

In Re Demand For Arbitration of:

Michael Mikel,
Claimant,

and

Larry Harvey and John Law,
Respondents.

CLAIMANT'S STATEMENT

In 1997, the claimant, Michael Mikel, formed a Limited Liability Company with respondents Larry Harvey and John Law. That company is known as Paper Man LLC. Initially, all three members of Paper Man LLC held equal voting interests; under the terms of the Paper Man Operating Agreement, John Law's voting interest has been reduced to 10 per cent. Paper Man LLC owns one asset – the federally registered mark BURNING MAN – and Paper Man LLC has one business activity – to license the mark BURNING MAN to its licensed operators of the desert arts festival that uses that name. A copy of that Operating Agreement is attached as Exhibit A; its Article 11 provides that any dispute of any kind between the members shall be resolved through arbitration before the American Arbitration Association.¹

The BURNING MAN arts festival is held in the Nevada desert every summer during the week before Labor Day. The festival is conducted by Black Rock City LLC; respondent Larry Harvey is the president (“Director”) of that limited liability company, and claimant Michael Mikel is a member of that LLC; respondent John Law does not have any interest in Black Rock

¹ Although the arbitration clause does not specify, it is clear that this arbitration is subject to the AAA Commercial Rules; it is not a consumer dispute, and the presence of more than two (2) parties precludes application of the Expedited Rules.

City LLC. Ever since its creation in 1999, Paper Man LLC has licensed the mark BURNING MAN to Black Rock City LLC for its use in connection with the desert arts festival.

On May 14, 2000, Paper Man LLC and Black Rock City LLC entered into a re-stated license agreement, attached here as Exhibit B. In the negotiations that produced the agreement, claimant Michael Mikel acted on behalf Paper Man and respondent Larry Harvey acted on behalf of Black Rock City, and the two men signed the final agreement as representatives of those two companies. The agreement gave Black Rock City a non-exclusive, non-assignable license to use the service mark for a period of seven (7) months (May 14, 2000 to January 1, 2001) – i.e., the minimum period required to conduct the Y2K Labor Day event, clean up, and settle the debts it had incurred – at a license fee of \$1800.00.

In 2001 and the years immediately after, Paper Man granted informal extensions of the license, renewing each year for another one (1) year, under the terms of the previous written agreement, at the same license fee. In 2004, however, Black Rock City LLC announced that it would no longer be bound by the written agreement. Instead, Black Rock City demanded that Paper Man sign a one-paragraph document that granted Black Rock City an exclusive license but failed to include any terms for quality control or maintenance of Paper Man's right to police the mark. Paper Man, nonetheless, has continued to exert control over the Mark, despite Black Rock City's regular protests.

Based on the relationship between the two companies over the years, claimant Michael Mikel recognized that he was Paper Man's only advocate in these discussions; Larry Harvey had consistently acted in the interests of Black Rock City. Indeed, in the year prior, respondent Larry Harvey had attempted to divest Paper Man LLC of its ownership of the BURNING MAN mark and transfer ownership to Black Rock City, by secretly instructing his personal lawyer to file an

application to register the mark. It was also clear that the one paragraph license that Larry Harvey and his personal counsel demanded would reduce Paper Man's rights in several significant regards; for example, the license would be exclusive to Black Rock City and run a term of 10 years, Black Rock City could assign the license, and Black Rock City could grant any sub-licenses it might desire.

Therefore, in accord with his fiduciary obligations as a member of Paper Man LLC, Michael Mikel told Larry Harvey that Paper Man was unable to accept the document that Harvey and Black Rock City had demanded. In response, Black Rock City LLC stopped paying any license fee, and respondent Larry Harvey simply refused to participate in any good faith discussion of a new written license agreement.

A year later, Michael Mikel sought the advice of an experienced intellectual property lawyer to confirm his impression that Larry Harvey and Black Rock City were attempting to undermine Paper Man's ownership of the service mark. Mr. Mikel learned that, under the established principles of trademark law, the type of "naked license" that Black Rock City demanded from Paper Man can be worse than no license at all: "Uncontrolled licensing of a mark whereby the licensee can place the mark on any quality or type of good or services may cause the mark to lose any significance it may have." *McCarthy on Trademarks* § 18:48. The proposed naked license created the risk that Paper Man LLC could lose the service mark and it could pass into the public domain. If that occurred, it would be possible that the designation BURNING MAN, and thereby the event itself, could fall into the hands of a corporate owner, in direct contravention of every principle on which the BURNING MAN festival was founded.

In January, 2006, Mr. Mikel, in his capacity as a member of Paper Man LLC, asked the intellectual property attorney to write a letter to the lawyer who had represented Black Rock City

and Larry Harvey individually, Terry Gross. That letter is attached as Exhibit C. The letter specifically asked respondent Larry Harvey to direct Black Rock City LLC to enter into good faith negotiations with Paper Man for a proper written agreement at an appropriate license fee. That letter was ignored.

In early Spring, Michael Mikel engaged litigation counsel, who spoke with Terry Gross to emphasize the importance of a written license agreement. On June 21, 2006, counsel wrote to Terry Gross to remind him that their discussion had taken place in April or early May, and yet nothing had happened. A copy of that e-mail is attached as Exhibit D; no response to that communication has ever been received.

On August 6, 2006, Michael Mikel met with Larry Harvey to discuss the business of Black Rock City LLC. At the end of that conversation, Mr. Mikel reminded Mr. Harvey that attention to the Paper Man LLC agreement was still required. *Larry Harvey then told Michael Mikel that a new license agreement had already been signed.*

That “license agreement,” attached as Exhibit E, demonstrates that Larry Harvey purported to act *on behalf of Paper Man LLC* – even though he had previously refused to negotiate with Paper Man LLC, had not consulted or obtained authority from the other members of Paper Man LLC, and had actually kept the existence of the document a secret until he was directly challenged by Michael Mikel. Moreover, the purported license is grossly one-sided in favor of Black Rock City LLC. Thus, the document that Larry Harvey signed directly contravenes the best interests of Paper Man LLC.

Respondent Larry Harvey presumed to act for Paper Man LLC, and then used that position to obtain a benefit for himself in his capacity as “Director” of Black Rock City LLC. His action was simply the latest in a series of efforts to seize control of the BURNING MAN

mark, to exclude other members of Paper Man LLC from participation in the company's operations and control of its assets, and ultimately to divert ownership of the mark from Paper Man LLC to Black Rock City. These actions, undertaken in secret and in complete contravention of Paper Man LLC's interests, constitute a breach of the fiduciary duty that respondent Larry Harvey owes to Paper Man LLC and to its other members, claimant Michael Mikel and respondent John Law.

Respondent, Larry Harvey's conduct over the past several years toward Paper Man LLC and its other members demonstrates his on-going disregard of – indeed, contempt for – the obligations of utmost good faith and loyalty that he owes them. By this action, claimant Michael Mikel seeks to have Larry Harvey expelled from Paper Man LLC, and his economic interest forfeited back to the company, as an appropriate sanction for his on-going pattern of violating the fiduciary duty that membership in Paper Man LLC imposes on him. In the alternative, Larry Harvey should be compelled to leave the company and sell his membership interest back to Paper Man LLC for the value that he placed on it – a one-third share of \$1,800 per year for ten years, or \$6,000 – which must also be reduced to its present cash value. At a minimum, Larry Harvey must be prohibited from participating in any Paper Man LLC company business related to Black Rock City LLC, and prohibited from sharing in any income generated from any agreement with Black Rock City LLC. Michael Mikel also asks that the Paper Man LLC Operating Agreement be reformed – as may be necessary to provide the relief requested here, or to reflect the new arrangement that Mr. Harvey's expulsion will create.

Michael Mikel has advanced various expenses on behalf of Paper Man LLC over the past several years, including government license and registration fees. Although Mr. Mikel has demanded that Larry Harvey and John Law each reimburse him for one-third of those fees, no

such reimbursement has ever been paid; therefore, Michael Mikel hereby demands an award of those amounts in this proceeding.

Finally, Michael Mikel seeks an award of his attorneys' fees and costs, pursuant to Article 11 of the Paper Man LLC Operating Agreement and California Code of Civil Procedure § 1021.5.