

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

HOMEAWAY, INC., and
HOMEAWAY.COM, INC.,

Plaintiffs,

vs.

AIRBNB, INC.

Defendant.

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Civil Action No. 1:13-cv-1087

JURY TRIAL DEMANDED

DECLARATION OF CARL SHEPHERD

I, Carl G. Shepherd, declare that the following is true and correct:

I am a co-founder of HomeAway, Inc. and serve as both the Chief Strategy and Development Officer and a Director. I have personal knowledge of the facts set forth herein, and if called upon to testify, could and would testify competently thereto.

1. Founded in 2005, HomeAway, Inc. operates the world’s largest online vacation rental property marketplace, enabling property owners and managers (collectively “Owners”) to market properties available for rent (collectively, “Properties”) to travelers who rely on HomeAway’s website marketplaces to search for and find available properties (collectively “Travelers”). Travelers use one or all of HomeAway’s websites to search for Properties that can be rented on a short term basis that meet their desired criteria, including location, size and price. Travelers that find Properties that meet their requirements through HomeAway’s marketplace are able to contact Owners directly by phone or through form-based communication tools on HomeAway’s websites. Today, the websites comprising HomeAway’s online marketplaces (“the HomeAway Websites”) bring together more than 30 million Travelers monthly seeking

vacation rental with hundreds of thousands of Owners of Properties located in all 50 of the United States and 171 countries around the world.

2. HomeAway primarily derives revenue from subscription fees paid by Owners for a listing on one or all of HomeAway Websites, but also derives revenue from commissions on rentals for Properties whose Owners select the transaction-based option. HomeAway benefits from what the industry calls the “network effect,” a virtuous cycle wherein an increase in Travelers who visit the HomeAway Websites attracts more listings from Owners, which in turn creates more and better rental options that in turn attract more Travelers.

3. Since its inception in 2005, HomeAway has experienced rapid growth and financial success. HomeAway’s operations expanded from 87 employees on December 31, 2005, to worldwide total of 1,461 employees as of September 30, 2013. From 2005 to 2013 the number of listings on the HomeAway Websites has grown from 60,000 listings on a single site to an aggregate of 773,000 paid listing on several sites. In 2012, total revenue increased by over 20% from the prior year and exceeded \$280 million. In the third quarter of 2013, revenue increased 23.3% to 90.1 million from the third quarter of 2012. HomeAway’s success and achievement led to a successful initial public offering of its stock on the Nasdaq OMX stock market in 2011 (NASDAQ: AWAY).

4. HomeAway uses television, print ads, and Internet advertising to promote and sell its vacation rental services. HomeAway has expended millions of dollars to develop its branding and operate its branded online marketplace.

5. Vacation rentals in vacation oriented markets are historically HomeAway’s primary market segment, however, it is possible for an individual advertiser to post his primary

home or rental apartment on a HomeAway Website, and HomeAway estimates that fewer than 5% of our total listings fall into this category.

6. In 2005, HomeAway commissioned a well-known advertising agency experienced in branding to create the Birdhouse Mark for HomeAway. Since July 2006, HomeAway has used the Birdhouse Mark in connection with its provision of vacation rental services. The Birdhouse Mark was intentionally developed and deployed as the unifying core brand for HomeAway's Websites and businesses and signifies the HomeAway customer experience both in the United States and abroad.

7. The Birdhouse Mark has been used and continues to be used prominently on several HomeAway Websites in the HomeAway global marketplace, including the HomeAway.com website, through which HomeAway provides a variety of Property rental services to Owners and Travelers throughout the United States and abroad. Other HomeAway Websites that utilize the Birdhouse Mark include: FeWo-Direkt.de (Germany), HomeAway.co.uk (UK), Arbritel.fr and Homelidays.fr (France), HomeAway.es and TopRural.com (Spain), AlugueTemporada.com.br (Brazil), HomeAway.com.au (Australia),), HomeAway.se (Sweden), HomeAway.pt (Portugal), HomeAway.ca (Canada), HomeAway.mx (Mexico), HomeAway.com.co (Colombia), HomeAway.com.ar (Argentina), HomeAway.at (Austria), HomeAway.dk (Denmark), HomeAway.no (Norway) and HomeAway.it (Italy). HomeAway adopted and deployed the Birdhouse Mark as a global unifying brand both in the United States and around the world. When HomeAway includes in its marketplace websites with regionally-appropriate domain name, such as AlugeTemporada.com.br in Brazil or Arbritel.fr in France or Fewo-Direkt.de in Germany, the Birdhouse Mark is used to signify that a HomeAway service is offered, uniting the Brand around the world.

8. Because of this, the mark has become a strong mark, particularly among potential customers for HomeAway's vacation rental services and has acquired substantial goodwill and reputation. HomeAway's official logo, with the Birdhouse Mark preceding the "HomeAway" name, is included on marketing and advertising, including TV commercials (including Super Bowl commercials in consecutive years), print ads, the HomeAway Websites, conferences, and other marketing materials. Attached as Exhibits 1 – 7 are true and correct images from HomeAway Marketing efforts. These promotional activities and advertisements continually increase the strength and significance of HomeAway's Birdhouse Mark.

9. Through HomeAway's extensive use, advertising and promotion, the Birdhouse Mark has become exclusively synonymous with HomeAway. Indeed, so central is the Birdhouse Mark to the company that it is prominently incorporated at HomeAway's corporate offices both on its exterior logo as well as in an interior two story high three dimensional installation that is visible from a busy intersection in downtown Austin, Texas. Attached as Exhibit 8 are true and correct pictures of HomeAway's headquarters.

10. HomeAway has taken steps to protect its valuable Birdhouse Mark. HomeAway.com, Inc., a wholly-owned subsidiary of HomeAway, Inc., owns several trademark registrations for marks containing or comprising the Birdhouse Mark. Attached as Exhibits 9 – 14 are true and correct copies of documents from the United States Patent and Trademark Office showing HomeAway's registered marks.

11. HomeAway has expended millions of dollars to develop its business plan, unique Birdhouse Mark, and "HomeAway" branding and, prior to its initial public offering in 2011 had raised more than \$450 million in private investments on the strength of that brand. The results of HomeAway's investment is tangible and substantial: "HomeAway" and the Birdhouse Mark as

well as HomeAway's excellent service have attracted hundreds of thousands of Owners and Travelers, and have generated enormous goodwill as the world's largest and most complete online marketplace of vacation and travel rental Properties. Through its efforts and expenditures, HomeAway has established itself in the marketplace among its customers and among vacationers as a reliable and credible source for searching, viewing, and locating vacation rental Properties.

12. After HomeAway had established itself as a leader and invested heavily in its Birdhouse Mark, Airbnb, Inc. ("Airbnb" or "Defendant") launched an online travel rental website in 2008. According to public statements by Airbnb's Chief Executive Officer and other Airbnb representatives, Defendant's website primarily allows Travelers to rent apartments in cities (i.e., the advertiser's primary residence) in the United States and worldwide. Defendant has described its services as "the easiest way for people to monetize their extra space." Defendant provides guidance on rates, processes payments and has systems that do not allow independent interaction between an Owner and a Traveler until after Defendant has collected payment from the Traveler. Additionally, my understanding is that Defendant receives the bulk of its revenue by charging the Traveler approximately 12-15% for the opportunity to rent via its website. Attached as Exhibit 22 is a screen shot of Defendant's website.

13. Defendant is well aware of HomeAway and its Birdhouse Mark. For example, in 2011, my friend Brian Chesky, the Chief Executive Officer of Defendant, visited the headquarters of HomeAway and I personally gave him a tour of the facility, including stopping to admire the two-story, three dimensional replica of the Birdhouse Mark that dominates the upper two stories of HomeAway's headquarters.

14. To my knowledge, Defendant never before used birdhouses to promote its business, yet, on December 16, 2013, Defendant launched what it is referring to in the media as

its first ever major multimedia advertising campaign dubbed “Home to You” depicting more than 50 birdhouses as well as a birdhouse logo similar to HomeAway’s Birdhouse Mark. Defendant’s “Home to You” promotion (“Birdhouse Promotion”) is viewable online at the Defendant’s website (www.birdbnb.com). Defendant’s Birdhouse Promotion also appears on other Internet websites that are fully accessible in the United States twenty-four hours a day, seven days a week. Attached as Exhibit 15 are true and correct copies of images from Defendant’s birdbnb.com site. Attached as Exhibit 16 is a screen shot of the huffingtonpost.com where Defendant’s Birdhouse Promotion has been linked and displayed. Significantly, the birdbnb.com website (the “Birdhouse Promotion Site”) links to Defendant’s primary website where customers can list or rent Properties.

15. Despite Defendant’s indisputable knowledge of HomeAway’s prior rights in its signature brand, the Birdhouse Mark, Defendant’s Birdhouse Promotion displays a birdhouse logo similar to the Birdhouse Mark, placed adjacent to the slogan “Home to You.” The use of the word “Home” next to an approximation of HomeAway’s Birdhouse Mark makes misassociation with HomeAway particularly likely. The use of a birdhouse alongside a name other than HomeAway is consistent with HomeAway’s use of the Birdhouse Mark in connection with its regionally-appropriate websites, such as AlugueTemporada.com.br in Brazil or Abritel.fr in France, to denote the websites’ association with HomeAway. However, there is no such relationship between HomeAway and Defendant’s Birdhouse Promotion Site.

16. Defendant’s Birdhouse Promotion also presents three-dimensional birdhouses in the style of vacation homes, historically HomeAway’s primary market segment, as opposed to apartments in cities, Defendant’s primary market segment. Defendant’s vacation-home birdhouses in its Birdhouse Promotion are similar to the three dimensional birdhouses

HomeAway displays at its headquarters and highlights on its public Blueprints website. Attached as Exhibit 17 are true and correct images of the birdhouses displayed at our headquarters and on our Blueprints website.

17. Media coverage of Defendant's Birdhouse Promotion immediately recognized and called out that the concept appeared to be lifted from HomeAway. For example, the AdverBlog wrote "I can't help but wonder if it's just a coincidence that the No. 1 competitor to [Defendant] (HomeAway) has a bird house as a logo." Consumers have also noted Defendant's copying. In a message left by a user on Defendant's Birdhouse Promotion Site, a user writes "This is so "HOMEAWAY . . ." Attached as Exhibits 18 – 19 are true and correct copies of comments posted online regarding the Birdhouse Promotion. Attached as Exhibit 20 is a list of some of the media coverage of Defendant's Birdhouse Promotion.

18. Defendant and HomeAway target and provide services to an overlapping class of travelers for their respective services, through overlapping channels of trade, i.e. the Internet. HomeAway's core market has been primarily vacation properties that are the second or third home of Owners, which Properties are sometimes used by the Owner, but are maintained in a manner to be suitable for the purpose of renting short-term to families and groups traveling together. Before the Birdhouse Promotion, Defendant primarily targeted lessees of rooms in apartments in cities or even entire apartments in major cities who may or may not have had permission from their landlord to sublet their apartments commercially as its core source of rentable inventory. Defendant has recently increased its efforts to attract Property listings in the more traditional vacation destinations, in which HomeAway has long been well-established as a market leader, and where vacation rentals are embraced as a part of the economic fabric of the community.

19. Defendant uses the same advertising media as HomeAway, including online search and television, and has specifically targeted online customers with its Birdhouse Promotion. Attached as Exhibit 21 is a true and correct copy of a New York Times Article describing Defendant's planned use of online search and television.

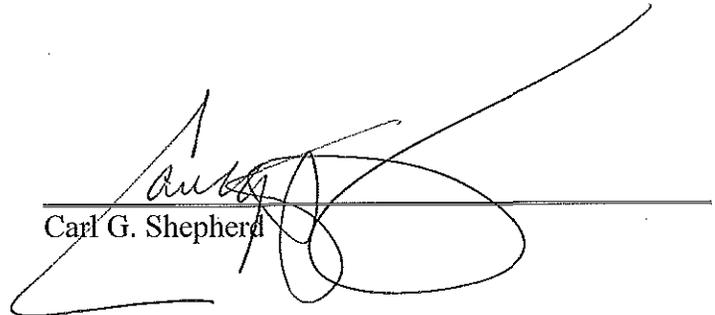
20. Defendant's recent actions suggest that it is targeting HomeAway and Travelers familiar with the HomeAway Websites and services, particularly, through its Birdhouse Promotion.

21. Based on the information I have seen online and reactions to the Birdhouse Promotion it is likely that consumers will connect the use of a birdhouse logo on Defendant's Birdhouse Promotion Site with HomeAway, indeed the comments posted suggest that this has already happened. Because HomeAway uses the Birdhouse Mark alongside brand-names other than HomeAway in the ordinary course of its business (such as Abritel.fr, for example), it is extremely likely that such consumers will be at least initially confused as to whom they are really dealing with given HomeAway's consistent global branding using the Birdhouse Mark, it is also extremely likely that consumers will conclude, in error, that Airbnb is a HomeAway-affiliated site or is sponsored or licensed by HomeAway. In light of HomeAway's acquisitions of other companies in the online travel space, it is likely that customers would perceive the Birdhouse Promotion as an indicator that Airbnb has been acquired by HomeAway and operates as part of HomeAway's birdhouse-branded marketplace.

22. The evidence that is available suggests that Airbnb is attempting to trade on the excellent reputation and goodwill that HomeAway enjoys in the Birdhouse Mark which HomeAway has achieved through its innovative design work and over 8 years of substantial investment in business planning, marketing, and product development.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2013.



Carl G. Shepherd