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8 UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)

10

11 LYNCH MARKS, LLC,
 12 Plaintiff,

13 v.

14 VERMONSTER, LLC,
 15 Defendants.

16 VERMONSTER, LLC,
 17 Counterclaim Plaintiff,

18 v.

19 LYNCH MARKS, LLC,
 20 Counterclaim Defendant.

CASE NO. 05-5178 BZ

**LYNCH MARKS, LLC.'S REPLY TO
 COUNTERCLAIM**

21

22 Plaintiff and counter-defendant, Lynch Marks, LLC ("Lynch Marks") replies as follows to
 23 the Counterclaim dated February 27, 2006 ("Counterclaim") of Defendant and Counterclaimant
 24 Vermonster ("Vermonster").

- 25 1. Admitted.
- 26 2. Admitted.
- 27 3. Lynch Marks admits this Court has subject matter jurisdiction. Except as expressly
- 28 admitted herein, Lynch Marks denies each and every allegation in Paragraph 3 of the Counterclaim.

1 4. Lynch Marks admits that Vermonster designed and developed an application for the
2 creation of FedEx shipping labels (“PSIShip v1) with Lynch Marks’ input and direction. Except as
3 expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 4 of the
4 Counterclaim.

5 5. Lynch Marks is without knowledge or information sufficient to form a belief as to
6 the truth of the allegations in paragraph 5 of the Counterclaim, in that the phrase “core components”
7 is vague and ambiguous, and on that basis, denies each and every allegation in Paragraph 5.

8 6. Admitted.

9 7. Lynch Marks admits that the parties agreed to the payment schedule for PSIShip
10 development performed pursuant to the March 11, 2003 Term Sheet. Except as expressly admitted
11 herein, Lynch Marks denies each and every allegation in Paragraph 7 of the Counterclaim.

12 8. Lynch Marks is without knowledge or information sufficient to form a belief as to
13 the truth of the allegations in paragraph 8 of the Counterclaim, and on that basis denies each and
14 every allegation contained therein.

15 9. Lynch Marks admits that Vermonster was tasked to design and develop a module to
16 import and process EDI-formatted electronic invoices from FedEx, pursuant to an agreement with
17 Lynch Marks, but that Vermonster failed to design and develop the module as agreed. Except as
18 expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 9 of the
19 Counterclaim.

20 10. Lynch Marks admits that it paid Vermonster \$18,000 for the Fed Ex EDI-processing
21 module, and agreed to pay a 15 percent royalty pursuant to the March 11, 2003 Term Sheet.
22 Except as expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 10
23 of the Counterclaim.

24 11. Lynch Marks admits that Vermonster endeavored to build the Fed Ex EDI
25 processing module, but that the module ultimately did not function as promised.

26 12. Lynch Marks is without knowledge or information sufficient to form a belief as to
27 the truth of the allegations in paragraph 12 of the Counterclaim, in that the phrase “modifications
28 and enhancements” is vague and ambiguous, and on that basis denies each and every allegation

1 contained therein.

2 13. Lynch Marks is without knowledge or information sufficient to form a belief as to
3 the truth of the allegations in paragraph 13 of the Counterclaim, in that the phrase “core
4 components” is vague and ambiguous, and on that basis denies each and every allegation contained
5 therein.

6 14. Admitted

7 15. Admitted.

8 16. Admitted.

9 17. Denied.

10 18. Admitted.

11 19. Lynch Marks admits that in the fall of 2003, Vermonster proposed and discussed
12 with Lynch Marks a completely new version of PSIShip. Except as expressly admitted herein,
13 Lynch Marks denies each and every allegation in Paragraph 19 of the Counterclaim.

14 20. Lynch Marks is without knowledge or information sufficient to form a belief as to
15 the truth of the allegations in paragraph 20 of the Counterclaim, in that the phrase “core
16 components” is vague and ambiguous, and on that basis denies each and every allegation contained
17 therein.

18 21. Lynch Marks admits that there were discussions between it and Vermonster relating
19 to a PSIShip version 3. Except as expressly admitted herein, Lynch Marks denies each and every
20 allegation in Paragraph 21 of the Counterclaim.

21 22. Lynch Marks is without knowledge or information sufficient to form a belief as to
22 the truth of the allegations in paragraph 22 of the Counterclaim, in that the phrase “core
23 components” is vague and ambiguous, and on that basis denies each and every allegation contained
24 therein.

25 23. Denied.

26 24. Denied.

27 25. Denied

28 26. Lynch Marks admits that a version of Label Server v.3 was installed in August 2004

1 at a client, but that version did not include any support for Fed Ex. Except as expressly admitted
2 herein, Lynch Marks denies each and every allegation in Paragraph 26 of the Counterclaim.

3 27. Lynch Marks admits that it agreed to pay a revised total of \$135,000, plus a 15
4 percent royalty pursuant to the March 11, 2003 Term Sheet in order for Vermonster to complete
5 development Label Server v.3 by October 2004, which Vermonster failed to do. Except as
6 expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 27 of the
7 Counterclaim.

8 28. Lynch Marks admits that Vermonster has delivered multiple versions of Label Server
9 v.3, but that those versions did not perform as required under the parties' agreement. Except as
10 expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 21 of the
11 Counterclaim.

12 29. Lynch Marks admits that it has not paid Vermonster the entire \$135,000 for Label
13 Server v3, in that Label Server v3 did not and does not function as Vermonster represented. Except
14 as expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 29 of the
15 Counterclaim.

16 30. Lynch Marks admits that between November 22, 2005 and December 14, 2005,
17 Vermonster sent Lynch Marks emails regarding Label Server v3. Except as expressly admitted
18 herein, Lynch Marks denies each and every allegation in Paragraph 30 of the Counterclaim.

19 31. Denied.

20 32. Denied.

21 33. Denied.

22 34. Denied.

23 35. Denied.

24 36. Admitted.

25 37. Lynch Marks admits that Vermonster has an obligation to provide ongoing support
26 services for the applications it developed for Lynch Marks. Except as expressly admitted herein,
27 Lynch Marks denies each and every allegation in Paragraph 37 of the Counterclaim.

28 38. Admitted.

1 39. Denied.

2 40. Lynch Marks is without knowledge or information sufficient to form a belief as to
3 the truth of the allegations in paragraph 40 of the Counterclaim, in that the phrase “development
4 services” is vague and ambiguous, and on that basis denies each and every allegation contained
5 therein.

6 41. Lynch Marks is without knowledge or information sufficient to form a belief as to
7 the truth of the allegations in paragraph 40 of the Counterclaim, in that the phrase “potential value”
8 is vague and ambiguous, and on that basis denies each and every allegation contained therein.

9 42. Admitted.

10 43. Lynch Marks admits that on October 12, 2005, Vermonster sent an email explaining
11 that the parties needed to “work out compensation” before distributing the specification to other
12 vendors. Except as expressly admitted herein, Lynch Marks denies each and every allegation in
13 Paragraph 43 of the Counterclaim.

14 44. Lynch Marks admits that on November 10, 2005, Vermonster sent an email
15 requesting that Lynch Marks “please not share [the specification] with anyone.” Except as
16 expressly admitted herein, Lynch Marks denies each and every allegation in Paragraph 44 of the
17 Counterclaim.

18 45. Denied.

19 46. Denied.

20 47. Admitted.

21 48. Admitted.

22 49. Admitted, although Lynch Marks is informed and believes that Vermonster has
23 never requested any such accounting.

24 50. Denied.

25 51. Lynch Marks repeats its responses to all preceding paragraphs as though fully set
26 forth herein by this reference.

27 52. Lynch Marks admits that the parties agreed to the payment schedule for EDI Server
28 development pursuant to the March 11, 2003 Term Sheet. Except as expressly admitted herein,

1 Lynch Marks denies each and every allegation in Paragraph 52 of the Counterclaim

2 53. Lynch Marks admits that the parties agreed to the payment schedule for Label Server
3 v3 development pursuant to the March 11, 2003 Term Sheet. Except as expressly admitted herein,
4 Lynch Marks denies each and every allegation in Paragraph 53 of the Counterclaim.

5 54. Admitted.

6 55. Admitted.

7 56. Denied.

8 57. Denied.

9 58. Denied.

10 59. Lynch Marks admits that in paragraph 59 of the Counterclaim, Vermonster alleges to
11 seek rescission of the Label Server v3 contract, voiding of the Assignment of Intellectual Property
12 Rights, and return of the full and exclusive intellectual property rights in Label Server v3 to
13 Vermonster, but specifically denies that Vermonster is entitled to such relief.

14 60. Lynch Marks repeats its responses to all preceding paragraphs as though fully set
15 forth herein by this reference.

16 61. Lynch Marks is without knowledge or information sufficient to form a belief as to
17 the truth of the allegations in paragraph 61 of the Counterclaim, in that the phrase “enhancements”
18 is vague and ambiguous, and on that basis denies each and every allegation contained therein.

19 62. Denied.

20 63. Denied.

21 64. Lynch Marks repeats its responses to paragraphs 1 through 50 as though fully set
22 forth herein by this reference.

23 65. Admitted.

24 66. Lynch Marks is without knowledge or information sufficient to form a belief as to
25 the truth of the allegations in paragraph 66 of the Counterclaim, and on that basis denies each and
26 every allegation contained therein.

27 67. Denied.

28 68. Denied.

1 69. Denied.

2 70. Denied.

3 71. Lynch Marks admits that in paragraph 71 of the Counterclaim, Vermonster alleges to
4 seek rescission of the Label Server v3 contract, voiding of the Assignment of Intellectual Property
5 Rights, and return of the full and exclusive intellectual property rights in Label Server v3 to
6 Vermonster, but specifically denies Vermonster is entitled to such relief. Except as expressly
7 admitted herein, Lynch Marks denies each and every allegation in Paragraph 71 of the
8 Counterclaim.

9 72. Lynch Marks repeats its responses to all preceding paragraphs as though fully set
10 forth herein by this reference.

11 73. Admitted.

12 74. Admitted.

13 75. Admitted.

14 76. Admitted.

15 77. Admitted.

16 78. Admitted.

17 79. Admitted.

18 80. Denied.

19 81. Lynch Marks admits that Vermonster seeks the relief claimed in paragraph 81 of the
20 Complaint, but specifically denies Vermonster is entitled to such relief. Except as expressly
21 admitted herein, Lynch Marks denies each and every allegation in Paragraph 81 of the
22 Counterclaim.

23 82. Lynch Marks repeats its responses to all preceding paragraphs as though fully set
24 forth herein by this reference.

25 83. Denied.

26 84. Lynch Marks admits that Vermonster has requested that it not share the specification
27 with third parties. Except as expressly admitted herein, Lynch Marks denies each and every
28 allegation in Paragraph 84 of the Counterclaim.

1 85. Denied.

2 86. Denied.

3 87. Denied.

4 88. Lynch Marks denies all other allegations in the Counterclaim not hereinbefore
5 admitted, controverted or denied.

6 89. Answering the “Prayer” of the Counterclaim, Lynch Marks specifically denies that
7 Vermonster suffered damages and denies that Vermonster is entitled to any relief against Lynch
8 Marks, and denies each and every allegation in the Counterclaim not otherwise addressed.

9 **FIRST AFFIRMATIVE DEFENSE**

10 As a separate and first affirmative defense to the Counterclaim, and to each claim for relief
11 against Lynch Marks set forth therein, Lynch Marks alleges that the Counterclaim fails to state facts
12 sufficient to support any claim upon which relief can be granted against Lynch Marks.

13 **SECOND AFFIRMATIVE DEFENSE**

14 As a separate and second affirmative defense to the Counterclaim, and to each claim for
15 relief against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
16 Vermonster is barred in whole or in part because Vermonster has failed to mitigate its damages, if
17 any.

18 **THIRD AFFIRMATIVE DEFENSE**

19 As a separate and third affirmative defense to the Counterclaim and to each claim for relief
20 against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
21 Vermonster is barred in whole or in part by the doctrine of unclean hands.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 As a separate and fourth affirmative defense to the Counterclaim, and to each claim for
24 relief against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
25 Vermonster is barred in whole in part by the applicable statutes of limitations.

26 **FIFTH AFFIRMATIVE DEFENSE**

27 As a separate and fifth affirmative defense to the Counterclaim, and to each claim for relief
28 against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that

1 Vermonster is barred in whole in part because Vermonster has waived its claims asserted in the
2 Counterclaim.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 As a separate and sixth affirmative defense to the Counterclaim, and to each claim for relief
5 against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
6 Vermonster is estopped from asserting its claims.

7 **SEVENTH AFFIRMATIVE DEFENSE**

8 As a separate and seventh affirmative defense to the Counterclaim, and to each claim for
9 relief against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
10 Vermonster breached its obligations under any agreement or contract governing the parties'
11 relationship, thereby discharging any obligations of Lynch Marks to Vermonster.

12 **EIGHTH AFFIRMATIVE DEFENSE**

13 As a separate and eighth affirmative defense to the Counterclaim, and to each claim for
14 relief against Lynch Marks set forth therein, Lynch Marks alleges upon information and belief that
15 the Counterclaim is barred, in whole or part, by the Statute of Frauds.

16 Lynch Marks reserves its right to supplement its Reply herein, including but not limited to
17 adding additional affirmative defenses after further discovery and investigation has been conducted.

18 WHEREFORE, LYNCH MARKS prays as follows:

19 1. That Vermonster take nothing from Lynch Marks by reason of the Counterclaim and
20 that judgment be entered in favor of Lynch Marks, dismissing the counterclaim in its entirety and
21 with prejudice;

22 2. For attorneys' fees and costs incurred herein if, and to the fullest extent permitted by
23 law; and

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

Dated: March 21, 2006

CARR & FERRELL *LLP*

By /S/
BRAD W. BLOCKER
Attorneys for Plaintiff
LYNCH MARKS, LLC

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JURY DEMAND

Pursuant to Fed. Rule of Civ. Pro. 38(b), LYNCH MARKS demands a jury trial of all such claims subject to a jury trial.

Dated: March 21, 2006

CARR & FERRELL *LLP*

By //S//
BRAD W. BLOCKER
Attorneys for Plaintiff
LYNCH MARKS, LLC