

**IN THE CIVIL COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY**

**GADO, INC.,**

**Plaintiff,**

**v.**

**CASE NO. 2022-CA-007723**

**EPIK INC.**

**Defendant.**

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**ANSWER TO THE COMPLAINT AND AFFIRMATIVE DEFENSES OF EPIK, INC.**

COMES NOW, the Defendant, Epik, Inc., (hereafter “Epik” or Defendant”) and files this Answer to the Complaint of Gado, Inc. (hereafter “Gado”) and Affirmative Defenses against Gado. This Answer and Affirmative Defenses is being filed after the benefit of an initial good faith investigation and without the benefit of any formal discovery. Defendant reserves the right to further supplement this filing prior to any final hearing, as additional facts and information may become available after further investigation, and after having had a full and fair opportunity to complete further party and non-party discovery in this matter.

As to the allegations contained in the Complaint, the Defendant, Epik states as follows:

1. As to the allegations of ¶ 1 of the Complaint, the Defendant admits that Epik signed an agreement presented to Epik by Mr. Mike Roth, Plaintiff, d/b/a Gado, Inc.

2. As to the allegations contained in ¶ 2 of the Complaint, the Defendant admits that jurisdiction is proper before this court.

3. As to the allegations contained in ¶ 3 of the Complaint, the Defendant admits that venue is proper in Miami-Dade County, Florida.

4. In response to the allegations contained in ¶ 4 of the Complaint, the Defendant

lacks sufficient information to form a belief as to plaintiff's claims in this paragraph and therefore denies the allegations in ¶ 4 of the Complaint.

5. In response to the allegations contained in ¶ 5 of the Complaint, the Defendant admits that Florida law should apply in a determination concerning the agreement. The Defendant denies the remaining allegations in ¶ 5 of the Complaint.

6. The Defendant lacks sufficient information at this time and therefore denies the allegations of ¶ 6 of the Complaint.

7. The Defendant admits that the Plaintiff alleges that he is seeking the money damages alleged in ¶ 7 of the Complaint, but denies that Epik has breached the agreement and that money damages are due to Plaintiff..

8. The Defendant admits that the Contractor Agreement was signed by Epik on or about August 18, 2021. However, at this time Mr. Mike Roth was privy to information that Epik did not have. The Defendant denies the remaining allegations contained in ¶ 8 of the Complaint.

9. The Defendant admits the allegations contained in ¶ 9 of Plaintiff's Complaint.

10. The Defendant admits the allegations contained in ¶ 10 of Plaintiff's Complaint.

11. As to the allegations contained in ¶ 11 of the Complaint, the agreement provides several ways in which the agreement may be terminated. The remaining allegations of the paragraph are denied.

12. The Defendant denies the allegations contained in ¶ 12 of the Complaint.

13. The Defendant denies the allegations contained in ¶ 13 of the Complaint.

14. As to the allegations contained in ¶ 14 of the Complaint, the Defendant admits that there is language in the agreement that provides for severance. However, the remaining allegations in ¶ 14 of the Complaint are denied.

15. The Defendant admits the allegations contained in ¶ 15 of the Complaint.

16. As to the allegations contained in ¶ 16 of the Complaint, the Defendant admits that there is language in the agreement that provides for termination “without cause”. However, since the whole agreement must be read in determining issues such as termination for and without cause, the remaining allegations in ¶ 16 of the Complaint are denied.

17. The Defendant denies the allegations contained in ¶ 17 of the Complaint. Events transpired so that both parties to the agreement were aware that the agreement was being terminated as to Gado.

18. The Defendant denies the allegations of paragraph 18 of the Complaint.

19. The Defendant denies the allegations contained in ¶ 19 of the Complaint.

20. As to the allegations contained in ¶ 20 of the Complaint, the Defendant admits that there is language in the agreement that provides for payment upon termination. However, since the whole agreement must be read in determining issues such as termination, the remaining allegations in ¶ 20 of the Complaint are denied.

21. The Defendant denies the allegations contained in ¶ 21 of the Complaint.

22. The Defendant denies the allegations contained in ¶ 22 of the Complaint.

23. The Defendant denies the allegations contained in ¶ 23 of the Complaint.

24. The Defendant denies the allegations contained in ¶ 24 of the Complaint.

### **AFFIRMATIVE DEFENSES**

#### First Affirmative Defense

Intervening impossibility of performance by Gado without the fault of Epik: After signing the agreement with Epik, the Plaintiff made changes so that he could no longer

work for Epik. While working for Epik, the Plaintiff began working with one of Epik's chief customers--JJE. JJE offered and invested into a plan for ownership in Epik. Within a few months, however, JJE changed its position and asked Epik if JJE could divest from their investment in Epik. As an agreement and negotiations between Epik and JJE progressed, JJE broke off from their original offer to Epik and negotiated for a settlement. As negotiated by Gado, part of the settlement was that JJE would have the right to hire four named individuals (including the Plaintiff). These persons could leave and did leave Epik to work for JJE. This circumstance was not known or anticipated by the parties at the time the agreement was signed. The Plaintiff decided to work for JJE thus making it impossible for the Plaintiff to continue working under the Agreement with Epik. Plaintiff's actions frustrated the purposes of the agreement between Gado and Epik.

#### Second Affirmative Defense

The equitable doctrine of unclean hands applies due to the conduct of the Plaintiff. Under the equitable doctrine of unclean hands, a party may be denied recovery where the party engaged in "reprehensible conduct in the course of the transaction at issue." McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) (citing Perma Life Mufflers, Inc. v. Int'l Part Corp., 392 U.S. 134, 138, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968)). Epik discovered that the Plaintiff had developed a plan to sell, and did sell services to an Epik customer without the knowledge or approval of Epik, and outside of the arrangement with Gado and Epik. The Plaintiff and several of his associates sold \$30,000.00 of services to JJE, an Epik client, before this plan was discovered by Epik. The Plaintiff has admitted that what he did was unethical and wrong in his actions. Epik earned no margin from this outside arrangement between

the Plaintiff and JJE, a large customer of Epik. The actions of the Plaintiff were arguably embezzlement and/or an admitted ethical breach and in violation of the agreement with Epik. In addition, during the closing 2 months of Roth's tenure with Epik, his efforts were largely ineffective with a grand total of just 52 sent emails for all of 2022 by the Plaintiff. The Plaintiff's actions establish that the Plaintiff did not live up to his duties toward Epik and serves as evidence of the Plaintiff's non-performance. The Plaintiff and Epik both understood that by the Plaintiff leaving and going to work for JJE, he was leaving and ending his arrangement with Epik. This was done by the Plaintiff's own volition and design.

#### Third Affirmative Defense

The Plaintiff has failed to mitigate his damages in that he has failed to make reasonable efforts to seek and find comparable employment. The plaintiff went to work for a client of Epik and received income from this client. A plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff. Sutherland on Damages, (1884) Vol. 1, p. 226 et seq. State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So.2d 707 (Fla. 1943).

#### Fourth Affirmative Defense

The Plaintiff failed to perform work for Defendant in a satisfactory manner. The Plaintiff's actions constituted unsatisfactory job performance.

#### Fifth Affirmative Defense

The doctrine of estoppel applies in this case to avoid injustice. Gado is estopped and should not profit from his own wrong in performing work for a client of Epik without the knowledge and approval of Epik.

Sixth Affirmative Defense

The damages, if any, incurred by Gado must be set-off by an amount equal to the wages earned by Gado from his work with an Epik client.

Seventh Affirmative Defense

The Defendant is entitled to a set-off of any recovery from any collateral sources inuring to the Plaintiffs benefit, including but not limited to, unemployment compensation benefits, the overpayment of wages paid, wages and benefits earned from JJE, other governmental benefits, judgment, settlement, insurance and/or the like.

Eighth Affirmative Defense

The actions of Defendant were in good faith and Defendant had reasonable grounds for believing that it was in compliance with the agreement and, therefore, damages should not be awarded in this case.

Ninth Affirmative Defense

Plaintiff's actions after the agreement was entered into constituted a material breach in the agreement. Plaintiff accepted new employment with JJE constituting a material breach of the agreement.

Tenth Affirmative Defense

Plaintiff's actions caused a change of position between the parties such that Epik was no longer required to abide by the contract terms.

### Eleventh Affirmative Defense

Plaintiff's actions constitute tortious interference with a business relationship of Epik. Plaintiff Gado knew of the relationship between Epik and its clients. The actions of Gado caused damages to the relationship between Epik and its clients. Plaintiff Gado's intentional and unjustified interference with the relationship between Epik and its clients caused damages to Epik. *See, Seminole Tribe of Fla. v. Times Pub. Co.*, 780 So.2d 310, 315 (Fla. 4th DCA 2001) and *Crawley-Kitzman v. Hernandez*, 324 So.3d 968 (Fla. 3<sup>rd</sup> DCA 2021)

### Twelfth Affirmative Defense

The Plaintiff's actions created the defense of "in pari delicto" by participation in the same wrongdoing as the defendant. *Memorex Corp. v. Int'l Bus. Machs. Corp.*, 555 F.2d 1379, 1382 (9th Cir.1977). The defense of in pari delicto is both an affirmative defense and an equitable defense. Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing. *Nisselson v. Lernout*, 469 F.3d 143, 151 (1st Cir. 2006); *see also Hall v. Hall*, 93 Fla. 709, 112 So. 622, 628 (1927) (referring to "the universal rule of our law that one in a court of justice cannot complain . . . of another's wrong whereof he was a partaker"... See, *O'Halloran v. Price Waterhouse Coopers LLP*, 969 So.2d 1039 (Fla. App. 2007)

### Thirteenth Affirmative Defense

A duty of good faith and fair dealing is implicit in all enforceable contracts under Florida law, and implied in the performance of every term of an express contract. Plaintiff's actions and conduct violated his duty of good faith and fair dealing in his agreement with Epik.

Fourteenth Affirmative Defense

The Defendant reserves the right to amend its Answer and/or otherwise amend, modify, or add further affirmative defenses and/or Counterclaims which become known after the filing of this pleading and/or upon the completion of discovery.

Epik requests trial by jury.

Respectfully submitted this 21st day of July, 2022.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Answer to Complaint and Affirmative Defenses of Epik, Inc. against Gado, Inc. has been furnished, via the court's ECF electronic filing system to the parties listed below this 21st day of July, 2022.

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*s/ G. Thomas Harper*

G. Thomas Harper