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12 DAVID RATH and KARA WELKER

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 DAVID RATH and KARA
16 WELKER,

Case No.: 2:18-cv-09624

17 Plaintiffs,

18 vs.

COMPLAINT

19 DEFY MEDIA, LLC, a Delaware
20 limited liability company;
21 MATTHEW DIAMOND, an
22 individual; KEITH RICHMAN, an
23 individual; and DOES 1 through 20,
24 inclusive,

25 Defendants.
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Plaintiffs David Rath and Kara Welker hereby allege as follows:

PARTIES

1. Plaintiff David Rath is, and at all relevant times hereto was, a citizen of the County of Los Angeles, State of California.

2. Plaintiff Kara Welker is, and at all relevant times hereto was, a citizen of the County of Los Angeles, State of California.

3. Defendant Defy Media, LLC is, and at all relevant times hereto was, a Delaware limited liability company with its principal place of business in New York City, New York. Upon information and belief, all of Defy Media, LLC’s members are citizens of the State of New York, Delaware and/or Connecticut.

4. Defendant Matthew Diamond is the Chief Executive Officer of Defy Media and is, and at all relevant times hereto was, a citizen of the County of Fairfield, State of Connecticut.

5. Defendant Keith Richman is the President of Defy Media and is, and at all relevant times hereto was, a citizen of the County of Suffolk, State of New York.

6. Plaintiffs are ignorant of the true names and capacities of defendants named herein as Does 1 through 20, inclusive. Plaintiff is informed and believes, and thereon alleges that does 1 through 20 are liable, in whole or in part, for the claims asserted in this Complaint against the Defendants. When Plaintiff learns the true identities and capacities of Does 1 through 20, Plaintiff will seek leave of the Court to amend this Complaint to allege the true names and capacities of Does 1 through 20.

7. Plaintiffs are informed and believe and thereon allege that at all relevant times, each defendant was the principal, agent, or employee of each other defendant, and acted within the scope of that relationship.

1 **JURISDICTION AND VENUE**

2 8. This Court has jurisdiction over this dispute and over this action
3 pursuant to 28 U.S.C. § 1332. There is a complete diversity of citizenship between
4 the parties, and the amount in controversy exceeds \$75,000, exclusive of attorneys’
5 fees and costs.

6 9. Venue is proper in the United States District Court for the Central
7 District of California pursuant to 28 U.S.C. § 1391(a) because, among other things,
8 a substantial part of the events, omissions, transactions, occurrences and/or damages
9 giving rise to the claim occurred in this judicial district.

10 **FACTUAL ALLEGATIONS**

11 10. Plaintiffs David Rath and Kara Welker owned and operated talent
12 agency Generate Holdings, Inc. and its related subsidiaries (collectively,
13 “Generate”). As a broad overview, Generate’s business operated by managing and
14 placing its roster of clients in entertainment or commercial projects, collecting the
15 revenues due to said clients, taking a small management fee and remitting the
16 remainder to the appropriate parties, including without limitation the respective
17 client. To safeguard these client funds, Plaintiffs were careful to have the funds
18 deposited in a segregated and protected client trust account.

19 11. In or about 2011, the assets and outstanding membership interests of
20 Generate were purchased by AdGen, LLC. Plaintiffs are informed and believe that
21 AdGen, LLC is a wholly owned subsidiary of Alloy Digital, LLC. Plaintiffs then
22 became employees of Alloy Digital each pursuant to a separate written Employee
23 Covenants Agreement. Plaintiffs also became equity holding members of Alloy
24 Digital Management, LLC each pursuant to a separate written Equity Incentive
25 Letter Agreement. Alloy Digital Management, LLC is the separate management
26 arm of the Alloy Digital related family of companies, including AdGen, LLC and
27 Generate. Plaintiffs are informed and believe that Defendants Diamond and
28 Richman are also equity holding members of Alloy Digital Management, LLC.

1 12. In or about 2013, Alloy Digital was merged into the entity Defendant
2 Defy Media, LLC, which was a joint venture between Alloy Digital and Break, Inc.
3 Defy Media assumed the obligations under Plaintiffs' respective Employee
4 Covenants Agreement and Equity Incentive Letter Agreement.

5 13. Plaintiffs continued to operate Generate and continued to utilize the
6 Generate name and trademarks, just as they had previously done, but now under the
7 umbrella of Defy Media.

8 14. After merging with Alloy Digital and Defy Media, certain accounting
9 functions previously performed by Plaintiffs were assumed by Defy Media
10 personnel. Among these accounting functions assumed by Defy Media were the
11 collection of fees generated by Plaintiff's/Generate's roster of clients and the
12 remittance of those fees to the respective clientele after deducting the appropriate
13 management fee.

14 15. Beginning in approximately 2017, Plaintiffs commenced discussions
15 with Defendants about extricating Plaintiffs and Generate from the Defy Media
16 umbrella so that Plaintiffs could operate their business (either through Generate or a
17 subsequent company) independently of a parent company. Plaintiffs requested from
18 Diamond and Richman that Defy Media spin off Generate and/or Plaintiffs so as to
19 effectuate a separation/divorce between Defy Media and Plaintiffs. Plaintiffs also
20 requested that Defendants provide them with a profit and loss statement on their
21 business operations for at least the prior 12 months.

22 16. Diamond and Richman responded with assurances that they were
23 working on a plan for separation so as to achieve Plaintiffs' aim of operating their
24 business independently, but needed a bit more time to ensure the transition went as
25 smoothly as possible. Diamond and Richman also responded that they were
26 working on putting together the requested financial information and would be able
27 to have it to Plaintiffs shortly. Diamond and Richman also promised and orally
28 agreed that they would cause Defy Media or themselves individually to pay

1 Plaintiffs increased salary, compensation and bonuses through the end of 2018
2 totaling at a minimum over \$100,000 each as pro-rated through the end of 2018, as
3 an incentive to have Plaintiffs stay with Defy Media until an exit strategy could be
4 arranged.

5 17. Plaintiffs are informed and believe that Diamond and Richman knew
6 or should have known that these representations were false when made and that
7 neither Diamond nor Richman had any intention of putting together a separation
8 plan for Plaintiffs or paying Plaintiffs any of the promised salary, compensation and
9 bonuses and merely made these misrepresentations in order to keep Plaintiffs under
10 the Defy Media umbrella so as to book their revenue and artificially inflate Defy
11 Media's accountings for use in obtaining additional emergency financing for Defy
12 Media or a sale of the company. Plaintiffs are also informed and believe that
13 neither Diamond nor Richman had any intention of providing Plaintiffs with the
14 requested financial information, as such would have alerted Plaintiffs to the true
15 state of Defy Media's business operations and would have hastened Plaintiffs
16 departure.

17 18. As a result of these assurances and in the hopes of working out a
18 mutually agreeable separation, Plaintiffs were lulled into not immediately
19 unilaterally terminating their relationship with Defy Media and separating on their
20 own accord.

21 19. Suddenly, with no prior notice, on November 6, 2018, Defendants
22 notified Plaintiffs that Defy Media was ceasing all further operations. While the
23 notice stated that the Defy Media would be shut down effective January 2, 2018, in
24 order to comply with the WARN Act, Defendants failed to abide by this and simply
25 shut down the company immediately.

26 20. Plaintiffs were thus left to scramble to continue servicing their existing
27 clients but with no infrastructure or equipment to do so – all of which was still tied
up with Defy Media. Plaintiffs also learned that Defy Media continued to hold

1 approximately \$200,000 that was due to Plaintiffs’ clients. However, to Plaintiffs
2 dismay, they discovered that Defy Media had simply placed this \$200,000 into its
3 general operating account – not in a protected, segregated client trust account.
4 These client funds are now subject to the claims of Defy Media’s many creditors
5 and may be tied up in a bankruptcy proceeding.

6 21. Plaintiffs are informed and believe that Diamond and Richman
7 deliberately placed these client funds in Defy Media’s general operating account
8 instead of in the proper client trust account in order to artificially inflate the
9 revenues and assets of Defy Media to make the company seem more attractive for
10 either further financing or sale.

11 22. Due to Defendants’ conduct as described above, Plaintiffs must fund
12 out of their own pocket numerous business costs to continue servicing their clients
13 and continue their business operations. Had Plaintiffs been advised of the true state
14 of Defy Media’s business and finances (and the same not fraudulently concealed
15 from them) and had Plaintiffs not reasonably relied on Diamond and Richman’s
16 fraudulent misrepresentations about developing an exit strategy for Plaintiffs,
17 Plaintiffs would have immediately implemented an exit from Defy Media’s
18 umbrella in a more efficient and cost-effective manner and/or would have located
19 another company to absorb and incorporate Plaintiff’s business and talent roster.
20 Plaintiffs are now left to fund their business operations out of their own personal
21 pockets and to engage in merger or buy-out discussions with potential suitors on a
22 rushed basis and for a likely worse deal than they otherwise could have obtained but
23 for Defendants’ fraudulent misrepresentations.

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FIRST CAUSE OF ACTION
(Fraud – Against All Defendants)

23. Plaintiffs reallege and incorporate by reference each and every allegation set forth above, as though fully set forth herein.

24. Defendants committed actionable fraud against Plaintiffs by way of affirmative misrepresentations and concealments of material facts as alleged in detail in the preceding paragraphs.

25. Defendants made the foregoing misrepresentations and concealments despite being aware of their falsity.

26. Plaintiffs reasonably and actually relied upon Defendants’ misrepresentations and concealments.

27. As a direct and proximate result of such conduct, Plaintiffs have suffered, and will continue to suffer, damages in an amount to be proven at trial.

28. Defendants’ acts were undertaken intentionally and in conscious disregard of Plaintiffs’ rights. In addition, Defendants’ acts were malicious, oppressive, and/or fraudulent. Plaintiffs should be awarded punitive and exemplary damages sufficient to punish Defendants and deter similar future conduct.

SECOND CAUSE OF ACTION
(Breach Of Oral Agreement – Against All Defendants)

29. Plaintiff realleges and incorporates by reference each and every allegation set forth above, as though fully set forth herein.

30. Defendants orally agreed to pay Plaintiffs increased salary, compensation and bonuses through the end of 2018 totaling at a minimum over \$100,000 to each Plaintiff as pro-rated through the end of 2018, as an incentive to have Plaintiffs stay with Defy Media until an exit strategy could be arranged.

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FOURTH CAUSE OF ACTION

(Breach Of The Implied Covenant Of Good Faith And Fair Dealing—Against All Defendants)

39. Plaintiffs reallege and incorporate by reference each and every allegation set forth above, as though fully set forth herein.

40. Plaintiffs and Defy had a contractual relationship through the respective Employee Covenants Agreement and Equity Incentive Letter Agreement.

41. Plaintiffs did all or substantially all of the significant things required of them under the agreements, except insofar as any such obligations have been prevented, excused or waived by the conduct of Defendants.

42. Defendants have unfairly interfered with Plaintiffs’ rights to receive the benefits of the aforementioned agreements, by among other things, taking the actions described above.

43. As a direct and proximate result of Defendants’ ongoing breaches and conduct, Plaintiffs have suffered damages and will continue to suffer damages in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

(Negligence – Against All Defendants)

44. Plaintiffs incorporate by reference and reallege each and every allegation set forth above, as though fully set forth herein.

45. By virtue of the relationship that existed between Plaintiffs and Defendants, Defendants owed Plaintiffs a duty of care to use such skill, prudence, and diligence as other similarly situated professionals commonly possess and exercise.

46. For the reasons set forth above, Defendants and each of them failed to exercise reasonable care and skill in undertaking to manage the business affairs between Plaintiffs and Defendants in breach of their duty to exercise reasonable care and skill in such endeavors.

1 55. Accordingly, based on the principals of total and/or equitable and/or
2 implied indemnity and/or comparative fault, Defendants (and each of them) is
3 obligated to fully or partially indemnify Plaintiffs for any sums Plaintiffs have been
4 or may be required to pay as a result of the aforementioned claims.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff respectfully prays for the following relief:

- 7 1. For compensatory and/or restitutionary damages in a sum according to
8 proof;
- 9 2. For exemplary and punitive damages;
- 10 3. For preliminary and permanent injunctive relief;
- 11 4. For complete or partial indemnity in a sum according to proof;
- 12 5. For an accounting;
- 13 6. For attorneys' fees and costs;
- 14 7. For pre-judgment interest;
- 15 8. For such other and further relief as the Court deems just and proper.

16 Respectfully submitted,

17 Dated: November 14, 2018

EARLY SULLIVAN WRIGHT
GIZER & McRAE LLP

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20
21 By: Devin A. McRae
22 Devin A. McRae
23 Peter Scott
24 Attorneys for Plaintiffs
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