

20-1488

To Be Argued By:
Natraj S. Bhushan

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 20-1488

EDWYNA W. BROOKS, DBA EW BROOKS BOOKS, LLC

Plaintiff – Appellee,

– against –

DAMON ANTHONY DASH and POPPINGTON LLC d/b/a/ DAMON DASH STUDIOS

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLANTS' PAGE PROOF BRIEF

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL
INTEREST**

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellant Poppington LLC (“Poppington”) hereby states that it is not a publicly-held company, has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Defendants-Appellants Damon Anthony Dash (“Dash” or “Appellant Dash” or “Appellant”) and Poppington LLC (“Poppington”) appeal from a final judgment dated April 15, 2020 (ECF Doc. No. 72),¹ which was entered pursuant to the Findings of Fact and Conclusions of Law (Hon. Jed Rakoff, U.S.D.J) issued in the United States District Court, Southern District of New York.

JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction pursuant to the 28 U.S.C. § 1331.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. Final judgment was entered in the court below on April 15, 2020 (ECF. Doc. No. 72). Defendants-Appellants filed a timely notice of appeal on May 5, 2020. (ECF Doc. No. 75). The appeal is from a final judgment after a bench trial which disposed of all three of Plaintiff’s counts/claims for damages.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues to decide on appeal are as follows:

- (1) Did the Court err in determining that the parties did not intend to work together based on the evidence presented at trial?

¹ The parties stipulated to submission of a deferred joint appendix after full briefing. Accordingly, all citations will be to the lower court’s record denoted as” ECF Doc. No. __ at...”

- (2) Did the Court err in determining that the Plaintiff was the dominant author of the film, “Mafietta,” based on the evidence presented at trial?
- (3) Did the Court err in awarding Plaintiff \$300,000 in actual damages?

STATEMENT OF THE CASE

This copyright and trademark infringement case concerns the ownership and authorship of a film entitled “*Mafietta*” (“Film”), which was a 17-minute pilot film directed by Appellant Dash, based, in part, on the book series of the same name authored by Plaintiff-Respondent Edwyna W. Brooks (“Brooks” or “Respondent” or “Plaintiff”). ECF Doc. No. 71 at p. 1.

Based on the evidence presented at trial and argument set forth below, it is respectfully submitted that the lower court first erred in finding that Dash failed to establish that the film was not a “joint work” under copyright law since the parties did intend to co-author the Film. *See generally*, ECF. No. 69 (Transcript (“Tr.”)).

The lower court next erred in determining that Brooks was the Film’s dominant author and, therefore, its sole author under copyright law. On this issue, it is respectfully submitted that because of Dash’s substantial contributions to the Film, that Dash was the more dominant author as he produced the Film; was the undisputed director of the Film, which he shot from an improvised script that Brooks did not provide him with; casted the main actors in the Film who he

lured to the project despite Brooks lacking money to pay these actors an on-camera appearance fee; Dash helped select filming locations along with cast wardrobe and lighting; he helped edit, promote and shop the Film to third parties in an effort to find potential distribution. Thus, when weighed against Brooks' contribution of essentially paying for the Film's production, Dash's creative and artistic contributions in bringing the Film to life outweigh Brooks' contribution. As such, this Court should reverse the lower court's finding that Brooks was the dominant author of the Film. *Id.*

Lastly, even if this Court affirms the findings on the first two issues presented, on Appellants' third issue - did the Court err in awarding Plaintiff \$300,000 in actual damages - the Court's monetary award of \$300,000 in actual damages should be reversed as it is the product of undue speculation and/or is clearly erroneous. *Id.*

A. Factual Background

The relevant facts are reproduced from the Court's Findings of Fact and Conclusions of Law (ECF Doc. No. 71), the Court's trial transcript (ECF Doc No. 69, hereafter "Tr.[date of transcript], at ____") and exhibits, and the Court's Judgment (ECF Doc. No. 72). These facts are as follows:

- “Brooks, d/b/a EW Brooks LLC, is the author of a four-part book series titled Mafietta, which is based on an aspiring female crime boss.” JCO 8-9; Tr. 1/22/2020, at 71:1-5, 19-20.
- “Dash is the Chief Executive Officer of Poppington LLC, a New York limited liability company, and ran a “Poppington seminar” designed to help and mentor independent, aspiring entrepreneurs.” JCO 9; Tr. 1/22/2020, at 156:10-157:5.
- “Brooks and Dash discussed the book series Mafietta, and Brooks relayed to Dash that she had the necessary funding to shoot a movie version of Mafietta and that she needed “mentorship and a co-sign” to pursue the movie production.” JOC 7; Tr. 1/22/2020, at 72:2-19. “Dash agreed to provide directorial services (JOC 7; Tr. 1/22/2020, at 158:20-159, 168:21-23).”
- “The filming began on August 3, 2015 and was completed by August 6, 2015.” JCO 10; Tr. 1/22/2020, at 75:23-76:1.
- “Brooks paid for the entire production cost of \$49,372.34.” Pl. Exs. 12, 25; Tr. 1/22/2020, at 103:23-104:4, 105:21-106:5.
- Dash, on the other hand, “provided his Dragon Red camera, performed the directorial services, brought in certain celebrities as key cast members – including the Film’s lead female on which the series is predicated upon, Chandra Davis a/k/a Deelishis and Jonathan Ancrum a/k/a Murda Mook –

and promoted the film afterwards.” *Id.*; Tr. 1/22/2020, at 79:6-10, 84:22-85:6, 85:12-21, 113:18-25, 118:11- 13, 119:18-23, 132:15-20; Tr. 1/23/2020, at 4:1-6, 16-20.

- Without any formal written agreement in place as to ownership of the copyright, or authorship of the finished Film, in February and March of 2017, Dash and Poppington shared several posts on the Instagram page of Dame Dash Studios promoting the 17-minute Film in an effort to test proof of concept and potentially find distribution for the Film. Tr. 1/22/2020, at 92:5-97:13.
- Also in 2017, the defendants placed the 17-minute version of the Film on the subscription-based platform of Dame Dash Studios and on iTunes to test proof of concept of the 17-minute version of the Film. JCO 11; Tr. 1/22/2020, at 91:25-92:11, 97:15-17.
- Plaintiff, taking issue with these posts, reached out to iTunes in late December 2017 (two years after the Film was completed) to take the Film down. *Id.*; see also Tr. 1/22/2020, at 97:19-100:22.
- On January 27, 2019 (four years after the completion of the Film and two years after the alleged infringement), Brooks registered the film with the U.S. Copyright Office with the Registration No. Pau 003956394, and

brought the instant action against defendants on February 28, 2019. Pl. Exs. 1, 14; JCO 11; Tr. 1/22/2020, at 107:10-20, 143:7-17.

B. Proceedings Below & Lower Court's Decision

On February 28, 2019, Brooks brought the instant action against Defendants, claiming: (1) copyright infringement in violation of the Copyright Act (“Count One”); (2) trademark infringement in violation of the Lanham Act (“Count Two”); and (3) common law trademark infringement (“Count Three”). See Pl. Ex. 1.1. ECF Doc. No. 71 at p.1.

On September 30, 2019, the Court granted summary judgment in favor of Brooks with respect to her trademark claims, but denied her motion with respect to the copyright claim as the Court found genuine disputes of material facts regarding that claim. ECF Doc. No. 71 at p.2.

A bench trial of the copyright claim, as well as to determine damages for all three claims, commenced on January 21, 2020 and lasted for three days. The Court received 19 exhibits and heard testimony from five witnesses: Brooks, Dash, Edwin Rush (attorney for Brooks in negotiating an unexecuted contract regarding the film), Eric Howard (attorney for Dash in negotiating the same unexecuted contract), and Alvin Williams (damages expert for Brooks). On March 30, 2020, the parties submitted post-trial memoranda in lieu of oral summations. ECF Doc. No. 71 at p. 2-3.

Thereafter, the Court granted judgment in favor of Brooks *on her copyright infringement claim*, issued a permanent injunction against defendants, and awarded Brooks \$300,000.00 in actual damages as set forth in its findings of fact that were based “on its assessment of the evidence received at trial, including its assessment of the credibility of the witnesses (based on their demeanor at trial, the consistency and internal logic of their accounts, and other pertinent factors).” ECF Doc. No. 71 at p. 3.; ECF Doc. No. 72 (Judgment).

The Plaintiff was not awarded any damages on Count Two and withdrew her claim for Count Three. ECF Doc. No. 71 at p. 19 and FN 15.

Thereafter, this appeal ensued.

SUMMARY OF ARGUMENT

As argued in depth below, it is respectfully asserted that the District Court’s Judgment was the product of a clear error as it was predicated on findings that (I) Respondent Brooks did not fully intend to be co-authors with Appellant Dash and (II) that Respondent Brooks was the dominant author of the Film.

Assuming arguendo that the lower court’s above findings are affirmed, it is respectfully averred that the Court’s award of \$300,000 is unduly speculative as per this Court’s precedent on interpreting awards of “actual damages” under 17

U.S.C § 504 (b) ²; clearly erroneous as it is not based on facts; and against the weight of evidence based on Plaintiff's experts own testimony and documentary evidence submitted by the alleged infringer (Appellants); and, therefore, should be reversed on the facts and law.

STANDARD OF REVIEW

i. Standard In Reviewing Decision Rendered After Bench Trial

“In reviewing a district court's decision in a bench trial, we review [its] findings of fact for clear error[,] . . . its conclusions of law *de novo*,’ and mixed questions of law and fact *de novo*.” *See, Congregation Rabbinical Coll. of Tartikov, Inc. v Vil. of Pomona, NY*, 945 F3d 83, 111 (2d Cir 2019).

ii. Standard In Reviewing Damages Awarded After Bench Trial

“The standard for appellate review of damage awards ... is whether the award is so high as to shock the judicial conscience and constitute a denial of justice.” *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988). However, as this award was rendered after a bench trial, the Court should note that, under this Court’s precedent, the factual component of the issue before the District Judge does not render all aspects of his decision-making subject to review under the "clearly erroneous" standard because “in making a factual determination, a

² The law of the Second Circuit exacts that the amount of damages awarded on a copyright claim may not be based on "undue speculation." *Davis v Gap, Inc.*, 246 F3d 152, 166 (2d Cir 2001); *Abeshouse v Ultragraphics, Inc.*, 754 F2d 467, 470 2d Cir 1985).

decision-maker might rely on legally impermissible factors, fail to give consideration to legally relevant factors, apply incorrect legal standards, or misapply correct legal standards...In court trials, where the functions of fact-finding and exposition of law are performed by the same person, the line between the functions is not always distinct. For example, the line between admissibility of evidence (law) and evaluation of the persuasive force of evidence (fact) is often blurred. Nevertheless, an appellate court is obliged to observe the law/fact distinction as best it can and accord plenary review to any aspect of a trial court's decision that can fairly be isolated as determining an issue of law. *See, Am. Socy. of Composers v Showtime/The Movie Channel, Inc.*, 912 F2d 563, 569 (2d Cir 1990).

ARGUMENT

I. The Admitted Evidence Established That The Film is a “Joint Work”

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. *Casa Duse, LLC v Merkin*, 791 F3d 247, 255 (2d Cir 2015).

Further, as the lower Court correctly noted in its Findings:

“In the Second Circuit, when there is no written contract to address co-authorship (as is the case here), two or more contributors to a work are considered “joint authors” if each “(1) made independently copyrightable contributions to the work; and (2) fully intended to be co-

authors.” *Thomson v. Larson*, 147 F.3d195, 200 (2d Cir. 1998). In its summary judgment order, the Court already determined that Dash has made independently copyrightable contributions to the film Mafietta.

Therefore, the only issue at trial with respect to the liability portion of Count One was whether Brooks and Dash fully intended to be co-authors.”

ECF Doc. No. 71 at p. 9.

Here, the lower court clearly erred in failing to focus its inquiry into the mutual intent element to the time of the Film’s creation, which is what the Thomson court required of it. Thomson v Larson, 147 F3d 195, 201 (2d Cir. 1998).

Under the clearly erroneous standard, a “finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

As argued herein, the Appellants established by a preponderance of the evidence that both Brooks and Dash fully intended to be co-authors of the Film – at the time of its creation - as evidenced by their verbal agreement (notwithstanding its unenforceability), Plaintiff’s admissions in her testimony and that of her lawyers (Edwin Rush), and certain emails exchanged by the parties.

Moreover, the *Thomson* court (in relying on the *Childress* court) required the lower court to consider how a collaborator – *i.e.*, Brooks and Dash – regarded themselves “in relation to the work in terms of billing and credit, decision-making,

and the right to enter into contracts.” In this regard, this Circuit noted that "though joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship, obviously some distinguishing characteristic of the relationship must be understood for it to be the subject of their intent."

Thomson v Larson, 147 F3d 195, 201-202 (2d Cir. 1998).

A. The Terms of the Verbal Agreement and Other Email Evidence Showing The Parties Intention On Being Co-Authors Just Prior To The Filming

At trial, Dash testified that he and Brooks intended on working together, which was, in part, evidenced by the verbal agreement that parties entered into in North Carolina prior to filming³ as well as the subsequent email communications, which were admitted into evidence. Specifically, Dash testified that:

A. “We discussed because of the fact that she already had a script and a book, that I have a camera that I paid \$50,000 for, I have resources, because no one would help you, I will be a man of my word and help you. So *we can be partners on what we shoot, I will produce it, I will use my resources, I will do a favor and direct it... And she agreed to that.*⁴

...

“Q. What were the terms of that agreement or understanding?

³ Tr. 1/22/2020 at pp.161 (Lns. 7-10)

⁴ Tr. 1/22/2020 at pp.158 (Lns. 23-25) and 159, (Lns. 1-4)

A. That what we shot, we would split 50/50.
It would be ownership.”⁵

.....

“Mr. Dash, what were the terms prior to shooting this film?

A. I was to direct and produce the movie and then to direct it, to promote it, to shop it, to edit it, to score it -- basically everything.

Q. For that, what were you to receive in return?

A. 50 percent of anything that we created together.”

Q. Did you do all of the things that you just mentioned?

A. Yes.

Tr. 1/23/2020 at p.4, Lns. 1-8

Instead of crediting this testimony, the lower court clearly erred by resting its finding of no mutual intent on drafts of an unsigned directorial agreement and emails admitted into evidence, which were negotiated or sent after the Film’s creation. ECF Doc. No 171.

Moreover, the Court had other indicia and documentary evidence corroborating the parties’ mutual intention on co-authoring the Film as proffered in Defendants’ Exhibit 14 and 17⁶ (which concerned product placement shot during creation of the Film).

⁵ Tr. 1/22/2020 at p. 160, Lns. 16-17

⁶ Tr. From January 23, 2020 at p. 13 and 14.

Relevant excerpts concerning those exhibits are as follows:

Q. Mr. Dash, can you please look at the body of the email with the date May 9, 2016 [referring to Defendant's Exhibit 14]

A. Yes.

Q. This was an email sent from E.W. Brooks to yourself?

A. Yes.

Q. In it says: "Micah noticed your product placement in Mafietta and made this."

A. Yes.

Q. "Thoughts?? I didn't want to use it, and you have a problem. E.W. Brooks."

.....

Q. Were there any product placements made or put into the film that you directed and produced?

A. Yes. Strategically the plan was for me to be able to promote her book and for me to promote my products. When you have a visual, that's the best commercial. *Sense we were moving as partners, she asked me if I was all right with it, and I told her I was.*

Q. Do you recall filming any product placement in the footage that you shot?

A. Yes. Strategically I also put my products in it. That's one of my models.

Q. *Do you recall if you shot product placement that involved Ms. Brooks' product?*

A. *Absolutely. Very intentionally. I put her books in there. Again, my whole agenda was for her to win as an independent and to empower her. "*

Tr. 1/23/2020 at p. 13-14.

In further support of this testimony, this court can also see the following testimony concerning Defendants Exhibit 17:

“Now, in the body of Exhibit 17 we see an October 20, 2015, email from E.W. Brooks to yourself. Do you see that?

A. Yes.

Q. The subject line is "Thoughts??"

Do you see that?

A. Yes.

Q. She writes: "The thought is to put the books out using this campaign, and then we split the money after paying authors. E.W. Brooks."

Do you see that?

A. Yes.

Q. Was that part of the discussion between you and Ms. Brooks, to put her books out using the film?

A. No.

...

Q. Was using or promoting her books a part of the film that you were to direct?

Was that part of the discussion?

A. It wasn't a part of the discussion, but it was one of the things that I would do regardless. So I wasn't obligated to do it, but I did it because I thought it was the right thing to do.

Q. Mr. Dash, the footage that was shot -- that was shot on your camera; correct?

A. Yes.

Q. As we sit here today, is there any signed agreement that allowed Ms. Brooks to use that footage?

A. No.

Q. But it was your understanding that whatever was shot was co-owned by both of you?

A. Yes.

Q. As we sit here today, is there any agreement that allowed for your product placement in the film to be used?

A. No.

Q. No agreement, verbal, signed, or otherwise?

A. I mean, the agreement is as partners we use it. But I've given no one permission to use my stuff, other than as a partner.

Tr. 1/23/2020 at p. 15-16

Additionally, the lower Court admitted a video clip that was attached to the email in Exhibit 14, which shows promotional footage that Dash shot.

Tr.1/23/2020at p. 80.

B. Testimony of Plaintiff Corroborates That The Parties Intended on Working Together

From the very first meeting, Brooks testified of her intention in seeking Dash's help and the place and time of some of the material terms that the parties verbally discussed and agreed upon prior to commencing photography of the Film in 2015.

“Q Was that a seminar you actively sought out, or how did you come about finding that seminar?

A. Well, my husband was going to a training for the army in South Carolina, and I'm from North Carolina, and I had a small child, so I went to my mother's. And then I learned that Damon Dash had left New York, and he was in North Carolina, so I wanted to see if there was a way that he could help me to promote my film. “

Tr. 1/22/2020 at p. 112.

Next, she testified that after she met with Mr. Dash at the seminar and prior to the Film's creation, there came a point in time where the parties agreed on some terms of his involvement with the Film.

“Q. What were those terms that you discussed at that point in time?

A. The terms were a 50 percent royalty for him directing and providing a camera and assisting me in the casting process.

Q. What about promotion of a film that was to be shot, was that discussed as well?

A. Yes. He was to help me promote the film in an effort to help me sell it, so he could get the 50 percent royalty.”

Tr. 1/22/2020 at p. 113.

...

And to be clear, she testified that this was an agreement:

“Q. So you guys had an agreement, is that how you define it, prior to filming?

A. Yes.”

Tr. From January 22, 2020 at p. 144

Despite the evidence of the foregoing, the Court found that “Brooks and Dash did not ever intend to be co-authors” contending that “Dash was employed under the doctrine of work for hire” based upon three drafts of an unsigned Mafietta Motion Picture Director's Agreement, none of which were reviewed by

Dash until after the Film was created (ECF Doc. No. 71 at p. 10); also, an email dated September 22, 2015. ECF Doc. No. 71 at pp. 12-13.

Based on a review of the record and the Findings, it is evident that the lower court predicated its finding on mutual intent based upon Dash's counsel's failure to object to drafts that included a work-for-hire provision after the Film was already created and authored. *Id.* This rationale, however, runs afoul of *Thomson's* holding that "joint authorship does not require an understanding by the co-authors of the legal consequences of their relationship." *Thomson v Larson*, 147 F3d 195, 202 (2d Cir 1998). Indeed, all parties admit that the issue of copyright never came up until years after the Film was already created and Plaintiff herself only registered the copyright years later.

Accordingly, applying all of the *Thomson* factors of mutual intent at the time of the Film's creation (which took place over a three-day period of improvised filming in August 2015), it is respectfully averred that the parties had joint decision-making authority at the time of the Film's creation and billed themselves as having co-authored the Film with Dash listed as director). Based on the foregoing, it is respectfully submitted that the finding that the parties did not mutually intend on co-authoring the Film at its creation was clearly erroneous and should be reversed.

II. The Admitted Evidence Establishes That Dash Was The Dominant Author of The Film

“When the Second Circuit finds that there is no mutual intent to be co-authors, it holds that whoever was the ‘dominant’ author is the sole author.”). *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015)

Applying *Merkin*’s holding to the Court’s Findings, it is respectfully averred that the Court clearly erred in finding “that Brooks was the dominant author between the two [Dash and Brooks]” (ECF Doc. No. 71 at p. 13) “based on authoring the book series,” paying for production, actors and providing scripts and re-writes (ECF Doc. No 71 at FN 8) when compared to Dash’s substantial contributions to the Film.

The evidence at trial establishes that Dash directed the Film from an improvised script that he, in part, created; also, he produced and induced and cast the lead actress and actor in the Film as well as some crew; selected locations, wardrobe and lighting; helped edited, market, promote and shopped the Film to third parties despite no compensation and a shoe-string budget; and, as the director he retained creative control over the project.

A. Directing

Dash testified that, “for this particular film, I had to interpret the script, and I had to work with what I had and the amount of time and the amount of money that

I had..” *Even discrediting Dash’s testimony (which the Court did), it is undisputed that Dash directed the Film, using his own camera, and Plaintiff admitted that Dash did not even see a script.* As she mentioned in a written email “you’ve seen no script.” Plaintiff’s Ex. 27.

B. Producing

“With respect to production, what did you do to produce the film?

A. I had to pick the DP, which was –

Q. What is a DP?

A. A DP is the person that runs the camera. It's the most important person. So I had to pick the lens. She identified -- like, she brought one DP. And he was terrible.

I had go through a bunch, and then I chose the right one. I hand selected the lens through the DP. I used my camera, which cost \$50,000.

Q. What kind of camera was that?

A. I have a Dragon Red Cam, a Dragon Red Cam.

Q. Is there anything else related to production?

A. I had to block -- when I got to the set, when I got there, there was nothing I would shoot in the script that was available to me. And the infrastructure was not -- there was no line producer. Even though there was a person that said they were a line producer, they didn't know what the job of a line producer was. So I spent hours before blocking, prepping, and then shooting.

I spent time coaching, writing. I had to cast the whole script personally, and then I was with the editor back and forth until all the footage got taken from me...”

Tr. 1/23/2020 at pp.4-5

C. Casting

Q. And Deelishis was an actress in the film?

A. She was the lead, yes.

Q. Was she someone that you cast?

A. I casted her. She did a favor for me.

Tr. 1/23/2020 at p. 11, Lns. 14-17

...

“Q. Are there any other cast members that you can identify byname that you personally cast?

A. Murda Mook.

Q. How did you cast Murda Mook?

A. Another artist. He was in another movie of mine. I thought he would bring value. Again, I feel like he might have waived his fee. I'm not sure. I just felt like they were good actors. I was invested in him because I put him in another movie, and I was just trying to bring some value to the movie at a low price point, and I was just trying to help.”

Id. at p. 17, Lns. 3-13.

D. Editing

“Q. After the film was shot, were you involved with the editing?

A. I was involved with the editing for the first couple of cuts, and I believe she ran out of money. She sent him an email telling him not to let me see my film. And I wasn't able to finish my edit or do what I needed to do with it.”

Id. at p. 18

E. Creative Control of The Film

Q. Did you expressly agree between yourself that you would have creative control?

A. Yes. Or at least if not -- because I know I'm a fair person. For us to mutually agree but not one to have more control than the other.

Id. at p. 19

Even crediting Brooks testimony over Dash's does not alter the fact that Dash was more seminal in the creation and authorship of the Film as he was materially involved in every phase of the Film from casting, production, wardrobe, lighting, direction, editing, scoring, post-production and then was tasked with promoting and shopping the Film. Thus, as the Court correctly observed during the trial that Mr. Dash, under any analysis, made substantial contributions to the film" and, indeed "He...made most of it..." Tr. 1/22/2020 at p. 170.

Further, documentary evidence corroborates that Dash did have creative control of the Film. For example, in Defendant's Exhibit 16⁷, this email plainly shows that Brooks had to ask Dash for permission to submit the Film to HBO. It is equally telling that Plaintiff testified that she has not made a single edit to the Film despite having possession of the raw footage. *See*, Tr. 1/22/2020 at p. 135.

⁷ This exhibit was admitted Tr. 1/23/2020 at p.8.

In sum, outside of paying for some of the production and registering the copyright of the Film days before Brooks filed a copyright infringement suit, the trial record is mainly devoid of Brooks' creative contributions to the Film. In fact, she readily credits Dash with directing, casting, picking shoot locations, editing, wardrobe, lighting, musical score, and using his cameras to do all of the above; and, even from a purely monetary consideration, these contributions alone far exceed the approximate \$40,000 she expended in Film-related receipts.

As the *Merkin* court posits "[t]he director of a film may, of course, be the sole or joint author of that film, such that she or he can secure copyright protection for the work. *See Cmty. for Creative Non-Violence*, 490 U.S. at 737 ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."); *see also* F. Jay Dougherty, *Not A Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. Rev. 225, 312 (2001) ("[T]he director of the film is certainly potentially one of its most important authors." *16 Casa Duse, LLC v Merkin*, 791 F3d 247, 258-259 2d Cir 2015).

For all the foregoing reasons, it is respectfully averred that the Court clearly erred in holding that the dominant author of the Film was Brooks as oppose to Dash.

III. The Court's Award of \$300,000 In Actual Damages Was Unduly Speculative And/Or Clearly Erroneous

As the Court correctly held, the streaming of the Film did not tarnish Plaintiff's *Mafietta* book brand in any manner nor did she offer evidence refuting this finding. In fact, Plaintiff still continues to publish books under the Mafietta name and with that logo without issue. ECF Doc. No. 71 at p. 19.

Despite this finding, the Court clearly erred in awarding actual damages (pursuant to *17 USCS § 504 (b)*) to Brooks in the amount of \$300,000.00 – an amount which, as argued below, was impermissibly based on undue speculation and/or clearly erroneous. Additionally, because of the blur between factual and legal issues in making its damages determination, it is respectfully averred that this Court should review the award *de novo* to the extent the Court is of the opinion that issues of law were determinative in rendering this award. *See, Am. Socy. of Composers v Showtime/The Movie Channel, Inc.*, 912 F2d 563, 569 (2d Cir 1990).

In the case at bar, the Court premised its award of actual damages based on the following findings: that once Dash “placed the film on Dame Dash Studios and iTunes in 2017, (i) the film no longer became eligible for submissions to many other film festivals, effectively eliminating any chance of further marketing of the film through festivals” and (ii) “dispute over the chain of title, largely erased the possibility that the film would be acquired by a media platform.”

At best, if the Court concluded that the picture was no longer commercially viable (which is itself clearly erroneous), the award should be reduced to the cost of producing the picture (and perhaps profits attributable to the infringement) since the parties both testified that no media platform (cable, SVOD) was ever interested in the 17-minute Film for an episodic series or otherwise. In fact, despite the court's finding as to commercial viability of the Film, the Court inconceivably found that Brooks "is not entitled to damages for the costs of producing and marketing the film in the amount" (\$49,372.84). ECF Doc. No. 71 at 17.

Furthermore, to the extent the award was further based on Plaintiff's expert opinion who speculated that because "Mafietta could well have been acquired as such by cable networks or streamlining video on-demand services ("SVODs"), given that there have been high demands for organized crime TV series and series produced by, written by, and starring people of color", the Plaintiff's own expert admitted (1) to never reading any of Plaintiff's books to competently testify about the value of a network picking up a potential episodic series (Tr. 1/21/2020 at p. 53-54).; (2) that he could not state with any reasonable degree of certainty state that any network would have picked up the 17-minute version of the Film without substantial further promotion and/or marketing budget (Tr. 1/21/2020 at p. 48-51); and (3), that though the Film may earn potentially \$50,000 in revenue per episode

if picked up as part of an episodic series, this amount does not necessarily represent income or profit for Brooks. Tr. 1/21/2020 at p. 51.

Lastly, the Court's award is speculative and/or clearly erroneous based on the finding that "six episodes would have come out of this film" and "Brooks lost about \$300,000 in future income" since the record is devoid that the Film had ever sold, been offered for sale, or licensed; nor was there any evidence that the 17 minute Film was on par with any of the films cited by the expert in his testimony or his "expert report." See, e.g., Tr. 1/21/2020 at p. 54 (mentioning *Hidden Figures* and *World War Z*).

Related to this point is that the only evidence of any income earned from streaming the Film from the date of alleged infringement in 2017 until present was Youtube revenue in the sum total of Three Dollars and Thirty-Seven Cents (\$3.37), which Appellants submitted to the Court. See, Tr. 1/23/2020, pp. 21-22; also, Defendants' Ex.32 (which was received into evidence at Lns. 23-24 of Tr. 1/23/2020).

In sum, Plaintiff having herself failed to submit proof of the infringer's gross revenue, as was her burden under 17 U.S.C. § 504(b) (*Cuffaro v Fashionisto LLC*, 2020 US Dist LEXIS 121890, at *11 [SDNY July 9, 2020, No. 19-CV-7265 (GBD) (KHP)]) should not be able to benefit from a monetary award that is not

based on a factual basis, but rather "undue speculation." *Bus. Trends Analysts, Inc. v Freedonia Group, Inc.*, 887 F2d 399, 404 (2d Cir 1989).

For the foregoing reasons the Court's award should be reversed and set aside as it was based on "undue speculation" and clearly erroneous. *Davis v Gap, Inc.*, 246 F3d 152, 166 (2d Cir 2001); *Abeshouse v Ultragraphics, Inc.*, 754 F2d 467, 470 2d Cir 1985).

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Judgment of the District Court should be reversed.

Dated: Brooklyn, NY
September 16, 2020

TURTURRO LAW, P.C.

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 5,547 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: September 16, 2020



Natraj S. Bhushan, Esq.

CERTIFICATE OF SERVICE

I, Natraj S. Bhushan, do hereby certify that, on September 14, 2020, I caused a true and correct copy of the DEFENDANTS-APPELLANTS' PAGE PROOF BRIEF to be served via CM/ECF to all counsel of record: Christopher Brown, Brown & Rosen LLC, 100 State Street, Suite 900, Boston, MA 02109.

Dated: September 16, 2020

A handwritten signature in black ink, appearing to be 'NB' followed by a long horizontal stroke.

Natraj S. Bhushan, Esq.