NO. _____

In The
Supreme Court of the United States

VICTOR ELIAS PHOTOGRAPHY, LLC,

Applicant,

v.

ICE PORTAL, INC., A DIVISION OF SHIJI (US), INC.,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Joel B. Rothman
SRIPLAW
21301 Powerline Road, Suite 100
Boca Raton, Florida 33433
(561) 404-4350
(joel.rothman@sriplaw.com)

Counsel for Applicant

October 26, 2022

PARTIES TO THE PROCEEDINGS

Applicant Victor Elias Photography, LLC was the plaintiff and appellant in the proceedings below.

Respondent Ice Portal, Inc., a division of Shiji (US), Inc. was the defendant and the appellee in the proceedings below.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, applicant Victor Elias Photography, LLC is a limited liability company that issues no stock and for which no Rule 29.6 statement is required.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI TO THEUNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, applicant Victor Elias Photography, LLC respectfully requests a 60-day extension of time, up to and including January 9, 2023, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit entered its judgment on August 12, 2022 (the court of appeals' opinion, reported at 43 F.4th 1313 is attached hereto as Exhibit A). The petition would be due on November 10, 2022. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. 17 U.S.C. § 1202(b), adopted as part of the Digital Millennium Copyright Act (DMCA), provides that "[n]o person shall, without the authority of the copyright owner or the law: (1)

intentionally remove or alter any copyright management information…knowing, or…having reasonable grounds to know, that it will induce, enable, facilitate, or conceal and infringement of any right under this title." 17 U.S.C. § 1202(b).

2. Section 1202(c) of the statute defines "copyright management information" (CMI) to include "information conveyed in connection with copies…of a work…in digital form" such as the "title," "name of…the author," and "[i]dentifying numbers or symbols referring to such information or links to such information." 17 U.S.C. §1202(c).

3. Section 1202(b) contains two intent or knowledge elements. In this regard, the Second Circuit referred to the statute as containing a "double-scienter" requirement. See *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 171 (2d Cir. 2020) ("double scienter" is required because "the defendant who distributed improperly attributed copyrighted material must have actual knowledge that CMI 'has been removed or altered without authority of the copyright owner or the law,' as well as actual or constructive knowledge that such distribution 'will induce, enable, facilitate, or conceal an infringement.'") While it did not use the term "double scienter," the Ninth Circuit agreed that the statute "require[s]

the defendant to possess the mental state of knowing, or having a reasonable basis to know, that his actions 'will induce, enable, facilitate, or conceal' infringement" and that his actions "will induce, enable, facilitate, or conceal" infringement. *Stevens v. Corelogic,* 899 F.3d 666, 673 (9th Cir. 2018). The Eleventh Circuit below also agreed. *Elias*, 43 F.4th at 1320.

4. The critical issue below concerned whether issues of fact precluded summary judgment on the second intent or scienter element that the violator "hav[e] reasonable grounds to know, that [the violator's CMI removal] will induce, enable, facilitate, or conceal infringement." Elias produced evidence showing that the CMI removing Shiji had been accused in the past of removing CMI, and that its removal induced, enabled, facilitated or concealed infringement of Elias' photographs. The Court of Appeal, however, affirmed the district court's summary judgment in the face of this evidence because third parties "could have purloined these images from any number of sources, and Elias LLC has identified no evidence indicating that Shiji's distribution of these photographs ever 'induce[d], enable[d], facilitate[d], or conceal[ed] an infringement.'" *Id.*, 43 F.4th at 1324-25. According to the

Eleventh Circuit, the "plain language requires some identifiable connection between the defendant's actions and the infringement or the likelihood of infringement." *Id.,* 43 F.4th at 1325.

5. By contrast, the Second Circuit determined that the second knowledge element was more flexible and was "not limited by actor (i.e., to third parties) or by time (i.e., to future conduct)." *Mango,* 970 F.3d at 172. In *Stevens*, the Ninth Circuit never reached the issue because it determined that there was no "evidence that CoreLogic [the CMI remover] knew its software carried even a substantial risk of inducing, enabling, facilitating, or concealing infringement, let alone a pattern or probability of such a connection to infringement." *Id.,* 899 F.3d at 676.

6. The statute implements U.S. law protections required by in the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonogram Treaty ("WPPT") that created new obligations concerning protections for what the treaties called "rights management information." When Congress enacted § 1202 to implement these treaties it created a stand-alone violation for CMI removal "to facilitate licensing of copyright for use on the Internet and to discourage piracy." S. Rep. 105-190 at 13, fn. 18. Protecting the integrity of rights

management information, and prohibiting its removal or alteration—the goals § 1202 effectuates—provides needed moral rights protection for authors and creators. See generally, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, Report of the Register of Copyrights (April 2019).

7. The Eleventh Circuit below held that in order for a plaintiff to prove a violation of § 1202(b) she must demonstrate "some identifiable connection" between the defendant's "intentional[] remov[al] or alter[ation]" of CMI and "the infringement or the likelihood of infringement." The Eleventh Circuit justified its reading of the statute requiring an "identifiable connection" because the absence of an "identifiable connection" "would effectively collapse the first and second scienter requirements," and subvert congressional intent. *Elias*, 43 F.4th 1325.

8. This "identifiable connection" requirement finds no support anywhere in the plain language of the statute. The statute's plain language makes the act of intentional removal or alteration violative of the rights of copyright owners even when that removal is unconnected to any specific infringement committed by anyone. The plain language

of § 1202(b) does not require a plaintiff to demonstrate that a CMI removing defendant ever "induce[d], enable[d], facilitate[d], or conceal[ed]" any *particular infringement,* but rather that the defendant's intentional removal occurred under circumstances where she knew, or had reasonable grounds to know, that those actions would "induce, enable, facilitate, or conceal" infringement in violation of the plaintiff's rights under the Copyright Act.

9. The Court of Appeal's decision below, and the *Stevens* decision by the Ninth Circuit that preceded it, render § 1202(b) toothless, and eviscerate the protections afforded to authors and creators under the statute's plain language. The question whether a plaintiff alleging a violation of § 1202(b) is required to demonstrate that the defendant's "intentional[] remov[al] or alter[ation]" of CMI "conveyed in connection with copies of [the plaintiff's] work" was connected, linked or associated in some identifiable way to known instances of infringement, is an important one, and one that is raised more and more frequently due to the problem of unauthorized copying and distribution of digital images online.

10. Further development of the law in the lower courts is

unlikely to result in differing views. Rather, the lower courts are likely to be misled by the decisions of the two courts of appeal in *Elias* and *Stevens* to have addressed a § 1202(b) claim presented, as in the case here, without an accompanying infringement claim.

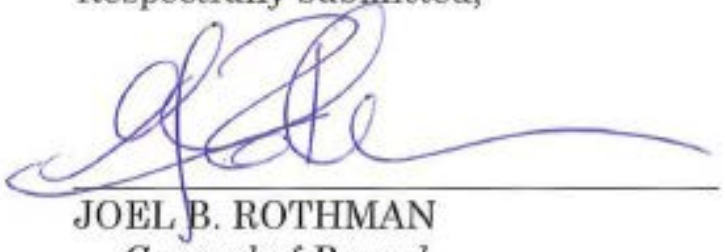
11. The 60-day extension to file a certiorari petition is necessary because undersigned counsel needs the additional time to prepare the petition and appendix, and because of other, previously engaged matters, including: (1) oral argument on November 15, 2022 in *Adlife Marketing & Communications Co., Inc. v. Karns Prime and Fancy Food, Ltd.*, Case Number 21-2074 (3d Cir.); (2) a reply brief due on December 12, 2022 in *Bruce Munro v. Fairchild Tropical Garden, et. al.*, Case Number 22-10450 (11th Cir.); (3) an initial brief due on November 14, 2022 in *Mohanlal v. Secretary, Florida Department of Corrections*, Case Number 22-11406 (11th Cir.); (4) a reply brief due in December in *Doe v. JFK Medical Center,* Case Number 22-2032 (Fla. 4th DCA); and (5) a trial scheduled for the week of December 12, 2022 in *Sedlik v. Katherine Von Drachenberg*, Case Number 2:21-cv-01102-DSF-MRWx (C.D.Ca.). In addition, counsel has a family vacation scheduled during this period.

Accordingly, applicant respectfully requests a 60-day extension of

time, up to and including January 9, 2023, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

DATED: October 26, 2022

Respectfully submitted,



JOEL B. ROTHMAN
Counsel of Record

SRIPLAW
21301 Powerline Road, Suite 100
Boca Raton, FL 33433
561.404.4350 – Telephone
561.404.4353 – Facsimile

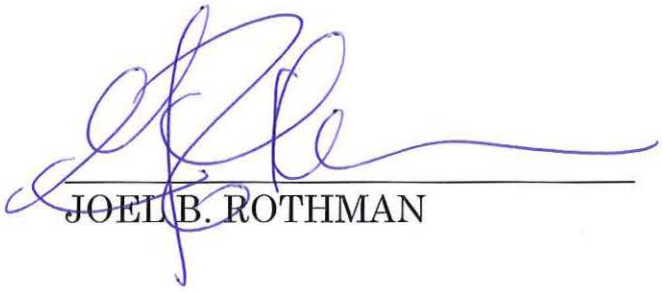
Attorneys for Applicant Victor Elias Photography, LLC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 26, 2022, I caused the forgoing to be served by the method indicated upon the following:

BY EMAIL:
David J. Wolfsohn
DJWolfsohn@duanemorris.com
Tyler Marandola
TMarandola@duanemorris.com
Kendra C. Oxholm
KCOxholm@duanemorris.com
DUANE MORRIS LLP
30 South 17th Street
Philadelphia PA 19103-4196
Tel: 215-979-1866
Fax: 215-689-2739
Counsel for Ice Portal, Inc.

BY FEDERAL EXPRESS:
Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303



JOEL B. ROTHMAN