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12 DK HOLDINGS d/b/a DOTCOM HOST
13

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF RIVERSIDE**
16

17 DK HOLDINGS d/b/a DOTCOM HOST, a
California general partnership,
18
19 Plaintiff,
20 v.
21 MIVA CORPORATION, a California
corporation; MSB ACQUISITION, INC., a
California corporation; MIVA, INC. a
22 California corporation, and DOES 1-5,
inclusive,
23
24 Defendants.

Case No. **PSC 1904537**
COMPLAINT FOR:
(1) BREACH OF CONTRACT;
(2) BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING
DEMAND FOR JURY TRIAL

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

JUL 03 2019

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1 Plaintiff DK Holdings d/b/a dotCOM host (“dotCOM host”) for its cause of action
2 against Defendants Miva Corporation, MSB Acquisition, Inc. and their successors by
3 contract, including Miva, Inc. and DOES 1-5 (“Miva”), alleges as follows:

4 **INTRODUCTION**

5 1. dotCOM host is a partnership and website-hosting company based in
6 Riverside County. It has been in business for about 20 years, and for that entire time, it
7 has primarily hosted websites for customers that use the Miva Merchant Software.

8 2. The Miva Merchant software is a shopping cart software that allows
9 customers to, among other things, accept and process orders for goods and services online.

10 3. The Miva Merchant software is owned by Miva, a California corporation
11 based in San Diego.

12 4. Before 2005, Miva and dotCOM host were in a productive and symbiotic
13 relationship. Miva’s software was useful to dotCOM host and its customers, Miva needed
14 third-party hosts to promote its software and host websites that used it, and both companies
15 could help generate business for the other. This relationship resulted in a “HOSTING
16 PARTNER DISTRIBUTION AGREEMENT” in 2005, a true and correct copy of which is
17 attached hereto as Exhibit 1, under which dotCOM host became a premier hosting partner
18 of Miva’s and therefore entitled to special privileges, such as favorable pricing, advertising
19 on Miva’s website, and support benefits.

20 5. Miva came to believe that market forces made the original HOSTING
21 PARTNER DISTRIBUTION AGREEMENT incompatible with Miva’s long-term success.
22 Miva stated to transition from a software company that sells its software pursuant to a one-
23 time fee to a Software-as-a-Service (SaaS) enterprise, which would involve, among other
24 things, monthly license fees and, hopefully, ongoing product improvements. Miva looked
25 to replace the substantive terms of the 2005 agreement with a new set of rights and
26 responsibilities more consistent with a SaaS business model, and therefore Miva drafted
27 and had third-party hosts like dotCOM host sign a new agreement. Miva and dotCOM
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1 host executed their new agreement, called ADDENDUM TO AGREEMENT, in 2009, a
2 true and correct copy of which is attached hereto as Exhibit 2.

3 6. Under the ADDENDUM TO AGREEMENT, Miva gained the right to
4 charge a monthly subscription rate for its software. Because the monthly subscription rate
5 put third-party hosts like dotCOM host in a tenuous position – changes in Miva’s pricing
6 could detrimentally affect dotCOM host’s relationships with its customers – the contract
7 had certain built-in protections for the third-party hosts. For example, Miva must give
8 180-days’ notice of any price increase, and Miva is precluded from offering any other
9 third-party host lower prices than it offers to dotCOM host. This prohibition on
10 discriminatory pricing – we refer to it as the “most favored nations” provision – was an
11 important protection for the benefit of dotCOM host and other third-party hosts.

12 7. In addition, while the ADDENDUM TO AGREEMENT allows both sides to
13 terminate, it gives dotCOM host special protections if Miva chooses to do so. Specifically,
14 if Miva terminates the agreement, dotCOM host can continue to use indefinitely any of the
15 licenses that it has in its possession at the time of the termination for no fee. (dotCOM
16 host would not, however, receive continuing support or updates for those licenses.)

17 8. Once the ADDENDUM TO AGREEMENT was signed, it rather than the
18 original 2005 agreement governed the parties’ relationship. Specifically, the parties’
19 ceased to operate under the terms of the 2005 agreement as that agreement was designed
20 for a different Miva business model.

21 9. What dotCOM host did not know when it signed the ADDENDUM TO
22 AGREEMENT was that Miva intended to move into the hosting space itself. This means
23 that, over time, Miva began to see dotCOM host not as a company with which it could
24 maintain a symbiotic relationship but as a competitor that needed to be removed from the
25 marketplace. Miva started making threats to this effect a few years after the ADDENDUM
26 TO AGREEMENT was signed, but dotCOM host was able to continue its business
27 operations.

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1 10. As the tension built between the parties, Miva began to take more drastic
2 efforts to replace dotCOM host and the other third-party hosting companies in the
3 marketplace. Miva acquired one of the leading third-party hosts, Hostasaurus, and made
4 Hostasaurus a division of Miva. Then, around the beginning of 2016, Miva dramatically
5 raised its prices from \$40 per month to as much as \$1,450 per month for the same license
6 and began engaging in other nefarious conduct to destroy dotCOM host. Miva’s conduct
7 led to a federal-court lawsuit by dotCOM host.

8 11. On March 7, 2016, dotCOM host filed a lawsuit in federal court against
9 Miva in the Southern District of California. While the complaint has been amended
10 multiple times, the operative pleading states causes of action against Miva for: (1)
11 Computer Fraud and Abuse arising under 18 U.S.C. § 1030; (2) False Advertising under
12 15 U.S.C. § 1125; (3) Computer Data Access and Fraud under Cal. Penal Code. § 502; (4)
13 Interference with Contractual Relations; (5) California Statutory Unfair Competition; (6)
14 Breach of Contract; and (7) Trade Secret Misappropriation. The federal lawsuit is styled
15 *DK Holdings d/b/a dotCOM Host v. Miva, Inc. et al*, Case No. 3:16-cv-00580-W-AGS.
16 That matter is still pending.

17 12. In the federal lawsuit, dotCOM host alleged that Miva’s own pricing for
18 hosting services through Hostasaurus breached the parties’ “most favored nations”
19 provision. The federal court disagreed, concluding that the provision could only apply to
20 third-party hosts, not hosting companies that Miva had acquired and incorporated into its
21 own business. But the court’s ruling on summary judgment did establish that dotCOM
22 host rightly interpreted the contract as preventing lower prices to other third-party hosts
23 than are charged to dotCOM host. Miva’s CEO agreed with this construction of the
24 provision in his deposition testimony as well.

25 13. In 2018 – two years after the federal-court filing and after the deadline for
26 amending pleadings in the federal court action – Miva produced documents showing that it
27 had entered into written agreements with other third-party hosting companies whereby
28 those companies received dramatically lower prices than the prices being offered to

1 dotCOM host. In some cases, dotCOM host was being charged as much as \$1,450 per
2 month for a license that was being offered to other third-party hosts for \$40 or \$50 per
3 month. dotCOM host sought leave to amend its pleading to allege breach of contract in
4 light of these findings. The federal court denied dotCOM host's leave to amend, and
5 therefore this clear breach of the ADDENDUM TO AGREEMENT has not been resolved
6 on the merits in the federal case and will not be.

7 14. In addition, Miva continued to engage in other acts inconsistent with the
8 parties' agreement after the federal lawsuit was filed. In early 2019 Miva again raised its
9 prices in dramatic fashion. For some of dotCOM host's customers, Miva's monthly
10 license fee would now be more than \$10,000 per month. The license available for \$1,450
11 per month has now increased to \$16,450 per month. Such remarkable price increases were
12 nowhere contemplated by the parties when they signed the ADDENDUM TO
13 AGREEMENT, which shows monthly license fees of between \$5 and \$9 per month. Miva
14 has changed its monthly license fees from the price of a Big Mac to the price of a car. And
15 Miva fails even to charge those prices to its own customers, who routinely receive
16 dramatically discounted pricing. One primary purpose of the price increase is to drive
17 dotCOM host and other third-party hosts out of business so Miva can take over their
18 customers. To that end, Miva has also, for example, refused to provide test licenses to
19 dotCOM host, which are necessary to troubleshoot for customers when problems arise, has
20 been intentionally slow to respond to service requests despite a provision requiring Miva to
21 respond to support requests within an hour during regular business hours, has used any
22 contact with dotCOM host's clients – including for service requests – to tell dotCOM
23 host's customers that they will get better pricing and better service if they leave dotCOM
24 host and join Miva, refused to adjust license prices to correct advertised levels (pricing
25 brackets) when notified of their incorrect calculations by dotCOM host or clients directly,
26 but offered either correct or vastly discounted pricing to those very clients – only if they
27 agreed to switch to Miva for hosting services, removed dotCOM host references from
28 Miva online public forums so that clients reading posts would not be aware there is an

1 alternative to Miva’s own in-house hosting, and failed to conform to the agreed-upon
2 billing practices which require, among other things, that Miva provide dotCOM host with a
3 list of active licenses for dotCOM host to review on a monthly basis, dotCOM host can
4 then confirm those that are still active, upon which time Miva provides an invoice and
5 dotCOM host has up to 10 days to pay it. Miva, instead, demands that dotCOM host pay
6 via credit card on the first of the month and Miva generally refuses to refund dotCOM host
7 if it has been billed incorrectly – all to apply additional pressure to dotCOM host.
8 Generally speaking, Miva has taken any steps at its disposal to remove dotCOM host from
9 the marketplace and become the sole host of Miva-software-using websites.

10 15. All of this is inconsistent with the purpose of the ADDENDUM TO
11 AGREEMENT. The ADDENDUM TO AGREEMENT was designed to permit dotCOM
12 host to continue to host websites that use the Miva Merchant software; that was, in fact, the
13 primary benefit of signing the agreement from dotCOM host’s perspective. When he
14 informed dotCOM host that Miva would offer hosting, Rick Wilson (then Miva’s EVP,
15 now CEO) said it was Miva’s “specific desire . . . to not negatively impact [dotCOM
16 host’s] business and grow the whole pie.” If Miva wanted to end this relationship, it is
17 supposed to terminate the ADDENDUM TO AGREEMENT pursuant to paragraph 1.5 of
18 that agreement. But Miva has not done so because Miva did not want to grant perpetual
19 licenses to the third-party hosts and didn’t want to lose revenue from recurring monthly
20 license fees overnight, thereby affecting their own revenue and bottom line.

21 16. Thus, Miva’s conduct is effectively a non-authorized termination of the
22 license agreement. Third-party hosts like dotCOM host cannot possibly continue to
23 function as envisioned by the ADDENDUM TO AGREEMENT in light of Miva’s actions,
24 but Miva has refused simply to terminate the ADDENDUM TO AGREEMENT because it
25 does not want to grant the required termination benefits to companies like dotCOM host.

26 17. As a result, Miva has received hundreds of thousands of dollars in license
27 fees that it should not have received from dotCOM host had Miva terminated lawfully
28 rather than intentionally denied dotCOM host its benefits under the parties’ contract to

1 effectuate a silent termination. In addition, dotCOM host has been denied hundreds of
2 perpetual Miva Merchant licenses that it should possess had Miva engaged in a proper
3 termination. And dotCOM host has lost many dozens of clients and many hundreds of
4 thousands of dollars as a result of Miva's improper conduct.

5 18. None of these claims and none of the remedies for these claims is currently
6 before the federal court. Nor will they be. dotCOM host was denied the right to amend
7 and add a breach of contract claim related to Miva's price-discriminatory agreements with
8 other third-party hosts because the request came after the deadline for amending pleadings
9 in the federal court. As to this and the other claims contained herein, dotCOM host will
10 simply choose to bring the claims in this Court. Claims that arise after the filing of a
11 federal claim can freely be asserted in a new action. Because there is no federal
12 jurisdiction for these purely state-law claims, dotCOM host has elected to bring such
13 claims in the Superior Court for the county in which it resides.

14 **FIRST CAUSE OF ACTION**

15 **(Breach of Contract)**

16 **(Against all Defendants)**

17 19. dotCOM host realleges and incorporates by reference the allegations set forth
18 in the preceding paragraphs, as though fully set forth herein.

19 20. dotCOM host and Miva entered into the ADDENDUM TO AGREEMENT.

20 21. Miva breached the ADDENDUM TO AGREEMENT by, among other
21 things, extending lower prices to third-party hosts without extending the same pricing to
22 dotCOM host, to the detriment of dotCOM host and by engaging in the other acts
23 discussed above, all of which were designed to deny dotCOM host the ability to stay in
24 business and benefit from the parties' agreement.

25 22. Simply put, Miva breached the ADDENDUM TO AGREEMENT by
26 denying dotCOM host all of the anticipated and intended benefits of the parties' agreement
27 in order to make the parties' arrangement unworkable and drive dotCOM host from the
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1 market rather than properly exercising its termination rights under Paragraph 1.5 of the
2 agreement.

3 23. dotCOM host performed the obligations required under the ADDENDUM
4 TO AGREEMENT except for such obligations that were excused by Miva's breach or
5 waived by Miva.

6 24. As a direct and proximate result of Miva's conduct as alleged above,
7 dotCOM host has been damaged in an amount to be proved at trial, an amount well in
8 excess of the jurisdictional minimum of this Court.

9 **SECOND CAUSE OF ACTION**

10 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

11 **(Against all Defendants)**

12 25. dotCOM host realleges and incorporates by reference the allegations set forth
13 in the preceding paragraphs, as though fully set forth herein.

14 26. Miva has taken significant steps over the last three years to deny dotCOM
15 host the anticipated and intended benefits of the ADDENDUM TO AGREEMENT. Even
16 where the parties' contract gives Miva some freedom to operate – for example, the right to
17 increase prices with proper notice – Miva's conduct falls well outside of any reasonable
18 interpretation of the parties' rights and is intended solely to deny contractual benefits to
19 dotCOM host, drive dotCOM host out of business, and allow Miva to effectuate a
20 termination of the agreement without triggering the termination provision of giving the
21 rights to dotCOM host that would come with a contractual termination.

22 27. dotCOM host performed the obligations required under the ADDENDUM
23 TO AGREEMENT except for such obligations that were excused by Miva's breach or
24 waived by Miva.

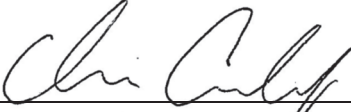
25 28. As a direct and proximate result of Miva's conduct as alleged above,
26 dotCOM host has been damaged in an amount to be proved at trial, an amount well in
27 excess of the jurisdictional minimum of this Court.

28

- 1 4. That Defendants be required to disgorge all gains, profits and advantages
- 2 derived by them, by reason of Defendants' acts complained of herein;
- 3 5. That Miva provide perpetual Miva Merchant licenses to dotCOM host;
- 4 6. For costs of suit and attorneys' fees as permitted by law; and
- 5 7. For such other and further relief as the Court deems just and appropriate.

6
7 Dated: July 3, 2019

ONE LLP

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9 By: 
10 Christopher W. Arledge
11 Peter R. Afrasiabi
12 Oscar M. Orozco-Botello
13 Attorneys for Plaintiff,
14 DK HOLDINGS d/b/a DOTCOM HOST
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