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Superior Court of California,
County of San Francisco

01/24/2023
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Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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11 CANARY, LLC DBA CANARY
MARKETING,

12 Plaintiff,

13 v.

14 TWITTER, INC., and DOES 1-5, inclusive,

15 Defendants.
16

Case No. CGC-23-603842

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CANARY, LLC DBA CANARY
MARKETING'S APPLICATION FOR
WRIT OF ATTACHMENT AGAINST
DEFENDANT TWITTER, INC.**

Date: 3/1/2023
Time: 9:30 a.m.
Dept: 302

Action Filed: January 6, 2023

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19 Plaintiff CANARY, LLC dba CANARY MARKETING (“Canary”) submits the following
20 Memorandum of Points and Authorities in support of its Application for Writ of Attachment
21 against Defendant TWITTER, INC. (“Twitter”):

22 **I. INTRODUCTION**

23 Canary’s Application for a Writ of Attachment against Twitter is straightforward. Canary
24 and Twitter entered into an agreement for Canary to provide certain services and materials to
25 Twitter for which Twitter agreed to compensate Canary by paying its invoices within sixty (60)
26 days after receipt. Twitter performed on the parties’ contract for nearly ten years, but beginning in
27 September 2022, it stopped paying Canary’s invoices. Twitter never complained about the quality
28 of Canary’s services or materials, and Twitter never communicated any objections to any invoices.

1 Twitter simply stopped paying. The amount now owing from Twitter to Canary is \$392,239.11.

2 For these reasons, and those more fully explained herein, it is respectfully requested that
3 the Court issue the right to attach order and order for issuance of writ of attachment against
4 Twitter so that Canary can attach Twitter’s assets for the full amount owed to Canary.

5 **II. STATEMENT OF FACTS**

6 Canary is a multi-faceted marketing company that, among other things, helps businesses
7 promote themselves by designing, packaging, and distributing branded merchandise to employees
8 and customers.

9 Twitter is a social media company that operates the microblogging and social networking
10 service Twitter.

11 The business relationship between Canary and Twitter dates back to 2013; between the
12 start of the relationship in 2013 and August 2022, Canary has delivered more than \$10 Million of
13 Twitter-branded merchandise to Twitter. (Declaration of Lauren Borelli [“Borelli Decl.”], ¶ 3.)

14 On or about June 24, 2020, Canary and Twitter entered into the Master Services
15 Agreement (the “MSA”), pursuant to which Canary agreed, among other things, to provide goods
16 and services to Twitter, and Twitter agreed, among other things, to pay Canary for the goods and
17 services that Twitter received within sixty (60) days of receipt of an invoice. (A true and correct
18 copy of the MSA is attached as Exhibit A to Canary’s Index of Evidence in Support of
19 Application for Writ of Attachment [“Evidence Index”] and incorporated herein by this
20 reference.) The June 2020 MSA was approximately the third MSA Canary had entered into with
21 Twitter as Twitter would renew the agreement periodically. (Borelli Decl., ¶ 4.)

22 The usual steps in the process for Canary to receive and fulfill orders for Twitter are
23 described as follows: A person from Twitter would send an email regarding an event or a program
24 for which Twitter wanted branded merchandise; frequently, the email would include the number of
25 people, a budget for this project, and a timeline (or some variation of one or more of those three
26 items); a person from my Canary sales team would respond with initial concepts of what Canary
27 would provide; once Twitter indicated approval of the proposed merchandise, Canary would send
28 a quote for approval; the quote would include the complete price of all aspects of fulfilling the

1 order (i.e, merchandise, packaging, labor, tax, and shipping); if Twitter approved the quote, it
2 would send a purchase order by email – the Twitter purchase order would contain the name of the
3 person at Twitter submitting the order, and the email from Twitter would be copied to several
4 other Twitter employees, including the Twitter accounting team (a screenshot of an example of
5 Twitter’s email delivering a purchase order to Canary is attached as Exhibit B to the Evidence
6 Index); Canary would begin production and working towards fulfilling the purchase order; the
7 Twitter branded merchandise would then be delivered as requested in the purchase order; the
8 Canary accounting department would send out the invoice for payment to Twitter. Up until
9 September 2022, the final step was Twitter sending payment to Canary. (Borelli Decl., ¶ 5.)

10 Between the start of the business relationship in 2013 and through August 2022, Canary
11 never had a problem with Twitter failing to pay Canary’s invoices. (Borelli Decl., ¶ 6.)

12 Beginning in September 2022, however, Twitter stopped paying; Canary provided goods
13 and services to Twitter in accordance with same process discussed above, but Twitter has failed to
14 pay such invoices. The purchase orders from Twitter relating to this unpaid work are collectively
15 attached as Exhibit C to the Evidence Index. The purchase orders show that Twitter agreed with
16 our quotes and requested that Canary perform the work. (Borelli Decl., ¶ 6.)

17 Canary fully performed all of the obligations it agreed to perform in the purchase orders
18 attached as Exhibit C. (Borelli Decl., ¶ 7.)

19 Canary delivered its invoices to Twitter for payment of the services provided in the
20 purchase orders. (Borelli Decl., ¶ 8; Declaration of Jeremiah Hoang in Support of Application for
21 Writ of Attachment [“Hoang Decl.”], ¶ 4.)

22 Twitter is in breach of the MSA due to its failure to pay Canary’s invoices within the
23 required sixty-day time period. (Borelli Decl., ¶ 9.) The unpaid invoices are the following:

<u>Number</u>	<u>Amount</u>	<u>Date</u>
178542	\$ 999.66	9/2/2022
178623	\$ 1,075.00	9/9/2022
178873	\$246,801.63	9/15/2022
178906	\$ 30,370.61	9/16/2022

1	179611	\$ 6,783.99	9/27/2022
2	180022	\$ 11,153.81	9/30/2022
3	180886	\$ 28,326.23	10/18/2022
4	181297	\$ 4,034.40	10/25/2022
5	181542	\$ 150.00	10/28/2022
6	181889	\$ 22,997.53	11/2/2022
7	181890	\$ 19,679.18	10/31/2022
8	181897	\$ 15,898.59	11/2/2022
9	182296	\$ 430.00	11/11/2022
10	182821	\$ 3,637.24	11/22/2022

11 TOTAL: \$392,239.11

12 (Hoang Decl., ¶ 5; true and correct copies of these invoices are collectively attached as Exhibit C
13 to the Evidence Index and incorporated herein by this reference.)

14 No one at Twitter communicated any complaints with Canary’s services on the unpaid
15 invoices. (Borelli Decl., ¶ 10.)

16 On several occasions, employees of Twitter, including individuals in the accounts payable
17 department, told Canary employees that Twitter would be paying the invoices. In November
18 2022, a Twitter employee specifically identified the invoices, and stated that Twitter would be
19 processing each one for payment. No such payments have been received. (Borelli Decl., ¶ 10;
20 Hoang Decl., ¶ 6.)

21 Canary has suffered damages due to Twitter’s breach of the MSA in the amount of
22 \$392,239.11. (Borelli Decl., ¶ 11.)

23 **III. ARGUMENT**

24 **A. Canary Satisfies the Requirements for Issuance of A Writ of Attachment**

25 California Code of Civil Procedure (“CCP”) section 484.090(a) provides that a court shall
26 issue a right to attach order if it finds all of the following: “(1) The claim upon which the
27 attachment is based is one upon which an attachment may be issued; (2) The plaintiff has
28 established the probable validity of the claim upon which the attachment is based; (3) The

1 attachment is not sought for a purpose other than the recovery on the claim upon which the
2 attachment is based and (4) The amount to be secured by the attachment is greater than zero.”
3 (Code Civ. Proc. § 484.090.)

4 As set forth below, Canary can satisfy each of these four requirements for its claim against
5 Twitter.

6 **1. Canary’s Claim Is One Upon Which An Attachment May Be Issued**

7 CCP section 483.010(a) provides, in part, that “an attachment may be issued only in an
8 action on a claim or claims for money, each of which is based upon a contract, express or implied,
9 where the total amount of the claim or claims is a fixed or readily ascertainable amount not less
10 than \$500.00.” (Code Civ. Proc. § 483.010.)

11 As set forth above and in the accompanying Borelli Declaration, Canary’s claim is for
12 money, based upon a contract, and for a readily ascertainable amount over \$500. Canary’s claim
13 against Twitter is based on the MSA along with the purchase orders and the invoices, which are in
14 writing and which obligated Twitter to pay Canary for services provided. (See Exhibit A [parties’
15 MSA], Exhibit C [Twitter’s Purchase Orders], and Exhibit D [Canary’s Invoices] attached to the
16 Evidence Index.)

17 Accordingly, Canary’s breach of contract claim against Twitter is one upon which an
18 attachment may issue.

19 **2. Canary Establishes The Probable Validity Of Its Claim**

20 CCP section 484.090(a)(2) requires the moving party to establish the “probable validity of
21 the claim” upon which attachment is sought. In CCP section 481.190, probable validity is defined
22 to mean “more likely than not that” the moving party will obtain a judgment against the other
23 party on the claim. In determining this issue, the court must consider the relative merits of the
24 positions of the respective parties. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007)
25 146 Cal.App.4th 1474, 1484.) The court does not determine whether the claim is actually valid;
26 that determination will be made at trial and is not affected by the decision on the application for
27 the order. (CCP §484.050(b).)

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1 The elements of a breach of contract claim are the existence of the contract, performance
2 by the plaintiff, breach by the defendant, and damages. (*Reichert v. General Ins. Co.* (1968) 68
3 Cal.2d 822, 830.) As alleged in Canary’s Complaint and as supported by the accompanying
4 Borelli Declaration and the Hoang Declaration, Canary satisfies all of these elements as to its
5 claim.

6 The parties entered into the MSA and further affirmed their contract terms in the purchase
7 orders and invoices. Canary performed all of its obligations under the MSA and in each purchase
8 order. Twitter is in breach of the MSA by failing to pay Canary for the services it performed as
9 billed in the invoices. As a result of Twitter’s breaches of the contract, Canary has been damaged
10 in the amount of \$392,239.11 (prior to interest, attorneys’ fees, and costs).

11 Thus, Canary has established the probable validity of its claim; it is more likely than not
12 that Canary will recover on the cause of action against Twitter.

13 **3. Canary Is Not Seeking Attachment For Any Purpose Other Than Recovery**
14 **On Its Claims Against Twitter**

15 Canary is only seeking attachment to ensure recovery on its claim against Twitter.
16 Because this Application is brought by noticed motion (as opposed to ex parte), there is no
17 requirement for Canary to prove that there is a danger that Twitter will conceal its assets or impair
18 the value of its assets.

19 **4. Amount To Be Secured By The Attachment**

20 The amount to be secured by the attachment is the sum of (1) the amount of the
21 defendant’s indebtedness claimed by the plaintiff, and (2) any additional amount included by the
22 court for estimate of costs and any allowable attorneys’ fees under CCP section 482.110. (CCP
23 §483.015(a); *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 852.) Here, those
24 amounts are easy to calculate. Twitter’s indebtedness to Canary is the sum of \$392,239.11.

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IV. CONCLUSION

For all of the foregoing reasons, Canary requests a right to attach order against Twitter in the amount of \$392,239.11. Upon issuance of the order, Canary will post the required bond so that the Court can issue the Writ of Attachment.

Dated: January 24, 2023

BROTHERS SMITH LLP

By:



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Attorneys for Plaintiff
CANARY, LLC dba CANARY MARKETING