

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

HOLMQUIST & GARDINER PLLC
HAMILTON H. GARDINER #249038
hamilton@lawhg.net
1000 Second Avenue, Suite 1770
Seattle, WA 9 8104
Telephone: (206) 438-9116
Facsimile: (206) 694-4601

PILLSBURY WINTHROP SHAW PITTMAN LLP
ROBERT L. WALLAN #126480
robert.wallan@pillsburylaw.com
MARIAH L. BRANDT #224076
mariah.brandt@pillsburylaw.com
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406
Telephone: (213) 488-7100
Facsimile: (213) 629-1033

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiffs,

vs.

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

Defendants.

No. CV-09-03088 R (AJWx)

DEFENDANTS AND
COUNTERCLAIMANTS NAME
INTELLIGENCE, INC. AND JAY
WESTERDAL'S FIRST
AMENDED COUNTERCLAIMS
FOR BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

CrtRm: 8
Judge: Manuel L. Real

2010 JAN 19 PM 3:49
U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

FILED

1 NAME INTELLIGENCE, INC., a
2 Washington corporation; and JAY
WESTERDAL, an individual;

3 Counterclaimants,

4 vs.

5 THOUGHT CONVERGENCE, INC.,
6 a Delaware Corporation and NAME
INTELLIGENCE, LLC, a Delaware
7 limited liability company

8 Counterdefendants.

9
10 Defendants and counterclaimants Name Intelligence, Inc. ("Name
11 Intelligence") and Jay Westerdal ("J. Westerdal") (collectively
12 "Counterclaimants") hereby demand a jury trial on their first amended
13 counterclaims and allege as follows:

14 **INTRODUCTION**

15 1. This case involves the enforcement of a Securities Exchange
16 Agreement (the "Agreement"), entered into between Name Intelligence and
17 Thought Convergence, Inc. ("TCI") on or about May 2, 2008 and an Offer
18 Letter, entered into between J. Westerdal and Name Intelligence, LLC ("NIL")
19 on or about May 28, 2008.

20 2. TCI breached the Agreement by failing to make a timely payment
21 for \$5 million to Name Intelligence and a timely payment for \$430,000 plus
22 interest to J. Westerdal on May 2, 2009. TCI further breached the Agreement
23 by failing to implement a non-discriminatory Equity Incentive Plan as required
24 by the Agreement.

25 **JURISDICTION AND VENUE**

26 3. Jurisdiction is proper under 28 U.S.C. § 1332(c) because
27 counterdefendants TCI and NIL are citizens of different states than
28

1 Counterclaimants and the amount in controversy exceeds \$75,000 exclusive of
2 interest and costs.

3 4. Venue is proper in this court pursuant to 28 U.S.C. § 1391(2) as a
4 substantial amount or part of the events or omissions giving rise to this action
5 occurred within this district. Venue is also proper based on section 7.11 of the
6 Agreement, which requires that any action arising out of or relating to the
7 Agreement be brought in the State of California, County of Los Angeles.

8 **THE PARTIES**

9 5. Counterclaimant and defendant Name Intelligence is, and all
10 relevant times herein mentioned was, a corporation duly organized pursuant to
11 the laws of the state of Washington, with its principal place of business in
12 Mercer Island, Washington.

13 6. Counterclaimant and defendant J. Westerdal is an individual
14 residing in Mercer Island, Washington. J. Westerdal is the co-founder, CEO
15 and President of Name Intelligence.

16 7. Counterdefendant and plaintiff TCI is, and at all relevant times
17 mentioned herein was, a corporation duly organized pursuant to the laws of
18 the state of Delaware, with its principal place of business in Los Angeles,
19 California. TCI is a provider of domain management, monetization and
20 development tools and technologies for domain owners and aggregators of
21 domain portfolios.

22 8. Counterdefendant and plaintiff NIL is, and all relevant times
23 mentioned herein was, a limited liability company organized in the state of
24 California with citizenship in California.

1 **THE TRANSACTION**

2 9. On or around November of 2007, TrafficZ (TCI's predecessor in
3 interest) approached Name Intelligence regarding a possible merger between
4 the companies or an outright acquisition.

5 10. Negotiations continued between Name Intelligence and TrafficZ
6 for the next six months until a deal was finally reached.

7 11. On or about May 2, 2008, the Agreement was executed between
8 Name Intelligence, the newly formed parent company, TCI, and TrafficZ.

9 12. The Agreement provided that all of the shares and assets of Name
10 Intelligence would be acquired by TCI in exchange for \$16 million to be paid
11 in three installments and approximately 15.3% of the outstanding shares of
12 TCI.

13 13. TCI paid Name Intelligence the initial payment of \$6 million
14 upon executing the Agreement. Under the Agreement, TCI was required to
15 make two subsequent payments of \$5 million each to Name Intelligence on
16 May 2, 2009 and May 2, 2010.

17 14. Under the Agreement, TCI was required to create a non-
18 discriminatory Equity Incentive Plan (the "EIP") prior to the execution of the
19 Agreement.

20 15. Counterclaimants have performed all of their obligations under
21 the Agreement.

22 **FIRST CAUSE OF ACTION**

23 **(Breach of Contract for Failure to Pay)**

24 16. The allegations of Paragraphs 1 through 15 are incorporated
25 herein by reference.

1 17. On or about May 2, 2008, Name Intelligence and TCI entered
2 into the Agreement. Under the Agreement, Name Intelligence agreed to
3 transfer all of its stock and assets to TCI.

4 18. Under the Agreement, TCI agreed to pay Name Intelligence \$16
5 million, in three installments, and approximately 15.3% of the outstanding
6 shares of TCI.

7 19. Pursuant to the Agreement, Name Intelligence transferred all of
8 its stock and assets to TCI and further performed its other responsibilities, if
9 any, as required under the Agreement.

10 20. In breach of the Agreement, TCI failed to timely pay the first
11 installment of \$5 million to Name Intelligence on May 2, 2009.

12 21. TCI made a partial late payment of \$4 million on or around May
13 8, 2009. TCI made an additional late payment of \$1.5 million on or around
14 May 26, 2009. TCI has not provided any accounting to explain the precise
15 amount paid.

16 22. As a direct and proximate result of TCI's failure to pay the
17 amounts owed on time, Name Intelligence has suffered damages in an amount
18 to be proven at trial.

19 **SECOND CAUSE OF ACTION**

20 **(Breach of Contract for Failure to Properly**

21 **Implement Non-Discriminatory Equity Incentive Plan)**

22 23. The allegations of Paragraphs 1 through 22 are incorporated
23 herein by reference.

24 24. As part of the Agreement, TCI was required to create a non-
25 discriminatory Equity Incentive Plan ("EIP") prior to the execution of the
26 Agreement.

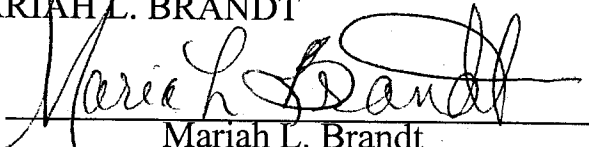
1 3. An award of attorney's fees and costs as authorized by section
2 7.12 of the Securities Exchange Agreement and applicable statutory
3 provisions; and

4 4. For such other and further relief as the Court deems proper.

5 Dated: January 19, 2010

6 HOLMQUIST & GARDINER PLLC
HAMILTON H. GARDINER

7 PILLSBURY WINTHROP SHAW
8 PITTMAN LLP
9 ROBERT L. WALLAN
MARIAH L. BRANDT

10 By  _____

11 Mariah L. Brandt
12 Attorneys for Defendants and Counter-
13 claimant NAME INTELLIGENCE, INC. and
14 JAY WESTERDAL and Defendants PER
15 WESTERDAL and RAY BERO
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Demand for Trial By Jury

Counterclaimants Name Intelligence, Inc. and Jay Westerdal demand a trial by jury pursuant to Federal Rule of Civil Procedure 38 for all issues that are triable by jury in the above captioned action.

Dated: January 19, 2010

HOLMQUIST & GARDINER PLLC
HAMILTON H. GARDINER

PILLSBURY WINTHROP SHAW
PITTMAN LLP
ROBERT L. WALLAN
MARIAH L. BRANDT

By 

Mariah L. Brandt

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Docket No. CV-09-03088 R (AJWx)

PROOF OF SERVICE

I am employed in the State of California, in the office of a member of the bar of this Court, at whose direction the service is made. I am over the age of eighteen years, and not a party to the within action. My business address is Pillsbury Winthrop Shaw Pittman LLP, 725 South Figueroa Street, Suite 2800, Los Angeles, CA 90017-5406. On January 19, 2010, I serve the document

titled DEFENDANTS AND COUNTERCLAIMANTS NAME
INTELLIGENCE, INC. AND JAY WESTERDAL'S FIRST AMENDED
COUNTERCLAIMS FOR BREACH OF CONTRACT AND DEMAND
FOR JURY TRIAL on the parties in this action as follows:

Kent B. Goss, Esq.
Christopher J. Chaudoir, Esq.
Dimitrios V. Korovilas, Esq.
Orrick, Herrington & Sutcliffe LLP
777 S. Figueroa Street
Suite 3200
Los Angeles, CA 90017-5855

(BY MAIL) I cause each envelope, with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, CA. I am readily familiar with the practice of Pillsbury Winthrop Shaw Pittman LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

(BY FACSIMILE) The above-referenced document was transmitted by facsimile transmission and the transmission was reported as complete and without error to the numbers listed above.

(BY EMAIL TRANSMISSION) The above-referenced document is transmitted via electronic transmission to the persons at the electronic-email addresses indicated above.

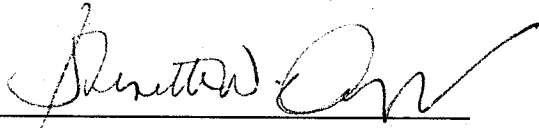
(BY PERSONAL SERVICE) I delivered to an authorized courier or driver authorized by _____ to receive documents to be delivered on the same date. A proof of service signed by the authorized courier will be filed forthwith.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(BY OVERNIGHT COURIER) I am readily familiar with the practice of Pillsbury Winthrop Shaw Pittman LLP for collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by _____ for overnight delivery.

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

Executed this 19th day of January, 2010, at Los Angeles, California.



Sherette W. Duffus