

Federal Court



Cour fédérale

**Date: 20141105**

**Docket: T-467-11**

**Toronto, Ontario, November 5, 2014**

**PRESENT: Madam Prothonotary Martha Mileczynski**

**BETWEEN:**

**VENNGO INC.**

**Plaintiff**

**and**

**CONCIERGE CONNECTION INC. C.O.B. AS  
PERKOPOLIS, MORGAN C. MARLOWE  
AND RICHARD THOMAS JOYNT**

**Defendants**

**ORDER**

**UPON MOTION** dated the 28<sup>th</sup> day of October, 2014 on behalf of the Plaintiff for:

1. An Order requiring the Defendants to disclose in a sworn supplementary affidavit of documents, on or before November 30, 2014, all documents in their possession, power or control relevant to the plaintiff's claim to an accounting and payment of the profits of the Defendants arising from the unauthorized use of PERKOPOLIS as detailed in the Amended Statement of Claim and as elected by the plaintiff on August 20, 2014.

2. An Order requiring the selected representative of the Defendant, Concierge Connection Inc. (“**Perkopolis**”), Ms. Morgan Marlowe to re-attend in Toronto, at her own expense, on a date agreeable to the parties prior to December 31, 2014 or, failing agreement, at a place, date and time fixed in the plaintiff’s Direction to Attend, to resume the examination for discovery of Perkopolis and Ms. Marlowe, and to answer all proper questions arising from the documents disclosed and produced by the defendants pursuant to paragraph 1, including the questions which were refused to be answered or taken under advisement during plaintiff’s examination for discovery of Ms. Marlowe set out in Schedule A to this Notice of Motion.
3. Costs of this motion to the plaintiff.
4. Such further and other relief as this Honourable Court deems just.

**AND UPON** reviewing the motion records filed on behalf of the parties and hearing submissions of counsel at the hearing of the motion, which were confined to the issue of further production of documents;

**AND UPON** ordering further production at the hearing of the motion, as set out below;

The Plaintiff claims that the Defendants have breached the Plaintiff’s trade-mark rights in the registered trade-marks: WORKPERKS, MEMBERPERKS, CUSTOMERPERKS, CLIENTPERKS, PARTNERPERKS and ADPERKS by their use of “PERKOPOLIS”, the Defendants’ registered trade-mark. The Plaintiff seeks an order expunging the Defendants’ trade-mark registration for PERKOPOLIS (TMA792711). In addition to statutory grounds to support expungement, the Plaintiff has pleaded that the Defendants have acted in bad faith, with deception and have engaged in misconduct in respect of their development and registration of the

PERKOPOLIS mark, (see paragraphs 10, 13, 17, 19 and 28 of the Statement of Claim), to a degree that they submit puts in issue the Defendants' liability for infringement for the goods/services covered inside the PERKOPOLIS registration, as well as those goods and services outside the scope of the Defendants' registration.

The Plaintiff has recently made the election for an accounting of profits, and in the event of expungement of the PERKOPLIS trade-mark and finding of infringement, seeks to recover the Defendants' profits for those goods/services outside registration (eg. gym memberships, car rentals, magazines, advertising revenue etc) and retroactively profits generated for goods/services within the registration (entertainment tickets, hotel booking services). While it is certainly an open issue and clearly disputed whether the latter will be available even if the PERKOPOLIS registration is expunged, sufficient facts relating to the Defendants' conduct have been pleaded and form part of the framework that governs the parties' obligations for production in this proceeding.

Production relating to the Defendant's financial information and profits thus far consists of three summary charts generated by the Defendants' accounting system – total dollar amounts for products and services that fall outside the Defendants' registration for PERKOPOLIS. There is no supporting documentation, dates of sales, commissions, referral fees or advertising revenue or any other itemized breakdown in respect of this information – just total dollar amounts. I note that this is essentially a virtual business, conducted electronically (online orders, payments and shipments arranged) and there may be little in the way of paper records. However, what has been provided is inadequate – the Plaintiff cannot test or explore the information provided. In addition, no information whatsoever has been provided in respect of revenue generated for the

services covered by the PERKOPOLIS registration, which whatever the merits are for the claim for those profits, the matter is clearly in issue in the event the registration is expunged.

At the hearing of the motion, various sources for further information were discussed that might support and/or clarify the Defendants' stated revenue (tax filings, sales or bank statements, HST remittances). Counsel for the Defendant also noted that the Defendants' accounting system was capable of producing an itemized breakdown – setting out dates, amounts derived from purchases, commissions/referrals or advertising for the time period in questions for goods/services inside and outside registration. I am satisfied that this information is relevant, and available, and should be ordered to be produced. While the request for this production might have been made earlier, there is insufficient evidence of prejudice arising to the Defendants in complying or concern that production would be an onerous exercise. Accordingly, the motion should be granted, as below.

**THIS COURT ORDERS that:**

1. The Defendant shall, by December 15, 2014, produce an itemized breakdown, by date and sale amount, of its revenue commencing as of April 1, 2008.
2. No costs are awarded on this motion.
3. The matter of any further examination for discovery is held abeyance pending the delivery of the further production, and may be addressed on a case management teleconference.

---

“Martha Milczynski”  
Prothonotary