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McNeil v Blackbelt TV, Inc.
22-CCB-082

Response to Request for Reconsideration by the Board filed by Respondent, Blackbelt TV, Inc.

Claimant Martin McNeil has requested that the Board reconsider its Final Determination awarding him $1,500 in damages for this matter. Claimant's request is ill-considered, intemperate, and unsupported both legally and factually. It should be denied in its entirety for those reasons.

To begin with, the standard Claimant quotes for reconsideration to be warranted (page 2) is "clear error" that is "*unquestionably* wrong" and material to the outcome. But it is not *unquestionably* wrong for the Board to disbelieve the reliability of Claimant's evidence – here, as relevant, fotoQuote's calculator. The board was entitled to make a credibility determination, and Claimant has offered no evidence that the calculator is *unquestionably* accurate, reliable, and applicable to these circumstances.

In support of fotoQuote's reliability, Claimant only quotes from fotoQuote's own website, but those representations by fotoQuote are not evidence because Claimant has not offered the "actual sales records from photographers and photo buyers" that they're supposedly based on. Instead, Claimant has simply offered the naked averments of fotoQuote itself, which are the textbook definition of hearsay – an out-of-court statement being offered for the supposed truth of its content. *See* Federal Rule of Evidence 801(c); *Jennings v. Prudential Ins. Co. of Am.*, No. CV 05-4620 CBM (RZx), 2006 U.S. Dist. LEXIS 103120, at *8-9 (C.D. Cal. Apr. 13, 2006) ("Defendant is correct in its assertion that the website printouts are hearsay, as they constitute out of

court statements offered for the truth of the matters asserted therein."). Claimant did not need *expert* evidence to substantiate the calculator, as he accuses the Board of implicitly demanding, but he surely needed *some* evidence yet offered none.

The fact that Claimant claims to tell the general public to look to the fotoQuote calculator to determine his ala carte licensing rate is simply not a genuine expression of practices for his photo licensing business. If a photographer makes it their standard business practice to always open negotiations over a single photo for $10 million, that does not make $10 million the genuine "sticker price" absent an indication that someone, *anyone,* has ever paid that price or something close to it. As courts throughout the Ninth Circuit have held, a license price is established through "objective evidence of benchmark *transactions*, such as licenses previously *negotiated* for comparable use of the infringed work," not the licensor's wishful thinking divorced from reality. *Raimondi v. Olenicoff*, No. SACV 12-2094 AG (RNBx), 2015 U.S. Dist. LEXIS 174961, at *6 (C.D. Cal. July 7, 2015) (emphasis added).

Claimant offers two district court citations (*Oppenheimer v. Plexuss, Inc*. and *Werner v. Priceonomics, Inc*.) for his proposition that fotoQuote has been deemed reliable by prior courts (page 4) and greatly emphasizes that those cases hail from the Ninth Circuit. However, even if Claimant's representations were accurate – and they are not – as district court citations, they are not binding precedent even within the Ninth Circuit and are therefore no more impactful here than the decisions the Board elected to rely upon in its order. Contrary to Claimant's claims, there is no obligation to weigh them more heavily, meaning they cannot establish the Board's determination as

"unquestionably wrong," especially considering that upon further inspection, Claimant has misrepresented their contents.

Oppenheimer v. Plexuss, Inc. actually *hurts* Claimant's position, as it involved the court principally *rejecting* the plaintiff's reliance on fotoQuote because he offered no evidence "that anyone has actually paid that rate for his work" or that the rate provided by fotoQuote "comports with license fees actually paid in the market." No. 21-cv-01422-JCS, 2021 U.S. Dist. LEXIS 226177, at *17-18 (N.D. Cal. Sep. 7, 2021). It was only once he offered actual evidence of his licensing fees matching the fotoQuote estimate in a subsequent declaration (which Claimant has not done here) that the court was willing to give even *slight* evidentiary value to the latter. *Id.* at *17-18. The same was true in *Werner v. Evolve Media, LLC*, which Claimant points out the Board has previously relied upon in *Dermansky v Rule 62, Inc.* 22-CCB-005 (Nov. 1, 2023). That court echoed *Oppenheimer* by noting that no court within the Ninth Circuit had ever actually relied on fotoQuote to estimate licensing fees. No. 2:18-cv-7188-VAP-SKx, 2020 U.S. Dist. LEXIS 126589, at *9-10 (C.D. Cal. June 22, 2020), It was only the fact that the plaintiff "supported the fotoQuote estimate by providing evidence of actual licensing fees he has received for [his] Images, all of which are higher than the fotoQuote estimate used to calculate damages" that the court accepted the estimate as reasonable. *Id.*

Claimant's reliance on *Werner v. Priceonomics, Inc*. is actually quite egregious, as it was not even an adversarial determination by the court – it was the ministerial entrance of a *consent judgment* that the parties had privately agreed to, in which they mutually elected to aver that fotoQuote was "industry standard" and reliable.

A true and correct copy of the consent judgment is attached hereto as an exhibit. *Priceonomics* made no evidentiary determination on the matter, and it is highly deceptive for Claimant to cite this case as though it reflects a reasoned decision of the district court judge.

In sum, Claimant has utterly failed to demonstrate it was even *arguable* error, much less *unquestionable* error, to reject fotoQuote, standing alone and unsupported by objective evidence that Claimant has ever commanded its prices in practice, as a reliable measure of damages for this case. Contrary to Claimant's claims (page 5), he cannot simply testify as to what he believes his work is worth and recover damages based thereupon. That testimony must be corroborated by prior licenses, as in *Oppenheimer* and *Evolve Media*. If the court were required to "broadly construe" Claimant's evidence, he would first need to actually submit cognizable and credible evidence. And indeed, that is precisely what the Board did, giving Claimant a generous upcharge on the one benchmark licenses he submitted and then trebling that fee.

Despite Claimant's claims (pages 5-6), this case is nothing like *Polar Bear Prod. v. Timex Corp*., 384 F.3d 700 (9th Cir. 2004). In that case, while the plaintiff had never previously charged the license fee awarded by the jury, it had been offered directly to the defendant in a one-on-one negotiation with no indication it had been artificially contrived, meaning the jury was entitled to consider it as a credible offer. Here, Claimant made no such direct offer and there is every indication that fotoQuote forms no legitimate part of Claimant's actual business practices. In fact, the only actual evidence in the case – the Smuggling Duds license – is wildly out of step with

fotoQuote's formulas, meaning the Board was entitled to find it more credible than Claimant's testimony.

With no case law left to support his position, Claimant begins to wildly point fingers at everyone but himself (pages 6-9). He blames the Board for not asking him to submit basic evidence that the plaintiffs in the very cases he relies upon knew well enough to provide, despite the fact he is represented by sophisticated counsel in this matter and citing no obligation the Board had to help him carry his evidentiary burden. He accuses the Board of mathematical error in its treatment of the fotoQuote license despite the fact that the fotoQuote license ultimately played *zero role* in the Board's damages calculation, which was instead based on taking Claimant's own license to Smuggling Duds, *crediting* his claim that it was discounted by doubling it, then further trebling it. He appallingly accuses the Board of bias simply for exercising agency – any court conducted a bench trial may independently investigate the law and disbelieve evidence deemed non-credible. Far from pointing out error, Claimant is simply castigating the Board for functioning *properly.*

Lastly, the Board had no obligation to award Claimant fees because it was Claimant who acted unreasonably throughout these proceedings by wildly inflating his damages in the hopes of a windfall and engaging in deceptive advocacy like that seen in his request for reconsideration. The Board was correct to reject Claimant's request, whether *sub silencio* or otherwise, and Claimant cannot complain that it constitutes unquestionable error when such fees are purely discretionary in the first instance.

For all the foregoing reasons, Claimant's request for reconsideration should be denied.

Respectfully submitted,
Rebecca Wolcott
Blackbelt TV, Inc.

EXHIBIT - *WERNER V. PRICEONOMICS, INC*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFERY R. WERNER, Plaintiff, v. PRICEONOMICS, INC.; and DOES 1 through 10 inclusive, Defendants.	Case No. 4:20-cv-04006-HSG **CONSENT JUDGMENT**

CONSENT JUDGMENT

This matter comes before the Court on the joint motion of the parties for entry of final judgment with respect to all pending claims. The Court being advised that all claims and other matters in this action have been fully, finally, and completely resolved and settled subject to the provisions hereof, IT IS HEREBY STIPULATED AND AGREED by the parties hereto through their respective counsel as follows:

1. This Court has jurisdiction over the parties to this action and over the subject matter.

2. Plaintiff Jeffery R. Werner is the owner of all right, title, and interest to the photograph referred to in this action as the Snuggery Image (attached as Exhibit A) which is registered under U.S. Copyright Registration Certificate No. VAu 1-119-467.

3. Defendant Priceonomics, Inc. displayed the Snuggery Image without authorization in an article on the Priceonomics, Inc. website titled titled "Inside the World of For-Profit Snuggling" which is attached as Exhibit B.

4. Defendant Priceonomics, Inc. displayed the Snuggery Image without authorization for approximately 40 months.

5. Pursuant to the estimated license fee provided by the industry standard software fotoQuote, Werner's lost license fee for the Snuggery Image would be $667 per month for a total lost license fee of $26,680.

6. Pursuant to the methodology set forth in the case *Werner v. Evolve Media, LLC*, 2020 WL 4012784 (C.D. Cal., 2020) the parties agree that a 3x multiplier is appropriate.

WHEREFORE, Defendant Priceonomics, Inc. hereby consents to a monetary judgment in favor of Plaintiff Jeffery R. Werner in the amount of $80,040.00 with both parties to bear their own costs and fees.

IT IS SO ORDERED.

Date: 8/4/2021

Hon. Haywood S. Gilliam, Jr.
United States District Judge

Proof of Delivery

I hereby certify that on Thursday, September 05, 2024, I provided a true and correct copy of the McNeil v Blackbelt TV-Response to Request for Reconsideration-9.5.2024 to the following:

Martin McNeil, represented by Leslie Burns, served via ESERVICE at leslie@burnstheattorney.com

Signed: /s/ Rebecca Wolcott