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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

YoHolla International, LLC, an Arizona limited liability company, Plaintiff, vs. Burton Design Group, Inc., a California corporation; Pinwheel Designs Corp., a Nevada corporation, Defendants.	NO. **COMPLAINT FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP, DEFAMATION, AND INDEMNIFICATION** **[JURY TRIAL REQUESTED]**

Plaintiff YoHolla International, LLC ("YoHolla") by and through its attorneys, Quarles & Brady LLP, for its complaint against Defendants Burton Design Group, Inc., ("BDG") and Pinwheel Designs Corp. ("Pinwheel") (collectively, the "Defendants"), alleges and states as follows:

PARTIES

1. Plaintiff YoHolla is an Arizona limited liability company with its principal place of business in Tucson, Arizona.

2. Upon information and belief, Defendant BDG is a California corporation with its principal place of business in Mission Viejo, California.

3. Upon information and belief, Defendant Pinwheel is a Nevada corporation with its principal place of business in San Francisco, California.

NATURE OF THE ACTION

4. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201 in which YoHolla seeks a determination that it does not infringe any purported copyrights held by BDG and/or Pinwheel in certain software applications under 17 U.S.C. § 501, and that YoHolla is the exclusive copyright owner of such software applications as a matter of contract.

5. This is further an action for breach of contract, tortious interference with business, defamation, and indemnification.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter on two grounds:

(i) 28 U.S.C. § 1331 and § 1338(a), because this matter arises under the copyright laws of the United States, 17 U.S.C. §§ 501 et seq.;

(ii) 28 U.S.C. § 1332, because there is complete diversity of citizenship in that Plaintiff YoHolla is a citizen of Arizona with its principal place of business in Arizona, whereas Defendants BDG and Pinwheel are citizens of California and Nevada, respectively, with their principal places of business in California, and the amount in controversy exceeds the sum of $75,000 exclusive of interest and costs, and in addition to other and further relief, declaratory relief is sought.

7. Supplemental jurisdiction over the state law claims is also proper in this Court pursuant to 28 U.S.C. § 1367 and the principles of pendent jurisdiction.

8. Personal jurisdiction over Defendants exists, at least, as a matter of contract and because some or all of the acts or events giving rise to this action occurred in this judicial district. *See* Software/Design Development and Services Agreement (hereinafter, "Software Contract"), attached hereto as Exhibit A, Section 13 (Jurisdiction/Disputes) ("All disputes under this Agreement shall be resolved by litigation in the courts of the State of Arizona, United States of America, including the federal courts situated therein and the parties all consent to the jurisdiction of such courts, agree to accept service of

process by mail, and hereby waive any jurisdictional or venue defenses otherwise available….").

9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and (c) because a substantial part of the events giving rise to the claims asserted herein arose in this district and/or because a substantial part of property that is the subject of this action is situated in this judicial district, and as a matter of contract. (*See* Exhibit A, Software Contract at Section 13.)

GENERAL ALLEGATIONS

10. YoHolla is an advertising-free, subscription-based online social network designed to give users maximum control over connecting and sharing information online with friends and family in a safe and private forum.

11. On December 8, 2010, YoHolla entered into a Software Contract with Defendant Pinwheel for the design and development of an iPhone-compatible mobile application (the "iPhone Application") and an Android-compatible mobile application (the "Android Application").

12. Under the Software Contract, Defendant Pinwheel agreed to complete and deliver to YoHolla both the iPhone and the Android Applications by January 1, 2011. Defendant Pinwheel was fully aware of the fact that "time was of the essence." (*See* Exhibit A, Software Contract at Section 19 ("**TIME IS OF THE ESSENCE**") ("Time is of the essence with respect to this Agreement and with respect to any and all obligations and covenants herein.")). Indeed, total time to complete the project was just over three weeks due to the expedited nature of the project and YoHolla's planned market launch of its social network on January 1, 2011.

13. Under Section 5 of the Software Contract, all software and/or deliverables, including the iPhone and Android Applications and source code thereof, was the sole property of YoHolla. YoHolla owned all rights, including all intellectual property rights. (*See* Exhibit A, Software Contract at Section 5(a) ("All Software and/or Deliverables, including all work product thereof, thereto, or therefrom, shall automatically, without

further action by either party, be the sole property of [YoHolla] upon their creation or (in the case of copyrightable works) fixation in a tangible medium of expression, and [YoHolla] shall own all rights, including all intellectual property rights, title and interest therein.")).

14. Under Section 5 of the Software Contract, Defendant Pinwheel agreed that all original works of authorship, including the iPhone and Android Applications and the source code thereof, protected by copyright are "works made for hire" as defined by 17 U.S.C. § 101. (*See* Exhibit A, Software Contract at Section 5).

15. Defendant Pinwheel also assigned "to [YoHolla] all of its right, title and interest in and to all of the Software or Deliverables, including all work product thereof, thereto, or therefrom, and all copies of any of the foregoing, including, without limitation, all intellectual property rights therein (and all renewals and extensions thereof), throughout the world, without any requirement of further consideration." (*See* Exhibit A, Software Contract, Section 5(a)).

16. Under Section 8 of the Software Contract, Defendant Pinwheel agreed to defend, indemnify, and hold harmless YoHolla against all costs, expenses, and losses, including reasonable attorneys' fees and costs, incurred through claims of third parties against YoHolla that were based on Defendant Pinwheel's breach of the Software Contract. (*See* Exhibit A, Software Contract at Section 8).

17. Thereafter Defendant Pinwheel subcontracted with BDG to write the software programming for both the iPhone and Android Applications.

18. Despite knowing that timely delivery of both the iPhone and Android Applications was critical for a January 1, 2011, planned market launch of YoHolla's social network, Defendants Pinwheel and BDG missed the January 1, 2011, delivery date.

19. Moreover, builds of both the iPhone and Android Applications received by YoHolla were so riddled with bugs as to be virtually nonfunctional.

20. YoHolla paid a total of $60,000 for the iPhone and Android Applications despite not receiving functional Applications.

21. As a result of Defendants Pinwheel's and BDG's failure to deliver functional iPhone and Android Applications by the January 1, 2011, deadline, YoHolla was forced to delay the planned market launch of its social network, resulting in significant and material losses.

22. On January 28, 2011, an addendum to the Software Contract was executed between YoHolla and Defendant BDG in the form of a revised Statement of Work in connection with the Software Contract ("SOW"), which is attached as Exhibit B to this Complaint.

23. Under the SOW, Defendant BDG committed to a revised delivery date of February 8, 2011, for the iPhone Application and February 15, 2011, for the Android Application. Further, YoHolla agreed to pay an additional $15,000 on top of the original $70,000 estimate, for completion and delivery of the fully functional iPhone and Android Applications by the extended deadlines established in the SOW. Thus, the total of $25,000 represented $10,000 remaining due on the original Software Contract, and an additional $15,000 to deliver fully functional applications.

24. Defendant BDG again missed both the February 8, 2011, delivery date for the iPhone Application and the February 15, 2011, delivery date for the Android Application, even though Defendant BDG was fully informed that time was of the essence.

25. Furthermore, each build of the iPhone and Android Applications provided to YoHolla continued to be riddled with bugs.

26. As a result of Defendant BDG's failure to make the promised delivery dates for the iPhone and Android Applications, YoHolla was again forced to delay the planned market launch of its social network at significant and material loss.

27. YoHolla finally received what it was told were "completed" builds for both the iPhone Application and the Android Application on or about February 19, 2011.

28. As with all previous builds, both Applications were riddled with bugs. Further, the Android Application was so deficient as to be essentially non-functional.

29. As a result of Defendants Pinwheel's and BDG's failure to provide bug-free builds of the iPhone and Android Applications which met the specifications set forth in the Software Contract and the SOW, YoHolla lost all confidence in Defendants Pinwheel and BDG and was forced to contract with a third-party software developer to finish both the iPhone and Android Applications.

30. As a matter of contract, YoHolla was fully within its rights to "complete Software either by itself or through the services of a third-party and to charge back to Developer any costs incurred." (*See* Exhibit A, Software Contract at Section 10(c)).

31. In regards to the Android Application, it was so deficient that not only did it lack functionality, when installed on a cellular telephone, it created problems with the phone's normal operation, which would resolve when the application was removed. As a result of these interference failures, YoHolla's new software developer has been forced to completely rewrite the Android Application source code.

32. Given that the source code for the Android Application has to be completely rewritten, YoHolla effectively paid $60,000 for a defective iPhone Application, instead of paying $85,000 for a fully functional iPhone and Android Application.

33. Due to the numerous bugs in the iPhone Application and because of the amount of work that will be needed to completely rewrite the Android Application, YoHolla's new software developer anticipates it will cost another $50,000 to complete the iPhone and Android applications.

34. Under the Software Contract, the cost to complete the iPhone and Android Applications is chargeable to Defendant Pinwheel. (*See* Exhibit A, Section 10(c) of the Software Contract).

35. Defendants Pinwheel's and BDG's failure to provide builds of the iPhone and Android Applications in conformity with the specifications constituted a material breach of the Software Contract.

36. Defendant BDG's failure to provide builds of the iPhone and Android Applications in conformity with the SOW constituted a material breach of the SOW.

37. The inability of YoHolla to be able to launch the iPhone and Android Applications on January 1, 2011, has resulted in over $550,000.00 in delay damages alone, not including subscription sales that would have been generated after launch.

38. Given that Defendant BDG failed to provide builds of the iPhone and Android Applications in conformance with the SOW, YoHolla stopped payment on a $25,000 check it had provided to Defendant BDG as final payment pursuant to the SOW.

39. Because of all the repeated delays that were caused by BDG and Pinwheel, which had initially promised YoHolla a completion date of January 1, 2011, YoHolla was forced to launch the iPhone Application in late February, 2011, notwithstanding that the functionality that was contracted for was still missing and the iPhone Application still required significant debugging.

40. The new software developer is currently working to fully debug and complete the iPhone Application for YoHolla. Only after that work is completed will YoHolla finally be able to launch a fully functional and fully debugged iPhone Application.

41. On February 25, 2011, YoHolla received a letter from James Hornbuckle, counsel for Defendant BDG, demanding payment of $25,000 for development of the iPhone and Android Applications. The February 25, 2011, letter further included a demand that YoHolla cease and desist using any of the source code developed by BDG for the iPhone Application and that further use would constitute willful copyright infringement. This false claim was made despite the fact that Section 5 of the Software Contract makes explicit that all rights, title, and interest, including the copyrights, in the iPhone Application and source code developed there under, were assigned to and are owned by YoHolla. (*See* Exhibit C (Letter by BDG dated February 25, 2011)).

42. On March 3, 2011, YoHolla received a first notice from Apple that Apple had also received a communication from Defendant BDG on February 25, 2011, in which Defendant BDG had stated, falsely, that YoHolla's iPhone Application infringes Defendant BDG's intellectual property rights, despite the fact that Section 5 of the

Software Contract makes explicit that all rights, title, and interest, including the copyrights, in the iPhone Application and source code developed thereunder, were assigned to and are owned by YoHolla. (*See* Exhibit D (First Notice from Apple dated March 3, 2011)).

43. Apple notified YoHolla that in Defendant BDG's February 25, 2011, communication with Apple, Defendant BDG stated that YoHolla, ". . . is using code that doen't [sic] belong to them." BDG made these statements despite the fact that Section 5 of the Software Contract makes explicit that all rights, title, and interest, including the copyrights, in the iPhone Application and source code developed thereunder, were assigned to and are owned by YoHolla. (*See* Exhibit D).

44. As a direct result of Defendant BDG's false claims, Apple notified YoHolla that it required that YoHolla either provide written assurance to Apple that YoHolla's iPhone Application does not infringe Defendant BDG's rights or that YoHolla was taking steps to promptly resolve the matter.

45. On March 4, 2011, YoHolla sent a letter to Defendants Pinwheel and BDG in response to Defendant BDG's demand letter of February 25, 1011. In the March 4, 2011, letter, YoHolla informed Defendants Pinwheel and BDG that the March 4, 2011, letter constituted written notice of termination of all contracts between YoHolla and Defendants Pinwheel and BDG pursuant to Section 10(b) of the Software Contract, written Notice of Rejection pursuant to Section 3(d) of the Software Contract of both the iPhone and Android Applications, and notice to Defendant Pinwheel of YoHolla's demand that Defendant Pinwheel defend, indemnify, and hold YoHolla harmless against Defendant BDG's claims pursuant to Section 8 of the Software Contract. Further, in the March 4, 2011, letter, YoHolla notified Defendant BDG that YoHolla would seek full recourse for its damages from Defendant BDG should Apple remove YoHolla's iPhone Application from the iTunes store.

46. On March 7, 2011, YoHolla notified Apple that YoHolla is the sole and rightful owner of YoHolla's iPhone Application and made the required averments under the Digital Millennium Copyright Act pursuant to 17 U.S.C. § 512(g)(3).

47. On March 10, 2011, YoHolla received a second notification from Apple in which Apple confirmed receipt of YoHolla's March 7, 2011, correspondence. Apple also warned that: "If this issue is not resolved shortly, Apple may be forced to pull your application(s) from the App Store." (*See* Exhibit E, attached hereto (Second Notice from Apple dated March 10, 2011)).

48. On March 18, 2011, YoHolla received yet a third notification from Apple that Defendant BDG had again advised Apple that the matter concerning YoHolla's iPhone Application was still unresolved. Upon information and belief, Defendant BDG again reasserted that Defendant BDG owned the intellectual property, including copyrights, to YoHolla's iPhone Application. (*See* Exhibit F (Third Notice from Apple dated March 18, 2011)).

49. In its March 18, 2011, communication, Apple notified YoHolla that the iPhone Application could be removed from the iTunes store if the matter was not resolved shortly. Apple stated that: "Burton Design Group has advised that this matter is still not resolved. Please contact Burton Design Group immediately regarding this issue…. As you know, it is your responsibility to resolve this issue directly with Burton Design Group, and further, that you are responsible for any liability to Apple in connection with this matter. We look forward to confirmation from you and Burton Design Group that this issue has been resolved. If the matter is not resolved shortly, Apple may pull your app from the App Store." (*See* Exhibit F).

50. As a direct result of Defendant BDG's false assertion that BDG owns the intellectual property rights to YoHolla's iPhone Application, Apple has sent YoHolla three separate notices threatening to remove the YoHolla iPhone Application from its iTune's store.

51. In YoHolla's March 7, 2011, letter to BDG, YoHolla demanded that BDG correct its false statement by informing Apple that YoHolla was the copyright owner of the iPhone Application. Not only has BDG refused to do so, it has done the opposite by again contacting Apple, falsely claiming that BDG owns the copyright to YoHolla's iPhone application.

52. Based on the foregoing, there is an actual controversy that is of sufficient immediacy and reality to justify the issuance of a declaratory judgment. YoHolla seeks a declaration confirming that YoHolla owns all intellectual property rights relating to the iPhone and Android Applications, including all copyrights, and that YoHolla is not infringing upon BDG or Pinwheel's rights in the iPhone and Android Applications, including the source code. Indeed, YoHolla reasonably fears that BDG will again contact Apple, as it has already done twice, and that Apple will take down the application.

53. Defendants Pinwheel's and BDG's actions have directly harmed YoHolla's reputation and YoHolla's ability to launch its iPhone and Android applications as well as its social network. Due to Defendants Pinwheel's and BDG's failures to perform under the Software Contract and Defendant BDG's failure to perform under the SOW, YoHolla has had to delay the launch of its social network as well as incur additional costs to finish the iPhone Application and to completely redevelop the Android Application. Delaying its market launch could allow and may have already allowed for other competitors to fill the void and thereby irreparably harm YoHolla's business. YoHolla has suffered substantial harm, in an amount to be proven at trial.

COUNT I

DECLARATORY JUDGMENT OF NONINFRINGEMENT AND OWNERSHIP OF COPYRIGHT

54. The allegations of paragraphs 1-53 are incorporated by reference as if fully set forth herein.

55. A real, justiciable and actual controversy exists between YoHolla, on the one hand, and BDG and/or Pinwheel, on the other, as to whether YoHolla is the copyright

owner of the iPhone and Android Applications, and all intellectual property rights relating thereto.

56. Pursuant to 28 U.S.C. § 2201, YoHolla respectfully requests a declaration from this Court establishing (i) YoHolla as the copyright owner of the iPhone and Android Applications, (ii) declaring that YoHolla has not infringed, and is not now infringing, willfully or otherwise, any copyright held by Defendant BDG and/or Pinwheel in the iPhone Application or the Android Application, and (iii) all copyright and all intellectual property rights relating to the IPhone and Android Applications have been assigned to YoHolla.

57. Count I of this Complaint arises out of contract, express or implied, and therefore, pursuant to A.R.S. § 12-341.01, YoHolla is entitled to recover its costs and reasonable attorneys' fees. Further, pursuant to A.R.S. § 12-1840, YoHolla is entitled to recover its costs incurred herein.

COUNT II
BREACH OF CONTRACT

58. The allegations of paragraphs 1-57 are incorporated by reference as if fully set forth herein.

59. YoHolla and Defendant Pinwheel entered into the Software Contract whereby Defendant Pinwheel agreed to design, develop, and deliver iPhone and Android Applications for YoHolla's social network by January 1, 2011.

60. Thereafter Defendant Pinwheel subcontracted software development work to Defendant BDG.

61. Pursuant to the Software Contract, YoHolla made the first three payments of $20,000 for a total of $60,000.

62. Defendants Pinwheel and BDG have breached the Software Contract by failing to design, develop, and deliver iPhone and Android Applications in the time deadlines specified and by failing to deliver at any time Applications which conformed to the specifications of the Software Contract.

63. After Defendants Pinwheel's and BDG's failure to deliver the iPhone and Android Applications by the January 1, 2011, delivery date, YoHolla further executed the SOW with Defendant BDG wherein Defendant BDG committed to a revised delivery date of February 8, 2011, for the iPhone Application and February 15, 2011, for the Android Application.

64. Defendant BDG has breached the SOW by failing to design, develop, and deliver iPhone and Android Applications by the stated deadlines and failing at any time to deliver Applications which conformed to the specifications of the SOW.

65. Because this action arises out of contract, YoHolla is entitled to recover its costs and attorneys' fees pursuant to A.R.S. § 12-341.01. Further, pursuant to A.R.S. § 12-1840, YoHolla is entitled to recover its costs incurred herein.

COUNT III

TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

66. The allegations of paragraphs 1-65 are incorporated by reference as if fully set forth herein.

67. Defendant BDG was fully aware when it notified Apple for the first time on February 25, 2011, that Section 5 of the Software Contract explicitly provided that all rights, title, and interest, including the copyrights, in the iPhone Application and source code developed thereunder, were assigned to and are owned by YoHolla.

68. Defendant BDG was further aware when it falsely notified Apple a second time that BDG was the owner of the copyrights to YoHolla's iPhone Application that Section 5 of the Software Contract explicitly provided that all rights, title, and interest, including the copyrights, in the iPhone Application and source code developed thereunder, were assigned to and are owned by YoHolla.

69. By contacting Apple and falsely stating that YoHolla's iPhone Application infringes Defendant BDG's intellectual property rights, Defendant BDG intentionally interfered with the business relationship between YoHolla and Apple.

70. As a direct and proximate result of Defendant BDG contacting Apple and falsely stating that YoHolla's iPhone Application infringes Defendant BDG's intellectual property rights, Apple has threatened to remove YoHolla's iPhone Application from its iTunes store.

71. But for Defendant BDG's actions, Apple would not be threatening to remove YoHolla's iPhone Application from its iTunes store.

72. As a direct and proximate result of Defendant BDG's intentional wrongdoing, YoHolla has been harmed. Specifically YoHolla's business reputation with Apple has been harmed.

73. As a result of the foregoing, YoHolla has suffered substantial damages in an amount to be established at trial.

74. The foregoing conduct constitutes deliberate and tortious conduct which warrants an award of punitive damages against Defendant BDG in an amount sufficient to punish Defendant BDG and to deter future similar conduct. Defendant BDG has showed a reckless disregard for the highly probable damaging effect that Defendant BDG's interference would have.

COUNT IV
DEFAMATION (DEFENDANT BDG)

75. The allegations of paragraphs 1-74 are incorporated by reference as if fully set forth herein.

76. Defendant BDG, by notifying Apple on February 25, 2011, that YoHolla's iPhone Application infringes Defendant BDG's intellectual property rights and that YoHolla "is using code that doen't [sic] belong to them," has published false statements and broadcast the same to Apple, with knowledge of the falsity of the statements, in an effort to damage the reputation of YoHolla within its business, trade, and/or professional community. On or before March 18, 2011, Defendant BDG contacted Apple again, further reiterating these false statements.

77. Defendant BDG's actions constitute defamation under Arizona common law. YoHolla has suffered damages as the proximate result of Defendant BDG's conduct.

COUNT V

INDEMNIFICATION (DEFENDANT PINWHEEL)

78. The allegations of paragraphs 1-77 are incorporated by reference as if fully set forth herein.

79. Because of Defendant Pinwheel's actions and/or inactions, YoHolla has been threatened with a cease and desist demand and liability claim for willful copyright infringement from Defendant BDG. Apple has also asserted that it will hold YoHolla liable for any claims by BDG. YoHolla has also sustained damages in incurring attorneys' fees to respond to legal threats asserted by Defendant BDG.

80. YoHolla is entitled to contribution and/or indemnification for all such damages and future damages, if any, from Defendant Pinwheel pursuant to Section 8 of the Software Contract. (*See* Exhibit A, Software Contract at Section 8).

WHEREFORE, Plaintiff YoHolla demands judgment and relief against Defendants as follows:

A. That the Court issue a judgment declaring that YoHolla does not infringe any copyrights in the iPhone and Android Applications;

B. That the Court issue a judgment declaring that Defendant BDG and Pinwheel have assigned all right, title, and interest in the iPhone and Android Applications, including the source code thereof, to YoHolla and that YoHolla is the exclusive owner of the copyrights relating to the iPhone and Android Applications and all intellectual property rights therein;

C. An award of damages for breach of contract as proven at trial against Defendants Pinwheel and BDG;

D. An award of damages incurred as proven at trial against Defendant BDG for tortious interference with a business relationship;

E. A judgment against Defendant Pinwheel for contribution and/or indemnity against all claims, costs, and expenses, including attorneys' fees, incurred in defending against any claims that may be asserted by Defendant BDG or any related third party against YoHolla;

F. An award of punitive damages in an amount sufficient to punish Defendant BDG and to deter others from engaging in such conduct in the future;

G. An award of YoHolla's reasonable attorneys' fees pursuant to A.R.S. § 12-341.01, taxable costs pursuant to A.R.S. § 12-341, and costs pursuant to A.R.S. § 12-1840;

H. Interest on the foregoing costs and expenses at the highest rate provided by law from the date of entry of judgment until paid; and

I. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff YoHolla demands a Jury Trial on all issues and claims so triable.

DATED this 24th day of March, 2011.

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