COPYRIGHT CLAIMS BOARD

Docket number: 24-CCB-0005
January 22, 2025

Kimberly Mullin	*v.*	Katherine Velasco
CLAIMANT		**RESPONDENT**

ORDER REGARDING CLAIMANT REQUEST TO AMEND CLAIM AND RESPONDENT REQUEST TO EXCLUDE EVIDENCE

The Copyright Claims Board (Board) closed discovery for all relevant purposes on August 27, 2024, *see* Dkt. 15, and the parties have submitted their written testimony. Claimant Kimberly Mullin's (Mullin) reply testimony included a request, to the extent the Board deemed it necessary, to amend the claim to join Kimberlin Photography LLC (Kimberlin), her single-member LLC, as a second claimant, and to join Respondent Katherine Velasco's (Velasco) single-member LLC as a second respondent. Dkt. 25 (Reply) at 9. Velasco opposed the request to amend, and requested that the Board exclude as evidence all eight exhibits Mullin filed in support of her reply testimony. Dkt. 32. Mullin opposed the request to exclude. Dkt. 34. On January 21, 2025, the Board held a conference to address both requests. As discussed at the conference and detailed further below, both requests are granted in part and denied in part.

1. Request to Amend the Pleadings

Based on the submissions, Kimberlin, not Mullin, is the real party in interest authorized to pursue this copyright infringement claim. *See* 17 U.S.C. § 1501(1). Copyright registration records list Kimberlin as the sole copyright owner of the allegedly infringed photographs. *See* Reg. No. VA 2-381-069. The Board credits that prima facie evidence. 17 U.S.C. §§ 410(c) & 1505(c). The Board does not credit Mullin's Exhibit 12 (Dkt. 24), which purports to memorialize a supposed "oral agreement" transferring Kimberlin's rights to Mullin. *See also* Reply at 7-9 (contending "I granted an oral assignment of the '069 Registration to myself from the LLC"). It is not credible that Mullin reached such an oral agreement with her LLC, in a supposed conversation with herself the day after submission of the copyright application, in 2023, with no other corroborative evidence (or amendment to the registration) in the entire time since. No credible evidence suggests that anyone other than Kimberlin owns the copyright. *See, e.g.*, *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 831-32 (3d Cir. 2011) (rejecting memorialization of supposed prior oral agreement with the same person on both sides of a supposed oral transfer with "no independent evidence").

However, the Board finds that Mullin shows good cause to make Kimberlin the claimant, and that removing Mullin and substituting Kimberlin in as the claimant will not unduly delay the proceedings or cause Velasco substantial prejudice. The Board also finds that raising the request to amend at this stage is not unreasonable, as the

need for the request was not so clear earlier in the proceeding. 37 C.F.R. § 222.12(d)(3). Therefore, the Board grants the request to amend to the extent that it will substitute Kimberlin, and amends the claim to name Kimberlin as the claimant instead of Mullin.

Mullin's request to amend also sought leave to join Velasco's single-member LLC as a respondent. Reply at 9. To that extent, the request is denied. At the end of the written testimony stage, a year after the claim was filed, good cause to add an unserved respondent is not shown and would cause undue prejudice.

As stated at the January 21 conference, Mullin must, **by January 28, 2025**, confirm by email sent to Velasco and to **asktheboard@copyright.gov**, if Kimberlin would have produced any documents or interrogatory responses other than or differently than those produced or filed by Mullin, and, if so, to produce to Velasco (not to the Board) any such documents or responses that Kimberlin would have been required to produce had it been a party during the discovery period. If new responses or documents are provided, Velasco may file additional written testimony **within 14 days after such production** *solely to the extent the new documents or responses change or supplement Velasco's defenses to the claim*.

2. Request to Exclude Evidence

Mullin filed eight exhibits (Exhibits 5-12) in support of her reply testimony. Dkt. 23, 24, 26-31. Velasco argued that all eight documents should be excluded as they were not previously served and/or not designed to contradict or rebut evidence submitted in Velasco's response testimony. Dkt. 32 at 4; *see* 37 C.F.R. §§ 222.15(b)(1)(ii) & (c).

At the January 21 conference, Mullin's counsel represented that Exhibit 5 (Dkt. 29) displays screenshots from Mullin's Google Drive, and that while those screenshots were not themselves provided in discovery, a link to the images in the screenshots had been provided to Velasco, even before the claim was filed. Exhibit 5 properly aims to rebut evidence presented in Velasco's testimony. *See* Dkt. 19 ¶ 7; Reply at 3. Exhibit 5 is ALLOWED.

Exhibit 6 (Dkt. 26) shows Mullin's text messages with the listing agent related to removing the allegedly infringing posts on Zillow. *See* Reply at 3. Mullin's counsel represented at the conference that Exhibit 6 was not disclosed in discovery. It should have been produced. It was directly responsive to Request # 11 of the Board's standard **document requests** for parties alleging infringement, which seeks "[a]ll documents and communications (with anyone), referring to respondent(s)/counterclaim respondent(s) and their allegedly infringing work(s) or their use of your work(s)." Exhibit 6 is EXCLUDED.

Exhibit 7 (Dkt. 28) is Kimberlin's invoice for the photoshoot in which Mullin shot the allegedly infringed photographs. *See* Dkt. 19 at 3. Mullin contended, "Velasco never asked me to produce any such documentation in this case until now." Reply at 4. However, the Board's standard Request #10 required Mullin to produce "[a]ll documents and communications (with anyone), referring to respondent(s)/counterclaim respondent(s) and their allegedly infringing work(s) or their use of your work(s)." The Board's standard Requests # 17-18 likewise deal with harm and prior licenses and royalties received. Exhibit 7 was not produced and it is EXCLUDED.

Exhibit 8 (Dkt. 30) is not new evidence. It is a subset of the images Mullin previously served and filed in Exhibits 2 and 4 (Dkt. 17), relabeled and without any watermark. Exhibit 8 is ALLOWED.

Exhibit 9 (Dkt. 23) is a screenshot from Kimberlin's website. Mullin contends that the exhibit shows that her rates have been available on her website since October 2023. Reply at 4. Documentary evidence of those rates should have been produced if it was available during the discovery period. Exhibit 9 is EXCLUDED.

Exhibit 10 (Dkt. 27) shows three screenshots taken on December 12, 2024, after the close of discovery, of photographs by "two other photographers" that Velasco posted in 2023, before this proceeding began. Reply at 5. The exhibit's relevance is minimal at best, and it does not contradict or rebut any evidence Velasco presented, as 37 C.F.R. § 222.15(c)(3) requires. Exhibit 10 is EXCLUDED.

Exhibit 11 (Dkt. 31) is copies of Kimberlin's 2023 and 2024 filings with the Washington Secretary of State that identify Mullin as Kimberlin's governor and sole member. Even though the claim is being amended, it is not a prejudicial document and was timely offered to counter Velasco's contentions about Mullin's standing to raise this infringement claim. *See* Dkt. 19 at 6-7. Exhibit 11 is ALLOWED.

Exhibit 12 (Dkt. 24) is the purported December 2024 memorandum of a transfer of rights between Kimberlin and Mullin. For the reasons stated at the January 21 conference (and because it is now moot given the Board's decision to amend the claim), Exhibit 12 is EXCLUDED.

Accordingly, the Board grants Velasco's request to exclude in part, excluding from evidence claimant's Exhibits 6, 7, 9, 10, and 12; and denies it in part, allowing the use as evidence of claimant's Exhibits 5, 8, and 11.

Copyright Claims Board