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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 KOS MEDIA, LLC and
MARKOS MOULITSAS ZÚNIGA,

12
13 PLAINTIFFS,

14
15 VS.

16
17 RESEARCH 2000 AND DELAIR D ALI,

18
19 DEFENDANTS.
20
21

) Case No.: -

) **COMPLAINT FOR**

-) **1) BREACH OF CONTRACT;**
) **2) UNFAIR BUSINESS**
) **PRACTICES IN VIOLATION**
) **OF CAL. BUS. & PROF. CODE**
) **§§ 17200 et seq.;**
) **3) BREACH OF IMPLIED**
) **WARRANTY**
) **4) INTENTIONAL**
) **MISREPRESENTATION;**
) **5) NEGLIGENT**
) **MISREPRESENTATION;**
) **6) CONSTRUCTIVE FRAUD;**
) **7) CONVERSION**

) **JURY TRIAL DEMANDED**

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23
24 **COMPLAINT**

25 Plaintiffs Kos Media LLC and Markos Moulitsas Zúniga (“Plaintiffs”), by their
26 undersigned counsel, and in support of their complaint against Defendants Research
27 2000 (“Research 2000”), and Delair D. Ali (collectively “Defendants”) hereby allege
28 as follows:

1 **FACTS**

2 **Nature of the Relationship Between the Parties**

3 10. Kos Media LLC owns and operates DailyKos
4 (<http://www.dailykos.com>), the largest progressive community blog in the United
5 States.

6 11. Founded in May 26, 2002, DailyKos is the premier online political
7 community with 2.5 million unique visitors per month and 250,000 registered users.
8 It is at once a news organization, community, and activist hub through which
9 hundreds of thousands of regular Americans continue to shape a political world once
10 the exclusive domain of the rich, connected, and powerful. Among luminaries posting
11 diaries on the site are President Jimmy Carter, Senator Barack Obama, Senate
12 Majority Leader Harry Reid, Speaker of the House Nancy Pelosi, and dozens of other
13 senators, congressmen, and governors.

14 12. DailyKos has nine paid staffers.

15 13. As part of its role as a news organization, Plaintiffs commissioned its
16 first paid political poll from Research 2000 in September 2007.

17 14. During 2007 and 2008, Plaintiffs requested and Research 2000
18 committed to perform paid polls on an as-needed basis for the website.

19 15. Late in 2008, Plaintiffs started commissioning polls in bulk from
20 Research 2000 for use on DailyKos. For a set fee, the parties contracted for Research
21 2000 to perform a daily tracking poll of the 2008 presidential election, as well as
22 number of other polls in specific states.

23 16. Shortly after the 2008 election, Plaintiffs entered into negotiations with
24 Research 2000 for a long term, multi-poll deal that included a weekly "State of the
25 Nation" poll and state/race specific polls as requested by DailyKos through Kos
26 Media. The agreement was reached orally, requiring Kos Media to make lump-sum
27 payments twice in 2009 as well as an additional large payment in December 2008 at
28 the initiation of the agreement.

1 23. In an effort to seek a more accurate and credible pollster for the
2 website, Kos Media terminated its relationship with Research 2000 on June 9, 2010.

3 24. As part of his correspondence to Ali terminating the relationship,
4 Moulitsas noted: “Currently, you owe us some polls. We won't pursue any refund.
5 We'll just call it even.” Ali responded by writing, “Best of luck to you” and attached a
6 lengthy self-defense of his polling methods, lashing out at the NYT's Silver as
7 “nothing more than a fringe blogger.” At neither that point nor at subsequent point
8 did Ali communicate to Moulitsas any different understanding as to the parties'
9 financial obligations to each other.

10 25. On June 14, 2010, Moulitsas was approached by a number of
11 independent statistical analysts with regards to Research 2000's polling for DailyKos.
12 Their analysis of the published data revealed a number of statistical anomalies
13 regarding the results which revealed that Research 2000 had almost certainly falsified
14 the results in whole or in part.

15 26. The anomalies detected included that among 778 weekly polling
16 questions regarding a politician's “favorables” allegedly performed by Research 2000,
17 the purported male and female sub-samples either came out both with even numbers
18 or both with odd numbers 776 of 778 times; the “unfavorables” were both even or
19 both odd 777 of 778 times. Since the odds of getting a match each time randomly is
20 50%, the odds of obtaining 776/778 matches is the odds of obtaining 776 heads on
21 778 tosses of a fair coin, an event which should occur one in every 10^{228} (ten
22 followed by 228 zeroes) times. The likelihood of the unfavorable results having
23 occurred by chance is one in every 10^{231} . The only logical conclusion is that the
24 numbers for these groups were not generated by independent polling but by
25 falsification of data in whole or in part.

26 27. Similarly, the week-to-week statistical variation claimed by Research
27 2000 could not have occurred randomly; the odds of its results occurring by chance
28 are less than one in 10^{16} , i.e. one in ten million-billion. The only logical conclusion is

1 that their numbers were not generated by independent polling but by falsification of
2 data in whole or in part.

3 28. Additionally, the week-to-week variance in favorability for politicians
4 polled demonstrated a distribution far outside the expected ranges and far outside the
5 ranges demonstrated by other polling firms, strongly indicating that Research 2000's
6 numbers were not generated by independent polling but by falsification of data in
7 whole or in part.

8 29. On Monday, June 14, 2010, Moulitsas approached Ali with his
9 concerns. In response, Ali promised via email on that date to provide Moulitsas with
10 the raw data from which the polling results were constructed to verify their validity.

11 30. On Wednesday, June 16, 2010, Ali emailed Moulitsas with regards to
12 the raw data, stating that "you can expect it either Friday, if not, no later
13 than Monday."

14 31. On Monday, June 21, Ali again stalled, emailing Moulitsas to state: "I
15 am at a Kinkos computer because we cannot read any mail from our PC,s [sic] and
16 cannot attached [sic] any documents or files to send. Reading email from my cell. Just
17 got to a Kinkos. Computer Geeks cannot do anything until tomorrow morning."

18 32. As of this date, Wednesday June 30, 2010, despite numerous requests
19 from Moulitsas and purported commitments from Ali to provide the raw data which
20 could verify Research 2000's polling's validity, Ali has refused to provide this data.

21
22 **FIRST CAUSE OF ACTION**

23 **Breach of Contract**

24 33. Plaintiffs hereby incorporate by reference the allegations set forth in
25 Paragraphs 1 through 32, as though fully set forth at length herein.

26 34. Kos Media and Research 2000, through Moulitsas and Ali, entered into
27 a series of oral agreements through which Kos Media would pay Research 2000 for
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1 political polling performed based on the standards of the profession, including specific
2 requirements for the number of individuals surveyed.

3 35. Defendants, each of them, breached the agreement between the parties
4 by failing to perform the polls which they were contracted to provide, instead
5 falsifying the data provided.

6 36. Plaintiffs performed all conditions, covenants, and promises required to
7 be performed in accordance with the terms and conditions of the agreement.

8 37. Plaintiffs were damaged by Defendants' breach, and have suffered
9 damages in excess of \$100,000.

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11 **SECOND CAUSE OF ACTION**

12 **Unfair Business Practices Pursuant to Cal. Bus. and Prof. Code §§ 17200 et seq.**

13 38. Plaintiffs hereby incorporate by reference the allegations set forth in
14 Paragraphs 1 through 37, as though fully set forth at length herein.

15 39. Under the agreement with Kos Media, Defendants were required to
16 supply accurate polling data for specific electoral contests as well as, among other
17 things, a weekly "State of the Nation" poll to be based upon a specific number of
18 respondents as described heretofore in greater detail. Defendants breached their
19 obligations under this agreement and perpetuated a fraud on Plaintiffs as well as the
20 general public at large by providing false polling data in whole or in part.

21 40. Defendants' caused injury to Plaintiffs in the form of reputational harm
22 and damages. Defendants' conduct also caused considerable harm to the general
23 public. Defendants were aware that their actions would cause harm to Plaintiffs and
24 the general public by the general dissemination of falsified polling data during an
25 election year. Unless enjoined by this Court, Defendants' fraudulent business practice
26 of providing false polling data will continue to cause damage to plaintiffs as well as
27 the general public. Plaintiffs are therefore entitled to injunctive relief as well as
28 restitution from Defendants.

- 1 b) The parties specifically agreed that the weekly “State of the
2 Nation” poll was to include 2,400 respondents. This remained in
3 effect until March 4, 2010, when the parties agreed to poll 1,200
4 respondents weekly;
- 5 c) The material misstatements by Research 2000 included statements
6 made on their web site. For example, upon information and belief,
7 on Dec. 11th 2002, Defendant Ali posted the following
8 misstatement on his website located at
9 <http://www.research2000.us/category/services/> : “All of our
10 surveys are conducted by telephone. We will design a
11 questionnaire in consultation with our client. The telephone
12 interviewing is conducted and supervised by a professional staff
13 and results are coded and processed into a statistical format. Our
14 poll reports include methodology, overall results, selected
15 crosstabulations, as well as written analysis and
16 recommendations.” As of the date of filing this Complaint, this
17 material misstatement continued to be displayed as part of
18 Defendants’ website. The statement is false because in reality
19 Defendants were falsifying their poll results in whole or in part.
- 20 d) Other misstatements published on a website maintained by
21 Defendants at <http://www.research2000.us/about-2/> include the
22 following: “Research 2000 had the most accurate “final” state and
23 congressional polls in the nation in the 2005, 2004, 202 and 200
24 elections” The statement is misleading because it creates the
25 false impression that Defendants’ current polls are accurate when,
26 in fact, they are fabricated in whole or in part. Moreover, the
27 website contains a material omission in that Defendants’ recent
28 polls are not at all accurate, and are actually fabricated in whole or

1 in part. Upon information and belief these material misstatements
2 and omissions were published over the past two years and as of the
3 date of filing this Complaint, remain published on a website
4 maintained by defendants.

- 5 e) Other misstatements published on a website maintained by
6 Defendants at <http://www.research2000.us/about-2/> include the
7 following: “What separates us from other firms is that we
8 ‘LISTEN’ to our clients. By listening, and consulting with our
9 clients we develop and design the most effective research strategy
10 that will accurately define and measure what our clients need to
11 know” This statement is false because in reality Defendants
12 do not accurately define or measure what their clients need to
13 know. In reality, Defendants fabricate the polling data in whole or
14 in part and supply false results and phony data to their clients.
15 Upon information and belief these material misstatements and
16 omissions were published over the past two years and as of the
17 date of filing this Complaint, and remain published on a website
18 maintained by defendants.
- 19 f) The parties specifically agreed that polling as to specific electoral
20 contests was to include 600 respondents, with primary oversamples
21 of 400 respondents.
- 22 g) By the request of Ali, claiming it would provide “immense” help
23 for cash flow reasons, DailyKos agreed to advance its second
24 lump-sum payment to May 2009 in exchange for additional polls
25 to be performed free of charge.
- 26 h) In December 2009, Ali and Research 2000 again promised under a
27 new agreement for 2010 that they would deliver polling results,
28

1 increasing the cost per poll performed and continuing the weekly
2 “State of the Nation” poll.

3 i) A further example of the false statements made to Plaintiffs by
4 Defendant Ali is provided by a statement made on Friday
5 November 14 2008 at 6:38 A.M. Defendant Ali made the
6 following claim in an email sent to Plaintiffs: “Here is the scoop
7 on margin of error. It would take 2400 likely voters to reduce the
8 margin of error to 2% for likely voters. Of course it only takes
9 1100 among adults to have a margin for error of 3%. So, the
10 question is, are you etched in stone on having a likely voter sample
11 of 2% margin or not? Our costs are based on the number of calls
12 we have to make and complete. I think we should do a sample of
13 2200, 1100 adult and 1100 likely voters and the margin for both
14 would be 3%.” This statement is false and misleading because
15 Defendant Ali fails to disclose that for many of the poll results
16 supplied to Plaintiffs, the phone calls could not have been made as
17 contracted, or the results were altered or fabricated in whole or in
18 part. As such, the costs were not based on the number of calls that
19 Defendants had to make and complete.

20 52. Plaintiffs reasonably relied on these results based on assurances by Ali
21 and Research 2000 and also because these polls were often praised for their
22 “transparency,” since they included what purported to be detailed cross-tabs on sub-
23 populations and a clear and accurate description of the random dialing technique
24 Research 2000 employed.

25 53. Ali and Research 2000 knew the representations they made during the
26 course of negotiations described above were false because, upon information and
27 belief, Ali and Research 2000 had knowingly supplied falsified polling data on a
28 systemic basis. Accordingly, it is evident that Ali and Research 2000 never intended

1 to fulfill their promise to provide accurate polling data and instead intended that
2 Plaintiffs rely upon their deliberate misrepresentations to the contrary.

3 54. DailyKos' reliance on the representations of Ali and Research 2000
4 caused Plaintiffs harm in the form of damage to their reputation, and also in the form
5 of damages.

6
7 **FIFTH CAUSE OF ACTION**

8 **Negligent Misrepresentation**

9 55. Plaintiffs hereby incorporate by reference the allegations set forth in
10 Paragraphs 1 through 54, as though fully set forth at length herein.

11 56. Defendants falsely represented to Plaintiffs that they were able to and
12 would provide accurate and detailed polling results for specific electoral contests.
13 Those representations included the following:

- 14 a) Shortly after the 2008 election, Plaintiffs entered into negotiations
15 with Research 2000 by and through Defendant Ali for a long term,
16 multi-poll deal that included a weekly "State of the Nation" poll
17 and state/race specific polls as requested. Defendants Ali and
18 Research 2000 promised to provide polling data in return for two
19 lump-sum payments from DailyKos as well as an additional large
20 payment in December 2008 at the initiation of the agreement
- 21 b) The parties specifically agreed that the weekly "State of the
22 Nation" poll was to include 2,400 respondents. This agreement
23 remained in effect until March 4, 2010, when the parties agreed to
24 poll 1,200 respondents weekly.
- 25 c) The material misstatements by Research 2000 included statements
26 made on their web site. For example, upon information and belief,
27 on Dec. 11th 2002, Defendant Ali posted the following
28 misstatement on his website located at

1 <http://www.research2000.us/category/services/> : “All of our
2 surveys are conducted by telephone. We will design a
3 questionnaire in consultation with our client. The telephone
4 interviewing is conducted and supervised by a professional staff
5 and results are coded and processed into a statistical format. Our
6 poll reports include methodology, overall results, selected
7 crosstabulations, as well as written analysis and
8 recommendations.” As of the date of filing this Complaint this
9 material misstatement continued to be displayed as part of
10 Defendants’ website. The statement is false because, in reality,
11 Defendants were falsifying their poll results in whole or in part.

12 d) Other misstatements published on a website maintained by
13 Defendants at <http://www.research2000.us/about-2/> include the
14 following: “Research 2000 had the most accurate “final” state and
15 congressional polls in the nation in the 2005, 2004, 2002 and 2000
16 elections” The statement is misleading because it creates the
17 false impression that Defendants’ current polls are accurate when,
18 in fact, they are fabricated in whole or in part. Moreover, the
19 website contains a material omission in that Defendants’ recent
20 polls are not at all accurate, and are actually fabricated in whole or
21 in part. Upon information and belief these material misstatements
22 and omissions were published over the past two years and as of the
23 date of filing this Complaint, remain published on a website
24 maintained by defendants.

25 e) Other misstatements published on a website maintained by
26 Defendants at <http://www.research2000.us/about-2/> include the
27 following: “What separates us from other firms is that we
28 “LISTEN” to our clients. By listening, and consulting with our

1 clients we develop and design the most effective research strategy
2 that will accurately define and measure what our clients need to
3 know” This statement is false because in reality Defendants
4 do not accurately define or measure what their clients need to
5 know. In reality, Defendants fabricate the polling data in whole or
6 in part and supply unreliable data and phony results to their clients.
7 Upon information and belief these material misstatements and
8 omissions were published over the past two years and as of the
9 date of filing this Complaint, remain published on a website
10 maintained by defendants..

- 11 f) The parties specifically agreed that polling as to specific electoral
12 contests was to include 600 respondents, with primary oversamples
13 of 400 respondents.
- 14 g) By the request of Ali, claiming it would provide “immense” help
15 for cash flow reasons, DailyKos agreed to advance its second
16 lump-sum payment to May 2009 in exchange for additional polls
17 to be performed free of charge.
- 18 h) In December 2009, Ali and Research 2000 again promised under a
19 new agreement for 2010 that they would deliver polling results,
20 increasing the cost per poll performed and continuing the weekly
21 “State of the Nation” poll.
- 22 i) A further example of the false statements made to Plaintiffs by
23 Defendant Ali is provided by a statement made on Friday
24 November 14 2008 at 6:38 A.M. Defendant Ali made the
25 following claim in an email sent to Plaintiffs: “Here is the scoop
26 on margin of error. It would take 2400 likely voters to reduce the
27 margin of error to 2% for likely voters. Of course it only takes
28 1100 among adults to have a margin for error of 3%. So, the

1 question is, are you etched in stone on having a likely voter sample
2 of 2% margin or not? Our costs are based on the number of calls
3 we have to make and complete. I think we should do a sample of
4 2200, 1100 adult and 1100 likely voters and the margin for both
5 would be 3%.” This statement is false and misleading because
6 Defendant Ali fails to disclose that for many of the poll results
7 supplied to Plaintiffs, the phone calls could not have been made as
8 contracted, or the results were altered in whole or in part. As such,
9 the costs were not based on the number of calls that Defendants
10 had to make and complete.

11 57. Plaintiffs reasonably relied on these results based on assurances by Ali
12 and Research 2000 and also because these polls were often praised for their
13 "transparency," since they included detailed cross-tabs on sub-populations and a clear
14 description of the random dialing technique Research 2000 employed.

15 58. Ali and Research 2000 had no reasonable grounds to believe the
16 promises they made during the course of negotiations described above as to the
17 accuracy and reliability of the poll data that they promised to provide. Upon
18 information and belief, Ali and Research 2000 supplied falsified polling data on a
19 systemic basis. Accordingly, Ali and Research 2000 had no reasonable grounds to
20 believe any representation made on their part as to the reliability and accuracy of the
21 poll data that they promised to provide Plaintiffs.

22 59. Plaintiffs' reliance misleading representations made by Ali and
23 Research 2000 caused Plaintiffs harm in the form of damage to Plaintiffs' reputation,
24 and also in the form of damages.

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1 **SIXTH CAUSE OF ACTION**

2 **Constructive Fraud**

3 60. Plaintiffs hereby incorporate by reference the allegations set forth in
4 Paragraphs 1 through 59, as though fully set forth at length herein.

5 61. A confidential relationship existed between the parties because, by
6 virtue of Defendants' promise to provide detailed and accurate polling results, they
7 gained the confidence of Plaintiffs and held themselves out as acting in Plaintiffs and
8 DailyKos' best interest. Plaintiffs placed utmost confidence in Ali and Research
9 2000, and justifiably relied upon their representations that Defendants would provide
10 detailed and accurate polling data. As such, the parties were in an unequal
11 relationship as DailyKos relied upon Defendants to supply accurate data, and had no
12 reasonable method of regularly and independently checking the accuracy of that data.
13 DailyKos' reliance was reasonable because *inter alia* Defendants' polls were often
14 praised for their "transparency," since they included detailed cross-tabs on sub-
15 populations and a clear description of the random dialing technique Research 2000
16 employed.

17 62. By virtue of this relationship, Defendants Ali and Research 2000 owed
18 Plaintiffs a duty to act in Plaintiffs' best interest by providing truly accurate and
19 reliable polling data. Defendants breached this duty by providing falsified polling
20 results.

21 63. As a direct proximate result of Defendants' conduct described above,
22 Plaintiffs lost net revenue, and suffered irreparable reputational harm. Such losses
23 were foreseeable at the time Defendants decided to provide false polling results as
24 Defendants knew that Plaintiffs would publish the same data, make projections and
25 write articles based upon the same information.

26 //

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1 **SEVENTH CAUSE OF ACTION**

2 **Conversion**

3 64. Plaintiffs hereby incorporate by reference the allegations set forth in
4 Paragraphs 1 through 63, as though fully set forth at length herein.

5 65. Defendants, and each of them, wrongfully exercised control over the
6 Plaintiffs' personal property in the form of monetary payments made to Defendants in
7 return for services to be rendered and goods to be delivered.

8 66. Defendants Ali and Research 2000 intentionally took possession of
9 Plaintiffs' property in the form of money paid to Defendants for polling results and
10 data. Defendants have in their possession now, and have possessed money received
11 from Plaintiffs continuously since at least December 2008

12 67. Defendants Ali and Research 2000 obtained possession of Plaintiffs'
13 property by fraud as described and set forth more fully herein in paragraphs 1 through
14 66. As such, Plaintiffs did not consent to Defendants' possession, use, or control of
15 their money as Defendants obtained that money by fraud.

16 68. Defendants' conduct in promising to provide accurate polling results
17 and then fraudulently manufacturing phony results in lieu of same directly caused
18 Plaintiffs to expend significant sums of money for polling results that Plaintiffs never
19 received.

20
21 **PRAYER FOR RELIEF**

22 69. Wherefore, Plaintiffs request that judgment be entered in their favor and
23 against each Defendant as follows:

- 24 a) Jointly and severally against each Defendant for damages suffered
25 by Plaintiffs as a result of such breaches, and fraudulent conduct in
26 an amount to be established at trial and including, but not limited
27 to, lost profits according to proof;
28

- b) Severally against each Defendant, restitution for an amount equaling the amount of unjust enrichment received by Defendants as a result of such breaches, fraudulent conduct and unfair business practices;
- c) Injunctive Relief;
- d) Exemplary damages;
- e) Costs and attorneys' fees according to proof;
- f) Such other equitable or monetary relief as the Court deems appropriate
- g) Plaintiff hereby demands a jury trial.

DATED: June 29, 2010

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