

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

TOMMY BAHAMA GROUP, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 07-CV-01402-ODE
	)	
v.	)	Judge Evans
	)	
THE WALKING COMPANY,	)	Magistrate Judge Brill
	)	
Defendant.	)	
THE WALKING COMPANY,	)	
	)	
Defendant/Counter-Plaintiff,	)	
	)	
v.	)	
	)	
TOMMY BAHAMA GROUP, INC.,	)	
	)	
Plaintiff/Counter-Defendant.	)	
THE WALKING COMPANY,	)	
	)	
Defendant/Third Party Plaintiff,	)	
	)	
v.	)	
	)	
PHOENIX FOOTWEAR GROUP,	)	
INC.,	)	
	)	
Third Party Defendant.	)	

**AMENDED ANSWER OF PHOENIX FOOTWEAR GROUP, INC.**  
**TO THIRD PARTY COMPLAINT WITH AFFIRMATIVE**  
**DEFENSES AND COUNTERCLAIM**

Third Party Defendant Phoenix Footwear Group, Inc. ("Phoenix") for its answer, affirmative defenses and counterclaim to the third party complaint of defendant and third-party Plaintiff The Walking Company ("Walking"), by its undersigned counsel states as follows:

As to the allegations in the Third Party Complaint:

1. The statements contained in paragraph 1 of the third party complaint allege statements of law as to which no answer is required.

2. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the third party complaint.

3. Admits the allegations contained in paragraph 3 of the third party complaint.

4. Admits the allegations contained in paragraph 4 of the third party complaint.

5. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the third party complaint.

6. Admits the allegations contained in the paragraph 6 of the third party complaint.

7. Admits only so much of paragraph 7 of the third party complaint as alleges that Phoenix wanted to sell to Walking items from its Tommy Bahama line of footwear and for Walking to market the same in its stores and through other means within the control of Walking, and denies the remaining allegations of said paragraph.

8. Admits only so much of paragraph 8 of the third party complaint as alleges that Walking agreed to market and distribute Tommy Bahama-brand footwear, denies knowledge or information sufficient to form a belief as to the purported conduct of a “test-run” in February, 2006, or otherwise, and denies the remaining allegations of said paragraph.

9. Admits only so much of paragraph 9 of the third party complaint as alleges that Walking became a retail distributor customer of Tommy Bahama-brand footwear and that Phoenix agreed to participate in Walking's co-operative advertising, denies knowledge or information sufficient to form a belief as to the manner in which Walking intended to utilize the co-operative advertising contribution of Phoenix, and denies the remaining allegations of said paragraph.

10. Denies knowledge or information sufficient to form a belief as to so much of paragraph 10 of the third party complaint as alleges that Phoenix provided Walking with advertising materials and images for Walking's use, affirmatively avers that Walking was referred to Tommy Bahama Group, Inc. to obtain necessary authorization for the extent and manner of Walking's intended use of the subject images, and denies the remaining allegations of said paragraph.

11. Denies the allegations contained in paragraph 11 of the third party complaint.

12. Admits only so much of paragraph 12 of the third party complaint as alleges that Kelly Green, President of the Tommy Bahama Footwear division of Phoenix was present at the World Shoe Association convention in Las Vegas, Nevada in February, 2007 and was shown only a mock-up of the interior catalog page that utilized Tommy Bahama marks and logos superimposed over the Tommy Bahama image, and that other representatives of Phoenix were in attendance at the meeting, including Dan Butler, National Sales Director for the Tommy Bahama Footwear division of Phoenix, affirmatively avers that Mr. Feshback only displayed to Ms. Green and Mr. Butler, as a courtesy and without seeking any type of authorization, a mock-up of the interior catalog page that utilized Tommy Bahama marks and logos superimposed over the Tommy

Bahama image, denies knowledge or information sufficient to form a belief as to whether said representatives were shown a copy of the cover page of the mock-up of the catalog, and denies the remaining allegations of said paragraph.

13. In answer to paragraph 13 of the third party complaint, Phoenix respectfully refers the Court to the subject catalog as to the content thereof, and denies the remaining allegations of said paragraph.

14. Denies the allegations contained in paragraph 14 of the third party complaint.

15. Denies the allegations contained in paragraph 15 of the third party complaint.

16. Admits only so much of paragraph 16 of the third party complaint as alleges that Dan Butler sent the email to Patrick Stewart, Walking's Vice President of Marketing, on March 21, 2007, respectfully refers the Court to the said email attached to the third party complaint as Exhibit B as to the meaning, content and legal effect thereof, and denies the remaining allegations of said paragraph.

17. In answer to the allegations contained in paragraph 17 of the third party complaint, Phoenix respectfully refers the Court to the Exhibit C emails between Butler of Phoenix and Mike Grenley of Walking, as to the meaning, content and legal effect thereof, and denies the remaining allegations of said paragraph.

18. Denies knowledge or information sufficient to form a belief as to so much of paragraph 18 of the third party complaint as alleges that Bahama contacted Walking and demanded that it cease and desist use of the so-called joint advertisements and whether the same constituted Bahama's first objection to any of the same, and denies the remaining allegations of said paragraph.

19. Admits only so much of paragraph 19 of the third party complaint as alleges that on June 15, 2007 Bahama filed the within legal action against Walking, respectfully refers the Court to the pleadings in said action as to the nature of the allegations and claims contained therein, and denies the remaining allegations of said paragraph.

20. Admits only so much of paragraph 20 of the third party complaint as alleges that Dan Butler of Phoenix sent Mike Grenley of Walking the email dated November 15, 2006 annexed to the third party complaint as Exhibit D, respectfully refers the Court to the said email as to the meaning, content and legal effect thereof, specifically denies that Phoenix is obligated to Walking as set forth in said paragraph, and denies the remaining allegations of said paragraph.

21. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 20 of the third party complaint, above.

22. Denies the allegations contained in paragraph 22 of the third party complaint.

23. Denies the allegations contained in paragraph 23 of the third party complaint.

24. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 23 of the third party complaint, above.

25. Denies the allegations contained in paragraph 25 of the third party complaint.

26. Denies the allegations contained in paragraph 26 of the third party complaint.

27. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 26 of the third party complaint, above.

28. Denies the allegations contained in paragraph 28 of the third party complaint.

29. Denies the allegations contained in paragraph 29 of the third party complaint.

30. Denies the allegations contained in paragraph 30 of the third party complaint.

31. Denies the allegations contained in paragraph 31 of the third party complaint.

32. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 31 of the third party complaint, above.

33. Denies the allegations contained in paragraph 33 of the third party complaint.

34. Denies the allegations contained in paragraph 34 of the third party complaint.

35. Denies the allegations contained in paragraph 35 of the third party complaint.

36. Denies the allegations contained in paragraph 36 of the third party complaint.

37. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 36 of the third party complaint, above.

38. Denies the allegations contained in paragraph 38 of the third party complaint.

39. Denies the allegations contained in paragraph 39 of the third party complaint

40. Phoenix hereby repeats and incorporates by reference its responses to paragraphs 1 through 39 of the third party complaint, above.

41. The allegations contained in paragraph 41 of the third party complaint contain a statement of law as to which no answer is required.

42. Denies the allegations contained in paragraph 42 of the third party complaint.

43. Denies each and every allegation of the third party complaint not heretofore expressly admitted, denied or otherwise controverted.

**FIRST AFFIRMATIVE DEFENSE**

Third party plaintiff's third party complaint fails, in whole or in part, to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

The Court lacks jurisdiction over the person of Phoenix.

**THIRD AFFIRMATIVE DEFENSE**

Any damages or relief claimed by the third party plaintiff are offset by the damages third party defendant has suffered by third party plaintiff's unlawful conduct.

**FOURTH AFFIRMATIVE DEFENSE**

Upon information and belief, third party plaintiff has failed to take reasonable steps to mitigate its claimed damages.

**FIFTH AFFIRMATIVE DEFENSE**

Third party plaintiff's claims are barred, in whole or in part, based upon the doctrine of unclean hands.



**SIXTH AFFIRMATIVE DEFENSE**

Third party plaintiff's claims are barred, in whole or in part, because third party defendant's acts are excused, privileged and/or justified.

**SEVENTH AFFIRMATIVE DEFENSE**

Third party plaintiff's claims are barred, in whole or in part, because of the non-existence of a contract or if a contract existed it was void and/or terminable at will.

**EIGHTH AFFIRMATIVE DEFENSE**

Third party plaintiff's claims are barred, in whole or in part, because, upon information and belief, Walking was expressly advised that any authorization for the use of Tommy Bahama images could only be obtained by Walking from plaintiff and, upon information and belief, Walking was given a form document for this purpose by plaintiff, and signed and returned the same to plaintiff prior to Walking being sent any Tommy Bahama images for use by plaintiff. Walking is therefore estopped from claiming that Phoenix had any authority to approve of Walking's use of the subject images and/or purportedly relied on such authority.

**COUNTERCLAIM**

For its counterclaim against third party plaintiff The Walking Company, Phoenix alleges as follows:

1. Phoenix brings this counterclaim against The Walking Company (“Walking”) to recover the balance due to Phoenix from Walking on account of goods sold to and accepted by Walking.

2. This Court has supplemental jurisdiction over the claims alleging violations of state law pursuant to 28 USC §1367(a).

3. Upon information and belief, Walking is a Delaware corporation doing business in the Northern District of Georgia.

4. Third party defendant Phoenix is a Delaware corporation with its principle place of business in Carlsbad, California.

5. Heretofore, Phoenix sold and delivered goods to Walking which accepted the same, and agreed to pay the agreed-upon price and/or fair and reasonable value of the same.

6. Walking has failed and refused to pay to Phoenix the balance owed in respect of the sale of such goods which, after allowing to Walking all appropriate credits, is in the amount of \$20,655.

7. No portion of the said balance due has been paid although due demand has been made for the same.

**PRAYER FOR RELIEF**

WHEREFORE, having fully answered and defended, third party defendant Phoenix respectfully requests that the Court:

- (a) Dismiss all counts of third party plaintiff's third party complaint with prejudice;
- (b) Enter judgment in favor of third party defendant Phoenix against third party plaintiff Walking on its counterclaim for money damages in the amount of \$20,655, or such greater or lesser amount as shall be determined on the trial of this action, together with interest;
- (c) Award to third party defendant the costs of this action incurred in defending against third party plaintiff's third party complaint; and
- (d) Award to third party defendant such other and further relief as the Court may seem just and proper.

Respectfully submitted this 29<sup>th</sup> day of August, 2007.

KITCHENS KELLY GAYNES, PC

By: /s/ Heather D. Dawson

Mark A. Kelley, Esq.

Georgia Bar No.: 412325

Heather D. Dawson

Georgia Bar No. 100169

Local Counsel for Third party Defendant

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

TOMMY BAHAMA GROUP, INC.,	)	
	)	
Plaintiff,	)	Civil Action No. 1:07-CV-1402-ODE
	)	
v.	)	
	)	
THE WALKING COMPANY,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	
_____	)	

**CERTIFICATE OF SERVICE**

I certify that on August 29, 2007, I electronically filed the foregoing **PLAINTIFF'S REPLY TO DEFENDANT'S COUNTERCLAIM** with the clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the attorneys of record, including:

**Charlena L. Thorpe**

**Robert L. Lee**

**Ryan W. Koppelman**

**Brian W. Kasell**

**Jacqueline A. Criswell**

**Rod S. Berman**

**Jeffrey Brickman**

**Lawrence K. Nodine**

**Robin L. Gentry**

This 29<sup>th</sup> day of August, 2007.

KITCHENS KELLY GAYNES, PC

By: /s/ Heather D. Dawson

Mark A. Kelley, Esq.

Georgia Bar No.: 412325

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