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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

ELIJAH SCHWARTZ,	)	
	)	
PLAINTIFF,	)	
	)	
V.	)	Case No. 1:22-cv-1563
	)	
KILROY’S NORTH AMERICA,	)	
LLC, KILROY’S SPORTS, LLC,	)	
and KILROY’S ON KIRKWOOD,	)	
LLC,	)	
	)	
Defendants.	)	

**COMPLAINT FOR DAMAGES**

Plaintiff Elijah Schwartz (“Mr. Schwartz” or “Plaintiff”), by counsel, hereby files this Complaint for Damages against Defendants Kilroy’s North America, LLC (“Kilroy’s North America”) Kilroy’s on Kirkwood (“Kilroy’s on Kirkwood”), and Kilroy’s Sports, LLC (“Kilroy’s Sports”) (collectively, “Kilroy’s” or “Defendants”), and in support thereof, alleges and states as follows:

**INTRODUCTION**

1. This is an action for non-payment of wages in violation of Indiana’s Wage Payment Act (the “Act”), breach of contract, for declaratory judgment of Plaintiff’s status as either an employee or independent contractor of the Defendants, and for claims of infringement of copyrights and trademarks pursuant to 28 U.S.C. §§ 2201 and 2202 (the “Declaratory Judgment Act”), and for injunctive relief and damages under the United States Copyright Act, 17 U.S.C. § 101 *et seq.* (the “Copyright Act”).

**PARTIES**

2. Plaintiff is citizen of the State of California whose permanent residence is 23620 Clover Trail, Calabasas, California, 91302.

3. Defendant Kilroy's North America is an Indiana limited liability company with its principal office address at P.O. Box 90323, Indianapolis, Indiana, 46290, USA.

4. Defendant Kilroy's on Kirkwood is an Indiana limited liability company with its principal office address at 6431 Norwood, Mission Hills, Kansas 66208.

5. Defendant Kilroy's Sports is an Indiana limited liability company with its principal office address at 6431 Norwood, Mission Hills, Kansas 66208, and its physical address at 319 N. Walnut Street, Bloomington, Monroe County, Indiana 47404.

6. Kilroy's North America is the parent company of Kilroy's on Kirkwood and Kilroy's Sports.

7. Kilroy's on Kirkwood and Kilroy's Sports are each bars and restaurants which operate and are located in Bloomington, Monroe County, Indiana.

**JURISDICTION AND VENUE**

8. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, because this litigation arises in part under federal laws including the Copyright Act.

9. This Court has jurisdiction over this action under the Declaratory Judgment Act.

10. This Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367, because these claims are so related to the claims in the action within this Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

11. This Court has personal jurisdiction over Kilroy's, who at all times relevant herein conduct business on a daily basis within this District.

12. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(1) and (2), and 1391(c).

### **FACTS**

13. In August 2021, Mr. Schwartz began working as an employee as a server and bartender for Kilroy's on Kirkwood.

14. On October 28, 2021, Defendants sent Mr. Schwartz a written offer for the position of "AV Intern" and requested that he complete the "new-hire" process through an online portal. Mr. Schwartz was provided a link to complete the process and advised that all "new-hire information must be completed in order to start work at Kilroy's Sports Bar."

15. Kilroy's eventually offered Mr. Schwartz the position of AV Intern, which Mr. Schwartz accepted.

16. For this position, Mr. Schwartz agreed to perform certain work for Defendants including, without limitation, services related to Defendants' social media accounts and digital presence, assistance with Defendants' relationship with Barstool Sports, promotion of events, and the creation of marketing and advertising content, which included the production, filming, and editing of video and digital content for Defendants (collectively the "Work").

17. Defendants agreed to pay Mr. Schwartz (a) Fifty and 00/100 Dollars (\$50.00) per hour for his time spent at the Kilroy's Sports venue ("Onsite Services"), (b) Fifty and 00/100 Dollars (\$50.00) per hour for his time editing content ("Editing Services"), and (c) certain fixed project rates for "packages" of services (the "Packages") that Mr. Schwartz would perform creating the Work (collectively, the "Agreement").

18. Over time, Mr. Schwartz's Work included original content created by Mr. Schwartz on behalf of Defendants, including videos, branding, copy, and related materials (the "Original Content"), which has been used and continues to be used in Defendants social media accounts, digital marketing, and other advertising purposes (the Work, Original Content, and Packages may be collectively referred to as the "Intellectual Property").

19. Mr. Schwartz kept detailed records of the time and services provided to create the Work under the Agreement. Mr. Schwartz used these records to generate and submit invoices to Kilroy's in order to be paid for the services he provided.

20. Mr. Schwartz submitted his invoices to Defendants by sending them to his immediate supervisor, Gus Gonzo ("Mr. Gonzo") on a bi-weekly basis.

21. Upon information and belief, Mr. Gonzo was a manager of The Atrium, which is a concert and event venue that is a part of Kilroy's Sports.

22. On November 12, 2021, Defendants failed to pay Mr. Schwartz the very first payroll since he accepted the position as AV Intern on or about October 28, 2021.

23. When Mr. Schwartz informed Mr. Gonzo that he was not paid, he was advised that "a couple new guys didn't get their deposit either. [L]ooking into it with myles. [W]e will get that to you asap i'm sorry for the inconvenience brother."

24. Throughout the months of November, December, and January, Mr. Schwartz exchanged numerous text messages with Mr. Gonzo in which he reported that he had not received payment from the Defendants for any of the time and services he provided.

25. In response, Mr. Gonzo repeatedly assured him that payment was forthcoming.

26. For example, on November 13, 2021, Mr. Gonzo informed Mr. Schwartz he had "figured out why you never got the payment. We accidentally put your onboarding info in wrong

on our system. I'm fixing it tonight and will 100% have you completely updated for next payroll you'll be getting a fatass check lmao."

27. On December 6, 2021, Mr. Gonzo contacted Mr. Schwartz via text message and stated, "[h]ey brother so no question about it your pay will 100% be ready this friday for direct deposit."

28. On December 11, 2021, Mr. Schwartz again notified Mr. Gonzo that he had not been paid.

29. On December 14, 2021, Mr. Gonzo again claimed that Mr. Schwartz's onboarding process had been completed incorrectly, that he had fixed the problem, and "next semester you'll get a payment every two weeks consistently."

30. At no time between October 28, 2021, through December 28, 2021, did Defendants, including Mr. Gonzo, dispute any of Mr. Schwartz's time records or invoices.

31. On December 28, 2021, Mr. Schwartz again notified Mr. Gonzo that he had still not received a single payment.

32. In response, on December 29, 2021, Mr. Gonzo informed Mr. Schwartz that Defendants wished to compensate him via check rather than direct deposit. He reiterated that Mr. Schwartz would be paid every two (2) weeks going forward.

33. On December 29, 2021, Mr. Gonzo also informed Mr. Schwartz that the Defendants would be unilaterally changing the compensation Mr. Schwartz would receive because the current compensation would result in a "huge payout."

34. Mr. Schwartz responded that he was not willing to accept that change without further discussion in a sit-down meeting among the parties.

35. On December 29, 2021, Mr. Gonzo also informed Mr. Schwartz that he would be paid as an employee for certain portions of the services he was performing for the Defendants, while also paying him as a “third party vendor” for other portions of the services.

36. During this December 29, 2021, text conversation, for the first time, Mr. Gonzo claimed that “there are some things in the log you sent me that I have questions about/ aren’t rated correctly.”

37. In January 2022, Defendants claimed there were inconsistencies on Mr. Schwartz’s invoices.

38. There were no inconsistencies on the invoices, but Defendants requested additional information such as hyperlinks to be included in Mr. Schwartz’s invoice(s).

39. In response, Mr. Schwartz informed Mr. Gonzo that his records had been provided to Defendants “for months,” and “any inaccuracies with that sheet should have been discussed far in advance. Just to reiterate, I was expecting to be receiving even more than \$5.5k.”

40. Mr. Gonzo and Sidneigh Scobie met with Mr. Schwartz on January 21, 2022, to discuss the outstanding amounts Defendants owed.

41. As of January 21, 2022, the Defendants owed Mr. Schwartz approximately Eleven Thousand Nine Hundred and Seventy-Five and 00/100 Dollars (\$11,975.00) for all services rendered prior to that date.

42. During that meeting, Mr. Schwartz proposed that the Agreement be reduced the rate for the Onsite Services and Editing Services from Fifty Dollars (\$50.00) per hour to Thirty and 00/100 Dollars (\$30.00) per hour.

43. Mr. Schwartz further agreed to apply such decreased rates to all services previously performed, thereby reducing the outstanding balance owed by Defendants to Eight Thousand Seven Hundred and Five and 00/100 Dollars (\$8,705.00).

44. The Defendants rejected Mr. Schwartz's offer and made a counterproposal that all Onsite Services would continue to be performed for Fifty and 00/100 Dollars (\$50.00) per hour, but all Editing Services would be reduced to Twelve and 00/100 Dollars (\$12.00), which would apply retroactively for all previously performed Editing Services.

45. This modified agreement was expressly conditioned upon Defendants' agreement to pay Mr. Schwartz all outstanding amounts no later than January 31, 2022 (the "Modified Agreement").

46. Under the Modified Agreement, Mr. Schwartz agreed to accept a total of Eight Thousand Four Hundred and Forty-One and 00/100 Dollars (\$8,441.00) in exchange for payment in full of that amount by January 31, 2022.

47. At no time during the January 21, 2022, meeting or in any other communication between Defendants and Mr. Schwartz did Defendants dispute any of Mr. Schwartz's records of the Work he performed.

48. On January 28, 2022, Mr. Gonzo informed Mr. Schwartz, via text message, that a check for the payment required under the Modified Agreement would be ready for pick up on Monday, January 31, 2022.

49. A day after that deadline, on February 1, 2022, Mr. Gonzo informed Mr. Schwarz that his check was not yet available, "but it will be this week thank you for the patience. it's just takin longer because it's so much."

50. Defendants failed to pay Mr. Schwartz any amounts on or before January 31, 2022.

51. The Defendants continued to promise Mr. Schwartz that his payment was forthcoming and continued to request his services, which he continued to perform in reliance upon the promises made to him that Defendants' payment to him was imminent.

52. Despite such assurances, the Defendants did not pay Mr. Schwartz.

53. To date, Mr. Schwartz has never received payment for any services performed for Defendants, despite the parties' express agreement for the payment of such amounts.

54. Defendants owe Mr. Schwartz an amount equal to approximately Eight Thousand Seven Hundred and Five and 00/100 Dollars (\$8,705.00).

55. Despite Defendants failure to pay Mr. Schwartz the amounts owed, on January 5, 2022, an individual from Kilroy's on Kirkwood requested Mr. Schwartz's address "to send your w2 this spring."

56. However, Mr. Schwartz never received any W-2 or 1099 from Defendants.

57. Due to Defendants' months-long failure to pay him his wages and other amounts owed; Mr. Schwartz voluntarily terminated his affiliation with Defendants.

58. Mr. Schwartz did not license or assign any of the Intellectual Property to Defendants.

#### **COUNT I – VIOLATION OF THE WAGE PAYMENT ACT**

59. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

60. Pursuant to the Act, Ind. Code 22-2-5-1 *et. seq.*, Indiana law requires employers to pay employees at least bi-weekly or semi-monthly, and pay their full wages earned within ten (10) business days prior to the date of payment.



61. The Act further requires that when employees voluntarily leave their employment, all wages earned must be paid no later than the next usual or regular day for payment of wages as established by the employer.

62. Pursuant to the Agreement, Defendants agreed to pay Mr. Schwartz Fifty and 00/100 Dollars (\$50.00) per hour for his time spent at the venue and Fifty and 00/100 Dollars (\$50.00) per hour for his time spent editing, on top of a flat rate for the type of Package provided.

63. Mr. Schwartz completed one hundred sixty-three and one half (163.5) hours of Onsite Services and Editing Services for Defendants at a rate of Fifty and 00/100 Dollars (\$50.00) per hour, totaling Eight Thousand One Hundred and Seventy-Five and 00/100 Dollars (\$8,175.00).

64. Mr. Schwartz is owed Three Thousand Eight Hundred and 00/100 Dollars (\$3,800.00) for all fixed rate Packages he completed for Defendants.

65. In total, the Defendants owe Mr. Schwartz Eleven Thousand Nine Hundred and Seventy-Five and 00/100 Dollars (\$11,975.00) (the "Unpaid Amounts").

66. Defendants failed to compensate Mr. Schwartz the Unpaid Amounts, as required under the Act.

67. Defendants' intentional and willful refusal to pay the wages comprising the Unpaid Amounts to Mr. Schwartz was not in good faith. As a result, Mr. Schwartz is entitled to liquidated damages, attorneys' fees, and costs under the Act.

WHEREFORE, Plaintiff Elijah Schwartz, by counsel, respectfully requests that judgment be entered in his favor as to his claims for violations of the Indiana Wage Payment Act, that he be awarded damages including the Unpaid Amounts owed, liquidated damages, attorneys' fees, costs of this action, and all other damages permitted under the Act, and for all other just and proper relief in the premises.

**COUNT II – BREACH OF CONTRACT**  
**(In the Alternative)**

68. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

69. Defendants and Mr. Schwartz both agreed to the terms of the Agreement.

70. Specifically, Mr. Schwartz and Defendants agreed that Mr. Schwartz would receive (a) Fifty and 00/100 Dollars (\$50.00) per hour for his time spent at the Kilroy’s Sports venue, (b) Fifty and 00/100 Dollars (\$50.00) per hour for his time editing content, and (c) certain fixed project rates for the Packages that Mr. Schwartz would perform creating the Work.

71. At various times during the parties’ relationship, Defendants asserted inconsistent positions regarding whether Mr. Schwartz was classified as an employee, an independent contractor, or both.

72. Defendants failed to pay Mr. Schwartz a single time under the Agreement, either as wages, fees, reimbursable expenses, or any combination thereof. At no time relevant to this Complaint have Defendants honored their obligations under the Agreement.

73. Mr. Schwartz has performed all actions and/or conditions required of him under the Agreement.

74. Defendants’ failure to pay Mr. Schwartz is a breach of the Agreement.

75. Mr. Schwartz has suffered and continues to suffer damages as result of the breach of the Agreement.

WHEREFORE, Mr. Schwartz respectfully requests that the Court enter judgment in his favor and against Defendants for breach of contract, as pled in the alternative, to award compensatory damages, interest, and all other just and proper relief in the premises.

**COUNT III – PROMISSORY ESTOPPEL**  
**(In the Alternative)**

76. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

77. Defendants promised, among other things, that Mr. Schwartz would be compensated for his time and efforts in creating the Work as the AV Intern.

78. Defendants also promised Mr. Schwartz that he would be reimbursed certain expenses incurred in performing the Work.

79. Mr. Schwartz relied on Defendants' promises and performed the Work with the expectation that he would be paid for his time and services.

80. It was reasonable for Mr. Schwartz to rely on Defendants' promises that he would be compensated for his services.

81. Mr. Schwartz relied on Defendants' promises to his detriment.

82. Injustice will only be avoided if Defendants' promises are enforced.

WHEREFORE, Mr. Schwartz respectfully requests that the Court enter judgment in his favor and against Defendants based upon promissory estoppel, as pled in the alternative, to award reliance damages, interest, and all other relief that is just and proper in the premises.

**COUNT IV – UNJUST ENRICHMENT**  
**(In the Alternative)**

83. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

84. Mr. Schwartz provided services to Defendants from October 2021 through January 2022.

85. Defendants agreed to pay Mr. Schwartz for his time and services in performing the Work.

86. Defendants have failed to pay Mr. Schwartz for any services rendered.

87. By providing the services, Mr. Schwartz has conferred a measurable benefit to Defendants, specifically in the form of the Work and the Original Content he created, which Defendants still use to this day.

88. It would be unjust for Defendants to retain the benefits conferred upon them by Mr. Schwartz without being required to pay for the full amount of the services that Mr. Schwartz provided to Defendants.

89. Accordingly, pleaded in the alternative to its breach of contract claim, Mr. Schwartz is entitled to recover the benefits he conferred upon Defendants under the theory of unjust enrichment.

WHEREFORE, Mr. Schwartz respectfully requests that the Court enter judgment in his favor and against Defendants under an unjust enrichment theory pled in the alternative, and award damages, interest, and all other just and proper relief in the premises.

**COUNT V – FRAUD**

90. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

91. Defendants, as set forth above and otherwise, materially misrepresented past or existing facts to Mr. Schwartz, including but not limited to, the following intentional misrepresentations made to Mr. Schwartz to induce him to continue providing services to Defendants without payment:

92. On November 13, 2021, Defendants informed Mr. Schwartz, via text message, that his onboarding paperwork had been incorrectly inputted into the Defendants' system, which Defendants claimed had been promptly rectified such that Mr. Schwartz will "100% percent have you completely update for next payroll."

93. On December 6, 2021, Defendants again advised Mr. Schwartz, via text message, that his "pay will 100% be ready this friday for direct deposit."

94. On December 14, 2021, Defendants informed Mr. Schwartz, via text message, that his onboarding paperwork had (again) be completed incorrectly, but that such mistake had been corrected.

95. On January 28, 2022, Defendants informed Mr. Schwartz, via text message, that a check for payment of outstanding amounts owed to him would be available for pick up on January 31, 2022.

96. On February 1, 2022, Defendants advised Mr. Schwartz, via text message, that despite its earlier promise that his check would be ready on January 31, 2022, it was not available, but would be issued that same week.

97. On February 6, 2022, Defendants notified Mr. Schwartz, via text message, that his invoice was being processed for payment.

98. On March 9, 2022, Defendants advised Mr. Schwartz, via text message, that his payment had been "recorded in the books" and "should be getting to you anytime."

99. In addition to the foregoing misrepresentations, Defendants communicated other intentionally misleading and untruthful information to Mr. Schwartz concerning the hourly rate for the AV Intern position, Defendants' ability to pay Mr. Schwartz, the reasons Defendants were

unable to issue payments to Mr. Schwartz, and Defendants' purported actions taken to issue payments to him.

100. Defendants' misrepresentations were deliberately false, misleading, and fraudulent, and/or were made with reckless disregard for their falsity and were further made with the intent to deceive and induce Mr. Schwartz to enter the Agreement with Defendants and/or to continue to invest his time in creating the Work and provide services to Defendants without compensation.

101. Mr. Schwartz reasonably and detrimentally relied on the fraudulent misrepresentations made by Defendants, which representations proximately caused damage to Mr. Schwartz.

WHEREFORE, Mr. Schwartz respectfully requests that this Court enter judgment in his favor and against Defendants on the basis of their fraud, and award Mr. Schwartz all available damages, costs and attorney's fees, and all other relief that is just and proper in the premises.

#### **COUNT VI – DECLARATORY JUDGMENT OF COPYRIGHT OWNERSHIP**

102. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

103. Mr. Schwartz created the Intellectual Property, in his capacity as an independent contractor, and did not otherwise license or assign the Intellectual Property to Defendants.

104. Mr. Schwartz fixed the Intellectual Property in a tangible medium of expression, including but not limited to Defendants' social media accounts, digital marketing, and other advertising vehicles.

105. Defendants have used and otherwise hold the Intellectual Property as though they belong to Defendants, despite having not paid Mr. Schwartz.

106. There is no assignment or license granted to Defendants for Mr. Schwartz's Intellectual Property.

107. The dispute over ownership of the Intellectual Property creates an actual, substantial, and justiciable controversy between the parties requiring resolution by the Court.

108. Plaintiff desires a judicial determination of the ownership of the Intellectual Property, each of them, and the rights appurtenant thereto, and such a determination is necessary and appropriate at this time.

WHEREFORE, Plaintiff Elijah Schwartz, by counsel, respectfully requests this Court enter declaratory judgment in his favor and against Defendants declaring him the owner of the Intellectual Property, with all rights appurtenant thereto, and for all other just and proper relief in the premises.

#### **COUNT VII – COPYRIGHT INFRINGEMENT**

109. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

110. To the extent Mr. Schwartz owns any or all of the Intellectual Property, Defendants have infringed and continue to infringe Plaintiff's rights as owner of the Intellectual Property.

111. Defendants' infringing acts were committed with knowledge and in reckless disregard of Plaintiff's rights under the Copyright Act.

112. By the acts complained of, Defendants have made substantial profits and gains which they are not, in law or in equity, entitled to retain.

113. Defendants' actions have caused and continue to cause damages to Plaintiff.

WHEREFORE, Mr. Schwartz respectfully requests that this Court enter judgment in his favor and against Defendants on the basis of copyright infringement, and award Mr. Schwartz all

available damages including compensatory damages, disgorgement of profits, costs and attorney's fees, and all other relief that is just and proper in the premises.

**JURY DEMAND**

Plaintiff Elijah Schwartz, by counsel, hereby demands a trial by jury on all claims of relief, where available.

Respectfully submitted,

Dated: August 5, 2022

*s/ William J. Brinkerhoff*

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Kimberly D. Jeselskis, Attorney No. 23422-49  
B.J. Brinkerhoff, Attorney No. 24811-53  
Hannah Kaufman Joseph, Attorney No. 24974-49  
JESELSKIS BRINKERHOFF AND JOSEPH, LLC  
320 North Meridian Street, Suite 428  
Indianapolis, Indiana 46204  
Telephone: (317) 220-6290  
Facsimile: (317) 220-6291  
[kjeselskis@jbjlegal.com](mailto:kjeselskis@jbjlegal.com)  
[bjbrinkerhoff@jbjlegal.com](mailto:bjbrinkerhoff@jbjlegal.com)  
[hjoseph@jbjlegal.com](mailto:hjoseph@jbjlegal.com)

*Counsel for Plaintiff*