

1 **GLUCK LAW FIRM P.C.**
Jeffrey S. Gluck (SBN 304555)
2 123 N. Kings Road #6
Los Angeles, California 90048
3 Telephone: 310.776.7413

4 **ERIKSON LAW GROUP**
David Alden Erikson (SBN 189838)
5 Antoinette Waller (SBN 152895)
200 North Larchmont Boulevard
6 Los Angeles, California 90004
Telephone: 323.465.3100
7 Facsimile: 323.465.3177

8 Attorneys for Plaintiff

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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

12

13 ADRIAN FALKNER, an individual;

14 Plaintiff,

15 v.

16 GENERAL MOTORS LLC, a
Delaware corporation; and DOES 1-10
17 inclusive.

18 Defendants.

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Case No. 2:18-cv-00549-SVW-JPR

Honorable Stephen V. Wilson

**CORRECTED FIRST AMENDED
COMPLAINT FOR DAMAGES,
RESTITUTION AND INJUNCTIVE
RELIEF**

DEMAND FOR JURY TRIAL

20 Plaintiff Adrian Falkner (“Falkner” or “Plaintiff”) hereby complains against
21 Defendants General Motors LLC (“GM”); and Does 1-10 inclusive (collectively
22 referred to as “Defendants”) as follows.

23

SUMMARY OF THE CASE

24 1. Plaintiff is an acclaimed contemporary artist, well known in the art
25 world by his pseudonym “SMASH 137.” He has exhibited in museums and galleries
26 around the world and is well known for his large-scale outdoor paintings.

27 2. In 2014, Falkner painted an outdoor mural (the “Mural”) as part of a
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1 program in Detroit designed to showcase art inside a new project called the Z
2 Garage. Falkner’s mural received critical acclaim and has been covered in the press
3 and media. Falkner prominently signed the Mural “Smash 137” in the lower left-
4 hand corner.

5 3. In November of 2016, General Motors’ marquee car brand Cadillac
6 inexplicably featured the Mural as the centerpiece of a marketing campaign
7 launching the new Cadillac XT5 (the “Campaign”), *without Falkner’s knowledge or*
8 *consent.*

9 4. Defendants’ exploitation of Plaintiff’s work damages his reputation,
10 especially because he has carefully and selectively approached any association with
11 corporate culture and mass-market consumerism. Indeed, Plaintiff is in high demand
12 for commercial work and is diligent in controlling distribution channels of his work.

13 5. Plaintiff brings this straightforward copyright infringement claim for
14 misappropriation of his original graphic expression. Because Defendants’ also
15 deliberately removed Plaintiff’s signature from the advertisements, Plaintiff also
16 brings claims for removal of copyright management information under 17 U.S.C.
17 Section 1202.

18 **JURISDICTION AND VENUE**

19 6. Plaintiff brings this action for copyright infringement (17 U.S.C.
20 Section 101 et seq.); and falsification, removal, and alteration of copyright
21 management information (17 U.S.C. Section 1202, et seq.).

22 7. This Court has original subject matter jurisdiction over this action and
23 the claims asserted herein, pursuant to 28 U.S.C. Section 1331 (“federal question
24 jurisdiction”) and 1338(a)-(b) (“patent, copyright, trademark and unfair competition
25 jurisdiction”) in that this action arises under the laws of the United States and, more
26 specifically, Acts of Congress relating to patents, copyrights, trademarks, and unfair
27 competition. This Court has subject matter jurisdiction over the state law claims
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1 pursuant to 28 U.S.C. Section 1367(a)(“supplemental jurisdiction”) in that they are
2 so related to the federal law intellectual property claims in the action that they form
3 part of the same case or controversy under Article III of the United States
4 Constitution.

5 8. Defendants are subject to the personal jurisdiction of the Court because
6 they do or transact business in, have agents in, or are otherwise found in and have
7 purposely availed themselves of the privilege of doing business in California and in
8 this District, and because the alleged misconduct was directed to and expressly
9 aimed at California, its residents, and this district. In particular, Defendants posted
10 the infringing material with the purpose of reaching thousands of California
11 residents.

12 9. Venue is proper in this District pursuant to 28 U.S.C. Section
13 1391(b)(1)-(3) because a substantial part of the events or omissions giving rise to
14 the claims occurred in this District in that, *inter alia*, the infringing advertising was
15 used here.

16 THE PARTIES

17 10. Plaintiff Adrian Falkner is, and at all times relevant herein has been, a
18 resident of Switzerland. He is a renowned artist, producing works under the
19 pseudonym “Smash 137.”

20 11. Defendant General Motors LLC (previously identified as Doe No. 1) is
21 a Delaware limited liability company authorized to do business, and doing business,
22 in California and Los Angeles County. It maintains regional offices in San Francisco
23 and directly employs more than 400 workers in California. GM is one of the world’s
24 largest companies, with an estimated market capitalization of \$50 billion and \$166
25 billion in reported revenue for 2016.

26 12. Plaintiff is ignorant of the true names and capacities of the Defendants
27 sued herein as Does 1-10, inclusive, and therefore sues said Defendants by such
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1 fictitious names. Plaintiff will amend this Complaint to allege the true names and
2 capacities when the same has been ascertained. Plaintiff is informed and believes,
3 and thereon alleges, that each fictitiously-named Defendant is responsible in some
4 manner for the occurrences herein alleged, and that Plaintiff's damages as herein
5 alleged were proximately caused by their conduct.

6 13. Each of the Defendants acted as an agent for each of the other
7 Defendants in doing the acts alleged and each Defendant ratified and otherwise
8 adopted the acts and statements performed, made or carried out by the other
9 Defendants so as to make them directly and vicariously liable to the Plaintiff for the
10 conduct complained of herein. Each of the Defendants was the alter ego of each of
11 the other Defendants.

12 **GENERAL ALLEGATIONS**

13 14. Plaintiff is an established contemporary artist. Known by his art world
14 pseudonym "SMASH 137" Falkner's work has been shown in museums and
15 galleries around the world. Falkner is highly sought after for commercial
16 collaborations and endorsements, but generally declines to participate in order to
17 preserve the value of his work.

18 15. In 2014, Plaintiff was invited by a Detroit art gallery to create an
19 outdoor mural as part of a marketing project (the "Project"). The Project paired
20 artists with various locations throughout a private parking garage.

21 16. As part of the Project, Plaintiff created the Mural on two perpendicular
22 walls on a structure at 1234 Library Street in Detroit, Michigan. Prominently placed
23 on the left side of one of the Mural walls, Plaintiff signed his name, "SMASH 137."

24 17. In November 2016, in an effort to increase sales revenues, attract new
25 young car buyers, and target a young urban demographic for the launch of its new
26 XT5 vehicle, Cadillac developed and launched the international media Campaign
27 using several still-image advertisements featuring Plaintiff's Mural as the
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1 centerpiece element.

2 18. The purpose of the Campaign was to (1) promote awareness and
3 increase sales of the new Cadillac XT5 vehicle, and (2) benefit the reputation and
4 recognition of the Cadillac brand as a whole. The Campaign debuted on Cadillac’s
5 Facebook account (reaching of 3.7 Million prospective customers) in an attempt to
6 court a new demographic for Cadillac’s new crossover XT5: consumers seeking an
7 association with urban cool. Cadillac even titled the Campaign, “The Art of the
8 Drive” to further draw a connection between the vehicle and Plaintiff’s Mural.
9 Cadillac also ran the Campaign on Cadillac’s Instagram (reaching of 2 Million
10 prospective customers) and Cadillac’s Twitter (reaching of 600,000 prospective
11 customers) totaling in an audience for the infringing advertisements of over 6
12 Million prospective buyers. The Campaign included the still photography
13 advertisements, in which the Mural is the one and only creative element dressing the
14 car.

15 19. That the Mural is the centerpiece of the Campaign is obvious—in that it
16 is the *only* creative element dressing the car. The Campaign consists of the Cadillac
17 XT5 vehicle parked directly in front of the Mural, with Cadillac’s branding and
18 logos surrounding the advertisement alongside the Campaign’s tagline “The Art of
19 the Drive” (emphasis added).

20 20. On information and belief (based on the content of the Campaign), the
21 image was designed to draw in and engage the consumers to whom Cadillac hoped
22 to sell an XT5. Cadillac furthered the connection between Plaintiff’s Mural and the
23 vehicle by labeling the Campaign, “The Art of the Drive.”

24 21. On information and belief (based on the nature of the advertising), the
25 Campaign was seen by a great many consumers worldwide. The Campaign was
26 distributed and published on Cadillac’s official Instagram, Facebook, and Twitter,
27 which reach a combined audience of over 6 Million prospective customers. The
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1 Campaign was also redistributed across a network of authorized third party Cadillac
2 sales dealerships.

3 22. In this regard, Cadillac undertook to unlawfully copy, and did
4 unlawfully copy, Plaintiff's artwork, for the purpose of incorporating the Mural into
5 the Campaign. Indeed, Cadillac and General Motors have used graffiti and street art
6 murals in its advertising materials many times, reflecting the effectiveness of such
7 approach in attracting new young car buyers.

8 23. As a result of Defendants' misconduct as alleged herein, Plaintiff's
9 reputation and career has been irreparably tarnished, diminishing the value of
10 Plaintiff's works and decreased revenue from the sale of artworks.

11 24. Cadillac benefitted from the misappropriation and infringement in a
12 number of ways, including but not limited to the following: (i) they enjoyed the
13 increase sales increases generated by the advertisements, and (ii) the association
14 with Plaintiffs increased the value, image, and positioning of the Cadillac XT5
15 vehicle and the Cadillac brand itself.

16 25. As a result of Defendants' misconduct as alleged herein, Cadillac has
17 enjoyed substantial revenue. Publicly available information reveals that in the
18 United States alone, approximately 13,000 Cadillac XT5 vehicles were sold during
19 November and December 2016 resulting in an estimated \$500,000,000 in revenue.

20 26. Plaintiff has sustained significant injury and monetary damages as a
21 result of Defendants' wrongful acts as alleged in this Complaint, including
22 reputational damage and diminishment of the value of his work. Plaintiff is at
23 present unable to ascertain the full extent of the monetary damages he has suffered
24 by reason of Defendants' acts. In order to determine the full extent of such damages,
25 including such profits of Defendants as may be recoverable, Plaintiff will require an
26 accounting from each Defendant of all monies generated from their wrongful
27 conduct.

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1 27. Plaintiff is informed and believes, and thereon alleges, that Defendants'
2 alleged conduct was, and continues to be, intentional, deliberate, willful, wanton,
3 committed with the intention of injuring Plaintiff, and depriving Plaintiff of
4 Plaintiff's legal rights; was, and is, despicable conduct that subjects Plaintiff to a
5 cruel and unjust hardship; and was, and continues to be, undertaken with oppression,
6 fraud and malice. Accordingly, Plaintiff is entitled to an award of punitive or
7 exemplary damages.

8 28. Defendants' actions have caused, and will continue to cause, damage
9 and irreparable harm to Plaintiff (as described above) and are likely to continue
10 unabated, thereby causing further damage and irreparable harm to Plaintiff, unless
11 preliminarily and permanently enjoined and restrained by the Court.

12 **First Claim For Relief For Copyright Infringement**
13 **(Against All Defendants)**

14 29. Plaintiff incorporates herein by this reference paragraphs 1 through 28
15 as if set forth in full in this cause of action.

16 30. Plaintiff's graphic expression embodied in the Mural is an original
17 work of authorship and constitutes copyrightable subject matter under the laws of
18 the United States. The image was fixed in a tangible medium of expression, as
19 described above. An application for a federal registration of the artwork has been
20 filed with the Register of Copyrights, dated January 8, 2018; and the deposit,
21 application, and fee required for registration have been delivered to the Copyright
22 Office in proper form. The case number associated with the application is 1-
23 6180867010. The title of the work is "Untitled."

24 31. At all times since the creation of the graphic expression, Plaintiff has
25 complied with all aspects of the Copyright Acts of 1909 and 1976 and all other laws
26 governing copyright, and secured the exclusive rights and privileges in and to the
27 graphic expression. Plaintiff is the sole owner of all rights, title, and interest in and
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1 to the copyright in the graphic expression.

2 32. Subsequent to Plaintiff's creation of the graphic expression and (on
3 information and belief) with full knowledge of the rights of Plaintiff, Defendants
4 infringed Plaintiff's copyright by copying and reproducing, as described above, the
5 artwork and exhibiting such copied images as advertising materials.

6 33. All of Defendants' acts were performed without the permission, license
7 or consent of Plaintiff.

8 34. Cadillac's use of Plaintiff's artwork is for the purpose of its own
9 advertising and brand enhancement.

10 35. By reason of Defendants' acts of copyright infringement as alleged
11 herein, Plaintiff has suffered and will continue to suffer substantial damage to
12 Plaintiff's businesses in the form of diversion of trade, loss of profits, and a
13 diminishment in the value of Plaintiff's works, rights, and reputation, in part as
14 described above, all in amounts that are not yet ascertainable but not less than the
15 jurisdictional minimum of this court.

16 36. By reason of its infringement of Plaintiff's copyright as alleged herein,
17 Defendants are liable to Plaintiff for the actual damages incurred by Plaintiff as a
18 result of the infringement, and for any profits of Defendants directly or indirectly
19 attributable to such infringement.

20 37. Defendants' copying was willful, as alleged above.

21 **Second Claim for Relief for Falsification, Removal, and Alteration of**
22 **Copyright Management Information in Violation of the Digital Millennium**
23 **Copyright Act (17 U.S.C 1202)**
24 **(Against All Defendants)**

25 38. Plaintiff incorporates herein by this reference paragraphs 1-37 as if set
26 forth in full in this cause of action.

27 39. The Mural contained copyright management information protected
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1 under 17 U.S.C. Section 1202(b), including Plaintiff's signature "Smash 137."

2 40. Defendants intentionally removed that copyright management
3 information in the image used in the Campaign, in that Defendants' photograph of
4 the Mural is taken from an angle that renders the signature not visible.

5 41. Defendants' conduct constitutes a violation of 17 U.S.C. Section
6 1202(b).

7 42. Defendants' removal of copyright management information was done
8 without Plaintiff's knowledge or authorization.

9 43. On information and belief, Defendants' removal copyright management
10 information was done by Defendants intentionally, knowingly, and with the intent to
11 conceal Defendants' infringement of Plaintiff's copyright in the Mural. Defendants
12 also knew, or had reason to know, that such removal and/or alteration of copyright
13 management information would conceal Defendants' infringement of Plaintiff's
14 copyright in the Mural. Lacking any way to know Defendants' states of mind,
15 Plaintiff pleads Defendants intent to conceal on information and belief. The basis for
16 such information and belief is an inference from the nature of Defendants' copying:
17 the most plausible explanation for Defendants' choice to omit Plaintiff's signature
18 from the Campaign is that that Defendants intended to obscure Plaintiff's name in
19 order to make less likely that Plaintiff would learn of Defendants' infringement.

20 44. Defendants' removal of said copyright management information was
21 done by Defendants intentionally, knowingly, and with the intent to induce, enable,
22 facilitate, or conceal Defendants' infringement of Plaintiff's copyright in the Mural.
23 Defendants also knew, or had reason to know, that such removal and/or alteration of
24 such copyright management information would induce, enable, facilitate, or conceal
25 Defendants' infringements of Plaintiff's copyright in the Mural.

26 45. Plaintiff has sustained significant injury and monetary damages as a
27 result of Defendants' wrongful acts as hereinabove alleged. Plaintiff is at present
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1 unable to ascertain the full extent of the monetary damages they have suffered by
2 reason of said acts. In order to determine the full extent of such damages, including
3 such profits of Defendant as may be recoverable under 17 U.S.C. Section 1203,
4 Plaintiff requires an accounting from each Defendant of all monies generated from
5 their wrongful falsification, alteration, and removal of Plaintiff's copyright
6 management information.

7 46. In the alternative, Plaintiff may elect to recover statutory damages
8 pursuant to 17 U.S.C. Section 1203(c)(3) in a sum of not more than \$25,000 from
9 each Defendant for each violation of 17 U.S.C. 1202.

10 **PRAYER**

11 WHEREFORE, Plaintiff prays judgment against Defendants as follows:

12 1. That Plaintiff is awarded all damages, including future damages and
13 Defendants' profits, that Plaintiff has sustained, or will sustain, as a result of the acts
14 complained of herein, subject to proof at trial;

15 2. That Plaintiff is awarded his costs, attorneys' fees and expenses in this
16 action;

17 3. That Plaintiff is awarded pre-judgment interest;

18 4. For an order permanently enjoining Defendants and their employees,
19 agents, servants, attorneys, representatives, successors, and assigns, and any and all
20 persons in active concert or participation with any of them, from engaging in the
21 misconduct referenced herein;

22 5. That Defendants be ordered to immediately recall and remove any and
23 all infringing advertisements from any and all remaining locations, physical or
24 digital;

25 6. That Defendants be ordered to file with this Court and serve upon
26 Plaintiffs' counsel within thirty (30) days after services of the judgment demanded
27 herein, a written report submitted under oath setting forth in detail the manner in
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