IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **03-D-2512 (PAC)**

KAREN DUDNIKOV,
MICHAEL MEADORS,

Pro Se Plaintiffs,

v.

MGA ENTERTAINMENT, INC., a California corporation,

Defendant.

Defendant's Motion for Summary Judgment

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Defendant MGA Entertainment, Inc. ("MGA") hereby moves for Summary Judgment.

I. INTRODUCTION

MGA is the exclusive owner of all rights in and to the internationally famous BRATZ Property (defined in ¶2 of the Statement of Undisputed Facts), including the "Sasha" character. The BRATZ Property has been enormously successful; with worldwide sales in the billions of dollars since BRATZ branded products were introduced. The BRATZ Property has spawned a full line of products, all sold either under license from MGA or manufactured by MGA itself.

Plaintiffs operate a "retail" business out of their home. Plaintiffs sell various items via their website and via auctions on eBay's website. Among the items sold by Plaintiffs are handmade items bearing well-known names, logos, characters, and insignia, owned by others. Relevant to this case, Plaintiffs allegedly purchased[1] a legitimate BRATZ appliqué and affixed it, with certain faux jewels, to a fleece hat that Plaintiff Dudnikov made herself. Plaintiffs then offered the hat for sale on eBay with the title "Girl's Fleece Hat w/ Bratz Appliqué of Sasha."

MGA's Senior Counsel, David Oakes, reviewed the auction, formed a good faith belief that the sale of this item infringed MGA's rights, and based on this belief, asked that eBay end the auction using eBay's Vero ("Verified Rights Owner") Program. After eBay did so, Plaintiffs filed suit, alleging that MGA acted wrongfully in notifying eBay of Plaintiffs' infringement.

Plaintiffs' complaint falls into two parts. First, Plaintiffs have raised five tort claims resulting from MGA's request that eBay remove Plaintiffs' auction of the BRATZ fleece hat.[2] Second, Plaintiffs seek a broad declaratory judgment that they and everyone else are authorized to manufacture and sell any items incorporating the BRATZ Property. (Complaint at 21-22.)

This court should grant MGA's motion for summary judgment because, as the Declaration of David Oakes demonstrates, MGA had a good faith belief that Plaintiffs were infringing MGA's copyright and trademark rights. Further, MGA's actions complied with the

[1] In the Complaint, Plaintiffs allege they received the item as a gift.
[2] Plaintiffs, however, do not seek any damages.

express terms of the Digital Millennium Copyright Act ("DMCA") and eBay's policies, and in any case, were not sufficiently wrongful to warrant relief under any of Plaintiffs' state law theories. Plaintiffs' request for declaratory judgment should also be denied as a matter of law, as there is no controversy in the form of a viable federal claim and Plaintiffs have failed to present facts to support an actual controversy, let alone request relief which is practically enforceable by this court. Finally, Plaintiffs' claim for perjury under 17 U.S.C. § 512(f) is not cognizable. Therefore, this Court should grant MGA's motion for summary judgment in its entirety.

II. STATEMENT OF UNDISPUTED FACTS

1. MGA is the exclusive owner of all rights in and to the internationally famous BRATZ characters (including all different authorized versions thereof), which include "SASHA", among others. (Decl. of David Oakes in Supp. of MGA's Opp. to Pls.' Mot. for Summ. Judg., filed April 27, 2004 ("Oakes Dec."), ¶ 2.) (These characters are referred to as the "BRATZ Characters." True and correct copies of exemplars of depictions of the BRATZ Characters are attached to the Oakes Dec. as **Ex. A-1**.)

2. MGA's rights in and to the BRATZ Characters include all intellectual and industrial property rights associated therewith, as set forth in the Oakes Dec., ¶ 5 (collectively referred to as the "BRATZ Property"). The BRATZ Characters, the associated images, designs, and expressions, and all other forms of intellectual property associated with the BRATZ Characters are extremely valuable to MGA. (Oakes Dec., ¶ 3.)

3. MGA has obtained federal copyright registrations for the BRATZ Characters (the "BRATZ Copyrights"). MGA has complied with all applicable copyright laws. The BRATZ Copyrights are valid, subsisting and in full force and effect. (Id., ¶ 6, **Ex. A-2**.)

4. In June 2001, MGA introduced a new line of fashion dolls known as the "BRATZ" which are three-dimensional depictions of the BRATZ Characters (hereinafter the "BRATZ Dolls"). (Id., ¶ 4.) The BRATZ Dolls were immediately popular. (Id., ¶¶ 7-8.)

5. A significant portion of MGA's business has been the creation and commercial exploitation of the BRATZ Property. MGA licenses third parties the right to use the BRATZ Characters in connection with a wide range of products and has numerous active licenses. In order to maintain its reputation and the value of its licenses, MGA carefully selects each licensee, who is subject to a strict quality review and approval program. (Oakes Dec., ¶ 10.)

6. The BRATZ Property is extremely valuable and successful. The BRATZ Property has received enormous amounts of unsolicited publicity, through various magazine and newspaper articles. (See Id., **Ex. A-3**.) In addition, MGA and/or its licensees have expended millions of dollars in advertising the BRATZ Products and in promoting the use of the BRATZ Characters on all licensed products. These products have been in great demand. (Id., ¶ 11.) The licensing of rights to the BRATZ Characters, and sale of BRATZ Products has generated hundreds of millions of dollars in revenue. (Id., ¶ 13.) As a result, the BRATZ Characters are extremely popular with the public, and have generated continuing publicity. (Id., ¶ 14.)

7. Through MGA's extensive sales and promotional efforts, and strict adherence to quality control standards, MGA and its BRATZ Property are associated in the public mind with high-quality products, and the BRATZ Property has considerable value to MGA. (Id., ¶ 15.) MGA has developed strong trademark rights in various elements associated with the sale and marketing of the BRATZ Property (hereinafter the "BRATZ Trademarks"). These BRATZ trademarks include, but are not limited to, the following: the names and designs of the BRATZ Characters, including the SASHA character. MGA has used the BRATZ Trademarks continuously on and in connection with the BRATZ Products since the inception of each of the various BRATZ Products, and these BRATZ Trademarks have never been abandoned. The BRATZ Trademarks are valid, subsisting and in full force and effect. (Oakes Dec., ¶ 16.)

8. Based on the extensive sales, promotion, and popularity of the BRATZ Products, the BRATZ Trademarks, including the BRATZ mark, the SASHA mark, and the SASHA

character design, have developed secondary meaning and significance in the minds of the public, and the services and products utilizing and/or bearing such marks are immediately identified by the purchasing public as being associated with MGA. (Id., ¶ 17.)

9. MGA has also obtained numerous federal trademark registrations for the BRATZ Trademarks, including registrations for the BRATZ and SASHA marks. (Id., **Ex A-4**.)

10. Unfortunately, due to the popularity of the BRATZ Products, products bearing infringements and counterfeits are being sold throughout the United States and elsewhere. MGA has undertaken substantial efforts to prohibit such activity through investigations, recordation of MGA's rights with U.S. Customs and international enforcement actions. (Id., ¶ 18.)

11. Child safety is an important issue in the design and manufacture of licensed BRATZ Products, including clothing. As MGA has no ability to supervise the quality of Plaintiffs' products, MGA cannot ensure that these products are not defective or inadequately designed, labeled or marked. This creates a risk of substantial peril for the consuming public, and an unavoidable risk of damage to the reputation and good will of MGA. (Oakes Dec., ¶ 21.)

12. Plaintiffs, Karen Dudnikov and Michael Meadors, are husband and wife and operate an unincorporated home-based business in Colorado. (Complaint ¶ 2.) In the course of their business, Plaintiffs sell items via their website, located at http://www.tabberone.com and via auctions on eBay's website. (Id. ¶ 2-3.) Among the items sold by Plaintiffs are homemade unlicensed items bearing the intellectual property owned by well-known companies. (Id. ¶ 3.)

13. Plaintiffs purchased a legitimate BRATZ appliqué of the SASHA mark from a retail store.[3] (Declaration of David K. Caplan in Support of MGA's Motion for Summary Judgment ("CD"), **Ex. A-11**, Ex. 2, Response No. 2.)[4] Plaintiffs attached the appliqué and faux jewels to a fleece hat made by Plaintiffs. (CD, **Ex. A-10**, p. 59:10-24.)

14. On or about December 2, 2003, Plaintiffs listed an eBay auction of the hat with

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[3] In their complaint Plaintiffs state that they obtained the appliqué as a gift. (Complaint ¶ 41.)

[4] For purposes of this Motion, MGA does not dispute that the appliqué was authorized and lawfully purchased.

the SASHA appliqué, the title of which was "Girl's Fleece Hat w/ Bratz Appliqué of Sasha." (Decl. of David K. Caplan in Supp. of MGA's Opp. to Pl.' Mot. for Sum. Judg., previously filed April 27, 2004 ("Opp. Dec."), **Ex. A-6**.) The description of the hat stated, "Fleece Hat for Girls has a Bratz Appliqué of Sasha and faux jewels for a darling effect." (Id.) The description of the auctioned item stated: "This is not a licensed Bratz Product. It is however hand-crafted with care using a licensed Bratz appliqué. I am not affiliated with Bratz or MGA Entertainment." (Id.)

15. MGA's Senior Counsel, David Oakes, reviewed Plaintiffs' auction and formed a good faith belief that Plaintiffs' hat affixed with a BRATZ appliqué infringed MGA's copyright and trademark rights, and based on his belief, requested that eBay remove the auction through eBay's Vero ("Verified Rights Owner") program. (Oakes Dec., ¶ 22.)

16. Plaintiffs visually inspected the fleece hat affixed with a BRATZ appliqué and faux jewels, but did no other quality control examination. (CD, **Ex. A-11**, Ex. 2, Response No. 6.) No flammability test was performed on the fleece hat affixed with a BRATZ appliqué and faux jewels before listing it for sale on eBay, as Plaintiffs claim that any such test is impractical and not required. (Id., Response No. 8.) In fact, Plaintiffs do not perform flammability tests on any of the products they offered for sale. (Id., Response No. 7.)

17. The fleece hat with the BRATZ appliqué contains no hangtag or label identifying Defendant as the owner of the BRATZ Property and the SASHA character. (CD, **Ex. A-10**, p. 59:25 – p. 60:19.)

18. On or about July 6 and July 27, 2004, and after Plaintiffs knew that MGA was represented by counsel, Plaintiff Dudnikov, posing as the fictitious "Ashley Weller" contacted Mr. Oakes via the ashweller2003@yahoo.com email address maintained by Plaintiff. (CD, **Ex. A-10**, p. 15:24; p. 21:20 – p. 24:18; p. 25:20- p. 27:13.) In such emails, Ms. Dudnikov listed eBay auctions selling various handcrafted items made of fabric containing BRATZ marks and asked David Oakes if such items were "allowed" by MGA. (Id., p. 25:20 – p. 27:13.)

19. Ms. Dudnikov used this identity because she did not want Mr. Oakes to see her note for the "set up that it was" and "there was also a possibility since we were involved in litigation that he would not read any email from me." (Id., p. 24:5-9; p. 26:15-18.)

III. ARGUMENT

A. Summary Judgment Standard.

To succeed on this Summary Judgment motion, MGA must demonstrate that there are no genuine issues of material fact to be resolved, and that MGA is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). An issue of fact is genuine if a reasonable jury could return a verdict for the nonmoving party. Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 797 (10th Cir. 1997). Thus, MGA must establish that no reasonable jury could return a verdict for Plaintiffs, even when the evidence is viewed in the light most favorable to Plaintiffs. See Concrete Works of Colorado, Inc. v. City & County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994.) MGA may fulfill its burden by pointing out the absence of evidence in Plaintiffs' favor: "The party moving for summary judgment has the initial burden of identifying for the trial court the absence of genuine issues of fact, but once this burden is satisfied, summary judgment is mandated if the nonmovant fails to come forward with specific evidence demonstrating a triable issue of fact as to each essential element of his case." County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1511 (10th Cir. 1991), citing Celotex, 477 U.S. at 322-23.

Based upon the applicable law, no reasonable jury could find in Plaintiffs' favor.

B. The Court Should Grant MGA's Motion for Summary Judgment As To Plaintiffs' Five Affirmative Claims Regarding the Removal of their Auction.

1. MGA's Conduct Was Privileged.

Each of Plaintiffs' five affirmative claims is based on MGA's submission of a notice to eBay regarding Plaintiffs' auction. Pursuant to Cal. Civ. Code § 47(2), this notice is absolutely

privileged.[5] See Leegin Creative Leather Prods. v. M.M. Rogers & Co., 33 U.S.P.Q.2d 1158, 1159-60 (C.D. Cal. 1994). The privilege extends to demand letters. Id.; Lerette v. Dean Witter Org., Inc., 60 Cal.App.3d 573, 577-78, 131 Cal. Rptr. 592 (Cal Ct. App. 1976). Thus, all torts asserted by Plaintiffs against MGA are, in fact, precluded due to their privileged status. See Silberg v. Anderson, 50 Cal. 3d 205, 215-16, 266 Cal. Rptr. 638, 786 P.2d 365 (1990) (en banc).

In addition to the litigation privilege, MGA's acts were privileged by reason of MGA's protection of its own intellectual property rights. See CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (hereinafter "CALLMANN") § 9:8, "A Privilege to Interfere" (4th ed. 2004). First, with respect to copyright infringement, MGA was acting pursuant to and in accord with the DMCA, which requires only that a copyright holder form a good faith belief of an alleged or "claimed" infringement prior to sending a notice of infringement. See Digital Millennium Copyright Act ("DMCA"), 17 USC § 512 (2004); Rossi v. MPAA, --F.3d--, 2004 WL 2725717 *4 (9th Cir., December 1, 2004); CALLMANN, § 9:8. This standard is a subjective standard. Rossi, --F.3d--, 2004 WL 2725717 *4.

As Mr. Oakes' declaration states, MGA had a good faith belief that Plaintiffs' auction infringed its rights. (Oakes Dec, ¶ 22.) This declaration provides sufficient evidence to justify MGA's good faith belief and action in notifying eBay pursuant to the DMCA. See DMCA, 17 USC § 512 (2004); Rossi, --F.3d--, 2004 WL 2725717. As MGA complied with the terms of the DMCA, its actions were privileged.[6] See CALLMANN, § 9:8. Moreover, Mr. Oakes' statements are unchallenged - Plaintiffs chose not to depose him. The undisputed evidence establishes that MGA acted in good faith and there is an absence of evidence to suggest otherwise.

Furthermore, although MGA complied with the *subjective* standard set forth by the DMCA, (see 17 U.S.C; Rossi, --F.3d--, 2004 WL 2725717), MGA's good faith was also

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[5] The California privilege applies in this case as the email was sent in California from a California resident to a California resident. See AroChem Int'l, Inc. v. Buirkle, 968 F.2d 266, 270-71 (2d. Cir. 1992).

[6] In addition, Plaintiffs' claims are preempted by the DMCA, which specifically authorizes MGA's conduct.

objectively reasonable and justified. It is undisputed that MGA owns the copyrights in the BRATZ characters, including the SASHA character. There is also no dispute that Plaintiffs attempted to sell a hat affixed with a BRATZ appliqué surrounded by faux jewels, a product that was not licensed by MGA. Therefore, it is reasonable that MGA would find that Plaintiffs' product could constitute an unauthorized derivative work under the Copyright Act. A derivative work includes any work based on the copyrighted work where it has been "recast, transformed, or adapted." 17 U.S.C. § 106. See, e.g., Mirage Editions., Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343-44 (9th Cir. 1988); Greenwich Workshop, Inc. v. Timber Creations, Inc., 932 F. Supp. 1210, 1215 (C.D. Cal. 1996); Munoz v. A.R.T. Co., 829 F. Supp. 309 (D. Alaska 1993).

In Mirage, the defendant removed artworks from a commemorative book and applied this artwork to ceramic tiles. The artist and book publisher sued for copyright infringement. The Ninth Circuit rejected the defendant's first sale doctrine argument, finding that the defendant's conduct created an unauthorized derivative work. Mirage, 856 F.2d at 1343-44.

Similarly, Plaintiffs took MGA's BRATZ appliqué, adorned it with faux jewels, and mounted the adorned item to a different item, Plaintiffs' own homemade hat, thereby creating an unauthorized BRATZ hat. Based on Mirage and its progeny, MGA reasonably formed a good faith belief that Plaintiffs' product was an infringing derivative work. Given the facts that (1) the auction occurred on eBay's web site, (2) eBay is located in the Ninth Circuit, and (3) Plaintiffs have submitted to California jurisdiction through their eBay auction listing agreement (Opp. Dec., **Ex. A-9**), Plaintiffs' conduct at issue in this case should be governed by Mirage and the Ninth Circuit's standard with respect to the creation of derivative works. Even if Plaintiffs' product was not a derivative work (which it is), MGA reasonably relied on Mirage and Ninth Circuit law in forming its good faith belief that Plaintiffs' conduct infringed MGA's rights. The undisputed evidence establishes that MGA had a good faith belief that Plaintiffs' product was an infringing derivative work, and Plaintiffs have submitted no evidence whatsoever to contradict

MGA's assertion that it acted in good faith when it asked eBay to terminate the auction.

Moreover, MGA's good faith belief is also justified under trademark law. See Leopold v. Henry I. Siegel Co., 1987 WL 5373 *4, (S.D.N.Y. 1987) ("A trademark owner is entitled to ... inform others that he is seeking to enforce his rights....") There is no dispute that Plaintiffs' conduct in this case was unauthorized. (See Oakes Dec., ¶ 23.) It is also undisputed that MGA owns the registered trademarks for the BRATZ marks, including the SASHA mark. The title of Plaintiffs' auction, which is what draws traffic to the auction, utilized both the BRATZ and SASHA marks. This results in "initial interest confusion," a type of confusion that is actionable under the Lanham Act. See, Brookfield Communications, Inc. v. West Coast Entertainment, 174 F.3d 1036, 1062 (9th Cir. 1999); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir.), cert. dismissed, 521 U.S. 1146 (1997). Moreover, the inclusion of the disclaimer does not dispel confusion. Charles of the Ritz Group, Ltd. v. Quality King Distrib., Inc., 832 F.2d 1317, 1324 (2d Cir. 1997) (disclaimers are "generally ineffective").

In addition, purchasers are not the only ones who come into contact with Plaintiffs' goods. People viewing the hat when worn by a purchaser are likely to believe that the item is authorized by MGA when, in fact, it is not. (See Oakes Dec.) In Karl Storz Endoscopy Am., Inc. v. Surgical Tech., Inc., 285 F.3d 848, 854 (9th Cir. 2002), the Court recognized that "post sale confusion," or "confusion on the part of someone other than the purchaser who, for example, simply sees the item after it has been purchased, can establish the required likelihood of confusion under the Lanham Act." The Court further recognized that "Post-sale confusion... may be no less injurious to the owner's reputation than confusion on the part of the purchaser at the time of sale." Id. In Payless Shoesource, Inc. v. Reebok Intern. Ltd., 998 F.2d 985, 989 (Fed. Cir. 1993), the Court recognized that the Tenth Circuit would find post sale confusion to be actionable. The hat sold by Plaintiffs bears no indication to post-sale consumers that the item was not an authorized MGA product. It bears no hangtag or trademark notice, as are typically

found on licensed items. (CD, **Ex. A-10**, p. 59:25 – p. 60:19.) MGA reasonably believed that consumers who come into conduct with Plaintiffs' hat would believe that it was authorized by MGA. Based on this evidence, MGA reasonably believed that Plaintiffs' conduct infringed MGA's trademark rights, and Plaintiffs have submitted no evidence to the contrary.

Plaintiffs likewise do not make fair use of MGA's BRATZ and SASHA registered trademarks, or the SASHA character design mark. See 2 MCCARTHY ON TRADEMARKS, § 11:49 (4th ed. 2002). Plaintiffs use the word marks to draw traffic to their auction, and to enhance their promotion of the infringing product. Id. In addition, Plaintiffs admit that they exercised nearly no quality control measures in making the infringing hat. The unauthorized use of the BRATZ and SASHA marks in Plaintiffs' auction establish that MGA reasonably formed a good faith belief that Plaintiffs had infringed upon MGA's trademarks, and Plaintiffs have not and cannot submit evidence to the contrary. This reasonably formed belief establishes that MGA's protection of its rights is privileged. CALLMANN, § 9:8.

Based upon the undisputed facts, MGA was not only reasonable but in fact correct, in forming a good faith belief that Plaintiffs were violating MGA's rights. Plaintiffs have failed to raise a genuine issue of material fact with regard to MGA's good faith belief. This Court should grant MGA's motion on the basis of MGA's absolute privilege under Cal. Civ. Code § 47(2), pursuant to the DMCA's good faith belief standard, and pursuant to MGA's common law right to protect its intellectual property rights.

2. Plaintiffs' Claim Under 17 U.S.C. § 512(f) Is Unavailable.

Plaintiffs' first claim for relief for "perjury" fails because there is no such civil claim. Morgan v. Graham, 228 F.2d 625, 627 (10th Cir. 1956).

Plaintiffs' Complaint cites the DMCA, which provides for a claim where "any person … knowingly materially misrepresents under this section … that material or activity is infringing…." 17 U.S.C. § 512 (f) (emphasis added). Plaintiffs cannot succeed on such a claim

because the evidence establishes, at a minimum, that MGA had a good faith belief that Plaintiffs' auctioned product violated MGA's rights. The DMCA only requires that a copyright holder form a subjective good faith belief of infringement prior to sending notices. See, 17 USC § 512 (2004); Rossi, --F.3d--, 2004 WL 2725717 *4. As set forth above, MGA *had* a subjective good faith belief. Moreover, under 17 U.S.C. § 512 (f), Plaintiffs must show that MGA knowingly materially misrepresented facts to eBay. Rossi, --F.3d--, 2004 WL 2725717. Plaintiffs cannot establish that MGA made any material misrepresentation regarding Plaintiffs' hat. Plaintiffs do not dispute that MGA owns the copyrights in the BRATZ Characters, including the SASHA character. Based on this ownership and leading Ninth Circuit authority (see, Mirage, 856 F.2d 1343-44), there is no evidence that Mr. Oakes made any knowing material misrepresentation. Plaintiffs admit that they have no evidence regarding MGA's good faith belief other than Mr. Oakes' notice to eBay. (CD, **Ex. A-11**, Ex. 2, Interrog. Response No. 18, Document Response Nos. 12, 14, 16, 20, Exs. 3, 4.) Plaintiffs chose not to depose Mr. Oakes. Based on this absence of evidence, and the law supporting Mr. Oakes' belief that Plaintiffs' auctions violated MGA's rights, this Court should grant MGA's motion for summary judgment.[7]

3. Plaintiffs Have Failed To Establish Tortious Interference with Contract.

To succeed on their claim for tortious interference with contract, Plaintiffs must establish that they had a contract, that MGA knew or should have known of the contract, that MGA intentionally induced the other party to the contract not to perform the contract, and that MGA's actions damaged Plaintiffs. See Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984); U.S. West, Inc. v. Business Discount Plan, Inc., 196 F.R.D. 576, 593-94 (D. Colo. 2000). The interference must also be improper. U.S. West, 196 F.R.D. at 593-94. The improper conduct alleged by Plaintiffs is the alleged misrepresentation that Plaintiffs' auction infringed MGA's rights. However, the assertion of a

[7] Furthermore, MGA's notice was also based on its trademark rights, to which 17 U.S.C. § 512 (f) does not apply.

legal right is only improper where the defendant has no belief in the merit of its claimed right or in its right to enforce such rights in litigation, or where it acts in bad faith, *or* brings the claim to harass the plaintiff rather than protect its own rights. See, Westfield Development Co. v. Rifle Investment Assocs., 786 P.2d 1112, 1118 (Colo. 1990); see also Cardtoons, L.C. v. Major League Baseball Players Assoc., 335 F.3d 1161, 1164-66 (10th Cir. 2003). Plaintiffs have adduced no evidence to establish that MGA lacked good faith, intended to harass Plaintiffs, or did anything other than attempt to protect MGA's valid intellectual property rights.

4. Plaintiffs Have Not Established Negligent and Fraudulent Misrepresentation.

To succeed on their third and fourth claims, Plaintiffs must show that MGA made a misrepresentation of a material fact, that Plaintiffs relied on that misrepresentation, that such reliance was justified, and that Plaintiffs were damaged as a result of such reliance. Nielson v. Scott, 53 P.3d 777, 779-80 (Colo. App. 2002). Plaintiffs have failed to identify or establish *any* misrepresentations of fact by MGA. Instead, they rely solely on the email submitted by MGA to eBay, in which e-mail MGA merely expressed its opinion and good faith belief to eBay that the Plaintiffs' auction infringed its intellectual property rights. (Oakes Dec, ¶ 22.) "Expressions of opinion cannot support a misrepresentation claim." Mehaffy, Rider, Windholz & Wilson v. Central Denver Bank, 892 P.2d 230, 237 (Colo. 1995) (en banc); See Two, Inc. v. Gilmore, 679 P.2d 116, 117 (Colo. Ct. App. 1984) ("representation of law is only an expression of opinion and is impotent to...support an action for damages.") As set forth herein, based on MGA's copyright and trademark rights, MGA's good faith belief is amply supported by the law. In addition, although Plaintiffs allege that eBay relied on the alleged misrepresentations, Plaintiffs do not allege that they relied on the alleged misrepresentations. As such, Plaintiffs have failed to plead the necessary element of reliance. Finally, to succeed on the third claim for negligent misrepresentation, Plaintiffs must also show that MGA owed a duty of care to Plaintiffs. See Miami Int'l Realty Co. v. Paynter, 841 F.2d 348, 352 (10th Cir. 1988). Plaintiffs have not shown

and cannot provide any evidence that MGA owed Plaintiffs any duty of care. Plaintiffs' claims of fraudulent and negligent misrepresentation fail as a matter of law and must be rejected.

5. Plaintiffs Have Not Established Outrageous Conduct.

To succeed on their outrageous conduct claim, Plaintiffs must establish that MGA's conduct was extreme and outrageous, that MGA acted recklessly or with the intent to cause Plaintiffs severe emotional distress, and that Plaintiffs suffered severe emotional distress. Archer v. Farmer Bros. Co., 70 P.3d 495, 499 (Colo. App. 2002). Plaintiffs cannot meet the extremely high threshold required by Colorado law. See Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859, 866 (Colo. App. 2001); Coors Brewing Co. v. Floyd, 978 P.2d 663, 665-66 (Colo. 1999). Rather, as a matter of law, MGA's assertion of its rights cannot be considered outrageous, in light of the law and the DMCA, which amply support MGA's good faith belief that Plaintiffs' auction infringed MGA's rights. Finally, there is an absence of evidence to establish the requisite intent by MGA or injury to Plaintiffs. A reasonable jury could only find in favor of MGA, thereby warranting summary judgment for MGA.

6. Plaintiffs' Complaint is Barred by the Doctrine of Unclean Hands

"The unclean hands defense bars ...pursuit of a cause of action if the plaintiff is guilty of misconduct in a transaction directly related to that cause of action...." Sunrise Financial, Inc. v. PaineWebber, Inc., 4 F.Supp.2d 1035, 1043 (D. Utah 1998), *vacated in part by* Sunrise Financial, Inc. v. PaineWebber, Inc., 164 F.Supp.2d 1277 (D. Utah, 2001), citing Dale v. Jennings, 90 Fla. 234, 107 So. 175, 180 (1925). After Plaintiff Dudnikov was aware that MGA was represented by counsel, she sent several e-mails to Mr. Oakes using the fictitious email name, "Ashley Weller" because she did not want Mr. Oakes to see her e-mail for "the set up that it was" and because "there was also a possibility since we were involved in litigation that he would not read any email from me." (CD, **Ex. A-10**, p. 15:24; p. 21:20 – p. 24:18; p. 25:20- p. 27:13.) This impersonation is clearly deceptive and constitutes an act of criminal impersonation

under Colorado law. See, C.R.S.A. § 18-5-113. Plaintiff Dudnikov knowingly assumed a false or fictitious identity or capacity with the intent to unlawfully gain a benefit for herself, or to injure MGA. See, C.R.S.A. § 18-5-113 (1) (e). Plaintiff's intent to gain a benefit may be inferred from her knowing use of the false identity and acknowledged intent to secure an advantage. See, People v. Borrego, 30 P.3d 718, 721-722 (Colo. 2000). Plaintiffs' complaint should be barred under the unclean hands doctrine and MGA should be granted Summary Judgment on this basis. Estate of Bruner v. Bruner, 338 F.3d 1172, 1179 (10th Cir. 2003).

C. The Court Should Grant MGA's Motion for Summary Judgment As To Plaintiffs' Request for Declaratory Relief.

In addition to the claims discussed above, Plaintiffs also seek a broad declaration that anyone can do anything with a lawfully acquired BRATZ item that they wish. (See Complaint at 21-22.) Plaintiffs believe that they are entitled to do anything with MGA's BRATZ products and property. (CD, **Ex. A-11**, p. 45:23 – p. 46:2; p. 50:25 – p. 51:7; p. 55:13 - p. 56:10; p. 69:17-21; CD, **Ex. A-10**, p. 31:15-20; p. 46:18 – p. 47:1.)

Plaintiffs' request for declaratory relief asks that this Court obliterate a copyright owner's exclusive right under 17 U.S.C. § 106(2) to create or to authorize the creation of a derivative work. Every court, from Mirage to the cases relied upon by Plaintiffs, agrees that a copyright owner has the exclusive right to create derivative works. Mirage, 856 F.2d at 1343-44. While some courts draw the line differently, no court provides that there is an unfettered right to take a copyrighted work and do with it as one wishes, as the Plaintiffs request. Therefore, Plaintiffs' requested declaratory relief fails because they have not requested "specific relief through a decree of a conclusive character." See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937); Vieux v. East Bay Regional Park Dist., 906 F.2d 1330, 1344 (9th Cir. 1990) Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 965 (10th Cir. 1996).

Moreover, this court has discretion in granting declaratory relief, as the existence of a

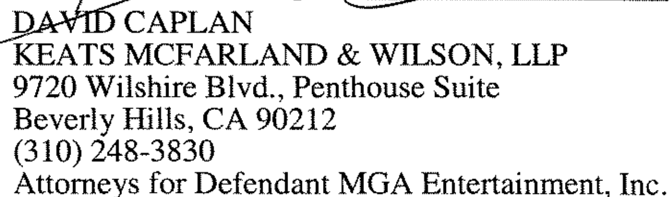
"case" does not confer upon Plaintiffs an absolute right to a declaratory judgment. See Kunkel v. Continental Casualty Co., 866 F.2d 1269, 1273 (10th Cir. 1989). Plaintiffs must allege facts to show that a substantial controversy exists, and that it is of sufficient immediacy and reality to warrant declaratory relief. Maryland Casualty Co. v. Pacific Oil & Coal Co., 312 U.S. 270, 273 (1941). Aydin Corp. v. Union of India, 940 F.2d 527, 528 (9th Cir. 1991); Paramount Pictures Corp. v. Replay TV, 298 F.Supp.2d 921, 924 (C.D. Cal. 2004). Plaintiffs have attempted to sell a specific hat adorned in a specific way. However, Plaintiffs' request for declaratory relief as to products that have yet to be produced would require the court to speculate on the appearance, type of sale, and advertisements used with such products, let alone the broad range of possible products that could be covered by the requested relief. This type of conjecture does not render an appropriate form of relief and such relief is not practically enforceable by any court. See United Food & Commercial Workers Union v. Albertson's Inc., 207 F.3d 1193 (10th Cir. 2000). By failing to demonstrate that there is a substantial controversy of sufficient immediacy and reality, Plaintiffs' request for declaratory relief should be denied.

Finally, based on the failure of Plaintiffs' 17 U.S.C. § 512 (f) claim, "Plaintiffs are not entitled to a declaratory judgment under 28 U.S.C. § 2201, as there is no longer any controversy in the form of a viable federal claim." See Dudnikov v. E! Enter. Telev., Civil Action 03-D-2334 (PAC) (D. Colo. 2003 Recomm. of U.S. Mag. Judge entered Sept. 9, 2004).

IV. CONCLUSION

This Court should grant MGA's Motion. MGA requests oral argument on this motion.

Respectfully submitted,



DATED: December 21, 2004

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Attorneys for Defendant MGA Entertainment, Inc.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, say:

I am and was at all times herein mentioned a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding. My business address is 9720 Wilshire Boulevard, Penthouse Suite, Beverly Hills, California 90212, and I am employed in the offices of Keats McFarland & Wilson LLP by a member of the Bar of this Court at whose direction the service mentioned herein below was made.

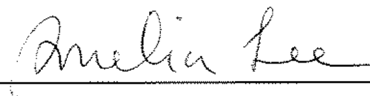
I am readily familiar with the normal business practice of my employer for the collection and processing of correspondence and other materials for mailing with the United States Postal Service. In the ordinary course of business, any materials for mailing with the United States Postal Service and placed by me for collection in the office of my employer is deposited the same day with the United States Postal Service.

On December 21, 2004, I served the within **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** upon interested parties named below by placing a true and correct copy thereof in an envelope addressed as follows:

Karen Dudnikov
Michael Meadors
P.O. Box 87
3463 Maskoke Trail
Hartsel, CO 80449

I sealed said envelope(s) and, following the ordinary business practices of my employer, placed said sealed envelope(s) in the office of my employer at 9720 Wilshire Boulevard, Penthouse Suite, Beverly Hills, California 90212, for collection and mailing with the United States Postal Service on the same date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 21, 2004, at Beverly Hills, California.



Amelia Lee