

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ADVENTURE ADVERTISING,	)	
LLC	)	
	)	CIVIL ACTION NO.
Plaintiff,	)	1:12-cv-00272-JEC
	)	
v.	)	JURY TRIAL
	)	DEMANDED
SIMON & SCHUSTER, INC.,	)	
HERMAN CAIN,	)	
and T.H.E. NEW VOICE, INC.	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES**

Plaintiff Adventure Advertising, LLC (“Adventure Advertising”) files this First Amended Complaint for Damages against Defendants Simon & Schuster, Inc. (“Simon & Schuster”), Herman Cain (“Cain”) and T.H.E. New Voice, Inc. (“THE New Voice”) (collectively referred to as “Defendants”), amending its Complaint as a matter of right pursuant to Federal Rule of Civil Procedure 15(a) (1) (B) as follows:

JURISDICTION, VENUE AND PARTIES

1.

This is an action for copyright infringement arising under the Copyright Act of 1976, 17 U.S.C. § 101 et seq. (hereinafter “the Act”) for Defendants’ copyright infringement of a photograph that Adventure Advertising took of Defendant Cain. Without Adventure Advertising’s authority, agreement or permission, Defendants used the photograph (attached hereto as Exhibit “A”) on the cover of the book entitled *This is Herman Cain!* that Simon & Schuster published.

2.

On information and belief, Simon & Schuster is a New York corporation with its principal place of business located at 1230 Avenue of the Americas, New York, NY 10020. Defendant Simon & Schuster may be served through its registered agent, The Prentice-Hall Corporation System, Inc., 80 State Street, Albany, NY 12207. Simon & Schuster regularly and continuously conducts business and maintains an office in the State of Georgia, and within this judicial district and division. Moreover, as shown herein, Defendant Simon & Schuster has engaged in tortious conduct, including specific contacts with this judicial district to carry out its copyright infringement, giving rise to tortious effects felt in this judicial district.

3.

On information and belief, Herman Cain is an individual residing within this judicial district and division in Stockbridge, Georgia in Henry County. Defendant Cain may be served with process at his business address, 825 Fairways Ct., Suite 303, Stockbridge, GA 30281.

4.

On information and belief, Defendant T.H.E. New Voice is a Georgia corporation with its principal place of business within this judicial district and division in Henry County, Georgia. Defendant T.H.E. New Voice may be served with process through its registered agent, Herman Cain, at 825 Fairways Ct., Suite 303, Stockbridge, GA 30281.

5.

This Court has subject matter jurisdiction of this action under 28 U.S.C. 28 U.S.C. §§ 1331, 1338(a) and (b).

6.

This Court has personal jurisdiction over Defendants Cain and T.H.E. New Voice as residents and domiciles of this judicial district. This Court has personal jurisdiction over Defendant Simon & Schuster pursuant to O.C.G.A. § 9-10-91(1) arising out of its regular and continuous conducting of business in the State of

Georgia and within this judicial district and division, and pursuant to O.C.G.A. § 9-10-91(2) arising out of its commission of tortious acts within this judicial district and division.

7.

Venue is proper in this district and division pursuant to 28 U.S.C. §§ 1391 and 1400(a).

FACTS COMMON TO ALL COUNTS

8.

In April 2011, representatives of Friends of Herman Cain, Inc. (“FHC”) contacted Adventure Advertising and arranged for Adventure Advertising to perform a photographic shoot of Defendant Cain for use in his political campaign.

9.

On or about April 25, 2011, Adventure Advertising performed a photographic shoot of Defendant Cain for use by FHC in Cain’s political campaign.

10.

On May 10, 2011, FHC requested to purchase three (3) photographs for use in Cain’s political campaign. On July 12, 2011, Adventure Advertising invoiced FHC \$1,050.00 for the three (3) photographs. One of the photographs was Exhibit

“A”, the photograph that is the subject of this claim. Adventure Advertising did not transfer the copyright in the photographs to FHC, nor did it grant FHC the right to use the work in any context outside of advancing the presidential campaign of Cain, nor did it grant any rights to sub-license the photographs or to publish any photograph in a book to any third parties.

11.

On June 3, 2011, Clark Barrow, an employee and/or agent of T.H.E. New Voice e-mailed Adventure Advertising and requested to purchase one (1) photograph of Cain. Mr. Barrow indicated in a telephone discussion that the photograph was for publication in a magazine. The e-mail attached the photograph to be purchased and that photograph is attached hereto as Exhibit “B”. On July 12, 2011, Adventure Advertising invoiced T.H.E. New Voice \$350.00 for the purchase of Exhibit “B”.

12.

On July 13, 2011, Clark Barrow, an employee and/or agent of T.H.E. New Voice, wrote an e-mail to Adventure Advertising employee Eric Rogers requesting a high resolution image of Exhibit “A”, and saying T.H.E. New Voice “MAY purchase the attached picture from your group.” (emphasis in original). Rogers

forwarded the e-mail to Adventure Advertising employee Mamie Scott Putman for a response.

13.

On July 14, 2011, Lisa Reichert, Defendant Cain's Administrative Assistant, e-mailed Adventure Advertising employee Bruce Hyer, attaching Exhibit "A". Ms. Reichert's e-mail stated that "we [T.H.E. New Voice and Cain] are currently under contract with Simon & Schuster for a biography on Herman" and that "we would like to use the attached (low res/PDF) photo for the book. Would you and Adventure Advertising grant us permission to use this photograph?"

14.

Bruce Hyer was out of the office in a remote area of South Carolina with poor cellular reception at the time of Ms. Reichert's July 14, 2011 e-mail and he did not see the e-mail until several days later. He never replied to Ms. Reichert's July 14, 2011 e-mail, nor did any other Adventure Advertising employee or agent ever reply or otherwise grant any Defendant permission to copy, distribute or use Exhibit "A" in any book.

15.

On July 14, 2011, Ms. Putman replied to Mr. Barrow's e-mail, which Eric Rogers had forwarded to her, noting that the attached picture Mr. Barrow had e-

mailed the previous day *was* a high resolution image, providing him with a download link to the image, and saying “if payment needs to be made for the use of this image, an invoice will be coming from our accounting department.” At Defendants’ request via telephone call, Ms. Putman copied Lisa Reichert on the e-mail. Ms. Putman did not receive the July 14, 2011 e-mail from Ms. Reichert, nor was it forwarded to her by anyone else, nor was she aware of its existence.

16.

Mr. Barrow replied to Ms. Putman’s e-mail by thanking her and asking her to send the bill for the picture to a specified address. Mr. Barrow’s e-mail did not give any indication that the photograph would be used by Simon & Schuster or that it would be published in a book.

17.

Adventure Advertising never invoiced T.H.E. New Voice for Exhibit “A” and it never sent any invoice to the address Mr. Barrow identified in his e-mail. Moreover, Adventure Advertising never licensed any Defendants to reproduce or distribute copies of Exhibit “A”.

18.

T.H.E. New Voice paid by check the \$350.00 July 12, 2011 invoice referenced in paragraph 11 above to Adventure Advertising. The payment was

received directly by Plaintiff's accounting department. Unbeknownst to Mr. Hyer and other executives of Adventure Advertising, the check included a copy of the invoice, and added a hand-written notation to the invoice: "For cover photo: This is Herman Cain." T.H.E. New Voice added this notation to the invoice even though the invoice was actually for Exhibit "B" and T.H.E. New Voice did not request permission to use Exhibit "A" in a book until two (2) days **after** the date of the invoice. Adventure Advertising's accounting department had no reason to ascribe any importance to the notation, and cashed the check to resolve the indebtedness of T.H.E. New Voice described in paragraph 11 above.

19.

Adventure Advertising is currently and at all times relevant has been the sole proprietor of all right, title, and interest in and to the copyright in Exhibit "A".

20.

As of November 15, 2011, Adventure Advertising complied in all aspects with the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of Exhibit "A" and received from the Register of Copyrights Certificate of Registration No. VA-1-793-612. A true and correct copy of this Certificate of Registration is attached hereto as Exhibit "C".

21.

Upon information and belief, since at least as early as October 2011, Simon & Schuster has been using, reproducing, and distributing Exhibit “A”, as the cover of the book entitled *This is Herman Cain!*

22.

Through correspondence dated December 13, 2011, Adventure Advertising notified Simon & Schuster that its publication of the book entitled *This is Herman Cain!* infringed Adventure Advertising’s copyright in Exhibit “A”. A copy of this letter is attached hereto as Exhibit “D”. Despite this notice, on information and belief, Simon & Schuster continues to use, reproduce and distribute Exhibit “A”, thereby continually infringing Adventure Advertising’s copyright.

23.

On information and belief, Simon & Schuster’s use, reproduction and distribution of *This is Herman Cain!* has been and continues to be under the management, direction and/or supervision of, and with the material assistance of, Defendants Cain and T.H.E. New Voice.

24.

Upon information and belief, Defendants have each gained substantial profits from the use, reproduction and distribution of Exhibit “A” in violation of

Adventure Advertising's copyright. To date, they have refused to provide Adventure Advertising with any accounting of their revenues and profits attributable to the sales of *This is Herman Cain!*

25.

Unless enjoined and restrained by this Court, Defendants will continue their acts of infringing Adventure Advertising's copyright and will otherwise profit from their infringing use of Exhibit "A", thereby causing Adventure Advertising immediate and irreparable harm, damage, and injury. Adventure Advertising is entitled to an Order of this Court enjoining Defendants' unlawful activities. Adventure Advertising has no adequate remedy at law.

**COUNT I: COPYRIGHT INFRINGEMENT**

26.

All preceding paragraphs of this Complaint are realleged and incorporated herein by reference.

27.

Adventure Advertising owns a valid copyright registration in Exhibit "A".

28.

Simon & Schuster, acting under the management, direction and/or supervision, and with the material assistance of Defendants Cain and T.H.E. New

Voice, copied Exhibit “A” and unlawfully reproduced it repeatedly as the cover of the book entitled *This is Herman Cain!*, resulting in Defendants’ mutual profit, and resulting in damage to Adventure Advertising. As shown above, Adventure Advertising never licensed Simon & Schuster to reproduce or distribute *This is Herman Cain!*, including the cover photograph.

29.

By its actions alleged above, Simon & Schuster, through itself or its instrumentalities, has infringed and will continue to infringe Adventure Advertising’s copyright in and relating to Exhibit “A” pursuant to 17 U.S.C. §§ 101 *et seq.* Simon & Schuster’s infringement has been and continues to be willful. Likewise, Cain and T.H.E. New Voice are (jointly and severally) contributorily and vicariously liable for said infringement, and upon information and belief, are also liable for inducing the infringement at issue. As shown above, Adventure Advertising never licensed Cain and T.H.E. New Voice to use, copy, distribute the photograph that is Exhibit “A,” nor to assist Simon & Schuster in doing so.

30.

The infringement complained of herein is and has been willful.

31.

Adventure Advertising is entitled to a preliminary and permanent injunction restraining Simon & Schuster, its officers, agents, servants, and employees, and all persons acting in concert with them, from engaging in any further such acts in violation of the United States copyright laws by the continued reproduction, sale and distribution of *This is Herman Cain!*

32.

As a result of Simon & Schuster's conduct set forth above, Adventure Advertising has suffered damages. Adventure Advertising is entitled to a judgment against the Defendants jointly and severally for, among other things: (1) Defendants' profits, gains and advantages derived from the copyright infringement; (2) actual damages sustained by Adventure Advertising, including lost profits, lost value in its copyright, lost royalties, and any and all diminution in value suffered as a proximate result of said infringement; (3) Adventure Advertising's statutory damages, including statutory damages for willful infringement; (4) Adventure Advertising's attorney fees; (5) Adventure Advertising's costs of this action; and (6) pre-judgment and post-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, Adventure Advertising prays as follows:

- (1) That the Court find that Defendants have jointly and severally and willfully infringed Adventure Advertising's copyright in Exhibit "A".
- (2) That the Court find a substantial likelihood that Defendants will continue to infringe Adventure Advertising's copyright in Exhibit "A" unless enjoined from doing so.
- (3) That Simon & Schuster, its corporate officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them be preliminarily and permanently enjoined and restrained from directly and indirectly infringing upon Adventure Advertising's rights in and to its copyright in Exhibit "A".
- (4) That Simon & Schuster be directed to file with the Court and serve on Adventure Advertising, no later than thirty (30) days after the issuance of an injunction, a report in writing under oath setting forth in detail the manner and form in which Simon & Schuster has complied with the injunction.
- (5) That Defendants be required to deliver up to be impounded during the pendency of this action all originals, copies, or facsimiles, or duplicates of any and all works infringing Adventure Advertising's Copyright Registration No. VA-1-793-612 in their possession or

under their control and to deliver up for destruction all infringing originals, copies, facsimiles, or duplicates and all other matter for making such infringing copies.

- (6) That an accounting be conducted and judgment be rendered against Defendants for copyright infringement, to wit:
  - (a) all gains, profits, and advantages received or derived by Defendants on account of Defendants' copyright infringement pursuant to 17 U.S.C. §§ 101 et. seq., and the common law; and
  - (b) all damages, including statutory damages, sustained by Adventure Advertising on account of Defendant's copyright infringement pursuant to 17 U.S.C. §§ 101 et. seq., and the common law; and
  - (c) actual compensatory damages in an amount to be determined during the pendency of this action.
- (7) That the Court award Adventure Advertising all of its costs and attorney's fees in connection with this action, along with any and all other relief that Adventure Advertising may show it is justly entitled to in this case.

JURY DEMAND

Plaintiff demands a trial by jury of all issues so triable.

This 22<sup>nd</sup> day of June, 2012.

Respectfully submitted,

/s/ Blake H. Frye

Steven G. Hill

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SIMON & SCHUSTER, INC.,	)	
HERMAN CAIN,	)	
and T.H.E. NEW VOICE, INC.	)	
	)	
Defendants.	)	
_____	)	

**CERTIFICATE OF SERVICE**

This is to certify that I have this date caused to be served upon all counsel a true and correct copy of the within and foregoing PLAINTIFF’S FIRST AMENDED COMPLAINT FOR DAMAGES with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

This 22<sup>nd</sup> day of June, 2012.

Respectfully submitted,

/s/ Blake H. Frye  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point New Times Roman type face.

This 22<sup>nd</sup> day of June 2012.

/s/ Blake H. Frye  
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