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COPYRIGHT CLAIMS BOARD

GAVIN O'NEILL Claimant, - against – SABRINA CARROLL d/b/a SKY LOUNGE SKIN CARE Respondent..	Case No. 23-CCB-0381 **PARTY STATEMENT**

Pursuant to the Order of the Copyright Claims Board dated June 21, 2024, (Case Doc. #13), Petitioner Gavin O'Neill submits the following Party Statement in support of his request that default judgment be entered against Respondent Sabrina Carroll d/b/a Sky Lounge Skin Care.

I. STATEMENT OF FACTS

Claimant Gavin O'Neill ("O'Neill") is a photographer specializing in beauty photography. Declaration of Gavin O'Neill ("O'Neill Decl.") ¶ 3. O'Neill does not allow third parties to use his works without the payment of a licensing fee or permission. *Id.* at ¶ 5.

Respondent Sabrina Carroll d/b/a Sky Lounge Skin Care ("Carroll") is an individual operating business as Sky Lounge Skin Care. *See* Declaration of Taryn R. Murray ("Murray Decl.") ¶5-6. Respondent Carroll is the owner, operator, and

manager of the website www.skyloungeskincare.com ("Respondent's Website"). *Id* at ¶ 7. Respondent Carroll is the owner, operator, and manager of a Facebook page "Sky Lounge Skin Care, LLC", which promotes Respondent's business ("Respondent's Facebook"). *Id* at ¶ 8.

In 2016, Respondent Carroll registered Sky Lounge Skin Care as an LLC with the state of Maryland. *See* Exhibit B. According to the Maryland Secretary of State website, Sky Lounge Skin Care LLC's business status with the state of Maryland was involuntarily forfeited due to Respondent Carroll's failure to file a property return in 2020. *Id* at ¶ 10. Despite the forfeiture of business status, Respondent Carroll has continued to operate the business as an individual. *Id* at ¶ 11; *See* Exhibit C.

According to Respondent's Website, Carroll is a "renowned" expert in "virtually pain-free waxing and customized skincare treatments". *See* https://www.skyloungeskincare.com/about-us. Respondent offers services such as facial waxing, brow design, spray tanning, as well as waxing trainings. *Id.* Additionally, Respondent sells various skin products such as facial wash, hyaluronic acid serum, and moisturizers ranging in price from $13.50 to $127.00. *Id.*

O'Neill is the sole author and rights holder of a beauty photograph of a model with a flower between her legs (the "Beauty Photograph"). *See* O'Neill Decl. ¶ 7.

O'Neill registered the Beauty Photograph with the United States Copyright Office, under registration VA 2-066-264. *Id* at ¶9.

On November 22, 2020, Claimant O'Neill's licensing agent discovered O'Neill's Beauty Photograph in a post on Respondent's Facebook. *See* O'Neill Decl. ¶11. Respondent used the Beauty Photograph to promote a sale of Respondent's services: "BOGO 50% off waxing services! Click the link in our bio to book your appointment today!" ("Infringing Post"). *Id* at ¶12. O'Neill never granted Respondent a license or other type of permission to use the Beauty Photograph in any manner. *Id* at ¶34.

Shortly after O'Neill's licensing agent discovered the Infringing Post, she reached out to O'Neill to confirm that he had not licensed them to Respondent directly. *See* O'Neill Decl. ¶14-15. Once confirmed, Mr. O'Neill's agent attempted to resolve this matter directly with Respondent. *Id* at ¶15. After attempts to resolve failed, Mr. O'Neill's agent referred the matter to O'Neill's attorneys. *Id* at ¶16.

On November 10, 2023, O'Neill filed the instant action with the CCB. Docket #1. On January 26, 2024, proof of service was filed for the Respondent. Docket #5. On April 3, 2024, the Board entered a Scheduling Order on the docket, scheduling a Pre-Discovery Conference for May 16, 2024. Docket #9. On May 16, 2024, the Discovery Conference took place and the Respondent did not appear. *See* Murray Decl. at ¶ 14.

As of the date of this filing, Respondent has not contacted Claimant or the Board and has not participated in this action.

II. RESPONDENTS HAVE ENGAGED IN INFRINGMENT

To establish a prima facie case of copyright infringement, a plaintiff must demonstrate "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Pubs., Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 361 (1991). "The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights" under 17 U.S.C. § 106. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (quotation omitted)). These exclusive rights include the right to reproduce, publicly display, or create derivative works of the copyrighted work. *See* 17 U.S.C. § 106.

A. Sommet Owns A Valid Copyright In The Image.

Claimant's Beauty Photograph is covered and protected under the Copyright Act. 17 U.S.C. § 102(a)(5). Here, Claimant registered the works pursuant to 17 U.S.C. § 411(a) and was given Certificates of Registration under Registration Number VA 2-066-264 issued on August 31, 2017. The Beauty Photograph was registered within 5 years of initial publication and is therefore entitled to a presumption of validity.

Thus, O'Neill has satisfied the first element of copyright infringement.

B. Respondents Engaged In Unlawful Copying.

The Copyright Act grants a copyright holder the exclusive right includes the right to reproduce, publicly display, or create derivative works of the copyrighted work. *See* 17 U.S.C. § 106.

As evidenced by the screenshots provided, O'Neill's Beauty Photograph was copied and displayed on Respondent's Facebook. *See* O'Neill Decl. ¶¶11-13, Exhibit F. Respondent's unauthorized use of the Beauty Photograph violated O'Neill's exclusive rights to reproduce, display, and create derivative works from the Beauty Photograph. Thus, O'Neill has satisfied the second element of copyright infringement.

In conclusion, O'Neill has established that Respondent Carroll engaged in *prima facie* copyright infringement because O'Neill owns a valid copyright in the Beauty Photograph and because Respondent Carroll impermissibly incorporated the Beauty Photograph into the Infringing Post on its commercial Facebook which was uploaded and displayed on the Internet.

III. O'NEILL IS ENTITLED TO RECOVER DAMAGES

Pursuant to 17 U.S.C § 1504(e)(1)(A), O'Neill is entitled to recover actual damages, profits, or statutory damages for infringement. Here, O'Neill would elect to pursue an award of statutory damages O'Neill submits that he is only eligible for the statutory award set forth in § 1504(e)(1)(A)(ii)(I) which sets a maximum award of $15,000 for each work infringed.

Courts have wide latitude to determine the scope of the statutory damages award, and there need not be a direct correlation between statutory and actual damages. *Psihoyos v. John Wiley & Sons, Inc*., 748 F.3d 120, 127 (2d Cir. 2014). An award may be in such amount "as the court considers just." 17 U.S.C. § 504(c)(1); *see also* 17 U.S.C. 1504(e)(1)(A)(ii)(stating that statutory damages in CCB proceedings "shall be determined in accordance with section 504(c)"); *F.W. Woolworth Co. v. Contemporary Arts, Inc*., 344 U.S. 228, 233 (1952).

Here, O'Neill has provided proof of a $16,500 for a six-month commercial license, which included 6 months of exclusivity to use of one of his images and use it on all digital platforms ("2019 License"). O'Neill Decl. ¶¶19, Exhibit G. O'Neill has also charged 1,000 Euros for an editorial license in a French magazine, which included a one-time non-exclusive right to publish the image in the magazine ("2018 License"). *Id* at ¶21, Exhibit H. Because Respondent used the Beauty Photograph on their Facebook page, which promotes her services and products, O'Neill would submit that the 2019 License is most analogous to the facts at hand. O'Neill would request that the Board award her $15,000 in statutory damages for the infringement of the Beauty Photograph by Respondent. *See* 17 U.S.C. § 1504(e)(1)(A)(ii)(II).

Although the statute prohibits the Board from making a finding of willfulness, *see* § 1504(e)(1)(A)(ii)(III), the statute does not prohibit the Board from considering deterrence or other policies goals when awarding statutory damages. *See Woolworth*

Co., 344 U.S. at 233 ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within [the] statutory limits to sanction and vindicate the statutory policy" of discouraging infringement.); *New World Music Co. v. Tampa Bay Downs, Inc.*, 2009 U.S. Dist. LEXIS 1221 *32, 2009 WL 35184 (M.D.Fla., Jan. 6, 2009) ("In keeping with the principle of awarding statutory damages to deter wrongful conduct, courts often award damages based on some multiple of unpaid licensing fees"); *Broad. Music, Inc. v. Prana Hosp., Inc*., 158 F. Supp. 3d 184, 198 (S.D.N.Y. 2016) ("[A] statutory damage award should significantly exceed the amount of unpaid license fees," so as to put "infringers on notice that it costs less to obey the copyright laws than to violate them"); *see also Nintendo of America, Inc. v. Dragon Pacific Intern*., 40 F.3d 1007, 1012 (9th Cir. 1994) (emphasizing punitive and deterrent goals).

O'Neill would also submit that an award of $15,000 in statutory damages is commiserate with the invoices he has provided, and would likely correlate with the amount of actual damages he would be entitled to recover had he elected to do so. Furthermore, such an award would effectively advance the policies of deterring future infringements particularly where, as here, the infringer has affirmatively chosen not to participate in these proceedings.

IV . CONCLUSION

In conclusion, Claimant O'Neill would request that he be awarded $15,000 in statutory damages.

DATED: August 5, 2024

Respectfully submitted,

/s/ Taryn R. Murray
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Proof of Delivery

I hereby certify that on Monday, August 05, 2024, I provided a true and correct copy of the Party Statement to the following:

Sabrina Carroll, represented by Sabrina Carroll, served via MANUALEEMAIL

Signed: /s/ Taryn R. Murray