

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

PUBLISHAMERICA, LLLP,)	
)	CASE NO. 3:10-cv-00108
Plaintiff/Counter-Defendant,)	
)	JUDGE NIXON
v.)	
)	MAGISTRATE JUDGE BRYANT
LIGHTNING SOURCE INC.,)	
)	JURY DEMAND
Defendant/Counter-Plaintiff.)	

ANSWER AND COUNTERCLAIM

For its Answer to the Complaint filed by Plaintiff PublishAmerica, LLLP (“PA”), Defendant Lightning Source Inc. (“LSI”) states as follows:

FIRST DEFENSE

LSI hereby responds to each numbered paragraph of the Complaint as follows:

1. Upon information and belief, LSI admits the first and fifth sentences of Paragraph 1 of the Complaint. LSI is without knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 1 of the Complaint, and they are accordingly denied.
2. Admitted, except that Defendant’s correct name is Lightning Source Inc.
3. Paragraph 3 of the Complaint states a legal conclusion and therefore requires no response. However, LSI agrees that jurisdiction and venue are proper in this Court.
4. No response to Paragraph 4 is required.
5. LSI admits the allegations contained in the first three sentences of Paragraph 5 of the Complaint. In response to the fourth sentence of Paragraph 5 of the Complaint, LSI admits that a copy of an Operating Manual is attached to the Complaint as Exhibit 2.

6. LSI admits the allegations contained in the first two sentences of Paragraph 6 of the Complaint. No response to the third sentence of Paragraph 6 is required. In response to the fourth sentence of Paragraph 6 of the Complaint, LSI states that the terms and conditions of the original Print On Demand Agreement and those Print On Demand Agreements executed during any “renewal periods” speak for themselves.

7.-8. LSI states that the terms of PA’s Print On Demand Agreement, including, but not limited to, the terms of the Operating Manual, which were incorporated therein (hereinafter collectively “Agreement”), speak for themselves. Because Paragraphs 7 and 8 contain legal conclusions and characterizations as to limited portions of the Agreement and do not completely or accurately recite the relevant terms and conditions, the allegations in Paragraphs 7 and 8 are denied.

9. In response to Paragraph 9 of the Complaint, LSI admits that it filled Wholesale Orders and Publisher Direct Orders pursuant to the Agreement, that PA designated some titles as returnable, and that LSI disposed of returns and charged PA for those returns in accordance with the parties’ Agreement. LSI otherwise denies the allegations and characterizations contained in Paragraph 9 of the Complaint.

10. In response to Paragraph 10 of the Complaint, LSI admits that in or about May 2009, and consistent with PA’s “Yes-Deliver” return designation, it began shipping to PA a physical copy of each title returned in exchange for a \$2 shipping and handling fee and the wholesale cost of the title in question as instructed by PA. LSI denies the remaining allegations and characterizations contained in Paragraph 10 of the Complaint.

11. In response to Paragraph 11 of the Complaint, LSI admits that it printed a physical copy of each book upon the return of the title and shipped such copies to PA. LSI also

admits that the copies that it shipped to PA were in newly-printed condition. LSI otherwise denies the allegations and characterizations contained in Paragraph 11 of the Complaint.

12. LSI admits that, pursuant to the express terms of the parties' Agreement, it accepted returns of PA titles that were the subject of the Agreement, and it further admits that the returns may have included titles that were not sold by LSI. All remaining allegations and characterizations set forth in Paragraph 12 are denied.

13. In response to the first sentence of Paragraph 13 of the Complaint, LSI admits that, on October 7, 2009, PA notified LSI that it would like to lower the prices of 33,069 titles. In response to the second sentence of Paragraph 13 of the Complaint, LSI admits that it notified PA that the price changes would become effective by November 1, 2009, if PA provided all information required to process the change request by October 10, 2009. LSI denies the allegations contained in the third sentence of Paragraph 13 of the Complaint.

COUNT I

14. Paragraphs 1 through 13 of this Answer are hereby incorporated by reference as if set forth fully herein.

15. Denied.

16. LSI admits that, in accordance with the parties' Agreement, it accepted returns of titles that may have included books that had not been printed by LSI. LSI denies the remaining allegations and conclusions contained in Paragraph 16 of the Complaint.

17. Denied.

COUNT II

18. Paragraphs 1 through 17 of this Answer are hereby incorporated by reference as if set forth fully herein.

19. Under the parties' Agreement, LSI agreed that PA would receive a physical copy of a book upon the title being returned in the event that PA designated the "Yes-Deliver" returns option. LSI denies the allegations and characterizations contained in Paragraph 19 of the Complaint.

20. Denied.

21. Denied.

22. In response to Paragraph 22 of the Complaint, LSI admits that PA paid a \$2 charge for each copy of the titles returned that were shipped back to PA (in addition to a charge for the wholesale cost of the title in question) pursuant to the Agreement and Operating Manual. The remaining allegations and conclusions contained in Paragraph 22 of the Complaint are denied.

COUNT III

23. Paragraphs 1 through 22 of this Answer are hereby incorporated by reference as if set forth fully herein.

24. As noted in Paragraph 19 above, LSI agreed that PA would receive a physical copy of each title returned in the event that PA designated the "Yes-Deliver" return option. LSI denies the allegations and characterizations contained in Paragraph 24 of the Complaint.

25. LSI states that, with respect to all books that PA designated for return under the "Yes-Deliver" option, LSI printed a physical copy of the book upon the return of the title and shipped it to PA. The allegations and characterizations contained in Paragraph 25 of the Complaint are denied.

26. LSI is without knowledge or information sufficient to form a belief as to PA's subjective motivations alleged in the second through the fifth sentences of Paragraph 26 of the

Complaint, and the allegations pertaining to those asserted motivations are therefore denied. In response to the fifth sentence of Paragraph 26 of the Complaint, LSI also denies the characterization of LSI's handling of the returns and states that, in accordance with the Agreement and Operating Manual, PA received a physical copy of each title returned that PA designated under the "Yes-Deliver" return option. In response to the first, sixth and seventh sentences of Paragraph 26 of the Complaint, LSI denies that it made any misrepresentations, LSI therefore denies that PA relied upon any such alleged misrepresentations, LSI denies that it committed any fraud, and LSI denies that it admitted to any such alleged fraud. All other allegations contained in Paragraph 26 of the Complaint are also hereby denied.

27. LSI admits that, pursuant to the terms of the Agreement, PA was charged \$2 per return (in addition to the wholesale cost of the book) for every title designated under the "Yes-Deliver" option. All remaining allegations in Paragraph 27 are denied.

COUNT IV

28. Paragraphs 1 through 27 of this Answer are hereby incorporated by reference as if set forth fully herein.

29. As noted in Paragraph 19 above, LSI agreed that PA would receive a physical copy of each title returned in the event that PA designated the "Yes-Deliver" return option. LSI denies the allegations and characterizations contained in Paragraph 29 of the Complaint.

30. LSI states that, with respect to all books that PA designated for return under the "Yes-Deliver" option, LSI printed a physical copy of the book upon the title's return and shipped it to PA. The allegations and characterizations contained in Paragraph 30 of the Complaint are denied.

31. LSI is without knowledge or information sufficient to form a belief as to PA's subjective motivations alleged in the second through the fifth sentences of Paragraph 31 of the Complaint, and the allegations pertaining to those asserted motivations are therefore denied. In response to the fifth sentence of Paragraph 31 of the Complaint, LSI also denies the characterization of LSI's handling of the returns and states that, in accordance with the Agreement and the Operating Manual, PA received a physical copy of each title returned that PA designated under the "Yes-Deliver" return option. In response to the first, sixth and seventh sentences of Paragraph 31 of the Complaint, LSI denies that it made any misrepresentations, LSI therefore denies that PA relied upon any such alleged misrepresentations, and LSI denies that it admitted to any such alleged misrepresentations. All other allegations contained in Paragraph 31 of the Complaint are hereby denied.

32. LSI admits that, pursuant to the terms of the Agreement, PA was charged \$2 per return (in addition to the wholesale cost of the book) for every title designated under the "Yes-Deliver" option. All remaining allegations in Paragraph 32 are denied.

COUNT V

33. Paragraphs 1 through 32 of this Answer are hereby incorporated by reference as if set forth fully herein.

34. Denied.

35. Denied.

36. Denied.

COUNT VI

37. Paragraphs 1 through 36 of this Answer are hereby incorporated by reference as if set forth fully herein.

38. In response to Paragraph 38 of the Complaint, LSI states that sales compensation reports that LSI sent to PA accurately reflected charges for returns in accordance with the parties' Agreement. LSI denies the remaining allegations and characterizations contained in Paragraph 38 of the Complaint.

39. Denied.

40. In response to Paragraph 40 of the Complaint, LSI denies that it made any misrepresentations, LSI therefore denies that PA relied upon any such alleged misrepresentations, and LSI denies that it committed any fraud. LSI further states that it processed returns and charges for titles returned in accordance with the parties' Agreement. All other allegations and characterizations contained in Paragraph 40 are denied.

41. Denied.

COUNT VII

42. Paragraphs 1 through 41 of this Answer are hereby incorporated by reference as if set forth fully herein.

43. In response to Paragraph 43 of the Complaint, LSI states that sales compensation reports that LSI sent to PA accurately reflected charges for returns in accordance with the parties' Agreement. LSI denies the remaining allegations and characterizations contained in Paragraph 43 of the Complaint.

44. Denied.

45. In response to Paragraph 45 of the Complaint, LSI denies that it made any misrepresentations, LSI therefore denies that PA relied upon any such alleged misrepresentations, and LSI denies that it committed any fraud. LSI further states that it

processed returns and charges for titles returned in accordance with the parties' Agreement. All other allegations and characterizations contained in Paragraph 45 are denied.

46. Denied.

47. All allegations not hereinabove admitted, denied or explained are hereby denied.

AFFIRMATIVE DEFENSES

For additional answers and affirmative defenses, LSI states as follows:

1. The Complaint fails to state a claim upon which relief may be granted.
2. Counts III, VI and VII fail to plead fraud with sufficient particularity pursuant to Fed. R. Civ. P. Rule 9(b).
3. PA's claims are barred in whole or in part by the defenses of waiver and estoppel.
4. Plaintiff's claims are barred or reduced to the extent that Plaintiff failed to mitigate its alleged damages.

COUNTERCLAIM

WHEREFORE, having fully answered the Complaint in this matter, Defendant LSI now assumes the role of Counter-Plaintiff and sues Counter-Defendant PA for breach of contract. For its cause of action against Counter-Defendant, LSI hereby states as follows:

1. Counter-Plaintiff LSI is a Delaware corporation with a principal place of business located at 1246 Heil Quaker Boulevard, LaVergne, Tennessee.
2. Counter-Defendant PA is a Maryland limited liability limited partnership with its principal place of business located in Frederick, Maryland.
3. Because this Court already has jurisdiction and venue over this matter, no additional jurisdictional statement is required.

4. LSI maintains a digital library containing books that publishers supply to LSI in an electronic format. LSI runs a print-on-demand operation in which it fulfills orders for the books contained in the digital library. LSI prints books in a variety of formats, including traditional hard-cover, hard-cover with jackets, and paperback.

5. PA is a book publisher for which LSI has provided print-on-demand services pursuant to a Print On Demand Agreement. A copy of the original Print On Demand Agreement is attached to the Complaint. *See* Complaint at Exhibit 1. The original Print On Demand Agreement and other subsequent Print On Demand Agreements that the parties executed from time to time are hereinafter collectively referred to as the “Agreement.”

6. Under the Agreement (as well as LSI’s Operating Manual, which was incorporated therein), PA agreed to pay certain fees and expenses incurred by LSI in providing the print-on-demand services to PA. Those fees and expenses included, *inter alia*, fees for placing PA’s book titles into LSI’s database, digital catalog fees for maintaining the titles in the database, printing charges and other charges. In addition, PA was obligated to pay certain charges associated with books that were returned by customers.

7. Since on or around October 27, 2009, PA has owed a net amount back to LSI after offsetting monies payable to PA under the Agreement against fees and expenses payable to LSI. LSI has sent monthly invoices and statements to PA demanding payment of the amount due and owing. Under the Agreement, PA agreed to pay LSI’s invoices within 30 calendar days of the date of each invoice. PA, however, has failed to pay the full amount owed to LSI.

8. By failing to pay the amount owed to LSI, PA has breached the Agreement. Accordingly, LSI is entitled to a judgment for compensatory damages in an amount to be proven at the trial of this matter, including the account balance that remains at the time of trial after all

appropriate adjustments to PA's account have been made based on any outstanding account activity.

WHEREFORE, LSI demands:

1. That the Court dismiss the Complaint with prejudice;
2. That LSI be granted a judgment for compensatory damages with respect to LSI's Counterclaim in an amount to be proven at trial;
3. That the Court further award LSI pre-judgment and post-judgment interest;
4. That the Court award LSI's reasonable attorney's fees and costs of suit; and
5. That the Court provide such other and further relief to which LSI may be entitled.

Respectfully submitted,

NEAL & HARWELL, PLC

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the method(s) indicated below, on the following counsel of record, this the 25th day of February, 2010:

<input type="checkbox"/> Hand	Raymond S. Leathers, Esq.
<input type="checkbox"/> Mail	Howard, Tate, Sowell, Wilson, Leathers & Johnson, PLLC
<input type="checkbox"/> Fax	150 2 nd Ave, North, Suite 201
<input type="checkbox"/> Fed. Ex.	Nashville, TN 37201-1931
<input type="checkbox"/> E-Mail	615-256-1125
<input checked="" type="checkbox"/> ECF	rsleathers@howardtatelaw.com
	Counsel for Plaintiff/Counter-Defendant

s/George H. Cate, III