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*Attorney for Defendants System Dialing LLC,  
Jordan McLean, and Amir Ziv*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	
DENARDO COLEMAN	:
as Guardian for	:
ORNETTE COLEMAN,	:
	:
Plaintiff,	:
	:
-against-	:
	:
	:
SYSTEM DIALING LLC; JORDAN McLEAN;	:
AMIR ZIV; and JOHN DOES 1-10,	:
	:
Defendants.	:
-----X	

15 Civ. 03868 (DLC)

**ANSWER**

Defendants System Dialing LLC (“System Dialing”), Jordan McLean (“McLean”), and Amir Ziv (“Ziv”) (collectively, the “Defendants”), by and through their counsel, Frigon Maher & Stern LLP, as and for their Answer to the Complaint, aver as follows:

**NATURE OF ACTION**

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Complaint, except to admit that the late Ornette Coleman (“Coleman”) was a renowned musician and composer and that Denardo Coleman (“Plaintiff”) is his adult son.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Complaint.

3. Deny the allegations in paragraph 3 of the Complaint, except to admit that Plaintiff seeks damages and injunctive relief under 17 U.S.C. § 1101; 15 U.S.C. § 1125(a); N.Y. Gen. Bus. Law §§ 349-350; and New York common law.

4. Deny the allegations in paragraph 4 of the Complaint, except to admit and aver that Defendant System Dialing has, with authorization, consent and by its rights, reproduced, publicly distributed and sold copies of audio recordings of joint, collaborative musical performances by McLean, Ziv and Coleman playing together in a studio setting (the “New Vocabulary” recordings), by means of Defendant System Dialing’s website located at [www.systemdialingrecords.com](http://www.systemdialingrecords.com), as well as through physical delivery channels.

5. Deny the allegations in paragraph 5 of the Complaint.

6. Deny the allegations in paragraph 6 of the Complaint, except to admit that Plaintiff seeks damages and injunctive relief.

#### **JURISDICTION AND VENUE**

7. Deny the allegations in paragraph 7 of the Complaint that Plaintiff presents this Court with a justiciable controversy over which it has subject matter jurisdiction and aver that the claims set forth in the Complaint are subject to binding arbitration pursuant an arbitration clause contained in a written contract executed by and between Defendants and Coleman, which contract is binding upon Plaintiff.

8. Deny the allegations in paragraph 8 of the Complaint, except to admit and aver that Defendants McLean and Ziv had made audio recordings of joint, collaborative musical performances by McLean, Ziv and Coleman and, further, that Defendant System Dialing has reproduced, publicly distributed and sold copies of such recordings in New York State and, further, that Defendant System Dialing transacts business in New York State.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Complaint, except to admit that the back cover of the vinyl LP entitled “New Vocabulary” contains, *inter alia*, the phrases: “Recorded in NYC” and “Engineered by Amir Ziv.”

11. Deny the allegations in paragraph 11 of the Complaint that Plaintiff presents claims properly before this Court and aver that the claims set forth in the Complaint are subject to binding arbitration pursuant an arbitration clause contained in a written contract executed by and between Defendants and Coleman, which contract is binding upon Plaintiff.

**PARTIES**

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Complaint, except to admit that Coleman was a renowned musician and composer.

13. Admit the allegations in paragraph 13 of the Complaint.

14. Deny the allegations in paragraph 14 of the Complaint, except to admit that Defendant McLean is an individual.

15. Admit the allegations in paragraph 15 of the Complaint.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 of the Complaint.

**DEFENDANTS’ UNLAWFUL ACTS**

17. Deny the allegations in paragraph 17 of the Complaint, except to admit and aver that Defendants McLean and Ziv attended numerous musical sessions and rehearsals at the home of

Coleman in New York City in or around July 2009.

18. Deny the allegations in paragraph 18 of the Complaint, except to admit and aver that Defendants McLean and Ziv had made audio recordings of joint, collaborative musical performances by McLean, Ziv and Coleman, playing together in a studio setting in a dedicated music room in Coleman's home, and that such recordings were made with Coleman's knowledge and consent.

19. Deny the allegations in paragraph 19 of the Complaint, except to admit and aver that Defendant System Dialing has reproduced, publicly distributed and sold copies of the "New Vocabulary" recordings with the band name "New Vocabulary" and with an eponymous album title, and that such actions were with Coleman's consent.

20. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the Complaint.

21. Deny the allegations in paragraph 21 of the Complaint, except to admit that Plaintiff Denardo Coleman and his representatives contacted Defendants and demanded, *inter alia*, that Defendants cease the further use or exploitation of the "New Vocabulary" recordings.

22. Admit the allegations in paragraph 22 of the Complaint.

23. Deny the allegations in paragraph 23 of the Complaint.

### **COUNT I**

24. In response to paragraph 24 of the Complaint, Defendants repeat and reaver their responses to paragraphs 1-23 of the Complaint as if fully set forth herein.

25. Deny the allegations in paragraph 25 of the Complaint.

26. Deny the allegations in paragraph 26 of the Complaint.

## COUNT II

27. In response to paragraph 27 of the Complaint (misidentified by Plaintiff as paragraph 26), Defendants repeat and reaver their responses to paragraphs 1-26 of the Complaint as if fully set forth herein.

28. Deny the allegations in paragraph 28 of the Complaint (misidentified by Plaintiff as paragraph 27).

29. Deny the allegations in paragraph 29 of the Complaint (misidentified by Plaintiff as paragraph 28).

30. Deny the allegations in paragraph 30 of the Complaint (misidentified by Plaintiff as paragraph 29).

31. Deny the allegations in paragraph 31 of the Complaint (misidentified by Plaintiff as paragraph 30).

32. Deny the allegations in paragraph 32 of the Complaint (misidentified by Plaintiff as paragraph 31).

## COUNT III

33. In response to paragraph 33 of the Complaint (misidentified by Plaintiff as paragraph 32), Defendants repeat and reaver their responses to paragraphs 1-32 of the Complaint as if fully set forth herein.

34. Deny the allegations in paragraph 34 of the Complaint (misidentified by Plaintiff as paragraph 33).

35. Deny the allegations in paragraph 35 of the Complaint (misidentified by Plaintiff as paragraph 34).

#### COUNT IV

36. In response to paragraph 36 of the Complaint (misidentified by Plaintiff as paragraph 35), Defendants repeat and reaver their responses to paragraphs 1-35 of the Complaint as if fully set forth herein.

37. Deny the allegations in paragraph 37 of the Complaint (misidentified by Plaintiff as paragraph 36).

38. Deny the allegations in paragraph 38 of the Complaint (misidentified by Plaintiff as paragraph 37).

To the extent any response is required to Plaintiff's WHEREFORE clause requesting relief, Defendants deny each and every allegation contained therein and deny that Plaintiff is entitled to any of the relief requested or to any other relief.

#### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Complaint, and each and every alleged cause of action therein, fails to state a claim upon which relief can be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

All claims set forth in the Complaint are subject to resolution by binding arbitration as set forth in an arbitration clause contained in a valid, written contract executed by and between Defendants and Coleman, which contract is binding upon Plaintiff.

#### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred to the extent Coleman agreed and consented to all actions by Defendants complained of herein by Plaintiff in a valid, written contract executed by and between Defendants and Coleman, as well as in oral, recorded statements by Coleman.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred to the extent Coleman licensed or otherwise authorized all actions by Defendants complained of herein by Plaintiff.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred to the extent Coleman ratified all actions by Defendants complained of herein by Plaintiff.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred to the extent Coleman released and waived Defendants from all liability.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands as Plaintiff has breached applicable agreements by and between Defendants and Coleman, which agreements are binding upon Plaintiff, and is liable to Defendants for damages and/or indemnification.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by applicable statutes of limitations and the doctrines of waiver, equitable estoppel, acquiescence, and laches.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred as Plaintiff does not have capacity to bring this action and, further, Plaintiff is not the real party in interest and/or a duly authorized agent of same for which Plaintiff's alleged claims are based.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff lacks standing to assert the claims contained in the Complaint in that Plaintiff has failed to demonstrate that Plaintiff is the owner of the copyright, trademark right or rights under state

law alleged to have been infringed or violated.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims fail in whole or in part to the extent Defendants McLean and Ziv are inappropriate defendants and not liable under Defendant System Dialing's company structure.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred because Plaintiff has failed to allege any infringement or violation.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred because Defendants received consent from the performers of the "New Vocabulary" recordings.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred because the "New Vocabulary" recordings are a work of joint authorship in which Defendants have an undivided ownership right to the actions complained of herein.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred because the "New Vocabulary" recordings are studio recordings and not a "live musical performance" under 17 U.S.C. § 1101.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred because 17 U.S.C. § 1101 is unconstitutional on its face and as applied under the Copyright Clause of the United States Constitution.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's copyright claim is barred to the extent Plaintiff claims any ownership or performance right to the underlying compositions in the "New Vocabulary" recordings.



**EIGHTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to demonstrate that he is the copyright owner entitled to recover damages under 17 U.S.C. § 504.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act claim is barred because Plaintiff has failed to allege any infringement or violation.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act is barred because Plaintiff fails to allege any infringing use in interstate commerce.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act is barred because Defendants received consent from Coleman for the complained of use.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act is barred because Defendant System Dialing's use complained of herein by Plaintiff is non-actionable nominative or descriptive fair use.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act is barred because the alleged acts of Defendants did not cause any confusion or mistake, nor likely confusion or mistake, nor false advertising and unfair competition with respect to Coleman's persona.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's Lanham Act is barred because Plaintiff does not have a protectable interest in Coleman's persona.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's state law claims are barred because Plaintiff has failed to allege any elements thereof.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part to the extent Plaintiff has suffered no damages.

**TWENTY- SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's is barred from recovery of treble damages or attorney's fees under 15 U.S.C. § 1125(a) as these remedies are unavailable to Plaintiff.

**TWENTY- EIGHTH AFFIRMATIVE DEFENSE**

Without any admission by Defendants that Plaintiff has suffered any purported injury, Plaintiff's claims are barred in whole or in part because Plaintiff has failed to mitigate, minimize and/or avoid any purported damages.

**TWENTY- NINTH AFFIRMATIVE DEFENSE**

Plaintiff is barred from recovery of damages or other relief to the extent that Plaintiff or others failed to perform conditions precedent, concurrent or subsequent under agreements by and between Defendants and Coleman.

**THIRTIETH AFFIRMATIVE DEFENSE**

Plaintiff's claims to damages are barred, in whole or in part, by the right of Defendants to a set-off against any such damages.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

Defendants reserve the right to assert additional affirmative defenses upon discovery of further information concerning Plaintiff's claims.

**WHEREFORE**, Defendants respectfully request the Court for relief as follows:

1. That all claims by Plaintiff be dismissed with prejudice;
2. That Defendants be awarded their costs of suit, including attorneys' fees; and
3. For such other and further relief that this Court may deem just and proper.

Dated: July 2, 2015  
New York, New York

FRIGON MAHER & STERN LLP

By:           /s/ Justin S. Stern            
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