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Lanard Toys v. Anker Play Prods.

United States District Court for the Central District of California

November 12, 2020, Decided; November 12, 2020, Filed

CV 19-4350-RSWL-AFMx

Reporter

2020 U.S. Dist. LEXIS 221783 *; 2020 WL 6873647

Angeles, CA USA.

LANARD TOYS LIMITED, Plaintiff, v. ANKER PLAY PRODUCTS, LLC, a Florida corporation; IG DESIGN GROUP AMERICAS, INC., a Georgia corporation; and LEON SUMMERS, an individual, Defendants.

Judges: HONORABLE RONALD S.W. LEW, Senior United States District Judge.

Prior History: [Lanard Toys v. Anker Play Prods., 2020 U.S. Dist. LEXIS 221741 \(C.D. Cal., Jan. 30, 2020\)](#)

Opinion by: RONALD S.W. LEW

Core Terms

Defendants', patent, affirmative defense, Chalk, Bomb, marks, similarities, likelihood of confusion, infringement, expert testimony, summary judgment, registration, products, trademark, copyright infringement, patent infringement, packaging, invalidity, trademark infringement, toy, reliable, asserts, copying, courts, weighs, ordinary observer, spoilage, parties, false designation, material fact

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For Anker Play Products, Llc, Defendant: Kenneth L Wilton, LEAD ATTORNEY, Destiny Jarine Brown, Seyfarth Shaw LLP, Los Angeles, CA USA; Jamaica P Szeliga, PRO HAC VICE, Roberto Sebastiano Terzoli, Jr, Seyfarth Shaw LLP, Washington, DC USA.

For Leon Summers, an individual, IG Design Group Americas, Inc., a Georgia Corporation, Defendants: Kenneth L Wilton, LEAD ATTORNEY, Seyfarth Shaw LLP, Los

Opinion

[REDACTED] ORDER re: Plaintiff's Motion to Strike "Rebuttal Expert Report of Joel Delman" Submitted by Defendants [55]; Defendants' Motion to Exclude Expert Testimony of Richard Gottlieb [58]; Defendants' Motion to Exclude Certain Expert Testimony of Neil J. Beaton [59]; Plaintiff's Motion for Summary Judgment on All Causes of Action and Affirmative Defenses [60]; Defendants' Motion for Partial Summary Judgment [61]

Plaintiff Lanard Toys Limited ("Plaintiff") brings this Action for false designation of origin, trademark infringement, [*2] design patent infringement, unfair competition, and copyright infringement against Defendant Anker Play Products, LLC ("Defendant Anker"), Defendant IG Design Group Americas, Inc. ("Defendant IG Design"), and Defendant Leon Summers ("Defendant Summers") (collectively, "Defendants").

Currently before the Court are the following five motions: (1) Plaintiff's Motion to Strike "Rebuttal Expert Report of Joel Delman" Submitted by Defendants ("Motion to Strike Delman Report") [55]; (2) Defendants' Motion to Exclude Expert Testimony of Richard Gottlieb ("Motion to Exclude Gottlieb Testimony") [58]; (3) Defendants' Motion to Exclude Certain Expert Testimony of Neil J. Beaton ("Motion to Exclude Beaton Testimony") [59]; (4) Plaintiff's Motion for

Summary Judgment on All Causes of Action and Affirmative Defenses ("Plaintiff's MSJ") [60]; and (5) Defendants' Motion for Partial Summary Judgment ("Defendants' MSJ") [61].

Having reviewed all papers submitted pertaining to these motions, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS** Plaintiff's Motion to Strike Delman Report; **GRANTS in part** and **DENIES in part** Defendants' Motion to Exclude Gottlieb Testimony; **GRANTS in part** and **DENIES in [*3] part** Defendants' Motion to Exclude Beaton Testimony; **GRANTS in part** and **DENIES in part** Plaintiff's MSJ; and **DENIES** Defendants' MSJ.

I. BACKGROUND

A. Factual Background

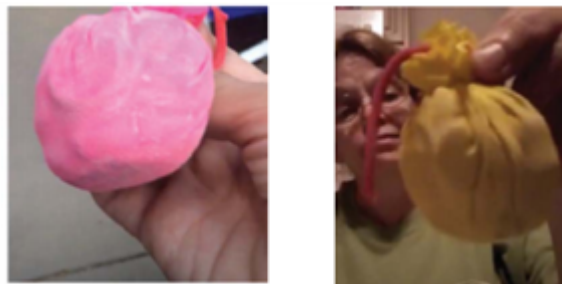
Plaintiff is a Hong Kong corporation. Separate Statement in Supp. of Pl.'s MSJ ("Pl.'s SUF") ¶ 1, ECF No. 60-2. Defendant Anker is a Florida limited liability company that manufactures and distributes activity play products for children. *Id.* ¶ 5. Defendant Summers is Defendant Anker's chief executive officer who resides in Florida. *Id.* ¶ 6. Defendant Anker is a subsidiary of Defendant IG Design, which is a Georgia corporation. *Id.* ¶¶ 7-8.

Plaintiff sought and obtained two copyright registrations from the U.S. Copyright Office, which assigned Registration Nos. VA 2-022-296 and VA 1-999-283 (collectively, the "Copyrighted Designs"), effective December 29, 2015, to 2-D artwork relating to the single-pack and three-pack versions of Plaintiff's "Chalk Bomb!" product (the "Chalk Bomb Product"), respectively. *Id.* ¶ 2; Separate Statement in Supp. of Defs.' MSJ ("Defs.' SUF") ¶¶ 45, 48, ECF No. 61-2. Plaintiff has remained the sole owner of the Copyrighted Designs. Pl.'s SUF ¶ 3. Plaintiff also applied for federal trademark registration [*4] for the mark CHALK BOMB!® (the "Mark") for "toys comprised of chalk powder, namely, tossing toys and drawing toys" in International Class 028. *Id.* ¶ 4. The Mark registered as U.S. Registration No. 5,046,808. *Id.*

Plaintiff is the assignee of U.S. Design Patent No. D804,596, dated December 5, 2017, for "[t]he ornamental design for a toy throwing ball, as shown and described" (the "'596 Patent"). *Id.* ¶ 9; Defs.' SUF ¶ 1. Plaintiff is also the assignee of U.S. Design Patent No. D815,220, dated April 10, 2018, for "[t]he ornamental design for a toy throwing ball, as shown and described" (the "'220 Patent"). Pl.'s SUF ¶ 9; Defs.' SUF ¶

2. The '220 Patent claims priority to, and is a divisional application of, the '596 Patent (collectively, the "Asserted Patents"). Defs.' SUF ¶ 2.

Defendants promoted and sold a product bearing the mark "Chalk Blast" ("Accused Product"). Pl.'s SUF ¶ 30. Below are screenshot images of the Accused Product after being removed from its packaging:



Defs.' SUF ¶¶ 18(a)-(b).

Plaintiff has asserted claims under [15 U.S.C. § 1117\(a\)](#), [17 U.S.C. § 504\(b\)](#), [35 U.S.C. § 284](#), and [35 U.S.C. § 289](#). *Id.* ¶ 52. Plaintiff's theory of actual damages is that the introduction of the Accused Product caused "market spoilage," which in turn caused Plaintiff to sell less product. *Id.* ¶ 53.

B. Procedural Background

Plaintiff filed its Complaint [1] on May 20, 2019, alleging false designation [*5] of origin, trademark infringement, design patent infringement, California unfair competition, and copyright infringement. After the parties stipulated [11] to extend time to answer the Complaint, Defendant Anker filed its Answer [12] on August 16, 2019.

On January 30, 2020, the Court granted [30] Plaintiff's Motion for Leave to File First Amended Complaint [22]. Plaintiff filed its First Amended Complaint [32] on February 3, 2020, and Defendants Anker and Summers answered [36] on March 3, 2020.

On April 30, 2020, the Court granted [45] Plaintiff's Motion for Leave to File Second Amended Complaint [43]. Plaintiff filed the operative Second Amended Complaint [46] on May 1, 2020, and Defendants answered [48] on May 15, 2020.

On September 30, 2020, the Court denied [82] Plaintiff's Motion for Leave to File Third Amended Complaint [51].

Plaintiff filed its Motion to Strike Delman Report [55] on August 21, 2020. Defendants opposed [72] on September 1, 2020, and Plaintiff timely replied [75].

Defendants filed their Motion to Exclude Gottlieb Testimony

[58] on August 25, 2020. Plaintiff opposed [71] on September 1, 2020, and Defendants timely replied [77].

Defendants filed their Motion to Exclude [*6] Beaton Testimony [59] on August 25, 2020. Plaintiff opposed [70] on September 1, 2020, and Defendants timely replied [76].

Plaintiff filed its MSJ [60] on August 25, 2020. Defendants opposed [73] on September 1, 2020, and Plaintiff timely replied [74].

Defendants filed their MSJ [61] on August 25, 2020. Plaintiff opposed [69] on September 1, 2020, and Defendants timely replied [78].

II. DISCUSSION

A. Legal Standards

1. Motion for Summary Judgment

Federal Rule of Civil Procedure ("FRCP") 56(a) states that a "court shall grant summary judgment" when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is "material" for purposes of summary judgment if it might affect the outcome of the suit, and a "genuine" issue exists if the evidence is such that a reasonable factfinder could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The evidence, and any inferences based on underlying facts, must be viewed in the light most favorable to the nonmovant. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1328-29 (9th Cir. 1983). In ruling on a motion for summary judgment, the court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. *Anderson*, 477 U.S. at 255.

Where the [*7] nonmovant bears the burden of proof at trial, the movant need only prove that there is no evidence to support the nonmovant's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). If the movant satisfies this burden, the burden then shifts to the nonmovant to produce admissible evidence showing a triable issue of fact. *Id.*; *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000); see also *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

2. Motion to Exclude Expert Testimony

Expert testimony is admissible pursuant to Federal Rule of Evidence ("FRE") 702 if it is relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Testimony is relevant if it will assist the trier of fact in understanding the evidence or determining a fact in issue. *Id.* at 591-92. As to the reliability requirement, the court must act as a "gatekeeper" to exclude "junk science" by making a preliminary determination that the expert's testimony is reliable. *Id.* at 592-93. Expert testimony must be the product of: (1) sufficient facts or data, (2) reliable principles and methods, and (3) the reliable application of those principles and methods to the facts of the case. *Fed. R. Evid. 702*.

If an expert's factual basis, data, methods, or application is called sufficiently into question, the court must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1998) (quoting *Daubert*, 509 U.S. at 592). The [*8] court has broad discretion in deciding how to assess an expert's reliability, including what procedures to use in making that assessment, as well as in making the ultimate determination of reliability in light of the facts and circumstances of the particular case. *Id.* at 152, 158.

However, the "court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land, More or Less Situated in Leflore Cnty.*, 80 F.3d 1074, 1078 (5th Cir. 1996). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citation omitted).

B. Discussion

1. Motions to Exclude Expert Testimony

a. Motion to Strike Delman Report

Defendants retained Joel Delman ("Delman") as an industrial design expert witness to opine on whether the Asserted Patents have been infringed and rebut the opinions offered by Plaintiff's expert Richard Gottlieb ("Gottlieb"). Ex. 1 to Decl. of Richard P. Sybert in Supp. of Pl.'s Mot. to Strike Delman Report, Rebuttal Expert Report of Joel Delman ("Delman Report") ¶¶ 2-4, ECF No. 55-4.

Plaintiff moves to strike the Delman Report on four independent grounds: (1) the Delman Report and the expected [*9] testimony derived from it contain improper legal opinions, which are inappropriate subject matters for expert testimony; (2) the Delman Report is not in rebuttal to Plaintiff's expert Gottlieb but instead is an affirmative expert report, and neither Delman nor his report were timely disclosed for that purpose; (3) Delman lacks sufficient qualifications to render opinions on the physical or mechanical toys at issue in this Action; and (4) the Delman Report is a "set up" in that the purported Accused Product that Delman supposedly examined was specially prepared and supplied for his report. Mem. of P. & A. in Supp. of Pl.'s Mot. to Strike Delman Report 2:2-3:8, ECF No. 55-1.

In response, Defendants assert that it is well-accepted that experts can provide infringement opinions. Opp'n to Pl.'s Mot. to Strike Delman Report 1:15-19, ECF No. 72. Additionally, Defendants respond that Plaintiff fails to provide any legal support for its claim that an expert "cannot perform the proper non-infringement analysis in response to another expert's bare, unmoored assertion of infringement." *Id.* at 1:20-23. Further, Defendants maintain that Delman's experience and qualifications working with toy makers [*10] and throwing toys are sufficient to opine on the ornamental designs at issue in this Action. *Id.* at 2:1-7. Lastly, Defendants argue that Plaintiff's accusation of an alleged scheme involving faux product is unfounded and an attempt to side-track the Court. *Id.* at 13:17-26.

Determining infringement of a design patent is a question of fact. *Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1287 (Fed. Cir. 2002); see also *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1295 (Fed. Cir. 2010). "[I]n conducting a design patent infringement analysis, the patented design is viewed in its entirety, as it is claimed. The ultimate question requires determining whether 'the effect of the whole design is substantially the same.'" *Payless Shoesource, Inc. v. Reebok Int'l Ltd.*, 998 F.2d 985, 990-91 (Fed. Cir. 1993) (internal quotation marks and alterations omitted) (quoting *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1125 (Fed. Cir. 1993)). In making this comparison, the factfinder puts itself into the place of an "ordinary observer." *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 670 (Fed. Cir. 2008). The "ordinary observer" is not an expert; he is an observer "of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give." *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528, 20 L. Ed. 731 (1871); *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1323 (Fed. Cir. 2007) ("[T]he ordinary observer is a person who is either a purchaser of, or sufficiently interested in, the item that displays the patented

designs . . .").

The Court finds that the Delman Report and any testimony therefrom [*11] would not be helpful to the trier of fact within the meaning of *FRE 702*. With respect to design patent infringement, courts routinely hold that "it would constitute error to permit defendant to present, under the imprimatur of a so-called 'expert,' an opinion which the witness is, at best, no more qualified than the members of the jury to make." *Huang v. Marklyn Grp. Inc.*, No. 11-cv-01765-*REB-BNB*, 2014 WL 3559367, at *3 (D. Colo. July 18, 2014) (finding an expert with a background in product development was not qualified to offer opinions as to the "ordinary observer").

Here, the Delman Report consists almost entirely of comparisons between the Accused Product and Plaintiff's Asserted Patents.¹ Delman's observations and conclusions regarding design patent infringement would not be helpful to the jury, as the jury is able to realize those observations themselves. See *Huang*, 2014 U.S. Dist. LEXIS 97861, 2014 WL 3559367, at *4 (excluding expert report that "merely lists some 18 asserted differences between the patented design and the accused products without stating what, if any, effect these differences would have on the overall appearance of the two products to the ordinary observer" because the expert was "no more qualified than the jurors to offer these observations").

In addition to offering opinions [*12] on design patent infringement, the Delman Report attacks Gottlieb's qualifications. But "any gaps in a witness' qualifications or knowledge or lack of specialization go to the weight of his testimony and not admissibility." *Romero ex rel. Ramos v. S. Schwab Co., Inc.*, No. 15-CV-815-*GPC-MDD*, 2017 WL 5885543, at *10 (S.D. Cal. Nov. 29, 2017) (citations omitted). Here, Delman's opinion on the weight of Gottlieb's testimony is irrelevant in light of the Court's conclusions with respect to Gottlieb's testimony and, to the extent relevant, invades the province of the jury as the trier of fact. As such, Delman's opinion on the weight of Gottlieb's testimony is not helpful to the jury. Further, much of the Delman report contains legal conclusions and legal analysis, including a thorough discussion of the case law which is not the proper subject of expert testimony. See *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) ("[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law."); *id.* ("Similarly, instructing the jury as to the applicable law 'is the distinct and exclusive province' of the court." (quoting *United States v.*

¹ The Delman Report also conducts a three-way analysis between the Accused Product, Plaintiff's Asserted Patents, and the nearest prior art. See Delman Report 27-39.

[Weitzenhoff, 35 F.3d 1275, 1287 \(9th Cir. 1993\)\)](#).

Accordingly, the Court **GRANTS** Plaintiff's Motion to Strike Delman Report and **STRIKES** the Delman Report because it fails to provide any [*13] opinions that would assist the trier of fact and Defendants have failed to meet their burden of establishing that Delman's opinions are admissible. See [Lanard Toys Ltd. v. Toys "R" Us-Delaware, Inc., No. 3:15-CV-849-J-34PDB, 2019 WL 1304290, at *5 \(M.D. Fla. Mar. 21, 2019\)](#) ("The burden of establishing qualification, reliability and helpfulness lies with the party offering the expert opinion.").

Plaintiff also requests an order "barring [Delman] from testifying or offering any opinions in this case." Mem. of P. & A. in Supp. of Pl.'s Mot. to Strike Delman Report 17:11-13. The Court declines to categorically preclude Delman from testifying, as Plaintiff's request is premature at this juncture and may be revisited at trial based on facts and evidence as they are presented. If Defendants wish to call Delman as a witness, the Court **ORDERS** that they make a proffer in advance of that testimony and outside the presence of the jury. The Court will determine its admissibility at that time. Accordingly, the Court **DENIES** Plaintiff's request without prejudice to Plaintiff's ability to raise it at trial, as appropriate.

b. Motion to Exclude Gottlieb Testimony

Plaintiff retained Gottlieb to opine on "all aspects of intellectual property infringements" [*14] related to Plaintiff's Chalk Bomb Product. Ex. A to Decl. of Kenneth L. Wilton in Supp. of Defs.' Mot. to Exclude Gottlieb Testimony, Expert Report of Richard Gottlieb ("Gottlieb Report") 2, ECF No. 58-3.

Defendants move to strike Gottlieb's testimony in its entirety, arguing that Gottlieb is unqualified to render the opinions he offers; conducts an improper infringement analysis; provides unsupported, subjective opinions that are not based on any specialized knowledge, skill, experience, training, or education; and does not apply the appropriate legal standards. See generally Defs.' Mem. Of Law in Supp. of Defs.' Mot. to Exclude Gottlieb Testimony ("Mot. to Exclude Gottlieb Testimony"), ECF No. 58-1.

Plaintiff responds that [TEXT REDACTED BY THE COURT] Opp'n to Defs.' Mot. to Exclude Gottlieb Testimony 1:4-15, ECF No. 71. Plaintiff asserts that [TEXT REDACTED BY THE COURT] Id.

i. Gottlieb's Design Patent Infringement Opinions

"[D]etermining whether a design patent is infringed is a two-step process. First, the court must construe the design patent's

claim." [Catalina Lighting, 295 F.3d at 1286](#); see [Wing Shing Prod. \(BVI\) Co. v. Sunbeam Prod., Inc., 665 F. Supp. 2d 357, 360 \(S.D.N.Y. 2009\)](#) ("District courts following [Egyptian Goddess](#) have generally relied on patent drawings to construe design claims."). Next, [*15] "the fact-finder must compare the patented and accused designs to determine whether the accused design is substantially similar in appearance to the patented design." [Rockport Co. v. Deer Stags, Inc., 65 F. Supp. 2d 189, 193 \(S.D.N.Y. 1999\)](#). Importantly, the "infringement analysis must compare the accused product to the patented design, not to a commercial embodiment." [Lanard Toys Ltd. v. Dolgencorp LLC, 958 F.3d 1337, 1341 \(Fed. Cir. 2020\)](#).

Here, the Court finds that Gottlieb's testimony regarding design patent infringement should be excluded in its entirety. In his report, Gottlieb compares the Accused Product to Plaintiff's Chalk Bomb Product, not to Plaintiff's Asserted Patents. See Gottlieb Report 17-19 ("[The Accused Product] is identical . . . to [Plaintiff's] product. . . . [I]t was nearly identical in appearance to [Plaintiff's] patented product."). Accordingly, the Court concludes that Gottlieb's testimony regarding an irrelevant comparison between the Accused Product and Plaintiff's Chalk Bomb Product, rather than the Asserted Patents, would not be helpful to and would only confuse the jury. As such, the Court **EXCLUDES** Gottlieb's report and testimony related to design patent infringement. See [In re Katz Interactive Call Processing Pat. Litig., No. 07-2196 RGK \(FFMX\), 2009 WL 10676152, at *2 \(C.D. Cal. Mar. 11, 2009\)](#) ("Expert testimony that is based on an erroneous understanding [*16] or application of the law cannot meet the requirements of [Rule 702](#) because it cannot logically assist the trier of fact.")

ii. Gottlieb's Copyright Infringement Opinions

In order to prove copyright infringement, a plaintiff must show: (1) he owns a valid copyright; and (2) that the defendant copied the protected aspects of the work. See [Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1064 \(9th Cir. 2020\)](#). "[T]he second element has two distinct components: 'copying' and 'unlawful appropriation.'" [Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 \(9th Cir. 2018\)](#), overruled on other grounds by [Skidmore, 952 F.3d 1051](#). "To prove unlawful appropriation . . . the similarities between the two works must be 'substantial' and they must involve protected elements of the plaintiff's work." Id.

In his report, Gottlieb compares the Accused Product and its packaging to those of Plaintiff without regard to the Chalk Bomb Product's protected elements. But "[b]ecause the requirement is one of substantial similarity to protected elements of the copyrighted work, it is essential to distinguish

between the protected and unprotected material in a plaintiff's work." Folkens v. Wyland Worldwide, LLC, 882 F.3d 768, 774 (9th Cir. 2018) (emphasis in original) (quoting Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004)). Accordingly, the Court concludes that Gottlieb applied an incorrect legal standard. See Ford Motor Co. v. Versata Software, Inc., No. 15-11624, 2018 WL 10733561, at *15 (E.D. Mich. July 9, 2018) (excluding expert testimony related to copyright infringement where expert failed [*17] to eliminate the unprotected elements of the copyright before concluding that infringement had occurred); Olin Corp. v. Lamorak Ins. Co., No. 84-CV-1968 (JSR), 2018 U.S. Dist. LEXIS 65446, 2018 WL 1901634, at *21 (S.D.N.Y. Apr. 18, 2018) ("Expert testimony also should be excluded when it applies the wrong legal standard."). Additionally, this comparison—without regard to the Chalk Bomb Product's protected elements—would not be helpful to and would only serve to confuse the jury. As such, the Court **EXCLUDES** Gottlieb's report and testimony as they pertain to his opinions related to copyright infringement.

iii. Gottlieb's Trademark Infringement and Likelihood of Confusion Opinions

To establish a claim for trademark infringement, a plaintiff must show: (1) ownership of the mark; and (2) a likelihood of customer confusion. See Applied Info. Sciences Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007). The same likelihood of confusion standard applies for false designation of origin claims under 15 U.S.C. § 1125. See Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1046 (9th Cir. 1999).

With respect to these claims, Gottlieb compares the Accused Product, its name, and its packaging to Plaintiff's Chalk Bomb Product. Gottlieb notes what he perceives to be the similarities between the two and concludes that it "all adds up to consumer confusion." Gottlieb Report 22. Additionally, he ultimately concludes that the Accused Product infringes the [*18] Mark and is "highly likely to cause consumer confusion." Id. at 5. All of Gottlieb's conclusions stem from his personal observations of the products, which are within the province of the jury. See Chesebrough-Pond's, Inc. v. Faberge, Inc., 666 F.2d 393, 398 (9th Cir. 1982) (stating in a trademark case that, "[T]he similarity or dissimilarity of these two words is a matter easily evaluated by laymen within the realm of their common knowledge and experience. It is highly doubtful that expert testimony on the subject, of the type presented by the affidavit, would be of any real assistance to the trier of fact. Certainly it would be well within the discretion of the trial judge to exclude the expert opinion evidence under [FRE] 702."); Patsy's Italian Rest., Inc. v. Banas, 531 F. Supp. 2d 483, 486 (E.D.N.Y. 2008)

("[T]estimony based solely on Wallace's personal opinion on the issue of likelihood of confusion should not be permitted because it would usurp the jury's role in making fact determinations."); Pharmacia Corp. v. Alcon Labs., Inc., 201 F. Supp. 2d 335, 377 (D.N.J. 2002) (noting that "[t]here are no reported trademark cases in which a court has based its findings of a likelihood of confusion" on experts' opinions "based primarily on a subjective evaluation of the marks in light of their experience"); Arner v. Sharper Image Corp., No. CV 94-1713 ABC(BQRX), 1995 WL 873730, at *9 (C.D. Cal. Oct. 5, 1995) ("The Court finds that an industrial design expert's testimony regarding what an [*19] 'ordinary purchaser' would perceive is not helpful under Rule 702").

The Court **EXCLUDES** Gottlieb's opinions regarding trademark infringement and likelihood of confusion because these opinions would not assist the trier of fact. See Playboy Enters., Inc. v. Terri Welles, Inc., 78 F. Supp. 2d 1066, 1082 (S.D. Cal. 1999) ("[T]he court will not allow Mr. Sterne to render a legal opinion on whether . . . there is a likelihood of confusion."); see also JIPC Mgmt., Inc. v. Incredible Pizza Co., No. CV 08-04310 MMM (PLAx), 2009 WL 8591607, at *4 (C.D. Cal. July 14, 2009) (permitting an expert "to testify regarding the characteristics of relevant consumers, but not to opine on the ultimate likelihood of confusion between the parties' marks" because "[t]estimony regarding the habits or characteristics of consumers concerns a subject beyond the knowledge of lay jurors and may assist them in understanding consumer reactions to the marks at issue").

iv. Gottlieb's Opinions Regarding Defendants' Intent and Motivation

"Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind." Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ., 927 F. Supp. 2d 1069, 1077 (D. Or. 2013) (citing Hill v. Novartis Pharm. Corp., No. 1:06-CV-00939-AWI, 2012 WL 5451816, at *2 (E.D. Cal. Nov. 7, 2012) ("The Court finds this and other testimony regarding Defendant's intent, motives or state of mind to be impermissible and outside the scope of expert testimony."); Johnson v. Wyeth LLC [*20], No. CV 10-02690-PHX-FJM, 2012 WL 1204081, at *3 (D. Ariz. Apr. 11, 2012) ("Dr. Parisian and Dr. Blume may not offer opinions concerning defendants' motive, intent, knowledge, or other state of mind."); In re Rezulin Prod. Liab. Litig., 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004) (finding that "the opinions of [expert] witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise"). "Expert testimony as to intent, motive, or state of mind offers no more than the drawing of an inference from the facts of the case." Siring, 927 F. Supp. 2d at 1077. "The jury is sufficiently

capable of drawing its own inferences regarding intent, motive, or state of mind from the evidence, and permitting expert testimony on this subject would be merely substituting the expert's judgment for the jury's and would not be helpful to the jury." *Id.* (first citing [United States v. Benson, 941 F.2d 598, 604 \(7th Cir. 1991\)](#) (rejecting expert testimony regarding the purpose of a transaction because "[m]uch of [the expert's] testimony consists of nothing more than drawing inferences from the evidence that [the expert] was no more qualified than the jury to draw"); then citing [Baldonado v. Wyeth, No. 04 C 4312, 2012 U.S. Dist. LEXIS 68691, 2012 WL 1802066, at *8 \(N.D. Ill. May 17, 2012\)](#) (finding that "the jury is fully capable of considering the issue of intent based on the evidence presented at trial"); and then citing [Smith v. Wyeth-Ayerst Labs. Co., 278 F. Supp. 2d 684, 700 \(W.D.N.C. 2003\)](#) ("[T]he jury should hear and/or see first-hand any relevant evidence pertaining to the Defendant's intent. Then the jury, not the witnesses, should consider the facts and make its own determination regarding Defendant's intent.")).

Accordingly, the Court **EXCLUDES** all of Gottlieb's opinions and testimony related to Defendants' intent, motive, or state of mind.

v. Gottlieb's Opinions Regarding the Quality of the Accused Product

Defendants argue that Gottlieb's opinions related to the quality of the Accused Product should be stricken because Gottlieb "did not analyze quality in any reasonable or reasoned way." Mot. to Exclude Gottlieb Testimony 15:3-4. The Court rejects Defendants' contention. Gottlieb concluded that the Accused Product was of "poor quality," Gottlieb Report 23, after assessing: (1) the thickness of the Accused Product's cardboard packaging; (2) the coverage and seal of the packaging's blister; (3) the coarseness of the chalk; (4) the thickness of the fabric material; and (5) the thickness of the "fuses." *See* Gottlieb Report 7-12. The Court finds that the assessments made and conclusions drawn by Gottlieb related to the quality of the [*21] Accused Product are based on a reliable foundation and may assist the trier of fact. Accordingly, the Court **DENIES** the Motion to Exclude Gottlieb Testimony on this basis.

vi. Gottlieb's Market Spoilage Opinions

Defendants assert that Gottlieb's testimony that the Accused Product resulted in market spoilage should be stricken because "Gottlieb simply assumes that the market for Plaintiff's product was impacted by Defendants' actions," Mot. to Exclude Gottlieb Testimony 16:1-2, and his conclusion "finds no support in the record," *id.* at 17:1-2. The Court **DENIES** Defendants' Motion to Exclude Gottlieb's Testimony as to Gottlieb's opinions on market spoilage.

Gottlieb's experience in the toy industry, *see* Gottlieb Report 2-4, provides him with the potential to provide insight as to whether an alleged "knock-off" of inferior quality could impact the market for the original product. These opinions could be helpful to the trier of fact. Moreover, the denial of Defendants' motion on this basis does not preclude Defendants from objecting to Gottlieb's conclusions at trial where they see fit.

vii. Gottlieb's Opinions Regarding the Safety of the Accused Product

Defendants maintain that Gottlieb's [*22] opinions regarding the safety of the Accused Product should be excluded because "Gottlieb simply lacks both the experience and the data necessary to assert that the Accused Product is unsafe." Mot. to Exclude Gottlieb Testimony 17:18-19. Moreover, Defendants maintain that such opinions would "introduce unfair prejudice under [Rule 403.](#)" *Id.* at 17:20-21.

The Court disagrees. Gottlieb's opinions regarding the safety concerns of the Accused product speak to the overall quality of the Accused Product, and accordingly, contribute to possible market spoilage. Moreover, any issues regarding Gottlieb's expertise or background in science or safety speak to weight, rather than admissibility, of his testimony. *See* [Romero, 2017 U.S. Dist. LEXIS 189959, 2017 WL 5494588, at *10](#) ("[G]aps in a witness' qualifications or knowledge or lack of specialization go to the weight of his testimony and not admissibility."). As such, the Court **DENIES** Defendants' Motion to Exclude Gottlieb Testimony on this basis.

As such, the Court **GRANTS in part** Defendants' Motion to Exclude Gottlieb Testimony as it pertains to Gottlieb's opinions related to design patent infringement, copyright infringement, trademark infringement, and likelihood of confusion. The Court **DENIES in part** Defendants' [*23] Motion to Exclude Gottlieb Testimony as it pertains to Gottlieb's opinions related to the quality of the Accused Product, market spoilage, and the safety of the Accused Product.

c. Motion to Exclude Beaton Testimony

Plaintiff's expert Neil J. Beaton ("Beaton") was retained to quantify Plaintiff's monetary recovery assuming it succeeds in its false designation of origin, trademark infringement, design patent infringement, California unfair competition, and copyright infringement claims. Ex. A to Decl. of Kenneth L. Wilton in Supp. of Defs.' Mot. to Exclude Beaton Testimony, Expert Report of Neil J. Beaton, CPA/ABV/CFF, CFA, ASA ("Beaton Report") ¶¶ 1-2, ECF No. 59-3.

Defendants move to exclude Beaton's testimony related to Plaintiff's actual damages on the basis that Beaton's opinion

related to market spoilage "is completely unsupported by the evidence and does not meet the standard of [\[FRE\] 702.](#)" Mem. of P. & A. in Supp. of Mot. to Exclude Beaton Testimony ("Mot. to Exclude Beaton Testimony") 2:10-11, ECF No. 59-1. Specifically, Defendants argue that Beaton's testimony should be excluded because Beaton assumed—based on communications with Plaintiff's Managing Director, James Hesterberg ("Hesterberg")—that [*24] market spoilage occurred in forming his opinions regarding actual damages. *Id.* 4:5-9. Additionally, Defendants assert that Beaton's opinion that Defendants failed to comply with their discovery obligations "should be stricken because it does not address an issue the jury is intended to decide, is entirely unsupported and baseless, encroaches on the authority of the Court, and its probative value is substantially outweighed by a danger of unfair prejudice and undue delay." *Id.* 2:13-16.

Plaintiff responds that [TEXT REDACTED BY THE COURT] Opp'n to Defs.' Mot. to Exclude Beaton Testimony 1:5-11, ECF No. 70. Further, Plaintiff asserts that [TEXT REDACTED BY THE COURT] *Id.* at 13:1-5.

Plaintiff is correct that expert testimony may be based on circumstantial evidence. See [Orth v. Emerson Elec. Co., White-Rodgers Div., 980 F.2d 632, 638 \(10th Cir. 1992\)](#) ("The expert testimony, though based on circumstantial evidence, was sufficiently reliable."). Here, Beaton relied on a timeline of Plaintiff's sales, as well as his discussions with Plaintiff's Managing Director, Hesterberg, in forming his opinions. See Beaton Report ¶¶ 33, 35. Any alleged flaws in Beaton's damages opinions go to the weight of his testimony and should be addressed on cross-examination. See [City of Pomona v. SOM N. Am. Corp., 750 F.3d 1036, 1044 \(9th Cir. 2014\)](#) ("Expert opinion [*25] testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline. Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." (internal quotation marks and citations omitted)). The Court **DENIES** Defendants' motion on this basis.

However, the Court finds that paragraph 42 of the Beaton Report should be stricken under [FRE 403](#). Beaton notes:

Based on these inconsistent representations by Anker, it is not possible to determine whether Anker has produced records accounting for its full sales of Accused Products. Given the inconsistencies of Anker's prior reporting, I would only be able to evaluate Anker's fulsome compliance with discovery requests for its sales of Accused Products were Anker to produce audited sales

records from 2018 to date, as well as the associated sales detail for all of its products sold beginning in 2018 by product number and description that reconciled to its audited financial statements. Only if these documents are provided would [*26] I be able to evaluate whether other Anker sales were of Accused Products or not.

Beaton Report ¶ 42. The Court concludes that any failure to comply with discovery requests should have been addressed during the discovery period through the proper avenue—a motion to compel. Opining on whether or not Defendants complied with its discovery requests is not relevant to the amount of damages Plaintiff sustained, and its prejudicial value outweighs any probative value. See [Fed. R. Evid. 403](#) ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

Accordingly, the Court **GRANTS in part** Defendants' motion and **STRIKES** paragraph 42 of the Beaton Report. Beaton is precluded from testifying as to whether Defendants fully complied with their discovery obligations in this Action.

2. Motions for Summary Judgment

Plaintiff seeks summary judgment as to all its claims and on all of Defendants' affirmative defenses. See generally Pl.'s MSJ, ECF No. 60. Defendants move for summary judgment as to Plaintiff's claims [*27] for design patent infringement, copyright infringement, and Plaintiff's prayer for actual damages. See generally Defs.' MSJ, ECF No. 61. To the extent the parties' motions involve the same claim, the Court will analyze these motions together.

Before proceeding to the merits of the parties' motions, the Court first addresses Plaintiff's request for judicial notice and the parties' evidentiary objections.

a. *Request for Judicial Notice*

Under [FRE 201](#), courts may take judicial notice of facts that are: (1) "generally known within the trial court's territorial jurisdiction" or (2) "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."

In support of its MSJ, Plaintiff requests that the Court take judicial notice of the following: (1) the copyright registration for "Chalk Balls Packaging" with the U.S. Copyright Office under Registration No. VA 2-022-296; (2) the copyright registration for "Chalk Balls Packaging" with the U.S. Copyright Office under Registration No. VA 1-999-283; (3) the trademark registration for "Chalk Bomb!" with the U.S.

Patent and Trademark Office under Registration No. 5,046,808; (4) the trademark registration for "CHALK BLAST BALLS!" with the U.S. Patent [*28] and Trademark Office under Registration No. 5,386,759; (5) the design patent with the U.S. Patent and Trademark Office under Patent No. D804,596; (6) the design patent with the U.S. Patent and Trademark Office under Patent No. D815,220; (7) Lex Machina's "Case Summary" for RMS Int'l (USA), Inc. v. Anker Play Products, LLC, et al., Case No. 1:20-cv-21554-UU; (8) Lex Machina's "Case Summary" for RMS Int'l (USA), Inc. v. Anker Play Products, LLC, et al., Case No. 1:20-cv-10400-RGS; (9) Lex Machina's "Case Summary" for Horizon Grp. USA, Inc. v. Anker Play Products, LLC, Case No. 1:19-cv-06356-DLC; (10) Lex Machina's "Case Summary" for Horizon Grp. USA, Inc. v. Anker Play Products, LLC, Case No. 1:18-cv-03445-PKC; (11) Lex Machina's "Case Summary" for Creative Kids Far East Inc. v. Anker Play Products, LLC, Case No. 1:17-cv-03858-RJS; and (12) Lex Machina's "Case Summary" for Larose Indus., LLC v. Anker Play Products, LLC, Case No. 2:19-cv-16285-MCA-LDW. Req. for Judicial Notice in Supp. of Pl.'s MSJ, ECF No. 60-29.

The Court **GRANTS** Plaintiff's request with respect to items (1)-(3), (5), and (6), as copyright and trademark registrations, as well as design patents, are documents appropriate for judicial notice. See Warren v. Fox Family Worldwide, Inc., 171 F. Supp. 2d 1057, 1062 (C.D. Cal. 2001) ("Copyright certificates are the type [*29] of documents that the court may judicially notice under Rule 201(b)(2)"); Dep't of Parks & Recreation v. Harper, No. CV 05-2008 DSF (JWJx), 2006 WL 8434676, at *3 (C.D. Cal. Apr. 25, 2006) (quoting Vitek Sys., Inc. v. Abbott Labs., 675 F.2d 190, 192 n.3 (8th Cir. 1982)) ("[T]he court may take judicial notice of Patent and Trademark Office documents.").

The Court **DENIES as moot** Plaintiff's request as to items (4) and (7)-(12), as the Court does not rely on those documents in reaching its decision. See Flate v. Mortg. Lenders Network USA, Inc., No. CV 15-08873-AB (FFMx), 2016 WL 9686051, at *4 (C.D. Cal. Mar. 4, 2016) (denying as moot a request for judicial notice where "the [c]ourt did not rely on any documents in . . . its ruling").

b. Evidentiary Objections

i. Plaintiff's Evidentiary Objections

Plaintiff objects to paragraph 22 of the Declaration of Kenneth L. Wilton in Support of Defendants' MSJ [62] on lack of personal knowledge and foundation grounds. Opp'n to Defs.' MSJ 20:1-10. Plaintiff contends that "Wilton is not qualified to say [Plaintiff] never produced a scintilla of

evidence as to negative consumer perception," and Plaintiff "produced testimony of toy industry veterans Hesterberg and Gottlieb." Id. The objections are without merit because Wilton, as counsel for Defendants in this Action, has personal knowledge and foundation to testify about evidence produced by Plaintiff. [*30] Indeed, Wilton states in his Reply Declaration that he has "reviewed all of the discovery produced by Plaintiff in this action." Reply Decl. of Kenneth L. Wilton in Supp. of Defs.' MSJ ¶ 2, ECF No. 78-2. And to the extent that Plaintiff seeks to rebut paragraph 22 of Wilton's declaration, such an objection is superfluous as the Court considers the parties' arguments in ruling on their motions. Therefore, the Court **OVERRULES** Plaintiff's evidentiary objection to paragraph 22 of Wilton's declaration.

Plaintiff also objects to portions of Defendants' Separate Statement of Undisputed Facts [61-2] on lack of personal knowledge and foundation grounds. See Suppl. Separate Statement in Supp. of Opp'n to Defs.' MSJ ("Resp. to Defs.' SUF") ¶¶ 30-32, ECF No. 69-1. Because the Court does not rely on this evidence, the Court **OVERRULES as moot** Plaintiff's evidentiary objections to Defendants' proposed undisputed facts.

ii. Defendants' Evidentiary Objections

Defendants separately filed evidentiary objections to paragraphs 2, 3, and 4 of the Declaration of Reid E. Dammann and corresponding Exhibits A, B, and C [[73-2]-[73-5]], which Plaintiff submitted and relies on in support of its Opposition to Defendants' [*31] MSJ [69]. See generally Defs.' Objs. to Pl.'s Evid. in Supp. of Opp'n to Defs.' MSJ, ECF No. 78-6. Defendants object on the basis of FRCP 37(c)(1), FRE 401, and FRE 403. The Court **OVERRULES as moot** Defendants' evidentiary objections because the Court does not rely on the objected-to evidence in its ruling.

c. Trademark Infringement

"To prevail on [a] trademark infringement claim," a party must show that "(1) it has a valid, protectable trademark, and (2) that [the other party's] use of the mark is likely to cause confusion." Applied Info., 511 F.3d at 969.

i. Valid Trademark

"Under the Lanham Act, registration of a trademark creates a rebuttable presumption that the mark is valid, but the presumption evaporates as soon as evidence of invalidity is presented." Hokto Kinoko Co. v. Concord Farms, Inc., 810 F. Supp. 2d 1013, 1022 (C.D. Cal. 2011). Here, Plaintiff asserts that it received a federal trademark registration for the mark

CHALK BOMB!² See Ex. C in Supp. of Pl.'s MSJ, CHALK BOMB![®] Trademark Registration, ECF No. 60-6. Defendants do not rebut the presumption of the Mark's validity, so the Court concludes that the first inquiry has been satisfied.

ii. Likelihood of Confusion

Courts within the Ninth Circuit generally consider eight factors (the "Sleekcraft factors") for determining whether a likelihood [*32] of confusion exists: "(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines." *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1209 (9th Cir. 2012) (citing *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979)). "The test is a fluid one and the plaintiff need not satisfy every factor, provided that strong showings are made with respect to some of them." *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631 (9th Cir. 2005). "Given the open-ended nature of this multi-prong inquiry, it is not surprising that summary judgment on 'likelihood of confusion' grounds is generally disfavored." *Rearden*, 683 F.3d at 1210.

Here, Plaintiff has the burden of establishing likelihood of confusion as a matter of law. Because Plaintiff put forth no evidence or argument as to "evidence of actual confusion" and "likelihood of expansion of product lines," the Court will not discuss those factors in its analysis.

A. Strength of the Mark

"The stronger a mark—meaning the more likely it is to be remembered and associated in the public mind with the mark's owner—the greater the protection it is accorded by the trademark laws." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1149 (9th Cir. 2011) (quoting *Brookfield*, 174 F.3d at 1058). Courts evaluate [*33] the strength of a mark conceptually and commercially. *Id.* Conceptual strength refers to the classification of a mark

along a continuum of "generally increasing inherent distinctiveness as generic, descriptive, suggestive, arbitrary, or fanciful." *Brookfield*, 174 F.3d at 1058. "Arbitrary or fanciful marks . . . are called 'strong' marks, whereas descriptive or suggestive marks are 'weak.'" *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605 (9th Cir. 1987). Commercial strength, on the other hand, refers to the mark's "actual marketplace recognition." *Id.* (citing *Brookfield*, 174 F.3d at 1058). A conceptually weak mark "can have its overall strength as a mark bolstered by its commercial success." *Monster Energy Co. v. BeastUp LLC*, 395 F. Supp. 3d 1334, 1352 (E.D. Cal. 2019) (citing *M2 Software, Inc. v. Madacy Ent.*, 421 F.3d 1073, 1081 (9th Cir. 2005)).

Here, Plaintiff argues that its Mark is "not generic, descriptive, or functional" because "the product is not a bomb, does not explode, has no incendiary elements, and cannot cause harm." Pl.'s MSJ 14:14-17. Defendants contend that the Mark is descriptive because "Plaintiff was required to disclaim the word 'chalk' in its application to register the mark because that term described a feature of the mark," and the "BOMB" portion of the mark describes the shape and appearance of Plaintiff's Chalk Bomb Product. See Opp'n to Pl.'s MSJ 15:12-18.

The Court concludes that a triable issue [*34] of fact exists as to the strength of the Mark. On the one hand, the Mark's connection to the Chalk Bomb Product is not obvious and requires a consumer to "use imagination or any type of multistage reasoning to understand the [M]ark's significance," indicating that the Mark is suggestive. *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 (9th Cir. 1998). On the other hand, a reasonable jury, viewing the evidence in the light most favorable to Defendants, could conclude that the Mark is descriptive because it "define[s] a particular characteristic of the product." *Survivor*, 406 F.3d at 632; see *Zobmondo Ent., LLC v. Falls Media, LLC*, 602 F.3d 1108, 1116 (9th Cir. 2010) ("[M]erely descriptive marks need not describe the 'essential nature' of a product; it is enough that the mark describe some aspect of the product."). Because there is a genuine issue of material fact as to whether the Mark is suggestive or descriptive, and a lack of facts or argument as to the Mark's commercial strength, Plaintiff has failed to demonstrate that uncontroverted evidence supports a finding that its Mark is strong. As such, the strength of Plaintiff's Mark is a question for the jury.

B. Proximity of the Goods

Proximity of the goods exists where "the public will mistakenly assume there is an association between the producers of the related goods, though no such association [*35] exists." *Sleekcraft*, 599 F.2d at 350. "The

² Plaintiff also seeks summary judgment on the basis of its trademark for CHALK BLAST BALLS![®]. See Pl.'s MSJ 13:18-21. But the operative Second Amended Complaint in this Action does not reference the CHALK BLAST BALLS![®] mark, and the Court denied Plaintiff's Motion for Leave to File Third Amended Complaint to include allegations related to the CHALK BLAST BALLS![®] mark. See generally Order re Plaintiff's Motion for Leave to File Third Amended Complaint, ECF No. 82. Accordingly, the Court DENIES Plaintiff's MSJ as it pertains to claims related to its CHALK BLAST BALLS![®] mark.

proximity of goods is measured by whether the products are: (1) complementary; (2) sold to the same class of purchasers; and (3) similar in use and function." [Network Automation, 638 F.3d at 1150](#).

Here, Plaintiff argues that the Accused Product and Plaintiff's Chalk Bomb Product "are identical in proximity" because "[b]oth toy products are throwable bags filled with colored powdered chalk," though the Accused Product is "inferior in quality." Pl.'s MSJ 15:7-13. Defendants fail to respond to Plaintiff's assertions with respect to proximity of the goods.

The Court finds that the Accused Product and the Chalk Bomb Product are sold to the same class of purchasers, primarily parents shopping for toys for their young children. Moreover, the Court finds that [TEXT REDACTED BY THE COURT]. Based on these facts, in combination with Defendants' failure to respond to Plaintiff's assertions that proximity of the goods exists, the Court concludes that this factor weighs in favor of finding a likelihood of confusion.

C. Similarity of the Marks

Similarity of the marks is an important factor in determining whether likelihood of confusion exists because "[w]here the two marks are entirely dissimilar, there is no likelihood [*36] of confusion." [Brookfield, 174 F.3d at 1054](#). "The following axioms define and delimit the similarity analysis: (1) similarity is best evaluated by appearance, sound, and meaning; (2) marks should be considered in their entirety and as they appear in the marketplace; and (3) similarities weigh more heavily than differences." [Pom Wonderful LLC v. Hubbard, 775 F.3d 1118, 1127-28 \(9th Cir. 2014\)](#). "Of importance here, commonly used words generally do not make two marks similar where they appear with distinguishing words." [Delta Forensic Eng'g, Inc. v. Delta V Biomechanics, Inc., 402 F. Supp. 3d 902, 909 \(C.D. Cal. 2019\)](#) (citing [Stonefire Grill, Inc. v. FGF Brands, Inc., 987 F. Supp. 2d 1023, 1052 \(C.D. Cal. 2013\)](#) ("Multiple courts have found that the presence of a common word does not render two marks similar where additional words make the marks distinctive.")).

Here, Plaintiff asserts that "Defendants used 'Chalk Bomb' interchangeably with 'Chalk Blast' in promoting and selling the Accused Product." Pl.'s MSJ 15:22-23. Specifically, Plaintiff states that "Defendants used 'Chalk Bomb' in the emails discussing the Accused Product and actually used 'Chalk Bomb' in the invoice of selling the Accused Product." *Id.* at 15:24-25. Further, with respect to the use of "Chalk Blast," Plaintiff argues: (1) "Chalk Blast" sounds similar to "Chalk Bomb" in that they both consist of "Chalk" with a word starting with the letter "B"; (2) the words "bomb" and "blast" convey similar [*37] meanings; and (3) "the

appearance of 'Chalk Blast!' is substantially similar to 'Chalk Bomb!'" *Id.* at 16:1-6.

Defendants dispute Plaintiff's assertion that they used "Chalk Bomb" interchangeably with "Chalk Blast" in selling the Accused Product. *See* Defs.' Resp. and Objs. to Pl.'s SUF ("Resp. to Pl.'s SUF") ¶¶ 28-29, ECF No. 73-1. Further, Defendants argue that Plaintiff "ignored how th[e] marks appear in the marketplace." Opp'n to Pl.'s MSJ 16:27-28. Specifically, Defendants note that "both parties use a house mark . . . on their products," ensuring that purchasers were not confused. *Id.* at 17:1-6.

Viewed as they appear in the marketplace, the marks differ in several significant ways. Although both marks use the term "chalk," they do not display the term in the same way. Specifically, Defendants' mark uses only capital letters, while Plaintiff's Mark uses both capital and lowercase letters; Defendants' mark uses a block-type font, while Plaintiff's Mark uses a wider font for "bomb" and a script-like font for the word "chalk"; and Plaintiff's Mark is larger and displayed more prominently than Defendant's mark. *See* Defs.' SUF ¶¶ 15, 46. The parties' inclusion of house marks on their packaging [*38] may also mitigate the likelihood of confusion. [Stone Brewing Co., LLC v. MillerCoors LLC, 445 F. Supp. 3d 1113, 1132 \(S.D. Cal. 2020\)](#). In addition, the marks, while both containing the word "chalk," are phonetically dissimilar, as "bomb" and "blast" do not sound the same. *See* [Delta V Biomechanics, 402 F. Supp. 3d at 909](#) (noting that "'Delta V Biomechanics' is phonetically different" from "Delta V Forensic Engineering"). Further, the two marks have similar, but not identical, meanings, as they both invoke impressions of explosions.

On balance, a factfinder could reasonably conclude that the marks are dissimilar because of their visual and aural differences. Even weighing the marks' semantic similarity more heavily than their differences, the evidence does not justify a conclusive finding in Plaintiff's favor as to similarity of the marks. *See* [Coachella Music Festival, LLC v. Simms, No. 2:17-CV-06059-RGK-GJS, 2018 WL 6074556, at *7 \(C.D. Cal. Sept. 10, 2018\)](#) (holding that "[t]he evidence therefore is not so one-sided that summary judgment is justified" where the two marks shared the same suffix, "chella," but the marks had different beginnings and were depicted in different fonts).

D. Marketing Channels Used

"In assessing marketing channel convergence, courts consider whether the parties' customer bases overlap and how the parties advertise and market their products." [Pom Wonderful, 775 F.3d at 1130](#) (citing [*39] [Nutri/Sys., 809 F.2d at 606](#)).

Plaintiff argues that Plaintiff and Defendants "have a potential overlap in customer base, making the marketing channels identical." Pl.'s MSJ 16:11-12. Defendants respond that "Plaintiff has presented no evidence that the parties sold to the same retailers and, in fact, their damages claim is based on the premise that they did not." Opp'n to Pl.'s MSJ 16:15-16; Resp. to Pl.'s SUF ¶ 39.

Here, the record shows that overlap in marketing channels, albeit minimal, is not entirely nonexistent. Although Defendant states that Plaintiff presented no evidence that the parties sold to the same retailers, Plaintiff did provide evidence that both parties sold to [TEXT REDACTED BY THE COURT] See Pl.'s SUF ¶ 39; Ex. W in Supp. of Pl.'s MSJ, Def. Anker's Suppl. Resp. to Pl.'s Interrogs. 7:7, ECF No. 65-14. However, the overlap of only one customer, coupled with Plaintiff's assertions that "the parties sell primarily to different customers," Beaton Report ¶ 45, and that the Accused Product has been distributed mainly through "second- and third-tier retailers," *id.* ¶ 34(c), renders this factor only slightly in favor of a finding of likelihood of confusion. See *Survivor*, 406 F.3d at 633-34 (determining that a "minor overlap" [*40] of distribution channels "slightly favors" a finding of likelihood of confusion).

E. Type of Goods and the Degree of Customer Care

"Likelihood of confusion is determined on the basis of a 'reasonably prudent consumer,'" and "[w]hat is expected of this reasonably prudent customer depends on the circumstances." *Brookfield*, 174 F.3d at 1060. "Unlike purchasers of expensive goods—whom we expect to be more discerning and less easily confused—purchasers of inexpensive goods 'are likely to exercise less care, thus making confusion more likely.'" *Pom Wonderful*, 775 F.3d at 1127 (citing *Brookfield*, 174 F.3d at 1060).

Here, Plaintiff argues that because both its product and the Accused Product are inexpensive products, "the reasonably prudent consumer is less discerning, as this item is more of an impulse buy." Pl.'s MSJ 17:3-5. Defendants do not rebut this assertion, nor do they advance any argument in opposition to Plaintiff's contention that this factor weighs in favor of likelihood of confusion.

The Court finds that this factor weighs in Plaintiff's favor because it is undisputed that the parties' products are not expensive. See *Pom Wonderful*, 775 F.3d at 1127 (affirming district court's finding that the beverages at issue that cost between \$1.99 and \$2.49 resulted in customers generally exercising a low degree [*41] of care).

F. Defendants' Intent in Selecting the Mark

"When an alleged infringer knowingly adopts a mark similar to another's, courts will presume an intent to deceive the public." *Off. Airlines Guides, Inc. v. Goss*, 6 F.3d 1385, 1395 (9th Cir. 1993).

Plaintiff maintains that Defendants were well aware of Plaintiff's Chalk Bomb Product "and even ma[de] a direct comparison to it in marketing and promoting the accused product," demonstrating that they "knowingly adopted a mark similar to" Plaintiff's Mark. Pl.'s MSJ 17:13-16; Pl.'s SUF ¶ 19. Defendants dispute Plaintiff's allegation that they had knowledge of the Chalk Bomb Product prior to their decision to sell the Accused Product. See Resp. to Pl.'s SUF ¶ 19.

The Court finds that a triable issue of fact exists as to whether Defendants had knowledge of Plaintiff's Chalk Bomb Product when they chose to begin marketing and selling the Accused Product. Defendants disputed Plaintiff's assertion as such, and Plaintiff failed to meet its burden of demonstrating that no genuine issue of material of fact exists. Accordingly, because a dispute exists as to whether Defendants had any knowledge of Plaintiff's Chalk Bomb Product and/or Mark before it began selling the Accused Product, the Court cannot assess whether [*42] Defendants knowingly adopted an allegedly similar mark.

G. Likelihood of Confusion: Conclusion

Because likelihood of confusion is an "intensely factual" inquiry, "summary judgment is generally disfavored" in trademark cases. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1031 (9th Cir. 2010) (citation omitted). Courts should only grant summary judgment where "the evidence is clear and tilts heavily in favor of a likelihood of confusion." *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1075 (9th Cir. 2006).

Evaluating all the factors, the Court cannot conclude that Plaintiff has, as a matter of law, demonstrated a likelihood of consumer confusion. While three of the *Sleekcraft* factors favor Plaintiff, "courts do not merely count beans or tally points" in determining whether a likelihood of confusion exists. *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 431 (9th Cir. 2017). Here, triable issues remain on several of the factors, and the question of likelihood of confusion "should be answered as a matter of fact by a jury, not as a matter of law by a court." *Fortune Dynamic*, 618 F.3d at 1031. The evidence "does not tilt so heavily in Plaintiff[s] favor that summary judgment is appropriate." *Coachella Music Festival, 2018 WL 6074556*, at *8; *Diamon-Fusion Int'l, Inc. v. Diamon-Fusion, USA, Inc.*, No. SA-CV-08-1460-DOC-PLAX, 2009 WL 10671716, at *4 (C.D. Cal. Oct. 20, 2009) ("[R]ecognizing that some of the *Sleekcraft* factors

weigh in favor of Defendants, others weigh in favor of Plaintiff, and some—notably the critical 'similarity [*43] of the mark' factor—require close factual determinations as to which way they lean, the Court does not find that judgment should be entered as a matter of law."); Positive Ions, Inc. v. ION Media Networks, Inc., No. CV-06-4296-ABC-FFMX, 2007 WL 9701964, at *9 (C.D. Cal. Aug. 6, 2007) (denying the plaintiff's motion for summary judgment as to trademark infringement where there were "genuine issues of material fact on several of the factors in the likelihood of confusion test that are important to the analysis in this case"). As such, the Court **DENIES** Plaintiff's MSJ as to its trademark infringement claim.

d. False Designation of Origin and Unfair Competition Under California Business and Professions Code § 17200

A claim for false designation of origin is subject to "[t]he same standard" as a claim for trademark infringement, except a claim for false designation of origin does not require that the mark be registered. Celebrity Chefs Tour, LLC v. Macy's, Inc., 16 F. Supp. 3d 1159, 1166 (S.D. Cal. 2014) (citing Brookfield, 174 F.3d at 1046 n.6). "Further, 'the Ninth Circuit has consistently held that state common law claims of unfair competition and actions pursuant to California Business and Professions Code § 17200 are substantially congruent to claims under the Lanham Act.'" New Age Imps., Inc. v. VD Imps., Inc., No. SA-CV-17-02154-CJC-KES, 2019 WL 4570035, at *3 (C.D. Cal. July 18, 2019) (quoting Wecosign, Inc. v. IFG Holdings, Inc., 845 F. Supp. 2d 1072, 1079 (C.D. Cal. 2012)).

Accordingly, because Plaintiff has failed to establish likelihood of confusion with respect to its trademark [*44] claim as a matter of law, Plaintiff has also failed to establish that it is entitled to summary judgment as to its false designation of origin and unfair competition claims. See Diamon-Fusion Int'l, 2009 WL 10671716, at *4 ("Additionally, as the issue of likelihood of confusion is essential to proving Plaintiff's false designation of origin, common law trademark infringement, California unfair competition, and common law unfair competition claims, Plaintiff's motion for summary judgment on those counts is defeated as well."). As such, the Court **DENIES** Plaintiff's MSJ as to Plaintiff's claims for false designation of origin and unfair competition.

e. Design Patent Infringement

A design patent may issue to the inventor of "any new, original and ornamental design." 35 U.S.C. § 171. Infringement of a design patent is evaluated in a two-step process. "First, the court must construe the claims of the design patent to determine their meaning and scope."

Arminak, 501 F.3d at 1319 (citing OddzOn Prods., Inc. v. Just Toys, Inc., 122 F.3d 1396, 1404-05 (Fed. Cir. 1997)). The court then applies the ordinary observer test, which asks whether "the accused design could not reasonably be viewed as so similar to the claimed design that a purchaser familiar with the prior art would be deceived by the similarity between the claimed and accused designs, 'inducing [*45] him to purchase one supposing it to be the other.'" Egyptian Goddess, 543 F.3d at 683 (quoting Gorham, 81 U.S. at 528).

i. Claim Construction

"Design patents are typically claimed as shown in drawings, and claim construction must be adapted to pictorial setting." Crocs, Inc. v. Int'l Trade Comm'n, 598 F.3d 1294, 1302 (Fed. Cir. 2010). "As a rule, the illustration in the drawing views is its own best description." Id. at 1303 (citation omitted). The Federal Circuit instructs the district courts to defer to figures for claim construction of a design patent. Egyptian Goddess, 543 F.3d at 679. Here, the sole claim in the '596 Patent and '220 Patent recites "[t]he ornamental design for a toy throwing ball, as shown and described." Ex. E in Supp. of Pl.'s MSJ ("'596 Patent"), at 1, ECF No. 60-8; Ex. F in Supp. of Pl.'s MSJ ("'220 Patent"), at 1, ECF No. 60-9. Because "the preferable course ordinarily will be for a district court not to attempt to 'construe' a design patent claim by providing a detailed verbal description of the claimed design," Egyptian Goddess, 543 F.3d at 679, the Court relies on the illustrations contained in the Asserted Patents as follows:

FIG. 1: "a perspective view of a juice bottle, showing my new design;"

FIG. 2: "a front elevational view thereof;"

FIG. 3: "a rear elevational view thereof;"

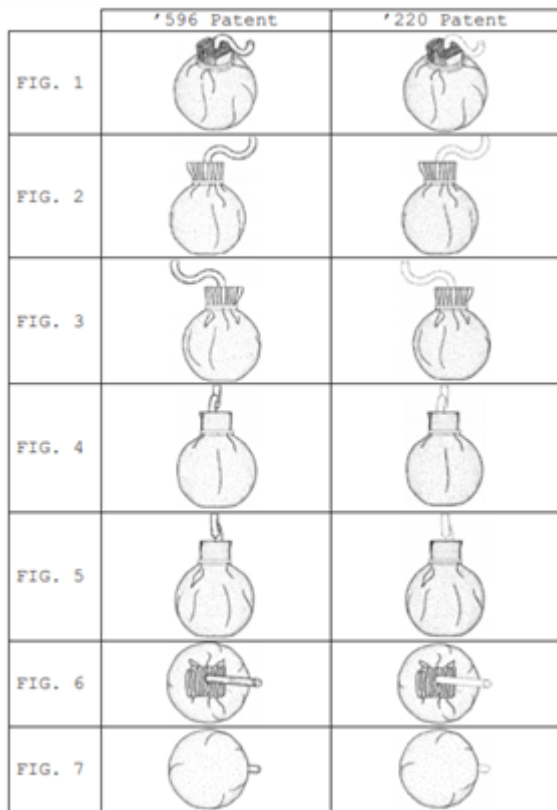
FIG. 4: "a left side elevational view thereof;"

FIG. 5: "a right side elevational view thereof;"

FIG. 6: "a top plan view thereof; [*46] and,"

FIG. 7: "a bottom plan view thereof."

'596 Patent at 1; '220 Patent at 1.



Resp. to Defs.' SUF ¶¶ 3-9.

ii. *Ordinary Observer Test*

Determining infringement of a design patent is a question of fact. [Catalina Lighting, 295 F.3d at 1287](#); see also [Richardson, 597 F.3d at 1295](#). "[I]n conducting a design patent infringement analysis, the patented design is viewed in its entirety, as it is claimed. The ultimate question requires determining whether 'the effect of the whole design is substantially the same.'" [Payless, 998 F.2d at 990-91](#) (quoting [L.A. Gear, 988 F.2d at 1125](#)) (internal quotation marks and alterations omitted). In making this comparison, the fact finder puts itself into the place of an "ordinary observer." [Egyptian Goddess, 543 F.3d at 667](#). The "ordinary observer" is not an expert; he is an observer "of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give." [Gorham, 81 U.S. at 528](#); see [Arminak, 501 F.3d at 1323](#) ("[T]he ordinary observer is a person who is either a purchaser of, or sufficiently interested in, the item that displays the patented designs . . .").

Here, Plaintiff argues that an ordinary observer would view the Accused Product as "substantially the same" as the Asserted Patents because the Asserted Patents and the Accused Product "both have a 'ball'-like round shape [*47] and wick, making their appearance identical," and they have similar contoured surfaces, wicks, and gathering of material

around the wick. Pl.'s MSJ 20:8-20. Defendants argue that they are entitled to summary judgment as to Plaintiff's design patent claim because the Accused Product and the Asserted Patents are plainly dissimilar in: (1) shape; (2) body pattern; (3) the gathering of material at the top; and (4) the fuse/lever shape. Defs.' MSJ 10:1-2, 12:3-23.

The Court concludes that many disputes as to material facts exist that preclude the Court from employing the ordinary observer test for design patent infringement, and further, granting summary judgment. First, the parties are in dispute about many photos of the Accused Product outside its packaging. See Resp. to Defs.' SUF ¶ 16. Specifically, Plaintiff asserts that the photos Defendants rely on in support of their motion are not actually photos of the Accused Product but instead are photos of a "product [that] was created for Defendants' expert . . . with the purpose of finding non-infringement." *Id.* Defendants maintain, however, that their counsel purchased the Accused Product on eBay and then sent some of the products to a professional [*48] photographer and others to Delman for his review. See Decl. of Jamaica P. Szeliga in Supp. of Opp'n to Pl.'s Mot. to Strike Delman Report ¶¶ 2-7, ECF No. 72-1; Decl. of Kenneth L. Wilton in Supp. of Opp'n to Pl.'s Mot. to Strike Delman Report ¶¶ 3-6, ECF No. 72-12. Next, the parties dispute the shape of the Accused Product. See Defs.' SUF ¶ 20 ("The Accused Product is not spherical."); Resp. to Defs.' SUF ¶ 20; Opp'n to Defs' MSJ 10:24-26 (noting that the Accused Product has "a 'ball'-like round shape"). The parties also dispute the manner in which the fabric material is gathered at the top of the Accused Product. See Defs.' SUF ¶ 21 ("The Accused Product does not have a neat 'cap' design. The cap of the Accused Product is 'jaggedy' and 'unkempt.'"); Resp. to Defs.' SUF ¶ 20; Opp'n to Defs' MSJ 11:15-17 ("It is hard to be certain at what the material is at the top of sphere-like product . . .").

Accordingly, based on the disputes concerning aspects of the Accused Product, in combination with a lack of clear photos³ from which the Court could conduct a reasonable comparison between the Accused Product and the Asserted Patents, the Court concludes that a dispute of material fact exists [*49] that precludes summary judgment. Accordingly, the Court **DENIES** both Plaintiff's MSJ and Defendants' MSJ as to design patent infringement.

³ As noted above, Plaintiff disputes the accuracy of the photographs of the Accused Product submitted in support of Defendants' MSJ. See Resp. to Defs.' SUF ¶ 16. The only undisputed photos: (1) show the Accused Product in its packaging; (2) do not show the Accused Product from multiple angles; and/or (3) are unclear screenshots from YouTube videos. See Defs.' SUF ¶¶ 15, 18(a)-(b). The agreed-upon photos do not allow the Court to reasonably compare the Accused Product, as depicted in the photos, to the Asserted Patents.

f. Copyright Infringement

To establish copyright infringement, Plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 361 (1991). Here, Defendants only contest the second element of copyright infringement. See Defs.' MSJ 18:8-10 ("With regard to the first element of infringement, for purposes of this motion Defendants assume that Plaintiff owns both the '296 Registration and the '283 Registration").⁴ Accordingly, the Court will only assess the second element.

"The second prong of the infringement analysis contains two separate components: 'copying' and 'unlawful appropriation.'" Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051, 1064 (9th Cir. 2020) (citing Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018)), overruled on other grounds by Skidmore, 952 F.3d 1051).

i. Copying

To establish copying, Plaintiff must show either: (1) the two works in question are substantially similar and the defendant had access to the subject work; or (2) that the works are strikingly similar. Malibu Textiles, Inc. v. Label Lane Int'l, Inc., 922 F.3d 946, 952 (9th Cir. 2019) (citations omitted). In the absence of direct evidence of copying, the plaintiff "can attempt to prove it circumstantially by showing that the defendant [*50] had access to the plaintiff's work and that the two works share similarities probative of copying." Skidmore, 952 F.3d at 1064 (internal quotation marks and citations omitted). "A finding of such similarity may be based on the overlap of unprotectable as well as protectable elements." Id. "To prove copying, the similarities between the two works need not be extensive . . . [t]hey just need to be similarities one would not expect to arise if the two works had been created independently." Rentmeester, 883 F.3d at 1117.

A. Access

"Direct access is shown if there is proof that the defendant actually viewed, read, or heard the work at issue." Briggs v. Blomkamp, 70 F. Supp. 3d 1155, 1165 (N.D. Cal. 2014) (citing Lucky Break Wishbone Corp. v. Sears, Roebuck & Co., 528 F. Supp. 2d 1106, 1122 (W.D. Wash. 2007), aff'd, 373 F.

App'x 752 (9th Cir. 2010)). Nevertheless, access can be demonstrated through circumstantial evidence by: (1) establishing a chain of events linking the plaintiff's work and the defendant's access, or (2) showing that the plaintiff's work has been widely disseminated. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000), overruled on other grounds by Skidmore, 952 F.3d 1051. The Ninth Circuit requires that "the defendant ha[ve] a reasonable opportunity to view or copy the plaintiff's work." Express, LLC v. Fetish Grp., Inc., 424 F. Supp. 2d 1211, 1227 (C.D. Cal. 2006). Reasonable access is "more than a 'bare possibility.'" Id.; see Briggs, 70 F. Supp. 3d at 1165 (citation omitted) (stating reasonable access requires more than a "bare possibility," and "may not be inferred through mere speculation [*51] or conjecture.").

Here, the parties dispute whether Defendants had access to the Copyrighted Designs. In support of its MSJ, Plaintiff relies on Defendant Summers's deposition as well as emails from Defendant Summers to Defendants' customers as evidence of access. Specifically, Plaintiff maintains that Defendants' use of "Chalk Bomb" to describe the Accused Product demonstrates access. See Reply in Supp. of Pl.'s MSJ 17:15-17, ECF No. 74; Ex. K in Supp. of Pl.'s MSJ, ECF No. 65-3 ((TEXT REDACTED BY THE COURT)).

The Court finds that Plaintiff has failed to meet its burden to demonstrate either direct or circumstantial evidence of access. Plaintiff provides no proof as to direct access. Moreover, [TEXT REDACTED BY THE COURT] fails to rise to the level of establishing "a particular chain of events . . . between the plaintiff's work and the defendant's access." Three Boys Music Corp., 212 F.3d at 482. Plaintiff also failed to establish that its work was widely disseminated. See id.

B. Striking Similarity

Because Plaintiff has failed to establish access, Plaintiff "can establish copyright infringement only by showing 'striking similarity.'" Briggs, 70 F. Supp. 3d at 1167 (citation omitted); see Three Boys Music Corp., 212 F.3d at 485 ("[I]n the absence of any proof of access, a copyright plaintiff [*52] can still make out a case of infringement by showing [the alleged copyrighted work and alleged infringing work] were 'strikingly similar.'").

"Strikingly similar is a high bar. 'At base, "striking similarity" simply means that, in human experience, it is virtually impossible that the two works could have been independently created.'" Briggs, 70 F. Supp. 3d at 1167 (quoting 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.02 [B] (2005)). Works are considered strikingly similar only when they "are so unmistakably similar that, 'as a matter of logic, the only explanation [for the similarities] between the

⁴As to copyright validity, Defendants only dispute Plaintiff's assertion that its Copyrighted Designs cover both the Chalk Bomb packaging and product. See Opp'n to Pl.'s MSJ 20:1-5. The Court finds that Plaintiff's Copyrighted Designs cover only the "2-D artwork" related to the "Chalk Balls Packaging." See Ex. A in Supp. of Pl.'s MSJ ("'296 Registration"), ECF No. 60-4; Ex. B in Supp. of Pl.'s MSJ ("'283 Registration"), ECF No. 60-5.

two works must be "copying" [Bernal v. Paradigm Talent & Literary Agency](#), 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (citation omitted).

In order to prove striking similarity, a plaintiff must show that the similarities between the works are "the sort of similarities that cannot satisfactorily be accounted for by a theory of coincidence, independent creation, prior common source, or any other theory than that of copying. The similarities should be sufficiently unique or complex as to make it unlikely that both pieces were copied from a prior common source, . . . or that the defendant was able to compose the accused work as a matter of independent creation." [Stewart v. Wachowski](#), 574 F. Supp. 2d 1074, 1103 (C.D. Cal. 2005) (citation omitted). Finally, the "mere existence of [*53] multiple similarities is insufficient to meet the test." [Stabile v. Paul Smith Ltd.](#), 137 F. Supp. 3d 1173, 1189 (C.D. Cal. 2015) (citation omitted).

"In assessing whether particular works are substantially similar, or strikingly similar, this Circuit applies a two-part analysis: the extrinsic test and the intrinsic test." [Unicolors, Inc. v. Urban Outfitters, Inc.](#), 853 F.3d 980, 985 (9th Cir. 2017). "The extrinsic test requires plaintiffs to show overlap of concrete elements based on objective criteria, while the intrinsic test is subjective and asks whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar." *Id.* (internal quotation marks and citations omitted). While the Court may determine whether Plaintiff has satisfied the extrinsic test, "once th[at] objective threshold is met, it is the role of the jury to make a nuanced subjective determination under the intrinsic test." *Id.* at 987.

Here, Plaintiff asserts that the following similarities between the Accused Product's packaging and Plaintiff's Copyrighted Designs demonstrate substantial similarity: (1) the phrases "200+ Throws!", "6+", "Collect All 6 Colors", and "Outdoor Only" on both the front and back of the packaging; (2) the phrase "Create Art with Every Toss" on the packaging; (3) the phrase "200+ Throws!" was placed [*54] in the exact same location on the card; and (4) the color range was placed in the same location. Pl.'s SUF ¶¶ 51, 53-55. Defendants do not dispute these facts, but nevertheless argue the works are dissimilar. See Defs.' MSJ 20:4-13. Specifically, Defendants point to the following differences between the Accused Product's packaging and the Copyrighted Designs: (1) Plaintiff's packaging includes images of its products, while the Accused Product's does not; (2) the fonts; (3) the color schemes; and (4) the fact that the Accused Product's packaging does not include the image of any people, but the Copyrighted Designs do. See *id.* at 20:7-13.



The Court concludes that a genuine dispute of material fact as to striking and substantial similarity exists. While the Court recognizes that similarities exist in the phrases used in the packaging and the placement of phrases, the Court questions whether these similarities are sufficient to prove substantial, or striking, similarity because, "[g]iven the simplicity of the toys, there are likely a limited number of ways of expressing their method of operation." [Lanard Toys Ltd. v. Novelty Inc.](#), 511 F. Supp. 2d 1020, 1040 (C.D. Cal. 2007); see also [Allen v. Acad. Games League of Am., Inc.](#), 89 F.3d 614, 617 (9th Cir. 1996) ("Consequently, the notions of idea and expression may merge from such 'stock' [*55] concepts that even verbatim reproduction of a factual work may not constitute infringement."). Accordingly, the Court **DENIES** both parties' MSJs as to copyright infringement. See [X-IT Prod., L.L.C. v. Walter Kidde Portable Equip., Inc.](#), 155 F. Supp. 2d 577, 614 (E.D. Va. 2001) (denying cross-motions for summary judgment where the plaintiff had "pointed to enough similarities between [its] current packaging and [the defendant's] copyright to survive a motion for summary judgment, although the Court cannot say that the packages are substantially similar so as to remove this question from the province of the jury . . .").

g. Actual Damages

Defendants move for summary judgment as to Plaintiff's request for actual damages in this Action, arguing that Plaintiff has failed to prove it is entitled to actual damages. See Defs.' MSJ 23:26-28. Specifically, Defendants assert that Plaintiff "has not disclosed, produced, or provided a single shred of evidence to support" its theory of market spoilage. *Id.* at 23:25-26. Plaintiff responds that market spoilage is not a "theory," and the "negative impact on the relevant market from the introduction of the Accused Product, and the consequent and subsequent rapid decline in the sales of the real product from Plaintiff, is a demonstrable fact fairly [*56] inferred from the sales data, timeline, and testimony from those who know the toy market." Opp'n to Defs.' MSJ 19:1-5.

Here, the Court finds that a dispute of material fact exists with respect to actual damages. Specifically, Defendants assert that Plaintiff never produced evidence demonstrating the negative impact of the Accused Product on Plaintiff's market. See Defs.' SUF ¶ 59. But Plaintiff disputes this fact and relies on the testimony of its expert, Gottlieb, and its Managing Director, Hesterberg. See Gottlieb Report 29 (noting that Plaintiff's "sales and brand identity would suffer (and evidently did) from the market spoilage resulting from introduction of the Anker knockoff" because Defendants "eschew[] quality to create a much cheaper and inferior product that can sell at discount stores"); Ex. ¶ to Decl. of Kenneth L. Wilton in Supp. of Defs.' MSJ, Hesterberg Dep. Tr. 77:5-14, ECF No. 62-15 ("We innovate a product and then another company comes out with a much less expensive, inferior product, and it has a residual effect with our customers that we are overcharging, a very negative effect to which the experts can testify as to what the knockoffs, the cheap imitations, the [*57] impact they have on . . . business."). The Court concludes that this evidence is sufficient to demonstrate that a genuine dispute of material fact exists. Accordingly, the Court **DENIES** Defendants' MSJ as to actual damages.

h. Defendants' Affirmative Defenses

Plaintiff moves for summary judgment as to the following affirmative defenses: (1) failure to state a claim for relief; (2) standing; (3) waiver, laches, estoppel, acquiescence; (4) descriptiveness; (5) invalidity of the patents-in-suit; (6) limitation on damages of the patents-in-suit; (7) invalidity of copyright; (8) de minimis use; (9) fair use; (10) innocent intent; and (11) lack of personal jurisdiction. See Pl.'s MSJ 24:15-28:17. Defendants only address four of these affirmative defenses in their Opposition. See Opp'n to Pl.'s MSJ 22:13-23:7. Defendants do not specifically oppose the remaining affirmative defenses; instead, Defendants generally assert that summary judgment should be denied because "Plaintiff has failed to present evidence to support summary judgment on Defendants' affirmative defenses." Opp'n to Pl.'s MSJ 22:10-12.

Although Defendants have the burden to prove their affirmative defenses at trial, Plaintiff bears [*58] the initial burden of establishing the absence of a genuine issue of material fact. See *Celotex*, 477 U.S. at 323. "However, if the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden." *In re Brazier Forest Prods., Inc.*, 921 F.2d 221, 223 (9th Cir. 1990) (citing *Celotex*, 477 U.S. at 323). Instead, the moving party "may simply point to the absence of evidence to support the nonmoving party's case." *Id.*; see also *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)

("[The moving party] may shift the burden of producing evidence to [the nonmoving party] merely by 'showing'—that is, pointing out through argument—the absence of evidence to support [the nonmoving party's] claim."). "The nonmoving party must then make a sufficient showing to establish the existence of all elements essential to its defense." *Farmers & Merchs. Bank v. Willemssen*, No. EDCV 13-0609-JGB (SPx), 2014 WL 12465445, at *5 (C.D. Cal. May 14, 2014) (citation omitted). "Summary judgment may be granted if the nonmoving party completely fails to offer evidence supporting its affirmative defenses." *Id.*

i. Failure to State a Claim for Relief

Plaintiff maintains that the Court should grant summary judgment as to Defendants' affirmative defense for failure to state a claim for relief because it is not a proper affirmative defense and Plaintiff [*59] has stated a claim for copyright infringement. Pl.'s MSJ 24:26-25:4. Defendants do not specifically respond to Plaintiff's argument in their Opposition.

The Court **GRANTS** Plaintiff's MSJ as it pertains to Defendants' affirmative defense for failure to state a claim because failure to state a claim is not a proper affirmative defense. See *In re Yashouafar*, No. CV 16-9519-JFW, 2017 WL 8180770, at *2 (C.D. Cal. June 8, 2017) (citing *Jacobson v. Persolve, LLC*, 2014 U.S. Dist. LEXIS 115601, 2014 WL 4090809, *7 (N.D. Cal. Aug. 19, 2014) ("This Court has previously held that failure to state a cause of action is better understood as a denial of Plaintiff's allegations rather than an affirmative defense.")).

ii. Standing

Plaintiff moves for summary judgment on Defendants' affirmative defense for standing, arguing that it is not a proper affirmative defense because Plaintiff has the burden of proving standing and Defendants' contention that Plaintiff lacks standing is not supported by the evidence. Pl.'s MSJ 25:6-14. Defendants respond that because Plaintiff "failed to present any evidence of standing, Plaintiff is not entitled to summary judgment on standing at this stage of the litigation." Opp'n to Pl.'s MSJ 2:20-21.

Standing is not an affirmative defense, but rather "is a jurisdictional issue." Plaintiff bears the burden of establishing jurisdiction, [*60] including standing. See *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). At the summary judgment stage, Plaintiff has "the burden of showing by uncontroverted facts that [it] ha[s] standing . . ." *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784 (9th Cir. 2008).

Here, Plaintiff provided the Court with its certificates of registration for Registration Nos. VA 2-022-296 and VA 1-999-283. See Ex. A in Supp. of Pl.'s MSJ; Ex. B in Supp. of Pl.'s MSJ. Defendants do not dispute that Plaintiff is the sole owner of these copyrights. See Resp. to Pl.'s SUF ¶¶ 2-3. *Section 501(b)* of the Copyright Act of 1976 establishes who has standing to sue for infringement: "The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the [registration] requirements of [section 411](#), to institute an action for any infringement of that particular right committed while he or she is the owner of it." *17 U.S.C. § 501(b)*. Accordingly, Plaintiff has standing to pursue its copyright infringement claims.

Plaintiff also provided the Court with its trademark registration for its CHALK BOMB!® mark. See Ex. C in Supp. of Pl.'s MSJ. Defendants do not dispute that Plaintiff applied for and received this Mark. See Resp. to Pl.'s SUF ¶ 4. [15 U.S.C. § 1114](#) provides that a trademark registrant has standing to sue for trademark infringement. Accordingly, the [*61] Court finds that Plaintiff has standing to bring its trademark-related claims.

Lastly, Plaintiff provided the Court with copies of its design patents. See '596 Patent; '220 Patent. Plaintiff is the owner of the Asserted Patents by way of assignment, which Defendant does not dispute. See Resp. to Pl.'s SUF ¶ 9. "A patentee shall have remedy by civil action for infringement of his patent." [35 U.S.C. § 281](#); see also *Dexas Int'l, Ltd. v. Saunders Mfg. Co.*, No. 3:07-CV-0296-O, [2008 WL 4526132](#), at *2 (*N.D. Tex. Oct. 7, 2008*) ("The term 'patentee' is expressly defined as both the person to whom the patent issued and any successors in title. When a patentee assigns the patent, the transferee is considered the 'patentee' under [§ 281](#) and is possessed with the right to sue infringers of the patent." (citations omitted)). As such, the Court finds that Plaintiff has standing to bring claims related to infringement of its Asserted Patents.

The Court **GRANTS** Plaintiff's MSJ as it pertains to the affirmative defense of standing because Plaintiff has demonstrated that it has standing to bring claims arising from its trademark, copyrights, and design patents.

iii. *Waiver, Laches, Estoppel, Acquiescence*

Plaintiff urges the Court to grant summary judgment as to Defendants' affirmative defense of [*62] waiver, laches, estoppel, and acquiescence because no evidence has been produced related to this defense. See Pl.'s MSJ 25:18-20. Specifically, Plaintiff argues: (1) there is no evidence of Plaintiff waiving any right; (2) there is no evidence that Plaintiff acquiesced, expressly or impliedly consented to the infringement; (3) Defendants have not provided evidence that

Plaintiff, either intentionally or under circumstances induced reliance, engaged in conduct upon which Defendants relied and that they acted or changed their position to their detriment; and (4) no evidence suggests that Plaintiff neglected or delayed in bringing suit. Id. at 25:20-26. Defendants failed to address any of Plaintiff's arguments. See generally Opp'n to Pl.'s MSJ.

Because Defendants have failed to set forth any evidence supporting this affirmative defense after Plaintiff demonstrated that this affirmative defense was unsupported, the Court **GRANTS** Plaintiff's MSJ as to the affirmative defense of waiver, laches, estoppel, and acquiescence. See Standard Fabrics Int'l, Inc. v. Dress Barn Inc., No. 2:15-CV-08437-ODW-PJW, [2017 WL 240072](#), at *7 (*C.D. Cal. Jan. 19, 2017*) (granting the plaintiff's summary judgment motion as to affirmative defenses for laches, waiver, and [*63] estoppel where the defendants "failed to produce any evidence in support of their defenses"); Levi Strauss & Co. v. Abercrombie & Fitch Trading Co., No. C 07-03752 JSW, [2008 WL 4614660](#), at *11 (*N.D. Cal. Oct. 16, 2008*) (granting summary judgment on the defendant's laches defense because the defendant "has not come forth with evidence to establish [the plaintiff] unreasonably delayed in filing suit").

iv. *Descriptiveness*

Plaintiff asserts that Defendants have offered no evidence showing Plaintiff's Mark as descriptive and thus invalid. See Pl.'s MSJ 26:8-13. Defendants respond that "in light of Plaintiff's disclaimer of 'chalk' and its admissions that its product looks like a 'bomb', there are genuine issues of fact regarding whether Plaintiff's asserted CHALK BOMB mark is descriptive." Opp'n to Pl.'s MSJ 22:23-25.

The Court agrees with Defendants. Because the Court holds that a triable issue of fact exists as to the strength of Plaintiff's Mark, i.e., whether it is descriptive, it necessarily follows that a triable issue of facts exists as to whether Defendants can assert an affirmative defense of descriptiveness. The Court **DENIES** Plaintiff's MSJ on this defense.

v. *Invalidity of the Patents-in-Suit*

Plaintiff asserts that the Court should grant [*64] summary judgment as to Defendants' affirmative defense of invalidity of the patents-in-suit because "Defendants do not proffer any evidence in support of their affirmative defense that the patents are invalid under patent law . . . [and] [a]s the party challenging a patent claim's validity, Defendants bear the burden to prove the invalidity by clear and convincing evidence." Pl.'s MSJ 26:15-19. Defendants respond that "in light of the substantial prior art there are serious questions related to the validity of Plaintiff's patents," so summary

judgment should not be granted on this affirmative defense. Opp'n to Pl.'s MSJ 22:27-23:2.

Based on Defendants' assertions with respect to the prior art, summary judgment as to the affirmative defense of invalidity of the patents-in-suit is improper, and the Court **DENIES** Plaintiff's MSJ on this defense.

vi. *Limitation on Damages of the Patents-in-Suit*

Plaintiff maintains that "Defendants have not provided any evidence that the damages should be limited in any way and therefore, the Court should grant summary judgment against Defendants' affirmative defense" of limitation on damages of the patents-in-suit. Pl.'s MSJ 27:2-4. Citing [35 U.S.C. § 287\(a\)](#), Defendants respond [*65] that "patentees are required to provide actual notice of infringement or constructive notice, accomplished by marking the article with the patent number to recover damage," and "Plaintiff has presented no evidence to defeat this affirmative defense." Opp'n to Pl.'s MSJ 23:4-7.

[35 U.S.C. § 287](#) is "a limitation on damages, and not an affirmative defense." [Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.](#), 876 F.3d 1350, 1366 (Fed. Cir. 2017) (citing [Motorola, Inc. v. United States](#), 729 F.2d 765, 770 (Fed. Cir. 1984)). Nonetheless, "district courts routinely permit [section 287](#) to be employed as an affirmative defense in an answer." [Targus Grp. Int'l, Inc. v. CODi, Inc.](#), No. SA-CV-1500353-CJC-EX, 2015 WL 12696220, at *2 (C.D. Cal. Sept. 17, 2015) (citing [Vistan Corp. v. Fadei USA, Inc.](#), No. C-10-4862 JCS, 2011 WL 1544796, at *1 (N.D. Cal. Apr. 25, 2011)). But "[c]ompliance with [§ 287](#) is a question of fact." [Arctic Cat](#), 876 F.3d at 1366. Accordingly, because a triable issue of fact exists as to whether an affirmative defense of limitation on damages exists, the Court **DENIES** Plaintiff's MSJ on this defense.

vii. *Invalidity of Copyright*

Plaintiff argues that the Court should grant summary judgment on Defendants' affirmative defense of invalidity of copyright because Defendants have not provided any evidence that Plaintiff's copyright registrations are invalid. Pl.'s MSJ 27:12-14. Defendants do not oppose Plaintiff's MSJ on this ground.

The parties do not dispute [*66] that the U.S. Copyright Office issued Copyright Registration Nos. VA 2-022-296 and VA 1-999-283 to Plaintiff. Resp. to Pl.'s SUF ¶ 2. The certificates establish that the registrations were made within five years after the first publication of the work and are therefore "prima facie evidence of the validity of the

copyright and of the facts stated in the certificate."⁵ [17 U.S.C. § 410\(c\)](#). Defendants have failed to present any evidence that Plaintiff's copyrights are invalid. Accordingly, the Court **GRANTS** Plaintiff's MSJ as to Defendants' affirmative defense of invalidity of copyright. See [Standard Fabrics](#), 2017 WL 240072, at *7 (granting the plaintiff's summary judgment motion as to affirmative defense for invalidity of copyright where the defendants "failed to produce any evidence in support of their defenses").

viii. *De Minimis Use*

Plaintiff states that the Court should grant summary judgment as to Defendants' affirmative defense of de minimis use because a "defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense," "Defendants already plead fair use as a defense to copyright infringement," and "Defendants have not provided any evidence to support this affirmative defense." Pl.'s MSJ 27:24-28. [*67] Defendants do not address Plaintiff's arguments in their Opposition.

"A copyright infringement is considered de minimis 'only if it is so meager and fragmentary that the average audience would not recognize the appropriation.'" [Rosen v. R & R Auction Co., LLC](#), No. CV-15-07950-BRO-JPRX, 2016 WL 7626443, at *11 (C.D. Cal. Aug. 31, 2016) (citing [Fisher v. Dees](#), 794 F.2d 432, 434 n.2 (9th Cir. 1986)). Whether Defendants' use is considered de minimis is a question of fact for the jury. See [Iantosca v. Elie Tahari, Ltd.](#), No. 19-CV-04527 (MKV), 2020 WL 5603538, at *3 (S.D.N.Y. Sept. 18, 2020) (noting that "affirmative defenses in copyright actions are generally fact-intensive"). Accordingly, the Court **DENIES** Plaintiff's MSJ on this defense.

ix. *Fair Use*

Plaintiff asserts that the Court should grant Plaintiff's MSJ as to Defendants' fair use defense because "Defendants have not provided any evidence to support this affirmative defense." Pl.'s MSJ 28:4-5. Defendants do not address this affirmative defense in their Opposition.

To establish fair use, the Court looks to "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value [*68] of the copyrighted work."

⁵ Both certificates of registration state the date of first publication as November 7, 2015 and their effective date as December 29, 2015. See '296 Registration; '283 Registration.

17 U.S.C. § 107.

First, Defendants used Plaintiff's works commercially and derived a financial benefit from that use, so this factor weighs in favor of Plaintiff. See BMG Rights Mgmt. (US) LLC v. Glob. Eagle Ent. Inc., No. 2:18-CV-03723-VAP-JEMx, 2019 WL 6315533, at *9 (C.D. Cal. Sept. 9, 2019) ("[T]he first factor weighs in BMG's favor because a commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.") (internal quotation marks and citations omitted).

Second, Plaintiff's copyrights protect original artwork for its packaging, which weighs in Plaintiff's favor. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (noting that "some works are closer to the core of intended copyright protection than others," such as fictional short stories versus factual works, motion pictures versus news broadcasts, and creative works versus bare factual compilations).

The third factor weighs in Defendants' favor because they did not use the entirety of Plaintiff's work.

And the fourth, and most important, factor weighs in favor of Plaintiff because a likelihood of market harm may be presumed when Defendants' intended use was for commercial gain. See FameFlynet, Inc. v. Breitbart News Network, L.L.C., No. [*69] CV-17-05416 TJH (ASx), 2018 WL 6321648, at *6 (C.D. Cal. Nov. 28, 2018) ("The fourth factor [is] the most important to the fair use analysis . . ."). Because the balance of the factors overwhelmingly tips in Plaintiff's favor, and because Defendants have provided no evidence of fair use, the Court **GRANTS** Plaintiff's MSJ as to Defendants' fair use defense.

x. *Innocent Intent*

Plaintiff seeks summary judgment as to Defendants' affirmative defense of innocent intent because "Defendants have not provided any evidence to support this affirmative defense." Pl.'s MSJ 28:9-12. Defendants do not address Plaintiff's arguments in their Opposition.

The Court finds that a dispute of fact exists as to whether any infringement on the part of Defendants was willful. See Pl.'s SUF ¶ 10; Resp. to Pl.'s SUF ¶ 10. And it necessarily follows that if Defendants' infringement was willful, it could not have been innocent. Accordingly, the Court **DENIES** Plaintiff's MSJ as to Defendants' affirmative defense of innocent intent because a dispute of material fact exists.

xi. *Lack of Personal Jurisdiction*

Plaintiff seeks summary judgment as to Defendant Summers's

affirmative defense of lack of personal jurisdiction because "Defendants have not provided any evidence to support this [*70] affirmative defense." Pl.'s MSJ 28:14-17. Defendants do not specifically respond to this argument in their Opposition.

Plaintiff has the burden of establishing personal jurisdiction. See Ziegler v. Indian River Cty., 64 F.3d 470, 473 (9th Cir. 1995); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1392 (9th Cir. 1984). Here, Plaintiff has set forth no argument as to why this Court has personal jurisdiction over Defendant Summers. Accordingly, the Court **DENIES** Plaintiff's MSJ on this defense.

III. CONCLUSION

Based on the foregoing, the Court rules as follows:

- (1) The Court **GRANTS** Plaintiff's Motion to Strike Delman Report and **STRIKES** the Delman Report in its entirety.
- (2) The Court **GRANTS in part** Defendants' Motion to Exclude Gottlieb Testimony as it pertains to Gottlieb's opinions regarding design patent infringement, copyright infringement, trademark infringement, and likelihood of confusion. The Court **DENIES in part** Defendants' Motion to Exclude Gottlieb Testimony as it pertains to Gottlieb's opinions regarding the quality of the Accused Product, market spoilage, and the safety of the Accused Product.
- (3) The Court **GRANTS in part** Defendants' Motion to Exclude Beaton Testimony and **STRIKES** paragraph 42 of the Beaton Report.
- (4) The Court **GRANTS in part** Plaintiff's MSJ as to Defendants' affirmative defenses of failure [*71] to state a claim for relief; standing; waiver, laches, estoppel, and acquiescence; invalidity of copyright; and fair use. The Court **DENIES in part** Plaintiff's MSJ as to its claims for trademark infringement; false designation of origin and unfair competition; design patent infringement; and copyright infringement; as well as Defendants' affirmative defenses of descriptiveness; invalidity of the patents-in-suit; limitation on damages of the patents-in-suit; de minimis use; innocent intent; and lack of personal jurisdiction.
- (5) The Court **DENIES** Defendants' MSJ as to Plaintiff's claims for design patent infringement; copyright infringement; and actual damages.

IT IS SO ORDERED.

DATED: November 12, 2020

/s/ Ronald S.W. Lew

HONORABLE RONALD S.W. LEW

Senior U.S. District Judge

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