APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROXANA TOWRY RUSSELL,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 23-55542

D.C. NO. 2:19-CV-05495-MWF-JC

ROXANA TOWRY RUSSELL, Plaintiff
Roxana Towry Russell an individual doing business as Roxy Russell Design,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 24-592

D.C. NO. 2:19-CV-05495-MWF-JC

MEMORANDUM[*]

Filed June 18, 2025

Appeal from the United States District Court
for the Central District of California

Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted February 4, 2025

Pasadena, California

Before: MILLER, LEE, and DESAI, Circuit Judges.

Partial Concurrence and Partial Dissent by Judge DESAI.

Walmart, Inc. and Wal-Mart.com USA, LLC (collectively "Walmart") appeal a jury's verdict entered against it for copyright infringement and the district court's order granting Roxana Russell attorneys' fees and costs. A jury found Walmart liable for infringement based on Walmart.com listings that contained Russell's two copyrighted photographs and that sold lamps which infringed on her three copyrighted sculptural lamps. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and vacate and remand in part.

We review the jury's verdict for substantial evidence and must uphold it "if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (quoting *Harper v. City of Los*

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Angeles, 533 F.3d 1010, 1021 (9th Cir. 2008)). Because Walmart moved for judgment as a matter of law at trial, we review the district court's denial of that motion de novo, viewing the evidence in the light most favorable to Russell as the non-moving party and drawing all reasonable inferences in her favor. *See Harper*, 533 F.3d at 1021; *Wallace v. City of San Diego*, 479 F.3d 616, 624 (9th Cir. 2007).

1. Walmart timely filed a notice of appeal of the district court's order entering final judgment in favor of Russell on the copyright claims. The notice of appeal was held in abeyance while Walmart's Federal Rule of Civil Procedure 50(b) renewed motion for judgment as a matter of law was pending, and it became effective once the district court denied the motion. *See* Fed. R. App. P. 4(a)(4)(B)(i). We thus have jurisdiction over this appeal.[1]

2. Substantial evidence supports the jury's verdict in favor of Russell as to her three copyrighted lamps. To prevail on her direct copyright infringement claims, Russell had to prove that Walmart engaged in active, volitional conduct that "can reasonably be described as the direct cause of the infringement." *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019) (emphasis omitted) (quoting *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017)). Walmart argued that it did not cause the infringement because it merely hosted the website through which a third-party vendor, Sunsea Grocery ("Sunsea"), sold the infringing lamps.

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[1] We have jurisdiction despite Walmart's failure to appeal the district court's order denying the 50(b) motion because Walmart does not challenge the 50(b) order or its "alteration or amendment" of the final judgment. Fed. R. App. P. 4(a)(4)(B)(ii); *see Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007).

At trial, Russell introduced the product listings into evidence. The listings did not contain Sunsea's name; instead, they stated that the lamps were "[s]old & shipped by Walmart." Russell also introduced Walmart's merchandise agreement with Sunsea, which stated that Walmart "assumes title to the Merchandise at the time the Merchandise is received by the shipping carrier." Additionally, she presented evidence that Walmart designates the shipping carrier used by third-party drop-ship vendors ("DSVs") like Sunsea, and that those DSVs—unlike other third-party vendors who sell in their own name—ship products sold on Walmart.com using Walmart's carrier account. Walmart also handles returns of products sold by DSVs. And buyers of those products pay Walmart directly, not the DSVs.

This evidence provides more than adequate support for the jury's verdict as to the lamps. Even if the jury believed that Sunsea produced the infringing lamps, it could reasonably believe that Walmart took legal title to the lamps and actively controlled their sale, shipment, and return. Although Walmart introduced some evidence that Sunsea shipped the infringing lamps without its involvement, the jury was not required to believe Walmart over Russell. *See Harper*, 533 F.3d at 1023. Viewing the evidence in the light most favorable to Russell, Walmart caused the infringement of her copyrighted lamps.

3. Substantial evidence does not support the jury's verdict in favor of Russell as to her two copyrighted photographs. To prove that Walmart directly caused the infringement of her photographs, Russell had to provide "some evidence showing [Walmart] exercised control (other than by general operation of its website); selected [her photos] for upload, download, transmission, or storage; or instigated any copying, storage, or distribution of

[her] photos." *Zillow*, 918 F.3d at 732 (quoting *Giganews*, 847 F.3d at 666, 670) (cleaned up). Passive activities, "such as automatic copying, storage, and transmission of copyrighted materials, when instigated by others, do not render an Internet service provider strictly liable for copyright infringement." *Id.* (quoting *Giganews*, 847 F.3d at 670) (cleaned up).

Russell did not carry her burden of proving that Walmart itself engaged in volitional conduct by posting or approving the listings that used her photographs. To be sure, Russell presented evidence that Walmart had the ability to control the listings of DSVs like Sunsea. But "the *possibility* that images might be moderated and tagged—conduct that is volitional—is not sufficient to transform [Walmart] from a passive host to a direct cause of the display of [Russell's] images." *Zillow*, 918 F.3d at 737 (cleaned up). Indeed, Walmart referenced internal records at trial to demonstrate that it did not approve, monitor, or otherwise change Sunsea's listings. Walmart also explained that the "[s]old & shipped by Walmart" label was automatically added to listings posted by third-party DSVs like Sunsea. In other words, Walmart did not play an active role in the selection and distribution of the copyrighted photographs. Much like the website owners in *Zillow* and *Giganews*, Walmart merely provided an online platform onto which Sunsea, a third-party DSV, uploaded the infringing content. *See Zillow*, 918 F.3d at 738 (finding no direct liability where a website owner institutes an automatic process for responding to users' input); *Giganews*, 847 F.3d at 669 (explaining that there was no direct infringement because the plaintiff "failed to show that the distribution does not happen automatically"). Russell fails to satisfy the substantial-evidence standard not because we find Walmart's evidence to be more con-

vincing than hers, but because she presented no evidence from which we can draw the reasonable inference that Walmart posted or controlled the listings at issue. The jury's verdict that Walmart directly infringed on Russell's copyrights therefore cannot stand.

Russell also did not present adequate evidence for the jury to find Walmart secondarily liable for Sunsea's infringement of the photographs.[2] Russell did not present evidence that Walmart materially contributed to or induced Sunsea's infringement, which is necessary to prove contributory liability. *Zillow*, 918 F.3d at 745. And Russell did not present evidence that Walmart had a direct financial interest in the infringing activity, which is necessary to prove vicarious liability. *Id.* at 746.

4. Because we reverse in part, we vacate the district court's order granting attorneys' fees and costs and remand to the district court to reconsider the award in light of Russell's partial success on her copyright claims. In awarding attorneys' fees, the district court should consider, among other things, the "amount of fees that is reasonable in relation to the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (discussing factors to consider).

AFFIRMED in part, REVERSED in part, and VACATED and REMANDED in part.

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[2] Walmart did not waive its defense to secondary liability in its oral motion at trial for judgment as a matter of law. Fed. R. Civ. P. 50(a). In its motion, Walmart argued that Russell failed to prove its liability for copyright infringement, which is sufficient to preserve the issue for appeal. *See Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989).

DESAI, Circuit Judge, concurring in part and dissenting in part:

I agree that substantial evidence supports the jury's verdict finding Walmart liable for infringement of Russell's copyrighted lamps. I part ways with the majority's decision to set aside the jury's verdict against Walmart for copyright infringement as to Russell's copyrighted photographs. Because our review of jury verdicts is highly deferential, and Russell presented adequate evidence for the jury to find Walmart liable for infringement of the photographs, I would affirm. I thus respectfully dissent in part.

"A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Unicolors, Inc. v. Urb. Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1021 (9th Cir. 2008)). We "must view all evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in the favor of the non-mover, and disregard all evidence favorable to the moving party that the jury is not required to believe." *Harper*, 533 F.3d at 1021. "Given the sanctity of the jury process, we undertake this review with special care and reluctance to overturn a verdict." *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 736 (9th Cir. 2019).

To prevail on her direct infringement claim, Russell had to prove that Walmart engaged in active conduct that "can reasonably be described as the direct cause of the infringement." *Id.* at 731 (emphasis omitted) (quoting *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017)). Russell clearly met that burden. She presented substantial evidence at trial that Walmart posted the listings that contained her copyrighted photographs. She introduced the listings into evidence, which stated that the lamps

were "[s]old & shipped by Walmart." The listings contained no indication that Sunsea had any involvement. Indeed, Walmart's former employees confirmed that the listings gave no indication that anyone other than Walmart created them.

Even if the jury believed that Sunsea posted the listings, Russell also presented substantial evidence that Walmart exercised control over the listings. Sunsea had to provide Walmart with the photographs used in the listings before they could be posted. Additionally, Russell introduced evidence that Walmart employees can edit the content of listings posted by third-party vendors and have done so in the past, retaining "final" say over the content.

Thus, viewing the evidence in Russell's favor, as we must, the jury could reasonably infer that Walmart posted or controlled the listings that infringed on Russell's photographs. This active conduct establishes Walmart's direct liability. *Cf. id.* at 733 (finding no direct infringement where users upload photos to Zillow's site and Zillow exercises no control over the photos other than general operation of the site and automated systems designed to avoid copyright infringement). Our inquiry should end there. The jury's verdict should be affirmed.[1]

The majority errs in requiring more from Russell. First, it improperly reweighs the evidence in Walmart's

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[1] Substantial evidence also supports the jury's verdict that Walmart did not prove its affirmative defense under section 512(c) of the Digital Millen[n]ium Copyright Act. 17 U.S.C. § 512(c). To prevail on its affirmative defense, Walmart had to prove that it "adopted and reasonably implemented" a repeat infringer policy. 17 U.S.C. § 512(i)(1)(A). Russell presented substantial evidence that Walmart did not reasonably implement its policy because it failed to "terminate[ ] users who repeatedly or blatantly infringe copyright" on Walmart.com. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

favor. The majority relies on Walmart's evidence that it was not involved in posting the listings, but the jury was not required to believe Walmart or find its witnesses credible. Indeed, Russell repeatedly impeached Walmart's witnesses during trial. "[I]t was entirely within the jury's prerogative to find more credible [Russell's] version of the facts." *Harper*, 533 F.3d at 1023. The majority errs in relying on Walmart's evidence, rather than discarding it. *Id.* at 1021.

Second, the majority erroneously reanalyzes Russell's evidence with a fine-toothed comb. The standard of review is whether Russell provided substantial evidence—which she did—not whether she provided undisputed evidence. Russell's evidence need not be conclusive or undisputed for us to affirm the jury verdict in her favor. "It is the function of the jury, not of this court, to weigh conflicting evidence and judge the credibility of witnesses." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985). The majority ignores this bedrock principle and usurps the jury's judgments for its own. In doing so, the majority undermines and lowers our high standard for overturning jury verdicts.

The majority may view the evidence differently or find Russell's evidence unconvincing. But the majority is not the jury. Russell presented sufficient evidence for the jury to find Walmart liable for copyright infringement on all counts. We must uphold our obligation to strongly safeguard jury verdicts. I would affirm in full.[2]

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[2] Because I would affirm the jury verdict on all five counts of copyright infringement, I would also affirm the district court's attorneys' fees award. The district court did not abuse its discretion because it reduced the award by a reasonable amount to account for Russell's limited success. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

District courts retain broad discretion to determine the exact reduction amount in these situations. *Id.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROXANA TOWRY RUSSELL,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 23-55542

D.C. NO. 2:19-CV-05495-MWF-JC
Central District of California, Los Angeles

ROXANA TOWRY RUSSELL,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 24-592

D.C. NO. 2:19-CV-05495-MWF-JC
Central District of California, Los Angeles

ORDER

Filed August 28, 2024

Before: SCHROEDER, M. SMITH, and HURWITZ, Circuit Judges.

The motion to dismiss appeal No. 23-55542 for lack of jurisdiction and to strike portions of the opening brief (Docket Entry No. 25 in No. 23-55542; Docket Entry No. 19 in No. 24-592) is denied without prejudice to renewing the arguments in the answering brief. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

The motion to extend time to file the consolidated answering brief (Docket Entry No. 28 in No. 23-55542; Docket Entry No. 22 in No. 24-592) is denied as unnecessary. *See* 9th Cir. R. 27-11. The consolidated answering brief is due September 30, 2024. The optional consolidated reply brief is due within 21 days after service of the consolidated answering brief.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA —
WESTERN DIVISION

ROXANA TOWRY RUSSELL,
Plaintiff,

vs.

WALMART, INC., ET AL.,
Defendants.

2:19-CV-5495-MWF

The Honorable Michael W. Fitzgerald,
United States District Judge

DISTRICT COURT RULING ON
DEFENDANTS' RULE 50(A) MOTION

FEBRUARY 9, 2023

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* * * * *

[699] THE COURT. Is there a motion from the defense?

MS. DELFINER: Yes, Your Honor. Walmart moves for judgment as a matter of law.

THE COURT: On which claims?

MS. DELFINER: On all of them, Your Honor.

THE COURT: And the basis for that, starting with copyright?

MS. DELFINER: Starting with copyright, the basis is the DMCA defense, which Walmart has proven—or excuse me, no reasonable jury could reach the conclusion that Walmart has not proven. Apologies for the double negative.

THE COURT: And as to the Lanham Act-ish claims, the unfair competition or false advertising claims?

MS. DELFINER: For unfair competition and false advertising, Your Honor, the plaintiff has failed to make a sufficient showing of confusion as a—and no reasonable jury could find that they have proven confusion here.

THE COURT: All right. And what about—in that case—and obviously, if I were to agree with that, there would not be punitive damages. But as to punitive damages, standing alone, I assume that you are moving as to those damages. What is your argument as to that?

MS. DELFINER: Yes, Your Honor. There is simply no evidence of—excuse me—malice, oppression—malice, oppression, or fraud on this record.

And also, Your Honor, we do have arguments, in the alternative, in case Your Honor decides against us on the DMCA. We believe there is also a motion for judgment as a matter of law and [sic] causation.

THE COURT: All right. The claim that gives rise, putatively, to punitive damages is a California law claim, California law applies. And there is not only the standard requirement for the elements that you just said, but also for some form of corporate ratification. In your view, could a

rational jury determine that there was corporate ratification here?

MS. DELFINER: Certainly not, Your Honor.

THE COURT: And let me hear from the plaintiff.

MR. RUTTENBERG: Would you like me to address all of those issues or just the last one?

THE COURT: You can address all of them, so there is a record.

MR. RUTTENBERG: So I think there is, in the record, quite extensive evidence to support a judgment on all of the elements. And I'll start with the copyright cases.

I think on copyright law, Your Honor, not only—we think there is evidence that if something says it's sold and shipped by Walmart, that it was sold and shipped by Walmart. So I think that alone—and I think as Your Honor found in the summary judgment stage, I think it's still true that that is still evidence to go to the jury.

And second of all, there is evidence on a number of other theories, one of which is agency. And, you know, this is one of the issues I think we have talked about for some time.

The reason that the Ninth Circuit in the Mavrix case, you know, found that the DMCA defense doesn't apply—excuse me, Your Honor, I have something in my throat—is because they said that you have to look at agency principles for figuring out whether the third party's liability is attributable to the defendant.

And that is something that has actually been discussed in further case law, and even applied—I'm sorry, Your Honor, I'm losing my voice.

It's something that has been applied in other future cases on the agency theory, pretty extensively, for the—

well, I don't know "pretty extensively." But it's been applied for the volitional conduct element as well. And we cited a case for that and filed a brief on that this morning or this afternoon.

The case on that is the Judge Carney case from 2020. It's the Sid Avery case, in which—in that case, Judge Avery (Sic) was considering a summary judgment motion, much like this JMOL, on the volitional conduct and causation point.

And Judge Carney—Judge Carney also pointed to Mavrix and, for that matter, other Supreme Court case law that says, when you look at liability, you have to apply agency, including apparent and actual authority. So for both sides, the DMCA and the volitional conduct.

And so the result of that is that you can't grant JMOL or summary judgment, for that matter—excuse me—when there is evidence of conduct taken by Walmart's employees or by anyone that would be attributed to Walmart as an agent.

And I think the evidence here is actually pretty extensive on both, as it relates to the copyright case. But I think on the agency, it's pretty clear when you have someone that is authorized to act in their name. But in a minimum, they are an ostensible agent.

THE COURT: Anything else?

MR. RUTTENBERG: Yeah. On the Lanham Act claims, I'll go through those, the allegation that there is no confusion I think is wrong, for two reasons. And again, these are the same reasons that Your Honor addressed in denying summary judgment, and I think they still hold.

The first reason is that the confusion is presumed once you show that something is false. And when you have someone selling on Walmart's—when Walmart is offering

a lamp that is not Ms. Russell's lamp, but they use her picture to offer the lamp, that is evidence that—of a false statement in advertising. It's also a false attribution of origin. And therefore, the other elements are actually presumed.

Beyond that, there is evidence that people would be confused. You don't have to prove that one specific person was confused. You just have to prove—to the extent you have to prove it at all, the question is not actual confusion, but the likelihood of confusion.

And there is evidence that people saw the listing and thought that Ms. Russell was suddenly on Walmart. There is evidence from Ms. Ziegler that talks about how the pictures are really important, because if you have the wrong picture on there, it's going to cause, and does cause, confusion. So I think the evidence there is actually quite extensive.

Addressing the fraud element, I think there is a couple of issues there. I think, number one, even on things like fraud, and there is—in punitive damages, there is Supreme Court—United States Supreme Court case law. We cited the AFSCME case from 1982, which is an interesting case. It's in the antitrust context, Your Honor.

In that case, the Supreme Court held—I apologize, I'm losing my voice. But in AFSCME, the Supreme Court held that in an antitrust case, even for punitive damages, you can look at the relationship to figure out whether or not punitive damages are available. Because—and it's because that such a—it's a fundamental aspect of how do you act as a corporation.

And in fact, in that case and in the Judge Carney case, I think they are talking about suppliers and whether the corporation can be held not just responsible for its

employees' levels, but also for the suppliers. And then I think on the punitive side—I think that goes also to the fraud.

And on the punitive damages case, Your Honor, I think what we've had here is—I think there is a lot of conflicting evidence about a number of different things. And I think there are some allegations that were misunderstood, at least by the defendants. We haven't come along and said that Walmart changed their system.

What we said is a couple of things. Number one, Walmart has a system that enables people to change it. Number two, Walmart covered up what it did in front of Your Honor, in front of us, in front of the jury.

They submitted a declaration saying that it was a Marketplace seller, when they knew it wasn't, because they knew that that would be a problem for them. I think some of that is attributable to Walmart, itself, not just the witness and putting that witness in that position.

I think Walmart has a system in place, and I think the evidence is pretty strong, that if someone doesn't get approved as a Marketplace seller, they have a workaround. That Walmart set up.

And this is something that wasn't set up by an individual. It's obviously someone that is a managing member of Walmart that set this up, that said, Well, let's figure out how we can still make money from the seller, and we just won't tell anybody. We won't tell anybody that it's a—it's a, you know, ABC Company, or Sunsea, or whoever it is. What we'll do is we'll just let them list themselves as Walmart. Then the seller is happy, because they can sell, and Walmart can still make $3.7 million in revenue in six months.

And I think there is evidence that the profit motive is what enabled Walmart, and encouraged Walmart, to do that for so long.

And I think Your Honor should know this: The impression I've gotten from the depositions is, there may have been changes to Walmart's system, and I don't—maybe Ms. Johnson someday will tell us if that is true or not. But those changes have been made, in large part, to the issues that we have raised in this very case. And I don't think that goes to the jury.

THE COURT: May I remind you, Counsel, that specifically through the Federal Rules of Evidence, subsequent remedial measures are not relevant to show—

MR. RUTTENBERG: I haven't argued to the jury, I haven't, but they have come up in the form of the witnesses. And I think it's—but I think it goes to the issues that we have uncovered here, Your Honor.

I'm not bringing it up as evidence that—as to why there is fraud. I'm bringing it up as evidence as to why what we uncovered here was so oppressive, and why Walmart's efforts to cover it up, after we uncovered it, were oppressive. And I do think that warrants a finding of punitive damages in this case. And I do think it was something that was set up at a very high level.

THE COURT: The motion is denied. There is—there is potentially liability on Walmart's part for both copyright and the non-registered trademark Lanham Act issues, which also involve California law.

However, the motion is granted for punitive damages under California law, which applies here. No rational jury could conclude that there was the corporate ratification necessary to justify punitive or exemplary damages. And that is even giving the benefit of the doubt for this ruling

that the fraud, oppression, or malice could possibly be shown.

You know, issues of that sort have a place in the case. Some of these factual arguments relate to whether there is vicarious or contributory infringement, and whether there is willfulness for the statutory damages, but not for punitive damages.

So that will be—that is the ruling, and the jury instructions will be drafted consistent with that.

All right. Thank you, Counsel. I have to get ready for my hearing. Ms. Diaz needs a break before the hearing.

And then when the hearing is done, I will talk to you about the draft jury instructions.

(Thereupon, the Court was in recess.)

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROXANA TOWRY RUSSELL,
D/B/A ROXY RUSSELL DESIGN

Plaintiff,

v.

WALMART INC., a Delaware corporation;
WAL-MART.COM USA, LLC, a California Limited Liability Corporation

Defendant[s].

CASE NO. 2:19-CV-5495-MWF(JCX)

The Honorable Michael W. Fitzgerald,
United States District Judge

JUDGEMENT AFTER TRIAL

This action came on regularly for jury trial between February 7, 2023 and February 14, 2023, in Courtroom 5A of this United States District Court. Plaintiff Roxanna Russell was represented by Guy Ruttenberg, Esq. and Bruce D. Kuyper Esq. of Ruttenberg IP Law, a Professional Corporation. Defendant Walmart Inc., and Wal-Mart.com USA, LLC (collectively "Walmart") was represented by Bijal V. Vakil, Esq., Jeremy T. Elman, Esq., Rebecca Delfiner, Esq., and Craig D. Gaver, Esq. of Allen and Overy, LLP.

A jury of eight persons was regularly empaneled and sworn. Witnesses were sworn and testified, and exhibits were admitted into evidence.

After Plaintiff Roxana Russell rested, Defendant Walmart made a motion pursuant to Federal Rule of Civil Procedure 50(a) for a judgment as a matter of law as to all claims. The Court denied the Motion except as to the issue of punitive damages, which were available only for the unfair competition claim under California common law. The Court held that there was insufficient evidence for a reasonable jury to find that there was corporate ratification of the conduct giving rise to Plaintiff Roxana Russell's claims as required for an award of punitive damages under California law. Accordingly, the Motion was **GRANTED** on the issue of punitive damages.

Before the action was submitted to the jury, the Court also concluded that Plaintiff Roxana Russell's unfair competition claim under California common law was duplicative of her federal false designation of origin claim. Therefore, the Court withdrew that claim from the jury and advised that it would direct the verdict on that claim in accordance with the jury's verdict on the federal false designation of origin clam.

The Court also concluded that Plaintiff Roxana Russell's unfair competition claim under California Business and Professions Code section 17200 was derivative of the other claims being submitted to the jury and the damages, if any, would be awarded by the Court given only equitable remedies are available for that claim. Therefore, the Court withdrew the statutory unfair competition law claim from the jury and advised that it would direct the verdict on that claim.

JURY VERDICT

After hearing the evidence and arguments of counsel, the eight-person jury was duly instructed by the Court and the cause was submitted to the jury. The jury deliberated and thereafter returned a verdict as follows:

COPYRIGHT INFRINGEMENT CLAIMS

QUESTION NO. 1:

Did Plaintiff Roxana Russell prove that Defendant Walmart is liable for copyright infringement of the following copyrighted materials (based on direct infringement or vicarious infringement or contributory infringement)?

A. Medusa photograph: __X__ YES _____ NO
B. Polyp photograph: __X__ YES _____ NO
C. Medusa sculpture: __X__ YES _____ NO
D. Polyp sculpture: __X__ YES _____ NO
E. Ophelia sculpture: __X__ YES _____ NO

If you answered YES to any of Question Nos. 1A-1E, please answer Question No. 2.

If you answered NO to all of Question Nos. 1A-1E, please skip to Question No. 8.

QUESTION NO. 2:

Did Defendant Walmart prove that it is entitled to the online service provider affirmative defense (Digital Millennium Copyright Act)?

YES ____ NO __X__

If you answered YES, please skip to Question No. 8.

If you answered NO, please answer Question No. 3.

QUESTION NO. 3:

What amount of actual damages do you award Plaintiff Roxana Russell based on Defendant Walmart's copyright infringement?

$ 22,000

Please answer Question No. 4.

QUESTION NO. 4:

What amount of Defendant Walmart's profits do you award Plaintiff Roxana Russell based on Defendant Walmart's copyright infringement?

$ $5,000

Please answer Question No. 5.

QUESTION NO. 5:

Did Roxana Russell prove independent economic value for two or five copyrighted "works"?

X Five Works (as claimed by Plaintiff Roxana Russell)

_____ Two Works (as claimed by Defendant Walmart)

If you answered "Five Works", please answer Question No. 6.

If you answered "Two Works", please skip to Question No. 7.

QUESTION NO. 6:

For each of the five works, what amount of statutory damages do you award Plaintiff Roxana Russell?

Your award must be between $750 and $30,000 per work, or up to $150,000 per work if you find that the infringement of that work was willful.

A. Medusa photograph: $ $15,000

B. Polyp photograph: $ $15,000

C. Medusa sculpture: $ $15,000

D. Polyp sculpture: $ $15,000

E. Ophelia sculpture: $ $15,000

Please skip to Question No. 8.

QUESTION NO. 7:

For each of the two works, what amount of statutory damages do you award Plaintiff Roxana Russell?

Your award must be between $750 and $30,000 per work, or up to $150,000 per work if you find that the infringement of that work was willful.

A. Photographs $ _____

B. Sculptures $ _____

Please answer Question No. 8.

CLAIMS FOR FALSE ADVERTISING AND UNFAIR COMPETITION

QUESTION NO. 8:

Did Plaintiff Roxana Russell prove that Walmart is liable for false advertising?

YES _____ NO X

Please answer Question No. 9.

QUESTION NO. 9:

Did Plaintiff Roxana Russell prove that Walmart is liable for unfair competition (false designation of origin)?

YES _____ NO X

If you answered YES to either Question Nos. 8 ***or*** *9, please answer Question No. 10.*

If you answered NO to both Question Nos. 8 ***and*** *9, please sign and return this form.*

QUESTION NO. 10:

What amount of damages do you award Plaintiff Roxana Russell for the costs of corrective advertising?

$ NONE $0.00

THE COURT'S DIRECTED VERDICT

Pursuant to the jury's verdict on the federal false designation of origin claim (Question No. 9), the Court hereby directs the verdict in favor of Defendant Walmart on Plaintiff Roxana Russell's unfair competition claim under California common law.

Pursuant to the jury's verdict on all claims submitted to it, the Court hereby directs the verdict in favor of Defendant Walmart on Plaintiff Roxana Russell's statutory unfair competition claim under California Business and Professions Code section 17200.

To the extent Plaintiff Roxana Russell's statutory unfair competition claim is premised on violations of the Copyright Act, it is preempted by federal law. *See Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1074 (N.D. Cal. 2016) ("To the extent that Plaintiff brings this [UCL] claim based on conduct involving subject matter covered by the Copyright Act, the claim is preempted if it implicates rights contained in that Act.") (citing *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998)). Accordingly, because Plaintiff Roxana Russell prevailed only on her copyright infring[e]ment claims, the jury's verdict does not support a finding of liability on

Plaintiff Roxana Russell's California statutory unfair competition law claim, and the Court need not award equitable damages.

ELECTION OF DAMAGES ON COPYRIGHT CLAIM

On February 15, 2023, the Court Ordered Plaintiff to file a notice confirming her election of damages as to the copyright infring[e]ment claims. (Order (Docket No. 359)).

Pursuant to the Court's Order, Plaintiff filed a Notice of Election of Damages on February 21, 2023, electing the statutory damages awarded by the jury's verdict as to the copyright infring[e]ment claims in the amount of $75,000.00. (Notice (Docket No. 368)).

FINAL JUDGMENT

Now, therefore, pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that final judgment in this action be entered as follows:

1. *On Plaintiff Roxana Russell's claim for relief for violations of the Copyright Act (17 U.S.C. § 501) (Counts I-III in Complaint):*

   Judgment is entered in favor of Plaintiff Roxana Russell and against Defendant Walmart in the amount of $75,000.00.

2. *On Plaintiff Roxana Russell's claim for relief for violations of the Lanham Act (15 U.S.C. § 1125(a)), premised on Defendant Walmart's false designation of origin (Count IV in Complaint):*

Judgment is entered in favor of Defendant Walmart. Plaintiff Roxana Russell shall take nothing on her false designation of origin claim.

3. *On Plaintiff Roxana Russell's claim for relief for violations of the Lanham Act (15 U.S.C. § 1123(a)), premised on Defendant Walmart's alleged false advertising (Count V in Complaint):*

   Judgment is entered in favor of Defendant Walmart. Plaintiff Roxana Russell shall take nothing on her false advertising claim.

4. *On Plaintiff Roxana Russell's California common law unfair competition claim (Count VI in Complaint):*

   Judgment is entered in favor of Defendant Walmart. Plaintiff Roxana Russell shall take nothing on her common law unfair competition claim.

5. *On Plaintiff Roxana Russell's statutory unfair competition claim (Cal. Bus. & Prof. Code § 17200, et. seq.) (Count VII in Complaint):*

   Judgment is entered in favor of Defendant Walmart. Plaintiff Roxana Russell shall take nothing on her statutory unfair competition claim.

6. Plaintiff may seek to recover attorney's fees and costs as provided by law.

Dated: May 16, 2023.

s/ Michael W. Fitzgerald
MICHAEL W. FITZGERALD
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

CASE NO. CV 19-5495-MWF (JCx)

Date: August 17, 2023

TITLE: ROXANA TOWRY RUSSELL v. WALMART INC. ET AL

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None Present	None Present

Proceedings (In Chambers):

ORDER RE: DEFENDANTS' MOTION FOR JUDGMENT PURSUANT TO RULE 50(b) [386]

Before the Court is Defendants Walmart Inc. and Wal-Mart.com USA, LLC (collectively "Walmart") Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b), filed on June 13, 2023. (Docket No. 386). Plaintiff

Roxana Towry Russell filed an Opposition to the Rule 50(b) Motion on July 24, 2023. (Docket No. 416). Walmart filed a Reply on July 31, 2023. (Docket No. 419).

The Motion was noticed to be heard on **August 21, 2023**. The Court read and considered the papers on the Motion and deemed the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15. The hearing was therefore **VACATED** and removed from the Court's calendar.

The Motion is **DENIED**. There was sufficient evidence for the jury to find that Plaintiff proved copyright infring[e]ment on at least one of the three alternative theories and that Walmart failed to prove entitlement to the Digital Millennium Copyright Act ("DMCA") defense.

I. LOCAL RULE 7-3

Plaintiff argues that the Motion should be denied based on Walmart's failure to comply with Local Rule 7-3. (Opp. at 9-10). Plaintiff contends that Walmart deliberately ignored or declined repeated requests from Plaintiff to discuss any post-trial motions. (*Id.* at 9). Plaintiff also points out that the Motion fails to include a certification of compliance with Local Rule 7-3. (*Id.*). Plaintiff argues that Walmart's failures to comply with the spirit and letter of Local Rule 7-3 prejudiced her because Plaintiff would have brought her own Rule 50(b) motion if she knew Walmart planned to bring such a motion. (*Id.* at 10).

Walmart responds that the parties discussed the relevant issues through multiple correspondences after trial and there was no need to further meet and confer to discuss the substance of the contemplated motion because the parties agreed to stand on their positions. (Reply at 11).

Based on the Court's review of the correspondence attached to the Opposition and Walmart's failure to include a certificate of compliance with its Motion, it seems clear that Walmart failed to substantially comply with Local Rule 7-3. While the Court takes the Local Rules seriously and has previously denied motions for failure to comply, the Court does not believe there was substantial prejudice or that further conferences of counsel would have led to a different outcome. Plaintiff contends that she believes she "was vindicated at trial, so she has no reason to bring her own post-trial motions," and therefore, it is unclear to the Court why Plaintiff's decision as to whether to bring her own Rule 50(b) motion should have turned on Walmart's decision to bring such a motion. Plaintiff has defended the outcome of the trial in her Opposition and if she wished to bring an affirmative Rule 50(b) motion, Walmart's failure to confer did not altogether prevent her from doing so. The Court also notes that Walmart's counsel has repeatedly stated its intention to appeal in this action, and so, in the Court's view, the Motion should not have come as much of a surprise. While the Court does not condone Walmart's violations of the Local Rules, the Court will nonetheless decide the merits of the Motion given the lack of substantial prejudice to Plaintiff.

II. BACKGROUND

The parties are by now quite familiar with the factual background of this action, which are fully set forth in the Court's prior summary judgment orders, the First Motion for Summary Judgment Order ("FMSJ Order"), granting in part and denying in part Plaintiff's Motion for Summary Judgment (Docket No. 135), and the Second Motion for Summary Judgment Order ("SMSJ Order"), denying Walmart's Motion for Remand to the Register of Copyrights and for Summary Judgment (Docket No. 162). The

Court also recounted the relevant procedural history in the Judgment After Trial (Docket No. 374). Accordingly, the Court will not repeat all of those facts here but incorporates by reference the factual and procedural background from its prior orders.

On or about June 24, 2019, Plaintiff filed this action against Walmart for copyright infringement, violations of the Lanham Act, and for unfair competition under California common law and California Business & Professions Code § 17200. As for the copyright infring[e]ment claim, Plaintiff alleged that Walmart infringed five copyrighted materials: two pictorial works (both registered under a group copyright registration, U.S. Copyright Registration No. VA 1-765-599) and three sculptural works (each registered under a group registration, U.S. Copyright Registration No. VA 1-765-597). Plaintiff contended that Walmart infringed on her copyrighted photographs by storing the photographs on their servers and displaying copies on Walmart's online e-commerce website through publishing product listings that offered to sell the sculptures depicted in the photographs (the "Product Listings"). And Plaintiff argued that Walmart infringed her copyrighted sculptures by selling inferior replicas of her physical sculptures ("the Replica Products").

Walmart disputed that it published (or caused to be published) the photographs in connection with the Product Listings or that it sold any of the Replica Products, but rather, contended that a third-party retailer, Sunsea Grocery ("Sunsea") displayed the photographs in the Product Listings and sold the Replica Products.

After Plaintiff Roxana Russell rested, Defendant Walmart made a motion, pursuant to Rule 50(a) for a judgment as a matter of law. Walmart argued that Plaintiff failed to prove causation for direct infring[e]ment; that a

rational jury could not find against it on the DMCA defense; and that Plaintiff failed to offer sufficient evidence to award punitive damages. The Court denied the motion except as to the issue of punitive damages, which were available only for the unfair competition claim under California common law. The Court held that there was insufficient evidence for a reasonable jury to find that there was corporate ratification as required for an award of punitive damages under California law. Plaintiff also made a Rule 50(a) motion but does not renew that motion herein.

The case was submitted to the jury after a five-day trial. The jury found in favor of Plaintiff on copyright infring[e]ment for five separate works and against Defendant on the DMCA defense. Based on the copyright infring[e]ment claim, the jury awarded Plaintiff $28,000 in actual damages or $75,000 in statutory damages, and Plaintiff subsequently elected to receive the latter award. (Judgment After Trial (Docket No. 374)). The jury found in favor of Walmart on all other claims.

On February 15, 2023, the Court Ordered Plaintiff to file a notice confirming her election of damages as to the copyright infring[e]ment claims. (Order (Docket No. 359)). Pursuant to the Court's Order, Plaintiff filed a Notice of Election of Damages on February 21, 2023, electing the statutory damages awarded by the jury's verdict as to the copyright infring[e]ment claims in the amount of $75,000.00. (Notice (Docket No. 368)).

The Court entered judgment on May 16, 2024. Walmart filed its Rule 50(b) motion on June 13, 2023.

III. RELEVANT JURY INSTRUCTIONS AND VERDICT FORM

The Court has reproduced the relevant jury instructions and verdict form regarding the copyright infring[e]ment claim and the DMCA defense as follows:

JURY INSTRUCTION NO. 21

Direct Copyright Infringement—Causation

To establish Defendant Walmart's liability on any of Plaintiff Roxana Russell's direct copyright infringement claims, Plaintiff Roxana Russell must prove by the preponderance of the evidence that Defendant Walmart was the cause of the infringement.

To establish causation, Plaintiff Roxana Russell must produce evidence showing Defendant Walmart exercised control (other than by general operation of its website) over the display of the allegedly infringing photographs and/or the distribution of the sculptures. Plaintiff Roxana Russell may show such control by proving that Defendant Walmart selected the allegedly infringing material(s) for upload, download, transmission, or storage; or instigated any copying, storage, or distribution of Plaintiff Roxana Russell's copyrighted photographs or sculptures. In other words, Defendant Walmart is liable for direct copyright liability if you find that Defendant Walmart was actively involved in the infringement

However, passive participation, such as automatic copying, storage, and transmission of copyrighted materials, when instigated by a party other than Defendant Walmart, does not render Defendant Walmart liable for direct copyright infringement.

JURY INSTRUCTION NO. 24

Verdict on Copyright Infring[e]ment Claims

If, for any of the copyrighted materials, you find Plaintiff Roxanna Russell proved each of the elements described in these instructions for direct infringement ***or*** vicarious infring[e]ment ***or*** contributory infringement, you should find for Plaintiff Roxanna Russell on the copyright claim for that material.

If, on the other hand, for any of the copyrighted materials, you find Plaintiff Roxanna Russell failed to prove one or more elements for direct infringement ***and*** vicarious infringement ***and*** contributory infring[e]ment, your verdict should be for Defendant Walmart for the copyright claim for that material.

JURY INSTRUCTION NO. 25

Online Service Provider Affirmative Defense (Digital Millennium Copyright Act)

Defendant Walmart contends that it is an online service provider and therefore is not liable for copyright infringement because the infringement was caused by information residing on Defendant Walmart's systems or networks at the direction of users. This affirmative defense is provided by a law called the Digital Millennium Copyright Act.

Defendant Walmart is entitled to prevail on this affirmative defense if Defendant Walmart proves all of the following elements by a preponderance of the evidence:

1. Defendant Walmart adopted, reasonably implemented and informed users of a policy to terminate users who are repeat copyright infringers;

2. Defendant Walmart is facing liability for copyright infringement based on information residing on its systems or networks at the direction of users;

3. Defendant Walmart lacked actual knowledge that the material or activity on the system or network was infringing;

4. while having the right and ability to control the infringing activity, Defendant Walmart did not receive a financial benefit directly attributable to the infringing activity; and

5. either: a. Defendant Walmart was not aware of facts or circumstances from which the specific infringing activity was apparent, or b. upon obtaining knowledge or awareness or upon receiving a valid notification of claimed infringement, Defendant Walmart acted expeditiously to remove or disable access to the material.

If you find Defendant Walmart has proved all of these elements, Defendant Walmart is entitled to prevail on this affirmative defense.

If, on the other hand, you find that Defendant Walmart has failed to prove all of these elements, Defendant Walmart is not entitled to prevail on this affirmative defense.

(Final Jury Instructions (Docket No. 358)).

JURY VERDICT FORM

COPYRIGHT INFRINGEMENT CLAIMS

QUESTION NO. 1:

Did Plaintiff Roxana Russell prove that Defendant Walmart is liable for copyright infringement of the following copyrighted materials (based on

direct infringement ***or*** vicarious infringement ***or*** contributory infringement)?

Medusa photograph: __X__ YES _____ NO

Polyp photograph: __X__ YES _____ NO

Medusa sculpture: __X__ YES _____ NO

Polyp sculpture: __X__ YES _____ NO

Ophelia sculpture: __X__ YES _____ NO

If you answered YES to any of Question Nos. 1A-1E, please answer Question No. 2.

If you answered NO to all of Question Nos. 1A-1E, please skip to Question No. 8.

QUESTION NO. 2:

Did Defendant Walmart prove that it is entitled to the online service provider affirmative defense (Digital Millennium Copyright Act)?

YES ____ NO __X__

If you answered YES, please skip to Question No. 8.

If you answered NO, please answer Question No. 3.

QUESTION NO. 3:

What amount of actual damages do you award Plaintiff Roxana Russell based on Defendant Walmart's copyright infringement?

$ 22,000

Please answer Question No. 4.

QUESTION NO. 4:

What amount of Defendant Walmart's profits do you award Plaintiff Roxana Russell based on Defendant Walmart's copyright infringement?

$ $5,000

Please answer Question No. 5.

QUESTION NO. 5:
Did Roxana Russell prove independent economic value for two or five copyrighted "works"?

__X__ Five Works (as claimed by Plaintiff Roxana Russell)

_____ Two Works (as claimed by Defendant Walmart)

If you answered "Five Works", please answer Question No. 6.

If you answered "Two Works", please skip to Question No. 7.

QUESTION NO. 6:
For each of the five works, what amount of statutory damages do you award Plaintiff Roxana Russell?

Your award must be between $750 and $30,000 per work, or up to $150,000 per work if you find that the infringement of that work was willful.

Medusa photograph:	$ $15,000
Polyp photograph:	$ $15,000
Medusa sculpture:	$ $15,000
Polyp sculpture:	$ $15,000
Ophelia sculpture:	$ $15,000

Please skip to Question No. 8.

(Jury Verdict Form (Docket No. 367)).

IV. DISCUSSION

A. Legal Standard

Walmart contends that it is entitled to judgment as a matter of law, under Federal Rule of Civil Procedure 50(b)

because Plaintiff failed to prove causation, which is necessary to support a theory of direct infring[e]ment and because Walmart sufficiently proved its entitlement to the DMCA defense.

Juries perform a vital role in our system of justice. As triers of fact, jurors become a part of the court itself, and judges are "rarely entitled to disregard jury verdicts that are supported by substantial evidence." *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003). But on occasion, the Federal Rules of Civil Procedure do permit a Court to enter judgment as a matter of law. *See* Fed. R. Civ. P. 50(b).

The party seeking to overturn the jury's verdict, however, "wages an uphill battle." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004). Even when a verdict is inconsistent, the Seventh Amendment requires the court to reconcile the inconsistency in any possible way. *Norris v. Sysco*, 191 F.3d 1043, 1048 (9th Cir. 1999) ("When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdict as expressing a coherent view of the case . . . .") (quoting *Toner v. Lederle Labs.*, 828 F.2d 510, 512 (9th Cir.1987)). The trial court may even assume that "the jury's lay understanding of a particular legal concept differs from the court's" when attempting to harmonize specific discrepancies. *Floyd v. Laws*, 929 F.2d 1390, 1396 (9th Cir. 1991). Only when all such efforts fail may the court set aside the jury's verdict and enter judgment for the opposing party as a matter of law.

When presented with a motion for judgment as a matter of law, "the court . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Rather, the court must view all evidence "in the light most

favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (quoting *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006)). The appropriate test is whether "the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.*

B. Discussion

Walmart's Motion essentially asks the Court to disregard all evidence that supports Plaintiff's theory of the case and draw all inferences in its favor, which the Court may not do. The Court, therefore, summarily denies the Motion for all the reasons previously stated on the record, argued by Plaintiff, and as explained in the FMSJ and SMSJ Orders.

Specifically, the Motion must be denied for the following reasons:

First, there was sufficient evidence for a jury to conclude that Walmart "caused" the copyright infring[e]ment of the photographs and sculptures. Walmart's arguments to the contrary require the Court and jury to disregard the differences between two types of sellers that participate on Walmart's online marketplace: Marketplace Sellers and Direct Ship Vendors ("DSVs"). But there was evidence at trial that there are significant differences between these types of sellers. While Marketplace Sellers act as third parties, operating independently from Walmart, according to Walmart's own policies and certain testimony, sales from DSV listings are considered first-party sales, meaning Walmart is actively involved with, and has "final say" as to what is displayed and sold pursuant to, DSV listings. Because there was evidence that the Product Listings undisputedly indicated that the Replica Products were "Sold and shipped by Walmart," the jury

was free to conclude that the relevant Product Listings were subject to Walmart's DSV policies and procedures. Accordingly, based on reasonable inferences from the evidence, a rational jury could conclude that Walmart was actively involved in the infring[e]ment beyond mere operation of its website.

Specifically, the following evidence supported the jury's finding that Walmart directly instigated the copying, storage, and/or display of the copyrighted photographs:

- the Product Listings stated the Replica Products were "Sold and shipped by Walmart" (Trial Ex. 35 (Docket No. 386-5));
- testimony that the product listings associated with DSVs will appear to consumers as products being "Sold and shipped by Walmart" (Trial Tr. 2/8/23 at 292:5-8) (Docket No. 401));
- that Walmart category specialists or managers must approve companies before they can sell on walmart.com as DSVs (*id.* at 316:23-317:23);
- that before a "product can be offered or marketed or sold" on Walmart's website, DSVs must provide Walmart with "product images [and] product descriptions" (*id.* at 375:14-18);
- that the photographs associated with the Product Listings were stored on Walmart's servers and displayed by Walmart (*id.* at 423:25-424:3, 424:21-25); and
- that Walmart's category specialists "have the final say when it comes to the content that appears on Walmart.com" (*id.* at 319:3-320:21) and "can essentially override the decisions in the content uploaded by the suppliers." (*id.* at 230:22-25).

The above evidence was sufficient for the jury to find "causation" or "volitional conduct" for direct infring[e]ment. *See VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) (to establish causation for direct infring[e]ment, the plaintiff must produce "some evidence showing the alleged infringer exercised control (other than by general operation of its website)") (internal alterations and citations omitted); *see also Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065, 1081-82 (9th Cir. 2021) ("Here, VisitUSA.com did not merely function as an online platform where third-party users independently upload and share materials [internal citation omitted], but rather a website managed (and updated) by Wilmott itself, which included the data then stored on the website's servers, including the Indianapolis photo . . . . As a result, Wilmott's actions assuming responsibility for and maintaining the server are clearly the most important causes of the public display of the Indianapolis photo.") (internal quotation marks and citations omitted).

To the extent that Walmart suggests that the jury could not rely on a reasonable inference from the circumstantial evidence to conclude that Walmart was more than passively involved in the display of copyrighted photographs on the relevant Product Listings, but instead needed direct evidence that a specific person at Walmart performed a specific act with respect to the Product Listings, the Court rejects that argument. As the jury instructions explained, the jury was free to weigh circumstantial evidence equally with direct evidence. (See Jury Instruction No. 7).

As for the sculptures, there was sufficient evidence for the jury to conclude that Walmart is liable for causing the distribution of the copyrighted sculptures based on the evidence that Walmart took title over the infringing replicas and itself designated shipping arrangements to deliver the

sculptures to customers. (*See* Trial Tr. 2/8/23 at 296:22-24, 305:7-16, 307:17-19, 308:4-12, 309:9-15, 392:24-25, 412:25-413:3 (Docket No. 401), Tr. Ex. 36 (Direct Ship Vendor Agreement) at 13 (Docket No. 416-8)) (cumulative evidence regarding Walmart's role in shipping products sold via DSV listings). Such conduct is sufficiently "volitional" to render it directly liable. *See, e.g., Atari Interactive, Inc. v. Redbubble, Inc.*, 515 F. Supp. 3d 1089, 1113 (N.D. Cal. 2021), *aff'd in part, appeal dismissed in part*, No. 21-17062, 2023 WL 4704891 (9th Cir. July 24, 2023) ("Since Redbubble actively instigates and exercises control over the sales on its website, a reasonable jury could find that Redbubble is liable for direct infringement[.]").

Second, even if there was insufficient evidence of causation to support a finding of direct infringement, "a jury's verdict may stand on a legally viable theory even if a legally defective theory also was presented." *Webb v. Sloan*, 330 F.3d 1158, 1166 (9th Cir. 2003). The Ninth Circuit has held that courts can, in their discretion, "construe a general verdict as attributable to a theory submitted to the jury that was viable." *Id.* (citing *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990)). "In deciding whether to exercise this discretion, the factors [to] consider are: (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories." *Id.* at 1166-67. The Court applies this principle to the answer to a question on a special verdict form that allows a finding of liability on multiple theories, i.e., the contributory and/or vicarious liability theories as well (Question No. 1).

Walmart does not suggest that there was juror confusion; does not challenge the weight of the evidence supporting vicarious or contributory liability; and does not suggest that the causation issue infected the secondary liability theories. Moreover, the DMCA defense applies equally to direct and secondary copyright infring[e]ment, and if successful, would have absolved Walmart of liability regardless of which theory of infring[e]ment the jurors choose. Therefore, the factors weigh in favor of upholding the verdict on the secondary liability theories.

While Walmart tries to argue in the Reply that it has preserved challenges to the secondary liability theories, the Court rejects such an argument. In its pre- and post-verdict Motions, Walmart only moved on the issues of causation and the DMCA defense; it has never advanced any basis for directing a verdict as to the secondary copyright infring[e]ment theories. In other words, Walmart has never pointed to any specific element of the secondary liability theories that Plaintiff failed to prove. Therefore, any challenges to those theories are waived.

In any event, for the reasons stated here and which were apparent at trial, Walmart's challenges to the secondary liability theories are without merit.

Third, the jury could reasonably conclude that Walmart failed to prove each of the elements required to establish the DMCA defense, most evidently that Walmart reasonably implemented a policy to terminate repeat copyright infringers as applied to DSVs and that it did not financially benefit from the infringing activity while having the right and ability to control the infringing activity. (*See* Opposition at 20, 22-23). The Court also agrees with Plaintiff that the jury was free to ignore much of the contrary testimony from Walmart's two corporate witnesses based on their lack of personal knowledge and/or credibility. (*Id.*

at 22 (citing testimony in which Walmart's witnesses explained that they lacked knowledge regarding key evidence); *see also id.* at 24 (citing multiple instances in which Walmart's witnesses were impeached)).

Accordingly, the Rule 50(b) Motion is **DENIED**.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

CASE NO. CV 19-5495-MWF (JCx)

Date: January 2, 2024

TITLE: ROXANA TOWRY RUSSELL v. WALMART INC. ET AL

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None Present	None Present

Proceedings (In Chambers):

ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES [410]

Before the Court is Plaintiff Roxana Towry Russell's Motion for Attorneys' Fees filed on July 10, 2023 (the "Motion"). (Docket No. 410). Walmart filed an Opposition to

the Fee Motion on July 24, 2023. (Docket No. 415). Plaintiff filed a Reply on July 31, 2023. (Docket No. 422).

The Court has read and considered the papers submitted in connection with the Motion and held a hearing on **August 21, 2023**.

The Motion is **GRANTED *in part***, in that the amounts awarded are less than those that Plaintiff seeks in the Motion.

Plaintiff seeks $1,651,332.50 in attorneys' fees and $28,703.56 in costs. In response, Walmart argues that Plaintiff is not entitled to any attorneys' fees and that, even if she were, she should recover no more than 10% of the requested fees and costs. The Court considers the parties' specific arguments but rejects both parties' numerical suggestions. Instead, the Court awards **$1,486,199.25 in attorneys' fees** and **$28,703.56** in costs based on the reasons detailed as follows:

- **Attorneys' Fees:**
    - The Court determines that Plaintiff, as the prevailing party, is entitled to recover reasonable attorneys' fees under the Copyright Act.
    - As for the number of reasonable hours worked, the Court has applied a modest 5% across-the-board cut to the hours to account for block-billing entries.
    - The Court concludes that Plaintiff may not recover the entirety of her request based on her limited success at trial and therefore applies an additional 5% cut. The Court will also mitigate that reduction based on Walmart's aggressive litigation approach.

- Therefore, the Court awards Plaintiff **$1,486,199.25** [$1,651,332.50 x 0.90] in attorneys' fees.

- **Costs:**
  - Because the costs appear reasonable, the Court declines to exercise its discretion to impose a percentage reduction based on Plaintiff's limited success, assuming the Court even has such discretion regarding costs.
  - Therefore, the Court awards Plaintiff **$28,703.56** in costs.

Dropping the third person for a moment, I note that these amounts are quite a bit more than what I indicated when I issued a written tentative before the hearing, which in keeping with my standard practice is not part of the record. As Plaintiff's counsel persuasively argued at the hearing, I placed too much weight in the tentative on Walmart's settlement offer. I make this point here so the transcript of the hearing will be more intelligible.

I. BACKGROUND

The parties are by now quite familiar with the factual background of this action, which are fully set forth in the Court's prior summary judgment orders, the First Motion for Summary Judgment Order ("FMSJ Order"), granting in part and denying in part Plaintiff's Motion for Summary Judgment (Docket No. 135), and the Second Motion for Summary Judgment Order ("SMSJ Order"), denying Walmart's Motion for Remand to the Register of Copyrights and for Summary Judgment (Docket No. 162). The Court also recounted the relevant procedural history in the Judgment After Trial (Docket No. 374). Accordingly, the Court will not repeat all of those facts here but

incorporates by reference the factual and procedural background from its prior orders.

On or about June 24, 2019, Plaintiff filed this action against Walmart for copyright infringement, violations of the Lanham Act, and for unfair competition under California common law and California Business & Professions Code section17200. As for the copyright infringement claim, Plaintiff alleged that Walmart infringed five copyrighted materials. Plaintiff contended that Walmart infringed on her copyrighted photographs by storing the photographs on its servers and displaying copies on Walmart's online e-commerce website (the "Product Listings"). And Plaintiff argued that Walmart infringed her copyrighted sculptures by selling inferior replicas of her physical sculptures ("the Replica Products").

After a five-day trial, the jury found in favor of Plaintiff on copyright infringement for all five works. The jury awarded Plaintiff $28,000 in actual damages or $75,000 in statutory damages, and Plaintiff subsequently elected to receive the latter. (Docket Nos. 368, 374). The jury found in favor of Walmart on all other claims.

The Court entered judgment on May 16, 2024. (Docket No. 374). Plaintiff filed her Motion for Attorneys' Fees on July 10, 2023. (Docket No. 410).

II. DISCUSSION

For any civil action under the Copyright Act, the district court has discretion to award the "recovery of full costs by or against any party other than the United States or an officer thereof," including "a reasonable attorney's fee to the prevailing party." 17 U.S.C. § 505. In applying § 505, the Court must (1) determine whether Plaintiff is the "prevailing party," (2) decide whether to exercise its discretion to award attorneys' fees, and (3) if warranted,

calculate the amount of the award. *See Cadkin v. Loose*, 569 F.3d 1142, 1147 (9th Cir. 2009).

A. Eligibility

Plaintiff is the prevailing party because the jury found in her favor for copyright infringement and awarded $75,000 in statutory damage. *See id.* at 1148 ("[A] 'prevailing party' is one who has been awarded some relief by the court." (citation omitted)). The Court also denied Walmart's motion to set aside the judgment. (Docket No. 429).

Walmart argues, and the Court agrees, that being the prevailing party is not enough alone to warrant a fee award. (Opp. at 8-9). However, Walmart does not dispute that the jury found in Plaintiff's favor on her copyright claim. (Opp. at 8).

Accordingly, the Court finds that Plaintiff is a "prevailing party" for purposes of § 505 and is therefore eligible for attorneys' fees.

B. *Fogerty* Factors

When determining whether to award attorneys' fees, courts may consider factors such as frivolousness, motivation, objective unreasonableness of factual and legal issues, and the need for compensation and deterrence. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994). The Ninth Circuit also instructs courts to consider "the degree of success obtained" and "the purposes of the Copyright Act." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 675 (9th Cir. 2017) (finding that the district court did not abuse its discretion in awarding $5,637,352.53 in fees and costs to a prevailing defendant because the decision was well-supported by the record and consistent with the purposes of the Copyright Act).

1. The Copyright Act's Purpose

"The most important factor in determining whether to award fees under the Copyright Act, is whether an award will further the purposes of the Act." *Mattel, Inc. v. MGA Ent., Inc., 705 F.3d 1108*, 1111 (9th Cir. 2013). "The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public." *Fogerty*, 510 U.S. at 524. "Inherent in the Act's purpose is that a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies." *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1041 (9th Cir. 2018) (internal quotation marks and citation omitted).

Plaintiff's case "fits squarely within the tradition of copyright enforcement." *Id.* As the jury found, Walmart's Product Listings and the Replica Products infringed on five of Plaintiff's copyrighted works. This infringement is contrary to the Act's purpose of "encouraging the production of original expression" or "enriching the general public through access to creative works." *Id.* at 524, 527. Nor is this "a case of the infringer creating something new and incorporating a copyrighted element into that new, creative work." *Id.*

Walmart contends that its zealous defense also furthered the purposes of the Act. The Court recognizes that "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Fogerty*, 510 U.S. at 527. At trial, Walmart relied on its sole defense under the Digital Millennium Copyright Act, which was reasonable. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016) ("If a plaintiff has a claim that hinges on

disputed facts sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide the case in the plaintiff's favor."). However, Walmart proffered mostly meritless defenses repeatedly throughout this litigation.

For example, Walmart argued that Plaintiff was not the valid author of the copyrighted works. (*See* FMSJ Order at 10). The Court rejected this defense as meritless because Walmart failed to offer any evidence disputing Plaintiff's ownership of the photographs. (*See id.* at 11-13). Nevertheless, without seeking reconsideration, Walmart repeatedly disputed the authorship issue in its motion to remand, motion for summary judgment, motion in limine, and proposed jury instructions. (*See* SMSJ Order at 11, 14-15; Proposed Jury Instructions (Docket No. 222) at 39; Motions in Limine Order (Docket No. 324) at 8). The Court also rejected eight out of nine affirmative defenses proffered by Walmart at summary judgment. (*See* FMSJ Order at 17). Specifically, the Court found that Walmart failed to offer any evidence supporting its fair use defense or first sale doctrine defense. (*See id.* at 6).

As such, this factor weighs in favor of awarding attorneys' fees and costs.

2. Objective Unreasonableness and Frivolousness

Courts "should give substantial weight to the objective reasonableness of the losing party's position." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 199-200 (2016). "[T]he mere fact that [the non-movant] lost cannot establish his objective unreasonability." *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1181 (9th Cir. 2013). A position is objectively unreasonable if the losing party "should have known from the outset that its chances of success in this

case were slim to none." *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013).

Walmart acted unreasonably by proffering defenses that it knew were meritless. Most of Walmart's affirmative defenses wholly lacked evidentiary support and were rejected by the Court. Nevertheless, Walmart continued to stand by these defenses despite its failure to seek reconsideration of the Court's rulings. Thus, at the very least, nearly all of Walmart's defenses became virtually frivolous. *See Greg Young Publ'g, Inc. v. Zazzle, Inc.*, No. CV 16-04587-SVW (KSx), 2018 WL 1626053, at *5 (C.D. Cal. Mar. 21, 2018) ("A claim is frivolous when it "lacks an arguable basis either in law or in fact." (citation omitted)).

As to Plaintiff's conduct in this case, Plaintiff prevailed on all her copyright claims on the merits. Her claims were clearly neither frivolous nor unreasonable nor pursued in bad faith.

Accordingly, the Court finds that these factors weigh in favor of awarding attorneys' fees.

3. Compensation and Deterrence

The Court also determines that a fee award would compensate Plaintiff for the work done in pursuing her meritorious copyright claims. (Motion at 19-20; Reply at 6-9). There is no need to deter meritorious copyright claims, especially those brought by small, independent artists (like Plaintiff) against multibillion dollar corporations (like Walmart).

Walmart argues that the Court must balance fee awards against deterring reasonable defenses. (*See* Opp. at 9-10). But, as the Court previously noted, most of Walmart's defenses and tactics were unreasonable.

Walmart further contends that awarding attorneys' fees would "encourage litigation against big companies."

(Opp. at 11). However, § 505 of the Copyright Act was meant to serve this exact purpose of "encouraging private enforcement and deterring infringements." *Botts v. Kompany.com*, No. 09-00195, 2013 WL 12137690, at *7 (C.D. Cal. Apr. 10, 2013) (citing *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989)).

Accordingly, the factors of compensation and deterrence also weigh in Plaintiff's favor.

4. Degree of Success Obtained

Plaintiff argues that the degree of her success obtained at trial weighs in favor of a fee award because she succeeded on all five claims of copyright infringement against Walmart. (Motion at 23). In response, Walmart contends that the Court should deny attorneys' fees because Plaintiff had a low degree of success as she recovered only 10% of the damages sought and lost on most claims. (Opp. at 15-16).

But Walmart's argument regarding Plaintiff's purportedly low degree of success misses the mark because "[a]ctual success in an infringement action involves establishing the defendant's liability . . . even if damages awarded are nominal or nothing." *Glacier Films*, 896 F.3d at 1038 (citing *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 787 (9th Cir. 2006)). Moreover, for purposes of this analysis, it is immaterial that Plaintiff lost her Lanham Act and unfair competition claims since she prevailed on all her copyright claims. *See Shame On You Prods., Inc. v. Banks*, 893 F.3d 661, 668 (9th Cir. 2018) (holding that the district court "did not abuse its discretion in placing a greater emphasis on the outcome of the Copyright Act claim" because "[t]he focus in the fees determination is whether successful prosecution or successful defense of the action furthers the purposes of the Copyright Act" (internal quotation marks and citation omitted)).

Because Plaintiff obtained a high degree of success by prevailing on all five copyright infringement claims, the Court finds that this factor weighs in Plaintiff's favor. And, based on the totality of the factors discussed, the Court finds that Plaintiff is entitled to attorneys' fees.

C. Attorneys' Fees Calculation

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," otherwise known as the "lodestar method." *Vogel v. Harbor Plaza Ctr., LLC*, 893 F.3d 1152, 1159 (9th Cir. 2018) (citation omitted). "Although in most cases, the lodestar figure is presumptively a reasonable fee award, the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (citation omitted).

The following chart presents the final calculation of the lodestar amount for work performed between January 2019 and June 2023:

Biller	**Hourly Rate**	**Compensable Hours**	**Total**
Guy Rutten-berg	$650-$775	724.2	$508,516.00
Steve Papazian	$440-$530	1,309.1	$595,029.50
Bruce Kuyper	$650	594.8	$386,620.00
Michael Eshaghian	$400	46.0	$18,400.00

Primo Solis	$210-$220	209.7	$46,079.00
Hiroko Yokomizo	$170	89.1	$15,147.00
Eyal Yadin	$170	97.3	$16,541.00
Total		**3,070.2**	**$1,586,332.50**

(*See* Declaration of Guy Ruttenberg ("Ruttenberg Decl.") (Docket No. 410-1), ¶52, Ex. A (Docket No. 410-2)). Plaintiff also request an additional $65,000 in fees for July and August 2023, for a total of $1,651,332.50. (*See id.* at ¶54).

1. Hourly Rate

"To determine a 'reasonable hourly rate,' the district court should consider: 'experience, reputation, and ability of the attorney; the outcome of the results of the proceedings; the customary fees; and the novelty or the difficulty of the question presented.'" *Hiken v. Dep't of Defense*, 836 F.3d 1037, 1044 (9th Cir. 2016) (quoting *Chalmers v. City of L.A.*, 796 F.2d 1205, 1211 (9th Cir. 1986)). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1224 (9th Cir. 2016) (quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)). "Once a fee applicant presents such evidence, the opposing party 'has a burden of rebuttal that requires submission of evidence . . . challenging the accuracy and reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits.'" *Chaudhry*,

751 F.3d at 1110-11 (quoting *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008)).

Here, Plaintiff's counsel submitted extremely detailed billing records for work performed. (*See* Ruttenberg Decl., ¶46, Ex. A). Mr. Ruttenberg's declaration and the attached invoices demonstrate that four attorneys—Mr. Ruttenberg, Steve Papazian, Michael Eshaghian, and Bruce Kuyper—and three law clerks—Primo Solis, Hiroko Yokomizo, and Eyal Yadin—billed fees to Plaintiff. (*Id.* ¶¶17-29).

From January 2019 up through June 20, 2023, Mr. Ruttenberg's and Mr. Papazian's hourly rates ranged from $625 to $775 and $420 to $530, respectively. (*Id.* ¶31). According to Mr. Ruttenberg's declarations, these rates are within the range of hourly rates charged by attorneys with similar levels of experience practicing intellectual property law in Southern California. (*Id.* ¶33). The Court finds that these rates are reasonable in light of Mr. Ruttenberg's over twenty-three years of experience litigating intellectual property matters and Mr. Papazian's focus on intellectual property litigation since at least 2012. (*Id.* ¶¶23-24). *See Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (SHx). 2015 WL 1746484, at *15, 20 (C.D. Cal. Mar. 24, 2015) (finding similar rates reasonable in light of prevailing markets rates for attorneys of similar experience, skill, and reputation), *aff'd*, 847 F.3d 657 (9th Cir. 2017). Likewise, Mr. Eshaghian's billing rate of $400 and Mr. Kuyper's of $650 are also reasonable. (*Id.* ¶31). As for the law clerks and staff, Mr. Solis' hourly rate ranged from $210 to $220, and Ms. Yokomizo's and Mr. Yadin each charged $170. (*Id.* ¶32). The Court also finds these rates reasonable. *Id.* (finding similar rates for staff reasonable). Moreover, Walmart does not challenge the hourly rates in its Opposition.

Upon review of the declaration and invoices, the Court determines that the hourly rates are reasonable.

2. Hours Billed

In support of the Motion, Plaintiff submits over 300 pages of billing records. Although additional attorneys and staff worked on this case, Plaintiff's counsel only billed for work performed by the four attorneys and three staff members noted above. (*Id.* ¶37). Walmart raises several points in arguing for a reduction, all of which are unpersuasive.

First, Walmart further contends that Plaintiff's billing entries are vague, clerical, inefficient, redundant, and violate the rule against block billing. (*See* Opp. at 25; Declaration of Jeremy Elman ("Elman Decl."), Ex. E (Docket No. 415-6)). But Walmart's conclusory assertions and annotations to Plaintiff's billing records fall short of rebutting the presumption that Plaintiff's detailed time entries are unreasonable [sic]. *See Hiken*, 836 F.3d at 1045 ("The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits." (citation omitted)). Although not required, it would have been helpful if Walmart had provided, by way of comparison, counter declarations "indicating the amount of time it expended in litigating this case." *Chalmers*, 796 F.2d at 1214. And contrary to Walmart's position, the prevailing party may recover fees for clerical work. *See Perfect 10, Inc.*, 2015 WL 1746484, at *20.

Second, Walmart contends that Plaintiff's invoices are dubious, pointing to the fact that Plaintiff's lead counsel billed thirty-three hours in a single day. (Opp. at 25). However, this alleged error appears to be a result of

Walmart's own edits to the invoice. A closer look at Plaintiff's billing entry shows that Mr. Ruttenberg actually billed thirty-three hours on two separate days: 21.5 hours on February 9, 2023, and 11.5 hours on February 10, 2023. (*Compare* Ruttenberg Decl., Ex. A, at 280 *with* Elman Decl., Ex. E, at 279).

Third, Walmart argues that the Court should examine the *Kerr* factors to justify a reduction. District courts may adjust the lodestar amount by examining the *Kerr* factors, including "whether the fee is fixed or contingent." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *abrogated on other grounds by City of Burlington v. Dague*, 505 U.S. 557 (1992). The Court need not discuss all factors "but only those called not question by the case at hand." *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002) (citation omitted).

Walmart only raises the sixth Kerr factor regarding contingency fees, arguing such a fee arrangement encourages lawyers "to work more hours since the client might get stuck with the bill." (Opp. at 6, 11). But the case law is mixed on this point. In fact, the Ninth Circuit has found that contingency fee arrangements may justify an upward fee adjustment due to the risk and delay involved in such cases. See *Clark v. City of L.A.*, 803 F.2d 987, 991 (9th Cir. 1986).

The Court thus finds that Plaintiff's lodestar is basically reasonable but does impose a 5% "haircut" for the use of block billing. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[T]he district court can impose a small reduction, no greater than 10 percent—a 'haircut'—based on its exercise of discretion and without a more specific explanation.); *see also Welch v. Metro. Life. Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (recognizing that district courts have authority to make

across-the-board cuts for block billing because it "makes it more difficult to determine how much time was spent on particular activities"). Accordingly, the modified lodestar is **$1,568,765.88** [$1,651,332.50 x 0.95].

3. Discretionary Adjustments

Notwithstanding Walmart's unavailing arguments, the Court exercises its discretion to make downward adjustments to Plaintiff's lodestar to ensure a reasonable fee award. Because of the voluminous billing records, the Court does not engage in a line-by-line analysis. "[W]hen faced with a massive fee application the district court has the authority to make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee application." *Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992) (internal quotation marks and citation omitted). When making broad percentage cuts, the district court must "set forth a 'concise but clear' explanation of its reasons" for doing so. *Id.* at 1400.

Walmart argues that the Court should exclude or reduce time expended on unsuccessful claims, such as Plaintiff's unfair competition and Lanham Act claims. (Opp. at 20-24). To address Walmart's contention, the Court must engage in a two-part analysis: (1) whether Plaintiff failed to "prevail on claims that were unrelated to the claims on which [she] succeeded," and (2) whether Plaintiff "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

Step 1 - Relatedness of Claims: The parties do not dispute that "a party entitled to attorney's fees as a prevailing party on a particular copyright claim, but not on other claims in the same lawsuit, can only recover attorney's fees incurred in defending against that one claim or any related

claims." *Shame On You Prods., Inc. v. Banks*, 893 F.3d 661, 669 (9th Cir. 2018) (internal quotation marks and citation omitted).

Walmart correctly states that Plaintiff's claims of copyright infringement were separate and distinct from her claims regarding the Lanham Act and unfair competition. (Opp. at 22-23). But just because these claims are distinct does not mean they do not share a "common core of facts" or "related legal theories." *Id.* (internal quotation marks and citation omitted). Contrary to Walmart's argument, all claims arose from Walmart displaying copies of Plaintiff's photographs on its Product Listings and selling the Replica Products. *See id.* at 669-70 (finding that the plaintiff's copyright and breach of contract claims were related because both turned on whether the defendant copied the plaintiff's copyrighted work). Because the claims share a common core of facts, it is of no matter that Plaintiff "insisted on separate jury instructions for each of the [] claims requiring separate factual elements." (Opp. at 22).

Plaintiff is therefore entitled to attorneys' fees on both her prevailing and non-prevailing claims, and the Court proceeds to the next step of this inquiry.

Step 2 - Significance of Overall Relief: Even if successful and unsuccessful claims are related, courts must examine whether "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436 (noting that recovery of full fees is excessive if a plaintiff prevailed "on only one of their six general claims"). "There is no precise rule or formula for making these determinations," but courts should focus on "the significance of the overall relief obtained by the plaintiff" instead of attempting to "divide the hours expended on a claim-by claim basis." *Id.* at 435-36. In doing so, the

district court may consider settlement offers in its analysis. *Jackson v. Gaspar*, No. 19-10450, 2022 WL 2155975, at *5 (C.D. Cal. Feb. 24, 2022) (citing *In* re *Kekauoha-Alisa*, 674 F.3d 1083, 1094 (9th Cir. 2012)) (considering settlement offers in a trademark case).

Based on these cases, the Court agrees with Walmart that this Court has the discretion to reduce the fee award based on success or to mitigate that reduction based on Walmart's aggressive litigation of this action. But the Court disagrees that Walmart's submitted cases mandate a reduction or that the cases give much guidance here—they are simply too distinguishable from our situation. *See Anthony California, Inc. v. Fire Power Co., Ltd.*, No. 15-876, 2018 WL 5816169 (C.D. Cal. 2018) (noting that the plaintiff only prevailed on two out of six copyright claims, in addition to recovering only 8.4% of the damages sought); *Telemasters, Inc. v. Vintage Club Ass'n*, No. CV 05-05139-RGK (VBKx), 2008 WL 11343356, at *1, 4 (C.D. Cal. Aug. 19, 2008) (awarding reduced fees because the plaintiff had limited success by prevailing only on non-copyright claims); *Milton H. Green Archives, Inc. v. Julien's Auction House*, LLC, No. CV 05-7686 AHM (FMOx), 2007 WL 4898364, *2-4 (E.D. Cal. Dec. 20, 2007) (reducing fees not only because the plaintiffs received a fraction of the damages sought but also because they only prevailed due to "the poor lawyering of the defendants' prior counsel" at summary judgment, still lost on the sole issue of damages at trial, and provided "dubious" invoices with inflated rates and overbilling); *Greg Young Publ'g, Inc.*, 2018 WL 1626053, at *3-6 (denying fee request after giving "substantial weight" to the defendant's reasonableness in litigating novel issues of law and considering the fact that the defendant prevailed on some copyright issues at summary judgment and the plaintiffs only won 16.7% of the amount

sought). Therefore, the Court declines to follow the approach taken in those cases.

Walmart also relies on *Lowery v. Rhapsody Int'l, Inc.*, 69 F.4th 994 (9th Cir. 2023), *amended and superseded by* 2023 WL 4933917 (9th Cir. Aug. 2, 2023). (Opp. at 18). But Lowery involved a class action suit, which requires different considerations. *See* 2023 WL 4933917, at *5 ("When evaluating reasonableness, a district court must mainly consider the benefit that class counsel obtained for the class. . . . In particular, district courts awarding fees must expressly consider the value that the settlement provided to the class, including the value of nonmonetary relief, and explain how that justifies the fee award." (citations omitted)).

Here, the Court exercises its discretion to apply an additional 5% cut in light of Plaintiff's failure to prevail on certain claims at trial. Without a way to identify the specific hours related exclusively to the non-copyright claims, a 5% reduction is appropriate and consistent with limited success reductions applied by courts in the Ninth Circuit. *See Garvey School Dist. v. V.S.*, No. 2:19-CV-01248-CAS (JCx), 2020 WL 208807, at *6 (C.D. Cal. Jan. 13, 2020) (collecting cases). The reduction also reflects the Court's view that Plaintiff was required to respond to Walmart's aggressive litigation tactics (and therefore accrue additional and unnecessary attorneys' fees) throughout the history of this action. Accordingly, the modified lodestar is **$1,486,199.25** [$1,651,332.50 x 0.90].

D. Costs

Plaintiff also seeks $28,703.56 in costs. (Mot. at 25). These costs include fees for deposition services, hearing and trial transcripts, printing, and equipment for trial. (Ruttenberg Decl., ¶¶58-68, Ex. B (Docket No. 410-4), Ex. C (Docket No. 410-5), Ex. D (Docket No. 410-6), Ex. E

(Docket No. 410-7)). The Court finds that Plaintiff has provided sufficient detailed accounting of the costs.

Not even Walmart contends that the costs are excessive; rather, Walmart's argument is that any costs "should similarly be proportional to the success that Plaintiff has had in this case overall." (Opp. at 25). Because the costs appear reasonable, the Court declines to exercise its discretion to impose a percentage reduction based on Plaintiff's limited success, assuming the Court even has such discretion regarding costs.

Accordingly, the Court awards Plaintiff **$28,703.56** in costs.

III. CONCLUSION

Plaintiff's Motion is **GRANTED *in part***. Plaintiff is entitled to a fee award of **$1,486,199.25** and **$28,703.56** in costs.

IT IS SO ORDERED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROXANA TOWRY RUSSELL,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 23-55542

D.C. NO. 2:19-CV-05495-MWF-JC
Central District of California, Los Angeles

ORDER

Filed July 11, 2023

When the notice of appeal was filed, a timely motion listed in Federal Rule of Appellate Procedure 4(a)(4) was pending in the district court. Appellate proceedings are therefore held in abeyance until the district court decides the pending motion. *See* Fed. R. App. P. 4(a)(4); *Leader Nat'l Ins. Co. v. Indus. Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994) (notice of appeal becomes effective when timely tolling motions resolved).

To challenge the district court's ruling on the motion, appellants must file an amended notice of appeal within the time set by Federal Rule of Appellate Procedure 4.

The Clerk will serve this order on the district court.

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROXANA TOWRY RUSSELL,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation; WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 23-55542

D.C. NO. 2:19-CV-05495-MWF-JC
Central District of California, Los Angeles

ROXANA TOWRY RUSSELL, Plaintiff Roxana Towry Russell an individual doing business as Roxy Russell Design,

Plaintiff-Appellee,

v.

WALMART INC., a Delaware corporation and WAL-MART.COM USA, LLC, a California Limited Liability Corporation,

Defendants-Appellants.

NO. 24-592

D.C. NO. 2:19-CV-05495-MWF-JC
Central District of California, Los Angeles

ORDER

Filed October 23, 2025

Before: MILLER, LEE, and DESAI, Circuit Judges

The panel has voted to deny appellee's petition and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The panel has unanimously voted to deny appellee's request for publication.

The petitions for rehearing and rehearing en banc are DENIED. The request for publication is DENIED.

APPENDIX I

RELEVANT STATUTES AND RULES

1. Federal Rule of Civil Procedure 50 provides:

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) ***In General.*** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) ***Motion.*** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) ***In General.*** If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) ***Effect of a Conditional Ruling.*** Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

2. Federal Rule of Appellate Procedure 4 provides in relevant part:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case

(1) Time for Filing a Notice of Appeal

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(v) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment

or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

* * * * *

3. Section 501 of Title 17 of the U.S. Code provides in relevant part:

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the 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. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

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