

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SPORTS MANAGEMENT
NETWORK, INC.,

Plaintiff/Counter-Defendant,

v.

KURT BUSCH, INC. and
KURT BUSCH,
jointly and severally,

Defendants/Counter-Plaintiffs

v.

FRASCO CAPONIGRO WINEMAN
& SCHEIBLE, PLLC, and JOHN P.
CAPONIGRO, an individual,

Counter-Defendants.

Case No. 2:17-cv-10413-AJT-EAS

Hon. Arthur J. Tarnow
Magistrate Judge Elizabeth A. Stafford

**ANSWER TO COMPLAINT,
AFFIRMATIVE DEFENSES,
COUNTERCLAIM, AND JURY
DEMAND**

ANSWER TO COMPLAINT

Defendants Kurt Busch, Inc. and Kurt Busch for their answer to the complaint of plaintiff Sports Management Network, Inc. ("SMN"), state as follows:

PRELIMINARY STATEMENT

A. From 2005 to March 2016 or thereabouts, plaintiff SMN, the law firm of Frasco Caponigro Wineman & Scheible, PLLC ("FCWS"), and John P. Caponigro, together, were the sports agents and lawyers for professional

- stock car racing driver Kurt Busch and his company Kurt Busch, Inc. (collectively, “Busch”). All references to SMN and FCWS necessarily include and incorporate John Caponigro, as they are all three responsible for the acts of misconduct described here. As Busch’s agents and lawyers, SMN and FCWS had fiduciary, legal, ethical, and contractual duties to act in Busch’s best interests. However, SMN and FCWS did not do so at various key times during the relationship, breached their duties to Busch, and caused him millions of dollars of damages.
- B. At the expense of Busch, SMN and FCWS at times improperly advantaged themselves and some of their other clients. Upon information and belief, these other clients include Penske Racing and Andretti Autosport. When SMN and FCWS had conflicts of interest, they did not disclose or identify these conflicts to Busch, seek or obtain Busch’s informed consent to their conflicts, nor advise Busch to seek the advice of independent counsel. Busch ultimately terminated SMN and FCWS in or about March 2016.
- C. While SMN has sued Busch for post-termination fees, Busch does not owe SMN and FCWS anything under the parties’ contract – a contract that expired by its very terms in December 2014. Nor does Busch owe SMN and FCWS anything under any of the theories alleged in the

complaint. In fact, Busch is now bringing the below counterclaims against SMN, FCWS, and John Caponigro for their breaches of fiduciary, legal, ethical, and contractual duties that they owed to him.

PARTIES AND JURISDICTION

1. Defendants plead no contest to the allegations in this paragraph.
2. Defendants admit the allegations in this paragraph.
3. Defendants admit the allegations in this paragraph.
4. Defendants admit the allegations in this paragraph.
5. Defendants admit the allegations in this paragraph.

GENERAL ALLEGATIONS

6. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

7. Defendants admit the allegations in this paragraph.

8. Defendants admit that they executed a document entitled “Letter of Agreement” on November 28, 2005 (the “2005 Representation Agreement”). Defendants deny the allegations in this paragraph to the extent that they are inconsistent with that document. For example, SMN fails to accurately disclose the fact that it was SMN, **and** FCWS and John Caponigro, who jointly entered into the 2005 Representation Agreement with Defendants. Defendants admit that on August 16, 2010, they executed a document entitled “Extension of Term of

Representation Agreement” (the “Extension”). Defendants deny the allegations in this paragraph to the extent that they are inconsistent with that document. The 2005 Representation Agreement and the Extension are referred to collectively as the “RA.” Defendants admit that they are in possession of the RA.

9. Defendants admit that SMN offered in 2012 that Defendants would not have to make two future 2012 payments under the RA, which future payments totaled \$125,000, given that Busch would be earning significantly less in 2012 than Busch had previously. Defendants admit that they accordingly did not make these two future 2012 payments. Defendants lack knowledge or information sufficient to form a belief as the truth of the allegations regarding SMN’s motivations.

10. Defendants deny the allegations in paragraph 10 as untrue. *See also*, Counterclaims.

11. Defendants admit that after July 2012, SMN and FCWS negotiated and finalized certain specific agreements on Defendants’ behalf. However, Defendants deny as untrue that Defendants are obligated, under the RA or otherwise, to make any further payments to SMN or FCWS based on compensation received by Defendants under those contracts or otherwise.

12. Defendants admit that they paid the invoices submitted by SMN beginning in January 2013 and through the first quarter of 2016, but deny as untrue

that such invoices were being submitted or that such payments were being made, pursuant to the agreement alleged by SMN. *See also*, Counterclaims.

13. Defendants admit that they terminated their relationship with SMN and FCWS in or about March 2016, and that such termination was effective immediately. Defendants also admit that they did not make any further payments to SMN and FCWS after this termination, but deny as untrue that they were obligated to make any further payments under the RA or otherwise.

14. Defendants deny as untrue that they remain obligated to SMN in any fashion. Defendants further deny that paragraph 3.G. of the RA survived the termination of the parties' relationship. *See also*, Counterclaims. Defendants admit that SMN continued to invoice Defendants, but Defendants objected to those invoices and are not obligated to pay them under the RA or otherwise.

15. Defendants admit that SMN sent quarterly invoices to Defendants over the course of their relationship, but otherwise deny the remaining allegations in this paragraph as untrue. Defendants objected to all invoices that were submitted after termination of the relationship, and are not obligated to pay them under the RA or otherwise.

16. Defendants deny the allegations in this paragraph as untrue.

17. Defendants deny as untrue that SMN is or could be entitled to any additional payments, and deny that Defendants remain obligated to SMN in any

fashion. Defendants lack knowledge or information sufficient to form a belief as to whether certain options will or will not be exercised by third parties.

18. Defendants deny the allegations in this paragraph as untrue.

COUNT I
BREACH OF CONTRACT

19. Defendants incorporate their answers to paragraphs 1 – 18 as if fully stated here.

20. Defendants deny the allegations in this paragraph as untrue. The RA has expired.

21. Defendants deny the allegations in this paragraph as untrue.

22. Defendants deny the allegations in this paragraph as untrue.

23. Defendants deny the allegations in this paragraph as untrue.

COUNT II
STATUTORY CONVERSION

24. Defendants incorporate their answers to paragraphs 1 – 23 as if fully stated here.

25. Defendants deny the allegations in this paragraph as untrue.

26. Defendants admit that SMN has demanded payment, but deny as untrue that Defendants have unlawfully retained any funds.

27. Defendants admit that they have objected to SMN's demands, but deny as untrue that they had any obligation to make any such payments.

28. Defendants deny the allegations in this paragraph as untrue.

29. Defendants deny the allegations in this paragraph as untrue.

30. Defendants deny the allegations in this paragraph as untrue.

COUNT III
FRAUDULENT MISREPRESENTATION/FRAUDULENT INDUCEMENT

31. Defendants incorporate their answers to paragraphs 1 – 30 as if fully stated here.

32. Defendants deny the allegations in this paragraph as untrue.

33. Defendants deny the allegations in this paragraph as untrue.

34. Defendants deny the allegations in this paragraph as untrue.

35. Defendants deny the allegations in this paragraph as untrue.

36. Defendants deny the allegations in this paragraph as untrue.

37. Defendants deny the allegations in this paragraph as untrue.

COUNT IV
UNJUST ENRICHMENT

38. Defendants incorporate their answers to paragraphs 1 – 37 as if fully stated here.

39. Defendants deny the allegations in this paragraph as untrue.

40. Defendants admit that SMN has requested payment, but deny as untrue that Defendants had or have any obligation to make any such payments.

41. Defendants deny the allegations in this paragraph as untrue.

COUNT V
BREACH OF FIDUCIARY DUTY

42. Defendants incorporate their answers to paragraphs 1 – 41 as if fully stated here.

43. Defendants deny the allegations in this paragraph as untrue. SMN and FCWS owe fiduciary duties **to** Defendants.

44. Defendants deny the allegations in this paragraph as untrue. SMN and FCWS owe fiduciary duties **to** Defendants. Defendants further deny as untrue that they have misappropriated, converted or unlawfully retained anything of SMN or FCWS.

45. Defendants deny the allegations in this paragraph as untrue. SMN and FCWS owe fiduciary duties **to** Defendants. Defendants further deny as untrue that they have misappropriated, converted, failed to honor any promise, duty or obligation, or unlawfully retained anything of SMN or FCWS.

46. Defendants deny the allegations in this paragraph as untrue. SMN and FCWS owe fiduciary duties **to** Defendants.

47. Defendants deny the allegations in this paragraph as untrue.

COUNT VI
PROMISSORY ESTOPPEL

48. Defendants incorporate their answers to paragraphs 1 – 47 as if fully stated here.

49. Defendants deny the allegations in this paragraph as untrue.

50. Defendants deny the allegations in this paragraph as untrue.

51. Defendants deny the allegations in this paragraph as untrue.

COUNT VII
QUANTUM MERUIT/CONSTRUCTIVE TRUST

52. Defendants incorporate their answers to paragraphs 1 – 51 as if fully stated here.

53. Defendants deny the allegations in this paragraph as untrue.

54. Defendants deny the allegations in this paragraph as untrue.

55. Defendants deny the allegations in this paragraph as untrue.

56. Defendants deny the allegations in this paragraph as untrue.

57. Defendants deny the allegations in this paragraph as untrue.

58. Defendants deny the allegations in this paragraph as untrue.

COUNT VIII
DECLARATORY JUDGMENT

59. Defendants incorporate their answers in paragraphs 1 – 58 as if fully stated here.

60. Defendants lack sufficient information or knowledge to form a belief as to the truth of the allegations in this paragraph. This paragraph also alleges a legal conclusion to which Defendants are not required to respond.

61. Defendants deny the allegations in this paragraph as untrue.

62. Defendants deny the allegations in this paragraph as untrue.

63. Defendants admit that SMN has requested payment, but deny as untrue that Defendants had or have any obligation to make any such payments.

64. Defendants deny the allegations in this paragraph as untrue.

COUNT IX
ACCOUNT STATED/OPEN ACCOUNT

65. Defendants incorporate their answers to paragraphs 1 – 64 as if fully stated here.

66. Defendants deny the allegations in this paragraph as untrue.

67. Defendants deny the allegations in this paragraph as untrue.

68. Defendants deny the allegations in this paragraph as untrue. *See also* Counter-Affidavit attached as Exhibit 1 and incorporated here.

69. Defendants admit that SMN has demanded payment, but state that Defendants objected to these demands and to any invoices submitted within a reasonable time. Defendants further deny that they had or have any obligation to make any such payments.

70. Defendants deny the allegations in this paragraph as untrue.

WHEREFORE, Defendants request that this Court enter judgment in favor of Defendants, and against SMN, together with costs and all other relief as the Court deems just and appropriate.

AFFIRMATIVE DEFENSES

1. SMN's complaint is barred in whole or in part because it fails to state a claim upon which relief can be granted.

2. SMN's complaint is barred in whole or in part because it has failed to join FCWS and John Caponigro as parties in this action, even though FCWS and John Caponigro are parties to the RA and thus required parties pursuant to Fed. R. Civ. P. 19(a)(1).

3. SMN's claims are barred in whole or in part by the statute of frauds because the oral modification alleged by SMN: (1) was not to be performed within one year of the making of the alleged agreement; and (2) was not in writing or signed by Defendants. *See* MCL 566.132(1)(a).

4. SMN's claims are barred in whole or in part by MCL 566.1 because the oral modification alleged by SMN was not in writing or signed by Defendants, nor was it supported by consideration.

5. SMN's claims are barred in whole or in part because the RA lapsed after December 31, 2014, and some or all of the agreements upon which SMN relies were secured and performed by Defendants after the RA lapsed. Such agreements are not subject to the RA, and SMN's attempt to claim compensation under the RA with respect to such agreements is invalid.

6. SMN's claims are barred in whole or in part because SMN, FCWS, and John Caponigro breached their fiduciary, legal, ethical, and contractual duties to Defendants, as more fully explained in Defendants' Counterclaims.

7. SMN's claims are barred in whole or in part because SMN, FCWS, and John Caponigro materially breached the RA, and their performance was defective, as more fully explained in Defendants' Counterclaims.

8. SMN's claims are barred in whole or in part because the fee-provision in the RA is unenforceable given SMN's, FCWS's, and John Caponigro's impermissible conflicts of interest, as more fully explained in Defendants' Counterclaims.

9. SMN's claims are barred in whole or in part due to Defendants' right of recoupment and/or set-off.

10. SMN's claims are barred in whole or in part by its waiver and/or equitable estoppel.

11. SMN's claims are barred in whole or in part by its novation.

12. SMN's claims are barred in whole or in part by the doctrine of election of remedies.

13. SMN's claims are barred in whole or in part because they are based on speculation and/or conjecture. For instance, SMN seeks compensation based upon future options which may never be triggered in any event.

14. SMN's claims are barred in whole or in part due to its unclean hands, as more fully explained in Defendants' Counterclaims.

15. SMN's claims of unjust enrichment, promissory estoppel, and quantum meruit/constructive trust are barred in whole or in part because of the existence of an express contract.

16. SMN's claim for account stated/open account is barred in whole or in part because Defendants objected to the statements submitted by SMN within a reasonable amount of time, and are not indebted to SMN in any fashion, and because of Defendants' Counterclaims.

17. SMN's claims are barred in whole or in part because it was not the procuring cause of the agreements upon which SMN relies, the procuring cause doctrine does not override an express agreement in any event, and the procuring cause doctrine does not apply.

18. SMN's claim for attorney fees is barred because it has no right and is not entitled to attorney fees.

19. SMN's claims are barred in whole or in part because: Defendants did not wrongfully exert dominion, control over, or convert any of SMN's property; Defendants did not convert any of SMN's property to Defendants' own use; Defendants' rights to the property at issue are superior, authorized, and privileged

given the interests of and compared to SMN; and SMN has not been actually or otherwise damaged.

20. SMN's claims are barred in whole or in part because a contingent fee agreement must be in writing and must state the method by which the fee is to be determined. *See*, Michigan Rule of Professional Conduct 1.5(c). In addition, SMN's fees are excessive and unreasonable. *See*, Michigan Rule of Professional Conduct 1.5(a).

**COUNTERCLAIM OF COUNTER-PLAINTIFFS KURT BUSCH, INC.
AND KURT BUSCH AGAINST COUNTER-DEFENDANTS SPORTS
MANAGEMENT NETWORK, INC., FRASCO CAPONIGRO WINEMAN &
SCHEIBLE, PLLC, AND JOHN P. CAPONIGRO**

Counter-Plaintiffs Kurt Busch, Inc. and Kurt Busch (collectively, "Busch") for their counter-complaint against Sports Management Network, Inc. ("SMN"), Frasco Caponigro Wineman & Scheible, PLLC ("FCWS"), and John P. Caponigro ("Caponigro") state as follows:

INTRODUCTION

1. SMN, FCWS, and Caponigro jointly represented Busch as Busch's sports agents and lawyers. All references to SMN and FCWS below necessarily include and incorporate Caponigro, as they are all three individually and collectively responsible for the acts of misconduct described here. For ease of reference, Caponigro and/or FCWS are not always specifically mentioned with

SMN, but all three should be considered included in the allegations below when any one of them is mentioned.

2. Throughout their joint representation of Busch, SMN, FCWS, and Caponigro had a number of conflicts of interest. First, they represented Busch in connection with transactions in which they also, upon information and belief, represented the adverse party. Second, in the contract that is the subject of SMN's complaint, and in related arrangements, SMN, FCWS, and Caponigro were adverse to Busch, their client, but did not advise or provide a reasonable opportunity for Busch to seek the advice of independent counsel. There was no informed consent by Busch. Nor did SMN, FCWS, and Caponigro comply with their obligations and duties to Busch under the Michigan Rules of Professional Conduct and otherwise. In doing so, they violated their fiduciary duties, committed legal malpractice, and materially breached their agreements with Busch.

3. Agents and lawyers, such as SMN, FCWS and Caponigro here, are not entitled to be paid for services rendered in violation of their duties owed to the client. Such agents and lawyers are also required to forfeit the compensation they received from their principal and client. Due to the breaches of their duties owed to Busch, SMN, FCWS, and Caponigro are liable to Busch for at least (1) all compensation they have received from Busch, which from January 2011 to January

2016 alone totals \$1,334,026.23; and (2) extensive damages incurred by Busch due to the misconduct of SMN, FCWS, and Caponigro.

PARTIES AND JURISDICTION

4. Kurt Busch is a resident of North Carolina who transacts business in Oakland County, Michigan.

5. Kurt Bush, Inc. is a North Carolina corporation with its principal place of business in North Carolina. It transacts business in Oakland County, Michigan.

6. Upon information and belief, SMN is a Michigan corporation with its principal place of business in Troy, Michigan.

7. Upon information and belief, FCWS is a Michigan professional limited liability company with its principal place of business in Troy, Michigan. Upon information and belief, the members of FCWS are not residents or citizens of North Carolina.

8. Caponigro is an individual who, upon information and belief, is a resident and citizen of Michigan.

9. For purposes of jurisdiction, diversity exists between Busch on the one hand, and SMN, FCWS, and Caponigro on the other. The amount in controversy also exceeds the threshold for this court's diversity jurisdiction, as millions of dollars are at issue.

10. FCWS and Caponigro have been joined as Counter-Defendants to this Counterclaim pursuant to Fed. R. Civ. P. 13(h) and 20(a)(2) because: (1) the relief sought through this Counterclaim is asserted against FCWS and Caponigro jointly, severally, and with respect to the same transactions and occurrences as that of SMN; and (2) questions of law and fact that are common to SMN, FCWS, and Caponigro will arise in this action.

11. This Court has jurisdiction pursuant to 28 USC § 1332.

12. Venue is proper in this Court pursuant to 28 USC § 1391(b)(2).

GENERAL ALLEGATIONS

The Relationship Between SMN and FCWS

13. SMN is a sports management company that represents several professional race car drivers and race car teams.

14. FCWS is a law firm that, among other things, jointly represents and provides legal services to the same professional race car drivers and race car teams. It is also representing SMN in this action, but has a conflict of interest in doing so.

15. SMN and FCWS are under common ownership and control.

16. Caponigro, an attorney, is the founder of SMN and its CEO. He is also the managing partner of FCWS. On his attorney profile webpage, it states that he founded FCWS's "Sports & Entertainment division, Sports Management

Network, Inc., in 1989 to provide additional services and expertise to [FCWS's] growing list of sports and entertainment related clients.”

17. SMN and FCWS have adjoining offices. On SMN's website, it prominently displays that SMN is “intricately connected” with the law firm of FCWS, and that “[b]ecause their respective offices are adjoined, the integration of the sports/entertainment and legal functions are seamless.”

18. SMN's website further provides that FCWS “provides effective legal counsel not only for the clients of SMN, but also for other sports/entertainment-related businesses and individuals on a case-by-case basis.”

19. According to SMN's website, “[f]or over 25 years SMN/FCW&S has provided expert, highly specialized legal services pertinent to the sports and entertainment industry.”

20. Similarly, FCWS's website repeatedly refers to SMN as “the sports and entertainment division” of FCWS. In addition, when describing its “Sports and Entertainment Law” practice area, FCWS's website directs the reader to “[s]ee Sport Management Network's . . . website for a more detailed explanation of this area of practice.”

21. This relationship between SMN, FCWS, and Caponigro has been this way, at least, since Busch first contracted with them in 2005.

The Representation Agreement

22. On November 28, 2005, Busch entered into a representation agreement with SMN, FCWS, and Caponigro, individually. The Counter-Defendants are in possession of that contract, so it is not attached. That contract will be referred to as the “2005 Representation Agreement.”

23. Caponigro drafted the 2005 Representation Agreement.

24. The 2005 Representation Agreement states that it is “to confirm the understanding reached between us concerning the ongoing representation by myself [Caponigro] and my related firms, Sports Management Network, Inc., and Frasco Caponigro Wineman & Scheible, PLLC (hereinafter collectively referred to as ‘SMN’).”

25. Unless otherwise noted, Caponigro was the individual agent and lawyer who provided all or most of the services to Busch at all relevant times. SMN and FCWS acted through and with Caponigro regarding the acts described here.

26. Pursuant to the 2005 Representation Agreement, SMN, FCWS, and Caponigro jointly agreed to “serve as [Busch’s] sole management agency.” SMN, FCWS, and Caponigro agreed to “provide [Busch] with advice, consultation, assistance and representative services concerning [Busch’s] career as a

professional race driver as well as [his] business, professional, corporate and personal activities.”

27. SMN, FCWS, and Caponigro agreed to provide the following services to Busch:

- a. Negotiation of [Busch’s] driver contracts with NASCAR or other racing teams and all other necessary services incidental to such negotiations including, but not limited to, the preparation, drafting and/or review of such driver contracts.
- b. Negotiation of [Busch’s] personal service contracts with team sponsors, including, but not limited to, the preparation, drafting and/or review of such personal service contracts.
- c. Development, negotiation, organization and administration of new income producing opportunities and activities.
- d. Assistance with the structuring of **all functions** pertaining [Busch’s] overall career and personal management including public relations, accounting, financial planning, insurance, charities, banking and **legal services**.

2005 Representation Agreement, ¶ 1 (emphasis added).

28. SMN, FCWS, and Caponigro also agreed to provide “[l]egal representation of a general nature on [Busch’s] behalf at [Busch’s] written request.” The 2005 Representation Agreement also provided that “[t]his legal representation will include but not be limited to the establishment of [Busch’s] new business entities, the establishment of a foundation for charitable purposes, [Kurt Busch’s] estate planning and documentation relating to [his] upcoming marriage.”

29. In other words, SMN, FCWS, and Caponigro agreed to jointly and simultaneously represent Busch as Busch's sports agents *and* lawyers with respect to "all functions" related to his overall career as a professional race car driver, including the negotiating and drafting of any agreements with third parties.

30. SMN, FCWS, and Caponigro also agreed to be lawyers for Busch in a general sense, covering all matters related to Busch. Indeed, thereafter SMN and FCWS provided a number of general legal services to Busch including, but not limited to:

- a. drafting estate planning and related documents;¹
- b. assisting Kurt Busch with the formation of a clothing company called Silver Lining Apparel Co, LLC;
- c. representing Kurt Busch and Silver Lining Apparel Co, LLC regarding a transaction with a California company called One Punch Distribution, LLC;
- d. representing Kurt Busch and Silver Lining Apparel Co, LLC in connection with litigation in California stemming from that transaction; and
- e. assisting in matters related to the Kurt Busch Foundation.

31. At all relevant times, Busch reposed faith, confidence, and trust in SMN, FCWS, and Caponigro.

¹ These legal services were provided by another member of FCWS.

32. Neither SMN, FCWS, nor Caponigro advised Busch about the inherent conflict of interests related to their acting as both Busch's sports agents and Busch's lawyers.

33. SMN, FCWS, and Caponigro never sought nor received Busch's informed consent regarding that nor any other conflict of interest, whether prior to executing the 2005 Representation Agreement or any time thereafter.

34. On August 16, 2010, the parties in writing extended the terms of the 2005 Representation Agreement through December 31, 2014 (the "Extension"). The Counter-Defendants are in possession of the Extension, so it is not attached. In the Extension, the parties agreed to increase the compensation of SMN, FCWS, and Caponigro by \$50,000 per year. The 2005 Representation Agreement and the Extension are hereafter collectively referred to as the "RA."

35. After 2012, SMN began invoicing Busch, on a quarterly basis, for amounts which SMN calculated as totaling 10% of all compensation received by Busch under Busch's personal service agreements and sponsorship agreements, **as well as Busch's driver agreements.**

36. This is a significant and material departure from the terms of the RA, and one to which Busch never agreed. Under the RA, Busch was to pay SMN in quarterly installments, 10% of all compensation Busch received under **only**

personal service agreements and endorsement agreements. Driver agreements were addressed separately.

37. Based on the Extension, which was effective from August 16, 2010 to December 31, 2014, Busch was required to pay an annual fee to SMN of \$250,000. This annual fee was derived from the annual compensation Busch was to receive under Busch's driver agreement that existed at that time. At that time, Busch had a driver agreement with Penske Racing South, Inc. ("Penske"). That driver agreement, like the Extension, commenced in 2010 and would be effective through 2013, with an option for 2014.

38. The parties agreed that the annual fee Busch would pay to SMN under the RA during that time would only total approximately 4% of the annual compensation Busch was to receive under that base driver agreement – not 10%. \$250,000 represents approximately 4% of what was due Busch under the base Penske driver agreement.

39. However, due to the improper actions of SMN, FCWS, and Caponigro (described below), the Penske driver agreement unexpectedly terminated in November 2011. Thereafter, Busch agreed to driver agreements with Phoenix Racing for the 2012 race season, Furniture Row Racing for the 2013 race season, and Stewart-Hass Racing for the 2014 season. Busch was due to make

considerably less under these agreements than what Busch would have made under the Penske driver agreement.

40. The RA itself states that “should there be occasion during the term hereof for you [Busch] to provide driving services for **another [non-Penske] team** and such services involve the structuring of an arrangement, SMN will handle those negotiations as well and **will be entitled to a fee in an amount to be agreed upon** between us in good faith.” (emphasis added).

41. In other words, when Busch’s relationship with Penske terminated, so did Busch’s obligation to pay the \$250,000 annual fee, and the parties were supposed to set a new annual fee based on the compensation Busch would be receiving from any subsequent driver agreements.

42. However, such a fee was never agreed upon with respect to any of the driver agreements between Busch and Phoenix Racing, Furniture Row Racing, and Stewart-Hass Racing. Instead, the 4% that the parties had agreed upon *increased* to 10% beginning in January 2013, via SMN’s billings, without Busch’s agreement, consent or otherwise.

43. Although the invoices submitted by SMN from January 2013 to January 2016 continued to be paid by Busch’s accounting and bookkeeping personnel, Busch never agreed to that compensation arrangement.

44. In any event, any payment obligations of Busch to SMN, FCWS, and Caponigro were to cease when Busch terminated the relationship. Busch was not required, under any scenario, to continue to make payments after the relationship with SMN, FCWS, and Caponigro was terminated. SMN and FCWS received payments from Busch until they were terminated in or about March 2016.

45. Moreover, the RA expired by its own terms on December 31, 2014. After the Extension expired, it no longer applied to the matters at issue here. For example, Busch's contract with Stewart Haas Racing, LLC ("Haas") was renegotiated between Busch and Haas on August 19, 2015 – **after the Extension (between Busch and SMN) had expired**. So the Extension **does not apply** to the post-Extension renegotiated 2015 Haas contract under any scenario.

46. While SMN, FCWS, and Caponigro represented Busch as agents and lawyers after the Extension expired, all obligations to compensate them for such representation terminated once they no longer represented Busch. As of or around March 2016, SMN, FCWS, and Caponigro no longer represented Busch. Busch has already paid all amounts owed to them, if not more.

47. Other contracts and arrangements of Busch were entered into **after the Extension (between Busch and SMN) expired**. One example is with Monster Energy covering the years 2016 and 2017 (with an option for 2018). Other contracts and arrangements of Busch also do not come within the RA. One

example is based upon driver services that Busch provided to Andretti Autosport. The RA does not set a fee for SMN, FCWS, and Caponigro in this situation. Rather, it only states that a fee will be agreed upon in the future.

48. With respect to these other contracts and arrangements, while SMN, FCWS, and Caponigro represented Busch as agents and lawyers, any obligation to compensate them for such representation terminated once they no longer represented Busch. As of or around March 2016, they no longer represented Busch. Busch has already paid all amounts owed to them, if not more.

Conflicts of Interest

A. Prohibition From Assisting Nonlaw Business in Delivering Legal Services

49. From the date of the 2005 Representation Agreement until Busch terminated the relationship in or about March 2016, SMN, FCWS, and Caponigro jointly acted as both Busch's sports agents and lawyers, creating an impermissible conflict of interest, and they received compensation for this joint representation.

50. This dual representation by SMN, FCWS, and Caponigro under the RA is expressly forbidden by the Michigan Rules of Professional Conduct:

The lawyer is prohibited from assisting the nonlaw business in delivering legal services to customers; although the nonlaw business may refer customers to the law firm for legal services with an appropriate disclosure of the lawyer's interest, **the legal services may not be made part of the contract with the nonlaw business**. MRPC 5.5, 7.2(c), MCL 450.681. The lawyer must remain free to exercise independent professional judgment regarding whether to represent the

customer and what legal services the customer should have, without being influenced by whatever the nonlaw business has recommended to the customer.

Michigan Ethics Op. RI-190 (emphasis added).

B. The Extension

51. In addition, SMN, FCWS, and Caponigro had a conflict of interest when seeking Busch's agreement to the Extension. On the one hand, they were acting as Busch's sports agents and lawyers, and had an interest in receiving the best possible deal for themselves under the Extension. On the other hand, SMN, FCWS, and Caponigro, as Busch's agents and lawyers, should have been trying to get Busch the best possible deal. Through the Extension, among other things, they secured a \$50,000 increase in their annual compensation at Busch's expense, which, along with other terms, were not fair and reasonable to Busch.

52. SMN, FCWS, and Caponigro did not advise Busch of this conflict of interest. Nor did they advise or provide a reasonable opportunity for Busch to seek the advice of independent counsel regarding the Extension. There was no informed consent by Busch.

C. The Different Charges and Payments Since 2013

53. SMN, FCWS, and Caponigro also had a conflict of interest when they charged and accepted payments after 2012 from Busch. On the one hand, they were acting as Busch's sports agents and lawyers, and were interested in receiving

as much as Busch was willing to pay for their services. On the other hand, they were Busch's agents and lawyers and should have been advising Busch regarding the best payment and other terms for Busch. Among other things, SMN, FCWS, and Caponigro charged and received more than what they should have, for what turned out to be several more years, taking advantage of Busch on terms which were not fair and reasonable to Busch.

54. SMN, FCWS, and Caponigro did not advise Busch of this conflict. Nor did they advise or provide a reasonable opportunity for Busch to seek the advice of independent counsel regarding the different charges and payments. There was no informed consent by Busch.

D. Adverse Transactions – Penske

55. In addition to the above conflicts of interest, on information and belief, SMN, FCWS, and Caponigro represented adverse parties in the same transactions in which they were representing Busch.

56. Upon information and belief, unless otherwise noted, SMN and FCWS represented Penske at all relevant times, and with respect to the transactions described below.

57. SMN prominently displays Team Penske as a client on its website. In addition, on FCWS's website, when describing its "Sports and Entertainment Law" practice area, it directs the reader to "[s]ee Sport Management Network's . . .

website for a more detailed explanation on this area of practice.” FCWS’s website further refers to SMN as “the sports and entertainment division” of FCWS.

58. Prior to the 2005 Representation Agreement, on July 20, 2005, Busch had entered into a Driver Agreement with Penske covering the 2006-2010 race seasons. It was at or around this time that Penske introduced Busch to Caponigro, SMN, and FCWS. Upon information and belief, SMN, FCWS, and Caponigro represented Penske with respect to that Driver Agreement.

59. A few months later, in November 2005, Busch entered into the 2005 Representation Agreement with SMN, FCWS, and Caponigro. Such agreement was also to be effective for the 2006-2010 race seasons – the same period as the Penske Driver Agreement. After entering into the 2005 Representation Agreement, Busch and Penske also entered into several other ancillary agreements between 2006 and 2008.

60. Upon information and belief, this was not the first time that SMN, FCWS, and Caponigro represented drivers with respect to agreements with their other client Penske, and that had been introduced by Penske. On information and belief, the client base of SMN, FCWS, and Caponigro consists of several driver clients that Penske steers to SMN, FCWS, and Caponigro. This results in a situation where the drivers and Penske will be simultaneously represented by SMN, FCWS, and Caponigro.

61. Effective April 8, 2010, Busch and Penske extended the Penske Driver Agreement pursuant to their First Amendment to Driver Agreement. The Counter-Defendants have these above-referenced agreements so they are not attached. Among other things, this amendment extended the Driver Agreement to cover the 2011-2013 race seasons with an option for the 2014 race season.

62. Since approximately 2010, SMN's, FCWS's, and Caponigro's efforts and representation of Busch were second rate and sub-standard with respect to Busch's dealings with Penske. A similar pattern of second rate effort and representation of Busch by them occurred on other dealings as well.

63. In or around Spring 2011, Penske presented Busch with a "Letter of Conduct." This letter strongly favored Penske and disadvantaged Busch, and was not warranted. Nonetheless, SMN, FCWS, and Caponigro advised, instructed and pressured Busch to sign the Letter of Conduct, despite Busch's repeated and express reluctance to do so.

64. In or around Summer 2011, Busch signed the Letter of Conduct pursuant to the advice, pressure, counsel, and at the express direction, of SMN, FCWS, and Caponigro.

65. On or around November 28, 2011, Caponigro, on behalf of himself, SMN and FCWS, together with a representative from Penske, came to the home of

Kurt Busch and presented a document entitled “Agreement and Release” for Busch’s signature.

66. On November 28, 2011, Busch signed the Agreement and Release pursuant to the advice, pressure, counsel, and at the express direction, of Caponigro, SMN, and FCWS. Signing the Agreement and Release was disadvantageous to Busch, not in Busch’s best interests, and was to the advantage of Penske. The Counter-Defendants have the Agreement and Release so it is not attached.

67. Upon information and belief, SMN, FCWS, and Caponigro sought Busch’s signature on the Agreement and Release, as well as the Letter of Conduct, to benefit Penske and at the expense of Busch’s interests. However, SMN, FCWS, and Caponigro were Busch’s fiduciaries, agents, and lawyers and were supposed to be representing, advising and looking out for the best interests of Busch.

68. After Busch signed the Agreement and Release, Busch began driving for Phoenix Racing and then Furniture Row Racing, pursuant to which Busch received less compensation for the 2012 and 2013 race seasons than he would have under the Penske Driver Agreement, as amended.

69. In August 2013, Busch secured a Driver Agreement with Stewart-Hass Racing, LLC (“Haas”), pursuant to which Busch received less compensation

for the 2014 race season than Busch would have under the 2014 option in the Penske Driver Agreement, as amended.

70. SMN, FCWS, and Caponigro did not advise Busch of their conflict of interest involving the dealings with Penske. Nor did they advise or provide a reasonable opportunity for Busch to seek the advice of independent counsel regarding these dealings. There was no informed consent by Busch.

71. Busch was harmed by this dual representation, as measured by, at a minimum, the difference between: (1) the amount Busch received from Phoenix Racing in 2012, Furniture Row Racing in 2013, and Stewart-Haas Racing in 2014; and (2) the amount Busch would have received from Penske in those years but for the misconduct of SMN, FCWS, and Caponigro.

72. SMN, FCWS, and Caponigro should have been acting solely on Busch's behalf as they were legally, contractually and ethically obliged to do. They were also paid compensation by Busch pursuant to their agreement with Busch, while they were acting under this conflict of interest.

E. Adverse Transaction - Andretti

73. SMN, FCWS, and Caponigro, also represented Andretti Autosport Holding Company, Inc. d/b/a Andretti Autosport in connection with an adverse transaction in which they were also representing Busch.

74. On March 3, 2014, Busch entered into a Driver Services Agreement with Andretti Autosport. Upon information and belief, Andretti Autosport was a client of SMN and FCWS at that time, and SMN and FCWS represented both Busch and Andretti Autosport with respect to that Driver Services Agreement.

75. SMN prominently displays Andretti Autosport as a client on its website.

76. In or about 2014, SMN and FCWS were paid 10% of the compensation received by Busch under the Driver Services Agreement with Andretti Autosport, while SMN and FCWS were acting under this conflict of interest.

77. In addition, it took Andretti Autosport far longer to pay Busch than what was required under the Driver Services Agreement. Despite Andretti Autosport's failure to timely pay Busch, SMN and FCWS made little or no effort to collect payment on behalf of Busch or to enforce Busch's rights under that Driver Services Agreement.

78. SMN, FCWS, and Caponigro did not advise Busch of their conflict of interest involving the dealings with Andretti Autosport. Nor did they advise or provide a reasonable opportunity for Busch to seek the advice of independent counsel regarding these dealings. There was no informed consent by Busch.

Other Deficiencies of SMN, FCWS, and Caponigro

79. In addition to the above, at various times throughout Busch's representation by SMN, FCWS, and Caponigro: Busch was left to handle negotiations with little assistance from SMN, FCWS, and Caponigro (i.e., with Penske, Phoenix Racing); the assistance of SMN, FCWS, and Caponigro was not supportive of Busch (i.e., with Penske, Richard Petty Motorsports offer, Furniture Row Racing); and the negotiating skills of SMN, FCWS, and Caponigro were sub-standard and disadvantageous for Busch (i.e., numerous failures negotiating with Haas, Penske, shares of sponsorship relating to Monster Energy, State Water Heater, Chevy, Mobil 1, and purse distributions). In addition, Busch missed out on a number of endorsement, merchandising, licensing and related opportunities as a result of the sub-standard and deficient representation of SMN, FCWS, and Caponigro.

80. Damages suffered by Busch in connection with these failures total many millions of dollars.

81. In addition, from January 2011 to January 2016 alone, Busch paid \$1,334,026.23 to SMN and FCWS, while they were acting under various conflicts of interest.

82. At all relevant times since November 2005, SMN, FCWS, and Caponigro owed fiduciary and contractual duties of disclosure, care, loyalty and fidelity to Busch.

83. The conduct described above of SMN, FCWS, and Caponigro violates at least the following Michigan Rules of Professional Conduct: 1.5(a), 1.5(c), 1.7(a), 1.7(b), 1.8(a), and 2.2.²

COUNT I – BREACH OF FIDUCIARY DUTY
(AGAINST SMN, FCWS, AND CAPONIGRO AS SPORTS AGENTS)

84. Busch incorporates the allegations in paragraphs 1 – 83 as if fully stated here.

85. SMN, FCWS, and Caponigro had a principal-agent relationship with Busch by virtue of the RA and also pursuant to the relationship described above.

86. As Busch’s agents, SMN, FCWS, and Caponigro had a fiduciary relationship with and owed fiduciary duties to Busch.

87. Based on this relationship, SMN, FCWS, and Caponigro had a duty of disclosure, care, loyalty, and fidelity to Busch.

88. SMN, FCWS, and Caponigro had a duty to Busch to act solely for the benefit of Busch in all matters connected with the agency.

² The Michigan Rules of Professional Conduct are “probative in establishing an independent cause of action” and “serve as evidence supporting various causes of action.” *CenTra, Inc. v Estrin*, 538 F. 3d 402, 410-11, n. 5 (6th Cir. 2008).

89. SMN, FCWS, and Caponigro had a duty to Busch not to act on behalf of an adverse party in a transaction connected with their agency.

90. SMN, FCWS, and Caponigro breached these duties to Busch as described above.

91. These breaches of fiduciary duty were clear and serious and have caused damage and injury to Busch.

92. An agent is not entitled to compensation for a service which constitutes a violation of the agent's duty of loyalty.

93. Busch is entitled to disgorge from SMN, FCWS, and Caponigro any such compensation received by them, as well as recover any other damages incurred by Busch as a result of these breaches of duty by SMN, FCWS, and Caponigro.

WHEREFORE, Busch requests that this Court enter judgment in Busch's favor, and against SMN, FCWS, and Caponigro, for millions of dollars to be proven at trial, plus all such other relief that the Court deems just and appropriate.

COUNT II – BREACH OF CONTRACT
(AGAINST SMN, FCWS, AND CAPONIGRO AS SPORTS AGENTS)

94. Busch incorporates the allegations in paragraphs 1 – 93 as if fully stated here.

95. SMN, FCWS, and Caponigro had a principal-agent relationship with Busch by virtue of the RA and also pursuant to the relationship described above.

96. As already described, Busch has valid and enforceable contract rights.

97. As already described, and as Busch's agents, SMN, FCWS, and Caponigro owed contractual duties to Busch.

98. SMN, FCWS, and Caponigro breached these duties to Busch as described above.

99. These breaches were clear and serious, and have caused damage and injury to Busch.

100. These violations of SMN's, FCWS's, and Caponigro's duties constitute a material breach of contract.

101. Agents, such as SMN, FCWS, and Caponigro here, who commit material breaches due to a violation of their duty of loyalty forfeit their rights to compensation for prior services, as well as any additional compensation.

102. Busch is entitled to disgorge from SMN, FCWS, and Caponigro any such compensation received by them, as well as recover any other damages incurred by Busch as a result of these breaches of duty by SMN, FCWS, and Caponigro.

WHEREFORE, Busch requests that this Court enter judgment in Busch's favor, and against SMN, FCWS, and Caponigro, for millions of dollars to be proven at trial, plus all such other relief that the Court deems just and appropriate.

COUNT III – BREACH OF FIDUCIARY DUTY
(AGAINST SMN, FCWS, AND CAPONIGRO AS LAWYERS)

103. Busch incorporates the allegations in paragraphs 1 – 102 as if fully stated here.

104. SMN, FCWS, and Caponigro had an attorney-client relationship with Busch at all relevant times.

105. This legal representation was of a general nature, and covered all matters related to Busch, including any transactions related to Kurt Busch's career as a professional race car driver.

106. As Busch's lawyers, SMN, FCWS, and Caponigro owed fiduciary duties and obligations to Busch.

107. SMN, FCWS, and Caponigro breached these duties to Busch as described above.

108. All of SMN's, FCWS's, and Caponigro's violations of their fiduciary duties to Busch were clear and serious, and caused damage and injury to Busch.

109. A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client and is required to forfeit the compensation already received.

110. Busch is entitled to disgorge from SMN, FCWS, and Caponigro any such compensation received by them, as well as recover any other damages

incurred by Busch as a result of these breaches of duty by SMN, FCWS, and Caponigro.

WHEREFORE, Busch requests that this Court enter judgment in Busch's favor, and against SMN, FCWS, and Caponigro, for millions of dollars to be proven at trial, plus all such other relief that the Court deems just and appropriate.

COUNT IV – BREACH OF CONTRACT
(AGAINST SMN, FCWS, AND CAPONIGRO AS LAWYERS)

111. Busch incorporates the allegations in paragraphs 1 – 110 as if fully stated here.

112. SMN, FCWS, and Caponigro had an attorney-client relationship with Busch by virtue of the RA and also pursuant to the relationship described above.

113. As already described, this legal representation was of a general nature, and covered all matters related to Busch, including any transactions related to Kurt Busch's career as a professional race car driver.

114. As already described, Busch has valid and enforceable contract rights.

115. As already described, and as Busch's lawyers, SMN, FCWS, and Caponigro owed contractual duties to Busch.

116. SMN, FCWS, and Caponigro breached these duties to Busch as described above.

117. These breaches were clear and serious, and caused damage and injury to Busch.

118. These violations of SMN's, FCWS's, and Caponigro's duties constitute a material breach of contract.

119. A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client and is required to forfeit the compensation already received.

120. Busch is entitled to disgorge from SMN, FCWS, and Caponigro any such compensation received by them, as well as recover any other damages incurred by Busch as a result of these breaches of duty by SMN, FCWS, and Caponigro.

WHEREFORE, Busch requests that this Court enter judgment in Busch's favor, and against SMN, FCWS, and Caponigro, for millions of dollars to be proven at trial, plus all such other relief that the Court deems just and appropriate.

COUNT V – LEGAL MALPRACTICE
(AGAINST SMN, FCWS, AND CAPONIGRO AS LAWYERS)

121. Busch incorporates the allegations in paragraphs 1 – 120 as if fully stated here.

122. SMN, FCWS, and Caponigro had an attorney client-relationship with Busch at all relevant times.

123. This legal representation was of a general nature, and covered all matters related to Busch, including any transactions related to Kurt Busch's career as a professional race car driver.

124. Based on this relationship, SMN, FCWS, and Caponigro owed duties to Busch to act as a reasonable attorney would under the circumstances.

125. SMN, FCWS, and Caponigro breached these duties by providing sub-standard and compromised representation (or lack thereof) as described above in light of numerous conflicts of interests and other deficiencies.

126. As a direct and proximate result of the misconduct and wrongful acts of SMN, FCWS, and Caponigro, Busch has been damaged because SMN, FCWS, and Caponigro acted while having a conflict of interest, and because Busch received less favorable terms and representation than Busch would have received had SMN, FCWS, and Caponigro not breached the standard of care.

127. A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client and is required to forfeit the compensation already received.

WHEREFORE, Busch requests that this Court enter judgment in Busch's favor, and against SMN, FCWS, and Caponigro, for millions of dollars to be proven at trial, plus all such other relief that the Court deems just and appropriate.

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), with respect to the complaint, affirmative defenses, and counterclaims, Busch hereby demands a jury trial on all issues so triable.

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

By: /s/ Todd R. Mendel

Eugene Driker (P12959)

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Dated: March 24, 2017

jsheets@bsdd.com

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, Defendants/Counter-Plaintiffs' ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES, COUNTERCLAIM, AND JURY DEMAND, and this Certificate of Service were filed with the Clerk of the Court and served on all counsel of record via the electronic court filing system.

By: /s/ Todd R. Mendel

Todd R. Mendel (P55447)

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