

New Lawsuit Against AdTech's Contribution to Bots

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In a New York State Court lawsuit filed on March 11, 2024, a small digital content developer called Nubai sued its former adtech vendor, Outbrain, for routing to it what it called primarily sophisticated invalid traffic (SIVT), *i.e.*, “bots,” instead of human traffic. The case, only the second one of which we are aware, seeks to hold Outbrain liable for fraudulent inducement, breach of contract, and negligent misrepresentation, in the amount of at least \$3 million plus possible punitive damages. *Nubai Ventures, Inc. v. Outbrain, Inc.*, No. 152157/2024 (N.Y. Supreme Ct.)

Nubai is a self-described digital content platform. It says it retained Outbrain beginning in 2018 to help it attract more readership. Outbrain is a publicly traded technology vendor that works by placing links to their customers' content on third-party websites in order to drive more traffic back to their customers' websites. A client can pay Outbrain on a Cost per Impression (CPM) or Cost per Click (CPC) basis for this service. Nubai says it did the latter, paying Outbrain a total of \$1 million over the life of its contract at a CPC of about \$0.03. Thus, the complaint says, every time a click occurred on an Outbrain-sourced link, Nubai would pay Outbrain about \$0.03.

Nubai says it discovered a major problem in 2023 when one of its customers, another ad tech platform that places ads on Nubai's own site, pulled all of its ads due to what it allegedly said were high rates of bot traffic. With this devastating blow from the loss of ad revenue, Nubai says it engaged an ad fraud investigator, who allegedly told Nubai that Outbrain was primarily responsible for the SIVT because it was sending huge numbers of bots, instead of real traffic, back to the Nubai site. The complaint further alleges that when Nubai confronted Outbrain, Outbrain responded that Nubai was simply not paying enough on a CPC basis to get higher-value (*i.e.*, human) traffic that originated from better publishers. What's more, alleges Nubai, even after it terminated its deal with Outbrain, the parade of bots continued.

It will be interesting to watch this case develop. While no ad tech vendor can promise 100 percent bot-free traffic, some appear to be better than others. Some, like Outbrain, the complaint alleges, rely substantially on traffic derived from “Made for Advertising” (MFA) sites, which often is characterized by a large proportion of bots.

This is just the latest in a burgeoning set of controversies surrounding the digital ad market. In just the last month, a variety of independent reports have raised concerns about digital ad fraud. One

commentator [has written](#) that the industry may lose as much as \$143 billion per year – about one-fourth of all revenue spent on digital ads. The bot problem not only costs advertisers in direct dollars, but it also can dramatically skew the data that advertisers hope to glean from their online efforts. Too few companies who are impacted by these problems ever take action, which only perpetuates the incentives for bad actors to look the other way at best, or to drive more SIVT at worst.

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National Law Review, Volume XIV, Number 164

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