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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

7 Attorneys for Defendants Charles S. DeVore and
8 Justin Hart

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **SOUTHERN DIVISION**

13 DON HENLEY and MIKE CAMPBELL,
14 Plaintiffs,

15 v.

16 CHARLES S. DEVORE and JUSTIN
17 HART,
18 Defendants.

Case No. SACV09-0481 JVS (RNBx)
**COUNTERCLAIMS OF CHARLES S.
DEVORE AND JUSTIN HART**
DEMAND FOR JURY TRIAL

19 CHARLES S. DEVORE and JUSTIN
20 HART,
21 Counterclaimants,

22 v.

23 DON HENLEY, MIKE CAMPBELL and
24 ROES 1-10 inclusive,
25 Counter-defendants.

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COUNTERCLAIM

Defendants and Counter-claimants Charles DeVore and Justin Hart allege as follows:

COMMON ALLEGATIONS

1. Charles DeVore is a member of the California Assembly and is running for the U.S. Senate seat currently occupied by Barbara Boxer. Justin Hart is a paid media consultant working with DeVore on his Senate campaign.

2. Counter-defendants Don Henley and Mike Campbell are successful songwriters and performers. Campbell is also a successful producer.

3. ROE defendants 1-10 are sued as Roe defendants because their true names and identities are not currently known but are believed to have participated in the wrongs detailed herein. When in discovery in this lawsuit their names or entity status are identified, these Counterclaims will be amended to so name the Roe defendants with their real names.

4. Henley is vocal and active in his support for liberal, political causes, including various environmental causes and Democratic political candidates. Indeed, Henley has given about \$750,000 to partisan, liberal causes over the years, including \$10,000 to Barack Obama and \$9,000 to DeVore’s soon-to-be opponent in a race for the U.S. Senate, Barbara Boxer. He also performs frequently at political fundraisers for partisan, liberal causes and candidates.

5. Henley also often uses his music to promote his political views. For example, his song “Boys of Summer,” which is the subject of Henley and Campbell’s copyright claim against DeVore and Hart, is a political tract set to pop music. On the surface, the song is a wistful look at an old romance, a fling between two kids, now grown, who have moved on with their lives. But the song also has a clear political message. As Henley says, the second verse of the song—the one with the famous line about seeing “a Dead Head sticker on a Cadillac”—was about the essential failure of Sixties’ politics: “I don’t think we changed a damn thing, frankly.... After all our marching and shouting and screaming

1 didn't work, we withdrew and became yuppies and got into the Me Decade." Likewise,
2 "All She Wants To Do Is Dance," a song performed by Henley though not written by him,
3 is about Americans' indifference to what Henley perceives to be the misconduct of the
4 Reagan administration in providing money and materials to the Nicaraguan Contras.

5 6. The dispute between the parties arose when DeVore and Hart created parodies
6 of "Boys of Summer" and "All She Wants To Do Is Dance," parodies that mocked the
7 liberal politics for which Henley and the songs stand. Although DeVore and Hart were
8 engaged in core political speech and protected parody, Counter-defendants threatened and
9 eventually filed lawsuits to silence the disfavored speech.

10 7. Counter-defendants also contacted You Tube, among other sites, where the
11 parodies were hosted and threatened suit against those third parties unless the parodies
12 were removed and public access to the parodies was terminated. You Tube and others on
13 information and belief removed the parodies in response to counter-defendants' threats.

14 8. DeVore and Hart's first parody takes on "Boys of Summer." It substitutes
15 Barack Obama for the singer's love interest and has Henley (and other outspoken liberal
16 celebrities) dreaming wistfully of the time before President Obama's election: "We will
17 never forget those nights/ We wonder if it was a dream/ Remember how you made us
18 crazy?/ Remember how we made you beam." The song asks whether the parties' naïve
19 love affair can survive the circumstances since, particularly President Obama's broken
20 promises and failure to deliver on the promised "hope."

21 9. DeVore and Hart's second parody takes aim at "All She Wants To Do Is
22 Dance." That song is a not-so-subtle attack on the U.S. government's policies in
23 Nicaragua. In essence, the song asserts that the American government was inserting itself
24 into Nicaragua and enriching itself through immoral foreign policy, policy which was
25 causing or at least contributing to violence in Nicaragua while the people of that country
26 simply demanded that America get out of their business. DeVore and Hart's parody is a
27 not-so-subtle attack on liberal policies in America. The song asserts that the American
28 government, through Barbara Boxer and her comrades in Washington, are inserting

1 themselves into the American economy and enriching the government and certain special
2 interests through immoral tax policy, policy which is causing or at least contributing to a
3 decrease in the American peoples' standard of living and the American people want Boxer
4 to get out of their business.

5 10. DeVore and Hart's parodies, then, are directed at songs promoting liberal
6 causes by a well-known liberal activist, who has injected himself and his music into the
7 political debate. Simply put, the parodies use political songs performed by a visible
8 supporter of DeVore's political opponents and turn the songs of their heads, promoting
9 conservative political philosophies rather than the liberal politics found in the originals. In
10 the process, the parodies mock the original songs, Henley, and the liberal politicians and
11 politics that he so vocally supports.

12 **FIRST CAUSE OF ACTION**

13 **(For declaratory relief of non-infringement of copyright against all Counter-**
14 **defendants)**

15 11. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if
16 set forth fully herein.

17 12. There is a dispute between the parties as to their rights and responsibilities
18 with regard to "Boys of Summer," "All She Wants to Do Is Dance," and the parodies
19 thereof. Counter-defendants assert that the parodies infringe the copyrights in the original
20 songs and are unlawful derivative works. Counter-defendants assert that DeVore and Hart
21 must stop making, displaying and using the parodies and that they have no right to make,
22 display or use other such parodies in the future.

23 13. DeVore and Hart contend that the parodies do not infringe Plaintiffs'
24 copyright, either directly, contributorily or vicariously, and are not unlawful derivative
25 works, and that they have the right to make, reproduce, copy, license, display, create
26 additional derivative works and/or use the existing parodies and have the right to make,
27 reproduce, copy, license, display, create additional derivative works and/or use other
28 similar parodies in the future. The parties' dispute is ripe for resolution by this Court.

1 14. The parties' dispute raises important questions, including foundational issues
2 of constitutional law and freedom of speech. Moreover, this issue is likely to arise again in
3 the future because DeVore and Hart—and countless others—believe they have the right to
4 make, display and use parodies, especially for political speech purposes, like the ones at
5 issue in this case

6 15. Therefore, DeVore and Hart ask this Court for a declaration stating the parties'
7 rights and responsibilities under the Copyright Act.

8 **SECOND CAUSE OF ACTION**

9 **(For declaratory relief of fair use against all Counter-defendants, 17 U.S.C. § 107)**

10 16. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if
11 set forth fully herein.

12 17. There is a dispute between the parties as to their rights and responsibilities
13 with regard to "Boys of Summer," "All She Wants to Do Is Dance," and the parodies
14 thereof. Counter-defendants assert that the parodies infringe the copyrights in the original
15 songs. Counter-defendants assert that DeVore and Hart must stop making, displaying and
16 using the parodies and that they have no right to make, display or use other such parodies in
17 the future.

18 18. DeVore and Hart contend that the parodies are core political speech, and that
19 the parodies are protected by the Fair Use Doctrine under the United States Copyright
20 Code, 17 U.S.C. § 107. DeVore and Hart contend that fair use principles allow them to
21 make, reproduce, copy, license, display, create additional derivative works and/or use the
22 existing parodies and have the right to make, reproduce, copy, license, display, create
23 additional derivative works and/or use other similar parodies in the future. The parties'
24 dispute is ripe for resolution by this Court.

25 19. The parties' dispute raises important questions, including important questions
26 of constitutional law. Moreover, this issue is likely to arise again in the future because
27 DeVore and Hart—and countless others—believe they have the right to make, display and
28 use parodies like the ones at issue in this case.

1 20. Therefore, DeVore and Hart ask this Court for a declaration stating the parties'
2 rights and responsibilities under the Copyright Act.

3
4 **THIRD CAUSE OF ACTION**

5 **(For declaratory relief that the First Amendment immunizes Defendants against all**
6 **Counter-defendants)**

7 21. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if
8 set forth fully herein.

9 22. There is a dispute between the parties as to their rights and responsibilities
10 with regard to “Boys of Summer,” “All She Wants to Do Is Dance,” and the parodies
11 thereof. Counter-defendants assert that the parodies infringe the copyrights in the original
12 songs. Counter-defendants assert that DeVore and Hart must stop making, displaying and
13 using the parodies and that they have no right to make, display or use other such parodies in
14 the future.

15 23. DeVore and Hart contend that the parodies are core political speech, and that
16 they are protected by the First Amendment to the United States Constitution even if the
17 parodies constitute copyright infringement and fall outside the bounds of the fair use
18 doctrine. DeVore and Hart contend that they have the right under the First Amendment to
19 make, reproduce, copy, license, display, create additional derivative works and/or use the
20 existing parodies and have the right to make, reproduce, copy, license, display, create
21 additional derivative works and/or use other similar parodies in the future. The parties'
22 dispute is ripe for resolution by this Court.

23 24. The parties' dispute raises important questions, including important questions
24 of constitutional law. Moreover, this issue is likely to arise again in the future because
25 DeVore and Hart—and countless others—believe they have the right to make, display and
26 use parodies like the ones at issue in this case.

27 25. Therefore, DeVore and Hart ask this Court for a declaration stating the parties'
28 rights and responsibilities under the Copyright Act and the United States Constitution.

FOURTH CAUSE OF ACTION

(For declaratory relief that there is no violation of the Lanham Act against Henley)

26. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if set forth fully herein.

27. There is a dispute between the parties as to their rights and responsibilities with regard to “Boys of Summer,” “All She Wants to Do Is Dance,” and the parodies thereof. Counter-defendants assert that the parodies create a false association or endorsement of Henley with the parodies and thereby cause consumer actionable confusion under the Lanham Act.

28. DeVore and Hart contend that the parodies do not create any confusion about Henley’s source or sponsorship of the parodies, and that there is no Lanham Act violation. The parties’ dispute is ripe for resolution by this Court.

29. This issue is likely to arise again in the future because DeVore and Hart—and countless others—believe they have the right to make, display and use parodies like the ones at issue in this case.

30. Therefore, DeVore and Hart ask this Court for a declaration stating the parties’ rights and responsibilities under the Lanham Act.

FIFTH CAUSE OF ACTION

(For declaratory relief that there is no violation of the Cal. Bus. & Prof. Code § 17200 against all Counter-defendants)

31. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if set forth fully herein.

32. There is a dispute between the parties as to their rights and responsibilities with regard to “Boys of Summer,” “All She Wants to Do Is Dance,” and the parodies thereof. Counter-defendants assert that the parodies create a false association or endorsement of Henley with the parodies and thereby cause consumer actionable confusion under the Lanham Act.

1 33. DeVore and Hart contend that the parodies do not create any confusion about
2 Henley's source or sponsorship of the parodies, and that there is no violation of § 17200 of
3 the California Business and Professions Code. The parties' dispute is ripe for resolution by
4 this Court.

5 34. This issue is likely to arise again in the future because DeVore and Hart—and
6 countless others—believe they have the right to make, display and use parodies like the
7 ones at issue in this case.

8 35. Therefore, DeVore and Hart ask this Court for a declaration stating the parties'
9 rights and responsibilities under the § 17200.

10 **SIXTH CAUSE OF ACTION**

11 **(For damages for violations of 17 U.S.C. § 512(f) against all Counter-defendants)**

12 36. DeVore and Hart incorporate by reference paragraphs 1 through 10 above as if
13 set forth fully herein.

14 37. Counter-defendants represented to third parties, such as You Tube, that the
15 parodies were infringing works in order to get those third parties to remove the parodies
16 from the third party web sites.

17 38. Counter-defendants subjectively and objectively knew that the representation
18 – specifically, that they owned the copyrights to said works and/or that the works were
19 infringing and not a fair use – made to the third parties was a false statement and that it was
20 a material statement made to the third parties to secure removal of the parodies or eliminate
21 public access to the parodies.

22 39. DeVore and Hart have been injured by these statements and are entitled to
23 damages, including costs and attorneys' fees, for these knowingly material
24 misrepresentations.

PRAYER FOR RELIEF

1
2 1. For a declaration that:

3 a. DeVore and Hart’s parodies of “Boys of Summer” and “All She Wants
4 to Do Is Dance” are permissible under the fair use doctrine and therefore do not infringe the
5 purported copyrights of Don Henley and Mike Campbell, either directly, vicariously or
6 contributorily;

7 b. DeVore and Hart’s parodies of “Boys of Summer” and “All She Wants
8 to Do Is Dance” constitute protected speech under the First Amendment to the United
9 States Constitution, and were DeVore and Hart found to be liable under the Copyright Act
10 or the Lanham Act, such application of those federal statutes would be a violation of the
11 First Amendment to the United States Constitution;

12 c. DeVore and Hart’s parodies of “Boys of Summer” and “All She Wants
13 to Do Is Dance” constitute protected speech under the First Amendment to the United
14 States Constitution, and were DeVore and Hart found to be liable under the UCL, such
15 application of the California statute would be a violation of the First Amendment to the
16 United States Constitution as made applicable to the states through the Fourteenth
17 Amendment;

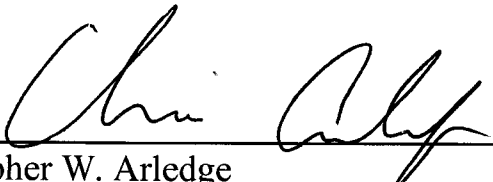
18 2. For damages;

19 3. For attorneys’ fees and costs of suit;

20 4. For such other relief as the Court deems just and proper.

21 Dated: July 15, 2009

TURNER GREEN AFRASIABI & ARLEDGE LLP

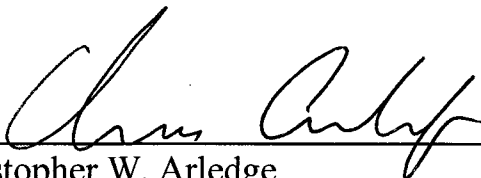
22
23
24 By: 
25 Christopher W. Arledge
26 Attorneys for Defendants, Charles S. DeVore and
27 Justin Hart
28

DEMAND FOR JURY TRIAL

Defendants and Counterclaimants hereby demand trial by jury of all issues so triable under the law.

Dated: July 15, 2009

TURNER GREEN AFRASIABI & ARLEDGE LLP

By: 
Christopher W. Arledge
Attorneys for Defendants, Charles S. DeVore and Justin Hart

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 535 Anton Boulevard, Suite 850, Costa Mesa, California 92626.

On July 16, 2009 I served the document (s) described as **COUNTERCLAIMS OF CHARLES S. DEVORE AND JUSTIN HART** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Charles S. Barquist
Morrison & Foerster LLP
555 West Fifth Street
Los Angeles, CA 90013
Attorneys for Plaintiff Don Henley and Mike Campbell

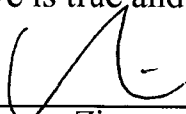
(BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY FAX) I transmitted, pursuant to Rules 2001 et seq., the above-described document by facsimile machine (which complied with Rule 2003 (3), to the above-listed fax number (s). The transmission originated from facsimile phone number (714) 434-8756 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

(BY OVERNIGHT DELIVERY) I caused said envelope (s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee (s).

Executed on July 16, 2009 at Costa Mesa, California.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Vanessa Zinn