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6

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**
11

12 ADRIAN FALKNER, an individual,
13 Plaintiff,

14 v.

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

CASE NO. 2:18-cv-00549-SVW-JPR

**DEFENDANT GENERAL MOTORS
LLC'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

CTRM: 350 W. 1st Street
Courtroom 10A
Los Angeles, CA 90012

DATE: July 23, 2018

TIME: 1:30 p.m.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant General Motors, LLC (“GM” or “Defendant”) hereby submits this
3 Reply Memorandum of Points and Authorities in Support of its Motion for Summary
4 Judgment, or in the Alternative, Partial Summary Judgment (“MSJ Motion”) (Dkt. 30)
5 as to the Corrected First Amended Complaint (“FAC”) of Adrian Falkner (“Plaintiff”
6 or “Falkner”) (Dkt. 22).

7 **I. THE PARKING STRUCTURE IS AN ARCHITECTURAL WORK**

8 **A. Plaintiff’s Argument To The Contrary Ignores The Statutory Text,
9 The Legislative History And The Implementing Regulations Of The
10 AWCPA**

11 The argument in Plaintiff’s Opposition (“Opp”), Dkt. 32, that the parking
12 structure is not an “architectural work” is contradicted by the Copyright Act and its
13 legislative history. Section 101 of the Act defines an “architectural work” as

14 the design of a building as embodied in any tangible medium of
15 expression, including a building, architectural plans, or drawings. The
16 work includes the overall form as well as the arrangement and
17 composition of spaces and elements in the design, but does not include
18 individual standard features.

19 Because the term “building” is not defined, it is necessary to look at the House of
20 Representatives Report issued prior to the enactment of the AWCPA for that
21 definition: “[T]he term [building] encompass[e]s habitable structures such as houses
22 and office buildings. *It also covers structures that are used, but not inhabited, by*
23 *human beings, such as churches, pergolas, gazebos, and garden pavilions.*” H.R. Rep.
24 101-735, 101st Cong. 2d Sess. (1990), at 20 (brackets and emphasis added). In
25 addition, Copyright Office regulations define buildings as “humanly habitable
26 structures that are intended to be both permanent and stationary, such as houses and
27 offices buildings, *and other permanent and stationary structures designed for human*
28 *occupancy, including but not limited to churches, museums, gazebos, and garden*
pavilions.” 37 C.F.R. § 202.11(b)(2). Thus, a structure does not even need to be
humanly “habitable” to be considered a building, as long as it is designed for human
use and/or occupancy.

1 Plaintiff's argument that people do not "occupy" the parking structure in Detroit
 2 is nonsense. Opp. at 9:24-10:1. The owner of the parking structure would not have
 3 commissioned artists to paint murals on the inward-facing or interior walls of the
 4 structure, FAC ¶¶15-16 ; Falkner Decl., ¶¶2-3 (Dkt. 32-3), if the structure were not to
 5 be "occupied" or "used" by human beings. The legislative history provides that
 6 structures which are "used" by human beings are considered "buildings".

7 **B. Defendant Has No Obligation To Prove The Parking Structure Has**
 8 **"Creative Elements" In Order To Establish The Structure Is An**
 9 **Architectural Work**

10 The parking structure is a building, and buildings are architectural works under
 11 17 U.S.C. §101. Plaintiff insists that "GM has not established that the parking garage
 12 is a copyright-protected architectural work" because GM did not "bother to describe
 13 any creative elements of the garage." Opp. at 9:13-16. In an inventive effort to avoid
 14 the § 120 exemption, Plaintiff argues:

15 The legislative history further explains that the Act affords protection [to
 16 an architectural work] only if 'the design elements are not functionally
 17 required':

18 A two-stop [*sic*] analysis is envisioned. First, an architectural
 19 work should be examined to determine whether there are original
 20 design elements present, including overall shape and interior
 21 architecture. If such design elements are present, a second step is
 22 reached to examine whether the design elements are functionally
 23 required. If the design elements are not functionally required, the
 24 work is protectable without regard to physical or conceptual
 25 separability. [H.R. Rep. No. 101-735, at pp. 20, 21.]

26 Opp. at 9:3-8. Plaintiff concludes, "[u]ntil GM presents far more evidence regarding
 27 the design of the garage, it is not established to be an architectural work." Opp. at
 28 10:1-3.

This argument has no basis in the Copyright Act.¹ If the parking structure is a
 "building" then that is the end of the analysis; it is an "architectural work" under 17
 U.S.C. § 101. There is no need to inventory all of the building's "creative elements."

¹ Whether the structure was registered with the Copyright Office is irrelevant as such, "registration is not a condition of copyright protection." 17 U.S.C. § 408(a).

1 Plaintiff cites no authority for the proposition that the House’s proposed “two-step
2 test” limits the statutory definition.²

3 **II. THE SECTION 120(a) EXEMPTION INCLUDES PGS FEATURES** 4 **EMBEDDED IN BUILDINGS**

5 **A. The Legislative History Does Not Support Plaintiff’s Argument That** 6 **PGS Features Are Excluded From §120(a)**

7 Plaintiff’s arguments, lifted almost entirely from the nonprecedential *dissenting*
8 opinion in *Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 1990), are unavailing.
9 Plaintiff argues that the legislative history of the AWCPA “compels” the conclusion
10 that the public cannot safely photograph buildings that have embedded PGS works.
11 Opp. at 11:6. Plaintiff quotes a passage in the underlying House Report about the
12 limited copyright protectibility given to buildings to conclude that the broad
13 exemption of section 120 must be similarly limited. They are not congruent.

14 The implementing legislat[ion] [of the Berne Convention] had one
15 simple, but important objective: to make only those changes in U.S. law
16 required to place the United States into compliance with our treaty
obligations.

17 Opp. at 11:13-15 (quoting H.R. Rep. 101-735, p. 10) (first brackets added). From this
18 quoted sentence, Plaintiff draws the unsupported inference that “Congress did not
19 intend to change the protectability of pictorial, graphic or sculptural works attached to
20 buildings.” Opp. at 11:16-17. However, the far more reasonable interpretation is that
21 Congress, in enacting the AWCPA, did not intend to extend copyright protection to
22 architectural works any further than required by Berne. The broader exemption of
23 §120(a) is a reminder of that goal.

24 _____
25 ² Because Plaintiff cannot reasonably object to the introduction of a photograph
26 depicting the exterior of the parking structure at issue – as Plaintiff has long been
27 aware exactly what the parking structure looks like – Defendant attaches a picture of
28 the entire parking structure as exhibit “A” to the Second Declaration of Paul Margolis,
filed with this Reply. As is evident in the photograph, the structure is a multi-use
building with commercial spaces on the ground floor, and numerous “creative
elements” on the parking floors above. This photograph readily dispels Plaintiff’s
specious arguments that the structure is not an “architectural work.”

1 Plaintiff's second argument is grounded in a "cryptic and ambiguous footnote"
2 in the House Report, *Leicester*, 232 F.3d at 1229, about statutory damage claims:

3 The Subcommittee was aware that certain works of authorship which
4 may separately qualify for protection as pictorial, graphic, or sculptural
5 works may be permanently embodied in architectural works. Stained
6 glass windows are one such example. Election is inappropriate in any
7 case where the copyright owner of a pictorial, graphic, or sculptural work
8 embodied in an architectural work is different from the copyright owner
9 of the architectural work.

10 *Id.* (quoting H.R. Rep. No. 101-735, at 19, n.41). While this footnote suggests there
11 may be a separate copyright in a PGS work embedded into a building, it does not
12 suggest that the embedded PGS work is excluded from the effects of the 120(a)
13 exemption. The footnote does not address the exemption at all. Indeed, recognizing a
14 copyright in PGS elements in a building is not inconsistent with finding that such
15 copyrights are subject to the pictorial representation exemption.

16 **B. Plaintiff Ignores The Compelling Reasoning Of Judge Tashima In
17 The Concurring Opinion In *Leicester***

18 Plaintiff dismisses the MSJ's discussion of *Leicester v. Warner Bros.*, 232 F.3d
19 1212 (9th Cir. 2000) as "turn[ing] to abstract legal doctrine." *Opp.*, at 12:14.
20 However, Plaintiff has ignored Judge Tashima's powerful reasoning based on the
21 legislative history of the AWCPA – which supports GM's Motion.

22 In *Leicester*, Judge Tashima wrote that because of the enactment of the
23 AWCPA the doctrine of "conceptual separability" no longer validly applies to PGS
24 works embedded in buildings. MSJ Motion, at 9:19-10:9; *Leicester*, 232 F.3d at 1221.
25 This conclusion is supported by numerous passages in the statute's legislative history.
26 As Judge Tashima noted, Congress in enacting the AWCPA expressly stated its desire
27 to avoid the "conundrum" of conceptual separability. *Id.* at 1222-1224. He reasoned,
28 "To require one to wade through the morass of conceptual separability before he can
exercise the right granted by §120(a) and be assured that his pictorial representation is
non-infringing cannot be what Congress intended." *Id.* at 1222.

Plaintiff ignores this point completely in his Opposition. He does not explain

1 how the public is supposed to navigate this “morass” if a doctrine of conceptual
2 separability applies to pictures of buildings. Joe Public should not be required to
3 research the history of the building and hire architectural experts before he snaps a
4 photograph. *Leicester*, 232 F.3d at 1218 (conceptual separability analysis included
5 review of building plans at the Community Redevelopment Agency and testimony of
6 dean of an architecture school).

7 Plaintiff’s interpretation of §120 would not only make it difficult for one to
8 determine whether he can safely photograph a building, it would also result in fewer
9 pictorial representations being made of architectural works. Congress intended to
10 encourage the public to make pictorial representations of buildings freed from even
11 the risk of liability for infringement. *Leicester*, 232 F.3d at 1217 (quoting the House
12 Report in noting the “important public purpose” served by such pictorial
13 representations). This public policy goal would be jeopardized if every building
14 including sculptural details or a mural could not be photographed without a license.
15 *See* MSJ Motion, at 11:10-16.

16 **C. The Majority Opinion In *Leicester* Supports GM’s Position**

17 Plaintiff’s discussion of *Leicester* mostly attempts to contradict GM’s
18 characterization of the opinion. But as GM explains below, the majority and
19 concurring opinions support GM’s interpretation of section 120(a).

20 Contrary to Plaintiff’s argument, Opp. at 12:16-17, the *Leicester* majority
21 agreed with Judge Tashima on this key point: The section 120(a) exemption applies
22 to PGS elements embedded in buildings, regardless of whether the elements are
23 conceptually separable. First, the majority noted that traditionally, in order for a
24 separate copyright to exist in a PGS feature in a useful article, the PGS feature had to
25 be conceptually separable. *Id.* at 1219, n.3. Then, the majority held that even if the
26 plaintiff sculptor had a separate copyright in the sculptural towers – i.e., even if the
27 towers were conceptually separable – §120(a) applied nonetheless:

28 Whether or not *Leicester* may have some other claim for a different
infringement of his copyright in the ... towers as a sculptural work, we
believe he has none for a pictorial representation of the 801 Tower and its

1 streetwall embodying a protected architectural work. Otherwise,
 2 § 120(a)'s exemption for pictorial representations of buildings would
 3 make no sense. When copyright owners in architectural works were
 4 given protection for the first time in 1990, the right was limited by
 5 §120(a) so that publicly visible buildings could freely be photographed.
 This reflected a shift from the prior regime of relying on "ad hoc
 6 determinations" of fair use. ... Having done this, it would be
 7 counterintuitive to suppose that Congress meant to restrict pictorial
 8 copying to some, but not all, of a unitary architectural work.

9 *Id.* at 1219-1220. The *Nimmer* treatise, citing the above passage in Judge Rymer's
 10 opinion, agrees:

11 [P]laintiff [in Leicester] claimed that the addition of architectural works
 12 to copyright protection in 1990 only increased the rights of copyright
 13 owners, and that he could continue to vindicate his interest in the *Zanja*
 14 *Madre* as a sculptural work. The majority rejected that position.

15 1 M. & D. Nimmer, *Nimmer on Copyright* §2A.09[B][4][c] at 2A-167 (Matthew
 16 Bender, Rev. Ed. 2018) (brackets and emphasis added). In another passage, the
 17 *Nimmer* treatise refers to "the majority's absolute allowance of sculptures attached to
 18 buildings to be photographed pursuant to the ... exemption," *Id.* at 2A-168. Thus, the
 19 majority held that §120(a) applied regardless of whether the sculptural towers were
 20 conceptually separable. That the majority also found the towers were not
 21 conceptually separable, *id.* at 1217,1219, does not affect the above holding.

22 **D. The Reasoning In Judge Tashima's Concurring Opinion Applies In
 23 This Case, Regardless Of How "Functional" The Mural Is**

24 Plaintiff argues that Judge Tashima's concurrence is entitled to no weight in
 25 this case because he limits his opinion to cases "where the PGS work is a functionally
 26 [*sic*] part of the architectural work." *Opp.*, 15:22-23. Plaintiff refers to various
 27 passages in the concurrence where Judge Tashima, in response to criticism from the
 28 dissent, purports to limit his opinion to the "narrow and unique circumstances of this
 case," *Leicester*, 232 F.3d at 1222, n.2. Judge Tashima also qualifies his opinion
 when he writes, "I ... read the AWCPA as rejecting application of the conceptual
 separability test where the architectural work and the artistic work are so closely and
 functionally intertwined as in this case." *Id.* at 1222.

1 First, Plaintiff does not explain how his mural, which is painted onto the
 2 building and rounds the corner of two perpendicular walls, is not “a functional[] part
 3 of the architectural work.” Falkner Decl., ¶¶3, 6, Ex. C. Second, Judge Tashima’s
 4 reasoning regarding the legislative history of §120(a) and the Congressional intent
 5 behind it applies equally to all PGS works embedded in buildings, not just those that
 6 are “functional.” *Id.* at 1224.³ The *Nimmer* treatise agrees that Judge Tashima’s
 7 opinion regarding §120(a) is not to be limited to the narrow circumstances of the case:

8 Judge Tashima ... adopted the position that “... the district court found it
 9 unnecessary to decide whether the streetwall towers were conceptually
 10 separable because it concluded as a matter of law that the enactment of
 11 Section 120(a) had the effect of limiting the conceptual separability
 12 concept to situations not involving architectural works.” Judge Tashima
 13 agreed with the district court, and ratified its interpretation that

14 the former doctrine of “conceptual separability” as it applied to
 15 pictorial, graphic or sculptural work embedded as part of a
 16 building, has been modified by the 1990 amendments.

17 Of course, Judge Fisher’s dissent strongly disagreed with that last
 18 conclusion. Nonetheless, the result of this case, given its particular
 19 alignment of opinions, is to follow that approach ...

20 1 *Nimmer*, §2A.09[B][4][c] at 2A-170 (emphasis added). Thus, Judge Tashima’s
 21 concurrence read in conjunction with the majority opinion is controlling law in this
 22 case.

23 **E. Conceptual Separability Is Irrelevant To The Application Of
 24 §120(a)**

25 Finally, Plaintiff clings to the argument that whether the mural is conceptually
 26 separable from the parking structure is a “fact issue.” *Opp.*, 17:5. However, as GM’s
 27 Motion explained, conceptual separability is not relevant when it comes to the
 28

29 ³ Judge Tashima’s concurrence stated that his interpretation of §120(a) “provides the
 30 same scope of protection to the architect and the artist, provides some certainty in the
 31 law, [and] conserves judicial resources by eliminating the difficult-to-apply
 32 conceptual separability test...” *Id.* at 1224. As Judge Tashima undoubtedly
 33 understood, such objectives could not be achieved if his opinion had no application
 34 beyond the “unique circumstances of this case.” *Id.* at 1222, n.2.

1 application of the broad §120(a) exemption. There is no triable fact issue.

2 **III. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON**
3 **PLAINTIFF'S SECTION 1202 CLAIM**

4 **A. Plaintiff Failed To Present Evidence That The Non-Party**
5 **Photographer Bernstein Removed Or Altered Any CMI In Taking**
6 **The Subject Photograph, "Intentionally" Or Otherwise Violated**
7 **Section 1202(b)(1)**

8 **1. Bernstein's Photograph Does Include The Relevant CMI In**
9 **The Form Of A Plaque**

10 Bernstein's photo depicted the CMI included in 17 U.S.C. §1202(c) on a plaque
11 in the photo. MSJ Memo 14-15. Plaintiff's Opposition does not argue that the CMI
12 information on the plaque was "removed" or "altered." There has thus been complete
13 compliance with section 1202(b)(1), (2) and (3). Plaintiff's Statement of Genuine
14 Issues, Dkt. 32-1, #26. Plaintiff cites no authority that Bernstein or GM had an
15 affirmative duty to assure that the CMI would be unnaturally enlarged so that the
16 viewer of the photo could read it.

17 **2. As A Matter Of Fact And Law, Bernstein Did Not "Remove"**
18 **Or "Alter" CMI In Taking A Photo Of The Facing Wall**

19 Plaintiff cites no authority or rule of statutory construction that required the
20 photographer to include the second or perpendicular wall with plaintiff's name – in
21 the photo of the facing wall. The statute is prohibitory not mandatory.

22 **3. Bernstein Was Not An Employee Or Agent Of GM And GM**
23 **Cannot Be Vicariously Liable For Bernstein's Act Of**
24 **Photographing The Facing Wall**

25 Plaintiff, not GM, has the burden of proving that Bernstein photographed the
26 building as an agent or employee of GM. Bernstein declared that he was neither an
27 employee nor an agent of GM at any relevant time. SUF 6, 10. Plaintiff's only
28 response is skepticism, Opp. at 21:18-22-19; 23:2-22, which is not proof of "missing
information" or the presentation of contrary evidence. Plf's Opp. at 23:18; *Newton v.*
NBC, 930 F.3d 662, 680 (9th Cir. 1990) (even if testimony is discredited, that is not a

1 basis for drawing a contrary conclusion). Plaintiff cannot prove vicarious liability
2 where the underlying violation must be intentional. MSJ Memo 15-16.

3 **B. Plaintiff Has Failed To Present Any Evidence That GM Distributed**
4 **CMI Or The Photo, “Knowing” That The CMI Had Been Removed**
5 **Or Altered, In Violation Of Section 1202(b)(2) Or (3)**

6 Plaintiff presented no evidence that GM knew the photo it was distributing even
7 arguably removed CMI (in fact, it included CMI on the plaque). MSJ Memo 16-17;
8 Opp. at 18. In fact, the Photographer identified the photos sent to GM; none of them
9 contain the CMI on the wall facing away from the facing wall. The GM employee,
10 Nordlicht, only received those emailed photos, SUF 22; Supp. Bernstein Decl., ¶¶3-4,
11 Exs. G, G-1. There was no basis for GM personnel in New York to know about the
12 contents of the perpendicular wall in Detroit. *Agence Fr. Presse v. Morel*, 934 F.
13 Supp. 2d 547, 578 (S.D.N.Y. 2013) does not apply here. Evidence there was presented
14 that CMI was falsified or intentionally removed – factors not present here.

15 **C. Plaintiff Failed Even To Present Evidence That GM’s Distribution**
16 **Of The Photo Would “Induce, Enable, Facilitate Or Conceal An**
17 **Infringement”**

18 Plaintiff has not even attempted to carry its burden of proving, MSJ Memo at
19 17, that GM knew its distribution or exhibition carried a “substantial risk of inducing,
20 enabling, facilitating, or concealing infringement, let alone a pattern or probability of
21 such a connection to infringement.” *Stevens v. CoreLogic*, ___ F.3d. ___, 2018 WL
22 3040129, *5 (9th Cir. 2018). This final clause of section 1202(b) is a part of each of
23 the three subsections 1202(b)(1), (2) and 3. 4 *Nimmer*, §12A.10[B][1][b] at 12A-191
24 to -193.

25 **D. Plaintiff Has Not Raised Material Credibility Issues Regarding The**
26 **Declarations Of Bernstein, Nordlicht Or Margolis**

27 There is no evidentiary objection that declarations are “self-serving.” Opp. at
28 3:18, 18:10. All evidence offered by a party is “self-serving.” The issues are whether
the evidence is competent, relevant and uncontroverted. FRE 402, 602.

Photographer Bernstein explained why the CMI on the perpendicular wall near

1 the ground opposite the rear tire of his car was not seen by him. SUF 16-20. Attorney
2 Margolis, months after this lawsuit was filed, took photos that illustrate why
3 Bernstein’s failure to see the CMI on the perpendicular wall is entirely credible. SUF
4 17. But, this “credibility issue” is a red herring. Even if Bernstein had seen the CMI
5 on the perpendicular wall, section 1202 did not require him to change the perspective
6 of his photograph (and move his car) to include the CMI in his photo.

7 Nor is there any reason to doubt that when GM’s Nordlicht received the photos
8 from Bernstein in New York, the subject photo did not reveal the perpendicular wall
9 or the CMI on that wall. SUF 22. Everyone viewing the photo would agree.
10 Contrary to Plaintiff’s Opp. at 18:13-19:11, GM did not have to conduct a line-up of
11 New York employees to determine that no one in the New York office knew that the
12 perpendicular wall (not depicted in the photo) on the Detroit building included CMI or
13 that Bernstein had removed or altered it. Section 1202 did not affirmatively require
14 GM to add the CMI to the photo.

15 None of the authorities cited by Plaintiff regarding the credibility of declarants
16 are apt. Opp. at 19:12-21:6. Most involve complex antitrust litigation or claims that a
17 firing was pretextual, where contrary evidence was presented. *Friedman v. Live*
18 *Nation Merch., Inc.* 833 F.3d 1180, (9th Cir. 2016) affirmed the finding of no section
19 1202(a)(1) violation by Live Nation because no proof existed that it was responsible
20 for removing or altering CMI. It found a triable issue regarding Live Nation’s
21 distribution of copyrighted designs only because Live Nation “never offered any
22 explanation of how it came to possess the images,” – the opposite of this case.

23 *Stevens v. CoreLogic, Inc.*, 194 F. Supp. 3d 1046, 1052-53 (S.D. Cal. 2016)
24 *aff’d* __ F.3d Cir. __ June 20, 2018) does not stand for the proposition that a triable
25 issue exists when a third party, Bernstein here, states he did not see the CMI, or when
26 a party, GM here, can show the Court tangible evidence that it had no knowledge any
27 CMI was purportedly “removed” from the photo received by it. Moreover, Plaintiff
28 failed to carry its burden to present evidence that any alleged removal or alteration of

1 CMI (none here) would result in future infringement. MSJ Memo, 17:10-20. *Agence*
2 *Fr. Presse*, 934 F. Supp. 2d at 577-78 is not to the contrary for the reasons stated
3 above.

4 Plaintiff's discovery Plf's Opp., at 22, that the photograph was still on a single
5 GM's social platform – albeit with CMI depicted – has been corrected. Second
6 Margolis Decl., ¶4; Petrich Decl., ¶2.

7 **E. Plaintiff Has Not Made A Proper Showing Under FRCP 56(d) To**
8 **Seek Discovery At This Time On “GM’s Knowledge And Intent.”**

9 Discovery in this case was never prohibited. GM explained to the court and
10 counsel on May 14, 2018, its plans to file its MSJ motion. Petrich Decl., ¶3. Plaintiff
11 provides no basis, Opp. 24, for the following requested discovery:

12 1. Depositions of Nordlicht and Bernstein “on the issues described above”
13 are not specific enough to permit FRCP 56(d) relief. No deposition will change the
14 fact that the photo taken by Bernstein in Detroit and sent to Nordlicht in New York
15 does not show that any CMI was removed or altered.

16 2. Information on the identity of the GM decision maker described in
17 Nordlicht’s declaration. No deposition will change the fact that the photo taken by
18 Bernstein in Detroit and sent to Nordlicht in New York does not show that any CMI
19 was removed or altered.

20 3. Discovery of relevant communications between GM and Bernstein,
21 including emails described but not attached to the Bernstein declaration. Bernstein
22 and Nordlicht are filing supplemental declarations attaching the requested emails
23 transmitting the photos to GM in New York.

24 None of the requested discovery will overcome the fatal defects in Plaintiff's
25 1202 claim, which are noted above.

26 **IV. THE PRAYER FOR PUNITIVE DAMAGES SHOULD BE STRICKEN**

27 As GM's MSJ Memo at 17-18 has shown, the comprehensive statutory scheme
28 for copyright infringement and violation of CMI do not allow an award of punitive

1 damages. Plaintiff’s Opp. at 23, relying on an outlier decision in *TVT Records and*
2 *TVT Music, Inc. v. Island Def Jam Music Group*, 262 F. Supp. 2d 185 (S.D. N. Y.
3 2003), argues that an exception should be made if the remedy of statutory damages –
4 which includes a punitive component – is not available because plaintiff did not
5 register his copyright claim before the alleged infringement. 17 U.S.C. §§ 412, 504,
6 505. But that would erode the legislative policy to induce timely registration by
7 offering the remedies of statutory damages and attorney’s fees, *Derek Andrew Inc. v.*
8 *Poof Apparel Corp.*, 528 F.3d 696, 700 (9th Cir. 2008). The clear weight of authority
9 since the *TVT* decision has been to disallow punitive damages in statutory copyright
10 cases.⁴

11 **V. CONCLUSION**

12 For the foregoing reasons, the motion for summary judgment should be granted.

13
14 DATED: July 9, 2018

/s/ Louis P. Petrich

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24 ⁴ *Brian Jonestown Massacre v. Davies*, 2014 WL 4076549, *6 (N.D. Cal. 2014)
25 (collecting district court decisions in the Ninth Circuit); *Warren Publishing Co. v.*
26 *Spurlock*, 2010 WL 760311, *4-5 (E.D. Pa. 2010) (holding a prayer for punitive
27 damages in a statutory copyright claim “objectively unreasonable in law.”); *Viacom*
28 *Intl, Inc. v. Youtube, Inc.*, 540 F. Supp. 2d 461, 462-64 (S.D.N.Y. 2008) (quoting *Sony*
Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 431) (“remedies for
infringement ‘are only those prescribed by Congress.’”); *Calio v. Sofa Express, Inc.*,
368 F. Supp. 2d 1290, 1291 (M.D. Fla. 2005).