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15 TROY AUGUSTO

16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA
18 WESTERN DIVISION

19 UMG RECORDINGS, INC., a
20 Delaware corporation,
21
22 Plaintiff,

23 v.

24 TROY AUGUSTO d/b/a ROAST
25 BEAST MUSIC COLLECTABLES
26 AND ROASTBEASTMUSIC, an
27 individual; and DOES 1 through 10,
28 inclusive,
29 Defendants.

Case No. 2:07-cv-3106 SJO (AJWx)
ANSWER AND COUNTERCLAIM

Defendant Troy Augusto answers Plaintiff UMG Recordings, Inc.'s
Complaint as follows:

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I. ANSWER
JURISDICTION AND VENUE

- 1. Admitted.
- 2. Admitted.
- 3. Augusto admits that he is subject to the personal jurisdiction of this Court and that venue is proper in this District. Augusto denies the remaining allegations in this paragraph.

PARTIES

- 4. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 5. Augusto admits that he resides in Pasadena, California and does business under the name Roast Beast Music Collectables and under the eBay User ID roastbeastmusic.
- 6. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 7. Augusto is without sufficient information to admit or deny the allegations in this paragraph.

BACKGROUND

- 8. Augusto admits that he has sold CDs on the eBay internet auction website since approximately July, 2000 under the eBay User ID roastbeastmusic. Augusto denies the remaining allegations in this paragraph.

FACTS

- 9. Augusto is without sufficient information to admit or deny the allegations in this paragraph.
- 10. Augusto admits that UMG’s record labels promote their musical releases through the distribution of “Promo CDs” to select influential persons. Augusto denies the remaining allegations in this paragraph.
- 11. Augusto admits that he has sold CDs on the eBay internet auction

1 website under the eBay User ID roastbeastmusic, sometimes labeling his auctions
2 with the name “Roast Beast Music Collectables.” Augusto admits that parties with
3 whom he has transacted on eBay have given positive feedback on more than
4 20,000 transactions, and that more than 15,000 different buyers have given positive
5 feedback on their transactions with Augusto. Augusto denies the remaining
6 allegations in this paragraph.

7 12. Augusto is without sufficient information to admit or deny the
8 allegations in this paragraph.

9 13. Augusto is without sufficient information to admit or deny the
10 allegations in this paragraph.

11 14. Denied.

12 15. Augusto is without sufficient information to admit or deny the
13 allegations in this paragraph.

14 16. Augusto admits that under 17 U.S.C. § 109 he is entitled, without the
15 authority of the copyright owner, to sell or otherwise dispose of the possession of
16 CDs he owns, including the CDs at issue in this action. Augusto admits that the
17 limitation on a copyright holder’s distribution right set forth in 17 U.S.C. § 109 is
18 sometimes referred to as the “first sale doctrine.” Augusto admits that he has cited
19 17 U.S.C. § 109 from time to time in his auction descriptions. Augusto denies the
20 remaining allegations in this paragraph.

21 17. Augusto is without sufficient information to admit or deny the
22 allegations in this paragraph.

23 18. Admitted.

24 19. Augusto admits that he affirmed as follows on each of the forms
25 contained in Exhibit C:

26 I CERTIFY UNDER SWORN PENALTY OF PERJURY that I am
27 sending this notification on the basis of my good faith belief that the
28 listings or other materials referred to below do not involve infringing
materials or uses and have been identified by a Verified Rights Owner
(VeRO) Program participant, its agent, or law enforcement as

1 infringing by mistake or due to misidentification:

2 Augusto denies the remaining allegations in this paragraph.

3 20. Augusto admits that, on June 21, 2004, Capitol Records, Inc. and
4 Virgin Records America, Inc. filed a civil action, No. 04C 4122, against Augusto
5 in the United States District Court for the Northern District of Illinois. Augusto
6 denies the remaining allegations in this paragraph.

7 21. Augusto admits that judgment was entered against him in *Capitol*
8 *Records, Inc. v. Augusto*, No. 04C 4122 in the United States District Court for the
9 Northern District of Illinois, on March 9, 2005. Augusto denies the remaining
10 allegations in this paragraph.

11 **FIRST CLAIM FOR RELIEF**

12 **(Copyright Infringement under 17 U.S.C. § 501)**

13 22. This paragraph requires no response.

14 23. Augusto is without sufficient information to admit or deny the
15 allegations in this paragraph.

16 24. Augusto is without sufficient information to admit or deny the
17 allegations in this paragraph.

18 25. Denied.

19 26. Denied.

20 27. Denied.

21 28. Denied.

22 29. Denied.

23 30. Denied.

24 31. Denied.

25 **II. AFFIRMATIVE DEFENSES**

26 **FIRST AFFIRMATIVE DEFENSE**

27 **(First Sale Doctrine, 17 U.S.C. § 109)**

28 1. At the time he offered them for sale, Augusto was the owner of the

1 particular copies and phonorecords at issue in this action.

2 2. Augusto did not acquire possession of the copies and phonorecords
3 from the copyright owner by rental, lease, or loan.

4 3. The particular copies and phonorecords at issue in this action were
5 lawfully made under the Copyright Act, 17 U.S.C. § 101 *et seq.*

6 4. Augusto was entitled, without the authority of the copyright owner, to
7 sell or otherwise dispose of possession of those copies and phonorecords.

8 5. Accordingly, UMG's claim is barred by the first sale doctrine, 17
9 U.S.C. § 109.

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11 **SECOND AFFIRMATIVE DEFENSE**

12 **(Estoppel)**

13 6. UMG's claim is barred, in whole or in part, by the doctrine of
14 estoppel.

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16 **THIRD AFFIRMATIVE DEFENSE**

17 **(Waiver)**

18 7. UMG's claim is barred, in whole or in part, by the doctrine of waiver.

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20 **FOURTH AFFIRMATIVE DEFENSE**

21 **(Unclean Hands)**

22 8. UMG's claim is barred, in whole or in part, by the doctrine of unclean
23 hands.

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25 **III. COUNTERCLAIM**

26 Defendant and Counterclaimant Troy Augusto, by and through counsel,
27 hereby counterclaims against Plaintiff and Counter-Defendant UMG Recordings,
28 Inc. ("UMG"), as follows:

1 **PARTIES**

2 1. Augusto is an individual residing in Pasadena, California. Augusto
3 does business on eBay under the user ID roastbeastmusic.

4 2. UMG is a Delaware corporation that maintains principal places of
5 business in Santa Monica, California and New York, New York.

6 **JURISDICTION AND VENUE**

7 3. This Court has subject-matter jurisdiction over this action pursuant to
8 17 U.S.C. § 101 *et seq.* (the Copyright Act); 28 U.S.C. § 1331 (federal question);
9 and 28 U.S.C. § 1338(a) (exclusive federal copyright jurisdiction).

10 4. UMG is subject to the personal jurisdiction of this Court and venue is
11 proper in this District under 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(a) in that
12 the acts complained of herein occurred in this District and UMG resides, may be
13 found, and/or transacts business in this District.

14 **FACTS**

15 5. eBay is an online auction website where millions of Internet users buy
16 and sell goods and services worldwide.

17 6. Augusto has been a regular user of the eBay website since July, 2000.
18 Since that time, he has built up substantial good will as a buyer and seller on eBay.
19 Indeed, in his nearly seven years of selling activity on eBay, he has accumulated a
20 positive feedback rating of 99.6% and has received over 21,000 user comments.

21 7. Augusto's eBay income, which is his primary source of income,
22 comes mainly from the sale of CDs.

23 8. On information and belief, eBay created the Verified Rights Owner
24 ("VeRO") program to provide intellectual property rights holders with a method
25 for terminating auctions of goods they claim are infringing by submission of
26 "Notices of Claimed Infringement."

27 9. Submission of a Notice of Claimed Infringement to the VeRO
28 program constitutes a notification under the Digital Millennium Copyright Act

1 (“DMCA”), 17 U.S.C. § 512.

2 10. On various dates in 2006 and 2007, UMG, through an agent,
3 submitted Notices of Claimed Infringement through the VeRO program
4 (“Notices”).

5 11. These Notices demanded that eBay terminate the auctions of
6 numerous CDs offered for sale by Augusto (the “Auctions”).

7 12. By these Notices, UMG represented under penalty of perjury that it
8 had a good faith belief that the Auctions infringed UMG’s intellectual property
9 rights.

10 13. By these Notices, UMG represented under penalty of perjury that all
11 of the information contained in the Notices was accurate.

12 14. The CDs offered for sale in the Auctions were lawfully made, and
13 their offer for sale did not infringe UMG’s copyrights.

14 15. Augusto’s sale of the CDs through the Auctions did not infringe
15 UMG’s copyrights.

16 16. On information and belief, at the time it submitted the Notices, UMG
17 did not have a good faith belief that the CDs offered for sale in the Auctions
18 infringed UMG’s copyrights.

19 17. On information and belief, at the time it submitted the Notices, UMG
20 did not have a good faith belief that Augusto’s Auctions or sale of the CDs through
21 the Auctions infringed UMG’s copyrights.

22 18. On information and belief, not all of the information contained in the
23 Notices was accurate.

24 19. On information and belief, at the time it submitted the Notices, UMG
25 knew or should have known that not all of the information contained in the Notices
26 was accurate.

27 20. At the time UMG submitted the Notices, no contract existed between
28 Augusto and UMG.

1 21. On information and belief, at the time it submitted the Notices, UMG
2 knew or should have known that no contract existed between Augusto and UMG.

3 22. On information and belief, when UMG first distributed the particular
4 physical CDs that were later offered for sale in the Auctions, UMG did not retain
5 ownership of those particular physical CDs.

6 23. On information and belief, at the time it submitted the Notices, UMG
7 knew or should have known that when UMG first distributed the particular
8 physical CDs that were later offered for sale in the Auctions, UMG did not retain
9 ownership of those particular physical CDs.

10 24. On various dates in 2006 and 2007, eBay notified Augusto that it had
11 removed the Auctions pursuant to the Notices.

12 25. But for UMG’s misrepresentations, eBay would not have removed the
13 Auctions pursuant to the Notices.

14 26. On various dates in 2006 and 2007, Augusto sent Counter Notices
15 Regarding Removed Listings (“Counter-Notices”) to eBay, in compliance with the
16 VeRO program policies and with the DMCA, 17 U.S.C. § 512(g)(3).

17 27. On information and belief, eBay informed UMG of Augusto’s
18 Counter-Notices, explaining that eBay would allow the Auctions to be re-listed if
19 eBay did not receive notice within 10 days that UMG had filed an action in federal
20 court seeking an order to restrain Augusto from doing so. UMG did not file such
21 an action, and therefore, eBay allowed the Auctions to be re-listed.

22 28. As a result of UMG’s actions, Augusto was forced to expend time and
23 resources, lost sales, and suffered damage to his reputation on eBay.

24 **COUNT I**

25 **(Misrepresentation under 17 U.S.C. § 512(f))**

26 29. Augusto repeats and incorporates herein by reference the allegations
27 in the preceding paragraphs of this counterclaim.

28 30. UMG knowingly materially misrepresented that the CDs sold in the

1 Auctions were infringing.

2 31. UMG knowingly materially misrepresented that Augusto's Auctions
3 and sale of the CDs through the Auctions were infringing.

4 32. UMG's knowing material misrepresentations were made under 17
5 U.S.C. § 512.

6 33. As a result of UMG's knowing material misrepresentations, Augusto
7 is entitled pursuant to 17 U.S.C. § 512(f) to all damages, including costs and
8 attorneys' fees, he incurred as the result of eBay's reliance upon UMG's
9 misrepresentations.

10 34. As a result of UMG's acts alleged herein, Augusto has suffered, is
11 suffering, and will continue to suffer substantial damage to his business in the form
12 of diversion of trade, loss of profits, and injury to goodwill and reputation, all of
13 which are not yet fully ascertainable.

14 35. UMG's wrongful acts have caused, and are causing, great damage to
15 Augusto, which damage cannot be accurately computed, and therefore, unless this
16 Court restrains UMG from further commission of these acts, Augusto will suffer
17 irreparable injury, for which it is without an adequate remedy at law. Accordingly,
18 Augusto seeks an order enjoining UMG from any further wrongful notices or
19 threats in connection with Augusto's sale of lawfully made CDs.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, the Counterclaimant prays for judgment as follows:

22 1. Dismissal of UMG's claim for copyright infringement with prejudice
23 and a declaration that UMG take nothing by way of its Complaint;

24 2. Injunctive relief restraining UMG, its agents, servants, employees,
25 successors and assigns, and all others in concert and privity with UMG, from
26 bringing any lawsuit or threat against Counterclaimant for copyright infringement
27 in connection with the offering or sale of lawfully made CDs;
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- 3. Damages according to proof;
- 4. Attorneys' fees pursuant to 17 U.S.C. § 512(f), other portions of the Copyright Act including Section 505, on a Private Attorney General basis, or otherwise as allowed by law;
- 5. Counterclaimant's costs and disbursements; and
- 6. Such other and further relief as the Court shall find just and proper.

Counterclaimant hereby requests a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

Dated: August 6, 2007 KEKER & VAN NEST, LLP

By: _____
MICHAEL H. PAGE
JOSEPH C. GRATZ
Attorneys for Defendant
TROY AUGUSTO