

1 David J. Williams (CA State Bar No. 236919)
2 dwilliams@mabr.com
3 MASCHOFF BRENNAN
4 100 Spectrum Center Drive, Suite 1200
5 Irvine, California 92618
6 Telephone: (949) 202-1900
7 Facsimile: (949) 453-1104

8 C.J. Veverka (*pro hac vice forthcoming*)
9 cveverka@mabr.com
10 Alexis K. Juergens (*pro hac vice forthcoming*)
11 ajuergens@mabr.com
12 MASCHOFF BRENNAN
13 1389 Center Drive, Suite 300
14 Park City, Utah 84098
15 Telephone: (435) 252-1362
16 Facsimile: (435) 252-1361

17 ATTORNEYS FOR DEFENDANT MOSCHINO, S.P.A.

18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**

20 **SPLASH NEWS AND PICTURE**
21 **AGENCY, LLC,**

22 *Plaintiff,*

23 v.

24 **MOSCHINO S.P.A., JEREMY SCOTT,**
25 **and BELCALIS MARLENIS**
26 **ALMANZAR p/k/a CARDI B,**

27 *Defendants.*

Case No.: 2:19-cv-9220
Hon. George H. Wu

ANSWER AND COUNTERCLAIMS
BY DEFENDANT MOSCHINO S.P.A.
TO COMPLAINT

DEMAND FOR JURY TRIAL

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOSCHINO S.P.A.,
Counterclaimant,
v.
**SPLASH NEWS AND PICTURE
AGENCY, LLC, ELDER ORDONEZ,
and DOES 1-10, inclusive,**
Counterdefendants.

1 Defendant Moschino S.P.A. (“Moschino” or “Defendant”), by and through its
2 counsel, state the following Answer and Counterclaims in response to Plaintiff Splash
3 News and Picture Agency, LLC’s (“Splash” or “Plaintiff”) Complaint.

4 1. Moschino lacks the knowledge or information sufficient to form a belief
5 about and to definitively confirm the truth or complete accuracy of the allegations and
6 information in paragraph 1, and on that basis denies the same.

7 **JURISDICTION AND VENUE**

8 2. The allegations in this paragraph are legal arguments and/or conclusions,
9 therefore no response is required. To the extent the allegations are construed to allege any
10 facts, they are denied, except that Moschino admits that Splash purports to bring an
11 action for copyright infringement and that subject matter jurisdiction appears to be proper
12 in this Court.

13 3. Moschino admits that it transacts business and has agents in the State of
14 California and that Jeremy Scott is its Creative Director. The remaining allegations in this
15 paragraph are legal arguments/or conclusions, and therefore no response is required.
16 Moschino denies any remaining allegations of paragraph 3 of the Complaint.

17 4. Moschino lacks knowledge or information sufficient to form a belief about
18 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
19 4, and on that basis denies the same.

20 5. Moschino lacks knowledge or information sufficient to form a belief about
21 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
22 5, and on that basis denies the same

23 6. Moschino admits, on information and belief, that venue appears to be proper
24 in this Court.

25 ///

26 ///

27 ///

28

PARTIES

1
2 7. Moschino lacks knowledge or information sufficient to form a belief about
3 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
4 7, and on that basis denies the same.

5 8. Moschino lacks knowledge or information sufficient to form a belief about
6 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
7 8, and on that basis denies the same.

8 9. Moschino admits that it is organized and existing under the laws of Italy and
9 that it conducts business in this District. Moschino also admits that it sells high-end
10 apparel and is among fashion’s most prominent names, selling products at its own
11 boutique stores and other stores around the world. Moschino denies any remaining
12 allegations of paragraph 9 of the Complaint.

13 10. Moschino admits that Jeremy Scott is its Creative Director. Moschino lacks
14 knowledge or information sufficient to form a belief about and to definitively confirm the
15 truth or complete accuracy of the allegations in paragraph 10, and on that basis denies the
16 same.

17 11. Moschino lacks knowledge or information sufficient to form a belief about
18 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
19 11, and on that basis denies the same.

20 12. The allegations in this paragraph are legal arguments and/or conclusions,
21 therefore no response is required. To the extent the allegations are construed to allege any
22 facts, they are denied.

BACKGROUND FACTS

A. The Allegedly Infringed Images

24 13. Moschino lacks knowledge or information sufficient to form a belief about
25 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
26 13, and on that basis denies the same except for the following:
27
28

1 a. Moschino admits that Image 1 depicts Cardi B in a New York City street
2 crosswalk wearing a Moschino dress designed by Jeremy Scott. Moschino
3 denies any remaining allegations of paragraph 13a of the Complaint.

4 b. Moschino admits that Image 2 depicts Cardi B on a New York City sidewalk
5 wearing a Moschino dress designed by Jeremy Scott. Moschino denies any
6 remaining allegations of paragraph 13b of the Complaint.

7 14. Moschino lacks knowledge or information sufficient to form a belief about
8 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
9 14, and on that basis denies the same.

10 15. Moschino lacks knowledge or information sufficient to form a belief about
11 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
12 15, and on that basis denies the same.

13 16. Moschino lacks knowledge or information sufficient to form a belief about
14 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
15 16, and on that basis denies the same.

16 **B. Defendants’ Alleged Unauthorized Uses**

17 17. Moschino lacks knowledge or information sufficient to form a belief about
18 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
19 17, and on that basis denies the same.

20 18. Moschino lacks knowledge or information sufficient to form a belief about
21 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
22 18, and on that basis denies the same.

23 19. Moschino lacks knowledge or information sufficient to form a belief about
24 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
25 19, and on that basis denies the same.

26 ///

27 ///

28

1 20. Moschino admits that as of October 26, 2019 it had a significant number of
2 followers on its Twitter feed and that it's Twitter feed is open and viewable to the public.
3 Moschino denies any remaining allegations of paragraph 20 of the Complaint.

4 21. Moschino lacks knowledge or information sufficient to form a belief about
5 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
6 21, and on that basis denies the same.

7 22. Denied.

8 23. Denied.

9 24. Moschino lacks knowledge or information sufficient to form a belief about
10 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
11 24, and on that basis denies the same.

12 25. Moschino lacks knowledge or information sufficient to form a belief about
13 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
14 25, and on that basis denies the same.

15 26. Moschino lacks knowledge or information sufficient to form a belief about
16 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
17 26, and on that basis denies the same.

18 27. Moschino lacks knowledge or information sufficient to form a belief about
19 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
20 27, and on that basis denies the same.

21 28. Moschino lacks knowledge or information sufficient to form a belief about
22 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
23 28, and on that basis denies the same.

24 29. Moschino lacks knowledge or information sufficient to form a belief about
25 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
26 29, and on that basis denies the same.

27

28

1 30. Moschino lacks knowledge or information sufficient to form a belief about
2 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
3 30, and on that basis denies the same.

4 **C. Plaintiffs Allegations that Systemic Piracy Destroys the Value of the**
5 **Creators' Work.**

6 31. Moschino lacks knowledge or information sufficient to form a belief about
7 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
8 31, and on that basis denies the same.

9 32. Moschino lacks knowledge or information sufficient to form a belief about
10 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
11 32, and on that basis denies the same.

12 33. Denied.

13 34. Denied.

14 35. Denied.

15 36. Denied.

16 37. Denied.

17 **D. Facts that Allegedly Support a Finding of Willful Infringement**

18 38. Denied.

19 39. Moschino lacks knowledge or information sufficient to form a belief about
20 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
21 39, and on that basis denies the same.

22 40. Denied.

23 41. Moschino lacks knowledge or information sufficient to form a belief about
24 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
25 41, and on that basis denies the same.

26 ///

27 ///

28

1 42. Moschino lacks knowledge or information sufficient to form a belief about
2 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
3 42, and on that basis denies the same.

4 43. Moschino lacks knowledge or information sufficient to form a belief about
5 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
6 43, and on that basis denies the same.

7 **CLAIM ONE**

8 **(For Alleged Copyright Infringement –Against All Defendants)**

9 44. This paragraph realleges facts for which further response is not required. To
10 the extent that this paragraph contains factual allegations, Moschino denies them.

11 45. Denied.

12 46. The allegations in this paragraph are legal arguments and/or conclusions,
13 therefore no response is required. To the extent the allegations are construed to allege any
14 facts, they are denied.

15 47. The allegations in this paragraph are legal arguments and/or conclusions,
16 therefore no response is required. To the extent the allegations are construed to allege any
17 facts, they are denied.

18 48. The allegations in this paragraph are legal arguments and/or conclusions,
19 therefore no response is required. To the extent the allegations are construed to allege any
20 facts, they are denied.

21 49. Denied.

22 50. The allegations in this paragraph are legal arguments and/or conclusions,
23 therefore no response is required. To the extent the allegations are construed to allege any
24 facts, they are denied.

25 51. The allegations in this paragraph are legal arguments and/or conclusions,
26 therefore no response is required. To the extent the allegations are construed to allege any
27 facts, they are denied.

1 52. The allegations in this paragraph are legal arguments and/or conclusions,
2 therefore no response is required. To the extent the allegations are construed to allege any
3 facts, they are denied.

4 53. The allegations in this paragraph are legal arguments and/or conclusions,
5 therefore no response is required. To the extent the allegations are construed to allege any
6 facts, they are denied.

7 54. The allegations in this paragraph are legal arguments and/or conclusions,
8 therefore no response is required. To the extent the allegations are construed to allege any
9 facts, they are denied.

10 **CLAIM TWO**

11 **(For Alleged Vicarious and/or Contributory Copyright Infringement –Against All**
12 **Defendants)**

13 55. This paragraph realleges facts for which further response is not required. To
14 the extent that this paragraph contains factual allegations, Moschino denies them.

15 56. Moschino lacks knowledge or information sufficient to form a belief about
16 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
17 43, and on that basis denies the same.

18 57. Moschino lacks knowledge or information sufficient to form a belief about
19 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
20 43, and on that basis denies the same.

21 58. Moschino lacks knowledge or information sufficient to form a belief about
22 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
23 43, and on that basis denies the same.

24 59. Moschino lacks knowledge or information sufficient to form a belief about
25 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
26 43, and on that basis denies the same.

1 60. Moschino lacks knowledge or information sufficient to form a belief about
2 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
3 43, and on that basis denies the same.

4 61. Moschino lacks knowledge or information sufficient to form a belief about
5 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
6 43, and on that basis denies the same.

7 62. The allegations in this paragraph are legal arguments and/or conclusions,
8 therefore no response is required. To the extent the allegations are construed to allege any
9 facts, they are denied.

10 63. The allegations in this paragraph are legal arguments and/or conclusions,
11 therefore no response is required. To the extent the allegations are construed to allege any
12 facts, they are denied.

13 64. The allegations in this paragraph are legal arguments and/or conclusions,
14 therefore no response is required. To the extent the allegations are construed to allege any
15 facts, they are denied.

16 65. The allegations in this paragraph are legal arguments and/or conclusions,
17 therefore no response is required. To the extent the allegations are construed to allege any
18 facts, they are denied.

19 **CLAIM THREE**

20 **(For Alleged Vicarious and/or Contributory Copyright Infringement—Against**
21 **Moschino)**

22 66. This paragraph realleges facts for which further response is not required. To
23 the extent that this paragraph contains factual allegations, Moschino denies them.

24 67. The allegations in this paragraph are legal arguments and/or conclusions,
25 therefore no response is required. To the extent the allegations are construed to allege any
26 facts, they are denied.

1 68. The allegations in this paragraph are legal arguments and/or conclusions,
2 therefore no response is required. To the extent the allegations are construed to allege any
3 facts, they are denied.

4 69. The allegations in this paragraph are legal arguments and/or conclusions,
5 therefore no response is required. To the extent the allegations are construed to allege any
6 facts, they are denied.

7 70. The allegations in this paragraph are legal arguments and/or conclusions,
8 therefore no response is required. To the extent the allegations are construed to allege any
9 facts, they are denied.

10 71. Denied.

11 72. Denied.

12 73. Denied.

13 74. The allegations in this paragraph are legal arguments and/or conclusions,
14 therefore no response is required. To the extent the allegations are construed to allege any
15 facts, they are denied.

16 75. The allegations in this paragraph are legal arguments and/or conclusions,
17 therefore no response is required. To the extent the allegations are construed to allege any
18 facts, they are denied.

19 76. The allegations in this paragraph are legal arguments and/or conclusions,
20 therefore no response is required. To the extent the allegations are construed to allege any
21 facts, they are denied.

22 **CLAIM FOUR**

23 **(For Alteration of Copyright Management Information in Violation of**
24 **17 U.S.C. 1202 – Against All Defendants)**

25 77. This paragraph realleges facts for which further response is not required. To
26 the extent that this paragraph contains factual allegations, Moschino denies them.
27
28

1 78. Moschino lacks knowledge or information sufficient to form a belief about
2 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
3 43, and on that basis denies the same.

4 79. Moschino lacks knowledge or information sufficient to form a belief about
5 and to definitively confirm the truth or complete accuracy of the allegations in paragraph
6 43, and on that basis denies the same.

7 80. The allegations in this paragraph are legal arguments and/or conclusions,
8 therefore no response is required. To the extent the allegations are construed to allege any
9 facts, they are denied.

10 81. The allegations in this paragraph are legal arguments and/or conclusions,
11 therefore no response is required. To the extent the allegations are construed to allege any
12 facts, they are denied.

13 82. The allegations in this paragraph are legal arguments and/or conclusions,
14 therefore no response is required. To the extent the allegations are construed to allege any
15 facts, they are denied.

16 **PRAYER FOR RELIEF**

17 Moschino denies that Plaintiff is entitled to any relief on its Complaint.

18 **AFFIRMATIVE DEFENSES**

19 Without assuming the burden of proof where such burden properly rests with
20 Plaintiff, Moschino asserts the following affirmative defenses to Splash's Complaint.

21 **FIRST AFFIRMATIVE DEFENSE**

22 **(Failure to State a Claim)**

23 The Complaint, and each of its claims for relief, fails to state a claim against
24 Defendant upon which relief can be granted.

25 **SECOND AFFIRMATIVE DEFENSE**

26 **(No Infringement)**

27 The Complaint is barred, in whole or in part, because Defendant did not copy or
28

1 reproduce any of Plaintiff's allegedly copyrighted works or in any other way infringe
2 Plaintiff's alleged copyright.

3 **THIRD AFFIRMATIVE DEFENSE**

4 **(Fair Use)**

5 Plaintiff's claims are barred by the doctrine of fair use. Any use by Defendant of
6 any of Plaintiff's copyrights is protected under the copyright's fair use doctrine, as
7 codified in 17 U.S.C. § 107.

8 **FOURTH AFFIRMATIVE DEFENSE**

9 **(Public Domain)**

10 The complaint is barred, in whole or in part, because the material allegedly used by
11 Defendant is in the public domain, and therefore is not subject to copyright protection.

12 **FIFTH AFFIRMATIVE DEFENSE**

13 **(No Copyright Protection)**

14 The Complaint is barred, in whole or in part, because even if some copyrighted
15 material allegedly owned by Plaintiff was used by Defendant, those materials were not
16 original works of authorship and therefore are not subject to copyright protection.

17 **SIXTH AFFIRMATIVE DEFENSE**

18 **(No Standing)**

19 The Complaint is barred, in whole or in part, because Plaintiff does not have
20 standing to bring his claims since, inter alia, Plaintiff is the holder of neither the legal nor
21 beneficial interests required to bring infringement suits under 17 U.S.C. § 501(b) for the
22 works in questions.

23 **SEVENTH AFFIRMATIVE DEFENSE**

24 **(Insufficient Creativity)**

25 The Complaint is barred, in whole or in part, because even if some copyrighted
26 material allegedly owned by Plaintiff was used by Defendant, those materials did not
27 contain the minimal level of creativity necessary for copyright protection.

1 **EIGHTH AFFIRMATIVE DEFENSE**

2 **(Substantial Similarity)**

3 The Complaint is barred, in whole or in part, because nothing utilized by
4 Defendant was substantially similar to any protected expression owned by Plaintiff.

5 **NINTH AFFIRMATIVE DEFENSE**

6 **(Independent Creation)**

7 The Complaint is barred, in whole or in part, because the copyrighted material at
8 issue in this suit was independently created and was not taken from Plaintiff.

9 **TENTH AFFIRMATIVE DEFENSE**

10 **(De Minimis/Incidental Use)**

11 The Complaint is barred, in whole or in part, because even if copyrighted materials
12 allegedly owned by Plaintiff were used by Defendant, the use was incidental and de
13 minimis and is therefore not actionable.

14 **ELEVENTH AFFIRMATIVE DEFENSE**

15 **(Invalid Copyright Registration)**

16 The Complaint is barred, in whole or in part, because the registration upon which
17 Plaintiff's right to bring the claims rest is invalid or otherwise obtained through fraud on
18 the Copyright Office.

19 **TWELFTH AFFIRMATIVE DEFENSE**

20 **(Unauthorized Derivative (Infringing) Work/No Copyright Protection)**

21 The Complaint is barred, in whole or in part, because the work upon which
22 Plaintiff brings its claims constitutes an unauthorized derivative (and, therefore,
23 infringing) work and therefore is ineligible for copyright protection.

24 **THIRTEENTH AFFIRMATIVE DEFENSE**

25 **(No Alteration/Removal of Copyright Management Information)**

26 The Complaint is barred, in whole or in part, because neither Defendant nor
27 anyone acting on his behalf removed or altered Copyright Management Information from
28

1 the Photographs without authorization.

2 **FOURTEENTH AFFIRMATIVE DEFENSE**

3 **(No Intentionality)**

4 The Complaint is barred, in whole or in part, because neither Defendant nor
5 anyone acting on his behalf intentionally removed or altered any Copyright Management
6 Information from the Photographs.

7 **FIFTEENTH AFFIRMATIVE DEFENSE**

8 **(No Knowledge)**

9 The Complaint is barred, in whole or in part, because neither Defendant nor
10 anyone acting on his behalf distributed the Photographs with knowledge that Copyright
11 Management Information had been removed or altered without authorization and neither
12 Defendant nor anyone acting on his behalf knew or had reasonable grounds to know that
13 any alteration or removal of Copyright Management Information from the Photographs,
14 or distribution thereof, would induce, enable, facilitate, or conceal an infringement of any
15 rights under Title 17 of the United States Code.

16 **SIXTEENTH AFFIRMATIVE DEFENSE**

17 **(No Willful Infringement)**

18 The complaint is barred, in whole or in part, because Defendant has not engaged in
19 the willful infringement of the allegedly copyrighted work.

20 **SEVENTEENTH AFFIRMATIVE DEFENSE**

21 **(Vague/Uncertain/Speculative Damages)**

22 The complaint is barred, in whole or in part, because Plaintiff's damages, if any,
23 are vague, uncertain, imaginary, and speculative.

24 **EIGHTEENTH AFFIRMATIVE DEFENSE**

25 **(Failure to State a Claim for Statutory Damages)**

26 Plaintiff has failed to state a claim upon which statutory damages can be awarded
27 against Defendant.

1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 **(First Amendment/Free Speech)**

3 The Complaint, and each of its claims for relief, is barred by the First and
4 Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the
5 California Constitution.

6 **TWENTIETH AFFIRMATIVE DEFENSE**

7 **(Statutory Damages Unconstitutional – Not Sufficiently Reprehensible Conduct)**

8 The Complaint, to the extent that it seeks punitive and/or statutory damages against
9 Defendant, violates Defendant’s right to procedural and substantive due process under the
10 Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section
11 7 of the California Constitution because, among other things, the alleged wrongful
12 conduct at issue here is not sufficiently reprehensible to warrant any assessment of
13 statutory damages, which would grossly exceed any actual damages to Plaintiff.
14 Therefore, Plaintiff cannot recover statutory damages against Defendant in this case.

15 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

16 **(Statutory Damages Unconstitutional –**
17 **Vague/Uncertain Criteria and Lack of Fair Notice)**

18 The Complaint, to the extent that it seeks statutory damages against Defendant,
19 violates Defendant’s right to procedural and substantive due process under the Fifth and
20 Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the
21 California Constitution because, among other things, of the vagueness and uncertainty of
22 the criteria for the imposition of statutory damages and the lack of fair notice of what
23 conduct will result in the imposition of such damages. Therefore, Plaintiff cannot recover
24 statutory damages against Defendant in this case.

25 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

26 **(Statutory Damages Unconstitutional – Protection from Excessive Fines)**

27 The Complaint, to the extent that it seeks statutory damages against Defendant
28

1 violates Defendant’s right to protection from “excessive fines” under Article 1, Section
2 17 of the California Constitution, and it violates Defendants’ right to substantive due
3 process under the Fifth and Fourteenth Amendments to the United States Constitution
4 and Article I, Section 7 of the California Constitution. Therefore, Plaintiff cannot recover
5 statutory damages against Defendant in this case,

6 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

7 **(Statutory Damages Unconstitutional – Equal Protection)**

8 The imposition of statutory and/or punitive damages against Defendant would
9 deny equal protection of the laws, in violation of the Fifth and Fourteenth Amendments
10 to the United States Constitution and Article I, Section 7 and Article IV, Section 16 of the
11 California Constitution. Therefore, Plaintiff cannot recover statutory damages against
12 Defendant in this case.

13 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

14 **(Copyright Misuse)**

15 Plaintiff’s claims for relief are barred, in whole or in part, by Plaintiff’s copyright
16 misuse.

17 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

18 **(Contributory Negligence)**

19 The damage suffered by Plaintiff, if any, was partially or completely caused by
20 Plaintiff’s own contributory negligence.

21 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

22 **(License/Consent/Acquiescence)**

23 The Complaint is barred, in whole or in part, by license, consent and/or
24 acquiescence.

25 ///

26 ///

27 ///

1 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

2 **(Innocent Infringement)**

3 Plaintiff's claims are barred, in whole or in part, to the extent any fact finder might
4 find infringement (which Defendant denies the existence of), because any infringement,
5 if any, was innocent.

6 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

7 **(Proximate Cause)**

8 Each and all of the purported causes of action asserted by Plaintiff in the
9 Complaint is barred because Defendant's actions were not the proximate cause of any
10 alleged damages suffered by Plaintiff.

11 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

12 **(Unforeseeability)**

13 Plaintiff's alleged damages were not contemplated or reasonably foreseeable and
14 are therefore not recoverable in this action.

15 **THIRTIETH AFFIRMATIVE DEFENSE**

16 **(Good Faith)**

17 The Complaint is barred, in whole or in part, because Defendant's conduct was
18 reasonable, justified, in good faith and/or innocent.

19 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

20 **(Unjust Enrichment)**

21 Each and all of the purported causes of action asserted in the Complaint is barred
22 because Plaintiff would be unjustly enriched if it prevailed on these causes of action.

23 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

24 **(Laches)**

25 Plaintiff's claims are barred by laches, in that Plaintiff has unreasonably delayed
26 efforts to enforce his rights, if any, despite his full awareness of Defendant's actions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Waiver)

Plaintiff’s Complaint and each cause of action therein are barred in whole or in part by the doctrine of waiver.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Privilege/Justification)

Defendant has competed fairly with Plaintiff and none of the acts of Defendant support claims of unlawful behavior, and all acts were and are justified and privileged under fair competition principles.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Fault of Another & Intervention)

The Complaint is barred, in whole or in part, because any damages allegedly suffered by Plaintiff was either wholly or in part the legal fault of persons, firms, corporations, or entities (including Plaintiff) other than Defendant, and that legal fault reduces the percentage of responsibility, if any, which is to be borne by Defendant.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

The damage suffered by Plaintiff, if any, was aggravated by Plaintiff’s failure to use reasonable diligence to mitigate any such damage. Because Plaintiff failed to take adequate steps to minimize, alter, reduce, or otherwise diminish its damages, if any, with respect to the matters alleged in the Complaint, and by any reason of the foregoing, Plaintiff is barred from recovery of damages.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The Complaint is barred, in whole or in part, because Plaintiff has acted with unclean hands.

1 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

2 **(Illegality)**

3 The Complaint is barred, in whole or in part, because of the illegality of Plaintiff's
4 conduct, including but not limited to the illegality of its conduct (and the conduct of its
5 predecessor-in-interest) in creating the works at dispute in this suit.

6 **THIRTY-NINTH AFFIRMATIVE DEFENSE**

7 **(No Volitional Conduct)**

8 The Complaint is barred, in whole or in part, because Defendant engaged in no
9 volitional conduct that could give rise to liability.

10 **FORTIETH AFFIRMATIVE DEFENSE**

11 **(Fraud)**

12 The Complaint is barred, in whole or in part, because of Plaintiff's fraud.

13 **FORTY-FIRST AFFIRMATIVE DEFENSE**

14 **(Estoppel)**

15 The Complaint is barred, in whole or in part, under the doctrine of estoppel.

16 **FORTY-SECOND AFFIRMATIVE DEFENSE**

17 **(No Knowledge of Direct Infringement)**

18 The Complaint is barred, in whole or in part, because Defendant neither had, nor
19 should have had, knowledge of the infringing activities of the Direct Infringers.

20 **FORTY-THIRD AFFIRMATIVE DEFENSE**

21 **(No Material Contribution to, Assistance with, or Inducement of Direct**
22 **Infringement)**

23 The Complaint is barred, in whole or in part, because Defendant did not materially
24 contribute to, assist with, or engage in inducement of infringement by the Direct
25 Infringers.

26 ///

27 ///

FORTY-FOURTH AFFIRMATIVE DEFENSE

(No Right and Ability to Control/Supervise Direct Infringers)

The Complaint is barred, in whole or in part, because Defendant lacked the right and ability to control or otherwise supervise the Direct Infringers and any infringing activity in which they may have engaged.

FORTY-FIFTH AFFIRMATIVE DEFENSE

(No Financial Benefit from Direct Infringement)

The Complaint is barred, in whole or in part, because Defendant did not obtain any financial benefit from any infringing activity of the Direct Infringers.

COUNTERCLAIMS

Counterclaimant Moschino, S.P.A. (“Moschino” or “Counterclaimant”), brings these Counterclaims against Splash and Elder Ordonez (collectively “Counterdefendants”) and reserves the right to add or amend Counterclaims based on further investigation and discovery. By and through their counsel, Moschino states the following Counterclaims in response to Plaintiff Splash’s Complaint.

PARTIES

1. Moschino is an Italian entity organized under the laws of the country of Italy.
2. On information and belief, Splash is an entity organized and existing under the State of Nevada with its principal place of business in Los Angeles, California.
3. On information and belief, Elder Ordonez (“Ordonez”) is an individual, has an exclusive working relationship with Splash, and currently resides in New York.
4. DOES 1 through 10, inclusive, are unknown to Moschino, who therefore sues said Defendants by such fictitious names. Moschino will ask leave of Court to amend this Complaint and insert the true names and capacities of said Defendants when the same have been ascertained. Moschino is informed and believes and, upon such, alleges that each of the Defendants designated herein as a “DOE” is legally responsible in some

1 manner for the events and happenings herein alleged, and that Moschino’s damages as
2 alleged herein were proximately caused by such Defendants.

3 **JURISDICTION AND VENUE**

4 5. This court has subject matter jurisdiction over the counterclaims under, at
5 least, 17 U.S.C. § 101, 28 U.S.C. §§ 1331 and 1338.

6 6. This Court has personal jurisdiction over Splash because Splash has its
7 principal place of business in Los Angeles, California and it has purposefully availed
8 itself of the benefits and protections of the laws of the State of California, asserted claims
9 of copyright infringement against Moschino in this District, and voluntarily subjected
10 itself to the Court’s jurisdiction by filing a Complaint against Moschino in this District.

11 7. On information and belief, this Court has specific jurisdiction over Ordonez
12 because Ordonez exclusively works for Splash News whose principal place of business is
13 in this District, and has purposefully availed himself of the benefits and protections of the
14 laws of the State of California by, at least, conducting business systematically and
15 continuously in this district.

16 8. Venue for the counterclaims is proper in this District pursuant to at least 28
17 U.S.C. § 1391.

18 **FACTUAL BACKGROUND**

19 9. Moschino is a world-famous fashion brand, selling high-end apparel around
20 the world at its own boutiques and at the world’s highest-end department stores.

21 10. Splash is a celebrity news agency that licenses images, videos, and stories to
22 publishers around the world.

23 11. On information and belief, Ordonez is a photographer of celebrities who
24 exclusively does business with Splash.

25 ///

26 ///

27 ///

1 **MOSCHINO’S COPYRIGHT IN THE WORK “WHEN SPRING IS IN**
2 **BLOOM”**

3 12. Counterclaimant Jeremy Scott designed and created the original work of
4 authorship, embodied in a dress later worn by Cardi B, entitled “When Spring Is In
5 Bloom (the “Work”).

6 13. The Work was registered to Moschino with the U.S. Copyright Office with
7 Registration No. VA 2-181-038 (eff. June 18, 2018) in compliance with the Copyright
8 Act.

9 14. The Work was first published on March 22, 2018.

10 15. Counterclaimant Moschino is the Copyright owner and Claimant and
11 Defendant Scott is the author of the Work. (Exhibit 1, Certificate of Registration)

12 16. On information and belief, Ordonez took, created and sold/licensed (to, at
13 least, Splash) certain photographs of the Work, including but not limited to Images 1 and
14 2 that form the subject matter of this lawsuit, (collectively, the “Photographs”) and
15 thereby reproduced, distributed and publicly displayed copies of the Work (or materials
16 substantially similar thereto), and/or prepared derivative versions thereof, for commercial
17 purposes and profit. (Complaint, ¶ 16).

18 17. On information and belief, Splash has reproduced, distributed, and publicly
19 displayed copies of the Work (or materials substantially similar thereto), and/or prepared
20 derivative versions thereof, by, among other things, further licensing said Photographs to
21 third parties for commercial purposes and profit. (Complaint, ¶¶ 13a-b, 15, 16).

22 18. Neither Moschino nor Scott have ever licensed any rights in the Work to
23 Splash or provided it with any authorization or permission to make any use whatsoever of
24 the Work.

25 19. Neither Moschino nor Scott have ever licensed any rights in the Work to
26 Ordonez or provided him with any authorization or permission to make any use
27 whatsoever of the Work.

1 28. Counterclaimant Moschino is the owner of the Work named in these
2 Counterclaims.

3 29. Defendant Scott is the author of the Work named in these Counterclaims.

4 30. Each Counterdefendant has unlawfully reproduced, distributed, and publicly
5 displayed copies of the Work, and/or prepared unauthorized derivative versions thereof,
6 without Counterclaimant or Scott's license, authorization, or permission.

7 31. The foregoing acts of Counterdefendants have infringed upon the exclusive
8 rights granted to copyright owners under 17 U.S.C. § 106.

9 32. Moschino has suffered damages as a result of Counterdefendants' infringing
10 activities.

11 33. Moschino timely registered its copyright in the Work, and is thus entitled to
12 elect statutory damages under 17 U.S.C. §§ 412 and 504(c).

13 34. Moschino, on information and belief, alleges that the Counterdefendants' acts
14 of infringement were willful, a finding that can increase the award of statutory damages
15 to a sum of not more than \$150,000 per infringement, as provided under 17 U.S.C. §
16 504(c)(2).

17 35. Alternatively, Moschino is entitled to recover its actual damages and
18 Counterdefendants' profits that are attributable to the infringement of the Work, per 17
19 U.S.C. § 504(b).

20 36. Moschino also seeks a discretionary award of attorney fees and costs under
21 17 U.S.C. §§ 412 and 505.

22 **COUNT II: Vicarious and/or Contributory Infringement**

23 *Against all Counterdefendants*

24 37. Moschino realleges and incorporates by reference the allegations contained in
25 the preceding paragraphs of the Counterclaims as if fully set forth herein.

26 ///

27 ///

1 selling, or offering for sale copies of the Work, materials substantially similar thereof,
2 and unauthorized derivative works based off of the Work, including but not limited to the
3 Photographs, as described in the Counterclaims;

4 B. Impoundment of all copies of any unauthorized derivative works based off
5 of the Work, as described in the Counterclaims, per 17 U.S.C. § 503, including any
6 digital copies or any other means by which they could be used again by
7 Counterdefendants without Moschino’s authorization, as well as all related documents
8 and records;

9 C. An order requiring Counterdefendants to account to Moschino their profits
10 and any damages sustained by Moschino arising from the acts of infringement;

11 D. Actual damages and all profits derived from the infringing conduct
12 complained of herein, or, where applicable and at Moschino’s discretion, statutory
13 damages;

14 E. An award of pre-judgment interest as allowed by law;

15 F. Reasonable attorney fees;

16 G. Court costs, expert witness fees, and all other amounts authorized under law;
17 and

18 H. Any other relief as the Court deems just and proper.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

JURY TRIAL DEMAND

Defendant Moschino respectfully requests a jury trial on all issues so triable.

Dated: January 6, 2020

Respectfully submitted,
David J. Williams
C.J. Veverka
(pro hac vice forthcoming)
Alexis K. Juergens
(pro hac vice forthcoming)
MASCHOFF BRENNAN

By: /s/ David J. Williams
David J. Williams

ATTORNEYS FOR DEFENDANT AND
COUNTERCLAIMANT MOSCHINO S.P.A.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28