

Honorable James L. Robart

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VHT, INC., a Delaware corporation,

Plaintiffs,

v.

ZILLOW GROUP, INC., a Washington  
corporation; and ZILLOW, INC., a  
Washington corporation,

Defendant(s).

Case No. 2:15-cv-01096-JLR

ZILLOW'S RENEWED MOTION FOR  
JUDGMENT AS A MATTER OF LAW OR  
FOR A NEW TRIAL

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## I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 50(b), Zillow renews its motion for judgment as a matter of law on the issues discussed below.

**Direct Infringement:** Zillow cannot be directly liable for infringement of the images (i) which were not displayed; and also (ii) that were not searchable. These categories encompass 24,203 of the 28,124 Digs images in suit. VHT has not met its burden to prove direct infringement of any of the four exclusive rights for these images:

**(1) Reproduction**—All copies of the images in suit were created by *users* triggering automated processes on Zillow’s computer systems. These copies therefore did not result from any volitional act of direct infringement by Zillow under *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017). Zillow is entitled thus entitled to judgment as a matter of law of no direct infringement for the 22,109 undisplayed images for which VHT has only plausibly claimed infringement in connection with users making these copies.

**(2) Display**—Of the 6,016 images that were displayed, 2,094 were not searchable and thus were only displayed as a result of actions by users, not by Zillow. The evidence further fails to distinguish whether users or moderators caused the displays of a further 3,483 images. Thus the record supports a finding that Zillow caused the display of no more than the remaining 438 Digs images in suit. VHT’s arguments that images it failed to *prove* were displayed should be *deemed* to have been displayed are factually unwarranted and legally unsound.

**(3) Derivative Works**—VHT elicited no evidence during the trial that Zillow has created derivative works of *any* VHT images. Cropping and scaling of images for Digs occurred solely as part of pre-caching copies in response to user interactions, and therefore did not result from a volitional act by Zillow. The evidence shows that Zillow did not tag every image that was part of the searchable set for placement of product bubbles, and VHT did not show which, if any, of its images that were part of the searchable set received product tags. Moreover, searchable images overlaid with product bubbles were never fixed in a tangible medium, and therefore do not constitute

1 derivative works in any event. *See* 17 U.S.C. § 101; *see Micro Star v. Formgen Inc.*, 154 F.3d  
2 1107, 1110 (9th Cir. 1998). Infringement of VHT’s exclusive right to create derivative works is  
3 therefore not a basis for finding direct liability for any of the 27,686 Digs images<sup>1</sup> that VHT can-  
4 not show Zillow caused to be displayed

5 **(4) Distribution**—VHT offered evidence of only one email containing one VHT image that  
6 was ever distributed by Zillow, but the evidence shows that the composition and transmission of  
7 that e-mail as well was the result of an automated process, not a volitional act by Zillow.

8 **Secondary Liability:** The evidence likewise fails to show any basis to hold Zillow secondari-  
9 ly liable for any direct infringements by its users. Zillow cannot be liable for contributory in-  
10 fringement by material contribution because no evidence in the trial record demonstrates that Zil-  
11 low had either knowledge of infringement or the necessary ability to prevent it. With respect to  
12 contributory infringement by inducement, VHT has not proven that Zillow had the requisite intent  
13 or took affirmative steps to foster infringement. Finally, there is no trial evidence that Zillow prof-  
14 ited financially from the VHT images, and therefore no basis for vicarious infringement.

15 **Fair Use:** Separately, the evidence shows that any copying, scaling, and cropping of VHT  
16 images on Zillow’s systems for Digs was fair use. The scaled copies that Zillow’s systems gener-  
17 ated for Digs during a portion of the time at issue functioned solely to improve display in various  
18 electronic environments by way of caching image resolutions that subsequent users might request,  
19 and are therefore fair use under well-established precedent. This separate ground precludes either  
20 direct or secondary liability by Zillow for the 22,109 undisplayed images for which pre-caching  
21 of scaled copies is the only potential basis for a finding of infringement.

22 **Willfulness:** Unrebutted evidence at trial establishes that Zillow was acting within the scope  
23 of license agreements with its feed providers when it added (or permitted its users to add) VHT  
24 photos to Digs. In addition, the Court found that VHT’s license to its customers was ambiguous as  
25

26  
27 <sup>1</sup> 28,124 total images in suit, less 438 searchable images that were not displayed (images for which Zillow  
could be held liable for direct infringement), totals 27,686 images for which VHT has no legally viable theory of in-  
fringement.

1 a matter of law because a reasonable interpretation of that license permitted them to authorize the  
2 conduct by Zillow that VHT claims is infringing. *See* Dkt. # 211, Order on Dispositive Motions  
3 at 23 . An accused infringer who is acting under a reasonable interpretation of an existing license  
4 cannot be liable for willful infringement. *Evergreen Safety Council v. RSA Network, Inc.*, 697 F.3d  
5 1221, 1228 (9th Cir. 2012). As a result, the jury’s verdict finding Zillow liable for willful in-  
6 fringement as to certain images should be vacated.

7 ***Statutory Damages:*** The record unambiguously establishes that all of the images in suit are  
8 part of a compilation for which only a single award of damages may be made under 17 U.S.C. §  
9 504(c)(1) regardless whether those images have independent economic value. To the extent that  
10 the Court’s oral ruling that VHT could obtain a separate award of statutory damages for each im-  
11 age that it could show has independent economic value constituted a denial of Zillow’s then-  
12 pending motion for judgment as a matter of law under Rule 50(a), VHT renews that motion under  
13 Rule 50(b) to preserve error, and respectfully submits that the Court’s ruling was clearly errone-  
14 ous in view of Ninth Circuit precedent and unanimous authority from every other circuit that has  
15 considered the question.

## 16 II. OVERVIEW OF RELEVANT FACTS

### 17 A. Zillow’s Image Categories

18 Zillow receives photographs of properties being listed for sale in feeds from real estate bro-  
19 kerages, multiple listing services, and other sources. Dkt. 294, 2/07/17 Tr. (Schielke) 69:13-22;  
20 Dkt. 294, 2/07/17 Tr. (Samuelson) 132:25-135:8. Every day, Zillow receives between three and  
21 five million photos through these feeds. Dkt. 292, 2/02/17 Tr. (Gurney) 120: 13-15. The providers  
22 of these feeds enter into agreements granting Zillow rights to use the photographs. Dkt. 294,  
23 2/07/17 Tr. (Samuelson) 139:2-22; Ex. A-77. Many of these agreements authorize Zillow to use  
24 the photographs without any time restriction, “on and in connection with the operation, marketing  
25 and promotion of the web sites and other properties owned, operated or powered by Zillow or its  
26 authorized licensees.” Ex. A-77 at ¶ 3. These feed agreements also include warranties from the  
27

1 feed providers that they have all of the intellectual property rights necessary to grant such rights  
2 to Zillow. *Id.* at ¶ 4; Dkt. 294, 2/07/17 Tr. (Samuelson) 139:23-141:7. Zillow describes the rights  
3 it has in photographs obtained under agreements with this scope as “evergreen.” Dkt. 291, 1/27/17  
4 Tr. (Bonert) 120; Dkt. 292, 2/02/17 Tr. (Acker) 70:8-16.

5 Prior to the public release of Digs, Zillow moderators selected evergreen images from Zil-  
6 low’s database to be made available for viewing when Digs launched. Dkt. 291, 1/27/17 Tr. (Ack-  
7 er I), 195-196 (no line numbers); Dkt. 294, 2/07/17 Tr. (Schielke) 69:13-22. By the time Zillow  
8 first made Digs available to the public, moderators had selected approximately twenty thousand  
9 images for this “launch set.” Dkt. 292, 2/02/17 Tr. (Acker II) 71:17-21. The launch set included  
10 870 VHT images. Exhibit 512; Dkt 292 2/07/17 Tr. (Schielke) at 95:1-6. In addition to making  
11 these images available to be seen in Digs, Zillow moderators added database tags to the images,  
12 with information such as room type and features. Dkt. 294, 2/07/17 Tr. (Schielke) 80:16-81:3,  
13 89:20-90:2. These tags render the associated images responsive to searches users run in Digs  
14 (such as searches for a particular room type in a particular color). Dkt. 294, 2/07/17 Tr. (Schielke)  
15 70:24-71:10. Zillow identifies images which have been given such tags as “searchable images” or  
16 part of the “searchable set.” Dkt. 292, 2/02/17 Tr. (Acker II) 73:3-14. Users can also upload their  
17 own images and add them to Digs. Dkt. 294, 2/07/17 Tr. (Schielke) 71:14-16.

18 During 2013, Zillow also added a “Save Image” button to pages displaying images associat-  
19 ed with real estate listings or off-market individual properties, which Zillow terms “home detail  
20 pages” or “HDPs.” Dkt. 294, 2/07/17 Tr. (Schielke) 71:17-25. Clicking this button allows users to  
21 save an image from an HDP to a “board” on that user’s personal Digs page. Dkt. 294, 2/07/17 Tr.  
22 (Schielke) 71:17-25. If images users save are identified as evergreen, they are saved to the user’s  
23 Digs board and are visible to any other user who accesses that board. Dkt. 294, 2/07/17 Tr.  
24 (Schielke) 73:5-7. These images saved by users are designated “board-only” or “personal board”  
25 images. Dkt. 294, 2/07/17 Tr. (Schielke) 73:5-7; Ex. 512. In early 2014, Zillow added functionali-  
26 ty permitting users to save images from real estate listings that are not identified as evergreen by  
27 Zillow. Dkt. 291, 1/27/17 Tr. (Acker I), 211. When such images are saved by a user, they will ap-

1 pear on that user's Digs board only to that user and are not visible to other users who access the  
2 same Digs board. Dkt. 291, 1/27/17 Tr. (Acker I), 211-212; Dkt. 294, 2/07/17 Tr. (Schielke) 77:2-  
3 18. Such images are designated "private." Dkt. 294, 2/07/17 Tr. (Schielke) 73:11-74:1.

4 Images that Digs users save are not immediately assigned tags or included in the searchable  
5 set. Dkt. 291, 1/27/17 Tr. (Acker I) 209. Instead, such images were added to a queue for eventual  
6 review by moderators. Dkt. 291, 1/27/17 Tr. (Acker I), 208-209, 214; Dkt. 294, 2/07/17 Tr.  
7 (Schielke) 78:12-81:7. The moderators selected some of these images for inclusion in the search-  
8 able set and added tags so that the images would appear in user search results. Dkt. 294, 2/07/17  
9 Tr. (Schielke) 80:16-81:3. If the image was not added to the searchable set, its status within Digs  
10 was unchanged and it remained a board-only image, viewable by the user who had saved the im-  
11 age and by any other user who accessed that board. Dkt. 294, 2/07/17 Tr. (Schielke) 81:4-7. Pri-  
12 vate images were not added to the queue and were not reviewed by moderators. Dkt. 294, 2/07/17  
13 Tr. (Schielke) 89:5-12.

14 For purposes of trial, the parties stipulated to the number of images at issue in the categories  
15 described above, including the launch set, searchable, board-only, and private. *See* Ex. 512; Dkt  
16 600, Exhibit 600 (stipulated facts) at ¶ 12. In total, VHT alleged that Zillow infringed its copy-  
17 rights in 28,124 images on Digs, and in one additional image by display in a blog post. *See id.*  
18 There are roughly 5 million images available on Digs. Dkt. 292, 2/02/17 Tr. (Gurney) 120:20–21.  
19 VHT introduced no evidence at trial that Zillow's use of any of that 5 million besides VHT's own  
20 was infringing.

## 21 **B. Zillow's Image Processing Systems**

22 Zillow used two different image processing procedures during the time period relevant to  
23 this case. Dkt. 292, 2/02/17 Tr. (Gurney) 121:6-124:19. In the first period—from the time Zillow's  
24 moderators were initially identifying images to be included in the Launch Set during 2012,  
25 through July of 2013—Zillow used what it describes as the "Legacy System." *Id.* at 121:10-18;  
26 122:25-123:5. In the Legacy System, no scaled, cropped, or enhanced copies of any images were  
27 made for use on Digs. *Id.* at 121:14-23. Instead, Zillow's systems would render the image accord-

1 ing to the demands of the particular display “on the fly”, at the time requested by the user. *Id.*

2 While the Legacy System was in operation, neither the saving of an image to Digs (whether by a  
3 user or by a Zillow moderator), nor display of an image in Digs, generated an additional copy of  
4 that image. *Id.*

5 Zillow’s second image processing procedure was identified at trial as the “Old Amazon Sys-  
6 tem.” *Id.* at 122:11-14. Zillow implemented this system in July 2013 after it had transferred its  
7 image processing and storage from its own data center to the Amazon Cloud. *Id.* at 122:2-20. Un-  
8 der the Old Amazon System, Zillow created scaled copies of images as soon as a user saved an  
9 image, or attempted to save the image, to Digs. *Id.* at 122:25-123:12. Even if an image was later  
10 reviewed by one of Zillow’s moderators, and even if that moderator approved the images for in-  
11 clusion in the searchable set, no additional copies of the image were made. *Id.* at 123:13-24.

### 12 **III. LEGAL STANDARD**

13 “The court may grant ... a renewed motion for judgment as a matter of law if it ‘finds that a  
14 reasonable jury would not have a legally sufficient evidentiary basis’ to find for [the opposing  
15 party].” *MKB Constructors v. Am. Zurich Ins. Co.*, No. C13-0611JLR, 2015 WL 1188533, at \*3  
16 (W.D. Wash. Mar. 16, 2015) (Robart, J.) (quoting Fed. R. Civ. P. 50(a)). In reviewing such a mo-  
17 tion, “[t]he court must view the evidence and draw all reasonable inferences in favor of ... the  
18 party in whose favor the jury returned its verdict.” *Id.* at \*3 (citations omitted). Granting a motion  
19 for judgment as a matter of law is proper if “the evidence permits only one reasonable conclusion,  
20 and the conclusion is contrary to that reached by the jury.” *Id.* Judgment as a matter of law “is ap-  
21 propriate when the jury could have relied only on speculation to reach its verdict.” *Id.* (citations  
22 omitted).

23 “The standard under which the court considers [a] motion for a new trial is distinct from the  
24 standards under which it considers [a] motion for judgment as a matter of law.” *Id.* at \*26. Under  
25 Rule 59(a)(1)(A), the “court may, on motion, grant a new trial on all or some of the issues—and  
26 to any party ... after a jury trial, for any reason for which a new trial has heretofore been granted  
27

1 in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). Since “Rule 59 does not specify  
2 the grounds on which a motion for new trial may be granted,” the court is “bound by those  
3 grounds that have been historically recognized.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729  
4 (9th Cir. 2007). “Historically recognized grounds include, but are not limited to, claims ‘that the  
5 verdict is against the weight of the evidence, that the damages are excessive, or that, for other rea-  
6 sons, the trial was not fair to the party moving.’” *Id.* (citation omitted).

7 Motions for a new trial are subjected to a lower standard of proof than motions for judgment  
8 as a matter of law; a verdict may be support by substantial evidence, yet still be against the clear  
9 weight of evidence. *Id.* Unlike a motion for judgment as a matter of law, in addressing a motion  
10 for a new trial, “[t]he judge can weigh the evidence and assess the credibility of witnesses, and  
11 need not view the evidence from the perspective most favorable to the prevailing party.” *Id.* If,  
12 “having given full respect to the jury’s findings, the judge on the entire evidence is left with the  
13 definite and firm conviction that a mistake has been committed,” then the motion for a new trial  
14 should be granted. *MKB Constructors*, 2015 WL 1188533, at \*26. Thus, even if the court declines  
15 to grant judgment as a matter of law, it may order a new trial under Rule 59.

#### 16 IV. ARGUMENT

##### 17 A. The volitional act doctrine precludes direct liability by Zillow for infringement of non- 18 displayed or non-searchable images.

19 The Ninth Circuit’s recent articulation of the volitional act doctrine in *Perfect 10, Inc. v. Gi-*  
20 *ganews, Inc.* precludes direct liability by Zillow for infringements of VHT’s exclusive rights  
21 whose immediate cause was user interactions with Zillow’s automated computer systems. 847  
22 F.3d 657. Under *Giganews*, “direct infringement requires the plaintiff to show causation (also re-  
23 ferred to as ‘volitional conduct’) by the defendant.” *Id.* at 666.

24 The so-called ‘volition’ element of direct infringement is not a judicially-  
25 created element of intent or knowledge; it is a basic requirement of causation.  
26 As its name suggests, direct liability must be premised on conduct that can  
27 reasonably be described as the direct cause of the infringement.

1 *Id.* (internal quotations and alterations omitted). Because user actions were the immediate cause  
 2 of any proven copying, display, adaptation, or distribution of all images other than those that were  
 3 displayed and part of the searchable set, Zillow is entitled to judgment as a matter of law that it is  
 4 not a direct infringer of VHT’s copyright in any of the non-displayed or non-searchable images.

5 **1. *Zillow did not cause the reproduction or adaptation of any VHT images.***

6 With respect to liability for reproduction, *Giganews* holds that “automatic copying, storage,  
 7 and transmission of copyrighted materials, when instigated by others, does not render an Internet  
 8 service provider strictly liable for copyright infringement.” *Id.* at 670 (internal quotations and al-  
 9 terations omitted). “Operating a system used to make copies at the user’s command does not  
 10 mean that the system operator, rather than the user, caused copies to made.” *Id.* (internal quota-  
 11 tions and alterations omitted). Thus the Ninth Circuit held that the defendant in *Giganews* did not  
 12 directly infringe the plaintiff’s reproduction rights by operating message boards on which users  
 13 copied and shared copyrighted images because, in doing so, it had not “exercised control (other  
 14 than by general operation of a Usenet service); selected any material for upload, download,  
 15 transmission, or storage; or instigated any copying, storage, or distribution.” *Id.*

16 VHT has failed to develop any facts at trial showing that Zillow caused the creation of any  
 17 copies of its images for Digs. In particular, there is no evidence that Zillow exercised any control  
 18 over the copying of VHT’s images on Digs other than by the general operation of the Digs plat-  
 19 form. Rather, as shown above, the evidence affirmatively demonstrates that a user selected every  
 20 image that was reproduced for Digs and instigated the creation of that reproduction. In particular:

- 21 • Zillow’s Old Amazon System automatically created scaled copies of images for  
 22 Digs when users confirmed or cancelled<sup>2</sup> saving an image that they had selected  
 23 from an HDP. Dkt. 292, 2/02/17 Tr. (Gurney) 122:21-123:19.

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25 <sup>2</sup> The fact that a user may have decided to cancel the posting of an image to their personal board does not  
 26 change the fact that it was their action and not Zillow’s that caused copies of that particular image to be created on  
 27 Zillow’s system. *Id.* at 666 (“We wish to emphasize that the word ‘volition’ in this context does not really mean an  
 ‘act of willing or choosing’ or an ‘act of deciding,’ [but] simply stands for the unremarkable proposition that proximate  
 causation historically underlines copyright infringement liability no less than other torts.” (internal quotations  
 omitted)).

- 1 • When Zillow selected the Launch Set of images its Legacy System was in place and did not create any scaled copies. Dkt. 292, 2/02/17 Tr. (Gurney) 121:10-23.
- 2 • Zillow’s moderation process for promoting images that users had selected for their
- 3 boards to the Searchable Set did not create any additional copies of those images.
- 4 Dkt. 292, 2/02/17 Tr. (Gurney) 123:20-24.

5 This un rebutted evidence concerning Zillow’s image processing systems establishes that  
6 copies of images used in Digs were made *only* as the result of an action by a user, never by Zil-  
7 low. At the time Zillow’s moderators were selecting images for Digs, no Digs copies were being  
8 made whatsoever. Dkt. 292, 2/02/17 Tr. (Gurney) 121:10-23. Later, when Zillow’s systems were  
9 creating Digs-specific copies of images, the action that caused the copy to be created was, in eve-  
10 ry case, a user’s decision to start saving the image to his or her Digs page. *Id.* at 122:2-123:12. As  
11 in *Giganews*, Zillow’s operation of a system that makes copies at the user’s command does not  
12 mean that Zillow, rather than the users, caused the creation of the copies. *Giganews*, 847 F.3d at  
13 670.

14 The same is true with respect to any creation of any derivative works by cropping, scaling, or  
15 enhancement of Digs images. The evidence shows that any such alteration occurred as part of the  
16 same process of creating Digs-specific copies in response to user interactions, not as a result of  
17 any action by a person at Zillow other than configuration of its generally non-infringing systems.  
18 Dkt. 292, 2/02/17 Tr. (Gurney) 109:12–111:11. With respect to dynamic rendering of product  
19 bubbles on displayed images that VHT also contends results in the creation of derivative works,<sup>3</sup>  
20 the evidence shows that not every searchable image was tagged to be displayed with product bub-  
21 bles, Dkt. 294, 2/07/17 Tr. (Schielke) 81:11–21, and there is no evidence which, if any, VHT im-

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22 <sup>3</sup>Product overlays also are not derivative works in any event. A work, including a derivative work, is only creat-  
23 ed under the Copyright Act when it is “fixed” in a copy. *See* 17 U.S.C. § 101; *see Micro Star*, 154 F.3d at 1110 (“[A]  
24 derivative work must exist in a concrete or permanent form” (internal quotation omitted)); 2 *Nimmer on Copyright* §  
25 8.09 (Under “the plain language of the Act ... the adaptation right ... should not be deemed implicated, absent fixa-  
26 tion.”). As Zillow’s Ben Shielke testified at trial, its systems only store the XY coordinates of identified products, and  
27 composite images with bubbles are only created dynamically at run time. Dkt. 294, 2/07/17 Tr. Schielke) 82:8–15. Such  
transitory compositing of content on a user’s computer screen does not result in the creation of a derivative  
work. “Even if the presence of an overlapping window could be said to change the appearance of the underlying win-  
dow on a computer screen, the mere alteration of the manner in which an individual consumer’s computer displays  
the content sent by plaintiffs’ websites does not create a ‘derivative work.’” *Wells Fargo & Co. v. WhenU.com, Inc.*,  
293 F. Supp. 2d 734, 769 (E.D. Mich. 2003) (citing *Lewis Galoob Toys v. Nintendo of Am.*, 780 F. Supp. 1283, 1291  
(N.D. Cal. 1991), *aff’d*, 964 F.2d 965 (9th Cir. 1992).

1 ages received such tags. Thus any direct infringement of its adaptation rights that VHT could  
2 prove occurred only in connection with making the Digs-specific copies in response to user inter-  
3 actions and was not caused by a volitional act of Zillow as well.

4 VHT has thus failed to show that Zillow had any role in reproducing or adapting its images  
5 beyond “designing or implementing a system that automatically and uniformly creates ... copies  
6 of all data sent through it” by users when they start to save an image to Digs. *Giganews*, 847 F.3d  
7 at 670 (internal quotations omitted). Because VHT has presented no other theory of infringement<sup>4</sup>  
8 for the 22,109 of the 28,125 images in suit identified in Exhibit 512 as not having been displayed  
9 on Digs,<sup>5</sup> Zillow is entitled to judgment as a matter of law that it is not directly liable for in-  
10 fringement of these images. Alternatively, Zillow is entitled to a new trial on this issue.

11 **2. Zillow did not cause the display of any non-searchable VHT images.**

12 With respect to the 6,016 images that *were* displayed on Digs, Zillow can only be liable un-  
13 der *Giganews* for direct infringement of those for which there is evidence to “demonstrate that  
14 [Zillow]—as opposed to the user who called up the images—caused the images to be displayed.”  
15 *Id.* at 668. In *Giganews*, the Ninth Circuit rejected the claim that merely providing software users  
16 the ability to view potentially infringing images makes the software provider the cause of result-  
17 ing displays. *See id.* (“[T]he fact that users may use *Giganews*’s reader to display infringing imag-  
18 es does not constitute volitional conduct by *Giganews*.” (internal quotations omitted)). In reaching  
19 this result, the Ninth Circuit distinguished its decision on this point in *Perfect 10, Inc. v. Ama-*  
20 *zon.com, Inc.*, 508 F.3d 1146, 1160 n.6 (9th Cir. 2007), because in that case it found “Google ini-  
21 tiates and controls the storage and communication of [the] images ....” *Id.*

22 Of the 6,016 displayed images, 2,094 were not searchable<sup>6</sup>; instead, they were classified as  
23 either private or board-only, meaning they were selected and saved to Digs by users and never  
24

25  
26 <sup>4</sup> Zillow anticipates VHT’s arguments that these images should be “deemed” to have been displayed or distrib-  
uted in part 2 below.

27 <sup>5</sup> *See* Dkt. 294, 2/07/17 Tr. (Schielke) 91:11–92:4; Ex. 490.

<sup>6</sup> *See* Dkt. 294, 2/07/17 Tr. (Schielke) at 92:10–93:8; Ex. 491.

1 added to the searchable set by Zillow’s moderators. Dkt. 294, 2/07/17 Tr. (Schielke) 88:16–89:19.

2 There is no evidence that Zillow “initiates and controls the storage and communication” of such  
3 images to users. To the contrary:

- 4 • Zillow’s moderators never even reviewed the private images, much less took any ac-  
5 tions that contributed to their display. Dkt. 294, 2/07/17 Tr. (Schielke) 89:5–12.
- 6 • Not every board-only image was queued for moderation, and Zillow moderators did  
7 not review all of those that were. Dkt. 294, 2/07/17 Tr. (Schielke) 78:21–79:25.
- 8 • When Zillow’s moderators did review board-only images and declined to promote  
9 them to the searchable set, it had no effect on their display on Digs. Dkt. 294,  
2/07/17 Tr. (Schielke) 81:4–7.

10 The mere fact that a Zillow moderator may have *looked* at an image is not sufficient to trans-  
11 form subsequent display into a volitional act by Zillow under *Giganews*. *See* 847 F.3d at 666  
12 (“The so called ‘volition’ element of direct infringement is not a judicially-created element of in-  
13 tent or knowledge; it is a basic requirement of causation.” (alterations and indication of quotation  
14 omitted)). Nor do any of the cases that VHT has previously cited establish that the *failure* to re-  
15 move a work that a defendant did not itself place on its system is an *act* that causes that work to  
16 be displayed.<sup>7</sup>

17 Nor is VHT entitled to a presumption that every image in suit should be “deemed” to have  
18 been displayed merely because it was available on Digs. Part of the bargain that VHT struck in  
19 order to have Exhibit 512 admitted as a summary of the voluminous evidence produced in discov-  
20 ery about the use of its photos on Digs was a stipulation to the accuracy of the information that it  
21 contains. *See* Dkt 600, Exhibit 600 (stipulated facts) at ¶ 12. Column AW of that spreadsheet iden-  
22 tifies with all images that Zillow’s database records show were displayed at least once in Digs  
23 with a “Y,” and those for which no record of a display exists with an “N.” VHT should not be

24 <sup>7</sup> Compare *Jarvis v. K2 Inc.*, 486 F.3d 526, 530 (9th Cir. 2007) (defendant selected photographs to be used in  
25 collage after license expired); *Wall Data v. Los Angeles Cty. Sheriff’s Dept.*, 447 F.3d 769, 774–75 (9th Cir. 2006)  
26 (defendant installed software on more computers than permitted by license); *Schmitt v. VAG Grp., Inc.*, 2010 WL  
27 331782, at \*2 (D. Or. Jan 25, 2010) (defendant commissioned and posted photographs that it continued to use after  
license expired); *Coogan v. Avent Inc.*, 2005 WL 2789311, \*2 (D. Ariz. October 24, 2005) (defendant commissioned  
photographs and placed them in magazine after license expired); *Quantum Sys. Integrators, Inc. v. Sprint Nextel  
Corp.*, 338 Fed. App’x. 329, 331, 336 (4th Cir. 2009) (defendant loaded software on its computers that was later used  
by its own employees after license revoked).

1 permitted to repudiate the bargain that allowed it to avoid being put to its proof on display of  
2 some images in this lawsuit by arguing now that there should be a presumption of display for im-  
3 ages that it agreed were not.  
4

5 The cases VHT has cited do not support the existence of such a presumption in any event.  
6 *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 551–52 (N.D. Tex. 1997), *aff'd*,  
7 168 F.3d 486 (5th Cir. 1999) rejected the contention that the defendant did not display images that  
8 users had downloaded from its servers because the actual visual perception of this images oc-  
9 curred on the users’ screens. It did not hold that the defendant should be deemed to have dis-  
10 played images that users never downloaded. The cases that the Copyright Office cites in its dis-  
11 cussion of the putative “making available right” likewise concern whether a server operator who  
12 uploads content to its web site is responsible for its ultimate display, not whether it may be pre-  
13 sumed that such a display occurred. *See* United States Copyright Office, *The Making Available*  
14 *Right in the United States* (February 2016) at p. 48 n.23, *available at* [https://www.copyright.gov/-](https://www.copyright.gov/-docs/making_available/making-available-right.pdf)  
15 [docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/-docs/making_available/making-available-right.pdf) (last visited March 16, 2017); *see Soc’y of the*  
16 *Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 57 (1st Cir. 2012) (disputing re-  
17 sponsibility for undisputed display under volitional act doctrine); *BWP Media USA Inc. v. Uropa*  
18 *Media, Inc.*, No. 13 Civ. 7871(JSR)(JCF), 2014 WL 2011775, at \*1 (S.D.N.Y. May 16, 2014)  
19 (finding that poster of images was responsible for copies being shown on users’ screens). The  
20 Ninth Circuit, by contrast, has defined display in the online context to mean actually “using a  
21 computer to fill a computer screen with a copy of the photographic image fixed in the computer’s  
22 memory.” *Perfect 10 v. Amazon*, 508 F.3d at 1160. Thus the court found that merely making  
23 works available for display by linking did not constitute an actionable display. *Id.*

24 The court should find as a matter of law that VHT has failed to prove any infringing display  
25 of the 22,109 images identified in Exhibit 512 as not having been displayed on Digs, and further  
26 that Zillow was not the cause of any direct infringement by display of the 2,094 non-searchable  
27 images that were displayed solely as a result of the actions of its users. Finally, with respect to the

1 3,921 searchable images that were displayed, 3,483 also appeared on users' boards, where visitors  
2 could view them without Zillow having influenced them to do so in any way through its modera-  
3 tion, indexing, and tagging process. The only images whose display the evidence VHT presented  
4 at trial can trace to Zillow's image moderation are the 438 searchable-only images.<sup>8</sup> Thus Zillow  
5 is entitled to judgment as a matter of law that it is not a direct infringer of VHT's display rights in  
6 any but those 483 images, or is at least entitled to a new trial on the issue of its liability for direct  
7 infringement by display.

8 **3. Zillow did not cause the distribution of any VHT images.**

9 The evidence shows that users, not Zillow, selected the images that were included in the sin-  
10 gular automated promotional e-mail that VHT introduced to show that Zillow infringed its distribu-  
11 tion right. Dkt. 292, 2/02/17 Tr. (Gurney) 110:15–111:6. VHT's eleventh-hour theory that Zillow  
12 infringed its distribution rights by merely storing copies of VHT's images on its servers without  
13 showing them to anybody was not disclosed in VHT's interrogatory responses, see Dkt. 133-10, at  
14 7 (previously filed), and should be disregarded for the same reasons that the Court has excluded  
15 VHT's undisclosed theories of infringement during the migration to the Amazon cloud platform  
16 and by caching copies in its content delivery network. *See* Dkt. 236, at 3–5. Even so, the availa-  
17 bility of these copies on Zillow's servers is no less the consequence of user actions than the crea-  
18 tion of the copies in the first place. Moreover, the Ninth Circuit has distinguished rather than  
19 adopt the much criticized "deemed distribution" rule of *Hotaling v. Church of Jesus Christ of Lat-*  
20 *ter-Day Saints*, 118 F.3d 199 (4th Cir.1997), that a mere offer to distribute a work amounts to in-  
21 fringing distribution. *See Perfect 10 v. Amazon*, 508 F.3d at 1162; see also *In re Napster, Inc. Cop-*  
22 *yright Litig.*, 377 F. Supp. 2d 796, 803 (N.D. Cal. 2005) ("In any event, to the extent that *Hotaling*  
23 suggests that a mere offer to distribute a copyrighted work gives rise to liability under section  
24 106(3), that view is contrary to the weight of ... authorities.").

25  
26  
27 <sup>8</sup> 3,921 displayed searchable images; less 3,483 such images that have been saved to users' boards and may  
have been displayed by those users; equals 438.

1 **B. There is no basis for a finding of secondary liability by Zillow on any ground.**

2 The jury's verdict form indicated that Zillow may be liable for secondary infringement, un-  
 3 der both contributory and vicarious liability theories. VHT failed to establish essential elements of  
 4 each of these theories and, as a result, judgment as a matter of law should be entered for Zillow  
 5 with regard to secondary liability. If the Court concludes to the contrary that VHT has offered suf-  
 6 ficient evidence to sustain a verdict of liability on one or more of these theories but enters judg-  
 7 ment as a matter of law as to any of the images for which the jury found liability for direct in-  
 8 fringement, a new trial must be held: the verdict did not indicate how many images the jury con-  
 9 cluded were infringed under the alternative theories of secondary liability.

10 ***1. Zillow cannot be liable for contributory infringement by material contribution.***

11 Contributory liability for direct infringement by others in the online context requires both  
 12 “*actual* knowledge that *specific* infringing material is available using [the defendant's] system” as  
 13 well as that the defendant be able to “take simple measures to prevent further damage to copy-  
 14 righted works, yet continue[] to provide access to infringing works.” *Perfect 10 v. Amazon*, 508  
 15 F.3d at 1172. VHT has failed to prove either element respecting any of the works in suit.

16 ***a. There is no evidence that Zillow knew about any specific infringements of VHT***  
 17 ***works on Digs.***

18 The record fails to show that Zillow had actual knowledge that specific VHT images were  
 19 available on its system at the time of any acts that could be found infringing. Communications  
 20 between VHT and Zillow in 2013 and early 2014 fail to establish Zillow's knowledge of in-  
 21 fringement because those conversations did not identify any infringing activity by users of Digs,  
 22 much less identify such activity with the specificity required by *Perfect 10 v. Amazon*. The testi-  
 23 mony of both VHT's witnesses and Zillow's witnesses was consistent on all salient points. Within  
 24 days of Digs launch, VHT's Vice President of Sales Kevin McGuire contacted Zillow Chief Rev-  
 25 enue Officer Greg Schwartz. Dkt. 291, 1/27/17 Tr. (McGuire) 54-44; Dkt. 293, 2/03/17 Tr.  
 26 (Schwartz) 62:8-20; Ex. A-83. Mr. McGuire told Mr. Schwartz that VHT had photographs of  
 27 homes that Zillow could license for use on Digs. Dkt. 291, 1/27/17 Tr. (McGuire) 55. Mr.

1 McGuire did not tell Mr. Schwartz that Zillow needed to obtain a license or remove any VHT  
2 photos that currently appeared on Digs. Dkt. 291, 1/27/17 Tr. (McGuire) 55-56; Dkt. 293, 2/03/17  
3 Tr. (Schwartz) 63:1-7, 63:23-64:1. Nor did he identify which VHT images appeared on Digs. Dkt.  
4 290, 1/24/17 (Balduf) 138: 3-5. Mr. McGuire and others at VHT had further conversations with  
5 Mr. Schwartz and others at Zillow in May, June, and July 2013 and January 2014 but VHT did not  
6 indicate in any of these conversations that Zillow was infringing VHT's copyrights or request that  
7 Zillow obtain a license or remove VHT photographs that appeared on Digs. Dkt. 290, 1/24/17 Tr.  
8 (Balduf) 137:12-138:8; 139:17-20; Dkt. 293, 2/03/17 Tr. (Schwartz) 69:2-10. Because VHT ad-  
9 mits these conversations did not include even a general allegation of infringement, much less an  
10 identification of VHT images on Digs, they certainly cannot serve as evidence of the specific  
11 knowledge required to prove contributory infringement. *Perfect 10 v. Amazon*, 508 F.3d at 1172.

12 The record includes only one communication from VHT to Zillow which even arguably  
13 identifies specific images as allegedly infringing. That communication is a July 10, 2014 letter  
14 from VHT's lawyers to Zillow requesting that Zillow remove VHT images from Digs. Dkt. 290,  
15 1/24/17 Tr. (Balduf) 119:7-17; Ex. 98. The letter attached a three hundred page list containing ap-  
16 proximately 50,000 addresses that had been photographed by VHT but did not identify any spe-  
17 cific images as appearing on Digs. Dkt. 290, 1/24/17 Tr. (Balduf) 120:5-13; Ex. 98. Only fourteen  
18 of the images in suit in this litigation are associated with addresses that are among the 50,000 on  
19 this list. Dkt. 290, 1/24/17 Tr. (Balduf) 144:4-23; Ex. 512, summary tab (indicating the party's  
20 agreement that fourteen of the images in suit appear on the list contained in Ex. 98). There is no  
21 evidence in this case that Zillow could or did use this list to determine whether VHT images ap-  
22 peared on Digs. Even if the Court concludes that the list is sufficient evidence of Zillow's  
23 knowledge to support a finding of contributory infringement, that finding would be limited to the  
24 fourteen images in suit that are associated with an address that appeared on the list.

25 Apart from this July 10, 2014 letter, the record contains no evidence whatsoever that Zillow  
26 knew about infringements of specific images. VHT failed to introduce any of the other notices  
27 identified in Exhibit 512 into evidence, so there is no way to determine the sufficiency of their

1 identification to inform Zillow about any of the 117 additional images that were added to Digs  
2 after their receipt. Without evidence of such knowledge, VHT’s claims for contributory infringe-  
3 ment fail as a matter of law.

4           **b. There is no evidence that Zillow possessed simple means to prevent future**  
5           **infringements.**

6           With respect to contributory infringement by material contribution, *Giganews* reiterated that  
7 “even assuming that takedown notices were sufficient to confer actual knowledge,” material con-  
8 tribution is lacking where there are no “simple measures available to remove infringing material.”  
9 847 F.3d at 671 (emphasis added). With respect to this requirement, *Giganews* held that where the  
10 methods available to the defendant to remove infringing materials were “unreliable and burden-  
11 some,” it lacks “reasonable and feasible means of preventing further damage to [the plaintiff’s]  
12 copyrighted works” for purposes of material contribution. *Id.* at 672 (quotations and alterations  
13 omitted). The Ninth Circuit found that material contribution was lacking where defendant would  
14 have had to expend substantial effort to relate available information about the infringements to the  
15 “Message-IDs” that were necessary to locate and take down the accused content. *Id.* at 671-72.

16           VHT has introduced no evidence that Zillow had any ability to identify and take down VHT  
17 images prior to receiving some sort of specific notice from VHT. Testimony by which VHT has  
18 sought to suggest that Zillow might have created some sort of system to recognize its watermarks  
19 is irrelevant, because Zillow is not obligated to develop technology it does not have to detect po-  
20 tentially infringing works. *See Perfect 10 v. Amazon*, 508 F.3d at 1170 (“Nor can Google be held  
21 liable solely because it did not develop technology that would enable its search engine to automat-  
22 ically avoid infringing images.” (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545  
23 U.S. 913, 939 n.12 (2005))).

24           Bosch’s testimony over Zillow’s objection that since his deposition in this case he had locat-  
25 ed software that can detect watermarks in photographs, Dkt. 291, 1/27/17 Tr. Bosch) 97:1–8, is  
26 insufficient to sustain the jury’s finding of contributory infringement. Bosch did not testify that  
27 the unidentified software he found could identify whose watermark the photo contained, or

1 whether it could operate at the scale and speed required to process the millions of photographs  
2 that Zillow receives every day. The only evidence regarding the actual feasibility of developing a  
3 system for identifying visual watermarks is the un rebutted testimony of Jason Gurney that doing  
4 so would have consumed 72 developer weeks of effort. Dkt. 292, 2/02/17 Tr. (Gurney) 126:17-25.  
5 *Giganews* firmly establishes that such an effort is not a “simple measure” that can satisfy the re-  
6 quirements of proving material contribution. *See Giganews*, 847 F.3d at 672. Just as in *Giganews*,  
7 the only reliable method to identify and take down VHT images in evidence requires unique iden-  
8 tifiers for those images, which it is undisputed that Zillow did not have prior to VHT’s notices.<sup>9</sup>

9 Because VHT cannot show that, at the time of any alleged infringement, Zillow had simple  
10 means to identify and remove the 27,993 images<sup>10</sup> that were added to Digs before VHT even at-  
11 tempted to identify them, Zillow is entitled to judgment as a matter of law that it did not infringe  
12 these images by material contribution.

13 **2. *Zillow cannot be liable for contributory infringement by inducement because Zillow***  
14 ***never promoted or fostered its users’ infringement of the VHT images in suit.***

15 With respect to inducement, VHT likewise cannot produce any evidence that Zillow “clearly  
16 expressed an intent to promote infringement or took affirmative steps to foster infringement.” *Gi-*  
17 *ganews*, 847 F.3d at 672 (quotation and alteration omitted). The Ninth Circuit found such intent  
18 and steps lacking in *Giganews* even on the assumption that the defendant “(1) offers 25,000 tera-  
19 bytes of copyrighted materials without permission, (2) continues to exploit the content of known  
20 repeat infringers, and (3) advertises that it does not keep track of subscriber downloads, effective-  
21 ly encouraging infringement.” *Id.* (quotations and alterations omitted). *A fortiori*, Zillow cannot  
22 be liable for induced infringement of any images where such evidence is not only lacking, but the  
23 Court has previously found that its systems are designed “to avoid infringing behavior, not facili-  
24 tate it.” Dkt. 211 at 29.

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25  
26 <sup>9</sup> VHT has also failed to prove the information it provided for the 131 images that were added to Digs after  
27 VHT’s notices was sufficient to locate them in particular instances.

<sup>10</sup> *See* Ex. 512 (filter on Col. AS for “Created on Digs After 1st Specific ID” = “N”).

1 None of the evidence that VHT has since introduced at trial comes close to supporting a find-  
2 ing of an object to promote infringement. In particular:

- 3
- 4 • There is no evidence that Zillow’s encouragement of users to post evergreen images  
5 to Digs constitutes an object to promote infringement because there is no dispute  
6 that the very reason Zillow classified images as evergreen was that the parties who  
7 had provided them had warranted to Zillow that it could use them indefinitely and  
8 on any part of its web site. Dkt. 291, 1/27/17 Tr. (Bonert) 120; Dkt. 292, 2/02/17 Tr.  
9 (Acker II) 70:8-16.
  - 10 • There is no evidence that concerns about copyright motivated Zillow’s decision to  
11 prevent users from saving deciduous images for public display on their boards, nor  
12 that Zillow’s decision to allow users to save such images for their own later private  
13 viewing evinced an indifference to copyright. Zillow’s deciduous agreements only  
14 addressed *public* displays of the images, Dkt. 291, 1/27/17 Tr. Acker I) 211, and the  
15 plain language of the statute provides that a *private* display is not an infringement.  
16 *See* 17 U.S.C. § 106 (providing exclusive right to “display the copyrighted work  
17 *publicly*” (emphasis added)); *see also* 2-8 *Nimmer on Copyright* § 8.14 (2017)  
18 (“[S]omeone who rightfully possesses a book and ports it to the Cloud may later  
19 read that book without violating the copyright owner’s public display right”).
  - 20 • There is likewise no evidence that Zillow’s decision not to retroactively reclassify  
21 images that had been provided under mislabeled feeds following Zillow’s feed audit  
22 shows an object to encourage infringement. Nothing shows that Zillow was even  
23 aware that failing to reclassify existing images might result in images being in-  
24 fringed, or that any infringement of images belonging to VHT or anyone else actual-  
25 ly resulted from that decision. With respect to the kinds of uses on Digs that are at  
26 issue in this case, the evidence shows instead that Zillow never received a complaint  
27 from a provider of these feeds. Dkt. 292, 2/02/17 Tr. (Acker II) 70:21-23.

Because there is not even a scintilla of evidence that Zillow had a purpose or took affirma-  
tive steps to encourage infringement on Digs, and the evidence in fact shows the opposite, Zillow  
is entitled to judgment as a matter of law on VHT’s claims of contributory infringement by in-  
ducement.

3. ***Zillow is not vicariously liable because it lacked the practical ability to control and never directly profited from any direct infringement by its users.***

Zillow’s inability to identify and remove VHT photographs also precludes vicarious liability  
for infringement on Digs. *See Perfect 10 v. Amazon*, 508 F.3d at 1173–75 (“[U]nder *Grokster*, a  
defendant exercises control over a direct infringer when he has both a legal right to stop or limit  
the directly infringing conduct, *as well as the practical ability* to do so.” (emphasis added)).

1 In addition, *Giganews* made clear that the requirement of direct financial benefit requires  
2 proof of a “causal link between the infringement of the plaintiff’s own copyrighted works and any  
3 profit to the service provider.” *Giganews*, 87 F.3d at 673. There is no evidence that Zillow ever  
4 generated revenue as a result of displaying a VHT image on Digs. For example:

- 5 • There is no evidence that Zillow was ever paid for displaying or receiving a click on  
6 an ad or product link displayed on or in connection with a VHT image.
- 7 • There is no evidence that the presence of the 28,124 VHT images that appeared  
8 among the roughly five million images on Digs ever caused a single user to visit  
9 Digs who otherwise would not have done so.
- 10 • Even if some small number of users had visited Digs for the specific purpose of  
11 viewing VHT images, there is no evidence that those visits generated any revenue  
12 for Zillow.<sup>11</sup>

13 Evidence that Zillow may have hoped to monetize Digs in the future via increased traffic  
14 fails to establish direct financial benefit under *Giganews* or prior Ninth Circuit cases. The Ninth  
15 Circuit’s preliminary injunction decision in *A&M Record, Inc. v. Napster, Inc.*, 239 F.3d 1004,  
16 1023 (9th Cir. 2001), in particular fails to establish this proposition. *Napster* was a suit brought by  
17 all the major record labels against a site whose *only* non-pretexual reason for existing was to  
18 monetize a base of users who traded commercial copyrighted music for which it had no colorable  
19 claim of license. *Id.* at 1014. On those facts, the Ninth Circuit found that there was a sufficient  
20 likelihood that the plaintiffs would be able to prove a direct financial benefit from infringement of  
21 their own works at trial to uphold a district court’s preliminary injunction. *Id.* at 1023. It did not  
22 remotely hold that a general aspiration to attract users to a site whose contents are overwhelming-  
23 ly not even alleged to be infringing amounts to deriving a direct financial benefit from a tiny frac-  
24 tion of works that are.

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25  
26 <sup>11</sup> Because Digs is not a subscription-based service like *Giganews* and has no general pool of revenue, the ques-  
27 tion of whether “customers were drawn to [Digs] because of the infringing [VHT] material at issue” has no bearing  
on the issue of direct financial benefit for purposes of vicarious liability. *Giganews*, 847 F.3d at 674. Even so, *Gi-*  
*ganews* makes clear that the mere fact that VHT’s material was available and viewed on VHT’s system is insufficient  
to show that it was a “draw” rather than an “added benefit” to subscribers.

1 The small fraction of VHT images that are alleged to be infringing on Digs are indistinguish-  
2 able from the fraction of works that were alleged to be infringing on the defendant's service in  
3 *Giganews*, and they are equally unconnected to any showing of a direct financial benefit to Zil-  
4 low. As a result, Zillow is entitled to judgment as a matter of law on VHT's vicarious infringe-  
5 ment claims as well.

6 **C. Zillow's pre-caching of Digs-specific renderings of VHT images was fair use.**

7 Zillow's scaling, cropping, and enhancing of images are "automatic processes carried out to  
8 improve a user's internet experience, and not to exploit the copyrighted works" that do not in-  
9 fringe as a matter of law because they are "an inevitable and necessary part of using the internet,  
10 and ultimately a trivial activity that falls within the protections of the fair use doctrine." *Rosen v.*  
11 *eBay, Inc.*, No. CV 13-6801 MWF EX, 2015 WL 1600081, at \*20 (C.D. Cal. Jan. 16, 2015)  
12 (granting summary judgment) (citing *Perfect 10 v. Amazon*, 508 F.3d at 1169). The Ninth Circuit  
13 has found these factors to be readily satisfied by automated technical measures, such as caching,  
14 that enhance internet access:

15 The copying function performed automatically by a user's computer to assist  
16 in accessing the Internet is a transformative use. Moreover, as noted by the  
17 district court, a cache copies no more than is necessary to assist the user in In-  
18 ternet use. It is designed to enhance an individual's computer use, not to su-  
19 persede the copyright holders' exploitation of their works. Such automatic  
background copying has no more than a minimal effect on Perfect 10's rights,  
but a considerable public benefit.

20 *Perfect 10 v. Amazon*, 508 F.3d 1146.

21 Applying *Perfect 10 v. Amazon*, the Central District of California in *Rosen* had little difficul-  
22 ty finding on summary judgment that a service provider's automated copying and distribution of  
23 images over content delivery networks (CDNs) was fair use as a matter of law:

24 [S]uch usage is minimal and is a crucial part of maintaining not only internet  
25 commerce, but the efficient operation of the internet generally. It also causes  
26 only minor and wholly incidental copying and distribution of images. ... As in  
27 *Amazon*, eBay's use of CDNs is designed to "enhance [a user's] use, not to  
supersede the copyright holders' exploitation of their works." *Id.* at 1169.  
eBay's use of CDNs is highly analogous and is fair use.

1 2015 WL 1600081, at \*21.

2 Zillow’s automated copying and image enhancement operations that VHT claims are infringing  
3 are effectively a form of caching like that which has been found to be fair use in *Perfect 10 v.*  
4 *Amazon, Rosen*, and elsewhere. Like a cache, these images served no other purpose than being  
5 immediately available rather than having to be generated dynamically each time a user requested  
6 a corresponding version of the original from Zillow’s servers. Dkt. 292, 2/02/17 Tr. (Gurney)  
7 124:5–10. They were identical to a dynamically generated image and had no different uses or  
8 contexts for display on Digs. *Id.* at 123:25–4. They did not—and could not—supersede any op-  
9 portunity for VHT to exploit its copyrights, because the presentation of Digs to users was exactly  
10 the same both with and without them.<sup>12</sup>

11 The Ninth Circuit has given substantial weight to such lack of superseding exploitation in  
12 finding that the comparable practice of creating scaled “thumbnail” images for display on search  
13 engines is fair use. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003). Indeed, the  
14 Ninth Circuit held in *Perfect 10 v. Amazon* that the transformational benefit to users of providing  
15 thumbnail images outweighed any incidental possibility that it might supersede the copyright  
16 holder’s as yet unconsummated efforts to license low resolution images on mobile phones. *See*  
17 *508 F.3d at 1166–67*. Here, there is not even a theoretical effect on the market for VHT’s copy-  
18 rights from automated transformations that occur to enhance the user experience on Zillow’s web-  
19 site, and a finding of fair use is even more highly compelled.

20 **D. There is no evidence that Zillow willfully infringed VHT’s copyrights.**

21 Unrebutted evidence at trial establishes that Zillow was acting within the scope of license  
22 agreements with its feed providers when it added (or permitted its users to add) VHT photos to  
23 Digs. While the jury concluded that VHT’s own license agreements with the agents and brokers  
24 did not permit Zillow’s use on Digs, VHT did not challenge and presented no evidence to contra-  
25

26  
27 <sup>12</sup> In this respect, this case is completely unlike *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1110 (C.D. Cal. 2007), where the copying of images that the defendant did not already possess from the plaintiff’s web site was instrumental to competing with the plaintiff’s business.

1 dict that Zillow’s own feed agreements permitted the challenged uses. Ninth Circuit precedent  
2 holds that an accused infringer who is acting under a reasonable interpretation of an existing li-  
3 cense cannot be liable for willful infringement. *Evergreen Safety*, 697 F.3d at 1228. The jury’s  
4 verdict finding Zillow liable for willful infringement as to certain images is contrary to the evi-  
5 dence and the law and should be vacated.

6 A defendant in a copyright claim cannot be a willful infringer if the “infringing works were  
7 produced under color of title, such as under a reasonable belief that the infringer possesses a li-  
8 cense or implied license.” *Id.* Even when such a defendant has received notice that its actions may  
9 infringe the copyrights of a third party, an existing license arrangement will preclude a finding of  
10 willfulness: “[c]ontinued use of a work even after one has been notified of his or her alleged in-  
11 fringement does not constitute willfulness so long as one believes reasonably, and in good faith,  
12 that he or she is not infringing.” *Id.* (citing cases and 5-14 *Nimmer on Copyright* § 14.04 (2012)).

13 At trial, Zillow established through unchallenged testimony that it received the VHT photo-  
14 graphs it used on Digs pursuant to agreements with real estate agents and MLSs. Dkt. 294,  
15 2/07/17 Tr. (Schielke) 69:13-22; Dkt. 294, 2/07/17 Tr. (Samuelson) 132:25-135:8. For all images  
16 in the searchable set and all board-only images, Zillow’s feed agreements provide “evergreen”  
17 rights, authorizing Zillow to use the images on any Zillow website or other property with no time  
18 restriction. Dkt. 294, 2/07/17 Tr. (Samuelson) 139:2-22; Dkt. 294, 2/07/17 Tr. (Schielke) 73:5-7;  
19 Ex. A-77. The same feed agreements provide warranties from the feed provider to Zillow that the  
20 feed provider has the intellectual property rights necessary to convey these rights to Zillow. *See*  
21 Dkt. 294, 2/07/17 Tr. (Samuelson) 139:23-141:7; Ex. A-77 at ¶¶ 3, 4. This unchallenged evidence  
22 establishes that Zillow had a reasonable, good faith belief that its use of the photographs provided  
23 in these feeds was authorized.

24 Even after VHT contacted Zillow in July 2014 and claimed that the use of VHT photos on  
25 Digs was unauthorized and constituted copyright infringement, Zillow had a reasonable, good  
26 faith belief that VHT was incorrect and Zillow’s use was licensed. Zillow’s licenses and warran-  
27 ties with its feed providers remained in effect and were the only relevant agreements to which Zil-

1 low was a party. When Zillow asked to review VHT’s licenses with its clients, VHT only provided  
 2 a blank, unsigned, form agreement. Dkt. 290, 1/24/17 Tr. (Balduf) 156:2-157:1; Ex. A-102. When  
 3 Zillow asked to see the actual, signed licenses, VHT indicated that it would provide them, but  
 4 never did and instead chose to file suit. Dkt. 293, 2/03/17 Tr. (Philips) 128:21-132:21. Moreover,  
 5 as this Court found in ruling on VHT’s motion for summary judgment, the scope of the relevant  
 6 provisions in VHT’s SLA is ambiguous and that in at least some instances seem to “favor Zillow’s  
 7 interpretation” more convincingly than VHT’s. Dkt. 211 at 22-24.

8 Despite this evidence, the jury found Zillow liable for willful infringement of 3,373 images,  
 9 the exact number of statutory-damages eligible images that Zillow added to the Digs searchable  
 10 set. *See* Ex. 512, summary tab. It appears that the jury concluded that Zillow’s more active in-  
 11 volvement with the searchable images, as opposed to the board-only and private images which  
 12 were viewed and saved only by users, supported a finding of willfulness. Regardless of the jury’s  
 13 reasoning, there is no evidence to support a finding of willfulness with regard to the searchable set  
 14 of images. The testimony was clear and un rebutted that only images received pursuant to ever-  
 15 green rights agreements were considered for or included in the searchable set. *See* Dkt. 291,  
 16 1/27/17 Tr. (Acker I) 195-196; Dkt. 294, 2/07/17 Tr. (Schielke) 69:13-22; 73:5-7; 78:12-81:7.<sup>13</sup>

17 **E. VHT is entitled to only a single award of statutory damages.**

18 The Copyright Act unequivocally provides that only a single award of statutory damages  
 19 may be made for the infringement of any number of works that are part of a compilation. The por-  
 20 tion of the Copyright Act that provides for the election of statutory damages concludes unambig-  
 21 uously: “For the purposes of this subsection, all the parts of a compilation or derivative work con-  
 22 stitute one work.” *Id.* While Nimmer notes ambiguity in the statute respecting compilations whose  
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24  
 25 <sup>13</sup> Even if the jury’s verdict were interpreted to be a finding that a portion of the 4,756 private images (as op-  
 26 posed to the searchable images) were willfully infringed because they were taken from non-evergreen feeds, the ver-  
 27 dict should be vacated. There is no basis in the record for distinguishing Zillow’s state of mind with regard to 3,373  
 of the private images from its state of mind with respect to the remainder of those images. More importantly, Zillow  
 had a good faith basis for concluding that its non-evergreen feed agreements (which govern the private set of images)  
 permit non-public display of those images by individual users who have saved them to their own Digs pages. Acker I  
 211-212; Schielke 73:11-74:1; 77:2-18.

1 “‘parts’ are separately owned,” he concludes: “When [a] plaintiff seeks recovery based on multi-  
2 ple works she owns, all of which fall into one compilation, then its application is straightfor-  
3 ward.” 5-14 *Nimmer on Copyright* § 14.04 (2017). “Th[e] result clearly follows if there is but a  
4 single copyright owner of all of the ‘parts’” that “[t]he current Act provides for but a single statu-  
5 tory damages award ....” *Id.*

6 The standing of the parts of the compilation as works in their own right has no bearing on  
7 this result. The plain language of the statute and its legislative history expressly contemplate that  
8 a compilation may consist of parts that might qualify as independent works for purposes other  
9 than statutory damages. *See* S. REP. 94-473 (“Subsection (c)(1) makes clear, however, that, alt-  
10 hough they are regarded as independent works for other purposes, all the parts of a compilation or  
11 derivative work constitute one work for this purpose.”). Indeed, the statutory definition of “com-  
12 pilation” includes “collective works” that, by definition comprise “a number of contributions,  
13 constituting separate and independent works in themselves ....” 17 U.S.C. § 101.

14 The Ninth Circuit has not adopted a rule that allows for separate awards of statutory damages  
15 for parts of a compilation that have “independent economic value” such that they can “live their  
16 own copyright lives.” In *Columbia Pictures Television v. Krypton Broadcasting* (“*Feltner I*”), 106  
17 F. 3d 284, 295–96 (9th Cir. 1997), the court first considered whether “each [television] series, and  
18 not each episode, constitutes a work” for purposes of the provision in § 501(c)(1) that “that statu-  
19 tory damages may be awarded ‘for all infringements involved in the action, with respect to any  
20 one work,’” and separately whether “each series was a ‘compilation’ under § 504(c)” so as to  
21 count as a single work for purposes of statutory damages *regardless* how many works it com-  
22 prised that might be considered independent for *other purposes*.

23 As to the first question, the court found that each episode was an independent work in view  
24 of the fact that “the episodes were separately written, produced, and registered.” *Id.* at 295. Turn-  
25 ing to the second question, it found that the plaintiff had failed to show that the defendant had in  
26 fact assembled the otherwise separate episodes into a compilation. *Id.* at 296 (“Because this evi-  
27 dence supports the conclusion that the episodes were not ‘assembled into a collective whole,’ it

1 was not error for the district court to reject Feltner’s contention that each series was a ‘compila-  
2 tion’ under § 504(c).” The Ninth Circuit’s consideration of the question of compilation *after* find-  
3 ing that the allegedly compiled episodes had independent economic value acknowledges that  
4 § 504(c) allows only a single award of statutory damages for otherwise independent works *if* their  
5 owner assembles them into a compilation.

6 *Feltner II* did not revisit this clear implication. It held only that the Supreme Court’s holding  
7 in remanding the case that a jury trial was required on statutory damages issues in *Feltner v. Co-*  
8 *lumbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998), did not require a jury trial on whether  
9 the episodes were independent works because no facts pertaining to that issue were in dispute. *See*  
10 *Columbia Pictures v. Krypton Broad.* (“*Feltner II*”), 259 F. 3d 1186, 1193–94 (9th Cir. 2001).  
11 *Monge v. Maya Magazines, Inc.*, 688 F. 3d 1164, 1179–80 (9th Cir. 2012), considered whether  
12 several hundred wedding photos of which the infringer had used only five were separate works or  
13 a compilation in order to assess the portion of the work that the alleged infringer had used for  
14 purposes of a fair use analysis, not statutory damages. Even so, it treated whether the photographs  
15 there at issue were separate works by virtue of their independent economic value *separately* from  
16 whether they had been “selected, coordinated, or arranged” into a compilation. *Id.* at 1180 (“In  
17 sum, there is no compilation *and* it makes sense to treat each photo as an individual copyrighted  
18 work.” (emphasis added)).

19 Here, there can be no dispute that VHT’s images are in fact parts of a compilation. The evi-  
20 dence at trial unequivocally shows that VHT not only assembled all of the images at issue into a  
21 single compilation, but also affirmatively used that fact to obtain the very copyright registrations  
22 that allowed it to bring suit against Zillow and claim statutory damages in the first place. The  
23 Copyright Office initially rejected VHT’s attempts to register its photographic database in the  
24 manner authorized by Section 1117 of the Compendium of U.S. Copyright Office Practices be-  
25 cause it “did not find a compilation element for the database.” Ex. 217. VHT responded by sub-  
26 mitting an affidavit from its CEO Brian Balduf purporting to show its selection and arrangement  
27 of the photographs in its database in order to make the required showing of compilation. Ex.

1 244.029–32. Based on that showing, the Copyright Office issued each of VHT’s registrations un-  
2 der the expressly stated finding: “Basis of registration: compilation of photographs added to re-  
3 vised database.” Exs. 400–414. VHT’s John Bosch confirmed that VHT’s analysts select and as-  
4 semble its photographs into the database in which it has claimed compilation authorship in the  
5 first instance, before it ever distributes them separately to individual clients. Dkt. 291, 1/27/17 Tr.  
6 (Bosch) 104:7–17.

7 The situation in which a copyright owner assembles its own works into a single registered  
8 compilation is literally the *textbook* example of a case in which § 501(c)(4) permits only a single  
9 award of statutory damages, regardless how many independently valuable works the compilation  
10 may comprise:

11 What if there is infringement of multiple works each capable of “living its  
12 own copyright life” but, unlike the situation in *Feltner*, the plaintiff can point  
13 to only one registration certificate? For instance, imagine a single registration  
14 for a record album containing multiple songs, several of which are infringed.  
15 Given the statutory command that “all the parts of a compilation or derivative  
work constitute one work” for purposes of computing statutory damages, only  
one award can be made for the album ....”

16 5-14 *Nimmer on Copyright* § 14.04.

17 There is no circuit split about whether the infringement of any number of independently val-  
18 uable works making up a single registered compilation is limited to a single award of statutory  
19 damages. The Fourth Circuit, for example, while recognizing that “the language of the Copyright  
20 Act does not bar multiple awards for statutory damages when one registration includes multiple  
21 works” that are not part of a compilation, has held that when such works *are* part of a compilation  
22 are, only one award of statutory damages for each compilation is available:

23 Imageline’s registration of SuperBundle and Master Gallery [image collec-  
24 tions] covered, for the purposes of this action, the products in their entirety  
25 and the underlying preexisting works contained therein in which Imageline  
26 also owned copyright. Although parts of a compilation or derivative work  
27 may be “regarded as independent works for other purposes[,]” for purposes of  
statutory damages, they constitute one work. H.R. Rep. No. 94-1476, at 162  
(1976). Because both SuperBundle and Master Gallery can be classified as ei-  
ther compilations or derivative works, we find that, for purposes of determin-

1 ing statutory damages under Section 504(c)(1), the registrations of SuperBun-  
2 dle and Master Gallery constitute a total of two works (one for each registra-  
3 tion of the compilation or derivative work). Therefore, Imageline may only  
4 receive a maximum of two awards of statutory damages for copyright in-  
5 fringement.

6 *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003).

7 The Second Circuit likewise found the independent economic value test irrelevant where the  
8 copyright holder chose to register and issue its works as compilations. *Bryant v. Media Right*  
9 *Prods.*, 603 F.3d 135, 142 (2d Cir. 2010) (“This language provides no exception for a part of a  
10 compilation that has independent economic value, and the Court will not create such an excep-  
11 tion.”). The Eleventh Circuit similarly concluded that the issue of independent economic value of  
12 the photographs that comprised a collection that the copyright holder had assembled and regis-  
13 tered as a compilation to be beside the point:

14 [I]f the dispositive factor for whether a work has an independent economic  
15 value is whether it can conceivably be sold on its own, Congress’s express  
16 mandate in 17 U.S.C. § 504(c)(1) that ‘all parts of a compilation [are to] con-  
17 stitute one work’ would be rendered meaningless, as the very definition of a  
18 collective work in the Copyright Act—“a periodical issue, anthology, or en-  
19 cyclopedia, in which a number of contributions, constituting separate and in-  
20 dependent works in themselves, are assembled into a collective whole,” see  
21 id. § 101—presupposes that each individual work in the collection has inde-  
22 pendent value.

23 *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1281 (11th Cir. 2015). And the Fifth  
24 Circuit has held that the collective registration of multiple photographs, each “constituting sepa-  
25 rate and independent works in themselves,” supported a “ruling that the photographs comprise a  
26 single compilation for purposes of copyright law” for which a single award of damages was prop-  
27 er. *Cullum v. Diamond A Hunting, Inc.*, 484 Fed. Appx. 1000, 1002 (5th Cir. 2012).

28 District Courts have also allowed a single award of statutory damages per compilation re-  
29 gardless of the number of independently valuable works contained. See *UMG Recordings, Inc. v.*  
30 *MP3.com, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (finding that where the infringed works  
31 were albums issued by the plaintiff, statutory damages should be awarded on a per-album basis);  
32 *Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003) (same);

1 *Arista Records, Inc. v. Flea World, Inc.*, Civ. No. 03-2670, 2006 WL 842883, at \*21 (D.N.J. Mar.  
2 31, 2006) (same); *Tattoo Art, Inc. v. TAT Int'l, LLC*, 794 F. Supp. 2d 634 \* (E.D. Va. 2011) (“Alt-  
3 hough plaintiff’s manner of organizing the [tattoo] Books for purposes of copyright registration is  
4 not dispositive, the fact that such organization was also adopted for purposes of the sale of plain-  
5 tiff’s tattoo images leads the Court to conclude, pursuant to *Xoom* and *Bryant*, that plaintiff is only  
6 entitled to one statutory damage award per Book infringed.”); *Stokes Seeds Ltd. v. Geo. W. Park*  
7 *Seed Co.*, 783 F. Supp. 104, 106 (W.D.N.Y. 1991) (holding that catalog containing many separate-  
8 ly copyrighted photographs of plant seedlings constituted a compilation entitled to only a single  
9 award of statutory damages because plaintiff had assembled the photographs into a compilation  
10 (the catalog)).

11 The Copyright Office’s authoritative guidance affirms that limitation to a single award of  
12 statutory damages is the consequence of using the specific group registration procedure that VHT  
13 chose to register its images:

14 When an applicant registers a number of works using the unpublished collec-  
15 tion option, the claimant may assert a claim in the copyrightable selection,  
16 coordination, and/or arrangement of the collection as a whole. ***This may have***  
17 ***significant consequences in a copyright infringement action.*** When a com-  
18 pilation claim has been asserted, the copyright owner may be entitled to claim  
only one award of statutory damages in an infringement action, even if the de-  
fendant infringed all of the works covered by the registration. ...

19 Copyright owners who use a group registration option may be entitled to  
20 claim a separate award of statutory damages for each work that is covered by  
21 the registration, because a group registration covers each work that is submit-  
22 ted for registration (rather than the group as a whole). ***However, there is an***  
23 ***exception to this rule.*** As discussed in Section 1117, a group registration for a  
24 database covers the updates or revisions that were added to the database dur-  
25 ing the period specified in the registration. ***Copyright owners that use this***  
***option are entitled to claim only one award of statutory damages in a copy-***  
***right infringement action,*** because the updates or revisions to a database are  
derivative compilations, and as noted above, the statute expressly states that  
“all the parts of a compilation or derivative work constitute one work” when  
calculating statutory damages.

26 Compendium § 1104.5 (quoting 17 U.S.C. § 504(c)(1)) (emphasis added).

1 The Copyright Office’s permissive statement that “[w]hen a compilation has been asserted,  
2 the copyright owner *may* be entitled to only one award of statutory damages in an infringement  
3 action, even the defendant infringed all of the works covered by the registration” does not reflect  
4 the view that multiple awards are available when the parts of the compilation have independent  
5 economic value. The statement that a single award may be available when multiple *works* that  
6 make up a compilation are infringed *presumes* that those works have independent economic val-  
7 ue, because independent economic value is just the test for whether something is a work in the  
8 first place. *See Feltner I*, 106 F. 3d at 295. Rather, the reference in the passive voice to “[w]hen a  
9 compilation *has been* asserted” likely reflects the scenario referenced by Nimmer, as noted above,  
10 where the owner of the copyrights in the *parts* is different from the one who has asserted author-  
11 ship of the *compilation*, inasmuch as the reference in the Copyright Act to the statutory damages  
12 election of “the copyright owner” assumes ownership of all the rights for which the election is  
13 effective. *See 5-14 Nimmer on Copyright* § 14.04; *c.f. TeeVee Toons, Inc. v. MP3.com, Inc.*, 134 F.  
14 Supp. 2d 546, 548 (S.D.N.Y. 2001) (“[T]he repeated use of the singular ‘copyright owner’ in 17  
15 U.S.C. § 504(c) makes clear that the mandate to consider ‘all the parts of a ... derivative work  
16 [as] one work’ assumed a single owner of all parts of the derivative work ...”).

17 By contrast, the language of the Compendium is *mandatory* in reference to the owner of the  
18 copyrights in the underlying works that, like VHT, also affirmatively asserts a claim of compila-  
19 tion in order to obtain registration under Section 1117: “Copyright owners that use this option *are*  
20 entitled to claim only one award of statutory damages in a copyright infringement action ....”  
21 Compendium § 1104.5.

22 The only case to consider the effect of registration in the form provided by Section 1117 spe-  
23 cifically reached the same conclusion as the Copyright Office. *See Metro. Reg’l Info. Sys., Inc. v.*  
24 *Am. Home Realty Network, Inc.*, No. 12-CV-00954-AW, 2013 WL 3967934, at \*2 (D. Md. July  
25 31, 2013) (overruling objection to “treatment of photographs as independent works for the pur-  
26 poses of injunction analysis yet only as components of a registered compilation for the purposes  
27 of assessing damages”). The facts of *MRIS* are indistinguishable. It even involved real estate pho-

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tographs whose owner assembled them into an electronic database and registered them as a compilation. *See Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 593–94 (4th Cir. 2013).

To reach a different result here based on a finding of independent economic value that would have been equally applicable to the photographs at issue in *MRIS* would, as one court put it, “make a total mockery of Congress’ express mandate that all parts of a compilation must be treated as a single ‘work’ for purposes of computing statutory damages, since, as the House Report expressly recognizes, the copyrighted parts of a compilation will often constitute ‘independent works for other purposes.’” *UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 162, reprinted in 1976 U.S.C.C.A.N. 5659, 5778). The statute would be a dead letter if a registrant of an expressly claimed compilation like VHT could simply elect to pursue individual statutory damages awards for the component works. Zillow is entitled to judgment as a matter of law that VHT can claim no more than a single award of statutory damages for infringement of any number of photographs that make up its image database.<sup>14</sup>

## F. Conclusion

For the above reasons, the Court should grant Zillow’s motion for judgment as a matter of law in full.

Dated: March 22, 2017.

Respectfully submitted,

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<sup>14</sup> Alternatively, Zillow is entitled to a new trial on the number of VHT photographs that have independent economic value, as the great weight of the evidence forecloses the conclusion that any market exists for images such as A-398 (toilet paper roll), A-399 (messy closet), A-416 (unfinished bathroom), and A-426 (hot water heaters), to name a few.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 22, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Ian B. Crosby