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 10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION**

13 TAYLOR WHITLEY, and
 14 WTF.INDUSTRIES, LLC,
 15 Plaintiffs,

16 v.

17 CLARE MAGUIRE, JAKE NYGARD,
 18 ANTONIUS WIRIADJAJA,
 DONGLEE HAN, and DOES 1-10,
 inclusive,
 19 Defendants.
 20

CASE NO. 22-CV-01837-ODW-JEM
**DEFENDANTS' REPLY IN
 SUPPORT OF THEIR MOTION TO
 DISMISS PLAINTIFFS'
 COMPLAINT**

Date: May 16, 2022
 Time: 1:30 p.m.
 Crtrm.: 5D

The Honorable Otis D. Wright II

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1 collection known as “Caked Apes” removed from its primary online market place,
2 known as “OpenSea,” claiming it infringed upon Whitley’s intellectual property.
3 Following Whitley’s takedown notice, Nygard submitted a DMCA “counter notice”
4 on March 7, 2022, disputing Whitley’s takedown claims and requiring OpenSea to
5 relist the collection within 14 days,¹ unless Whitley provided OpenSea timely notice
6 that he had filed suit against Nygard for copyright infringement. *See* 17 U.S.C.
7 § 512(g)(2)(C) (providing that an online service provider shall have no liability for a
8 DMCA takedown if it ceases “disabling access . . . no more than 14 . . . business
9 days following receipt of the counter notice, unless its designated agent first
10 receives notice from the person who submitted the [takedown notice] that such
11 person has filed an action seeking a court order to restrain the subscriber from
12 engaging in infringing activity relating to the material”).

13 That is exactly what Whitley did with this lawsuit, which he filed on March
14 18, 2022, eleven days after Nygard’s counter notice. As Defendants explained in
15 their Motion, Whitley’s copyright infringement claim is defective. First, he filed it
16 without a valid registration for his alleged work, ignoring the Supreme Court’s clear
17 statement that registration is a pre-filing requirement. *See Fourth Estate Pub.*
18 *Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (“Before pursuing
19 an infringement claim in court . . . a copyright claimant generally must comply with
20 § 411(a)’s requirement that ‘registration of the copyright claim has been made.’”).
21 Second, he has alleged facts that, on their face, establish he granted Defendants a
22 license for the minimal use of his work. *See* Compl. ¶ 48 (alleging Whitley granted
23 “authorization for use of the Subject Design in the Caked Apes NFT project”).
24 Accordingly, it was imperative for Defendants to bring a prompt challenge to the
25 claim to obtain the relisting of their works. Allowing Whitley an indefinite time to

26 _____
27 ¹ Defendants have also filed a separate action against Whitley alleging the claims
28 made in his takedown notices were false and that he violated the DMCA. *See Jacob*
L. Nygard, et al. v. Taylor Whitley, Case No. 22-cv-00425-ODW-JEMx.

1 file an amended complaint would have interfered with their ability to do that.²

2 In light of the foregoing, the parties’ Local Rule 7-3 conference—which
3 Defendants arranged and took seriously—did not eliminate the necessity of the
4 Motion. Nevertheless, Defendants do not dispute that Plaintiffs have the right to
5 amend their Complaint in response to the Motion. If they fail to do so, however, the
6 Motion should be granted. Finally, in either event, Defendants’ Motion will not have
7 wasted judicial resources, as Plaintiffs argue, because the unopposed Motion will
8 either result in the dismissal of Plaintiffs’ claims or be mooted altogether by the
9 filing of an amended complaint. Defendants thank the Court for its time and
10 consideration.

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12 DATED: May 2, 2022

KING, HOLMES, PATERNO & SORIANO, LLP

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15 By: /s/ John G. Snow

HOWARD E. KING

JOHN G. SNOW

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17 Attorneys for Defendants CLARE MAGUIRE,
18 JAKE NYGARD, ANTONIUS WIRIADJAJA, and
19 DONGLEE HAN

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28 ² Five days after Defendants filed their Motion, Whitley finally permitted the
relisting of Caked Apes collection.