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**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 my law firm and I 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 member 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 my firm and I, 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 the law firm and myself, 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 my law firm nor I 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 my law firm and myself, 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 March 11, 2019, at Santa Ana, California.

A handwritten signature in black ink, appearing to read "Mathew K. Higbee", written over a horizontal line.

Mathew K. Higbee