

SANDERS LAW, PLLC

Craig B. Sanders, Esq. (284397)
100 Garden City Plaza, Suite 500
Garden City, New York 11530
Telephone: (516) 203-7600
Facsimile: (516) 281-7601
csanders@sanderslawpllc.com
Attorneys for Plaintiffs
File No.: 104511

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

National Photo Group, LLC and
BWP Media USA Inc. d/b/a Pacific Coast News,

Plaintiffs,

vs.

Chaos Unlimited, LLC d/b/a Chaos, Chaos
Inc., XY Zinc, LLC,

Defendant.

Case No: 2:15-CV-08010-ODW-AGR

FIRST AMENDED COMPLAINT

National Photo Group, LLC (“NPG”) and BWP Media USA Inc. d/b/a Pacific Coast News (“BWP”) (hereinafter collectively “Plaintiffs”), by and through their undersigned counsel, for their First Amended Complaint against Defendant, Chaos Unlimited, LLC d/b/a Chaos, Chaos, Inc., XY Zinc, LLC (“Defendant”), state and allege as follows:

INTRODUCTION

1. This action seeks to recover for copyright infringement. Plaintiffs herein provide entertainment-related photojournalism goods and services, and own the rights to photographs featuring celebrities that they license to online and print publications. Plaintiffs have obtained U.S. copyright registrations covering many of their photographs, and many others are the subject of pending copyright applications.

2. Defendant owns and operates a website known as www.adultdvdtalk.com (the

1 “Website”). Without permission or authorization from Plaintiffs, Defendant actively copied,
 2 stored, modified, and displayed Plaintiffs’ photographs on the Website and engaged in this
 3 misconduct knowingly and in violation of United States copyright laws.

4 **JURISDICTION AND VENUE**

5
 6 3. This Court has subject matter jurisdiction over the federal copyright
 7 infringement claims pursuant to 28 U.S.C. §1338(a) and 28 U.S.C. §1331.

8 4. Additionally, this Court has subject matter jurisdiction over all of the
 9 photographs, inclusive of any unregistered images. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S.
 10 154, 130 S.Ct. 1237 (2010), *see e.g. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,
 11 1154 9th Cir. 2007); *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994);
 12 *Pac. & S. Co., Inc., v. Duncan*, 744 F.2d 1490, 1499 n. 17 (11th Cir. 1984).

13 5. This Court has personal jurisdiction over Defendant because, through the
 14 Website, Defendant directs substantial and continuous activities at the residents of California
 15 and therefore, falls under the applicable long-arm jurisdictional statutes of California. For
 16 example, on information and belief, Defendant sells and rents pornographic movies through
 17 the Website to businesses located in California as well as to individual California residents.

18 6. Venue is proper under 28 U.S.C. §1391(a)(2) because Defendant does business
 19 in this Judicial District and because a substantial part of the events or omissions giving rise to
 20 the claim occurred in this Judicial District.

21 **PARTIES**

22 **I. Plaintiffs**

23
 24 7. NPG is a California limited liability company and maintains its principal place
 25 of business in Los Angeles County, California.

26 8. BWP is a Delaware corporation and maintains its principal place of business in
 27 Los Angeles County, California.
 28
 29
 30
 31
 32

II. Defendant

9. On information and belief, Defendant is a Maine limited liability company with locations in Rancho Santa Margarita, California; Norco, California; San Diego, California; New Portland, Maine; and Kingsfield, Maine.

10. On information and belief, Defendant is fully owned and operated by husband-and-wife team Mark L. Smith and Stephanie L. Dunn, individuals who currently reside in either New Portland, Maine or Kingsfield, Maine.

FACTS COMMON TO ALL COUNTS

11. On information and belief, Defendant is liable and responsible to Plaintiffs based on the facts alleged herein.

12. Defendant owns and operates the Website, which is comprised of a “full service shopping portal and an active online community...supported by a great group of advertisers and by everyone who makes purchases through our links.”¹

13. The Website is a popular and lucrative enterprise that purposefully displays celebrity photographs, including Plaintiffs’ copyrighted photographs.

14. The Website is monetized in that it contains paid advertisements and sells merchandise to the public and, on information and belief, Defendant profits from these activities.

15. Without permission or authorization from Plaintiffs, Defendant volitionally selected, copied, modified, stored and displayed Plaintiffs’ copyright-protected photographs (hereinafter collectively referred to as “Photographs”), as set forth in Exhibit “1,” which is annexed hereto and incorporated in its entirety herein, on the Website.

16. On information and belief, the Photographs were copied, modified, stored and displayed without license or permission, thereby infringing on Plaintiffs’ copyrights (hereinafter collectively referred to as the “Infringements”).

17. As is set forth more fully in Exhibit “1”, each listed Infringement contains the Uniform Resource Locator (“URL”) for a fixed tangible medium of expression that was sufficiently permanent or stable to permit it to be communicated for a period of more than transitory duration, and, therefore, constitutes a specific item of infringement. *17 U.S.C.*

¹ <http://www.adultdvdtalk.com/adtalk/sitemap.asp>

1 §106(5); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

2 18. Each listed Infringement in “Exhibit 1” is an exact copy of one of the
3 Plaintiffs’ original images that was directly copied and stored by Defendant on the Website.

4 19. Each Infringement listed in “Exhibit 1” constitutes a separate and distinct act
5 of infringement by Defendant.

6 20. On information and belief, Defendant takes an active and pervasive role in the
7 content posted on its Website, including, but not limited to copying, posting, selecting,
8 commenting on and displaying Plaintiffs’ Photographs.

9 21. On information and belief, Defendant directly contributes to the content posted
10 on the Website by, *inter alia*, directly employing moderators and administrators as
11 Defendant’s agents (hereinafter collectively referred to as “Agents”) who are responsible for
12 operating and controlling the activities on the Website.

13 22. Defendant’s act of designating Agents as moderators and/or administrators,
14 regardless of their actual position or the nature of their relationship with Defendant, and
15 providing them with specific forum-related powers beyond that of a typical user leads a “third
16 party reasonably to believe the actor has authority to act on behalf of the Defendant[.]”
17 Restatement (Third) of Agency, § 2.03 (2006); *Columbia Pictures Industries, Inc. v. Fung*,
18 No. CV 06–5578(SVW), 2009 WL6355911 (C.D.Cal. Dec.21, 2009) *aff’d in part and*
19 *modified*, 710 F.3d 1020 (9th Cir. 2013).

20 23. At all material times hereto, the Agents were acting within the course and
21 scope of their employment.

22 24. At all material times hereto, the Agents were acting within the course and
23 scope of their agency.

24 25. 17 U.S.C. §512, also known as the Digital Millennium Copyright Act
25 (“DMCA”) provides a defense against an infringement that is “by reason of the storage at the
26 direction of a user.” The applicable legislative history provides that “[i]nformation that
27 resides on the system or network operated by or for the service provider through its own acts
28 or decisions and not at the direction of a user does not fall within the liability limitation of
29 subsection (c).” *See* S.Rep. No. 105–190, at 43 (1998).

30 26. Defendant’s conduct is not safe harbored by DMCA, in that, on information
31 and belief, Defendant has failed to register with the United States Copyright Office pursuant
32

1 to 17 U.S.C. §512.

2 27. Further, none of the Infringements were posted at the direction of a “user” as
3 that term is defined in 17 U.S.C. §512(c).

4 28. On information and belief, Defendant was aware of facts or circumstances
5 from which the determination regarding the Infringements was apparent. Defendant cannot
6 claim that it was unaware of the infringing activities, including the specific Infringements that
7 form the basis of this First Amended Complaint, since such a claim would amount to only
8 willful blindness to the Infringements on the part of Defendant.

9 29. Additionally, on information and belief, Defendant, with “red flag” knowledge
10 of the Infringements, failed to promptly remove same (*see 17 U.S.C. §512(c)(1)(A)(i)*) as
11 evidenced by the following:

- 12 (a) Defendant’s employees and Agents actively created, authored, participated in and/or
13 commented on postings, threads, or articles similar to and/or including those featuring
14 Plaintiffs’ copyrighted Photographs.
- 15 (b) Defendant’s employees and Agents actively reviewed, monitored, commented on,
16 deleted, and/or “cleaned” postings, threads, or articles similar to and/or including
17 those featuring Plaintiffs’ copyrighted Photographs.
- 18 (c) The majority of the Photographs are readily identifiable as copyright-protected as they
19 contain a copyright watermark on the images, thereby making Defendant’s
20 infringement willful as a matter of law.

21 30. Further, Defendant has the legal right and practicable ability to control and limit the
22 infringing activities on its Website and regularly exercised such right, which, on information and
23 belief, is evidenced by the following:

- 24 (a) Defendant’s employees and Agents actively reviewed and monitored the
25 content posted on the Website.
- 26 (b) Defendant admits that it and its Agents monitor the content on the Website.
- 27 (c) Defendant’s employees and Agents actively review, modify and delete or
28 “cleaned” postings, articles, and/or threads on the Website.

29 31. On information and belief, Defendant has received a financial benefit directly
30 attributable to the Infringements. Specifically, by way of the Infringements, Defendant
31 experienced increased traffic to the Website and, in turn, realized an increase in its advertising
32 revenues, sponsorship fees, readership / membership base, and merchandise sales. *17 U.S.C.*

1 §512(c)(1)(B).

2 32. On information and belief, a large number of people have viewed the unlawful
3 copies of the Photographs on the Website.

4 33. On information and belief, Defendant at all times had the ability to stop the
5 reproduction and display of Plaintiffs' copyrighted material.

6 34. As a result of Defendant's misconduct, Plaintiffs have been substantially
7 harmed.

8
9 **FIRST COUNT**

10 ***(Direct Copyright Infringement, 17 U.S.C. §501 et seq.)***

11 35. Plaintiffs repeat and incorporate by reference the allegations contained in the
12 preceding paragraphs, as though set forth in full herein.

13 36. The Photographs are original, creative works in which Plaintiffs own valid
14 copyrights, properly registered with the United States Copyright Office.

15 37. Plaintiffs have not licensed Defendant the right to use the Photographs in any
16 manner, nor have Plaintiffs assigned any of their exclusive rights in the copyrights to
17 Defendant.

18 38. Without permission or authorization from Plaintiffs, and in willful violation of
19 their rights under 17 U.S.C. §106, Defendant improperly and illegally copied, stored,
20 reproduced, distributed, adapted, and publicly displayed works copyrighted by Plaintiffs,
21 thereby violating Plaintiffs' exclusive rights in their copyrights.

22 39. Defendant's reproduction and display of the Photographs on the Website
23 constitutes willful copyright infringement. *Feist Publications, Inc. v. Rural Telephone Service*
24 *Co., Inc.*, 499 U.S. 340, 361 (1991).

25 40. On information and belief, thousands upon thousands of people have viewed
26 the unlawful copies of the Photographs on the Website.

27 41. As a direct and proximate result of Defendant's misconduct, Plaintiffs have
28 been substantially harmed and should be awarded statutory damages against Defendant
29 pursuant to 17 U.S.C. §504(c) of up to \$150,000 per infringement in an amount to be proven
30 at trial.

SECOND COUNT
(Vicarious Copyright Infringement)

42. Plaintiffs repeat and incorporate, as though fully set forth herein, each and every allegation contained in the preceding paragraphs.

43. At all material times hereto, on information and belief, Defendant had the legal right and practicable ability to supervise, control, limit, and stop the infringing conduct of its employees, Agents, and members, and yet, Defendant declined to do so in the instant case.

44. For example, on information and belief, Defendant had the practicable ability to police the images on the Website when its employees, Agents, and members edited, modified and/or interacted with the Photographs, and therefore, had the right and ability to supervise and control the infringing Photographs.

45. As a direct and proximate result of Defendant's refusal to exercise its right to stop or limit the infringing conduct, on information and belief, Defendant's Agents and members have continued to infringe upon Plaintiffs' Photographs, which, in turn, generates profits for Defendant directly from the use of the Infringements.

46. On information and belief, Defendant enjoyed a directed financial benefit from the infringing activity of its members, employees and Agents from, *inter alia*, an increase in advertising revenue resulting from the increased traffic to the Website and from increase in Defendant's membership / readership base, brand awareness, and fees paid by sponsors.

47. On information and belief, Defendant further enjoyed a directed financial benefit from using the "draw" of Plaintiffs' Photographs to increase user traffic, thereby increasing advertising revenue, merchandise sales, sponsorship fees, and the growth of Defendant's business.

48. Accordingly, Defendant is liable as a vicarious infringer since it profited from direct infringement while declining to exercise a right to stop or limit it. *See e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d. 1146, 1171 (9th Cir. 2007); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005).

49. As a direct and proximate result of Defendant's misconduct, Plaintiffs have been substantially harmed and should be awarded statutory damages against Defendant pursuant to 17 U.S.C. §504(c) of up to \$150,000 per infringement in an amount to be proven at trial.

1 DATED: March 14, 2016

2 **SANDERS LAW, PLLC**

3
4 /s/ Craig B. Sanders

5 Craig B. Sanders, Esq. (284397)
6 100 Garden City Plaza, Suite 500
7 Garden City, New York 11530
8 Tel: (516) 203-7600
9 Fax: (516) 281-7601
csanders@sanderslawpllc.com

10 *Attorneys for Plaintiffs*
11 File No.:104511
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32