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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FASHION NOVA, LLC,  
Plaintiff,

v.

BLUSH MARK, INC., ET AL.,  
Defendants.

CV 22-6127-RSWL-RAOx

**ORDER re: MOTION TO  
DISMISS [17]**

Plaintiff Fashion Nova, LLC, ("Plaintiff") brought the instant Action against Defendants Blush Mark, Inc. ("Defendant Blush Mark") and Blush Mark Outfitters, Inc. (collectively, "Defendants") alleging that Defendants infringed on Fashion Nova's copyrights and violated 17 U.S.C. §§ 1202(a) and (b) of the Digital Millennium Copyright Act by intentionally removing copyright management information ("CMI") from Plaintiff's works. Currently before the Court is Defendants' Motion to

1 Dismiss [17].

2 Having reviewed all papers submitted pertaining to  
3 this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**  
4 the Court **GRANTS** Defendant's Motion to Dismiss **with**  
5 **leave to amend.**

6 **I. BACKGROUND**

7 **A. Factual Background**

8 Plaintiff and Defendants are fashion brands that  
9 compete with one another. First Am. Compl. ("FAC")  
10 at ¶ 25, ECF No. 9. Both parties market themselves and  
11 sell their products through their respective e-commerce  
12 websites. Id. at ¶ 27.

13 Plaintiff alleges that Defendants willfully  
14 infringed on Plaintiff's copyrights in various product  
15 images displayed on Plaintiff's website and  
16 removed/alterd the CMI identifying those images in  
17 violation of 17 U.S.C. §§ 1202(a) & (b). Id. at ¶¶ 30,  
18 35-37; see generally FAC, Ex. A, ECF No. 9-1.  
19 Specifically, Plaintiff alleges that Defendants  
20 intentionally and wrongfully stole Plaintiff's product  
21 images from Plaintiff's website and then used those  
22 images on Defendants' website to market and sell their  
23 competing products. FAC ¶ 3. Plaintiff asserts that  
24 its product images are accompanied by Plaintiff's name  
25 and logo that identify Plaintiff as the owner of the  
26 copyrights in those images. Id. at ¶ 18. Moreover,  
27 Plaintiff states that it assigns identifying file names  
28 to these product images. Id. at ¶ 20.

1 Plaintiff contends that after Defendants downloaded  
2 digital copies of the product images, they removed the  
3 file names assigned to the images and proceeded to  
4 distribute the product images with Defendants' company  
5 name and/or logo so as to falsely identify themselves as  
6 the copyright owner. Id. ¶¶ 43-45. Plaintiff sent a  
7 cease-and-desist letter to Defendant Blush Mark  
8 demanding it stop the unauthorized use of Plaintiff's  
9 product images. Id. ¶ 48. Defendants, however,  
10 allegedly continued to infringe on Plaintiff's product  
11 images. Id. ¶¶ 36-38.

12 Plaintiff thus seeks (1) injunctive relief; (2) a  
13 damages award to compensate Plaintiff for the diversion  
14 of sales and damage to its business by Defendants'  
15 illicit activities; and (3) an award of Defendants' ill-  
16 gotten profits and benefits. Id. ¶ 3.

## 17 **B. Procedural Background**

18 Plaintiff filed its Complaint [1] on August 29, 2022,  
19 and later filed an FAC [9] on September 7, 2022.  
20 Defendants filed the instant Motion to Dismiss [17] on  
21 December 12, 2022. Plaintiff opposed [24] the Motion on  
22 January 5, 2023, and Defendants replied [25] on  
23 January 17, 2023.

## 24 **II. DISCUSSION**

### 25 **A. Legal Standard**

26 Federal Rule of Civil Procedure ("Rule") 12(b)(6)  
27 allows a party to move for dismissal of one or more  
28 claims if the pleading fails to state a claim upon which

1 relief can be granted. A complaint must "contain  
2 sufficient factual matter, accepted as true, to state a  
3 claim to relief that is plausible on its face."  
4 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation  
5 omitted). Dismissal is warranted for a "lack of a  
6 cognizable legal theory or the absence of sufficient  
7 facts alleged under a cognizable legal theory."  
8 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
9 (9th Cir. 1988) (citation omitted).

10 In ruling on a 12(b)(6) motion, a court may  
11 generally consider only allegations contained in the  
12 pleadings, exhibits attached to the complaint, and  
13 matters properly subject to judicial notice. Swartz v.  
14 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007); see also  
15 White v. Mayflower Transit, LLC, 481 F. Supp. 2d 1105,  
16 1107 (C.D. Cal 2007), aff'd sub nom. White v. Mayflower  
17 Transit, L.L.C., 543 F.3d 581 (9th Cir. 2008). ("unless  
18 a court converts a Rule 12(b)(6) motion into a motion  
19 for summary judgment, a court cannot consider material  
20 outside of the complaint (e.g., facts presented in  
21 briefs, affidavits, or discovery materials)"). A court  
22 must presume all factual allegations of the complaint to  
23 be true and draw all reasonable inferences in favor of  
24 the non-moving party. Klarfeld v. United States, 944  
25 F.2d 583, 585 (9th Cir. 1991). "[T]he issue is not  
26 whether a plaintiff will ultimately prevail but whether  
27 the claimant is entitled to offer evidence to support  
28 the claims." Jackson v. Birmingham Bd. of Educ.,

1 544 U.S. 167, 184 (2005) (quoting Scheuer v. Rhodes,  
2 416 U.S. 232, 236 (1974)). While a complaint need not  
3 contain detailed factual allegations, a plaintiff must  
4 provide more than "labels and conclusions" or "a  
5 formulaic recitation of the elements of a cause of  
6 action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
7 (2007). However, "a well-pleaded complaint may proceed  
8 even if it strikes a savvy judge that actual proof of  
9 those facts is improbable, and 'that a recovery is very  
10 remote and unlikely.'" Id. at 556 (quoting Scheuer v.  
11 Rhodes, 416 U.S. 232, 236 (1974)).

## 12 **B. Discussion**

### 13 1. Motion to Dismiss<sup>1</sup>

14 Section 1202(a) of the DMCA provides that "no  
15 person shall knowingly and with the intent to induce,  
16 enable, facilitate, or conceal infringement (1) to  
17 provide [CMI] that is false; or (2) distribute or import

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18 <sup>1</sup> Plaintiff requests the Court take judicial notice of four  
19 documents: (1) the complaint filed in Kirk Kara Corp. v. Western  
20 Stone & Metal Corp., 2:20-cv-01931-DMG-E(C.D. Cal.); (2) the  
21 first amended complaint filed in O'Neal v. Sideshow, Inc., 2:21-  
22 cv-07735-DSF-PLA (C.D. Cal.); (3) the second amended complaint  
23 filed in Crowley v. Jones, 1:21-cv-05483-PKC (S.D.N.Y.); and  
24 (4) Plaintiff's copyright registrations in the images at issue in  
25 this Action. Opp'n at 4:19-24, see also Opp'n, Exs. 1-4, ECF  
26 Nos. 24-2, 24-3, 24-4, 24-5. Since the Court does not rely on  
27 the proffered case filings to resolve the instant Motion, the  
28 Court deems Plaintiff's request for judicial notice of those  
court filings moot and thus **DENIED**. Since copyright  
registrations are properly subject to judicial notice, the Court  
**GRANTS** Plaintiff's request and judicially notices the proffered  
registrations. See Idema v. Dreamworks, Inc., 90 F. App'x 496,  
498 (9th Cir. 2003), as amended on denial of reh'g (Mar. 9, 2004)  
(holding that copyright registrations are the sort of document as  
to which judicial notice is appropriate).

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