

Erin P. Smith ISB No. 7874
3215 Warm Springs Road
Post Office Box 10160
Ketchum, Idaho 83340
Telephone 208.726.7148

Attorney for Plaintiffs Leonard B. Barshack and Erin P. Smith

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

LEONARD B. BARSHACK, an individual,
and ERIN P. SMITH, an individual

Plaintiffs,

vs.

TWITTER, Inc., a Delaware corporation, and
SUN VALLEY COMPANY, a Wyoming
corporation

Defendants.

Case No. CV-12-

COMPLAINT FOR:

1) INJUNCTIVE RELIEF

AND DEMAND FOR JURY TRIAL

Fee Category: A

Fee: \$ 96.00

Plaintiffs Leonard Barshack (“Barshack) and Erin P. Smith (collectively “ the Barshacks”) complain of Defendant Twitter, Inc. (“Twitter”) and Defendant Sun Valley Company (“SV”) as follows:

NATURE OF ACTION

1. The Barshacks seek an injunction prohibiting Twitter from allowing SV to use the Twitter handle @SunValley.
2. The Barshacks seek an order that the Twitter handle @SunValley be returned for their use.

Parties

3. Plaintiffs Leonard B. Barshack and Erin P. Smith are married individuals and are residents of Ketchum, Idaho.

4. Defendant Twitter is a corporation organized under the laws of the State of Delaware.

5. Defendant Sun Valley Company (the "Company") is a corporation organized and existing under the laws of the State of Wyoming and has its principal place of business in Blaine County, Idaho where it is engaged in the hospitality business.

Jurisdiction and Venue

4. The court has subject matter jurisdiction over the claims specified in this complaint pursuant to Idaho Code §§ 5-514.

5. Venue is proper in this Court by virtue of the fact that both Defendants provide services in Blaine County, Idaho.

Facts

1. Prior to April 3, 2010, Barshack registered to and was granted the right to use the Twitter handle @SunValley.¹
2. Barshack periodically tweeted on a variety of topics, including Apple products, MacRumors, weather, a pig roast, and skiing. At no time did Barshack impersonate SV.²
3. On information and belief, on or about Oct 23, 2012, SV contacted Twitter stating they wished to use the handle @SunValley.³

¹ Attached Exhibit A, page 18, which shows tweets starting April 3, 2010.

² *Id.*

³ *Id* at page 11.

4. On information and belief, SV claimed Barshack was using its trademarked logo of a sun.
5. On or about Oct. 15, 2012, Twitter sent Barshack an email notifying him that he was in violation of Twitter's Rules and that the handle @SunValley was being taken away from him and given to SV.
6. At that time, Twitter gave the following reason for the suspension, "We have received a valid report and determined that your account, @sunvalley, is engaged in non-parody impersonation."⁴
7. At no time did Barshack impersonate SV in his tweets.⁵
8. Barshack did use an image of a sun for his tweets.
9. SV does not indicate anywhere on its home page or any materials that its logo is trademarked.⁶
10. According to the USPTO, SV's trademark "...consists of a sun positioned above and to the right side of the words, "Sun Valley"."⁷
11. Sun Valley allowed the registration for a stand-alone sun image to lapse.⁸
12. SV's only mark at the time of its complaint was a sun positioned above and to the right of the words, "Sun Valley." ("the Mark")
13. Barshack never used the Mark. Barshack simply used a sun.
14. Numerous businesses, including jewelers, artists, and real estate companies use a sun logo in the communities of Sun Valley and Ketchum, Idaho.⁹

⁴ *Id. at 16.*

⁵ *Id. at 18.*

⁶ *Id at 6-7.*

⁷ *Id at 12, 14.*

⁸ *Id at 13.*

⁹ *Id at pages 8-10.*

15. Twitter's Trademark Policy states it will give account holder's the opportunity to clear up any potential confusion.¹⁰
16. Twitter never contacted Barshack regarding SV's claim.
17. Barshack never violated SV's trademark and, therefore, never violated Twitter's rules.
18. Barshack has attempted to contact Twitter to discuss the matter via email and letter on numerous occasions.¹¹

CLAIMS FOR RELIEF

Count One **(Injunctive Relief)**

1. The Barshacks re-allege and incorporate by reference the paragraphs set forth above.
2. Twitter has failed to respond despite the Barshacks numerous attempts to contact it.
3. Twitter improperly took the Twitter handle @SunValley from the Barshacks.
3. By not complying with its own rules, Twitter improperly granted SV the right to use the Twitter handle @SunValley.
4. Twitter continues to allow the improper use of the Twitter handle @SunValley by SV.
4. Defendants' actions constitute a gross inequity and will cause the Barshacks to suffer irreparable harm for which there is no adequate remedy at law.
5. The Barshacks are entitled to a preliminary injunction and a permanent injunction enjoining Twitter from allowing SV to use the Twitter handle @SunValley.

¹⁰ *Id at 4.*

¹¹ *Id at. 1, 2, 16.*

6. The Barshacks are entitled to have the handle @SunValley returned to them.

Count Two

(Breach of Contract)

1. The Barshacks re-allege and incorporate by reference the paragraphs above.
2. Twitter's rules are a fundamental element of the contract between Twitter and its users.
3. The Barshacks never falsely represented themselves as, nor impersonated, SV.
4. The Barshacks never violated Twitter's rules.
5. Twitter in fact breached its own rules by transferring the Twitter handle, @SunValley, from the Barshacks to SV.
6. By virtue of its actions, Twitter breached the implied contract that existed between the Barshacks and Twitter.

Count Three

(Breach of Good Faith and Fair Dealing)

1. The Barshacks re-allege and incorporate by reference the paragraphs above.
2. Implied in all business agreements is the covenant of good faith and fair dealing.
3. By transferring the Twitter handle @SunValley to SV without examining whether it was warranted and without allowing the Barshacks any opportunity to rebut SV's claims, Twitter breached the implied covenant of good faith and fair dealing.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that the Court:

- A. Enter into a judgment in favor of the Plaintiffs and against the Defendants on the Claim for Relief in the Complaint;

- B. Enjoin Twitter from allowing SV from using the Twitter handle, @SunValley;
- C. Order Twitter to return the Twitter handle, @SunValley, to Plaintiffs;
- D. Order the Defendants to pay Plaintiffs their reasonable attorney's fees, costs and other expenses under Idaho Code Sections 12-120 and 12-121; and
Order such other relief as the Court deems just and equitable.

Dated: May 31, 2013

By: _____
Erin P. Smith
Attorney for the Plaintiffs

Exhibit A is the 17 Page Document.