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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIC GOTTESMAN,

Plaintiff,

v.

CARLOS SANTANA, et al.,

Defendants.

Case No.: 16-CV-2902 JLS (JLB)

ORDER ON MOTIONS TO DISMISS

(ECF Nos. 70, 72, 73, 75, 79, 116)

Presently before the Court are Motions to Dismiss and Motions to Strike filed by various Defendants.¹ (ECF Nos. 70, 72, 73, 75, 79, 116.) Also before the Court are Plaintiff

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¹ Defendants Daniel J. Schacht, Esq. (“Schacht”) and the law firm Donahue Fitzgerald LLP (“Donahue”) (collectively, the “Attorney Defendants”) bring a special motion to strike Plaintiff’s FAC under California’s anti-SLAPP law. (“anti-SLAPP MTS,” ECF No. 77). In response, Plaintiff voluntarily dismissed the Attorney Defendants. (ECF Nos. 130, 132.) However, the Attorney Defendants claim that this “type of litigation chicanery has been overwhelmingly rejected by the courts” and argue that “when a plaintiff tries to avoid an adverse ruling on an anti-SLAPP motion by dismissing the moving party, a court must rule on the merits of the anti-SLAPP motion by identifying the prevailing party, thereby allowing for the mandatory recovery of attorney’s fees.” (“anti-SLAPP MTS Reply” 2, ECF No. 153 (citing *Coltrain v. Shewalter*, 66 Cal. App. 4th 94, 107 (1998))). Plaintiff also moves to strike the Attorney Defendants’ Reply suggesting that the Court must rule on the merits of the anti-SLAPP motion. (“MTS,” ECF No. 158.) Accordingly, the Court does not in this Order consider these pending Motions to Strike (ECF Nos. 77, 158). The Court will address those issues in a separate Order.

1 Eric Gottesman’s (“GMAN”) responses in opposition to, (ECF Nos. 141, 142, 143, 144,
2 145), and Defendants’ replies in support of, (ECF Nos. 152, 154, 155), these various
3 motions. After considering the parties’ arguments and the law, the Court rules as follows.

4 **BACKGROUND**

5 Plaintiff is a professional artist who has extensive experience in, among other things,
6 freehand airbrush, hand-drawn and digital illustration, graphic design, and photo
7 retouching. (First Am. Compl. (“FAC”) ¶ 16, ECF No. 38.) Plaintiff has produced original
8 works of art and designs for a number of clients, including, for example, Carlos Santana,
9 the Jimi Hendrix Estate, Tom Petty and the Heartbreakers, and Metallica. (*Id.* ¶ 15.) This
10 case concerns Plaintiff’s work for Defendant Carlos Santana.

11 After Plaintiff spent some time working at a Fullerton-based company where he
12 created graphics for bands, celebrities, casinos, and the like, (*id.* ¶ 21), Santana contacted
13 and engaged Plaintiff as an independent contractor to create the art and design for
14 merchandizing in connection with an event, (*id.* ¶ 30). Santana was so impressed with his
15 work that he invited Plaintiff to his home and said he believed Plaintiff was the artist that
16 had the ability to “turn SANTANA into a brand.” (*Id.* ¶ 33.) The parties entered into a
17 business relationship where Plaintiff submitted original works to Santana and his
18 management company for use in building the Santana brand. (*Id.* ¶ 176.) Plaintiff retained
19 ownership in these works, but each submitted work contained limited copy and distribution
20 rights. (*Id.*)

21 Plaintiff filed a 103-page, 473-paragraph FAC against dozens of Defendants
22 associated with Defendant Carlos Santana. (ECF No. 38.) The gravamen of Plaintiff’s
23 claims is that these Defendants infringed his copyrights in several of his works by
24 exceeding the scope of the licenses in those works. (*See generally* FAC.) Thus, Plaintiff
25 brings claims for: (1) copyright infringement; (2) contributory copyright infringement; (3)
26 vicarious copyright infringement; (4) inducing copyright infringement; (5) breach of
27 contract; (6) intentional misrepresentation; (7) negligent misrepresentation; (8) breach of

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1 implied covenant of good faith and fair dealing; (9) unfair business practices; and (10)
2 constructive trust. (*Id.*)

3 **LEGAL STANDARD**

4 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
5 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
6 generally referred to as a motion to dismiss. The Court evaluates whether a complaint states
7 a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure
8 8(a), which requires a “short and plain statement of the claim showing that the pleader is
9 entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it
10 [does] demand more than an unadorned, the-defendant-unlawfully-harmed-me
11 accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
12 *Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide
13 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
14 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.
15 at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint will not suffice
16 “if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S.
17 at 677 (citing *Twombly*, 550 U.S. at 557).

18 In order to survive a motion to dismiss, “a complaint must contain sufficient factual
19 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
20 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
21 when the facts pled “allow the court to draw the reasonable inference that the defendant is
22 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
23 556). That is not to say that the claim must be probable, but there must be “more than a
24 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’
25 a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*,
26 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions” contained
27 in the complaint. *Id.* This review requires context-specific analysis involving the Court’s
28 “judicial experience and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-

1 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
2 the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”
3 *Id.*

4 Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to
5 amend unless it determines that no modified contention “consistent with the challenged
6 pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,
7 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
8 1393, 1401 (9th Cir. 1986)).

9 ANALYSIS

10 Given the variety of motions considered in this order, the Court organizes its analysis
11 by each motion.

12 **I. Motion to Dismiss—Breach of Contract (ECF No. 72)**

13 Defendants Linton Hall and Service First Specialty Food and Marketing, LLC move
14 to dismiss Plaintiff’s cause of action against them for breach of contract. (*See generally*
15 “Contract MTD,” ECF No. 72-1.) Specifically, Defendants argue that Plaintiff’s
16 allegations are insufficient to state a plausible breach of contract claim. (*Id.*)

17 “[T]he elements of a cause of action for breach of contract are (1) the existence of
18 the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s
19 breach, and (4) the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v. Goldman*,
20 51 Cal. 4th 811, 821 (2011) (citing *Reichert v. Gen. Ins. Co.*, 68 Cal. 2d 822, 830 (1968)).

21 The Court agrees with Defendants. Plaintiff’s allegations supporting its breach of
22 contract cause of action are the following:

23
24 429. GMAN repeats and incorporates by this reference each and every
25 allegation set forth in paragraphs 1 through 428, inclusive.

26 430. GMAN entered into a verbal contract with SERVICE FIRST which
27 required this defendant to pay GMAN for the license to limited use of the salsa
28 labels and associated designs, time taken to create the works, time to modify

1 same, and time to coordinate production and printing of the labels at GMAN's
2 normal and customary rates.

3 431. HALL is personally liable for SERVICE FIRST breach of contract as the
4 alter-ego of SERVICE FIRST for the reasons already alleged above.

5 432. Despite GMAN's demands for payment, these defendants breached the
6 parties' contract by continuing to refuse to pay as agreed.

7 433. GMAN has timely and fully performed all of his obligations under the
8 parties' contract.

9 434. As a direct and proximate result of SERVICE FIRST breach of contract,
10 GMAN has been damaged in an amount to be proven at trial.

11 (FAC ¶¶ 429–434.)

12 These allegations are insufficient to allow Defendants to appropriately respond.
13 Among other things, these allegations do not provide any specifics regarding the material
14 terms of the verbal contract between Plaintiff and Service First, much less when this
15 contract was allegedly formed and breached. Indeed, even Plaintiff admits that his
16 “allegations for this cause of action are minimal” (“Contract MTD Opp’n” 6, ECF
17 No. 145.) In short, Plaintiff has failed to allege sufficient factual matter from which this
18 Court may infer a plausible claim for the existence and breach of a contract.² *See, e.g., N.*
19 *Cty. Commc’ns Corp. v. Verizon Glob. Networks, Inc.*, 685 F. Supp. 2d 1112, 1122 (S.D.
20 Cal. 2010) (finding that the defendant did not adequately allege a breach of contract claim
21 where it failed to “plead, among other things, the nature of the contract, dates pertinent to
22

23 ² Additionally, Plaintiff argues that a “claim may be dismissed only if ‘it appears beyond doubt that the
24 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” (Contract
25 MTD Opp’n 4 (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citing *Conley v. Gibson*, 35
26 U.S. 41, 45–46 (1957))). Plaintiff also relies on this legal statement for his other responses in opposition
27 to Defendants’ various motions. However, nearly ten years ago in the seminal case of *Bell Atlantic Corp.*
28 *v. Twombly*, the United States Supreme Court expressly abrogated this exact aspect of the *Conley* standard.
550 U.S. 544, 560–62 (2007) (holding that the “no set of facts” language “has earned its retirement” and
“is best forgotten as an incomplete, negative gloss on an accepted pleading standard”). Plaintiff’s reliance
on *Conley* and its progeny is particularly strange given that he also relies on *Twombly* and *Iqbal* in his
legal standard. (Contract MTD Opp’n 4.)

1 the contract, and other relevant terms that would put [plaintiff] on notice of the basis of”
2 the claim); *cf. TreeFrog Devs., Inc. v. Seidio, Inc.*, No. 13CV0158-IEG KSC, 2013 WL
3 4028096, at *3 (S.D. Cal. Aug. 6, 2013) (finding that a breach of contract claim was
4 adequately pleaded where the plaintiff alleged the dates and material terms of the contract,
5 including the subject of the contract and the specific payment obligations of each party);
6 *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009) (“A plaintiff may not
7 escape dismissal on a contract claim, for example, by stating that he had a contract with
8 the defendant, gave the defendant consideration, and the defendant breached the contract.
9 What was the contract? The promises made? The consideration? The nature of the
10 breach?”).

11 To be sure, Plaintiff provides additional details about this oral agreement, including
12 supporting exhibits, in the introduction portion of his opposition brief. (*See* Contract MTD
13 Opp’n 2–3 (describing, among other things, the dates of certain agreements, the
14 approximate hours worked in reliance on those agreements, and the alleged money owed
15 for breaching those agreements).) Such details would likely be sufficient to state a plausible
16 claim for the existence and breach of a contract, if they appeared in the FAC. Because they
17 do not, however, the Court may not consider them in assessing the adequacy of Plaintiff’s
18 allegations. *See Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998)
19 (“In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond
20 the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a
21 defendant’s motion to dismiss.”) (emphasis in original)). Accordingly, the Court **GRANTS**
22 Defendants’ Motion to Dismiss (ECF No. 72).³ Plaintiff will have an opportunity to include
23 these additional factual allegations in his amended complaint.

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27 ³ Plaintiff also strangely argues that his state law claims are not preempted by the Copyright Act. (*See*
28 Contract MTD Opp’n 5.) But Defendants do not raise this argument in their motion. Thus, the Court does
not consider these arguments in assessing the present Motion to Dismiss.

1 **II. Motion to Dismiss Certain Claims (ECF No. 73)**

2 Various Defendants⁴ seek to dismiss Plaintiff’s FAC on several grounds, including:
3 (A) Plaintiff’s copyright claims seek impermissible damages; (B) Plaintiff fails to state a
4 claim for inducing copyright infringement; (C) Plaintiff’s sixth, seventh, eighth, and ninth
5 claims are preempted by the Copyright Act; (D) Plaintiff’s sixth, seventh, and ninth claims
6 grounded in fraud fail to meet the heightened pleading standard under Rule 9(b); (E)
7 Plaintiff fails to state a claim for breach of the implied covenant of good faith and fair
8 dealing; (F) Plaintiff fails to state a claim for unfair business practices; and (G) Plaintiff
9 fails to state a claim for constructive trust. (*See generally* “Claims MTD,” ECF No. 73-1.)
10 The Court considers each argument in turn.⁵

11 **A. Copyright Damages**

12 Defendants first argue that Plaintiff’s copyright claims are defective because they
13 seek damages that precluded as a matter of law. (Claims MTD 10.) Specifically,
14 _____

15 ⁴ These Defendants include Carlos Santana; Salvador Santana; Michael Vrionis; Maria Vrionis; Steven
16 Vrionis; Daniel J. Schacht, Esq.; Donahue Fitzgerald LLP; Guts & Grace Records, Inc.; Cristalino, Inc.;
17 Santana IV, LLC; Santana Tesoro, LLC; Universal Tone Management, LLC; Adam Fells; Constellation
18 Brands, Inc.; Dawn DeBisschop; Howard Schomer; Hi Fidelity Entertainment, Inc.; House of Blues
19 Entertainment, LLC; Steven Newman; The Rock.com Group, Inc.; Walmart Stores, Inc.; Double O, LLC;
20 Will Oakley; Band Tees Apparel, Inc.; Art.com; Glenn Morelli; GFM Licensing Group; Infinity 1, Inc.
21 dba Rockabilia; Casa Noble Holdings LLC; Casa Noble Spirits, LLC; and MiJa Park. (*See* Claims MTD.)

22 ⁵ Defendants Linton Hall and Service First Specialty Food and Marketing, LLC also “join in the arguments
23 set forth by Defendants Carlos Santana, et al., and seek the requested relief as to Defendants Linton Hall
24 and Service First Specialty Food and Marketing, LLC.” (ECF No. 70.) But the underlying motion did not
25 assess the merits of Plaintiff’s FAC with regard to these claims and these Defendants. The Court agrees
26 with Plaintiff’s objection that this notice of joinder “fails to give the requisite notice of the basis for
27 Moving Defendants’ request for dismissal under Rule 12(b)(6)” and that it “makes it difficult at best to
28 respond to their position since Plaintiff’s state claim against Moving Defendants is founded upon a
different set of facts and legal theories than those applicable to the” other Defendants. (ECF No. 144, at
5.) While the Court is willing to entertain some level of joinder of nonmoving Defendants in certain
arguments, those motions of joinder must at the very least point the Court to those specific portions of the
other motion to which the Defendants join and supply additional facts or legal theories where necessary.
Otherwise the Court and Plaintiff are, as is the case here, left with a blanket joinder that provides no
specific guidance. Accordingly, the Court **DENIES** this joinder motion (ECF No. 70). These Defendants
are, of course, free to bring another motion to dismiss based on these arguments in response to Plaintiff’s
amended complaint.

1 Defendants argue that Plaintiff erroneously seeks (1) punitive damages; (2) damages based
2 on a judgment that a party “injured the business reputation and business” of a plaintiff; (3)
3 damages for unfair trade practices; and (4) both profits and statutory damages. (*Id.*)

4 In response, Plaintiff “does not challenge the motion to the extent it seeks to dismiss
5 Plaintiff’s claim for punitive damages under the Copyright Act, attorneys’ fees pursuant to
6 Cal. Civ. Code § 3344 for claims of copyright infringement, a declaration that defendants
7 have damaged his business reputation, or that he’s entitled to damages for unfair business
8 practices.” (“Claims MTD Opp’n” 6, ECF No. 141.) Plaintiff further argues that his
9 copyright infringement claims are otherwise adequately pled and should not be dismissed
10 on this basis, (*id.*), which Defendants do not appear to contest, (*see* Claims MTD; “Claims
11 MTD Reply,” ECF No. 154). Given Plaintiff’s concessions, the Court **GRANTS**
12 Defendants’ Claims MTD on these points and **DISMISSES WITH PREJUDICE** these
13 particular claims. Plaintiff will have an opportunity to address these deficiencies in his
14 amended complaint.

15 As to requesting both statutory damages and profits, Plaintiff argues he “is entitled
16 to recover profits from one defendant and statutory damages from another and his prayer
17 for relief can be read as requesting one or the other from each Defendant.” (Claims MTD
18 Opp’n 6.) Thus, Plaintiff appears to understand that statutory damages and actual damages
19 (including profits) are alternative damages bases under the Copyright Act. *See* 17
20 U.S.C. § 504(a) (noting that a copyright infringer is liable for either actual damages or
21 statutory damages). So cabined, the Court finds that Plaintiff’s FAC does not
22 impermissibly seek both statutory and actual damages against each alleged infringer. *See*
23 *also* 17 U.S.C. § 504(c)(1) (noting that a copyright owner “may elect, at any time before
24 final judgment is rendered,” to recover either actual or statutory damages). Accordingly,
25 the Court **DENIES** this portion of Defendants’ Claims MTD.

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1 ***B. Inducing Copyright Infringement***

2 Defendants argue that Plaintiff fails to state a claim for inducing copyright
3 infringement. (Claims MTD 11.)

4 Induced infringement is a species of contributory infringement since “one
5 contributorily infringes when he (1) has knowledge of another’s infringement and (2) either
6 (a) materially contributes to or (b) induces that infringement.” *Perfect 10, Inc. v. Visa Int’l*
7 *Serv. Ass’n* (“*Perfect 10 I*”), 494 F.3d 788, 795 (9th Cir. 2007). “The Supreme Court has
8 held that ‘one who distributes a device with the object of promoting its use to infringe
9 copyright, as shown by clear expression or other affirmative steps taken to foster
10 infringement, is liable for the resulting acts of infringement by third parties.’” *Perfect 10,*
11 *Inc. v. Giganews, Inc.* (“*Perfect 10 II*”), 847 F.3d 657, 672 (9th Cir. 2017) (quoting *Metro-*
12 *Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005)). In the Ninth
13 Circuit, a claim for inducement has “four elements: (1) the distribution of a device or
14 product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright,
15 and (4) causation.” *Id.* (quoting *Columbia Pictures Indust., Inc. v. Fung*, 710 F.3d 1020,
16 1032 (9th Cir. 2013)).

17 The Court agrees with Defendants. Among other things, Plaintiff’s fourth cause of
18 action for inducing copyright infringement fails to identify any service, device, or product
19 that encourages another person to commit copyright infringement. (See FAC ¶¶ 420–28.)
20 Moreover, Plaintiff concedes that he “will not be pursuing . . . inducement claims against
21 the defendants bringing this motion” (Claims MTD Opp’n 9.) Accordingly the Court
22 **GRANTS** this portion of Defendants’ Claims MTD and **DISMISSES WITH**
23 **PREJUDICE** Plaintiff’s claim for induced copyright infringement against these moving
24 Defendants.

25 ***C. Preemption Under the Copyright Act***

26 Defendants argue that Plaintiff’s sixth through ninth claims for intentional
27 misrepresentation, negligent misrepresentation, breach of the implied covenant of good
28 faith and fair dealing, and unfair business practices are all preempted by the Copyright Act.

1 (Claims MTD 11–14.) But as with his inducement cause of action, Plaintiff concedes that
2 he “will not be pursuing his state court . . . claims against defendants bringing this
3 motion” (Claims MTD Opp’n 9.) Accordingly, the Court **GRANTS** this portion of
4 Defendants’ Claims MTD and **DISMISSES WITH PREJUDICE** Plaintiff’s state court
5 causes of action⁶ against these moving Defendants.⁷

6 **III. Motion to Dismiss Certain Individual Defendants (ECF No. 75)**

7 Defendants also move to dismiss certain individual Defendants⁸ because Plaintiff
8 fails to state copyright infringement claims against them. (“Indiv. Def.’s MTD,” ECF No.
9 75.) Plaintiff has since dismissed all moving Defendants except Casa Noble Spirits, LLC
10 (“Casa Noble”). (*See* “Indiv. Def.’s MTD Opp’n” 2, ECF No. 142.) Accordingly, the Court
11 assesses Defendants’ arguments solely with respect to Casa Noble.⁹

12 Defendants argue that Plaintiff fails to state a copyright infringement claim against
13 Casa Noble. (Indiv. Def.’s MTD 20–21.) “To establish a prima facie case of direct
14 infringement, a plaintiff ‘must show ownership of the allegedly infringed material’ and
15 ‘demonstrate that the alleged infringers violated at least one exclusive right granted to
16 copyright holders under 17 U.S.C. § 106.’” *Perfect 10 II*, 847 F.3d at 666 (quoting *A&M*

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18 ⁶ These claims include Plaintiff’s sixth claim for intentional misrepresentation, seventh claim for negligent
19 misrepresentation, eighth claim for breach of implied covenant of good faith and fair dealing, ninth claim
20 for unfair business practices, and tenth claim for constructive trust.

21 ⁷ For this reason the Court need not reach Defendants’ additional arguments, since they all pertain to the
22 deficiencies of Plaintiff’s state causes of actions against Defendants. (*See also* Claims MTD Reply 3
23 (noting that Plaintiff stated he will not be pursuing state law claims against the moving Defendants).)

24 ⁸ These moving Defendants include Maria Vrionis, Adams Fells, Steve Vrionis, MiJa Park, Will Oakley,
25 Glen Morelli, Steven Newman, House of Blues Entertainment, LLC, and Casa Noble Spirits, LLC. (Indiv.
26 Def.’s MTD 4.)

27 ⁹ As above, *supra* note 5, Defendants Linton Hall and Service First Specialty Food and Marketing, LLC
28 “join in the arguments set forth by Defendants Carlos Santana, et al., and seek the requested relief as to
Defendants Linton Hall and Service First Specialty Food and Marketing, LLC.” (ECF No. 79.) But the
underlying motion did not assess the merits of Plaintiff’s FAC with regard to these claims and these
Defendants. And Plaintiff’s response in opposition to this motion focused on the only remaining moving
Defendant—Casa Noble Spirits, LLC. Accordingly, the Court **DENIES** this joinder motion for the same
reasons discussed above.

1 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)). In this case the
2 exclusive rights include the right of reproduction, the right to prepare derivative works, and
3 the right of distribution. 17 U.S.C. § 106. “In addition, direct infringement requires the
4 plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.” *Id.*
5 (quoting *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir.
6 2013)).

7 The Court agrees with Defendants. The sole allegation against Casa Noble is that it
8 is listed as a registrant of the domain name www.casanoble.com and that some of Plaintiff’s
9 registered works appear on that site. (FAC 35 (providing chart noting that two of Plaintiff’s
10 registered works appear on the website).) But there are no actual allegations that satisfy the
11 causation element of direct infringement (e.g., that Casa Noble posted those works on its
12 site, created derivative versions of the copyrighted works, or offered for sale the allegedly
13 infringing merchandise). Merely alleging that an entity owns or operates a domain name is
14 not enough to plausibly demonstrate that the entity caused, for example, a copy of
15 Plaintiff’s copyrighted work to appear on its site. *See, e.g., Perfect 10 II*, 847 F.3d at 668
16 (“The sole evidence Perfect 10 points to in support of its argument that Giganews was not
17 merely a passive host shows only that images and thumbnails were accessed through the
18 Giganews platform. The evidence does not demonstrate that Giganews—as opposed to the
19 user who called up the images—caused the images to be displayed.”); *Carell v. Shubert*
20 *Org., Inc.*, 104 F. Supp. 2d 236, 271 (S.D.N.Y. 2000) (dismissing direct copyright
21 infringement claims against certain defendants because the complaint failed to provide
22 “any description of acts that could lead to the conclusion of direct copyright”
23 infringement).

24 To be sure, Plaintiff provides additional allegations and exhibits against a group of
25 Defendants he labels “CASA NOBLE” Defendants. (FAC ¶ 113 (labeling Casa Noble
26 Holdings LLC and Casa Noble Holding, LLC as “CASA NOBLE”).) But this group does
27 not include Casa Noble Spirits, LLC. Indeed, as discussed, the only references to Casa
28 Noble Spirits, LLC are in the case caption and regarding its status as a domain name

1 registrant for www.casanoble.com. The Court will entertain a reasonable level of group
2 pleading in assessing the adequacy Plaintiff's FAC, but a prerequisite to that, of course, is
3 that the group actually include the moving Defendant. And here it does not. Accordingly,
4 the Court **GRANTS** this portion of Defendants' MTD and **DISMISSES WITHOUT**
5 **PREJUDICE** Plaintiff's copyright infringement claims¹⁰ against Casa Noble Spirits, LLC.

6 **IV. DPC Defendants' Motion to Dismiss (ECF No. 116)**

7 As above, *supra* Part II, various Defendants (hereinafter, the "DPC Defendants"¹¹),
8 move to dismiss Plaintiff's FAC on several grounds, including: (A) failure to state claims
9 for copyright infringement; (B) Plaintiff's ninth cause of action is preempted by the
10 Copyright Act; and (C) Plaintiff's tenth cause of action for constructive trust is not a cause
11 of action. (*See generally* "DPC MTD," ECF No. 116-1.) However, Plaintiff concedes that
12 he "will not be pursuing [his state court claims] against the moving Defendants."¹² ("DPC
13 MTD Opp'n" 9, ECF No. 143.) Accordingly, the Court only considers the DPC
14 Defendants' arguments regarding Plaintiff's claims for copyright infringement.¹³

15
16 ¹⁰ Because Plaintiff fails to state a direct infringement claim against Casa Noble Spirits, LLC, and because
17 Plaintiff fails to allege that Casa Noble Spirits, LLC was otherwise aware of or encouraged another's
18 direct infringement, his secondary infringement claims against this Defendant also fail. *See, e.g., Louis*
19 *Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 591 F. Supp. 2d 1098, 1104 (N.D. Cal. 2008) ("All theories
20 of secondary liability for copyright and trademark infringement require some underlying direct
21 infringement by a third party." (citing *Perfect 10 I*, 494 F.3d at 795, 807)).

22 ¹¹ These moving Defendants include Dorfman-Pacific Co., Inc. (sued herein as Dorfman Pacific Co.);
23 Shawn Daniel (sued herein as Shawn Daniel doing business as www.dorfmanpacific.com); Steven Singer
24 (sued herein as Steven Singer doing business as Hartford York); Hats.com, LLC (sued herein as Hats.com,
25 LLC doing business as www.hats.com); Bel-Born Management Corp. (sued herein as Bel-orn
26 Management Corp. doing business as www.villagehatshop.com); Gary Monds (sued herein as Gary
27 Monds doing business as Phoenix Leather Goods dba www.beltoutlet.com); and Phoenix Leather Goods
28 LLC (sued herein as Phoenix Leather Goods doing business as www.beltoutlet.com). (DPC MTD 7.)

¹² Additionally, Plaintiff has since dismissed Defendant Shawn Daniel. (DPC MTD Opp'n 9.)

¹³ Also, as above, *supra* Part II, Defendants argue that (1) Plaintiff impermissibly seeks punitive damages
under the Copyright Act, (2) Plaintiff impermissibly seeks punitive damages and fees under the California
Civil Code based on copyright claims, (3) the Copyright Act does not allow a remedy for injury to business
reputation, and (4) Plaintiff impermissibly seeks both profits and statutory damages under the Copyright
Act. (DPC MTD 15–16.) Plaintiff does not respond to these arguments in this particular motion, but he

1 Defendants argue that Plaintiff fails to state a claim for direct copyright infringement
2 against each DPC Defendant. (DPC MTD 10–12.) The Court partially agrees.

3 To begin, the Court finds that Plaintiff’s charts showing (1) a domain name, (2) the
4 alleged owner/operator of that domain name, and (3) the “registrations infringed”
5 presumably on those sites are insufficient to state a claim for direct copyright infringement.
6 Specifically, as discussed above, *supra* Part II, this information is insufficient to plausibly
7 allege the causation element of direct infringement (i.e., that Defendant acted in some way
8 to infringe Plaintiff’s copyrighted works). Nor does Plaintiff identify any other material
9 allegations in its opposition against the majority of the DPC Defendants. (*See* DPC MTD
10 Opp’n 6–9 (arguing that its charts are sufficient to state a claim for direct infringement
11 against certain Defendants).)

12 But Plaintiff does provide additional allegations against Defendant Dorfman-Pacific,
13 Inc. For instance, Plaintiff alleges that Dorfman “infringed the HANDRAWN ABRAXAS
14 ANGEL by copying and/or distributing same on hat boxes containing SANTANA’s hats.”
15 (FAC ¶ 213.) Plaintiff also alleges that Dorfman “directly infringed the New Lion works
16 by making unauthorized derivative works and/or copying and distributing the originals
17 and/or derivatives via their online 2015-2017 eCatalogs, hard copies of same, and the hats,
18 boxes and merchandizing and marketing materials sold through their catalogs and the
19 above websites.” (*Id.* ¶ 327; *see also* Ex. 88 (depicting relevant pages of the Dorfman
20 eCatalogs).) This is sufficient to state a claim of direct infringement against Defendant
21 Dorfman-Pacific, Inc. Accordingly, the Court **GRANTS IN PART** and **DENIES IN**
22 **PART** this portion of the DPC MTD. Thus, the Court **DISMISSES WITHOUT**
23 **PREJUDICE** Plaintiff’s direct copyright infringement claims against all DPC Defendants
24 except Dorfman-Pacific, Inc.

25 ///

26 _____
27 has agreed to correct these deficiencies in his amended complaint. *See supra* Section II.A. Accordingly,
28 Plaintiff will have an opportunity to amend his complaint on these grounds as to the DPC Defendants
consistent with his representations above and the Court’s Order. *See id.*

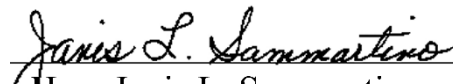
1 Defendants further argue that Plaintiff fails to state a claim for secondary copyright
2 infringement against the DPC Defendants. (DPC MTD 13–14.) Plaintiff does not address
3 these arguments in his opposition to Plaintiff’s motion.¹⁴ (*See generally* DPC MTD Opp’n.)
4 Accordingly, the Court **GRANTS** this portion of the DPC MTD and **DISMISSES**
5 **WITHOUT PREJUDICE** Plaintiff’s claims for secondary copyright infringement against
6 the DPC Defendants. *See, e.g., Said v. Cty. of San Diego*, No. 12CV2437-GPC RBB, 2013
7 WL 2120866, at *3 (S.D. Cal. May 15, 2013) (“[S]ince Plaintiff has not addressed the
8 merits of Defendants’ argument, the court assumes that [P]laintiff concedes this point.”).

9 **CONCLUSION**

10 For the reasons stated above, the Court **GRANTS IN PART** and **DENIES IN**
11 **PART** the various Motions to Dismiss. Plaintiff’s FAC is **DISMISSED WITHOUT**
12 **PREJUDICE** unless otherwise noted. Plaintiff **SHALL FILE** an amended complaint, if
13 any, on or before 21 (twenty-one) days from the date on which this Order is electronically
14 docketed. In so amending, Plaintiff is advised to provide an amended complaint that more
15 clearly and concisely states a claim for relief against each particular Defendant. *See* Fed.
16 R. Civ. P. 8(a)(2) (requiring a pleading to contain “a short and plain statement” of the
17 grounds for relief).

18 **IT IS SO ORDERED.**

19 Dated: July 6, 2017

20 
21 Hon. Janis L. Sammartino
22 United States District Judge
23
24
25
26

27 ¹⁴ Plaintiff, in conclusory fashion, simply states that he “sufficiently alleg[es] Defendants’ direct and
28 secondary infringing activity.” (DPC MTD Opp’n 2 (emphasis added).)