

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Chris Gregerson)	No.: 06-cv-01164 (ADM/AJB)
)	
Plaintiff)	
)	
vs.)	PLAINTIFF'S MEMORANDUM
)	OF LAW SUPPORTING
Vilana Financial, Inc., a Minnesota Corporation; Vilana Realty, Inc., a Minnesota Corporation, and Andrew Vilenchik, a private individual,)	MOTION FOR PARTIAL SUMMARY
)	JUDGMENT ON PLAINTIFF'S
)	CLAIMS AND SUMMARY
)	JUDGMENT ON DEFENDANT'S
)	CLAIMS AND COUNTERCLAIMS
Defendants)	
)	

I. INTRODUCTION

Plaintiff moves for partial summary judgment on his claims against all three defendants as to liability for copyright infringement of photograph #2891 and defendants Vilana Financial, Inc. and Andrew Vilenchik as to liability for infringement of photograph #2258. The amount of damages will remain to be determined at trial. Plaintiff seeks summary judgment on Vilana Financial's state court Amended Complaint for defamation and appropriation [Docket no. 11] and the defendant's counterclaims contained in their Answer and Amended Counterclaims [Docket no. 55].

The evidence on record shows that the Plaintiff owns the copyright to images #2891 and #2258. The images were available on the world wide web prior to publication of same by the defendants. The defendant's publication of the Plaintiff's images infringed on the Plaintiff's exclusive right to reproduce the works under 17 USC § 106(1).

Vilana Financial, Inc. and Andrew Vilenchik have claimed Michael Zubitskiy is the true creator and copyright owner of those images, and Zubitskiy gave Vilana legal authority to publish the photos. The defendants have not located Michael Zubitskiy or the photos they claim to have obtained from him.

Gregerson published a webpage that described Vilana's copyright infringement and argued that Michael Zubitskiy does not exist. That webpage is the target of Vilana's state court defamation lawsuit and counterclaims in this suit. It is protected from the defamation claim and other counterclaims because the published statements are true, do not create consumer confusion, and Gregerson does not benefit from the mention of Vilana's name or display of Vilenchik's photo.

Gregerson has developed sufficient evidence over the last 18 months (below) to affirmatively prove the statements he published are true. Vilana has not produced any evidence to support their defamation claim or their counterclaims. There being no genuine controversy as to the material facts of the dispute, the Plaintiff moves for summary judgment on all but the amount of damages owed for the infringement by the defendants.

II. BACKGROUND

Plaintiff Chris Gregerson is a professional photographer who offers images for licensing on his self-published website at www.cgstock.com (formerly www.phototour.minneapolis.mn.us). He occasionally finds images from his website used without permission, which was the case in May of 2005 when he saw a night skyline photo from his website in a phone book ad for Vilana Financial and Vilana Realty.

Gregerson's image #2891 was in a full-page ad on the inside cover of the Twin Cities Dex directory for 2005. Am. Comp. At exhibit F.

Gregerson sent a letter to Vilana explaining his ownership of the photo and the licensing fee that was owed. Id. at exhibit I. The letter was not answered, and Gregerson telephoned Vilana's owner, Andrew Vilenchik, in June of 2005. Mr. Vilenchik refused to pay the licensing fee and claimed he lawfully purchased the photo from a Russian-speaking photographer named Michael Zubitskiy. Mr. Vilenchik said he "...had no intention of paying for the photo a second time, never even questioning Gregerson's rights to the photo". Attached exhibit A, Vilenchik's comments. Gregerson brought a small claims court action against Vilana Financial, Inc., which was heard on August 18th, 2005, and was denied without prejudice after Vilana objected to jurisdiction.

In September of 2005 Gregerson published an account of the above events on a webpage in the "essays" section of his website. In October of 2005, Vilana Financial filed a defamation lawsuit against Gregerson in Minnesota state court (MC 27 CV 05-16185). Vilana re-asserted their claim to having lawfully purchased the rights to image #2891 from Michael Zubitskiy. Vilana's state court Amended Complaint at ¶4. On March 27th of 2006, Gregerson filed the instant action for copyright infringement.

On April 10th of 2006, Judge Mark Wernick ruled that Vilana's state defamation complaint failed to state a claim under substantive defamation law, and Vilana must amend their complaint if they wished to proceed. [Docket No. 11]. The "...Court expressed doubts about the merits of Vilana's defamation claim". Attached exhibit B, Judge Wernick's order of May 10th, 2006 at Findings no. 4. p. 1.

Vilana filed a motion to amend their state complaint on April 14th, 2006, and Gregerson filed a memorandum opposing Vilana's motion to amend on April 19th. Id. at Findings 5 and 6, p. 2. Before Judge Wernick could rule on Vilana's motion to amended, Andrew Vilenchik asked to withdraw Vilana's Complaint. Id. at findings no. 7, p. 2. Judge Wernick rejected a notice of withdrawal filed by Vilana Financial, ruling the deadline for withdrawal had tolled. Id. at findings no. 14, p. 3.

On June 26th, 2006, Vilana removed their Minnesota state court action for defamation to federal court to be consolidated with this case. The document previously filed in state court with the caption “proposed Amended Complaint” was filed at docket no. 11, exhibit #8, with the caption “Amended Complaint”¹.

On August 28th of 2006, Vilana answered Gregerson's Complaint for copyright infringement with counterclaims for deceptive trade practices, trademark infringement and dilution, interference with contractual relationships, appropriation, injunction, and unjust enrichment (a defamation counterclaim also included was later withdrawn).

On January 15th, 2007, Gregerson discovered a second photo of his (#2258) was used by the defendants, and on February 5th, 2007, Gregerson was granted leave of the court to amend his complaint by Magistrate Judge Arthur Boylan to include the second photo [Docket No. 75]. On February 12th, 2007, Gregerson filed an Amended Complaint

1 Vilana was not granted leave of Minnesota state court or this court to amend their Complaint. Fed. R. Civ. P. 15(a) and Minn. R. Civ. P. 15.01. The Amended Complaint filed by Vilana Financial at Docket no. 11 should properly have been captioned “proposed Amended complaint”. This court's Memorandum Opinion and Order of August 16th, 2006 [Docket no. 21] refers to Vilana's state court complaint as it's “state court *Amended* Complaint” (emphasis added, p. 3, ¶3). Consequently, Gregerson now responds to Vilana's proposed Amended Complaint as if leave to amend had been sought and granted by this court.

which included infringement of the second image, #2258 [Docket no. 77]. Judge Boylan's order directed defendants to serve an answer by February 27th, 2007. The defendants have not filed an Answer to the Plaintiff's First Amended Complaint.

III. STANDARD OF REVIEW

The non-moving party may not “rest on mere allegations or denials, but demonstrate on the record the existence of specific facts which create a genuine issue for trial.” *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(e).

A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” Fed. R. Civ. P. 56(c) .

IV. UNDISPUTED FACTS

The following facts are established by the evidence on record.

Evidence as to the source of photographs #2891 and #2258:

- A) The Plaintiff, Chris Gregerson, created image #2891 on January 8th, 2004. Plaintiff's Amended Complaint at ¶8 and exhibit A. Gregerson published a reduced, cropped, and watermarked version of image #2891 on his website on 2004-01-14. *Id.* at ¶9 and exhibit B. The Plaintiff has a valid certificate of copyright registration for image #2891. *Id.* at exhibit C.
- B) The Plaintiff created image #2258 on August 20th, 2002. *Id.* at ¶22 and exhibit L. Gregerson published a reduced, cropped, and watermarked version of image

#2258 on approximately 2002-10-19. Id. at ¶23 and attached exhibit C. The Plaintiff has a valid certificate of copyright registration #2258. Id. at exhibit M.

Evidence of Publication of image #2891 and #2258 by the defendants

- C) Image # 2891 was published in the 2005 Twin Cities Dex phone book advertisement for Vilana Financial and Vilana Realty. Am. Comp. at exhibit F. and G. Vilana Financial published image #2891 in web ads, a brochure, and Zerkalo newspaper ads. id. at exhibit H, N and attached exhibit D (Zerkalo advertisement).
- D) Image #2258 was published by Vilana Financial in an advertising brochure (which also incorporated image #2891). This occurred some time after March of 2004 . Am. Comp. At exhibit N.
- E) The publication of images #2891 and #2258 by the defendants occurred after Gregerson had made the images available on his website.
- F) The publication of images #2891 and #2258 was the “web versions” of these images, which are distinctly lower in resolution that the original, high-resolution versions. The web versions do not appear as sharp in print. See attached exhibit K, comparison of the original version of image #2891, the web version, and the version Vilana provided to Dex. The original photo for image #2891 was not level, and the web version was rotated. The version Vilana sent to Dex matches to rotation of the web version. Id. The images were cropped before web publication, and Vilana only published those regions of the photos visible in the cropped, web versions. Am. Comp. At exhibit G, N.

Evidence of Andrew Vilenchik's role in Vilana Financial/Vilana Realty's publication of images #2891 and #2258:

G) Andrew Vilenchik is the sole corporate officer and owner of Vilana Financial and Vilana Realty. Defendant's Joint and Separate Answer and Amended Counterclaims at ¶38.

H) Andrew Vilenchik contracted with Dex, Zerkalo, and RH Donnelly to use Plaintiff's image #2891 in advertisements for Vilana. Attached exhibit E.

Evidence related to a third-party source (Michael Zubitskiy) for the photos :

I) Defendants claim they lawfully purchased image #2891 on March 19th, 2004, from Michael Zubitskiy for \$850.00 in cash. Defendant's Joint and Separate Answer and Amended Counterclaims at ¶¶41, 44; Vilana's state court Amended Complaint at ¶4; attached exhibit F-1 at interrogatory answers 1 and 2, pp. 2 and 3.

J) Vilana described their contact with Zubitskiy as follows:

...Andrew Vilenchik met met Mr. Zubitskiy at the Life Time Fitness gym during the early part of March, 2004. Mr. Vilenchik and Mr. Zubitskiy met noting that each gentleman spoke Russian. Mr. Zubitskiy learned that Mr. Vilenchik was at that time starting a company, and Mr. Zubitskiy offered web design and photography services in connection therewith. Mr. Vilenchik gave Mr. Zubitskiy Mr. Vilenchik's cellular phone number, and told Mr. Zubitskiy to take pictures and call upon Mr. Vilenchik thereafter. Mr. Zubitskiy called Mr. Vilenchik on or about March 14th, 2004. Mr. Vilenchik and Mr. Zubitskiy met at Mr. Vilenchik's office on March 19th, 2004. During that meeting Mr. Zubitskiy he [sic] delivered a CD-Rom. Mr. Vilenchik paid Mr. Zubitskiy in cash for the CD and both signed a contract/receipt.

Attached exhibit F-2 at Interrogatory answer 11, p. 7. There was no further contact with Zubitskiy after this. Id. at answer to interrogatory 12, p. 8.

K) Upon deposition, Vilenchik testified he met Zubitskiy at either Lifetime or Balley's.

Attached exhibit G-3, deposition of Andrew Vilenchik 23:17-19.

L) Lifetime Fitness and Balley's never had a member named Michael Zubitskiy.

Vilenchik last visited Balley's in 2003. Attached exhibit H.

M) Vilenchik testified he could not remember the photos on the CD-ROM specifically, but they were "different views of downtown". Attached exhibit G-3, Vilenchik deposition at 25:22.

N) Vilana stated they only published one photo from the CD-ROM, image #2891 (the Minneapolis skyline at night). Attached exhibit F-2 at answer to interrogatory 8, p. 6.

O) Vilenchik testified on Feb. 13th, 2006, that he believed Michael Zubitskiy owned the copyright to image #2891.

Q. Who do you believe owns the copyright to that photo [image #2891]?

A. Michael Zubitskiy

Attached exhibit G-1 Vilenchik deposition at 9:2-9:4. Vilenchik explained further:

Q. What is your basis for believing that he [Zubitskiy] did take this photo?

A. He brought them over to me.

Q. Can you - why do you believe that he's the photographer more than my claim that I'm the photographer of the photo?

A. He sold me the pictures.

Id. Vilenchik deposition at 27:11-27:17. Vilenchik also testified:

- Q. Can you tell me why you believe more strongly that Michael Zubitskiy is the photographer rather than myself?
- A. Because I bought a picture from him.
- Q. When you buy something from someone, you assume that it's theirs, that's what has happened in this case with the photo?
- A. Correct.
- Q. Are you aware of any evidence that Michael Zubitskiy took the photo?
- A. I'm not aware.

Attached exhibit G-2, Vilenchik deposition at 34:11-34:21. Vilenchik also testified:

- Q. Is there anything that would convince you I took that photo?
- A. Yes.
- Q. What would that be?
- A. The court system.
- Q. Anything else?
- A. No.

Id. Vilenchik deposition at 39:24-40:5

P) At the same deposition, Andrew Vilenchik testified he had know way of knowing who took image #2891, he has not attempted to ask Zubitskiy who took the photo.

- Q. That is a representation of a webpage that is on the Internet [showing image #2891]. I sent something similar to you in a letter last year. Do you have any way of knowing whether or not Michael Zubitskiy took the photo that he gave you from this webpage?
- A. I do not.
- Q. Have you attempted to contact Michael Zubitskiy to ask him about whether or not he took the picture from this webpage.
- A. I haven't.

Attached exhibit G-1, Vilenchik deposition at 18:17-18:24

Q) Andrew Vilenchik testified he does not challenge Gregerson's copyright to image

#2891.

Q. You haven't asked me to produce the high-resolution file for the photo or out-takes that show that I was at the time and location that the photo was produced or a wider version of the same image. Such evidence logically might - might suggest or support the argument that I am the original photographer. Do you have an interest in that kind of documentation or evidence?

A. No.

Q. Can you tell me why you're not interested in it?

A. Yes, I can.

Q. And why is that?

A. Because I'm not questioning your copyrights on the picture.

Id. Vilenchik deposition at 22:12-23:1.

R) On January 15th, 2007, Vilana provided Gregerson with a copy of a Vilana brochure requested in discovery. Gregerson identified two of his images in the brochure, #2891 and #2258. Gregerson asked Vilana to identify where they obtained image #2258 (Vilana previously stated they only published one image from the Zubitskiy CD-ROM, #2891). Vilana responded that image #2258 also came from the Zubitskiy CD-ROM. Attached exhibit I-1 at interrogatory 9, p 2.

S) In the month of March, when Zubitskiy allegedly created the photos on the CD-ROM, the average temperature in Minneapolis is 32 degrees Fahrenheit and the average snowfall is 10.7 inches. Image #2258 (alleged to be on the Zubitskiy CD-ROM and taken by Zubitskiy in March) is an outdoor photo clearly showing weather from August. Am. Comp. at exhibit L.

Evidence related to the Zubitskiy photo agreement

- T) The Zubitskiy photo agreement does not contain a description of the photos, identify who took the photos, or include any contact information for Michael Zubitskiy. Vilana's state court Amended Complaint at exhibit A. Andrew Vilenchik testified it's purpose was to show Zubitskiy had received the \$850.00 in cash Vilenchik gave him. Attached exhibit G-1, Vilenchik deposition at 27:22-25.
- U) The Zubitskiy Sales Agreement was notarized by a Vilana employee, Vladimir Kazaryan. Vladimir did not keep a notarial log. Attached exhibit J-1, Deposition of Vladimir Kazaryan at 5:18 – 6:2. Kazaryan had no specific recollection of looking at Zubitskiy's ID. Id. at 14:18-14:21.
- V) The Minnesota Department of Commerce prepared to commence formal action against Vladimir Kazaryan based on Gregerson's allegation that Kazaryan notarized a fraudulent document. Kazaryan signed a consent order agreeing to dispose of the matter by being removed from his office as a notary public in the State of Minnesota. Attached exhibit L, Kazaryan consent decree.
- W) Vilana did not get an IRS W9 form from Michael Zubitskiy or submit a 1099-MISC form to Zubitskiy and the IRS at the end of the year. These are required by their alleged payment of \$850.00 to Zubitskiy¹. Attached exhibit F-3 at request for

¹ IRC § 6041A(a) requires the recipient of a service to report payments of \$600.00 or more in a calendar year to report the payment on IRS form 1099-MISC. IRC 6041A(f) requires the person receiving such payment to provide their name, address, and TIN (Taxpayer ID Number) on a completed and signed W9 form. IRC § 3606(a)(1) states that if the payer (in this case, Vilana Financial) does not obtain a completed W9, they must withhold 28% of the amount paid to the individual. Vilana did not get a W9, did not file a 1099-MISC, and did not withhold 28%. Vilana Financial offers tax preparation services.

production of documents 3, p. 13.

X) Former Vilana employee Michael Walker testified under oath on Jan. 11th, 2007, that he saw the Zubitskiy photo agreement in June of 2005 (the month Gregerson notified Vilana of their infringement of his first photo). Mr. Walker saw the Zubitskiy document on the photocopier at the offices of Vilana Financial without any signatures, but dated more than a year prior. Attached exhibit Q-1, deposition of Michael Walker, at 11:1 -7, 12:8-24.

Y) The Plaintiff requested bank records which showed the withdrawal of cash used to pay Zubitskiy \$850.00. Vilana responded they had no such records. Attached exhibit R-2 at request for production of documents set 2, no. 3 p. 10.

Z) Gregerson requested the contact information for Michael Zubitskiy, the Zubitskiy CD-ROM, copies of the files on the CD-ROM, and copies of digital files for the ads created with photos from the CD-ROM. The defendants responded that none of these are available. Attached exhibit F-1 at interrogatory 6, p. 4.

Evidence related to the non-existence of Michael Zubitskiy:

AA) A search by a skip trace service in 2006 showed there is no Minnesota Driver's license, national credit record, voter registration, or mailing address for anyone named Michael Zubitskiy in the United States. Am. Comp. at exhibit D.

AB) Two West Publishing "people records" searches (one national, the other local for Minnesota) done in May of 2007 for the last name "Zubitskiy" showed no record of any kind for anyone named "Zubitskiy". Attached exhibit M. This search included credit records, consumer household records, telephone-based records, utility hook-

ups, criminal records, and other data.

AC) An investigator utilized by Vilana, Michael Grostyan, was unable to locate anyone named Michael Zubitskiy in the United States. Attached exhibit N at p. 2.

AD) The local phone service for Minnesota, Qwest Communications, has no record of ever having a phone number, listed or unlisted, for anyone named Zubitskiy, Zubitski, or Zubitsky. Attached exhibit O.

AE) Upon subpoena by Gregerson, Hennepin County responded that they had no record of a client named Michael Zubitskiy in any of their assistance programs, such as Economic Assistance, Medical Assistance, or social services. Attached exhibit P.

AF) Vilana filed a motion to quash Gregerson's subpoenas seeking to locate Michael Zubitskiy to Qwest, Balley's Total Fitness, and the Hennepin County Attorney because "Plaintiff's discovery requests to these individuals and entities are served for the sole purpose of determining whether or not Michael Zubitskiy exists...and are not calculated to the discovery of any relevant evidence." [Docket no. 59, pp. 1, 4].

AG) Gregerson publicly offered a \$500 reward (and to unilaterally drop all legal claims against the defendants) if anyone could produce evidence of a valid, legal, ID for Michael Zubitskiy. This reward was posted on Gregerson's webpage for approximately 6 months. There were no responses. Plaintiff's affidavit at 1.

AH) The name "Michael Zubitskiy" does not appear anywhere on the world wide web except for web pages which refer to this litigation itself.

V. ANALYSIS OF THE UNDISPUTED FACTS

A. There is no one named Michael Zubitskiy in the USA

The Plaintiff has affirmatively shown there is no person named Michael Zubitskiy in the United States, establishing his online statements to that effect are true and thus not defamatory. Even Vilana's investigator, Michael Grostyan, could not find any record of a person named Michael Zubitskiy. Attached exhibit N. Grostyan indicated finding Zubitskiy would require "...tracing trails through friends, relatives, old work places, prior residences...". Id. Zubitskiy has no known friends, relatives, or old work places. Zubitskiy does not "live underground", as he allegedly produced a valid, government issued photo ID to the notary (Vladimir Kazaryan) for notarization of his signature, and Zubitskiy was allegedly transacting business at a suburban health club freely and openly.

B. Vilana has not produced evidence to create a genuine controversy that Micheal Zubitskiy exists

Vilana brought a defamation claim against Gregerson over his online statement that Zubitskiy does not exist in Vilana Financial's state court Amended Complaint at ¶¶ 17.17 - 17.24. Judge Wernick ruled on April 10th that Minnesota defamation law places the burden of proof on the claimant, and his order stated "...if Vilana intends to pursue its defamation claim...Vilenchik would be well advised to find the elusive Mr. Zubitskiy...". Although Vilana has the burden of establishing that Michael Zubitskiy exists, they failed to produce any evidence that independently supports their assertion Zubitskiy is a real person. Instead the defendants moved to *quash* Gregerson's subpoenas to find Zubitskiy.

C. Gregerson has established photos #2891 and #2258 came from his website

Gregerson published images #2891 and #2258 on the world wide web, where they were accessible by the Defendants before the defendant's published the photos. Gregerson

modified both photos before publication on the web by reducing their resolution and cropping them, and image #2891 was further rotated to make it level. The photo Vilana sent to Dex uniquely matches the web version of image #2891. Attached exhibit K. The second image published by the defendants, #2258, is also consistent with the web version of that photo¹. Am. Comp. at exhibit N. This establishes *prima facie* the photos came from Gregerson's website. The burden shifts to the defendant's to show a third-party source for the photo exists if they want to support their defamation claim against Gregerson and/or avoid higher statutory damages for deliberate infringement.

The practice of taking photos from web sites and re-publishing them is so common that when visiting Manila in March of 2007, Gregerson found four images from his website in the Manila Bulletin. Attached exhibit L. One of the four photos was Gregerson's wife, Arlene. Gregerson visited the company responsible, and they identified www.cgstock.com as the source of the images and paid Gregerson for their use.

An image search on www.google.com using the keywords “IDS night skyline” returns **Gregerson's image #2891 as the number one result** out of 6,320 results. A search using the keywords “Minneapolis skyline stock photo” returns two other images (#1756 and #2944) from www.cgstock.com as the **top two results out of 15,500 images**. It is not hard to find images from cgstock.com if you are looking for stock photos of Minneapolis, and the obvious presumption when such an image appears in a publication without permission is that the source was the website.

¹ Gregerson requested the name of the company who published the Vilana brochure that uses the Plaintiff's image #2258, and a copy of the digital file sent to the print service. Vilana responded they are unable to provide the printer's name or the file sent to them.

D. Vilana has not raised a genuine issue a third party source exists.

Vilana has not produced any admissible evidence a third-party source for Gregerson's photos exists. Whether named Michael Zubitskiy or some other name, this alleged entity cannot be located and the photos he provided cannot be located.

The circumstances are dubious and contradicted by the evidence on record.

1. Paying a stranger in cash for a corporate purchase of a photo license but not recording the seller's contact information, not completing the required tax forms, and then loosing the photos, would be consistent with money laundering, embezzlement, or tax evasion. It is not consistent with a legitimate corporate purchase of intellectual property.
2. When asked for the details of his meeting with Zubitskiy in the Lifetime Fitness sauna, Vilenchik testified "I just mentioned I needed some photos. That's it". Exhibit G-1 at 24:9-10. According to Vilenchik's account, there was no discussion of what was to be photographed, how many photos were to be taken, if Zubitskiy would be providing negatives, prints, or digital files, there was no review of Zubitskiy's past work, or deadline for completing the photography. There was also no discussion of payment whatsoever. This is an unrealistic scenario for hiring an assignment photographer.
3. Vilenchik testified "I met him [Michael Zubitskiy] in a sauna". Attached exhibit G-1 at 23:21-24. Vilana also stated "Mr. Vilenchik gave Mr. Zubitskiy Mr. Vilenchik's cellular phone number." Attached exhibit F-2 at Interrogatory answer 11, p. 7. Vilenchik did not explain how, while in a sauna, he was able

to give his phone number to Zubitskiy. It would be highly unusual to carry a pen and paper with you into the sauna, but Vilenchik never stated he left the sauna to get a pen and paper.

4. The Zubitskiy photo agreement is not useful as evidence that Micheal Zubitskiy is a real person, as the notary public did not keep a notarial log, could not remember looking at Zubitskiy's ID, gave inconsistent testimony about remembering Zubitskiy, and is not independent in that he worked for Andrew Vilenchik at the time. Further, he surrendered his commission to the Minnesota Department of Commerce based on allegations of misconduct over his notarization of this very document.
5. Vilenchik testified he could not remember the images on the CD-ROM Zubitskiy sold him, but was certain Gregerson's image #2891 was on the disc merely by the process of elimination, saying "He was the only source of photos I got". Vilenchik deposition at 27:2-4. Vilenchik stated he only published one photo from the Zubitskiy CD-ROM, but when he later produced a brochure with two photos belonging to Gregerson, images #2891 and #2258, Vilenchik changed his story and stated both came from the Zubitskiy CD-ROM. Exhibit I-1 at interrogatory 9, p. 2.
6. Image #2258 is an outdoor photo showing August weather in Minnesota. According to Vilenchik's testimony, he bought the CD-ROM under the belief all the photos had been taken by Zubitskiy in March of 2004. This requires Vilenchik to believe (or at least not question) that Zubitskiy could somehow

photograph August weather in Minneapolis in the month of March.

7. Absent the production of the Zubitskiy CD-ROM, and in light of Vilenchik's inability to remember what images were on it, there is no possible way of establishing that it contained image #2891 or #2258. Attached exhibit G-1, Vilenchik's deposition at 26:5-26:7.
8. Vilenchik has never attempted to locate Zubitskiy. He was advised by Judge Wernick to locate Zubitskiy, and needs Zubitskiy's testimony regarding the rights to the photos on the CD-ROM. Vilana needs to get their money back from Zubitskiy and could take advantage of Gregerson's offer to drop all litigation if Zubitskiy is found. The defendants have not served any subpoenas to locate Michael Zubitskiy, but instead moved to quash Gregerson's subpoenas to find Zubitskiy.
9. Vilana's failure to get the required IRS W9 form from Zubitskiy, or in the alternative withhold 28% of the \$850.00 paid to him, and their failure to submit a 1099-MISC to the IRS, is in conflict with Vilana Financial's advertised role as a tax preparation service.

The scenario claimed by the defendants is unbelievable. Any such extraordinary claim would require equally extraordinary evidence to support it. There is no independent evidence Zubitskiy exists, or he provided photos to Vilana. Gregerson's online statements that Zubitskiy doesn't exist are true. The Minnesota state district court temporarily suspended Gregerson's free-speech rights (in October of 2005) under a TRO Vilana obtained based on this Michael Zubitskiy story. A thorough investigation has disproved

Vilana's account, with Vilana unable to show anything to support it.

E. Vilana's argument is that they have a legal right to stolen property

Taking Vilana's discovery answers and Andrew Vilenchik's testimony as true, the defendants are essentially claiming that by purchasing Gregerson's photos from Zubitskiy, they are legally entitled to that property regardless of Gregerson's rights to it. Their defamation claim is not based on Zubitskiy's actual ownership of Gregerson's photos, but only on the claim that they paid Zubitskiy for the photos.

1. Vilana claims they were authorized by the copyright holder, Michael Zubitskiy, to publish image #2891.
2. Andrew Vilenchik testified he has no way of knowing if Zubitskiy took photo #2891, but he believes Zubitskiy has the copyright regardless of all evidence to the contrary because he paid Zubitskiy for the photo.
3. Vilenchik rejected Gregerson's offer to prove he took image #2891 "Because I'm not questioning your copyrights on the picture". Attached exhibit G-1, Vilenchik deposition at 22:12-23:1. In comments Vilenchik posted on Gregerson's webpage he stated he never questioned Gregerson's rights to the photo, only that "I have purchased this photo and had no intention of paying for it 2nd time..."¹. Attached exhibit A.

This argument is not a denial of copyright infringement, only a claim to having paid someone for the photograph(s). Judge Mark Wernick wrote on April 10th, 2006:

If Vilenchik had been acting in good faith in

¹ Andrew Vilenchik's comments can also still be found online, as he posted them at, http://www.cgstock.com/essays/vilana.html#vilenchik_comment

connection with his possession of the photograph, then once Vilenchik learned the photograph had been stolen from Gregerson, Vilenchik would have offered to fairly compensate Gregerson and then seek reimbursement from from 'Zubitskiy', the person who allegedly sold the photograph to Vilana.

IV. ARGUMENT FOR SUMMARY JUDGMENT ON THE PLAINTIFF'S COPYRIGHT CLAIMS

The elements required to prove copyright infringement are (1) existence and ownership of a valid copyright, and (2) defendant's violation of one of the United States' exclusive rights granted under copyright law. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992). These elements are established as described below.

A. Plaintiff owns a valid copyright to images #2891 and #2258

Gregerson has produced a valid certificate of copyright registration for both photos. Plaintiff's Am. Comp. at exhibit C, M. These certificates “constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.” Notes on 17 USC § 410. There is no evidence of a genuine controversy as to Gregerson's authorship or copyright to images #2891 and #2258.

B. Vilana Financial, Inc. and Vilana Realty, Inc. infringed on the Plaintiff's copyright to photo #2891

Gregerson has the exclusive right to reproduce, distribute, and publicly display copies of image #2891. Title 17 U.S.C. § 106(1)). Image #2891 was published by Vilana Financial and Vilana Realty in their Dex phone book ad (Am. Comp. at exhibit F) and a series of ads in the newspaper published by Zerkalo. Attached exhibit D. It was also

published by Vilana Financial in a brochure. Am. Comp. at exhibit N. This establishes copyright infringement of photo #2891 by Vilana Financial and Vilana Realty, with the amount of actual damages remaining to be determined at trial.

C. Vilana Financial, Inc., infringed on photo #2258

Gregerson has the exclusive right to reproduce, distribute, and publicly display copies of image #2258. Title 17 U.S.C. § 106(1)). Vilana published a promotional brochure which included Plaintiff's image #2258. Am. Comp. at exhibit N. This establishes copyright infringement of photo #2258 by Vilana Financial, Inc. with the amount of actual damages remaining to be determined at trial.

D. Copyright infringement of both photos (#2891 and #2258) by Andrew Vilenchik

Andrew Vilenchik personally created the advertising for Vilana Financial and Vilana Realty cited above and arranged for its publication. Attached exhibit E. Andrew Vilenchik is the sole owner and board member for both corporations, and was actively involved in the infringing activity as well as having a supervisory responsibility in preventing the infringement. Mr. Vilenchik stood to directly benefit from the infringement as the sole owner of both corporate defendants.

“In this circuit, we have also spelled out the elements of 'vicarious liability': '(1) the right and ability to supervise the infringing activity; and (2) an obvious and direct financial interest in the exploitation of the copyrighted materials.'” *Pinkham*, 983 F.2d at 834 (quoting *RCA/Ariola Int'l Inc. v. Thomas & Graston Co.*, 845 F.2d 773, 781 (8th Cir. 1988)). This same standard for vicarious liability was applied in *Cass County Music Co. v.*

C.H.L.R., Inc., 88 F.3d 635, 641 (8th Cir. 1996), citing Pinkham.

Andrew Vilenchik has personal liability for any infringement by Vilana Financial, Inc. and Vilana Realty, Inc, as he is the sole corporate officer and/or has a supervisory authority, and he is in a position to benefit financially from the infringement. These elements of vicarious liability for copyright infringement against Andrew Vilenchik for both images are satisfied by the evidence already on record, with the amount of damages remaining to be determined at trial.

**V. ARGUMENT FOR SUMMARY JUDGMENT ON VILANA FINANCIAL'S
MINNESOTA STATE COURT AMENDED COMPLAINT**

A. Defamation

The elements of defamation in Minnesota require a showing that the defendant communicated something provably false to a third party that was damaging to the Plaintiff. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252,255 (Minn. 1980). Truth is a complete defense against defamation, and “true statements, however disparaging, are not actionable.” *Id.* “It is well recognized in Minnesota that the First Amendment absolutely protects opinion that lacks 'a provably false statement of fact.'” *McClure v. American Fam. Mut. Ins. Co.*, 223 F.3d 845, 853 (8th Cir. 2000). Further:

A commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist. Consequently, remarks on a subject lending itself to multiple interpretations cannot be the basis for a successful defamation action because as a matter of law no threshold showing of 'falsity' is possible in such circumstances.

Hunter v. Harman, 545 N.W.2d 699, 707 (Minn. Ct. App. 1966).

Vilana's original Complaint for defamation claimed Gregerson's essay accused Vilana of theft. Judge Mark Wernick disagreed, and ruled the essay only stated Vilana published a photo that belonged to Gregerson without his permission and when informed refused to pay the licensing fee. See Judge Wernick's April 10th, 2006, memorandum [Docket no. 11] at p. 9 ¶3. Judge Wernick directed Vilana to file an amended complaint which “specifies the exact statements...Plaintiff alleges are defamatory and false and which Plaintiff concedes are true”.

Vilana's state court Amended Complaint cites 22 statements as being false and defamatory from various versions of Gregerson's webpage at ¶¶ 17.1 – 17.25. The statements by Gregerson that Vilana alleges are defamatory can be consolidated and summarized as follows: Vilana used Gregerson's photos without permission, Michael Zubitskiy does not exist, and the Zubitskiy sales agreement is fraudulent.

Gregerson has shown that Vilana Financial used his photos, there is no Michael Zubitskiy, and the sales agreement is fraudulent. Vilana Financial has an affirmative burden to designate specific facts creating a triable controversy. *Crossley v. Georgia-Pacific Corp.*, 355 F.3d 1112, 1113 (8th Cir. 2004). Vilana has not produced any evidence to support to contradict these statements by Gregerson and support their defamation claim. Each of Vilana's 22 allegations is addressed individually below.

Vilana Financial's state court Am. Comp. ¶ 17. 2 cites the original title of Gregerson's webpage, “Vilana Financial’s president Andrew Vilenchik and Intellectual Property Theft”, as false and defamatory. It has already been ruled by Judge Wernick that

“...neither the headline nor the essays themselves accuse Vilana of theft...”. Judge Mark Wernick's order of April 10th [Docket no. 11], pp. 10 ¶ 2.

Id. at ¶ 17. 3 objects to “An implied statement that Plaintiff knew or should have known theft occurred, or that Plaintiff knowingly received stolen goods.” This allegation fails to specify the exact statement which is false and defamatory, as ordered by Judge Wernick.

Id. at ¶ 17. 4 alleges that “In June of 2005, I informed the owner of Vilana Financial/ Vilana Realty (www.vilanafinancial.com) that their current phone book ad featured one of my copyrighted photos” is false and defamatory. This statement is true. Am. Comp. at exhibit I, Plaintiff's letter to Vilana of June 6th, of 2005.

Id. at ¶ 17. 5 “The ad with my photo is shown at right.” is cited by Vilana as being false and defamatory. The ad to the right is Vilana's Dex phone book ad, which contains Gregerson's image #2891. Am. Comp. at exhibit B, F, and G.

Id. at ¶ 17. 6 cites “There is no question that the photo is mine, it came from my website and my watermark was carefully cropped out of the lower-left (you can see the photo on my site, #2891).” as false and defamatory. This statements is true.

Id. at ¶ 17. 7 cites “Mr. Vilenchik has shown bad faith” as being false and defamatory. This is an opinion based on facts set forth in the essay. Judge Wernick's April 10th order [Docket no. 11] agreed with this characterization, stating that Vilana indeed acted in bad faith on p. 11, ¶¶ 1,2.

Id. at ¶ 17. 8 cites “Vilana's use of my copyrighted photo involved the deliberate removal of my website address from the image, and was not plausibly an accident” as

false and defamatory. The version of #2891 published by Vilana came from Gregerson's website except the area with the watermark cropped out. Am. Comp. at exhibit B, F.

Id. at ¶ 17.10 cites “I’ve since learned that Vilana has actually used my photo is [sic] multiple ads. At right is a screenshot on a website homepage which also uses my same photograph.” as false and defamatory. This statement is true. Am. Comp. at exhibit H shows image #2891 at www.zerkalo.com in an ad for Vilana Financial, Inc.

Id. at ¶ 17.11 cites “Everything written here is what I witnessed myself and is also supported by other witnesses and physical evidence.” as false and defamatory. This statement is true.

Id. at ¶ 17.13 objects to “An implied statement that Plaintiff has committed Fraud or engaged in predatory loan practices and should be reported to the Minnesota Department of Commerce and/or Minnesota Attorney General.” as being false. This allegation fails to “specify the exact statements” which are false and defamatory, as ordered by Judge Wernick. Gregerson filed a complaint with the Minnesota Department of Commerce in 2006 and his website publicizes this complaint and provides a link to the Minnesota Department of Commerce for anyone who wants to make their own complaint. This is not a “provably false” statement and not defamatory.

Id. at ¶ 17.14 cites “Copyright violation and other misconduct” as false and defamatory. Vilana Financial did commit copyright violation. “Other misconduct” refers to Andrew Vilenchik's refusal to pay Gregerson once he was notified of the infringement.

Id. at ¶ 17.15 cites “Vilana Financial took a photo from this website...” as being false and defamatory. The photos published by Vilana are the “web versions” of

Plaintiff's image #2891 and #2258 with the watermark removed. Vilana has yet to come forward with evidence showing another source for the photos besides the website.

Id. at ¶ 17.16 cites “His lawsuit uses a forged sales agreement...” as false and defamatory. This reference to the Zubitskiy Sales Agreement is true; whoever signed the name “Michael Zubitskiy” was not legally named Michael Zubitskiy.

Id. at ¶ 17.17 cites “... a person who does not exist...” as false and defamatory by implication. This is a reference to Michael Zubitskiy. The evidence on record establishes there is nobody in the US named Michael Zubitskiy.

Id. at ¶ 17.18 cites “They say this proves they purchased my photo lawfully” as false and defamatory. This statement is true, Vilana has claimed they lawfully purchased Gregerson's photo from Zubitskiy. Defendant's Joint and Separate Answer and Amended Counterclaims at ¶ 44.

Id. at ¶ 17.19 cites “...the document is a forgery - - Michael Zubitskiy does not exist” as false and defamatory. Vilana has not come forward with any evidence that Michael Zubitskiy exists, and Gregerson has affirmatively shown he does not.

Am. Comp. ¶ 17.20 cites “...they cannot show any evidence that such person exists.” as false and defamatory. This statement is true, Vilana has not produced any independent documentation a person named Michael Zubitskiy exists in the USA, or a person by any name sold them a CD-ROM with Gregerson's photos.

Am. Comp. ¶ 17.21 cites “Vilana told me they had no contact information for him. I had an investigator try to locate him, doing an extensive background check (driver’s license, state ID, credit records, voter registration, etc.). He reported that in his

professional opinion there is no such person as Michael Zubitskiy in the United States.”

as being false and defamatory by implication. This is not false, but is on record. Plaintiff's

Am. Comp. at exhibit K.

Am. Comp. ¶ 17.22 cites as false and defamatory the statement:

“If there is no Michael Zubitskiy, who’s signature appears on the Zubitskiy photo agreement? I sent the document to a court-certified handwriting expert, Jack Cammarata. He reported that the signature appeared to be made by the notary public - -a forgery. The graphic below shows the similarity of two signatures, Vilana Financial employee Vladimir Kazaryan and 'Michael Zubitskiy'. The handwriting expert stated 'there is sufficient evidence to conclude a high probability that both signatures were made by the same person'.

The above statement is true, Jack Cammarata reported that the signature appeared to be made by the notary public. Attached exhibit T.

Am. Comp. ¶ 17.23 cites “He made no attempt to try and locate Michael Zubitskiy (*which makes sense since he doesn't exist*).” as false and defamatory. This statement is

true, Andrew Vilenchik has made no attempt to try to locate Michael Zubitskiy.

Gregerson requested, though discovery, that he be notified of efforts to locate Zubitskiy, and none have been identified. Attached exhibit F-2, interrogatory answer no. 13, p. 8.

Am. Comp. ¶ 17.24 cites as false and defamatory the statement:

“Nobody met Michael Zubitskiy except Andrew Vilenchik and the employee who notarized the sales agreement, Vladimir Kazaryan. Vladimir Kazaryan has said that he doesn't remember the sales agreement or Michael Zubitskiy”.

This statement is true. Attached exhibit J-1, Affidavit of Vladimir Kazaryan at 11:17-22 and 13:4-7.

Am. Comp. ¶ 17.25 cites the following statement as false and defamatory:

“I’m not a customer of theirs, and they *still* stole from me. They sued me for telling others about their theft of my photo in violation of my right to free speech. Their use of a forged document in Minnesota state court is a fraud upon the courts of Minnesota”.

Vilana's use of Gregerson's photo without his permission and refusing to pay Gregerson once informed of this is essentially “stealing” from Gregerson; Judge Wernick wrote that “Vilenchik's bad faith, as described in Gregerson's essays, is the moral equivalent of 'theft' as that term is uniquely described in Minnesota law.” Wernick order of April 10th 2006, at p. 11 ¶ 1.

Gregerson informed Vilana the Zubitskiy photo agreement was not valid before Vilana filed it in their state court defamation complaint. Gregerson filed a motion for rule 11 sanctions against Vilana in January of 2006 alleging that the Zubitskiy photo agreement was fraudulent. Judge Mark Wernick wrote of the sanctions motion:

“...Gregerson's allegations are serious, and on their face credible...Vilenchik said that he now has no idea how to locate Zubitskiy, and the \$850 paid to Zubitskiy was in cash.”

Judge Wernick's order of April 10th, 2006 [Docket no. 11, exhibit #10]. Judge Wernick ordered that Gregerson's motion for sanctions “shall remain under advisement pending further order of the court”. *Id.* at order no. 3. Despite this, Vilana has continued to represent the Zubitskiy photo agreement proves their lawful purchase of Gregerson's photos, but making no effort to locate Zubitskiy and moving to quash Gregerson's subpoenas to locate Zubitskiy.

B. Appropriation of likeness

Vilana Financial's state court Amended Complaint (at ¶¶ 25 – 19) includes a claim

for appropriation of likeness based on the Restatement (Second) of Torts § 652C. The Plaintiff, Vilana Financial, Inc., claims this tort protects “...an individual's identity...” (at ¶ 25) and Vilana Financial, Inc. is “...aggrieved by the unauthorized use and appropriation of the likeness of it's president...Mr. Vilenchik” (at ¶ 29).

1. Invasion of Privacy is not actionable by a corporation

The tort of invasion of privacy protects an individual from intrusion into their private affairs based on the offensiveness and the emotional distress that results. A corporation cannot be offended or suffer emotional distress. The Restatement of Torts has held that a corporation may not bring an action for invasion of privacy. Restatement (Second) of Torts §652(1), comment c (1977).

2. Gregerson did not benefit from Vilenchik's likeness

“To tortuously appropriate an individual’s name, one must appropriate for the purpose of taking advantage of that individual's name, or reputation.” *Kovatovich v. K-Mart Corp.*, 88 F. Supp. 2d 975, 986-87 (D. Minn. 1999). Andrew Vilenchik's name and reputation do not have any positive reputation or value for Gregerson to take advantage of (note the dozens of critical comments posted on Gregersn's webpage attacking Vilenchik). The only use of Vilenchik's name and likeness by Gregerson was to identify Vilenchik as the party who stole Gregerson's photo, and the party who sued Gregerson for defamation (Vilenchik's photo is captioned “Andrew Vilenchik, President of Vilana Financial, Inc.”). Gregerson's webpage does not contain advertising, it only describes the defendant's dispute with the Plaintiff and this litigation. The Restatement (Second) of Torts §652C,

comment d (1977), states:

"No one has the right to object merely because his name or his appearance is brought before the public since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness."

3. Vilenchik self-published his own name on the webpage

On December 12th, 2005, Andrew Vilenchik posted his own extended remarks on Gregerson's webpage. Attached exhibit A. He used his own name and admitted to his authorship of the comments in a discovery interrogatory. Attached exhibit F-3 at request for admission 1, p. 14.

VI. ARGUMENT FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS

The counterclaims below are cited from the Defendant's joint and separate Answer and Amended Counterclaims [Docket no. 55]. There is no genuine dispute as to any material fact related to the counterclaims, as the contents of Gregerson's webpage are not in dispute and Gregerson admits to authorship. The evidence of record establishes the statements written by Gregerson are true, and no likelihood of consumer confusion or evidence of unjust enrichment has been shown by the defendants.

A. Deceptive trade practices under MSA § 325D.44 and trademark infringement and dilution under MSA §333.28 and 15 USC § 1114, 1125

Vilana has not offered any evidence which, if proved true, would support the claim that Gregerson has disparaged their business through “...false or misleading representations of fact” in the course of Gregerson's business, vocation, or occupation. Minn. Stat. § 325D.44 Subd. 1(8). There is no infringement of Vilana Financial's trademark, as Gregerson's webpage is only an editorial use of the name Vilana to identify Vilana. Gregerson neither attempts to pass off his goods as Vilana's or offers products with a competitive proximity to Vilana's.

Gregerson's essay is in a distinctly separate section of his website, and Gregerson does not write essays as his “vocation or occupation”. Other essays posted in his essays section address Gregerson's opinions about representative democracy, a complaint about a travel service called “hotwire.com”, and a discussion of his late brother's battle with Hodgkin's disease. None of these essays are a commercial venture, they only appear at cgstock.com because it's more convenient than obtaining a different domain name for each item published online. Gregerson published a medically-related website at www.cgstock.com/candida even though it has no relationship to Gregerson's stock photography business. Out of some 7,500-8,500 pages under the domain name of www.cgstock.com, only one page¹ lists prices for photos (other pricing information can be obtained by completing and submitting a web fill-out form²). There is no likelihood of consumer confusion by Gregerson's use of the name Vilana to identify the company his

1 <http://www.cgstock.com/photographs.html>

2 <http://www.cgstock.com/cgi-bin/quote.cgi?image=4000>

web essay is about.

B. Interference with contractual relationships

Making representations to third parties is not improper if the representations are true. *Glass Serv. Co., Inc. v. State Farm Mut. Auto. Ins.*, 530 N.W.2d 867, 871 (Minn. Ct. App. 1995). There is “no liability for interference on part of one who merely gives truthful information to another.” *Id.* (citing Restatement (Second) of Torts § 722 cmt. b (1979).) The counterclaim plaintiffs have not established Gregerson made any false statements about them. Gregerson has proved the truthfulness of the statements on his website, as outlined above. Without any evidence from Vilana to create a genuine controversy over statements Gregerson has made, there is no basis for a claim of interference with contractual relationships.

C. Appropriation

Gregerson has not appropriated Andrew Vilenchik's name or likeness for his own benefit. It is used only to identify Vilenchik in an essay about Vilenchik. See V(B) above.

D. Equitable relief: Injunction

¶ 74 (a) and (b) of the defendant's Amended Answer and Counterclaims seeks an order that Gregerson cease further infringement and defamation against the defendants. There is no infringement or defamation to be enjoined.

E. Unjust enrichment

In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the

benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). The counterclaim plaintiffs have not produced any evidence whatsoever that Gregerson received anything of value he was not entitled to.

VII. CONCLUSION

The Plaintiff has established the elements of copyright infringement for image #2891 against all three defendants, and image #2258 against Vilana Financial and Andrew Vilenchik. The Plaintiff has affirmatively shown the photos came from his website, and the defendants have failed to provide meaningful evidence of any other source. The defendants have further produced no evidence to support their state court defamation claims, or any of their counterclaims in the instant action.

Based on the facts already on record, summary judgment in favor of Gregerson's copyright infringement claims is appropriate, with the amount of damages remaining to be determined at trial. Summary judgment against Vilana's state court defamation and appropriation claim, and the defendant's counterclaims, is also appropriate as a matter of law based on the substantial evidence already on record.

Respectfully submitted,

Dated: June 29th, 2007

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