

**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;

**B E T W E E N:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT June 23, 2016 CT-2016-003 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 25

**CARGURUS, INC.**

Applicant

- and -

**TRADER CORPORATION**

Respondent

**AFFIDAVIT OF ROGER DUNBAR**

I, Roger Dunbar, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Vice President of Marketing for the Respondent, Trader Corporation (“**Trader**”), and have personal knowledge of the matters contained in this affidavit, except where I have indicated that my knowledge is based on information from others, in which case I believe that information to be true.
2. I began working for Trader in April 2012 as Vice President of Marketing. I manage consumer and dealer marketing efforts. I also oversee the marketing intelligence group

and manage product pricing, and am also responsible for the consumer experience of autotrader.ca.

3. In December 2015, Trader commenced an application against CarGurus, Inc. (“**CarGurus**”) under section 34(4) of the *Copyright Act*, R.S.C. 1985, c. C-42, in the Ontario Superior Court of Justice (Commercial List), as Court File No. CV-15-11232-00CL (the “**Civil Proceeding**”). In the Civil Proceeding, Trader seeks declarations that CarGurus has infringed Trader’s copyright in a total of 217,856 photographs added to a website administered by Trader between January 1, 2015 and January 15, 2016, as well as statutory damages in the total amount of \$108,928,00 in respect of those infringements. The Civil Proceeding is currently scheduled to be heard in October 2016. Contrary to the assertion at paragraph 19 of the Second Blue Affidavit, the Civil Proceeding is not “an attempt to litigate CarGurus out of the market,” but is rather a legitimate exercise of certain of Trader’s intellectual property rights; specifically, Trader’s copyright in certain photographs.
4. In the Civil Proceeding, I swore an Affidavit dated December 22, 2016 and a Reply Affidavit dated March 24, 2016. Copies of those Affidavits (without all of the Exhibits) are attached as Exhibits “3” and “7”, respectively, to the Affidavit of Martha Blue sworn April 14, 2016 in this proceeding (the “**Second Blue Affidavit**”).
5. The purpose of this Affidavit is to respond to certain specific allegations made in the Second Blue Affidavit. This Affidavit is not intended to respond to every statement made in the Second Blue Affidavit and by not responding to any particular statement made in the Second Blue Affidavit, I should not be taken to agree with such statement.

**i. No Treatment Based on “Low Pricing Policy” of CarGurus**

6. At paragraph 20 of the Second Blue Affidavit, Ms. Blue states that Trader “operates on a higher-cost subscription model” and that this model makes it “difficult to discern exactly what Trader charges for leads to dealers.” At paragraph 22, Ms. Blue states that CarGurus does not charge dealers for leads sent to them. Trader does not charge dealers for leads either. Trader charges dealers for services (which vary by dealer, depending on what each dealer chooses, including advertising and Capture services).
  
7. Also at paragraph 20 of the Second Blue Affidavit, Ms. Blue states that Trader is trying to keep CarGurus’ “low-cost model from flourishing in Canada.” A similar statement is made at paragraph 42 of the Second Blue Affidavit. These statements are false. As with all advertising, “low cost” cannot be judged on the basis of absolute cost, but should rather be judged on the value generated for the advertiser in terms of sales revenue. There is no evidence presented by CarGurus that the cost of advertising on CarGurus’ website is any less or more costly – in the context of response by consumers – than other choices available to dealers. In any event, I disagree that CarGurus’ model is in fact “low-cost” given the average price charged by CarGurus to dealers for advertising packages. According to paragraph 23 of the Second Blue Affidavit, unless a dealer pays CarGurus, all it receives for the “free, no-cost package” is “anonymized leads and a means for communicating with the potential consumer through CarGurus.” Accordingly, what CarGurus refers to as the “free, no-cost package” is not a package that competes with Trader’s packages offered to dealers, which always provide dealers with the ability to communicate directly with potential customers.

8. As for packages offered by CarGurus to dealers that include the ability for dealers to communicate directly with potential customers, Trader has entered into syndication agreements with several other competitors who offer pricing models that are comparable to the model CarGurus claims is “low cost”.
9. Attached hereto and marked as **Exhibit “A”** is a document compiled by Kelly Mitchell, a Manager in the Marketing Department at Trader, which sets out the rates charged to dealers for advertising on certain sites that are competitors of Trader and CarGurus. This document shows that different competitors offer different pricing models and price ranges that are also comparable to the cost of CarGurus’ average advertising package (which Ms. Blue states is [redacted] at paragraph 29 of the Second Blue Affidavit).
10. Of the competitors listed on Exhibit “A”, Trader has syndication agreements with Kijiji, Lespac, Autoaubaine, Carpages, and Autocatch/Wheels. Trader also has syndication agreements with other competitors. It is incorrect, as Ms. Blue states (at paragraph 42 of the Second Blue Affidavit), that Trader’s interaction with CarGurus is motivated by a low pricing policy of CarGurus.

**ii. No Exclusivity**

11. At paragraphs 54, 59 and 64 of the Second Blue Affidavit, Ms. Blue claims that Trader requires exclusivity of its feed providers and dealers. This is untrue. It is my experience that dealers choose to work with Trader because they like Trader’s products, services and pricing. Trader competes with its competitors based on the value that it provides customers in the form of consumer response. Trader never tells or requires dealers or feed providers

to deal only or primarily in products supplied by or designated by Trader or any nominee, or to refrain from dealing in a specified class or kind of product or service except as supplied by Trader or a nominee; nor does Trader in any way induce a feed provider or dealer to do so by offering to supply the product or service to that feed provider or dealer on more favourable terms or conditions.

**iii. Alternative Sources of Inventory**

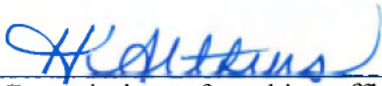
12. At paragraph 43 of the Second Blue Affidavit, Ms. Blue states that: “Without being able to obtain Trader Inventory, CarGurus will not be able to compete effectively with Trader or provide value to Canadian consumers.” I disagree with this statement. First, CarGurus can obtain so-called “Trader Inventory” through sources other than a data feed from Trader. As noted at paragraph 34 of the Affidavit of Martha Blue sworn March 3, 2016, CarGurus can and does obtain data feeds from other feed providers, which, even accepting, for sake of argument, CarGurus’ contention that Trader controls as much as 42.5% of all vehicle listings, means that CarGurus can access the majority of vehicle listings from other feed providers.
13. Second, for vehicle listings that are included in what CarGurus claims is the “Trader Inventory,” I believe CarGurus can obtain certain of the data (not including those photographs to which Trader owns the copyright) for those vehicle listings from other feed providers. Kijiji is an example that it is possible to compete very effectively with Trader without receiving a data feed from Trader. Trader did not enter into a syndication agreement with Kijiji until May 2013. Prior to that time, Trader did not offer its dealer customers syndication to Kijiji and dealers who wanted their listings to be sent directly to

Kijiji purchased a syndication service from either Boost or Strathcom, two other feed providers, who had syndication agreements with Kijiji. Trader estimates that approximately 1,700 dealers chose to syndicate their content in this manner. During that time, Kijiji was able to capture a significant portion of the new and used car online classified ad business.

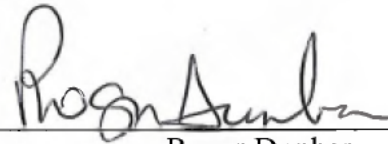
14. Third, to the extent the “Trader Inventory” includes photographs taken by Trader employees (or contractors who have assigned their intellectual property rights to Trader) as part of Trader’s Capture service and in which Trader claims copyright, I am not aware of any impediment to CarGurus or any other third party taking photographs of those vehicles themselves and posting them to CarGurus’ website. Trader owns the copyright in those photographs taken as part of its Capture service. However, as set out above, Trader does not require dealers to deal only or primarily in products or services supplied by Trader, including its Capture service. While replicating Trader’s Capture service might involve cost and effort, it is an alternative source of supply of the “Trader Inventory” available to CarGurus.

15. Finally and in any event, CarGurus has been successful in obtaining a very significant number of vehicle listings to be displayed on its website. According to March 2016 data from AutoBiz, a third party subscription service that provides a monthly view of customers, inventory and ad count for the industry, CarGurus' website had approximately [redacted] classified ads, compared to approximately [redacted] classified ads on Trader's website.

SWORN before me at the City of Toronto,  
in the Province of Ontario on the 17<sup>th</sup> day of  
June, 2016



A Commissioner for taking affidavits  
Name: Hannah Arthurs



Roger Dunbar

This is Exhibit "A" referred to in the Affidavit of Roger Dunbar  
sworn June 17, 2016



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*Commissioner for Taking Affidavits (or as may be)*

**HANNAH ARTHURS**



[redacted]		
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	
[redacted]	[redacted]	

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