

James C. Bender  
Hollis, New Hampshire 03049

RECEIVED  
FEDERAL ELECTION  
COMMISSION

2011 MAR 29 AM 11:46

OFFICE OF GENERAL  
COUNSEL

March 23, 2011

Jeff S. Jordan  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Regarding MUR 6460

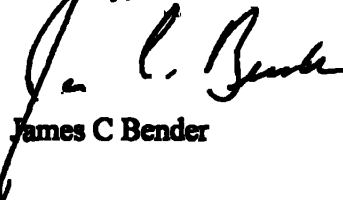
Dear Mr. Jordan,

We are in a billing dispute with Swift Current, and have declined to pay the full amount of their invoice. Swift Current did not fulfill their obligations to the campaign. Swift Current fully understands the concerns, and the reasons for dissatisfaction with their performance. This is a trade dispute, not an FEC matter. Our campaign handled hundreds of transactions with vendors, and, to the best of our knowledge, this is the only known unresolved problem.

Despite numerous serious concerns, I have made several offers to resolve this matter amicably. Nonetheless, Swift Current filed a civil lawsuit in Massachusetts District Court dated February 4, 2011. We recently answered that complaint and moved for a summary judgment and dismissal.

There is no possibility, in my opinion, that Mr. Fullerton or Swift Current actually believe that the reason that we have not paid this invoice, is because we intended to make an illegal contribution to our campaign. Please be assured that we are trying to do everything properly, that we will not close down the campaign until this matter is resolved, and we continue to make quarterly filings with the FEC. If you have any further questions, call me :

Sincerely,



James C Bender

CC: Mr. Vincent DeVito, Attorney for Swift Current

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**Commonwealth of Massachusetts**

**District Courts of Massachusetts**

**SwiftCurrent Strategies LLC, Plaintiff**

**First District Court of Essex**

**v.**

**65 Washington St, Salem MA**

**Bender for Senate, Defendants**

**James C. Bender,**

**Frank C. Mancl,**

**Civil Action No. 2011136CV**

**Request for hearing on summary motions for dismissal, or change of venue by James C Bender, Frank C. Mancl and by Bender for Senate.**

I, James C. Bender am authorized to act on behalf of all the defendants listed above, and would like to request a hearing on our motions for dismissal or change of venue. I understand that those hearings are normally held on Wednesday morning at 9:00AM. I have confirmed that all parties have received our motions. In order to give all parties adequate time, I propose that we schedule the hearing for Wednesday, April 13, 2011. If that is not convenient, I propose Wednesday April 20, 2011 as an alternate date. If neither of those dates are available, I request the next available date.

I certify that I have sent a copy of this notice to the Plaintiff attorney Mr. Devito.



**James C. Bender**

**PO Box 1107, Hollis NH. 03049**

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**Commonwealth of Massachusetts**

**District Courts of Massachusetts**

**SwiftCurrent Strategies LLC, Plaintiff**

**v.**

**First District Court of Essex**

**Bender for Senate,**

**65 Washington St, Salem MA**

**James C. Bender,**

**Frank C. Mancil,**

**Defendants**

**Civil Action No. 2011136CV**

**Request for Dismissal by Frank C. Mancil**

Named Defendant Frank C. Mancil, requests a summary judgment to dismiss this case against me, pursuant to Federal Rules of Civil Procedure 12 (b) (2), or alternatively, to transfer venue pursuant to 28 U.S.C. SS 1404 (a). My specific reasons are as follows:

- 1) My request for summary judgment of dismissal is because I am not a party to the agreement or to the dispute. I have had no role whatsoever in this matter. I have never met either of the Plaintiffs. I have never corresponded or had a telephone conversation with either Plaintiff. I had no role in the hiring or managing of the Plaintiff. I had no role in the operating decisions of the campaign. I had no authority to authorize or deny payments. The only individuals who had authorization to commit funds or to make commitments for the campaign were; the candidate, Defendant James C. Bender, the Chief Operating Officer, Bruce Monk; or The Campaign Manager, Beth Lindstrom. My role in the campaign was to provide oversight to ensure FEC compliance, and as such, I am listed on the FEC forms as Treasurer, and that is the only way that the Plaintiffs know of me. The plaintiffs could not pick me out of a line up! I am 66 years old, and I still have a full time job, which I must attend to on a daily basis. This will be a significant and unnecessary burden for me, and will do nothing to advance justice. The other Defendants do not object to my name being removed. Finally, the Plaintiff's complaint was clearly filed without much preparation or understanding of the facts. Even the dates of events and agreements are all wrong. Plaintiff has thrown every ridiculous allegation

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at the wall and in hopes that something sticks, or that the Defendants be intimidated into a favorable settlement. The burden of proof rests with the plaintiff to show the Court why I should remain listed as a Defendant.

- 2) The agreement is between Swift Current Strategies and Bender for Senate exclusively. There are no individuals who are parties to this agreement. Swift Current Strategies and Bender for Senate have an agreement which stipulates that all disputes will be resolved by arbitration. Enclosed is a copy of the e-mail from Swift Currents to the campaign, which contained Swift Currents standard form agreement as an attachment, dated Monday June 14, 2010. Also enclosed is a copy of that attachment, the agreement with the arbitration provision ( clause number 9 on page 2). The campaign returned this executed agreement by US Mail to Swift Currents along with their first monthly retainer check of \$5,500, which Swift Currents cashed. Because this agreement stipulates that the parties agree that all disputes will be resolved by arbitration, I ask that their complaint be dismissed.
- 3) Due process under the 14<sup>th</sup> Amendment requires that the defendant have "sufficient minimum contacts with the [forum] state, such that 'maintenance of the suit does not "offend traditional notions of fair play and justice.'" Adelson, 510 F.3d at 49 (quoting Int'l Shoe Co. v. Walsh, 326 U.S. 310, 316 (1945)). Specific jurisdiction exists only where the plaintiff's cause of action arises from or relates to the defendant's contacts with the forum state. I, an alleged Defendant in this matter, have had no contact with Massachusetts. Therefore, the Massachusetts forum should not have an interest in adjudicating this case. The burden of proof in determining jurisdiction falls to the Plaintiff.
- 4) The exercise of jurisdiction over Defendant Frank C. Minici, must be reasonable based on an evaluation of other "gestalt factors" as well. The gestalt factors include the defendant's burden of appearing. In addition to the burden of traveling to the Salem Massachusetts Court house, I do not have legal representation which is licensed to practice law in Massachusetts. This would constitute an undue burden.
- 5) The Defendants will rely on witnesses who live in New Hampshire, and who also work in New Hampshire. The most important witnesses would have a significantly longer commutes to court, if the matter is adjudicated in Salem Massachusetts, perhaps 90 to 120 minutes additional in each direction, than if the forum were the Federal Courthouse in Concord NH. It would be an undue burden to ask these people, who also must work every day, to appear in Salem Massachusetts and this may adversely impact the ability to provide the best defense of the case.
- 6) On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of persuading the court that jurisdiction exists. Hannon v. Beard, 524 F.3d 275, 279 (1<sup>st</sup> Cir. 2008).

Sincerely,

  
Frank C. Mandl

**CERTIFICATION**

A true copy of this Answer and Counter Claim was mailed postage prepaid to Attorney Vincent DeVito, One International Place, 44<sup>th</sup> Floor, Boston, MA 02110.

February 28, 2011

  
Frank C. Mandl

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***Commonwealth of Massachusetts***

***District Courts of Massachusetts***

**SwiftCurrent Strategies LLC, Plaintiff**

**v.**

**First District Court of Essex**

**Bender for Senate,**

**65 Washington St, Salem MA**

**James C. Bender,**

**Frank C. Mancl,**

**Defendants**

**Civil Action No. 2011136CV**

**Answer and Counterclaim of Defendant Frank C. Mancl.**

Defendant Frank C. Mancl hereby responds to the Plaintiff's complaint Civil Action No. 201136CV, speaking with respect to his own actions, as follows:

- 1) . Defendant states that he is without knowledge or information sufficient to form a belief as to whether this paragraph is true.
- 2) Defendant admits the allegations of paragraph 2.
- 3) Defendant admits the allegations of paragraph 3.
- 4) Defendant admits the allegations of paragraph 4.
- 5) This requires no response from Defendants.
- 6) Defendant denies the allegations of Paragraph 6.
- 7) Defendant denies the allegations of Paragraph 7.
- 8) Defendant denies the allegations of Paragraph 8.
- 9) Defendant denies the allegations of Paragraph 9.
- 10) Defendant denies the allegations of Paragraph 10.

**11) Defendant denies the allegations of Paragraph 11.**

**11) Defendant denies the allegations of Paragraph 11.**

**12) Defendant denies the allegations of Paragraph 12.**

**13) Defendant denies the allegations of Paragraph 13.**

**14) Defendant states that he is without knowledge or information sufficient to form a belief as to whether this paragraph is true.**

**15) Defendant denies the allegations of Paragraph 15.**

**16) Defendant denies the allegations of Paragraph 16.**

**17) Defendant denies the allegations of Paragraph 17.**

**18) Defendant denies the allegations of Paragraph 18.**

**19) Defendant denies the allegations of Paragraph 19.**

**20) Defendant admits receiving a letter dated November 15, 2010 from Mr. DeVito. The claims made in that letter of unfair acts and practices are inconsistent with my knowledge.**

**21) Defendant admits that James Bender did respond to Mr. DeVito in an e-mail dated December 7. Mr. Bender reiterated an existing offer to settle this matter, and offered to meet to discuss the matter.**

**22) The campaign has tried to communicate promptly, and to be constrictive in expressing concerns, and trying to settle this matter. Mr. Bender has made repeated efforts to schedule meetings in an attempt to resolve this matter.**

**23) Defendant denies the allegations of Paragraph 23.**

**"Reasonable" is in the eye of the beholder.**

**24) Defendant denies the allegations of Paragraph 24.**

## 1<sup>st</sup> Affirmative Defense

Swift Current Strategies and Bender for Senate have an agreement which stipulates that all disputes will be resolved by arbitration. We request that this case be dismissed with prejudice and referred to arbitration.

## 2<sup>nd</sup> Affirmative Defense

Due process under the 14<sup>th</sup> Amendment requires that the defendant have "sufficient minimum contacts with the [forum] state, such that 'maintenance of the suit does not "offend traditional notions of fair play and justice.'" Adelson, 510 F.3d at 49 (quoting Int'l Shoe Co. v. Walsh, 326 U.S. 513, 516 (1945)). The gestalt factors all favor the Defendant's request to change the forum to New Hampshire. Bender for Senate Campaign was a New Hampshire campaign for United States Senate. The defendants live and work in New Hampshire. All of our activity was based in New Hampshire, and moreover, all of Swift Current Strategies activity was based on helping our campaign to win a New Hampshire election. Finally all of our meetings with the Plaintiffs, and all other activity with Plaintiffs took place in New Hampshire. Specific jurisdiction exists only where the plaintiff's cause of action arises from or relates to the defendant's contacts with the forum state. The defendants had and have no contact with Massachusetts. Additionally, it would be a burden for the Defendants and their witnesses, most of whom live and work in New Hampshire, to appear in Salem Massachusetts rather than the Federal Court in Concord NH. In some cases it would add 90-120 minutes of commuting time in each direction. The burden of proof rests with the Plaintiff as to whether the Massachusetts forum should not have an interest in adjudicating this case.

## 3<sup>rd</sup> Affirmative Defense

Swift Currents and/or Broadnet repeatedly made false representations as to what they would deliver for an average cost to the campaign of \$12,500 per hour.

## 4<sup>th</sup> Affirmative Defense

Swift Currents violated the compensation section of our agreement. The agreement states that the campaign would compensate Swift Currents at a rate of \$5,500 per month retainer, and a bonus if we won the primary. There was no other provision for compensation. They failed to disclose to campaign management that they had unilaterally decided to piggy back additional fees on top of vendor relationships which they were managing.

They involved themselves in a clear cut conflict of interest, which they did not disclose and made significant effort to hide.



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## 5<sup>th</sup> Affirmative Defense

Swift Currents was intentionally deceptive, to their benefit, and the detriment of the campaign.

## 6<sup>th</sup> Affirmative Defense

Our sixth defense is the doctrine of unclean hands. We have reason to believe that we may have routinely paid too much for services which were negotiated and managed by Swift Currents.

## 7<sup>th</sup> Affirmative Defense

Swift Currents violated the confidentiality clause of our agreement in a way that was beneficial to themselves and harmful to the candidate.

## 8<sup>th</sup> Affirmative Defense

If plaintiff suffered damages, which defendants deny, then said damages resulted from Plaintiff's own acts or omission.

## 9<sup>th</sup> Affirmative Defense

If plaintiff suffered damages, which defendants deny, then said damages are from the acts or omissions of third parties, for whose conduct Defendant is neither legally liable nor responsible.

## 10<sup>th</sup> Affirmative Defense

Plaintiff claims are barred either in whole or in part by his failure to mitigate damages.

## 11<sup>th</sup> Affirmative Defense

Plaintiff's claims are barred either in whole or in part by Plaintiff's own breaches of contractual obligation to the defendant.

Wherefore, Defendant requests that this action be dismissed with prejudice and that the court award the Defendant his costs and expenses, including attorney's fees, and that this court grant such other relief as it deems appropriate and just.

  
Frank C. Mancini

CERTIFICATION

A true copy of this Answer and Counter Claim was mailed postage prepaid to Attorney Vincent DeVito, One International Place, 44<sup>th</sup> Floor, Boston, MA 02110.

February 28, 2011

  
Frank C. Mancini

COMMONWEALTH OF MASSACHUSETTS  
DISTRICT COURTS OF MASSACHUSETTS

ESSEX:

FIRST DISTRICT  
COURT OF ESSEX  
201136 CV 73

SWIFTCURRENT STRATEGIES, LLC

v.

BENDER FOR SENATE and JAMES C. BENDER,  
and FRANK C. MANCL

DEFENDANTS' MOTION TO DISMISS

The Defendants move to dismiss this action filed against each of them.

As basis for this motion, the Defendants, each of them, says that the contract on which the Plaintiff makes its claim, a copy of which is attached hereto as Exhibit A, and made part hereof, by its terms at Paragraph 9, requires that any dispute and/or claim arising out of or relating to it, shall be subject to decision by binding arbitration in Boston, MA consisting of a single arbitrator.

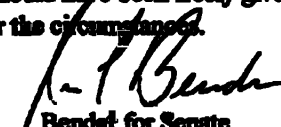
The word "shall" has been interpreted in Massachusetts as "mandatory".

The Defendants James C. Bender and Frank C. Mancl also move to dismiss them as individuals, since they were not parties to the contract.

WHEREFORE, THE DEFENDANTS PRAY:

- A. that the court will dismiss the suit on the basis that it is brought in contradiction of the terms of the contract on which the suit is based with regard to choice of jurisdiction;
- B. that the court will dismiss the suit as it applies to Defendants James C. Bender and Frank C. Mancl who are not parties to the contract;
- C. that the court will award the Defendants their costs, including reasonable legal fees incurred in order to obtain this relief which should have been freely given;
- D. For such other and further relief as fair under the circumstances.

February 16, 2011

  
Bender for Senate  
By: James C. Bender

  
James C. Bender

  
Frank C. Mancl

CERTIFICATION

A true copy of this motion was mailed postage pre-paid to Attorney Vincent De Vito,  
One International Place, 44<sup>th</sup> fl., Boston, MA 02110.

February 16, 2011

  
James C. Bender

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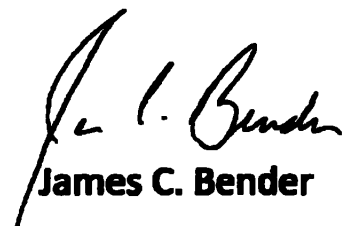
The following is an e-mail, dated June 14, 2010, with the subject line "Agreement", from Rob Willington, (Founding Partner of Swiftcurrent) to Beth Lindstrom, who was the Bender for Senate campaign manager. Along with this e-mail is a true copy of the attachment titled; "Swiftcurrent-Bender\_Agreement.pdf".

To the best of my knowledge and belief, this agreement was signed by Beth Lindstrom and returned on June 15, 2010 along with the first monthly retainer check of \$5,500.

Attachment A of this agreement stipulates that "Swiftcurrent shall be paid Five Thousand Five Hundred Dollars on June 15, July 15 and August 15". Each of these payments had been made on time by the campaign, and we have a copy of each canceled check.

I do not have a signed copy of this agreement, I was not copied on the correspondence, and I am not listed as a party to this agreement. Beth Lindstrom has not been able to find the final signed copy in her files, but she has affirmed to me that this was the agreement between Swiftcurrent and the campaign.

To the best of my knowledge and belief, there is no dispute by either party that this is the only Consulting Engagement Agreement between the Bender for Senate campaign and Swiftcurrent.

  
James C. Bender

February 16, 2011

AOL | 1037 | Toolbar | Main AOL | My Home Page

Join now | Sign Out

Check Mail | Compose

Search the Web

Search | enhanced by

Themes | Settings | Help

Search Mail

Reply

Forward

IM

Action

Delete

Spam

Events

Today on AOL

Post: Agreement

Inbox: 1037

Beth Lindstrom to you - Dec 7 2010 | More Details

Drafts

Selfcourant-Sender\_Agreement.pdf

Sent

Rite

Spam (4)

Trash

Contacts

Calendar

My Folders

----- Forwarded message -----

From: Rob Willington <[rob@selfcourantstrategies.com](mailto:rob@selfcourantstrategies.com)>

Date: Mon, Jun 14, 2010 at 5:58 PM

Subject: Agreement

To: Beth Lindstrom <[beth@bendandcreate.com](mailto:beth@bendandcreate.com)>Cc: Pete Fullerton <[pete@selfcourantstrategies.com](mailto:pete@selfcourantstrategies.com)>

Hi Beth,

Thanks again for your call today. Attached is an agreement.

Thanks,

-Rob

--

Robert Willington

Selfcourant Strategies

Add

January 2011

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Today is 1/5/2011

Add Event

Events: 1/5 - 4/18

Today Jan 5

No Events

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## Consulting Engagement Agreement

THIS CONSULTING ENGAGEMENT AGREEMENT (the "Agreement") dated as of June 15, 2010, is entered into by and between ~~Swiftcurrent~~ Strategies, a Massachusetts Limited Liability Company, having its principal place of business at 67 Foster Street, Peabody, Massachusetts, 01960 (the "Swiftcurrent") and Jim Bender for Senate, having its principal place of business at PO BOX 110, Hollis, New Hampshire, 03049 ("Campaign"), collectively referred to herein as the "Parties." This Agreement, including *Schedule A* which is a part of it, sets forth the terms and conditions under which Swiftcurrent will serve as a Consultant and Advisor for the Bender for Senate:

### 1. *Consulting and Advisory Services.*

(a) Swiftcurrent agrees to serve as Consultant and Advisors to the Campaign and, in such capacity, to provide political and social media development, strategic planning and support;

(b) Swiftcurrent shall be indemnified, defended and held harmless by the Campaign from and against any claims, cause of actions, liabilities, damages, costs and expenses (including reasonable attorney's fees) arising from or attributable to, directly or indirectly, his service as a Consultant and Advisor to the Campaign, ~~other than claims alleging his own willful misconduct.~~

2. *Compensation.* In consideration of the Services to be provided by Swiftcurrent as a Consultant and Advisor to the Campaign or as an Attorney, shall be entitled to and shall receive the remuneration set forth on Schedule A.

3. *Term.* Swiftcurrent shall continue as Consultant and Advisor to the Company for an initial term of three months (3 months) or until he shall resign upon written notice to the Campaign or until the Campaign shall terminate this Engagement with at least 15 days prior notice.

4. *Independent Contractor.* Swiftcurrent shall act as an independent contractor. As such, the Campaign shall not deduct from fees or other remuneration paid under this Agreement any statutory deductions or unemployment, withholding or social security taxes. Swiftcurrent hereby agrees that they shall have no authority, and shall not represent him as having any authority, to bind the Campaign in any manner whatsoever.

5. *Confidential Information.* In the course of serving as a Consultant and Advisor to the Campaign, Swiftcurrent may be presented with, learn or discover information concerning the techniques, procedures, products, software, hardware, business, plans, strategies or operations of the Campaign that is non-public, proprietary information. Swiftcurrent agrees not to disclose or use any such information ("Confidential Information") without the written consent of the Campaign. Confidential Information shall not

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include: information which is currently in the public domain or hereafter enters the public domain without the fault or involvement of Swiftcurrent; and information disclosed by Swiftcurrent from a source (other than the Campaign) having a lawful right to make such disclosure to Swiftcurrent.

6. **Conflicts.** Swiftcurrent represents that the services contemplated by this Consulting Engagement Agreement does not violate any agreement to which it or its principals is a party with any client, prior employer or other party and that they will not disclose to the Campaign or induce the Campaign to use any confidential or proprietary information or material belonging to any previous client, employer or others. The Campaign acknowledges that Swiftcurrent performs services for and on behalf of clients and other persons of an Advisory, Consulting or Legal nature who may have, directly or indirectly, common, similar or competing interests to those of the Campaign. Subject to his obligations regarding Confidential Information, nothing herein shall be construed or interpreted to limit or restrict in any way the nature or type of services which may, during this Consulting Engagement Agreement or thereafter, be performed or undertaken by Swiftcurrent.

7. **Notices.** All notices required or permitted under this Agreement shall be in writing and shall be deemed effective upon personal delivery or upon deposit in the United States Post Office, by registered or certified mail, postage prepaid, addressed to the other party at the address shown above, or at such other address or addresses as either party shall designate to the other in accordance with this Section 7.

8. **Governing Law.** This Agreement Shall be governed by the Laws of the Commonwealth of Massachusetts.

9. **Arbitration.** The Parties agree that any Dispute and/or Claim arising out of or relating to this Agreement, concerning the interpretation of this Agreement, and/or the performance and/or non-performance of any obligation of a Party to this Agreement shall be subject to decision by binding arbitration in Boston, MA consisting of a single arbitrator selected by agreement of the Parties based upon the laws and Rules of Procedure of Massachusetts.

**IN WITNESS WHEREOF, the parties, intending to be bound hereby, have  
executed this Agreement on the date and year first above written.**

---

**Robert Willington**

**Swiftcurrent**

**Founding Partner**

---

**Beth Lindstrom**

**Bender for Senate**

**Campaign Manager**

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## **SCHEDULE A**

### **COMPENSATION AND EXPENSE REIMBURSEMENT**

As compensation for the Services contemplated by this Consulting Engagement Agreement, the Company agrees to pay Swiftcurrent Strategies in the following manner:

1. For Consulting Services—During the term in which this Agreement remains in full force and effect, and the Campaign authorizes and directs the performance of consulting, the Campaign will be billed for all services on retainer and billed on a monthly basis. For purposes of monthly billing for Swiftcurrent shall be paid Five Thousand Five Hundred Dollars on June 15th, July 15th and August 15.

2. For Consulting Services—During the term in which this Agreement remains in full force and effect, and the Campaign authorizes and directs the performance of consulting, the Campaign will be billed for a one time Primary Victory Bonus. For purposes of a one time Victory Bonus Swiftcurrent shall be paid to Twenty Thousand Dollars on September 15, 2010.

*Swiftcurrent Strategies – Baseline for Senate Scope of Work*

**June 15, 2010**

This will outline the specific responsibilities held to increase online – offline operations for to increase the profile of Jim Bender for U.S. Senate Campaign.

#### ***Online Operations***

*Twitter – Provide guidance on proper use of twitter*

*Design and Implement YouTube channel properly.*

#### ***Political Operations***

*Volunteer Recruitment – Strategy and Implementation plan*

*Develop Targeted Voter Contact Plan with weekly goals to track progress*

*Database (Votervault)– Preparation for GOTV*

Swiftcurrent will advise on all Online Operations in a weekly call with Campaign Manager Beth Lindstrom and essential staffers. Swiftcurrent will monitor social media and online strategy daily and recommend action items on a weekly basis. They also oversee online operations and ensure essential branding and theme is consistent throughout all social media and online communication. Swiftcurrent will make sure that all of the online tools available to the campaign are used properly and are focused on the important aspects of political campaign operations.



***Commonwealth of Massachusetts***

***District Courts of Massachusetts***

**SwiftCurrent Strategies LLC, Plaintiff**

**v.**

**First District Court of Essex**

**Bender for Senate,**

**65 Washington St, Salem MA**

**James C. Bender,**

**Frank C. Mancl,**

**Defendants**

**Civil Action No. 2011136CV**

**Summary motion for dismissal, or change of venue by  
James C Bender and by Bender for Senate.**

**Bender for Senate moves to dismiss this case pursuant to Federal Rules of Civil Procedure 12 (b) (2), or alternatively, to transfer venue pursuant to 28 U.S.C. SS 1404 (a). Our specific reasons are as follows:**

- 1) Swift Current Strategies and Bender for Senate have an agreement which stipulates that all disputes will be resolved by arbitration. Enclosed is a copy of the e-mail from Swift Currents to our campaign dated Monday June 14, 2010, which contained their standard form agreement as an attachment. Also enclosed is a copy of the same agreement, signed by me without changes, on June 15, 2010. We returned this executed agreement by US Mail to Swift Currents along with their first retainer check of \$5,500, which Swift Currents cashed. Because this agreement stipulates that the parties agree that all disputes will be resolved by arbitration, we ask that their complaint be dismissed, or at least stayed pending arbitration.**
- 2) Due process under the 14<sup>th</sup> Amendment requires that the defendant have "sufficient minimum contacts with the [forum] state, such that 'maintenance of the suit does not "offend traditional notions of fair play and justice."' Adelson, 510 F.3d at 49 (quoting**

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Int'l Shoe Co. v. Walsh, 326 U.S. 310, 316 (1945)). Bender for Senate Campaign was a New Hampshire campaign for United States Senate. All of our activity was based in New Hampshire, and moreover, all of Swift Current Strategies activity was based on helping our campaign to win a New Hampshire election. Finally all of our meetings and other activity took place in New Hampshire. Specific jurisdiction exists only where the plaintiff's cause of action arises from or relates to the defendant's contacts with the forum state. The defendants had and have no contact with Massachusetts. Therefore, the Massachusetts forum should not have an interest in adjudicating this case.

- 3) The exercise of jurisdiction over Bender for Senate, or James C Bender, must be reasonable based on an evaluation of other "gestalt factors". The, gestalt factors include: the defendant's burden of appearing; the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and the shared interest of the several states in furthering fundamental social policy. The first two of those points, and point four, strongly favor the defendants, the remaining two points are at worst, neutral.
- 4) The defendant's primary witnesses are based in New Hampshire, and also work in New Hampshire. It would be an undue burden to ask them to appear in Massachusetts and this may adversely impact our ability to defend our case. We believe that Massachusetts does not have an interest in adjudicating based on the points made in section 2 above. The plaintiff can obtain equally convenient and effective relief in either New Hampshire or Massachusetts because the plaintiff worked in New Hampshire throughout the campaign, and also is soliciting work in New Hampshire with Republican potential presidential candidates for President in 2012, this being due to the enormous importance of New Hampshire's first in the nation primary. For Swift Current Strategies, the New Hampshire forum would not be a material inconvenience. For the Bender for Senate campaign, it would not only be inconvenient, but may prevent us from providing an effective defense.

I have offered repeatedly in writing to meet and to talk with the plaintiffs in order to resolve this case out of court, and to not unnecessarily clog the court system. All of my initiatives have been ignored. We know for certain that the plaintiff put themselves in a clear cut conflict of interest with their fiduciary responsibilities to our campaign. Plaintiffs also violated the compensation clause as well as the confidentiality clause of their own standard form agreement. This was a breach of good faith and fair dealing. I continue to be interested in talking with the plaintiff. All that I want is information in order to inform the extent to which we were injured by these violations, before making a further settlement offer. This should easily be doable through arbitration rather than in the far more time consuming and expensive process of going to trial.

For these reasons I respectfully request that this case be referred to arbitration, which our contract stipulates, or if this contract provision is deemed invalid, to the NH court system. If there is any part of this letter which requires elaboration or explication, I can be promptly reached by either letter or phone.

Finally, I am including herewith our responses to the points made in Mr. DeVito's complaint.

Sincerely,

  
James C. Bender

11044310065

***Commonwealth of Massachusetts***

***District Courts of Massachusetts***

**SwiftCurrent Strategies LLC, Plaintiff**

**v.**

**First District Court of Essex**

**Bender for Senate,**

**65 Washington St, Salem MA**

**James C. Bender,**

**Frank C. Mancl,**

**Defendants**

**Civil Action No. 2011136CV**

**Answer and Counterclaim of Defendants James C. Bender and  
Bender for Senate campaign committee.**

**Defendant James C. Bender hereby responds to the Plaintiff's  
complaint Civil Action No. 201136CV as follows:**

- 1) Defendant admits the allegations of paragraph 1.**
- 2) Defendant admits the allegations of paragraph 2.**
- 3) Defendant admits the allegations of paragraph 3.**
- 4) Defendant admits the allegations of paragraph 4.**
- 5) This requires no response from Defendants.**
- 6) Defendant states that he is without knowledge or  
information sufficient to form a belief as to whether the  
defendants were engaged in trade and commerce at "all  
relevant times", pending definition of the terms "trade  
and commerce" and "all relevant times". Frank Mancl was**

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categorically not involved in trade and commerce on behalf of the campaign at any time.

- 7) Defendant denies the allegations of Paragraph 7. For the record, the first meetings with Swift Currents were in early April, 2010. Swift Currents proposed a \$20,000 per month retainer for 20% of their time, and assured campaign management and advisors no other client had received, or would receive, a better deal than this one being offered to our campaign. When we declined this offer, Swift Currents came back to us with a formal proposal on June 1, 2010, and had reduced their proposed monthly retainer to \$8,000 per month. When we declined that offer, they came back to the campaign with an offer of \$5,500 per month. They e-mailed a copy of a standard form contract on June 14, 2010, which we accepted without changes. We returned an executed agreement along with their first month retainer of \$5,500 on June 15, 2010. The first sentence of the agreement between Swift Currents and the campaign states that the Plaintiffs were hired on June 15, 2010, not "on or about August 1, 2010". Also, Plaintiff's responsibilities were broader than internet and telemarketing. Plaintiffs were responsible for all aspects of the campaign's social media efforts. These activities and responsibilities included, but were not limited to, a) evaluating and hiring vendors, b) negotiating prices with

- vendors, c) negotiating performance metrics for vendors, d) managing the relationship with vendors.
- 8) Defendant denies the allegations of Paragraph 8. "On or about October 1, 2010" is incorrect because the campaign had ended on September 14, 2010. Broadnet conducted a Tele-town Hall meeting for the campaign in July 2010, and they were paid promptly and in full. Broadnet was hired without input from, and without the knowledge of, Frank Mancl or James Bender. Typically, Swift Current's operated independently and assumed broad authority and a high degree of autonomy in selecting vendors.
- 9) Defendant denies the allegations of Paragraph 9. Neither James C. Bender nor Frank Mancl requested that Plaintiff hire Broadnet. Defendant repeats and realleges the points made in paragraphs 7 & 8, as if fully set forth herein.
- 10) Defendant denies the allegations of Paragraph 10. This is categorically not true. The defendants did in fact pay in full on the first Teleforum which was held in July, 2010. The disputed invoices are from September 12 & 13, 2010. At the conclusion of the campaign on September 14, 2010, the defendants had every intention of paying this invoice. On or about September 15, the Chief Operating Officer for the campaign, Bruce Monk, told James Bender that he had held two invoices for review out of the many

hundreds which we processed, both involved Swift Currents. His exact quote was "Something smells funny, but I am not sure where the aroma is coming from". Upon further examination we discovered probable breach of fiduciary duty by the plaintiff. We discovered that the campaign had been given materially false information in order to persuade us to keep purchasing services from Brononet. We then discovered breach of contract by the plaintiff. We discovered that Plaintiffs had violated the compensation provision of our agreement, and were benefitting financially from these Teleforums. They did not disclose this to us, and tried to prevent us from finding out. Since that time we have simply been trying to get information from the plaintiff in order to determine in how many other instances were there breaches of fiduciary duty, and how much did these breaches cost the campaign.

- 11) Defendant denies the allegations made in paragraph 11. There is no basis whatsoever for this claim. Defendant repeats and realleges the points made in paragraphs 7 & 8 & 10, as if fully set forth herein.
- 12) Defendant denies the allegations of Paragraph 12. There was no breach of contract or misrepresentation by the defendants. Defendant repeats and realleges the

points made in paragraphs 7 & 8 & 10, as if fully set forth herein.

- 13) Defendant denies the allegations of Paragraph 13. If Plaintiff suffered damages, which Defendants deny, then said damages either resulted from Plaintiff's own acts and/or omissions.
- 14) Defendant denies the allegations of Paragraph 14. If Plaintiff suffered damages, which Defendants deny, then said damages resulted from Plaintiff's own acts and/or omissions, or from the acts or omissions of third parties for whose conduct Defendant is neither legally liable or responsible.
- 15) Defendant denies the allegations of Paragraph 15.
- 16) Defendant denies the allegations of Paragraph 16.
- 17) Defendant denies the allegations of Paragraph 17.
- 18) Defendant denies the allegations of Paragraph 18.
- 19) Defendant denies the allegations of Paragraph 19. If Plaintiff suffered damages, which Defendants deny, then said damages resulted from Plaintiff's own acts and/or omissions.
- 20) Defendants admit receiving a letter dated November 15, 2010 from Mr. DeVito. The claims made in that letter of unfair acts and practices are false. This letter appears to have been written prior to having read the contract, or my prior correspondence, and prior to having sufficient



understanding of the facts of the case. This February 4, 2011 complaint is rough and ready "cut and paste" version of that same November 15, 2010, letter.

- 21) I, James Bender did respond to Mr. DeVito in an e-mail dated December 7. I reiterated an existing offer to settle this matter, which I believe to be reasonable. For the record, our offer to settle this was \$7,659. Swift Currents offered then offered to drop their \$3,200 "mark up" ( which they failed to disclose and were not entitled to) and settle for \$22,334.50. We were \$14,675.50 apart. I am just trying to get the facts, I offered on several occasions to meet with plaintiffs and their attorney. I want to know whether Swift Currents was charging mark ups or placement fees with the other vendors. If the Broadnet experience was a pattern of behavior by Swift Currents then we may have been damaged far more than the disputed amount. I have offered to meet on numerous occasions, both verbally and in writing. I have also said on numerous occasions that if my understanding of the facts is incorrect, that I am open to changing my mind and increasing my offer. The Plaintiff's attorney refused my offer to meet in a December 29, 2010 phone call. I reiterated my offer to meet in a January 1, 2011 email and have heard nothing since.

22) I have consistently tried to communicate with the Plaintiff in a constructive and timely manner. I have made every effort to schedule meetings and to obtain information which we need in order to determine whether our offer should be revised. My requests have been ignored.

23) Defendant denies the allegations of Paragraph 23. We believe that our offer was reasonable given the facts as we understand them. I have repeatedly asked for additional information, and these requests have been ignored.

24) Defendant denies the allegations of Paragraph 24. Defendant repeats and realleges the points made in paragraphs 7 through 23, as if fully set forth herein.

### **1<sup>st</sup> Affirmative Defense**

Swift Current Strategies and Bender for Senate have an agreement which stipulates that all disputes will be resolved by arbitration. Enclosed is a copy of the e-mail from Swift Currents to our campaign dated Monday June 14, 2010, which contained their standard form agreement as an attachment. Also enclosed is a copy of the same agreement, signed by me without changes, on June 15, 2010. We returned this executed agreement by US Mail to Swift Currents along with their first retainer check of \$5,500, which Swift Currents cashed. Because this agreement stipulates that the parties agree that all

disputes will be resolved by arbitration, we ask that their complaint be dismissed without prejudice, or at least stayed pending arbitration.

## **2<sup>nd</sup> Affirmative Defense**

Due process under the 14<sup>th</sup> Amendment requires that the defendant have "sufficient minimum contacts with the [forum] state, such that 'maintenance of the suit does not 'affend traditional notions of fair play and justice.'" Adelson, 510 F.3d at 49 (quoting Int'l Shoe Co. v. Walsh, 326 U.S. 310, 316 (1945)). Bender for Senate Campaign was a New Hampshire campaign for United States Senate. All of our activity was based in New Hampshire, and moreover, all of Swift Current Strategies activity was based on helping our campaign to win a New Hampshire election. Finally all of our meetings and other activity took place in New Hampshire. Specific jurisdiction exists only where the plaintiff's cause of action arises from or relates to the defendant's contacts with the forum state. The defendants had and have no contact with Massachusetts. Therefore, the Massachusetts forum should not have an interest in adjudicating this case.

- 1) The exercise of jurisdiction over Bender for Senate, or James C Bender, must be reasonable based on an evaluation of other "gestalt factors". The, gestalt factors include: the defendant's burden of appearing; the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and the shared interest of the several states in furthering fundamental social policy. The first two of these points, and point four, strongly

favor the defendants, the remaining two points are at worst, neutral.

- 2) The defendant's primary witnesses are based in New Hampshire, and also work in New Hampshire. It would be an undue burden to ask them to appear in Massachusetts and this may adversely impact our ability to defend our case. We believe that Massachusetts does not have an interest in adjudicating based on the points made in section 2 above. The plaintiff can obtain equally convenient and effective relief in either New Hampshire or Massachusetts because the plaintiff worked in New Hampshire throughout the campaign, and also is soliciting work in New Hampshire with Republican potential presidential candidates for President in 2012, this being due to the enormous importance of New Hampshire's first in the nation primary. For Swift Current Strategists, the New Hampshire forum would not be a material inconvenience. For the Bender for Senate campaign, it would not only be inconvenient, but may prevent us from providing an effective defense.

### **3<sup>rd</sup> Affirmative Defense**

Swift Currents and/or Broadnet made false representations as to what they would deliver for an average cost to the campaign of \$12,500 per hour. A case in point is how big our Teleforum audiences were on the evening of Sunday September 12, 2010. The entire campaign management team was somehow led to believe that at the peak, we had over 10,000 listeners during our town hall, and we had 700 people waiting in line to ask Jim Bender a question. The campaign manager, Beth Lindstrom, could not believe how big

our audience was, and avoided telling me while we were on the air for fear that I might "freeze up". This false perception of our success led to duplicating the order for the following night, September 13, 2010. But after the campaign had ended on September 14, we began to understand that the results which were represented were just not possible. As it turns out, our true results were probably less than 10% of this. I learned last week that over the course of the hour long teleforum we had less than 600 inbound listener minutes.

Upon further review, we discovered that Swift Currents exaggerated the expected performance as well as the actual performance of many of their projects. They had great influence on allocation of funds, and much of that influence, and the motive, is now in question. A review of e-mails confirms that they were highly authoritative in directing the campaign staff and steering the team to make decisions which they wanted regarding our capital expenditures.

#### 4<sup>th</sup> Affirmative Defense

Swift Currents violated the compensation section of our agreement. The agreement states that the campaign would compensate Swift Currents at a rate of \$5,500 per month retainer, and also a \$20,000 bonus if we won the primary. There was no other provision for compensation. They failed to disclose to us that they had unilaterally changed the rules of the game, and were piggy backing additional fees on top of vendor relationships which they were managing. We did not discover this until after the campaign was over.

They involved themselves in a clear cut conflict of interest. Swift Currents was well paid to select and manage our vendors, and to negotiate on our behalf, they were not further entitled to financially benefit from these relationships. We know for certain that this happened in the case of Broadnet, and we have reasons to believe that it may have

happened with other vendor relationships which Swift Currents managed.

### 5<sup>th</sup> Affirmative Defense

Swift Currents was intentionally deceptive with us. After learning that there might be a conflict of interest with Swift Currents, I asked Pete Fullerton directly, "Have you asked any of our vendors, or prospective vendors, for placement fees, or commissions, or did you charge us markups on any of the services which you have been involved in?" He vigorously denied that they had done so. After several minutes of sharp interrogation, I told him that I would insist on seeing the original invoice from Broadnet. Pete then admitted to a "small mark up", which turned out to be approximately \$3,200. Aside from the question of why they kept this information from us, why would he have first denied this if he thought that it was OK?

Three people had authorization authority in our campaign; Beth Lindstrom our campaign manager, Bruce Monk, our chief operating officer, and myself. None of us knew that Swift Currents had a separate financial interest in the outcome of our decisions.

### 6<sup>th</sup> Affirmative Defense

One of our defenses is the doctrine of unclean hands. The defendants argue that the plaintiff is not entitled to obtain an equitable remedy on account of the fact that the plaintiff has acted unethically, and has acted in bad faith with respect to the subject of this complaint. We have reason to believe that we may have routinely paid too much for services which were negotiated and managed by Swift Currents. The pattern which was first noticed by our chief operating officer Bruce Monk, was that we were being invoiced for very large round numbers, with almost no way to measure results.

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Mr. Monk commented to me on or about September 15, 2010, "something stinks, I am not sure yet where the aroma is coming from." As we looked into this, we had reason to believe that there may have been other types of conflicts of interest in some of these cases. We have reasons to believe that some of these suppliers, or potential suppliers, may have been asked for placement fees in exchange for a purchase order from our campaign. If this was the case, then the most qualified suppliers may not have been hired, and we also would have ended up paying more for the services than we should have. This may have had a material impact on the outcome of the campaign. Finally, we believe that Swift Currents would have been compromised in managing these relationships with vendors. We have a growing number of examples where our interests may have taken a back seat to Swift Current's interests.

If there was no cause for concern here we should have been able to clear this up with a one hour meeting or an exchange of a few e-mails. I asked to see the e-mails with the final agreements for six vendors that Swift Currents was involved in managing. These vendors were; Broadnet, Rapleaf, Faulkner Strategies, CC Advertising, Vylitics, and GOTV.

### 7<sup>th</sup> Affirmative Defense

Swift Currents violated the confidentiality clause of their own standard form "Consulting Engagement Agreement" which the parties entered into on June 15, 2010. The result of this breach was harmful to me personally.

The Wall Street Journal was investigating one of the campaign suppliers which Swift Currents hired. The article alleged inappropriate and

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invasive techniques for "data mining" of personal information, and went on to note that Google took action against this company. Rob Willington, who was quoted in the article, took it upon himself to inform the Wall Street Journal reporter Emily Steele, our campaign had hired this company and used this precise technique in New Hampshire. He then gave the reporter my phone numbers and she called me to confirm this information. This ended up in a series of Wall Street Journal stories, including a page one Wall Street Journal story. The story went on to say how these invasive techniques were distressing to the New Hampshire citizen's who discovered they had become "victims". It also ended up becoming the subject of talk radio here in New Hampshire. It grew to the point that I had to call these folks and apologize for the actions of my campaign, and this also ended up becoming another Wall Street Journal story.

There is no way to quantify how much damage may have been done to my reputation. Suffice to say that it is still being talked about here in New Hampshire. I was at a luncheon on February 1, 2011 for Senator Rick Santorum at the home of Congressional candidate Jennifer Horn. Also in attendance was Linda Twombly who was one of the victims of this technique, and these Wall Street Journal stories were once again discussed at length.

This is an example of Swift Currents putting their own interests ahead of their responsibilities to our campaign. They violated the confidentiality provision of their own standard form agreement. This was useful press coverage for Swift Currents, but negative and damaging for me. This was a confirming data point that Swift Currents was putting their own interests ahead of the campaign.

### 8<sup>th</sup> Affirmative Defense

If plaintiff suffered damages,. Which defendants deny, then said damages resulted from Plaintiff's own acts or omission.



**9<sup>th</sup> Affirmative Defense**

If plaintiff suffered damages, which defendants deny, then said damages are from the acts or omissions of third parties, for whose conduct Defendant is neither legally liable nor responsible.

**10<sup>th</sup> Affirmative Defense**

Plaintiff claims are barred either in whole or in part by his failure to mitigate damages.

**11<sup>th</sup> Affirmative Defense**

Plaintiff's claims are barred either in whole or in part by it's own breaches of contractual obligation to the defendant.

Wherefore, Defendant requests that this action be dismissed with prejudice and that the court award the Defendant his costs and expenses, including attorney's fees, and that this court grant such other relief as it seems appropriate and just

**Jury Demand**

Defendant hereby demands a trial by jury on all issues triable.

**James C. Bender**

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