

**Better Business Bureau Arbitration No. ■
Heard ■**

Parties

■, Complainant

■, Respondent

Dispute

The complaint arises from a contract entered into between the Complainant and the Respondent for the purchase and operation of four communication kiosks with digital advertising. The kiosks were installed at ■.

The Complainant claims that the Respondent misrepresented the potential revenue and profits to be made from these kiosks. He says he relied on these misrepresentations when he entered into the agreement.

The Complainant seeks a cancellation of the contract and a refund of the money paid for the kiosks and additional damages.

The complaint was filed with the Better Business Bureau and submitted to arbitration by mutual agreement of the parties.

Relief Claimed

The Complainant claims damages of \$■, including:

- \$■ refund of the purchase price of the kiosks
- \$■ in financing charges for one year
- \$■ in guaranteed advertising revenue, net of costs
- \$■ expenses to file the complaint and attend the arbitration hearing

Summary of Evidence

M. B., president of the Complainant, presented the evidence for the Complainant.

M. G., ■ of the Respondent, presented the evidence for the Respondent.

Complainant's Evidence

Mr. B. presented very detailed documentary evidence of his dealings with the Respondent, amounting to 96 exhibits in total. He also provided a detailed oral account of those dealings between November ■ and the date of the hearing.

Mr. B. states that he attended a presentation by the Respondent at a franchise and business opportunity trade show in Montreal on November ■. He was provided with marketing materials which promoted guaranteed advertising income of \$■, potential profits of \$■ per month and a potential for a complete return on investment in ■ months. These materials indicated that the kiosks were operated "in association with ■". They also claimed "part time work with full time business profits."

Based on these materials, Mr. B. was interested enough to attend another information session the following day.

At the information sessions Mr. B. was provided with a business plan and contact information for other kiosk owners and the equipment supplier. The business plan stated that the concept had been successfully tested. The kiosks would be installed in high traffic locations for maximum revenues. In particular, the Respondent was launching a program to install kiosks in 150-170 ■ convenience store locations, in Quebec and other provinces.

Mr. B. says the association with ■ and ■ was the main reason he was interested in this business opportunity. He believed the financial summaries and cost analysis he was given, which showed an estimated net profit of \$■ per month and a ■% return on investment within one year. He was told that national companies had purchased advertising on the kiosks and that more would follow when more units were installed. He calculated that, even if these estimates were discounted, the kiosks would make money.

Mr. B. also received a disclaimer which stated that the Respondent did not guarantee the accuracy of any information provided or the potential revenue or profits from the kiosk. The disclaimer also stated that “every effort has been made to accurately represent our products and their potential.”

Mr. B. contacted some of the references provided by the Respondent and was given positive recommendations. He tried to contact the owners of other kiosks located in Montreal, but was unable to determine who they were. He was told that information was confidential.

Mr. B. met with Mr. G. on November 10. At that time, he asked questions about the business. He was told that ownership details and financial information regarding the Respondent was confidential. He was told that details of current advertisers, distributors and investors were also confidential.

Mr. B. states that Mr. G. told him that there were four or five national companies which were paying \$■ to \$■ per kiosk per month to advertise on the kiosks. He was also told that there were 700-800 kiosks in total, including those that had been ordered by not yet installed.

On the basis of these statements and his own assessment of the potential profits, Mr. B. signed contracts on November ■, for the purchase of five kiosks (later reduced to 4). These included a purchase agreement for the kiosks themselves, a letter of authorization, a services agreement, an advertising agreement and a turnkey agreement for the installation and set up of the kiosks. At that time he paid a deposit of \$■, which he placed on his credit card, and provided post-dated cheques for the balance of the purchase price. He was given seven days in which to conduct further inquiries and make a final decision to purchase the kiosks.

Between November ■ and November ■, Mr. B. visited kiosk locations in ■. He saw advertisements for ■ and other companies on these kiosks. He visited the Respondent’s offices on November ■, where he met with Mr. G. again.

At that time, he decided to purchase four kiosks, rather than five, at a total price of \$76,320, including taxes.

Mr. B. stated in his evidence that A.M., advertising sales manager for the Respondent, advised him at a training session in Montreal in January ■, that the advertising Mr. B. saw prior to his

purchase were not paid ads. Mr. B. was expected to sell local advertising for his own kiosks. Mr. B. also stated that he learned that the total number of kiosks and the number of ■ locations was less than he was previously told. He testified that he was shocked by this information. He was also surprised that the ■ logo no longer appeared on the sales and marketing materials.

However, Mr. M stated that the Respondent was still committed to rapidly increasing the number of installed kiosks, with a goal of ■ kiosks by the end of ■, and to selling advertising to regional and national companies.

Mr. B. stated that he made substantial efforts between January and May ■ to sell advertising on his kiosks and to generate leads for potential regional and national advertisers for the Respondent, without any success. He provided copies of email messages and other records to document these efforts and his communications with the Respondent during this time.

Mr. B. testified that he received a phone call from B. D., the Respondent's customer service coordinator, in May ■, advising that the Respondent wished to remove the Complainant's kiosks from the ■ locations, because ■ had not honoured its commitments to the Respondent. He was told that the Respondent would provide alternative locations.

Mr. B. signed an authorization to remove the kiosks. They were removed in June 2007 and stored by the Respondent in a warehouse. Mr. B. contacted the Respondent several times in June and July, to inquire where and when his kiosks would be relocated.

According to his evidence: "I began to think there was no Plan B."

In mid-July he was contacted by Mr. D, who advised that the Respondent would install the Complainant's kiosks at several bars in ■. Mr. B. states that he asked for more information about these locations, because they seemed to be a very different market from the original ■ locations. He made several phone calls and sent several emails to Mr. D and others in July, but received no further information.

On July 30, Mr. B. filed the complaint with the Better Business Bureau which led to this arbitration.

Respondent's Evidence

The Respondent relies on the Disclaimer provided to the Complainant at the original sales presentations, which states that the Respondent does not guarantee the accuracy of any information provided.

The respondent relies on the contracts signed by the Complainant. In particular, the Respondent relies on section 10 of the Agreement of Purchase and Sale which states:

This agreement and the other agreements executed by the parties whatsoever relating thereto, will constitute the entire agreement between ■ and the purchaser. There is no other representation, guarantee, collateral agreement or condition, whether directly, collaterally, expressly or implicitly, which has induced either party to enter into this agreement, or on which claims may be placed by any party or affect this agreement or the purchased equipment other than those expressed herein. (Translation)

In his evidence, Mr. G. stated that the Respondent had met all of its obligations under the contract. It supplied the kiosks to the Complainant. It provided the four ■ locations. It provided sales training and technical support. It honoured the \$■ annual revenue guarantee.

When the Respondent determined that it was necessary to remove the kiosks from ■, it offered alternative locations. It also offered to extend the advertising revenue guarantee for a further 12 months and to absorb a significant part of the cost of removing and reinstalling the kiosks.

Mr. G. stated that the Respondent did not provide the Complainant with monthly statements, because the monthly operating expenses were greater than the monthly revenue.

Mr. G. stated that the kiosks owned by the Complainant are still being held in storage, awaiting the Complainant's agreement to install them in the new locations arranged by the Respondent or instructions where to deliver them.

Mr. G. denies any misrepresentation regarding the number of kiosks sold and installed or the amount of paid advertising sold by the Respondent, either at the time the Complainant purchased the kiosks in November ■ or subsequently. He said there was no "national" advertising because the Respondent does not yet have a national network.

He stated that some of the advertising was unpaid because the Respondent does free test runs for advertisers to test market response. It also places some paid advertising on additional, unpaid locations, so that the kiosk screens are not blank.

Findings

Based on the totality of the oral and documentary evidence presented at the hearing, I find that the Complainant purchased the four communications kiosks in reliance on the representations made by the Respondent regarding the potential revenue and profits to be made from the kiosks. I find on a balance of probabilities that the Respondent knew or ought to have known that these representations were false and misleading. There was no reasonable expectation that the Complainant could achieve a profit of \$■ per month or a ■% return on investment within one year, as the Respondent promoted in its marketing materials.

I accept Mr. B.'s evidence that the Complainant would not have purchased the kiosks if he had known that much of the advertising on the kiosks was unpaid or was sold by individual owners. It is unclear from the evidence whether the Respondent had any paid advertising in November ■, but Mr. G. admitted that some of the advertising on existing kiosks was unpaid. Mr. B. was not told this.

The Complainant presented evidence relating to Mr. B.'s discussions and correspondence with a former employee of the Respondent and other owners or prospective purchasers of kiosks. I stated at the hearing that I would not accept any of this evidence for the truth of the statements made – it was entirely hearsay and the individuals did not appear at the hearing. I do not base my findings of fact on any of this evidence.

I do accept this evidence only to the extent that it explains Mr. B.'s reluctance to accept the Respondent's offer of new locations and an extended revenue guarantee. He no longer believes any of the Respondent's promises.

The Respondent cannot rely on the Disclaimer to relieve itself from responsibility for misrepresentations made to the Complainant. The disclaimer also stated that “every effort has been made to accurately represent our products and their potential.” This was not true. The Respondent did not accurately present the products or their potential to the Complainant.

Nor does section 10 of the Agreement of Purchase and Sale relieve the Respondent from responsibility. It was signed on November 10. The Complainant made additional due diligence inquiries and the Respondent made further representations between November 10 and 17. I find that the Complainant relied on those inquiries and representations in making the decision to proceed with the purchase of four kiosks.

The Complainant has suffered damages in the amount of \$■, being the purchase price of the kiosks, as shown on the invoice dated November ■. The Respondent does not dispute the amount paid.

The Complainant also claimed recovery of its financing charges. It was the Complainant’s choice to finance part of the purchase on a personal credit card. Therefore, I do not award any additional compensation for the cost of financing.

With respect to the guaranteed advertising revenues, I accept the evidence of Mr. G. that these revenues were applied against the operating costs of the kiosks and that no additional amounts are owing. I find that the Complainant incurred additional operating costs, as well as the out-of-pocket cost of this complaint and the arbitration. However the Complainant did not provide any documentary evidence in support of those costs.

Award

I award the Complainant the sum of \$■. Respondent shall pay this amount to Complainant within fifteen (15) business days following the date of this award. If it fails to do so, the Complainant shall be entitled to receive interest on the unpaid amount, at an annual rate of ten per cent (10%), calculated and compounded daily from the date of the award until the date of payment in full.

The contracts for services shall be cancelled. The Respondent shall be entitled to retain the kiosks purchased by the Complainant which are currently in the Respondent’s possession. Ownership of the kiosks shall be formally transferred and each party shall be released from any further claims against or obligations to the other upon payment of the amount awarded above. This award may be entered and enforced as a judgement of any court of competent jurisdiction.

Made at Toronto, December ■.

“Michael Erdle”

Michael Erdle,
Arbitrator