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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15
16 SARAH ANDERSEN, et al.,

17 Plaintiffs,

18 v.

19 STABILITY AI LTD., a UK corporation;
20 STABILITY AI, INC., a Delaware
corporation; DEVIANTART, Inc., a Delaware
corporation; MIDJOURNEY, INC., a
21 Delaware corporation; RUNWAY AI, INC.,
a Delaware corporation,

22 Defendants.
23

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

**REPLY IN SUPPORT OF DEFENDANT
MIDJOURNEY, INC'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Hearing Date: May 8, 2024
Time: 2:00 PM
Courtroom: Videoconference
Before: Hon. William H. Orrick

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28

1 **I. INTRODUCTION¹**

2 Plaintiffs’ Opposition outright ignores many of the arguments Midjourney advanced in its
3 motion to dismiss and misconstrues the law and their own pleading in responding to others. After
4 two complaints and two full rounds of briefing, one thing is clear: plaintiffs have no facts to
5 establish that Midjourney copied any registered work of any plaintiff in training its model,
6 intentionally removed CMI from identical copies of plaintiffs’ works in violation of the DMCA, or
7 engaged in any activity that can be contorted into a Lanham Act claim or non-preempted state law
8 claim for unjust enrichment. The entire FAC should be dismissed with prejudice as to Midjourney.

9 **II. ALL CLAIMS AGAINST MIDJOURNEY SHOULD BE DISMISSED WITH PREJUDICE**

10 **A. Plaintiffs’ Copyright Claims (Counts 5, 6) Should Be Dismissed**

11 As the Opposition confirms, plaintiffs cannot plead facts to support either of their remaining
12 direct infringement theories: (1) that Midjourney copied their registered works in training its
13 models (§§ 282, 287); or (2) that the model is, itself, an infringing copy or derivative (§ 288).

14 **1. Plaintiffs Fail to Allege Copying of Registered Works**

15 **a. Most of the at-issue images are *unregistered***

16 Plaintiffs improperly persist in advancing infringement claims based on unregistered works.

17 **“Previously Published” Art:** Fourteen alleged registrations (13 for Andersen; one for Kaye)
18 are for compilations including “previously published” art. (Ex. C at 11, 14–21, 24–28.) By law,
19 such registrations do not cover “unclaimable material” such as “previously published” images. (Mot
20 at 6–7 (citing authorities).) Plaintiffs do not claim in the FAC or Opposition that any of the images
21 supposedly covered by these registrations (Ex. A at 64–68, 93–103, 109–118; Ex. B 11, 12, 15)
22 were previously unpublished. These works are, thus, unregistered and cannot support a copyright
23 claim. *UAB “Planner 5D” v. Facebook, Inc.*, 2020 WL 4260733, at *4 (N.D. Cal. July 24, 2020).²

24 Andersen and Kaye argue that their registrations extend to the “underlying elements of the

25 _____
26 ¹ Unless otherwise noted, citations to “§” and “Ex. ” are to the paragraphs and exhibits to the
27 FAC, all emphases are added, and internal citations and quotation marks are omitted. Citation to
28 specific pages in an exhibit are to the exhibit page numbers, not the ECF page numbers.

² Contrary to plaintiffs’ assertion (Opp. at 4), the Court has not “already ruled” on this pleading
defect. The Order (at 4) addressed a different question (whether Andersen had adequately pleaded
which works “were scraped into the training datasets” for Stable Diffusion)—*not* whether she had
adequately pleaded *registrations* for her at-issue works. She and Kaye have not.

1 collections,” even if previously published, so long as they (not a third party) own the copyrights to
 2 those images. (Opp. at 4–5.) That is incorrect. As stated in § 508.2 of the Compendium of U.S.
 3 Copyright Office Practices (3rd ed. Jan. 28, 2021), “a registration for a compilation does not cover
 4 **any previously published ... or third party material** that appears in the compilation.” An “applicant
 5 may register a collective work together with the separate and independent works ... (i) if the
 6 copyright in the contributions and the collective work are owned by the same claimant, **and** (ii) if the
 7 component works have not been previously published ...” *Ambrosetti v. Ore. Cath. Press*, 458 F.
 8 Supp. 3d 1013, 1018 (N.D. Ind. 2020) (quoting Compendium § 618.7). These are distinct
 9 requirements; plaintiffs cannot avoid the second by collapsing it into the first. *See id.* 1018–19
 10 (dismissing with prejudice; registration for song collection did not cover song in which plaintiff
 11 also claimed copyright, as it “was published prior to its inclusion” in the collection); *UAB “Planner*
 12 *5D”*, 2020 WL 4260733 at *4 (registration did not cover previously published software).³

13 **“Text” Only Registrations:** Eleven of the fourteen images Brom claims Midjourney
 14 copied in training (Ex. A at 3–13) are allegedly covered by book registrations claiming authorship
 15 solely in the “text,” not any artwork (Ex. C at 3–4; *compare* Ex. C at 5 (claiming “Authorship: text,
 16 artwork”). The result is that only the text is registered, as the Copyright Office “only examines the
 17 authorship that is **explicitly claimed** in the application,” and “no *prima facie* presumption should
 18 apply to unclaimed authorship that appears in the work.” Compendium §§ 503.3–503.4.

19 The Code of Federal Regulations is no help to Brom. 37 C.F.R. § 202.3(b)(2)(iii) pertains
 20 to “application... class,” directing applicants to file in the class best suited to the work as a whole.
 21 *See Nimmer on Copyright* § 2.03[F]. Application class is not at issue here, as Midjourney does not
 22 dispute that Brom properly sought to register his books in the “text” or “TX” class, and **could have**
 23 claimed authorship over both text and artwork in the same application (though “Visual Arts” works
 24 typically fall within class “VA”). *Id.* The problem for Brom is he didn’t do that; he claimed only

25 _____
 26 ³ Plaintiffs’ authorities are inapt. *Nimmer on Copyright* § 7.16[B][5][c] acknowledges that the
 27 registration in a collection can extend to “new and preexisting” underlying works if the registrant
 28 owns all rights to both; it does not discuss the bar on claiming previously **published** material. *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673 (9th Cir. 2014), involved an unrelated challenge to the validity of a collective work registration for failure to list the names of all authors of the underlying works. That is not at issue in this case.

1 the text.⁴ Apparently recognizing this defect, plaintiffs misleadingly truncate the second subsection
 2 they cite, 37 C.F.R. § 202.3(b)(4), which provides: “For the purpose of registration on one
 3 application ..., the following shall be considered one work: ... all copyrightable elements that are
 4 otherwise recognizable as self-contained works, that are included in the same unit of publication,
 5 **and in which the copyright claimant is the same.**” As Brom’s applications did not claim copyright
 6 in any artwork, his registrations do not cover them and they cannot support an infringement claim.

7 Claims based on images in Ex. A at 3–13 (Brom), 64–68 (Kaye), and 93–103, 109–118 and
 8 Ex. B at 11, 12, 15 (Andersen) must be dismissed with prejudice. As to the remaining 47 at-issue
 9 registered images (Mot. at 8 (chart)), the FAC fails to plead that Midjourney trained on any of them.

10 **b. Plaintiffs fail to plausibly allege copying of registered works**

11 Plaintiffs speculate that, because 47 registered and 78 unregistered works of plaintiffs were
 12 among the billions of images in LAION-5B, and Midjourney trained on *some* unspecified works in
 13 that dataset (“a *subset* of LAION5b” and “*modified* version” of LAION-400M (¶¶ 266, 274)), it
 14 must have made copies of their registered works in training its model. (Mot. at 8–11.) This makes
 15 about as much sense as presuming that because a woman read a book at the world’s largest library,
 16 she must have selected not only a novel, but a Dickens novel specifically, i.e., it falls woefully short
 17 of “the line between possibility and plausibility.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

18 Plaintiffs ask the Court to overlook this defect because its prior Order resolved this issue as
 19 to Stability, and Runway does not seek dismissal on this basis. (Opp. at 6–7.) But the Order only
 20 addressed the adequacy of training allegations as to Stable Diffusion. (Order at 7.) In contrast, it
 21 found that plaintiffs had pleaded “no facts regarding what training, if any, Midjourney conducted.”
 22 (Order at 14.) The claim against Midjourney is now directed to its own training efforts (¶¶ 282,
 23 288), not the training of Stable Diffusion, which still undergirds the claims against all other
 24 defendants. (¶¶ 214–15, 342–45, 387.) Moreover, unlike Stable Diffusion, which was allegedly
 25 trained on the full LAION-5B dataset (*id.*), plaintiffs affirmatively alleged that Midjourney’s model
 26 was *not*. (¶¶ 266, 274.) As such, they were required to plead facts plausibly showing that the subset

27 _____
 28 ⁴ This is common, as writers and illustrators are often different individuals, or the artwork may have
 been previously published or previously registered and, thus, unclaimable. Compendium § 503.5.

1 it trained on included their registered works—and they have failed to do so. The allegations against
 2 Midjourney do not “parallel” those against Stability (Opp. at 7); they are distinct and inadequate.

3 Plaintiffs also demur that Rule 8 does not require them to identify “every example” of
 4 infringement (Opp. at 7 n.4), but this misses the point. As the Motion details (at 8–11), they do not
 5 plead *any* example of actionable infringement because the FAC lacks facts to plausibly show that
 6 Midjourney copied any of the 47 alleged registered works in LAION. The FAC, thus, fails to state
 7 a claim. *See Synopsys, Inc. v. ATopTech, Inc.*, 2013 WL 5770542, at *4 (N.D. Cal. Oct. 24, 2013).

8 Plaintiffs continue to rely on manufactured Exhibits F and I to support an inference that
 9 Midjourney trained on their registered works. Neither does. As to Exhibit F, plaintiffs baldly posit
 10 that the “chef” and “teacher” images they created using Brom, Manchess, McKernan, Zhang, and
 11 Andersen’s names “evoke[]” these artists’ “protected content.” (Opp. at 9–10.) But they do not
 12 identify this “protected content,” and on their face *the images look nothing like their registered*
 13 *works*. Comparing the “Jingna Zhang” chef and teacher outputs (Ex. F at 4, 10) with her registered
 14 works (e.g., Ex. A at 43, 48), for instance, shows no discernable similarity, negating (rather than
 15 supporting) any inference of copying:



21 The same is true of “Manchess” outputs (Ex. F at 2, 8), which bear no resemblance to images
 22 covered by his single registration (e.g., Ex. A at 20, 23):



1 As for the other three artists included in Exhibit F, McKernan’s claim was already dismissed with
 2 prejudice, and Andersen and Brom both have many more *un*registered artworks in LAION than
 3 registered ones. The Exhibit F images plaintiffs made on Midjourney’s platform simply permit no
 4 plausible inference that it was trained on any *registered* work of any plaintiff. (Mot. at 9–10 & n.8.)⁵

5 Plaintiffs’ arguments as to Exhibit I are even further afield. They admittedly uploaded their
 6 own images (most of which are *un*registered (Mot. at 11)) into Midjourney’s platform and asked it
 7 to generate visually similar variations. (¶ 189.)⁶ That it could do so is not surprising: Midjourney’s
 8 website states that using image prompts will “influence a Job’s composition, style, and colors.”
 9 (¶ 188; Dunning Ex. 3.) It is also irrelevant, since this made-for-litigation exercise sheds no light
 10 on which works *Midjourney* used in training. Plaintiffs’ only retort is to again misconstrue a
 11 Discord post about a different feature (the “/blend command”), which allows users to blend images
 12 together by “look[ing] at the ‘concepts’ and ‘vibes’” of those images and “merg[ing] them together
 13 into novel interpretations.” (Opp. at 10; ¶ 187 & n. 38; Dunning Ex. 2.) Nothing in that statement
 14 (even if it were about single-image prompting like that plaintiffs used to make Exhibit I, which it
 15 plainly wasn’t) permits the logical leap plaintiffs ask the Court to make—that the platform cannot
 16 return visually similar output when so prompted unless it was pre-trained on that same image by
 17 Midjourney. (¶ 188.) Like Exhibit I, that is an unsupported allegation *plaintiffs* invented.

18 2. Midjourney’s Model is Not an Infringing Copy or Derivative Work

19 Allegations that a generative AI model is, itself, an infringing copy or derivative of the
 20 works on which it was trained have been rejected on a motion to dismiss as “nonsensical” and
 21 incapable of stating a claim. *Kadrey v. Meta Platforms, Inc.*, 2023 WL 8039640, at *1 (N.D. Cal.
 22 Nov. 20, 2023). Judge Chhabria separately addressed and dismissed this theory as “not viable”
 23 even though dismissal was not sought under the alternative theory that copies were made in training.

24 _____
 25 ⁵ Plaintiffs’ repeated assertion that they have followed the Court’s “suggestion” to strengthen their
 26 claim by alleging facts showing that Midjourney’s model “allow[s] users to create new works by
 27 expressly referencing [plaintiffs’] *works* by name” is unavailing. (Opp. at 9, 11 (citing Order at
 28 10).) The Exhibit F prompts did not name works, they named artists, and even then the outputs
 look nothing like those artists’ registered works. Exhibit F only undermines the training claim.

⁶ Plaintiffs do not dispute that copyright owners may, consistent with the law and Midjourney’s
 terms of use, upload and iterate on their own images using Midjourney’s platform. That is what
 plaintiffs did to create Ex. I, and what people do every day with other tools, such as Photoshop.

1 *Id.* (there “is no way to understand the LLaMA models themselves as a recasting or adaptation of
 2 any of the plaintiff’s books”). Likewise, this Court previously analyzed four distinct direct
 3 infringement theories advanced by plaintiffs, and rejected each as to Midjourney. (Order at 13–
 4 14.) It should do so again. The theory that Midjourney’s model is an infringing copy or derivative
 5 is legally unsound and factually unsupported, and has no proper place in this case. (Mot. at 11–15.)⁷

6 The Opposition fails to address Midjourney’s argument that this claim is foreclosed under
 7 *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015). (Mot. at 13–15.) At bottom, plaintiffs’
 8 claim is that Midjourney’s model must be a derivative work because it was created using copies of
 9 plaintiffs’ works. But *Author’s Guild* rejected this exact theory. *Id.* at 226. Google made digital
 10 copies of millions of books from which it extracted data such as “word frequencies, syntactic
 11 patters, and thematic markers” to create a search tool that would return text snippets from the books
 12 when prompted. *Id.* at 209, 225–27. Yet, the Second Circuit found that the tool was outside the
 13 “statutory definition of a derivative work, or of the logic that underlies it,” as it did not allow access
 14 “in any substantial way to a book’s expressive content” apart from the snippets. *Id.* at 226. Here,
 15 plaintiffs have been unable to generate *any* outputs on Midjourney’s platform (not even snippets)
 16 that substantially replicate their art, apart from allegedly those in Ex. I, which they were able to
 17 make only by feeding their own images into the tool. The theory simply fails.

18 Plaintiffs also fail to address any of the Ninth Circuit cases (*Litchfield, Roth, Hanagami*)
 19 holding that a work must be **substantially similar** in protected expression to the copyrighted work
 20 to be an infringing copy or derivative. (Mot. at 12–14.) That would require facts showing that the
 21 code comprising Midjourney’s model (the challenged work) actually contains protected expression
 22 from plaintiffs’ registered paintings and photographs—something they have not even tried to plead.

23 Plaintiffs do not even contend that Midjourney’s model *is* substantially similar. The closest
 24 they come is that it is “capable of reproducing protected expression from each of the LAION-5B
 25 Registered Works that was in each case substantially similar to that registered work.” (Opp. at 11

26 ⁷ Plaintiffs’ attempt to avoid scrutiny of this untenable theory fails. Contrary to their assertion,
 27 nothing in the Court’s Minute Order (Dkt. 121), which was directed to *Stability*, limited arguments
 28 *Midjourney* could make for dismissal of the distinct claims against it. *Skinner v. Switzer* is inapt
 and merely holds that a § 1983 complaint must contain a “short and plain” statement of the claim,
 not an “exposition” on plaintiff’s “precise legal theory.” 562 U.S. 521, 530 (2011).

1 (quoting ¶ 288).) They have no examples (unaided by their own image prompting) to substantiate
 2 this bald allegation. It is not even properly considered, since it directly contradicts their earlier
 3 allegation that “none of the [] output images ... is likely to be a close match” to any training image.
 4 (Dkt. 1 ¶ 93.) *Airs Aromatics, LLC v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595,
 5 600 (9th Cir. 2014) (amendment may not contradict facts in earlier pleading); *Parziale v. HP, Inc.*,
 6 2020 WL 5798274, at *7 (N.D. Cal. Sept. 29, 2020) (same, dismissing with prejudice). In any
 7 event, being **capable of making** infringing copies is not the same as **being** one. Otherwise, every
 8 printer and photocopier would be an infringing copy or derivative. That is obviously not the law.

9 Plaintiffs’ discussion of Nimmer (Opp. at 10) is perplexing and unavailing. Section 203[C]
 10 describes the “distinction between the work and the material object” in which it is embodied. For
 11 example, there is no question that a single work can be “fixed in copies of different forms,” e.g., a
 12 motion picture can be fixed in different tangible mediums, such as videotape and DVD. (Opp. at
 13 10.) Section 209[A] discusses the definition of an “audiovisual work,” which plaintiffs’ works are
 14 not. And Section 209[D] merely states the unremarkable proposition that an audiovisual work may
 15 be embodied in a computer program, i.e., that a computer “program may be the vehicle in which
 16 an audiovisual work is fixed.” Nimmer, § 2.09[D] at [1] n.35. None of this helps plaintiffs.

17 Plaintiffs do not allege that copies of their works are “fixed” in Midjourney’s model. The
 18 model is not like a DVD or game cartridge with set content embedded within it. By plaintiffs’ own
 19 allegations, it is a “mathematical construct” that algorithmically enables the creation of new images
 20 through the “interpolation” of data from the images on which it was trained. (¶ 118; Ex. F.)⁸ If
 21 digitized “copies” of plaintiffs’ works (compressed or otherwise) actually resided in the model for
 22 anyone to access (as on a DVD), plaintiffs should have been able to elicit outputs replicating those
 23 images without having to upload them to the platform themselves. That they could not do so after
 24 significant apparent effort disproves the basic factual premise upon which this theory depends.⁹

25 ⁸ The data taken from these images for purposes of creating a software model is not even protectible
 26 by copyright law (*see* Mot. at 13–14), another defect plaintiffs wholly fail to address.

27 ⁹ Plaintiffs cannot save this claim by pointing to “[r]ecent AI research suggesting that diffusion
 28 models **like** the Midjourney Model are compressed versions of their training datasets.” (Opp. at 9
 (citing papers incorporated by reference in the FAC at ¶¶ 117–144).) None of these papers save
 for one (*Webster*) evaluated any version of Midjourney’s model. Moreover, although plaintiffs cite
Webster as finding that diffusion models contain “stored copies of training images” (*id.* (citing

1 **B. Plaintiffs’ DMCA Claim (Count 7) Should Be Dismissed With Prejudice**

2 The only DMCA claim against Midjourney is for “intentionally remov[ing] or alter[ing]
3 CMI from the Plaintiffs’ works in violation of 17 U.S.C. § 1202(b)(1).” (¶ 300.) This claim is
4 premised on allegations that Midjourney’s model generates “unlicensed artwork missing CMI.”
5 (Opp. at 16; *see also id.* at 18 (models “generate output[s], which ... necessarily remove the CMI”).
6 However, there is no allegation that Midjourney’s model has ever generated an otherwise *identical*
7 copy of any of their works; plaintiffs assert only that the model creates “*visually similar*” outputs
8 “*based on*” their “work with [CMI] removed or altered.” (¶ 194; *see* ¶¶ 195–200 (examples). Such
9 allegations not only fail to state a claim under 1202(b); they render it defective as a matter of law.

10 Courts in this Circuit consistently reject 1202(b) claims where defendant allegedly removed
11 CMI from—or failed to include CMI on—a work other than an “identical” copy of plaintiff’s work.
12 (Mot. at 15–16 (citing cases).) In *Doe 1 v. GitHub, Inc.*, Judge Tigar dismissed plaintiffs’
13 1202(b)(1) claim based on allegations that a generative AI coding tool did not include plaintiffs’
14 CMI on non-identical outputted code. 2024 WL 235217, at *8–9 (N.D. Cal. Jan. 22, 2024); *see*
15 *also Kirk Kara Corp. v. W Stone & Metal Corp.*, 2020 WL 5991503, at *6 (C.D. Cal. Aug. 14,
16 2020) (dismissing claim as “Defendant did not make *identical* copies of Plaintiff’s works and then
17 remove the [] CMI”); *O’Neal v. Sideshow, Inc.*, 583 F. Supp. 3d 1282, 1287 (C.D. Cal. 2022)
18 (same). Conversely, in *Friedman v. Live Nation Merch., Inc.* (cited in Opp. at 14), the Ninth Circuit
19 allowed the claim because the photographs at issue “were *exact copies* of the images precisely as
20 they appeared ... in Friedman’s book” and the “*only* material difference ... was that the CMI was
21 missing.” 833 F.3d 1180, 1188 (9th Cir. 2016). Plaintiffs cannot make this showing. As they admit,
22 “none of the...output images ... is likely to be a *close* match” (Dkt. 1 ¶ 93), let alone an *identical*
23 copy. The FAC certainly doesn’t plead any outputs that are exact copies but for removal of CMI.

24 Unable to satisfy this requirement, plaintiffs cite several out-of-circuit district court cases
25 to argue that identity is not required. Two provide no support for that proposition.¹⁰ The third,

26 ¶ 138), it says no such thing. The words “stored copies” do not appear in the paper, and
27 “compression” of images is not even discussed. Plaintiffs cannot avoid dismissal by citing analyses
28 of models other than Midjourney’s and misconstruing the papers upon which they purport to rely.

¹⁰ In *Software Pricing Partners, LLC v. Geisman*, defendant sent “an *exact copy* of one of SPP’s
copyrighted documents” to third parties, altered to make it look like his work. 2022 WL 3971292, at

1 *ADR Int’l Ltd. v. Inst. for Supply Mgmt., Inc.*, 667 F. Supp. 3d 411 (S.D. Tex. 2023), further
 2 undermines their claim. In *ADR*, the court was careful to distinguish between “[r]emoval of CMI
 3 from a copyrighted work,” and “failure to add CMI to a ... derivative of the protected work.” *Id.*
 4 at 428. It also noted: “Plaintiff does not claim that Defendant’s allegedly infringing works are
 5 derivative works.” *Id.* This is decisive in the Ninth Circuit, as allegations that a defendant “created
 6 [a] derivative work” without transposing CMI do not establish that it “removed [CMI] from [the]
 7 original work”. *Frost-Tsuji Architects v Hwy Inn, Inc.*, 2014 WL 5798282, at *6 (D. Haw. Nov. 7,
 8 2014), *aff’d*, 700 F. App’x 674 (9th Cir. 2017) (making “virtually identical” derivative without CMI
 9 is *not* a DMCA violation; “removal is not the same as basing a drawing on someone else’s work”).
 10 Plaintiffs, however, continue to assert precisely what *Frost* and *ADR* held inadequate: that
 11 Midjourney’s model creates “*visually similar*” outputs “*based on*” “original work[s] with [CMI]
 12 removed” (¶ 194) and that “*every* output ... is an infringing *derivative*.” (Opp. at 15; *see* Dkt. 1 ¶¶
 13 18, 95.) Such allegations are irreconcilable with § 1202(b)(1), warranting dismissal with prejudice.

14 Plaintiffs also offer no effective defense of their continuing failure to adequately allege the
 15 requisite double scienter. (Mot. at 16–17.) In the Ninth Circuit, this requires facts to show that
 16 defendant intentionally removed CMI “knowing, or having a reasonable basis to know, that [its]
 17 actions ‘*will* induce, enable, facilitate, or conceal’ infringement.” *Stevens v. Corelogic, Inc.*, 899
 18 F.3d 666, 673 (9th Cir. 2018); *see also Tremblay v. OpenAI, Inc.*, 2024 WL 557720, at *4 (N.D.
 19 Cal. Feb. 12, 2024) (dismissing nearly identical DMCA claim against OpenAI for failure to plead
 20 scienter under *Stevens*). Here, there are no facts pleaded from which the Court could conclude that
 21 Midjourney “removed” any CMI, much less did so knowing it would induce or conceal
 22 infringement. To the contrary, applying plaintiffs’ CMI to works that are not theirs would have
 23 amounted to providing “false” CMI, which the DMCA prohibits. 17 U.S.C. § 1202(a).

24 C. Plaintiffs’ False Endorsement Claim (Count 8) Fails as a Matter of Law

25 Plaintiffs’ “false endorsement” claim under § 43(a) of the Lanham Act is based on allegations
 26 that Midjourney included five plaintiffs’ names (Andersen, Brom, Kaye, Ortiz, and Rutkowski)

27 *5 (W.D.N.C. Aug. 31, 2022). In *Widespread Elec. Sales, LLC v. Upstate Breaker Wholesale*
 28 *Supply, Inc.*, there was no identity issue; the sole challenge to the DMCA claim was that plaintiff
had failed to allege copyright infringement. 2023 WL 8721435, at *1 (N.D. Tex. Dec. 17, 2023).

1 among 4,700 others in a “Name List” posted to Discord. (¶¶305–317; Ex. J.) Plaintiffs concede
2 that the purpose of this list and accompanying post was to communicate that the model “recognizes”
3 these artist names “in prompts” designed to elicit outputs “emulat[ing] the[ir] styles.” (¶¶260–62;
4 Opp. at 20.) Such facts are incapable of stating a claim under the Lanham Act. (Mot. at 17–20.)

5 Plaintiffs do not claim that their names have “no artistic relevance” to the creative works
6 described or that the post or Name List was “explicitly misleading.” *Brown v. Elec. Arts, Inc.*, 724
7 F.3d 1235, 1245 (9th Cir. 2013). This is fatal, because to get a false endorsement claim past the
8 First Amendment, it “is key [] that the creator must **explicitly mislead** consumers”; “use of a mark
9 alone is not enough.” *Id.* Any “risk that ... use of a celebrity’s name might implicitly suggest
10 endorsement or sponsorship to some people is outweighed by the danger of restricting artistic
11 expression, and **in cases where there is no explicit misleading the Lanham Act is not applicable.**”
12 *Id.* (cleaned up); see *Mattel v. MCA Recs., Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (First Amendment
13 permits “unauthorized use” of a mark in “communicative message” if not “explicitly misleading”).

14 By failing to address this binding authority requiring dismissal, Plaintiffs abandon their
15 claim. See *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 129 (N.D. Cal. 2020) (failure “to address
16 arguments raised in a motion to dismiss constitutes abandonment of the claim, which results in
17 dismissal with prejudice”). Indeed, the only vague response they offer—that affirmative defenses
18 “may not ordinarily be raised on a motion to dismiss” (Opp. at 20)—ignores that *Brown* affirmed
19 the grant of a motion to dismiss with prejudice. 724 F.3d at 1246–48 (unauthorized use of football
20 legend’s likeness in commercial video game not “explicitly misleading” and, thus, not actionable
21 “even if Brown could offer a survey demonstrating that consumers of the *Madden NFL* series
22 believed [he] endorsed the game”). (See also Mot. at 20 (citing other cases granting dismissal).)

23 The Opposition also largely ignores Midjourney’s argument that plaintiffs fail to identify
24 anything “false” about the Name List or accompanying post, the “key element” of a claim. (Mot.
25 at 17–18.) They assert that the “relevant falsity” is “whether the artists on the [] Style List consented
26 to have their names commercially exploited as part of the Midjourney Image Product.” (Opp. at
27 20.) That is not the relevant inquiry, and the post did not indicate that any artist listed “consented”
28 to anything; it said that Midjourney had compiled the names of 4,700 artists “from wikipedia”

1 whose “styles” could be emulated on the platform. (¶ 262; Dunning Ex. 1.) These facts cannot
 2 sustain a false endorsement claim; rather, they show use of a third party’s alleged mark for truthful,
 3 comparative advertising—a nominative fair use under well-settled law. (Mot. at 18–19.)

4 Artistic “[s]tyle, no matter how creative, is an idea, and is not protectible by copyright.”
 5 *Tangle Inc. v. Aritzia, Inc.*, 2023 WL 6883369, at *3 (N.D. Cal. Oct. 18, 2023). As such, every
 6 artist is free to emulate another artist’s style, and to tell the world whose “style” they are emulating,
 7 without running afoul of trademark law. “The Lanham Act does not prohibit a commercial rival’s
 8 truthfully denominating his goods a copy of a design [or style] in the public domain, though he uses
 9 the name of the designer to do so.” *Smith v. Chanel, Inc.*, 402 F.2d 562, 565 (9th Cir. 1968). As
 10 the Ninth Circuit explained in *Chanel*:

11 [I]mitation is the life blood of competition. It is the unimpeded availability of
 12 substantially equivalent units that permits the normal operation of supply and
 13 demand to yield the fair price society must pay for a given commodity. But this
 14 public benefit might be lost if appellants could not tell potential purchasers that
 15 appellants’ product was the equivalent of appellees’ product.... To prohibit use of a
 16 competitor’s trademark for the sole purpose of identifying the competitor’s product
 17 would bar effective communication of claims of equivalence.

18 402 F.2d 562, 567–68 (9th Cir. 1968) (rejecting claim and overturning preliminary injunction).
 19 Plaintiffs’ attempt to misuse the Lanham Act to prevent Midjourney from truthfully conveying to
 20 users that they can generate competing works in the “style” of specific artists must fail.¹¹

21 **D. The Vicarious Trade Dress Infringement Claim (Count 9) Fails**

22 The Opposition fails to address the myriad pleading defects necessitating dismissal of their
 23 claim for vicarious infringement of unregistered trade dress.

24 **No Protectible Trade Dress:** The Opposition ignores the authority cited by Midjourney
 25 showing that “there is no trademark protection for the ‘style’ of an artist.” (Mot. at 22 (collecting
 26 cases).) Even if trade dress protection were available for art styles (it is not), the descriptions of
 27 Andersen’s “black and white” cartoons and Brom’s “gritty [] fantasy images” (¶ 319) are
 28 impermissibly broad to support a claim. (Mot. at 21–22 (citing cases dismissing on this basis).)

¹¹ *Make Him Smile, Inc. v. Trek Bicycle Corp.* is easily distinguished. There, defendant used the
 challenged name (“Farley”) as the brand name for one of its own bicycles, not in truthful
 comparative advertising. 2018 WL 5986983, at *1 (C.D. Cal. Jan. 18, 2018). Plaintiffs also point
 to Ex. K for the first time as purported support for Count 8, but it shows prompts *users* have entered
 that include plaintiffs’ names, not use of those names by Midjourney as brand name or trademark.

1 Plaintiffs ask the Court to ignore these “shorthand textual summar[ies]” of their claimed
 2 trade dress in the FAC (Opp. at 22), but offer no explanation of how the vague characteristics they
 3 seek to monopolize could possibly serve as a source identifier or define the bounds of exclusive
 4 use their trade dress is meant to protect.¹² Plaintiffs’ assertion that a “more definite identification
 5 of trade dress” can be deferred “until discovery” (Opp. at 22) is based solely on an unpublished
 6 district court case (*Chihuly, Inc v. Kaindl*, 2006 WL 83462, at *4 (W.D. Wash. Jan. 11, 2006)), that
 7 *predates* the Supreme Court’s enunciation of the Rule 8 pleading standard in *Bell Atl. Corp. v.*
 8 *Twombly*, 550 U.S. 544 (2007) and *Iqbal*, 556 U.S. at 678 (“[t]hreadbare recitals of the elements of
 9 a cause of action, supported by mere conclusory statements, do not suffice”). It also ignores
 10 plaintiffs’ own cited authority, making clear that, post *Iqbal*, dismissal on a motion to dismiss is
 11 appropriate where “Plaintiff fails to provide a recitation of the concrete elements of its trade dress.”
 12 *YZ Prods., Inc. v. Redbubble, Inc.*, 545 F. Supp. 3d 756, 768 (N.D. Cal. 2021) (citing cases); *see*
 13 *also Crafty Prods., Inc. v. Michaels Cos., Inc.*, 424 F. Supp. 3d 983, 990–92 (S.D. Cal. 2019), *aff’d*
 14 *sub nom. Crafty Prods., Inc. v. Fuqing Sanxing Crafts Co.*, 839 F. App’x 95 (9th Cir. 2020)
 15 (dismissing trade dress claim as plaintiffs did “not clearly articulate[] their trade dress” and,
 16 instead, “merely attach[ed] hundreds of images” to the complaint); *Arcsoft, Inc. v. Cyberlink Corp.*,
 17 153 F. Supp. 3d 1057, 1069 (N.D. Cal. 2015) (granting motion to dismiss; “courts in this circuit
 18 have required trade dress plaintiffs, at the very least, to provide adequate notice by including in
 19 their complaint ‘a complete recitation of the concrete elements of [their] alleged trade dress’”).

20 **Functional as a Matter of Law:** Plaintiffs also do not (and cannot) satisfy their “heavy
 21 burden” to show that the artistic elements they claim as unregistered trade dress are non-functional.
 22 *Arcsoft, Inc. v. Cyberlink Corp.*, 153 F. Supp. 3d 1057, 1069 (2015) (granting motion to dismiss).
 23 The aesthetics of a work of visual art can never surmount the “presumption of functionality” under
 24 the Lanham Act, *id.*, because they are “essential to [its] use or purpose,” and therefore functional
 25 as a matter of law. *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 850 n.10 (1982).

26 ¹² Contrary to plaintiffs’ assertion, that Midjourney’s model can create images in the “style” of
 27 plaintiffs’ artworks supports no inference that the generic trade dress elements alleged in the FAC
 28 serve as unique source identifiers for plaintiffs. (Opp. at 22 n.12.) “Simple, cartoony, and often
 strictly in black and white” (¶ 319) describes untold thousands of works by thousands of artists.
 No one can own that as trade dress. Not Disney. Not Schultz. And certainly not Andersen.

1 Simply claiming that their “trade dress has no intrinsic functional value” (Opp. at 23
 2 (quoting ¶ 327)) does not change the equation; that is a conclusory statement unentitled to the
 3 presumption of truth under *Iqbal*. It is also flatly contradicted by plaintiffs’ own pleading. The
 4 FAC alleges that the “artistic elements” allegedly comprising their trade dress are what make their
 5 works “desirable to customers.” (¶¶ 319, 327.) In other words, people buy plaintiffs’ artworks for
 6 their aesthetic. That is the very definition of “aesthetic functionality.” (Mot. at 22–23.) As
 7 explained in *Crafty Products*, a “designer has an incentive to make a china pattern or plush toy
 8 aesthetically pleasing because that drives the consumer’s decision to buy the plate or toy. Such
 9 designs are, therefore, functional.” 424 F. Supp. 3d at 993 (dismissing trade dress claim because
 10 the “shape of the wooden mask drives the consumer’s decision to buy [it]” and is, thus, functional);
 11 *see also Int’l Order of Job’s Daughters v. Lindleburg, Co.*, 633 F.2d 912, 917 (9th Cir. 1980)
 12 (reversing post-trial judgment and finding that jewelry design was functional as matter of law).

13 Here, by plaintiffs’ own admission, the aesthetics of their artworks are not arbitrary or
 14 incidental to their value in the market; the design is the works’ “essential selling feature[] ... if,
 15 indeed, not the primary [or only feature].” *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457
 16 F.3d 1062, 1073 (9th Cir. 2006) (quoting *Pagliari v. Wallace China Co.*, 198 F.2d 339 343 (9th
 17 Cir. 1952)). As such, plaintiffs’ art styles are functional and cannot be protected as trade dress.¹³

18 As the Supreme Court has noted, “product design almost invariably serves purposes other
 19 than source identification.” *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).
 20 To permit a trade dress claim in such circumstances “inhibit[s] legitimate competition by allowing
 21 a producer to control a useful product feature” of their product. *Qualitex Co. v. Jacobson Prod.*
 22 *Co.*, 514 U.S. 159, 164 (1995). Here, it would give plaintiffs a monopoly over “simple, cartoony”
 23 drawings and “gritty fantasy paintings.” The Lanham Act does not permit such a result.

24 **No Secondary Meaning:** Plaintiffs’ reliance on outdated cases to argue that they need only
 25 allege that their claimed trade dress is “*either* distinctive *or* has secondary meaning” (Opp. at 23)

26 ¹³ Groping for any way to distinguish *Job’s Daughters* and *Pagliari*, plaintiffs argue that their
 27 designs are not functional because they are not “applied” to any “underlying functional object,”
 28 such as “dinnerware and jewelry.” (Opp. at 23 n.13.) That makes no sense. The style and
 appearance of plaintiffs’ works are intrinsic to their value, and therefore functional, whether applied
 to an object (like a print or book), or existing solely in a digital file.

1 is highly improper. In *Wal-Mart Stores, Inc. v. Samara Bros.*, the Supreme Court held, “in an
 2 action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product’s
 3 design is distinctive, and therefore protectible, **only upon a showing of secondary meaning.**” 529
 4 U.S. 205, 216 (2000); *see also Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1145 (9th
 5 Cir. 2009) (“plaintiff must show that her design has attained secondary meaning.”) Secondary
 6 meaning exists “when the purchasing public associates [the trade dress] with a **single producer or**
 7 **source** rather than with the product itself,” *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819,
 8 824 (9th Cir. 1993), and is typically pleaded and proved with facts showing lengthy, exclusive use
 9 by plaintiff with significant sales and customers, *Art Attacks*, 581 F.3d at 1145. (Mot. at 22–23.)

10 Here, the Opposition asserts that plaintiffs have alleged secondary meaning (Opp. at 24
 11 (citing ¶¶ 319, 328), but the FAC does not bear that out. Paragraph 319 merely states that plaintiffs’
 12 “recurring visual elements and artistic techniques” “are associated with them and their work.”
 13 Paragraph 328 says their “trade dress possesses secondary meaning because [it] ... invoke[s] a
 14 mental association by a substantial segment of potential consumers between the trade dress and the
 15 creator.” These are conclusions, not facts, warranting dismissal. (*See* Mot. at 24 (citing cases).)

16 **No Vicarious Liability:** Plaintiffs’ vicarious liability claim also fails for lack of the
 17 “requisite direct infringement by a third party,” and because they have not pleaded the requisite
 18 “joint ownership or control over the infringing product” between Midjourney and any direct
 19 infringer. (Opp. at 24). This is a high standard, and plaintiffs do not meet it.¹⁴ While Midjourney
 20 hosts its platform, it does not control what outputs users make or how they use them. Midjourney
 21 cannot be vicariously liable for trade dress infringement by its users. *See, e.g., Y.Y.G.M. SA v.*
 22 *Redbubble, Inc.*, 2020 WL 3984528, at *9 (C.D. Cal. July 10, 2020) (no vicarious liability for
 23 infringement by customers absent facts showing that “Redbubble takes some action with regard to
 24 the infringing products beyond the uniform steps it takes to maintain its [service] generally”).

25 **E. The Unjust Enrichment Claim (Count 10) Must Be Dismissed**

26 Plaintiffs do not dispute that a state-law unjust enrichment claim premised on unauthorized

27
 28 ¹⁴ The test is “even more difficult to satisfy than those required to find secondary copyright
 infringement.” *Perfect 10 v. Visa Int’l Svc. Ass’n*, 494 F.3d 788, 806 (9th Cir. 2007).

1 use of copyrighted works is preempted under the Copyright Act. (*See* Mot. at 25 (citing cases)).
2 Instead, plaintiffs advance a strawman, contending that their unjust enrichment claim is really about
3 “use of Plaintiffs’ names and reputations,” which “does not sound in copyright at all.” (Opp. at 24–
4 25.) But, as pleaded, the unjust enrichment claim makes no mention of names or reputations; it is
5 based exclusively on allegations that Midjourney made “unauthorized use of [their] works” from
6 which it derived “benefits” it would be “unjust for Midjourney to retain.” (¶¶ 335, 338–39; *see also*
7 ¶ 337 (alleging deprivation of “value of their works”).) Plaintiffs cannot avoid dismissal of the
8 preempted claim they pleaded by pulling a bait-and-switch in their Opposition. *See Schneider v.*
9 *Cal. Dep’t. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

10 The unjust enrichment claim would fail even if not preempted, and even if they had pleaded
11 a names-based claim (which they have not). As the Motion argued (at 25) and the Opposition
12 concedes through silence, plaintiffs cannot plead facts to invoke a quasi-contract theory of liability.
13 Nor can they allege a standalone unjust enrichment claim. To do so, as their cited cases make clear
14 (Opp. at 25), plaintiffs were required to plead that the “benefits” Midjourney allegedly unjustly
15 obtained “were conferred by mistake, fraud, coercion, or request; otherwise, though there is
16 enrichment, it is not unjust.” *CSI Elec. Contractors, Inc. v. Zimmer Am. Corp.*, 2013 WL 1249021,
17 at *5 (C.D. Cal. Mar. 25, 2013); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir.
18 2015). As plaintiffs “have not alleged that [Midjourney] unjustly obtained benefits from Plaintiffs’
19 copyrighted works [or use of their names] through fraud, mistake, coercion, or request, this claim
20 fails.” *Tremblay*, 2024 WL 557720, at *7 (dismissing identical claim against OpenAI with
21 prejudice); *CSI Elec.*, 2013 WL 1249021, at *5 (dismissing claim).

22 III. CONCLUSION

23 Plaintiffs have twice tried—and failed—to plead facts establishing a viable claim against
24 Midjourney, despite prior warning that the Court would “not be as generous” in granting leave again.
25 (Order at 14 n.10.) As the Opposition now confirms, plaintiffs’ claims are infirm as a matter of
26 law, they have “no additional facts [of consequence] to plead,” and further amendment would be
27 futile. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009). Accordingly,
28 the Court should dismiss all claims against Midjourney in the FAC (Claims 5–10) with prejudice.

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Dated: April 18, 2024

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