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12 **UNITED STATES DISTRICT COURT**  
 13 **NORTHERN DISTRICT OF CALIFORNIA**  
**San Jose Division**

14 ERIK ANDERSON,	)	Case No. 5:19-cv-05630-EJD
	)	
15 Plaintiff,	)	<b>REPLY MEMORANDUM SUPPORTING</b>
	)	<b>MOTION FOR FEES AND COSTS</b>
16 v.	)	
	)	Hearing Date: August 27, 2020
17 STEVEN HIRSCH and MARK SELIGER,	)	Hearing Time: 9:00 a.m.
	)	Courtroom: 4 - 5th Floor
18 Defendants.	)	Judge: Honorable Edward J. Davila

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1 **I. Anderson Is a Prevailing Party Who is Entitled to Move for Fees and Costs.**

2 **A. This Court Has Jurisdiction to Decide This Fees Motion**

3 Defendants first argue (Opposition 2-4) that attorney fees can never be awarded after a voluntary  
 4 dismissal because dismissal divests a court of jurisdiction. That argument flies in the face of Supreme Court  
 5 and Ninth Circuit precedent holding that district courts retain subject matter jurisdiction to hear “collateral”  
 6 issues like Rule 11 sanctions and attorneys’ fees after a case has been voluntarily dismissed pursuant to Rule  
 7 41(a)(1)(A). In *Cooter & Gell v Hartmarx*, 496 US 384, 395 (1990), the Supreme Court held that “nothing  
 8 . . . terminates a district court’s authority to impose sanctions” after the plaintiff voluntarily dismisses under  
 9 Rule 41(a)(1)(A):

10 Like the imposition of costs, attorney’s fees, and contempt sanctions, the imposition of a  
 11 Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the  
 12 determination of a collateral issue: whether the attorney has abused the judicial process, and,  
 13 if so, what sanction would be appropriate. Such a determination may be made after the  
 14 principal suit has been terminated.

15 496 US at 395 (emphasis added).

16 *See also U.S. Bancorp Mortg. Co. v. Bonner Mall Partn.*, 513 U.S. 18, 21 (1994) (fact that a court has held  
 17 that a case was outside its Article III jurisdiction does not bar it from awarding costs).

18 The Ninth Circuit has followed this jurisdictional principle to allow fees to be considered after a  
 19 court has lost jurisdiction over the merits in various contexts, such as remands following improvident  
 20 removal. Thus, in *Moore v. Permanente Medical Group*, 981 F.2d 443, 445 (9th Cir.1992), the court held  
 21 that a district court “retained jurisdiction after the remand to entertain Plaintiffs’ motion for attorney’s fees.”  
 22 Similarly, in *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir.1987), although the case had been dismissed,  
 23 the court had jurisdiction to consider Rule 11 sanctions. *See also Budanio v. Saipan Marine Tours*, 22 Fed.  
 24 Appx. 708, 2001 WL 1173242 (9th Cir. Oct. 2, 2001), where the court rejected defendants’ contention that,  
 25 because the case had been voluntarily dismissed under Rule 41(a)(1), the district court lacked authority to  
 26 award attorneys’ fees to plaintiff’s counsel: “Despite Plaintiffs’ voluntary dismissal, the district court retained  
 27 jurisdiction . . . to consider collateral matters such as a request for attorney’s fees.” *Id.* (citing *Cooter & Gell*,  
 28 496 U.S. at 395).

Defendants ignore these and similar cases that recognize post-dismissal jurisdiction of collateral  
 issues like attorneys’ fees. Instead, they cite cases with general language about lack of jurisdiction after

1 voluntary dismissal. But those cases address only jurisdiction over subsequent matters dealing with the  
2 merits of the dismissed litigation, not jurisdiction to consider a motion for fees or sanctions. *See, e.g.,*  
3 *American Soccer Co. v. Score First Enters.*, 187 F.3d 1108, 1112 (9th Cir. 1999) (following Rule  
4 41(a)(1)(A) voluntary dismissal, district court had no jurisdiction to vacate the dismissal “to rule on the  
5 merits of the case”); *Commercial Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1077-78 (9th Cir.  
6 1999)(following Rule 41(a)(1)(A) voluntary dismissal, district court had no jurisdiction to designate the  
7 dismissal as with prejudice); *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (no jurisdiction  
8 to strike voluntary dismissal under Rule 41(a)(1)); *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (after  
9 voluntary Rule 41(a)(1) dismissal, no authority to order plaintiffs to dismiss by motion or with prejudice).

10 Thus, Anderson has standing to seek and this court has jurisdiction to hear this motion for fees.

11 **B. Voluntary Dismissal Based on Actions Taken Within the Litigation Does Not**  
12 **Bar Anderson’s Prevailing Party Status.**

13 Defendants assert that Anderson did not secure the relief he sought in the complaint and that there  
14 is a categorical bar on a party being deemed a prevailing party where a case has been voluntarily dismissed  
15 without prejudice. Opposition at 4-10. However, Defendants have misstated both the record and the law.

16 **1. The Holding and Dicta of *Cadkin v. Loose* Support Anderson’s Fee**  
17 **Application.**

18 In arguing that Anderson is not a prevailing party, Defendants misread *Cadkin v. Loose*, 569 F.3d  
19 1142, 1148, 1149 (9th Cir. 2009), the leading circuit precedent on the prevailing party standard. Focusing  
20 on *Cadkin*’s observation that voluntary dismissal without prejudice did not in that case confer prevailing  
21 party status on the defendant, Defendants argue that no party can ever be considered prevailing after a  
22 dismissal without prejudice. Opposition at 4-6. But their argument ignores both *Cadkin*’s dicta, and the  
23 express reason for the result in *Cadkin*. Specifically, the court rested its holding on the facts that the  
24 plaintiffs there “remained free to refile their copyright claims against the defendants in federal court  
25 following their voluntary dismissal of the complaint,” *id.* at 1145, and that the defendants “remain subject  
26 to the risk that the Cadkins will refile their copyright claims.” *Id.* at 1150. Thus, unlike here, the facts  
27 showed no material alteration in the legal relationship between the parties. And the Court compared the  
28 voluntary dismissal without prejudice, which left defendants without prevailing party status, with a voluntary  
dismissal with prejudice, which, the Court indicated, **would have** made defendants the prevailing party.

1 Defendants argue that only other circuits, not the Ninth, recognize that, in some circumstances, the  
2 plaintiff's voluntary dismissal with prejudice that can make the other side the prevailing party. But *Cadkin's*  
3 reasoning shows why, under the procedural posture of this declaratory judgment action, the legal relationship  
4 between Anderson and Defendants has been materially, and irrevocably, altered even though the dismissal  
5 was without prejudice. The licenses that this litigation compelled Defendants to issue eliminate, once and  
6 for all, any "risk of re-filing" of copyright infringement claims by Defendants against Anderson. Anderson  
7 is completely free of any risk of future suit for infringement of Defendants' photos. It is this certain and final  
8 resolution of the parties' legal relationship, not the label attached to the dismissal, that makes Anderson a  
9 prevailing party.

10 For this reason, in a case with a comparable "unique" procedural posture where the usual "roles  
11 became reversed," Judge Illston recognized that, "if a dismissal without prejudice nevertheless precludes  
12 re-filing a complaint, it alters the legal relationship of the parties; this 'material alteration of the legal  
13 relationship of the parties' may be sufficient to find that one party is the prevailing party." *J.B. ex rel. H.S.*  
14 *v. San Jose Unified School Dist.*, 2013 WL 1891398, at \*4 (N.D. Cal. May 6, 2013) (quoting *Miles v.*  
15 *California*, 320 F.3d 986, 989 (9th Cir.2003), and *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health*  
16 *& Human Res.*, 532 U.S. 598, 603 (2001)).

17 Defendants' only means of evading this logical conclusion is to assert, without explanation, that  
18 material alteration of the parties' legal relationship is lacking here because Anderson's "litigation decision"  
19 to dismiss without prejudice "did not and could not have finally and forever disposed of all claims raised  
20 in the litigation." Opposition at 9. This claim makes no sense. The licenses granted to Anderson by  
21 Defendants do "finally and forever" dispose of all claims in this litigation. The licenses resolve, once and  
22 for all, any claim that posting of or links to Defendants' photos on the AwardsWatch web site while  
23 Anderson owned it constitute copyright infringement. There is no longer any "risk of re-filing" claims about  
24 that issue. The licenses have rendered such claims moot and they provide Anderson a complete and  
25 immediate defense to any future attempt to "re-file" such claims. Although Defendants try to conjure up  
26 some distinction between the effect on future litigation of the licenses and that of "per se" enforceable  
27 judgments or consent decrees, it is a distinction without a difference.

28



1                   **2. The Material Alteration in the Legal Relationship Between the Parties**  
2                   **Gave Anderson the Relief He Sought in His Complaint.**

3                   Defendants' Opposition tries to prop up its erroneous "no material alteration" claim by asserting that  
4                   Anderson did not achieve "even a modicum" of the relief he sought in his complaint. Opposition at 8. That  
5                   assertion too is wrong.

6                   As Anderson explained in his opposition to the motion to dismiss, his purpose in filing this action  
7                   was to obtain legal protection against Defendants' infringement threats and intimidation over links and  
8                   postings on the AwardsWatch forum during the time he managed it, seeking to ensure that neither of the  
9                   Defendants could hold him liable for any deeplinks to or posting of any of their photographs. Anderson  
10                  Affidavit ¶ 4; Opposition to Dismissal, DN 21, at 1, 2, 5, 6, 7. His First Amended Complaint sought that  
11                  protection via a declaration that posting of deeplinks to any of Defendants' photographs that enable users  
12                  to view them "was not and would not be copyright infringement," Prayer for Relief A, and that deeplinks  
13                  to other web sites where any of Defendants' photographs are displayed "was not infringement for which  
14                  plaintiff is legally liable." Prayer for Relief B. The licenses unequivocally provide that any post or deeplink  
15                  to any of Defendants' works on the AwardsWatch forum during Anderson's time running the forum is now  
16                  fully and retroactively authorized and thus was not and would not be infringing. The outcome is precisely  
17                  what he sought: elimination of any possibility of copyright infringement liability over links to the photos.

18                  Critically, the licenses are straightforward and readily enforceable. Defendants seek to characterize  
19                  the license terms as having "potential but debatable enforceability" and "enforceability . . . which is subject  
20                  to myriad legal and factual questions." Opposition at 6, 7. Those characterizations are wrong. The license  
21                  terms leave nothing to debate; they remove any legal risk to Anderson from the accessibility of Defendants'  
22                  photos on the forum, whether by deeplinking or otherwise. If either Defendant were to try to sue Anderson  
23                  in the future for any of the postings or links at issue in this case, the licenses would provide an immediate  
24                  basis to dismiss that lawsuit, just as a dismissal with prejudice in a typical lawsuit would provide a basis to  
25                  dismiss a future suit. Although the mechanism of preclusion differs, the effect is exactly the same. The  
26                  licenses effectively bar Defendants from pursuing a future lawsuit against Anderson over infringement  
27                  claims involving the photos at issue or any of Defendants' other photographs. Thus the litigation produced  
28                  a final, material alteration in the legal relationship between the parties.

1 Defendants try to portray **themselves** as prevailing parties, claiming that Anderson took four steps  
2 in response to their pre-litigation demand letters (Opposition at 9):

3 As a result of the pre-litigation letters from Hirsch and Seliger raising infringement issues  
4 on the AwardsWatch website and this lawsuit, Anderson took the affirmative steps of (1)  
5 removing Hirsch and Seliger's photographs from the AwardsWatch website; (2) registering  
6 a designated agent for AwardsWatch with the Copyright Office to receive takedown  
7 notifications; (3) permanently shutting down the AwardsWatch forum; and (4) completely  
8 divesting himself from ownership and operation of the AwardsWatch website

9 There is no evidence that it was any these actions, or all of them together, as opposed to Anderson's lawsuit,  
10 that animated Defendants' decision to issue the broad licenses—they have submitted no affidavits with their  
11 Opposition. But the more important point is this: the actions that Anderson did take (as correctly described  
12 below in footnote 1) had been taken before Anderson filed his Amended Complaint, and the first two  
13 preceded the filing of his original complaint. Indeed, although Anderson promptly told Defendants' counsel  
14 that he would have the photos removed, Anderson Affidavit, Exhibit 2, that did not stop Defendants'  
15 continued demands for more than \$23,000 in payments. Nor did the combined total of the actions that  
16 Anderson took after receiving the threatening letters lead Defendants to issue the broad licenses, even though  
17 they knew about the actions when they filed their motion to dismiss. It was only because Anderson's refused  
18 to allow his action to be dismissed on mootness grounds, and only because the Court rejected Defendants'  
19 mootness contentions and accordingly denied the motion to dismiss, that Defendants made Anderson the  
20 prevailing party by issuing the broad licenses. Indeed, Defendants' portrayal of Anderson's response to their  
21 threats, and their claiming that steps 3 and 4 represented a fulfillment of their objectives, strongly suggests  
22 that they sent their demand letters for an improper purpose even apart from the demand for payment of a  
23 large sum of money to which they were not entitled.<sup>1</sup>

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24 <sup>1</sup> Anderson operates a journalistic web site, Awards Watch, about entertainment awards, to  
25 which he had appended a forum section, largely maintained by volunteers, on which members of the  
26 public posted two million comments about such awards. After the removal of the photographs and  
27 his registration of a DMCA agent did not lead Defendants to retract their demands for money,  
28 Anderson both filed this action and transferred ownership of the forum to one of the forum's  
volunteers. Anderson Affidavit ¶ 7. (Defendants' claim of victory in point 3 above is inaccurate;  
Anderson never shut down the forum, although he made some changes pendente lite, and later  
detached it from his Awards Watch site. Complaint ¶ 35).

Securing the closing of a discussion forum, simply because there had been three instances  
of infringement over the course of six years, was an improper objective. Both the journalistic site

### 3. A Strict Showing of Judicial Imprimatur Is Not Required.

*Buckhannon* and its particular facts do not require the formalistic, separate element of judicial imprimatur that Defendants' Opposition suggests. While trying to force the specific context of *Buckhannon* onto the very different and ill-fitting context of this case, Defendants acknowledge that the decision was directed at rejecting the "catalyst theory." Opposition at 7. That theory was based on the state legislature's change of the underlying law through voluntary action entirely outside the litigation, *Buckhannon*, 532 U.S. at 603-05, action that did not effect a change in the legal relationship between the parties because the legislature could simply have changed its law again if it chose. The Court's concern about voluntary, reversible action outside the litigation is inapposite here, where Defendants have granted irrevocable and unequivocal licenses only as a result of events entirely within the litigation. In this case, the licenses explained, on their face, that they were issued to end the litigation, and they fully and finally caused the necessary material alteration in the legal relationship between the parties through the litigation itself, not through any outside voluntary action. Notably, it was Defendants themselves who chose to include that language in their licenses. Levy Third Affidavit ¶ 5.<sup>2</sup>

As Anderson argued in his opening fees brief, there is a well-recognized set of circumstances in which action taken unilaterally by one side, without any express judicial involvement, can make the other side the prevailing party: when the plaintiff dismisses the action with prejudice. DN 36 at 9-10. Defendants denigrate that argument by saying that it is only other circuits that have employed that exception which, they say, is barred by *Cadkin*. But Defendants' argument ignores the *Cadkin* dictum stating that a voluntary

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and the attached forum were entirely legitimate activities, and even if Defendants had some basis for infringement claims against three forum users, that does not justify using bogus threats of infringement liability to chase Anderson out of the business of maintaining a forum for public comment. By admitting that the demand letters that they sent, threatening a large award of damages, was not only attempting to extract unjustified monetary payments, but also to discourage Anderson from hosting a wholly appropriate forum, Defendants have admitted an improper motivation that is an **additional** basis for awarding attorney fees against them.

<sup>2</sup> Levy Third Affidavit is filed with this reply brief. Levy Second Affidavit was filed with the opening fees brief, DN 36-1; Levy Affidavit was filed with the opposition to dismissal, DN 21-2.

1 dismissal with prejudice does make the defendant a prevailing party.<sup>3</sup> Therefore, the Ninth Circuit is  
 2 consistent with the precedent from other circuits on which Anderson's argument relies.

3 Moreover, as argued in the opening brief, the Copyright Act's fee shifting provision is unlike most  
 4 fee-shifting provisions in that it is not more friendly to one side of the litigation than the other — the  
 5 Supreme Court has insisted that, in copyright cases, lower courts adopt fee-shifting standards that are  
 6 evenhanded as between plaintiffs and defendants. DN 36, at 11. Consequently, it is entirely appropriate to  
 7 hold that a voluntary dismissal, that is brought about when a defendant seeks to moot a declaratory judgment  
 8 action by granting complete and irrevocable licenses, can make the plaintiff a prevailing party just as a  
 9 voluntary dismissal with prejudice that gives a defendant relief by virtue of res judicata can make it a  
 10 prevailing party. Defendants offer no response to this reasoning.

11 Defendant also do not address Anderson's argument that policy concerns about trolling practices  
 12 support recognizing his prevailing party status. The record discloses that the sort of threatening demand  
 13 letters and draft complaints sent to Anderson in this case are not isolated actions. Rather, they are consistent  
 14 with the systematic practice followed by Defendants' counsel seeking to extract unjustified payments from  
 15 the hosts of online forums. In these situations, the cost of hiring counsel would be much higher than paying  
 16 a few thousand dollars in settlement money, even though the hosts are not guilty of infringement and even  
 17 though Defendants' counsel have shown that they have no intention of actually suing for infringement once  
 18 they learn that their targets are ready to stand up for their rights. The very complaints that Defendants make  
 19 elsewhere in their brief, about the amount of fees sought, drive home the potentially extortionate means by  
 20 which trolling demands can be so effective. Intellectual property litigation is notoriously expensive, *see*  
 21 *AIPLA, 2017 Report of the Economic Survey* (2018), and the recipients of demand letters must weigh the

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22  
 23 <sup>3</sup> The court in *Nutrivita Labs. v. VBS Distribution*, 160 F. Supp. 3d 1184, 1189-90 (C.D. Cal.  
 24 2016), *aff'd*, 697 Fed. Appx. 559 (9th Cir. 2017), recognized precisely this aspect of *Cadkin*, noting  
 25 that the Ninth Circuit there "went on to add that 'a defendant is a prevailing party following  
 26 dismissal of a claim if the plaintiff is judicially precluded from refileing the claim against the  
 27 defendant in federal court.' *Id.* at 1150 (emphasis added). That is precisely the circumstance here.  
 28 By stipulating to a dismissal with prejudice, Nutrivita agreed to never reassert these claims against  
 VBS in federal court. That is a sufficient alteration in the parties' legal relationship to confer  
 prevailing party status on VBS under *Cadkin* and *Buckhannon*." *Nutrivita* was cited in Anderson's  
 opening fees brief, at 9, but is ignored by Defendants.

1 expense of litigating against how much easier it is to pay a few thousand dollars for an unfounded  
2 infringement accusation and thus have done with the matter. Levy Affidavit ¶ 21.

3 Moreover, the threatening demand letters, emails and phone calls provide very lucrative returns, to  
4 enable Defendants' counsel to set goals for the "Compliance Resolution Specialists" who do the bulk of the  
5 work of intimidating his clients' targets to meet daily goals of recovering as much as a hundred thousand  
6 dollars. Levy Second Affidavit ¶ 7 and Exhibit P. Awards of attorney fees in cases such as this one are  
7 needed to create a disincentive for the rapacious demand letter practices that produce unjustified recoveries  
8 for Defendants and their fellow clients of this law firm.

9 Finally, as Anderson argued in his opening brief, and again without response in the Opposition, the  
10 Court's ruling on the motion to dismiss placed its imprimatur on the actions that directly and immediately  
11 resulted in Defendants having to bring this case to an end.

## 12 **II. The Court Should Award Attorney Fees Under the *Kirtsaeng* Factors.**

13 Anderson's opening brief explained that the factors enumerated in *Kirtsaeng v. John Wiley & Sons*,  
14 136 S. Ct. 1979, 138 S. Ct. 1015 (2016), support an award of attorney fees because (1) the infringement claims based  
15 on which Defendants tried to extract payments from Anderson totaling \$17,000 and \$6,750, respectively,  
16 were barred by controlling precedent; (2) Defendants litigated this case in an unreasonable manner; and (3)  
17 an award of attorney fees is needed to deter the strategy of using demand letters and intimidation to extract  
18 large payments from innocent targets against whom the Defendants could not succeed in litigation and  
19 against whom they knew they were not going to file lawsuits. Defendants ignore the second and third points.

20 On the first factor, Defendants' effort to justify the infringement claims that they used to demand  
21 payment of \$23,750 falls woefully short. First, they point to the fact that a few district courts in other  
22 circuits have disputed the Ninth Circuit's adoption of the server test, and to a district court decision that  
23 declined to dismiss a lawsuit contending that a web site operator engaged in wholesale infringement by  
24 systematically using deeplinking to illustrate his articles, noting (incorrectly) that no court has ever applied  
25 the "server" test to an alleged infringer other than a search engine. Opposition 14, citing *Free Speech Sys.*  
26 *v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019). Apparently, neither of the parties called that court's  
27 attention to *Flava Works v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012), cited in Anderson's opening brief,  
28 in which the server test was extended to a social bookmarking site; Defendants ignore that decision as well.

1 Anderson relies on the broad holding of *Perfect 10 v. Amazon, Inc.*, 508 F.3d 1146, 1160-63 (9th Cir. 2007),  
2 which declares the server test to be governing law in the Ninth Circuit. The claim that the individual  
3 Defendants entertained an actual belief, not to speak of a good faith or reasonable belief, that they could have  
4 prevailed on an infringement claim based on deeplinking, the existence of which is not supported by any  
5 evidence, is belied by their conduct in this case. They had no willingness to pursue this line of argument  
6 unless they were guaranteed immunity from an award of attorney fees (which could only be awarded if their  
7 position was unreasonable and other *Kirtsaeng* standards were met).

8 Even if Defendants' had shown a reasonable belief, genuinely held in good faith, that infringement  
9 claims could prevail in the Ninth Circuit based on deeplinking, in order to have tenable claims against  
10 Anderson both Defendants faced the additional hurdle of showing the presence of volitional conduct that  
11 is required to succeed on a direct infringement claim, or knowing hosting of the specific infringing works  
12 at issue as a draw for use of the web site and direct financial benefit to the host, to secure a judgment for  
13 indirect liability. Defendants offer not a whit of evidence to suggest that they genuinely thought they could  
14 make such a showing if Anderson refused their rent-seeking demands. Although their brief says that maybe  
15 they could have obtained such evidence in discovery, they have presented no basis for the Court to conclude  
16 that discovery might have produced such evidence; nor have they explained how they could have pleaded  
17 a plausible complaint alleging volition. This was a forum with two million posts in 16,000 discussion  
18 threads, Complaint ¶ 15. and it beggars belief to suggest that a host would have had actual knowledge of the  
19 allegedly infringing deeplinks, or that a rational plaintiff would have litigated a case hoping to use discovery  
20 to find a smoking gun showing such knowledge. Indeed, it is doubtful that a plausible and nonconclusory  
21 claim could have been pleaded meeting the requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

22 In addition, as Anderson's opening brief noted, at 17 n.6, without any rebuttal by Defendants, in  
23 order to take advantage of the indirect infringement theories recognized in such cases as *MGM Studios v.*  
24 *Grokster*, 545 U.S. 913 (2005) (addressing contributory but not vicarious liability); and *A&M Records v.*  
25 *Napster*, 239 F.3d 1004, 1023 (9th Cir. 2001), Defendants would have had to show that there was a  
26 sufficient quantity of infringing copyrighted works in the forum to make the presence of such works, and  
27 indeed a sufficient quantity of their **own** copyrighted works, a draw to the forum. *Perfect 10, Inc. v.*  
28 *Giganews, Inc.*, 847 F.3d 657, 674 (9th Cir. 2017). They did not need discovery to make that showing—

1 they found three deeplinks scattered among the two million posts using reverse-image search software, and  
2 if they genuinely thought there was a basis for holding Anderson liable for indirect infringement, they would  
3 have used the same search methods and cited that evidence in their brief.

4 The fact that they have presented the Court with no such evidence belies the Opposition's assertion  
5 that Defendants had a genuine or reasonable belief on such theories that gave them a good reason to try to  
6 extract \$23,750 from Anderson via demand letters, threatening emails and phone calls. And, again, the  
7 history of the Higbee firm in issuing demand letters on the basis of allegedly infringing posts, not only on  
8 behalf of Seliger (see Levy First Affidavit ¶¶ 14, 23), but on behalf of other clients as well, but then backing  
9 away when it becomes apparent that their targets know the law and have able counsel, strongly suggests that  
10 baseless infringement claims are persistently pursued in bad faith. An award of fees is needed to deter such  
11 misconduct.<sup>4</sup>

12 Finally, Defendants' attack on the supposed motives of one of Anderson's attorneys is a distraction.  
13 The declaratory judgment cases in which Higbee firm clients dropped their claims of infringement by hosts  
14 of forums were brought on behalf of demand letter targets by both of Plaintiff's counsel working  
15 collaboratively, and they have brought those cases pro bono. Anderson now seeks attorney fees because he  
16 has prevailed in this case against copyright trolling by Defendants. Indeed, although Defendants quote  
17 language from *Ward v. Consequence Holdings*, 2020 WL 2219070, at \*4 (S.D. Ill. May 7, 2020), in which  
18 a judge expressed concern that a lawyer in private practice was seeking paying clients by advertising  
19 personal contests with copyright troll Richard Liebowitz, Defendants ignore what the court **did** in *Ward*: it  
20 imposed a \$20,000 sanction, including an award of \$10,000 in attorney fees. The Court awarded less than  
21 the full amount of fees because the defendant there did, in fact, infringe plaintiff's copyright, and engaged  
22 in its own litigation misconduct while pro se, and the Court wanted to discourage such infringement (*id.*):

23 Aggressive plaintiffs' attorneys such as Liebowitz, then, can be said to represent the fetid  
24 backwash of online media providers' own persistent and willful disregard for intellectual  
25 property norms, and the Court is not overly sympathetic to Consequence's plea to be made  
26 whole.

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26 <sup>4</sup> The fact that the Higbee firm also handles cases for clients who have sound copyright  
27 claims and successfully defends against declaratory judgment lawsuits in cases involving different  
28 copyright issues, Opposition at 11 and n.2, is no evidence that its demand letters in this case were  
pursued either reasonably or in good faith.

1 No such reasons support an award of less than the full attorney fee to Anderson as the prevailing party in  
2 this case.

3 **III. The Fees Sought Are Reasonable.**

4 Defendants object to the amount of fees sought on two main grounds.

5 First, defendants object to the hourly rates, citing a pair of rulings, one by the Ninth Circuit and one  
6 by the Ninth Circuit's Appellate Commissioner. Opposition at 18, citing *Pollinator Stewardship Council*  
7 *v. U.S. E.P.A.*, 2017 WL 3096105, at \*5 (9th Cir. June 27, 2017), and *Prison Legal News v.*  
8 *Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010). Both rulings awarded or affirmed awards based on  
9 evidence showing market rates, rejecting arguments by the government defendants that the Laffey Matrix  
10 maintained by the U.S. Attorney's office in D.C., which portrayed market rates as being significantly lower,  
11 was sufficient evidence to outweigh other evidence supporting higher hourly rates. The D.C. Circuit  
12 addressed the problem of the unduly low rates set forth in the U.S. Attorney's version of the Laffey Matrix  
13 by endorsing the Adjusted Laffey Matrix in a case cited in Anderson's opening brief. *DL v. District of*  
14 *Columbia*, 924 F.3d 585, 591 (D.C. Cir. 2019). Anderson's fee request here relies on the Adjusted Laffey  
15 Matrix, as applied by courts in this district. But Anderson does not rest on the Adjusted Laffey Matrix  
16 alone—several district court decisions, including a finding by Judge Seeborg that the proper market rate for  
17 Mr. Levy's services in 2013 was \$700 per hour, *Recouvreur v. Carreon*, 940 F. Supp. 2d 1063, 1070 (N.D.  
18 Cal. 2013), provide ample support for the hourly rates sought here.

19 Defendants' complaint that Anderson's attorneys have never been in private practice or billed private  
20 clients, Opposition at 18-19, and their objection to the use of an hourly rate comparable to a senior partner  
21 at a large firm, Opposition at 19, should similarly be rejected, just as that argument was rejected in  
22 defendants' own authority, *Pollinator*. The Supreme Court has held that the hourly rates for lawyers  
23 employed by NGO's, who do not have actual billing rates as evidence of the value of their legal services,  
24 are determined by "those prevailing in the community for similar services by lawyers of reasonably  
25 comparable skill, experience and reputation." *Id.* quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).  
26 Different sizes of law firm was **not** one of the factors endorsed by the Supreme Court. And *Pollinator*  
27 rejected the complaint of the respondents in that case that the petitioner was seeking rates comparable to "the  
28 most senior partners at the largest private law firms." *Id.* at \*5-\*6. The affidavits of Anderson's counsel,



1 who have been litigating cases since 1977 and 1984, respectively, show that their level of “skill, experience  
2 and reputation” is at least comparable to the partner at Nixon Peabody whose 32 years of experience was  
3 valued at \$785 per hour in 2018 in a case from this district, *Super Consulting Services v. Steeves-Kiss*, 2018  
4 WL 2183295, at \*6 (N.D. Cal. May 11, 2018).

5 Defendants’ argument that fees should not be awarded for time spent by law students because they  
6 work for free and also pay tuition has been squarely rejected. *League of Wilderness Defenders v. U.S. Forest*  
7 *Serv.*, 2014 WL 3546858, at \*15 (D. Or. July 15, 2014) (argument that law student time is not compensable  
8 because they work for free and pay tuition to their school is “not support[ed] by legal authority and lacks  
9 merit.”). As the Malone affidavit attests, ¶ 12, the students’ hourly rate is based on the judicially-awarded  
10 rate for Stanford law students in another case. Other district courts have issued awards based on similar  
11 hourly rates. *League of Wilderness Defenders*, 2014 WL 3546858, at \*15 (\$125 per hour for student work);  
12 *Hamed v. Macy’s W. Stores*, 2011 WL 5183856, at \*10 (N.D. Cal. Oct. 31, 2011) (\$120 per hour for law  
13 student work). *See also Pollinator*, at \*7 (finding \$189 an appropriate hourly rate for law clerks).

14 Defendants present a variety of unpersuasive nitpicks about the hours sought as a basis for the fee  
15 award. Opposition at 17-18. They claim that the time records “lack basic detail and contain significant  
16 block billing,” citing *Darling Int’l v. Baywood Partners*, 2007 WL 4532233, at \*9 (N.D. Cal. Dec. 19,  
17 2007). But *Darling* defined block billing as instances “where disparate activities are lumped together in one  
18 entry for an entire day,” and went on to say, at \*9 n.6:

19 Where multiple activities are related such as preparing for a deposition and taking the  
20 deposition, the Court does not consider the entry to be block billing. Only a mass entry of  
21 disparate tasks which hinders an assessment of reasonableness of time spent on a particular  
22 task is considered block billing.

23 The time records attached to the Malone and Levy Affidavits do not reflect block billing. And although  
24 courts have discretion to reduce the hours sought both for block billing and when, as in the case of Mr.  
25 Malone and his students, time is recorded in increments of fifteen rather than six minutes, *Welch v. Metro.*  
26 *Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007), *Welch* holds that such reductions may be applied only when  
27 tied to actual examples of overbilling, *id.* at 948-949. Indeed, the use of repeated six-minute increments for  
28 several small items on a single day can itself represent overbilling. *Bretana v. Intl. Collection Corp.*, 2010  
WL 2510081, at \*5 (N.D. Cal. June 17, 2010). Here, Defendants present only one example of a situation

1 in which fifteen-minute increments allegedly caused overbilling, and the example is erroneous.<sup>5</sup> Defendants  
 2 also toss around claims of an allegedly excessive number of **total** hours for preparing certain documents or  
 3 for the case as a whole, but Defendants' arithmetic is consistently wrong, as is their characterization of the  
 4 subjects of the time spent.<sup>6</sup> These are not a proper basis to seek reduction in the hours spent.

5 Finally, Defendants complain that an attorney fees award would somehow be improper because there  
 6 are two separate Defendants in this case who made two separate demands to Anderson for payments of many  
 7 thousands of dollars for alleged infringement of their copyrights. But it is not at all uncommon for multiple  
 8 defendants to be joined as defendants in a single case where, as here, they engaged in the "same series of  
 9 occurrences or transactions," Rule 20(a)(2)(A), Federal Rules of Civil Procedure. Significantly, Defendants  
 10 chose not to raise any joinder concerns in their Rule 12 motion, and have never mentioned the issue until  
 11 now.

12 Courts consider a variety of approaches to allocating fee awards among multiple defendants,  
 13 sometimes awarding fees jointly and severally, and sometimes awarding a set fraction per defendant, perhaps  
 14 with different fractions for different defendants based on the court's assessment of their relative culpability.  
 15 *Herbst v. Ryan*, 90 F.3d 1300, 1304 (7th Cir. 1996); *Council for Periodical Distributors Associations v.*  
 16 *Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987). An alternate approach taken by some courts is to assess fees  
 17 against individual defendants for the additional time that it took to litigate against them. *Id.*

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18  
 19 <sup>5</sup> Defendants say that Mr. Malone recorded .5 hours for the same task on October 18, 2019,  
 20 for which Mr. Levy recorded .3 hours. Not so. Mr. Malone's record reflects that the parties held a  
 21 meet-and-confer on that date, and recorded time on both the meet-and-confer and discussions with  
 22 Mr. Levy both before and after that conference. Mr. Levy apparently recorded only time for part of  
 that series of discussions.

23 <sup>6</sup> Defendants object that student Sam Sherman allegedly recorded 13 hours editing and  
 24 finalizing the memorandum of law in opposition to the motion to dismiss. Opposition 1, 17. His  
 25 records reflect that he spent 10 hours on this work over the course of four days. Defendants say that  
 26 counsel and their students recorded 51.4 hours on the motion to dismiss; *id.* 17, in fact, the time  
 27 records show 40.5 hours of lawyer and student time spent researching, drafting and editing a 20-page  
 28 brief and two affidavits attaching numerous exhibits. Defendants say plaintiff seeks \$62,992.50 in  
 fees and costs just to oppose the motion to dismiss, *id.*, but in fact several other documents had to  
 be filed on the merits alone, and about 30% of the hours were spent on the fee application. The  
 calculations above are supported by paragraphs 4 and 5 the Levy Third Affidavit, and the attached  
 exhibit.

1 Here, neither Defendant has articulated any basis for treating him differently from the other  
2 Defendant. Neither has claimed to be less guilty of making abusive infringement demands than the other,  
3 or to have taken fewer unreasonable positions in the litigation. Had one or both of the Defendants made  
4 such arguments persuasively, the Court would have had to address those arguments and then adopt an  
5 appropriate allocation approach. But the two Defendants' infringement claims were virtually identical, and  
6 equally egregious; and they acted jointly in filing their frivolous motion to dismiss on mootness grounds  
7 without citing the controlling Supreme Court precedent.

8 **CONCLUSION**

9 The motion for an award of attorney fees and costs should be granted.

10 DATED: June 12, 2020

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