**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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| *Rapid Relief Team (RRT) Ltd.*,<br>Plaintiff and Counterclaim-Defendant<br>v.<br>*Cheryl Bawtinheimer*,<br>Defendant and Counterclaim-Plaintiff<br>v.<br>*Brown Rudnick LLP, Michael Graif, and Katy-Jade Church*,<br>Counterclaim-Defendants. | Case No. 1:26-cv-07423-GHW |

**SUPPLEMENTAL BRIEF IN SUPPORT OF COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS COUNTERCLAIM COUNT ONE**

## I. Introduction

Plaintiff and Counterclaim-Defendant Rapid Relief Team (RRT) Ltd. ("RRT") and Counterclaim-Defendants Brown Rudnick LLP ("Brown Rudnick"), Michael Graif ("Graif"), and Katy-Jade Church ("Church") (collectively, "Counterclaim-Defendants") respectfully submit this limited supplemental brief in support of their pending Motion to Dismiss Counterclaim Count One (the "Motion"). Dkt. 33. This brief supplements, rather than supersedes, the Motion. Following the transfer of this action to this District, Second Circuit law now governs this case. This brief advances the same two arguments as in the Motion: (1) Counterclaim Count One fails to plead a plausible claim for relief under 17 U.S.C. § 512(f) and (2) that dismissal of the claim should be with prejudice. The law in the Second Circuit compels the same result as the Ninth Circuit precedent on which the Motion principally relied.

Just as in the Ninth Circuit, the governing rule is that a § 512(f) claim turns on the sender's subjective state of mind, and a copyright holder "is not liable for misrepresentation under the DMCA if they subjectively believe the identified material infringes their copyright, even if that belief is ultimately mistaken." *Hosseinzadeh v. Klein*, 376 F. Supp. 3d 34, 44 (S.D.N.Y. 2017) (citing *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2015) and *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)). Courts in this Circuit have repeatedly dismissed § 512(f) claims – including at the pleading stage – where, as here, the claim rests on a disagreement over fair use and the complaint contains only conclusory assertions about the sender's knowledge. Counterclaim Count One should be dismissed with prejudice.

## II. Background

Counterclaim-Defendants incorporate the Factual Background set forth in the Motion and need not repeat it in detail here. RRT owns the copyright in its unique cartoon bird logo known as Cookie the Kookaburra (the "Logo."). Motion at 3. After discovering that certain videos on two YouTube channels operated by Defendant Cheryl Bawtinheimer ("Bawtinheimer") gratuitously displayed the Logo, RRT's counsel submitted DMCA takedown requests to YouTube beginning on October 28, 2025. *Id.* RRT's counsel filed suit for copyright infringement on December 19, 2025. On April 3, 2026, Bawtinheimer filed her Answer and Counterclaim, asserting in Count One that Counterclaim-Defendants violated § 512(f) by "knowingly materially misrepresenting" that her use of the Logo was infringing rather than fair use. *Id.* at 9. Counterclaim Count One pleads purported "actual subjective knowledge" and, alternatively, willful blindness or failure to consider fair use. *Id.* All of the claims are pled "[o]n information and belief" and through the lens of an objective reasonableness standard. *Id.*; *see* Dkt. 26 at ¶¶ 74-81. Objective reasonableness is not the standard in the Ninth or, more importantly here, the Second Circuit.

## III. Argument

### A. This Circuit Applies the Same Subjective, Knowing-Misrepresentation Standard Under §512(f).

Courts in this District have repeatedly construed a § 512(f) claim to require a subjective bad-faith misrepresentation, not an objective one. Specifically, as the Court in *Hosseinzadeh* explained, citing *Lenz* and *Rossi*, a "copyright holder need only form a *subjective* good faith belief that a use is not authorized" and "is not liable for misrepresentation under the DMCA if they subjectively believed the identified material infringes their copyright, even if that belief is ultimately mistaken." 276 F. Supp. 3d at 44 (emphasis in original).

Critically, this standard "establishes a high bar to liability" and turns on "the state of mind of the party issuing the takedown notice at the time of issuance." *Shaffer v. Kavarnos*, No. 23-CV-10059 (KMK), 2025 WL 2299173, at *2 (S.D.N.Y. Aug. 7, 2025). Courts in this District have found that "a copyright holder 'must have *actual knowledge* that it is making a misrepresentation of fact'" to be liable under § 512(f). *Nat'l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc.*, 551 F. Supp. 3d 408, 432 (S.D.N.Y. 2021) (quoting *Cabell v. Zimmerman*, No. 09-CV-10134, 2010 WL 996007, at *4 (S.D.N.Y. Mar. 12, 2010) (emphasis in original)). Negligence, and even an unreasonable mistake will not suffice; accordingly, to survive a Rule 12(b)(6) motion to dismiss, Bawtinheimer's complaint must include actual alleged facts, not conclusory assertions, showing that Counterclaim-Defendants knew that their infringement representations were false when they sent the takedown notices. *See id.* (granting motion to dismiss § 512(f) counterclaim). It does not.

The standard is subjective, not objective. Count One alleges that "[a]ny reasonable person" would have recognized that the videos' use of the Logo was fair. Motion at 10. That objective "reasonable person" theory is not the law. *See, e.g. Shaffer*, 2025 WL 2299173, at *2;

*Hosseinzadeh*, 276 F. Supp. 3d at 44. Bawtinheimer's alternative theory of willful blindness fares no better: willful blindness requires "proof that (1) the defendant subjectively believe[d] that there is a high probability that a fact exists, and (2) he/she must have taken deliberate action to avoid learning of that fact." *Shaffer*, 2025 WL 2299173, at *3. Count One pleads no facts supporting either element and, if anything, the facts show the contrary. Dkt. 31-5 (Graif Decl.); 31-7 (Church Decl.).

**B. A Good-Faith Disagreement Over Fair Use Cannot Support a § 512(f) Claim, and Courts in this District Routinely Dismiss Such Claims**

Bawtinheimer's claim reduces to a contention that her use of the Logo was fair use and that Counterclaim-Defendants should have recognized as much. Under Second Circuit law, that is not a § 512(f) violation. "[I]t is a complete defense to a claim under [§] 512… that the party issuing a takedown notice had a subjective good faith belief that the use in question was 'not authorized.'" *Shaffer*, 2025 WL 2299173, at *2 (quoting *Stern v. Lavender*, 319 F. Supp. 3d 650, 683 (S.D.N.Y. 2018)). A sender "need not have formed an objectively reasonable belief" that the targeted material infringed; it is enough that the sender "subjective[ly] belie[ved] [that] the identified material infringes [its] copyright." *Id.* And "[i]t is self-evident that a statement cannot be a misrepresentation for purposes of 17 U.S.C. § 512(f) if it is factually accurate, and the same is of course true for statements that are legally accurate." (quoting *Hosseinzadeh*, 276 F. Supp. 3d at 47).

Courts in this Circuit have dismissed § 512(f) claims at the pleading stage where the allegations are conclusory and do not include facts sufficient to support them. In *National Academy of Television Arts & Sciences, Inc. v. Multimedia System Design, Inc.*, the court dismissed a § 512(f) counterclaim where the counterclaimant asserted that the sender "had actual knowledge, or with reasonable diligence could have obtained knowledge" and that its takedown "had no merit,"

but did not allege any actual facts to support that assertion. *Nat'l Acad.*, 551 F. Supp. 3d at 433. The court therefore deemed the pleading "conclusory and insufficient to state a claim under § 512(f)." *Id.* Likewise, in *Hughes v. Benjamin*, the court dismissed a § 512(f) claim because the pleading did "not plausibly allege that [the sender] made misrepresentations … let alone knowing and material misrepresentations." 437 F. Supp. 3d 382, 395 (S.D.N.Y. 2020). As in those cases, Count One makes only conclusory assertions that paraphrase the statutory language, and does include any of the specific alleged facts required to support those assertions. As such, Bawtinheimer is attempting to convert a legal dispute regarding fair use into a knowing falsehood. That is improper, and certainly not supported by any allegations in the Complaint, and Count One thus must be dismissed.

### C. Conclusory and "Information and Belief" Allegations of Subjective Bad Faith are not Entitled to the Presumption of Truth

In the Second Circuit, the court accepts well-pleaded factual allegations as true and draws all reasonable inferences in the non-movant's favor. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009) However, courts are still guided by "two working principles": first, the tenet that a court must accept allegations as true "is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"; and, second, that "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 71-72 ((citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). "[L]abels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do," and a claim that does not include actual facts which permit the court "to draw the reasonable inference that the defendant is liable" has not been raised "above the speculative level." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (citing *Twombly*, 550 U.S. at 555)).

Count One cannot clear that bar. Its core allegations, *i.e.* that Counterclaim-Defendants "had actual subjective knowledge" that the use of the Logo was fair and lacked a "good-faith basis" for challenging it, or that they "knowingly materially misrepresented" infringement, are precisely the "[t]hreadbare recitals of the elements" that courts disregard. Motion at 9. A court "is not bound to accept" a pleader's characterizations, which are "legal conclusion[s], not … fact[s]." *S.E.C. v. One or More Unknown Traders in Sec. of Onyx Pharms., Inc.* 296 F.R.D. 241, 251 (S.D.N.Y. 2013); *see also Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015) ("Courts are not bound to accept as true a legal conclusion couched as a factual allegation.") (quoting *Iqbal*, 556 U.S. at 678).

That Bawtinheimer pleads her knowledge allegations "[o]n information and belief" confirms that her claim is defective. The Second Circuit has held that "[a] litigant cannot merely plop 'upon information and belief' in front of a conclusory allegation and thereby render it non-conclusory." *Zeitlin v. Palumbo*, 532 F. Supp. 3d 64, 69 (E.D.N.Y. 2021) (quoting *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018)). State-of-mind allegations that a defendant "knew, recklessly disregarded, or should have known" a fact, pleaded on information and belief, are "all belief and no information" and do not carry a claim "across the line from conceivable to plausible." *Onyx Pharms.*, 296 F.R.D. at 250-51. Count One's subjective-knowledge allegations are unsupported by any facts from which actual knowledge of falsity could be inferred and therefore fail under this standard.

## IV. Conclusion

The law in this Circuit confirms that Count should be dismissed. To properly plead a § 512(f) claim, a complaint must contain actual facts showing a knowing, subjective misrepresentation. A legal dispute regarding what does or does not constitute fair use is never actionable; and conclusory, information-and-belief assertions of bad faith are insufficient to defeat

a motion to dismiss. Because Bawtinheimer does not (and cannot) plead actual facts showing the essential element of subjective bad faith, and therefore amendment would be futile, Counterclaim-Defendants respectfully request that the Court dismiss Counterclaim Count One with prejudice.

Dated: October 22, 2026

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of October 2026, a true and correct copy of the foregoing document was served on counsel of record via CM/ECF.

*/s/ Michael R. Graif*