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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 ON PLAINTIFFS'
SECOND MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND SECOND
MOTION FOR SANCTIONS

15 **I. INTRODUCTION**

16 Before the court are two motions: (1) Plaintiffs Chara Curtis, Cynthia Aldrich,
17 and Alfred Currier's second motion for partial summary judgment (2d SJ Mot. (Dkt. #
18 32)); and (2) Plaintiffs' second motion for sanctions (2d Sanc. Mot. (Dkt. # 30)). The
19 court has considered both motions, all submissions filed in support of and opposition to
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1 the motions, the balance of record, and the applicable law. Being fully advised,¹ the
2 court GRANTS in part and DENIES in part Plaintiffs' second motion for partial
3 summary judgment and GRANTS in part and DENIES in part Plaintiffs' second motion
4 for sanctions.

5 **II. BACKGROUND**

6 **A. Plaintiffs' Second Motion for Partial Summary Judgment**

7 This case involves claims for breach of contract and copyright infringement. (*See*
8 *generally* Compl. (Dkt. # 1).) On May 29, 2013, the court granted in part and denied in
9 part Plaintiffs' first motion for partial summary judgment. (*See* 5/29/13 Order (Dkt.
10 # 29).) The court ruled that Defendants Illumination Arts, Inc. ("IAI") and Illumination
11 Arts Publishing, LLC ("IAP") are liable to Plaintiffs for breach of contract. (*Id.* at 10,
12 13.) The court ruled that IAP is liable for IAI's breach of contract because it is a mere
13 continuation of IAI and that both entities will be subject to the same liability with respect
14 to Plaintiff's claims because the corporate veil between IAI and IAP has been pierced.
15 (*Id.* at 13, 18.) The court declined to pierce the corporate veil with respect to Defendants
16 John Thompson's and Kimmie Lynn Thompson's personal liability because there was no
17 evidence before the court that either of the Thompsons personally dissipated any of IAI's
18 or IAP's assets or that their activities actually harmed Plaintiffs. (*Id.* at 18-19.) Finally,
19 the court ruled that all Defendants were liable for copyright infringement and that the

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21 ¹ No party has requested oral argument with respect to either motion. The court deems
22 both motions to be appropriate for disposition without oral argument.

1 infringement was willful. (*Id.* at 19-23.) Based on the foregoing, the court also granted
2 Plaintiffs a permanent injunction and ordered Defendants to return to Plaintiffs all
3 infringing copies of Plaintiffs' books. (*Id.* at 23-24.) Plaintiffs now seek an additional
4 order on summary judgment with respect to damages for breach of contract and statutory
5 damages for willful copyright infringement. (*See generally* 2d SJ Mot.)

6 With respect to breach of contract damages, Plaintiffs assert that between 1998
7 and 2011, Defendants sold 77,869 copies of the books at issue: (1) 4,786 copies of *How*
8 *Far to Heaven?*, (2) 19,328 copies of *Fun Is a Feeling*, and (3) 53,755 copies of *All I See*
9 *Is a Part of Me*. (*See* 6/5/13 Kruckeberg Decl. re: SJ (Dkt. # 34) Exs. A-C.) The retail or
10 list price for each book is \$15.95. (*See id.*; 3/28/13 Kruckeberg Decl. (Dkt. # 24) Ex. J.)
11 The publishing agreements for *Fun Is a Feeling* provide that each author is to receive a
12 royalty of 5% for the first 10,000 copies sold and 6.25% for the next 20,000 copies sold.
13 (*Id.* Exs. F at 3, G at 4.) Similarly, the publishing agreements for *How Far to Heaven?*
14 provide for each author to receive a royalty of 5% for the first 10,000 copies sold and
15 6.25% for the next 20,000 copies sold. (*Id.* Exs. D at 3-4, E at 4.) Accordingly, Plaintiffs
16 calculate their royalty rate for all sales of all books as follows: \$53,526.61 for Mr. Curtis,
17 \$49,709.77 for Ms. Aldrich, and \$3,816.84 for Mr. Currier. (*See* 2d Sanc. Mot. at 9-10.)
18 Comparing these figures to available tax records, Plaintiffs also calculate that Mr. Curtis
19 was underpaid \$5,790.84 or roughly 10.82%. (*See* 6/5/13 Curtis Decl. (Dkt. # 33) ¶ 3,
20 Ex. A.)

21 Plaintiffs do not, however, provide direct evidence of the amount of royalty
22 underpayments with respect to Ms. Aldrich and Mr. Currier. Rather, Plaintiffs infer that,

1 if Defendants had permitted an audit as required by the publishing contracts between
2 Plaintiffs and IAI, Ms. Aldrich and Mr. Currier could have expected to find and recoup
3 similar underpayments in the amounts of \$5,377.91 and \$412.93, respectively. (*See* Mot.
4 at 10.)

5 Plaintiffs note that because the court denied their motion to pierce the corporate
6 veil between the corporate entities, IAI and IAP, on the one hand, and the Thompsons, on
7 the other hand, their claim for contract damages is limited to IAI and IAP. (*See* Mot. at 8,
8 n.1.) However, if the court were to grant their pending motion for sanctions, then
9 Plaintiffs would ask the court to find Mr. Thompson and Ms. Thompson jointly and
10 severally liable with IAI and IAP. (*See id.*)

11 In addition to damages for their breach of contract claim, Plaintiffs seek \$150,000
12 each as maximum statutory damages under 17 U.S.C. § 504(c)(1)-(2) for willful
13 copyright infringement. (2d SJ Mot. at 4-5.) Defendants provided no argument or
14 evidence in contradiction to Plaintiffs' evidence with respect to Plaintiffs' claimed
15 contract and willful copyright infringement damages.

16 **B. Plaintiffs' Second Motion for Sanctions**

17 Plaintiffs have also moved separately for additional sanctions against Defendants.
18 (*See generally* 2d Sanc. Mot.) On November 29, 2012, Plaintiffs served Defendants with
19 a set of discovery requests that included interrogatories, requests for the production of
20 documents, and requests for admission. (1/21/13 Kruckeberg Decl. (Dkt. # 17) ¶ 2,
21 Ex. A.) By January 31, 2013, Plaintiffs had received no responses or objections to any of
22 the discovery requests (*id.* ¶ 12), and they moved to compel responses and for sanctions

1 (*see generally* Mot. to Compel (Dkt. # 16)). Defendants filed no response to Plaintiffs’
2 motion to compel. (*See* 2/20/13 Order (Dkt. # 19) at 3.) On February 20, 2013, the court
3 granted Plaintiffs’ motion to compel, found that Defendants had waived any objections to
4 Plaintiffs’ discovery requests, and ordered Defendants to “provide complete responses . .
5 . no later than March 1, 2013.” (*Id.* at 6, 8.) In addition, the court ordered Defendants to
6 pay sanctions to Plaintiffs in the form of Plaintiffs’ reasonable expenses and attorneys’
7 fees incurred in bringing the . . . [discovery] motion.” (*Id.* at 8.)

8 On February 20, 2013, the same day as the court’s ruling on discovery and
9 sanctions above, Defendants served their initial answers to Plaintiffs’ discovery requests.
10 (*See* 6/5/13 Kruckeberg Decl. re Sanc. (Dkt. # 31) Ex. A.) Despite the court’s order
11 stating that Defendants had waived any objections to Plaintiffs’ discovery requests,
12 Defendants objected to requests for production and interrogatories related to Ms.
13 Thompson’s financial records. (*See id.*) Between February 27 and February 29, 2013,
14 Defendants began producing financial records relating to Mr. Thompson, IAI, and IAP,
15 but they produced no information regarding Ms. Thompson’s financial records. (*Id.* ¶ 6.)
16 To date, Defendants have produced no documents or information related to Plaintiffs’
17 discovery requests concerning Ms. Thompson. Plaintiffs assert that they have been
18 prejudiced by Defendants’ failure to produce any of the requested financial information
19 concerning Ms. Thompson because Plaintiffs have been unable to establish their claim
20 that the corporate veil should be pierced with respect to Ms. Thompson. (*See* 2d Sanc.
21 Mot. at 4-5.) Indeed, the court previously declined to pierce the corporate veil with
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1 respect to Ms. Thompson because “there [wa]s no evidence . . . that either of the
2 Thompsons personally dissipated any of IAI’s or IAP’s assets.” (5/29/13 Order at 18.)

3 On June 20, 2013, after Plaintiffs had filed their present motion for sanctions, and
4 after the discovery and dispositive motions cutoff,² Defendants finally produced copies of
5 bank statements for IAP’s Chase checking and savings accounts (6/28/13 Kruckeberg
6 Decl. (Dkt. # 41) ¶ 2, Ex. A), copies of bank statements for Mr. Thompson’s and
7 Arriana Thompson’s³ Bank of America checking and savings accounts (*id.* ¶ 3, Ex. B),
8 and copies of bank statements for IAI’s Bank of America checking and savings accounts
9 (*id.* ¶ 4, Ex. C). Defendants, however, produced no records related to Ms. Thompson’s
10 bank accounts.

11 Plaintiffs assert that this new evidence, produced after the dispositive motions
12 deadline, contradicts or is in conflict with Mr. Thompson’s testimony in response to
13 Plaintiffs’ initial motion for summary judgment that his bank accounts were never
14 comingled with IAI or IAP bank accounts and that Defendants’ corporate forms were
15 never abused or used for an improper purpose. (*See* 2d Sanc. Reply (Dkt. # 40) at 4
16 (citing Thompson Decl. (Dkt. # 26) ¶¶ 10, 16-17; 6/28/13 Kruckeberg Decl. Ex. A).)
17 Plaintiffs assert that the new evidence demonstrates that Mr. Thompson freely transferred
18 funds between his personal account and IAI’s bank account in the months before he

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20 ² The discovery cutoff was May 6, 2013. (*See* Sched. Ord. (Dkt. # 15) at 1.) The
dispositive motions deadline was June 5, 2013. (*Id.*)

21 ³ Arriana Thompson is Mr. Thompson’s former wife (*see* King Decl. (Dkt. # 38) Ex. 3 at
22 36) and is not a party to this action.

1 closed IAI's Bank of America account. (*Id.* (citing 6/26/13 Kruckeberg Decl. Exs. B-C).)
2 Plaintiffs assert they have been prejudiced by Defendants' failure to comply with the
3 court's prior discovery order because, had this information been available sooner (*i.e.*,
4 before the dispositive motions deadline), Plaintiffs could have used it to support their
5 motion for summary judgment with respect to piercing the corporate veil and establishing
6 Mr. Thompson's personally liability. (*Id.* at 4, n.1.)

7 Defendants assert that they should not be sanctioned because they "have provided
8 at least 60 reports on the royalties due for the work and financial records, including tax
9 returns for the Defendants," and that "[a]dditional documents were similarly emailed to
10 Plaintiffs' counsel." (Resp. to Sanc. Mot. (Dkt. # 37) at 2 (citing King Decl. (Dkt. # 38)
11 Exs. 3, 5).) They do not deny, however, that the bank records cited above were provided
12 only after the discovery cutoff and dispositive motions deadline had expired. Defendants
13 also do not deny that they have not produced requested financial information related to
14 Ms. Thompson.

15 Defendants also assert that they offered an opportunity to Plaintiffs to review
16 additional records at Defendants' offices (which is also the Thompsons' home), but
17 Plaintiffs failed to avail themselves of this opportunity. (*Id.* at 2 (citing King Decl. Ex.
18 2).) Plaintiffs respond that, despite repeated inquiries, Defendants' counsel never
19 clarified how documents produced at their home were to be duplicated. (Reply to Sanc.
20 Mot. (Dkt. # 40) at 5.)

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III. ANALYSIS

A. Summary Judgment Motion

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-moving party “must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477 F.3d at 658. The court is “required to view the facts and draw reasonable inferences in the light most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Defendants filed a consolidated response to Plaintiffs’ motions for summary judgment and for sanctions. (*See* Consol. Resp. (Dkt. # 37).) Nowhere in the responsive memorandum or in counsel’s declaration (*see* King Decl. (Dkt. # 38)), however, do Defendants provide any evidence or argument in opposition to Plaintiffs’ motion for summary judgment. Instead, the substance of Defendants’ response is directed virtually entirely towards Plaintiffs’ concurrently-filed motion for sanctions and discovery-related issues. (*See generally* Consol. Resp; King Decl.) Nevertheless, the court must still assess the substance of Plaintiffs’ second motion for partial summary judgment and the

1 evidence they have submitted in support thereof to determine if they have met their initial
2 burden of demonstrating the lack of a genuine dispute of material fact for trial. *See*
3 *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003) (holding that nonmoving
4 party's failure to oppose summary judgment "does not excuse the moving party's
5 affirmative duty under Rule 56 to demonstrate its entitlement to judgment as a matter of
6 law").

7 **1. Contract Damages**

8 The court finds that Plaintiffs have submitted unopposed evidence in support of
9 their motion for summary judgment and met their initial burden of demonstrating their
10 entitlement to judgment as a matter of law with respect to Mr. Curtis's claim that he was
11 underpaid \$5,790.84 with respect to royalty payments he was entitled to receive from IAI
12 or IAP under his publishing contract. (*See* 6/5/13 Curtis Decl. (Dkt. # 33) ¶ 3, Ex. A.)
13 Accordingly, the court will grant Mr. Curtis's motion for summary judgment with respect
14 to his claimed contract damages in this amount.

15 However, the court also finds that Plaintiffs have failed to meet their initial burden
16 on summary judgment with respect to contract damages for either Ms. Aldrich or Mr.
17 Currier. Here, Plaintiffs do not provide direct evidence of Ms. Aldrich's or Mr. Currier's
18 contract damages but merely extrapolate based on the contract damages they found with
19 respect to Mr. Curtis. (*See* 2d SJ Mot. at 10.) Further, Plaintiffs do not explain or
20 provide evidence to support their assertion that "[i]f [] [D]efendants had allowed an audit,
21 Ms. Aldrich and Mr. Currier could have expected to find and recoup similar
22 underpayments [to those experienced by Mr. Curtis] in the amounts of \$5,377.91 and

1 \$412.93, respectively.” (*Id.*) Accordingly, the court denies Plaintiffs’ motion for
2 summary judgment with respect to contract damages for Ms. Aldrich and Mr. Currier.
3 The court’s ruling in this respect, however, is without prejudice to Plaintiffs re-filing a
4 motion for partial summary judgment with respect to Ms. Aldrich’s and Mr. Currier’s
5 contract damages as described below.

6 **2. Maximum Statutory Damages for Willful Copyright Violations**

7 A copyright owner may elect to recover statutory damages, rather than actual
8 damages and additional profits of the infringer, “in a sum of not less than \$750 or more
9 than \$30,000” for each copyright infringed. *See* 17 U.S.C. § 504(c)(1). If the copyright
10 owner proves that the infringement was willful, the Copyright Act authorizes enhanced
11 statutory damages of up to \$150,000.00 per infringed work. *See id.* § 504(c)(2). Here,
12 the court has already determined on summary judgment that Defendants’ infringement of
13 Plaintiffs’ copyrights was willful. (*See* 5/29/13 Order at 19-23.) Accordingly, Plaintiffs
14 now seek a judgment of \$150,000.00 for each of their three copyright claims, totaling
15 \$450,000.00 against all Defendants jointly and severally.⁴ (*See* 2d SJ Mot. at 4-8; *see*
16 *also* Prop. SJ Ord. (Dkt. # 32-1) at 2.)

17 A plaintiff may elect statutory damages regardless of the adequacy of the evidence
18 offered as to his or her actual damages and the amount of the defendant’s profits.

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20 ⁴ Plaintiffs seek a joint and several judgment against Defendants in favor of Mr. Curtis
21 and Ms. Aldrich in the amount of \$300,000.00 for willful copyright infringement, and a joint and
22 several judgment against Defendants in favor of Mr. Curtis and Mr. Currier in an amount of
\$150,000.00. (*See* Prop. SJ Ord. (Dkt. # 32-1) at 2.)

1 *Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259
2 F.3d 1186, 1194 (9th Cir. 2001). “If statutory damages are elected, ‘[t]he court has wide
3 discretion in determining the amount of statutory damages to be awarded, constrained
4 only by the specified maxima and minima.’” *Peer Int’l Corp. v. Pausa Records, Inc.*,
5 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris v. Emus Records Corp.*, 734 F.2d
6 1329, 1335 (9th Cir. 1984)). Nevertheless, the court is guided by “what is just in the
7 particular case, considering the nature of the copyright, the circumstances of the
8 infringement and the like.” *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336
9 (9th Cir. 1990) (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 314 U.S. 228,
10 232 (1952)). Because awards of statutory damages serve both compensatory and punitive
11 purposes, a plaintiff may recover statutory damages “whether or not there is adequate
12 evidence of the actual damages suffered by plaintiff or of the profits reaped by
13 defendant.” *Harris*, 734 F.2d at 1335. Such an approach serves “‘to sanction and
14 vindicate the statutory policy’ of discouraging infringement.” *Peer Int’l Corp.*, 909 F.2d
15 at 1337 (quoting *Woolworth Co.*, 344 U.S. at 233).

16 Plaintiffs assert that an award of the statutory maximum is appropriate here
17 because Defendants’ willful infringement was particularly egregious. (*See* 2d SJ Mot. at
18 5-6.) Plaintiffs sent Defendants demand letters after having terminated their licensing
19 agreement with respect to the books at issue. (*See* 5/29/13 Order at 6-7.) In one demand
20 letter, Mr. Curtis even set out Section 502 of the Copyright Act in full, stating: “If you’re
21 not familiar with copyright infringement penalties, you need to take a look. I’ve printed
22 the basics below.” (Curtis Decl. (Dkt. # 23) Ex. J.) In any event, Defendants are in the

1 business of selling copyrighted books and so should be familiar with copyright
2 requirements. *See Peer Int'l Corp.*, 909 F.2d at 1337 (affirming district court's
3 imposition of maximum statutory damages for willful infringement in part due to the
4 number of willful infringements by defendant and the fact defendant was "engaged in the
5 business of selling copyrighted works").

6 Plaintiffs also assert that an award of the statutory maximum is warranted due to
7 Defendants' failure to participate in discovery and obstruction of the discovery process.
8 (2d SJ Mot. at 6-7.) Plaintiffs assert that Defendants' obstructionist behavior has made it
9 difficult, if not impossible, to ascertain the actual amount of Plaintiffs' damages for
10 infringement. (*Id.* at 7.) Finally, Plaintiffs also assert that Defendants' wide, open-access
11 distribution of their works on the Internet (*see* 5/29/13 Order at 7) favors imposition of
12 maximum statutory damages. (*Id.* at 7-8.) Defendants offer no evidence or argument to
13 contravene Plaintiffs' position on statutory damages.

14 Despite the fact that Defendants have offered virtually no response to Plaintiffs'
15 motion for summary judgment, the determination of whether Plaintiffs are entitled to an
16 award of maximum statutory damages for willful copyright infringement is inherently
17 discretionary, and therefore the court cannot enter summary judgment on this issue. The
18 court's conclusion in this regard arises out of the logical extension of a 1998 Supreme
19 Court decision. In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355
20 (1998), the Supreme Court held that a claim for statutory damages under § 504(c) of the
21 Copyright Act, 17 U.S.C. § 504(c), is a suit at law to which the Seventh Amendment
22 applies. *See also GoPets Ltd. v. Hise*, 657 F.3d 1024, 1034 (9th Cir. 2011) ("[T]he

1 Seventh Amendment provides a right to a jury trial both as to liability and as to the
2 amount of actual copyright damages, even though the copyright statute does not so
3 provide.”). This does not mean, however, that a jury must resolve every issue in a
4 copyright dispute, as Defendants similarly argued in response to Plaintiffs’ first motion
5 for summary judgment (*see* Resp. to 1st SJ Mot. (Dkt. # 25) at 6-7). *BMG Music v.*
6 *Gonzalez*, 430 F.3d 888, 892 (7th Cir. 2005). “When there are no disputes of material
7 fact [with respect to an issue in a copyright action], the court may enter summary
8 judgment without transgressing the Constitution.” *Id.* (citing *Fidelity & Deposit Co. v.*
9 *United States*, 187 U.S. 315 (1902); *Galloway v. United States*, 319 U.S. 372 (1943);
10 *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)). As the Seventh
11 Circuit explained in *BMG Music*:

12 We read *Feltner* as establishing no more (and no less) than that cases under
13 § 504(c) are normal civil actions subject to the normal allocation of
14 functions between judge and jury. When there is a material dispute of fact
15 to be resolved or discretion to be exercised in selecting a financial award,
16 then either side is entitled to a jury; if there is no material dispute and a rule
17 of law eliminates discretion in selecting the remedy, then summary
18 judgment is permissible.

19 430 F.3d at 892-93 (citing *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 65 n.7 (1st
20 Cir. 2000)). Thus, this court could and did enter summary judgment with respect to the
21 issues of copyright infringement and willfulness because there were no disputes of
22 material fact with respect to those issues. (*See* 5/29/13 Order at 19-23 & n.8.)

23 The issue of imposing maximum statutory damages, however, is different in that it
24 inherently involves an exercise of discretion by the fact finder. In *BMG Music*, because
25 Plaintiffs had requested only the minimum statutory damages, the Seventh Circuit

1 concluded that the issue of damages could be properly decided on summary judgment.
2 *See BMG Music*, 430 F.3d at 892-93; *see also GoPets*, 657 F.3d at 1034 (discussing
3 *Feltner*, the Ninth Circuit held “that there is no right to a jury trial when a judge awards
4 the minimum statutory damages” and cited *BMG Music* with approval). Here, however,
5 Plaintiffs have not sought minimum statutory damages, but rather of \$150,000.00 per
6 work, which is the statutory maximum for a willful copyright violation. (*See* 2d SJ Mot.
7 at 8 (“Given the nature of the defendants’ infringement, the statutory maximum is a just
8 award and the plaintiffs should be awarded \$150,000 for each of their three copyright
9 claims.”).) Even considering Plaintiffs’ undisputed evidence in favor of an award of the
10 statutory maximum, the selection of such an award requires the exercise of discretion by
11 the fact finder. In *BMG Music*, the Seventh Circuit stated that if the plaintiff “had
12 requested more than [the statutory minimum in damages] per work, then [the defendant]
13 would have been entitled to a trial.” 430 F.3d at 892. This is because “[w]hen there
14 is . . . discretion to be exercised in selecting a financial award, then either side is entitled
15 to a jury.” *Id.* This court agrees with the Seventh Circuit’s analysis in *BMG Music*, and
16 accordingly must deny Plaintiffs’ motion for summary judgment with respect to an award
17 of maximum statutory damages for Defendants’ willful copyright violations. This is an
18 issue that the court must reserve for the jury. *See also Matlow v. Solomon*, No. 04-6109-
19 HO, 2005 WL 309976, at *2 (Feb. 7, 2005) (concluding that the Supreme Court’s holding
20 in *Feltner* “preclude[s] the court from determining statutory damages on summary
21 judgment”); *Ultra-Images, LLC v. Franclemont*, No. 05-60538-CIV, 2007 WL 4557148,
22 at *5 (S.D. Fla. Dec. 20, 2007) (“[I]f infringement is found to be willful, a fact finder

1 must determine if enhanced statutory damages should be imposed. . . . Thus, the Court
2 cannot make any determination regarding statutory damages at the summary judgment
3 stage.”)⁵

4 **B. Sanctions Motion**

5 Due to Defendants’ failure to fully abide by the court’s prior order on discovery,
6 Plaintiffs seek sanctions including either the entry of factual findings that “the
7 Thompsons and their corporate entities are alter-egos and that Mr. and Mrs. Thompson
8 dissipated corporate assets for personal expenses” or default judgment on all of Plaintiffs’
9 claims. (2d Sanc. Mot. at 7.) Under Federal Rule of Civil Procedure 37(b)(2)(A), the

11 ⁵ In *Microsoft Corp. v. Image & Bus. Solutions, Inc.*, No. CV 05-6807, 2007 WL
12 2874430, at *7-8 (C.D. Cal. May 4, 2007), the federal district court rejected defendants’
13 argument that the court could award only the statutory minimum damages for non-willful
14 infringement on summary judgment. The plaintiff had requested the statutory maximum in
15 damages. *Id.* at *7. The *Microsoft* court evaluated the plaintiff’s “undisputed” evidence of the
16 defendants’ “egregious pattern of unlawful conduct and suspect business practices,” *see id.*, and
17 concluded that “[w]hile . . . this conduct warrants a damages award toward the higher end of the
18 statutory damages for non-willful infringement,” it did not justify an award of the statutory
19 maximum. *Id.* Indeed, the court cut plaintiff’s request for damages in half. *Id.* at *8. The
20 *Microsoft* court’s resolution of the statutory damages issue underscores the discretionary nature
21 of the issue and its consequent inappropriateness for resolution on summary judgment. This
22 court also notes that in rejecting the Seventh Circuit’s decision in *BMG Music*, the *Microsoft*
court stated that *BMG Music* was not binding authority and was contradicted by Ninth Circuit
authority. The *Microsoft* court, however, relied upon Ninth Circuit authority that predated the
Supreme Court’s decision in *Feltner*. *See Microsoft*, 2007 WL 2874430, at *7 (citing *Peer Int’l*,
909 F.2d at 1335; *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)). The
only other decision cited by the *Microsoft* court in rejecting *BMG Music* simply affirmed the
district court’s denial of defendant’s motion in limine to preclude a jury trial on statutory
damages following remand by the Supreme Court in *Feltner* and is not in conflict with *BMG*
Music. *See Microsoft*, 2007 WL 2874430, at *7 (citing *Columbia Pictures Television, Inc. v.*
Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186, 1192-93 (9th Cir. 2001)).
Particularly in light of the Ninth Circuit’s recent reliance upon *BMG Music* while analyzing
Feltner, *see GoPets*, 657 F.3d at 1034, this court cannot conclude that the rationale of the
Microsoft court to decide a claim under the Copyright Act for maximum statutory damages on
summary judgment remains viable.

1 court has discretion to impose “just” sanctions against a party for failure to obey an order
2 to permit or provide discovery. Fed. R. Civ. P. 37(b)(2)(A). Specifically, Rule
3 37(b)(2)(A) provides that “[i]f a party or a party’s officer, director, or managing
4 agent . . . fails to obey an order to provide or permit discovery . . . the court . . . may issue
5 further just orders.” Fed. R.Civ. P. 37(b)(2)(A). “These may include . . . (ii) prohibiting
6 the disobedient party from supporting or opposing designated claims or defenses, or from
7 introducing designated matters in evidence; [and] . . . (vi) rendering a default against the
8 disobedient party.” *Id.* These sanctions are not available unless a court’s discovery order
9 has not been obeyed. *Id.* “Also, “[i]nstead of or in addition to the orders above, the court
10 must order the disobedient party, the attorney advising that party, or both to pay the
11 reasonable expenses, including attorney's fees, caused by the failure, unless the failure
12 was substantially justified or other circumstances make an award of expenses unjust.”
13 Fed. R. Civ. P. 37(b)(2)(C).

14 Under Rule 37(b)(2), sanctions such as default judgment or orders taking the
15 plaintiff’s allegations as established are “appropriate only in ‘extreme circumstances’ and
16 where the violation is ‘due to willfulness, bad faith, or fault of the party.’” *Fair Housing*
17 *of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2000) (citations omitted); *Computer Task*
18 *Group, Inc. v. Brothby*, 364 F.3d 1112, 1115 (9th Cir. 2004) (per curiam). Further, in
19 deciding whether to grant such a motion for sanctions under subsections (A) through (C)
20 of Rule 37(b)(2) for noncompliance with a discovery order, the court should consider five
21 factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
22 need to manage its docket; (3) the risk of prejudice to [the party seeking sanctions]; (4)

1 the public policy favoring disposition of cases on their merits; and (5) the availability of
2 less drastic sanctions.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1022 (9th
3 Cir. 2002); *Computer Task Group, Inc.*, 364 F.3d at 1115.

4 Based on the factual record recited above, the court has little difficulty in
5 concluding that Defendants’ failure to fully comply with the court’s prior discovery order
6 was willful. Nevertheless, Defendants assert that they should not be sanctioned because
7 “Plaintiffs have had ample opportunity to go on-site and review all of Defendants’
8 records,” but they failed to do so. (*See Resp.* at 5.) Defendants’ documents, however,
9 even if offered for review, were late in their production to Plaintiffs. The court ordered
10 Defendants “to provide complete responses to Plaintiffs’ discovery requests . . . no later
11 than March 1, 2013.” (2/20/13 Order at 8.) Defendants acknowledge that they did not
12 offer them for production until the week of March 18, 2013. More importantly, as
13 Plaintiffs note, Defendants present counsel’s March 1, 2013, email offering Defendants’
14 documents for production out of context. (*See Sanc. Reply* at 5.) Counsel for both
15 Plaintiffs and Defendants conferred just hours after Defendants’ counsel sent his March
16 1, 2013 email. (6/5/13 Kruckeberg Decl. re Sanc. ¶ 9.) Plaintiffs’ counsel asked about
17 the availability of duplication services and proposed sending the documents off-site for
18 duplication. (*Id.*) Plaintiffs’ counsel responded that he would inquire with his clients.
19 (*Id.*) Despite numerous follow-up inquiries from Plaintiffs’ counsel, Defendants never
20 provided any clarification concerning duplication services and continued to put off
21 arrangements for inspection and copying of their records. (*Id.* ¶¶ 10-20, Exs. G-N.)
22

1 In any event, there is no indication in the record before this court that Defendants’
2 offer to provide documents for inspection on-site included any of the financial
3 information concerning Ms. Thompson that was requested by Plaintiffs. To the contrary,
4 the evidence before the court is that Ms. Thompson still has not provided any answers to
5 discovery regarding her finances. (6/5/13 Kruckeberg Decl. re Sanc. ¶ 20.)

6 Further, the court has no difficulty in concluding based on the foregoing factual
7 record that Plaintiffs have been prejudiced by Defendants’ conduct. Defendants’
8 complete failure to provide any discovery regarding Ms. Thompson’s financial
9 information prevented Plaintiffs from establishing on summary judgment that the
10 corporate veil between her and IAI and IAP should be pierced. (*See* 2d Sanc. Mot. at 4-
11 5.) In addition, Plaintiffs assert that the evidence that Defendants produced after the
12 dispositive motions deadline contradicts Mr. Thompson’s statements in his prior
13 declaration that the assets in his bank accounts were never commingled with the assets in
14 IAI’s or IAP’s bank accounts (*see* Sanc. Reply (Dkt. # 40) at 4 (citing Thompson Decl.
15 (Dkt. # 26) ¶ 16)) and that IAI and IAP had never been used for an improper purpose or
16 their corporate forms abused (*id.* (citing Thompson Decl. ¶¶ 10, 17)).

17 Based on the foregoing, the court concludes that further sanctions are warranted.
18 In its prior discovery order, the court warned Defendants that “[s]hould Defendants fail to
19 produce the ordered discovery . . . within the timeframe stated . . . , the court w[ould]
20 consider the imposition of additional sanctions.” (2/20/13 Order at 7.) Plaintiffs ask the
21 court to impose sanctions including either an entry of default judgment on all claims or
22 the entering of factual findings that “the Thompsons and their corporate entities are alter-

egos and that Mr. and Mrs. Thompson dissipated corporate assets for personal expenses.”
(2d Sanc. Mot. at 7.) In considering the factors outlined by the Ninth Circuit prior to the
imposition of such sanctions, however, the court concludes that something less than these
extraordinary sanctions are warranted. There is no question that the public’s interest in
expeditious resolution of litigation and the court’s need to manage its docket weigh in
favor of additional sanctions. As described above, there is also no question that Plaintiffs
have established that they have been prejudiced during the course of this litigation as a
result of Defendants’ obstreperous behavior in discovery. However, the public policy
favoring disposition of cases on the merits still favors the imposition of less drastic
sanctions, and despite Defendants’ continuing failure to pay monetary sanctions
previously ordered by the court (*see* 6/5/13 Kruckeberg Decl. re Sanc. ¶ 21), the court
believes that it can fashion a lesser sanction that will not only punish Defendants for their
conduct but also alleviate the prejudice Plaintiffs have experienced to date. In
determining that lesser sanctions than those sought by Plaintiffs are warranted at this
point, the court is mindful that Defendants produced at least a portion of the ordered
discovery.

Accordingly, the court orders Defendants to produce, without objection, all of the
financial records pertaining to Ms. Thompson that have been requested by Plaintiffs
within fourteen days of the date of this order and file a certification with the court that
they have done so. The certification should be signed not only by counsel for
Defendants, but also by Mr. Thompson and Ms. Thompson, in both their personal and
representative capacities for IAI and IAP. If Defendants fail to produce this discovery,

1 having now been ordered to do so twice, the court will consider entering a factual finding
2 piercing the corporate veil between Ms. Thompson and the other Defendants. In
3 addition, within the same timeframe, Defendants must produce any remaining
4 outstanding discovery covered by the court's prior order (*see* 2/20/13 Order) and file a
5 similar certification with the court that they have done so. If Defendants fail to file the
6 foregoing certifications or fail to produce the ordered discovery within the timeframe
7 described above, the court will consider imposing additional adverse evidentiary findings
8 or the entry of default judgment against Defendants.

9 Following receipt of the foregoing discovery, the court further authorizes Plaintiffs
10 to bring a third motion for partial summary judgment regarding the issue of piercing the
11 corporate veil with respect to Mr. Thompson and/or Ms. Thompson, and with regard to
12 contract damages for Ms. Aldrich and Mr. Currier—if the discovery produced by
13 Defendants so warrants. If Defendants fail to timely comply with this order, the court
14 authorizes Plaintiffs to bring a third motion for sanctions in which the court will consider
15 the imposition of adverse evidentiary findings or the entry of default judgment against
16 Defendants. Plaintiffs' third motion for partial summary judgment or for further
17 sanctions, if any, shall be filed no later than 45 days following the date of this order.

18 Finally, Plaintiffs have requested the imposition of additional monetary sanctions.
19 Under Federal Rule of Civil Procedure 37(b)(2)(C) the court "must order the disobedient
20 party, the attorney advising that party, or both to pay the reasonable expenses, including
21 attorney's fees, caused by the failure, unless the failure was substantially justified or
22 other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

1 Defendants have failed to demonstrate that their failure to comply with the court's prior
2 discovery order was substantially justified or that other circumstances make such an
3 award unjust. The court can discern no just reason to deny Plaintiffs' request for
4 additional monetary sanctions, and Defendants have offered none. Accordingly, the court
5 grants Plaintiffs' request for additional monetary sanctions. The court orders both
6 Defendants and their counsel to pay Plaintiffs' reasonable expenses, including attorney's
7 fees, caused by Defendants' failure to comply with the court's prior discovery order. *See*
8 Fed. R. Civ. P. 37(b)(2)(C). Within seven days of the date of this order, Plaintiffs shall
9 submit a statement, along with appropriate documentation, concerning such reasonable
10 expenses and attorney's fees. Defendants will have an additional seven days following
11 Plaintiffs' submission to respond concerning the reasonableness of Plaintiffs' expenses
12 and fees. After considering these additional submissions, the court will issue a further
13 order regarding the specific amount of sanctions awarded to Plaintiffs.

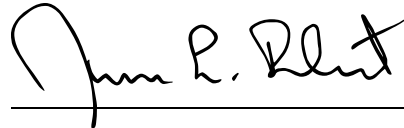
14 The timeline that the court has outlined above with respect to possible additional
15 motions for partial summary judgment renders obsolete the present trial date of
16 September 3, 2013. It would only compound any prejudice to Plaintiffs to force them to
17 go to trial on September 3, 2013 on an incomplete factual record caused by Defendants'
18 obstreperous behavior in the discovery process. Accordingly, the court strikes the trial
19 date. The court, however, recognizes that this detrimental effect on its calendar and trial
20 schedule is caused by Defendants' conduct. The court places Defendants on notice that it
21 will consider additional sanctions if there is any further delay in timely compliance with
22 this court's orders. The court will reschedule the trial date, if necessary, following

1 consideration of Plaintiffs' third motion on partial summary judgment or for sanctions, if
2 any.

3 **IV. CONCLUSION**

4 Based on the foregoing, the court GRANTS in part and DENIES in part Plaintiffs'
5 second motion for partial summary judgment (Dkt. # 32) and GRANTS in part and
6 DENIES in part Plaintiffs' second motion for sanctions (Dkt. # 30). Further, the court
7 strikes the trial date, but will reschedule it, if necessary, as described above.

8 Dated this 18th day of July, 2013.

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11 JAMES L. ROBART
12 United States District Judge
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