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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **SAN FRANCISCO DIVISION**

19 SARAH ANDERSEN, et al.,
 Individual and Representative Plaintiffs,
 20 v.
 21 STABILITY AI LTD., et al.,
 22 Defendants.

Case No. 3:23-cv-00201-WHO

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT MIDJOURNEY, INC.'S
 MOTION TO DISMISS PLAINTIFFS'
 FIRST AMENDED COMPLAINT**

Date: May 8, 2024
 Time: 2:00 pm
 Location: Videoconference
 Before: Hon. William H. Orrick

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1 **I. INTRODUCTION**

2 Plaintiffs' First Amended Complaint (ECF No. 129, "FAC")—filed in response to this
 3 Court's order following the previous motions to dismiss (ECF No. 117, "MTD Order")—
 4 sufficiently alleges four claims against defendant Midjourney, Inc. ("Midjourney"): direct copyright
 5 infringement via the LAION-400M dataset (Count 5), direct copyright infringement via the
 6 LAION-5B dataset (Count 6), DMCA violations (Count 7), and unjust enrichment (Count 8). For
 7 the reasons below, Midjourney's motion should be denied.

8 **II. FACTUAL BACKGROUND**

9 Midjourney trains machine learning models (referred to in the FAC as the "Midjourney
 10 Models") and incorporates these models into a commercial AI image product (the "Midjourney
 11 Image Product"). ¶¶ 1, 5, 169.¹ Like other image products, the Midjourney Image Product generates
 12 images in response to user prompts. ¶ 3. User prompts are often text, but can also be images. ¶ 171 &
 13 Ex. F (Midjourney text prompts); ¶ 189 & Ex. I (Midjourney image prompts).

14 To train its models, Midjourney has relied on the LAION datasets, which are enormous
 15 collections of images paired with descriptive text captions ("training images"). ¶¶ 2, 58. The
 16 LAION-400M dataset contains records for approximately 400 million training images. ¶¶ 59–60.
 17 The LAION-5B dataset contains records for approximately 5.85 billion training images. ¶ 65.
 18 LAION-400M is a subset of LAION-5B, meaning every image in LAION-400M is also in LAION-
 19 5B. ¶ 65. Sometime before February 2022, Midjourney trained version 1 of the Midjourney Model
 20 (and possibly others) using the LAION-400M dataset. ¶ 266. Sometime before March 2023,
 21 Midjourney trained version 5 of the Midjourney Model and subsequent models on LAION-5B.
 22 ¶¶ 274–75.

23 Training a model with the LAION-400M or LAION-5B data set requires downloading from
 24 the internet each of the images referenced in the dataset. ¶¶ 60–62, 66–68. The LAION-400M and
 25 LAION-5B datasets only contain URLs and metadata for training images, and not the images

26
 27 ¹ "¶ ___" and "Ex. ___" citations are to ECF No. 129 (First Amended Class Action Complaint)
 28 unless otherwise indicated.

1 themselves. ¶¶ 281, 286. Therefore, when it trained the Midjourney Models, Midjourney
2 necessarily downloaded copies of billions of copyrighted images without permission—including
3 registered works belonging to Plaintiffs. ¶¶ 4, 72. Midjourney knew that the LAION datasets
4 contained copyrighted works. ¶¶ 271, 276. Plaintiffs who own these works never authorized
5 Midjourney to use them in any way. ¶¶ 72, 80, 347.

6 In February 2022, near the release of the initial version of the Midjourney Image Product,
7 Midjourney CEO David Holz posted messages publicly promoting the Midjourney Image Product’s
8 ability to emulate the styles of particular artists. ¶ 260. Holz posted a link to a document called the
9 “Midjourney Style List” that contained over 4,700 artist names whose styles can be emulated by the
10 Midjourney Image Product. ¶ 262 and Ex. J. In so doing, Midjourney sought to capitalize on the
11 popularity, recognition, and appeal of these artists—all without their consent. ¶¶ 305–06.
12 Midjourney actively encourages its users to create images that invoke artist names and their
13 protectable trade dress. ¶ 325. Midjourney promotes such images in its online “Showcase” feature
14 images made with artist names. ¶ 325(b) & Ex. K. Midjourney also publishes the Midjourney
15 Magazine that promotes the use of artist names in image prompts. ¶ 278.

16 **III. ARGUMENT**

17 “[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
18 allegations[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 8(a) requires only a “short
19 and plain statement” of facts supporting a claim. Fed. R. Civ. P. 8(a); *see Twombly*, 550 U.S. at 569
20 n.14, 570. The plaintiff’s allegations need only provide “the defendant[s] fair notice of what . . . the
21 claim is and the grounds upon which it rests.” *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d
22 1133, 1141 (N.D. Cal. 2009) (citations omitted).

23 In weighing a motion to dismiss under Rule 12, “[a]ll allegations of material fact are taken as
24 true and construed in the light most favorable to the nonmoving party.” *McShannock v. J.P. Morgan*
25 *Chase Bank NA*, 976 F.3d 881, 886–87 (9th Cir. 2020). “Dismissal is proper only where there is no
26 cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.”
27 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

28 Still, if a court grants a motion to dismiss, it should also grant leave to amend the complaint,

1 unless it “determines that the pleading could not possibly be cured by the allegation of other facts.”
 2 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Furthermore, “court[s] should be especially
 3 reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel . . .
 4 since it is important that new legal theories be explored and assayed in the light of actual facts.” *Elec.*
 5 *Constr. Main. Co. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir. 1985).

6 **A. Plaintiffs Have Plausibly Alleged Two Counts of Direct Copyright Infringement**
 7 **Against Midjourney (Counts 5, 6)**

8 A copyright owner holds the exclusive rights to reproduce, distribute, publicly display,
 9 perform, and create derivative works of their copyrighted work. 17 U.S.C. § 106. A claim of direct
 10 copyright infringement must allege: (1) “ownership of the allegedly infringed material” and (2)
 11 “that the alleged infringers violated at least one exclusive right granted to copyright holders under 17
 12 U.S.C. § 106.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). “[C]opyright
 13 claims need not be pled with particularity.” *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d
 14 1114, 1120 (C.D. Cal. 2001) (“*Cybernet Ventures*”). “Direct infringement does not require intent or
 15 any particular state of mind.” *Fox Broad. Co. Inc. v. Dish Network, L.C.C.*, 905 F. Supp. 2d 1088, 1098
 16 (C.D. Cal. 2012); *see also ITC Textile Ltd. v. Wal-Mart Stores Inc.*, No. CV-12-2650-JFW (AJWx),
 17 2015 WL 12712311, at *5 (C.D. Cal. Dec. 16, 2015) (“Copyright infringement is a strict liability
 18 tort.”).

19 “To establish a prima facie case of copyright infringement,” a plaintiff must show
 20 “ownership of a valid copyright” and “copying of constituent elements of the work that are
 21 original.” *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1152 (9th Cir. 2012); *see also*
 22 *UAB “Planner 5D” v. Facebook, Inc.*, No. 19-cv-03132-WHO, 2019 WL 6219223, at *5 (N.D. Cal.
 23 Nov. 21, 2019). In this context, the word “copying” means “the infringing of any of the copyright
 24 owner’s exclusive rights.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085, n.3 (9th Cir. 1989).

25 Plaintiffs meet both requirements of a direct-infringement claim because they allege
 26 (1) ownership of valid copyright registrations and (2) that Midjourney violated Plaintiffs’ exclusive
 27 rights by copying their registered images to train the Midjourney models.
 28

1 **1. Plaintiffs own valid copyright registrations.**

2 A plaintiff who alleges copyright infringement must show “ownership of a valid copyright.”
3 *Range Rd.*, 668 F.3d at 1153. Here, Plaintiffs have identified works for which they own valid
4 registrations and were included in the LAION-400M and LAION-5B datasets—works that
5 Midjourney copied in order to make their models. *See, e.g.*, Ex. A (includes Plaintiffs’ registered
6 works within the LAION-5B dataset); Ex. B (Plaintiffs’ registered works contained within the
7 LAION-400M dataset).

8 Midjourney nitpicks certain Plaintiff registrations, arguing that: (1) several of Plaintiff
9 Andersen’s registrations are for compilations and thus the underlying works lack protection; and (2)
10 with respect to Plaintiff Brom, his registrations for two of his works—which are books—cover “text
11 only” and thus, did not protect the artwork incorporated into the work. ECF No. 160 at 6
12 (hereinafter “Midjourney Br.”). Neither of these arguments hold water.

13 **2. Plaintiff Andersen’s compilation registrations extend to the underlying works**
14 **that are elements of each compilation.**

15 Midjourney argues that some of Plaintiffs’ copyright registrations are invalid because some
16 of these compilations contain previously published material. Midjourney Br. at 6. But this Court
17 already ruled on allegations of infringement based on registered collections, finding that “the
18 plausible inferences are that all . . . works that were registered as collections *and* were online were
19 scraped into the training datasets.” MTD Order at 6. Furthermore, as Nimmer explains, when a
20 copyright owner of a derivative or collective work is not merely a licensee, but also the owner of the
21 underlying elements, the registration of the collective work serves as a registration of the underlying
22 elements as well. Nimmer on Copyright § 7.16[B][5][c] (endorsing rule that “[w]hen the same party
23 owns the derivative or collective work plus the underlying elements incorporated therein, its
24 registration of the former is ‘sufficient to permit an infringement action on the underlying parts,
25 whether they be new or preexisting’”). The Ninth Circuit is in accord. *See Alaska Stock, LLC v.*
26 *Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 684–85 (9th Cir. 2014).

27 Midjourney does not dispute that Plaintiffs own the copyrights in the underlying elements of
28 the collections, nor the validity of the copyright registrations for each collection. Thus, the inquiry

1 ends there—Plaintiffs have a valid registered copyright in a collection of works which extends to
2 each copyrightable element of those collections. Nimmer on Copyright § 7.16[B][5][c].

3 Midjourney cites *Ambrosetti v. Oregon Cath. Press*, 458 F. Supp. 3d 1013, 1018 (N.D. Ind.
4 2020), but *Ambrosetti* supports Plaintiffs, not Midjourney. In *Ambrosetti*, the plaintiff did **not** own
5 the copyright to the component song of the compilation. 458 F. Supp. 3d at 1013–15. The court in
6 *Ambrosetti* explained that “unless the copyright owner of a collective work also owns **all the rights in**
7 **a constituent part**, a collective work registration will not extend to a constituent part.” *Id.* at 1018
8 (emphasis added). Here, Plaintiffs own the registrations in the compilation and own the copyrights
9 for all the underlying elements, i.e., the previously published works comprising the compilations. *See*
10 ¶¶ 14–25; Ex. C at 3–4, 11, 14–21, 24–28.²

11 **3. Plaintiff Brom’s “text only” registrations for certain books also cover his** 12 **artwork included within those works.**

13 Midjourney’s second nitpick—as to Plaintiff Brom’s registrations—fares no better. Citing
14 zero authority, Midjourney quibbles that the registrations for two of Plaintiff Brom’s works
15 supposedly cover only text, and thus any artwork included in those books is unregistered and cannot
16 be the basis of an infringement claim. Midjourney Br. at 7–8.

17 This is not so: “[i]n cases where a work contains elements of authorship in which copyright
18 is claimed that fall into two or more classes, the application should be submitted in the class most
19 appropriate to the predominant type of authorship in the work as a whole.” 37 C.F.R.
20 § 202.3(b)(2)(iii) (2022). For published works, a registration encapsulates “all copyrightable
21 elements that are otherwise recognizable as self-contained works, that are included in the same unit
22 of publication[.]” 37 C.F.R. § 202.3(b)(4) (2022).

23 The works in question here are books. *See* Ex. C at 3–4. The fact that the registrations

24 ² Midjourney additionally relies on *Oracle Am., Inc. v. Terix Comput. Co. Inc.*, No. 13-cv-03385 -PSG,
25 2015 WL 2090191, at *4 (N.D. Cal. May 5, 2015), a computer program case for the proposition that
26 registration does not cover previously published material. But *Oracle* is inapposite—as the court
27 there explains, “the owner of both an underlying work ‘can . . . sue for copying of material that
28 appears in both the derivative work and the underlying work.’” *Id.* Plaintiffs are the valid copyright
owners of both the underling work and compilations here and so can bring claims for both.

1 indicate only “text” when they are works that fall into multiple classes of authorship—namely, text
 2 and artwork—is of little import when the predominant type of authorship is text, as would be
 3 expected from a book. 37 C.F.R. § 202.3(b)(2)(iii) (2022). Additionally, the text and artwork of *The*
 4 *Child Thief* and *Krampus* each constitute one work in a single unit of publication—when Plaintiff
 5 Brom registered the copyright, he did it for the *entire* work, not just for one component part of the
 6 work. *See* 37 C.F.R. § 202.3(b)(4) (2022). Thus, Plaintiff Brom’s registrations for each of his books
 7 extend to all copyrightable elements of that work, i.e., including his artwork.³

8 **4. Plaintiffs have sufficiently alleged that Midjourney copied their LAION-400M**
 9 **registered works and LAION-5B registered works to train certain Midjourney**
 10 **Models.**

11 To show “copying of constituent elements of the work that are original,” it suffices for a
 12 plaintiff to allege “direct copying of copyrighted works.” *Range Rd.*, 668 F.3d at 1153–54.
 13 Importantly, the evidentiary doctrine of substantial similarity “is irrelevant in a case . . . that entail[s]
 14 direct copying of copyrighted works” because the copying of entire copyrighted works necessarily
 15 entails copying protected aspects of the work. *Id.* at 1154; *see also Narell v. Freeman*, 872 F.2d 907,
 16 910 (9th Cir. 1989).

17 Furthermore, in its earlier MTD Order, this Court found that Plaintiffs had sufficiently
 18 pleaded a direct-infringement claim against Stability based on the “use of ‘Training Images’ scraped
 19 from the internet into the LAION datasets and then used [them] to train” an AI model. MTD Order
 20

21 ³ Midjourney’s attempt to undermine Plaintiff Brom’s registrations fly in contravention of the
 22 legislative intent behind the Copyright Act. Section 408(c)(1) of the Copyright Act, which
 23 authorizes the Register of Copyrights to regulate the administrative classes into which works are to
 24 be placed for purposes of registration plainly states that the “administrative classification of works
 25 has no significance with respect to the subject matter of copyright or the exclusive rights provided by
 26 this title.” 17 U.S.C. § 408(c)(1). Thus, the omission of the term “artwork” from Plaintiff Brom’s
 27 registration of a book does not mean the artwork contained in the book lacks protection. *See* Nimmer
 28 on Copyright § 2.03[F] (“The legislative intent expressed in that last sentence means that errors in
 the form used to register a work cannot serve as a basis for invalidating the copyright.”) (footnote
 call number omitted); *see also id.*, n.132 (“It is important that the statutory provisions setting forth
 the subject matter of copyright be kept entirely separate from any classification of copyrightable
 works for practical administrative purposes.”) (quoting H. Rep. No. 94-1476, at 153).

1 at 7. As for which Plaintiff works had been infringed, this Court held that “the plausible inferences
2 are that *all* of [Plaintiff Andersen’s] works that were registered as collections *and* were online were
3 scraped into the training datasets.” *Id.* at 6 (emphasis in original).

4 As a result, in their current motions to dismiss the FAC, Stability has not renewed its
5 challenge to Plaintiffs’ theory of infringement based on training. ECF No. 162 at 2. Defendant
6 Runway AI, Inc. has also accepted the Court’s prior rulings and declined to challenge Plaintiffs’
7 theory of infringement based on training. ECF No. 164 at 4. Yet Midjourney persists—even though
8 in the FAC, Plaintiffs have made parallel allegations of infringement based on training.

9 Here, Plaintiffs have set forth detailed facts showing Midjourney’s use of copied and
10 reproduced images for training the Midjourney Models. Midjourney affiliates admitted that
11 Midjourney used two LAION datasets to train different Midjourney Models. ¶¶ 266–72 (LAION-
12 400M), 273–77 (LAION-5B). Because the LAION datasets only contain URLs of training images,
13 anyone who wants to train their own models on those datasets must download or otherwise acquire
14 copies of the actual training images, and Midjourney did so. ¶¶ 281 (LAION-400M), 286 (LAION-
15 5B). During each training process, Midjourney made further intermediate copies of Plaintiffs’ works.
16 ¶¶ 282 (LAION-400M), 287 (LAION-5B). Taken as true, these facts state a claim that Midjourney
17 violated Plaintiffs’ exclusive rights of reproduction.

18 Midjourney parries, claiming Plaintiffs “do not specify which of their works were included”
19 in the datasets Midjourney copied. Midjourney Br. at 9. But Midjourney is merely rehashing an
20 argument that the Court has already discarded. MTD Order at 6–7. Plaintiffs have included exhibits
21 showing dozens of examples of registered works that were included in the LAION datasets. ¶ 24, Ex.
22 A (LAION-5B), Ex B. (LAION-400M).⁴

23
24
25 ⁴ Midjourney’s preferred rule would contradict Rule 8, particularly in this case, where the
26 infringement involves the scraping and copying of billions of images. *See Cybernet Ventures*, 167 F.
27 Supp. 2d at 1120 (where plaintiffs alleged “the existence of hundreds, even thousands of infringing
28 photographs” within the defendant’s websites, “[r]equiring a statement of each and every example
[of infringement] would defeat the regime established by Rule 8.”).

1 **5. Plaintiffs have plausibly alleged the Midjourney Models are either Statutory**
 2 **Copies and/or Statutory Derivative Works**

3 Midjourney also argues that Plaintiffs’ claim fails because the Midjourney Models
 4 themselves are neither infringing Statutory Copies nor infringing Statutory Derivative Works.
 5 Midjourney Br. at 11–15. As an initial note, Plaintiffs need only allege one viable theory of direct
 6 infringement for their claim to succeed—and as demonstrated above, Plaintiffs have already made
 7 out a claim of direct infringement for both Midjourney Models based on the taking and copying of
 8 registered works in the LAION-400M and LAION-5B datasets to train the respective models. ¶¶
 9 282 (Midjourney 400M Models); 287 (Midjourney 5B Models). It is improper to dismember each
 10 claim into each alternative theory on the pleadings. *Skinner v. Switzer*, 562 U.S. 521, 530 (2011)
 11 (explaining that “a complaint need not pin plaintiff’s claim for relief to a precise legal theory.”).

12 This Court has already ruled on this issue as to Stability and determined that the direct-
 13 infringement claim was sufficiently alleged. MTD Order at 7. What is more, the Court also
 14 determined that it would not parse out theories of direct infringement “that plaintiff may assert
 15 within that cause of action against Stability until a later stage of the case.” ECF No. 121. The Court
 16 should decline Midjourney’s invitation to selectively dismiss theories of infringement once one
 17 viable theory has been alleged. Regardless, Midjourney’s arguments fail on the merits.

18 **a. Plaintiffs plausibly allege that the Midjourney Models are**
 19 **Statutory Copies of the LAION datasets**

20 Plaintiffs do allege that the Midjourney Model is itself an infringing Statutory Copy of
 21 Plaintiffs’ works. ¶ 288. In its earlier MTD Order, this Court offered additional guidance on how
 22 Plaintiffs ought to substantiate their claim that an AI image model qualifies as a copy of Plaintiffs’
 23 images: “Plaintiffs will be required . . . to state facts in support of how [the AI model] . . . operates
 24 with respect to the Training Images. [I]f plaintiffs’ compressed copies theory is based on a
 25 contention that [the AI model] contains mathematical or statistical methods that can be carried out
 26 through algorithms or instructions in order to reconstruct the Training Images . . . they need to
 27 . . . provide plausible facts in support.” MTD Order at 9–10. In the FAC, Plaintiffs have assembled a
 28 spectrum of new allegations that, when “taken as true,” plausibly allege that the Midjourney Model

1 qualifies as a Statutory Copy of its training dataset, including Plaintiffs’ works. *McShannock*, 976
2 F.3d 886–87.

3 **Recent AI research suggesting that diffusion models like the Midjourney Model are**
4 **compressed versions of their training datasets.** The Midjourney Model relies on an AI technique
5 called *CLIP-guided diffusion*. ¶ 83. To elucidate the operation of a diffusion model, Plaintiffs have
6 cited papers and commentary by five separate AI researchers. First, François Chollet said that
7 machine learning models are “analogous to a database.” ¶ 117. Second, Yaodong Yu offered a plainer
8 statement about the capabilities of these models: “Compression is all there is.” ¶ 119. Third,
9 Nicholas Carlini said that “diffusion models are explicitly trained to reconstruct the training set”
10 and diffusion models can “memorize and regenerate” training images. ¶ 131. Fourth, Ryan Webster
11 “tested several diffusion models . . . and found stored copies of training images within all of them.”
12 ¶ 138. Fifth, Stephen Casper found that “Stable Diffusion has a broad-ranging ability to imitate the
13 style of individual artists.” ¶ 143. While true style is ordinarily not a basis for an infringement claim,
14 as this Court has observed, “if plaintiffs can plausibly plead that defendants’ AI products allow users
15 to create new works by referencing [Plaintiffs’] works by name, the inferences about how and how
16 much of [Plaintiffs’] protected content remains in Stable Diffusion or is used by the AI end-products
17 might be stronger.” MTD Order at 10. Casper’s research, despite the use of the colloquial term
18 “style,” substantiates this idea that the “protected content” of many artists remains in the Models.
19 *Id.* Though the terminology used by these five researchers varies, they all point toward an emerging
20 consensus: that “AI image products are only getting better and better at storing copies of training
21 images.” ¶ 144.

22 **Sample output from the Midjourney Image Product.** Plaintiffs have taken up in earnest
23 the Court’s suggestion that “if plaintiffs can plausibly plead that defendants’ AI products allow
24 users to create new works by expressly referencing [Plaintiffs’] works by name, the inferences about
25 how and how much of [Plaintiffs’] protected content remains in [the product] or is used by the AI
26 end-products might be stronger.” MTD Order at 10. To that end, Plaintiffs provide two sets of
27 examples from the Midjourney Image Product.

28 The first set of examples uses text prompts, and shows what happens when one “expressly

1 referenc[es]” the names of certain Plaintiffs. ¶¶ 169–75, Ex. F. The addition of each artist name to
2 the otherwise generic prompts “chef” and “teacher” immediately elicits an image that evokes the
3 “protected content” of each named artist. ¶ 174 (“chef”), ¶ 175 (“teacher”).

4 The second set of examples show the results of using Midjourney’s image-prompting feature
5 with work by seven plaintiffs. ¶¶ 188–90, Ex. I. Midjourney calls foul, claiming that Plaintiffs merely
6 “asked [the Midjourney Image Product] to generate lookalike outputs.” Midjourney Br. at 11. But
7 Plaintiffs have relied on Midjourney’s own statements that this feature only extracts “concepts” and
8 “vibes” of input images to “influence” the “style” and “colors” of the output. ¶ 188. Or perhaps
9 Midjourney’s counsel has inadvertently said the quiet part out loud: that Midjourney’s image-
10 prompting feature is merely a copyright-laundering facility, designed to produce low-cost knockoffs
11 of copyrighted images. Ex. I. Yes—Plaintiffs are aware. ¶ 8. Midjourney’s arguments in opposition
12 all fail.

13 First—Midjourney argues that Plaintiffs cannot allege infringement, because “[s]oftware
14 code for a machine learning diffusion model is not similar to a painting or a photograph[.]”
15 Midjourney Br. at 12–13. As Nimmer points out, a work of authorship—say, a “motion picture”—
16 may often be fixed in copies of different forms—“such as celluloid, videotape, Blu Ray discs, and the
17 like. There is but a single work of authorship, no matter how numerous and diverse the copies.”
18 Nimmer on Copyright § 2.03[C]. The fact that the work of authorship itself may not be outwardly
19 “similar,” Midjourney Br. at 13, to the object where it is fixed as a copy is irrelevant to any
20 infringement analysis. *See, e.g.*, Nimmer on Copyright § 2.09[D][1] (“A work is no less a motion
21 picture (or other audiovisual work) whether the images are embodied in a videotape, videodisc, or
22 any other tangible form”). Courts have accordingly upheld infringement claims where movies
23 copied books, cartoon characters copied dolls, and photographs copied dances. *See Horgan v.*
24 *Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986) (collecting cases). Midjourney’s use of a “learning
25 diffusion model,” Midjourney Br. at 12, to infringe Plaintiffs’ works is clever and newfangled, but
26 that does not exempt it from the reach of the Copyright Act, particularly when it directly copied
27 Plaintiffs’ work wholesale. *See* Nimmer on Copyright § 3.03[C][4] (“All of this is not to say that
28 digital models are incapable of attracting copyright protection; but to do so, they must incorporate

1 the features that plaintiff’s works lacked”) (discussing *Meshworks, Inc. v. Toyota Motor Sales*, 528 F.3d
2 1258 (10th Cir. 2008)).

3 Second—Midjourney argues that evidence of its model’s capabilities cannot raise an
4 inference that it contains protected expression. Midjourney Br. at 13. But that is exactly what this
5 Court suggested in its earlier MTD Order—“if plaintiffs can plausibly plead that defendants’ AI
6 products allow users to create new works by expressly referencing [Plaintiffs’] works by name, the
7 inferences about how and how much . . . protected content remains . . . might be stronger.” MTD
8 Order at 10. Midjourney claims that these new allegations contradict those in the initial complaint.
9 *Id.* at 13. But Plaintiffs’ initial complaint had no output examples based on prompts using Plaintiffs’
10 names and works, nor the Midjourney Image Model in particular.

11 Third—Midjourney argues that Plaintiffs’ theory that “protected expression” is retained in
12 the Midjourney Image Model is merely “conclusory” and no facts are alleged in support. *Id.* at 14.
13 Not so—Plaintiffs’ copious allegations and exhibits have already been enumerated.

14 Fourth: Midjourney argues that Plaintiffs have not alleged that “copies are viewable or
15 otherwise accessible to Midjourney users.” *Id.* at 15. On the contrary—Plaintiffs have alleged this
16 and offered many examples. ¶¶ 189–90; Ex. I; *see also* Nimmer on Copyright § 2.09[D][1]
17 (discussing *Worlds of Wonder, Inc. v. Vector Intercont’l Inc.*, 653 F. Supp. 135 (N.D. Ohio 1986) and
18 commenting “[t]he audiovisual work subject to protection here, if at all, is the information on the
19 cassette tape, which, when played on the requisite machinery, produces sights and sounds”).

20 **b. Plaintiffs have plausibly alleged that the Midjourney Model is a**
21 **Statutory Derivative Work**

22 Plaintiffs also allege that the Midjourney Models are infringing Statutory Derivative Work
23 based on the LAION-5B Registered Works. ¶ 288. Under the Copyright Act, a *derivative work* is “a
24 work based upon one or more preexisting works, such as . . . an] abridgment, condensation, or any
25 other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (Plaintiffs call
26 this a “Statutory Derivative Work.” ¶ 210.) As noted above, Plaintiffs allege that the Midjourney
27 Model is “capable of reproducing protected expression from each of the LAION-5B Registered
28 Works that was in each case substantially similar to that registered work.” ¶ 288. Furthermore, all

1 the allegations above that support Plaintiffs’ theory that the Midjourney Model is a Statutory Copy
 2 also support this theory: the commentary from five AI researchers (¶¶ 117, 119, 131, 138, 143); and
 3 the examples of output from the Midjourney Image Product (¶¶ 169–75 & Ex. F (text-prompt
 4 examples); ¶¶ 189–190 & Ex. I (image-prompt examples)).

5 **B. Plaintiffs Have Adequately Pled Violations of the DMCA. (Count 7)**

6 The DMCA provides that “no person shall knowingly and with the intent to induce, enable,
 7 facilitate, or conceal infringement, (1) provide copyright management information that is false, or (2)
 8 distribute or import for distribution copyright management information that is false.” 17 U.S.C.
 9 § 1202(a). It further prohibits the intentional removal or alteration of copyright management
 10 information (“CMI”), and the distribution of CMI or Works with CMI removed or altered, without
 11 the authority of the copyright owner. *Id.* § 1202(b).

12 CMI includes: “[the] title and other information identifying the work, including the
 13 information set forth on a notice of copyright;” “[the] name of, and other identifying information
 14 about, the author of a work;” and “[the] name of, and other identifying information about, the
 15 copyright owner of the work, including the information set forth in a notice of copyright.” 17 U.S.C.
 16 § 1202(c); *see also Stevens v. Corelogic, Inc.*, 899 F.3d 666, 671 (9th Cir. 2018) (CMI includes
 17 “information such as the title, the author, the copyright owner, the terms and conditions for use of
 18 the work, and other identifying information set forth in a copyright notice or conveyed in connection
 19 with the work.”). Section 1202(c) has been interpreted broadly. *See Brown v. Stroud*, No. C 08-02348
 20 JSW, 2011 WL 2600661, at *5 (N.D. Cal. June 30, 2011); *Williams v. Cavalli*, No. CV 14-06659-AB
 21 JEMX, 2015 WL 1247065, at *3 (C.D. Cal. Feb. 12, 2015); *Leveyfilm, Inc. v. Fox Sports Interactive*
 22 *Media, LLC*, 999 F. Supp. 2d 1098, 1102 (N.D. Ill. 2014).

23 “Knowledge or intent on the part of the defendant is required for liability under
 24 . . . § 1202(b).” *Merideth v. Chi. Trib. Co., LLC*, No. 12 C 7961, 2014 WL 87518, at *2 (N.D. Ill. Jan.
 25 9, 2014). As long recognized by the Ninth Circuit, “direct proof of one’s specific wrongful intent is
 26 rarely available” and such knowledge or intent can be inferred through circumstantial evidence.
 27 *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1189 (9th Cir. 2016) (internal quotation marks
 28 omitted). “[I]ntent, knowledge, and other conditions of a person’s mind may be alleged generally”

1 for purposes of pleading Section 1202(b)'s mental state requirements. *Logan v. Meta Platforms, Inc.*,
 2 636 F. Supp. 3d 1052, 1063 (N.D. Cal. 2022) (citations omitted).

3 **1. Plaintiffs Plead All Elements of a Section 1202(b) Violation.**

4 A claim for a CMI violation under the DMCA requires the plaintiff to plead: “(1) the
 5 existence of CMI on the infringed work, (2) removal or alteration of that information, and (3) that
 6 the removal or alteration was done intentionally.” *O’Neal v. Sideshow, Inc.*, 583 F. Supp. 3d 1282,
 7 1286–87 (C.D. Cal. 2022). The plaintiff must also plead the requisite scienter. *Izmo, Inc. v. Roadster,*
 8 *Inc.*, No. 18-CV-06092-NC, 2019 WL 13210561, at *3–4 (N.D. Cal. Mar. 26, 2019). Scienter,
 9 however, need not be alleged with specificity. *Id.* at *4; *accord* Fed. R. Civ. P. 9(b) (“intent,
 10 knowledge, and other conditions of a person’s mind may be alleged generally”).

11 In its order on the previous complaint, the Court set forth specific guidance to the Plaintiffs
 12 on the DMCA claims: “Plaintiffs must, on amendment, identify the particular types of their CMI
 13 from their works that they believe were removed or altered. In addition, plaintiffs must clarify and
 14 then allege plausible facts regarding which defendants they contend did the stripping or altering in
 15 violation of the DMCA and when that occurred.” MTD Order at 18. Plaintiffs have addressed each
 16 of the Court’s requests for clarification and have alleged facts sufficient to make out a DMCA claim.

17 ***Existence of CMI.*** The FAC includes allegations regarding the types of CMI that named
 18 Plaintiffs include in their Works. *See* ¶¶ 292–93; MTD Order at 19 (directing Plaintiffs to “identify
 19 the specific CMI each named plaintiff included in the images that each plaintiff contends was used
 20 to train Stable Diffusion.”). Plaintiffs specifically allege that their works contained CMI, including
 21 captions, and distinctive marks.⁵ The FAC includes visual examples of Plaintiffs’ specific CMI in
 22 original images, and the reproduction of those images without CMI. Ex. I; ¶¶ 194–200; 292–93.
 23 Each is recognized as CMI. *See* 17 U.S.C. § 1202(c)(2), (3), (7), (8); *see also Logan*, 636 F. Supp. 3d at
 24 1063 (finding that the creator’s name, title of the work, “and a link to a Creative Commons website

25 _____
 26 ⁵Examples include Plaintiff Brom’s signature and a watermark containing the URL for his personal
 27 website, ¶¶ 53, 195, 198; a watermark containing the URL for Plaintiff Zhang’s personal website, ¶¶
 28 53, 196, 199; Plaintiff Ortiz’s signature, ¶¶ 53, 197; Plaintiff McKernan’s distinctive mark, ¶ 53; and
 Plaintiff Andersen’s signature, ¶ 53.

1 . . . setting forth the terms and conditions for use’” constituted CMI). Plaintiffs similarly allege that
2 CMI was incorporated directly into their works. ¶¶ 292; 293; *see also Logan*, 636 F. Supp. 3d at 1063
3 (“[I]dentifying information . . . provided . . . beneath each [work]” “sufficiently close to qualify as
4 CMI.”).

5 Further, Plaintiffs’ names or identifying handles are included in the text captions of their
6 Works. *See* ¶¶ 15, 17, 18, 19, 21, 292.⁶ The captions, which are often generated by the artists
7 themselves, function as CMI, describing the images and identifying the artists. ¶¶ 78, 106. Plaintiffs
8 clearly allege that this “identifying information” included on the images themselves and in the
9 images’ metadata is “conveyed in connection with the work.” *See Stevens*, 899 F.3d at 671.
10 Midjourney’s assertion that Plaintiffs “fail to identify the CMI that was purportedly removed,”
11 Midjourney Br. at 15, is belied by the FAC’s detailed allegations to the contrary.

12 ***Knowing removal of CMI.*** Plaintiffs allege that Midjourney knowingly removed or altered
13 CMI from Plaintiffs’ Works. Without the authority of Plaintiffs, Midjourney directly copied the
14 LAION-5B Works and used the Statutory Copies as training data for the Midjourney Image Product.
15 ¶ 300. Plaintiffs also allege that Midjourney knew that CMI was being removed or altered, which
16 made attribution particularly difficult in the Midjourney Models. *See, e.g.*, ¶¶ 78–79. Plaintiffs
17 further allege that “[t]he works copied by Midjourney included CMI, including in the form of
18 distinctive marks such as watermarks or signatures, and as the captions in the image-text pairs. The
19 training process is designed to remove or alter CMI from the training images. Therefore,
20 Midjourney intentionally removed or altered CMI from the Plaintiffs’ works in violation of 17 U.S.C.
21 § 1202(b)(1).” ¶ 300.

22 ***Distribution of copied works.*** Plaintiffs allege Midjourney distributed copies of the
23 Works. ¶ 302 (“Midjourney also knew that the distribution of works without CMI would lead to
24 further infringement.”). As Plaintiffs allege, the point of Midjourney is to encourage the use of artist
25 names as prompts, thereby encouraging the Midjourney Image Product’s users and licenses to

26 ⁶ Midjourney’s assertion that the captions were created by LAION, Midjourney Br. at 15, is untrue;
27 the FAC clearly alleges that Plaintiffs themselves generally create the captions. *See* ¶¶ 72–78. At
28 best, Midjourney merely injects a factual dispute which cannot be decided on the pleadings.

1 infringe on an artist' work. ¶ 302.

2 ***Knowingly enabling infringement.*** Plaintiffs allege Midjourney knew or had reasonable
3 grounds to know that its distribution would induce, enable, or conceal an infringement, either by
4 itself or its users. *See* ¶¶ 78–79, 189–94, 271, 276. “[A] defendant’s awareness that distributing
5 copyrighted material without proper attribution of CMI will conceal his own infringing conduct
6 satisfies the DMCA’s second scienter requirement.” *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 172 (2d
7 Cir. 2020); *see also id.* (“Section 1202(b)(3) also encompasses ‘an infringement’ that, upon
8 distribution, ‘will . . . conceal’ the fact of that infringement.”). This so-called scienter element is
9 evidenced by Midjourney’s knowing or having reasonable grounds to know that this removal of CMI
10 would facilitate copyright infringement by concealing the fact that every output from the model is an
11 infringing derivative work, synthesized from copies with CMI. ¶ 302.

12 Plaintiffs detail how the training process is designed to remove or alter CMI from the
13 training images. ¶¶ 292–301. The CLIP models, including the Midjourney Models, train on the
14 training images, including those with CMI, and learn to associate images with the text, including the
15 CMI captions. ¶ 115. The CLIP models specifically detect and identify the presence of CMI, in the
16 form of watermark detection scores. ¶¶ 66, 216, 241. The diffusion models learn how to deconstruct
17 and reconstruct the images, ¶ 115, and store copies of original Work that can be extracted, ¶ 134. The
18 Midjourney Models then create copies based on Plaintiffs’ Works with CMI removed or altered. ¶¶
19 194, 300–02; Ex. I. In addition, the FAC includes visual examples of Plaintiffs’ Works, which
20 include CMI, that were included in the training set, and highly similar or functionally identical
21 images generated in Stable Diffusion XL, in which the CMI is removed. ¶¶ 188–200; Ex. I. As
22 indicated in the FAC, the “copies generated by the AI image product could not have been generated
23 but for copying the original image which included CMI[.]” ¶ 200.

24 The FAC alleges that Midjourney knew that the works contained in its training sets
25 contained CMI. First, the LAION datasets, on which Midjourney Models are built, contain fields
26 for the URLs of the image, the image caption, the similarity of the caption and image, and
27 watermark detection scores for each image, which indicates the likelihood that an image possess an
28 artist’s distinctive mark or CMI. ¶ 66. To train its models, Midjourney had to download exact copies

1 of each of the images in the datasets, including Plaintiffs’ works with the associated CMI. ¶¶ 61–62,
2 67–68. Because the LAION-5B dataset contains detection scores for watermarks and because CMI is
3 ubiquitous in art, Midjourney knew that the LAION-400M and LAION-5B datasets contained
4 copyrighted works with CMI affixed to them. ¶¶ 271–72, 276–77. Further, Midjourney could have
5 trained its models on images free of CMI, but instead chose not to due to the higher quality of
6 images with CMI. ¶ 295. Where, as here, a defendant distributes unlicensed artwork missing CMI,
7 Midjourney “knew or should have known” that this conduct “could lead their customers to infringe
8 [plaintiffs’] copyrights.” *GC2 v. Int’l Game Tech., IGT, Doubledown Interactive LLC*, 391 F. Supp. 3d
9 828, 842 (N.D. Ill. 2019).

10 2. Section 1202 does not require the copy be “identical.”

11 Midjourney argues that Plaintiffs’ DMCA claim fails because Plaintiffs have not alleged that
12 Midjourney made an otherwise identical copy of a plaintiff’s work with the CMI removed or altered.
13 Midjourney Br. at 15–16. The plain language of the DMCA makes it a violation to remove or alter
14 CMI; it includes no requirement that the output work be original or identical to obtain relief. 17
15 U.S.C. § 1202(b)(1). Rather, the statute defines CMI as “information conveyed in connection with
16 copies . . . of a work[.]” 17 U.S.C. § 1202(c).

17 The definition of “copy” under the DMCA includes no requirement of identity. To be
18 considered a copy under the DMCA, the “allegedly infringing work must be fixed in some tangible
19 form from which the work can be perceived, reproduced, or otherwise communicated, either
20 directly or with the aid of a machine or device.” *Columbia Pictures Indus., Inc. v. Galindo*, No. 20-cv-
21 3129-MEMF (GJSx), 2022 WL 17094713, at *8 (C.D. Cal. Nov. 18, 2022) (citing 17 U.S.C. § 101).
22 Indeed, the requirement that the DMCA requires identical copies was recently squarely rejected.
23 *ADR Int’l Ltd. v. Inst. For Supply Mgmt., Inc.*, 667 F. Supp. 3d 411, 427 (S.D. Tex. 2023) (explaining
24 for claims under the DMCA, “copies include more than just the original work.”).

25 None of the cases upon which Stability relies which adopt an “identity” standard for
26 DMCA claims explain the origins of this standard—either by drawing on statutory language,
27 legislative history, or potentially analogous interpretations of “copying” under the Copyright Act.
28 *See, e.g., Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV. 13-00496 SOM, 2015 WL 263556, at *3

1 (D. Haw. Jan. 21, 2015); *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. CV 20-1931-DMG (EX),
 2 2020 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020); *Dolls Kill, Inc. v. Zoetop Bus. Co.*, No.
 3 222CV01463RGKMAA, 2022 WL 16961477 (C.D. Cal. Aug. 25, 2022). Many of these cases also
 4 cite other cases that either never discussed the issue of “identity” (despite being cited for that
 5 proposition.⁷ See *ADR Int’l*, 667 F. Supp. 3d at 427–29 (observing that “Defendants’ cases do not
 6 require a plaintiff to plead allegedly infringing works are identical copies”).

7 Notably, as explained by the court in *ADR Int’l*, neither the statute’s plain language nor its
 8 legislative history—which the district court actually examined (unlike the cases on which
 9 Defendants rely)—supported an “identity” requirement. Instead, well-established standards of
 10 statutory construction compelled the opposite conclusion, namely, that “copying” under the
 11 DMCA should align with “copying” under the Copyright Act. *ADR Int’l*, 667 F. Supp. 3d at 427. In
 12 accord with this position, courts routinely analyze whether a copy is “substantially similar” to an
 13 original work or portion thereof when evaluating DMCA claims—a standard drawn directly from
 14 the Copyright Act.⁸ And Plaintiffs have amply alleged substantial similarity. See III. A.4, *supra*.

15 In any event, Midjourney misinterprets the FAC and ignores Plaintiffs’ allegation that
 16 Defendants incorporated their Works *in their entirety* into the Midjourney Models. See, e.g., ¶¶ 1, 2,

17
 18 ⁷ The extrastatutory identity requirement likely stems from dicta from district court opinions
 19 with little underlying analysis. See, e.g., *Kirk Kara Corp.*, 2020 WL 5991503, at *6. As *ADR Int’l*
 20 noted, the *Kirk Kara* court (cited by Midjourney) cited *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116,
 21 1122 (C.D. Cal. 1999) and *Frost-Tsuji Architects*, 2015 WL 263556, at *2, “but neither [of these cases]
 22 mentioned nor employed an identical copies requirement. *Id.* at 427 (S.D. Tex. 2023). The *Kirk*
 23 *Kara* court similarly cited *Fischer v. Forrest*, 286 F. Supp. 3d 590 (S.D.N.Y. 2018), yet, the term
 24 appears nowhere in the decision, and in fact, the court stated that where DMCA claims had been
 25 adequate, “the underlying work has been *substantially* or entirely reproduced.” *Id.* at 609 (emphasis
 26 added); see also *ADR Int’l Ltd.*, 667 F. Supp. 3d at 427 (rejecting *Kirk Kara*’s reliance on *Fischer*).

27 ⁸ See, e.g., *Friedman*, 833 F.3d at 1188 (applying a “substantial similarity” standard to DMCA
 28 analysis); *Widespread Elec. Sales, LLC v. Upstate Breaker Wholesale Supply, Inc.*, No. 3:20-CV-2541-K,
 2023 WL 8721435, at *1 (N.D. Tex. Dec. 17, 2023) (denying DMCA claim on summary judgment
 because “there is a material fact question on substantial similarity.”); *Software Pricing Partners, LLC*
v. Geisman, No. 319CV00195RJCDCK, 2022 WL 3971292, at *5 (W.D.N.C. Aug. 31, 2022) (finding
 employee liable for violating DMCA where employee “reasonably knew that such information was
 copyrighted work and knew he was altering it by changing it enough to look like his own work while
 maintaining a substantial similarity to the original work.”).

1 4, 5, 40, 50, 55, 61–63, 67–69, 72, 85. The models then remove the CMI from these works in the
 2 training process, ¶¶ 66, 194, 295–301, and ultimately generate output, which are reconstructed
 3 copies and necessarily remove the CMI contained in these works, *see* Ex. I; *see also GC2 Inc.*, 391 F.
 4 Supp. 3d at 844 (upholding jury verdict on DMCA removal claim where the defendants had used
 5 the plaintiff’s work “in its entirety”).⁹ Because Plaintiffs allege that their images were directly
 6 copied with CMI, *see, e.g.*, ¶¶ 2, 52–55, 300–01, the Court need not infer whether Midjourney
 7 removed CMI in the training process. *Fischer*, 286 F. Supp. 3d at 609 (“In those cases where claims
 8 of removal of CMI have been held viable, the underlying work has been *substantially* or entirely
 9 reproduced.”) (emphasis added).

10 3. Plaintiffs have sufficiently alleged double scienter.

11 At the motion to dismiss stage, a plaintiff need only “allege sufficient facts to support the
 12 reasonable inference that the defendant ‘knew or had a reasonable basis to know that the removal or
 13 alteration of CMI . . . w[ould] aid infringement.’” *Doe 1 v. GitHub, Inc.*, 672 F. Supp. 3d 837, 858
 14 (N.D. Cal. 2023) (*quoting Harrington v. Pinterest, Inc.*, No. 5:20-CV-05290-EJD, 2022 WL 4348460,
 15 at *5 (N.D. Cal. Sept. 19, 2022)). Further, the Ninth Circuit has consistently held that scienter for
 16 the DMCA can be inferred through circumstantial evidence. *Friedman*, 833 F.3d at 1189. Plaintiffs’
 17 allegations plainly support the reasonable inference that Midjourney knew that their removal of CMI
 18 would aid infringement. Midjourney chose to train its models on the LAION-400M and LAION-5B
 19 datasets, knowing that these datasets contained CMI, ¶¶ 271–72, 276–77, 295–96, and knowingly
 20 removes that CMI, ¶¶ 300–01. Midjourney then released its AI Image Product to third parties, who
 21 used Midjourney’s models to generate functionally identical images without CMI. ¶ 302. Thus,
 22 Plaintiffs plausibly allege that Midjourney “knew or should have known that their unlicensed

23 _____
 24 ⁹ The cases on which Stability relies generally involve a scenario in which copying needed to be
 25 inferred to establish that CMI was removed from the original Works. *See, e.g., Dolls Kill*, 2022 WL
 26 16961477, at *4 (“The differences between the parties’ products undercut any inference that
 27 defendants removed or altered Plaintiffs’ CMI.”). *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927,
 28 938 (C.D. Cal. 2018), is similarly unavailing. There, the Court found that CMI was not “removed”
 when a photographer took a photograph at a strange angle and did not capture the artist’s signature.
Falkner at 938. Here, Midjourney wholesale copied and then removed the CMI from Plaintiffs’
 images.

1 distribution of artwork missing copyright management information to their customers could lead
 2 their customers to infringe [plaintiffs'] copyrights.” *GC2*, 391 F. Supp. 3d at 842.

3 **C. Plaintiffs sufficiently allege that Midjourney violated the Lanham Act under a**
 4 **theory of false endorsement. (Count 8)**

5 A claim of false endorsement requires (1) “a protectible ownership interest in the mark” and
 6 (2) “that the defendant[s]’ use of the mark . . . is likely to cause consumer confusion.” *Adobe Sys. Inc.*
 7 *v. A & S Elecs., Inc.*, 153 F. Supp. 3d 1136, 1141 (N.D. Cal. 2015). A name can constitute a protected
 8 mark. *Make Him Smile, Inc. v. Trek Bicycle Corp.*, No. 2:17-cv-07136-RGK-KS, 2018 WL 5986983, at
 9 *5 (C.D. Cal. Jan. 18, 2018). Likelihood of confusion relies on the “reasonably prudent consumer.”
 10 *Adobe Sys. Inc.*, 153 F. Supp. 3d at 1142 (quoting *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d
 11 1190, 1202–03 (9th Cir. 2012)). “Neither intent nor actual confusion are necessary to establish a
 12 likelihood of confusion.” *Church & Dwight Co., Inc. v. Mayer Labs., Inc.*, No. C-10-4429 EMC, 2011
 13 WL 1225912, at *19 (N.D. Cal. Apr. 1, 2011) (quoting *Century 21 Real Estate Corp. v. Sandlin*, 846
 14 F.2d 1175, 1178 (9th Cir. 1988)). “[O]nly a likelihood of deception is needed.” 4 McCarthy on
 15 Trademarks and Unfair Competition § 28.15 (5th ed. 2024).

16 ***Protectible ownership interest in the mark.*** Midjourney published and promoted a document
 17 called the “Midjourney Style List” that included over 4700 artist names. ¶ 262. Five plaintiffs—
 18 Greg Rutkowski, Sarah Andersen, Karla Ortiz, Gerald Brom, and Julia Kaye—appear on that list,
 19 and together are called the “Midjourney Named Plaintiffs.” ¶ 264. These plaintiffs have a
 20 protectible ownership interest in their own names, which have a “high level of recognition,” ¶ 310,
 21 and embody their “fame and goodwill as popular artists[.]” ¶ 314.

22 ***Likelihood of confusion.*** Midjourney CEO David Holz exhorted his customers to use artist
 23 names from the Midjourney Style List in their image prompts. ¶ 262. Midjourney has also published
 24 user-created images that incorporate these artist names in its own official “Showcase” site. ¶ 325(b)
 25 & Ex. K. Thus, a “reasonably prudent consumer in the marketplace for art products would likely be
 26 confused” as to whether the Midjourney Named Plaintiffs had a connection to the Midjourney
 27 Image Product. ¶¶ 308–12. Midjourney’s arguments to the contrary all fail.

28 First—Midjourney argues that Plaintiffs failed to “identify anything purportedly false or

1 misleading about the [Midjourney] Name List” because it “accurately identif[ies] thousands of
 2 names that can be used in prompts.” Midjourney Br. at 18. In so arguing, Midjourney seems to
 3 concede Plaintiffs’ separate claim for trade-dress infringement. Leaving that aside the relevant falsity
 4 does not pertain to the capabilities of the Midjourney Image Product, but whether the artists on the
 5 Midjourney Style List consented to have their names commercially exploited as part of the
 6 Midjourney Image Product. They did not. ¶¶ 306–308.

7 Midjourney relies on *Cairns v. Franklin Mint Co.* even though that court was determining a
 8 motion for summary judgment—not a motion to dismiss—and therefore considered “ample
 9 evidence” to determine whether there was “*actual* customer confusion” which is not the standard at
 10 this stage. 107 F. Supp. 2d 1212, 1216–19, 1223 (C.D. Cal. 2000) (emphasis added). Midjourney
 11 customers *could* reasonably believe (and thereby be misled) into associating Plaintiffs’ endorsement
 12 of the Midjourney Image Product because of Midjourney’s inclusion of their names in the
 13 Midjourney Name List. *See, e.g., Make Him Smile*, 2018 WL 5986983, at *4–5 (plaintiff sufficiently
 14 alleged that the defendant’s use of “Farley” would likely cause confusion).

15 Second—Midjourney raises nominative fair use and First Amendment defenses. Midjourney
 16 Br. at 18–19. But “[a]n affirmative defense may not ordinarily be raised on a motion to dismiss.”
 17 *Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047, 1056 (N.D. Cal. 2021) (quoting *U.S. Commodity*
 18 *Futures Trading Comm’n v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019)). Midjourney makes
 19 no effort to claim that their defenses are “based on undisputed facts” or that “the basis for the[ir]
 20 argument appears on the face of the complaint and any materials the court takes judicial notice of.”
 21 *Id.* (citation omitted). Regardless, the Court cannot conclude that, as a matter of law, Midjourney’s
 22 use of Plaintiffs’ names “makes no suggestion of . . . endorsement by [the defendant], as the third
 23 element of the nominative fair use defense requires.” *Gorski v. The Gymboree Corp.*, No. 14-CV-
 24 01314-LHK, 2014 WL 3533324, at *7 (N.D. Cal. July 16, 2014).¹⁰

25 _____
 26 ¹⁰ In any event, Midjourney’s use is plainly commercial and not expressive—as demonstrated by the
 27 Midjourney Showcase attached as Exhibit K, Midjourney promotes images with artist-name
 28 prompts in order to market its products. *See* 4 McCarthy on Trademarks and Unfair Competition §
 28:16 (5th ed. 2024) (explaining free speech defense inapplicable to “commercial” works).

1 **D. Plaintiffs Sufficiently Allege that Midjourney Violated the Lanham Act Under a**
 2 **Theory of Vicarious Trade-Dress Infringement. (Count 9)**

3 A claim for trade-dress infringement must allege that “(1) the trade dress is nonfunctional,
 4 (2) the trade dress has acquired secondary meaning, and (3) there is substantial likelihood of
 5 confusion between the plaintiff’s and defendant’s products.” *YZ Prods., Inc. v. Redbubble, Inc.*, 545 F.
 6 Supp. 3d 756, 766 (N.D. Cal. 2021). Courts consider the third element, likelihood of confusion, to be
 7 the “most important element.” *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042,
 8 1048 (9th Cir. 1998). A plaintiff must, “at the very least,” give adequate notice “by including in their
 9 complaint ‘a complete recitation of the concrete elements of [their] alleged trade dress.’” *YZ Prods.,*
 10 *Inc.*, 545 F. Supp. 3d at 767. “The claimed trade dress ‘must be examined as a whole, not by its
 11 individual constituent parts.’” *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1068 (N.D. Cal.
 12 2015) (quoting *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001)). “[T]here
 13 is no heightened pleading requirement in trade dress cases.” *Chihuly, Inc. v. Kaindl*, No. C05-1801-
 14 JPD, 2006 WL 83462, at *4 (W.D. Wash. Jan. 11, 2006).

15 Here, Plaintiffs’ trade-dress allegations plainly meet these requirements:

16 **No functional value.** Plaintiffs’ respective trade dress “has no intrinsic functional value”
 17 because “[t]he unique combination of particular artistic elements” are “purely ornamental and
 18 aesthetic.” ¶ 327 Plaintiffs’ protected trade dress is not essential to the use or purpose of a product
 19 and “there remains an unlimited number of alternative artistic styles available.” ¶ 327.

20 **Secondary meaning.** Plaintiffs’ trade dress has secondary meaning because consumers of
 21 Plaintiffs’ goods associate those goods with their respective trade dress. ¶ 328. For each of the
 22 Midjourney Named Plaintiffs, the FAC alleges specific recurring elements of their work that each
 23 artist “is known for” which therefore qualify as trade dress. ¶ 319. Midjourney markets the
 24 Midjourney Image Product to generate images featuring the trade dress of Plaintiffs. ¶¶ 324-25. The
 25 Midjourney Image Product relies on a CLIP model that acts as a trade-dress database. ¶ 320.

26 **Likelihood of confusion.** Plaintiffs allege that the CLIP model used in the Midjourney Image
 27 Product can “appropriate the distinctive look and feel” of Plaintiffs’ trade dress and the Midjourney
 28 Image Product “can and frequently does generate images featuring protectable trade dress[.]” ¶¶

322–23. Worse, Midjourney promotes images with artist-name prompts in its online “Showcase.” ¶ 324 & Ex. K. These allegations suffice. *See Chihuly, Inc.*, 2006 WL 83462, at *4 (denying motion to dismiss trade dress claim where plaintiff asserted claim over “glass sculptures. . . made in various series reflecting a common theme” which have their own “aesthetic” and which is “inherently distinctive and has achieved secondary meaning in the market”).

Midjourney’s arguments to the contrary fail:

First—Midjourney incorrectly argues that Plaintiffs fail to adequately identify their trade dress. Midjourney focuses on the shorthand textual summary in the FAC of Plaintiffs’ protectible trade dress. ¶ 319. But tellingly, Midjourney entirely sidesteps its use of a CLIP model, which acts as a trade-dress database.¹¹ ¶¶ 83, 320. The absurd effectiveness of the Midjourney Image Product in recreating Plaintiffs’ trade dress is shown via output examples using text prompts. ¶¶ 171–175, Ex. F. These trade-dress infringements perpetrated by the Midjourney Image Product are so good that Midjourney uses them to promote itself. Ex. K. Thus, Midjourney cannot claim ignorance of capitalizing on Plaintiffs’ trade dress. In any event, this is not a basis to dismiss Plaintiffs’ claims on the pleadings. *See Chihuly, Inc.*, 2006 WL 83462, at *4 (deferring a “more definite identification of trade dress” until discovery).¹²

Second—Midjourney falsely claims that imitation of an artistic style cannot be actionable as a trade-dress violation. Midjourney Br. 22. Plaintiffs’ descriptions of their trade dress clearly fall

¹¹ A CLIP model is trained on images and captions, and guides the diffusion process toward a certain kind of result. ¶¶ 105–11. Within a CLIP model, “artist names are particularly influential” to generate images in the style of that artist. ¶ 112. This capability of the CLIP model was empirically substantiated in a research paper by Stephen Casper. ¶¶ 141–143.

¹² *Walker & Zanger, Inc. v. Paragon Industries, Inc.*, 549 F. Supp. 2d 1168 (N.D. Cal. 2007) and *Stouffer v. National Geographic Partners, LLC*, 400 F. Supp. 3d 1161 (D. Colo. 2019) are distinguishable. In *Stouffer*, the alleged trade dress was both functional and based merely on aesthetic choices without a “source-identifying role.” 400 F. Supp. 3d at 1185. Here, the Midjourney Image Product’s ability to output images incorporating Plaintiffs’ trade dress proves that their trade dress was identifiable. ¶¶ 322–328. Further, Plaintiffs explicitly allege that their trade dress is nonfunctional whereas the plaintiff in *Stouffer* conceded the opposite. 400 F. Supp. 3d at 1185; ¶ 327. *Walker & Zanger* was a summary-judgment opinion where the plaintiffs had the benefit of discovery. 549 F. Supp. 2d at 1177 (N.D. Cal. 2007).

1 within what the Ninth Circuit has recognized as “[the] combination of visual elements that, taken
 2 together, may create a distinctive visual impression Trade dress is the composite tapestry of
 3 visual effects.” *Clicks Billiards, Inc.*, 251 F.3d at 1259 (internal quotations omitted). 4 McCarthy on
 4 Trademarks and Unfair Competition § 8.2 (4th ed. 2016) provides further guidance, explaining that,
 5 “[t]rade dress refers to a product’s combination of elements, not individual elements to be judged in
 6 a vacuum.” Here, Plaintiffs’ trade dress “consists of a set of recurring visual elements and artistic
 7 techniques, the particular combination of which are distinctive to each of the Midjourney Named
 8 Plaintiffs, associated with them and their work, and desirable to customers.” ¶ 319. Accordingly, the
 9 combination of Plaintiffs’ artistic techniques, styles, and artworks and products, when taken as a
 10 whole, create a distinctive visual impression and thus, constitute protectable trade dress. *See*
 11 *Chihuly, Inc.*, 2006 WL 83462, at *4 (denying motion to dismiss trade-dress claim where artist
 12 asserted claim over artworks that had their own “aesthetic,” “inherently distinctive and has
 13 achieved secondary meaning in the market”).

14 Third—Midjourney is wrong that “Plaintiffs’ works are functional.” Midjourney Br. at 22.
 15 Plaintiffs have already alleged pleaded that “each of Midjourney Named Plaintiffs’ respective trade
 16 dress has no intrinsic functional value” ¶ 327. Beyond that, functionality is a question of fact that is
 17 inappropriate for resolution at this stage. *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th Cir.
 18 2002) (trade-dress functionality is “an intensely factual issue”); *see also Givenchy S.A. v. BCBG Max*
 19 *Azria Grp., Inc.*, No. CV 10-8394-GHK SHX, 2012 WL 3072327, at *3 (C.D. Cal. Apr. 25, 2012).¹³

20 Fourth—Midjourney misstates the standard. Under Ninth Circuit precedent, a Plaintiff
 21 must plead that a mark or trade dress is “*either distinctive or has a secondary meaning[.] [I]f a mark*
 22 *or dress is inherently distinctive it need not be shown to also have a secondary meaning.” Int’l*

23
 24 ¹³ *Pagliari v. Wallace China Co.*, 198 F.2d 339, 343 (9th Cir. 1952) and *Int’l Ord of Job’s Daughters v.*
 25 *Lindeburg Co.*, 633 F.2d 912, 917 (9th Cir. 1980) are distinguishable. In *Pagliari*, patterns on
 26 dinnerware were held to be functional and non-protectable. *Pagliari*, 198 F.2d at 343. In *Int’l Ord of*
 27 *Job’s Daughters*, a jewelry design by the defendant was held to be functional. 633 F.2d at 920. But
 28 both of those cases involved aesthetic elements that were intrinsic to the value of an underlying
 functional object—dinnerware and jewelry, respectively. Here, there is no such underlying
 functional object that Plaintiffs’ aesthetic efforts have been applied to.

1 *Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 824 (9th Cir. 1993) (quoting *Two Pesos, Inc.*, 505
 2 U.S. 763, 769 (1993)). “A mark or dress is distinctive when it identifies the particular source of the
 3 product or distinguishes it from other products.” *Id.* at 824; *cf. Lisa Frank, Inc. v. Impact Int’l, Inc.*,
 4 799 F. Supp. 980, 988 (D. Ariz. 1992) (including arbitrary features that do not describe the product
 5 or assist in effective packaging makes trade dress distinctive). Correspondingly, a trade dress
 6 acquires a secondary meaning when the public associates the mark or dress with a single producer or
 7 source rather than with the product itself. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354
 8 (9th Cir. 1985). And Plaintiffs allege *both*. ¶¶ 319, 328..

9 Fifth—Midjourney’s last-ditch attack claiming no direct or vicarious liability provides no
 10 grounds for dismissal. Midjourney Br. at 24. Midjourney’s recitation of this standard conveniently
 11 leaves out the “control” standard relied upon by Plaintiffs. *Louis Vuitton Malletier, S.A. v. Akanoc*
 12 *Sols., Inc.*, 591 F. Supp. 2d 1098, 1113 (N.D. Cal. 2008) (“Vicarious trademark infringement requires
 13 a finding that the defendant and the infringer have an apparent or actual partnership, have authority
 14 to bind one another in transactions with third parties **or exercise joint ownership or control over**
 15 **the infringing product.**”) (internal quotation omitted, emphasis added). And Plaintiffs allege both
 16 the requisite direct infringement by a third party, *see, e.g.*, ¶ 326, and “control over the infringing
 17 product”, *see, e.g.*, ¶ 326; *see also Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 807 (9th Cir.
 18 2007)).

19 **E. Plaintiffs Adequately Allege Their California State Law Claims (Count 10).**

20 **1. Plaintiffs’ state law claims are not preempted.**

21 Plaintiffs’ unjust enrichment claim, as pleaded, contains “the necessary qualitatively
 22 different extra element [to] distinguish it” from a copyright claim and, therefore, is not preempted
 23 by the Copyright Act. *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1074 (N.D.
 24 Cal. 2016). Specifically, Plaintiffs allege that Midjourney’s use of their names created a likelihood of
 25 confusion over whether Plaintiffs endorsed Midjourney’s Image Product and the affiliation that
 26 Plaintiffs may have had with Midjourney. ¶¶ 307, 309. Therefore, it is Midjourney’s use of
 27 Plaintiffs’ names and reputations as well-known artists that underlies Plaintiffs’ unjust enrichment
 28 claim. Despite Midjourney’s contention that this claim “is just a repackaged copyright claim,”

1 Midjourney’s use Plaintiffs’ names does not sound in copyright at all. ¶¶ 259–64, 278. *See, e.g.*,
 2 *Eksouzian v. Albanese*, No. CV 13-728 PSG (MANx), 2013 WL 12139828, at *3 (C.D. Cal. July 12,
 3 2013) (finding no preemption where plaintiffs “allege extra elements beyond the basic elements of
 4 copyright,” like “trade dress[] and confusingly similar domain names”); *Perfect 10, Inc. v. Google,*
 5 *Inc.*, No. CV 04-9484 AHM (SHx), 2008 WL 4217837, at *9 (C.D. Cal. July 16, 2008) (“To the
 6 extent its unjust enrichment theory of relief is based on nonpreempted claims—i.e., right of
 7 publicity, trademark—the unjust enrichment claim is not preempted by the Copyright Act.”).

8 **2. Plaintiffs state a claim for unjust enrichment.**

9 Pleading unjust enrichment as a standalone claim requires that plaintiff “show that the
 10 defendant received and unjustly retained a benefit at the plaintiff’s expense.” *In re Juul Labs, Inc.,*
 11 *Mktg., Sales Practices, & Prods. Liability Litig.*, 497 F. Supp. 3d 552, 641 (N.D. Cal. 2020) (quoting
 12 *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016)). A benefit is broadly
 13 defined as “any type of advantage.” *CSI Elec. Contractors, Inc. v. Zimmer Am. Corp.*, No. CV 12-
 14 10876-CAS (AJWx), 2013 WL 1249021, at *5 (C.D. Cal. Mar. 25, 2013). A plaintiff may plead unjust
 15 enrichment even if such a claim is “duplicative of or superfluous” to other claims. *Astiana v. Hain*
 16 *Celestial Grp., Inc.*, 783 F.3d 753, 762–63 (9th Cir. 2016).

17 Product without Plaintiffs’ consent. ¶¶ 260–64, 312. Specifically, thanks to Plaintiffs’
 18 renown and notoriety, Midjourney was able to unjustly enrich itself by promoting the Image
 19 Product’s ability to mimic Plaintiffs’ work. ¶¶ 261–62, 310. To make matters worse, Midjourney’s
 20 use of Plaintiffs’ names falsely suggested that Plaintiffs have endorsed and/or are affiliated with
 21 Midjourney’s Image Product—the outputs of which they compete with in the marketplace for art—
 22 thereby creating confusion amongst reasonably prudent consumers. ¶¶ 308–12, 14.

23 **IV. CONCLUSION**

24 For the foregoing reasons, Midjourney’s motion to dismiss should be denied.
 25
 26
 27
 28

1 Dated: March 21, 2024

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