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By email: ddesouza@desouzalaw.com

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Daniel DeSouza, Esquire
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Re: Demand Letter to James Whittle

Dear Mr. DeSouza:

This letter responds to the demand letter that you sent to James Whittle on behalf of Prepared Food Photos, Inc. ("PFP"), contending that the use of a photograph of some fruits and vegetables on the web site of his small acupuncture practice in Asheville, North Carolina infringed your client's copyright in that photograph, and demanding payment of $30,000 to avoid his being sued for damages in excess of that amount as well as an award of attorney fees. As I explain in this letter, Whittle is not going to pay you. Indeed, if you do not promptly retract your threat of litigation, Whittle reserves the possibility of seeking a declaratory judgment in the United States District Court for the Western District of North Carolina, and an award of attorney fees based on the clearly unreasonable threat to seek such a large amount of damages, including your threat to seek statutory damages and attorney fees which you should know cannot possibly be awarded.

First, although you and I have not communicated about your client until this week, I am very familiar with your client's record of making unreasonable demands. In that regard, I have seen many demand letters by the Higbee firm on behalf of your client's predecessor company, AdLife Marketing and Communications ("AdLife"), making damages demands based on its current marketing scheme despite the fact that, when the images were first used, it made its photos available to stock photo services. It was only in the past few years that AdLife adopted the subscription-only marketing program that you describe in your letter. In past cases, your client was able to say that it had no record of any licensing arrangement only because it was the stock photo service that provided the photos and was paid for the licenses.

For example, the Higbee firm made an outrageous damages demand to a small grocery store chain in Ohio that had used a photo of some sliced cold cuts; the demand letter insisted on a payment of $13,000 in damages for this alleged infringement. It was only after extensive correspondence between the grocery chain and Getty Images that the latter was able to find records of its license. The Higbee firm then dropped its demand.

That situation appears to have been similar to what happened here. Over a dozen years ago, Whittle's former web site creator posted the produce photo on the clinic's web site. The photo's use as early as 2010 can readily be seen on the Internet Archive.[1] Both the email traffic that Whittle has retained, as well as the recollection of his former web designer confirm that Whittle obtained the photo for use in his acupuncture business from iStock photos, a subsidiary of Getty Images.[2] Given how long ago this occurred, we have not yet located the actual license, but if this case is litigated, I am confident that Whittle will be able to show the photo that was properly licensed. Therefore, PFP has no claim for infringement.

Despite the fact that your client derived substantial profits for many years by licensing through stock services, your client has made a regular practice of sending demand letters to the clients of those services, threatening liability for large amounts of damages and attorney fees unless they can establish that they had a license. Given the passage of time, of course, many of the targets of these demands may no longer retain the relevant records; they may even have changed web providers in the meantime. And they may not have lawyers knowledgeable about copyright law readily available to protect their interests. I also share the concern expressed by Getty Images in light of the grocery store situation mentioned above:

> AdLife pulled their content from all Getty Images sites quite a few years ago, which is their right to do. They then began pursuing our customers under the pretense of ensuring that the customer had licensed their content. Many companies have insurance to cover copyright infringement, and AdLife was hoping to capitalize on this since most companies would prefer to pay out a claim through their insurance rather than do some legwork to dispute a claim (or go to court). [Given the potential for substantial damages] this is a lucrative endeavor for AdLife. This is why they have been doing it for so many years.

Your demand letter to Whittle fits this description to a T. If AdLife is ready to have a judge rule on its conduct, Whittle is prepared to litigate this matter.

Second, even if your client had a valid claim for infringement, the damages and attorney fee theories on which you base your demand for $30,000 are absurd, for several reasons. The copyright in the photo was not registered until several years after its first publication; as a result, 17 U.S.C. § 412 forbids any award of statutory damages or attorney fees. Moreover, your client can obtain in

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[1] https://web.archive.org/web/20101231063541/http://blueridgeclinic.com/online-consultations/.

[2] The following URL shows that the photo was carried on iStock's photo database, where it was available royalty free. https://web.archive.org/web/20090612024815/http://www.istockphoto.com/ stock-photo-4461830-mixed-fruits-and-vegetables.php.

actual damages only the lost license fee for the one photo whose copyright was allegedly infringed, not lost license fees for its entire catalogue: "what a willing buyer would have been reasonably required to pay to a willing seller for [the] plaintiffs' work, . . . not what the owner would have charged." *Dash v. Mayweather*, 731 F.3d 303, 313 (4th Cir. 2013); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001). On the iStock photo database, the photo was available for as little as one "credit," or as high as 12 credits for a large version of the photo; the price of 12 credits was $18.00. https://web.archive.org/web/20090615032645/http://www.istockphoto.com/buy-stock-credits-pay-as-you-go.php. Assuming that permission to use the photo was regularly purchased on these terms, these actual market prices provide the measure of your client's damages.

Your demand letter contends that you have secured actual damages awards in the vicinity of $30,000 "many times" for infringement of a copyright in a single food photograph, but the only two cases that you cite were default judgments. If you have any decisions awarding that level of damages in a contested case, we are ready to review the citations. I doubt, however, that you will want to litigate the issue, just as your client's corporate predecessor chose not to pursue claims against Curt Achambault in Seattle and Brian Krueger in North Carolina when they showed their readiness to litigate.

Third, your threat to file suit in Florida is an empty one. Whittle has a strictly local business in western North Carolina. He has no customers in Florida and his website is not directed to Florida. A local business cannot be sued in Florida just because its website can be seen there. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Vision Media TV Group v. Forte*, 724 F. Supp. 2d 1260, 1266 (S.D. Fla. 2010). Unlike *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir. 2008), Whittle did not intentionally direct any tortious conduct toward an entity in Florida, knowing that its injury would be suffered there. Indeed, at the time of the allegedly infringing act of placing the photo on Whittle's web site, the copyright was owned by AdLife, a Rhode Island company. It was not until July 2021 that the owner of your client created a Florida corporation and opted to "convert" AdLife into a Florida entity. Your client cannot force alleged infringers to defend themselves in Florida simply by closing its Rhode Island operation and moving to Florida.

In sum, you have made a baseless demand and Whittle demands a prompt retraction if your client wants to avoid defending a declaratory judgment action in Asheville.

Sincerely yours,

Paul Alan Levy