

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MATILDE GATTONI,

Plaintiff,

16 Civ. 7527 (RWS)
OPINION

-against-

TIBI, LLC,

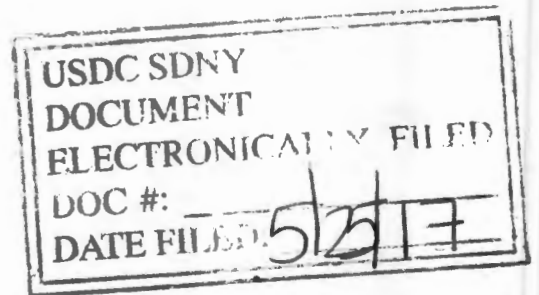
Defendant.

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A P P E A R A N C E S:

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Sweet, D.J.

Defendant Tibi, LLC ("Tibi" or the "Defendant") has moved to dismiss the complaint of plaintiff Matilde Gattoni ("Gattoni" or the "Plaintiff") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As set forth below, the motion is denied in part and granted in part.

I. Prior Proceedings

Gattoni filed her complaint (the "Complaint") against Tibi on September 27, 2016, alleging copyright infringement under Section 501 of the Copyright Act and removal and/or alteration of copyright management information under Section 1202(b) of the Digital Millennium Copyright Act. The instant motion was filed on October 27, 2016, and the motion was marked fully submitted on December 15, 2016.

II. The Facts

The facts as set forth below are drawn from the Plaintiff's Complaint. They are taken as true for purposes of the motion to dismiss.

Gattoni, a professional photojournalist, is the author of a photograph of a woman in a long dress walking down an empty street near a building with a colorful façade in Essaouira, Morocco (the "Photograph"). Compl. ¶¶ 5, 7, 9 & Ex. A. On or about August 26, 2016, Gattoni posted the Photograph on her Instagram page, @matildegattoni. *Id.* ¶ 8 & Ex. B. The caption to the Photograph included the phrase "(c) Matilde Gattoni Photography, 2016, All rights reserved." *Id.* Ex. B. The Photograph has a pending United States copyright registration number of 1-4017865036. *Id.* ¶ 9 & Ex. C.

Tibi, a clothing corporation with a place of business at 120 Wooster Street, New York, New York 10012, operates the Instagram page @Tibi. *Id.* ¶ 6. On or about September 20, 2016, Tibi copied the Photograph, cropped it so that only the colorful façade of the building remained, and posted the image to Tibi's Instagram page. *Id.* ¶ 11 & Ex. D. The post was accompanied by the caption "Palette," an image of a camera, a colon, and a hyperlinked reference to Gattoni's Instagram page, as shown below. *Id.* Ex. D.

tibi Palette. 📷: @matildegattoni

Tibi did not license the Photograph from Gattoni for its Instagram social media page, nor did Tibi acquire Gattoni's permission or consent to publish the Photograph on its Instagram page prior to doing so. *Id.* ¶ 12.

III. The Applicable Standards

The Rule 12(b)(6) standard requires that a complaint plead sufficient facts to state a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On a motion to dismiss under Fed. R. Civ. P 12(b)(6), all factual allegations in the complaint are accepted as true, and all reasonable inferences are drawn in the plaintiff's favor. *Littlejohn v. City of N.Y.*, 795 F.3d 297, 306 (2d Cir. 2015); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (quotation marks omitted). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570).

A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

Additionally, while "a plaintiff may plead facts alleged upon information and belief 'where the belief is based on factual information that makes the inference of culpability plausible,' such allegations must be 'accompanied by a statement of the facts upon which the belief is founded.'" *Munoz-Nagel v. Guess, Inc.*, No. 12-1312, 2013 WL 1809772, at *3 (S.D.N.Y. Apr. 30, 2013) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)) and *Prince v. Madison Square Garden*, 427 F. Supp. 2d 372, 384 (S.D.N.Y. 2006); see also *Williams v. Calderoni*, No. 11-3020, 2012 WL 691832, *7 (S.D.N.Y. Mar. 1, 2012). The pleadings, however, "must contain something more than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555

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