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Dear Ms. Hausman and Mr. DeSouza:

This letter responds to the demand letter that you sent to Lingerfelt Farms on behalf of Prepared Food Photos, Inc. ("PFP"), contending that the use of a photograph of a raw brisket on the Facebook page of a small family farm in Dinwiddie County, Virginia, infringed your client's copyright in that photograph, and demanding that the farmers pay $30,000 to avoid being sued for damages in excess of that amount as well as an award of attorney fees. The Lingerfelts promptly took down the photo, and they have already sent you a check for $750 to cover your client's claim of infringement.

This is, unfortunately, not the first time that I have communicated with you and other attorneys about your client's sorry record of making unreasonable demands. In that regard, your client's predecessor company, Adlife Marketing and Communications ("Adlife"), formerly made its food photographs available for licensing on an individual basis, but several years ago it adopted the subscription-only marketing program that you describe in your letter, effectively confining use of its photos to large supermarket chains with a frequent need for a variety of food photos. Represented by lawyers whose reputation as copyright trolls is well known to the courts, *e.g.*, *Adlife Mktg. & Commc'ns Co. v. Karns Prime & Fancy Food,* 2023 WL 179840, at *1 (3d Cir. Jan. 13, 2023), your client and its predecessor company have filed hundreds of copyright infringement lawsuits. Adlife issued demand letters demanding payments in the four figures to avoid being sued; after switching to your law firm and changing its name, your client's demand letters escalated to a routine demand of $30,000 in "settlement" of its infringement claims.

Debbie Lingerfelt and her husband John operate Lingerfelt Farms, a family farm that has been operated by the Lingerfelt family for more than ninety years. The farm sells only at local markets in Virginia; no sales are made by mail. On December 28, 2022, Lingerfelt posted a photograph of a raw brisket to the farm's Facebook page. At the time, the farm had four briskets available for sale for prices ranging from just under $57 to $82 and change (price based on the weight), for a total of

$286. Although one Facebook user asked for a price list, no sales resulted.

Lingerfelt usually obtains photos for the farm from a stock photo site, for which the farm pays a modest monthly fee. Even assuming that the brisket photograph that she used was one taken by your client, similar photos are available for licensing on iStock, a subsidiary of Getty Images, for $12. https://www.istockphoto.com/search/2/image?family=creative&phrase=raw%20brisket. That is the market value of the photo she used.

Consequently, even assuming that your client has a valid claim for copyright infringement, the damages and attorney fee theories on which you base your demand for $30,000 are absurd, for several reasons. First, I have examined many of the copyright infringement lawsuits that your client has filed, and it appears that it consistently files suit in the federal court for the district in which the alleged infringer is located—here, the Eastern District of Virginia. And the law in the Fourth Circuit is clear: Your client can obtain in 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); *Hofmann v. O'Brien*, 367 Fed. App'x 439, 442 (4th Cir. 2010) (unpublished). Other circuits follow the same approach. *Gaylord v. United States*, 777 F.3d 1363, 1368 (Fed. Cir. 2015) ("court is not constrained to accept particular practices of the parties on either side"); *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001). Moreover, no sales resulted from the posting of the brisket photo, so that element of a claim for actual damages is entirely absent here.

Indeed, given the number of copyright infringement lawsuits that your client has filed, and the number of demand letters it issues, there is reason to wonder whether your client is mostly in the business of licensing access to its database or mostly in the business of suing for damages and threatening to sue for damages. Even if you had a sound basis for your argument that damages can be based on a licensing practice applied to your client's entire database of photos instead of the market value of the individual photograph whose copyright was allegedly infringed, the suit you have threatened to file will present a factual issue about the nature of your client's real business. Moreover, the prospect of excessive statutory damages may be creating too great an incentive for your client's enforcement efforts, and too great a threat to infringers who cause no significant harm. *See* Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. Cal. L. Rev. 723 (2013). We reserve the possibility of exploring that issue in discovery.

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. You and I discussed this line in your letter when I took you to task for your threat to sue James Whittle, an Asheville, North Carolina acupuncturist, over his use of one of your client's photographs that formerly appeared on a stock photo site, and you

admitted then that you have never won damages for your client on this damages theory in a contested case. It is disappointing that this line continues to appear in your demand letter, which you are apparently using in the expectation that you can take advantage of targets who do not have experienced copyright counsel to inform them how empty this threat is.

Should you litigate your damages theory against an adversary, however, you will lose both your ability to secure such default judgments in the future, and your ability to shake down other alleged infringers with the threat of such liability. That is, no doubt, why your client's corporate predecessor chose not to pursue claims against Curt Achambault in Seattle or against Brian Krueger in North Carolina when it recognized that adversary litigation would be required, and it is undoubtedly why you chose not to pursue James Whittle.

There is one important difference between the Whittle and Krueger situations and this one, in that your client registered its copyright before the Lingerfelts' infringement began, so you would be able to seek an award of statutory damages instead of actual damages, and you could also seek an award of attorney fees if you could show that this is an exceptional case.

But as you have frequently told courts in the course of seeking to have statutory damages awarded after obtaining default judgments, statutory damages should generally bear some relation to the likely amount of actual damages, such as by applying a small multiplier such as two or three times the actual damages. See, for example, your motion for a default judgment in *Prepared Food Photos v. Zein,* 8:22-cv-01924-MSS-AEP, at 13 (M.D. Fla.), citing *Corson v. Gregory Charles Interiors*, 2020 WL 6323863, at *2 (S.D. Fla. Aug. 7, 2020) (courts "generally look to a plaintiff's actual damages and award 2x – 3x to properly account for statutory damages."). *Accord Mon Cheri Bridals v. Cloudflare, Inc.*, 2021 WL 1222492, at *1–2 (N.D. Cal. Apr. 1, 2021); *BMG Rights Mgt. (US) v. Cox Commun.*, 149 F. Supp. 3d 634, 677 (E.D. Va. 2015), *aff'd in part, rev'd in part*, 881 F.3d 293 (4th Cir. 2018). Because the actual damages in this case are about twelve dollars, there would be no reason for a court to award any more than the minimum amount of statutory damages – and Lingerfelt has already sent you a check for that amount.

Similarly, although you could seek an award of attorney fees, such fees would only be awarded if Lingerfelt took unreasonable positions in the litigation, or litigated in an unreasonable manner. But Lingerfelt has behaved in an entirely reasonable manner, promptly removing the photo after receiving your demand letter, and sending you a check for $750, recognizing the minimum award of statutory damages which, indeed, is all you would be likely to get out of such a lawsuit. It is your client that has acted in an unreasonable manner, demanding a payment of $30,000, even though it has no likelihood of recovering nearly that much. Indeed, if you file the lawsuit that you have threatened, it is your client that would be exposing itself to an award of attorney fees. See *Bell v. Oakland Community Pools Project*, 2020 WL 13695114 (N.D. Cal. Oct. 14, 2020), where court awarded attorney fees against a copyright plaintiff in part because "Bell's original demand of $25,000 border[ed] on the extortionate" and effectively "forc[ed the defendant] to choose between

spending money to defend th[e] case or paying [the plaintiff] off in a disproportionate settlement." *Id.* at 3 (cleaned up). If you sue the Lingerfelts, we will ask the Court to make similar findings here. I rather expect that a local judge and local jury will have little patience with the bullying in which your client has been engaged against many individuals and small businesses who can ill afford to hire copyright counsel to defend themselves..

Finally, your threat to file suit in Florida is an empty one. Lingerfelt Farms is a strictly local business in rural Virginia. It has no customers in Florida, and its Facebook page is not directed to Florida, even though it is accessible there. A local business cannot be sued in Florida just because the World Wide Web can be seen there. Unlike *Licciardello v. Lovelady*, 544 F.3d 1280, 1286 (11th Cir. 2008), Lingerfelt did not intentionally direct any tortious conduct toward an entity in Florida, knowing that its injury would be suffered there.

In sum, Lingerfelt has already taken the photo down and paid you as much as your client would likely obtain in any litigation. That should be the end of this controversy. Unfortunately, in response to your receipt of their check, your paralegal demanded a payment of $23,000. Lingerfelt is not going to pay any more than the $750 check that you have already received. To quote Steve Miller and Woody Allen, it's time for you to "take the money and run."

Sincerely yours,

Paul Alan Levy