

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DDE, Inc., a Minnesota Corporation,

Plaintiff,

vs.

Court File No. 0:13-CV-03215(ADM/JJK)–

Advance Payroll Funding, Ltd., an Ohio
Corporation

Defendant.

ANSWER AND COUNTERCLAIM

Defendant Advance Payroll Funding, Ltd. (“Advance”) for its’ Answer and Counterclaim to Plaintiff DDE, Inc.’s (“DDE) Declaratory Judgment (the “Complaint”) states as follows:

1. By its response, Advance does not concede that DDE’s Complaint is a pleading permitted under the Federal Rules of Civil Procedure.

2. With respect to Paragraph No. 1 of the Complaint, Advance admits to the nature of DDE’s action but denies that it has no legal obligation or liability to Advance for tortiously interfering with Advance’s contract with Diamond Staffing, LLC (“Diamond”).

3. With respect to Paragraph Nos. 2, 12, 13, 15, 22, 23 and 24 of the Complaint, Advance lacks sufficient information to admit or deny the allegations set forth therein and therefore denies the same and puts DDE to its strictest burden of proof thereof.

4. With respect to Paragraph Nos. 3-7, 9, 11, 19, 21, and 25 of the Complaint, Advance admits the allegations set forth therein.

5. With respect to Paragraph No. 8 of the Complaint, Advance lacks sufficient information to admit or deny the allegation concerning when Diamond was formed and therefore

denies the same and puts DDE to its strictest burden of proof thereof. Advance admits that Diamond engaged in temporary staffing services.

6. With respect to Paragraph Nos. 10 and 16 of the Complaint, the documents speak for themselves.

7. With respect to Paragraph No. 14 of the Complaint, Advance lacks sufficient information to admit or deny the allegations set forth therein and therefore denies the same and puts DDE to its strictest burden of proof thereof. Notwithstanding the foregoing, Advance denies that DDE did not have any evidence to refute the alleged representations of Diamond. Specifically, on or about May 20, 2013, Advance filed its UCC Financing Statement, File No. 201332429031 (the "UCC"), which granted Advance a secured interest in all assets of Diamond and informed the world (including DDE) of such secured interest.

8. With respect to Paragraph No. 17 of the Complaint, Advance admits the content of Exhibits A and C to the "Purchase Agreement" (as that term is defined in the Complaint) but denies DDE's intent behind the language in the exhibits and puts DDE to its strictest burden of proof thereof.

9. With respect to Paragraph No. 18 of the Complaint, Advance admits that it contacted DDE on September 20, 2013 and that an executed copy of the amendment between Diamond and Advance was subsequently provided to DDE. Advance denies that Advance's notification on September 20, 2013 was the first notice DDE had of Diamond's contractual obligation to Advance and therefore puts DDE to its strictest burden of proof thereof.

10. With respect to Paragraph No. 20 of the Complaint, said paragraph does not require a response, but to the extent that said paragraph does, Advance denies the same and puts DDE to its strictest burden of proof thereof

11. With respect to Paragraph No. 26 of the Complaint, Advance denies the same and puts DDE to its strictest burden of proof thereof.

AFFIRMATIVE DEFENSES

12. Pursuant to that certain UCC, Advance has a secured interest in all assets of Diamond.

13. DDE's Complaint may fail to state a claim upon which relief can be granted.

14. DDE's Complaint may be barred by the equitable doctrines of unclean hands, waiver, estoppel, or laches.

15. DDE's claimed damages, if any, may have been caused by DDE's own actions or inactions.

16. As a separate and alternative defense, Advance alleges that DDE's Complaint may be barred by any or all of the affirmative defenses contemplated by the Federal Rules of Civil Procedure 8(c)(1). To the extent DDE's Complaint may be barred by one or more of such affirmative defenses not specifically cited above, such defenses cannot be determined until Advance has an adequate opportunity to complete discovery

COUNTERCLAIM

FACTUAL ALLEGATIONS

17. On or about October 15, 2008, Preferred Employment Group, Inc. ("Preferred") executed and delivered to Advance that certain Factoring and Security Agreement dated October 15, 2008, which was subsequently amended on December 23, 2008, June 9, 2009, December 21, 2011, August 30, 2012 and November 26, 2012 (collectively the "Factoring Agreement").

18. Pursuant to the Factoring Agreement, Advance was to act as a factor wherein it was granted, among other things, a security interest in Preferred's collateral, which included, but

was not limited to, account receivables of Preferred's "Payor's" (as that term is defined in the Factoring Agreement).

19. To further secure the obligations of Preferred, on or about October 14, 2008, Roy Abrego ("Abrego"), Ralph Warren Clayton ("RClayton"), Martin Cheatham ("MCheatham"), Kathryn R. Clayton ("KClayton"), and Elizabeth L. Cheatham ("ECheatham") (each a "Guarantor" and collectively the "Guarantors") each signed personal guarantees (each a "Guaranty") wherein each Guarantor absolutely and unconditionally guaranteed the performance of Preferred (and subsequently Diamond Staffing, LLC ("Diamond")) with Advance.

20. On or about May 20, 2013, Preferred executed and delivered to Advance an additional Addendum to Factoring and Security Agreement ("Addendum") (the collective Factoring Agreement and Addendum are hereafter referred to as the "Agreement") wherein Preferred and Advance amended the Factoring Agreement to redefine "Seller" (as that term is defined to mean Preferred in the collective Factoring Agreement to include Diamond; rendering the definition of "Seller" to be inclusive of Preferred and Diamond).

21. To further secure the obligations of Diamond under the Agreement, Advance filed its UCC securing all assets of Diamond.

22. The Agreement is scheduled to mature on January 15, 2016 (the "Maturity Date").

23. Prior to the Maturity Date, on or about September 16, 2013, Diamond executed and delivered to DDE that certain Asset Purchase Agreement ("Purchase Agreement"), along with ancillary documents part and parcel to Diamond's sale to DDE, wherein Diamond sold its assets to DDE, which were secured by Advance without Advance's knowledge, consent or receipt of payment in exchange for a release of its secured interest in Diamond's assets (the "Sale").

24. Upon information and belief, DDE's chief executive officer is David Dourgarian ("Dourgarian").

25. Upon information and belief, Dourgarian is also the chief executive officer for TempWorks Management Services, Inc., which is also located at 3140 Neil Armstrong Blvd. #205, Eagan, MN 55121.

26. Upon information and belief, subsequent to the Sale, TempWorks procured Advance's business by and between Advance and Diamond by offering payroll funding services to Diamond.

27. DDE was aware of the Agreement by and between Advance and Diamond prior to the Sale as evidenced by:

- a. Dourgarian's position as chief executive officer for DDE and TempWorks and his presumed knowledge of the Sale.
- b. Pursuant to Exhibit A of the Asset Agreement, "Reserves from *Advance Payroll* (\$35,000)," was listed as an excluded asset from the Sale. (Emphasis added).
- c. Pursuant to Exhibit C of the Asset Agreement, "DDE, Inc. will not be assuming *Diamond Staffing or Preferred Employment Group's contracts with Advance Payroll* or Venture HR." (Emphasis added).
- d. On or about **September 18, 2013**, Mike Binder ("Binder") of TempWorks sent an email correspondence to WClayton and Abrego imploring said Guarantor Defendants to not say anything about TempWorks or about Diamond's Sale to DDE in the event

32. By virtue of the Sale, Preferred and Diamond breached the terms of the Agreement by terminating the Agreement prior to the Maturity Date. Accordingly, as a proximate cause of that early termination, Advance has been damaged in the sum of \$200,446.00 (the "Early Termination Fee").

33. As of the date hereof, Advance has not received the Early Termination Fee, or any monies that make up said fee.

TORTIOUS INTERFERENCE OF CONTRACT AGAINST DDE

34. Advance realleges each and every factual matter contained in Paragraph Nos. 17-33 of its Counterclaim.

35. It is undisputed that Advance had a contractual relationship with Diamond by virtue of the Agreement, which was not scheduled to terminate until the Maturity Date.

36. DDE had knowledge of Advance's Agreement based on, minimally, (i) Dourgarian's common position that he held (and currently holds) with DDE and TempWorks, (ii) the express references to Advance and its contractual relationship with Diamond in the Purchase Agreement, and (iii) the email correspondence from Binder to certain Guarantors.

37. Despite DDE's knowledge of Advance's contractual relationship with Diamond, DDE procured Diamond's business away from Advance for the benefit of TempWorks; thus, interfering with Advance's Agreement with Diamond.

38. In light of Advance's Agreement, not to mention the UCC, DDE was without justification to interfere with Advance's Agreement with Diamond.

39. Due to DDE's interference with Advance's Agreement with Diamond, Advance has suffered damage in the sum of the Early Termination Fee.

40. Accordingly, Advance entitled to judgment against DDE for tortious interference of contract of the Agreement in the amount of the Early Termination Fee, plus costs, disbursements and attorneys' fees incurred herein.

WHEREFORE, Advance demands judgment against all defendants as follows:

1. Enter judgment in favor of Advance adjudging and declaring that DDE tortuously interfered with Advance's contract with Diamond;
2. Enter judgment in favor of Advance and against DDE in the sum of \$200,446.00 for tortious interference of contract;
3. Award Advance its costs and disbursements incurred herein;
4. Award Advance its attorneys' fees incurred herein; and
5. For such other and further relief as the Court deems just and equitable.

GURSTEL CHARGO P.A.

Dated: December 9, 2013

By: /s/ Norman I. Taple
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