

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DIVISION

ROBERT A. DOANE

Plaintiff

v.

XANADU MARKETING, INC.
JOSEPH DELFGAUW

Defendants

Civil Action No. 2381-CV-719

RECEIVED

06/15/2023

AMENDED COMPLAINT
(with jury demand endorsed hereon)

Now come Plaintiff, **ROBERT A. DOANE**, by and through undersigned counsel, and for his Amended Complaint against Defendants states and avers as follows:

INTRODUCTION

1. This is an action seeking damages for defamation and to remedy the breach of a settlement agreement (“Settlement Agreement”) that was entered into between Plaintiff Robert A. Doane (“Plaintiff”) and Defendant Xanadu Marketing, Inc. (“Xanadu”) on February 17, 2020. Through this action, Plaintiff seeks damages and equitable relief resulting from Defendants’ defamation of Plaintiff on the “Deserve to Win” podcast in February 2023 and the willful and purposeful breach of the non-disparagement provision of the Settlement Agreement.

THE PARTIES

2. Plaintiff, Robert A. Doane (“Doane” or “Plaintiff”), is, and was at all relevant times, a citizen of the Commonwealth of Massachusetts with a residence at 103 Prospect Street,

Wakefield, Massachusetts 01880. Plaintiff likewise resides at 21 New Lane, West Tisbury, Massachusetts, 02575.

3. Defendant Xanadu is a domestic corporation organized under the laws of the State of Michigan, with its principal place of business at 956 3 Mile Rd. NW, Grand Rapids, MI 49544.

4. Defendant Joseph Delfgauw (“Delfgauw”) is a citizen of the State of Michigan who maintains his principal place of business at 956 3 Mile Rd. NW, Grand Rapids, MI 49544.

Delfgauw is the co-founder of Xanadu and was and is at all relevant times an officer, director, shareholder, agent, and control person of Xanadu. At all times relevant, Delfgauw had exclusive control and direction over Xanadu and exclusively formulated, directed, controlled, exercised authority over, and personally participated in the acts and practices set forth in this Amended Complaint for his own personal gain.

5. Whenever in this Amended Complaint it is alleged that the Defendants committed any act or omission, it is meant that Delfgauw personally committed such act or omission.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to M.G.L. c. 212, § 3 because the amount in controversy exceeds Fifty-Thousand Dollars (\$50,000.00).

7. This Court may exercise personal jurisdiction over Defendants Delfgauw and Xanadu in accordance with M.G.L. c. 223A, §3(a), (b), (c) and (d) as these Defendants have transacted business in the Commonwealth of Massachusetts, contracted to supply services and things in this Commonwealth, caused tortious injury by acts or omissions in this Commonwealth and caused tortious injury in this Commonwealth by acts and omissions outside of the Commonwealth at times the Defendants have regularly solicited business in this Commonwealth.

8. This Court likewise has personal jurisdiction over Defendants as Defendants have consented to the jurisdiction of this Court in accordance with Paragraph 11 of the Settlement Agreement.

9. Venue is proper in this Court pursuant to M.G.L. c. 223, § 1 because Plaintiff has a residence in Middlesex County.

10. Venue is likewise proper in this Court as Defendants have consented to venue in this Court pursuant to Paragraph 11 of the Settlement Agreement.

STATEMENT OF OPERATIVE FACTS

A. Xanadu's Operations

11. At all relevant times, Defendants have promoted Xanadu as a full-service digital marketing agency specializing in UGC, SEO, PPC, reputation management, lead generation, social media, and chat/messenger marketing. As part of its services, Defendants claim that they have sent over one billion marketing text messages¹.

12. As part of the conduct of their business, Defendants have regularly and systematically conducted marketing and advertising in Massachusetts and derived significant revenues as a result of thereof. As part of these operations, Plaintiff states upon information and belief that Defendants have caused millions of text messages to be sent to Massachusetts consumers.

B. Delfgauw's Contacts with Massachusetts

13. At all relevant times, in addition to Xanadu's operations, Delfgauw has independently had sufficient contacts with Massachusetts to warrant the exercise of personal jurisdiction over him in Massachusetts. By way of example, Delfgauw has promoted himself personally and conducted business in Massachusetts (and nationally) as a "marketing specialist".² Delfgauw

¹ Delfgauw makes specific reference to this on the Podcast.

² <https://www.linkedin.com/services/page/62989a3078b5991902/>

also operates a personal website where he promotes himself in Massachusetts (and nationally) as an expert trainer.³

C. The Settlement Agreement

14. In or about 2019, Plaintiff brought a claim against Defendants in connection with Defendants' advertising and marketing activities.

15. On February 17, 2020, Plaintiff entered into the Settlement Agreement with Xanadu.

16. The Settlement Agreement released Plaintiff's claims against Xanadu and Delfgauw up to the date of the Settlement Agreement.

17. Delfgauw executed the Settlement Agreement as the authorized representative of Xanadu and was an intended third-party beneficiary of the Settlement Agreement.

18. Pursuant to Section 12 of the Settlement Agreement, Plaintiff and Xanadu agreed that neither would "disparage the other or share any information related to [the Settlement] Agreement with any third party, or party not a signatory to [the Settlement Agreement]". Section 12 was a material and inducing provision of the Settlement Agreement.

19. Pursuant to the Section 11 of the Settlement Agreement, the parties agreed that the Settlement Agreement would "be governed by, interpreted according to, and enforced by and under the laws of the Commonwealth of Massachusetts, and venue shall exclusively be within the courts of competent jurisdiction within Dukes County or Middlesex County, in the Commonwealth of Massachusetts".

20. Section 6 of the Settlement Agreement provides for a recovery all "costs, damages, and reasonable attorney fees incurred in the enforcement of any of the terms of the [Settlement Agreement]".

³ <http://joedelfgauw.com>

D. Defendants Defame and Disparage Plaintiff on the “Deserve to Win” Podcast

21. In February, 2023, Delfgaw was invited to be a special guest on Episode 10 of the “Deserve to Win” podcast (“Podcast”) produced by the California based Telephone Consumer Protection Act (“TCPA”) defense law firm, The Troutman Firm⁴ (now known as “Troutman Amin LLP”).⁵ Delfgaw, as he appeared on the podcast, is depicted below:



22. During his appearance on the Podcast, Delfgaw described Defendants’ operations and complained that his business was hampered by “professional scammers”.

23. During the Podcast, Delfgaw, in an effort to enhance Defendants’ credibility and reputation and to attempt to demonstrate that they “deserve to win”, published the following false, defamatory and disparaging comments (“False Statements”) concerning Plaintiff:

⁴ The Troutman Law Firm was founded by Eric Troutman Esq., the self-proclaimed “Tsar” of the TCPA world and Puja Amin, the self-proclaimed “TCPA Queenie”. Attorney Troutman and his law firm regularly publicly comment on developments in TCPA litigation and produce and publish podcasts.

⁵ On or about March 8, 2023, the Troutman Firm changed its name to the Troutman Firm to Troutman Amin LLP. (See <https://www.prnewswire.com/news-releases/troutman-firm-announces-name-change--elevates-puja-j-amin-to-named-partner-301766028.html>)

A. Delfgauw falsely and disparagingly implied that Plaintiff was a “professional scammer” that fraudulently manufactured claims under the TCPA by opting in on websites.

B. Delfgauw falsely and disparagingly claimed that Plaintiff would not sue Xanadu as Xanadu has evidence of Plaintiff’s fraudulent opt-ins⁶.

C. Delfgauw falsely and disparagingly claimed that Plaintiff filed frivolous court cases.

D. Delfgauw falsely and disparagingly claimed that Plaintiff is actually “thrown ... out of court” because the Court is “like dude, you again, the judge is like, you again, get out of here.”

E. Delfgauw falsely and disparagingly claimed that the Massachusetts courts were “mad” at Plaintiff as a result of Plaintiff’s “frivolous lawsuits”.

24. At the time that Delfgauw made and published the False Statements, he knew that the False Statements were in fact false and disparaging and knowingly, intentionally and willfully published the False Statements in an attempt to defame and disparage Plaintiff and to subject him to ridicule and contempt.

25. At the time that Delfgauw made and published the False Statements he knew from his previous dealings with Plaintiff that Plaintiff was a citizen of the Commonwealth of Massachusetts and purposely directed his defamatory comments to Plaintiff to cause Plaintiff harm in Massachusetts.

26. During the Podcast, Delfgauw likewise disclosed the existence of the Settlement Agreement in violation of Section 11 of the Settlement Agreement.

⁶ Delfgauw refers to these as “inducements”.

27. The Podcast was widely disseminated and viewed in Massachusetts and across the country on several media sources, including www.tcpa.world.com, YouTube and www.natlawreview.com.

28. At all times, Delfgauw was acting as an agent of Xanadu during the course of his regular duties for Xanadu.

29. Delfgauw made and published the False Statements for Xanadu's benefit and with the full knowledge and actual authority and consent of Xanadu. Xanadu likewise ratified the actions of Delfgauw complained of.

30. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered harm, including the loss of the benefit of his bargain, undue publicity, invasion of his privacy, damage to his reputation, emotional distress, annoyance, anger, anxiety, waste of time, worry, embarrassment, and attorney's fees and costs to address Defendants' False Statements and breach of contract.

COUNT ONE
(Defamation Per Se)

31. Plaintiff incorporates the averments contained in paragraph one (1) through thirty (30) of the Amended Complaint as if fully rewritten hereunder.

32. The False Statements are false and defamatory.

33. Defendants published the False Statements without privilege or justification.

34. The Defendants knowingly, intentionally and willfully published the False Statements in an attempt to defame and disparage Plaintiff and to subject him to ridicule and contempt.

35. The Defendants knowingly, intentionally and willfully directed the False Statements at Plaintiff who Defendants knew to be a citizen of Massachusetts with the intent to cause harm to Plaintiff in Massachusetts.

36. The Defendants were at fault for publishing the False Statements.

37. The False Statements, which constitute libel and accuse Plaintiff of criminal misconduct, constitute defamation per se.

38. The False Statements have caused and will cause Plaintiff imminent, irreparable injuries for which there is no adequate remedy at law. Accordingly, Plaintiff is entitled to permanent injunctive relief.

39. As the Defendants have placed Plaintiff's reputation publicly at issue, Plaintiff is entitled to a declaratory judgment that the False Statements are in fact false.

40. The False Statements have caused Plaintiff substantial damage as set forth above for which the Defendants are legally responsible.

COUNT II
(Breach of Contract)

41. Plaintiff incorporates the averments contained in paragraph one (1) through forty (40) of the Amended Complaint as if fully rewritten hereunder.

42. Section 12 of the Settlement Agreement provides that neither party "shall disparage the other".

43. The False Statements constitute disparaging statements in breach of Section 12 of the Settlement Agreement.

44. Section 12 of the Settlement Agreement provides that the Settlement Agreement "shall be confidential" and prohibits the parties from providing "any information related to [the Settlement Agreement] with any third party, or party not a signatory to the [Settlement Agreement].

45. The Defendants breached the confidentiality provision of the Settlement Agreement.

46. The Defendants, knowingly, willfully, and intentionally breached the Section 12 of the Settlement Agreement.

47. Defendants' breach of Settlement Agreement has caused Plaintiff substantial damage as set forth above for which the Defendants are legally responsible.

COUNT III
(Alter Ego/Piercing)

48. Plaintiff incorporates the averments contained in paragraph one (1) through forty-seven (47) of the Amended Complaint as if fully rewritten hereunder.

49. Defendants were engaged at all relevant times in a common enterprise.

50. At all relevant times, Xanadu was solely owned and pervasively controlled by Delfgauw.

51. Plaintiff states upon information and belief that Xanadu was thinly capitalized.

52. Plaintiff states upon information and belief that Xanadu failed to observe legal formalities, failed to maintain adequate financial records and failed to maintain any separation between the affairs of Xanadu and the affairs of Delfgauw.

53. Plaintiff states upon information and belief that Delfgauw commingled his business activities, assets, funds and liabilities with those of Xanadu.

54. Plaintiff states upon information and belief that Delfgauw siphoned away the assets of Xanadu for his own benefit.

55. At all relevant times, Xanadu had no will or existence independent from Delfgauw.

56. Xanadu is an alter ego of Delfgauw and utilized to commit wrongful acts.

57. Equity requires disregarding the legal form of Xanadu and holding Delfgauw personally liable for the debts of Xanadu.

WHEREFORE, the Plaintiff prays for relief and judgment as follows:

A. Judgment in favor of Plaintiff and against Defendants, in an amount to be determined at trial including, but not limited to compensatory damages, punitive damages, and pre-judgment and post-judgment interest, as permitted by law.

B. A preliminary and permanent injunction that issues the following orders against Defendants, their agents, officers, employees, representatives and co-conspirators (“Restrained Parties”):

i. Prohibiting the Restrained Parties from any further acts of defamation or publishing of false statements, comments or information regarding Plaintiff.

ii. Mandating that the Restrained Parties take all action to remove all defamatory, disparaging, libelous or false statements about Plaintiff posted on the Internet, including requesting that Internet search engines such as Google, Yahoo!, and Bing remove all links to the libelous Uniform Resource Locators (“URL”) from their search indices.

iii. Prohibiting the Restrained Parties from further publishing and/or disclosing the existence the Settlement Agreement.

C. A declaratory judgment that the False Statements are false.

D. A declaratory judgment that Xanadu is an alter ego of Delfgauw and has no will or existence independent from Delfgauw.

E. An award of attorneys’ fees, costs and expenses in accordance with Section 6 of the Settlement Agreement or otherwise.

F. For such other and further relief as the Court deems just, equitable and proper.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF ALL CLAIMS SO TRIABLE

Dated: June 15, 2023

Respectfully submitted,

/s/ Richard B. Reiling
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon counsel for Defendants Jeremy R. Bombard, Esq., Bombard Law Office, P.C., 945 Concord St., Framingham, MA 01701 by E-Mail and Regular U.S Mail, postage pre-paid this 15th day of June, 2023.

/s/RICHARD B. REILING
RICHARD B. REILING BBO#: 629203
Attorney for Plaintiff