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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

GLENNON MARRERO,

 Plaintiff,

 vs.

MICHAEL RAY NGUYEN-
 STEVENSON; UNIVERSAL MUSIC
 GROUP, INC.; TILLY'S, INC.;
 SHIEKH SHOES; BRAVADO
 INTERNATIONAL GROUP
 MERCHANDISING SERVICES, INC.;
 AND DOE CORPORATION,

 Defendants.

Case No. 13-cv-09291-CBM-PJW

[Assigned to The Honorable Consuelo
 B. Marshall, Courtroom 2, 2nd Floor]

**PLAINTIFF GLENNON
 MARRERO'S MEMORANDUM IN
 SUPPORT OF MOTION FOR
 PARTIAL SUMMARY
 JUDGMENT**

Hearing

Date: January 6, 2015
 Time: 10:00 a.m.
 Place: Courtroom 2
 Judge: Consuelo B. Marshall

Original Complaint Filed:
 December 18, 2013

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I. INTRODUCTION

Defendants Bravado International Group Merchandising Services, Inc. (“Bravado”),¹ Tilly’s, Inc. (“Tilly’s”) and Shiekh Shoes (“Sheikh”) collectively have sold millions of dollars of merchandise bearing Glennon Marrero’s (“Marrero”) copyrighted graphic designs. Despite being the author and sole owner of the copyrighted designs, Glennon Marrero never received compensation from Defendants’ infringing merchandise.

Summary judgment on the issue of liability for copyright infringement is necessitated where, as here, Defendants concede the two elements of copyright infringement: “(1) ownership of a valid copyright” and “(2) copying of constituent elements of the work that are original.” *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

The only defense urged by Defendants to the instant clear case of infringement borders on frivolous. Defendant Stevenson claims that he is the beneficiary of an undocumented, oral implied license granted to him directly by Marrero or transferred to him through Last Kings Designs LLC (“LKD”). As set forth below, there is no evidence to support any oral agreement between Marrero and Stevenson.

Furthermore, there is no evidence of any consideration to support any purported agreement. Stevenson claims that, in consideration for an implied license to Marrero’s works, he provided Marrero an ownership interest in LKD, an LLC described by its Rule 30(b)(6) witness as a “waste of time,” and an LLC that never commenced business operations. Stevenson contends that an interest in this LLC somehow conferred on him, in his individual capacity (as opposed to LKD), an implied license to Marrero’s designs, and that he in turn has been able to license other entities to infringe Marrero’s designs; this contention is supported in neither fact nor law.

¹ This motion is not directed at Universal Music Group, Inc.

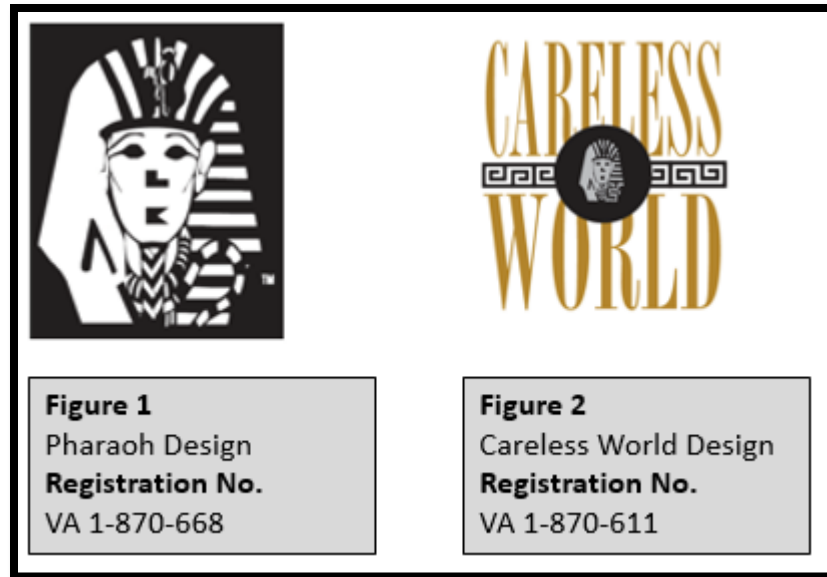
The evidence in this case cannot remotely measure up to the level of proof required to establish either the existence of an implied license or that there was any consideration rendering any implied license irrevocable. Defendants' only defense fails as a matter of law.

Because there is no dispute that Marrero owns the copyrighted works and that these works have been repeatedly infringed, there are no material facts in dispute necessitating trial on the issue of Defendants' copyright infringement liability. Accordingly, summary judgment should be granted on the issue of copyright liability.

II. FACTUAL SUMMARY

A. Marrero Creates the Designs

In 2010, Marrero, on his own, created the Pharaoh Design and Careless World Designs, shown below. (UF² 1-3.)



The Pharaoh Design was created by Marrero on or before August 14, 2010 (Def. Fact³ 8); the Careless World Design was created by Marrero on or before

² Separate Statement of Uncontroverted Facts and Conclusions of Law in Support of Plaintiff Glennon Marrero's Motion for Partial Summary Judgment (hereinafter, "UF"), which is filed concurrently herewith.

November 1, 2010. (Def. Fact 19.) After creating the Pharaoh Design, Marrero conceived of an ancient Egyptian-themed clothing line that would incorporate the iconography of Egyptian civilization into fashion. (UF 4.) Marrero approached his friends Stevenson (a musician who performs under the name “Tyga”), Tarell Meeks, and Shakir Bahati. (UF 5.) Mr. Marrero was the only member of the group who had previous experience in the apparel merchandising industry and the only one with graphic design abilities. (UF 6.) Marrero was the sole individual who designed the Pharaoh Design and Careless World Design. (UF 1-3, 6; Def. Facts 8, 19.)

B. The Group Forms LKD, Which Never Operates

Using LegalZoom, the four set up Last Kings Designs LLC (“LKD”). Throughout the latter half of 2010 and most of 2011, Mr. Marrero worked to try to get LKD off the ground by designing clothing, conducting the day-to-day operations, managing the website, and attempting to secure distribution for the clothing. (UF 7.)

Marrero considered licensing his designs to LKD. But the parties never came to any agreement regarding the terms for licensing Marrero’s copyrighted works to LKD. (UF 8.) The LKD Operating Agreement expressly states Marrero’s contribution to LKD did not include a capital contribution or any other property. (Dkt. No. 23 Ex. 1 (LKD Operating Agreement) at 9.) Further, there is no provision obligating Mr. Marrero to assign any intellectual property rights to LKD. (*Id.*)

In any event, LKD never sold any merchandise bearing the Designs. LKD never had any sales whatsoever. As confirmed by Tarrel Meeks, LKD’s 30(b)(6) designee:

³ Defendants' Statement of Uncontroverted Facts (Dkt. No. 108) (hereinafter, "Def. Fact"), which was submitted in support of Defendants' Motion for Summary Judgment (Dkt. No. 102).

Q: So Last Kings Designs, LLC has never made a dollar?

A: Never. I don't know where the money is if it has made a dollar.
Please.

Q: So to today, Last Kings Designs LLC has never made a dollar?

A: Never made a dollar.

Q: Okay. Has Last Kings Designs LLC ever sold a product?

A: Never sold a product. Are you talking about online?

Q: I am talking about anywhere.

A: Never. Last Kings never – designs has never sold anything.

Q: Not one hat?

A: I haven't sold anything from Last Kings Designs.

Q: Has anyone from Last Kings Designs LLC --

A: No.

(Hipskind Decl. Ex. B (Meeks Depo. Tr.) at 54:2-21; *see also id.* at 167:17-168:7 (describing LKD as having made no money, having no documents, and having been a "[w]aste of time."))

In addition, LKD never paid Marrero anything, whether a salary, a commission, or any other compensation. (UF 9.) In short, LKD never got off the ground as an operating company.

C. Stevenson Sells Merchandise Bearing The Designs Through Companies In Which Marrero Has No Interest

Beginning at some point in 2013, Stevenson began selling the clothing through Tyga Music, LLC and Egypt Last King Clothing, LLC ("Egypt LKC"), both of which are owned at least in part by Stevenson, and in which Marrero has no ownership interest. (UF 10-11.) Egypt LKC and Tyga Music, LLC continue to supply the retailer Defendants with merchandise bearing Marrero's copyrighted work. (UF 13-16.)

In effect, Egypt LKC, at least, appears to have been formed for the express purpose of squeezing Marrero out of any participation in the exploitation of the Designs. Indeed, as admitted by LKD's 30(b)(6) designee:

Egypt Last Kings is selling it. We didn't – we stopped – we formed a whole nother company because your guy wasn't – he wasn't performing. He dropped out the group. He didn't design anything. Where are his designs? He didn't design anything before or after. I

am trying to figure out where his design is. He left us. He left me hanging, so I formed another group. I formed another entity, and I kept it going because I am a dreamer and I am a hustler. I am a visionary.

Hipskind Decl. Ex. B (Meeks Depo. Tr.) at 56:7-17. Stevenson's deposition testimony further emphasizes this point:

Q. Okay. Is it your belief that Egypt Last Kings clothing has the right to authorize retailers to sell merchandise, including the image shown in Figure 1 [Pharaoh Design]?

A. Yep.

...

Q. Okay. Why do you believe they have that right?

A. Why wouldn't we have that right? We got it to this point, me and Tarell, without Glen [Marrero].

Q. So you and Tarell have all the rights? Is that your understanding?

A. Yeah.

Hipskind Decl. Ex. A (Stevenson Depo. Tr.) at 76:7-18.

There can be no material dispute about the fact that (1) Mr. Marrero created the Designs; (2) the original LKD entity never did anything with the designs; and (3) Defendants Tilly's, Bravado, and Shiekh Shoes sold merchandise bearing the Designs (without Marrero's permission) they purchase through an entity that had been formed to exclude Marrero. To date, Mr. Marrero has never received a single dollar from the sale of merchandise bearing his copyrighted works. (UF 9.)

D. The Role of the Defendants

The Defendants at issue in this motion have all infringed the copyright in the Pharaoh Design and Defendants Stevenson and Bravado have also infringed the copyright in the Careless World Design.

First, Stevenson used the design created by Marrero in connection with apparel; he has caused the Designs to be placed on apparel, and has sold the clothing, both directly and through the other Defendants. (UF 10-16.)

Second, Tilly's has purchased and re-sold products bearing the Pharaoh Design from Egypt LKC, and sold them to consumers. (UF 13.)

Third, Shiekh Shoes has purchased and re-sold products bearing the Pharaoh Design from Egypt LKC, and sold them to consumers. (UF 14.)

Fourth, Bravado has purchased and re-sold products bearing the Pharaoh Design and World Design from Tyga Music, LLC, and sold them to consumers. (UF 15-16.)

III. ARGUMENT: DEFENDANTS CANNOT SERIOUSLY CHALLENGE PLAINTIFF'S PRIMA FACIE CASE

"To establish copyright infringement, a plaintiff must prove two elements: '(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.'" *L.A. Printex Indus. v. Aeropostale, Inc.*, 2012 U.S. App. LEXIS 12033 (9th Cir. June 13, 2012) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

A. Ownership

Marrero is the owner of the registered copyrights in the Designs. As such, Marrero has stated a prima facie case for copyright infringement, shifting the burden to Defendants. *Entm't Research Group v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997) (copyright registration within five years of publication entitles holder to prima facie presumption of valid copyright ownership).



B. Copying

Copying does not appear to be meaningfully in dispute in this case. In any event, Stevenson has admitted to obtaining the Designs and to providing the Designs to the other Defendants.⁴ Hipskind Decl. Ex. A at 44:6-45:8 ("... Q. So Bravado did sell some Last Kings merchandise? A. They sold Tyga merchandise, yeah. ... Q. Okay. But did they also include the image shown in Figure 1 of Exhibit 1 [the Pharaoh Design]? ... A. I think so, yeah."); *see also* Dkt. No. 105 (Stevenson Decl.) at ¶ 24 ("With my permission, Egypt Last Kings Clothing has

⁴ Through Tyga, LLC and Egypt LKC.

made and sold merchandise bearing the Logos to Tilly's and Shiekh Shoes."). A side-by-side comparison of the infringing works with the Designs shows substantial similarity.

Tilly's:

| Merchandise Sold by Tilly's | Copyrighted Pharaoh Design |
|---------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
|  <p>Hipskind Decl. ¶ 8, Ex. G.⁵</p> |  |

⁵ All documents incorporating images of Tilly's products produced by Tilly's in this litigation were produced Highly Confidential pursuant to the Protective Order entered in this case. For the convenience of the Court and the parties, Plaintiff desired to file his motion and supporting brief publicly. Accordingly, the above images were taken from Tilly's website rather than their production. See Hipskind Decl. ¶¶ 8-9. Plaintiff respectfully requests that the Court take judicial notice of the web pages included as Exhibits G-H of the Hipskind Decl. See, e.g., *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965-66 (C.D. Cal. 2005) (taking judicial notice of publicly available web pages).

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Hipskind Decl. ¶ 9, Ex. H.



Sheikh Shoes:

Merchandise Sold by Shiekh Shoes

Copyrighted Pharaoh Design



Hipskind Decl. Ex. E
(SHIEKH_000077).





Hipskind Decl. Ex. E
(SHIEKH 000104).



Bravado:

| Merchandise Sold by Bravado | Copyrighted Pharaoh Design |
|--------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|
|  <p>Hipskind Decl. Ex. F (BRAVADO 000044).</p> |  |
|  <p>Hipskind Decl. Ex. F (BRAVADO 000045).</p> |  |

Bravado:

| Merchandise Sold by Bravado | Copyrighted Careless World Design |
|-----------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
|  <p>Hipskind Decl. Ex. F</p> |  |

(BRAVADO_000043).

Plaintiff thus has presented evidence establishing that Stevenson, Tilly's, Sheikh Shoes, and Bravado are liable for infringing Plaintiff's copyright in the Pharaoh Design and that Stevenson and Bravado are also liable for infringing Plaintiff's copyright in the Careless World Design.

IV. DEFENDANTS CANNOT SHOW THEY HAVE AN IMPLIED LICENSE BECAUSE THERE IS NO EVIDENCE MARRERO AGREED TO SALES BY A NEW ENTITY FORMED FOR THE PURPOSE OF SQUEEZING HIM OUT.

Defendants assert that Stevenson (in his individual capacity, not LKD) has an implied license to exploit the copyrighted works. Even more bizarre, Defendants further assert, without supporting evidence, that this implied license is either transferrable to third parties who never had any relationship to Marrero, or that Stevenson somehow has the right to sublicense these third parties within the scope of his purported sublicense. As there is no admissible evidence creating a disputed issue of material fact in connection with this defense, the Court should enter partial summary judgment in Plaintiff's favor.

A. The Standard For Implied Licenses: They Are Narrowly Found, and Are Presumptively Non-Transferable.

"Implied non-exclusive licenses are generally found only in narrow circumstances where one party created a work at the other's request and handed it over, intending that the other copy and distribute it." *Bangkok Broadcasting & TV Co. v. IPTV Corp.*, 742 F. Supp. 2d 1101 (C.D.Cal. 2010). An implied license requires a showing of three elements:

(1) a person (the licensee) requests the creation of the work; (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested and (3) the licensor intends that the licensee—requestor copy and distribute his work.

Id. (citing *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990)). The reason for such a narrow reading of implied licenses is that the Copyright Act

contains a writing requirement for copyright transfers, and transfers of any sort are not to be easily implied:

Indeed, § 204(a) ensures that the creator of a work will not give away his copyright inadvertently and forces a party who wants to use the copyrighted work to negotiate with the creator to determine precisely what rights are being transferred and at what price. Moreover, § 204(a)'s writing requirement not only protects authors from fraudulent claims, but also enhances predictability and certainty of ownership — Congress's paramount goal when it revised the Act in 1976.

Id. at 1111.

Absent the showing set forth in *Bangkok*, there can be no implied license, otherwise, implying non-exclusive licenses beyond this test “would undermine copyright owners’ statutory rights by turning every failed negotiation for an exclusive license into a potential claim for a nonexclusive license.” *Id.* at 1112. A finding of no implied license can be made at the summary judgment state. *Bangkok, supra*, 742 F. Supp. 2d at 1112-13.

Further to this point, an implied license (indeed, any license) is not generally transferrable, absent evidence of specific intent to do so.

a copyright license itself does not include the right to transfer the license, unless the copyright owner explicitly conveys this right in addition to the license itself. . . IEG is correct in asserting that copyright owners and their licensees can contract around the non-transferability of licenses. The default rule of non-transferability, however, makes IEG's burden heavier in proving its license defense. It must prove not only that Michaels granted a license to the unnamed client, but also that Michaels's agreement with the unnamed client included a term allowing the license to be transferred to IEG without further consent from Michaels. There is no evidence that any purported non-exclusive license agreement between Michaels and the unnamed agent included the authority to transfer the license.

Michaels v. Internet Entertainment Group, 5 F. Supp. 2d 823, 834 (C.D.Cal. 1998).

B. There Is No Evidence Of a Transferrable Implied License to Stevenson⁶

There are no genuine issues of material fact supporting Defendants' implied license defense. To prevail on their implied license defense, Defendants must show that (1) Marrero granted an implied license to Stevenson personally, and (2) that Marrero agreed, when granting this license, that Stevenson could simply transfer (or sublicense) the implied license to a new entity created for the purpose of squeezing Marrero out. Mr. Marrero has never had any relationship with Egypt LKC or Tyga Music, LLC, the entities selling the infringing merchandise to Tilly's, Bravado, and Shiekh. Moreover, there is no evidence whatsoever of Marrero granting an implied license to Stevenson, Egypt LKC, or Tyga Music LLC. As there is no admissible evidence in support of the first or second element,⁷ the implied license defense fails as a matter of undisputed facts.

1. An Interest In LKD Cannot Be Consideration For A License To Stevenson Personally.

For an implied license to be irrevocable, consideration must be paid. *Asset Mktg. Sys. v. Gagnon*, 542 F.3d 748, 757 (9th Cir. 2008); *Sprengel v. Mohr*, 2013 U.S. Dist. LEXIS 24701, at *23-25 (C.D. Cal. Feb. 21, 2013). It is undisputed that Stevenson has never paid Marrero any money for the use of the Designs; Stevenson claims a 25% interest in LKD was the consideration supporting an irrevocable implied license to the Designs to Stevenson in his individual capacity. (Dkt. No. 118 at 11:21-25.)

⁶ Plaintiff set forth a full explanation of the relevant law and facts underpinning the various reasons why Defendants' implied license defense fails in his Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 113), which is hereby incorporated by reference. This section only addresses how, even when the facts are considered in the light most favorable to Defendants, their implied license defense fails.

⁷ As discussed in Plaintiff's Opposition to Defendants' Motion for Summary Judgment, there is no implied license at all (Dkt. No. 113 at 12-22), but this motion is focused on the transferability element.

"[C]ourts[] find that a copyright owner has granted an implied non-exclusive license in only *limited circumstances*." *Bangkok*, 742 F. Supp. 2d at 1111 (emphasis added). In evaluating whether an implied license exists, Courts look to determine "objective conduct that would permit a reasonable person to conclude that an agreement had been reached" can be found. *Design Options v. Bellepointe, Inc.*, 940 F. Supp. 86, 92 (S.D.N.Y. 1996).

Here, an objective analysis of the undisputed facts shows only that Marrero intended to start LKD *with* Stevenson and two additional partners (UF 4-5; Def. Facts 1, 3) and that Marrero would own 25% of LKD and control the use of his Designs on an ongoing basis as LKD's Creative Director. (Dkt. No. 23 Ex. 1 at 9-10.) To the extent there is any implied license to any person or entity, the implied license would have been granted to LKD. The only control Marrero would have had in the use of his Designs was if they were exploited through LKD, and Marrero did not stand to gain financially unless the Designs were exploited through LKD. Accordingly, an objective analysis of these undisputed facts shows that, to the extent an equity interest in LKD constitutes consideration for an implied license, that implied license would belong to LKD, not to any individual member of LKD. Because implied nonexclusive licenses are not transferrable without the consent of the copyright owner, any implied license to LKD was not transferred to Stevenson in his individual capacity. *See, e.g., In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997); *SQL Solutions, Inc. v. Oracle Corp.*, 1991 U.S. Dist. LEXIS 21097, at *8-16 (N.D. Cal. Dec. 18, 1991).

2. Stevenson's Setting Up A Separate Entity To Undercut LKD Renders Any Implied License Terminable By Marrero.

"State law dictates the sufficiency of consideration to support a finding of an implied license." *Sprengel v. Mohr*, 2013 U.S. Dist. LEXIS 24701, at *25 (C.D. Cal. Feb. 21, 2013). In California, "[the] elementary rule that a court of law will not inquire into the adequacy of consideration for a contract [citations] does not

preclude the necessity of a showing that the consideration has some value at least. It is well settled that something which is completely worthless cannot constitute a valid consideration." *Louisville Title Ins. Co. v. Surety Title & Guar. Co.*, 60 Cal. App. 3d 781, 791 (Cal. App. 1976) (quoting *Grant v. Aerodraulics Co.*, 91 Cal. App. 2d 68, 78 (Cal. App. 1949)).

Even if promises made at the time an implied license arose constitute sufficient consideration, under California law, the agreement is revocable if the consideration later fails. *See Benson v. Andrews*, 138 Cal. App. 2d 123, 132 (Cal. App. 2d Dist. 1955) ("The defense of failure of consideration, in its precise sense, rests not upon facts existing at the time the mutual promises bargained for in a bilateral contract are made but upon some fact or contingency which occurs between the time of the making of the contract and the action thereon which results in the material failure of performance by one party."); *see also* Cal. Civ. Code § 1689(b)(2) ("A party to a contract may rescind the contract . . . [i]f the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.").

Within the context of implied nonexclusive copyright licenses, "a nonexclusive implied license . . . may be revoked by the licensor if the licensee materially breaches the licensing agreement." *Sprengel*, 2013 U.S. Dist. LEXIS 24701, at *26-27 (citing *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993)). The right of revocation arises in situations where "the breach 'is of so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s] to defeat the object of the parties.'" *Sprengel*, 2013 U.S. Dist. LEXIS 24701, at *26 (quoting *Rano*, 987 F.2d at 586). A "material breach" constitutes "a total failure in the performance of the contract." *Sprengel*, 2013 U.S. Dist. LEXIS 24701, at *26.

In support of their implied license defense, Defendants argue that Marrero's equity interest in LKD was the consideration he received in exchange for an

1 implied license to Stevenson in his individual capacity. (Dkt. No. 103 at 11-12;
2 Dkt. No. 118 at 11.) However, Defendants gloss over the detail that LKD made no
3 sales of the merchandise accused of infringement and that Stevenson set up
4 competing entities created to exclude Marrero and ensure that LKD forever
5 remained worthless. This case does not present the somewhat typical implied
6 license fact pattern where the creator of a copyrighted work complains that he or
7 she was not paid all of what he or she was owed; rather, in this case, not only did
8 Marrero not receive a single dollar for the use of his Designs, but Stevenson
9 actively worked to ensure Marrero would never receive compensation by creating
10 Egypt LKC and Tyga Music, LLC to directly compete with and undercut the
11 purpose of LKD.

12 To the extent any implied license to Stevenson could possibly be found, the
13 undisputed facts show that the purpose of any such agreement was to advance the
14 interests of LKD, thus providing some benefit to Marrero. Stevenson's conduct in
15 ensuring the worthlessness of the only "consideration" Defendants attempt to
16 identify unquestionably constitutes a breach of any implied license that could
17 possibly be found that was "so material and substantial a nature that it affect[ed]
18 the very essence of the contract and serve[d] to defeat the object of the parties."
19 *Sprengel*, 2013 U.S. Dist. LEXIS 24701, at *26. For this reason, any implied
20 nonexclusive license granted to Stevenson that could potentially be found would
21 have been revocable at will by Marrero on account of Stevenson's subsequent
22 conduct. Any such license was revoked by Marrero when he contacted Tarell
23 Meeks, who was a founding member of LKD and the current business partner of
24 Stevenson in Egypt LKC, to object to the ongoing use of Marrero's Designs in mid-
25 2012. (UF 19.) To the extent any implied license to Stevenson ever existed, all
26 exploitation of Marrero's Designs after mid-2012 constitute copyright
27 infringement.
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3. The Last Kings Designs LLC Operating Agreement Precludes Marrero's Interest In LKD Serving As Consideration For An Implied License.

The LKD operating agreement provided Marrero with his 25% interest in LKD and contains an integration and no-oral-modification clause that, as a matter of law, precludes the 25% interest in LKD as consideration for an oral implied license. Essentially, Defendants' implied license defense requires the Court to find an oral, implied agreement in which Marrero's 25% interest in LKD was provided in exchange for an implied oral license granting Stevenson the right to use and sublicense Marrero's works. However, the written agreement that governs the purported consideration (the 25% interest in LKD) is an integrated contract whose provisions do not allow the 25% interest in LKD to be tied to any oral agreement, including the oral implied license to Stevenson Defendants allege in this case. Absent consideration, the implied license would be, and was revocable.

The parol evidence doctrine prohibits the introduction of extrinsic evidence to vary, add, or contradict the terms of an integrated written instrument. "The doctrine is based on the premise that the written agreement *is*, in those circumstances, the agreement of the parties." *Wagner v. Glendale Adventist Med. Center*, 216 Cal. App. 3d 1379, 1385 (Cal. App. 2d Dist. 1989) (citations omitted). "In other words, the law 'presumes a written contract supersedes all prior or contemporaneous oral agreements' [citation] and, where the writing is integrated, the presumption ***cannot be overcome***." *Id.* (emphasis added). "The central question in determining whether there has been an integration, and thus whether the parol evidence doctrine applies, is 'whether the parties intended their writing to serve as the exclusive embodiment of their agreement.'" *Id.* at 1385-86 (citation omitted). When an integration clause is combined with a "no-oral modification clause[]," it "is intended to foreclose claims of any representations outside the written contract aside from those made in another written document executed by

the parties." *Pace v. Honolulu Disposal Serv.*, 227 F.3d 1150, 1159 (9th Cir. 2000).

California contract law "recognizes one of the broad exceptions to the parol evidence rule" that "parol evidence may be introduced to show the meaning of the express terms of the written contract." *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.*, 971 F.2d 272, 277 (9th Cir. 1992). However, "[t]o avoid completely eviscerating the parol evidence rule, . . . there must be reasonable harmony between the parol evidence and the integrated contract for the evidence to be admissible." *Id.* "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is . . . whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Id.* (citations omitted).

Here, the LKD Operating Agreement, which was signed August 31, 2011, contains an integration clause combined with a no-oral-modification clause:

This agreement constitutes the whole and entire agreement of the parties with respect to the subject matter of this agreement, and it shall not be modified or amended in any respect except by written instrument executed by all of the Members. This agreement supersedes all prior written and oral agreements by and among the members.

(Dkt. No. 23 Ex. 1 at 6 (§ 10.1) (emphasis added).) The Operating Agreement is a fully integrated agreement.

The parol evidence on which Defendants seek to rely relates to an alleged implied agreement between Stevenson and Marrero that provided Stevenson with a right to not only use Marrero's Designs, but also provided Stevenson with the right to sublicense any entity to use the Designs as well. This parol evidence is not relied upon to "explain the meaning" of the Operating Agreement. *Brinderson-Newberg*, 971 F.2d at 277. Indeed, there is no mention of any license pertaining to Marrero's Designs in the Operating Agreement. (Dkt. No. 23 Ex. 1.) Defendants

1 instead seek to introduce this parol evidence to "eviscerate the very essence of" the
2 Operating Agreement. *Pace*, 277 F.3d at 1160.

3 Granting Stevenson, in his individual capacity, an implied license to use
4 Marrero's designs and sublicense any entity to do the same, including entities not
5 affiliated with LKD, would frustrate the purpose of LKD. Accordingly,
6 Defendants' proffered parol evidence regarding the implied license to Stevenson is
7 inadmissible. *See, e.g., Pace*, 277 F.3d at 1160 ("[W]e cannot sanction the
8 introduction of parol evidence that would eviscerate the very essence of the
9 contracts."); *Brinderson-Newberg*, 971 F.2d at 277 ("[T]here must be reasonable
10 harmony between the parol evidence and the integrated contract for the evidence to
11 be admissible."); *Bionghi v. Metro. Water Dist.*, 70 Cal. App. 4th 1358, 1368 n.6
12 (Cal. App. 2d Dist. 1999) ("There cannot be a valid express contract and an
13 implied contract, each embracing the same subject, but requiring different
14 results.").

15 Without the inadmissible parol evidence of an implied license to Stevenson
16 on which Defendants are attempting to rely, Defendants are left with no support for
17 their implied license defense. Plaintiff, therefore, respectfully requests that the
18 Court enter partial summary judgment against Defendants' implied license defense.

19 **V. CONCLUSION**

20 As to Stevenson, Tilly's, Sheikh Shoes, and Bravado, Plaintiff requests
21 summary judgment on liability and all liability-based affirmative defenses, leaving
22 only damages remaining for trial.

23
24 DATED: November 21, 2014

Respectfully submitted,

26 /s/ Daniel P. Hipkind
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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, the foregoing document described as **PLAINTIFF GLENNON MARRERO’S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed electronically via the Court’s Electronic Case Filing System (ECF). Notice of the filing is being served upon all counsel of record automatically through Notice of Electronic Filing.

/s/ Daniel P. Hipkind