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6 Attorneys for Plaintiffs and Counterdefendants
7 THOUGHT CONVERGENCE, INC. and
NAME INTELLIGENCE, LLC

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 THOUGHT CONVERGENCE, INC.,
a Delaware Corporation and NAME
12 INTELLIGENCE, LLC, a Delaware
limited liability company,

13 Plaintiff,

14 v.

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

19 Defendants.

20
21 NAME INTELLIGENCE, INC., a
Washington corporation; and JAY
22 WESTERDAL,

23 Counterclaimants,

24 v.

25 THOUGHT CONVERGENCE, INC.,
a Delaware corporation and NAME
26 INTELLIGENCE, LLC, a Delaware
limited liability company,

27 Counterdefendants.
28

Case No. CV 09-3088-R(AJWx)

**PLAINTIFFS THOUGHT
CONVERGENCE, INC. AND NAME
INTELLIGENCE, LLC'S ANSWER
AND AFFIRMATIVE DEFENSES TO
COUNTERCLAIMS**

Honorable Manuel L. Real
Courtroom 8

1 Plaintiffs and Counterdefendants Thought Convergence, Inc. and Name
2 Intelligence, LLC (“Plaintiffs”) hereby answer Counterclaimants Name
3 Intelligence, Inc. and Jay Westerdal’s Counterclaim as follows:

4 **INTRODUCTION**

5 1. Answering paragraph 1 of the Counterclaim, Plaintiffs admit that this
6 case concerns, among other things, the enforcement of a Securities and Exchange
7 Agreement (the “Agreement”), entered into between Name Intelligence and
8 Thought Convergence, Inc. on or about May 2, 2008. Except as so admitted,
9 Plaintiffs deny each and every allegation contained in paragraph 1.

10 2. Answering paragraph 2 of the Counterclaim, Plaintiffs admit that it
11 made the initial cash payment to Name Intelligence at the closing of the Agreement
12 and made the First-Post Closing Payment. Except as so admitted, Plaintiffs deny
13 each and every allegation contained in paragraph 2.

14 **JURISDICTION AND VENUE**

15 3. Answering paragraph 3 of the Counterclaim, Plaintiffs admit that
16 Plaintiffs are citizens of different states than Counterclaimant. Plaintiffs are
17 without knowledge or information sufficient to form a belief as to the truth of
18 whether Counterclaimants’ allegations exceed \$75,000 exclusive of interest and
19 costs but admit that Plaintiffs’ claims exceed that amount.

20 4. Answering paragraph 4 of the Counterclaim, Plaintiffs admit the
21 allegations contained in paragraph 4.

22 **THE PARTIES**

23 5. Answering paragraph 5 of the Counterclaim, Plaintiffs are informed
24 and believe the allegations to be true and, on that basis, admit the allegations
25 contained in paragraph 5.

26 6. Answering paragraph 6 of the Counterclaim, Plaintiffs are informed
27 and believe the allegations to be true and, on that basis, admit the allegations
28 contained in paragraph 6.

1 7. Answering paragraph 7 of the Counterclaim, Plaintiffs admit the
2 allegations contained in paragraph 7.

3 8. Answering paragraph 8 of the Counterclaim, Plaintiffs admit the
4 allegations contained in paragraph 8.

5 **THE TRANSACTION**

6 9. Answering paragraph 9 of the Counterclaim, Plaintiffs admit that in or
7 around October 2007, TrafficZ approached Name Intelligence to discuss business
8 opportunities, including possible merger between the companies or an outright
9 acquisition. Except as so admitted, Plaintiffs deny each and every allegation
10 contained in paragraph 9 of the Counterclaim.

11 10. Answering paragraph 10 of the Counterclaim, Plaintiffs admit that
12 discussions concerning the nature of the transaction occurred over a six month
13 period. Except as so admitted, Plaintiffs deny each and every allegation contained
14 in paragraph 10 of the Counterclaim.

15 11. Answering paragraph 11 of the Counterclaim, Plaintiffs admit that
16 discussions concerning a domain ecosystem occurred. Except as so admitted,
17 Plaintiffs deny each and every allegation contained in paragraph 11 of the
18 Counterclaim.

19 12. Answering paragraph 12 of the Counterclaim, Plaintiffs are without
20 knowledge or information sufficient to form a belief as to the truth of the
21 allegations contained in paragraph 12 of the Counterclaim, and on that basis deny
22 each and every allegation contained therein.

23 13. Answering paragraph 13 of the Counterclaim, Plaintiffs admit that the
24 Securities and Exchange Agreement (“Agreement”) provides that all of the shares
25 and assets of Name Intelligence would be acquired by TCI in exchange for \$16
26 million to be paid in three installments and approximately 15.3% of the outstanding
27 shares of TCI.

28 14. Answering paragraph 14 of the Counterclaim, Plaintiffs admit that TCI

1 paid Name Intelligence \$6 million upon executing the Agreement. Plaintiffs further
2 admit that the Agreement also called for two additional payments of \$5 million
3 each. Except as so admitted, Plaintiffs deny each and every allegation contained in
4 paragraph 14 of the Counterclaim.

5 15. Answering paragraph 15 of the Counterclaim, Plaintiffs admit that
6 Agreement called for the creation of a Equity Incentive Plan. Except as so
7 admitted, Plaintiffs deny each and every allegation contained in paragraph 15 of the
8 Counterclaim.

9 16. Answering paragraph 16 of the Counterclaim, Plaintiffs admit that
10 TrafficZ made certain representations and warranties as provided for in the
11 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
12 contained in paragraph 16 of the Counterclaim.

13 17. Answering paragraph 17 of the Counterclaim, Plaintiffs admits that
14 TCI and/or TrafficZ made certain representations and warranties as provided for in
15 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
16 contained in paragraph 17 of the Counterclaim.

17 18. Answering paragraph 18 of the Counterclaim, Plaintiffs deny each and
18 every allegation contained therein.

19 19. Answering paragraph 19 of the Counterclaim, Plaintiffs deny each and
20 every allegation contained therein.

21 20. Answering paragraph 20 of the Counterclaim, Plaintiffs deny each and
22 every allegation contained therein.

23 **FIRST CAUSE OF ACTION**

24 (Breach of Contract)

25 21. Answering paragraph 21 of the Counterclaim, Plaintiffs incorporate
26 their responses to the allegations contained in paragraph 1 through 20 above as
27 though fully set forth herein. To the extent any further answer is required, Plaintiffs
28 deny the allegations contained in paragraph 21 of the Counterclaim.

1 22. Answering paragraph 22 of the Counterclaim, Plaintiffs admit the
2 allegations contained therein.

3 23. Answering paragraph 23 of the Counterclaim, Plaintiffs admit the
4 allegations contained therein.

5 24. Answering paragraph 24 of the Counterclaim, Plaintiffs deny each and
6 every allegation contained therein.

7 25. Answering paragraph 25 of the Counterclaim, Plaintiffs deny each and
8 every allegation contained therein.

9 26. Answering paragraph 26 of the Counterclaim, Plaintiffs deny each and
10 every allegation contained therein.

11 **SECOND CAUSE OF ACTION**

12 (Breach of Representations and Warranties)

13 27. Answering paragraph 27 of the Counterclaim, Plaintiffs incorporate
14 their responses to the allegations contained in paragraphs 1 through 26 above as
15 though fully set forth herein. To the extent that any further answer is required,
16 Plaintiffs deny the allegations contained in paragraph 27.

17 28. Answering paragraph 28 of the Counterclaim, Plaintiffs admit that TCI
18 and/or TrafficZ made certain representations and warranties as provided for in the
19 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
20 contained in paragraph 28 of the Counterclaim.

21 29. Answering paragraph 29 of the Counterclaim, Plaintiffs admit that TCI
22 and/or TrafficZ made certain representations and warranties as provided for in the
23 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
24 contained in paragraph 29 of the Counterclaim.

25 30. Answering paragraph 30 of the Counterclaim, Plaintiffs deny each and
26 every allegation contained in paragraph 30 of the Counterclaim.

27 31. Answering paragraph 31 of the Counterclaim, Plaintiffs deny each and
28 every allegation contained in paragraph 31 of the Counterclaim.

1 32. Answering paragraph 32 of the Counterclaim, Plaintiffs deny each and
2 every allegation contained in paragraph 32 of the Counterclaim.

3 33. Answering paragraph 33 of the Counterclaim, Plaintiffs deny each and
4 every allegation contained in paragraph 33 of the Counterclaim.

5 **THIRD CAUSE OF ACTION**

6 (Breach of Contract)

7 34. Answering paragraph 34 of the Counterclaim, Plaintiffs incorporate
8 their responses to the allegations contained in paragraphs 1 through 33 above as
9 though fully set forth herein. To the extent that any further answer is required,
10 Plaintiffs deny the allegations contained in paragraph 34.

11 35. Answering paragraph 35 of the Counterclaim, Plaintiffs admit that
12 Agreement called for the creation of a Equity Incentive Plan. Except as so
13 admitted, Plaintiffs deny each and every allegation contained in paragraph 35 of the
14 Counterclaim.

15 36. Answering paragraph 36 of the Counterclaim, Plaintiffs deny each and
16 every allegation contained in paragraph 36 of the Counterclaim.

17 37. Answering paragraph 37 of the Counterclaim, Plaintiffs deny each and
18 every allegation contained in paragraph 37 of the Counterclaim.

19 38. Answering paragraph 38 of the Counterclaim, Plaintiffs deny each and
20 every allegation contained in paragraph 38 of the Counterclaim.

21 **FOURTH CAUSE OF ACTION**

22 (Misrepresentation and Fraud)

23 39. Answering paragraph 39 of the Counterclaim, Plaintiffs incorporate
24 their responses to the allegations contained in paragraphs 1 through 38 above as
25 though fully set forth herein. To the extent that any further answer is required,
26 Plaintiffs deny the allegations contained in paragraph 39.

27 40. Answering paragraph 40 of the Counterclaim, Plaintiffs admit that TCI
28 and/or TrafficZ made certain representations and warranties as provided for in the

1 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
2 contained in paragraph 40 of the Counterclaim.

3 41. Answering paragraph 41 of the Counterclaim, Plaintiffs admit that TCI
4 and/or TrafficZ made certain representations and warranties as provided for in the
5 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
6 contained in paragraph 41 of the Counterclaim.

7 42. Answering paragraph 42 of the Counterclaim, Plaintiffs deny each and
8 every allegation contained in paragraph 42 of the Counterclaim.

9 43. Answering paragraph 43 of the Counterclaim, Plaintiffs deny each and
10 every allegation contained in paragraph 43 of the Counterclaim.

11 44. Answering paragraph 44 of the Counterclaim, Plaintiffs deny each and
12 every allegation contained in paragraph 44 of the Counterclaim.

13 45. Answering paragraph 45 of the Counterclaim, Plaintiffs deny each and
14 every allegation contained in paragraph 45 of the Counterclaim.

15 46. Answering paragraph 46 of the Counterclaim, Plaintiffs deny each and
16 every allegation contained in paragraph 46 of the Counterclaim.

17 47. Answering paragraph 47 of the Counterclaim, Plaintiffs deny each and
18 every allegation contained in paragraph 47 of the Counterclaim.

19 48. Answering paragraph 48 of the Counterclaim, Plaintiffs deny each and
20 every allegation contained in paragraph 48 of the Counterclaim.

21 **FIFTH CAUSE OF ACTION**

22 (Cal Corp Code § 25401)

23 49. Answering paragraph 49 of the Counterclaim, Plaintiffs incorporate
24 their responses to the allegations contained in paragraphs 1 through 48 above as
25 though fully set forth herein. To the extent that any further answer is required,
26 Plaintiffs deny the allegations contained in paragraph 49.

27 50. Answering paragraph 50 of the Counterclaim, Plaintiffs admit that the
28 Agreement contemplated the exchange of stock as part of the Agreement. Except

1 as so admitted, Plaintiffs deny each and every allegation contained in paragraph 50
2 of the Counterclaim.

3 51. Answering paragraph 51 of the Counterclaim, Plaintiffs deny each and
4 every allegation contained in paragraph 51 of the Counterclaim.

5 52. Answering paragraph 52 of the Counterclaim, Plaintiffs deny each and
6 every allegation contained in paragraph 52 of the Counterclaim.

7 53. Answering paragraph 53 of the Counterclaim, Plaintiffs admit that
8 TrafficZ made certain representations and warranties as provided for in the
9 Agreement. Except as so admitted, Plaintiffs deny each and every allegation
10 contained in paragraph 53 of the Counterclaim.

11 54. Answering paragraph 54 of the Counterclaim, Plaintiffs deny each and
12 every allegation contained in paragraph 54 of the Counterclaim.

13 55. Answering paragraph 55 of the Counterclaim, Plaintiffs deny each and
14 every allegation contained in paragraph 55 of the Counterclaim.

15 56. Answering paragraph 56 of the Counterclaim, Plaintiffs deny each and
16 every allegation contained in paragraph 56 of the Counterclaim.

17 57. Answering paragraph 57 of the Counterclaim, Plaintiffs deny each and
18 every allegation contained in paragraph 57 of the Counterclaim.

19 **SIXTH CAUSE OF ACTION**

20 (Breach of Contract)

21 58. Answering paragraph 58 of the Counterclaim, Plaintiffs incorporate
22 their responses to the allegations contained in paragraphs 1 through 57 above as
23 though fully set forth herein. To the extent that any further answer is required,
24 Plaintiffs deny the allegations contained in paragraph 58.

25 59. Answering paragraph 59 of the Counterclaim, Plaintiff admits that 5.8
26 of the Agreement states “[o]n the date of the payment of the First Post-Closing
27 Payment, subject to the Subordination Agreement, NI LLC will pay \$430,000, plus
28 simple interest at a rate of 8% from the Effective Date until the date of such

1 payment...” Except as so admitted, Plaintiffs deny each and every allegation
2 contained in paragraph 59 of the Counterclaim.

3 60. Answering paragraph 60 of the Counterclaim, Plaintiffs admit that the
4 Offer Letter speaks for itself. Except as so admitted, Plaintiffs deny each and every
5 allegation contained in paragraph 60 of the Counterclaim.

6 61. Answering paragraph 61 of the Counterclaim, Plaintiffs deny each and
7 every allegation contained in paragraph 61 of the Counterclaim.

8 62. Answering paragraph 62 of the Counterclaim, Plaintiffs deny each and
9 every allegation contained in paragraph 62 of the Counterclaim.

10 63. Answering paragraph 63 of the Counterclaim, Plaintiffs deny each and
11 every allegation contained in paragraph 63 of the Counterclaim.

12 **PRAYER FOR RELIEF**

13 64. Paragraphs 1 through 5 of the Prayer for Relief do not require a
14 response, since they are not charging allegations. To the extent that any further
15 answer is required, Plaintiffs deny the allegations contained in paragraph 1 through
16 5 and deny that Counterclaimants are entitled to any relief.

17 **AFFIRMATIVE DEFENSE**

18 **FIRST AFFIRMATIVE DEFENSE**

19 (Failure to State a Claim)

20 65. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
21 that the Counterclaim fails to state a claim upon which relief may be granted.

22 **SECOND AFFIRMATIVE DEFENSE**

23 (Waiver)

24 66. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
25 that some of all of the claims asserted in the Counterclaim are barred by the
26 equitable doctrine of waiver.

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THIRD AFFIRMATIVE DEFENSE

(Doctrines of Laches, Waiver, Unclean Hands, and Acquiescence)

67. As a separate affirmative defense to the Counterclaim, Plaintiffs allege that all claims are barred by the equitable doctrines of laches, waiver, unclean hands, and acquiescence.

FOURTH AFFIRMATIVE DEFENSE

(Consent)

68. As a separate affirmative defense to the Counterclaim, Plaintiffs allege the claims are barred because Counterclaimants consented to the alleged conduct.

FIFTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

69. As a separate affirmative defense to the Counterclaim, Plaintiffs allege that the Counterclaim and each purported claim contained therein, may be barred by the applicable statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

70. As a separate affirmative defense to the Counterclaim, Plaintiffs allege that Counterclaimants have failed to mitigate their damages, if any.

SEVENTH AFFIRMATIVE DEFENSE

(Prior Material Breach)

71. As a separate affirmative defense to the Counterclaim, Counterclaimants' failure to act in accordance to the requirements of the agreements are prior material breaches and bar Counterclaimants' claims.

EIGHTH AFFIRMATIVE DEFENSE

(Excuse of Performance)

72. As a separate affirmative defense to the Counterlcaim, Plaintiffs alleges that its performance of the contract was excused by Counterclaimants' failure to perform the conditions precedent as specified in the written contract,

1 and/or any oral understanding between the parties.

2 **NINTH AFFIRMATIVE DEFENSE**

3 (Intervening Cause)

4 73. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
5 that Counterclaimants' alleged damages, if any, may have been caused or
6 contributed by intervening causes and/or acts of Counterclaimants and/or other
7 currently unknown third parties, which constitute superseding causes thereby
8 insulating Plaintiffs from liability to Counterclaimants.

9 **TENTH AFFIRMATIVE DEFENSE**

10 (Failure to Include Necessary Party)

11 74. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
12 that the Counterclaim fails to include a necessary party required for this Court to
13 grant complete relief.

14 **ELEVENTH AFFIRMATIVE DEFENSE**

15 (Lack of Consideration)

16 75. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
17 that the Counterclaims fail for failure of consideration.

18 **TWELFTH AFFIRMATIVE DEFENSE**

19 (Setoff)

20 76. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
21 that all or part of Counterclaimants fail due to Counterclaimants own breach of
22 contract and damages associated with that breach and setoffs thereto.

23 **THIRTEENTH AFFIRMATIVE DEFENSE**

24 (Negligence)

25 77. As a separate affirmative defense to the Counterclaim, Plaintiffs allege
26 that the claims are barred by Counterclaimants own negligent and/or intentional
27 misrepresentations and admissions.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Other Parties' Fault)

78. As a separate affirmative defense to the Counterclaim, Plaintiffs allege that any damages allegedly suffered by Counterclaimants were caused wholly or in part by the acts, omissions, negligence or other wrongful tortious conduct or breach of duties or obligations by third parties in connection with the matters alleged, and such acts, omissions, negligence or other wrongful or tortious or breach of duties or obligations caused or contributed directly and proximately to the events referred to in the Complaint. Thus, any liability of Plaintiffs for any damages allegedly suffered by Counterclaimants is diminished or limited in proportion to the fault attributable to third parties.

FIFTEENTH AFFIRMATIVE DEFENSE

(Unconstitutional Claim for Punitive Damages)

79. Under the circumstances of this action, the imposition of punitive or exemplary damages upon Plaintiffs would violate their constitutional right to due process under the laws of the United State and California Constitutions.

80. The claims asserted by Counterclaimants are subject to discovery. Plaintiffs therefore expressly reserve their right to amend, supplement and/or revise its Answer and to assert additional Affirmative Defenses as may be necessary before trial.

Dated: July 15, 2009

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



CHRISTOPHER J. CHAUDOIR
Attorneys for Plaintiffs and Counterdefendants
THOUGHT CONVERGENCE, INC. and
NAME INTELLIGENCE, LLC

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PROOF OF SERVICE

I, Lupe Flores, declare:

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 777 South Figueroa Street, Suite 3200, Los Angeles, California 90017-5855.

I hereby certify that on July 15, 2009, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties listed below:

PLAINTIFFS THOUGHT CONVERGENCE, INC. AND NAME INTELLIGENCE, LLC'S ANSWER AND AFFIRMATIVE DEFENSES TO COUNTERCLAIMS

Hamilton Gardiner
Holmquist & Gardiner, PLLC
1000 Second Avenue, Suite 1770
Seattle, WA 98104
Tel: (206) 438-9116
Fax: (206) 694-4601

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

I declare under penalty of perjury that the foregoing is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 15, 2009, at Los Angeles, California.



LUPE FLORES

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PROOF OF SERVICE

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 777 South Figueroa Street, Suite 3200, Los Angeles, California 90017. On July 15, 2009, I served the following document(s):

PLAINTIFFS THOUGHT CONVERGENCE, INC. AND NAME INTELLIGENCE, LLC'S ANSWER AND AFFIRMATIVE DEFENSES TO COUNTERCLAIMS

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

Hamilton Gardiner
Holmquist & Gardiner, PLLC
1000 Second Avenue, Suite 1770
Seattle, WA 98104
Tel: (206) 438-9116
Fax: (206) 694-4601

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

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

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

Executed on July 15, 2009 at Los Angeles, California.



LUPE FLORES