

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 STEVEN LIGUORI, an Individual; and BRUNO )  
4 LIGUORI TURQUOISE TRADING, INC., a Nevada )  
5 corporation, )

6 Plaintiffs, )

7 vs. )

8 BERT HANSEN, individually and doing business as )  
9 HOOVER DAM SNACKETERIA or the HIGH )  
10 SCALER CAFÉ; KAWANA POHE, individually and )  
11 doing business as the HOOVER DAM STORE; and )  
12 DOES 1 through 10, )

11 Defendants. )

Case No.: 2:11-cv-0492-GMN-CWH

ORDER

13 Pending before the Court is Defendant Kawana Pohe’s Motion to Dismiss or in the  
14 Alternative Motion for Summary Judgment (ECF No. 8).

15 **I. BACKGROUND**

16 Plaintiffs Steven Liguori and Bruno Liguori Turquoise Trading, Inc. (“Plaintiffs”) filed a  
17 Complaint before this Court on April 1, 2011. (ECF No. 1.) In the Complaint, Plaintiffs alleged  
18 three causes of action against Defendants Hansen and Pohe: (1) Breach of Contract; (2) Breach  
19 of the Implied Covenant of Good Faith and Fair Dealing; and (3) Copyright Infringement. (Id.)

20 **II. LEGAL STANDARD**

21 **Dismissal Pursuant to Federal Rule of Civil Procedure 12(b)(6)**

22 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
23 that fails to state a claim upon which relief can be granted. *See North Star Int’l. v. Arizona Corp.*  
24 *Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule  
25 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not

1 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.  
2 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint  
3 is sufficient to state a claim, the Court will take all material allegations as true and construe them  
4 in the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th  
5 Cir. 1986).

6 The Court, however, is not required to accept as true allegations that are merely  
7 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*  
8 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
9 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
10 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,  
11 550 U.S. at 555) (emphasis added).

12 “Generally, a district court may not consider any material beyond the pleadings in ruling  
13 on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the  
14 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*  
15 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents  
16 whose contents are alleged in a complaint and whose authenticity no party questions, but which  
17 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)  
18 motion to dismiss” without converting the motion to dismiss into a motion for summary  
19 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence  
20 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*,  
21 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside  
22 of the pleadings, the motion to dismiss is converted into a motion for summary judgment. See  
23 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

### 24 **Summary Judgment**

25 The Federal Rules of Civil Procedure provide for summary adjudication when the

1 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
2 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is  
3 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may  
4 affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).  
5 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to  
6 return a verdict for the nonmoving party. See *id.* “Summary judgment is inappropriate if  
7 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
8 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th  
9 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
10 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
11 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

12 In determining summary judgment, a court applies a burden-shifting analysis. “When the  
13 party moving for summary judgment would bear the burden of proof at trial, it must come  
14 forward with evidence which would entitle it to a directed verdict if the evidence went  
15 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing  
16 the absence of a genuine issue of fact on each issue material to its case.” C.A.R. Transp.  
17 Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In  
18 contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
19 moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
20 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed  
21 to make a showing sufficient to establish an element essential to that party’s case on which that  
22 party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at 323–24. If the  
23 moving party fails to meet its initial burden, summary judgment must be denied and the court  
24 need not consider the nonmoving party’s evidence. See *Adickes v. S.H. Kress & Co.*, 398 U.S.  
25 144, 159–60 (1970).

1           If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
2 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith*  
3 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
4 opposing party need not establish a material issue of fact conclusively in its favor. It is  
5 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the  
6 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*  
7 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid  
8 summary judgment by relying solely on conclusory allegations that are unsupported by factual  
9 data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go  
10 beyond the assertions and allegations of the pleadings and set forth specific facts by producing  
11 competent evidence that shows a genuine issue for trial. See *Celotex Corp.*, 477 U.S. at 324.

12           At summary judgment, a court’s function is not to weigh the evidence and determine the  
13 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.  
14 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn  
15 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not  
16 significantly probative, summary judgment may be granted. See *id.* at 249–50.

### 17           **Statutes of Limitations**

18           Under Nevada law, “[a]n action upon a contract, obligation or liability founded upon an  
19 instrument in writing” has a six-year statute of limitations. NRS 11.190(1)(b). Claims arising  
20 under Title 17 of the United States Code, including claims for copyright infringement, must be  
21 “commenced within three years after the claim accrued.” 17 U.S.C. § 507(b).

### 22           **III. DISCUSSION**

23           Defendant Pohe moves to dismiss Plaintiffs’ Complaint on the grounds that: (1) “the  
24 allegations of the Plaintiffs’ Complaint are so threadbare so as to permit disposition under  
25 12(b)(6),” specifically because “[t]here is no date associated with any actions mentioned in the

1 complaint subsequent to the year 2000”; (2) Plaintiffs’ First and Second Causes of Action are  
2 barred by the six-year statute of limitations in Nevada Revised Statutes 11.190(1)(b) because it  
3 began to run on February 4, 2002; and (3) Plaintiffs’ Third Cause of Action is barred by the  
4 three-year statute of limitations in 17 U.S.C. § 507(b) because “[t]he Retail Licensing  
5 Agreement was terminated by Pohe in 2002.” (Mot. Dismiss, 4:14-28, 5:1-4, ECF No. 8.)

6 To support these arguments, Defendant Pohe refers to the June 12, 2000, Retail Licensing  
7 Agreement (Ex. 5 to Compl., ECF No. 1-4) attached to Plaintiffs’ Complaint. (Mot. Dismiss,  
8 2:3-5.) The Retail Licensing Agreement states that it was made “by and between BRUNO  
9 LIGUORI TURQUOISE TRADING POST, INC., a Nevada corporation . . . (hereinafter  
10 ‘Licensor’) and BERT HANSEN, d/b/a HOOVER DAM SNACKETERIA, Boulder City,  
11 Nevada and Kawana Pohe, d/b/a HOOVER DAM STORE, hereafter collectively referred to as  
12 (hereinafter ‘Licensee’).” (Id. at 1:¶1.)

13 Defendant Pohe attaches a February 4, 2002 letter from counsel for Plaintiff Bruno  
14 Liguori Turquoise Trading Post, Inc. (“BLTTP”) “alleging that Pohe was in breach of the retail  
15 agreement by failing to pay royalties or place BLTTP’s licensed products for sale to the general  
16 public.” (Mot. Dismiss, 2:6-8; Ex. A to Mot. Dismiss, ECF No. 8-1.) This letter appears to be  
17 the basis upon which Defendant Pohe argues that the statute of limitations has expired for  
18 Plaintiffs’ three causes of action.

19 Defendant Pohe also alleges that he sent a letter to Plaintiff Steven Liguori (“Liguori”) in  
20 March 2002 terminating the licensing agreement with BLTTP. (Mot. Dismiss, 2:13-14.) In  
21 support of this allegation, Defendant Pohe cites to his attached affidavit and purported draft of  
22 the letter. (Id. at 2:16; Ex. B to Mot. Dismiss, ECF No. 8-2.) Defendant Pohe alleges that the  
23 draft letter attached to his affidavit is “substantially similar” to the letter that he sent terminating  
24 the Retail Licensing Agreement. (Ex. B, 1:¶6, ECF No. 8-2.) The draft letter is unsigned and  
25 undated, and purports to give “the required 30 day notice of cancellation of our agreement,” to

1 take effect on March 31, 2002, but does not specify which provision of the agreement is being  
2 invoked. (Id.)

3 The Retail Licensing Agreement contains a provision for termination of the agreement by  
4 “either party herein” “upon at least thirty (30) days’ notice” “[i]n the event Licensee is  
5 prevented from manufacturing or distributing the Licensed Products because of any act of God,  
6 unavoidable accident, fire, epidemic, strike, lockout or other labor dispute, war, riot or civil  
7 commotion, act of public enemy, enactment, rule, order or act of government or governmental  
8 instrumentality (whether federal, state, local or foreign), or other cause of a similar or dissimilar  
9 nature beyond Licensee’s entire control, and such condition continues for a period of three (3)  
10 months or more.” (RLA, Ex. 5 to Compl., 9:¶11(b), ECF No. 1-4.)

11 Defendant Pohe also submits copies of proceedings initiated in 2002 before the Eighth  
12 Judicial District Court of Clark County, Nevada, to argue that Defendants Hansen and Pohe  
13 were not joint venturers or in a partnership. (Reply Mot. Dismiss, ECF No. 13.) None of  
14 Defendant Pohe’s submitted Exhibits are purported to be legal documents modifying the Retail  
15 Licensing Agreement. The case before the Eighth Judicial District Court does not include  
16 Plaintiffs as parties and does not relate to the Retail Licensing Agreement.

17 **A. Motion to Dismiss**

18 The legal standard governing motions to dismiss under Rule 12(b)(6) requires only that a  
19 complaint give a defendant fair notice of a legally cognizable claim and the grounds on which  
20 the claim rests. Facts pleaded in the complaint must show that a violation is plausible, not just  
21 possible. These requirements, though exacting, do not demand the detail required for summary  
22 adjudication. Defendant Pohe argues that Plaintiffs’ Complaint may be dismissed under Rule  
23 12(b)(6) because there is no date associated with actions subsequent to the year 2000, but does  
24 not address why these dates are necessary in order to satisfy the pleading requirements of Rule  
25 12(b)(6). The Court finds that Plaintiffs’ Complaint sufficiently alleges facts showing that a

1 violation is plausible and that give Defendants fair notice. Furthermore, Defendant Pohe  
2 presents no grounds on which the Court should find otherwise. Therefore, Defendant Pohe's  
3 Motion to Dismiss will be denied.


4 **B. Motion for Summary Judgment**

5 In the alternative, Defendant Pohe requests summary judgment in his favor on the basis  
6 of the applicable statutes of limitations for Plaintiffs' three causes of action. The Exhibits  
7 submitted by Defendant Pohe in support of the motion do not provide the Court sufficient basis  
8 on which to find that summary adjudication is merited. Based on the evidence presented here,  
9 the Court finds that reasonable jurors, drawing all inferences in favor of Plaintiffs, could return a  
10 verdict in Plaintiffs' favor as to the applicability of the statutes of limitations. Therefore,  
11 Defendant Pohe has not met his initial burden to establish the absence of a genuine issue of fact  
12 as to whether the statutes of limitations have run. Accordingly, Defendant Pohe's alternative  
13 motion for summary judgment will be denied.

14 **IV. CONCLUSION**

15 **IT IS HEREBY ORDERED** that Defendant Pohe's Motion to Dismiss or in the  
16 Alternative Motion for Summary Judgment (ECF No. 8) is **DENIED**.

17 **DATED** this 9th day of March, 2012.

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22 Gloria M. Navarro  
23 United States District Judge  
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