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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CHARA CURTIS, et al.,

11 Plaintiffs,

12 v.

13 ILLUMINATION ARTS, INC., et al.,

14 Defendants.

CASE NO. C12-0991JLR

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

15 **I. INTRODUCTION**

16 Before the court is Plaintiffs Chara Curtis, Cynthia Aldrich, and Alfred Currier's
17 motion for partial summary judgment. (Mot. (Dkt. # 22).) The court has considered the
18 motion, all submissions filed in support and opposition thereto, the applicable law, and
19 the balance of the record.¹ Being fully advised, the court GRANTS Plaintiffs' motion.

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21 _____
22 ¹ No party has asked for oral argument, and the court deems this motion appropriate for disposition without it.

II. BACKGROUND

1
2 Plaintiffs wrote and illustrated three children’s books that are the subject of this
3 litigation: *Fun is a Feeling*, *All I See Is Part of Me*, and *How Far to Heaven?*
4 (collectively, “the Books”). (Compl. (Dkt. # 1) ¶¶ 11-16; Answer (Dkt. # 13) ¶¶ 11-16.)
5 Each of the Books is an original work that may be copyrighted under the laws of the
6 United States. (Compl. ¶ 11; Answer ¶ 11.) The copyright office issued certificates of
7 registration to Plaintiffs for each of the Books between 1991 and 1994. (Compl. ¶¶ 12-
8 16; Answer ¶¶ 12-16.)

9 Defendant Illumination Arts, Inc. (“IAI”) is a Washington corporation founded in
10 1987. (See Compl. ¶ 4; Answer ¶ 4; Kruckeberg Decl. (Dkt. # 24) Ex. A at 6 (“... IAI
11 has been an active publisher of books since its formation in 1987.”).) Defendant
12 Illumination Arts Publishing, LLC (“IAP”) is a Washington limited liability company
13 founded in 2011. (See Compl. ¶ 5; Answer ¶ 5; Resp. (Dkt. # 25) at 2 (“IAP was formed
14 on February 18, 2011.”).) Defendant John Thompson is both the president of IAI and the
15 manager of IAP. ((Kruckeberg Decl. Ex. A at 6; Thompson Decl. (Dkt. # 26) ¶¶ 2-3.)
16 He is the largest shareholder of IAI, the sole owner of IAP, and the sole operator of both
17 IAI and IAP. (Thompson Decl. ¶ 12.) Defendant Kimmie Lynn Thompson (formerly
18 Kim Hansen) is Vice President of Promotions for IAP. (Kruckeberg Decl. Ex. B at 10.)

19 Mr. Thompson has admitted that IAI “has gone through significant financial
20 woes.” (Thompson Decl. ¶ 4.) Mr. Thompson has testified: “I started [IAP] after my
21 personal bankruptcy in 2010 in order to try to rebuild and rebrand our authors’ work,
22 while keeping the collection of Illumination Arts inspiring children’s books alive.” (*Id.*

1 ¶ 5.) Under an “Agreement of Understanding” dated February 21, 2011, IAP assumed
2 operations of IAI and purported to take control of IAI’s inventories, accounts receivable,
3 and book-sale proceeds. (Kruckeberg Decl. Ex. A (Agreement of Understanding) at 6-7.)
4 Mr. Thompson signed the Agreement of Understanding on behalf of both IAI and IAP.
5 (*Id.* Ex. A at 8.) Under the Agreement of Understanding, “[u]ntil a sale of IAI assets has
6 been completed,” IAP is not to compensate Mr. and Ms. Thompson for their services
7 “except for the right to live in the fourth bedroom of the business office without paying
8 rent/utilities therefore [sic].” (*Id.* Ex. A at 7; *see also* Thompson Decl. ¶ 6 (“[M]y new
9 wife and I live in the office without pay”).) There was never a rental agreement
10 executed between IAP and the Thompsons. (Kruckeberg Decl. Ex. H (Defendants’
11 Responses to Plaintiffs’ Discovery Requests) at 15-16.) Mr. and Ms. Thompson provide
12 funds to pay for IAP expenses and obligations when IAI sales proceeds are insufficient.
13 (*Id.* Ex. A at 7; *see also* Thompson Decl. ¶ 6 (“I put the majority of my social security
14 check and outside income into keeping . . . [IAP] afloat.”); *id.* ¶ 13 (“To cover the costs
15 of keeping both businesses viable, [Ms. Thompson] has loaned some of her personal
16 funds and I have invested my own money.”).) Nevertheless, the Agreement of
17 Understanding states that if IAI ever sells its assets, then the purchaser of those assets
18 will pay Mr. and Ms. Thompson for any amounts they have “loaned” to IAP less an
19 amount equal to the Thompsons’ personal expenses which IAP has paid. (Kruckeberg
20 Decl. Ex. A at 7-8.)

21 IAI has received loans from its shareholder, Mr. Thompson, amounting to
22 approximately \$900,000.00. (Thompson Decl. ¶ 13 (stating that Mr. Thompson has

1 “loaned to” or “‘invested’ nearly \$900,000” in IAI); *see also* Kruckeberg Decl. Ex. A at 6
2 (“IAI has incurred debts totaling \$1.7 million, of which less than \$900,000 consists of
3 loans from shareholders.”.) IAI never issued any promissory notes memorializing any
4 loans from Mr. Thompson. (*See* Kruckeberg Decl. Ex. H at 71.) Instead, “[t]he loan
5 amount was calculated each year based on new advances by [Mr. Thompson] reduced by
6 payments to [Mr. Thompson]” (*Id.*) IAI no longer has any bank or other investment
7 accounts. (*Id.* at 74.)

8 Mr. Thompson stated in email correspondence with Mr. Curtis that he created IAP
9 “in order to (hopefully) hold off Bank of America and TWP,” two of IAI’s creditors.
10 (Curtis Decl. (Dkt. # 23) Ex. A at 6.) TWP America, Inc. was pursuing a claim against
11 IAI in New York State at the time IAI’s assets were transferred to IAP. (*See* Kruckeberg
12 Decl. Ex. C (attaching a copy of a \$50,370.36 judgment against IAI on behalf of TWP
13 America).) Mr. Thompson stated that ultimately the transfer of assets from IAI to IAP
14 was made for the purpose of avoiding a circumstance that “would result in no one but the
15 secured creditors getting anything.” (Curtis Decl. Ex. B at 9.) Mr. Thompson described
16 his plan in detail in email correspondence to Mr. Curtis:

17 As I told you a while back, [IAI] has one judgment with TWP [America,
18 Inc.] and another in the works with B of A [Bank of America]. Together
19 these total over \$100K. To avoid a liquidation which would result in no
20 one but the secured creditors getting anything, the inventories and operating
21 assets, including the inventory, were transferred to another company last
22 Feb [sic] in hopes we can secure a way to sell the company as an ongoing
operation. As I noted, any sales agreement which is negotiated must
specify that back royalties be paid even before secured creditors.

1 (*Id.*) In his response to Plaintiffs' motion for partial summary judgment, Mr. Thompson
2 has not disavowed any of the statements contained in the email correspondence described
3 above.

4 Between 1989 and 1992, Plaintiffs entered into publishing contracts with IAI for
5 each of the Books. (Compl. ¶¶ 19-21; Answer ¶¶ 19-21.) The publishing contracts are
6 valid and enforceable (Compl. ¶ 65; Answer ¶ 65), and provide for the following:

- 7 • IAI must provide Plaintiffs with quarterly royalty reports showing (1) royalties
8 due for the quarter, (2) cumulative royalties earned, and (3) the number of copies
9 of each book printed and bound (Compl. ¶ 23; Answer ¶ 23);
- 10 • All quarterly reports are due within 90 days after the end of each quarter (Compl. ¶
11 24; Answer ¶ 24);
- 12 • All royalties must be paid within 90 days after the end of each quarter (Compl. ¶
13 25; Answer ¶ 25);
- 14 • On written notice, Plaintiffs have the right to inspect IAI's books and records to
15 verify the quarterly and cumulative royalties due to them (Compl. ¶ 26; Answer ¶
16 26);
- 17 • Plaintiffs may terminate the publishing contracts if, after 10-days written notice
18 IAI fails to provide past-due statements of account and royalty payments (Compl.
19 ¶ 28; Answer ¶ 28); and
- 20 • The publishing contracts do not license electronic reproduction or distribution
21 rights to IAI (Compl. ¶ 27; Answer ¶ 27).

1 Plaintiffs received regular royalty payments through the quarter ending June 30,
2 2009. (Curtis Decl. ¶ 4.) Beginning with the quarter ending September 30, 2009, IAI
3 ceased sending Plaintiffs royalty statements and ceased paying Plaintiffs regular
4 royalties. (Kruckeberg Decl. Ex. H at 84-89 (Defendants' Responses to Request for
5 Admission ("RFA") Nos. 1-24).) Since that time, Defendants have made only one small,
6 unscheduled royalty payment to Plaintiffs. (Curtis Decl. ¶ 4.)

7 After Defendants ceased sending royalty statements and paying royalties,
8 Plaintiffs demanded, via telephone and email, that Defendants resume paying royalties
9 and sending statements. (Curtis Decl. ¶ 5.) In a letter to Mr. Thompson, dated July 14,
10 2011, Mr. Curtis demanded all past-due royalties. (*Id.* Ex. C.) Defendants, however,
11 continued to fail to pay royalties or provide royalty statements. (Kruckeberg Decl. Ex. H
12 at 32 (In Defendants' Responses to RFA Nos. 25-26 they admit that they failed to deliver
13 royalties and statements within 10 days of written demand).) In a letter to Mr. Thompson
14 dated August 8, 2011, Mr. Curtis terminated the publishing contracts with Illumination
15 Arts, Inc. for *All I See Is Part of Me* and *Fun Is a Feeling* (Curtis Decl. Ex. D), and in a
16 letter dated September 15, 2011, Mr. Curtis terminated the publishing contract for *How*
17 *Far to Heaven?* (*id.* Ex. H).

18 After terminating the publishing contracts, Plaintiffs requested an audit of
19 Defendants' books and records, and Defendants denied the request. (Kruckeberg Decl.
20 Ex. H at 90 (Defendants' responses to RFA Nos. 27-28).) In addition, Plaintiffs
21 requested to purchase the Books remaining in Defendants' inventory within 180 days of
22

1 terminating the publishing contracts, but Defendants denied this request as well. (*Id.*
2 (Defendants’ responses to RFA Nos. 29-30).)

3 Before terminating the publishing contracts, Plaintiffs discovered that Defendants
4 had made electronic copies of the Books available on BigUniverse.com, despite the fact
5 that the publishing contracts do not license digital rights for the Books to Defendants.
6 (Curtis Decl. ¶ 12.) In two separate letters to Mr. Thompson, Mr. Curtis demanded that
7 *All I See Is Part of Me* and *Fun Is a Feeling* be removed from BigUniverse.com. (*See id.*,
8 Exs. C-D.) Plaintiffs also discovered that full copies of the Books had been posted to
9 Google Books with the following notice: “Pages displayed by permission of Illumination
10 Arts Pub. Co. Copyright.” (*Id.* Ex. I at 2.) In a letter to Mr. Thompson, dated September
11 9, 2011, Mr. Curtis demanded that IAI remove the Books from any website. (*Id.*) Mr.
12 Curtis explicitly stated that IAI was infringing Defendants’ copyrights by making the
13 Books available without permission. (*Id.* (“[T]his violates my rights under 17 U.S.C.
14 Section 106.”).)

15 After Plaintiffs terminated the publishing contracts, Defendants continued making
16 copies of, distributing, and displaying the Books online and at trade shows. (Kruckeberg
17 Decl. Ex. H at 92-93 (Defendants’ Responses to RFA Nos. 41-43); *Id.* Ex. J (showing
18 Illumination Arts website images as of April 2, 2012 showing the Books for sale); *id.* Ex.
19 K (Illumination Arts Facebook page dated June 18, 2012, showing Ms. Thompson
20 displaying and selling one or more of the Books at a trade show); *id.* Ex. L (Illumination
21 Arts Facebook images dated May 26, 2012, digitally displaying Plaintiffs’ cover art for
22 the Books).) Defendants also continued to sell the Books (*see id.* Ex. M (excerpts of sales

1 reports for the Books showing sales after termination of publishing contracts)), despite
2 Plaintiffs' repeated requests to cease and desist (*see id.* Exs. J, K, L). On June 8, 2012,
3 Plaintiffs filed the present lawsuit alleging willful infringement of their copyrights. (*See*
4 *generally* Compl. (Dkt. # 1).) Even after Plaintiff's filed their complaint, Defendants
5 continued to sell the Books. (Kruckeberg Decl. Ex. M.)

6 Plaintiffs seek partial summary judgment on issues of (1) breach of contract, (2)
7 infringement, and (3) willfulness. (Mot. at 9.) Plaintiffs also seek an order permanently
8 enjoining Defendants from reproducing, distributing, or displaying the Books. (*Id.*)

9 III. ANALYSIS

10 A. Standards

11 Summary judgment is appropriate if the evidence, when viewed in the light most
12 favorable to the non-moving party, demonstrates "that there is no genuine dispute as to
13 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
14 P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Torres v. City of Madera*,
15 648 F.3d 1119, 1123 (9th Cir. 2011) ("Summary judgment is appropriate only if, taking
16 the evidence and all reasonable inferences drawn therefrom in the light most favorable to
17 the non-moving party, there are no genuine issues of material fact and the moving party is
18 entitled to judgment as a matter of law."). The moving party bears the initial burden of
19 showing that there is no genuine issue of material fact and that he or she is entitled to
20 prevail as a matter of law. *Celotex*, 477 U.S. at 323; *Furnace v. Sullivan*, 705 F.3d 1021,
21 1026 (9th Cir. 2013). If the moving party meets his or her burden, then the non-moving
22 party "must make a showing sufficient to establish a genuine dispute of material fact

1 regarding the existence of the essential elements of his case that he must prove at trial” in
2 order to withstand summary judgment. *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th
3 Cir. 2007).

4 In judging evidence at the summary judgment stage, the court does not make
5 credibility determinations or weigh conflicting evidence, but rather views all evidence
6 and draws all inferences in the light most favorable to the non-moving party. *T.W. Elec.*
7 *Serv., Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing
8 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *see also*
9 *Hrdlicka v. Reniff*, 631 F.3d 1044, 1048, 1051 (9th Cir. 2011); *Motley v. Parks*, 432 F.3d
10 1072, 1075 n. 1 (9th Cir. 2005) (en banc); *Miranda v. City of Cornelius*, 429 F.3d 858,
11 860 n. 1 (9th Cir. 2005). However, conclusory testimony in affidavits and motion papers
12 is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill*
13 *Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Similarly, “[w]hen
14 opposing parties tell two different stories, one of which is blatantly contradicted by the
15 record, so that no reasonable jury could believe it, a court should not adopt that version of
16 the facts” when ruling on the motion. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *see also*
17 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (“When the non-moving party
18 relies on its own affidavits to oppose summary judgment, it cannot rely on conclusory
19 allegations unsupported by factual data to create an issue of material fact.”) As the
20 Supreme Court has stated, “[the] mere existence of a scintilla of evidence . . . will be
21 insufficient; there must be evidence on which the jury could reasonably find for the [non-
22 moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

1 **B. Breach of Contract**

2 In their responsive memorandum, “Defendants admit that IAI and IAP breached
3 their obligations to pay the Plaintiffs’ royalties.” (Resp. (Dkt. # 25) at 3; Thompson
4 Decl. ¶ 7 (IAI and IAP do not dispute that unpaid royalties exist to Plaintiffs.”).)
5 Accordingly, they acknowledge that “summary judgment is proper as no fact issues exist
6 and Plaintiffs’ are entitled to judgment as a matter of law.” (*Id.*) Based on this
7 admission, the court GRANTS Plaintiffs’ motion for summary judgment with respect to
8 their claim for breach of contract against Defendants IAI and IAP.

9 **C. Piercing the Corporate Veil**

10 Although Defendants have acknowledged that both IAI and IAP are liable for
11 breach of contract, they assert that “IAI and IAP have different timeframes for liability.”
12 (Resp. at 3.) Defendants assert that IAI is liable for Plaintiffs’ breach of contract
13 damages from the date of its formation to the present, and that IAP’s liability is also
14 limited from the date of its formation (February 18, 2011) to the present. (*Id.* at 3-4 (“IAI
15 is, certainly liable from the date of formation to the present. IAP’s liability, however,
16 should only be for royalties due between February 18, 2011 (its date of formation) and
17 the present.”).) This would effectively limit Plaintiffs’ recovery because all of IAI’s
18 assets were purportedly transferred to IAP in the Agreement of Understanding. (*See*
19 *generally* Kruckeberg Decl. Ex. A.) Plaintiffs assert that both IAI and IAP are fully
20 liable for either’s breach of contract because IAP is a mere continuation of IAI. (Mot. at
21 12.) In addition, Plaintiffs assert that the court should disregard the corporate veil
22 between IAI and IAP and between the companies and Mr. and Ms. Thompson based on a

1 fraudulent transfer of assets from IAI to IAP made for the purpose of escaping liability to
2 IAI's creditors. (*Id.* at 13-15.) The Thompsons oppose any piercing of the corporate veil
3 between the companies or with respect to either of them personally. (Resp. at 3-6.)

4 Generally, a corporation purchasing the assets of another corporation does not
5 become liable for the debts and liabilities of the selling corporation. *Cambridge*
6 *Townhomes, LLC v. Pac. Star Roofing Inc.*, 209 P.3d 863, 868 (Wash. 2009). Likewise,
7 individual shareholders or owners are not ordinarily liable for the actions or debts of the
8 corporation. *Burns v. Norwesco Marine, Inc.*, 535 P.2d 860, 862-63 (Wash. Ct. App.
9 1975) (“The corporate form is of course frequently utilized to limit the personal liability
10 of its officers, directors and shareholders. And as a general rule, the corporate entity will
11 be respected by the courts.”). Indeed, “[t]he purpose of a corporation is to limit liability.”
12 *Meisel v. M & N Moders Hydraulic Press Co.*, 645 P.2d 689, 693 (Wash. 1982). The
13 general rule, however, does not apply if: “(1) there is an express or implied agreement
14 for the purchaser to assume liability; (2) the purchase is a de facto merger or
15 consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of
16 assets is for the fraudulent purpose of escaping liability.” *Cambridge Townhome*, 209
17 P.3d at 868 (quoting *Hall v. Armstrong Cork, Inc.*, 692 P.2d 787, 789-90 (Wash. 1984)).
18 The last two exceptions are potentially at issue here, and the court will consider each in
19 turn.

20 **1. Mere Continuation**

21 Plaintiffs assert that IAP should be fully liable with respect to any breach of
22 contract by IAI because IAP is a mere continuation of IAI. (Mot. at 12.) To determine

1 | whether a successor business is a mere continuation of the seller business, the court
2 | considers two factors: (1) whether there is a common identity between the officers,
3 | directors, and stockholders of the selling and purchasing companies, and (2) the
4 | sufficiency of the consideration running to the seller corporation in light of the assets
5 | being sold. *Cambridge Townhomes*, 209 P.3d at 868. In considering these factors, “the
6 | objective of the court is to discern whether the ‘purchaser represents merely a new hat for
7 | the seller.’” *Id.* (internal quotation marks omitted) (quoting *Cashar v. Redford*, 624 P.2d
8 | 194, 196 (Wash. Ct. App. 1981)).

9 | Under the standards set forth above, Plaintiffs have established on summary
10 | judgment that IAP is merely a “new hat” for IAI. First, the Agreement of Understanding
11 | that transfers IAI’s inventory and assets to IAP recites that Mr. Thompson is the
12 | President, Chairman of the Board, and sole active shareholder of IAI, as well as the only
13 | shareholder and the Manager of IAP. (Kruckeberg Decl. Ex. A at 6.) Further, Mr.
14 | Thompson has admitted that he is “the sole owner of IAP, the largest shareholder of IAI,
15 | and the sole operator of both IAP and IAI.” (Thompson Decl. ¶ 12.) Thus, there is no
16 | genuine issue of material fact that there is a common identity between the officers and
17 | shareholders or members of the two companies.²

18 | Despite the fact that the Agreement of Understanding recites that the sale of IAI
19 | “would create a current fair market sales price of \$300,000,” there is nothing in the

20 |
21 | ² The fact that the IAI is a corporation and IAP is a limited liability company with only
22 | one member does not alter the analysis of the first factor. *See Cambridge Townhomes*, 209 P.3d
at 868 (“The particular form of the business entity should not be determinative.”).

1 Agreement of Understanding to indicate that IAP paid anything for the transfer of IAI's
2 assets. (*See generally* Kruckeberg Decl. Ex. A.) Defendants have produced no evidence
3 in contravention of the forgoing. Indeed, the assertion in their responsive memorandum
4 that IAI's and IAP's liability for unpaid royalties should be limited based on the dates of
5 their formation is unsupported by any citation to the record. (*See Resp.* at 3-4.) Based on
6 the forgoing, the court concludes that the second factor is also met that there is
7 insufficient consideration running to IAI in light of the assets being sold to IAP.
8 Accordingly, the court GRANTS Plaintiffs' motion for summary judgment concluding
9 IAP is liable for IAI's breach of contract with respect to Plaintiffs as a mere continuation
10 of IAI.

11 **2. Fraudulent Transfer**

12 Plaintiffs also assert that the court should disregard the corporate distinction
13 between IAP and IAI and hold the Thompsons personally liable for IAI's and IAP's
14 breach of contract based on a fraudulent transfer of assets from IAI to IAP. (Mot. at 13-
15 15.) A court will pierce the corporate veil and find a corporate entity is one and the same
16 with another corporate entity when the corporate form has been intentionally used to
17 violate or evade a duty. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 271 P.3d 925,
18 930 (Wash. Ct. App. 2012). In addition, the corporate separateness that shields an owner
19 from liability may be disregarded under certain circumstances. *Id.* In order to disregard
20 the corporate form based on a fraudulent transfer of assets, the court evaluates two
21 factors: (1) the corporate form must be "used to violate or evade a duty," and (2)
22 disregard of the corporate form must be "necessary and required to prevent unjustified

1 | loss to the injured party.” *Meisel v. M & N Modern Hydraulic Press Co.*, 645 P.2d 689,
2 | 692 (Wash. 1982). “With regard to the first element, the court must find an abuse of the
3 | corporate form.” *Id.* “Such abuse typically involves fraud, misrepresentation, or some
4 | form of manipulation of the corporation to the stockholder’s benefit and creditor’s
5 | detriment.” *Id.* (internal quotations omitted). “With regard to the second element,
6 | wrongful corporate activities must actually harm the party seeking relief so that disregard
7 | is necessary.” *Id.* at 693. The court will address each element in turn.³

8 | First, the court considers whether it should pierce the corporate veil or disregard
9 | the corporate distinction between IAI and IAP on this additional ground. Plaintiffs have
10 | offered substantial evidence with respect to the first element. On February 16, 2011,
11 | TWP America, Inc., moved for default judgment against IAI in the Supreme Court of the
12 | State of New York. (Kruckeberg Decl. Ex. C at 12.) On February 18, 2011, Mr.
13 | Thompson created IAP. (Thompson Decl. ¶ 9.) On February 21, 2011, by signing the
14 | Agreement of Understanding on behalf of both IAI and IAP, Mr. Thompson transferred
15 | all of IAI’s assets to IAP. (*See generally* Kruckeberg Decl. Ex. A.) On July 13, 2011,

16 |
17 | ³ RCW 25.15.060 provides in part:

18 | Members of a limited liability company shall be personally liable for any
19 | act, debt, obligation, or liability of the limited liability company to the
20 | extent that shareholders of a Washington business corporation would be
21 | liable in analogous circumstances. In this regard, the court may consider
22 | the factors and policies set forth in established case law with regard to
piercing the corporate veil

(*Id.*) Accordingly, Washington case law with respect to piercing the corporate veil applies
equally to both IAI, which is a corporation, and IAP, which is a limited liability company.

1 the Supreme Court of the State of New York entered a judgment against IAI and in favor
2 of TWP America, Inc. in an amount of \$50,370.36. In addition, Mr. Thompson has
3 indicated in email correspondence with Mr. Curtis that IAI is indebted to Bank of
4 America in a similar amount. (*See* Curtis Decl. Ex. B at 9 (“[IAI] has one judgment with
5 TWP and another in the works with B of A. Together these total over \$100K.”).)

6 After reciting that IAI has incurred debts in excess of \$1.7 million, the Agreement
7 of Understanding states that IAP was “formed . . . with the express intention of
8 continuing to maintain the IAI line of books as a viable business. . . .” (Kruckeberg Decl.
9 Ex. A at 7.) The Agreement also states that “[a]ny new agreement regarding the sale of
10 IAI assets must include a provision that net amounts which [Mr. Thompson] or [Ms.
11 Thompson] loan to IAP following the date [of the agreement] . . . shall be repaid as a
12 priority item following . . . [certain] royalty payments” (*Id.* at 7-8.)

13 In email correspondence with Mr. Chara dated August 26, 2011, Mr. Thompson
14 admitted that IAI “transferred its operating assets (inventory and accounts receivable) to a
15 newly formed company [IAP] . . . in order to (hopefully) hold off Bank of America and
16 TWP long enough to find a suitable buyer that can keep the IAI collection moving
17 forward.” (Curtis Decl. Ex. A at 6.) Again, on October 12, 2011, in further email
18 correspondence with Mr. Curtis, Mr. Thompson stated:

19 As I told you a while back, [IAI] has one judgment with TWP and another
20 in the works with B of A. Together these total over \$100K. To avoid a
21 liquidation which would result in no one but the secured creditors getting
22 anything, the inventories and operating assets, including the inventory,
were transferred to another company [IAP] last Feb in hopes we can secure
a way to sell the company as an ongoing operation.

1 (*Id.* Ex. B at 9.)

2 Abuse of the corporate form may include: (1) the diversion of assets from one
3 corporation to another entity; and (2) the manipulation of assets and liabilities between
4 entities so as to concentrate the assets in one and the liabilities in another. *See* Thomas
5 V. Harris, Washington’s Doctrine of Corporate Disregard, 56 Wash. L. Rev. 253, 260 n.
6 38 (1980); *Meisel*, 645 P.2d at 692 (citing Harris article above). Here, the record detailed
7 above supports the conclusion that Mr. Thompson diverted assets owned by IAI to IAP
8 leaving IAI unable to pay debts to its creditors. IAI owes a duty to its creditors to pay its
9 debts, and it has been rendered incapable of doing so by the transfer of all of its assets
10 and accounts receivable to IAP.

11 In addition, with respect to the second element, disregard of the corporate
12 distinction between IAI and IAP is necessary to prevent unjustified losses to Plaintiffs.
13 Defendants admit they failed to deliver royalties due for quarters ending September 30,
14 2009 through June 30, 2012. (Kruckeberg Decl. Ex. H at 89.) Nevertheless, Defendants
15 assert that IAP, the entity to which Mr. Thompson transferred all of IAI’s assets, is “only
16 liable for royalties due between February 18, 2011 (its date of formation) and the
17 present,” whereas IAI would be liable for unpaid royalties due prior to that date. (*See*
18 *Resp.* at 3-4.) Defendants’ position would effectively render Plaintiffs incapable of
19 collecting any unpaid royalties due prior to February 18, 2011 due to the transfer of all of
20 IAI’s assets to IAP.

21 Defendants offer scant evidence in contravention of the forgoing facts. In his
22 declaration, Mr. Thompson offers conclusory statements in an attempt to raise an issue of

1 fact. He states that “[n]either IAI nor IAP has been used for an improper purpose, nor
2 have the corporate forms been abused.” (Thompson Decl. ¶ 10.) He also states that he
3 has “observed all corporate legal requirements in running the business.” (*Id.* ¶ 17.)
4 Neither of these statements creates a genuine issue of material fact with respect to the
5 abuse of IAI’s and IAP’s corporate forms.

6 “Conclusory allegations unsupported by factual data will not create a triable issue
7 of fact” allowing a party to survive a summary judgment motion. *Marks v. United States*,
8 578 F.2d 261, 263 (9th Cir. 1978). “The mere existence of a scintilla of evidence in
9 support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252. As the
10 Ninth Circuit has stated:

11 Self-serving affidavits may be cognizable on motions for summary
12 judgment if they go beyond conclusions and include facts that would be
13 admissible in evidence, *see United States v. Shumway*, 199 F.3d 1093,
14 1103-04 (9th Cir. 1999), but “a conclusory, self-serving affidavit, lacking
15 detailed facts and any supporting evidence, is insufficient to create a
16 genuine issue of material fact,” *FTC v. Publ’g Clearing House, Inc.*, 104
17 F.3d 1168, 1171 (9th Cir. 1997); *see also Rodriguez v. Airborne Express*,
265 F.3d 890, 902 (9th Cir. 2001) (summary judgment inappropriate where
plaintiff set forth facts directly relevant to claim with “great specificity”);
McLaughlin, 849 F.2d at 1206 (nonmoving party survived summary
judgment where he relied on sworn affidavit that included specific factual
averments, sworn answers to interrogatories, and payroll documentation
supporting his factual allegations).

18 *Burchett v. Bromps*, 466 Fed. App’x 605, 606-07 (9th Cir. 2012) (unpublished). Here,
19 Mr. Thompson merely states in a conclusory fashion that neither IAI nor IAP have been
20 used for an improper purpose and that their corporate forms have not been abused.
21 (Thompson Decl. ¶¶ 10, 17.) He does not bolster these conclusions with any supporting
22 facts and does not deny any of the specific facts stated above. Thus, he cannot survive

1 summary judgment on this issue. Accordingly, the court rules on summary judgment that
2 the corporate veil between IAI and IAP has been pierced and both entities will be subject
3 to the same liability with respect to Plaintiffs' claims.

4 The court, however, declines to pierce the corporate veil with respect to Mr.
5 Thompson's and Ms. Thompson's personal liability on summary judgment. Mr.
6 Thompson has testified that neither his nor Ms. Thompson's bank accounts were ever
7 comingled with IAI's or IAP's bank accounts. (Thompson Decl. ¶ 16.) Although
8 undisputed evidence establishes that Mr. Thompson transferred the assets of IAI to IAP
9 to avoid a duty to IAI's creditors, there is no evidence presently before the court that
10 either of the Thompsons personally dissipated any of IAI's or IAP's assets. Instead, the
11 evidence before the court is that the Thompsons pay for IAP expenses when IAI's
12 proceeds do not cover operating costs either through personal investments in or loans to
13 the companies. (*See* Kruckeberg Decl. Ex. A at 7 ("It is anticipated that [the Thompsons]
14 will provide funds in order to pay IAP expenses and obligations when net proceeds from
15 selling IAI books are not sufficient"); Thompson Decl. ¶ 13 ("To cover the costs of
16 keeping both [IAI and IAP] viable, [Ms. Thompson] has loaned some of her personal
17 funds and I [Mr. Thompson] have invested my own money.").)

18 Plaintiffs also assert that the Thompsons "conduct the business as their personal
19 enterprise . . . [because they] liv[e] in 'the fourth bedroom of the business office' instead
20 of receiving compensation from the business." (Mot. at 14 (quoting Kruckeberg Decl.
21 Ex. A).) They also point to the provision in the Agreement of Understanding that
22 requires any purchaser of IAI's assets to pay off any loans the Thompsons make to IAP

1 offset by any amount IAP has paid for the Thompsons' personal expenses. (*Id.*) Yet,
2 because IAI's assets have not been sold yet, there is no evidence that any of the foregoing
3 activities have actually harmed Plaintiffs. Without such evidence, the court cannot
4 conclude that Plaintiffs have established the second element necessary for disregarding
5 IAI's and IAP's corporate form and finding the Thompsons personally liable.
6 Accordingly, the court denies this aspect of Plaintiffs' motion for summary judgment,
7 and the issue of the Thompsons' personally liability remains for trial.

8 **D. Willful Copyright Infringement**

9 Plaintiffs also move for summary judgment that Defendants infringed Plaintiffs'
10 copyright of the Books, the infringement was willful, and the Thompsons are both
11 directly liable for the infringement and secondarily liable for IAI's and IAP's
12 infringement. (Mot. at 15-19.) As discussed below, because the court finds that the
13 Thompsons have admitted to directly infringing Plaintiffs' copyrights, there is no need
14 for the court to reach the issue of the Thompsons' secondary liability. The court will
15 address the issues of infringement and willfulness in turn.

16 To establish a prima facie case of copyright infringement, Plaintiffs must
17 demonstrate (1) ownership of a valid copyright, and (2) copying of constituent elements
18 of the work that are original. *Wash. Show Co. v. A-Z Sporting Goods, Inc.*, 704 F.3d 668,
19 674 (9th Cir. 2012). While a copyright owner may license its exclusive rights to another
20 person, the licensee infringes the owner's copyright when the licensee reproduces,
21 distributes, or displays the work after the copyright owner has terminated the licensee's
22 license. *See generally Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993) ("After

1 the agreement is terminated, any further distribution would constitute copyright
2 infringement.”); *Carson v. Verismart Software*, No. C 11-03766 LB, 2012 WL 1038662,
3 at *4 (N.D. Cal. Mar. 27, 2012). In addition, the licensee may be liable for copyright
4 infringement if the licensee exceeds the scope of the license. *Effects Assocs., Inc. v.*
5 *Cohen*, 908 F.2d 555, 558 n. 5 (9th Cir. 1990) (explaining that a party may be liable for
6 copyright infringement when the use of the copyrighted materials exceeded the scope of
7 the implied license (citing *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984))).

8 Here, Defendants admit that Plaintiffs own valid copyrights in the Books.⁴
9 (Kruckeberg Decl. Ex. H at 90 (RFA No. 31).) Defendants admit that Plaintiffs
10 terminated the publishing contracts, and therefore any license to reproduce, distribute or
11 display the Books.⁵ (*Id.* at 92 (RFA No. 40).) Defendants admit that they reproduced,
12 distributed and displayed the Books after Plaintiffs terminated the publishing agreements
13 and Defendants’ license to do so.⁶ (*Id.* at 92-93 (RFA Nos. 41-43).)

15
16 ⁴ “**REQUEST FOR ADMISSION NO. 31:** Admit that Plaintiffs are the owners of
copyrights in the Books. **ANSWER:** Admit.” (Kruckeberg Decl. Ex. H at 90.)

17 ⁵ “**REQUEST FOR ADMISSION NO. 41:** Admit that you made copies of the Books,
18 including images from the Books, in whole or in part after the Authors terminated the Publishing
Agreements. **ANSWER:** Admit.” (Kruckeberg Decl. Ex. H at 92.)

19 ⁶ “**REQUEST FOR ADMISSION NO. 41:** Admit that you made copies of the Books,
20 including images from the Books, in whole or in part after the Authors [Plaintiffs] terminated the
Publishing Agreements. **ANSWER:** Admit.

21 **REQUEST FOR ADMISSION NO. 42:** Admit that you distributed the Books or copies
22 of the Books, including images from the Books or copies of images from the Books, in whole or
in part after the Authors [Plaintiffs] terminated the Publishing Agreements. **ANSWER:** Admit.

1 In their discovery requests, Plaintiffs specify that “‘You’ means IAI, IAP, J.
2 Thompson, and K. Thompson who, collectively formerly published the Books, as well as
3 their members, agents, servants, attorneys, analysts, employees, former employees,
4 predecessors and successors in interest, other representatives, and others who are in
5 possession of, or may have obtained information for or on behalf of, any of the
6 aforementioned persons.” (Kruckeberg Decl. Ex. H at 61.) Defendants did not object to
7 this definition, or otherwise limit their responses to Plaintiffs’ requests for admission to a
8 smaller subset of Defendants. Accordingly, all Defendants (IAI, IAP, Mr. Thompson,
9 and Ms. Thompson) have admitted to the foregoing facts. Defendants’ admitted acts
10 infringed upon Plaintiffs’ exclusive rights to control their work. Accordingly, the court
11 grants this aspect of Plaintiffs’ motion for summary judgment and holds that Defendants
12 IAI, IAP, Mr. Thompson, and Ms. Thompson are each directly liable for copyright
13 infringement of the Books.⁷

15 **REQUEST FOR ADMISSION NO. 43:** Admit that you displayed the Books or copies
16 of the Books, including images from the Books or copies of images from the Books, in whole or
17 in part after the Authors [Plaintiffs] terminated the Publishing Agreements.” **ANSWER:**
18 Admit.” (Kruckeberg Decl. Ex. H at 92-93.)

18 ⁷ As discussed above, the Thompsons have admitted that they are directly liable for
19 infringement of Plaintiffs’ copyrights. (See Kruckeberg Decl. Ex. H (Defendants’ responses to
20 RFAs) at 90, 92-93; see *id.* at 61 (defining term “you” to include IAI, IAP, Mr. Thompson, and
21 Ms. Thompson).) Plaintiffs, however, also assert that the Thompsons are secondarily liable for
22 IAI’s and/or IAP’s infringement (Mot. at 18-19), and that the Thompson’s have failed to provide
any response with respect to this issue of their secondary liability (Reply (Dkt. # 27) at 2). A
defendant is secondarily liable for copyright infringement when the defendant exercises
“requisite control” over the direct infringer and derives a financial benefit from the direct
infringement. *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1155 (9th Cir.
2007). A defendant “exercises control over a direct infringer when he has both a legal right to
stop or limit the directly infringing conduct, as well as the practical ability to do so.” *Id.*

1 Plaintiffs also assert that Defendants' infringement was willful. The Copyright
2 Act provides an additional damage remedy if a plaintiff can show that infringement of his
3 or her rights was willful. *Wash. Shoe*, 704 F.3d at 674 (citing 17 U.S.C. § 504(c)(2)).
4 The court may find "willfulness" based on either intentional behavior or reckless
5 behavior of the infringer. *Id.* (citing *Barboza v. New Form, Inc.*, 545 F.3d 702, 707 (9th
6 Cir. 2008)). To prove willfulness, a plaintiff must show (1) that the defendant was
7 actually aware of the infringing activity, or (2) that the defendant's actions were the result
8 of reckless disregard for, or willful blindness to, the copyright holders' rights. *Id.*
9 Evidence that the infringer has been given notice of the infringement "is perhaps the most
10 persuasive evidence of willfulness." *Id.* (quoting *Chi-Boy Music v. Charlie Club, Inc.*,
11 930 F.2d 1224, 1227 (7th Cir. 1991)). In this case the evidence, as described above, is
12 overwhelming that Defendants knew of their infringement. As discussed above,
13 Plaintiffs provided unequivocal notice that the continued reproduction, distribution, and
14 display of the Books would constitute infringement. Despite this notice, Defendants
15 continued to infringe Plaintiffs' copyrights in the Books.

16 Further, in their responsive memorandum and in Mr. Thompson's declaration,
17 Defendants neither cite to nor offer any evidence in contravention to Plaintiffs' assertion
18

19 Although Plaintiffs assert that they are entitled to summary judgment on this issue because
20 Defendants failed to respond, Plaintiffs provided scant evidence with respect to the financial
21 benefit the Thompsons' personally derived from any infringement, and scant evidence of Ms.
22 Thompson's legal right to stop or limit the infringement or her practical ability to do so.
Nevertheless, because the Thompsons' have admitted to direct infringement of Plaintiff's
copyrights, it is unnecessary for the court to rule on this issue, and it therefore declines to do so.

1 of willfulness. (*See generally* Resp.; Thompson Decl.) Instead, Defendants offer a near
2 specious argument that Seventh Amendment to the United States Constitution, providing
3 for the right to a jury trial, prohibits any summary adjudication of the issue of willfulness
4 and statutory damages under the Copyright Act, 17 U.S.C. § 504(c). (Resp. at 6-7.) This
5 assertion is patently wrong. “It is established law that the Seventh Amendment right to a
6 trial by jury does not preclude the granting of a summary judgment where there is no
7 genuine issue of material fact.” *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505
8 F.2d 1199, 1203 (9th Cir. 1974); *see also In re Healthcentral.com*, 504 F.3d 775, 787
9 (9th Cir. 2007) (reasoning that court’s ruling on dispositive motions does not affect a
10 party’s Seventh Amendment right to a jury trial as these motions merely address whether
11 trial is necessary at all).⁸ Accordingly, the court grants Plaintiffs’ motion for summary
12 judgment that Defendants’ infringement of Plaintiffs’ copyrights of the Books was
13 willful.

14 **E. Permanent Injunction**

15 Plaintiffs also seek the imposition of a permanent injunction against Defendants
16 prohibiting any further violation of Plaintiffs’ copyrights in the Books. The Copyright
17 Act provides that a court may “grant temporary and final injunctions on such terms as it
18 may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C.

19
20 ⁸ Defendants’ reliance on *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340,
21 344 (1998) is misplaced. The issue in *Feltner* was whether a bench trial satisfies one’s right to a
22 jury trial. *Id.* at 345. The Supreme Court held that it does not. *Id.* at 355. The entire analysis of
the case revolves around the distinction between courts sitting in equity and courts of law. *Id.*
352-53. *Feltner* says nothing about a trial court’s authority to resolve undisputed legal issues on
summary judgment.

1 § 502(a). “The Copyright Act provides the owner of a copyright with a potent arsenal of
2 remedies against an infringer of his work, including an injunction to restrain the infringer
3 from violating his rights” *Sony Corp. of Am. v. Universal City Studios*, 464 U.S.
4 417, 433-34 (1984). When liability for copyright infringement has been established, a
5 permanent injunction will be granted if there is a threat of continuing violations. *MAI*
6 *Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993).

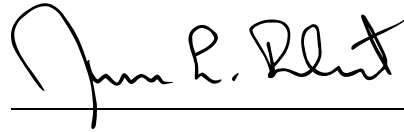
7 Plaintiffs assert that a permanent injunction is necessary because Defendants
8 continued to infringe Plaintiffs’ copyrights in the Books well after Plaintiffs demanded
9 that the infringement stop. In addition, Defendants are still in possession of copies of the
10 Books and the means of producing them, which increases the risk of a continuing
11 violation. Defendants offer no opposition to the imposition of a permanent injunction on
12 summary judgment. (*See generally* Resp.; *see also* Reply at 4.) Accordingly, the court
13 will grant this portion of Plaintiffs’ motion, permanently enjoin Defendants from
14 infringing Plaintiffs’ copyrights in the Books, and order Defendants to return to Plaintiffs
15 all infringing copies of the Books and all means, electronic or otherwise, of reproducing
16 the Books.

17 **IV. CONCLUSION**

18 Based on the foregoing, the court GRANTS in part and DENIES in part Plaintiffs’
19 motion for partial summary judgment (Dkt. # 22). Because the court has determined on
20 summary judgment that Defendants are liable for willful copyright infringement, the
21 court also hereby permanently ENJOINS Defendants from continued infringement of
22 Plaintiffs’ copyrights in the Books, and ORDERS Defendants to return to Plaintiffs all

1 | infringing copies of the Books and all means, including electronic means, of reproducing
2 | the Books within ten days of the date of this order.

3 | Dated this 29th day of May, 2013.

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5 | _____
6 | JAMES L. ROBART
7 | United States District Judge

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