. Carpages.ca has not provided data feeds to CarGurus, saying that it is unable to re-syndicate Vehicle Listings for Canada without the express permission of Trader. In one instance Carpages re-syndicated by mistake and was advised by Trader not to do so. As indicated above at paragraphs 68-69, DDC has had to stop providing CarGurus with any Inventory for Canada.
95. CarGurus understands that other Trader syndication agreements lack the anti-competitive terms described at paragraphs 79-84 above. For example, CarGurus' Senior Vice President Technology has reviewed other Canadian Digital Marketplaces and has never seen a link back to the Trader Website. Accordingly, the requirement in Section 2.6.1 of the Syndication Agreement appears to have been designed to target CarGurus and CarGurus alone.

96. As noted in paragraph 68, Inventory includes not just dealers who use the Trader Capture Service, but all dealers to whom Trader provides services (even simple web hosting services). As discussed further below, this is a significant percentage of dealers in Canada, and has resulted in Feed Providers stopping syndication of dealers' Vehicle Listings to CarGurus regardless of whether the dealer uses Trader's Capture Service. Feed Providers cannot syndicate Inventory to CarGurus.
97. For example, even if a dealer takes its own photographs but puts them on a DDC-hosted website, and uses Trader for syndication, Trader will not syndicate to CarGurus though Trader can claim no copyright in the photographs.
98. A dealer can advise Trader that it would like to have its inventory syndicated to CarGurus; however, Trader can refuse to grant its permission even if the dealer has taken its own photographs, because Trader has refused to enter into a syndication agreement with CarGurus.
99. Trader's Conduct is contrary to representations that it makes on the Trader Website, which suggest that Trader syndicates "everywhere". To the contrary, it would appear that Trader is highly selective and strategic about syndication.
100. Since Trader will not allow syndication of any Inventory to CarGurus on commercially reasonable terms that would allow CarGurus to compete with Trader, CarGurus would need to have dealers compile all listing information about their vehicles and take a second set of photographs (assuming that the existing photographs may be owned by Trader), and then upload the information and different photographs into at least two different systems: the Trader Website and at least one Feed Provider. This would involve a very significant amount of work, which a dealer is not likely to do if it can simply

rely on Trader to do it for them. Moreover, because their listing is already on Trader's Digital Marketplace and it is dominant, the benefit from being on a competing Digital Marketplace is reduced. Accordingly, it appears that Trader has unfairly targeted CarGurus.

101. CarGurus is negotiating with Kijiji.ca to obtain a data feed agreement, and although the talks are in the early stages, Kijiji has told CarGurus that it will not send a feed for any Inventory without Trader's consent. To date, Trader has refused consent.
102. Since the Fall of 2015, CarGurus has been trying to work with a company called CarProof which tracks historical data on vehicles, such as whether a vehicle has been in any accidents. CarProof told CarGurus that "one of our canada [sic] marketplace partners is pushing us to agree not to integrate with cargurus in Canada. Apparently you have the incumbents in Canada nervous". CarGurus interpreted this to be a reference to Trader.

M Trader's Conduct is Anticompetitive

103. Trader enjoys market power in the upstream Vehicle Listings market. It uses this market power to deny (directly and indirectly) Inventory to CarGurus. The result of this foreclosure is to enhance, create, or maintain its market power in the downstream Digital Marketplaces market. The reason it has targeted CarGurus is because of the latter's ability to become a significant competitor, based on its U.S. track record and ability to replicate in Canada its innovative U.S. offerings.
104. Trader's treatment of CarGurus and its refusal to deal with CarGurus on commercially reasonable terms stems from Trader's concern that CarGurus' expansion in the Canadian market would threaten Trader's position in the market.

105. CarGurus believes that, more than any other Digital Marketplace, Trader views CarGurus as its biggest competitive threat because the CarGurus Website is innovative and CarGurus drives considerable value to dealers and the public, as is proven by CarGurus' U.S. business. CarGurus' IMV ratings drive traffic and views not only to the CarGurus' Website, but also dealers' websites based on CarGurus' rankings. This provides value to dealers that Trader cannot.
106. Moreover, CarGurus offers these services either for free or for a lower cost than Trader offers its services. For example, CarGurus' basic package, which is offered to dealers free of charge, includes dealers' inventory on the CarGurus Website with up to 10 photographs, and allows CarGurus Website users to anonymously email such dealers about their available vehicles for sale.
107. CarGurus believes that Trader's different treatment of CarGurus and its refusal to deal with CarGurus on the usual trade terms with which it deals with other Digital Marketplaces stems from CarGurus' low pricing policy and from Trader's concern that CarGurus' expansion in the Canadian market would force Trader to compete by providing more innovative products and services and by lowering its prices.
108. Trader's refusal to provide access to its photographs of vehicles is not the mere exercise of copyright, if it is found that the copyright in each photograph is valid. Because of network effects the market power in a collection of copyrighted photographs exceeds the market power of a single photograph. The number of listings affected by the exercise in copyright is important, and the larger the number, the more the competitive implications of a denial of access. Moreover, the exercise of those rights is creating and maintaining Trader's market power in the market for Digital Marketplaces in Canada.

N Impact of Removing Vehicle Listings on CarGurus, Competition, and Consumers

109. The removal of Inventory from CarGurus' Canadian website has had, and is having, a direct and substantial measurable and deleterious impact on CarGurus' business. Without being able to obtain Inventory, CarGurus will not be able to effectively compete with Trader.
110. As a result of Trader's actions, the CarGurus Website is missing a significant proportion of Vehicle Listings and CarGurus believes that it is obvious to users of the CarGurus Website that it does not have all available inventory. Without a comprehensive inventory of photographs in Vehicle Listings, CarGurus is receiving less traffic and generating fewer leads to dealers, which prevents revenue realization.
111. Since CarGurus removed the photographs over which Trader has asserted copyright:
- (a) **The number of dealers with [REDACTED] leads per month has diminished.** This is particularly acute in the market on which CarGurus has focused, namely, English-speaking consumers in Ontario, where there is the highest concentration of dealers.
 - (b) Email leads for inventory posted to the CarGurus Website from Inventory dropped from an average of [REDACTED] leads/day to [REDACTED] leads/day. In other words, without photographs, **CarGurus has lost [REDACTED] of leads** for dealers whose Vehicle Listings are related to Trader.
 - (c) In terms of overall lead volume (after normalizing for traffic differences), **CarGurus lost approximately [REDACTED] of its overall lead volume.**
 - (d) **CarGurus' conversion rate (the percentage of visitors to the CarGurus Website who contacted at least one dealer about a car for sale) decreased by [REDACTED].** A negative impact to conversion rate demonstrates an increasingly negative user experience of the CarGurus Website, which diminishes the CarGurus Website's growth, repeat visitors, and value provided to dealers.

- (e) **Total Vehicle Detail Page (“VDP”) views have dropped by [REDACTED].** Most of CarGurus’ advertising revenue is made from advertising on VDPs, the reduction in total VDP views represents not only a large reduction in user engagement (measured by time spent on the CarGurus Website), but also a corresponding [REDACTED] decrease in advertising revenue.
112. CarGurus estimates that the loss of photographs and inability to display Trader Inventory has cost CarGurus approximately [REDACTED] in revenue to date. CarGurus’ forgone revenue through 2017 is estimated to be [REDACTED].
113. In the longer term, the reduction in leads and the corresponding reduction in the ability to monetize leads will affect all aspects of CarGurus’ Canadian business, preventing CarGurus from continuing to develop innovative features to assist consumers in their purchasing path. Consumers suffer from the lack of innovation and lack of competition. If Trader continues its current practices, the percentage of the market it controls will only increase with time as it enters into exclusive agreements with additional dealers and Feed Providers, and the adverse effects on CarGurus’ business from Trader’s Conduct are likely to grow.
114. CarGurus is still trying to source Vehicle Listings from all available Feed Providers in Canada. However, even if CarGurus obtains data feeds from all of them, the CarGurus Website will not have a true reflection of the available Canadian inventory, as Trader controls at least 42.5% of the marketplace and will not allow Feed Providers to syndicate any Inventory to CarGurus.
115. In fact, as stated above, by refusing its consent, Trader is trying to ensure that inventory is not syndicated to CarGurus even if a dealer requests it and a Feed Provider would otherwise be willing to syndicate that dealer’s inventory to CarGurus.

116. CarGurus has received complaints from dealers who want to have their Vehicle Listings on the CarGurus Website but have been prevented in doing so by Trader. CarGurus has a list of more than 30 dealers who would like to work with CarGurus but cannot because of Trader's refusal to consent to syndication of Inventory to CarGurus. Moreover, Trader itself acknowledges that at least 36 dealers have approached Trader seeking syndication of their Vehicle Listings to CarGurus. Trader has refused.

PART 3 - GROUNDS FOR THE SECTION 76 APPLICATION

117. Trader's Conduct violates sections 75, 76, and 77 of the Act.
118. CarGurus has been directly and substantially affected by Trader's Conduct. Trader is preventing CarGurus from entering and expanding in the market and from having the competitive impact that was observed in the short time that CarGurus was able to operate the CarGurus Website with adequate inventory. Without being able to obtain Inventory, CarGurus will not be able to compete effectively with Trader or provide value and innovative products to Canadian consumers.

A Refusal to Deal (Section 75(1))

119. Section 75(1) of the Act sets out the requirements for the reviewable trade practice of refusal to deal:

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

120. As set out at paragraphs 109-113 above, CarGurus is substantially affected in its business and precluded from carrying on its business due to its inability to obtain Inventory on usual trade terms.
121. CarGurus is unable to obtain these Vehicle Listings because the Inventory is in the sole control of the Respondent.
122. CarGurus is willing to meet the usual trade terms of Trader for the syndication of Inventory through a commercially reasonable syndication agreement. It has tried to enter into a syndication agreement with Trader, but Trader refuses to deal with it on its standard terms.
123. Trader has stated that only “once the matters at issue in [the Trader Application] are resolved, Trader is open to negotiating with CarGurus with respect to a syndication agreement”. This amounts to a refusal. Trader is seeking over \$70,000,000 in damages, which, as CarGurus will show in the Trader Application, is grossly disproportionate even if there were a copyright violation. This means the “matters at issue” will not be “resolved” absent a judicial decision of the Trader Application, likely well into the future. Trader has no intention of “negotiating with CarGurus with respect to a syndication agreement”; rather, Trader is seeking to materially impair CarGurus’ ability to compete

by litigating the matter for as long as it can before ostensibly being willing to deal with CarGurus on usual commercial terms.

124. Vehicle Listings and Inventory are not limited in supply – as noted above, these are digital listings that are normally syndicated to Digital Marketplaces as a matter of course and can be duplicated at no cost.
125. Trader's refusal to deal is having an adverse effect on competition in the market for Digital Marketplaces in Canada. The consuming public is being denied CarGurus' innovative, consumer-focused website and is being forced to use higher cost alternatives, like Trader.
126. CarGurus therefore submits that Trader's refusal to deal satisfies all the elements of s. 75 of the Act and respectfully requests that the Tribunal make an order under s. 75 of the Act requiring Trader to accept CarGurus as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other Digital Marketplaces.

B Price Maintenance (Section 76)

127. Trader's Conduct violates s. 76 of the Act, which states, in part:

Price maintenance

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

- (a) a person referred to in subsection (3) directly or indirectly

...

- (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

- (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

...

Persons subject to order

- (3) An order may be made under subsection (2) against a person who

- (a) is engaged in the business of producing or supplying a product;

... or

- (c) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

- 128. Trader is engaged in the business of syndicating Inventory, as required by s. 76(3)(a).
- 129. If it is accepted that Trader holds copyright in the Inventory (which CarGurus denies), Trader also falls within s. 76(3)(c), as it has the exclusive rights and privileges conferred by the copyright in the Inventory associated with the syndication agreements.
- 130. Trader's Conduct falls within s. 76(1)(a)(ii) because it has refused to supply a product to CarGurus. Specifically, Trader has refused to supply CarGurus with Inventory, in an attempt to keep CarGurus from competing in the market for Digital Marketplaces. CarGurus believes Trader is doing so because CarGurus' low pricing policy and innovative features were disrupting the Digital Marketplaces market and taking away market share from Trader.

131. Trader has also acted contrary to s. 76(1)(a)(ii) because it has “otherwise discriminated against” CarGurus. Trader has discriminated against CarGurus by denying it access to Inventory and by refusing to deal with it on terms similar to the terms that it applies to other Digital Marketplaces. This discrimination arises because of CarGurus’ low pricing policy and superior innovative features.
132. Trader has also acted contrary to s. 76(8) by inducing DDC and other Feed Providers, as a condition of doing business with Trader, to refuse to syndicate Inventory to CarGurus. Trader invokes its contractual rights to prevent DDC and other Feed Providers from syndicating Vehicle Listings to CarGurus. This refusal arises because of CarGurus’ low pricing policy and superior innovative features.
133. Trader’s refusal to supply has impeded CarGurus’ entry into and expansion in the Digital Marketplaces market in Canada, as set out at paragraphs 109-113 above. It has resulted, and is likely to result, in a substantial lessening or prevention of competition, as it diminishes CarGurus’ ability to compete with Trader and enhances Trader’s dominance. Consumers are being denied access to an innovative, consumer-friendly Digital Marketplace.
134. CarGurus therefore respectfully requests that the Tribunal make orders pursuant to ss. 76(2) and 76(8) of the Act **(1)** prohibiting Trader from continuing to engage in price maintenance and **(2)** requiring Trader to accept CarGurus as a customer within 15 days of the Tribunal’s, on the same standard trade terms applicable to other Digital Marketplaces.

C Exclusive Dealing (Section 77)

135. Trader’s Conduct is in violation of s. 77 of the Act.

136. Subsection 77(1) defines “exclusive dealing” as:

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs

137. Subsection 77(2) provides:

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

138. Trader is a major supplier of Vehicle Listings in Canada and is also a major supplier of Digital Marketplaces in Canada.

139. Exclusivity provisions in Trader’s agreements with dealers and Feed Providers provide that dealers and Feed Providers cannot syndicate Inventory to CarGurus without Trader’s consent, which consent Trader refuses to grant. As a result, CarGurus cannot access Inventory. In particular, Roger Dunbar’s reply affidavit in the Trader Application

includes Trader's Master Service Agreement as Exhibit "C", as well as the Data Feed Agreement and Trader Dealership Syndication Agreement as Exhibit "A".

140. Trader's Master Service Agreement contemplates at section 3 that Trader's proprietary rights include all intellectual property rights, and that a dealer cannot reproduce any of the "proprietary materials" without prior written consent of Trader. At Sections 6.1, 6.6, and 6.7, Trader obtains a license to Dealer Content and the ability to further license said content and to use the content for any business purpose. These sections are reproduced below:

3.1 The Dealer hereby acknowledges and agrees that Trader and the Trader Associates (as hereinafter defined), or any of their respective licensors, own and shall retain all legal right, title and interest in and to the Software and Services, including any intellectual property rights that subsist in the Software or Services (of whatever nature, whether registered or not, and wherever in the world those rights may exist). Without limiting the foregoing, the Dealer acknowledges that Trader exclusively owns the intellectual property rights related to any written content, graphics, images, and/or photographs taken, created, written, or developed by Trader, Trader Associates, or their employees, contractors, or representatives, pursuant to this Agreement or otherwise. The Dealer shall not reproduce any of these proprietary materials without Trader's express prior written consent.

...

6.1 In the course of the Dealer's use of the Software and Services, the Dealer may be required to provide (or Trader or its representatives may collect) certain information about itself and its inventory (the "Dealer Information"). The Dealer consents to Trader's collection, storage, distribution, use and making available of such Dealer Information as Trader may reasonably require in order to carry on its business and/or to provide the Software and Services.

...

6.6 By submitting, posting or displaying Dealer Content in connection with any of the Services, the Dealer hereby grants to Trader and all Trader Associates a perpetual, irrevocable, worldwide, royalty-free, sublicenseable [sic], and non-exclusive license to use, reproduce, adapt, modify, translate, publish, publicly perform, make available, publicly display and distribute any Dealer Content, as Trader may reasonably require in order to carry on its business and/or provide the Software and Services. This license is for the sole purpose of enabling Trader and all Trader Associates to display, distribute and promote the Software or Services, and to display, publish, analyze and archive Dealer listings and advertisements placed pursuant to this Agreement. The Dealer agrees that this license includes a right for Trader and the Trader Associates to make the Dealer

Content available to their licensors. The Dealer understands that Trader or any Trader Associate, in performing the required technical steps to provide the Software or Services to the Dealer, may: (a) transmit or distribute the Dealer Content over various public networks and in various media; and (b) make such changes to the Dealer Content as are necessary to conform and adapt the Dealer Content to the technical requirements of connecting networks, devices, services or media. The Dealer hereby acknowledges and agrees that this license shall permit Trader to take all of the foregoing actions. The Dealer confirms, represents and warrants to Trader that it has all of the rights, power and authority necessary to grant this license.

6.7 Dealer agrees that Trader may aggregate and anonymize the Dealer Content and/or the Dealer Information and analyze, collect, store, distribute and use that information for any reasonable business purpose.

141. Trader's Data Feed Agreement requires Trader and its syndication partner(s) to swap Vehicle Listings. The agreement stipulates:

2.1.2 For certainty the license granted pursuant to Section 2.1.1. shall not:

...

2.1.2.2 permit the Syndication Partner to providing [*sic*] or sublicense the Trader Data to any third party for any purpose whatsoever.

2.1.3: The Syndication Partner will not, and is expressly prohibited from using alternative means (including, but not limited to, the use of robots, spiders or scraping) to obtain the Data from Trader, other than as contemplated under this Agreement; provided however that, for greater certainty, Trader acknowledges and agrees that nothing in this Agreement will prevent or restrict the Syndication Partner from obtaining and using any data obtained from a source other than Trader.

142. Trader's Dealership Syndication Agreement contemplates extraction of a dealer's listings by Trader from the Trader Database for publication on the dealer's own website or Trader approved third party website. The terms of the agreement state:

If Dealer wishes to republish the Dealer Data via any 3rd party website or other medium, Dealer must first obtain Trader's approval of each 3rd party website or medium. (3rd party websites and media approved by Trader shall be referred to in this Agreement as "Approved 3rd Party Media", and the parties who publish Approved 3rd Party Media shall be referred to as "Approved 3rd Parties") Dealer Data may not be republished anywhere other than on the Dealer's website or on Approved 3rd Party Media. Trader may charge a fee for republication of the Dealer Data on Approved 3rd Party Media, and Dealer agrees to pay all such fees to Trader in a timely fashion.

Dealer acknowledges that the Dealer Data in aggregate form, and the individual photos and textual or other elements of the Dealer Data taken individually are proprietary works owned by Trader, and protected under copyright and other intellectual property law. All Dealer Data is and shall remain the sole property of Trader.

143. Trader has exploited these exclusivity provisions to impede CarGurus' entry into and expansion into the Digital Marketplaces market in Canada, as set out at paragraphs 68-69 and 93-98 above. It has resulted, and is likely to result, in a substantial lessening or prevention of competition, as it diminishes CarGurus' ability to compete with Trader and enhances Trader's dominance. Consumers are being denied access to an innovative, consumer-friendly Digital Marketplace.
144. If Trader is found to hold copyright in the photographs, Trader's exploitation of its right, in combination with the rest of Trader's Conduct, is having a negative impact on competition in the Digital Marketplace market, and, by extension, is violating the Act.
145. CarGurus therefore respectfully requests that the Tribunal make orders under s. 77(2) of the Act **(1)** prohibiting Trader from continuing to engage in exclusive dealing; and **(2)** requiring Trader to accept CarGurus as a customer within 15 days of the Tribunal's order, on the same standard trade terms applicable to other Digital Marketplaces.
146. In support of this Application, and the Grounds and Material Facts set out above, CarGurus relies on:
 - (a) the affidavit of Martha Blue, sworn April 14, 2016;
 - (b) the *Competition Act*, RSC 1985, c C-34, as amended, including ss. 75, 76, 77 and 103.1;
 - (c) the Competition Tribunal Rules, SOR/2008-141; and
 - (d) such further and other grounds and material facts as counsel may advise and the Tribunal may permit.

**SCHEDULE “B” – CONCISE STATEMENT OF THE
ECONOMIC THEORY OF THE CASE**

A Introduction

1. This statement of economic theory explains why Trader’s Conduct has the effect of creating, enhancing, and maintaining market power and why, even if Trader does hold copyright in photographs of automobiles in Vehicle Listings (which CarGurus denies), its assertion of copyright is not the “mere” exercise of intellectual property rights.
2. Trader is alleged to have engaged in the following:
 - (a) refused to syndicate to CarGurus Vehicle Listings that Trader administers on usual trade terms made available to other Digital Marketplaces;
 - (b) entered into exclusive contracts with automobile dealers and private sellers such that they cannot provide their Vehicle Listings to other Digital Marketplaces that match buyers and sellers of vehicles without Trader’s permission if they provide their Vehicle Listings to Trader;
 - (c) refused to syndicate to CarGurus Vehicle Listings from dealers who request that Trader do so; and
 - (d) improperly asserted copyright in photographs of automobiles included in Vehicle Listings, thereby denying other Digital Marketplaces access to the photographs in Vehicle Listings.
3. The relevant market where competition is harmed by Trader’s anticompetitive practices is Digital Marketplaces (online platforms for vehicle sales) in Canada. Digital Marketplaces do not sell vehicles, but instead facilitate matches between buyers and sellers of vehicles. Trader’s Conduct maintains its market power by reducing the quality of competing Digital Marketplaces and thereby reducing the willingness of buyers and sellers to substitute to these rival services.

B Economic Fundamentals

4. Conduct contrary to the Act typically must create, enhance, or maintain market power. An effect on market power is indicative of a negative effect on competition. The extent of the harm to competition required for a violation of the Act varies, but in all of the sections of the Act that allow for private action there is a requirement for a negative effect on competition, i.e., some increase in market power.
5. In considering whether conduct is sanctionable under the Act, it is important to distinguish between the exercise of market power and conduct that creates, enhances, or maintains market power. Market power is the ability to raise prices profitably above competitive levels or otherwise distort some facet of competition, e.g., product variety, quality, or innovation, away from competitive levels. Typically the ability of a firm to exercise market power depends on the willingness and ability of its consumers to substitute to other suppliers of the same product or other products. Conduct that creates, enhances, or maintains market power does so by reducing the willingness of consumers to substitute to the products of rivals by reducing the quality or value of rivals' products or by reducing the ability of consumers to substitute to rivals by raising their costs or otherwise reducing their ability to supply.¹
6. The fundamental right of copyright is the ability to exclude others. Such exclusion is not conduct that typically can be reached under the Act. It is exclusion explicitly granted and enforced by the Federal Government in the *Copyright Act* to provide incentives for innovation by holding out the prospect for recoupment of upfront investment (long run fixed costs) by reducing the incentives for duplication and competition from other firms. If

¹ Activities by a firm that reduce its costs or raise the quality of its products are not subject to sanction even if they have the effect of reducing the ability or willingness of consumers to substitute.

this exclusion maintains market power in the supply of the copyrighted material, it is considered an acceptable cost (during the lifetime of the copyright).

C The Economics of Two-Sided Platforms

7. Digital Marketplaces are examples of two-sided platforms. A two-sided platform is an intermediary that connects two distinct groups of users; in this case, the two groups are sellers of vehicles and potential buyers of vehicles. A key characteristic of two-sided platforms is the existence of positive cross-platform externalities: each group benefits from an increase in the size of the group on the other side of the platform.
8. The demand for access to the platform by buyers of vehicles will increase with the greater number and variety of vehicles that can be accessed. The demand for access to the platform by sellers of vehicles will depend upon the number of buyers who use the platform. The reason is simple, and intuitive: the greater the number of participants on the other side of the platform, the greater the chance not just of a match, but also of a better match, between buyers and sellers of vehicles.
9. The interdependency of demand means that online platforms for the sale of vehicles (Digital Marketplaces) will have incentives to attract both buyers and sellers of vehicles. Indeed, the success and sustainability of a Digital Marketplace will depend on its ability to attain and maintain a sufficient number of buyers and sellers. Digital Marketplaces will attract buyers and sellers through appropriate pricing of access to each group and enhancing the quality and features of using their online platform for the sale of vehicles. They will do so recognizing that increasing usage by one side will increase usage by the other side, with positive feedback effects back to the first side. For instance, providing buyers an enhanced user experience through access to reviews and pricing tools will not only increase usage of the platform by buyers, but also make it more likely for sellers to

make sure their Vehicle Listings are on that platform. The response by sellers will make the platform more attractive to buyers, increasing usage by buyers, further increasing demand of sellers, etc. This virtuous circle of positive feedback is an example of indirect network effects.

10. An important determinant of the relative quality of Digital Marketplaces, therefore, from the perspective of buyers and sellers of vehicles, is their expectation of the number of users of the platform on the other side of the platform. The greater their expectation that there will be more buyers or more sellers on a platform relative to its rivals, the more likely they are to use that platform and the less likely they are to view rival platforms as relatively good substitutes. In particular, the ability of a Digital Marketplace to attract buyers will be an important determinant of whether sellers will provide their Vehicle Listings to a Digital Marketplace. But the ability to attract buyers depends critically on whether sellers have supplied their Vehicle Listings.
11. The extent to which Digital Marketplaces can acquire listings is critical to their viability. Digital Marketplaces can “populate” their website by acquiring syndicated Vehicle Listings, by crawling dealer and other websites, and sourcing Vehicle Listings directly from sellers of vehicles.
12. Syndicated Vehicle Listings are licensed data feeds from aggregators, who have acquired and aggregated Vehicle Listings from private sellers and dealers.
13. Automobile dealers can, and do, outsource their website and online directory of Vehicle Listings to third-party providers. These Enhanced Services Providers develop websites and host dealer websites. In the process, they often assist in creating Vehicle Listings and those Vehicle Listings are often compiled into a database of the Enhanced Services

Provider. The Enhanced Services Provider then syndicates those Vehicle Listings, either in whole or in part. For instance, the Enhanced Services Provider will syndicate back to the dealer for display on the dealer's website its own Vehicle Listings. Alternatively, the Enhanced Services Provider may syndicate its database for display on a Digital Marketplace.

D Trader's Market Power

14. Trader has market power in two relevant markets. The relevant downstream market is Digital Marketplaces (online platforms for sale of vehicles) in Canada. The relevant upstream market is the supply of Vehicle Listings to Digital Marketplaces. The market power of Trader in the downstream market arises because consumers, whether buyers or sellers of vehicles, will not substitute sufficiently to alternative suppliers of either Digital Marketplaces or other means for buyers to become aware of availability and pricing of vehicles.
15. Trader also has market power in the upstream market, the supply of Vehicle Listings. Rival Digital Marketplaces are not able to access alternatives at all, or efficiently, to the Vehicle Listings under the exclusive control of Trader. Trader exercises its market power in Vehicle Listings by denying access to rival Digital Marketplaces of Vehicle Listings in which it has exclusive rights. Its exclusive rights are attributable to its asserted copyright in photographs and its exclusive contracts with suppliers of Vehicle Listings.
16. The link between copyright and control of a Vehicle Listing is attributable to the fact that a Vehicle Listing without photographs is considerably inferior to the same listing with photographs.

17. Trader's contracts with dealers in the provision of services allegedly results in the assignment of property rights in the listing to Trader, including that the dealer cannot, without Trader's consent, allow those listings to be syndicated or displayed on rival Digital Marketplaces. This appears to be the case even if the Vehicle Listing does not contain an allegedly copyrighted photograph. Finally, Trader has, as in this case, effectively refused to syndicate its Vehicle Listings to rival Digital Marketplaces by making the terms offered unacceptable to the competing Digital Marketplace, in part because of the terms' negative effect on competition.²

E The Effect of Trader's Conduct on Market Power

18. Trader is able to maintain its market power in Digital Marketplaces for the sale of vehicles in Canada by entering into exclusive contracts for Vehicle Listings and exercising its asserted copyright in photographs. The effect of this exclusivity is to reduce the quality of rival Digital Marketplaces and enhance the attractiveness to buyers and sellers of Trader's Digital Marketplaces. This effect exists because of indirect network effects, and the effect of exclusivity is multiplied by these indirect network effects. The long-term effects on relative quality are, because of indirect network effects, more significant than in the short term. The effect of reducing the supply of Vehicle Listings today decreases the attractiveness of CarGurus to buyers today and in the future. But because it has reduced the attractiveness of CarGurus to buyers in the future, it will reduce demand by sellers to have their Vehicle Listings on the CarGurus Website, further reducing demand by buyers, etc. Exclusivity today by maintaining a

² Trader has offered to syndicate its listings to CarGurus. However, the terms of the proposed Syndication Agreement could easily mean that CarGurus is, from the perspective of sellers, incorporated into Trader's Digital Marketplaces. The terms of the Syndication Agreement give Trader control over how the lead from the CarGurus Website to private sellers and dealers is represented to sellers. It could be represented as originating from the Trader Website. Given the importance of expectations of buyers and sellers on participation by the other group and the likelihood of a match, the terms of the Syndication Agreement could easily marginalize CarGurus as a competitive discipline on Trader, just as effectively as Trader's denial of Vehicle Listings.

head start for Trader, the dominant Digital Marketplace in terms of participation by both sides (buyers and sellers), creates a positive upward dynamic for Trader and a negative downward dynamic for competing Digital Marketplaces. The effect of denying listings to CarGurus is to reduce its ability to compete with Trader's Digital Marketplaces, enhancing and maintaining Trader's market power.

19. The effect of the exercise of asserted copyright in the photographs is more than just the exercise of market power stemming from the asserted copyright in *a photograph*. First, because of network effects the market power of a collection of copyrighted photographs exceeds the market power of a single photograph. Because of network effects the number of listings affected by the exercise in copyright is important, and the larger the number, the more the competitive implications of a denial of access. Second, Trader's refusal is effectively not just of a single photograph or even a collection of photographs. Its refusal effectively denies access to all the information *for each vehicle and all* vehicles in its database. Third, the exercise of those rights is creating market power in the market for Digital Marketplaces in Canada.
20. If Trader was not dominant, or unlikely to become dominant, it would have incentives to make sure that listings created by DSS and on its Digital Marketplaces were readily available on all other Digital Marketplaces. Demand for its services would be increasing in the extent to which it maximized exposure to buyers for its Vehicle Listings. Non-dominant Enhanced Services Providers and Digital Marketplaces would not have the ability or incentive to impose exclusivity conditions on private sellers and dealers.

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to section 103.1 of the Act granting leave to bring an application under sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by CarGurus, Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

BETWEEN:

CARGURUS, INC.

Applicant

- and -

TRADER CORPORATION

Respondent

**PROPOSED NOTICE OF APPLICATION UNDER
SS. 75, 76 AND 77 OF THE *COMPETITION ACT*)**

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