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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

**DEFENDANT’S REPLY IN
SUPPORT OF ITS MOTION
TO COMPEL ANSWERS
TO DISCOVERY**

Hearing December 8, 2023
6:30 PM

17 A. The Facts and Documents Bearing on Equity Are Relevant to
the Claims and Defenses in This Litigation. 2
18 B. Plaintiff’s Reliance on Alleged Burdensomeness Should Be Rejected. 3
19 C. The Discovery Is Relevant to the Damages Claim. 5
20 CONCLUSION. 7
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1 Pool World’s Motion to Compel Discovery showed that Pool World has a sound basis
2 for believing that this lawsuit is part of a seven-year long campaign in which plaintiff
3 Prepared Food Photos (“PFP”) has been using deliberately deceptive and coercive demand
4 letters to extract payments for alleged infringements of single photographs occurring many
5 years before, in amounts far larger than the few dollars that would have been charged at the
6 time of the alleged infringement. To avoid the three-year statute of limitations, PFP invokes
7 the discovery rule; but as the motion explains, the discovery rule is an equitable exception
8 to the statute of limitations. Thus, Pool World seeks discovery of the volume of the
9 financial gain, and of the coercive content of demand letters and follow-up communications,
10 to support its arguments that PFP cannot invoke equity to avoid the statute of limitations in
11 this case. Pool World also seeks the discovery in support of its side of a factual dispute: the
12 complaint alleges that plaintiff is in the business of licensing high-end photographs of food,
13 but Pool World contends that this allegation is false, because PFP’s main business, and its
14 main source of revenue, is threatening to sue for copyright infringement and suing when the
15 target does not surrender to coercion.

16 In response to the motion, PFP apparently does not deny engaging in deception and
17 coercion of the targets of its copyright enforcement practices, and apparently concedes that
18 it makes more in revenue from infringement claims than from selling subscriptions to its
19 database of photos. PFP argues that these facts are irrelevant for two main reasons: First,
20 it points to a handful of unreported cases that had been brought within the statute of
21 limitations, but where the defendant pleaded an affirmative defense of copyright misuse or
22 unclean hands; in those cases, the courts said that evidence of the amount of excess rents
23 extracted from the targets of copyright enforcement practices either was not relevant to the
24 issues in lawsuits, or should be excluded because possible relevance was outweighed by
25 likelihood of prejudice. Second, it says that even though it pleaded the nature of its business
26 in the complaint, that allegation is irrelevant to the issues in this case. PFP closes with a
27 general plea that copyright owners need to have leeway to protect their works against “mass
28 infringement” by any means necessary. As shown below, none of these arguments provides

1 a sound basis for denying the discovery sought here.

2 **A. The Facts and Documents Bearing on Equity Are Relevant to the Claims and**
3 **Defenses in This Litigation.**

4 Here, the issue of equity on the part of plaintiff comes into play because, to avoid the
5 statute of limitations defense based on PFP's failure to sue within three years of the alleged
6 infringement in 2010, PFP invokes the discovery rule. PFP baldly argues that "the
7 discovery rule is not an equitable exception to the statute of limitations," Opp. at 9, but it
8 cites no cases standing for that proposition, instead citing cases generally saying that the
9 discovery rule applies in copyright cases. Most important, PFP cites no cases where the
10 Ninth Circuit has retreated from the decisions quoted in Pool World's Motion (at 5)
11 specifying that the discovery rule is an equitable doctrine. As the Motion to Compel noted,
12 no court has yet addressed the issue of whether these equitable concerns bear on the
13 application of the discovery rule when invoked by what courts charitably euphemize as
14 "seasoned litigators" (in decisions quoted at page 7 of the motion). The absence of such
15 authority may be an artifact of the fact that few small businesses can afford to defend cases
16 like this—it is easier to send a demand letter to the insurance company to pay the ransom.

17 Because PFP has invoked equity, it must meet the requirements of equity. PFP does
18 not deny that evidence showing the amount of money that it makes from its deployment of
19 deliberate deception and coercion could bear on whether PFP has done equity. And as
20 explained in the Motion and its accompanying affidavit, Pool World reasonably expects that
21 its discovery will show that PFP regularly seeks outsized settlements by deliberately
22 exploiting the fact that it is so expensive to defend a copyright case, even a baseless lawsuit,
23 not only by expressly reciting the expense of defending to the targets of its efforts but also,
24 as it appears, by suing only defendants that are incorporated so that they cannot appear pro
25 se (*see* Affidavit, ¶ 5).

26 The cases that PFP cites at pages 5 to 7 of its Opposition do not help it. In *Home*
27 *Design Services v. B & B Custom Homes*, 2008 WL 2302662 (D. Colo. May 30, 2008), the
28 court held that because defense of copyright misuse applies only when enforcement extends

1 a company's monopoly beyond the legitimate bounds of copyright protection, and because
2 the other cases were ordinary infringement suits, that misuse defense could not be asserted.
3 But Pool World does not invoke the defense of copyright misuse; thus *Home Design*
4 *Services* is not inconsistent with its discovery motion here.¹ And in both *Unicolors v. Urban*
5 *Outfitters*, 686 F. Appx. 422 (9th Cir. 2017), and *Evox Prods v. Yahoo!*, 2023 WL 4850748
6 (C.D. Cal. July 28, 2023), the courts decided not to admit evidence about alleged excessive
7 enforcement at trial, because any probative value was outweighed by its potential prejudicial
8 effect. But those are not reasons to deny discovery of such information. In *Unicolors*, the
9 court also noted that the unclean hand defense was vitiated by the lack of any pattern of
10 fraudulent enforcement or of a "copyright-trap conspiracy." 686 F. Appx. at 425. Pool
11 World will argue in its summary judgment motion that there is evidence of deliberate
12 deception and coercion, not for an unclean hands defense, which if upheld, would prevent
13 PFP from ever enforcing its copyrights, but only to limit PFP's invocation of an equitable
14 exception to the statute of limitations.

15 This motion is not a summary judgment motion. When that motion is filed, the Court
16 will be asked to decide whether this sort of failure to do equity is a proper basis for rejecting
17 PFP's reliance on the discovery rule. The Court should grant the requested discovery so that
18 the Court can have a basis for addressing that legal question on a complete record.

19 **B. Plaintiff's Reliance on Alleged Burdensomeness Should Be Rejected.**

20 PFP also argues that responding to Interrogatory 12 and Request to Produce 6 would
21 be burdensome because, in the past two years alone, its current counsel has sent out 1800
22 demand letters claiming infringement (there is no contention that providing the amount of
23 money extracted from PFP's targets each year, pursuant to Interrogatory 14 would be
24 burdensome). Opp. at 5. However, PFP waived this issue during the meet-and-concurs that
25 preceded filing of this motion. Thus, as noted in the affidavit submitted in support of the

26
27 ¹ The defense of copyright misuse applies when, for example, a company
28 enforces its copyright to suppress criticism. *Video Pipeline v Buena Vista Home*
Entertainment, 342 F.3d 191 (3d Cir. 2003).

1 motion to compel, at ¶ 4, undersigned counsel sought to discuss the issue of
2 burdensomeness, but lead counsel for plaintiff declined to engage on the ground that PFP
3 objected in principle to disclosing such information. (Notably, PFP does not assert that any
4 privilege protects the information.)

5 If the Court reaches the issue of burden despite PFP’s refusal to discuss the issue
6 during the meet-and-confers, it is important to note that, although Interrogatory 12 calls on
7 PFP to “identify” the documents, PFP may instead under Rule 33(d) produce the relevant
8 business records and put the burden of deriving the relevant information on Pool World.
9 As for Document Request 6, PFP objects that it has to review each communication after the
10 demand letter to decide which of these documents made express reference to the expense
11 of litigation. But assuming that these documents are maintained electronically, it should not
12 be difficult for PFP to identify search terms that would quickly identify the documents that
13 it would need to examine by hand. In the alternative, PFP could simply provide all of its
14 demand emails to counsel for Pool World and let defendant bear the burden of searching.
15 But the parties were unable to have such discussions because PFP’s counsel said that not
16 disclosing this information was a matter of principle.²

17 Burdensomeness should also be considered in light of the stakes in the litigation. PFP
18 seeks an award of \$35,664 in damages of license fees for an alleged infringement of a stock
19 photo that was on the market for a license fee of a few dollars at most in 2010, when Pool
20 World acquired the composite image containing that photo and posted it online. PFP also
21 plans to argue that it is entitled to a share of Pool World’s profits, in an amount not yet
22 specified. That is large hit for a small business, and it pales against the millions of dollars

23
24 ² PFP could also disclose a spreadsheet which, response to an interrogatory
25 only recently answered, PFP has disclosed that it maintains of every situation in
26 which its staff records a “hit” in its reverse image searching. Given that PFP has told
27 the Court that it sends a demand letter every time it gets a hit, that spreadsheet could
28 provide at least an initial shortcut for the review of demand letters that Pool World
needs to conduct to assess the evidence that could aid its defense. PFP has declined
thus far to produce the spreadsheet.

1 that PFP appears to earn from its copyright enforcement program.

2 As the court said in *Righthaven v. Hill*, Copyright L. Rep. (CCH) ¶ 30,125, 2011 WL
3 12897489 (D. Colo. Sep. 11, 2011), assessing a different copyright owner that filed many
4 infringement actions,

5 there is substantial evidence that Righthaven has engaged in a pattern of filing
6 copyright infringement suits against naïve bloggers in order to secure
7 settlement agreements, often with a minimal investment of time and effort.
8 These lawsuits act as an effective bargaining chip in the negotiation of
9 settlement agreements, because the cost of settlement is often less than the cost
10 a defendant would incur in defending against Righthaven's suit.

11 *Id.*³ When a plaintiff seeks a ruinous level of damages from a small business, having
12 previously warned that business that it should pay a settlement because defending the
13 lawsuit will be too expensive, it should not be heard to complain that it is too burdensome
14 for the plaintiff to litigate the case.

15 **C. The Discovery Is Relevant to the Damages Claim.**

16 Turning now to the other basis for relevance, plaintiff alleged in its complaint that it
17 is a business that licenses access to high-end photographs of food. That is a disputed issue
18 of fact; Pool World contends that PFP's main business is using deceptive and coercive
19 means to secure damage settlements for individual infringement in amounts far in excess of
20 market value of the individual stock photos at issue here. (Pool World also argues that the
21 prices charged for individual photos, when individual photos were licensed, belies any claim
22 that PFP's work product is high-end photography.) The public record reveals the many five-
23 figure default judgment damages awards issued in the past year alone, whose total alone
24 exceeds the amount of revenue that plaintiff has disclosed in discovery that it obtained in
25 the past two years by selling subscriptions. The default judgments also total three or four
26 times the annual amounts that PFP has disclosed that it earned when licensing individual

27 ³ In addressing a different motion in that case, the court said, "Plaintiff's wishes
28 to the contrary, the courts are not merely tools for encouraging and exacting
settlements from Defendants cowed by the potential costs of litigation and liability."
Righthaven v. Hill, No. 1:11-cv-00211-JLK (D. Colo. Apr. 7, 2011), at 2, available
at <https://storage.courtlistener.com/recap/gov.uscourts.cod.124054.16.0.pdf>.

1 photos on iStock. (Plaintiff's Initial Disclosures, attached to this reply brief as an exhibit,
2 listed default judgments of more than \$400,580 in a sixteen-month period beginning March
3 2022).

4 The amount awarded in default judgment cases is just the tip of the iceberg.
5 considering that PFP has filed 260 infringement actions since 2017 and considering that, as
6 revealed in its opposition memorandum (at 5), Copycat Legal has sent 1800 demand letters
7 in the past two years alone. If each of these demands produced only \$1000, PFP's earnings
8 from both litigation and threats of litigation dwarf its subscription income during that two-
9 year period by a factor of more than ten; if the average settlement is \$4000, its income from
10 threatening and bringing litigation could exceed licensing income by a factor of fifty.

11 In some of the cases seeking a default judgment, PFP has argued that every
12 infringement, even of a single photo, has the tendency to reduce the market value of its
13 database of photos. *E.g., Prepared Food Photos v. AM Inc.*, No. 1:23-cv-00931 -CNS-MDB
14 (D. Colo. Aug. 4, 2023), available at <https://storage.courtlistener.com/recap/gov.uscourts.cod.223662/gov.uscourts.cod.223662.19.0.pdf>. If PFP makes that argument here (despite
15 not articulating this theory of damages in its initial disclosures), Pool World will need to
16 show how much revenue PFP has already obtained by making claims of individual
17 infringement—that is, it should be able to argue that any market harm allegedly caused by
18 its 2010 infringement must be offset by payments already secured for such alleged
19 infringements.
20

21 In this regard, Plaintiff contends that a business that sells copyrighted product needs
22 to be able to pursue infringement claims both to remedy and to deter infringement, citing
23 *Malibu Media v. Doe*, 2014 WL 2581168 (N.D. Ill. June 9, 2014) (another case holding that
24 repeat litigation is not “copyright misuse”). Opp. at 7-8. However, copyright owners do not
25 require the financial incentive of outsized claims for actual damages, or the ability to pursue
26 thirteen-year old infringement claims, or the ability to send deceptive and coercive demand
27 letters to protect their interests. Congress has provided statutory incentives in the form of
28 statutory damages in the minimum amount of \$750 per infringed work, not matter how low

1 the market value of the image in question, and the possibility of recovering attorney fees
2 under section 505 of the Copyright Act when a defendant unreasonably refuses to pay for
3 a clear infringement and raises unreasonable defenses. But Congress afforded those
4 remedies only to plaintiffs that register their copyrights in timely fashion, 17 U.S.C. § 412,
5 which PFP failed to do here. It can seek those remedies for alleged infringements after
6 2016.

7 PFP should not be heard to present itself as a beleaguered business faced with “mass
8 infringement” of highly valuable individual photos. When Pool World argues to the trier
9 of fact that the requested award of \$35,764 in damages (plus claimed profits!) is excessive,
10 Pool World ought to be allowed to present evidence of where PFP actually derives the great
11 bulk of its revenue.

12 CONCLUSION

13 The motion to compel discovery should be granted.

14 Respectfully submitted,

15
16 /s/ Paul Alan Levy

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Attorneys for Defendant

December 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of December, 2023, I am filing this Reply Memorandum by the Court’s ECF system, which will effect service on on counsel for plaintiff, Max Archer and Lauren Hausman, at their respective email addresses.

/s/ Paul Alan Levy
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December 1, 2023

Exhibit to Reply Brief

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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

Plaintiff,

v.

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

Defendant.

NO. 2:23-cv-00160-TOR

PLAINTIFF'S INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1) and the Parties Joint Litigation and
Discovery Plan, ECF No. 13, Plaintiff Prepared Food Photos, Inc., fka, Adlife

Marketing & Communications Co., Inc. (“Plaintiff”) hereby provides to Defendant Pool World, Inc. (“Defendant”) the following initial disclosures.

Plaintiff’s initial disclosures are based on information now reasonably available to Plaintiff. Plaintiff reserves the right to supplement, amend, or modify these initial disclosures if and when Plaintiff obtains information through discovery or otherwise becomes aware of additional information.

INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION

The following individuals are believed to have discoverable information that Plaintiff may use to support its claims or defenses. Plaintiff reserves the right to identify additional individuals if it learns that any such persons have information that Plaintiff may use to support its claims or defenses.

Individual and Location	Subject Matter
Joel Albrizio c/o Riverside Law Group PLLC 905 W. Riverside Ave., Ste. 404 Spokane, WA 99201	Information concerning Plaintiff’s creation of the subject photograph, Plaintiff’s efforts to sell its professional photography, and Plaintiff’s discovery of Defendant’s use of the subject photograph.
Rebecca Jones c/o Riverside Law Group PLLC 905 W. Riverside Ave., Ste. 404 Spokane, WA 99201	Information concerning Plaintiff’s creation of the subject photograph, Plaintiff’s efforts to sell its professional photography, and Plaintiff’s discovery of Defendant’s use of the subject photograph.

Individual and Location	Subject Matter
Agents, employees, officers, executives, and owners of Pool World, Inc. c/o Public Citizen Litigation Group 1600 20th Street NW Washington, DC 20009 c/o Kirby Law Office PLLC 1312 N Monroe Street Spokane, WA 99201-2623	Information concerning Defendant's affirmative defenses, Defendant's publication of the subject photograph, Defendant's profits/revenue generated therefrom, and Defendant's prior payment of licensing fees for photographs.

LOCATION AND DESCRIPTION OF DOCUMENTS AND THINGS

Plaintiff will make available to Defendant for inspection and copying, as provided by Fed. R. Civ. P. 34, all non-privileged documents, data collections, and tangible things in its possession, custody or control that may be used by it (other than solely for impeachment purposes) to support its claims or defenses in this case. These documents are generally located on Plaintiff's computers and/or e-mail accounts. The categories of documents upon which Plaintiff currently intends to rely include the following:

1. Copyright Office registration materials for the subject photograph.
2. Documents showing Defendant's display of the subject photograph.
3. Communications with Defendant with respect to the subject photograph.
4. Prior licensing information with respect to Plaintiff's professional photography.

COMPUTATION OF DAMAGES

Plaintiff seeks actual damages/disgorgement of Defendant's profits in this lawsuit. Defendant's profits are currently unknown (as discovery is pending). Plaintiff is not currently aware when Defendant first published the subject photograph. However, based on facts currently known to Plaintiff, it appears Defendant published the subject photograph prior to the date of copyright registration for the photograph. Plaintiff does not license individual photographs but rather the entirety of its image library to paying subscribers. The library is offered at a starting price of \$999.00/month with a 12-month minimum commitment. Plaintiff would calculate its actual damages by multiplying the license it would have charged (a minimum of \$999.00/month) by the number of years the photograph was published.

This means of calculating Plaintiff's damages has been adopted by numerous federal courts. See Prepared Foods Photos, Inc. v. Patriot Fine Foods LLC, No. 21-82129-CV, 2022 U.S. Dist. LEXIS 205649 (S.D. Fla. Mar. 22, 2022) (finding that \$11,988.00 was Prepared Food Photos' actual damages for what amounted to a 4-month use of the subject photograph and applying a 2x multiplier for statutory damages); Prepared Food Photos, Inc. v. 193 Corp., No. 1:22-cv-03832, 2022 U.S. Dist. LEXIS 205690 (N.D. Ill. Sep. 21, 2022) (awarding Plaintiff \$35,964.00 in actual damages, representing the \$11,988.00 annual license fee x 3 years of usage of pre-registration usage of a single photo; Prepared Food Photos, Inc. v. Miami Beach

411 Corp., No. 22-23197-CIV-ALTONAGA/Damian, 2022 U.S. Dist. LEXIS 216003 (S.D. Fla. Nov. 28, 2022) (awarding Plaintiff \$35,964.00 in actual damages, representing the \$11,988.00 annual license fee x 3 years of usage of a single photo); Prepared Food Photos, Inc. v. Fat Daddy Co., No. 22-61671-CIV-SINGHAL, 2022 U.S. Dist. LEXIS 216004 (S.D. Fla. Nov. 29, 2022) (awarding Plaintiff \$23,976.00 in statutory damages, representing the \$11,988.00 annual license fee for a 1-year use with a 2x multiplier applied thereto); Prepared Food Photos, Inc. v. Perry Wings Plus, Inc., No. 22-CV-61883-RAR, 2022 U.S. Dist. LEXIS 227304, at *24 (S.D. Fla. Dec. 19, 2022) (awarding \$71,928.00 in statutory damages, representing the \$11,988.00 annual license fee for a 3-year use with a 2x multiplier applied thereto); Prepared Food Photos, Inc. v. Silver Star of Brooklyn / Brooklyn's Best Inc., No. 1:22-cv-04196-WFK-CLP, 2023 U.S. Dist. LEXIS 22037 (E.D.N.Y. Jan. 23, 2023) (awarding \$71,928.00 in statutory damages, representing the \$11,988.00 annual license fee for 3-year use with a 2x multiplier applied thereto); Prepared Food Photos, Inc. v. Chi.-Mkt.-Distrib., Inc., Civil Action No. 1:22-cv-03299-CNS-MEH, 2023 U.S. Dist. LEXIS 88407 (D. Colo. May 19, 2023) (awarding Plaintiff \$35,964.00 in actual damages, representing the \$11,988.00 annual license fee x 3 years of usage of a single photo); Prepared Food Photos, Inc. v. Exec. Dining Club, Inc., No. 22-cv-9446 (ER), 2023 U.S. Dist. LEXIS 99676 (S.D.N.Y. May 25, 2023) (awarding Plaintiff \$71,928.00 in statutory damages, representing the \$11,988.00 annual license fee for 3-year use with a 2x multiplier applied thereto); Prepared

Food Photos, Inc. v. Shadowbrook Farm LLC, No. 1:22-CV-00704 (LEK/ATB), 2023 U.S. Dist. LEXIS 110171 (N.D.N.Y. June 27, 2023) (awarding Plaintiff \$23,976.00 in statutory damages, representing the \$11,988.00 annual license fee for a 1-year use with a 2x multiplier applied thereto); Prepared Food Photos, Inc. v. WaDaYaNeed, LLC, No. 1:22-CV-01270 (LEK/ATB), 2023 U.S. Dist. LEXIS 110993 (N.D.N.Y. June 28, 2023) (awarding Plaintiff \$23,976.00 in statutory damages, representing the \$11,988.00 annual license fee for a 1-year use with a 2x multiplier applied thereto).

Plaintiff thus seeks \$11,988.00 in actual damages for each annualized period the subject photograph was displayed by Defendant, exclusive of attorneys' fees, costs, and prejudgment interest, which Plaintiff will also seek as damages. Plaintiff reserves the right to revise and/or add to its computation of damages as the facts of this action are developed through discovery.

INSURANCE AGREEMENTS

Plaintiff is not aware of any insurance agreement relevant to the claims asserted in this lawsuit.

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RESPECTFULLY SUBMITTED this 15th day of August, 2023.

RIVERSIDE LAW GROUP, PLLC

By: 

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CERTIFICATE OF SERVICE

I certify that on August 15, 2023, I e-mailed the foregoing document to the attorneys of record for Defendant.

/s/ Max K. Archer

Max K. Archer, WSBA 54081