

## **Statement on behalf of Victory Records, Inc.**

Dated: December 15, 2011

Recent reports of claims filed by the Victory artist *A Day to Remember* (ADTR) in litigation presently pending in US District Court in the Northern District of Illinois (a case that was just transferred from Nashville upon Victory's successful motion based upon improper venue) have misleadingly stated that the principal issue in the case concerns the payment of royalties. The lawsuit, filed shortly after the band hired new management, is really about the band's refusal to fulfill their 5-album contractual commitment to Victory and their newfound desire to move to a major label. Recycled and often apocryphal stories of misguided and unsuccessful attempts by a few Victory bands to jump ship from the label that put them on the map have one common truthful thread; they always end badly for the band. In those cases, the bands eventually seek reconciliation and often ask to return to the Victory fold after having been disappointed by their post-Victory experiences. Victory is confident that this dispute will be resolved to the satisfaction of both the band and Victory, and that ADTR will continue to deliver great music to Victory in the coming years. Victory continues to honor its commitment to ADTR by placing its significant resources behind the band's current album, *What Separates Me From You*, which continues to climb the charts and meet or exceed Victory's expectations. The band, in the meantime, has enjoyed the benefits of the hundreds of thousands of dollars in record royalties generated from their album sales, which Victory accounts for in full compliance with its contract. Victory's job remains the same- work hard, sell records and abide by our agreements.

### Contact:

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

JOSHUA WOODARD, NEIL WASTFALL, )  
ALEX SHELNUT, JEREMY MCKINNON, )  
all professionally known as )  
A DAY TO REMEMBER, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
VICTORY RECORDS, INC. and )  
ANOTHER VICTORY, INC., )  
 )  
Defendants. )

No. 11 CV 7594

**ANSWER and  
COUNTERCLAIMS**

Judge Sharon Johnson Coleman

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Defendants Victory Records, Inc. and Another Victory, Inc. (collectively “Victory” and or “Defendants”), as and for their Answer and Counterclaims to the Complaint of Plaintiffs, Joshua Woodard, Neil Westfall, Alex Shelnut and Jeremy McKinnon, all professionally known as A Day To Remember (collectively “Plaintiffs”), respond as follows:

1. Defendants deny the allegations in Paragraph 1 of the Complaint, except aver that Plaintiffs agreed to render their personal services as professional recording artists and song writers in connection with the production of musical records exclusively for Victory Records, Inc. and respectfully refer the Court to the July 17, 2006 Agreement (“Deal Memo”), still extant, loosely referred to therein and attached as Exhibit A to the Complaint, for its true content, terms, meaning and import. To the extent Paragraph 1 calls for a legal conclusion, no response is required.

2. Defendants admit the allegations in Paragraph 2 of the Complaint.

3. Defendants admit that this Court has subject matter jurisdiction over this cause pursuant to 28 U.S.C. §1332 because it is a controversy between citizens of different states and the matter in controversy, exclusive of interest and costs, exceeds \$75,000, and deny the remaining allegations to the extent they relate to the jurisdiction and venue in the Middle District of Tennessee in Paragraph 3 of the Complaint. To the extent Paragraph 3 calls for a legal conclusion, no response is required.

4. Defendants admit that Plaintiffs entered into a contract with Defendants as alleged in Paragraph 4 of the Complaint and respectfully refer the Court to the Deal Memo, for its true content, terms, meaning and import. To the extent Paragraph 4 calls for a legal conclusion, no response is required.

5. Defendants deny knowledge and information sufficient to form a belief as to the allegations in Paragraph 5 of the Complaint, except respectfully refer the Court to the Deal Memo, for its true content, terms, meaning and import. To the extent Paragraph 5 calls for a legal conclusion, no response is required.

6. Defendants deny knowledge and information sufficient to form a belief as to the allegations in Paragraph 6 of the Complaint, except respectfully refer the Court to the Deal Memo, for its true content, terms, meaning and import. To the extent Paragraph 6 calls for a legal conclusion, no response is required.

7. Defendants deny the allegations in Paragraph 7 of the Complaint.

8. Defendants deny the allegations in Paragraph 8 of the Complaint.

9. Defendants deny the allegations in Paragraph 9 of the Complaint.

To the extent Paragraph 10 calls for a legal conclusion, no response is required.

10. Defendants deny the allegations in Paragraph 10 of the Complaint, except aver that Victory has properly filed sound recording copyright applications for the albums “For Those Who Have Heart” and “For Those Who Have Heart (Re-Issue)” and respectfully refer the Court to those copyright applications, for their true content, terms, meaning and import. To the extent Paragraph 10 calls for a legal conclusion, no response is required.

11. Defendants deny the allegations in Paragraph 11 of the Complaint, except aver that Victory has properly filed copyright applications for the musical compositions embodied on the albums “For Those Who Have Heart”, “For Those Who Have Heart (Re-Issue)” and “What Separates Me From You” and respectfully refer the Court to those copyright applications, for their true content, terms, meaning and import. To the extent Paragraph 11 calls for a legal conclusion, no response is required.

12. Defendants deny the allegations in Paragraph 12 of the Complaint, and respectfully refer the Court to the Deal Memo for its true content, terms, meaning and import. To the extent Paragraph 12 calls for a legal conclusion, no response is required.

13. Defendants deny the allegations in Paragraph 13 of the Complaint, and respectfully refer the Court to the Deal Memo for its true content, terms, meaning and import. To the extent Paragraph 13 calls for a legal conclusion, no response is required.

**RESPONSES TO COUNT I**

14. Defendants admit that Plaintiffs seek the relief set forth in the allegations in Paragraph 14 of the Complaint but deny that Plaintiffs are entitled to the requested relief. To the extent Paragraph 14 calls for a legal conclusion, no response is required.

15. Defendants deny the allegations in Paragraph 15 of the Complaint.

16. Defendants admit that Plaintiffs seek the relief set forth in the allegations in Paragraph 16 of the Complaint but deny that Plaintiffs are entitled to the requested relief. To the extent Paragraph 16 calls for a legal conclusion, no response is required.

**RESPONSES TO COUNT II**

17. Defendants admit that Plaintiffs seek the relief set forth in the allegations in Paragraph 17 of the Complaint but deny that Plaintiffs are entitled to the requested relief. To the extent Paragraph 17 calls for a legal conclusion, no response is required.

18. Defendants deny the allegations in Paragraph 18 of the Complaint, except admit that Plaintiffs seek the relief set forth in the allegations in Paragraph 18 of the Complaint but deny that Plaintiffs are entitled to the requested relief. To the extent Paragraph 18 calls for a legal conclusion, no response is required.

**RESPONSES TO COUNT III**

19. Defendants deny the allegations in Paragraph 19 of the Complaint and respectfully refer the Court to Deal Memo for its true content, terms, meaning

and import. To the extent Paragraph 19 calls for a legal conclusion, no response is required.

20. Defendants deny the allegations in Paragraph 20 of the Complaint and respectfully refer the Court to Deal Memo for its true content, terms, meaning and import. To the extent Paragraph 20 calls for a legal conclusion, no response is required.

**RESPONSE TO COUNT IV**

21. Defendants admit that Plaintiffs seek the relief set forth in the allegations in Paragraph 21 of the Complaint but deny that Plaintiffs are entitled to the requested relief. To the extent Paragraph 21 calls for a legal conclusion, no response is required.

**RESPONSES TO COUNT IV**

22. Defendants deny the allegations in Paragraph 22 of the Complaint. To the extent Paragraph 22 calls for a legal conclusion, no response is required.

23. Defendants deny the allegations in Paragraph 23 of the Complaint. To the extent Paragraph 23 calls for a legal conclusion, no response is required.

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state a claim on which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

The Complaint is barred by the doctrines of waiver and estoppel.

**THIRD AFFIRMATIVE DEFENSE**

The Complaint is barred by the doctrine of unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

The Complaint fails to state an actionable claim for an Accounting as Defendants have no contractual or equitable duty to account to Plaintiffs.

**FIFTH AFFIRMATIVE DEFENSE**

The Complaint fails to state an actionable claim under the TCPA as Plaintiffs have failed to plead any unfair, false, misleading or deceptive acts as required under that statute.

**SIXTH AFFIRMATIVE DEFENSE**

The Complaint fails to state an actionable claim for Declaration of Copyright Ownership, as it is barred in whole and/or part by the applicable Statute of Limitations and/or Laches.

**SEVENTH AFFIRMATIVE DEFENSE**

Count II of the Complaint seeking a declaration of ownership of federally registered copyrights is pre-empted by the Copyright Act, 17 U.S.C. §101 *et. seq.*

### COUNTERCLAIMS

1. These are counterclaims for breach of contract arising from the Deal Memo dated as of July 17, 2006.

2. Pursuant to paragraph 8 of the Deal Memo, Plaintiffs-Counterclaim Defendants (hereinafter “Counterclaim Defendants”) are prohibited from manufacturing and selling merchandise bearing the band name and/or mark A DAY TO REMEMBER, or the images or likenesses of the band members (the “Band Merchandise”), including sales to wholesalers or retail vendors or via the Internet, and are only permitted to sell Band Merchandise at Counterclaim Defendants’ live concert performances.

3. Pursuant to the Deal Memo, Victory has the exclusive right to manufacture and sell Band Merchandise bearing the Mark at wholesale or retail, including through brick and mortar store fronts and on the Internet.

4. Moreover, pursuant to the Deal Memo, all Band Merchandise designs are required to be mutually approved by Counterclaim Defendants and Victory.

5. On or about February 2009, Victory learned that Counterclaim Defendants were selling merchandise bearing Band Merchandise through retail outlets, including on the Internet.

6. Victory also learned at or about that time that Counterclaim Defendants had caused Band Merchandise to be manufactured by a third party, and that Counterclaim Defendants had caused the manufacture of Band Merchandise without seeking or obtaining Victory’s prior approval of the designs thereof.



7. Moreover, in September 2011, Victory sought to manufacture new Band Merchandise for sale in conjunction with Counterclaim Defendants' latest album and submitted the designs to be used on the new Band Merchandise to Counterclaim Defendants for their approval pursuant to the Deal Memo.

8. Counterclaim Defendants arbitrarily rejected and/or unreasonably withheld their approval of the submitted designs, without providing Victory with any objectively reasonable basis for their action.

9. As a result, Victory's manufacture and sale of the new Band Merchandise was unreasonably delayed and sales of that new Band Merchandise were lost as a direct result of Counterclaim Defendants' conduct.

**FIRST COUNTERCLAIM**  
**(Breach of Contract)**

10. Victory repeats and realleges all of the allegations set forth in paragraphs 1 through 9 of the Counterclaim as if fully set forth herein.

11. Counterclaim Defendants' manufacture and sale of Band Merchandise through retail outlets, including the Internet, was a material breach of the Deal Memo.

12. In addition, Counterclaim Defendants manufactured and sold Band Merchandise without seeking or receiving Victory's prior approval of the design thereof.

13. As a result thereof, Victory has been injured in an amount to be determined at trial, including interest and costs.

**SECOND COUNTERCLAIM**  
**(Breach of Contract)**

14. Victory repeats and realleges all of the allegations set forth in paragraphs 1 through 13 of the Counterclaim as if fully set forth herein.

15. Counterclaim Defendants' arbitrary rejection and/or objectively unreasonable refusal to approve the designs of the new Band Merchandise Victory submitted in September 2011, led to the delay in the manufacture and sale thereof.

16. As a result thereof, Victory has been injured in an amount to be determined at trial, including interest and costs.

**WHEREFORE**, Victory demands judgment as follows:

- a. Dismissal of each individual Count of the Complaint in part and/or in their entirety;
- b. On the First Counterclaim, damages in an amount to be determined at trial, including interest and court costs;
- c. On the Second Counterclaim, damages in an amount to be determined at trial, including interest and court costs;
- d. Applicable pre-judgment and post-judgment interest; and
- e. Such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Pursuant to Fed. R. Civ. P. 38(b), plaintiff demands a trial by jury of all issues which are so triable.

Dated: December 1, 2011

Yours, etc.,

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