

Rayminh L. Ngo, Esq.  
 EDNY #RN4834  
 HIGBEE & ASSOCIATES (*Of Counsel*)  
 1504 Brookhollow Dr., Ste. 112  
 Santa Ana, CA 92705  
 714-617-8336 (Ph)  
 714-597-6559 (Fax)  
 rngo@higbeeassociates.com  
*Attorney for Defendants Mathew K. Higbee & Higbee & Associates*

**UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF NEW YORK**

**MEYER, SUOZZI, ENGLISH & KLEIN,  
 P.C.,**

Plaintiff,

v.

**MATHEW K. HIGBEE, Esq.,  
 NICK YOUNGSON,  
 RM MEDIA, LTD., &  
 HIGBEE & ASSOCIATES,**

Defendants.

Case No. 2:18-cv-03353-ADS-ARL

**DECLARATION OF MATHEW K.  
 HIGBEE**

**DECLARATION OF MATHEW K. HIGBEE**

1. I am an attorney at law eligible to practice law in the state of California and other jurisdictions. I am over the age of 18 years old and I have personal knowledge of the matters stated herein. If called as a witness I could and would testify thereto.

2. I am a Defendant in the above captioned action. I am also the principle of Defendant Higbee & Associates.

3. Defendant RM Media Ltd. (“RM Media”), which is one of my clients, is a stock photography licensing company that specializes in commercial product photography and supplies unique images for web designers, bloggers and content writers.

4. RM Media is the assignee and sole rights holder to an original image of a computer tablet bearing the words “burden of proof” (hereinafter the “Copyrighted Work”), which was photographed by RM Media’s founder, Defendant Nick Youngson (“Youngson”).

5. Youngson had registered the Copyrighted Work with the United States Copyright Office under registration number VAu 1-248-878, with an effective registration date of June 10, 2016. Youngson subsequently transferred all rights to the Copyrighted Work to RM Media, and RM Media is currently the sole rights holder to the Copyrighted Work.

6. RM Media owns a series of affiliate websites including the website identified in the Complaint as the “Blue Diamond Gallery”, which offers RM Media content for licensing. See <http://www.thebluediamondgallery.com/terms-and-conditions.html>.

7. RM Media offers two licensing options for consumers wishing to use its content. Under the first option, RM Media offers the majority of its content to consumers for a paid licensing fee. Under the second option, RM Media offers a limited portion of its content library (including the Copyrighted Work that gave rise to this action) for license under a Creative Commons Attribution-ShareAlike 3.0 Unported (CC BY 3.0) (“CC License”), which, *inter alia*, requires as a condition, that the consumer “give appropriate credit, provide a link to the license, and indicate if changes were made.” See Complaint Exhibit 2.

8. RM Media offers a limited portion of its content library, including the Copyrighted Work, to those who meet the requirements of a CC License of providing attribution and required link back to RM Media’s affiliate websites.

9. The affiliate websites direct prospective licensees to RM Media’s larger library of paid content, which, I am informed and believe, drives sales, and boosts RM Media’s paid content higher in search engines such as Google.

10. As demonstrated in Plaintiff's Complaint, the Blue Diamond Gallery website contains a detailed explanation of the terms of the CC License as well as multiple disclaimers alerting prospective licensors that attribution is a required condition to obtaining a license. *See* Complaint, Exhibit 1.

11. On or about January 19, 2018, RM Media discovered that Plaintiff was using the Copyrighted Work on Plaintiff's website without fulfilling the conditions of the license. Attached hereto as "Exhibit A" is a true and correct copy of the post on Plaintiff's website featuring the Copyrighted Work and showing that Plaintiff did not comply with the express attribution requirement to qualify for a CC License.

12. I am informed and believe that RM Media did not have a record of Plaintiff purchasing a paid license for use of the Copyrighted Work.

13. Shortly thereafter, RM Media retained me and my law firm to send correspondence to Plaintiff regarding its unlicensed use of the Copyrighted Work.

14. Correspondence was subsequently sent on or about January 30, 2018, and apparently received by Plaintiff on or about February 5, 2018. *See* Complaint ¶ 22.

15. Thereafter, Plaintiff began communicating with members of my law firm. Plaintiff denied any copyright infringement or liability, and never made any payments or concessions.

16. On June 8, 2018, Plaintiff filed the instant lawsuit, alleging two claims/causes of action against me and my firm, as well as against my Client RM Media and its owner Nick Youngson.

17. The Plaintiff's "First Claim for Relief," alleged against all Defendants, including myself and the lawfirm, purports to be a federal copyright claim for a declaratory judgment that

Plaintiff never committed any copyright infringements in connection with its use of RM Media's Copyrighted Work. Plaintiff additionally seeks a declaratory judgment insulating it from any claims for breach of contract based on its use(s) of the Copyrighted Work.

18. Neither I nor my law firm own any interest in the Copyrighted Work and we have never owned an interest in the Copyrighted Work. I have never purported to enforce any copyright or breach of contract claim related to the Copyrighted Work against Plaintiff or any other party.

19. Plaintiff's "Second Claim for Relief," alleged against all Defendants, including myself and my law firm, is a supplemental state claim under section 349 of New York's General Business Law.

20. For the supplemental state claim, Plaintiff alleges that my firm and I somehow violated section 349 for simply making pre-litigation settlement demands on the Plaintiff — in a representative capacity as attorneys for my client — for the Plaintiff's admitted copyright infringement.

21. As an initial matter, the original letter I sent to Plaintiff also alleges a claim for liability for violation of 17 U.S.C. § 1202, which prohibits infringers from "intentionally remov[ing] or alter[ing] any copyright management information." Attached hereto as Exhibit B is a true and correct copy of my original letter to Plaintiff.

22. Tellingly, Plaintiff's Complaint and the Opposition omit this key fact.

23. I do not believe Plaintiff's Complaint against my client or me has any merit. It appears from the Complaint and the Opposition that Plaintiff openly admits that it used my client's Copyrighted Work without complying with the express terms on the Blue Diamond Gallery Website.

24. While Plaintiff and I may disagree over whether such conduct constitutes copyright infringement or breach of contract as a matter of law, in any case, Plaintiff clearly bears some liability to my client.

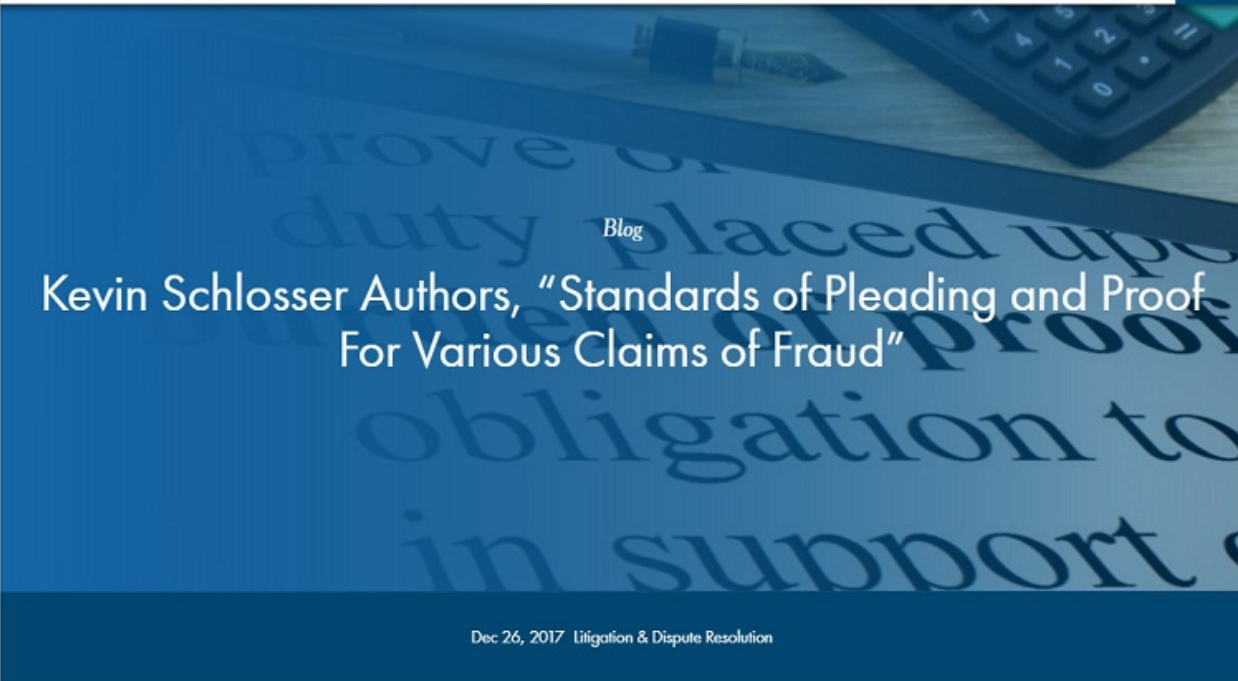
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this April 16, 2018, at Santa Ana, California.

A handwritten signature in black ink that reads "Mathew K Higbee". The signature is written in a cursive style and is positioned above a horizontal line.

Mathew K. Higbee

# **Exhibit “A”**



Source: [www.nyfraudclaims.com](http://www.nyfraudclaims.com)

My [previous post](#) addressed the different statutes of limitations that apply to claims of actual fraud, where intent to defraud is a necessary element, and constructive fraud, where proving intent to defraud is not required. The difference is that claims for actual fraud receive the benefit of the extended two-year period from the time the fraud was discovery or could reasonably have been discovered, while the statute of limitations for constructive fraud claims is a straight six years from when the wrong occurred.

This post addresses other differences in causes of action that do not require actual intent to defraud. Careful attention to these details is required to avoid unintended consequences.

#### Pleadings Particularity Requirement

The New York Debtor Creditor Law (DCL) has a number of provisions dealing with species of fraud in connection with conveyances of property that affects creditors. [DCL Section 276](#) requires an actual intent by the debtor to avoid claims of creditors. The so-called constructive fraud sections of the DCL do not require actual intent as an element – DCL 273 (conveyances by insolvent), DCL 273-a (conveyance by a defendant), DCL 274 (conveyances by person in business), DCL 275 (conveyance by person about to incur debts), DCL 277 (conveyance of partnership property).

“Pursuant to CPLR 3016(b), where a cause of action is based on fraud, the ‘circumstances constituting the wrong’ must be ‘stated in detail,’ including ‘specific dates and items’ (*Orchid Constr. Corp. v Gottbeter*, 89 AD3d 708, 710 [internal quotation marks omitted]; see *Doukas v Ballard*, 135 AD3d 896, 898).” *Swartz v Swartz*, 145 AD3d 818 (2d Dep’t 2016). Recent cases discussing this pleadings standard can be found using the search function in this blog by [simply searching for “3016.”](#)

This special pleadings standard does not apply to certain “constructive fraud” claims. As observed by the Fourth Department in the recent and informative decision in *Matter of City of Syracuse Indus. Dev. Agency (Amadeus Dev., Inc.)*, 2017 NY Slip Op 08945 (4<sup>th</sup> Dep’t Decided December 22, 2017), “claims for fraudulent conveyances under Debtor and Creditor Law §§ 273, 274, and 275 ‘are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud’ (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; see *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-150 [2d Dept 2009]).”

There are also different standards of proof for constructive fraud claims.

#### Standard of Proof – Clear and Convincing and Preponderance

The two standards of proof in civil litigation are a preponderance of the evidence and clear and convincing proof. The New York Pattern Jury Instructions provide a straightforward and simple explanation of these respective standards of proof as follows:

[Clear and Convincing evidence] means evidence that satisfies you that there is a high degree of probability that there was (e.g., fraud, malice, mistake, a gift, a contract between the plaintiff and the deceased, incompetency, addiction), as I (have defined, will define) it for you.

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To decide for the plaintiff it is not enough to find that the preponderance of the evidence is in the plaintiff's favor. A party who must prove (his, her) case by a preponderance of the evidence only need satisfy you that the evidence supporting (his, her) case more nearly represents what actually happened than the evidence which is opposed to it. But a party who must establish (his, her) case by clear and convincing evidence must satisfy you that the evidence makes it highly probable that what (he, she) claims is what actually happened.

N.Y. Pattern Jury Instr.–Civil 1:64.

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The state and federal courts in New York have not provided clear guidance as to whether the clear and convincing standard that applies to claims of actual fraud also applies to claims of constructive fraud under the DCL. The case law in this regard was recently summarized concisely in *Piccarreto v. Mura*, 51 Misc.3d 1230(A) (NY Sup. Ct, Monroe Co. 2016), as follows:

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The burden of proof under [DCL] Section 273 and 273-a seems somewhat in dispute. In 2003, a federal court in New York held that a preponderance standard governs claims under § 273, for reasons that apply with equal force to § 273-a. See *Lippe v. Bairmo Corporation*, 249 F.Supp2d 357, 376 n. 6 (SDNY 2003). The Second Circuit affirmed that decision, *Lippe v. Bairmo Corp.*, 99 F. Appx. 274 (2d Cir.2004), and several subsequent federal decisions have taken the same approach. See *In re Dreier LLP*, 452 B.R. 391, 442 (Bankr.SDNY 2011); *In re Borriello*, 329 B.R. 367, 373 (Bankr.E.D.NY 2005).

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However, New York appeal courts seem to require the higher standard in order to sustain claims in Section 273 and 273-a. *Matter of U.S. Bancorp Equip. Fin., Inc. v. Rubashkin*, 98 AD3d 1057, 1060 (2nd Dept.2012) (reversing judgment in plaintiff's favor because the plaintiff "failed to establish, by clear and convincing evidence, ... a fraudulent conveyance under either section 273 or section 275 of the Debtor and Creditor Law"); *Farkas v. D'Oca*, 305 A.D.2d 237, 237 (1st Dept.2003) ("The trial court properly dismissed the complaint upon the ground that plaintiff had failed to establish by clear and convincing evidence that the payments at issue ... were fraudulent conveyances under either section 273 or section 273-a of the Debtor and Creditor Law."). The conflict between these lines of cases remains unresolved. See *Fannie Mae v. Olympia Mortgage Corp.*, No. 04-CV-4971, 2011 U.S. Dist. LEXIS 63669, 2011 WL 2414685, at 8 (EDNY, June 8, 2011) (noting, without resolving, the "dispute as to the appropriate standard of proof required to prove constructive fraud under § 273"). In the face of this unresolved judicial dispute, this court will apply the higher standard—clear and convincing evidence—to all of the plaintiff's claims under the Debtor/Creditor Law.

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#### Distinction of Negligent Misrepresentation and Challenged Fiduciary Transactions

Although state courts apply the clear and convincing standard to "constructive fraud" claims under the DCL, the New York Pattern Jury Instructions recommend a preponderance of the evidence standard for "negligent representation" claims (that also do not require actual intent to defraud):

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As you have heard, the plaintiff AB seeks to recover the damages that (he, she, it) claims were caused by (his, her, its) reliance on incorrect statement(s) that were negligently made by the defendant CD. Specifically, AB claims [state plaintiff's claim(s)]. CD denies [set forth elements of plaintiff's claim(s) that defendant denies] and contends [state defendant's contentions].

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Where a person makes a statement that (he, she, it) knows or should know will be relied upon by another, that person is under a duty to the other person to take reasonable care that the statement is correct. Reasonable care means that degree of care that a reasonably prudent person would use under the same circumstances. When a person takes an action or makes a decision in reliance on an incorrect statement and the reliance was reasonable, that person is entitled to recover the damages (he, she, it) sustained as a result.

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To recover, AB has the burden of proving, by a preponderance of the evidence, that (1) CD stated [set forth statement(s) that plaintiff claims were made]; (2) the statement was incorrect; (3) CD failed to use reasonable care to ensure that the statement was correct; (4) AB (heard, read) CD's statement; (5) CD knew or a reasonable person in CD's position would have known that AB would rely on the statement in [state action that plaintiff took or decision plaintiff made in alleged reliance on the statement]; (6) AB relied on CD's statement in [state action that plaintiff took or decision plaintiff made in alleged reliance on the statement]; (7) AB's reliance on CD's statement was reasonable; and (8) as a result of (his, her, its) reliance, AB suffered damage.

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N.Y. Pattern Jury Instr.–Civil 321 (emphasis added).

Even this is not settled, however, as there is case law support for applying the clear and convincing standard to negligent misrepresentation claims:

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Negligent misrepresentation is a species of fraud that replaces the required showing of scienter with a showing of negligence. Like actions for fraud, negligent misrepresentation actions typically are based on inference rather than direct evidence. Thus, *New York's high standard of "clear and convincing" proof applies to actions for negligent misrepresentation as well as actions for intentional fraud.* See \*285 *Alice D. v. William M.*, 113 Misc.2d 940, 450 N.Y.S.2d 350, 354 (N.Y.City Civ.Ct.1982). Cf. *Ajax Hardware Mfg. Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir.1977) (discussing "clear and convincing" standard required of actions for fraud and citing *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969); *Manchel v. Kasdan*, 286 A.D. 483, 144 N.Y.S.2d 694 (1st Dep't 1955) (per curiam), *aff'd*, 1 N.Y.2d 734, 151 N.Y.S.2d 940, 134 N.E.2d 687 (1956); *Cave v. Green*, 281 A.D. 560, 120 N.Y.S.2d 865 (1st Dep't 1953), *aff'd*, 308 N.Y. 754, 125 N.E.2d 109 (1955)).

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*Allen v. Westpoint-Pepperell, Inc.*, 11 F.Supp.2d 277 (S.D.N.Y.1997)(emphasis added).

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Even further clarification is necessary for claims in which fraud is alleged against a fiduciary where the transaction is challenged by the



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person or entity to whom the fiduciary duty is owed. In those circumstances, the fiduciary who enters into a transaction with the one to whom it owes a fiduciary duty has the burden of proving by clear and convincing evidence that the transaction was free of improper influence, fraud or other wrongdoing. The New York Court of Appeals in *Matter of Aoki v. Aoki*, 27 N.Y.3d 32 (2016) recently explained the rules applying to transactions involving fiduciaries (see [my post for a full description](#)). The Court of Appeals first pointed out: “It is a well-settled rule that “fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the parties seeking to [be] relieve[d] ... from an obligation on that ground”.” The Court continued: “However, an exception to that general rule provides that where a fiduciary relationship exists between the parties, the law of constructive fraud will operate to shift the burden to the party seeking to uphold the transaction to demonstrate the absence of fraud.” The Court noted that it had applied the constructive fraud doctrine in different contexts, but “the pertinent fact at present is that the fiduciary stood to benefit from the transaction itself.” The Court cited prior case law in describing the doctrine of constructive fraud explaining that

“[when] the relations *between the contracting parties* appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood [emphasis supplied].”

As the New York Pattern Jury Instructions note, the clear and convincing standard applies to the burden placed on the fiduciary to prove the validity of the transaction:

Under the constructive fraud doctrine, where a fiduciary relationship exists between parties, “transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood, and that there was no fraud, mistake, or undue influence. Where those relations exist, there must be clear proof of the integrity and fairness of the transaction, or any instrument thus obtained will be set aside or held as invalid between the parties,” *Ten Eyck v Whitbeck*, 156 NY 341, 50 NE 963 (1898). Although in conventional fraud cases a party seeking rescission must prove the fraud, the burden of proof on that issue is shifted whenever the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality and that—as a result of (a) one side having superior knowledge derived from a fiduciary relation, (b) one side having an overmastering influence, or (c) the other side operating from weakness, dependence, or trust justifiably reposed—unfair advantage in the transaction is rendered probable. In such circumstance, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood, *Gordon v Bialstoker Center and Bikur Cholim, Inc.*, 45 NY2d 692, 412 NYS2d 593, 385 NE2d 285 (1978); *Cowee v Cornell*, 75 NY 91 (1878). *In such situations, the burden of proof is on the stronger party to show, by clear and convincing evidence, that no undue influence was used, Matter of Estate of Nealon*, 104 AD3d 1088, 962 NYS2d 481 (3d Dept 2013), *aff’d*, 22 NY3d 1045, 981 NYS2d 353, 4 NE3d 363 (2014). However, this shift in the burden of proof is applicable only in cases where the fiduciary or stronger party stood to gain as a result of the transaction, *Aoki v Aoki*, 27 NY3d 32, 29 NYS3d 864, 49 NE3d 1156 (2016).

N.Y. Pattern Jury Instr.–Civil 320 (emphasis added).

### Commentary

As can be seen from the above, much care should be taken in determining the different standards of pleading and proof for the various types of fraud claims that exist. The rules are not entirely consistent or clear so the relevant authorities must be analyzed and applied in a manner that best suits a party’s position.

← Richard Fromewick Authors, “Real Estate Tax Assessment Cap”

Richard Fromewick Authors, “Nassau County Real Estate Tax Increase In 2018” →



One Commerce Plaza, Suite 1705  
Albany, NY 12260

Phone: (518) 465-5551 | Fax: (518) 465-2033



990 Stewart Avenue, Suite 300  
Garden City, NY 11530

Phone: (516) 741-6565 | Fax: (516) 741-6706



1350 Broadway, Suite 501  
New York, NY 10018

Phone: (212) 239-4999 | Fax: (212) 239-1311



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# **Exhibit “B”**

January 30, 2018,  
Re: Claim Number: 509950 FRE 408 Settlement Communication

Dear Meyer, Suozzi, English & Klein, P.C,

The Law Firm of Higbee & Associates represents RM Media Ltd. Copyright images owned by RM Media Ltd were discovered on Meyer, Suozzi, English & Klein, P.C website(s). Please see the attached exhibits that show the use of the copyrighted works. Our client has no record of you having a license to use their copyrighted work and has authorized us to contact you on their behalf. If you have a license, please contact us immediately with a copy of that license at [claims@higbeeassociates.com](mailto:claims@higbeeassociates.com), please include the claim number (509950).

RM Media is the publisher of best selling images. People using its images without a license hurts its business and results in RM Media having to spend tens of thousands of dollars and countless hours a year stopping unauthorized use.

If you do not have a license, we believe the use of the work is a violation of The Copyright Act, Title 17 of the United States Code. As the violation occurred on a company website, the company is liable for the unauthorized use, including cases in which a website designer, employee or a third party is responsible for the inclusion of this image on your website. Even if your use of the image without a license was unintentional, for example; if the image was found on the internet and believed to be available for free use, it is still a violation of copyright law, and ceasing use of the images now may reduce the liability, but not release you or your organization from liability.

The unauthorized use of my client's work threatens my client's livelihood. While Nick Youngson, does have the right to bring a lawsuit for damages, my client is willing to settle this in an amicable way, out of court and without a lawsuit. I was asked to contact you and see if we can negotiate a settlement and save everyone the stress and costs of going to court. Please know that I only have a limited amount of time to settle this claim out of court.

If forced to go to court, my client will ask for the maximum relief possible, which may include statutory damages under 17 U.S.C. §504 for up to \$150,000 for intentional infringement or \$30,000 for unintentional infringement. If the use is unlicensed, we have reason to believe the use may also constitute a violation of 17 U.S. Code § 1202. Section 1202 violations often occur when an infringer removes or does not publish information that identifies the author when said author publishes such information on or near the copyrighted work. Violations of Section 1202 give rise to an additional minimum damage amount of \$2,500. My client would also ask the court to have you pay court costs and attorneys fees. Copyright lawsuits can result in judgments, wage garnishments and liens on property. In some instances, the business owner can be held individually liable.

This type of claim is often covered by business insurance. You may wish to forward this to your insurance carrier. You may also wish to hire an attorney.

**If we do not hear from you within 30 days from the date of this letter, we will have no choice but to take this to mean that you do not have a license and do not want to settle this matter out of court.**

To resolve this matter efficiently and amicably out of court, please follow these steps:

---

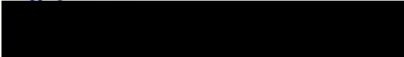
(1) Within five business days after receipt of this letter, remove all occurrences of the image from your website(s), cease using it in any way, and confirm in writing that you have done so.

**AND**

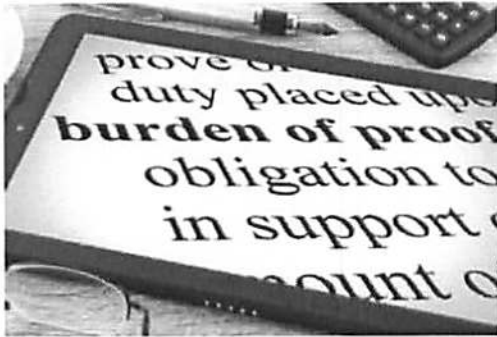
(2) Within seven business days after receipt of this letter, return to our firm the attached Release License, along with your payment in the form of a valid cashier's check or money order for \$████ payable to "**Higbee & Associates Client Trust Account**". This can be returned to us via US Mail. You can also pay over the phone or online at <http://copyright.higbeeassociates.com/resolution>. Your login is 509950. Your password is mqms9frg. If you choose to make your payment online, you can return the Release License via email to [claims@higbeeassociates.com](mailto:claims@higbeeassociates.com). Please include the case number (509950) in the subject line.

Please feel free to call or email us to discuss this matter, 800-716-1245 or send email to [claims@higbeeassociates.com](mailto:claims@higbeeassociates.com)

Sincerely,

  
Mathew K. Higbee  
Attorney at Law

## EXHIBIT A



### Infringing webpages:

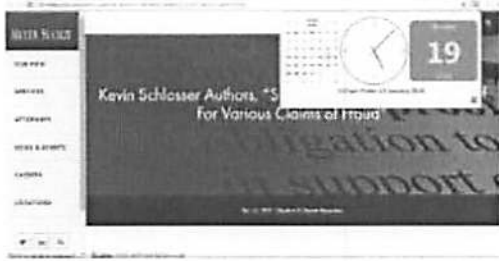
- <http://nyfraudclaims.com/standards-pleading-proof-claims-fraud/>
- <http://nyfraudclaims.com/>
- <http://msek.com/blog/kevin-schlosser-authors-standards-pleading-proof-various-claims-fraud/>
- <http://msek.com/news-events/news/>

### Infringing file locations:

- <http://nyfraudclaims.com/wp-content/uploads/2017/12/burden-of-proof.jpg>
- <http://nyfraudclaims.com/wp-content/uploads/2017/12/burden-of-proof.jpg>
- <http://msek.com/wp-content/uploads/2017/12/burden-of-proof.jpg>
- <http://msek.com/wp-content/uploads/2017/12/burden-of-proof-1024x683.jpg>

Infringing images and screenshots are shown below. You can receive copies of these images via email by sending a request to [infringements@higbeeassociates.com](mailto:infringements@higbeeassociates.com). The email must include the case number (509950) in the subject line.





# Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Maria A. Pallante*

United States Register of Copyrights and Director

Registration Number

**VAu 1-248-878**

Effective Date of Registration:

June 10, 2016

## Title

Title of Work: still-images-16-06-10

## Completion/Publication

Year of Completion: 2016

## Author

- Author: Nicholas Youngson  
Author Created: photograph  
Domiciled in: England

## Copyright Claimant

Copyright Claimant: Nicholas Youngson  
15 Church Road, Liverpool, L24 4AY, England

## Rights and Permissions

Name: Nicholas Youngson  
Email: [nick@nyphotographic.com](mailto:nick@nyphotographic.com)  
Telephone: 1514255987  
Address: 15 Church Road  
Liverpool L24 4AY England

## Certification

Name: N Youngson  
Date: June 10, 2016

Copyright Office notes: Basis for Registration: Unpublished collection



Mathew Higbee: CA # 241380, MI # P73980, MN # 0388759, NV # 11158, OR # 106514, UT # 11133, WA # 42755, TX # 24076924  
Ray Ngo: UT # 11936, NY # 4780706  
Melissa Clark: CA # 247998, AZ # 024644, UT # 11271, FL # 62465  
Virginia Kostmayer: CO # 45648, IL # 255433

**LETTER OF REPRESENTATION  
POWER OF ATTORNEY**

RE: NICK YOUNGSON and RM MEDIA, LTD.

To Whom It May Concern:

Please be advised that the Law Firm of Higbee & Associates has been retained by NICK YOUNGSON and RM MEDIA, LTD. regarding a copyright infringement matter. As such, we have been appointed as attorney in fact with full power and authority in determining the validity of the above matter and assist in any negotiation, settlement, and payment. We are further authorized to pursue any legal remedies available to our client as a result of this matter. Any attorney, staff member or agent of Higbee & Associates is hereby authorized to discuss any effort to settle and resolve the above matter.

Effective immediately, all communication (mail, phone, electronic or otherwise) regarding the above matter must be forwarded to Higbee & Associates at:

Higbee & Associates  
1504 Brookhollow Drive, Suite 112  
Santa Ana, CA 92705  
(714) 617-8385 Telephone

Sincerely,

  
\_\_\_\_\_  
Mathew Higbee      Ray Ngo      Melissa Clark      Virginia Kostmayer

The undersigned have retained Higbee & Associates and grant full power and authority as described above.

Date: April 19, 2016

Client: NICK YOUNGSON and RM MEDIA, LTD. Signature: 

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## **RAPID CONDITIONAL RELEASE LICENSE AGREEMENT**

This RAPID CONDITIONAL RELEASE LICENSE AGREEMENT ("Agreement") is entered into on January 30, 2018 ("Effective Date") by and between RM Media Ltd ("LICENSOR") and Meyer, Suozzi, English & Klein, P.C ("LICENSEE") (the "Parties" or individually the "Party").

The Parties agree as follows:

1. The Parties acknowledge and agree that this Agreement is made in resolution to the LICENSEE's alleged unlicensed use of image(s) referenced in the Exhibit(s) below ("Images").
2. LICENSOR hereby represents and warrants that it has the exclusive rights in the settlement and resolution of the claims related to the alleged unlicensed use of the copyrighted Images, including the rights to grant licenses for past and future use, and rights to grant releases from future claims.

### **GRANT OF RETROACTIVE LICENSE TO COVER PAST USE**

3. In consideration of the license and other consideration granted herein, LICENSEE will pay to LICENSOR the sum of \$ [REDACTED] in U.S. Dollars (the "Payment") within fourteen (14) days after the Effective Date.
  - a. Upon Payment in full, LICENSOR will grant LICENSEE a non-exclusive, non-sub licensable and non-assignable retroactive license, with the term commencing with the beginning of time and concluding upon the Effective Date.
  - b. The LICENSEE will be granted rights to use the Images only within the limited scope as shown in this Agreement.
  - c. The LICENSOR will retain all rights, interest and ownership in derivative works containing the Images, in whole or in part.
  - d. Payment shall be made payable to "Higbee & Associates Client Trust Account" and delivered to 1504 Brookhollow Dr., Suite 112, Santa Ana, CA 92705. Payment may also be made online at <http://copyright.higbeeassociates.com/resolution>

### **ADDITIONAL TERMS AND CONDITIONS**

4. Except for the agreements, obligations, and covenants arising under this Agreement, the Parties will release the other party from any and all claims arising from the use of the Images.
5. The Parties acknowledge that all terms of this Agreement are supported by legally sufficient consideration so as to make this Agreement binding and valid.
6. All of the Parties will pay their own costs and expenses incurred in negotiation and preparation and execution of this Agreement.
7. The terms of this Agreement are confidential; provided however, that each Party may disclose the terms of this Agreement, as necessary to enforce its terms, in response to valid legal process or as otherwise required by law, and/or to its financial advisors and/or legal advisors.
8. The Parties represent and warrant that they have read and understand the provisions of this Agreement and have full authority to execute and consummate the transactions contemplated by this Agreement.
9. This Agreement may not be modified or amended except by written agreement, signed by all Parties.
10. This Agreement, along with its terms and conditions will be binding upon and inure to the benefit of each of the Parties and to their heirs, executors, administrators, successors in interest and assigns.
11. The Parties acknowledge that if any provision or application of this Agreement is held invalid or unenforceable then any such provision will be deemed severed from this Agreement and

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the remaining provisions and applications of this Agreement will not be affected, but will remain valid and enforceable.

12. This Agreement will be governed by and construed in accordance with the laws of the State of California, without regard to conflict of law principles, notwithstanding the fact that one or more counterparts hereof may be executed outside of such state, or one or more of the obligations of the Parties hereunder are to be performed outside of such state. Any suit, action or proceeding to determine, construe or enforce any provision of this Agreement, or the rights of any party hereunder, will be brought in the State of California, and the Parties agree that jurisdiction will lie therein.

13. If a suit, action, arbitration or other proceeding of any nature whatsoever is instituted in connection with any controversy arising out of this Agreement, or to interpret or enforce any rights under this Agreement, the prevailing party is entitled to recover reasonable costs and attorney's fees from the other party.

14. Payments that are received more than 5 calendar days late will be assessed a \$40 late fee. Additionally, an interest rate based on a 15% per annum will be charged on overdue balances after 30 days.

15. This Agreement constitutes and contains the entire agreement between the Parties with respect to the alleged unlicensed use referred to in this Agreement and there are no other agreements, understandings or representations with respect to this subject matter, which are not expressly set forth herein.

\_\_\_\_\_  
Meyer, Suozzi, English & Klein,  
P.C  
On Behalf of  
Licensee(s) Meyer, Suozzi,  
English & Klein, P.C

\_\_\_\_\_  
Date



January 30, 2018

\_\_\_\_\_  
Mathew K. Higbee, Esq.  
on Behalf of Licensor(s)  
Nick Youngson

\_\_\_\_\_  
Date

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**CREDIT CARD PAYMENT AUTHORIZATION FORM**

The Law Firm of Higbee & Associates offers interest-free payment plans through our automated billing system. Sign and complete this form to authorize the Law Firm of Higbee & Associates to make the agreed upon credit or debit card or ACH payments. Licensee agrees to pay the settlement amount of \$5,280.00 in 1 automatic payment.

By signing this form you give us permission to bill your credit/debit card or bank account for the amount indicated on the dates above plus any additional fees, penalties, or interest charges which have accrued in accordance with the Rapid Conditional Release License Agreement ("Settlement Agreement"). This is permission for all transactions related to the Settlement Agreement, and does not provide authorization for any additional unrelated charges.

Please complete the information below:

**PAYMENT METHOD (Please Choose One & Provide Requested Information):**

**CREDIT CARD**

Name as it Appears on Card: \_\_\_\_\_

Credit Card #: \_\_\_\_\_

Expiration Date: \_\_\_\_\_ CCV (Security Code): \_\_\_\_\_

Billing Address: \_\_\_\_\_

**ACH / DIRECT DEPOSIT**

Name on the Account: \_\_\_\_\_

Account Type:  Savings  Checking

Account #: \_\_\_\_\_

Routing #: \_\_\_\_\_

Bank Name: \_\_\_\_\_

I hereby authorize The Law Firm of Higbee and Associates to automatically bill my account on the dates indicated in the payment plan above.

PRINT NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

COMPANY: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

I authorize the above named business to charge the credit card indicated in this authorization form according to the terms outlined above. This payment authorization is for the goods/services described above, for the amount indicated above only, and is valid for the specified use only. I certify that I am an authorized user of this credit card and that I will not dispute the payment with my credit card company; so long as the transaction corresponds to the terms indicated in this form.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronically filing with the Clerk of the Court using CM/ECF on this **20th** day of **July, 2018**, on all counsel or parties of record on the service list below.

**/s/ Rayminh L. Ngo**  
Rayminh L. Ngo, Esq.

**SERVICE LIST**

Kevin Schlosser  
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.  
990 Stewart Avenue, Suite 300  
Garden City, New York 11530  
kschlosser@msek.com