

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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LEAH BASSETT, )  
 Plaintiff, )  
 v. )  
 MONICA JENSEN, d/b/a NICA NOELLE; JON BLITT, )  
 in his Personal Capacity & d/b/a MILE HIGH MEDIA, )  
 ICON MALE, and TRANSSENSUAL; MILE HIGH )  
 DISTRIBUTION, INC.; JOSHUA SPAFFORD, d/b/a )  
 JOSHUA DARLING; APRIL CARTER, d/b/a DIANA )  
 DEVOE; TLA ENTERTAINMENT GROUP, d/b/a TLA )  
 GAY and TLA DISTRIBUTION; and GAMMA )  
 ENTM'T, d/b/a CHARGEPAV B.V.; WILLIAM )  
 GRAY, d/b/a BILLY SANTORO; and FIORE J. )  
 BARBINI, d/b/a HUGH HUNTER, )  
 Defendants. )

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Hon. Patti B. Saris

CIVIL ACTION  
No. 18-cv-10576-PBS

*Filed concurrently with:  
Declaration of Gary Jay  
Kaufman; Evidentiary  
Objections*

**Hearing Date:  
February 18, 2020**

**DEFENDANTS MILE HIGH DISTRIBUTION, INC., JON BLITT, AND MONICA  
JENSEN'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT, AND OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR  
SUMMARY ADJUDICATION**

**MEMORANDUM OF LAW**

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## INTRODUCTION

Plaintiff Leah Bassett's Opposition Response to Defendant's Motion for Summary Judgment ("Opposition") and Cross Motion for Summary Adjudication ("Cross Motion") prove what Defendants have contended all along – that Plaintiff copyrighted her personal belongings, a year-and-half after the incident she now complains of, solely for the purpose of shaking down Defendants.

Defendants have maintained this position from the outset. And now, Plaintiff has confirmed it under oath in her recent affidavit that accompanied her Opposition.

**“When my lawyer sent the 93A demand letter to the Defendants, I was hopeful that I could avoid filing a lawsuit and the Defendants and I could reach a settlement. I didn't want to have to file for copyright certificates. But over time, it became clear that the Defendants weren't willing to reach an agreement... John advised that I file the copyright applications, as it looked like we were heading towards a lawsuit. [...].**

Although I filed for the copyright registrations, I have never sought to sell, reproduce, license or otherwise seek a profit from any of the 53 works that were included in those 3 applications.” (Dkt. 98-3, page 12, Par. 32-33).

This confession is astonishing. Plaintiff concedes that she never had any intention of filing copyright applications to protect her household items and things. Rather, only once she was unable to extract a pre-lawsuit settlement out of Defendants, she filed copyright registrations for the personal items around her house, just so that she could sue Defendants. Prior to the Defendants coming along, Plaintiff had no interest or intention in protecting these items. And our position is: If she never thought these “works” were worth protecting, why would the Defendants think they were? And, even more importantly, why should the Court?

A simple review of the films makes clear that not a single person who watched them would notice Plaintiff's items (which are even less noticeable when viewing the action of the

films themselves rather than the individualized still screenshots).<sup>1</sup> Indeed, no one ever did. (Dkt. 88, Statement of Undisputed Facts (“SOF”) ¶ 33). Knowing how fatal that is to the claim, Plaintiff made up a false story that someone had seen her belongings while watching a film by chance, put it in her initial demand letter, and included that as an exhibit to the verified complaint. (Dkt. 88, SOF ¶ 34). Plaintiff has since admitted that wasn’t true, (Id.), but she’s never tried to correct the record.

Plaintiff is asking this Court to award her damages for “infringement” of something she never sought to protect, never sought to profit off of, and quite frankly may have little-to-no protectable elements. She does so after not only waiting a year-and-half after the fact to register these copyrights, but now admitting that she only did it so that she could sue Defendants.

Nor does Plaintiff present any facts to back up her RICO claim. Instead she relies on familiar conclusory, false, and salacious allegations. The discovery Plaintiff claims she “needs” has been denied to her previously, *and* she was given every opportunity to indicate what discovery she needed to oppose summary judgment before Judge Kelley.

Plaintiff does no better on her state claims. As set forth below and in Defendants’ moving papers, Plaintiff utterly fails to establish a legal basis for these claims against these Defendants, including some of which that are clearly barred by the applicable statutes of limitations.

This memorandum responds to arguments set forth in opposition to Defendants’ moving papers, as well as Plaintiff’s Cross Motion. Based on the arguments set forth below and in their

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<sup>1</sup> Separately, the materials at issue were lodged by Defendants carefully with the Court under seal. Astonishingly, it appears that Plaintiff nonetheless (and despite a prior clear admonition from the Court) filed more examples depicting explicit content on PACER.

moving papers, Defendants respectfully request that this Court grant Defendants summary judgment on all claims, and award Defendants their attorneys' fees under the Copyright Act.

### **COPYRIGHT CLAIM**

#### **I. Plaintiff's Lack of Contribution, and Scope of Protection, Within the Works is Not a Damages Issue – It's Proof of No Infringement**

Plaintiff contends – without any authority – that the fact that many of the works at issue were primarily not of her creation would be a damages issue, rather than liability issue.

This is not a fact question for damages. It's a legal question that goes directly to the issues of (a) the scope of her rights in the asserted works, (b) whether there are grounds to claim that any infringement occurred, and (c) the legal analysis of fair use and/or de minimis use. Plaintiff's contention that it's not necessary to determine the scope of her protection at the liability stage (Dkt. 98, Opposition, p. 7-8) simply doesn't add up – if she has no protection, then there is no liability. See CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1514-1515 (1st Cir. 1996) (on motion for summary judgment, district court's "dissection" of copyrighted work into protectable and unprotectable elements for purpose of infringement analysis was appropriate, and question of originality could be determined by the court); William Patry, *Copyright in Collection of Facts: A Reply*, 6 *Comm. & Law* 11, 27 (1984) ("[a] work that is not original does not have a limited scope of protection – it has no protection regardless of how much labor went into its production.").

Although Plaintiff claims it's required, expert testimony is not needed to see that the designs of at least several of the claimed works are not original. Plaintiff conceded at her deposition (See Dkt. 88 and 98-1, SOF ¶¶ 30-31) and in her opposition (Dkt. 98, Opposition, p. 8-9 ("there is no question that some of the registered Works include subparts that were not

created by Ms. Bassett’)) that parts of the works were not created by her. The examples provided in Defendants’ motion illustrate how this manifests. (Dkt. 87, Defendants’ Motion for Summary Judgment Memorandum of Law (“Defendants’ MSJ”) p. 18-22). Changing the colors – which are not copyrightable – does not add a sufficient quantum of originality, nor create a derivative work. Nor would expert testimony be particularly appropriate here, anyway. Whether copyright protection exists is a legal issue for the Court to determine. An expert opining on such to the Court would be of little value. (And in any event, Plaintiff herself has no expert on this topic, as her proposed experts have been stricken by this Court.)

## **II. Plaintiff’s Arguments That This Is Not De Minimis or Fair Use Are Unpersuasive**

Plaintiff’s set forth two primary arguments that her copyright claims are not de minimis or fair use: One, that these are equitable doctrines, and Defendants have not acted equitably. And two, that *Ringgold v. Black Entertainment Television* prevents either doctrine from applying to this scenario.

### **A. Defendants Are Not Equitably Barred From Asserting These Arguments**

With respect to Plaintiff’s equitable argument, Defendants addressed in their Motion the fact that any appearance of these items in the films was never a conscious decision to portray copyrighted work. (Dkt. 87, Defendants’ MSJ, p.27, 29). These items were not registered at the time. Nor do they stand out as copyright protectable items. There is no evidence whatsoever that Defendants intentionally sought to portray copyrighted work (even to the extent copyright protection exists). Query: Who in the world would ever think these miscellaneous household items were being claimed as copyrighted?

These Defendants never had conversations with the Plaintiff. (See Dkt. 88 and 98-1, SOF ¶ 16). Plaintiff herself has conceded that these items are just part of her home décor. (Dkt.

98, Opposition, p. 6). She did not see the need to file registrations for them. (Dkt. 98-3, p. 12, Par. 32-33). Plaintiff claims that Defendants lacked good faith and fair dealing following the transmittal of her demand letter. (Dkt. 98, Opposition, p. 11). Aside from being after the fact, good faith and fair dealing does not mean agreeing with and accepting as true everything that Plaintiff claims in a demand letter.

B. Ringgold v. Black Entertainment Television, Inc.

Defendants addressed the *Ringgold* case in their Motion. (Dkt. 87, Defendants' MSJ, p.24). Relying on this Second Circuit case as her primary decisional authority, Plaintiff simply quotes huge swaths of the opinion. But in doing so she leaves out the crucial distinction to our set of facts.

In *Ringgold*, the court was presented with a case where a television program featured a copyrighted poster of a story quilt that was made the exclusive center of the viewer's attention. The camera focused on the poster in nine separate sequences. Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 72-73, 76 (1997). The poster and its contents was central to the theme and message of the program. *Id.* at 77. Therefore, that court determined the use was not de minimis or fair use without a further factual inquiry.

That's not the case here. In this case, these are simply Plaintiff's personal items. Defendants did not use them or focus on them. Nor do they have any bearing on the films. They were just there. Seeing these films reinforces the point that not a single person who watched these films would notice these items. Even when you know what to look for it can be difficult to focus on the items.

Even under *Ringgold*, a work may have been "selected by production staff for thematic relevance, or... decorative value, [but] might ultimately be filmed at such distance and so out of

focus that a typical program viewer would not discern any decorative effect that the work of art contributes to the set,” such that its use is de minimis. Ringgold, 126 F.3d at 77.

The distance between *Ringgold* and this case becomes wider even still after considering that Plaintiff – per her own acknowledgement – did not create parts of these works. To the extent these items are visible at all, and not obscured or out of focus, whatever unintentional decorative effect they have may not even be attributable to Plaintiff.

If Plaintiff’s position were accepted, based on these facts, it would open the floodgates for copyright trolls. Anytime Disney, Fox, Warner Bros., or some other major studio produced a film, copyright trolls would come out of the woodwork claiming their personal items were captured in the background and demanding damages. Such a situation would be untenable. The standard shouldn’t be different just because Defendants produce a different form of entertainment.

Plaintiff’s other fair use arguments are similarly unpersuasive. She claims that the most important fair use element – that there is no effect on the potential market for these items, because there no market exists – shouldn’t matter because she should be entitled to a licensing fee.<sup>2</sup> (Dkt. 98, Opposition, p. 20). Unlike *Ringgold*, however, this was never alleged by Plaintiff in her complaint. Ringgold, 126 F.3d at 73. The “potential” market for these items is not “undetermined,” (Dkt. 98, Opposition, p. 20) because Plaintiff has already told us what it is – zero. (Dkt. 88, SOF ¶ 27; Dkt. 89-17, Exhibit Q, p. 3-4, 6-7). She has told us she never intended to register these items. (Dkt. 98-3, Bassett Affidavit, p. 12, Par. 32-33). She admits – rather incredulously – that she never intended to market or license these items because they are just the interior furniture of her home. (Dkt. 98, Opposition, p. 6 (“it defies common sense to credit that

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<sup>2</sup> Plaintiff’s damages argument, including this point, are discussed in further detail below.

she would have even tried to sell over the Internet her home’s roughly one ton fireplace façade, and/or any or all of her hand-sewn decorative pillows and slipcovers; her pottery pieces; or any of her wall-hanging artwork that she had created years earlier as part of her own home’s distinctive interior design.”)).

In sum, both Plaintiff’s fair use and de minimis arguments (and most of her theory on the copyright claim as a whole) are premised largely on *Ringgold*. It’s the only substantive authority she cites, in contrast to the myriad of cases that Defendants have provided. But ultimately *Ringgold* and subsequent cases, such as *Sandoval v. New Line Cinema Corp.* and *Gottlieb Development LLC v. Paramount Pictures Corp.*, stand for the proposition that a work must be more than “just there” – they must contribute some intrinsic meaning, value, or message, or have been selected for that purpose. See *Gottlieb Development LLC v. Paramount Pictures Corp.*, 590 F.Supp.2d 625, 632 (2008) (considering *Ringgold*, copyrighted work that was never mentioned, played no role in plot, and average observer would not recognize it as anything but generic held de minimis); *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (1998) (also considering *Ringgold*, copyrighted photographs used in movie that were not displayed with sufficient detail to be recognizable to average lay observer were held de minimis). Plaintiff’s side table and slip coversheets are not that.

### C. The De Minimis and Fair Use Arguments Apply Globally

Finally, Plaintiff charges Defendants with failing to set forth how the fair use or de minimis doctrines apply in each and every instance. (Dkt. 98, Opposition, p. 12). Plaintiff, however, has never herself identified what she believes to be the infringements to be.

Ms. Bassett is the Plaintiff. She has prosecuted this case in generalizations, by categorically claiming that the films infringed on her works without specifying the scenes or

photos in question. She has never specified which works were infringed, where, and how. Defendants, therefore, have responded accordingly.

In any event, Defendants believe the Court can make appropriate determinations for purposes of this motion. As stated in Defendants' Motion, this is one those cases where you know it when you see it. Rather than inundate the Court with many *possible* instances that the Plaintiff *may* refer to as part of her case at trial, the Defendants proceeded in a manner that logistically made the most sense. The same arguments apply generally to each scene or photo that could potentially be at issue. Each one is similarly situated. They are not unique in some distinct way what requires individualized assessment of every frame. Defendants' legal argument apply largely to each film as a whole, and require the same conclusions.

### **III. Plaintiff Still Has Not Presented Any Avenue for Recoverable Damages**

Plaintiff sets forth two arguments in response to the fact that she has no recoverable damages. The first is that she is entitled to declaratory relief even though she has no monetary damages. The second is a brand-new theory that she is entitled to actual damages in the form of the market value of a licensing fee. (Dkt. 98, Opposition, p.21).

As an initial matter, Plaintiff doesn't ask for either of these remedies in her complaint. (Dkt. 1, Complaint, ¶ 59). She has previously sought preliminary injunctive relief based on her copyright claim, and was denied. (Dkt. 85). As far as monetary damages, Plaintiff's complaint seeks – at her election – the profits attributable to the infringement (none)<sup>3</sup> or statutory damages

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<sup>3</sup> Plaintiff does not specifically argue that she is seeking the “profits” avenue of damages in her Opposition. She's not entitled to it anyway. Under this form of damages, a copyright holder is required to prove that amount of profit made by a supposed infringer *that is attributable to the infringement*. Doe ex. rel. Roe v. Backpage.com LLC, 104 F.Supp.3d 149, 165 (D. Mass. 2015). There is no evidence whatsoever that any revenue (let alone profit) is attributable to Plaintiff's items. And not only do it not exist, Plaintiff does not have the ability to try to prove it either, because she has no expert available to opine and provide admissible evidence on it.

(not entitled to as a matter of law). (Dkt. 1, Complaint, ¶ 59). She does not request “actual damages” under a licensing fee theory. Nor did she ask for it in her verified interrogatory responses. (Dkt. 89-17, Decl. of Gary Jay Kaufman, Ex. Q, p. 3-4). And she does not request declaratory relief.

Plaintiff’s copyright damages theory has been like shifting sands. She first conceded she had no actual damages, and demanded statutory damages. (Dkt. 88, SOF ¶¶ 27-28). Now it seems she’s acknowledged that she is not entitled to statutory damages, and has changed her mind about not having actual damages. But because there are no real damages, she claims she is entitled to the market value of a licensing fee for the use of her items. There are no recoverable damages for Plaintiff under this theory, and the case she cites, *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2nd Cir. 2001), doesn’t help her.

In *On Davis*, a New York district court determined that “as an abstract matter, the statutory term ‘actual damages’” could cover a licensing fee. *On Davis v. The Gap, Inc.*, 246 F.3d at 165. But it is far from a certainty – and certainly not based on the undisputed facts of this case, and Plaintiff’s inability to provide any competent evidence to support it. The following table illustrates the differences:

<b>On Davis v. The Gap, Inc.</b>	<b>This Case</b>
The major clothing company “The Gap” displayed the plaintiff’s copyrighted eyewear on an advertisement. The plaintiff had previously promoted and marketed his eyewear design in “carefully chosen media settings”. That included runway shows, photographs, and major publications such as <i>Vogue</i> , <i>Women’s Wear Daily</i> , <i>Fashion Market</i> , <i>In Fashion</i> , <i>The New York Times</i> , <i>The New York Post</i> , and <i>The Village Voice</i> . <u><i>On Davis</i></u> at 156.	Plaintiff’s items have never been featured anywhere. According to her, she has not published her items anywhere. (Dkt. 98, Opposition, p. 6).

On Davis v. The Gap, Inc.	This Case
In The Gap’s ad, the <u>central</u> figure was <u>wearing</u> the plaintiff’s copyrighted eyewear. It was so central, that when the ads were cut for bus benches, the ad was cropped to show on the head and shoulders and feature the eyewear. <u>On Davis</u> at 156-157.	Plaintiff’s items were off to the side, obscured, in the background and out of focus. And, of course, nobody was wearing anything.
The Gap’s ad campaign appeared in prominent mainstream magazines (such as W, Vanity Fair, Spin, Details, and Entertainment Weekly), with a total circulation of over 2,500,000. <u>On Davis</u> at 157.	The films at issue are anything but mainstream.
The plaintiff produced evidence that sales for The Gap’s parent company increased by 10 percent during the period of the ad campaign. <u>On Davis</u> at 157.	There is no evidence at all that viewership of these films was affected at all by Plaintiff’s items.
The plaintiff provided evidence that in the past he had sought and received royalties for in exchange for licensing the work at issue. <u>On Davis</u> at 161-162.	Plaintiff has never licensed these items, tried to license them, or wanted to license them. As Plaintiff herself said, “it defies common sense” to think she would look to market her home’s interior design. (Dkt. 98, Opposition, p. 6), and she never even intended to file copyright applications for these items. (Dkt. 98-3, Bassett Affidavit, p. 12, Par. 32-33).
The plaintiff expressly requested declaratory relief, which led to the court’s remand to consider that request. <u>On Davis</u> at 158.	Plaintiff did not request declaratory relief in her Complaint.

Perhaps most importantly, *On Davis* court explained that a licensing fee theory is possible “so long as the amount of the award is based on a factual basis rather than ‘undue speculation.’” On Davis v. The Gap, Inc., 246 F.3d 152, 163 (2d Cir. 2001). A copyright owner must prove “that a license to make such use of the work has a fair market value [...]. The question is not what the owner would have charged, but rather what is the fair market value. In order to make out his claim that he has suffered actual damage because of the infringer's failure

to pay the fee, the owner must show that the thing taken had a fair market value.” On Davis at 164-166. Given the undisputed facts of this case, and the fact that Plaintiff cannot provide any admissible evidence because she has no expert opinion to support the theory, an award under a license fee theory would be *purely* speculation. See On Davis at 171 (plaintiff “adduced sufficiently concrete evidence of a modest fair market value”).

(Parenthetically, although it did not exist in that case, *On Davis*’ commentary on the *de minimis* doctrine supports Defendants’ position. That court explained that “[m]ost honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the *de minimis* doctrine, would technically constitute a violation of law. [...] Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law. If a copyright owner were to sue the makers of trivial copies, judgment would be for the defendants. The case would be dismissed because trivial copying is not an infringement.” Acknowledging their “argument may be valid in other circumstances,” the court declined to find *de minimis* copying for The Gap because “the infringing item is highly noticeable.” The “strikingly bizarre” copyrighted eyewear was “startling to see,” the “focal point of attention,” the wearer was “at the center of the group,” and “the viewer’s gaze is powerfully drawn to [the plaintiff’s] creation.” On Davis v. The Gap, Inc., 246 F.3d 152, 173. Every one of those factors is nonexistent in this case.)

With respect to damages, Defendants are relying on what Plaintiff herself has said and asked for in her Complaint, and subsequently in her verified interrogatory responses. Nothing else. And with no quantifiable or admissible way to determine a use fee based on the existing undisputed facts, and no expert to opine on it, this is not such a case where a royalty or license fee may serve as actual damages.

#### **IV. Plaintiff Provides No Substantive Response to Defendants Request for Attorneys' Fees**

Plaintiff did not even bother to make any substantive arguments in response to Defendants' request for attorneys' fees. Instead, her Opposition simply states that, "Ms. Bassett feels no need to cite to the Copyright Act's provisions, and pertinent case law" to show why Defendants wouldn't be entitled to attorneys' fees. (Dkt. 98, Opposition, p. 23).

This case is a prime example of one that merits attorneys' fees. Plaintiff's concession that she copyrighted these items solely for purpose of suing Defendants, coupled with Plaintiff's early fabrication that *someone* had actually seen her items in these films (which was included in an exhibit to her verified complaint, and which she later confessed never occurred), illustrate Plaintiff's motive. Her entire copyright litigation has been malicious and false.

Respectfully, Defendants reiterate their request for an award of statutory attorneys' fees under the Copyright Act.

#### **V. Jon Blitt Is Not Liable as an Individual**

The law in the First Circuit is different than the Arizona district court case cited by Plaintiff. Here, the mere fact that an individual is a corporate officer, manages, and/or controls and entity is *not* sufficient for vicarious liability. See Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc., 423 F.Supp. 341 (D. Mass 1976).

Rather, a corporate officer may be held vicariously liable under the Copyright Act in circumstances where he (a) personally participated in actual infringement; (b) derived financial benefit from infringing activities either as major shareholder or through some other means such as receiving percentage of revenues; (c) used the corporation as instrument to carry out deliberate infringement; or (d) was a dominant influence in the corporation and determined the policies

which resulted in infringement. See e.g. Marvin Music Co. v. BHC Ltd. Partnership, 830 F.Supp. 651, 654-655 (D. Mass. 1993).

There is no evidence at all that Mr. Blitt participated in the actual infringement, derived any benefit at all from Plaintiff's items, is a shareholder of Mile High Distribution or derived a percentage of any revenues, that he used Mile High Distribution in any manner, shape, or form to carry out a deliberate infringement, or that he was the dominant influence that led to Plaintiff's household items being filmed in the background. The entire premise of an individual being liable through a company is when there is some deliberate and affirmative action taken by the individual to effectuate the infringement. There is no evidence here that Mr. Blitt even knew that there was something to *be* infringed until Plaintiff brought this case.

#### **Summary of Copyright Analysis: No Liability**

- ❖ Plaintiff three copyright registrations are potentially invalid because they are registered as "unpublished collections" even though Plaintiff indicated that she had published her items online in the past.
- ❖ Even if her three registrations are facially valid, the scope of Plaintiff's actual protection is extremely limited because the items (a) contain significant non-copyrightable elements, (b) contain significant elements that were not created by Plaintiff, and (c) have functional elements that are not protected.
- ❖ Even to the extent Plaintiff has protection, any appearance of the items is de minimis as a matter of law based on the limited observability and appearance as mere generic background.
- ❖ Even if not de minimis, any appearance of the items is fair use under the four-factor test.
- ❖ Even if there was an infringement, Plaintiff has no avenue to recoverable damages because (a) she is not entitled to statutory damages as a matter of law, (b) has no evidence (admissible or otherwise) that Defendants received any profits attributable to, and casually connected, to an alleged infringement, and she has no expert to prove otherwise, and (c) has no admissible evidence to establish that she is entitled to a "license" fee, no expert to prove it, and has conceded she has no actual damages.

### **RICO CLAIM**

In opposing Defendants' motion for summary judgment on her RICO claim, Plaintiff contends that (a) she has met the quantum of factual proof of the RICO elements necessary to overcome summary judgment, and (b) to the extent she hasn't, it is because she has not been able to secure the evidence because she did not receive it in discovery.

Defendants disagree on both counts. First, Plaintiff has utterly failed to establish any evidence for a number of the RICO elements, including the underlying predicate acts, the necessary pattern, or the enterprise. And second, there is no discovery that Plaintiff is missing that she is entitled to and/or that did not have an opportunity to request prior to this motion.

#### **I. Plaintiff Has Not Provided Any Facts that Support Her RICO Claim**

Arguing that she has established sufficient evidence to overcome summary judgment on her RICO claim, Plaintiff claims that Defendants have engaged in the racketeering activity of dealing with obscene matters, criminal copyright infringement, and mail/wire fraud. She even adds a never-before disclosed *new* predicate act, nowhere alluded to in the Complaint or at any subsequent point in this litigation – retaliating against witnesses or victims.

Defendants already addressed her fraud-based allegations (Dkt. 87, Defendants' MSJ, p. 49-50) and criminal copyright infringement allegations (Id. at 38-39) in the moving papers. Suffice it to say that Plaintiff has not specified or established with particularity how Defendants supposedly formed the criminal intent needed to steal the rights to Plaintiff's items when they weren't even copyrighted at the time. Her allegation of "witness retaliation" is even more bare. Plaintiff provides no facts – she just says it and leaves it at that.

Plaintiff's assertion regarding obscenity is as legally flawed as it is offensive. Aside from failing to specify which "obscenity" statute Defendants supposedly violated, pornography is not

obscurity. See e.g. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (striking down law that placed restriction on cable television channels that were “primarily dedicated to sexually-oriented programming,” and accepting without question litigants’ agreement that the material at issue was not obscene). (For further context, one of the obscenity statutes defines “indecent” as including matters “tending to incite arson, murder, or assassination.” 18 U.S.C. § 1461.)

These films do not meet the long-standing constitutional test for obscenity that was spelled out by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973) (obscene matter must meet all of the following three prongs: (a) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) the work is patently offensive sexual conduct, and (c) taken as whole the works lacks serious literary, artistic, political, or scientific value).

Is Plaintiff now suggesting that every adult entertainment company in the nation is engaged in federal RICO violations? Or has she just limited it to Defendants because they feature homosexual and transgender people?

Instead of pointing to actual facts to support her claims, Plaintiff reverts back to her familiar tactic of alleging a myriad of baseless assertions that, even if true, have nothing to do with this case (and which have no nexus to Plaintiff’s supposed damages). Defendants’ zoning permits, DBA certificates, insurance coverage, or tax obligations are not Plaintiff’s problem, and not predicate acts.

Plaintiff is just making this up. These are some of the same nonsense allegations that Plaintiff has indiscriminately alleged previously. And all are made without pointing to any facts, and without any regard for their truthfulness. As Defendants have mentioned before, some of

these suggestions (such as implying that Defendants employ underage actors) are nothing short of defamatory statements cloaked under the litigation privilege.

Finally, Plaintiff does not even address the pattern element, including specifically which pattern theory (open or closed ended) she is alleging. Even if one of her predicate act allegations were true, there is zero evidence to substantiate the pattern element of RICO. Nor does she explain what the RICO enterprise. Without even a baseline of evidence, Plaintiff's RICO claim must be dismissed.

**II. Plaintiff Has Received All the Discovery She is Entitled To, And Had an Opportunity to Request Any Discovery She Supposedly Needed**

Plaintiff claims that she requires 4 categories of information in order to fully evaluate the merits of her RICO claim. (Dkt 98, Opposition, p. 28). The four categories are: (1) all of Defendants other shoot locales in the U.S. since 2014; (2) all actors and crew that were at the Plaintiff's premises; (3) all of Defendants' tax information since 2014, and (4) all of the distributors and entities used to market and sell the films. But Plaintiff neglects to tell the Court that all of these requests were previously either (a) denied, or (b) was determined she did not need to address summary judgment.

The first category was addressed at a hearing on September 6, 2019, before Magistrate Judge Kelley, where Plaintiff raised a myriad of discovery grievances. Plaintiff was not granted that information.

The remaining three categories were addressed by Judge Kelley on October 16, 2019, the last time the parties appeared in court. On that date, the parties appeared in this Court and a briefing schedule was set for summary judgment motions. Afterwards, the parties appeared before Magistrate Judge Kelley to resolve a number of discovery disputes that had been

previously scheduled. In short, Judge Kelley determined that none of these categories of documents were needed to resolve the summary judgment motion, as they are either not relevant to the summary judgment issues and/or related to damages not liability. (See Declaration of Gary Jay Kaufman (“Kaufman Decl.”), par. 2, Ex. A (Oct. 16, 2019 Hearing Transcript) 16:20-17:4, 21-25, 26:5-7). (In the case of tax information, Plaintiff conceded that this information is only relevant for damages. *Id.* at 26:1-7). Judge Kelley did so after carefully considering these requests, entertaining Plaintiff’s arguments, and repeatedly inquiring of Plaintiff whether there was *any reason* why this information might be necessary for Plaintiff to address Defendants’ summary judgment motion. (See e.g. *id.* at 13:25-14:13, 17:19-22, 21:13-14).

Throughout this case, every piece of evidence that Defendants have been required to provide has been provided. Where Plaintiff made objectionable requests, Defendants objected. The times that Plaintiff disagreed with the objections, they were brought to the court’s attention, and we have complied with all of the Court’s directives. Most of the time, Defendants were justified in their objections, but when we were told to provide something, we have.

More importantly, the Court specifically asked Plaintiff whether there was discovery she would need to contest summary judgment. Plaintiff understood that Defendants’ summary judgment motion would cover all causes of action. (Kaufman Decl., Ex. A, 4:12-5:11). The specific information mentioned here was addressed, argued, and denied at this time.

### **STATE CLAIMS**

As to the Plaintiff’s state law claims, the Defendants make a few points below on two of the Plaintiff’s claims. The Defendants otherwise rely on their moving papers in support of their Summary Judgment Motion and the concurrently filed evidentiary objections to (1) the

“Affidavit” of Joshua Spafford (filed previously as Dkt. 74-1) and (2) the unverified and inadmissible “Chapter 93A Response email” from Mr. Spafford (Dkt. 98-2, p. 22-27).

### **I. Negligence Claim: The Discovery Rule Does Not Apply**

Plaintiff untenably asserts that the “discovery rule” precludes the entry of summary judgment for the Defendants. (Dkt. 98, Opposition, p. 31). Plaintiff argues that “[m]ost of the actual, and pricier, physical damages were not shown in those photos” that Plaintiff’s mother sent to her on March 20, 2015, and that Plaintiff did not discover the damage to the “pricier” items until she returned to her house in May 2015. (Dkt. 98, Opposition, p. 32) (emphasis added). Such facts do not satisfy the discovery rule. “**The plaintiff need not know the full extent** of the injury before the statute [of limitations] starts to run.” Bowen v. Eli Lilly Co., 408 Mass. 204, 206, 557 N.E.2d 739, 741 (1990) (emphasis added) (summary judgment allowed dismissing negligence claims). “The important point is that the statute of limitations starts to run when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.” Id. (emphasis supplied).<sup>4</sup>

### **II. Chapter 93A Claim: Plaintiff’s Chapter 93A Claim Fails as a Matter of Law**

In arguing that she was not engaged in “a trade or business” where she rented out her home (Dkt. 98, Opposition, p.33), Plaintiff relies on two distinguishable and inapplicable cases where the defendant landlords lived in their two-or-three family homes and rented out an apartment.

**First**, as to the Defendants here, Plaintiff has it backwards. She was the vendor engaged in trade or commerce renting her house; Defendants were selling her nothing. Unlike the Plaintiff

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<sup>4</sup> Without any facts, the Plaintiff baldly avers “fraudulent concealment” of the alleged physical damage to her property. (Dkt. 98, Opposition, p. 31).

here, the landlords in the cases that Plaintiff cites were Chapter 93A, Section 9 counterclaim defendants. See Billings v. Wilson, 397 Mass. 614, 615-616, 493 N.E.2d 187, 188 (1986); Young v. Pautkonis, 24 Mass.App.Ct. 907, 910, 506 N.E.2d 1164, 1168 (1987). Consequently, even assuming that Defendants rented Plaintiff's house (which they did not -- Mr. Spafford did), Defendants were, if anything, the *consumers*, not the vendors. Thus, Defendants could not be Chapter 93A defendants. (See Dkt. 87, Defendants' MSJ, p. 34-35).

**Second**, "While G.L. c. 93A is a statute of "broad impact" ... a violation of G.L. c. 93A requires, at the very least, more than a finding of mere negligence." Darviris v. Petros, 442 Mass. 274, 278, 812 N.E.2d 1188, 1192-1193 (2004) (emphasis added). Moreover, a violation of Chapter 93A "does not necessarily mean the consumer has suffered an injury or a loss entitling her to at least nominal damages and attorney's fees; instead, the violation of the legal right that has created the unfair or deceptive act or practice must cause the consumer some kind of separate, identifiable harm arising from the violation itself." Tyler v. Michaels Stores, Inc., 464 Mass. 492, 503, 984 N.E.2d 737, 745 (2013).

**Third**, Plaintiff persists in untenably arguing that Defendants' alleged infractions of various regulations, acts or ordinances (such as violating an Aquinnah Ordinance, failing to obtain a "business certificate" or "governmental permission" as to filming, and disabling smoke detectors or carbon monoxide alarms), subjects them to Chapter 93A liability. (Dkt. 99, Plf.'s Cross-Motion, p. 7-12). Chapter 93A, however, "does not 'authorize purely 'vicarious suits by self-constituted private attorneys-general.'" See Roberts v. Enterprise Rent-A-Car Co. of Boston, Inc., 445 Mass. 811, 813-814, 840 N.E.2d 541, 543-544 (2006); Diviacchi v. Speedway LLC, 109 F.Supp.3d 379, 384 n. 2 (D. Mass. 2015) (rejecting claim that the plaintiff is serving as a "private attorney general", citing Carroll v. Marzilli, 75 Mass.App.Ct. 550, 553-555, 914 N.E.2d

268, 270-272 (2009); see also Shaulis v. Nordstrom, Inc., 120 F.Supp.3d 40, 46 (D. Mass. 2015) (no private causes of action for violation of Federal Trade Commission Act and Code of Mass. Regulations). These arguments provide no basis for Plaintiff's claim.

**CONCLUSION**

Based on the foregoing, Defendants Mile High Distribution, Inc., Jon Blitt, and Monica Jensen respectfully request that their motion for summary judgment be granted in its entirety, Plaintiff Leah Bassett's Cross Motion for Summary Judgment be denied, and that the Court award Defendants costs and attorneys' fees, as authorized under the Copyright Act.

Respectfully submitted,

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Dated: January 31, 2020

CERTIFICATE OF SERVICE

I, Gary Jay Kaufman, Esq., attorney for the Defendants Jon Blitt and Mile High Distribution, Inc., hereby certify that a true copy of this document was filed through the ECF system, and will be sent this date, January 31, 2020, electronically to the registered participants as identified on the Notice of Electronic Filing.

Dated: January 31, 2020

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/s/ Gary Jay Kaufman

Gary Jay Kaufman