

FindTheBest

Think like an expert

Testimony of Danny Seigle
Director of Operations, FindTheBest.com

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Oversight and Investigations

Hearing on
“The Impact of Patent Assertion Entities
on Innovation and the Economy”

Washington, D.C.
Nov. 14, 2013

I. Introduction

Chairman Murphy, Ranking Member DeGette, and Members of the Subcommittee:

Thank you for the opportunity to testify today on the pivotal issue of patent assertion entities harming innovation and our economy. I am Danny Seigle, Director of Operations at FindTheBest.com, an online research platform. Every month FindTheBest helps 20 million businesses and consumers make confident purchase decisions about smartphones, cars, colleges, nursing homes, financial advisors, and hundreds more products and services.

FindTheBest is a four-year-old company that employs 110 people in Santa Barbara, California. Our founder and CEO, Kevin O'Connor, previously co-founded and led DoubleClick, the first substantial online advertising technology firm. FindTheBest was built on the promise of helping people sort through information in ways that helped them understand it and make smart decisions. That's why we characterize FindTheBest as a research engine, rather than a simple search engine.

II. Lumen View Technology's Vague and Threatening Demand Letter

Before May 30, 2013, I had limited knowledge of the patent system and no knowledge of the unfair, deceptive, and corrupt practices of "patent trolls." I understand the politically correct terms would be "non-practicing entities" and "patent assertion entities,"

but after less than six months of suffering their coercion, fraud, and abusive legal gamesmanship, I feel qualified to call them trolls.

Patent trolls use vague, threatening demand letters to coerce companies like ours into settling baseless lawsuits, regardless of infringement, by abusing the legal system's high cost of defense. This became clear when I received our first demand letter, sent by Lumen View Technology, a troll that has filed more than 20 infringement lawsuits since 2012.

The demand letter from Lumen View Technology vaguely claims that FindTheBest's "Assist Me" feature infringes "one or more claims" of patent 8,069,073 (Exhibit A). A patent which Lumen View exclusively licenses for the purpose of bringing infringement allegations against companies.

The demand letter arrived in tandem with a lawsuit,¹ which narrowed our window for reply to 21 days after service of the complaint. This is an exceedingly short period of time--particularly for a resource-constrained startup without inside counsel, like FindTheBest--to familiarize ourselves with the patent, solicit outside counsel, assess infringement and validity, and determine the appropriate response.

As a young businessman receiving my first demand letter, I was shocked by the letter's vague and threatening language.

¹ Lumen View Technology LLC v. FindTheBest.com, Inc. Case No. 13 CV 3599

With the exception of naming the patent number and the feature of our site that allegedly infringes, the demand letter failed to provide any specifics, such as: (1) Which of the 9 claims are being asserted against FindTheBest; (2) The reasons Lumen View believed FindTheBest infringed; and (3) A description of the specific FindTheBest functionality that is allegedly infringing the patent. The absence of such details places the burden of researching all claims of the patent on FindTheBest, unnecessarily inflating our costs, while permitting the troll to mass-produce demand letters with the same boilerplate template –which is exactly what Lumen View did.

The 5-page Lumen View demand letter is predominantly comprised of scare tactics intended to compel settlement. Some of the excerpts from the demand letter, along with our interpretation, include:

- “Plaintiff is prepared for full-scale litigation to enforce rights. This includes all motion practice as well as protracted discovery.” - **Interpretation:** If you try to defend yourself, we will make it very costly and time consuming.
- “If company engages in early motion practice...we must advise that it will force us to reevaluate and likely increase plaintiff's settlement demand... For each nondispositive motion filed by company, plaintiff will incorporate an escalator into its settlement demand...” - **Interpretation:** Regardless of merit, we will increase the settlement cost for each motion you file if you attempt to defend yourself.

- In the context of telling FindTheBest its document preservation obligations, Lumen View stated, “It should be anticipated that users may seek to delete or destroy information unrelated to the suit that they regard as personal, confidential or embarrassing and, in doing so, may also delete or destroy potentially relevant ESI [Electronically Stored Information]” - **Interpretation:** If you try to defend yourself, personal and embarrassing information may be disclosed during discovery.
- “You should take affirmative steps to prevent anyone with access to these systems from seeking to modify, destroy, or delete any ESI contained on their laptops, PCs, or personal smartphones” - **Interpretation:** You should confiscate personal smartphones from executives and other people knowledgeable on the subject matter.

When FindTheBest first received the Lumen View demand letter, I reviewed it with our CEO, Kevin O’Connor and we quickly realized that FindTheBest does not infringe. I decided to call Lumen View’s counsel at Aeton Law, in hopes of resolving the matter and avoiding legal costs. I asked the plaintiff’s lawyer several questions in reference to the patent and the basis for alleging infringement. He was either unwilling or unable to provide answers, simply repeating “no comment” in response to every question I asked. Rather than sharing the details I needed to properly respond to the demand letter, he repeatedly asked if we would like to discuss settlement negotiations.

From this phone call, it was clear that Lumen View had no interest in discussing the scope of the patent or the specifics of the alleged infringement. Instead, they were fixated on obtaining a settlement based on the cost of defense. For example, instead of providing a substantive basis for alleging infringement, the Lumen View's attorney stated that FindTheBest should pay Lumen View for a license simply as a "business decision." It was clear that they failed to perform any semblance of due diligence, negating any good-faith basis for the allegations.

For many small businesses in this situation, the pragmatic solution is to settle, and Lumen View offered a "one day settlement offer of \$50,000," a bargain considering that the cost of defense would be, at a minimum, hundreds of thousands of dollars. It would have been financially prudent to settle, which our investors and our board encouraged, but we made the decision based on ethics and decided to fight this frivolous and fraudulent lawsuit. To protect our investors and focus our business resources on our product, our CEO pledged \$1 million to finance the litigation.

To date this demand letter and lawsuit have cost FindTheBest countless days of employee time and approximately \$160,000 in legal fees. We would rather dedicate these resources to hiring additional engineers, improving our product, and providing more value to the 20 million monthly consumers and businesses that utilize FindTheBest to make significant decisions.

Once it became clear to Lumen View that we were willing to defend ourselves against these baseless claims, the plaintiff and plaintiff's counsel became increasingly

aggressive. Continuing their unethical behavior, the plaintiff threatened to pursue criminal charges against our CEO for calling the co-inventors “patent trolls.” The plaintiff’s counsel told us that the only way the plaintiff would not pursue these criminal charges was if we settled the case by the end of the day. At this point, we identified a pattern of abuse and corruption and made the decision to file Racketeer Influenced and Corrupt Organization “RICO” charges against Lumen View Technology and the related parties.²

III. A Four-Sentence Demand Letter from Make Communications & Computing, LLC

FindTheBest received a second demand letter on Oct. 10, 2013 from Make Communications & Computing (MakeCom). The demand letter alluded to three patents describing “automatic scrolling technology” (Exhibit B). I am not entirely certain how automatic scrolling qualifies as novel or how the public benefits from such an “invention,” but the USPTO decided this was patentable concept, so as the target of the demand letter, we must assume it is a valid patent and hire lawyers to respond.

This entire demand letter is a mere four sentences long. Opening with the declaration that “FindTheBest.com is using automatic scrolling technology on their web site,” it states that we are “likely infringing on MakeCom Intellectual property” and names three possible patents that “require licensing for use.” The only evidence of infringement

² FindTheBest.com, Inc. v. Lumen View Technology LLC et al. Case No. 13 CV 6521

provided is a link to our homepages for FindTheBest and our sister site FindTheData, accompanied by a demand that we “contact MakeCom immediately to discuss arrangement for obtaining the necessary license.”

After reviewing the patents we concluded, once again, that we do not infringe. We responded to MakeCom requesting additional information including, (1) The particular claims of the 78 possible claims of the MakeCom patents on which FindTheBest is potentially infringing; (2) The specific reasons why MakeCom believes that FindTheBest is infringing, including the due diligence MCC engaged in prior to Oct. 10, 2013 to determine the alleged infringement, (3) The description of the specific functionality attributes of the FindTheBest website that MakeCom alleges are infringing; (4) The names of all parties with financial interest in the MakeCom patents; (5) The licensing fees or royalties that MakeCom believes FindTheBest should pay; and (6) The names of any other parties to whom MakeCom, or any other party with financial interest in the MakeCom patents, have sent communication alleging infringement of the MakeCom patents (Exhibit C).

MakeCom’s cryptic and vague demand letter cost them less than \$3 to send via certified mail, but costs FindTheBest thousands of dollars in legal fees and countless hours of time and effort.

IV. Conclusion: Demand Letter Reform is Necessary

I wish I could say that our story is unique, but it is not. The only unique thing about our story is our willingness to be vocal about these unethical and corrupt business practices. As Newegg, Rackspace, and other larger companies are proving, recipients of fraudulent demand letters that can afford to fight publicly should do so, as it has proven successful.

Most companies remain silent, as they are intimidated into signing non-disclosure agreements, and they are afraid that going public may negatively affect business or that patent trolls may retaliate with additional suits. The most recent court motion filed by Lumen View asked the judge for a gag order to silence us, a clear sign that Lumen View has something to hide about its own unscrupulous behavior.

Our decision to be vocal about this process has resulted in an outpouring of support from hundreds of companies, many of whom have shared stories of their own battles with patent trolls. I am here today not only as a representative of FindTheBest, but as a voice for others that do not have the resources to fight or were silenced with non-disclosure agreements. When FindTheBest decided to fight back, we never imagined that we would receive so much praise and admiration for defending ourselves against frivolous claims and doing what is right.

I joined FindTheBest because I wanted to be part of something that adds real value to people's lives. Patent trolls aren't adding value to society. They are attacking young companies, stifling innovation, and hindering economic growth in the process.

Comprehensive patent abuse legislation is absolutely necessary and it must include demand letter reform. Patent owners have received an extraordinary benefit from the government and the people, and they should be required to use it in good faith.

Congress must require patent demand letters to include specifics about infringement claims and patent owners, or their agents, must have a duty of good faith regarding these assertions and their monetary demands.

FindTheBest could have chosen an easy option and settled these cases. Settlement would have been far less costly and time-consuming, but there's more to this issue than the cost and time involved. It's about doing what's right. If no one stands up for what's right, the abuse will continue, and society will suffer. I ask that you too do what is right, and put an end to these deceptive and unethical tactics that hurt the American economy, innovation, and ultimately consumers.

Thank you for your time and I look forward to answering your questions.



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VIA HAND DELIVERY

May 30, 2013

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FindTheBest.com, Inc.
101 Innovation Place, # A
Santa Barbara, California 93108

c/o
Thomas N. Harding Seed Mackall LLP
1332 Anacapa St., Suite 200
Santa Barbara, CA 93101

RE: *Lumen View Technology LLC v. FindTheBest.com, Inc., S.D.N.Y.*

Dear Mr. Seigle:

This firm represents Lumen View Technology LLC ("Plaintiff") in connection with U.S. Patent Number 8,069,073, entitled "System and Method for Facilitating Bilateral and Multilateral Decision- Making" ("the '073 Patent"). We write to you as Director of Operations for FindTheBest.com, Inc. ("Company") regarding Company's unlicensed use of subject matter covered by the claims of the '073 Patent.

Based on our examination, Company's AssistMe feature meets one or more claims of the '073 Patent, as more fully described in the Complaint attached hereto which already has been filed against Company in the United States District Court for the Southern District of New York (the "Suit"), and that Company has directed this infringing activity to residents in the State of New York.

A service copy of the Complaint is attached. The Complaint has been filed and served on the Company's New York registered agent listed above. Please note that a response to the Complaint ("Response") must be filed within twenty-one (21) days from the date of service or a default judgment may be entered against the Company.

If Company is interested in avoiding the need for filing responsive pleadings, you must contact us (prior to the due date of Company's Response) to discuss license terms. To facilitate such discussions, please be prepared to discuss the extent of the

Company's use of and revenues generated from the features described in the Complaint.

While it is Plaintiff's desire that the parties amicably resolve this matter, please be advised that Plaintiff is prepared for full-scale litigation to enforce its rights. This includes all motion practice as well as protracted discovery.

Should Company engage in early motion practice, however, we must advise that it will force us to reevaluate and likely increase Plaintiff's settlement demand. Please be advised that for each nondispositive motion filed by Company, Plaintiff will incorporate an escalator into its settlement demand to cover the costs of its opposition papers and argument.

Preservation Request

Please allow this correspondence to also serve as our request for preservation of evidence to include all documents, tangible things and electronically stored information ("ESI") potentially relevant to the issues in this case. As used in this Preservation Notice, "you" and "your" refers to Company, and its predecessors, successors, parents, subsidiaries, divisions or affiliates, and their respective officers, directors, partners, agents, attorneys, employees or other persons occupying similar positions or performing similar functions.

You should anticipate that much of the information subject to disclosure or responsive to discovery in this matter is stored on your computer systems or other media and devices (including personal digital assistants, smart phones, BlackBerry, iPhone, voice messaging systems, online repositories and cell phones).

ESI should be afforded the broadest possible definition and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically or optically stored as:

- Digital communications (e.g., email, voicemail, instant messaging);
- Word processed documents (e.g., Word documents and drafts);
- Spreadsheets and tables (e.g., Excel worksheets);
- Accounting application data (e.g., Quickbooks, Peachtree data files);
- Image and facsimile files (e.g., PDF, TIFF, JPG, GIF images);
- Sound recordings (e.g., .WAV and .MP3 files);
- Video and animation (e.g., .AVI and .MOV);
- Databases (e.g., Access, Oracle, SQL, SAP);
- Contact and relationship management data (e.g., Outlook, ACT);
- Calendar and diary application data (e.g., Outlook PST, Gmail, blogs);

- Online access data (e.g., temporary internet files, history, cookies);
- Network access and server activity logs;
- Project management application data;
- Computer aided design; and
- Backup and archival files (e.g., ZIP and .GHO)

ESI resides not only in areas of electronic, magnetic or optical storage media reasonably accessible to you, but also in areas you may deem not reasonably accessible. You are obliged to preserve potentially relevant evidence from both of these sources of ESI, even if you do not anticipate producing such ESI.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. You will be asked in this litigation to identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of ESI even if it is not reasonably accessible. Accordingly, even ESI that you deem reasonably inaccessible must be preserved in the interim so as not to deprive Plaintiff of its right to secure this evidence or request that the court order it to be produced.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI including, without limitation, from six (6) years prior to the date of the filing of the Suit up to the present time, and ongoing, in any way relating to the products implicated by the '073 Patent.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques and protocol suited to protection of ESI. You should be advised that sources of ESI that are altered and erased may very well be detectable and subject you to sanctions. You should also be advised that sources of ESI are altered and erased by continued use of your computers and other devices.

Consequently, alteration and erasure may result from your failure to act diligently and responsibly to prevent loss or corruption of ESI.

Suspension of Routine Destruction

We request that you immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things, and to act diligently and in good faith to secure and audit compliance with this litigation hold. Your failure to do so is gross negligence. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

- Purging the contents of email repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding backup media;
- Reassigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs affecting wholesale metadata alteration;
- Releasing or purging online storage repositories;
- Using metadata or stripper utilities;
- Disabling server or IM logging; and
- Executing drive or file defragmentation or compression programs.

Obligation to Guard Against Deletion

It should be anticipated that your employees, officers or others may seek to hide, destroy or alter ESI and you should act to prevent or guard against such actions. Especially where company machines have been used for Internet access or personal communications, it should be anticipated that users may seek to delete or destroy information unrelated to the Suit that they regard as personal, confidential or embarrassing and, in doing so, may also delete or destroy potentially relevant ESI. This concern is not one unique to you or your employees or officers. It is simply an event that occurs with such regularity in electronic discovery efforts that any custodian of ESI and their counsel are obliged to anticipate and guard against its occurrence.

You should take affirmative steps to prevent anyone with access to your data, systems and archives from seeking to modify, destroy or hide electronic evidence on network or local hard drives. With respect to local hard drives, a method of protecting existing data on local hard drives is through the creation and authentication of a forensically qualified image of the sectors of the drive.

With respect to specific ESI in relevant to the Suit, we understand that Your employees may have frequently used computers and smart phones. We also understand that employees regularly communicate via email. You should take affirmative steps to prevent anyone with access to these systems from seeking to modify, destroy, or delete any ESI contained on their laptops, PCs, or personal smart phones.

With respect to servers like those used to manage electronic mail (e.g., Microsoft Exchange) or networked storage (often called a user's network share), the complete contents of each user's network share and email accounts should also be preserved.

To the extent that officers, board members or employees have sent or received potentially relevant emails or created potentially relevant documents away from the office, you must preserve the content of the systems, devices and media used for these purposes. Similarly, if employees, officers or board members used online or browser-based email accounts or services (such as Gmail) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

Agents and Third Parties

Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you must notify any current or former agent, employee, custodian or contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation.

System Sequestration

We suggest that with respect to certain individuals with significant knowledge of Company's products implicated by the '073 Patent, that you remove their ESI systems, media and devices from service to properly sequester and protect them. This may be the most appropriate and cost effective preservation step to ensure non-destruction of ESI.

We are available to discuss reasonable preservation steps of ESI in your possession, custody or control. However, you should not defer preservation steps pending such discussion because ESI may be lost or corrupted as a consequence of delay.

Should your failure to preserve potentially relevant ESI result in the loss, corruption or inability to produce evidence in this matter, such failure may constitute spoliation

of evidence and we will not hesitate to seek sanctions, court costs, or an independent action for spoliation where appropriate.

Thank you for your attention to this matter. We look forward to hearing from you as soon as possible.

Very truly yours,



of Aeton Law Partners

Attachments



Make Communications & Computing
PO Box 762
Los Gatos, CA 95031-0762

October 10, 2013

To: *Mr. Kevin O'Connor, CEO*
FindTheBest.com
PO Box 1259
Summerland, CA 93067-1259

Dear Mr. O'Connor:

Please be advised that FindTheBest.com is using automatic scrolling technology on their web-site, technology which we believe to be covered under MCC patents and therefore likely infringing on MakeCom Intellectual Property.

This technology is specifically protected under patents #7,308,653B2, #7,712,044B2, and #8,108,792B2 and requires a license for use. The following link to FindTheBest.com's home page shows the infringement:

<http://www.findthebest.com/>
<http://www.findthedata.org/>

Please contact MakeCom ((408) 560-1591) immediately to discuss arrangements for obtaining the necessary license.

With best regards

Catherine Lin-Hendel
Founder and CEO

November 8, 2013

Catherine Lin-Hendel
Make Communications & Computing
P.O. Box 762
Los Gatos, CA 95031-0762

Dear Ms. Lin-Hendel:

We received your October 10, 2013 letter asserting that our client, Findthebest.com, Inc. ("FTB"), is allegedly using automatic scrolling technology on its website that Make Communications & Computing ("MCC") believes is covered under U.S. Patent Nos. 7,308,653, 7,712,044, and 8,108,792 (the "MCC Patents") and demanding that FTB contact MCC to discuss entering into a license to use the technology covered by those patents.

As an initial matter, your letter lacks many important details that would facilitate our review of the MCC Patents and MCC's allegations of infringement. For example, the letter contains no information about:

- There are more than 75 claims between the three patents and you fail to identify the specific claims that MCC asserts FTB allegedly infringes.
- The specific reasons why MCC believes that FTB is infringing including the due diligence MCC engaged in prior to October 10, 2013, to determine purported infringement.
- A description of the specific functionality or attributes of FTB's website that MCC alleges are infringing the MCC Patents. Referencing a link to FTB's homepage as a description of infringement is meaningless.
- The names of all parties with financial interests in the MCC Patents.
- Licensing fees or royalties that MCC believes FTB should pay.
- The names of any other parties to whom MCC, or any other party with financial interests in the MCC Patents, have sent communications alleging infringement of the MCC Patents.

Without this critical information, it is difficult to fully evaluate MCC's claims of infringement against FTB. We have, however, reviewed the MCC Patents and the FTB website and concluded that FTB does not infringe the MCC Patents. Moreover, we question the validity of the MCC Patents.

FTB takes allegations of infringement and abuse of the patent/legal system very seriously and will defend itself vigorously should MCC decide to pursue unfounded and frivolous litigation. In the most recent example, FTB is defending itself in litigation initiated by Lumen View Technology LLC (Case No. 13CV3599 pending in the U.S. District Court for the Southern District of New York), which has been the subject of extensive media coverage in print and online publications such as *ArsTechnica*, *The Washington Post*, *Bloomberg Business Week*, as well as many other business and legal industry blogs.



We trust that our response resolves this matter to MCC's satisfaction.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J.S. Leventhal'.

Joseph S. Leventhal

cc: Danny Seigle, FindTheBest.com, Inc.