

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Findology Interactive Media Inc. v. Revquest Technologies Inc., 2007 NSSM 13

2007

Claim No. 272745

Date: 20070430

BETWEEN:

Name: **Findology Interactive Media Inc.**

Claimant

- and -

Name: **Revquest Technologies Inc.**

Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on May 4, 2007. This decision replaces the previously distributed decision.

Appearances:

Claimant: Maureen Ryan and Eli Pearlman

Defendant: Troy Muise

ORDER

[1] This matter came before the Small Claims Court in Halifax on December 14, 2006, and evidence was heard at that time. At the conclusion of the hearing I provided the parties further time to submit supporting documentation. First, the Defendant had until January 31, 2007, to file documentary evidence and submissions in support of its defence and counterclaim and, following that, the Claimant had until March 15, 2007, to file material in response to the Defendant's supplementary material. In such circumstances I consider therefore that the hearing date is March 15th for the purposes of filing a decision.

- [2] The claim herein is for \$25,000.00 in respect of what is referred to as a “pay-per-click” internet search engine use provided to the Defendant by the Claimant. The written defence filed by the Defendant disputes the claim for the reasons stated as:

Fraudulent & incentive-based-fake & inflated traffic generated by software bots, IP spoofing, etc.

- [3] Further, the Defendant counterclaims for:

Losses due to bandwidth & infrastructure, usage, management & processing fees and loss of business due to the harm caused to our reputation with our customers (advertisers) & partners.

- [4] The evidence on behalf of the Claimant was presented by Trevor Lakier who also submitted an affidavit under date of December 14, 2006. For the Defendant, the Vice President and Chief Executive Officer, Troy Muise, testified. Mr. Muise also filed a supplementary affidavit dated January 31, 2007, and Mr. Lakier submitted a supplementary affidavit which was filed with the court on March 15, 2007. Counsel for the Claimant also filed a detailed written submission dated March 15, 2007.
- [5] In evidence was the document dated September 9, 2004, which is entitled “RevQuest.com Search Agreement” between RevQuest Technologies Inc., the Defendant herein and Traffic Ads Media, Inc. (Traffic Ads Media Inc. changed its name on April 26, 2006, to Findology Interactive Media Inc., which is the named Claimant herein.)
- [6] The Claimant is an internet advertising company. It provides a pay-per-click search engine which companies, such as RevQuest Technologies Inc. utilize on behalf of its own customers who are the ultimate advertisers on various internet sites. As stated in Mr. Lakier’s affidavit of December 14th (and this does not appear to be at all contested):

When an internet user enters the purchased key words in the search box a link is generated to the advertisers' website ("sponsored listings"). Whenever an internet user clicks on a sponsored listing the corresponding advertiser pay the search engine on a per click basis.

- [7] The evidence indicates that the Defendant would bill its customers on a per-click basis and then in turn would compensate Findology at a rate of 60% of the revenues it earned. This 60% rate is stipulated in the search agreement dated September 9, 2004. This search agreement then goes on to state that:

RevQuest may, at its sole discretion, ignore or credit back click through revenue, which it believes are fraudulent or invalid in nature.

- [8] It is this last provision which the Defendant primarily relied on at the December 14th hearing. In essence, its position is that a substantial amount of the traffic provided by the Claimant was fraudulent and that it was entitled therefore in its discretion to credit back "click-through revenue" which it believed was fraudulent or invalid in nature.

- [9] The Defendant also raised a jurisdictional issue which potentially arises from the search agreement. It states:

This agreement shall be governed by and construed according to the laws of the State of Delaware, to the jurisdiction of which the parties hereto submit.

- [10] Based on this, the Defendant states that this court has no jurisdiction to entertain the claim.

- [11] Further, the Defendant raised, effectively for the first time, in its January 31st submission, a further argument that during the period of November 2005 to July 2006, RevQuest sent Findology a total of \$113,000.00 of traffic. It is noted that on this issue, the parties relationships are reversed from that in the main claim herein. That is, during this period Findology was effectively the customer of RevQuest. RevQuest states (and again this is in the affidavit of January 31st from Troy Muise) that Findology only paid approximately

\$61,000.00 of this and did not pay for the approximately \$52,000.00 of that traffic. In support of that the affidavit of Mr. Muise has attached to it two spreadsheets showing the alleged figures.

Issues

[12] There are primarily three issues that arise from the materials and evidence filed:

1. Jurisdiction;
2. Findology's claim against RevQuest - "fraudulent traffic";
3. RevQuest's counterclaim against Findology.

Jurisdiction

[13] The jurisdictional issue arises as a result of the language in the contract referred to above. It is unclear to me why the parties to this contract would have picked Delaware for the jurisdiction to hear this matter. No apparent explanation was offered by Mr. Muise at the hearing. It was his company which drafted the agreement.

[14] In the material filed on January 31st on behalf of the Defendant, little is offered by way of legal submission. It is simply stated in Mr. Muise's affidavit that it is his position that the case should be thrown out as it clearly states in the contract, that the laws and jurisdiction of the State of Delaware should prevail and that Nova Scotia courts have no jurisdiction and should not rule on the case. That is the entire submission made on the issue by the Defendant.

[15] As stated, the Claimant has spent considerable time dealing with the jurisdictional issue in its written submission of March 15th. First it argues that RevQuest did not plead lack of jurisdiction in its defence and therefore is estopped from pleading that this court lacks jurisdiction. I would not be prepared to make a finding on that argument alone.

[16] However, the Claimant makes a further argument that the agreement does not confer **exclusive** jurisdiction to the State of Delaware and that there is still concurrent jurisdiction in the courts of the Province of Nova Scotia. As I understand the case law in this regard, where there is an argument as between two jurisdictions, and there is a substantial connection to one of those jurisdictions (here, Nova Scotia), and little or no connection to another jurisdiction, (in this case, Delaware), there is a significant onus on the party that claims the forum which has little connection has exclusive jurisdiction under the terms of the contract.

[17] In this case, RevQuest bears this onus and has really offered nothing in this regard to meet this onus. Further, and as already noted, I see no connection between the the State of Delaware and the dispute here and the parties herein except for the fact that it is in the agreement. The wording in the agreement does not state that there is to be exclusive jurisdiction. Based on this, I dismiss the argument that there is no jurisdiction in the Courts of this Province.

Findology's claim against RevQuest - "fraudulent traffic"

[18] The claim amount is \$25,000.00. This covers invoices for April 2005 - September 2005 inclusive which actually total \$27,394.00, which the Claimant has reduced to \$25,000.00 to come within the jurisdictional limits of this court. It is to be noted that all of these invoices are based on RevQuest's own "on-line interface" or also referred on the actual printout as the "RevQuest Control Panel". As confirmed by Troy Muise in his January 31st affidavit the figures on these documents show 60% of the total traffic sent to RevQuest by Findology before deduction for invalid traffic. I note as well that there are no documents showing deductions for invalid traffic done at the time of these printouts being done for April 2005 - September 2005.

[19] In Mr. Lakiers's evidence he indicates that the Defendant never complained about the quality of Findology clicks or traffic prior to the filing of the defence/counterclaim. While

Mr. Muise disputes that, certainly there was nothing in writing to substantiate that his company advised Findology that it questioned the “quality” of the traffic.

[20] In Mr. Muise’s *via voce* evidence of December 14th he stated that his company performed a “post-click” analysis at the time and they knew that there was fraudulent traffic and that they did so advise Findology. He also stated that he could not attest to whether or not his company sent the post-click analysis to Findology. He stated that the documentary evidence which would show that there was fraudulent traffic was no longer on the server but would be on hard disc. Nevertheless, I was under the understanding that the information would be available with some time and work on the part of RevQuest. Given that RevQuest was not represented at the hearing and given that this information appeared to be critical to their case, I gave RevQuest until the end of January to produce the documentary evidence regarding the alleged fraudulent traffic.

[21] While Mr. Muise’s affidavit of January 31st continues the stated position that there was fraudulent traffic, there is in fact nothing exhibited to it which supports that claim.

[22] Based on the fact that the Defendant has not provided any corroborating evidence of the alleged fraudulent traffic, I dismiss that defence.

[23] In doing so I am mindful of the language of the agreement which states that RevQuest may at its sole discretion credit back click through revenue which it believes are fraudulent or invalid in nature.

[24] While the contract clearly gives RevQuest the discretion to do so, such discretion must be exercised in good faith and objectively and consistent with the parties’ expectations at the time of entering into the contract. See *Duka v. Smilestone (1994)*, 131 N.S.R.(2d) 81 (S.C.) and the following comments of Kelly, J. (p. 90):

The common core of all of these examples is that if one party had explicitly reserved in the contract the "right" to exercise its discretion, even when such phrases as "its sole discretion" are used, the courts have held that this does not mean absolute discretion, but that the discretion must be exercised reasonably, honestly, and in good faith, and further that the assessment of such discretionary power should be an objective one.

.....

*As part of his comprehensive discussion of the good faith doctrine in *Breach of Contract and the Common Law Duty to Perform in Good Faith* 94 Harv. L.Rev. 369, Steven J. Burton stated at p. 373:*

Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting - when the discretion -exercising party refuses to pay the expected cost of performance. Good faith performance, in turn, occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation - to capture opportunities that were preserved upon entering the contract, interpreted objectively

[25] To put it plainly, the company in the position of RevQuest should be able to provide some objective verification of its position that the traffic was fraudulent. It is not sufficient to in effect merely say it is fraudulent traffic because we say it is fraudulent traffic. That puts the company in the position of Findology into an impossible situation.

[26] For these reasons the defence is dismissed and I am going to allow the claim of the Claimant in the amount of \$25,000.00.

Counterclaim

[27] In effect this was raised for the first time on January 31st. In such a case where the "pleadings" (informal as they may be) are already filed and the hearing before the court on December 14th has already taken place, a counter-claimant is compelled to have very strong evidence in support of its counterclaim which it is now just raising for the first time. The evidence in Mr. Muise's affidavit does not satisfy me, even if it had been raised in the first case and pleaded in the first case.

[28] The reason for this is that it is merely spreadsheets which I would infer were prepared by Findology and which I would further infer were likely prepared between December 14th and January 31st.

[29] The counterclaim is dismissed. I would also refer to the original counterclaim for loss of business reputation and I find there is absolutely no evidence to support that claim and it is hereby dismissed.

Interest

[30] The Claimant claims interest at the rate of 10% per annum. I can find no basis for this claim either in the Search Agreement of September 9, 2004, or even in the invoices submitted by Findology, and in this latter case, it is questionable whether any agreement could be inferred in any event. Under the Small Claims Court regulations (Section 16) prejudgment interest may be awarded at the rate of 4% and I am prepared to award that. The Court has some discretion on the awarding of interest and that includes the time frame in which to award the interest. I am going to allow the prejudgment interest for 20 months, essentially September 1, 2005 - April 30, 2007. This recognizes that September 1st date is used because it is approximately a mid-point through the issuance of the larger invoices and approximates what is sometimes referred to as the "rough and ready" method of calculating interest.

[31] According to my calculations the prejudgment interest on the \$25,000.00 Canadian is \$1,667.00, and that is the amount I will allow.

[32] I accept the costs requested, including the travel costs. The total costs therefore is \$1,485.52.

Order

[33] It is hereby ordered that the Defendant pay the Claimant as follows:

Debt:	\$25,000.00
Prejudgment Interest:	1,667.00
Costs:	<u>1,485.52</u>
Total:	\$28,152.52

DATED at Halifax, Halifax Regional Municipality, Nova Scotia, this 30thrd day of April, 2007.

Michael J. O'Hara
Adjudicator

Original	Court File
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Copy	Defendant(s)