

No. 17-1025

In The
Supreme Court of the United States

FROST-TSUJI ARCHITECTS,

Petitioner,

v.

HIGHWAY INN, INC., *et al.*,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the granting of an implied nonexclusive license to a project owner and its contractors to use architectural works upon payment of substantial consideration violates the U.S. Constitution and the AWCPA when petitioner never briefed this constitutional argument at the lower court levels.
2. Whether the Ninth Circuit erred in granting an implied license to project owner and contractors to use architectural works when: (1) the Ninth Circuit employed the same legal standards applied by all circuits; (2) the cases denying an implied license are distinguishable on case-specific facts employing the same legal standards; and (3) the interpretation of the written contract is governed by Hawaii state law.
3. Whether the District Court abused its discretion in awarding attorneys' fees in a Copyright Act case where the prevailing respondents established their meritorious defense of implied license furthering the purposes of the Copyright Act, where plaintiff brought objectively unreasonable motions for reconsideration and engaged in extensive discovery that it failed to justify, and plaintiff utterly failed to support its copyright management information ("CMI") removal claim with any evidence of any respondents' culpability.
4. Whether the lower courts erred in granting summary judgment on a CMI removal claim where no disagreement of the legal standard to apply exists, and plaintiff submitted absolutely no evidence of any respondents' removal of CMI.

CORPORATE DISCLOSURE

Highway Inn, Inc. has no parent corporation and has issued no stock to any publicly held corporation.

J. Kadowaki, Inc., is a Hawaii corporation, has no parent corporation, and has issued no stock to any publicly held corporation.

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INTRODUCTION

Petitioner Frost-Tsuji Architects (“FTA”) seeks review by the highest court in this country to resolve a \$39,000 breach of contract claim. Aside from being an inappropriate use of this Court’s time and resources, there are readily demonstrable reasons why the matters raised by FTA are simply not proper for this Court’s review. Accordingly, Respondents Highway Inn, Inc. (“HII”) and J. Kadowaki, Inc. (“JKI”) request that this Court deny the petition.

First, FTA asks this Court to grant review in order to establish a special rule for architects under the Copyright Act. FTA claims the recognition of an implied nonexclusive license, as was granted in this case, violates the Constitution and Architectural Works Copyright Protection Act (“AWCPA”) and is outside the authority of the federal courts. Importantly, FTA never briefed these arguments at the Ninth Circuit or below, and instead abruptly raised them at oral arguments before the Ninth Circuit panel. FTA’s contrived “issue” is neither novel nor consequential enough to warrant review in the first instance by this Court. Additionally, despite FTA’s assertions as to the AWCPA, federal courts absolutely have the authority to elucidate the governing law of implied nonexclusive licenses and assess whether such licenses were properly granted. That was done in this matter and nothing in the AWCPA precludes the same. Finally, FTA’s reliance on the AWCPA’s application is misplaced because ownership rights to architectural works – which were expanded by the AWCPA – are not, and have never been,

at issue in this case. Instead, this case is about “use” pursuant to a nonexclusive implied license. There is simply nothing novel about this breach of contract case that deserves this Court’s review.

Second, even if the questions FTA now raises for the first time had been properly briefed, there is no genuine conflict among the appellate circuits that would justify certiorari review. FTA greatly exaggerates that the appellate circuits are divided in their application of the test for a nonexclusive implied license. Notwithstanding FTA’s consternation, all circuits apply the same legal standard. As with almost all cases, differing outcomes in some of those matters resulted from varied factual circumstances – not from a conflicting framework for the legal analysis.

Third, the lower courts did not ignore this Court’s standard for awarding fees in Copyright Act disputes. FTA’s copyright claims and actions were patently frivolous and objectively unreasonable, and warranted the awarding of fees to those parties whose defense was recognized by the lower courts to be in furtherance of the purposes of the Copyright Act. FTA concedes that Respondents achieved a high degree of success as to the Copyright Claims. Nevertheless, FTA attacks the award of attorneys’ fees by making the demonstrably false representation that Respondents are guilty of multiple discovery violations. The record in this action is crystal clear that no lower court ever found any Respondent had committed any discovery violation during the course of the litigation. By contrast, the District Court repeatedly noted FTA’s abuse of the discovery

process, which frivolously increased the cost of litigation. Therefore, the awarding of attorneys' fees to Respondents was appropriate.

Finally, FTA's claim of improper removal of copyright management information ("CMI") in violation of the Digital Millennium Copyright Act ("DMCA") is even less compelling than its AWCPA claim. In order to support its DMCA claim, FTA was required to produce evidence demonstrating that one or more of the Respondents intentionally removed FTA's CMI from the drawings. That did not happen. FTA presented no evidence indicating that any Respondent removed or directed anyone else to remove FTA's CMI. The same lack of evidence of intentional removal of the copyright management information exists in the record on appeal.

Peeling away FTA's rhetoric, this is a simple \$39,000 breach of contract action that fails to invoke any novel question of federal law and does not remotely demonstrate circuit split worthy of this Court's review. Accordingly, HII and JKI respectfully request this Court deny FTA's petition for writ of certiorari.



STATEMENT OF THE CASE

A. Factual Background

This case originated as a contract dispute over an alleged unpaid balance of \$39,000. On December 1, 2012, HII retained FTA to design a Hawaiian food

restaurant pursuant to a letter agreement (“Letter Agreement”). Pet. App. 9. The Letter Agreement provided that FTA was to “coordinate and manage [HII’s] consultant team” and provide for “Concept, Schematic, Design Development and Construction Document Phases.” In exchange, FTA agreed to a maximum architectural fee of \$97,500. *Id.* Under the Letter Agreement, FTA was supposed to “convert” the letter agreement “into a Standard AIA Short Form Contract between Architect and Owner, not later than December 31, 2012.” Order Denying Motion for Reconsideration of Order filed on August 26, 2014, D. Ct. Dkt. 320. FTA did not meet that deadline and, in fact, no AIA Short Form Contract was ever executed by the parties. Instead, FTA delivered its architectural drawings to HII as agreed to in the Letter Agreement. The Letter Agreement was the operative contract for the entire term of HII’s and FTA’s architect-owner relationship for the project. Pet. App. 15.

While the project was ongoing, HII made payments to FTA amounting to \$59,400 for basic services; \$10,220.98 in “reimbursable expenses” and GE tax; and \$12,000 for additional services for a total of \$81,620.98 out of the maximum allowable \$97,500. Pet. App. 16. Despite this, FTA alleged that it was owed \$39,015.98 arising from services rendered under the Letter Agreement and additional services that FTA had unilaterally performed. *Id.*

On April 25, 2013, HII, through counsel, terminated FTA as architect for the Project. *Id.* On May 3, 2013, HII entered into an agreement with Bryce E.

Uyehara (“BEU”) for the provision of architectural services necessary to move forward with the completion of the Project (“BEU Agreement”). Pet. App. 46. After being retained for the Project, BEU did not rely on FTA’s plans and developed its own set of plans, drawings and related specifications for the Project. Additionally, during the course of litigation, BEU stated that it did not have a copy of the computer aided design (“CAD”) files created by FTA and therefore it would have been impossible to either reuse or remove any copyright information from the same. Instead, by June of 2013, BEU had created its own set of drawings and submitted the same to the Honolulu Department of Permitting and Planning for the issuance of a building permit for the Project.

On July 1, 2013, HII contracted with J. Kadowaki, Inc. (“JKI”) for the provision of construction services on the Project (“GC Contract”). During the course of litigation, JKI provided un rebutted sworn statements attesting that it was not hired to participate in design nor did JKI use FTA’s plans or drawings in the construction of the Project. Instead, JKI prepared its contractor layouts and shop drawings used for construction based on information and plans provided by HII’s kitchen equipment designer, Bargreen Ellingson of Hawaii, Inc. (“Bargreen”), and input from BEU. Moreover, JKI attested to the fact that HII specifically instructed JKI not to use any of FTA’s plans or drawings because BEU would be preparing new plans for the Project. Thereafter, HII worked with JKI, Bargreen,

and BEU, among others, to complete the Project, which became fully operational by January 2014.

B. Relevant Procedural History

On September 30, 2013, FTA filed a Complaint (“Complaint”) against HII alleging HII had breached a December 1, 2012 letter agreement (“Letter Agreement”) between HII and FTA. FTA claimed damages arising from the breach of that letter in the principal amount of thirty-nine thousand fifteen dollars and eighty-five cents (\$39,015.85), plus interest arising from the alleged breach of contract.

On February 28, 2014, FTA filed its Second Amended Complaint. This version differed significantly from FTA’s First Amended Complaint in that it contained substantial additions to its pertinent facts regarding FTA’s copyright claims. FTA had also modified its Count V claim from “unlicensed use of plans and specifications” in the Complaint and First Amended Complaint to “copyright violations-copyright notice removal” in its Second Amended Complaint.

Shortly thereafter, the parties filed cross motions for summary judgment. The District Court denied FTA’s Count IV MPSJ, and granted HII’s Count IV Cross MPSJ (“Count IV Order”). *See generally* Pet. App. 6. In the Count IV Order, the District Court held that HII did not violate any copyrights belonging to FTA because, even if HII used FTA’s plans, HII had a nonexclusive implied license to do the same. *Id.* at 36-37.

On November 7, 2014, the District Court issued its order granting summary judgment in favor of all Respondents with respect to Count V (“Count V Order”). See Pet. App. 44. Specifically, the Count V Order recognized that summary judgment was appropriate because FTA presented “no evidence indicating that HII or Ho’ola Mau (“HM”) removed or directed anyone else to remove Frost-Tsuji’s copyright management information.” Pet. App. 54. Perhaps more fundamentally, the District Court held that “[w]ithout evidence of removal, Frost-Tsuji has no viable claim for removal of copyright management information.” Pet. App. 56.

Thereafter, FTA filed multiple unsupported motions for reconsideration and continued to conduct discovery post-adjudication. In denying FTA’s first Motion for Reconsideration, the District Court provided:

Frost-Tsuji argues that it conditioned Highway Inn’s use of the drawings on Frost-Tsuji’s continued involvement with the construction project. The problem with this argument is that it is not supported by the record and is at odds with the position previously taken by Frost-Tsuji. Conspicuously lacking from the record is any affidavit or declaration of any Frost-Tsuji representative indicating that Frost-Tsuji never intended that Highway Inn use its drawings if Frost-Tsuji was off the project. . . . Given those arguments, Frost-Tsuji’s argument in the present reconsideration motion that it *never* intended to grant a

nonexclusive license to Highway Inn is hard to accept.

Order Denying Motion for Reconsideration of Order filed on August 26, 2014, D. Ct. Dkt. 320.

In denying FTA's second motion for reconsideration, the District Court provided the following in its Order Denying Second Reconsideration Motion:

Frost-Tsuji does not demonstrate that it acted with reasonable diligence in obtaining this new evidence. To the contrary, the record indicates that it was only after it lost cross-motions for summary judgment with respect to the copyright infringement claim asserted in Count IV that Frost-Tsuji sought the discovery its [sic] says led to the new evidence. This court expended substantial effort in drafting its orders of August 26 and October 27, 2014. What Frost-Tsuji would have this court do is accept that the court wasted its time relying on the then-existing record, excuse a party's belated discovery effort, and revisit issues whenever a party feels ready to supplement the record. The court denies Frost-Tsuji's Second Motion for Reconsideration.

Pet. App. 83.

In denying FTA's third motion for reconsideration, the District Court provided:

The miscitations in Frost-Tsuji's present motion and in underlying motions, combined with its submission of multiple documents when one would have done the job, have

complicated this court's review of the record. While the court is able to discern that, as Frost-Tsuji points out, it cited ECF Nos. 186-9 and 186-10 in connection with the underlying motions, those documents do not justify reconsideration.

Pet. App. 78.

After Counts IV and V had been adjudicated and despite HII's compliance with all of FTA's discovery requests, FTA also filed several unnecessary and untimely Motions to Compel. At the hearing on these two motions, the District Court simply asked that all parties confirm with their clients that discovery requests submitted by FTA had been complied with. The District Court did not issue sanctions, and did not appoint a discovery master.

After all of the claims were settled or adjudicated, the District Court granted HII's motions for attorneys' fees and costs, noting, "Defendants were forced to spend substantial amounts of time and money because Frost-Tsuji not only brought objectively unreasonable motions for reconsideration, but also engaged in extensive discovery that it failed to justify in its motions for reconsideration." Pet. App. 151.

On October 26, 2017, a Ninth Circuit panel consisting of Judges Mary Schroeder, D. W. Nelson, and M. Margaret McKeown issued an unpublished ten sentence memorandum opinion affirming the District Court's reasoning and orders and disposing of United States Court of Appeals, Ninth Circuit Docket Nos:

16-15562, 16-15799, and 16-15802. *See* Pet. App. 1-5. The unpublished ten sentence memorandum opinion was also entered as a judgment.



REASONS FOR DENYING THE WRIT

First, the issue of the constitutionality of implied nonexclusive licenses in light of the AWCPA was not raised in this case until oral arguments at the Ninth Circuit and should not be granted certiorari for review in the first instance by this Court. Second, the alleged circuit split on implied nonexclusive licenses on which FTA relies is illusory. Third, the Ninth Circuit faithfully applied this Court's standards in determining fee awards in copyright infringement cases. Finally, there is no conflict or confusion in the application of federal CMI removal law, and even if there was, the record on appeal reflects that FTA has failed to produce any evidence of removal.

I. FTA's Claims Regarding The Constitution And The AWCPA Are Improperly Raised And Improperly Analyzed

A. FTA's Constitutional Claims Are Improperly Raised After Review By The Circuit Court

FTA has improperly raised the AWCPA issue before this Court without substantive review in any of the prior proceedings. This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718

n.7, 125 S. Ct. 2113, 2120 (2005). *See also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175, 124 S. Ct. 2359, 2372 (2004) (refusing to address the respondents’ argument that certain anticompetitive conduct was linked to foreign harm and therefore fell outside the Foreign Trade Antitrust Improvements Act of 1982’s exception to bring independently caused foreign injury within the Sherman Act’s reach); *accord, United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494, 121 S. Ct. 1711, 1719 (2001) (declining to address constitutional questions regarding Congress’ Commerce Clause powers and the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments in relation to medical necessity defenses under the Controlled Substances Act because the lower court did not address those constitutional claims). FTA did not mention the AWCPA in any filings or proceedings until oral arguments at the Ninth Circuit. Thereafter, FTA included in its improperly filed¹ Petition for Rehearing En Banc a brief and illogical argument that the District Court and Ninth Circuit panel’s imposition of a common law principle was preempted by the AWCPA in accordance with section 301(a) of the Copyright Act. FTA made this argument notwithstanding that neither section 301(a) nor the sections regarding nonexclusive licenses (17 U.S.C. § 204 and the definition of “transfers of ownership” under 17 U.S.C. § 101) were amended by the AWCPA. Furthermore,

¹ The Ninth Circuit denied the Petition for Rehearing because FTA filed the Petition after the deadline to file had passed. The arguments included in the Petition were not therefore reviewed by the Ninth Circuit.

section 301(a) prohibits the imposition of an *individual state's* common law over the Copyright Act. As discussed in the next section, federal common law is appropriately applied when a federal statute creates a right but does not delineate the rules regarding that right. FTA's claims regarding the AWCPA are therefore objectively unreasonable. Regardless of these inadequacies, FTA has simply failed to justify why its frivolous and procedurally improper claims warrant review in the first instance by this Court.

B. The Invocation Of Federal Common Law Is Appropriate In This Case

FTA's claim that the lower courts have denied FTA its exclusive rights "by creating an implied license by judicial grant" in contradiction to the AWCPA and outside of the scope of their judicial authority is patently incorrect. Pet. at 15. Federal common law is appropriately invoked with respect to the creation of license agreements under the Copyright Act.

Copyrights to creative works, including "architectural works" under the AWCPA, are a form of property with a specific bundle of rights created by the federal government through the Copyright Act, 17 U.S.C. § 101 et seq. As with other property regimes, a copyright owner may utilize a license to authorize the use of its copyright by another. *W. Elec. Co. v. Pacent Reproducer Corp.*, 42 F.2d 116, 118 (2d Cir. 1930) ("In its simplest form, a license means only leave to do a thing which the licensor would otherwise have a right to prevent.").

The Copyright Act excludes by definition nonexclusive licenses from the transfers of ownership of copyrights under 17 U.S.C. § 204. Specifically, section 204 delineates the requirements for a transfer of ownership of a copyright. Section 101 defines “transfers of ownership” to mean “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, **but not including a nonexclusive license.**” 17 U.S.C. § 101 (emphasis added). The statute does not define what a nonexclusive license is or the requirements for granting a nonexclusive license. Because the statute is silent as to the rules governing nonexclusive licenses, federal courts must “fashion the governing rule of law according to their own standards.” *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367, 63 S. Ct. 573, 575 (1943). Thus, the federal courts have the authority to fashion governing law related to implied nonexclusive licenses without violating the Copyright Act or the Constitution.

C. FTA’s Claims Relating To The AWCPA Are Misplaced Because The AWCPA Relates To Ownership Of Copyrights For Architectural Works And Did Not Impact The Provisions By Which Implied Nonexclusive Licenses Are Granted

FTA’s reliance on the applicability of the AWCPA in this matter is misplaced because the ownership of FTA’s architectural plans is not at issue here. The

AWCPA was enacted to put the United States in compliance with its treaty obligations under the Berne Convention for the Protection of Literary and Artistic Works by extending broader protections to architectural works under the Copyright Act. *See* H.R. Rep. 101-735, at 4-10. The AWCPA therefore expanded an architect's ability to claim and exercise ownership interests in various design aspects of architectural projects.

Prior to the AWCPA, architectural plans were copyrightable under the Copyright Act of 1909 as "drawings or plastic works of a scientific or technical character" and then as "pictorial, graphic, and sculptural works" under the Copyright Act of 1976. Courts had resolved disputes regarding the ownership and infringement of architectural plans under these provisions prior to the enactment of the AWCPA.² Similarly, courts had recognized that a copyright owner may impliedly grant a nonexclusive license through his conduct based on clauses regarding "transfers of ownership" in sections 204 and 101 of the Copyright Act.³ The AWCPA did not amend the provisions of the Copyright

² *Eales v. Envtl. Lifestyles, Inc.*, 958 F.2d 876, 880 (9th Cir. 1992); *Herman Frankel Org. v. Tegman*, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973); *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 898 (5th Cir. 1972); *Demetriades v. Kaufmann*, 680 F. Supp. 658, 663 (S.D.N.Y. 1988) ("Architectural plans, as drawings of a technical nature, are eligible for copyright protection.").

³ *Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984).

Act relied upon by those courts in recognizing implied nonexclusive licenses.

The existence of this type of license was not determined on a whim by the lower courts in this matter. Under 17 U.S.C. § 106, FTA has certain exclusive rights to its copyrighted work. Accordingly, FTA has the ability to grant a license to a client to do an act with the copyrighted work which FTA would otherwise have a right to prevent. As discussed further below, the lower courts' assessment of such a license in this case was made using the nationally consistent rubric that has not been changed by the AWCPA.

This case therefore does not present a novel question of law or fact that warrants this Court's review. This case is about a disagreement over the use of architectural plans to construct a building and payment for such plans – there is no issue over who owns those plans. As noted by FTA and in all of the previous filings and orders, there is sufficient case law to provide stability and predictability in the architectural field.

II. No Conflict Exists Among The Circuits In The Legal Standards To Use In Implying A License To Use A Copyrighted Architectural Work

FTA asserts a conflict among the circuits in the determination of whether a license to use a copyrighted work will be implied. In fact, no such “conflict” exists. All cases from the different circuits cited in the Petition utilize the very same legal standard, and in

the limited instances where the cited cases deny the implied license, the courts' decisions are explained by the application of different case-specific facts to the identical legal standards. Certiorari should not be granted to "resolve" a conflict where only harmony exists.

A. All Circuits Cited By FTA Follow The Same Legal Standards In The Evaluation Of A Nonexclusive Implied License

The District Judge applied the Ninth Circuit standard for granting a nonexclusive implied license, a three-part test:

(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.

Pet. App. 25, citing *Asset Marketing Systems v. Gagnon*, 542 F.3d 748, 754-55 (9th Cir. 2008), citing *Effects Assocs. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990) (quotation marks and citations omitted) (hereafter, the "Gagnon implied license test"). Not only did the parties to this appeal agree that this *Gagnon* legal standard controlled the implied license issue in the briefing below, but every implied license case cited by FTA in its Petition similarly agreed that this *Gagnon* implied license test was the applicable standard. See *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 587 (5th Cir.

2015); *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010); *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 41 (1st Cir. 2003); *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002); *Johnson v. Jones*, 149 F.3d 494, 500-01 (6th Cir. 1998); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 776 (7th Cir. 1996); *Hanover Architectural Service, P.A. v. Christian Testimony – Morris, N.P.*, Civ. No. 2:10-5455 (KM)(SCM), 2015 WL 3462889 at *17 (D.N.J. May 18, 2015); *AHAdams & Co. v. Spectrum Health Services, Inc.*, 40 F. Supp. 3d 456, 462 (E.D. Pa. 2014).⁴

With respect to the third prong of the three-part nonexclusive implied license test discussed in *Gagnon* and followed by the District Court below⁵ which addresses a licensor's intent to copy and distribute its work, the Ninth Circuit notes the following relevant factors in determining said intent, expressly following the First and Fourth Circuits:

(1) whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship; (2) whether the creator utilized written contracts . . . providing that copyrighted materials could only be used with the creator's future involvement or

⁴ FTA also cited to *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 997 (1st Cir. 2006). However, because *T-Peg* is not an implied license case, the three-part *Gagnon* implied license test was not discussed.

⁵ ECF No. 320, Page ID 5340.

express permission; and (3) whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.

Gagnon, 542 F.3d at 756, quoting *Danielson*, 322 F.3d at 41 (quoting *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 516 (4th Cir. 2002)) (hereafter, the “*Nelson-Salabes* intent test”). To the extent the other cases alleged by FTA to be inconsistent discuss the intent factor, they consistently follow the *Nelson-Salabes* “intent test.” In addition to the Ninth (*Gagnon*), First (*Danielson*), and Fourth (*Nelson-Salabes*) Circuits expressly adhering to the *Nelson-Salabes* intent test to interpret the third prong of *Gagnon*’s three-part non-exclusive implied license test, two other cases cited by FTA also expressly cite to this “intent test.” See *Hevia*, 602 F.3d at 41; *AHAdams & Co.*, 40 F. Supp. 3d at 462-63. *Latimer v. Roaring Toyz, Inc.* does not expressly cite to the above *Nelson-Salabes*’ intent test, but does analyze licensor’s short-term project (motorcycle photo shoot), lack of a written contract, and the photographer’s conduct in the delivery of the motorcycle photographs subject of the copyright infringement action. *Latimer*, 601 F.3d at 1235-37. These are the same three factors analyzed in *Nelson-Salabes*’ intent test, and therefore *Latimer* is also fully consistent. *Johnson v. Jones, supra*, was cited by FTA as an example of an inconsistent Sixth Circuit case allegedly in conflict with the Ninth Circuit. *Johnson v. Jones* was decided in 1998, before the *Nelson-Salabes* intent test, and also predates *Danielson* and *Gagnon*. Despite coming

before these cases, *Johnson v. Jones* does not hold that different factors apply. Compare *Johnson v. Jones*, 149 F.3d at 500-02 with *Nelson-Salabes*, 284 F.3d at 516 and *Gagnon*, 542 F.3d at 754-55. In fact, a later district court of the Sixth Circuit expressly cites to and follows *Gagnon* for its implied license test and three-part *Nelson-Salabes* intent test in a copyright infringement action. *FefF, LLC v. Healio Health Inc.*, Case No. 5:08CV404, 2009 WL 10688713 at *4 (N.D. Ohio 2009), citing *Gagnon*, 542 F.3d at 755 (citing *Danielson*, 322 F.3d at 42). Thus, the Sixth Circuit is also in accord.

All circuits referenced by FTA, the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, all adopt the *Gagnon* implied license and *Nelson-Salabes* intent tests. Therefore, it is far from accurate to represent that the circuits are “in disarray.” Indeed, the ultimate results of most of the cases cited by FTA granted implied licenses. See *Hevia*, *AHAdams & Co.*, *Hunn*, *I.A.E.*, *Gagnon*, *Foad*, and *Latimer*. Where the FTA-cited cases denied implied licenses (*Danielson*, *Nelson-Salabes*, *Johnson*, and *Hanover*), these were the results mandated by case-specific facts. Accordingly, Supreme Court review premised upon a split in the circuits is not justified.

B. The Cases Not Granting An Implied License All Involved Facts Significantly Different From The Present Case

In only four of the cases cited in the Petition was the result a finding of no implied license. *See Danielson, Nelson-Salabes, Johnson, and Hanover, supra*. Even in these cases, the courts employed the same legal standards. In each of these cases, the facts were materially and significantly distinguishable from the present case.

As it did in the lower courts, FTA primarily relies upon *Johnson v. Jones* and *Nelson-Salabes, Inc. v. Morningside Dev., LLC, supra*, for the proposition that FTA's and HII's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was impermissible, the third factor of *Nelson-Salabes'* objective intent test. Because in both the *Johnson* and *Nelson-Salabes* cases no written contract existed, the evaluation of the parties' intent posed a significantly different question than posed in the present case, where HII and FTA did memorialize their contractual intent by the written Letter Agreement. The fact that FTA and HII did memorialize their contractual intent in a written contract is the significant fact distinguishing the present case from both *Johnson* and *Nelson-Salabes*.

In *Johnson*, architect/contractor Johnson was hired by owner Jones to design and build her dream home. On July 15, 1993, Johnson presented an AIA contract

between Owner and Architect to Jones containing the following restrictive language:

The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others . . . for completion of this project by others . . . except by agreement in writing and with appropriate compensation to the Architect.

Johnson v. Jones, 921 F. Supp. 1573, 1577 (E.D. Mich. 1996). Although Jones did not sign the AIA contract, she wanted to get the renovations started as soon as she took ownership of the house, and requested Johnson to begin his drawings. *Id.* at 1578.

In August 1993, Johnson delivered to Jones a second AIA standard form agreement. This second AIA contract had similar restrictive language as the first AIA contract. *Id.* Johnson kept working at Jones' request, and copyrighted his drawings. On September 24, 1993, Johnson met with Jones expecting to sign the second AIA contract. However, Jones' attorney also attended the meeting, and he informed Johnson that he would prepare a new contract. The parties exchanged contracts until November 8, 1993 when Jones informed Johnson that she no longer wanted Johnson to work on her house. *Id.* at 1579-80. Litigation ensued.

The district court recognized that the proper analysis of the implied license claimed by Jones required "a determination of whether the parties' conduct created an implied license." *Id.* at 1584, citing

Nimmer on Copyright § 10.03[A], at 10-38. The trial court concluded:

The evidence at trial clearly establishes that Mr. Johnson had made it clear that it was never his intent that Mrs. Jones be granted the unfettered right to use his copyrighted drawings and documents. The language of the two contracts he had given to Mrs. Jones to consider makes that clear.

Id. at 1584. Furthermore, the replacement architect obtained some of the drawings from the city inspector (delivery being part of the third prong of *Nelson-Salabes*' intent test). 149 F.3d at 501. Based on the evidence presented, including the fact that Johnson delivered the draft AIA contract from the beginning of the relationship, before he began any work and repeatedly thereafter, the trial court, considering ***the absence of any written contract***, was fully entitled to conclude that the restrictive language in the AIA contracts formed the basis of the implied-in-fact contract between Johnson and Jones. *Id. Accord, Effects Assocs.*, 908 F.2d at 556 (implied license found where parties to oral contract failed to discuss copyright and license matters).

Based on all the foregoing facts, *Johnson* is significantly different and factually distinguishable from the facts in the present case because: (1) there is a written Letter Agreement memorializing FTA's and HII's contractual intent; (2) the Letter Agreement has no restrictive language; (3) there were no oral discussions between the parties prohibiting HII from using FTA's plans without FTA's permission or future involvement;

(4) there was no agreement or testimony by HII that FTA had fully earned its fee; (5) when HII received the proposed AIA contract from FTA, HII immediately questioned the ownership of the copyrights; and (6) FTA directly delivered its drawings to HII, JKI, Bargreen and others.

The second case heavily relied on by FTA, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, similarly differs on the facts in material ways. In *Nelson-Salabes*, the owner The Strutt Group and architect Nelson-Salabes, Inc. (“NSI”) never entered into a written contract. In the spring of 1996, Strutt sought planning assistance from NSI for an assisted living facility called Satyr Hill. On June 5, 1996, NSI delivered to Strutt a proposed letter agreement. On July 24, 1996, NSI delivered to Strutt a second proposed letter agreement, but Strutt failed to execute either proposal. On February 14, 1997, NSI delivered a third proposed letter along with an AIA contract. The AIA contract included restrictive language that “the Architect’s Drawings, Specifications or other documents shall not be used by the Owner or others . . . for completion of this Project by others . . . except by agreement in writing and with appropriate compensation to the Architect.” *Nelson-Salabes*, 284 F.3d at 509-10. On September 29, 1997, NSI sent Strutt a revised third letter agreement and a revised AIA contract. *Nelson-Salabes, Inc. v. Morningside Holdings*, Civ. B-98-2226, 2001 WL 419002 (D. Md. Feb. 16, 2001), *aff’d in part, vacated in part*, 284 F.3d 505 (4th Cir. 2002). Strutt did not execute the third proposed letter or the AIA contract. On October 7,

1997, Strutt advised NSI to cease its architectural work. 284 F.3d at 510.

On appeal, the Fourth Circuit applied the *Gagnon* implied license test, and concluded that the first two prongs were satisfied. In evaluating the third prong, however, the Fourth Circuit determined, ***in the absence of a written contract governing the parties' contractual relationship***, the court “should examine the totality of the circumstances surrounding NSI’s conduct.” *Id.* In applying the three-part intent test, the Fourth Circuit found important that in the *I.A.E. v. Shaver* and *Foad Consulting Group v. Musil Govan Azzalino*, 270 F.3d 821 (9th Cir. 2001) cases, “neither of those task-specific contracts contained language prohibiting future use of the architectural drawings without the architect’s involvement or consent.” *Nelson-Salabes*, 284 F.3d at 516. The Fourth Circuit then compared *Nelson-Salabes* to *Johnson v. Jones*, and held:

NSI and Strutt plainly contemplated NSI’s long-term involvement in Satyr Hill, and they engaged in ongoing discussions for more than nine months concerning NSI’s development of the Project. And during those discussions, NSI submitted contracts to Strutt that, similar to those in *Johnson*, contained the standard AIA prohibition against use of the NSI Drawings without NSI’s future involvement or its express consent. Indeed, NSI never expressed to Strutt by its representations or conduct that Strutt could utilize NSI’s plans without NSI’s future involvement or express consent; in fact,

NSI specifically advised Strutt to the contrary on at least two occasions.

Id. at 516. At trial, the court evaluated the entirety of the Strutt-NSI relationship and concluded that, in the absence of a written contract, the restrictive AIA language on future use was intended to be included in the parties' contractual relationship.

Because Strutt and NSI did not enter into a written contract, *Nelson-Salabes* substantially differs from the present case. Here, HII and FTA objectively expressed their intentions by written contract, the Letter Agreement, which was silent on the issue of license. The interpretation of the terms of the Letter Agreement is no different than the written contract in *Foad*. Whereas, in *Foad* and *Gagnon*, the Ninth Circuit concluded that the parties' silence expressed in the *written contracts* (where the design professional had an opportunity to express its prohibition on future use) supported the grant of the implied license, in *Nelson-Salabes* and *Johnson*, the Fourth and Sixth Circuits concluded the owners' silence in light of being presented with the architects' repeated proposals of form AIA standard contracts supported the inclusion of the restrictive terms. Thus, based on facts materially different from *Foad*, *Gagnon*, and the present case, the Fourth and Sixth Circuits concluded an implied license was not intended.

Danielson is likewise factually different from the present case, and concluded that no implied license was granted. As a matter of law, *Danielson*

acknowledged the proper legal standards were both *Gagnon*'s implied license test and *Nelson-Salabes*' intent test. *Danielson*, 322 F.3d at 40-41. John G. Danielson, Inc. ("JGD") was the architect of a condominium development in Winchester, Massachusetts. JGD and the developer signed a standard AIA contract with restrictive language on the use of JGD's plans after termination. The First Circuit described the relevant AIA contract provision:

[The parties'] intent was also manifested by the standard AIA contract signed by [developer] Farese and Danielson, which specifically provided that plans "shall not be used . . . for other projects, for additions to this Project, or for completion of this Project by others . . . except by agreement in writing and with appropriate compensation."

Danielson, 322 F.3d at 41. The contracting parties expressly agreed in writing to the limitation of use of the copyrighted plans after termination, thereby expressing their mutual intent. This is significantly different from the present case, where FTA's and HII's Letter Agreement is silent as to HII's permitted use of the copyrighted plans after termination.

The only other case FTA cites to in which an implied license was not granted is a district court case, *Hanover Architectural Service, P.A. v. Christian Testimony – Morris, N.P.*, *supra*. *Hanover* adopted the same *Gagnon* implied license test, *id.* at *17, and is factually distinguished from the present case because the district court denied defendants' summary judgment for

several reasons, including a factual dispute over the architect Hanover's intent to copy and distribute the designs. *Id.* The district court did not elaborate on the material questions of fact precluding summary judgment, but referenced Hanover's letter warning that defendant required Hanover's permission before using them. The lack of any in-depth analysis of the district court's reasons for denying defendants' summary judgment motion precludes *Hanover* from having any precedential value.

In all of these cases, the principle is clear: When parties express their intent in a written contract without an express prohibition on the owner's future use of the architect's plans without consent, a nonexclusive license is presumed to be implied into the architect-owner contract. The court looks to the written contract as the objective manifestation of the parties' intent. Had the restrictive language prohibiting the owner from using the architect's plans in the future been sufficiently important, it would have been included in the written contract.⁶ That all circuits interpreting the

⁶ The Ninth Circuit in *Effects Assocs.* recognized the significant difference where a written contract exists in a copyright dispute:

Common sense tells us that agreements should routinely be put in writing. This simple practice prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one. . . . Rather than look to the courts every time they disagree as to whether a

Gagnon implied license and *Nelson-Salabes* intent tests do not look to the parties' unwritten subjective intent in determining whether an implied license exists in a written contract is fully consistent with Hawaii's parol evidence rule. Hawaii courts have held:

The parol evidence rule generally precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract – a writing the parties have adopted as the expression of their final agreement. The rule applies to exclude both oral and written extrinsic evidence. ***It also operates to exclude evidence that varies or contradicts both the express and the implied terms of a written agreement.***

Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300, 310, 944 P.2d 97, 107 (Haw. App. 1997), citing 29A Am.Jur.2d *Evidence* § 1092, at 551-52 (2d ed. 1994) (emphasis added) (footnote omitted).

On the other hand, where no written contract is signed, and the parties' agreement is only oral, the court's approach is different. Instead of interpreting a written contract, the court is required to interpret the entirety of the parties' relationship. Where no contract has been signed, the combination of: (1) an architect's proposal of contractual language in a draft contract prohibiting the future use of its plans without the

particular use of the work violates their mutual understanding, parties need only look to the writing that sets out their respective rights.

Effects Assocs., 908 F.2d at 557.

architect's consent; (2) the architect's performance of design services; and (3) the owner's lengthy delay in deciding to not sign the architect's contract, are all important factors favoring the incorporation of the restrictive language into the implied-in-fact contract. *See Foad*, 270 F.3d at 830 n.15; 270 F.3d at 836 (Kozinski, J., concurring). In this latter circumstance, presented in *Nelson-Salabes* and *Johnson*, the court concludes that the architect did express its intent in an objective manner by consistently and repeatedly presenting the restrictive language to the owner prior to and during the rendition of significant services, and the architect had no reason to believe the license language restricting the owner's use of the copyrighted plans would not become part of the contractual relationship. Thus, in the evaluation of the entirety of the owner-architect relationship, and in the absence of a written contract specifying the rights and obligations of the parties, it was appropriate to incorporate the restrictive language into the owner-architect oral contract.

C. State Law Controls Whether The Letter Agreement's Reference To "AIA Standard Contract" Adopts The Specific AIA B101 Draft Contract

The Supreme Court should not accept FTA's invitation to grant a Writ of Certiorari based upon the State law question of whether the Letter Agreement's reference to the undefined term "AIA standard contract" effectively incorporated by reference the specific provision of AIA B101 § 7.3 into the Letter Agreement.

The interpretation of the Letter Agreement, including whether Section 7.3 of AIA B101 was incorporated into the Letter Agreement, is purely a matter of State law. Supreme Court review of Hawaii contract law is unwarranted.

As a factual matter, HII was not provided with a copy of AIA B101 or any AIA contract when the Letter Agreement was signed on December 1, 2012, and the parties never signed the AIA B101 document in any form.⁷ As a matter of Hawaii law, the District Judge committed no error by correctly stating Hawaii law:

“[T]o effectively incorporate by reference a separate writing, or a portion thereof, into a contract, ‘the language used . . . must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).’” *Safeway, Inc. v. Nordic PCL Constr., Inc.*, 130 Haw. 517, 527, 312 P.3d 1224, 1234 (Ct. App. 2013) (quoting

⁷ FTA’s petition only notes that the AIA standard contract “was held by both parties during creation of the work. . . .” Pet. at 7. The Petition fails to state that the AIA B101 contract was never signed by HII, and that it was not until February 1, 2013 did FTA deliver a draft of the AIA B101 document to HII, two months after the December 1, 2012 Letter Agreement was signed. Pet. App. 10.

Northrop Grumman Info. Tech. Inc. v. United States, 535 F.3d 1339, 1345 (Fed. Cir. 2008)).

Pet. App. 24. Applying this Hawaii law to the facts, the District Judge concluded that the Letter Agreement's reference to the phrase "AIA standard contract" did not incorporate the AIA B101 document or any portion thereof:

No part of the letter agreement clearly incorporates anything by reference. Instead, the letter agreement provides that it will be converted into the standard AIA form. This court thinks it would be a stretch to read a reference to a conversion as equivalent to an incorporation, much less to an incorporation that has been "clearly communicated."

Pet. App. 24. In addition to the fact that the final arbiter of Hawaii law is the Hawaii Supreme Court, and not the U.S. Supreme Court, there was no error in the District Judge's analysis, and Supreme Court review predicated upon a review of this Hawaii law issue should not be granted.

III. The Lower Courts Did Not Violate This Court's Ruling In *Kirtsaeng v. Wiley & Sons* When It Awarded Respondents' Attorneys' Fees And Costs

Despite FTA's contentions, the lower courts in this matter followed this Court's guidance in awarding fees. In awarding Respondents' attorneys' fees and costs, the District Court admonished FTA for its objectively

unreasonable approach to litigating this matter. Pet. App. 150-51. In admonishing FTA, the District Court properly applied this Court’s rule as stated in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), which was followed by *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016). *Kirtsaeng* provided additional guidance to district courts awarding attorneys’ fees for copyright disputes under 17 U.S.C. § 505 by recommending district courts can give substantial weight to the reasonableness of a party’s position to determine if it served the Act’s objectives, but that such consideration may not be the only controlling basis for an award. *Kirtsaeng*, 136 S. Ct. at 1988. It also recommended that other relevant factors including “litigation misconduct” and “overaggressive assertion of copyright claims” must be given due consideration. *Kirtsaeng*, 136 S. Ct. at 1989. This Court cautioned, however, relying too heavily on “a lawsuit’s role in settling significant and uncertain legal issues” as “[t]he precedent-setting, law-clarifying value of a decision may become apparent only in retrospect – sometimes, not until many years later.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. at 1988. Here, the lower courts examined a myriad of relevant factors and considered the guidance of this Court in awarding Respondents’ attorneys’ fees and costs. Review of the lower courts’ assessments will not clarify or change the standard for awarding fees under the Copyright Act.

**A. FTA's Pursuit Of Its Copyright Claims
Was Objectively Unreasonable**

The lower courts awarded Respondents' fees and costs following this Court's guidance in *Fogerty* and *Kirtsaeng* and assessed FTA's copyright claims and actions in the course of the litigation related thereto to be frivolous, overly aggressive, and objectively unreasonable. The District Court's bases for the award are adequately supported by the record. This matter arose out of a simple contract dispute in which FTA originally claimed \$39,015.85, plus interest, but it was litigated so irresponsibly and unreasonably by FTA that the parties have each incurred hundreds of thousands of dollars in attorneys' fees and costs.

If FTA had conducted a fair evaluation of its copyright infringement claim prior to filing its First Complaint, including the facts and the controlling Ninth Circuit legal precedent, FTA would have known from the outset that:

- FTA was retained by Highway Inn pursuant to a Letter Agreement, which was the only executed document between the parties and therefore the controlling document. Pet. App. 9-10, and 15.
- FTA was paid \$81,620.98 in consideration for services rendered to HII. Pet. App. 16.
- The documents, communication, and exchanges of consideration between FTA and HII established FTA's clear intent to

convey a license to HII, whether express or implied. Pet. App. 28.

The law regarding implied nonexclusive licenses was well-established by the time FTA contemplated filing its First Complaint. As the District Court noted in its Order granting summary judgment to HII on Count IV of FTA's Second Amended Complaint, "[c]learly, HII paid for something." Pet. App. 28. From the beginning, FTA's Count IV copyright infringement claim has lacked any basis in fact.

In Count V, FTA's CMI removal claim was completely frivolous because FTA could not muster any evidentiary support for the same. In the initial adjudication of the Motions for Summary Judgment on FTA's DMCA claim, FTA did not just fail to raise a genuine issue of fact – FTA made no effort toward doing so. Pet. App. 54. To date, FTA has failed to come up with a shred of evidence that any Respondent intentionally removed FTA's CMI from its architectural drawings. Pet. App. 159. These failures clearly demonstrate that FTA did not have any factual basis for bringing such claim. It also reveals FTA's DMCA claim for what it is: a blatant attempt to exhaust Respondents by stacking claims on a simple contract dispute.

Even if FTA's Count IV and DMCA claims alone were not frivolous or objectively unreasonable, which they are, FTA's conduct in litigating these issues certainly soars above and beyond the standard for both. The District Court had made its position on FTA's Count IV and V claims clear in its Orders granting

summary judgment to HII on those issues. *See generally* Pet. App. 6 and Pet. App. 44. FTA disregarded all of this, however, and opted to continue pursuing its claim for copyright infringement post-adjudication through depositions, written discovery, and three wholly unsupported Motions for Reconsideration.

In its Motions for Reconsideration, FTA failed to make any material changes to its arguments, wasting the District Court's time and forcing Respondents to expend more resources in responding to FTA's frivolous motions. At no point in time could FTA have had any reasonable expectation that its Motions for Reconsideration would succeed. Rather, FTA has simply driven up the fees and costs of litigation; fees and costs that FTA is now trying to deny Respondents. There can be no dispute that there is ample evidence in the record supporting that FTA's Copyright Claims and actions in pursuing the same were objectively unreasonable and frivolous.

The Ninth Circuit appropriately determined that awarding attorneys' fees and costs to HII would also deter other parties from bringing frivolous, improperly motivated copyright claims. Given the Court's strong interests in deterring frivolous actions, Highway respectfully requests this Court recognize the Ninth Circuit's appropriately awarded fees by denying FTA's petition for writ of certiorari.

**B. FTA Engaged In Litigation Misconduct;
Respondents Did Not**

FTA alleges that the lower courts failed to address or even consider a key factor under *Kirtsaeng*: litigation misconduct. Pet. at 30. Of course, FTA's assertion missed a fundamental point: the District Court did not address any discovery misconduct on the part of Respondents because there was no misconduct. No finding of misconduct can be found anywhere in the record, and no sanctions have been issued or were even threatened against any of the Respondents. None of the lower courts or magistrates ever found that Respondents had committed any discovery violations.

By contrast, FTA's discovery abuses are well-documented in the record. As the District Court explicitly recognized in its Order Denying [FTA's] Second Motion for Reconsideration Concerning Count IV:

This court expended substantial effort in drafting its orders of August 26 and October 27, 2014. What Frost-Tsuji would have this court do is accept that the court wasted its time relying on the then-existing record, excuse a party's belated discovery efforts, and revisit issues whenever a party feels ready to supplement the record.

Pet. App. 83.

The District Court commented further on FTA's relentless pursuit of its copyright claims through discovery even after these claims were adjudicated by summary judgment. Specifically, the court noted the

“Defendants were forced to spend substantial amounts of time and money because Frost-Tsuiji not only brought objectively unreasonable motions for reconsideration, but also engaged in extensive discovery that it failed to justify in its motions for reconsideration.” Pet. App. 151.

FTA’s misrepresentations and unsubstantiated allegations are insufficient to establish that the lower courts erred in their application of this Court’s standards under *Kirtsaeng*. The record in this matter is clear that FTA abused the discovery process in this matter, not Respondents. Review of the record on appeal will only establish that there was no misconduct by Respondents in this case, and will not clarify the standard for awarding fees under the Copyright Act.

IV. Certiorari Should Not Be Granted To Review The Lower Courts’ Granting Of Summary Judgment On FTA’s Removal Of CMI Claim Where Absolutely No Evidence Was Presented Of Any CMI Removal By Any Respondent

FTA requests the Supreme Court’s review of the summary judgment order in favor of Respondents on FTA’s CMI removal claim to “clarify the provisions of the DMCA with respect to the removal of marks of attribution and CMI on ‘architectural works.’” Pet. at 37. FTA’s Petition is bereft of any federal question or conflict among federal appellate courts as to any CMI removal issue. Even more compelling and proving that this is not the appropriate case for Supreme Court

review is the fact that no evidence of any CMI removal by any Respondents was presented to the lower courts in opposition to the Respondents' summary judgment motions. The Supreme Court should not grant certiorari review of an issue wholly unsupported by any factual evidence.

In granting Respondents' summary judgment, the District Court expressly found that FTA submitted no evidence of removal of its CMI by any Respondent. As to HII and HM:

Frost-Tsuji presents no evidence indicating that Highway Inn or Ho'ola Mau removed or directed anyone else to remove Frost-Tsuji's copyright management information.

Pet. App. 54. As to JKI: "Frost-Tsuji makes no effort to raise a genuine issue of fact as to whether Kadowaki *removed* Frost-Tsuji's copyright management information." Pet. App. 58 (*italics in original*). As to Bargreen Ellingson:

Frost-Tsuji does not specifically identify a drawing that it created from which Frost-Tsuji's copyright management information is missing. . . .

Even if Frost-Tsuji is correct in contending that Bargreen Ellingson created its CAD for the kitchen design of the restaurant "based on FTA's work," . . . basing a CAD on Frost-Tsuji's CAD is not the same as "removing"

copyright information from a copyrighted work.

Pet. App. 57-58.

Even upon FTA's reconsideration motion, the Court again failed to find any question of fact regarding removal of CMI. Pet. App. 80 ("none of Frost-Tsuji's arguments raises a genuine issue of fact as to whether any Defendant removed the copyright management information from Frost-Tsuji's original work"). FTA presents no compelling legal reason for the Supreme Court to consider review of FTA's issue of CMI removal since there is no conflict or confusion in the application of federal CMI removal law. More importantly, even if a federal question had been presented, FTA alleges no facts to support the assertion that any removal of FTA's CMI occurred. Granting certiorari on this issue would serve absolutely no federal purpose.

◆

CONCLUSION

For the reasons expressed herein, the opinions of the District Court and Ninth Circuit are not in conflict with other courts that have analyzed this and related issues. The rulings below and newly asserted issues do not warrant review by this Court.

DATED: Honolulu, Hawai'i, February 23, 2018.

Respectfully submitted,

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