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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF WASHINGTON

10 PREPARED FOOD PHOTOS, INC.,  
f/k/a ADLIFE MARKETING  
11 & COMMUNICATIONS CO., INC.,  
a Florida for profit corporation,

12 Plaintiff,

13 v.

14 POOL WORLD, INC., a Washington for  
15 profit corporation,

16 Defendant.

No. 2:23-cv-00160-TOR

**AFFIRMATION OF  
PAUL ALAN LEVY  
SUPPORTING MOTION TO  
COMPEL**

17  
18 1. My name is Paul Alan Levy. I am lead counsel for defendant Pool World. I make  
19 this affirmation in support of defendant’s motion to compel discovery, showing information  
20 from our investigation that we believe provides a reasonable basis for believing that the  
21 discovery that Pool World seeks to compel will produce information that would support  
22 Pool World’s defenses and rebut facts on which plaintiff’s affirmative case is predicated.

23 2. I attach as Exhibit A the requests for production of documents and interrogatories  
24 that we served on plaintiff, and as Exhibit B the initial responses to those discovery  
25 requests.

26 3. My co-counsel and I met and conferred with plaintiff twice orally—first with its  
27 counsel Lauren Hausman on September 28, 2023, and then with Ms. Hausman and Daniel  
28 DeSouza, the partner in her law firm who has decisionmaking authority in the case, on

1 October 27, 2023. There were several substantive written exchanges between those dates.  
2 It appears that the parties were able to resolve many of their disagreements through this  
3 process; plaintiff committed to further responses to several requests.

4 4. The motion to compel addresses requests that defendant propounded to support  
5 its legal defenses and to cast light on certain factual disputes, but that plaintiff contends are  
6 irrelevant as a matter of law. It appears that there is no possibility of compromise between  
7 the parties on these requests because the parties' respective positions rest on a difference  
8 about the applicable law governing the merits. Mr. DeSouza said that plaintiff is unwilling  
9 to disclose the information being sought, even though he understands that defendant seeks  
10 to use it in moving for summary judgment, because once the information is disclosed it will  
11 not be possible to "put the toothpaste back in the tube." Plaintiff's counsel did not suggest  
12 that disclosure of this information could cause it any competitive harm. Although  
13 plaintiff's responses to Interrogatory 12 and Request for Production 6 also raise concerns  
14 about breadth and burden, when I tried to discuss ways to ameliorate those concerns,  
15 plaintiff's counsel indicated that the basic issue was his client's view that the discovery  
16 sought is not relevant to the case.

17 5. Using the Party Search mechanism on the United States PACER Case Locator,  
18 <https://pcl.uscourts.gov/pcl/pages/search/findPartyAdvanced.jsf>, I looked for copyright  
19 infringement actions filed by Prepared Food Photos, Inc., and by its corporate predecessor,  
20 AdLife Marketing and Communications, Inc. Exhibit C is a list of 260 such infringement  
21 actions. For a period of time in the past year, plaintiff was filing a dozen or more such  
22 lawsuits each month.

23 6. I have reviewed the dockets of a sample of the 260 cases. In almost all of the cases  
24 I reviewed, the lawsuits were dismissed voluntarily shortly after being filed, with the  
25 appearance that there had been a settlement: sometimes, plaintiff filed a document referring  
26 to a settlement; sometimes, the docket simply reflects a voluntary dismissal. In a few cases,  
27 the court entered a default, and then a default judgment based solely on the allegations in  
28 the complaint as well as the plaintiff's ex parte representations about its damages.

1 7. I have reviewed several cases in which default judgments were entered, reviewing  
2 plaintiff's filings and the ensuing court rulings. In each of the cases I reviewed, plaintiff  
3 sought statutory damages in excess of \$10,000, citing its current policy of making photos  
4 available only for licensing by monthly subscription, without revealing that it formerly made  
5 its photos available for licensing one by one on iStock for very small amounts of money per  
6 photo, and without disclosing to the court the many decisions of courts of appeals stating  
7 that damages for a lost license fee must be based on what a reasonable user would have paid,  
8 not what the plaintiff would have charged. Instead, plaintiff's papers cited several cases in  
9 which damages were awarded to plaintiff based on its own damages calculations by default.

10 8. Mr. DeSouza told me in a January, 2023 exchange about a demand letter that he  
11 sent to a different small business that his client has never obtained a court ruling approving  
12 his subscription rate theory of damages in a contested case. Rather, he has only obtained  
13 court awards on that theory when he was seeking them ex parte, by way of default  
14 judgments. Since that time, I have not seen in the PACER dockets any court rulings on his  
15 damages theory following adversary presentations.

16 9. In response to Pool World's discovery requests, plaintiff admitted that, until 2016,  
17 plaintiff placed its photographs on the stock photograph website iStock, which is a  
18 subsidiary of Getty Images. Plaintiff's answers did not provide the amount that iStock  
19 charged for licenses to use its photos. Instead, the answer to Interrogatory 9 said only that  
20 iStock determined and changed the pricing from time to time, without specifying the actual  
21 prices. In response to a separate discovery request about plaintiff's income from licenses  
22 when it was using iStock (Interrogatory 13), plaintiff avoided the question by saying that  
23 its income from iStock was from commissions. In the final meet-and-confer, plaintiffs'  
24 counsel promised to confirm whether plaintiff retains records of its income from licensing  
25 via iStock. At the time I am filing this affidavit, plaintiff has not yet responded on this  
26 point.

27 10. On iStock's current website, <https://www.istockphoto.com/>, I searched for  
28 photographs of vegetables on a grill, comparable to the work whose copyright plaintiff

1 claims has been infringed. My search can be replicated using this URL:  
2 [https://www.istockphoto.com/search/2/image-film?family=creative&phrase=skewered%20](https://www.istockphoto.com/search/2/image-film?family=creative&phrase=skewered%20vegetables%20on%20grill)  
3 [vegetables%20on%20grill](https://www.istockphoto.com/search/2/image-film?family=creative&phrase=skewered%20vegetables%20on%20grill). As shown in Exhibit D, reflecting the web page seen by clicking  
4 the “pricing” link on the iStock website, iStock’s users can choose between a monthly  
5 subscription starting at \$29 per month, supporting licenses of ten photos per month (the  
6 amount of the subscription depending on the number of licenses anticipated), or buying  
7 bundles of “credits” that can be used to download individual photos. A single credit costs  
8 twelve dollars; credits cost less as larger bundles of credits are purchased. It appears that  
9 single photos can be licensed for one credit.

10 11. Using the “Wayback Machine” feature of the Internet Archive,  
11 <https://archive.org/>, I have looked on iStock’s website as it appeared in 2010, when the  
12 alleged infringement in this case took place. As shown in Exhibit E, it appears users  
13 similarly had a choice between buying bundles of credits or monthly subscriptions, but for  
14 lower prices. It appears that the standard price for licenses for photos was as low as one  
15 dollar per photo. Because plaintiff’s discovery responses reflect that it has not kept records  
16 of the prices for licenses that prevailed at the time of the alleged infringement in this case,  
17 defendant will be seeking discovery from iStock to ascertain the actual prices charged.

18 12. Because I have litigated several cases against copyright holders making baseless  
19 or exorbitant copyright infringement claims, and written articles about the practices of such  
20 copyright enforcement schemes, I am often approached by the recipients of demand letters  
21 alleging copyright infringement. As a result, I became familiar with claims made on behalf  
22 of plaintiff and with the demand letters making those claims.

23 13. Based on the many demand letters that I have seen as a result of hearing from the  
24 targets of those demand letters, it appears that the demand letter that plaintiff sent to  
25 defendant, which was attached to the Answer as Exhibit A, is typical of the demand letters  
26 that the law firm Copycat Legal has been sending to alleged infringers in recent years (the  
27 one major difference is discussed below in paragraph 25). Defendant’s discovery requests  
28 are directed at showing that the sample of demand letters and follow-up emails that I have

1 seen do in fact represent plaintiff's standard practice.

2 14. Exhibit A, like plaintiff's other demand letters from Copycat Legal that I have  
3 seen, contains several misrepresentations which, in my opinion, are designed to put the  
4 recipients of the letters in fear of being held liable for a very large amount of damages for  
5 alleged copyright infringement, as well as facing high legal costs.

6 15. For example, early in the standard demand letter, plaintiff's demand says that, "to  
7 their knowledge, [plaintiff] *did not* authorize you . . . to use or display the foregoing  
8 photograph. Notwithstanding this lack of authorization . . . ." (emphasis in the original).  
9 I expect that most recipients of letters containing this language would assume that plaintiff  
10 knows who licensed its work, and that the absence of such information from plaintiff's  
11 records implies that the photo was never licensed. In fact, plaintiff has admitted in its  
12 discovery responses that, during the time when it was allowing its photos to be licensed by  
13 iStock, plaintiff was never informed who was licensing its works. (Answer to Interrogatory  
14 11). Thus, at the time plaintiff sent this letter to Pool World, plaintiff could not have known  
15 whether the target had a license.

16 16. In fact, I am aware of many situations in which iStock, after being informed of  
17 a demand letter from the plaintiff, in a communication from a target that believed it had  
18 secured a license from iStock, spent a good deal of effort in confirming the existence of a  
19 license. Exhibit F is an email exchange I had with a staff member at iStock describing this  
20 situation. But a target that does not think to contact iStock, or a target that cannot remember  
21 where it got a photograph ten years ago, or a target whose web page was created by someone  
22 who is no longer available, would not find this out, while assuming that plaintiff knows who  
23 had licenses.

24 17. Further down that page, plaintiff's counsel warn defendant that it will incur  
25 attorney fees both to defend itself in the event litigation is filed, and to pay Prepared Food  
26 Photos, Inc.'s attorney fees that could be awarded under the copyright act.

27 18. Indeed, plaintiff's counsel have been known to be even more explicit about how  
28 much it might cost its targets to defend themselves. In one situation of which I am aware,

1 the demand letter recipient was able to find a local lawyer to respond on its behalf. That  
2 lawyer made a small offer representing nuisance value. One of the lawyers at Copycat  
3 Legal, James D'Loughy, warned that the target of that demand would likely have to pay  
4 between \$15,000 and \$30,000 to defend itself, describing the discovery that would be likely,  
5 citing a \$17,500 minimum defense cost, and therefore saying that only a much higher offer  
6 equal to a two-year subscription would avoid litigation. At that point, the lawyer for the  
7 target withdrew his nuisance value offer and said that the target would pay nothing. A copy  
8 of this exchange of correspondence is attached as Exhibit G. To the best of my knowledge,  
9 plaintiff has not sued that alleged infringer. Mr. D'Loughy is one of the lawyers who signed  
10 the demand letter sent to Pool World (Exhibit A to the Answer).

11 19. So far as I have been able to determine, plaintiff files infringement actions against  
12 defendants that operate as corporations or LLC's, who thus cannot defend themselves pro  
13 se. Defendant has served discovery requests intended to establish that this is also true of  
14 plaintiff's demand letters.

15 20. The standard demand letter, including the letter sent to Pool World, contains an  
16 extensive discussion of statutory damages, stating that it would provide for a multiplier of  
17 two or three times the lost license fee so that the target is facing a statutory damages award  
18 of "\$35,964 (*for each annualized licensing period*).” (emphasis in the original). The letter  
19 includes several cases, lending the letter an air of authority. That part of the letter is  
20 misleading because the plaintiff in a copyright infringement action can seek an award of  
21 statutory damages only if the copyright was registered in a timely fashion—generally  
22 speaking, if it is registered within 90 days of first publication in the United States or, at  
23 least, before the allegedly infringing use began. See 17 U.S.C. § 412. Because Pool World  
24 began using the composite image in question here in 2010, but the copyright was not  
25 registered until 2016, PFP could not seek an award of statutory damages attorney fees here,  
26 and its counsel must have known that when they wrote to Pool World.

27 21. The reference to the possibility of attorney fees in the standard demand letter is  
28 similarly misleading because, for the same reason that it could not seek an award of statutory

1 damages, PFP cannot seek an award of attorney fees against Pool World—its registration  
2 was not timely under 17 U.S.C. § 412. Its counsel must have known that when the letter was  
3 sent.

4 22. Indeed, the complaint in this case does not seek statutory damages (although the  
5 complaint asserts that its attorney fees can be awarded as a form of actual damages, that  
6 theory is contrary to the American Rule on attorney fees). When plaintiff’s counsel filed  
7 this action, they knew that seeking statutory damages would be legally frivolous.

8 23. The standard demand letter cites legal precedent from the Eleventh Circuit,  
9 including a footnote purporting to show a basis for suing the target in Florida because  
10 plaintiff viewed the alleged infringement there; indeed, the letter warns that “[Our client],  
11 if forced to file a lawsuit, would proceed by filing in the United States District Court for the  
12 Southern District of Florida.” In fact, plaintiff did not sue Pool World in Florida, and so far  
13 as I have been able to determine from reviewing the results of the PACER Party search, the  
14 only times when plaintiff sues in Florida is when the defendant is located there. A small  
15 business would reasonably be more nervous about having to defend itself in a far-away  
16 federal court where it does not know any lawyers.

17 24. Plaintiff’s corporate predecessor, AdLife Marketing and Communications, also  
18 sent letters insisting that the targets pay a few thousand dollars to avoid being sued for  
19 infringement. I attach two examples as Exhibit H (with email addresses and phone numbers  
20 redacted), a demand that Curt Archambault pay \$4525 for having used a photo of a  
21 Thanksgiving turkey to encourage donations for his church’s annual drive to provide  
22 Thanksgiving meals to Seattle’s homeless, and another demanding that Brian Krueger pay  
23 \$2525 because a user of a scientific discussion site that he had created posted an inline link  
24 to a photo of fruits and vegetables. In the latter case Krueger sought a declaratory judgment  
25 of noninfringement; plaintiff successfully opposed that on jurisdictional grounds but did not  
26 file suit after it learned that Krueger had counsel. After Copycat Legal assumed the  
27 representation of plaintiff in its demand letter scheme, plaintiff appears to have adopted the  
28 practice of demanding a \$30,000 payment. I am aware of an instance in which plaintiff

1 demanded a minimum settlement payment of \$60,000 on the ground that **that** target had  
2 used two of plaintiff's photos. A copy of that demand letter is attached as Exhibit I.

3 25. One difference between the demand letter sent to Pool World and the typical  
4 demand letters sent to other targets by Copycat Legal (such as Exhibit I) is that plaintiff  
5 normally includes a paragraph warning that many courts have awarded damages in excess  
6 of \$20,000 based on its theory that the lost license fee is a multiplier of its monthly license  
7 fee extended over a period of years. The letters do not reveal that these are default  
8 judgments awarded with no adversary argument.

9 26. Intellectual property litigation, including copyright litigation, is a specialized  
10 practice, and is notoriously expensive. The American Intellectual Property Lawyers  
11 Association publishes a biennial survey of the costs of patent, trademark and copyright  
12 litigation. According to the 2023 survey, the median cost to litigate a copyright  
13 infringement action through the discovery and motion stage, in "low value" cases where the  
14 potential damages were less than a million dollars, is \$100,000. To take the case through  
15 trial is significantly more expensive. A relevant portion of a chart from the 2023 Survey is  
16 attached as Exhibit J.

17 26. I have assisted several targets of demand letters from attorneys for plaintiff and  
18 its corporate predecessor. In each case arising before suit was filed, plaintiff dropped its  
19 demand entirely. I am aware of other situations in which, faced either with knowledgeable  
20 counsel, or indeed with pro se responses which reflected that the target was receiving  
21 informed legal advice (such as the responses from Archambault), the infringement claim was  
22 not pursued in litigation.

23 27. Exhibit A, and the standard letter sent by plaintiff's current counsel, instructs  
24 recipients to provide the demand letter to their insurance company and tell plaintiff the name  
25 of the company. Defendant, however, decided not to make a claim to its insurance  
26 company because defendant was concerned that an insurance company might decide that it  
27 was financially prudent to pay off the plaintiff rather than incurring the cost of a legal  
28 defense. Defendant objects to being bullied and prefers to defend itself.

1 28. Pursuant to the initial disclosure requirements, defendant told plaintiff who its  
2 insurers were, and on request sent the identified policies to the plaintiff, while telling  
3 plaintiff that defendant is not making a claim on the policies. I attach as Exhibit K a  
4 communication from plaintiff's counsel directly to defendant's insurance company,  
5 threatening to proceed against the insurer if plaintiff recovers a judgment.

6 Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of  
7 perjury that the foregoing is true and correct. Executed on  
8 November 3, 2023.

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/s/ Paul Alan Levy