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15 **UNITED STATES DISTRICT COURT**  
16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

17 ADVANCED VISUAL IMAGE ) Case No.: CV10-9383 JGB (AJWx)  
18 DESIGN, LLC, dba AVID INK, a ) *Honorable Jesus G. Bernal Presiding*  
19 California Limited Liability Company )  
20 Plaintiff, ) **DEFENDANT’S SECOND AMENDED**  
21 v. ) **CONTENTIONS OF LAW AND**  
22 ) **FACT AND TRIAL BRIEF (L.R. 16-**  
23 ) **10(a))**  
24 EXIST, INC., a Florida Corporation; )  
25 ROSS STORES, INC., a California )  
26 Corporation, and DOES 1-10, ) **TRIAL: December 10, 2013**  
27 ) **Courtroom 1**  
28 Defendants. )  
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- C. RESERVATION OF RIGHTS TO REVISE CONTENTIONS: . . . . . 17

1 Defendant Exist Inc. (hereinafter referred to as “Defendant”) hereby files  
2 Defendant’s Contentions of Law and Fact as follows:

3  
4 **A. DEFENDANT’S CONTENTIONS OF LAW**

5 **I.** Plaintiff has the burden of proving the following by a preponderance of the  
6 evidence: first, the plaintiff is the owner of a valid copyright, and second, the  
7 defendant copied original elements from the copyrighted work. Feist Publications  
8 v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (two elements that must be  
9 proved by the plaintiff to establish infringement are: "(1) ownership of a valid  
10 copyright, and (2) copying of constituent elements of the work that are original.");  
11 Swirsky v. Carey, 376 F.3d 841, 844 (9th Cir.2004).

12 **i. Invalidity of Copyrights**

13  
14 1. The Designs Are Not Original

15 Designs are not original if they lack some minimal creativity and are a  
16 simple presentation of preexisting works. Feist Publications, Inc. v. Rural  
17 Telephone Service Co., Inc., 499 U.S. 340, 345 (1991) (“Original, as the term is  
18 used in copyright, means only that the work was independently created by the  
19 author, as opposed to copied from other works, and that it possesses at least some  
20 minimal degree of creativity.”); Satava v. Lowry, 323 F.3d 805, 810–12 (9th Cir.),  
21 cert. denied, 540 U.S. 983 (2003)(minimum of creativity necessary for copyright, it  
22 is said to have "thin" copyright protection and only protects against "virtually  
23 identical copying."); Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442  
24 (9th Cir.1994) ("thin" copyright requires "virtually identical copying"), cert.  
25 denied, 513 U.S. 1184 (1995); Urantia Foundation v. Maaherra, 114 F.3d 955,  
26 958–59 (9th Cir.1997) (selection and arrangement of "greater being's" revelations  
27 was not so mechanical as to lack originality). The Ninth Circuit has found that the  
28 combination of six unprotectable elements was not enough for copyright

1 protection. The court noted that the work is eligible for copyright protection only if  
2 those elements are numerous enough and their selection and arrangement original  
3 enough that their combination constitutes an original work of authorship. Lamps  
4 Plus v Seattle, 345 F3d 1140 (9th Cir 2003). Original aspects of the work must be  
5 more than trivial for derivative work protection. Enter. Research v Genesis, 122  
6 F3d 1211 (9th Cir. 1997). The “Compendium II of Copyright Office Practices  
7 307.01 (1984) states that “[a]ny compilation consisting of less than four selections  
8 is considered to lack the requisite original authorship.” Lamps Plus at 1146.

9 Whether a copyright is entitled to broad or thin protection is a question of  
10 law for the court to decide. LA Printex v Belk, Case No. 08-08268 DMG, Order  
11 on Summary Judgment, Feb 2, 2011 @ 9 (J. Gee).

## 12 13 14 2. Unauthorized Use of Preexisting Works

15 Works which incorporate preexisting work, without obtaining permission to  
16 use and reproduce such preexisting work will invalidate a copyright. Sobhani v.  
17 @Radical.Media, Inc., 257 F.Supp.2d 1234 (C.D. Cal. 2003); Sapon v. DC  
18 Comics, 2002 U.S. Dist. LEXIS 5395, 27-29 (S.D.N.Y. Mar. 28, 2002)(“In Section  
19 103(a) of the Copyright Act, Congress contemplated that a derivative work could  
20 be simultaneously protected and infringing: ‘protection for a work employing  
21 preexisting material in which copyright subsists does not extend to any part of the  
22 work in which such material has been used unlawfully.’ Thus, situations can arise  
23 where a derivative work unlawfully contains preexisting material in one portion of  
24 the work, but not in the other. The part which does not contain infringing material  
25 may be protected if it is original.”); Oravec v. Sunny Isles Luxury Ventures, L.C.,  
26 527 F.3d 1218, 1231 (11th Cir. 2008).

1 **ii. No Access to Designs**

2 “Absent direct evidence of copying, proof of infringement involves fact-  
3 based showings that the defendant had 'access' to the plaintiff's work and that the  
4 two works are 'substantially similar.’” Three Boys Music Corp. v. Bolton, 212 F.3d  
5 477, 481 (9th Cir.2000). Plaintiff must prove that Defendant copied the work by  
6 showing that Defendant had access to Plaintiff's copyrighted work and that there  
7 are substantial similarities between Defendant’s work and original elements of  
8 Plaintiff's work. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001,  
9 1018 (9th Cir.1985), cert. denied, 474 U.S. 1059 (1986)(discusses substantial  
10 similarity and independent creation).

11 **iii. No Substantial Similarity**

12 Copyright owner’s rights only relate to the original material it added to  
13 preexisting works. All preexisting work must be excluded from copyright owner’s  
14 designs and thereafter, the resulting “original material” added by copyright owner  
15 should then be compared against alleged infringer’s designs. Plaintiff must prove  
16 that Defendant copied the work by showing that Defendant had access to Plaintiff’s  
17 copyrighted work and that there are substantial similarities between Defendant’s  
18 work and original elements of Plaintiff's work. Transgo, Inc. v. Ajac Transmission  
19 Parts Corp., 768 F.2d 1001, 1018 (9th Cir.1985), cert. denied, 474 U.S. 1059  
20 (1986)(discusses substantial similarity and independent creation). Public domain  
21 components are to be considered in determining infringement. Hamil v GFI, 193  
22 F.3d 92, 100-02 (2d Cir. 1999).

23 **iv. Defendant’s Actions Do Not Amount to Willful Infringement**

24 Willfulness requires both knowledge and the absence of good faith belief  
25 that the further acts did not constitute infringement. John Wiley & Sons, Inc. v.  
26 Kirtsaeng, 654 F.3d 210, 223 n48 (2d Cir. N.Y. 2011) holds that “infringement is  
27  
28

1 ‘willful’ for the purpose of awarding enhanced statutory damages only if the  
2 defendant had ‘knowledge that [his] actions constitute[d] an infringement’ or if the  
3 defendant exhibited ‘reckless disregard of the copyright holder's rights’” (citing  
4 N.A.S. Import, Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252 (2d Cir. 1992)).  
5 Zomba Enters. v. Panorama Records, Inc., 491 F.3d 574, 584 (6th Cir. 2007)(“For  
6 infringement to be ‘willful,’ it must be done ‘with knowledge that [one's] conduct  
7 constitutes copyright infringement.’ Princeton Univ. Press, 99 F.3d at 1392  
8 (quoting NIMMER, 3 NIMMER ON COPYRIGHT § 14.04[B][3] (1996)).  
9 Accordingly, ‘one who has been notified that his conduct constitutes copyright  
10 infringement, but who reasonably and in good faith believes the contrary, is not  
11 ‘willful’ for these purposes.’ *Id.* This belief must be both (1) reasonable and (2)  
12 held in good faith. See *id.*”).

13  
14 **v. Damages**

15 The Parties have stipulated to Exist’s net profits on a design-per-design  
16 basis. Assuming that the jury finds the registrations valid, copyright owner is only  
17 entitled to a portion of these profits. First, copyright protection afforded to a  
18 derivative work is limited to the "incremental originality" added to the work, and  
19 does not extend to the underlying preexisting works. See Saturday Evening Post  
20 Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1193 (7th Cir. 1987), see also  
21 Theotokatos v. Sara Lee Pers. Prods., 971 F. Supp. 332, 341 (N.D. Ill. 1997).  
22 Second, any unauthorized use of a preexisting work must be excluded under an  
23 apportionment theory. Sapon v. DC Comics, 2002 U.S. Dist. LEXIS 5395, 27-29  
24 (S.D.N.Y. Mar. 28, 2002)(“In Section 103(a) of the Copyright Act, Congress  
25 contemplated that a derivative work could be simultaneously protected and  
26 infringing: ‘protection for a work employing preexisting material in which  
27 copyright subsists does not extend to any part of the work in which such material  
28 has been used unlawfully.’ Thus, situations can arise where a derivative work

1 unlawfully contains preexisting material in one portion of the work, but not in the  
2 other. The part which does not contain infringing material may be protected if it is  
3 original."); see also Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218,  
4 1231 (11th Cir. Fla. 2008).

5 Third, with respect to a claim for lost profits, the copyright owner must  
6 disclose gross receipts in a pre-defined accounting period and the associated  
7 expenses for that same accounting period. Plaintiff must establish a "net profit  
8 margin" to establish what its lost profits might have been in connection with the  
9 alleged infringement. Frontline Med. Assocs. v. Coventry Health Care, 263 F.R.D.  
10 567, 569 (C.D. Cal. 2009)("If Plaintiff intends to seek lost profits, it should also  
11 state its computation of expenses and lost profits. Simply producing financial  
12 statements without this type of explanation is not sufficient. '[B]y its very terms  
13 Rule 26(a) requires more than providing -- without any explanation --  
14 undifferentiated financial statements; it requires a 'computation,' supported by  
15 documents."")

## 16 **II. DEFENDANT'S AFFIRMATIVE DEFENSES**

### 17 **i. Plaintiff's Requested Relief Should be Denied Due to Unclean Hands**

18 The copyrights are unenforceable due to Plaintiff's unclean hands and  
19 relief should be denied. For this defense, Defendant can establish that (1)  
20 Plaintiff misused the process of the Copyright Office by falsifying information  
21 in preparation of this suit against Defendant; (2) Plaintiff misrepresented the scope  
22 of its copyrights in the re-registration process when it filed this lawsuit;  
23 (3) misrepresented the scope of its copyright claims during discovery by  
24 refusing to disclose information about the original "A" designs while  
25 aggressively asserting modifications and derivative "M" design works; (4)  
26 destroyed underlying evidence; (5) filing copyright applications during the  
27 course of the litigation (see Order on motions in limine, D.E. 132; (6) use of  
28

1 witnesses who financially benefit based upon their testimony at trial; and (7)  
2 other facts showing wrongful acts related to Defendant in connection with this  
3 action. The defense of unclean hands is recognized "when the plaintiff's  
4 transgression is of serious proportions and relates directly to the subject matter  
5 of the infringement action." 4 Nimmer on Copyright § 13.09[B] (citing L.A.  
6 News Serv. v. Tullo, 973 F.2d 791, 799 (9th Cir. 1992)); see also Dream  
7 Games of Ariz., Inc. v. PC Onsite, 561 F.3d 983, 990-991 (9th Cir. Ariz.  
8 2009).

9  
10 **ii. Plaintiff is Estopped From Obtaining the Requested Recovery**

11 Even if Plaintiff has copyrights on its designs, it cannot enforce its  
12 copyrights due to laches or estoppel. For laches or estoppel to attach, Defendant  
13 will establish that (1) Plaintiff delayed in correcting its earlier copyright  
14 registrations; and (2) Defendant was prejudiced by the delay.

15 Defendant stopped all production of the accused designs within 30 days of  
16 the May 4 Snell and Wilmer letter and, for the designs it continued to manufacture,  
17 Exist changed those designs such that the revised designs were no longer  
18 infringements of Avid's designs.

19 "The test for laches is two-fold: first, was the plaintiff's delay in bringing  
20 suit unreasonable? Second, was the defendant prejudiced by the delay?" Jarrow  
21 Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 838 (9th Cir. 2002);  
22 Tillamook Country Smoker, Inc. v. Tillamook County Creamery Association, 465  
23 F.3d 1102, 1108 (9th Cir. 2006).

24 **iii. Innocent Infringement**

25 Defendant is an innocent infringer because (1) they were not aware that their  
26 acts constituted infringement of the copyright; and (2) they had no reason to  
27 believe that their acts constituted an infringement of the copyright law. See Los  
28 Angeles News Serv. v. Reuters Television Int'l, 149 F.3d 987, 995 (9th



1 Cir.1998)(Whether defendant's infringement was innocent is a factual  
2 determination); Los Angeles News Serv. v. Tullo, 973 F.2d 791, 800 (9th  
3 Cir.1992)(a finding of innocent infringement is a factor in assessing statutory  
4 damages).

5  
6 **B. DEFENDANT'S CONTENTIONS OF FACT**

7 **i. Invalidity of Copyrights**

8 Avid's copyrights for its designs are invalid for one or more of the following  
9 reasons.

10  
11 1. Designs Are Not Original

12 Avid's designs are not original because they lack some minimal creativity  
13 and are a simple presentation of preexisting works. The following Avid Designs  
14 lack minimal creativity in that they copied other works, and are not more than the  
15 combination of 4 - 6 unprotectable elements. The first number/alpha character  
16 refers to Avid's complaint exhibit number. Avid's design is then matched to  
17 Exist's print number.

18 Avid Design A102868; Exist Print No. #45 Dk Brown

19 Avid Design A110352; Exist Print No. #71 White/Black

20 Avid Design A110455 (not asserted in complaint, subject to Exist motion in  
21 limine); Exist Print No. #9, Black/White

22 Avid Design A110757; Exist Print No. #46 Wht/Blk

23 Avid Design A111971; Exist Print No. #34 Monarch

24 Avid Design A112523; Exist Print No. #25 multi

25 Avid Design A112607; Exist Print No. #24 Royal

26 Avid Design A112883; Exist Print No. #85 Brown

27 Avid Design A113018; Exist Print No. #23 Beige

28 Avid Design A113287; Exist Print No. #201

1 Avid Design A113736; Exist Print No. #21 Green  
2 Avid Design A113772; Exist Print No. #3 Pink  
3 Avid Design M109830 (modified from A104898); Exist Print No. Abstract  
4 Avid Design M111486; (modified from A106013); Exist Print No. #54 Lt Blue  
5 Avid Design M111562, (modified from A109570); Exist Print No. #39 Purple  
6 Avid Design M113443(modified from A109775); Exist Print No. #27 Blue  
7 Avid Design M114409 and/or A113511; Exist Print No. #87 Lt Orange  
8 Avid Design M115025; Exist Print No. #83 Brown  
9 Avid Design M115195; Exist Print No. #74 red,

10  
11 **2. Unauthorized Use of Preexisting Works**

12 Avid's registrations are invalid because the Avid design incorporates  
13 preexisting work and Avid never obtained permission to use and reproduce such  
14 preexisting work. The following is a list of Avid designs which are invalid for this  
15 reason.

16 Avid Design A111002 and/or M114751; Exist Print No. #57 Turquoise  
17 Avid Design A111971; Exist Print No. #34 Monarch  
18 Avid Design A112883; Exist Print No. #85 Brown  
19 Avid Design A113772; Exist Print No. #3 Pink  
20 Avid Design A11388; Exist Print No. #74 Red;  
21 Avid Design M109830 (modified from A104898); Exist Print No. Abstract  
22 Avid Design M114409 and/or A113511; Exist Print No. #87 Lt Orange  
23 Avid Design M115195; Exist Print No. #74 red,

24  
25  
26 **ii. No Access to Designs**

27 Exist had no access to Avid's designs prior to manufacturing the accused  
28 products. Testimony will show that the principals of Exist visited a Chinese

1 clothing manufacturer in China, viewed hundreds of designs, and selected various  
2 ones, all without prior knowledge or exposure to Avid's designs.

3  
4 **iii. No Substantial Similarity**

5 Avid's rights only relate to the original material it added to preexisting  
6 works. All preexisting work must be excluded from Avid's designs and thereafter,  
7 the resulting "original material" added by Avid should then be compared against  
8 Exist's designs. Plaintiff cannot prove that Defendant copied original work. Public  
9 domain components are to be considered and eliminated in determining  
10 infringement.

11 All Plaintiff's designs suffer from this defect.

12 **iv. Defendant's Actions Do Not Amount to Willful Infringement**

13 This dispute began on April 16, 2010 when Avid's prior counsel, Snell &  
14 Wilmer, sent Exist an extraordinarily broad letter asserting that Exist's 2010  
15 catalog infringed Avid's copyrights. The April letter did not identify any copyright  
16 registrations, Avid designs or specific Exist designs. The April letter did not give  
17 Exist any notice of infringement. In a follow-up letter on May 4, Snell & Wilmer  
18 identified Avid's copyright registrations and several accused style and print  
19 designs. On or about May 28, 2010, Exist stopped the manufacture of all accused  
20 designs and also changed certain designs to avoid Avid's charges of infringement.  
21 On December 7, 2010, Avid sued Exist for copyright infringement asserting  
22 infringement of 27 Avid designs, without listing any copyright registrations in its  
23 initial complaint. Now AVID has asserted over 40 copyright registrations and  
24 applications, ten of which were filed ten days prior to the end of discovery cut-off  
25 (January 6, 2012) and one (1) filed after discovery cut-off. Many designs were  
26 either re-registered or were the subject of a CA, corrective supplemental  
27 application.  
28

1 Willfulness requires both knowledge and the absence of good faith belief  
2 that the further acts did not constitute infringement. Exist will prove that they had  
3 a good faith belief.

4  
5 **v. Damages**

6 The Parties have stipulated to Exist's net profits on a design-per-design  
7 basis. Assuming that the jury finds the registrations valid, Avid is only entitled to a  
8 portion of these profits. First, copyright protection afforded to a derivative work is  
9 limited to the "incremental originality" added to the work, and does not extend to  
10 the underlying preexisting works. Second, any unauthorized use of a preexisting  
11 work must be excluded under an apportionment theory.

12 Third, with respect to Avid's claim for lost profits, Avid has not disclosed to  
13 Defendant the gross receipts in a pre-defined accounting period and the associated  
14 expenses for that same accounting period. Therefore, Avid cannot establish a "net  
15 profit margin" and therefore cannot establish what its lost profits might have been  
16 in connection with the alleged infringement. AVID has not produced a single  
17 financial statement, nor an accounting of gross revenue over a pre-determined  
18 period of time, nor provided adequate supporting financial documents.

19 **vi. DEFENDANT'S AFFIRMATIVE DEFENSES**

20 In addition to the defenses listed above, Defendant will prove the following  
21 affirmative defenses:

22  
23 **1. Plaintiff's Requested Relief Should be Denied Due to Unclean Hands**

24 The copyrights are unenforceable due to Plaintiff's unclean hands and  
25 relief should be denied. For this defense, Defendant can establish that (1)  
26 Plaintiff misused the process of the Copyright Office by falsifying information  
27 in preparation of this suit against Defendant; (2) Plaintiff misrepresented the scope  
28 of its copyrights in the re-registration process when it filed this lawsuit;

1 (3) misrepresented the scope of its copyright claims during discovery by  
2 refusing to disclose information about the original “A” designs while  
3 aggressively asserting modifications and derivative “M” design works; (4)  
4 destroyed underlying evidence; (5) filing copyright applications during the  
5 course of the litigation (see Order on motions in limine, D.E. 132; (6) use of  
6 witnesses who financially benefit based upon their testimony at trial; and (7)  
7 other facts showing wrongful acts related to Defendant in connection with this  
8 action.

9 Plaintiff's transgressions are serious and directly relate to the subject matter  
10 of the infringement. Defendant will show that Plaintiff's transgression is of serious  
11 proportions and relates directly to the subject matter of the infringement action.

12 All of Plaintiff's designs are defective.

13 Error: Design was a Derivative: As for the false information about  
14 permission to use preexisting work and whether the design was a derivative of a  
15 preexisting work, see Section B(i)(2) above.

16 Error: Failure to Properly List Author: As for errors in authorship resulting  
17 in misleading information related to the discovery of how the designs were created  
18 and what preexisting artwork was used in the design, see:

19 Avid Design A109573; Exist Print No. #84 Purple

20 Avid Design A111002 and/or M114751; Exist Print No. #57 Turquoise

21 Avid Design A111228; Exist Print No. #44 Orange

22 Avid Design A112607; Exist Print No. #24 Royal

23 Avid Design A113287; Exist Print No. #201

24 Avid Design A113729; Exist Print No. #32 Yellow

25 Avid Design M109830 (modified A104898); Exist Print No. Abstract

26 Avid Design M115025; Exist Print No. #83 Brown

27 Avid Design M115195; Exist Print No. #74 red,

28 Avid Design M117039 and/or Avid Design A114682; Exist Print No. #48 Multi

1 Avid Design M117896 (modified A109983); Exist Print No. #8 White/Blk

2 Error: No Identification of Earlier Registration: As for modified “M” Design  
3 registrations that did not identify the earlier registration of the “A” designs, see:

4 M109830: Reg. No. Val-742-706 (re-registration) does not list A104898

5 M111486: Reg. No. VA 1-742-712; (re-registration) does not list A106013

6 M111562: Reg. No. VA1-680-218 as amended by Form CA dated 10/7110,  
7 supplementary Reg. No. VA 1-432-778; does not list A109570

8 M113443: Reg. No. VA 1-742-260 (re-registration) does not list A109775

9 M113797 : Reg. No. VA 1-682-664 amended by Form CA dated 10/7110,  
10 supplementary Reg. No. VA 1-432-780; does not list A113178

11 M114409: Reg. No. VA 1-742-554; (re-registration) does not list A113511

12 M114751: Reg. No. VA 1-742-261 (re-registration) does not list A111002

13 M115025: Reg. No. VA 1-742-262; (re-registration) does not list A109842

14 M115195: Reg. No. VA1-680-221 as amended by Form CA dated 10/711 0,  
15 supplementary Reg. No. VA 1-432-775; does not list A114504

16 M117039: Reg. No. VA 1-742-263; (re-registration) does not list A114682

17 M117896 : Reg. No. VA 1-684-199 amended by Form CA dated 10/4/10,  
18 supplementary Reg. No. VA 1-432-782; does not list A109983

19  
20 **2. Plaintiff is Estopped From Obtaining the Requested Recovery**

21 Even if Plaintiff has copyrights on its designs, it cannot enforce its  
22 copyrights due to laches or estoppel. For laches or estoppel to attach,

23 Defendant will establish that (1) Plaintiff delayed in correcting its earlier  
24 copyright registrations; and (2) Defendant was prejudiced by the delay.

25 As stated earlier, virtually all copyright registrations listed in the Snell &  
26 Wilmer law firm cease and desist letter of May 4, 2010 (the only letter that  
27 listed registrations and designs), were revised, corrected or refiled by Plaintiff.

28 Snell & Wilmer identified Avid's copyright registrations and 27 accused style

1 and print designs. On or about May 28, 2010, Exist stopped all manufacture of  
2 the accused designs and changed other designs to avoid Avid's then current  
3 complaints. On December 7, 2010, Avid sued Exist for copyright infringement,  
4 initially asserting infringement of 27 Avid designs, without listing any  
5 copyright registrations. Now Avid asserts over 40 copyright registrations. All  
6 but one (1) of the 27 initially asserted registrations was subject to a CA,  
7 corrective supplemental application which deleted hundreds and hundreds of  
8 designs from the Register.

9 Plaintiff delayed in bringing suit unreasonably. Also, defendant prejudiced  
10 by the delay.

11 Plaintiff cannot enforce its copyrights due to laches or estoppel. Defendant  
12 will establish that (1) Plaintiff delayed in correcting its earlier copyright  
13 registrations; and (2) Defendant was prejudiced by the delay.

14 All but one (1) of the 27 initially asserted registrations was subject to a CA,  
15 corrective supplemental application which deleted hundreds and hundreds of  
16 designs from the Register.

17 The following is a list of Avid designs subject to CA registrations.

18 Avid Design A109573; Exist Print No. #84 Purple

19 Avid Design A110352; Exist Print No. #71 White/Black

20 Avid Design A110455 (not asserted in complaint, subject to Exist motion in  
21 limine); Exist Print No. #9, Black/White

22 Avid Design A110757; Exist Print No. #46 Wht/Blk

23 Avid Design A111002 and/or M114751; Exist Print No. #57 Turquoise

24 Avid Design A111228; Exist Print No. #44 Orange

25 Avid Design A111971; Exist Print No. #34 Monarch

26 Avid Design A112523; Exist Print No. #25 multi

27 Avid Design A112607; Exist Print No. #24 Royal

28 Avid Design A112883; Exist Print No. #85 Brown

1 Avid Design A112886; Exist Print No. #79 Fuschia  
2 Avid Design A113018; Exist Print No. #23 Beige  
3 Avid Design A113287; Exist Print No. #201  
4 Avid Design A113729; Exist Print No. #32 Yellow  
5 Avid Design A113736; Exist Print No. #21 Green  
6 Avid Design A113772; Exist Print No. #3 Pink  
7 Avid Design A11388; Exist Print No. #74 Red;  
8 Avid Design M109830 (modified from A104898); Exist Print No. Abstract  
9 Avid Design M111486; (modified from A106013); Exist Print No. #54 Lt Blue  
10 Avid Design M111562, (modified from A109570); Exist Print No. #39 Purple  
11 Avid Design M113443(modified from A109775); Exist Print No. #27 Blue  
12 Avid Design M113797 (modified from A113178); Exist Print No. 2945 A-D  
13 Avid Design M114409 and/or A113511; Exist Print No. #87 Lt Orange  
14 Avid Design M115025; Exist Print No. #83 Brown  
15 Avid Design M115195; Exist Print No. #74 red,  
16 Avid Design M117039 and/or Avid Design A114682; Exist Print No. #48 Multi  
17 Avid Design M117896 (modified from A109983); Exist Print No. #8 White/Blk

18  
19 **3. Innocent Infringement**

20 Defendant is an innocent infringer because (1) they were not aware that their  
21 acts constituted infringement of the copyright; and (2) they had no reason to  
22 believe that their acts constituted an infringement of the copyright law.

23 As stated earlier, Defendant stopped all production of the accused designs  
24 within 30 days of the May 4 Snell and Wilmer letter and, for the designs it  
25 continued to manufacture, Exist changed those designs such that the revised  
26 designs were no longer infringements of Avid's designs.



1 **C. RESERVATION OF RIGHTS TO REVISE CONTENTIONS:**

2 Defendant reserves the right to supplement its contentions of law and fact based  
3 upon events, documents and testimony at trial.  
4

5  
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23 Attorneys for Defendant Exist, Inc.

24 **Certificate of Service**

25 I hereby certify that on Nov. 22, 2013, I electronically filed the foregoing  
26 document with the Clerk of the Court using CM/ECF. I also certify that the  
27 foregoing document is being served this day on all counsel of record or pro se  
28 parties identified on the attached Service List in the manner specified, either via

1 transmission of Notices of Electronic Filing generated by CM/ECF or in some  
2 other authorized manner for those counsel or parties who are not authorized to  
3 receive electronically Notices of Electronic Filing.  
4

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10 Attorney for Plaintiff

11 s/Robert Kain

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