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Attorneys for Defendants Kent and Heidi Powell

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Heidi Powell,

Plaintiff,

v.

Kent Powell and Heidi Powell,

Defendants.

Case No. 2:16-cv-02386-SRB

ANSWER AND COUNTERCLAIM

Defendants Kent Powell and Heidi Powell, by counsel, hereby jointly answer the Complaint (“Complaint”) filed by Plaintiff Heidi Powell f/k/a Heidi Lane and Heidi Solomon (“Plaintiff”). Defendants answer and respond to the specific numbered paragraphs as follows:

Responses to Numbered Paragraphs

1. Defendants are without information sufficient to form a belief as to the allegations of paragraph 1, and accordingly deny the allegations.

1 2. Admitted.

2 3. Defendants admit that this Court has subject matter jurisdiction and
3 deny any remaining allegations in paragraph 3.

4 4. Denied.

5 5. Defendants are without information sufficient to form a belief as to the
6 allegations of paragraph 5, and accordingly deny the allegations.

7 6. Defendants are without information sufficient to form a belief as to the
8 allegations of paragraph 6, and accordingly deny the allegations.

9 7. Defendants are without information sufficient to form a belief as to the
10 allegations of paragraph 7, and accordingly deny the allegations.

11 8. Defendants are without information sufficient to form a belief as to the
12 allegations of paragraph 8, and accordingly deny the allegations.

13 9. Defendants are without information sufficient to form a belief as to the
14 allegations of paragraph 9, and accordingly deny the allegations.

15 10. Defendants are without information sufficient to form a belief as to the
16 allegations of paragraph 10, and accordingly deny the allegations.

17 11. Defendants are without information sufficient to form a belief as to the
18 allegations of paragraph 11, and accordingly deny the allegations.

19 12. Defendants are without information sufficient to form a belief as to the
20 allegations of paragraph 12, and accordingly deny the allegations.

21 13. Defendants are without information sufficient to form a belief as to the
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1 allegations of paragraph 13, and accordingly deny the allegations.

2 14. Defendants are without information sufficient to form a belief as to the
3 allegations of paragraph 14, and accordingly deny the allegations.

4 15. Defendants are without information sufficient to form a belief as to the
5 allegations of paragraph 15, and accordingly deny the allegations.

6 16. Defendants admit that United States Trademark Application No.
7 87006291 was filed on or around April 19, 2016 on behalf of a “Heidi Powell” with
8 an address of PO Box 21243 Mesa, Arizona 21243 in connection with “physical
9 fitness consultation and instruction; providing information in the field of exercise
10 and fitness training and weight loss; providing a website featuring information on
11 exercise, fitness, nutrition, weight loss, parenting, children's clothing, how to dress,
12 how to love yourself and embrace your flaws, mental health; and promoting the
13 goods and services of others by providing a website featuring product reviews, links
14 to the retail websites of others, and discount information,” and that the application
15 specified a date of first use of April 19, 2014. Defendants are without information
16 sufficient to form a belief as to any remaining allegations of paragraph 16, and
17 accordingly deny the allegations.

18 17. Defendants are without information sufficient to form a belief as to the
19 allegations of paragraph 17, and accordingly deny the allegations.

20 18. Defendants are without information sufficient to form a belief as to the
21 allegations of paragraph 18, and accordingly deny the allegations.

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1 19. Defendants admit that they registered the domain name
2 heidipowell.com on or around November 26, 2005 and deny any remaining
3 allegations in paragraph 19.

4 20. Defendants admit that Plaintiff sought to purchase the heidipowell.com
5 domain name from them, are without information sufficient to form a belief as to
6 why Plaintiff sought to purchase the domain name from them, and therefore deny
7 any remaining allegations in paragraph 20.

8 21. Defendants admit that they have repeatedly refused to sell the
9 heidipowell.com domain name to Plaintiff and that they are under no obligation to
10 sell the heidipowell.com domain name to Plaintiff, and deny any remaining
11 allegations in paragraph 21.

12 22. Defendants are without information sufficient to form a belief as to the
13 allegations of paragraph 22, and accordingly deny the allegations.

14 23. Denied.

15 24. Defendants admit that the heidipowell.com domain name has at times
16 redirected to the website located at clicktocallmobile.com, which is a website
17 operated by Defendant Heidi Powell under her personal name offering website
18 design and consulting, and deny any remaining allegations in paragraph 24.

19 25. Defendants admit that the heidipowell.com domain name has at times
20 displayed advertisements for third-party websites and deny any remaining allegations
21 in paragraph 25.

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1 26. Defendants admit that they have utilized a proxy service offered by
2 Domains By Proxy, LLC in connection with the heidipowell.com domain name and
3 deny any remaining allegations in paragraph 26.

4 27. Defendants are without information sufficient to form a belief as to the
5 allegations of paragraph 27, and accordingly deny the allegations.

6 28. Defendants admit that they maintain full control over the
7 heidipowell.com domain name, including any and all content on the website
8 displayed at heidipowell.com, and deny any remaining allegations in paragraph 28.

9 29. Defendants admit that they are the true registrants of the
10 heidipowell.com domain name and maintain full control over whether to sell or
11 transfer the heidipowell.com domain name and deny any remaining allegations in
12 paragraph 29.

13 30. Admitted.

14 31. Admitted.

15 32. Defendants admit that the screenshot in Exhibit C reflects the landing
16 page for the heidipowell.com domain name on or around June 20, 2016 and deny any
17 remaining allegations in paragraph 32.

18 33. Denied.

19 34. Denied.

20 35. Denied.

21 36. Defendants admit that the text of 15 U.S.C. § 1125(d) speaks for itself
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1 and deny any remaining allegations in paragraph 36.

2 37. Defendants admit that they are the lawful registrants of the
3 heidipowell.com domain name and maintain full control over the heidipowell.com
4 domain name and deny any remaining allegations in paragraph 37.

5 38. Defendants admit that the legislative history of the ACPA speaks for
6 itself and deny any remaining allegations in paragraph 38.

7 39. Defendants admit that the legislative history of the ACPA speaks for
8 itself and deny any remaining allegations in paragraph 39.

9 40. Defendants admit that the ACPA speaks for itself and deny any
10 remaining allegations in paragraph 40.

11 41. Defendants admit that the legislative history of the ACPA speaks for
12 itself and deny any remaining allegations in paragraph 41.

13 42. Denied.

14 43. Denied.

15 **PLAINTIFF'S COUNT ONE**

16 **(Violation of 15 U.S.C. § 1125(d))**

17 44. Defendants hereby incorporate their answers to the foregoing
18 paragraphs as if fully stated herein.

19 45. Denied.

20 46. Defendants admit that they are the true and lawful owners of the
21 heidipowell.com domain name and deny any remaining allegations in paragraph 46.
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1 47. Denied.

2 48. Defendants admit that they have used and continue to use the
3 heidipowell.com domain name, deny that Plaintiff has any basis to interfere with
4 such use, and deny any remaining allegations in paragraph 48.

5 49. Defendants deny that Plaintiff is the owner or exclusive licensee of any
6 trademark contained in the heidipowell.com domain name, deny that Plaintiff is
7 entitled to any relief, and deny any remaining allegations in paragraph 49.

8 **PLAINTIFF'S COUNT TWO**

9 **(Violation of 15 U.S.C. § 8131)**

10 50. Defendants hereby incorporate their answers to the foregoing
11 paragraphs as if fully stated herein.

12 51. Defendants hereby incorporate their answers to the foregoing
13 paragraphs as if fully stated herein.

14 52. Defendants admit that Plaintiff has pled a cause of action under 15
15 U.S.C. § 8131, deny that Plaintiff is entitled to any relief under this statute, and deny
16 any remaining allegations in paragraph 52.

17 53. Defendants admit that the heidipowell.com domain name consists of a
18 common English name held by Defendant Heidi Powell and deny any remaining
19 allegations in paragraph 53, including that Plaintiff's legal name was Heidi Powell
20 when Defendants registered the heidipowell.com domain name.

21 54. Defendants admit that they registered the heidipowell.com domain
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1 name without Plaintiff's consent, deny that Plaintiff's consent was required when
2 they registered the heidipowell.com domain name, and deny any remaining
3 allegations in paragraph 54.

4 55. Defendants deny that they have violated 15 U.S.C. § 8131 and are
5 without information sufficient to form a belief as to the remaining allegations of
6 paragraph 55, and accordingly deny the allegations.

7 56. Defendants deny that they have violated 15 U.S.C. § 8131 and are
8 without information sufficient to form a belief as to the remaining allegations of
9 paragraph 56, and accordingly deny the allegations.

10 57. Denied.

11 58. Defendants deny that Plaintiff is entitled to any relief, and deny any
12 remaining allegations in paragraph 58.

13 **PLAINTIFF'S COUNT THREE**

14 **(Declaratory Judgment)**

15 59. Defendants hereby incorporate their answers to the foregoing
16 paragraphs as if fully stated herein.

17 60. Admitted.

18 61. Denied.

19 Defendants deny each and every allegation, whether express or implied,
20 contained in the Complaint that is not specifically admitted herein

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AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

This Court lacks personal jurisdiction over Defendants.

Third Affirmative Defense

Plaintiff’s claims are barred by the doctrine of statutory fair use.

Fourth Affirmative Defense

Plaintiff’s claims are barred by waiver, laches, and/or estoppel.

Fifth Affirmative Defense

Defendants did not act in bad faith and Plaintiff’s claims have no colorable basis under the Anticybersquatting Consumer Protection Act or the Lanham Act.

Sixth Affirmative Defense

Defendant reserves the right to assert additional affirmative defenses that may become known.

WHEREFORE, Defendants Kent Powell and Heidi Powell respectfully request that this Court dismiss the Complaint in its entirety, and grant such further relief as this Court deems proper.

COUNTERCLAIMS

Defendants Kent Powell and Heidi Powell, by and through undersigned

1 counsel, assert the following as their Counterclaims against Plaintiff:

2 **NATURE OF THE ACTION**

3 1. This is an action for reverse domain name hijacking (trademark
4 bullying) and for a finding of Mr. and Mrs. Powell’s lack of bad faith under the
5 Anticybersquatting Consumer Protection Act.

6 2. Plaintiff is a reality television “celebrity” who apparently changed her
7 name to “Heidi Powell” in 2010. The Defendants are a senior citizen couple, Kent
8 and Heidi Powell, and Mrs. Powell’s legal name has been “Heidi Powell” since
9 marrying Mr. Powell on December 23, 1979.

10 3. There is only one plausible explanation for why Plaintiff brought this
11 action: to attempt to intimidate Mr. and Mrs. Powell into relinquishing the
12 heidipowell.com domain name that they have properly owned for more than a
13 decade—since long before Plaintiff even became “Heidi Powell” much less before
14 she arguably could have established any trademark rights in that name.

15 4. Plaintiff’s complaint is an unfortunate example of trademark bullying
16 by a reality television personality who, having had her many, many purchase
17 solicitations refused by Mr. and Mrs. Powell, is now pursuing a baseless lawsuit to
18 try to force Mr. and Mrs. Powell to give up the domain name that they lawfully own
19 and are not willing to sell. Although Plaintiff perhaps believes that her status as a
20 reality television celebrity entitles her to pursue a frivolous claim to obtain the forced
21 transfer of Mr. and Mrs. Powell’s property—it does not.

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1 12. Since acquiring the heidipowell.com domain name, Mr. and Mrs.
2 Powell have used it for e-mail services and for Mrs. Powell’s various home-based
3 businesses, including a McGruff the crime dog franchise and, more recently, “Click
4 To Call Mobile.”

5 13. Defendant Heidi Powell has also used the Twitter handle
6 @heidipowell since 2009 to promote her various business interests.

7 14. Registration and use of the heidipowell.com domain name has been
8 fair and in good faith in that the domain name, as a common English name, is
9 descriptive and corresponds directly to Defendant Heidi Powell’s legal name.

10 15. Mr. and Mrs. Powell, at all relevant times, believed and had reasonable
11 grounds to believe that their registration and use of the heidipowell.com domain
12 name was a fair use or otherwise lawful.

13 **Background on the Anticybersquatting Consumer Protection Act**

14 16. The Anticybersquatting Consumer Protection Act (the “ACPA”) was
15 passed into law in 1999 to address the serious problem of cybersquatting, which is
16 the registration, trafficking in, or use of a domain name with a bad faith intent to
17 profit from a trademark that is identical or confusingly similar to the domain name.

18 17. The ACPA was developed to address “‘cybersquatters’ or
19 ‘cyberpirates,’ who abuse the rights of trademark holders by purposely and
20 maliciously registering as a domain name the trademark name of another company to
21 divert and confuse customers” (106 Cong. Rec., S10517).

22

1 18. The ACPA includes a requirement of specific bad faith intent to profit
2 from the plaintiff's trademark.

3 "Good faith, innocent or negligent uses of a domain name that is identical or
4 confusingly similar to another's mark or dilutive of a famous mark **are not**
5 **covered by the legislation's prohibition.** Thus, registering a domain name
6 while unaware that the name is another's trademark would not be actionable."
7 106 Cong. Rec., S10518.

8 19. When drafting the ACPA, Congress was concerned that overreaching
9 cybersquatting claims could be asserted to take a domain name from a registrant who
10 did not possess the bad faith specifically required under the ACPA. The
11 Congressional Record for the ACPA is replete with specific examples of
12 overreaching cybersquatting claims, such as claims asserted against "two year old
13 Veronica Sam's 'Little Veronica' website and 12 year old Chris 'Pokey' Van Allen's
14 web page." 106 Cong. Rec., S9755.

15 20. In light of the potential for such overreaching claims, Congress
16 provided domain name owners with causes of action to determine that they have not
17 violated the ACPA, and to award damages, attorney's fees, and injunctive relief in
18 cases of reverse domain name hijacking.

19 21. Plaintiff's actions in the present case are precisely the type of
20 trademark bullying that Congress cited as the reason for creation of the
21 counterclaims now asserted.

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Plaintiff's Reverse Domain Name Hijacking

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2 22. On information and belief, Plaintiff was born in 1982—more than two
3 years after Mr. and Mrs. Powell were married and Mrs. Powell assumed the legal
4 name “Heidi Powell.”

5 23. On information and believe, Plaintiff’s given name at birth was “Heidi
6 Lane.”

7 24. On information and belief, Plaintiff did not assume her third legal
8 name “Heidi Powell” until 2010.

9 25. On information and belief, when Mr. and Mrs. Powell registered the
10 heidipowell.com domain name in 2005, Plaintiff’s legal name was either Heidi Lane
11 (her given name at birth) or Heidi Solomon (sharing a surname with then-husband
12 Derek Solomon).

13 26. Plaintiff filed a trademark application with the U.S. Patent and
14 Trademark Office for the purported mark HEIDI POWELL on or around April 19,
15 2016.

16 27. Plaintiff’s trademark application included a sworn statement that
17 Plaintiff’s first use of the applied-for mark occurred “at least as early as 09/19/2014.”

18 28. Plaintiff knew when she filed the Complaint that Mr. and Mrs. Powell
19 registered the heidipowell.com domain name in 2005 and Plaintiff pleaded as much
20 in the complaint.

21 29. Notwithstanding the fact that Plaintiff had no trademark rights in the
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1 above as if fully set forth and restated herein.

2 33. The actions described above evidence the absence of bad faith, within
3 the meaning of Anticybersquatting Consumer Protection Act, by Mr. and Mrs.
4 Powell as owners of the heidipowell.com domain name registration.

5 34. The actions described above evidence a belief by Mr. and Mrs. Powell
6 that the registration and use of the heidipowell.com domain name was a fair use or
7 otherwise lawful.

8 35. The actions described above evidence reasonable grounds for belief by
9 Mr. and Mrs. Powell that the registration and use of the heidipowell.com domain
10 name was a fair use or otherwise lawful.

11 36. Mr. and Mrs. Powell are entitled to a judgment of no bad faith intent in
12 the registration or use of the heidipowell.com domain name.

13 37. Plaintiff's conduct has harmed and will continue to harm Mr. and Mrs.
14 Powell, thereby entitling them to recover actual and/or statutory damages and
15 attorney's fees and costs.

16 **COUNT II**

17 **REVERSE DOMAIN NAME HIJACKING**

18 **(15 U.S.C. § 1114(2)(D)(iv))**

19 38. Defendants reallege and incorporate each and every allegation set forth
20 above as if fully set forth and restated herein.

21 39. Plaintiff is well aware that "Heidi Powell" was Defendant Heidi
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1 Powell's legal name when Mr. and Mrs. Powell registered the domain name in 2005.

2 40. Plaintiff is well aware that Plaintiff had no rights in any HEIDI
3 POWELL mark and that her legal name was not "Heidi Powell" when Mr. and Mrs.
4 Powell registered the domain name in 2005.

5 41. Plaintiff is well aware that Mr. and Mrs. Powell's registration and use
6 of the heidipowell.com domain name is entirely proper.

7 42. Plaintiff's allegations represent a knowing and material
8 misrepresentation that the heidipowell.com domain name is identical to, confusingly
9 similar to, or dilutive of a mark.

10 43. Plaintiff's allegations represent a knowing and material
11 misrepresentation that the heidipowell.com domain name was a bad faith registration
12 of a valid trademark.

13 44. Plaintiff's allegations represent a knowing and material
14 misrepresentation that the heidipowell.com domain name was registered with a
15 specific intent to profit from Plaintiff's name.

16 45. Plaintiff's allegations have resulted in the disabling and/or suspension
17 the heidipowell.com domain name thereby limiting Mr. and Mrs. Powell's lawful use
18 of the domain name.

19 46. The above acts by Plaintiff constitute reverse domain name hijacking
20 in violation of the Anticybersquatting Consumer Protection Act, 15 U.S.C. §
21 1114(2)(D)(iv).

22

1 47. The foregoing actions of Plaintiff have been knowing, deliberate, and
2 willful.

3 48. Mr. and Mrs. Powell are entitled to a judgment that Plaintiff's actions
4 violate the Anticybersquatting Consumer Protection Act.

5 49. Plaintiff's conduct has harmed and will continue to harm Mr. and Mrs.
6 Powell, thereby entitling them to recover actual and/or statutory damages and
7 attorney's fees and costs.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Defendants respectfully request that the Court:

- 10 1. Enter judgment on their behalf against Plaintiff on all counts;
- 11 2. Enter an order finding an absence of bad faith, within the meaning of
12 Anticybersquatting Consumer Protection Act, by Mr. and Mrs. Powell, as owners of
13 the heidipowell.com domain name;
- 14 3. Enter an order enjoining Plaintiff from any and all further efforts to
15 force Mr. and Mrs. Powell to transfer the heidipowell.com domain name to Plaintiff;
- 16 4. Enter an award of Mr. and Mrs. Powell's damages, costs and
17 reasonable attorneys' fees pursuant to 15 U.S.C. § 1114(2)(D)(iv);
- 18 5. Enter an award of statutory damages in the maximum amount of
19 \$100,000.00 against Plaintiff pursuant to 15 U.S.C. § 1117(d);
- 20 6. Enter an order finding the case to be exceptional and awarding Mr. and
21 Mrs. Powell their reasonable attorney's fees pursuant to 15 U.S.C. § 1117(a); and
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1 7. Award such other and further relief as the Court deems just and proper
2 under the circumstances.

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4 DATED this 7th day of September, 2016.

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WILEY REIN LLP

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 /s/ David E. Weslow /s/

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David E. Weslow

Ari S. Meltzer

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Attorneys for Defendants

Kent and Heidi Powell

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such Filing (NEF) to the following:

Maria Crimi Speth, Esq.
Laura Rogal, Esq.
Jaburg & Wilk, P.C.
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Phoenix, AZ 85012
Counsel for Plaintiff

 /s/ David E. Weslow /s/
David E. Weslow
Ari S. Meltzer
Attorneys for Defendants
Kent and Heidi Powell