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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

14

SAN FRANCISCO DIVISION

15

16 JINGNA ZHANG, an individual; SARAH)
ANDERSEN, an individual; HOPE)
17 LARSON, an individual; and JESSICA)
FINK, an individual,)
18 Individual and Representative)
19 Plaintiffs,)

CASE NO.: 3:24-cv-02531-AMO

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
COMPLAINT AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

20

v.

Date: January 9, 2025

21

GOOGLE LLC and ALPHABET INC.,)
22 Defendants.)

Time: 2 p.m.

Courtroom: 10

Judge: Hon. Araceli Martínez-Olgún

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1 Plaintiffs’ Opposition is an exercise in obfuscation. Rather than even attempting to
2 defend the conclusory and often confusing allegations in their Complaint, Plaintiffs misconstrue
3 Defendants’ arguments, disregard established law, and invent new, unpleaded theories—none of
4 which actually addresses Defendants’ arguments. Plaintiffs’ direct infringement claims should be
5 circumscribed, and their vicarious infringement claim dismissed in its entirety.

6 As Defendant’s explained in their Motion, black letter copyright law provides that a
7 plaintiff cannot “su[e] for infringement until ‘registration [of the work] ... has been made’” with
8 the U.S. Copyright Office. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S.
9 296, 302 (2019) (quoting 17 U.S.C. § 411(a)); accord Mot. 8–9. Plaintiffs have failed to allege
10 pre-suit registration of certain allegedly infringed images for two reasons. **First**, as a matter of
11 Copyright Office policy and longstanding practice, compilation registrations do not cover
12 previously-published material. Mot. 9–10. Plaintiff Sarah Andersen has failed to plausibly plead
13 that her registrations, which are for compilations that include webcomics she previously
14 published online, cover the images she contends Defendants infringed. After clearing away
15 Plaintiffs’ irrelevant and unsupported responses, all that remains is her argument that her online
16 distribution of certain webcomics did not constitute publication under the Copyright Act. That is
17 wrong as a matter of law, because the definition of “publication” encompasses distributing
18 content via social media websites and licensing content to these websites for further distribution
19 and display. It also ignores Ms. Andersen’s own admission on this point: three of her
20 registrations say on their face that they exclude “cartoons [that were] previously published
21 online” (Compl., Ex. A at 10), and she does not plausibly allege that the comics at issue fall
22 outside her own express exclusion. **Second**, the scope of a copyright registration is “limited by
23 the deposit copy.” *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1063 (9th Cir. 2020) (en banc).
24 Plaintiff Hope Larson asserts infringement of an image that is not contained in the deposit copy
25 of the asserted registration (or any other registration she proffers). Ms. Larson’s response—that
26 its omission is a “ministerial error,” Opp. 10, does not salvage her claim; rather it confirms that
27 her claim as to that image cannot proceed.

1 These registration flaws are not only dispositive in and of themselves, but also illustrate
 2 why courts have repeatedly held that a copyright infringement complaint must specifically
 3 identify all of the copyrighted works at issue in a case. Plaintiffs here have not done so. They
 4 insist that they should be allowed to proceed based on an open-ended “nonexhaustive” and “not
 5 ... complete” list of allegedly infringed works. *See* Compl. ¶¶ 15–16. And Plaintiffs protest that
 6 requiring them to identify “every single infringing Work” would amount to a heightened
 7 pleading standard. Mot. 3–4. But identification of the relevant works at the pleading stage is
 8 what *Twombly* (and *Fourth Estate*) require. Only if a work is identified can the plaintiff plausibly
 9 plead the elements of an infringement claim—pre-suit registration, ownership, and
 10 infringement—and only then can a defendant identify and raise fatal pleading problems like
 11 those present in Plaintiffs’ current claims.

12 Plaintiffs’ other infringement theory—that Defendants’ AI model Imagen is itself an
 13 infringing derivative work—similarly warrants dismissal. Plaintiffs never acknowledge, much
 14 less grapple, with authority in this district that addressed and rejected a materially identical
 15 derivative-work theory advanced by the same counsel representing Plaintiffs in this case. *See*
 16 Mot. 12; *Kadrey v. Meta Platforms, Inc.*, 2023 WL 8039640, at *1 (N.D. Cal. Nov. 20, 2023).

17 Finally, based on nothing more than the allegation of a parent-subsiary relationship,
 18 Plaintiffs assert that Alphabet, a stock holding company, is vicariously liable for alleged
 19 infringement by its corporate subsidiary, Google. That theory has been rejected by scores of
 20 courts. Mot. 13–15. Plaintiffs cannot defend the claim as pleaded, so they invent new theories—
 21 that Google was Alphabet’s “agent” and that Alphabet profited from its “lenience,” Opp. 13–
 22 14—that were never pleaded and, in any event, fail on their own terms.

ARGUMENT

I. Plaintiffs Sarah Andersen And Hope Larson Failed To Allege Registration Of Their Works.

26 None of Plaintiffs’ arguments addresses the central registration issue raised by Google’s
 27 motion: the Complaint does not adequately plead that Ms. Andersen’s and Ms. Larson’s
 28 registrations cover the images that Google purportedly infringed. Without a registration covering

1 the images they have put at issue, their claims cannot proceed as to those works. *See Fourth Est.*,
2 586 U.S. at 302.

3 ***Plaintiff Sarah Andersen.*** The Complaint alleges that Google infringed Ms. Andersen’s
4 copyrights by using six of Ms. Andersen’s images to train Google’s generative AI models, and
5 identifies five copyright registrations purporting to cover these six images. *See Compl.*, Ex. B at
6 15–20 (listing six images at issue); *id.*, Ex. A at 7–11 (listing five registrations). Plaintiffs do not
7 dispute that these five registrations are for compilations. *See Opp.* 8. They also do not dispute
8 that registrations for compilations are different from registrations of the underlying images
9 included in the compilations. *See Opp.* 7; *cf.* 17 U.S.C. § 103. They instead argue that because
10 Ms. Andersen is allegedly the author of both the compilations and the underlying images
11 contained therein, registrations of the compilations also cover the underlying images, even
12 preexisting ones. *Opp.* 8. That misses the point. Regardless of whether compilation registrations
13 *generally can* cover preexisting underlying material that is included in the compilation, they
14 “do[] not cover any ***previously published material.***” United States Copyright Office,
15 *Compendium of U.S. Copyright Office Practices* (3rd ed. Jan. 28, 2021) (“Compendium”)
16 § 508.2 (emphasis added); *see also* Mot. 9. That “longstanding practice of precluding previously
17 published material” remains applicable “even if the author of the collective work ... is the author
18 of the previously published material and owns all of the rights in the material.” Compendium
19 § 1008.2; *see also* Compendium § 618.7(B)(2) (registration of collective works may cover
20 underlying contributions by the same author “only if those contributions have not been
21 previously published”).¹ The Copyright Office confirmed that governing practice as recently as
22 ten days ago. *See* 89 Fed. Reg. 58991, 58995 (July 22, 2024) (“Consistent with any collective
23 work registration, any [works] included in the collective work that were previously published ...
24 are automatically excluded from the claim”).

25
26 ¹ This practice exists for good reason: among others, it “clarifies the date of publication for a
27 particular work, which may assist the courts in assessing the copyright owner’s eligibility for
28 statutory damages and attorney’s fees in an infringement action.” Compendium § 1008.2; *see also* 17 U.S.C. § 412 (no statutory damages or fees for infringements commenced after first
publication and before registration, unless registration is made within three months of first
publication).

1 Plaintiffs cite a hodgepodge of authorities in response, but none discusses registration of
2 previously published material in compilations. The Opposition’s principal authority, *Alaska*
3 *Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, concerns whether a court should defer to
4 the Copyright Office’s reading about what information must be included in a valid application
5 for registration under 17 U.S.C. § 409. 747 F.3d 673, 679, 686 (9th Cir. 2014). There, the
6 Compendium and other Copyright Office regulations *agreed* with the copyright applicant that the
7 author and title of each specific work in a compilation need not be separately listed in an
8 application for it to be valid. *Id.* at 679–80, 682, 684–85. Finding the Copyright Office’s
9 “longstanding administrative interpretation” persuasive, the Court deferred to that interpretation.
10 *Id.* at 685–86. But the opinion does not touch upon previously published material at all. In fact, it
11 expressly quotes a Copyright Office regulation about the scope of a “[r]egistration of an
12 *unpublished* ‘collection’” to support its analysis. *Id.* at 682 (emphasis added). *Alaska Stock*’s
13 holding is not at issue in this case, and if anything, it counsels in favor of the direct and repeated
14 language in the Compendium and the Copyright Office’s filings in courts around the country that
15 compilation registrations do not cover any underlying work that has been previously published
16 (*see* Mot. 9–10). Plaintiffs’ other authorities fare no better, because none suggests a compilation
17 registration covers previously published material. *Cf. Unicolors, Inc. v. Urban Outfitters, Inc.*,
18 853 F.3d 980, 989 (9th Cir. 2017) (no discussion about registration of previously published
19 material in a compilation); *Nimmer on Copyright* § 7.16[B][5][c] (same); *Andersen v. Stability*
20 *AI*, 2023 WL 7132064, at *4 (N.D. Cal. Oct. 30, 2023) (assessing whether the plaintiffs needed
21 to identify the copyrighted works at issue, not whether their copyrighted works were covered by
22 the registrations they pleaded).

23 Lacking any supporting authority for the legal proposition they advance, Plaintiffs
24 alternatively claim that three of the six images Ms. Andersen included in her compilations have
25 not been previously published even though they were posted by Ms. Andersen on X (formerly
26 known as Twitter) prior to the registration dates of the compilations. Opp. 8–9. That argument
27 too is without legal basis. The Opposition cites a string of cases holding that the mere act of
28 posting a work on the internet does not constitute publication under the Copyright Act, Opp. 8–9,

1 but ignores the critical difference between posting on the internet in general, and posting on X
 2 and other social media platforms such as Facebook and Instagram. Posting on these platforms
 3 not only distributes the works to the general public, but also grants a license to the platforms to
 4 further display, distribute, and sublicense these works,² which is more than enough to constitute
 5 “publication.” *See* 17 U.S.C. § 101 (“The offering to distribute copies or phonorecords to a group
 6 of persons for purposes of further distribution, public performance, or public display, constitutes
 7 publication”). Again, the Compendium is in accord: “[p]ublication occurs when copies of a
 8 photograph are offered to clients, including but not limited to ... *websites with a license*
 9 *permitting further distribution or display of the photograph.*” Compendium § 1906.1 (emphasis
 10 added).

11 The analysis in *Brunson v. Cook*, 2023 WL 2668498 (M.D. Tenn. Mar. 28, 2023), is
 12 instructive. Confronted with an identical question, the *Brunson* court observed that because “the
 13 fundamental purpose of social-media platforms such as Twitter and Instagram is for viewers to
 14 share and re-share content posted by creators,” a work is published under the Copyright Act
 15 “when it was made available on ... Twitter, where it could be viewed and shared by the public.”
 16 *Brunson*, 2023 WL 2668498 at *11–13. The *Brunson* court “in the alternative [found] that
 17 publication nonetheless occurs when a work is made available to YouTube, Instagram, and
 18

19 ² X’s terms of service at the time Ms. Andersen posted each image include virtually identical
 20 language stating that:

21 By submitting, posting or displaying Content on or through the Services, you grant
 22 us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to
 23 use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute
 24 such Content in any and all media or distribution methods now known or later
 25 developed (for clarity, these rights include, for example, curating, transforming, and
 26 translating). This license authorizes us to make your Content available to the rest of
 the world and to let others do the same. You agree that this license includes the right
 for Twitter to provide, promote, and improve the Services and to make Content
 submitted to or through the Services available to other companies, organizations or
 individuals for the syndication, broadcast, distribution, Retweet, promotion or
 publication of such Content on other media and services, subject to our terms and
 conditions for such Content use.

27 Twitter Terms of Service (effective June 18, 2020), https://x.com/en/tos/previous/version_15; *see*
 28 *also* Twitter Terms of Service (effective January 27, 2016),
https://x.com/en/tos/previous/version_10. Twitter Terms of Service (effective May 18, 2015),
https://x.com/en/tos/previous/version_9.

1 Twitter due to the terms of use or services to which a creator on these platforms must agree in
2 order to post the work to the respective platforms.” *Id.* at *13–14 (citing Compendium, holding
3 that the plaintiff “clearly offered to distribute the work to these respective platforms for the
4 purposes of further distribution” (cleaned up)). The same reasoning applies here: Ms. Andersen’s
5 images were published on X, which could and did further display, distribute, and sublicense
6 these images. They were thus published before her compilation registrations and not covered by
7 those registrations. Claims based on these unregistered images cannot proceed for lack of
8 registration. *See Fourth Est.*, 586 U.S. at 302.

9 Lastly, the Opposition ignores the three other images at issue, which come from
10 compilations whose certificates of registration expressly exclude previously published material.
11 *See* Mot. 10 (discussing Compl., Ex. A at 7–8, 10). Because the Complaint fails to plausibly
12 allege that the images at issue fall outside the express exclusion in these registrations, Ms.
13 Andersen’s claims based on these three images should be dismissed. *See* Mot. 11. In failing to
14 address this point her Opposition, Ms. Anderson has conceded it. *See, e.g., Cody v. Ring LLC*,
15 2024 WL 735667, at *7 n.4 (N.D. Cal. Feb. 22, 2024).

16 ***Plaintiff Hope Larson.*** One of the works at issue for Ms. Larson is “training image 2,”
17 which was purportedly covered by a registration for the book “Chiggers.” Comp., Ex. B at 3. But
18 that image is nowhere to be found in the certified deposit copy for “Chiggers” from the Library
19 of Congress. *See* Mot. 12. The “Chiggers” registration thus does not cover “training image 2,”
20 *id.*, and an action for any alleged infringement of “training image 2” must be dismissed for
21 failure to state a claim. *See Fourth Est.*, 586 U.S. at 302.

22 The Opposition’s counterarguments again miss the point. Google’s Motion is not about
23 whether a book and its jacket can be registered as a single unit of publication.³ *See* 37 C.F.R.
24 § 202.3(b)(4) (2022). It is also not about what edition of work a claimant must submit to the
25 Library of Congress to satisfy the deposit requirement under the Copyright Act or the Copyright
26

27 ³ In any event, “Chiggers” was not registered as a single unit of publication. Its registration
28 record does not include an annotation such as “Basis for registration: Unit of publication,” which
would appear for all works so registered. *See* Compendium § 1103.4; *cf.* Compl., Ex. A at 3.

1 Office’s regulations. *See* 17 U.S.C. § 407; 37 C.F.R. § 202.20(b)(2)(ii) (1986). And despite
 2 Plaintiffs’ mischaracterization, Google’s motion does not seek to “invalidate Ms. Larson’s
 3 registered copyright.” Opp. 11. Rather, the problem is that Ms. Larson’s registration for
 4 “Chiggers” simply does not cover “training image 2,” because “training image 2” was not
 5 included in the deposit copy of “Chiggers.” *See* Mot. 12; Compendium § 504.2 (registration
 6 “only covers the material that is included in the deposit copy(ies)” and “does not cover
 7 authorship that does not appear in the deposit copy(ies)”). Any claim based on “training image
 8 2” must be dismissed for failure to plead registration.

9 **II. Plaintiffs’ Claims Should Be Dismissed As To Any Unidentified Works.**

10 Decisions requiring a complete identification of the copyrighted works in the operative
 11 pleading are legion. *See* Mot. 6 (collecting cases). Plaintiffs do not cite a single case permitting
 12 copyright infringement claims to proceed based on an open-ended list of copyrighted works. In
 13 every case relied on by Plaintiffs, the works at issue were identified or limited in scope.⁴ Nor do
 14 they have any substantive response to the requirement that they identify the works at issue or the
 15 cases holding that a copyright plaintiff cannot “list certain works that are the subject of an
 16 infringement claim, and then allege that the claim is also intended to cover other, unidentified
 17 works.” *Cole v. John Wiley & Sons, Inc.*, 2012 WL 3133520, at *12 (S.D.N.Y. Aug. 1, 2012).

18 That requirement makes eminent sense. Identifying the works at issue is necessary both
 19 to plead a plausible claim and to provide fair notice of that claim to Defendants. Mot. 7. This
 20 case illustrates the importance of that modest pleading burden. “[Section] 411(a) bars a copyright
 21 owner from suing for infringement until ‘registration [of the work] ... has been made’” with the
 22 U.S. Copyright Office. *Fourth Est.*, 586 U.S. at 302 (quoting 17 U.S.C. § 411(a)). Unless the
 23

24 ⁴ *See Andersen v. Stability AI Ltd.*, 2023 WL 7132064, at *4 (N.D. Cal. Oct. 30, 2023)
 25 (concluding that Andersen’s claims were “limited to the collections which she has registered”);
 26 *Microsoft Corp. v. My Choice Software, LLC*, 2017 WL 5643210, at *3 (C.D. Cal. Oct. 10, 2017)
 27 (complaint “described the type of software and software components that were sold,” including
 28 Windows 10, Windows 7, Office 365, Office 2013, Office 2010); *Autodesk, Inc. v. Kobayashi + Zedda Architects Ltd.*, 191 F. Supp. 3d 1007, 1022 (N.D. Cal. 2016) (complaint “provide[d] a list
 of nine Autodesk copyright registrations”); *Facebook, Inc. v. Power Ventures, Inc.*, 2009 WL
 1299698, at *3 (N.D. Cal. May 11, 2009) (complaint asserted infringement of the “Facebook
 website”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1121 (C.D. Cal.
 2001) (complaint “identifie[d] copyrights involving their magazines”).

1 asserted works are named in the complaint, plaintiffs can skirt this threshold registration
2 requirement set forth by statute and in the Supreme Court’s decision in *Fourth Estate*. Only if the
3 works are identified in the complaint can the Court and the defendant assess whether there is a
4 registration for that work, whether the alleged registration actually covers the work being
5 asserted, whether the work was registered before the infringement began (which determines the
6 availability of statutory damages, 17 U.S.C. § 412), and whether there are other issues with the
7 registration. Plaintiffs’ complaint—with its manifold registration problems—proves the point.
8 *See supra* 2–7.

9 Identification of the works at issue is also necessary for a Plaintiff to plausibly plead
10 ownership and to enable the defendant to assess what defenses it may have to the infringement
11 claim. *See, e.g., Plakhova v. Hood*, 2017 WL 10592315, at *2 (C.D. Cal. June 20, 2017)
12 (“Without specifically identifying the exact works and the instances of infringement, Plakhova
13 cannot sufficiently allege direct copyright infringement.”). Plaintiffs try to characterize this
14 straightforward requirement as a “heightened [pleading] standard,” *Opp.* 5, but it merely follows
15 from *Twombly*’s plausibility standard, Rule 8’s requirement of fair notice to the defendant, and
16 the work- and infringement-specific nature of a copyright infringement claim. *See Perfect 10,*
17 *Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017); *Lafarga v. Lowrider Arte Mag.*, 2014
18 WL 12573551, at *3 (C.D. Cal. July 18, 2014) (“While [plaintiff] correctly acknowledges the
19 *Twombly* requirement of a short and plain statement, under Rule 8(a)(2), courts often require the
20 plaintiff to identify the particular work that is the subject of the copyright claim.”).

21 *Andersen v. Stability AI Ltd.*, 2023 WL 7132064 (N.D. Cal. Oct. 30, 2023), is against the
22 weight of authority and provides scant support for Plaintiffs’ position. In that case, Sarah
23 Andersen, also a plaintiff here, alleged that her works appeared in a much larger LAION dataset
24 of “five billion images,” LAION-5B, used by Stability AI to train its image-diffusion model. *Id.*
25 at *2, *4. Ms. Andersen asserted Stability AI infringed “over two hundred Works” covered by 16
26 registrations attached to her complaint. *Id.* at *4. While Judge Orrick did not require Andersen to
27 identify her “specific works,” the court did “limit[]” Andersen’s claims to the 16 registrations.
28 *Id.* At minimum, *Andersen* confirms that Plaintiffs’ claims should be limited to works covered by

1 the registrations in Exhibit A. *See id.* at *4.

2 But Plaintiffs here want to claim more while pleading less. In insisting that they need not
3 identify “every single infringing Work at issue in their Complaint,” Mot. 3, Plaintiffs apparently
4 object to limiting their claims to the images listed in Exhibit B or the registrations listed in
5 Exhibit A. Yet nowhere do Plaintiffs plead even an approximate number of works at issue or the
6 universe of relevant registrations. Defendants are left to guess whether this case is about the 10
7 registrations and 19 images mentioned in the complaint, Compl., Exs. A, B, or the “over two
8 hundred works” mentioned in *Andersen*, 2023 WL 7132064, at *4, or some undefined (and to
9 Defendants, unknowable) set of “all of Plaintiffs’ works that were available online,” Opp. 5. That
10 is not fair notice under any standard.

11 Next, citing pre-*Fourth Estate* case law, Plaintiffs conflate the requirement that they
12 identify every work with the burden of identifying every instance of infringement. *See, e.g.,*
13 *Microsoft v. My Choice Software*, 2017 WL 5643210, at *3 (concluding, in a case about
14 infringing software sales, that alleging details about “some but not all” infringing sales was
15 sufficient to state a claim); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114,
16 1120 (C.D. Cal. 2001) (“Requiring a statement of each and every example [of infringement]
17 would defeat the regime established by Rule 8.”) (pre-*Twombly*). Whether a plaintiff must
18 “allege every instance of infringement is distinct from requiring that a plaintiff identify the
19 works which have been infringed.” *Warner Bros. Ent. Inc. v. Random Tuesday, Inc.*, 2020 WL
20 12762735, at *12 (C.D. Cal. Nov. 9, 2020). Defendants have not argued that Plaintiffs must, at
21 the pleading stage, supply an exhaustive list of all alleged infringements. While Plaintiffs will
22 need to do so by a deadline well before the end of the discovery process to allow defendants to
23 rebut the specific charges of infringement, that is not what Defendants are arguing for here.

24 Plaintiffs also miss the mark in relying on their class-wide allegations to justify the
25 inadequacy of their own individual allegations. The claims in this case do not involve “hundreds
26 of millions of images” or “thousands” of copyright owners. Opp. 4. The claims as pleaded
27 involve four plaintiffs, 10 registrations, and 19 alleged infringements. *See* Compl. ¶¶ 15–16;
28 Compl., Exs. A, B. And, as Plaintiffs do not dispute, having reviewed and searched the LAION-

1 400M database for copies of their works before suit, they have no excuse for failing to provide a
2 complete list of asserted works. *See* Mot. 8.

3 In short, Defendants simply request a complete identification of the asserted works
4 instead of Plaintiffs' vague, open-ended, "nonexhaustive" list. *See* Compl. ¶¶ 15–16. Only
5 Plaintiffs know what works they own, have registered, have licensed, and contend to be
6 infringed. Defendants should not be forced to guess.

7 **III. Plaintiffs Have Not Plausibly Alleged That Any AI Model Is An Infringing Derivative**
8 **Work.**

9 The Opposition offers no meaningful defense of Plaintiffs' theory that the Imagen model
10 is an infringing derivative work. Plaintiffs do not dispute that, to plead a claim, they must allege
11 that the allegedly infringing work is substantially similar to the protected aspects of the original
12 work. *See* Mot. 13. But Plaintiffs do not point to any allegations that plausibly suggest Imagen is
13 substantially similar in protected expression to their works. The Court need go no further to
14 dismiss Plaintiffs' claim that the model itself is an infringement.

15 Notably, Plaintiffs do not acknowledge—much less distinguish—Judge Chhabria's on-
16 point decision in *Kadrey*, which rejected a virtually identical derivative-work theory, supported
17 by similarly sparse allegations and advanced by the same counsel representing Plaintiffs in this
18 case. *See* Mot. 12; *Kadrey*, 2023 WL 8039640, at *1. Instead, Plaintiffs point to a tentative ruling
19 issued by Judge Orrick, which (if adopted) would allow copyright claims over Stable Diffusion,
20 the AI model central to *Andersen*, to proceed. *See* Opp. 11–12 (citing *Andersen*, No. 3:23-cv-
21 201, ECF No. 193 (N.D. Cal. May 7, 2024)). While Plaintiffs claim *Andersen* presents a "similar
22 argument" concerning derivative works (Opp. 11), that is not the case, as the *Andersen* complaint
23 includes lengthy allegations about the Stable Diffusion AI model that are absent with respect to
24 Google's Imagen model here. *Compare* Compl. ¶ 6, with *Andersen*, No. 3:23-cv-00201, ECF No.
25 129 at 27–49, Exs. D–E, G–H (Nov. 29, 2023) (dozens of pages of factual allegations and
26 exhibits concerning the Stable Diffusion model's functioning and output). Indeed, the Opposition
27 does not identify a single case that suggests Plaintiffs' cursory, one-sentence allegation is
28 sufficient to state a claim. Plaintiffs nonetheless ask that this Court allow their derivative-work

1 theory to proceed—not based on any actual authority, but because this case involves “cutting-
 2 edge” technology and “unresolved” (and unspecified) “factual questions.” Opp. 12. The novelty
 3 of Plaintiffs’ argument only reinforces the need for concrete factual allegations plausibly
 4 showing substantial similarity between the model and the protected aspects of Plaintiffs’
 5 copyrighted images.

6 **IV. Plaintiffs Fail To State A Claim For Vicarious Copyright Infringement Against**
 7 **Alphabet.**

8 Plaintiffs’ Opposition asks the Court to believe that their vicarious infringement claim is
 9 based on more than just “the parent-subsidary relationship between Alphabet and Google.” Opp.
 10 12. But the Complaint refutes that contention. The only specific allegations against Alphabet are
 11 that “[a]s the corporate parent of Google, Alphabet had the right and ability to supervise the
 12 infringing activity of Google” and “benefitted [sic] financially from the infringing activity.”
 13 Compl. ¶¶ 58–60 (emphasis added). Those allegations run headlong into the law foreclosing
 14 vicarious liability based solely on a parent-subsidary relationship. Mot. 14–15. And they are
 15 textbook examples of formulaically parroting the elements of a cause of action. *Id.* at 13–14.
 16 Indeed, Plaintiffs’ “Factual Allegations” never mention Alphabet, much less plausibly allege
 17 facts showing Alphabet’s vicarious liability. *See* Compl. ¶¶ 21–49.

18 If Plaintiffs’ meager allegations sufficed to plead vicarious liability, then every stock
 19 holding company like Alphabet would be subjected to protracted litigation for their subsidiaries’
 20 alleged misconduct, no matter the remote nature of their alleged involvement. That is not the
 21 law. Mot. 13–15. All of Plaintiffs’ attempts to paper over these pleading defects fail.

22 **A. Plaintiffs Have Not Adequately Alleged That Alphabet Has The Right And**
 23 **Ability To Supervise Google’s Alleged Conduct.**

24 Plaintiffs argue that they satisfy the “right and ability to supervise” (or “control”) element
 25 by alleging that Google acted as Alphabet’s “agent.” Opp. 13 (citing Compl. ¶ 19). But a parent
 26 corporation can only be vicariously liable for its subsidiary’s conduct under an agency theory
 27 “when the parent so controls the subsidiary as to cause the subsidiary to [] become merely the
 28 instrumentality of the parent.” *Williby v. Hearst Corp.*, 2017 WL 1210036, at *4 (N.D. Cal. Mar.

1 31, 2017) (citation omitted). To clear that high bar, a plaintiff must allege “(1) a manifestation by
 2 the principal that the agent shall act for the principle; (2) acceptance by the agent of the
 3 undertaking; and (3) an understanding between the parties that the principal is in control of the
 4 undertaking.” *Id.* Plaintiffs allege nothing like that here. And their vague and unelaborated
 5 allegations regarding the “Defendants’ agents” (Compl. ¶ 19) have consistently been rejected as
 6 insufficient for pleading an agency relationship. *See, e.g., Cal-Star Prod., Inc v. Fencepost*
 7 *Prods., Inc.*, 2019 WL 13038581, at *4 (C.D. Cal. Apr. 18, 2019) (“conclusory statement” that
 8 “each of the Defendants ... is and was the agent, servant, employee, representative, co-
 9 conspirator, principal, affiliate and/or alter ego of the other”); *Connecticut Gen. Life Ins. Co. v.*
 10 *Earl Scheib, Inc.*, 2012 WL 12868358, at *5 (S.D. Cal. May 22, 2012) (allegations that “each
 11 Defendant” was “the agent ... of the other” and gave “consent and permission”); *Hernandez v.*
 12 *Wells Fargo & Co.*, 2019 WL 3017657, at *2 (N.D. Cal. July 10, 2019) (similar).

13 To actually plead the “control” prong, Plaintiffs must plausibly allege that Alphabet had
 14 “a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do
 15 so.” *Nat’l Photo Grp., LLC v. Allvoices, Inc.*, 2014 WL 280391, at *7 (N.D. Cal. Jan. 24, 2014)
 16 (citation omitted). The Opposition only confirms that Plaintiffs have failed to allege Alphabet’s
 17 control. Plaintiffs rotely recite the element and reassert their “corporate parent” allegation
 18 without elaboration. Opp. 13 (citing Compl. ¶ 60). That does not move the needle.⁵ Mot. 13–15.
 19 And Plaintiffs’ cited cases—none of which arises in the parent-subsidiary context—only
 20 underscore the insufficiency of their allegations. Opp. 13–14. In *Keck v. Alibaba.com Hong*
 21 *Kong Ltd.*, 369 F. Supp. 3d 932, 936–38 (N.D. Cal. 2019) (Opp. 14), the plaintiff pled in
 22 extensive detail how Alibaba purportedly controlled the infringing conduct of third-party
 23 merchants on its platform, including because it allegedly oversaw the day-to-day operation of the
 24 marketplace, guided merchants regarding the layout of their stores, facilitated their transactions,

25
 26 ⁵ Plaintiffs write that “as Google’s corporate parent, Alphabet had the practical ability to
 27 influence Google’s 2023 decisions to expand Imagen commercially following January 2023
 28 lawsuits against competitors engaged in similar infringing conduct with LAION datasets.” Opp.
 13 (citing Compl. ¶¶ 28–30). But that is not alleged in the Complaint, and Plaintiffs’ cited
 allegations concern Google, not Alphabet. Regardless, that assertion is also premised solely on
 the parent-subsidiary relationship.

1 could terminate the merchants and reject their unlawful content, and was specifically notified
 2 about infringing material but failed to remove it. And even then, whether the plaintiff adequately
 3 pleaded control was a “close call.” *Id.* at 937. *See also* Opp. 13 (citing *Fonovisa, Inc. v. Cherry*
 4 *Auction, Inc.*, 76 F.3d 259, 261, 263 (9th Cir. 1996) (holding “swap meet” operator had control
 5 over third-party vendors’ infringing conduct where it organized the meet, decided which vendors
 6 could access the area, affirmatively patrolled their booths, and could “exclude any vendor for any
 7 reason” pursuant to a “broad contract”)).⁶

8 Plaintiffs’ allegations bear no resemblance to those in *Keck* or *Fonovisa*. Nor is it a close
 9 call. Plaintiffs plead no specific facts relevant to the control inquiry, let alone ones that would
 10 satisfy it. Conclusory allegations and a parent-subsidary relationship are not enough. *See, e.g.*,
 11 *Hartmann v. Google LLC*, 2022 WL 684137, at *8 (S.D.N.Y. Mar. 8, 2022); Mot. 13–15.

12 **B. Plaintiffs Have Not Adequately Alleged That Alphabet Derived A Direct**
 13 **Financial Benefit From Google’s Alleged Conduct.**

14 Plaintiffs similarly fail on the “direct financial benefit” prong. Opp. 14–15. “The essential
 15 aspect” of that inquiry “is whether there is a causal relationship between the infringing activity
 16 and any financial benefit a defendant reaps.” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir.
 17 2004). Here too, Plaintiffs cannot satisfy the element with their bare “corporate parent”
 18 allegation. Compl. ¶ 59. Courts uniformly reject near-identical allegations as insufficient. *See*,
 19 *e.g.*, *Hartmann v. Amazon.com, Inc.*, 2021 WL 3683510, at *9 (S.D.N.Y. Aug. 19, 2021)
 20 (dismissing vicarious infringement claim against Amazon that “relie[d] solely on the fact of
 21 Amazon Digital’s subsidiary status” and merely “recite[d]” the element); *Hartmann v. Google*,
 22 2022 WL 684137, at *8 (same, where complaint alleged “Google received a direct, financial
 23 benefit; financial advantages; and/or other economic consideration from YouTube’s infringing
 24 _____

25 ⁶ Plaintiffs also cite *Routt v. Amazon.com, Inc.*, 584 F. App’x 713, 715–16 (9th Cir. 2014),
 26 which affirmed the *dismissal* of a vicarious infringement claim for failure to adequately plead
 27 control, and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173–75 (9th Cir. 2007),
 28 which affirmed the *denial* of a preliminary injunction because the movant did not establish a
 likelihood of success on the control prong. Opp. 13. Neither case—nor Plaintiffs’ cherry-picked
 quotations therefrom (*id.*)—helps their claim here. And *Howard Johnson Co. v. Khimani*, 892
 F.2d 1512 (11th Cir. 1990), which concerned an appeal from a civil contempt order in a
 trademark infringement case, has *nothing* to do with vicarious copyright infringement. Opp. 13.

1 activities”) (cleaned up); *cf. Netbula, LLC v. Chordiant Software, Inc.*, 2009 WL 750201, at *2
 2 (N.D. Cal. Mar. 20, 2009) (the “mere fact that a defendant is an officer and shareholder of an
 3 infringing corporation is ‘too attenuated’ to show a ‘direct’ financial interest”) (cleaned up).

4 Plaintiffs rely solely on *Cook v. Meta Platforms Inc.*, 2023 WL 6370891 (N.D. Cal. Jan.
 5 4, 2023) (Opp. 14), but that case is uninstrucive. In *Cook*, the plaintiff alleged that Meta—the
 6 owner and operator of Facebook—earned revenue from “selling advertisement space to
 7 advertisers,” that it allowed advertisers to post infringing advertisements and helped them target
 8 their preferred audience, and that its “lenience toward” such “advertisements draws advertisers to
 9 Facebook.” *Id.* at *1, *6.⁷ The court held that those allegations “support[ed] the inference” that
 10 Meta financially benefited from its “alleged lenience toward infringement.” *Id.* at *6.

11 Here, in marked contrast, Plaintiffs do not plead *any* facts describing how Alphabet was
 12 “lenient” toward Google’s allegedly infringing conduct, how any supposed lenience drew any
 13 customers anywhere, or how Alphabet benefited financially from any such lenience. Plaintiffs’
 14 out-of-left-field assertion that “Alphabet has profited handsomely from its ‘lenience’” (Opp. 14)
 15 is unpleaded, unsupported, and cannot save their claim.

16 CONCLUSION

17 For these reasons, Defendants respectfully request dismissal of Plaintiffs’ copyright
 18 infringement claims as to works not named in the Complaint; all copyright infringement claims
 19 asserted by Plaintiff Sarah Andersen for failure to allege valid registration; all copyright
 20 infringement claims asserted by Plaintiff Hope Larson based on “Chiggers” for failure to allege
 21 valid registration; Plaintiffs’ copyright infringement claim based on the theory that Defendants’
 22 AI models are an infringing derivative work; and the vicarious infringement claim against
 23 Alphabet in its entirety.

24
 25
 26
 27 ⁷ The *Cook* complaint included extensive allegations about Meta’s purportedly lenient
 28 policies and how it allegedly monetized and benefited financially from infringing
 advertisements. *See Cook v. Meta Platforms Inc.*, Case No. 22-cv-02485-YGR, ECF No. 1,
 ¶¶ 65–89 (N.D. Cal. Apr. 22, 2022).

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Respectfully submitted,

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