

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JANINE GORDON

Plaintiff,

Index No.: 11-CV-1001 (RJS)

-against-

RYAN MCGINLEY, et al.

Defendants.

**MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

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**MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

PRELIMINARY STATEMENT

1. At the appearance on April 29, 2011, this Court indicated to counsel for both parties that it did not believe that there were any copyrightable elements in the visual art presented. Following its stated position, the Court represented, in jest, that it might be exposing itself as a “philistine”. Obviously the Court intended this comment to be a means to provide a soft touch of levity to the Court’s sternly declared position, and Plaintiff whole heartily accepts this statement in the spirit in which it was meant. The statement does, however, bring to the light the great caution that must be taken when determining the legal application of copyright to the visual arts. Of course Plaintiff believes this Court to be very cultured, and she has great deference for the Court’s experience in matters of copyright law. Plaintiff only respectfully requests that the Court consider carefully the impact its decision will have upon the field of visual art. Not only will the Court’s decision impact the Plaintiff’s action against the Defendants, but it will have a massive effect upon the arena of photography art as a whole, if not all visual arts in *toto* – even Defendant McGinley’s rights in his works.

2. To punctuate this last point, the Court is respectfully reminded of its disposition regarding the nude comparison, (Exhibit “A.41”) reviewed during the May 29, 2011 appearance. The Court’s initial impression was that both parties could be subject to lawsuit by Playboy magazine. The full effect of this position is to invalidate even Defendant McGinley’s copyrights.

3. The Court’s representations on the record are only referred to herein as a means to

illustrate the great complexity involved in the application of copyright to visual art as a whole. As counsel represented to the Court during the prior appearance, it is all too easy to glance at a photograph and dismiss it as lacking any unique element which can be subject to copyright. However, as stated by Dan Cameron in Plaintiff's Complaint Exhibit "F", "[i]t's pretty clear to anyone who cares about this kind of thing that [Plaintiff was] there first." This position and belief is shared by the six experts, all of whom "care about this kind of thing", who have given sworn statements in this matter (attached hereto as Exhibits "B" – "G"). Each of them have voluntarily, without demand for or expectation of compensation, provided affidavits regarding this matter and the Court's position as established in the record. Collectively, their testimony is a general outcry to this Court to preserve the rights of artists who brave the realm of visual arts – especially photography art. Their position makes it clear, as does the Exhibit "A" booklet attached hereto (exhibiting once more the breakdown of the pieces in question, but in an order of blatancy), that the Courts must take careful and close consideration concerning the copyrights of visual art, and preserve the rights of those who engage in them.

4. At this stage, the Court should find that there exists a sufficient substantial similarity between enough of the works to warrant trial, with those works which may have a more subtle similarity to represent a pattern of infringement. As a matter of law, the substantial similarities which exist are elements which are entirely protected by copyright law. The Defendants impermissibly attempt to blur those elements with non-copyrightable elements inherent in a photograph by citing inappropriate case law, and providing "analysis" of the imagery from a person who has no background or (seemingly) the slightest knowledge of visual arts in general, let alone photography art.

5. Though it may seem as if concept and execution should be exceedingly disparate from one another in all copyrightable creations, the attached affidavits make it clear, as did Justice Kaplan in *Mannion v Coors Brewing Company* (377 F.Supp.2d 444 [S.D.N.Y. 2005]), that visual arts require a more refined prism of review, one different from that used for the written word. As will be

discussed herein, one has been provided for the Court by Justice Lewis A. Kaplan, JDC.

STATEMENT OF FACTS

6. The Court is respectfully referred to Plaintiff's claim for the facts in this matter. Therein can be found the circumstances concerning the infringing actions by Defendant McGinley, the manner in which he has drawn all of his co-defendants into his mire, and the means by which he was able to access Plaintiff's works, including through his representative, co-Defendant Christopher (aka "Cristobol"¹) Perez.

ARGUMENT

7. As Defendants point out in their brief, infringement can be found where substantial similarity exists between the infringing and infringed upon works. The arena in which copyright is at its most complex is in visual arts. The matter currently before the Court addresses one field of visual arts: photography (see Exhibit "A"). Under the rubric of copyright, visual arts in general involve a great deal of complexity when compared to the written word. "[O]ne cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text."² Defendants rely heavily on this complexity to confuse this matter and blur the differentiation between idea and expression, which is a difficult matter to suss from a photograph in particular. However, their attempts to confuse the matter are entirely irrelevant. What is of imminent importance is Defendants' attempt to misrepresent the role of the Court when faced with a motion to dismiss.

8. "[A]t this stage in the proceedings, the court must accept all of the allegations as true, and its job is not to weigh the evidence." *Safety Management Systems, Inc .v Safety Software Limited*, 10 Civ 1593 (SDNY 2011). But Defendants misrepresent the meaning of *Peter F. Gaito*

¹ This name is simply the Hispanic representation of the name "Christopher" as it is known in the English language.

² *Warner Bros. v. American Broadcasting Companies*, 720 F.2d 231 (2d Cir. 1983); see also Hon. Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 698 (1999).

Architecture, LLC v. Simone Development Corp. (602 F.3d 57 [2d Cir. 2010]) to manipulate this Court into doing just the opposite. While, according to *Gaito*, it may be “appropriate for the district court to consider the similarity between those works in connection with a motion to dismiss” “where, as here, the works in question are attached to [] plaintiff’s complaint” (*Gaito Architecture, supra*; D. Motion, I(A)(1)), the Court in that case did not intend to imply that a court is to replace the jury. *Gaito* specifically recognized that it is well settled law that the fact finder is ultimately to decide whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. (*Gaito Architecture, Id.*)³ *Gaito* further explained, however, that, on a motion to dismiss, when the court is called upon to consider whether substantial similarity is present in the works, the Court’s role is primarily to determine that “either [] the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or [that] no reasonable jury, properly instructed, could find that the two works are substantially similar.” (*Id.*; see also *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 [2d Cir. 1983][internal quotation marks and emphasis omitted]; see also *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 [2d Cir. 1986][*15]; *Gaito Architecture, supra*).⁴ If neither can be found, than a motion to dismiss must fail.

9. As will be demonstrated herein, Defendants’ arguments, which compare photography art to photographic ads and present the biased, self-serving analysis of an associate attorney, fail to establish that appropriated elements in the presented works are not copyrightable or that a jury could not find substantial similarity with an appropriate instruction.

³ See also *Knitwaves, Inc. v. Lollytogs Ltd., Inc.*, 71 F.3d 996, 1002 [2d Cir. 1995] citing *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991); see also *Laureyssens*, 964 F.2d at 141; *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2d Cir. 1977); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

⁴ See also *Gaito Architecture, Infra* ¶8.

I. Dismissal Is Inappropriate Because The Appropriated Elements of Plaintiff's Works Are Protect by Copyright, And A Jury Could Find Such Substantial Similarity With A Proper Instruction.

10. Substantial similarity ultimately is a question of fact. (*Mannion, supra*). Works are substantially similar if the expression of ideas in the plaintiff's copyrighted work and the expression of ideas in the defendant's work are substantially similar. (*Armour v. Knowles*, 81 U.S.P.Q.2d 2016 [S.D. Tex. 2006]; see also *Mannion, Id.*, citing 4 NIMMER § 13.03[B][2][a] [“copyright does not protect ‘ideas,’ only their expression.”]; 17 U.S.C. § 102(b)). “To the extent a photograph is original [], copyright protects not what is depicted, but rather how it is depicted [in its overall aesthetic rendition].” (*Id.*). But it is the separation of idea from its expression where the difficulty lies for the Court when reviewing photography art on a motion to dismiss.

11. As a threshold matter, any person – any jury – could reasonably identify, at a glance, a substantial similarity between most, if not all, of the works presented⁵ (Defendants, themselves, contradictorily spend a significant portion of their motion actually discussing how similar the works are, if but to claim the similarities are not protectable). But, as suggested in *Gaito* and *Warner Brothers* (*supra*), the Court is asked to determine on a motion to dismiss whether those substantially similar works comprise, on its face, appropriated original elements that are copyrightable⁶ by filtering out any similarity of unprotectable “ideas”.⁷ But Justice Kaplan has found in *Mannion v Coors Brewing Co.* (*supra*) that “little is gained by attempting to distinguish an unprotectable ‘idea’ from its protectable ‘expression’ in a photograph or other work of visual art” (*Mannion, Id.*) because the idea of a photographic depiction and the expression of that depiction can be, and almost always is,

⁵ Any works not apparent at a glance would present an act of serial infringement to the Court, which is made self-evident by the fact that Defendant McGinley appropriated the works of Plaintiff over years from works years old.

⁶ *Psihoyos v National Geographic Society*, 409 F.Supp.2d 268, 274 (SDNY 2005)

⁷ *Bill Diadato Photography, LLC v Kate Spade, LLC*, 388 F.Supp.2d 382 (SDNY 2005).

intertwined to the state of being one and the very same – “those elements of a photograph, or indeed, any work of visual art protected by copyright, could just as easily be labeled ‘idea’ as ‘expression.’” (*Id.*). This is why Justice Kaplan felt compelled in *Mannion* to create a new test for visual arts, the “Total-Concept-and-Feel Test” (which could also be called the “Aesthetic Test”).

12. Defendants’ papers, when subjected to Justice Kaplan’s new test, fail to establish that the elements in the McGinley Images, appropriated from the Gordon Images, are unprotected by copyright law. Moreover, their self-serving analysis, provided by an associate attorney who is not an expert in photography art, and who works for the law firm paid by the Defendants to oppose Plaintiff’s actions, fails entirely to disprove substantial similarities between the works when subjected to Justice Kaplan’s new test.

A. The similarity between the parties’ works concerns copyrightable elements.

13. Defendants make it seem that the issue of copyright is a well defined matter with well defined tests that have simple and quick application in all creative works. However, “[t]he test for infringement of a copyright is of necessity vague. . . . Obviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be ad hoc.” (*Mannion, Id.*, citing *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 [2d Cir. 1960]). This is particularly so for the nebulous realm of visual arts.⁸

⁸ See *Mannion, supra*, quoting Newman, *New Lyrics for an Old Melody, supra* at 697

“I do not deny that all of these subject matters [computer programs, wooden dolls, advertisements in a telephone directory] required courts to determine whether the first work was copyrightable and whether the second infringed protectable elements. What I question is whether courts should be making those determinations with the same modes of analysis and even the same vocabulary that was appropriate for writings. . . . [I]t is not just a matter of vocabulary. Words convey concepts, and if we use identical phrases from one context to resolve issues in another, we risk failing to notice that the relevant concepts are and ought to be somewhat different.”

i. The “Total-Concept-and-Feel Test” establishes the similar elements are protected

14. Justice Kaplan in *Mannion* (*supra*) grappled with the complexities of copyright law’s inquiry into visual art infringement when addressing the dichotomy of “expression” and “idea”. According to Justice Kaplan, “[i]n the case of [visual arts], which are addressed to the aesthetic⁹ sensibilities of the observer, the test [segregating expression from idea] is, if possible, even more intangible”¹⁰ than that applied to the written word. He explained in his analysis that “[i]n the visual arts, the distinction [between expression and idea] breaks down. For one thing, it is impossible in most cases to speak of the particular ‘idea’ captured, embodied, or conveyed by a work of [visual] art because every observer will have a different interpretation. Furthermore, it is not clear that there is any real distinction between the idea in a work of [visual] art and its expression. An artist’s idea, among other things, is to depict a particular subject in a particular way. As a demonstration, a number of cases from this Circuit have observed that a photographer’s ‘conception’ of his subject is copyrightable.¹¹ By ‘conception,’ the courts must mean originality in the rendition, timing, and creation of the subject – for that is what copyright protects in photography.¹² But the word ‘conception’ is a cousin of ‘concept’, and both are akin to ‘idea.’ In other words, those elements of a photograph, or indeed, any work of visual art protected by copyright, could just as easily be labeled “idea” as ‘expression’.” (*Id.*).

15. Under this rubric, Justice Kaplan therefore determined that “little is gained by

⁹ Emphasis added.

¹⁰ *Mannion*, 377 F. Supp. 2d 444 [S.D.N.Y. 2006]; see also *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d at 489.

¹¹ See *Mannion* at *fn.* 81, citing *Andersson*, at *2; *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914); *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916); *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987); *Kaplan v. Stock Market Photo Agency, Inc.*, 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001).

¹² See *Infra* ¶13, *Gaito Architecture, supra*.

attempting to distinguish an unprotectable ‘idea’ from its protectable ‘expression’ in a photograph or other work of visual art.” (*Id.*). The reason for this, according to Justice Kaplan, is that “[c]onfusion is caused in the law of copyright because of the use of the catchphrase ‘There is no copyright in ideas but only in the form of their expression’. Unless one understands what this means its utility is non-existent, or it is positively misleading. An artistic work of the imagination presupposes two kinds of ingredients: the conception of one or more ideas, and artistic dexterity and skill in their representation in the chosen medium. It is not the law that copyright protects the second kind of ingredient only. If that were so a debased copy which failed to capture the artist’s dexterity and skill would not infringe, which plainly is not the case. Unless an artist is content merely to represent a pre-existent object (e.g. a building) or scene, it is part of his task as artist to exercise his imagination and in so doing he may create a pattern of ideas for incorporation in his finished work. This idea-pattern may be as much part of his work, and deserving of copyright protection, as the brushstrokes, pencil-lines, etc. The true proposition is that there is no copyright in a general idea, but that an original combination of ideas may [be protected].” (*Id.* at *fn.* 90, quoting Hon. Sir Hugh Laddie et al., *The Modern Law of Copyright and Designs* [3d ed. Butterworths 2000] § 4.43, at 212).

16. Given the foregoing, however, the Court is still left with the responsibility, as provided in *Gaito* and *Warner Bros.* (*supra*), of determining if the substantial similarities in the works comprise protectable elements. What is the Court to measure in order to determine if copyright protects the visual art of photography? Defendants endorse the “discerning observer test” (D. Motion, §I[A][2]), but the way in which the request the Court to apply it is impermissible. Moreover, it may not even be appropriate, at least not on its own, according to Justice Kaplan.

17. Defendants correctly state that in the realm of visual arts, and in particular the niche field of photography art, protectable elements “may include posing the subjects, lighting, angle, selection of film and camera, [and] evoking the desired expression, along with variants.” (D. Motion,

Section I(A)(2), ¶1).¹³ “There may [also] be originality which does not depend on creation of the scene or object to be photographed and which resides instead in the specialties [in addition to] angle of shot [and] light[, such as] shade, exposure, effects achieved by means of filters, developing techniques” (*Mannion, Id., citing I LADDIE*, §4.57 at 229), “rendition, timing, and creation of the subject” (*Mannion, Id.*). “Even if [the images] have been drawn from life, that fact would not deprive them of protection.” (*Id.*). But “one cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text.”¹⁴ So the simplistic approach to the application of the “discerning observer test”, as Defendants endorse (D. Motion, §I[A][2], ¶1), may be entirely inappropriate when reviewing photography art. In fact, the Southern District typically refuses to engage in this type of analysis. “In several cases dealing with fabric and garment designs, the Circuit has cautioned that: ‘a court is not to dissect the works at issue into separate components and compare only the copyrightable elements. . . . To do so would be to take the ‘more discerning’ test to an extreme, which would result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectable elements like letters, colors and symbols.’”¹⁵

18. “This discussion of course prompts the question: at what point do the similarities between two photographs become sufficiently general that there will be no infringement even though actual copying has occurred? But this question is precisely the same, although phrased in the opposite way, as one that must be addressed in all infringement cases, namely whether two works are substantially similar with respect to their protected elements. It is nonsensical to speak of one photograph being substantially similar to another in the rendition and creation of the subject but

¹³ Citing *Kaplan v Stock Market Photo Agency, Inc.*, 133 F.Supp.2d 317.

¹⁴ *Infra fn.* 3.

¹⁵ *Mannion, Id.*, citing *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (citing *Knitwaves*, 71 F.3d at 1003); accord *Hamil America, Inc. v. GFI*, 193 F.3d 92 100, 101 (2d Cir. 1999).

somehow not infringing because of a shared idea. Conversely, if the two photographs are not substantially similar in the rendition and creation of the subject, the distinction between idea and expression will be irrelevant because there can be no infringement. The idea/expression distinction in photography, and probably the other visual arts, thus achieves nothing beyond what other, clearer copyright principles already accomplish.” (*Mannion, supra*).

19. This leads to the test created by Justice Kaplan in *Mannion* – the “Total-Concept-and-Feel Test”. Put succinctly, a photograph “is protectable to the extent of its originality in the rendition and creation of the subject. Key elements of the [photograph] that are in the public domain – ... such as the existence of a cloudy sky, [the model’s] pose, [and other basic elements] – may not be copyrightable in and of themselves, but their existence and arrangement in [the] photograph[s] indisputably contribute[s] to its originality. Thus the fact that the [Plaintiff’s] Photograph[s] include[] certain elements that would not be copyrightable in isolation does not affect the nature of the comparison. The question is whether the aesthetic appeal of the [compared] images is the same.” (*Mannion, Id.*). The “aesthetic appeal” necessarily refers to the ‘defaults’, ‘impurities or defects, vagueness, shadows, and moved frame¹⁶; the “punctum”¹⁷ within the imagery; unusual lighting and offbeat compositions¹⁸; and various other elements which comprise a photograph in tandem with those unprotectable elements. In other words, it is the “total-concept-and-feel” of the entirety of each work which must be measured by the Court.¹⁹

¹⁶ Chauvin Aff., ¶4, Exh. “C”.

¹⁷ Krampf Aff., Exh. “E”, ¶12, the main focus where the eye goes to first on immediate reaction to an image; the portion of the image that pierces the viewer upon first exposure.

¹⁸ Cameron Aff., ¶6, Exh. “A”.

¹⁹ Justice Kaplan cites *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.* (338 F.3d 127 [2d Cir. 2003]) where the “total-concept-and-feel” originated. He explains that “[t]he Circuit observed that the more discerning observer test is ‘intended to emphasize that substantial similarity must exist between the defendant’s allegedly infringing design and the *protectable* elements in the

20. “The [case law] agree[s] that the relevant comparison is between the protectable elements in the [Gordon Images] and the [McGinley Images], but that those elements are not to be viewed in isolation.” (*Id.*) As such, Justice Kaplan’s “Total-Concept-and-Feel Test” is what must be applied. And when done so, it is without question that “[t]he [Gordon Images are] protectable to the extent of [their] originality in the rendition and creation of the subject. Key elements of the [Gordon Images] that are in the public domain – such as [a model’s] likeness [such as race] – are not replicated in the [McGinley Images]. Other elements arguably in the public domain – such as the existence of a cloudy sky, [a model’s] pose, [clothes work or the lack thereof, and other elements] – may not be copyrightable in and of themselves, but their existence and arrangement in [the] photograph[s] indisputably contribute to its originality. Thus the fact that the [Gordon Images] includes certain elements that would not be copyrightable in isolation does not affect the nature of the comparison. The question is whether the aesthetic appeal of the two [bodies of work are] the same.” (*Id.*) They are. As such, the Court’s responsibility as described under *Gaito* and *Warner Bros.*, which requires that the Court determine if the substantial similarities comprise copyrightable elements, is satisfied sufficiently to warrant denial of dismissal at this stage.

ii. *A Reasonable jury could find infringement with a proper Instruction.*

21. In determining substantial similarity and infringement, the inquiry for the trier of fact is “principally guided by ‘comparing the contested [work’s] total concept and overall feel with that of the allegedly infringed work’ (*Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338

plaintiff’s design.’ [(*Id.* at 130).] In making its own comparison, the Circuit did not mention the ‘more discerning observer’ test at all, but it did note that:

‘the total-concept-and-feel locution functions as a reminder that, while the infringement analysis must *begin* by dissecting the copyrighted work into its component parts in order to clarify precisely what is not original, infringement analysis is not *simply* a matter of ascertaining similarity between components viewed in isolation. . . . The court, confronted with an allegedly infringing work, must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is to something in the original that is free for the taking.’ [(*Id.* at 134-35).]”

F.3d 127, 133 (2d Cir. 2003); *see Boisson*, 273 F.3d at 272; *Knitwaves Inc.*, 71 F.3d at 1003), ‘as instructed by [a viewer’s] good eyes and common sense (*Hamil Am.*, 193 F.3d at 102).’” (*Gaito Architecture*, 602 F.3d at 66. *Accord Marketing Tech. Solutions, Inc. v. Medizine LLC*, No. 09 Civ. 8122,2010 WL 2034404, at *3 [S.D.N.Y. May 18,2010] quoting *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215,217 [2d Cir. 1998]).

22. “The parties have catalogued at length and in depth the similarities and differences between these works. In the last analysis, a reasonable jury [with a proper instruction] could find substantial similarity either present or absent. As in *Kisch v. Ammirati & Puris Inc.* [657 F. Supp. 380, 384 (S.D.N.Y. 1987)], which presents facts as close to this case as can be imagined, the images are such that infringement cannot be ruled out – or in – as a matter of law.” (*Mannion, supra*).

B. Plaintiff’s comparison of photographs to videos is permissible

23. Again, Justice Kaplan, in his very complete discussion in *Mannion*, addresses and invalidates the broad arguments of the defendants.

24. The expression in the videos, moving or not, find their source with Plaintiff’s original works. The fact that Plaintiff’s works of still photographs have now been rendered in moving film is not relevant. Justice Kaplan notes in *Mannion* that “a number of cases from this Circuit have observed that a photographer’s “conception” of his subject is copyrightable”²⁰ – the concept being the “idea-pattern” described in Justice Kaplan’s “Total-Concept-and-Feel Test”. “[O]ne cannot divide a visual work into neat layers of abstraction in precisely the same manner one could with a text.” (*Mannion, supra* citing *Warner Bros., supra*). “Troublesome, too, is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information,

²⁰ *See Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914); *Kaplan*, 133 F. Supp. 2d at 323 (S.D.N.Y. 2001); *Andersson v. Sony Corp. of Am.*, No. 96 Civ. 7975 (RO), 1997 WL 226310, at *2 (S.D.N.Y. May 2, 1997); *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987); *Pagano v. Chas. Beseler Co.*, 234 F. 963, 964 (S.D.N.Y. 1916).

musical compositions, as well as artistic paintings. Isolating the idea from the expression and determining the extent of copying required for unlawful appropriation necessarily depend to some degree on whether the subject matter is words or symbols written on paper, or paint brushed onto canvas.” (Id. citing *Franklin Mint Corp. v. Nat’l Wildlife Art Exchange, Inc.*, 575 F.2d 62, 65 [3d Cir. 1978]; accord *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 383 [S.D.N.Y. 1987]).

25. The resolution for the difficulty in dealing with cross-medium infringement in visual arts, and indeed the foil for Defendants’ argument, is found in the “Total-Concept-and-Feel Test”. The imagery in the videos finds its source from a single scene captured in an instant and then expands upon it; the videos find their entire theme, their story, springing from that created by Plaintiff in a single and multiple still pictures. The “idea-pattern”, composition, thematic undertone, the “punctum”, and many of the various copyrightable elements are rooted in the Gordon Images. Defendants’ reference to cases such as *Leigh v Warner Bros., Inc.* (212 F.3d 2010 [11th Cir. 2000]), do not negate the appropriation which is discernable under the “Total-Concept-and-Feel Test”.²¹ The rendition and creation of the subject (a statute in *Leigh*) were substantially different, though the subject was the same. Here, the rendition, though in moving film rather than still photography, was the same - angles, lighting, monochromatic styling, punctum, etc. All of it find its source from Plaintiff’s works.

26. One other issue of note, ultimately, the entire theme of the entire campaign finds its origins in the derivative works – it was what McGinley was paid to “create”. As such, the origins of McGinley’s infringing works, used as the basis for the subsequent campaign, make any works which spring from McGinley’s infringing works equally as infringing, for they would not have been created were it not for the original works “inspiring” the foundational works upon which the campaign was

²¹ Also of note is that the subject matter in *Leigh v Warner Bros., Inc.* was of a non-protectable subject, that being a statute, which can be captured in many different ways, which Justice Kaplan explained would naturally not be protected – *Infra* ¶19.

built. That is the clear theory behind “derivative works” in copyright law. Therefore, Defendants’ arguments fail absolutely.

II. Defendants’ Analysis Of The Similarities Between The Works Should Be Disregarded.

27. One piece of entertainment value in Defendant’s motion is the contradictory manner in which Defendants attempt to engage in both a legal and comparative analysis which assert opposite claims – at first they claims that the works are substantially similar but the similarities are unprotectable; and then they claim that the works are actually not substantially similar because Defendant McGinley executed minor changes in his works. Defendants must choose one position.

A. Defendants’ fail to establish that the substantial similarities are unprotectable.

28. On the one hand, Defendants attempt to explain away the obvious echoes of the “total-concept-and-feel” in the McGinley images, relying heavily on *Kaplan v Stock Market Photo Agency, Inc.* (*supra*) and *Bill Diodato Photography, LLC* (*Infra fn. 7*) to support their argument that all of the substantial similarities to the Gordon Images comprise unprotectable element. However, Justice Kaplan addresses the focus of both cases²² in a discussion regarding *Kaplan*, “in which two remarkably similar photographs of a businessman’s shoes and lower legs, taken from the top of a tall building looking down on a street below, were held to be not substantially similar as a matter of law because all of the similarities flowed only from an unprotected idea rather than from the expression of that idea.”

29. Justice Kaplan’s analysis in *Mannion* as to the applicability of *Kaplan* parallels here. For *Kaplan* and *Diodato*, the question of protectable substantial similarities looked first to the “idea” being conveyed. In *Kaplan*, explained Justice Kaplan, if the idea was “a businessman contemplating suicide by jumping from a building,” or “a sense of desperation produced by urban professional life...

²² *Diodato* occurred after Justice Kaplan’s decision in *Mannion*, but the circumstance, works in question and decision echo each other almost exactly, therefore Justice Kaplan’s discussion applies to both equally.

then the similarities between the two photographs flow from something much more than that idea, for it would have been possible to convey (1) and (3) in any number of ways that bear no obvious similarities to Kaplan’s photograph.” (*Mannion, supra*). However, as Justice Kaplan discerned from *Kaplan*, the court there determined that the substantial similarities were not protectable because the similarities were of the idea – “[t]he *subject matter* of both photographs is a businessperson contemplating a leap from a tall building onto the city street below. As the photograph’s central *idea*, rather than Kaplan’s expression of the idea, this *subject matter* is unprotectable in and of itself.” (*Kaplan* at 323). In *Diodato* – in which the imagery depicted the idea of a woman (possibly in bowel distress) on the toilet with her purse on the floor beside her, from the vantage point of a third-party on-looker from under the stall door – was determined not to be protectable for the same reason as in *Kaplan*. The expression represented only the basic ideas inherent in the images.

30. However, the Gordon Images do not express only the basic ideas inherent in their images. They are a rendition of Plaintiff’s mind’s eye, presented in a specific manner chosen by her to titillate, inspire and create discourse as to its meaning and her vision and intent. After all, “[i]t is not... the *idea* of a couple with eight small puppies seated on a bench that is protected, but rather Rogers’ *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects” etc. (*Rogers v. Koons*, 960 F.2d 301). Plaintiff’s images were carefully selected by her as they occurred, and further manipulated to draw out other unique elements through the use of other elements used in its final rendition. Therefore, Defendants’ comparison of the present matter with *Kaplan* and *Diodato* fail to establish that the McGinley Images’ substantial similarities with the Gordon Images comprise unprotected elements.

B. Defendants’ analysis has no merit; Defendants fail to establish that the minor changes in the McGinley Images render it original and non-infringing.

31. Conversely, after finishing their discussion of how the works *were* substantially similar, the Defendants engage in an academic soliloquy which they refer to as an “analysis” to differentiate the same works as being entirely disparate. In it, they discuss minutia elements changed

in, removed from or added to the McGinley Images – seemingly in an effort to show that a “discerning observer” would recognize these changes as being sufficient to differentiate the works and establish that there is no infringement – as a means of representing an apparent “analysis” of how the Gordon Images are so different.

32. With all due respect to the artistic opinion of an associate attorney working for the firm paid to oppose the Plaintiff’s claims, the Court should, respectfully, grant Defendants’ analysis the time and weight it is due – which is to say none at all. Defendants’ attempt to supplant the biased, self-serving analysis and comparisons of a lawyer for that of an expert versed in the artistic realm in which Plaintiff cultivated a career. As will be demonstrated herein, the opinions of actual experts (“discerning observers”) in this field of art disagree entirely with that of Defendants’ attorneys.

33. Setting aside for a moment the expert opinions of those versed in visual arts/photography art, Defendants arguments in its analysis fail as a matter of law. Justice Kaplan actually addresses in *Mannion* the same or similar “minutia” arguments Defendants assert in this matter:

“There of course are differences between the two works. The similarity analysis may take into account some, but not all, of these. It long has been the law that ‘no plagiarist can excuse the wrong by showing how much of his work he did not pirate.’²³ Thus the addition” of certain elements “may not enter into the similarity analysis.”

“Other differences, however, are in the nature of changes rather than additions. One image [may be] black and white and dark, the other [may be] in color and bright. One [may be] the mirror image of the other. One [may] depict[] only an unidentified man’s torso, the other the top three-fourths of [a model’s] body. The [model’s attire may] not [be] identical. . . . These changes may enter the analysis because “[i]f the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are, within the context of plaintiff’s work, of minimal importance . . . then no infringement results.”

Mannion, *supra*, citing 4 NIMMER § 13.03[B][1][a], at 13-63.

34. The addition of certain elements to the McGinley Images affords no safe harbor for Defendants under Justice Kaplan’s analysis – such distracters cannot be considered for purposes of

²³ Citing *Tufenkian*, 338 F.3d at 134-35.

the similarity test. Therefore, Defendants' discussion in that regard has no weight and should not be considered.

35. As to Defendants discussion of the changes made to the original images, under *Mannion*, they must be sufficient to render the remaining points of similarity of minimal importance. According the those "who care[] about this kind of thing" (P. Complaint Exh. "F") presented in Exhs. "B" to "G", such sufficiency is not achieved.

36. The consensus of the experts²⁴, who have reviewed the Gordon and McGinley Images, is that Defendant McGinley's "works are not original to him" (Holden Aff., Exh. "D" ¶10). Generally, each expert observes that Defendant McGinley's entire body works (which include images not derivative of Plaintiff's works) are unoriginal, comprising "blatant composite[s] of many [] well-known and lesser-known photographers, including [Plaintiff], Nan Goldin, David Armstrong, Bill Jacobson, and a handful of others." (Cameron Aff., Exh. "B" ¶6; see Diehl Aff., Exh. "F" ¶4).

37. When presented with Plaintiff's comparison booklet Exh. "A" (attached hereto), each immediately observes and recognizes, in their opinion, an apparent, "striking" and "uncanny" substantial similarity between Defendant McGinley's overall treatment, construction, content, overall appearance, composition, and style to that of Plaintiff's (Chauvin Aff., Exh. "C" ¶6; Krampf Aff., Exh. "E" ¶7; Diehl Aff., Exh. "F" ¶5; Mitchel Aff., Exh. "G" ¶8)²⁵. Moreover, the experts find that the repetition of similarities appear to be "too numerous and too common to be coincidence." (Chauvin Aff., Exh. "C" ¶6; see also Mitchel Aff., Exh. "G" ¶8). Thus, the opinion of each expert echoes the same conclusion: Defendant McGinley's works, produced over the past 9 years, are based upon Plaintiff's preceding unique works, and that he has been consciously

²⁴ All of the experts have volunteered to give their opinion here (and others who could not provide affidavits in time) did so without compensation, and without the expectation or request for compensation.

²⁵ Substantial similarities were apparent to experts without Plaintiff's analysis (Mitchel Aff., Exh. "G" ¶9).

appropriating and deliberately deriving his works from those originating with the Plaintiff (Cameron Aff., Exh. “B” ¶6; Krampf Aff., Exh. “E” ¶6; Diehl Aff., Exh. “F” ¶4).

38. For the sake of economy, Plaintiff will not engage, as the Defendants did, in a comparative discussion of example exhibits from her Exh. “A” (attached hereto). Such discussion has already taken place within the expert affidavits. These documents speak for themselves, and address many, if not all, of the same examples which are referenced in Defendants’ “analysis” provided by the associate attorney of Defendants’ firm (who does not hold up beside such experts).

39. To sum up the experts’ analysis in this matter (following Justice Kaplan’s “Total-Concept-and-Feel Test”), they all agree that Defendant McGinley has been dishonestly “borrowing” (Cameron Aff., Exh. “B” ¶6, 8) from Plaintiff to produce his works, around which he has developed a cottage industry. He has reproduced the content, subjects, composition, techniques, colors and other various elements found and assembled within Ms. Gordon’s works (Diehl Aff., Exh. “F” ¶5), “chip[ing] away at the integrity of Ms. Gordon’s work by appropriating the heart and soul of what she creates” – the “heart and soul” being the “punctum” (the main focus where the eye goes to first on immediate reaction to an image; the portion of the image that pierces the viewer upon first exposure) – and “dressing it up with additional or changed minor elements to call it his unique work.” (Krampf Aff., Exh. “E” ¶12).

40. The peripheral changes observed by the experts, and relied upon heavily by Defendants to establish uniqueness, refer to “basic element[s], such as the switching of black to white, left to right, up to down, model ethnicity, background setting, and color to monochrome, just to name a few. These minor ‘switch-ups’ can distract from more prevalent compositional devices found in Ms. Gordon’s works such as color, content, technique, lighting, energy, emotion, positioning and other tangible and intangible elements which make up the unique vision of Ms. Gordon’s bodies of work.” (Krampf Aff., Exh. “E” ¶11; Diehl Aff., Exh. “F” ¶5; see also discussion in Holden Aff., Exh. D ¶15-16). However, echoing Justice Kaplan in *Mannion* (*supra*),

are of one mind that “[c]hanging the direction of a head, a background setting, or a slight color shift, does not constitute a new vision where the lighting, content and composition [and other significant and small elements in combination] are the same.” (Mitchel Aff., Exh. “G” ¶9).

41. The experts also recognize that in addition to his blatant appropriation, “[s]ome of [] McGinley’s mimicry are, indeed, very subtle and may not have been noticed with a simple glance” (Chauvin Aff., Exh. “C” ¶6). But even this subtlety is apparent to them, wherein they find that “he essentially recreates many of Ms. Gordon’s images with new models or different backgrounds, combines[/composites] multiple images into one, or distracts from the core imagery and style of Ms. Gordon’s work found in his pieces with extra extraneous content which act as distracters from the core imagery which is derived from Ms. Gordon’s pieces” (Diehl Aff., Exh. “F” ¶5; Holden Aff., Exh. D ¶8).

42. The overall position of the experts is that “McGinley’s photographs are overtly and repeatedly derived from Ms. Gordon’s images.” (Mitchel Aff., Exh. “G” ¶8). “It is virtually impossible... that such repetitious and substantial similarities to Ms. Gordon’s works would occur unless they were specifically chosen and planned.” (Krampf Aff., Exh. “E” ¶10). And given that Defendants have trumpeted McGinley’s production of the works in question as having been created in a controlled environment under his exclusive direction, “the deliberateness of Mr. McGinley’s scenes make more poignant... the intent to derive his works from Ms. Gordon”. (Diehl Aff., Exh. “F” ¶8). It is evident that, in the experts’ opinions, McGinley’s derivative works range from total and blatant reproduction to subtle appropriation of “punctum” and “total concept and feel”. “As such, together they all represent a pervasive pattern on the part of Mr. McGinley to appropriate those works which are clearly Ms. Gordon’s and to produce derivative pieces, as well as derivative bodies of work.” (Chauvin Aff., Exh. “C” ¶6).

III. Defendants' Arguments Concerning Contributory and Vicarious Infringement Fail

43. As a matter of law, absent outright denial of any affiliation with any of the McGinley Images (which does not exist here), "at this stage in the proceedings, the court must accept all of the allegations as true, and its job is not to weigh the evidence." *Safety Management Systems, supra*). This is especially so when considering a Rule 12(b)(6) motion to dismiss. (See *Christopher v. Harbury*, 536 U.S. 403, 406 [2002][When reviewing a motion to dismiss under Rule 12(b)(6), the Court must accept all factual allegations in a complaint as true and view them in the light most favorable to the plaintiff]). It is sufficient that the complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed. R. Civ. P. 8[a][2]) for it to survive a dismissal motion. Assuming the factual allegations are true, even if doubtful in fact, the "factual allegations must be enough to raise a right to relief above the speculative level." (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 [2007]). All that is required is "a complaint with enough factual matter (taken as true) to suggest the required element" of a cause of action. (*Phillips v. County of Allegheny*, 515 F.3d 224, 234 [3d Cir. 2008] *citing Twombly*, 550 U.S. at 556.) In sum, if a complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," (*Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 [2009]), then the complaint is "plausible on its face," and will survive a motion to dismiss under Rule 12(b)(6). (*Twombly*, 550 U.S. at 570). Plaintiff has satisfied this requirement in her complaint.

44. As the Defendants have not denied association to any of the images, it is enough that they have any admitted association to any image which may constitute copyright infringement. (*Atlantic Recording Corp. v. Howell*, 2007 WL 2409549, at *3-4 [D. Ariz. Aug. 20, 2007]["[T]he mere presence of copyrighted sound recordings in defendant's share file may constitute copyright infringement"). Moreover, it is enough that the complaint makes clear that there are McGinley Images alleged to be infringed by the Defendants (see *Vianix LLC v Nuance Communications, Inc.*, 2010 WL 3221898 [Del. Ch. Aug. 13, 2010]), especially given that there has been no claim from

Defendants that they have not acted with any of the McGinley Images to infringe upon Plaintiff's rights.

45. The facts alleged by Plaintiff in her papers state over and over again that Defendant McGinley was producing works which were based upon hers; that the works were substantially similar; that McGinley was requested, through representatives (most named as Defendants here), to cease his appropriation of Plaintiff's works. Further, Plaintiff had informed some of the named Defendants who were engaged in selling Defendant McGinley's works that such works were infringing on her rights. Some of those same Defendants had materials belonging to Plaintiff with which to compare his works and determine the infringing nature. Furthermore, the law requires that contributing parties engage in some sort of due diligence to ensure that the works they are representing in the stream of commerce are not derivative of other works without the grant of right of appropriation. An infringing party was identified, and Plaintiff has represented a factual pattern, not conclusory allegations, of occurrences which include all the liable parties. The factual pattern alleged provides a sufficient basis for the claims made in her complaint, and therefore dismissal must be denied.

46. As a final matter, with regard to "alter ego", establishing a party as an "alter ego" of their corporation requires a showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (*A & P Brush Manufacturing Corp. v National Labor Relations Board*, 140 F.3d 216 [1998]). Upon information and belief, those individuals named in conjunction with their companies (art galleries) are the sole shareholders/chairmen of the board of their companies, with total control of its operations where each makes a declaration which are not reviewed by the corporation. As the sole shareholder, each would have a personal interest which could not be divorced from the corporation. Unless or until the individual Defendants named with their company can show that they is not an "alter egos" of their

company, it is premature at this stage to dismiss the claim as against them.

IV. Defendants' Claims Concerning Preemption By Federal Law Of The State Law Claims Are Without Merit.

47. Federal copyright law does not completely preempt state law; it preempts state law only to the extent state law purports to create rights "equivalent to any of the exclusive rights within the general scope of copyright"... "State laws granting or protecting other rights (such as breach of contract, conversion, defamation, etc.) [will] not [be] preempted." (*Durgom v Janowiak*, 87 Cal.

Rptr. 2d 619 [Ct. App. 1999]). The General Business Law provides in pertinent part:

§349: Deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the State are hereby unlawful.

§350(A): False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this State is hereby declared unlawful.

§360(L): Injury to business reputation; dilution. Likelihood of injury to business reputation or of dilution of the distinctive quality of a trade name shall be a ground for injunctive relief in cases of infringement or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

"Deceptive acts or practices", "false advertising" and "injury to business reputation" are all elements without any reference or application under the Copyright act. On this basis alone, Defendants' claims of preemption fails dramatically and, respectfully, should be given no further consideration.

48. While failing to show that preemption applies as a matter of federal law, Defendants' arguments further fail as a matter of state law while they attempt to attack Plaintiff's claims and her alleged facts in support of the claims. Pursuant to CPLR 3211, "[t]he sole criterion [to survive a motion to dismiss] is whether [the complaint's] four corners factual allegations are discerned which taken manifest any cause of action cognizable in law." (*Chin v Mn Choi Chiu*, 71 Ad3d 621, 622 [2010], quoting *Arnki v Goldman & Assoc., LLP*, 34 Ad3d 510, 511 [2006][internal quotations omitted]). Respectfully, the Court must only determine whether the pleader has a cognizable cause of action and not whether the action has been properly plead (which it has). (*Well v Yeshiva Ranbam*, 300 AD2d 580 [2nd Dept. 2002]). The complaint must be liberally construed, and Plaintiff given

every favorable inference that can be drawn from the facts alleged in the complaint. (*Paterno v CYC, LLC*, 8 Ad3d 544 [2nd Dept. 2004]).

49. It is sufficient that the complaint contains “a short and plain statement of the claim showing that the pleader is entitled to relief” (Fed. R. Civ. P. 8[a][2]) for it to survive a dismissal motion. Assuming the factual allegations are true, even if doubtful in fact, the “factual allegations must be enough to raise a right to relief above the speculative level.” (*Twombly, supra*). All that is required is “a complaint with enough factual matter (taken as true) to suggest the required element” of a cause of action. (*Phillips v. County of Allegheny*, 515 F.3d 224, 234 [3d Cir. 2008] *citing Twombly*, 550 U.S. at 556.) In sum, if a complaint “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” (*Ashcroft v. Iqbal, supra*), then the complaint is “plausible on its face,” and will survive a motion to dismiss under Rule 12(b)(6). (*Twombly*, 550 U.S. at 570). Plaintiff’s complaint has satisfied this requirement.

50. Defendants’ arguments concerning (what they refer to as) “trademark dilution” fall entirely flat. The claim addresses the “likelihood of injury to business reputation or of dilution of a distinctive mark or trade name. (GBL §360-L). An injury to business reputation is a distinctive claim from merely asserting the misrepresentation of Plaintiff’s work as Defendant McGinley’s own. The misrepresentation, if asserted, would be only one component assessed in the various elements involved in a §360-L claim. It is not even necessary under State law that Plaintiff show “that defendant is using his own name or any part of it, or that the parties are not in actual competition or in identically the same line of business” (*see, Frank's Rest. v. Lauramar Enterprises.*, 273 A.D.2d 349, 711 N.Y.S.2d 433 [2000] *quoting Harvey Mach. Co. v. Harvey Aluminum Corp.*, 9 Misc.2d 1078, 175 N.Y.S.2d 288 [1957]). Given this, the Defendants have not established preemption.

51. As a final note, Defendants’ discussion which applies for a merits based determination of the State law claims provides no basis as to why such a request should be granted. As provided above, the State law claims comprise elements which are not addressed by copyright law, and further

they have not challenged the merits in any way short of claiming that Plaintiff has not made a claim upon which remedy can be granted. Therefore, the request should be disregarded.

V. Plaintiff Has Alleged Sufficient Facts To Support Her State Law Claims.

52. Defendants claim that Plaintiff fails to state a claim as to any “deceptive practices” and “false advertising” which harm the public. This assertion is contrary to the realities of the Complaint. The complaint provides clearly, and it is inherent in the overall handling of the works, that McGinley has represented to the world that he created unique pieces when he did not. McGinley has stated that he derives his works from those of others (P. Complaint Exh. “H”). Moreover, McGinley’s Co-Defendants have had knowledge of this fact. Defendant Halpert, himself, has even admitted to Plaintiff directly that he has knowledge of McGinley’s proclivity to review the works of other artists and photographers from books, magazines and on websites, to create his works (and McGinley goes as far in his interview [P. Complaint Exh. “H”] to say that he will even take a snapshot of a scene in a movie). As such, the deception is the representation that McGinley created his works on his own, giving no acknowledgement to those from whom he appropriated his expressions. The false advertising is the marketing of his works, by him and those who represent his works, that they are original to McGinley. And the harm to the public from there is obvious: they purchased a piece of McGinley art with the justified belief that it was original to him, would retain and improve its value over time, and would not be an expression appropriated from someone else. “If the words or images, considered in context, necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.” (*Time Warner Cable, Inc. v. DIRECTV, Inc.*, No. 07-0468-cv, 2007 WL 2263932 at *10 [2d Cir. Aug. 9, 2007]) (internal quotations and citations omitted).

VI. Plaintiff’s Contract Claims Survive A Motion To Dismiss

53. Defendants arguments are nothing if not inventive at the very least. The proposition that contract claims are preempted by federal law does have some merit, but it is not

all encompassing as Defendants would lead this Court to believe. Furthermore, the Statute of Frauds claim is entirely misplaced since the contract in question was actually performed within a year.

54. First, to set the record straight, the agreement between Plaintiff and Perez/Ratio 3 did not require Perez/Ratio 3 to refrain from selling McGinley works, or any works – the agreement was not an exclusive contract. The agreement at issue was a non-exclusive licensing and representation agreement which was performed.

55. Referring now to the contract between the parties as it applies to the Statute of Frauds, Plaintiff described in her alleged facts that Perez/Ratio 3 represented Plaintiff as her *de facto* agent, they exhibited her work for the purpose of promoting and selling them, and the relationship then ended – all within one year. The contract was fully performed and then terminated. As such, the Statute of Frauds is satisfied. As an additional note, even if the relationship between the parties

56. With regard to the contract itself, in New York, a covenant of good faith and fair dealing is implied in every contract (see *Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 639 N.Y.S.2d 977, 663 N.E.2d 289, 291 [1995]). It “embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” (*Id.* at 389 [internal quotation marks and citation omitted]; accord *Moran v Erk*, 11 NY3d 452, 456 [2008]). Inherent in this implied duty is the fiduciary duty of confidentiality, which would be a fiduciary duty all its own in conjunction with the implied covenant.

57. Defendants’ fiduciary duty to Plaintiff, which included keeping her confidence, is one New York has long held to a standard “stricter than the morals of the market place. Not honor alone, but the punctilio of an honor the most sensitive, is... the standard of behavior” (*Meinhard v Salmon*, 249 NY 458, 464, 164 NE 545 [1928][Cardozo, C.J.]). Respectfully, the Court must look to the “morals of the market place” in conjunction with its review. The type of oral relationship is common

in the industry of art – a gallery owner represents an artist, takes possession of all of the artist’s works, chooses the ones to exhibit, and then engages in promotion for the purpose of sale to benefit financially along with the artist. Such relationships are based on an exhibit-by-exhibit basis (therefore performed in a year), and the gallery owner is always held within his/her industry to a standard that they will not engage in behavior to misuse the artist’s work.

58. Having had in their possession the Plaintiff’s works after termination of the agency agreement, Defendants Perez/Ratio 3 had a fiduciary duty to not use them in any way which would “destroy[] or injur[e] the right of [Plaintiff] to receive the fruits of [their] contract”. Now, before Defendants “cry preemption” here again, the conduct in question which falls outside the realm of copyright is one element: the injury to Plaintiff’s business; the appropriation of her good will and unfair competition.

59. It should also be noted that Restatement Second of Contracts §344 famously provides that judicial remedies in contract law serve to protect one or more of three interests of a promisee:

- (a) her "expectation interest," which is her interest in having the benefit of her bargain by being put in as good a position as she would have been in had the contract been performed,
- (b) her "reliance interest," which is her interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as she would have been in had the contract not been made, or
- (c) her "restitution interest," which is her interest in having restored to her any benefit that she has conferred on the other party.

60. Under this rubric, the matter of Plaintiff’s interests as described in (b) and (c) are what is in question. Since she, in good faith, provided all of her works to Perez/Ratio 3, and such materials were retained by them, it was expected that, subsequent to the termination of the agreement, the implied agreement – and just common sense – would require that Perez/Ratio 3 would not then use her works for the purpose injuring her ability to ply her business and compete with her unfairly.

61. Finally, this Court must note that Perez/Ratio 3 has not even denied a single allegation made by Plaintiff. Respectfully, the absence of denial should be inferred by the Court as an admission. If, “at this stage in the proceedings, the court must accept all of the allegations as true” (*Safety Management Systems, Inc., supra*), and Defendants have not even taken the simple effort to deny them, respectfully, the Court can only conclude that Defendants are making an admission.

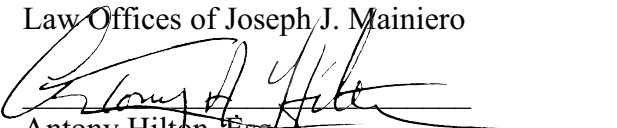
CONCLUSION

62. Plaintiff respectfully requests that the Court deny Defendants’ motion in its entirety, along with any other relief the Court may deem just and appropriate.

Dated: New York, New York
July 1, 2011

Respectfully submitted,

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Index No.:11 CIV 1001
Docket No.:
File No.:

Year:
CSMS:

Hon.:

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JANINE GORDON,

Plaintiff(s)/Petitioner(s),

-against-

**RYAN MCGINLEY
LEVI STRAUSS & CO. INC.
CHRISTOPHER PEREZ
RATIO 3 GALLERY
JOSE FREIRE
TEAM GALLERY, INC.
AGNÉS ANDRÉE MARGUERITE TROUBLÉ a.k.a.
“AGNES B.”
AGNES B. WORLDWIDE, INC. a.k.a. “CMC Agnes B.”
PETER HALPERT
PETER HAY HALPERT FINE ART**

Defendant(s)/Respondent(s)

**MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

NOTICE OF ENTRY

Sir: PLEASE TAKE NOTICE that the within is a true certified copy of a
duly entered in the office of the clerk of the within named court on:

Dated: Yours, etc.
 Law Offices of Joseph J. Mainiero

NOTICE OF ENTRY

Sir: PLEASE TAKE NOTICE that
of which the within is a true copy will be presented for settlement to
Hon.
on of the judges of the within named Court at:

on the day of , 20 , at am pm.
Dated: Yours, etc.
 Law Offices of Joseph J. Mainiero

Service of a copy of the within is hereby admitted.

.....
Attorney(s) for

TO:

Compliance pursuant to 22 NYCRR §130-1.1a

To the best of the undersigned's knowledge,
information and belief formed after an inquiry
reasonable under the circumstances, the within
document(s) and contentions contained herein are not
frivolous as defined in 22 NYCRR §130-1.1a.

By: _____
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