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Nomi Health's COVID-19 app was built on stolen software and broken promises, lawsuit claims
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A judge has ordered Nomi to pay more than \$7 million to a Texas software company for breach of contract. Two other lawsuits are still pending.

When Nomi Health jumped into providing COVID-19 testing for Utah and other states, it first used a system from another Utah-based company — Qualtrics — to schedule appointments and handle other tasks.

But Qualtrics' survey software, according to an affidavit from a contract engineer who worked with Nomi, "was ill-equipped to manage thousands of COVID-19 tests per day" and share the data from them. A Nomi executive confirmed in a deposition that Qualtrics "was having some data issues."

So by September 2020, Nomi had instead licensed a new custom test scheduling app from Texas-based software developer OSGHD; it signed a second licensing contract a year later.

Nomi was paying OSGHD a per-test fee, but it "grew greedy and resented paying even this very small percent of its revenues to OSGHD," the Texas company claims.

Nomi then secretly made its own version — duplicating and reverse engineering the software with help from Utah tech company Domo and developers from Ukraine, the Texas company charges in a federal copyright lawsuit.

The federal case is one of three lawsuits OSGHD has filed against Nomi and one of its co-founders, Texan and chief technology officer Boe Hartman, in Texas, also alleging Nomi signed a contract it didn't intend to honor as it strung OSGHD along long enough to copy its app.

"With Domo's help, Nomi unjustly earned hundreds of millions of dollars or more in COVID-19 testing revenues — monies that OSGHD is entitled to recover ... under federal law," the Texas developer claims.

Nomi has admitted it breached its contract with OSGHD, which prohibited Nomi from, among other things, copying or sharing access to the app. Following a June jury trial on the contract claim, a state court judge found "OSGHD proved that Nomi committed a wrongful act," and signed a judgment ordering Nomi to pay OSGHD more than \$7 million, including contract damages plus attorney's fees and interest.

But Nomi and Domo argue they did not violate federal copyright law. The "look" of an interface and basic functionality, they argue, is not copyrightable. Nomi points out in court documents that it admitted breaching its contract with OSGHD, but not specifically to copying. And in counterclaims, Nomi argued OSGHD's app didn't keep up with the demands of its testing capacity.

This isn't the first time Nomi has faced controversy around its COVID-19 testing program, which began in Utah in 2020 as a philanthropic pitch but quickly won a multimillion, no-bid state contract to run TestUtah sites.

The tests Nomi chose — from Salt Lake City company Co-Diagnostics — produced fewer positive test results than other testing sites early in the pandemic, raising questions about the tests' effectiveness; Co-Diagnostics defended its tests, but the Securities and Exchange Commission recently fined Co-Diagnostics for issues that included how it promoted them to investors and others early in the crisis.

Inspectors in 2020 found that the Utah County hospital Nomi chose to analyze its tests was "not in compliance" with federal regulations; regulators in 2022 found violations at Nomi testing sites. Both the hospital and Nomi resolved issues and came into compliance.

Since the start of the pandemic, Utah has paid Nomi roughly \$84 million, according to Transparent Utah. The state of Utah has two current contracts with Nomi, for coronavirus testing and vaccinating, but TestUtah sites are closed and Nomi isn't currently providing either service.

Domo's and Nomi's attorneys did not respond to requests for comment. Nomi's in-house legal counsel, Debbie Giambruno, said only that company leaders "disagree with the judgment" entered in the breach of contract case "and plan to appeal." Qualtrics declined to comment on its performance in 2020; in 2022, a recent company blog post noted, more than 3.5 billion pieces of customer and employee feedback were collected and analyzed on its platform.

The discovery

They called it "Project Tiger."

OSGHD's chief software developer and project supervisor Nate Redding first saw the name in March 2022, according to court documents.

Redding had been given access to Nomi's system, including internal communications and documents. In "Project Tiger" file folders, Redding found screenshots of OSGHD's app alongside development files for Nomi's own version, court documents said.

Nomi staffers "captured dozens of screenshots and screencasts" of OSGHD's app and shared them with internal and Domo developers, the latest version of OSGHD's complaint alleges.

Under time pressure as the pandemic accelerated, Nomi "decided to simply spoon-feed Domo the requirements directly from OSGHD's application," the lawsuit said, "or, as one Nomi developer put it, Nomi 'sesame streeted the development team' by giving them a guided demonstration — to say nothing of direct links — to OSGHD's application."

Nomi's demonstration occurred during three full-day, "deep-dive" meetings with its internal developers and Domo developers in December 2021, the lawsuit said, in which Nomi "walked [developers] step-by-step" through OSGHD's app.

Nomi's licensing agreement said it was free to make its own application, but it could not base any part of it on OSGHD's software, the lawsuit said. And Nomi's licensing agreement prohibited it from giving outsiders access to OSGHD's app, the lawsuit said, and limited who within Nomi could have access.

With the December meetings recorded, "the 'crime' was caught on video tape," said Gary Cruciani, an attorney for OSGHD.

"Heading into 2022, Domo's developers were off to the races with a clear directive to 'follow design patterns and flow' and create a new application that 'replicates' the OSGHD application," the lawsuit said.

In April 2022, a month after OSGHD caught wind of Project Tiger, the suit said, Nomi terminated its contract with OSGHD and launched its own app.

Nomi's 'breaking point'

Nomi claims Project Tiger was necessary.

Nomi was battling "back-to-back" outbreaks of new COVID-19 variants, Delta and Omicron, and running over 10,000 tests a day — tests that OSGHD's software often lost, Nomi said in court documents.

OSGHD "repeatedly failed to modify the application to comply with applicable requirements," a Nomi counterclaim said.

And in the thick of these outbreaks, Nomi claims, OSGHD "demanded" Nomi sign a new licensing contract with a fee increase of more than 70%, from \$1 to \$2.50 per COVID-19 test.

OSGHD alleges Nomi had been “chronically and habitually late in making payments” under its first contract, according to Cruciani and court documents, and that’s why it threatened to terminate its agreement with Nomi, if Nomi didn’t catch up.

In its counter to the copyright claim, Nomi contends that no elements similar to OSGHD’s app that appear in its app was subject to copyright. OSGHD copyrighted its application’s source code, Nomi says — but Nomi didn’t have access to that code.

“Instead, OSGHD improperly attempts to extend the registration for its source code to vague generalities regarding the ‘look and feel’ and ‘layout’ of the application’s user interfaces — which are very similar to every other scheduling application used today,” Nomi’s counterclaim said.

“It is axiomatic that ‘look and feel’ and ‘layouts’ are not protectable elements under the Copyright Act.”

Domo also argues its developers did not have access to OSGHD’s source code. And it said any similarities between the apps are “the result of the functionality needs for a testing application — namely a form for scheduling patient testing with available staff.”

Basic functionality, Domo said, is not copyrightable. Domo also argues it cannot be sued in Texas, as it has no personal or professional ties to the state that would give Texas jurisdiction over the business.

The end of Project Tiger?

Nomi’s admission that it violated its agreement with OSGHD came in a stipulation it signed the day before the June trial began on the contract claim in Texas state court.

That narrowed the evidence, which meant the jury didn’t hear testimony about the screen shots and December meetings with Domo developers.

The jury awarded OSGHD \$3.9 million in damages for the contract breach — calculating what OSGHD would have made if Nomi hadn’t terminated the agreement — and the judge added \$2.9 million in attorney’s fees plus \$100,000 in interest.

In the federal copyright case, Nomi, Domo and OSGHD are submitting written arguments related to Nomi’s and Domo’s requests to dismiss it. One of Nomi’s additional arguments, among several, is that a rule against “claim splitting” prohibits using the same set of facts in separate litigation — and the narrative in all three suits against it is essentially the same.

If the judge rules the case should continue, a trial has been set for January 2025.

And in the meantime, the judgment in the contract case includes a permanent injunction against Nomi using the app it developed with Domo. Project Tiger, for now, is done.