UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 21-cv-60914-CIV-DIMITROULEAS/SNOW

UMG Recordings, Inc.; Capitol Records, LLC; Universal Music Corp.; Universal Music – Z Tunes LLC; Universal Musica, Inc.; PolyGram Publishing, Inc.; Songs of Universal, Inc.; and Universal Music – MGB NA LLC,

Plaintiffs,

v.

Vital Pharmaceuticals, Inc., *d/b/a* Bang Energy; and Jack Owoc, an individual,

Defendants.
_____

DEFENDANTS'
MOTION FOR FINAL SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW

Defendants, Vital Pharmaceuticals, Inc., and Jack Owoc ("Bang Energy"), by and through their undersigned counsel, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, hereby move for final summary judgment on each of Plaintiffs' claims and state:

I. INTRODUCTION

Plaintiffs allege that Bang Energy unlawfully and willfully used portions of copyrighted songs—the accused videos average about 15 seconds in duration—in content posted to one online platform: TikTok. But Bang Energy used TikTok in the way it was intended and TikTok expressly advised Bang Energy that it had access to TikTok's music library. Moreover, Plaintiffs' case is replete with fatal evidentiary flaws: from the lack of any evidence permitting the legally-required comparison of any copyrighted song to any infringed work, to the lack of evidence that Plaintiffs

even own all of the copyrights they assert in this case. These failures entitle Bang Energy to summary judgment on a number of bases.

Bang Energy promotes its brand message to customers through multiple media channels, including trade shows and expos, and press coverage, as well as through social media and online marketing. Bang Energy's online presence is not limited to TikTok but includes many channels that predated TikTok by years: YouTube, Facebook, Instagram, and Twitter, among other platforms, in addition to Bang Energy's own website.

Plaintiffs allege infringement by musical content included in just over 100 posts (the "Accused Videos") on one platform, which represent a drop in the bucket of Bang Energy's thousands of posts across various platforms. As an initial matter, Plaintiff has produced no evidence that it even owns asserted rights to the majority of the allegedly-infringed works. And it appears that Plaintiff brought its allegations based merely on text that accompanies the videos—without actually watching and listening to them—as some of the Accused Videos include music other than that referenced in the text and some *include no music content*. More importantly, for each of the Accused Videos, Plaintiffs have produced no evidence from which a comparison to the copyrighted work can be made, undermining their entire case.

Furthermore, Bang Energy used TikTok in the way it was intended and was expressly told by TikTok that it had access to the music in TikTok's library for use in Bang Energy's TikTok videos. Bang Energy reasonably relied on that representation. And, TikTok ***has paid*** Plaintiffs, not only a flat fee for access to the asserted works, but also a "per creation fee." So Plaintiffs have received payment from TikTok for the use of the asserted music.

Bang Energy is thus entitled to summary judgment of no direct or indirect infringement. Bang Energy is also entitled to summary judgment regarding Plaintiffs' claim that they are entitled

to Bang Energy' profits. Finally, summary judgment should be granted regarding Plaintiffs' allegation of willful infringement.

II. FACTUAL BACKGROUND

A. Background of Defendants

Founded in 1993, Vital Pharmaceuticals manufactures and sells the popular Bang Energy drink. (MF1.[1]) Jack Owoc owns Vital Pharmaceuticals. (MF2.) Bang Energy drink is a cutting-edge product launching new and unique beverage flavors and products to match consumers' ever-changing desires. Bang Energy products are science-backed drinks created to positively impact the lives of its consumers. Health conscious individuals like fitness enthusiasts, college students, and others with active lifestyles looking for a great taste, nutraceutical ingredients, and boost of energy have flocked to Bang Energy's products. (Declaration of Megan Owoc ("Owoc Decl." at ¶6.)

B. Bang Energy's Use of TikTok

Bang Energy's success is backed by its innovative marketing strategies that appeal to its consumers—rather than the usual print, television, and radio methods. Bang Energy's marketing efforts include in-person interactions like a marketing blitz in key markets, event sponsorships, and tournament and concert appearances. Bang Energy also utilizes the internet through various social media platforms, web campaigns, and influencers. (Owoc Decl. at ¶7.) Bang Energy regularly posts on TikTok and makes thousands posts per year across all online platforms. (*See* Declaration of Peter Kent ("Kent Decl.) at ¶¶ 22-24; MF3.) Though Bang Energy's social media activities are just a drop in the ocean of overall social media. (Kent Decl. at ¶ 21.

TikTok is a social media site centered around short videos.[2] TikTok launched in August

[1] All reference to "MFX" refer to the corresponding Material Fact in Defendants' concurrently filed Statemetn of Material Facts.

[2] TikTok videos were initially limited to 15 second durations but more recently the maximum duration has increased. (MF4.)

2018, and contains a built-in music library of songs. TikTok allows its users to include music in videos posted on its platform. TikTok has its own built-in music library with popular songs that users can choose to include in their videos. (MF4.) When users create a video, they are given the option to select music from that built-in library. Users do not have to exit the application or upload their own music. (*Id*.) TikTok has licensing agreements with record labels for the use of the songs owned by the respective labels. (MF5.) Under TikTok's agreement with Plaintiffs, Plaintiffs are paid not only a flat fee for access to the asserted works, and also a "per creation fee." *Id*. So Plaintiffs have received payment from TikTok for the use of the asserted music.

In 2020 Bang Energy expanded its social media marketing to include TikTok. (MF6.) At the time Bang Energy posted videos on TikTok, no warning was provided that the songs TikTok provided could not be used in videos posted by businesses, such as Bang Energy. (MF7.) Bang Energy used TikTok as it was intended, posting videos utilizing the music that TikTok provided. (MF8.)

At the time Bang Energy first began posting on TikTok in 2020, (MF6), TikTok videos were limited to a duration of 15 seconds. (MF4.) By creating an account Bang Energy, including both the brand account and individual user accounts, was given access to TikTok's music library. (*Id*.) And Bang Energy understood from TikTok that it had purchased licenses for the songs in the library for use in the 15 second videos. (MF9.)

Bang Energy is a sophisticated company but the use of music on social media—where the social media service provides the music directly to its users via a music library—is a recent phenomenon. Such music was provided to Bang Energy with no warning that it needed to obtain separate copyrights from the license holder. (MF7.) The music libraries themselves provided no warnings that the music could not be used for commercial purposes. (MF7.)

Moreover, in March of 2020, Bang was expressly informed by a TikTok representative that as part of Bang Energy's social media advertising use of TikTok, Bang Energy "would have access to [Tiktok's] music library." (MF10.) Prior to that communication a TikTok representative had also conveyed that information over videoconference and, during that conference, helped Bang Energy create a video using TikTok's music library. (MF11.) Up until Bang Energy received a communication from Plaintiffs it never had any reason to believe that its use of TikTok's music library was unlicensed. (MF12.)

C. Bang Energy Respects Intellectual Property

Bang Energy has detailed written corporate policies, which it updates regularly, aimed at avoiding unauthorized use of the intellectual property of others. (MF13.) Bang Energy has in place multistep review processes aimed at assuring that no copyrighted material is used inappropriately. Prior to receiving notice from Plaintiffs,' due to its good faith understanding that the music was free to use on the platform, Bang Energy did not police TikTok posts for copyrighted music. (MF14.) Bang Energy has removed or made inaccessible posts with which Plaintiffs' raised issue and Bang Energy now uses its own proprietary music library for TikTok posts. (MF15.)

D. Background of the Dispute

Before Bang Energy received a communication from Plaintiffs it had no reason to believe that its use of TikTok's music library was unlicensed. (MF12.) In December 2020, Bang Energy approached Universal regarding a potential license to a catalog of music for a new project it was contemplating. During initial communications, on December 3, 2020, a representative of Universal indicated that Universal "would also love to sort out the attached list of unauthorized uses by Bang Energy for use on TikTok." (MF16.) Within hours, in-house counsel for Universal Ms. Cho emailed to ask Bang Energy to immediately delete the referenced attachment, which Bang Energy

confirmed it did. *Id*.

A month later on January 15, 2021, Ms. Cho sent a replacement file listing Bang Energy videos that purportedly included Universal copyrighted works and requesting evidence of Bang Energy's license to use the works. Bang Energy's Chief IP Counsel responded noting Bang Energy's "understanding is that TikTok provides the use of these songs, and others, with a license to all of its members." (MF17.) As discussed above, Bang Energy took down the disputed posts and discontinued use of music other than from its own proprietary library. (MF18.) On April 28, 2021 Plaintiffs filed their Complaint. (ECF No. 1.)

III. SUMMARY JUDGMENT STANDARD

"[I]t has long been the rule that when the nonmovant has the burden of proof at trial, the moving party may make a proper summary judgment motion, thereby shifting the summary judgment burden to the nonmovant, with an allegation that the nonmovant has failed to establish an element essential to that party's case." *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017); *see also, e.g., Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999) ("When a moving party alleges that there is an absence of evidence necessary to prove a specific element of a case, the nonmoving party bears the burden of presenting evidence that provides a genuine issue for trial.") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

"There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted); *see also Grimes v. Tex. Dep't of Mental Health*, 102 F.3d 137, 139–40 (5th Cir.1996) ("Conclusory allegations and unsubstantiated assertions will not satisfy the non-moving party's burden.").

IV. ARGUMENT

A. Plaintiffs Must Come Forward With Evidence of Direct Infringement With Respect to Each Asserted Copyright

Plaintiffs allege that Bang Energy has infringed their exclusive rights to reproduce, distribute, adapt and publicly perform the asserted copyrighted works. (ECF No. 1 ¶¶ 35, 57.) To survive summary judgment, Plaintiffs must come forward with specific evidence of direct infringement for each asserted copyright that they contend gives rise to a genuine issue of material fact regarding infringement.

But Plaintiffs cannot prove direct infringement for a number of separate and independent reasons. Plaintiffs' case is riddled with fatal evidentiary flaws: Plaintiffs lack evidence of its ownership of certain of the asserted copyrights; Plaintiffs lack evidence from which a comparison of the asserted works to the *any* of the Accused Videos can be made; and Plaintiff has even asserted claims against videos that *include no musical content*.

1. Plaintiff's Lack Evidence of Ownership

In order to prove copyright infringement, Plaintiffs must prove ownership of the asserted copyrights. *See, e.g.*, *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003). Bang Energy is entitled to partial summary judgment because Plaintiffs cannot prove ownership of many of the copyrights asserted in their Complaint. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 n.10 (5th Cir. 2017) ("[A] movant may support a motion for summary judgment by pointing out that there is no evidence to support a *specific element* of the nonmovant's claim.") (emphasis in original).

Plaintiffs' Exhibits 1 and 2 to list 54 copyrighted sound recordings, and 83 copyrighted

musical compositions[3] "at issue" in this case.[4] (MF19.) For six of these Plaintiffs produced no copyright registration whatsoever and no other evidence of ownership.[5] (MF20.)

Additionally, from Bang Energy's detailed review of the copyright registrations produced, one of the Plaintiffs is the listed owner of only 57[6] of the 137 purported copyrights. (MF21.)For purposes of this Motion, Bang Energy does not dispute Plaintiffs' ownership of these 57 registered copyrights. But for an additional 13 asserted copyrights, the copyright registration produced by Plaintiffs does not list the same artist or song title that Plaintiffs' Exhibits 1 & 2 identify as being infringed. (MF22.)

This leaves 99 unique copyright registrations at issue 1) for which Plaintiffs have produced no ownership information, or 2) that do *not* identify a Plaintiff as the owner, and/or 3) that do not list both the asserted song title and artist (the "Contested Registrations"). Bang Energy is therefore entitled to partial summary judgment with respect to the copyrights corresponding to the Contested Registrations as Plaintiffs has come forward with no evidence that they own the asserted copyrights.

Plaintiffs have refused to identify the specific evidence that establishes ownership of each asserted copyright. (*See* MF23.) From what Bang Energy can determine, Plaintiffs lack the documentary evidence necessary to establish ownership of all of the asserted copyrights reflected in Exhibits 1 and 2. *See* 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other by operation

[3] Bang Energy does not concede that any of these asserted copyrights are valid or were properly registered.
[4] These totals are based on detailed review of Plaintiffs' production as Plaintiffs have failed to specifically identify or particularly point out all of the allegedly infringed copyrights.
[5] Fact discovery closed in this case on April 15, 2022. (ECF 29 at ¶2.)
[6] This number, 57, includes registrations where the listed owner is close to but not an exact match for a named Plaintiff. In close cases Bang Energy exercised some discretion in identifying discrepancies. The Contested Registrations identify an owner that is completely different from the information in Plaintiffs' Exhibits 1 & 2.

of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.").

2. Plaintiffs Lack Evidence to Show "Substantial Similarity"

a) Lack of evidence regarding Accused Videos

In addition to listing copyrighted works, Plaintiffs' Exhibits 1 and 2 also purport to list the Accused Videos. (MF19 ("attached are updated lists of the videos at issue").) The third column in each of those lists has a heading "Post URL." For most of the entries in the list a URL, or link, is provided. However, for nine entries in those lists, Plaintiffs' have failed to provide a URL and no other information that could be used to identify the purportedly accused video—Plaintiffs' have not even identified the particular TikTok account from which the mystery videos were supposedly posted. (MF24.) And for each of those nine plus an additional 23 Accused Videos, Plaintiffs have failed to produce the allegedly infringing videos themselves. (MF25.)

Of the Accused Videos for which video has actually been produced in this case, three, although the posts included text with the *name* of an asserted song, the content of the video *includes no music*. (MF26.) And for *every single Accused Video*, Plaintiff lacks evidence to show substantial similarity because Plaintiffs have produced *none* of the copyrighted works. (MF27.)

b) Lack of evidence regarding Copyrighted Works

Every copyright infringement claim requires a side-by-side comparison of the copyrighted work and the allegedly infringing work, so that the factfinder can assess whether they are "substantially similar." *Bridgmon v. Array Sys. Corp*., 325 F.3d 572, 577 (5th Cir. 2003) ("[T]he law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the works."); *Creations Unlimited, Inc. v. McCain*, 112 F.3d 814, 816 (5th Cir. 1997) ("To determine whether an instance of copying is *legally actionable*, a side-by-side comparison must

be made between the original and the copy to determine whether a layman would view the two works as 'substantially similar."') (emphasis in original).

There is no evidence in this case that permits the factfinder to conduct a "substantial similarity" comparison between (1) the Accused Videos and (2) a copyrighted song owned by any Plaintiff. This failure of proof is fatal to Plaintiffs' claims: there is no genuine issue of material fact regarding direct infringement. *See King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999) ("[C]opying is an issue to be determined by comparison of works, not credibility. King's failure to adduce evidence for such a comparison vitiates her claim.") (citation omitted); *Peel & Co. v. The Rug Market*, 238 F.3d 391, 398 (5th Cir. 2001) (summary judgment is proper on copyright infringement claim if the evidence does not permit a finding of substantial similarity); *Batiste v. Najm*, 28 F. Supp. 3d 595, 618-23 (E.D. La. 2014) ("no reasonable juror could find substantial similarity—as to the constituent elements stated in the complaint, as to any combination of those elements, as to the songs taken as a whole, or as to any part(s) thereof").

Here Plaintiffs have provided a list of allegedly infringed song titles and artists names but have produced no true copies of the songs that could be compared to the "infringing" "copies"—videos (to the extent they themselves have been produced) averaging 15 seconds in duration.[7] (MF27.) Plaintiffs have produced only copies of asserted copyright registrations—and only some of them at that. (MF20.) The registration certificates contain only the title and description of the allegedly covered work. Without the deposit copies that accompanied the copyright applications, there is no way for the factfinder to compare the Accused Videos to the asserted allegedly copyrighted works. And as noted, Plaintiffs have also failed to produce a number of the videos themselves.

[7] Plaintiffs' lists themselves seem to contend for some Accused Videos that the music included is a "remix." (Ormond Decl. at Ex. F.)

Without this evidence, without some of the Accused Videos and without *any* of the allegedly copyrighted works, which Plaintiffs have failed to produce, no comparison can be made and no reasonable juror could, therefore, find substantial similarity. Plaintiffs' "failure to adduce evidence for such a comparison vitiates [their] claim," *King*, 179 F.3d at 376, and Bang Energy is entitled to summary judgment of non-infringement.

B. Plaintiffs Have No Evidence of Indirect Infringement

One infringes contributorily by intentionally inducing or encouraging direct infringement, and one infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citations omitted). Where, as here, there is no direct infringement, there can, of course, be no indirect infringement. "It is well-established that secondary liability for copyright infringement does not exist in the absence of direct infringement." *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1031 (9th Cir. 2013). But even if Plaintiffs' could show that third-party influencers infringed Plaintiffs' copyrights, Plaintiffs' indirect infringement claim fail for the following independent reasons.

1. There is No Evidence to Support a Contributory Infringement Claim

"A party is liable for contributory infringement when it, with knowledge of the infringing activity, induces, causes or materially contributes to infringing conduct of another." *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (internal citation omitted). "One infringes contributorily by intentionally inducing or encouraging direct infringement ...." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). There is no evidence whatsoever that Bang Energy took affirmative steps to induce or encourage third-party influencers to infringe Plaintiffs' copyrights. *See also Grokster*, 545 U.S. at 937 ("The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate

others to commit violations."). Plaintiffs cannot show direct infringement and Bang Energy does not produce or assist in the production of third-party influencer videos. (MF28.) Nor does Bang Energy select or, indeed, have any input regarding the selection of music included in influencers' TikTok videos. (*Id*.)

2. There Is No Evidence That Bang Energy Has the "Right and Ability to Supervise" Necessary to Support a Claim of Vicarious Infringement

To show vicarious liability, a plaintiff must prove that a defendant has a direct financial interest in the infringing activity, and has the right and ability to supervise the activity which causes the infringement. *Swallow Turn v. Wilson*, 831 F.Supp. 575, 579 (E.D.Tex.1993). To show a defendant has the right or ability to supervise infringement requires proof of both "a legal right to stop or limit the directly infringing conduct ... [and] the practical ability to do so." *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 730 (9th Cir. 2007).

Even if Plaintiffs could show direct infringement by the eight videos that are alleged to infringe and were posted by third-party influencers, Plaintiffs still cannot meet their burden to show that Bang Energy had the legal right and ability to stop the posting of the allegedly infringing videos. Bang Energy did not. Because Plaintiffs cannot show that Bang Energy had the right and ability to supervise influencers, Bang Energy is entitled to summary judgment of no vicarious infringement.

C. Damages

The Copyright Act permits a copyright owner to pursue one of two groups of damages: (1) actual damages and defendant's profits, or (2) statutory damages. 17 U.S.C. § 504. Only if the plaintiff elects to pursue statutory damages are enhanced damages due to willful infringement available pursuant to 17 U.S.C. § 504(c). *See id*. at § 504(c)(2).

Plaintiffs here cannot show entitlement to defendants' profits. Neither can Plaintiffs show

that alleged infringement was willful.

1. Plaintiffs Can Show Neither Actual Damages Nor a Causal Connection to Bang Energy's Profits

The Court should grant summary judgment that Plaintiffs cannot recover damages under 17 U.S.C. § 504(b), which gives a plaintiff the option to seek "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."

With respect to actual damages, there is no evidence of actual damages suffered by any individual Plaintiff as a result of the alleged infringement. Plaintiffs have not alleged that they lost any sales as a result of infringement and have not alleged any other measure of damages specific to this case. The only other measure of actual damages that Plaintiffs can raise is a reasonable license fee. But Plaintiffs have produced no evidence of license agreements that are indicative of what it would cost to license the music. While Plaintiffs have produced some license agreements, none is for comparable use—in approximately 15 second social media videos—all produced agreements exceed the scope of Bang Energy's alleged uses in this case. (Ormond Decl. at ¶18.)

As for Bang Energy's profits, Plaintiffs similarly lack any evidence of profits attributable to the alleged infringement. While § 504(b) provides that the copyright owner is only required to present proof of gross revenues, "[i]n meeting its initial burden, … a copyright holder must show more than the infringer's total gross revenue from *all* of its profit streams." *MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc*., 622 F.3d 361, 367 (5th Cir. 2010) (emphasis in original). "Rather, 'gross revenue' refers only to revenue reasonably related to the infringement. *Id*. (emphasis in original). Before they can be awarded an accused infringer's profits, copyright owners are required to show "some causal connection between the infringement and profits claimed." *Oceans of Images Photography, Inc. v. Foster & Smith*, No. 8:11-cv-1160, 2012 WL 5878092, at *8 (M.D.

Fla. Nov. 21, 2012); *Ordonez-Dawes v. Turnkey Props. Inc.*, 2018 WL 828124, at *3 (S.D. Fla. Mar. 26, 2008) (there must be "some nexus between the infringing activity and the gross revenue figure proffered by a plaintiff"); *see also Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors' corporate income tax return in the record and rest your case for an award of infringer's profits.").

There are no direct profits at issue in this case; that is to say, Plaintiffs do not allege that Bang Energy sold Plaintiffs' copyrighted works. Rather Bang Energy is alleged to have used the works in approximately 15 second videos relating to Bang Energy beverages. A nexus between the alleged infringement and the defendant's profits is essential in such cases involving indirect profits. And where, as here, the accused use is not even traditional advertising, no causal nexus whatever between the alleged infringement and Bang Energy's profits can be shown.

Plaintiffs have no evidence to show a causal connection between Bang Energy's profits and its social media marketing generally. Plaintiffs have no evidence to show a causal connection between Bang Energy's profits and its social media marketing on TikTok. But even if Plaintiffs had such evidence, they cannot show a causal connection between Bang Energy's profits and the accused roughly 140 posts of the thousands of posts that Bang Energy makes to social media. Even if Bang Energy's drink sales are attributable purely to social media marketing (and not, for example, to taste, to caffeine or calorie content, or to habitual purchase), there is no way to link profits to these few posts.

Even when alleged infringing material is used in a traditional marketing element that is just one of many media elements it is notoriously difficult to prove a link to profits. As the leading copyright law treatise states, "modern cases more frequently deny profits earned from advertising."

Nimmer on Copyright § 14.03(B)(2)(b), citing *Deltak, Inc. v. Advanced Sys., Inc.*, 574 F. Supp. 400 (N.D. Ill. 1983) (Posner, J., sitting by designation)), vacated on other grounds, 767 F.2d 357 (7th Cir. 1985) (explaining that increased sales arising from infringing advertising to be too speculative on the facts, while acknowledging that, in theory, an award may be appropriate in certain cases).

Plaintiffs need evidence of a "causal connection between the infringement and profits claimed." *Oceans of Images Photography,* No. 8:11-cv-1160, 2012 WL 5878092, at *8. And Plaintiffs have none. Plaintiffs lack any evidence of Bang Energy's revenues that are "reasonably related" to the alleged infringement, and accordingly the Court should grant judgment as a matter of law on damages under § 504(b).

2. There Is No Evidence of Willful Infringement

The plaintiff bears the burden of proving willfulness. *See* 17 U.S.C. § 504 (c)(2). A showing of willfulness under the Copyright Act tracks the common law construction of the term. *See Graper v. Mid-Continent Cas. Co.,* 756 F.3d 388, 395 & n. 7 (5th Cir. 2014) (citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 58, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007)). Willfulness thus requires a showing that Defendants knew their conduct constituted copyright infringement or acted with reckless disregard of Plaintiffs' rights as copyright holders. *Id.*

Assuming it is determined that Defendants copied Plaintiffs' copyrighted materials, there is no evidence that Defendants knew or should have known that they did not have a right to use the materials. The Court should grant summary judgment on Plaintiffs' allegations of willful copyright infringement because there is no evidence from which a reasonable juror could conclude that Bang Energy knew that its alleged conduct constituted copyright infringement or acted with reckless disregard of Plaintiffs' rights. *See Graper*, 756 F.3d at 395 & n.7.

Bang Energy understood its use of TikTok and the music library provided, in the manner

in which they were intended to be used, did not constitute infringement. (MF12) Bang Energy had strict procedures in place regarding copyrighted content but did not extend these procedures to TikTok in light of its understanding. (MF14) Bang was further expressly informed by TikTok that Bang Energy had access to TikTok's music library. (MF10.) All evidence supports, and no evidence contradicts, that Bang Energy's use was reasonable and in good faith.

Bang Energy reasonably relied on information provided by TikTok relating to the use of copyrighted music in connection with its posts. There is no evidence that that Bang Energy knowingly or intentionally infringed Plaintiffs' copyrighted material. Courts have consistently held that infringement is not willful where, as here, the defendant reasonably and in good faith believes that its use is not barred by law. *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 748-49 (9th Cir. 2019) ("[c]ontinued use of a work even after one has been notified of his or her alleged infringement does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing."); *see also Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir. 2001) ("It would seem to follow that one who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not 'willful' for these purposes.") (quoting 4 NIMMER ON COPYRIGHT § 14.04[B][3]); *Zomba Enters. v. Panorama Records,* 491 F.3d 574, 584 (6th Cir.2007); *Princeton Univ. Press v. Michigan Document Services,* 99 F.3d 1381, 1392 (6th Cir.1996); *N.A.S. Import, Corp. v. Chenson Enterprises,* 968 F.2d 250, 252 (2d Cir.1992); *RCA/Ariola Int'l v. Thomas & Grayston Co.,* 845 F.2d 773, 779 (8th Cir.1988).

All evidence reflects that Bang Energy "believe[d] reasonably, and in good faith, that [it was] not infringing." The Court should grant summary judgment on Plaintiffs' allegations of willful copyright infringement because there is no evidence from which a reasonable juror could

conclude that Bang Energy knew that its alleged conduct constituted copyright infringement or acted with reckless disregard of Plaintiffs' rights.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Bang Energy's Motion for Summary Judgment and enter judgment as a matter of law in Bang Energy's favor.

REQUEST FOR HEARING PURSUANT TO LOCAL RULE 7.1(B)(2)

In accordance with Local Rule 7.1(b)(2), Bang Energy respectfully requests a hearing on this Motion. The estimated time required for argument is not more than one hour. Argument will permit the Court to make full inquiry of the parties, particularly because Bang Energy anticipates that Plaintiffs will attempt to dispute and/or controvert the material facts at issue.

Dated: April 29, 2022

Respectfully submitted,

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