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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 STAR FABRICS, INC., a California
15 Corporation

16 Plaintiff,

17 v.

18 ZULILY, LLC, *et al.*,

19 Defendants.

Case No.: 2:17-cv-08358-AB-AS
Hon. Andrew Birotte Jr. Presiding

**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS**

Date: March 2, 2018
Time: 10:00 AM
Courtroom: 7B

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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 Through this motion, Zulily, LLC claims that it cannot be held liable for
3 copying Star’s original artwork. Zulily is understandably eager to limit its liability
4 for transacting in infringing goods—in the past two years it has earned the dubious
5 distinction of being sued for copyright infringement more than any other
6 company,¹ yet ironically, and improperly,² it seeks to paint Star Fabrics as a
7 “professional litigant.” But Zulily’s motion is poorly grounded—the artwork at
8 issue is certainly entitled to copyright protection and was plainly copied by Zulily.
9 Therefore, this motion must be denied.

10 Since the start of this case Zulily has taken unreasonable positions while
11 claiming that Star has refused to confer in good faith and/or engaged in a game of
12 “hide the ball.” But, as set forth more fully below, these accusations are baseless
13 and reflect nothing more than Zulily’s frustration at Star’s refusal to confer inside
14 of incorrect legal standards.

15
16 _____
17 ¹ Should this Court conduct a PACER search, it will find scores of infringement
18 lawsuits filed against Zulily in this district over the past two years by copyright
19 holders including NS Textiles, Jitrade, Inc., Jacqueline Maldonado, Wendy
20 Sloane, Kilina America, Inc., Unicolors, Inc., Joanne Fabric, Inc., Fabric Selection,
Universal Dyeing & Printing, Inc., Neman Brothers and Associates, Inc., Couture
Textile, Inc., Acmet, Inc., Design Collection Inc., Citi Prints, Inc., Standard
Fabrics Int’l, Inc., Gold Value Int’l Textile, Inc., Italian Connection, Inc., Desire
LLC, LA Century Textiles Inc. and Zelouf West Ltd.

21 ² As noted by another court in this district:

22 The use of past litigation to cast doubt on a litigant’s present credibility warrants careful
23 scrutiny. *See D’Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir.
24 2008) (involving ADA claims), *cert. denied*, 129 S.Ct. 2824, 174 L.Ed.2d 569 (2009).
25 Here Defendants submit evidence that Plaintiff has filed scores of copyright infringement
26 actions in the Central District. Although this fact is consistent with Defendants’ theory, it
is equally consistent with Plaintiff’s being a successful design company that needs to
protect its intellectual property from widespread infringement. Thus, Plaintiff’s unrelated
litigation is not probative of any material fact[...]

27 *See L.A. Printex v. The Buckle, Inc.*, Case No. CV09-02468 (“Order on Plaintiff’s
28 Motion for Summary Adjudication”) at 6-7 (Hon. Dolly M. Gee) (Dkt. No. 56).

1 Zulily initially sought to meet and confer over a motion to dismiss *all seven*
2 of the claims at issue in this case on lack of substantial similarity grounds. This
3 was extremely surprising to Star since the images incorporated into the Complaint
4 demonstrate that Star’s original artwork was copied wholesale. Nevertheless,
5 Zulily’s counsel insisted that Plaintiff identify “the original, and thus protectable,
6 elements of each design at issue in these (sic) case.” See Dkt 25-1 (Exhibit A-10).
7 In response, Star’s counsel wrote, “I am unaware of any part of the artwork at issue
8 that is not original authorship.” See Dkt 25-1 (Exhibit A-8).

9 Unsatisfied, Zulily’s counsel continued to press Star to “identify the specific,
10 original ‘protectable elements’ that you will be claiming are substantially
11 similar...” See Dkt 25-1 (Exhibit A-8). Through this exchange, it became clear that
12 Zulily’s counsel was attempting to require Star to analyze and dissect its wholly
13 original artwork under the mistaken belief that “[a]nalytic dissection applies to
14 fabric claims too.” See Dkt 25-1 (Exhibit A-8). Star resisted Zulily’s efforts to
15 confer over an incorrect legal standard for evaluating substantial similarity,³
16 reiterated its belief that its work was entirely original, and refused to “specifically
17 identify each element since you can see them with your own eyes.” See Dkt 25-1
18 (Exhibit A-4).

19 Zulily’s meet and confer efforts were confounding since Star’s Complaint
20 plainly demonstrated that Zulily copied original artistic expression wholesale.
21 Consider the images of Subject Design B (from ¶ 21 of Star’s Complaint):

22 ///

23 ///

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26 ³ As discussed more fully in section II(A) below, *L.A. Printex Indus., Inc. v.*
27 *Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012), *as amended on denial of reh'g and*
28 *reh'g en banc* (June 13, 2012), specifically holds that analytic dissection is not
appropriate for fabric design artwork cases.

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Subject Design B



Subject Product B



Incredibly, Zulily’s counsel claimed: “With my own eyes, I see no similarities whatsoever between protectable, original expression.” See Dkt 25-1 (Exhibit A-2).

Despite this outrageous statement, Star held a meet and confer call with Zulily to discuss each design. Following that meet and confer call, Zulily agreed to limit this motion to only Designs A, D, E, and G. See Dkt 25-1 (Exhibit A-12). However, Designs E and G⁴ are also identical or near identical reproductions of Star’s artwork, as can be seen in Paragraphs 33 and 41 of the Complaint, and below:

⁴ Star’s claims regarding Design D have been dismissed from this case (see Docket No. 15) and are no longer at issue.

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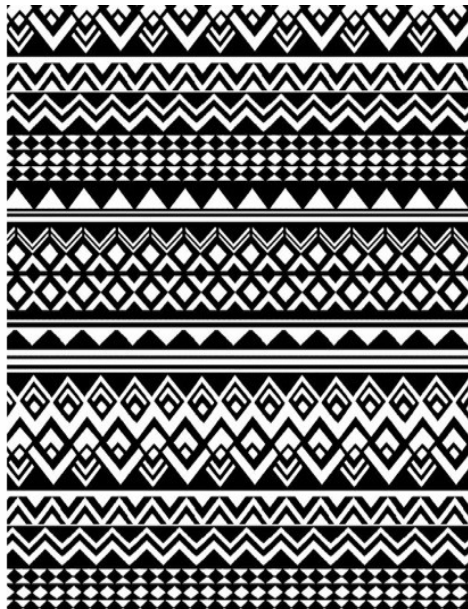
Subject Design E



Subject Product E



Subject Design G



Subject Product G



Apparently realizing that it could not argue a lack of substantial similarity in good faith as to any other designs, Zulily ultimately brought this motion only as to Design A (Star's 37493 design).

1 Design A was registered with the United States Copyright Office under
2 Registration Number VA 1-809-706, which has an effective date of registration of
3 December 9, 2011. Per that registration certificate, the work was completed in
4 2011 and first published on October 31, 2011.

5 Zulily has provided no information regarding the provenance of the design
6 accused of infringing Design A.

7 **II. ARGUMENT**

8 To succeed on its copyright infringement claims, Star need only establish (1)
9 ownership of a copyright, and (2) infringement, i.e., that Zulily copied protectable
10 elements of the Subject Design. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477,
11 481 (9th Cir. 2000), *citing Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

12 Here, Zulily seeks judgment on the grounds that there is no substantially
13 similarity of protectable expression, and thus no copying. The Ninth Circuit “has
14 expressed a certain disfavor for summary judgment on questions of substantial
15 similarity.” *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991).
16 Moreover, in this case, Zulily simply cannot establish, as a matter of law, either
17 that Star lacks a valid copyright in its Design A or that no reasonable factfinder
18 could conclude that Zulily copied original expression of Design A. Therefore, this
19 motion must be denied.

20 **A. Star holds a valid copyright in Design A.**

21 As the subject of a timely registration, Design A is presumed to be original,
22 copyrightable work and Star is presumed to hold a valid copyright in and to it. So
23 owing, Zulily bears the burden of disproving either the originality or copyright
24 protectability of the design. In its feeble attempt to meet that burden, Zulily points
25 to the existence of other stylistically similar designs and argues, in essence, that
26 zig-zag patterns are unoriginal and should not be afforded copyright protection—an
27 argument foreclosed by controlling Ninth Circuit and Supreme Court authority. To
28

1 the extent this motion seeks a finding that Design A is not protectable as a matter
2 of law, it must be denied.

3 A certificate of registration made before or within five years of first
4 publication of the registered work is *prima facie* evidence of the validity of the
5 copyright. 17 U.S.C. §410(c); *S.O.S., Inc. v. Payday, Inc.* 886 F.2d 1081, 1085
6 (9th Cir. 1989) (citing *Durham Industries, Inc. v. Tomy Corp.*, 630 F.2d 905, 908
7 (2d Cir. 1980)). It is well-established that the copyright certificate constitutes
8 *prima facie* evidence of the validity of the copyright and facts stated in the
9 certificate, and shifts the burden to Defendants to offer proof that these facts are
10 not true. 17 U.S.C. § 410(c); *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345
11 F.3d 1140, 1144-45 (9th Cir. 2003); *see also N. Coast Indus. v. Jason Maxwell,*
12 *Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) (“Under our copyright law, the
13 registration of the copyright certificate itself establishes a *prima facie* presumption
14 of the validity of the copyright in a judicial proceeding...”).

15 As set forth above, Design A was created, published, and registered with the
16 Copyright Office in 2011. As such, it enjoys a presumption of originality and
17 copyrightability.

18 Alleged infringers bear the burden of rebutting the presumption of validity.
19 *Hamil America Inc. v. GFI*, 193 F.3d 92, 98 (2d Cir. 1999). To rebut the
20 presumption, competent evidence must be introduced, such as when the “alleged
21 infringer ‘offers proof that the plaintiff’s product is copied from other works.’”
22 *Entm’t Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1218
23 (9th Cir.1997) (quoting *Masquerade Novelty, Inc. v. Unique Indus., Inc.* 912
24 F.2d 663, 668-69 (3d Cir. 1990)).

25 Zulily seeks to meet this burden by first arguing that Star has failed to
26 articulate “any particular elements embodied within Subject Design A that it
27 claims constitute its own protectable, original expression.” See Docket 23-1, 7:10-
28

1 12. But this argument is flatly improper since “[a]s the copyright claimant,
2 [plaintiff] is presumed to own a valid copyright...and the facts stated therein,
3 including the chain of title in the source artwork, are entitled to the presumption of
4 truth.... By failing to point to any evidence indicating that the copyright was
5 invalid [defendant] has failed to rebut the presumption.” *United Fabrics Int’l, Inc.*
6 *v. C&J Wear, Inc.*, 630 F.3d 1255, 1258 (9th Cir. 2011) (“By repeatedly
7 mentioning that [plaintiff] provided ‘no evidence,’ we are skeptical that
8 [defendant] understands that it bears the burden of providing ‘some evidence’ of
9 invalidity.”).

10 Zulily’s only other “evidence” that Star’s design is that there are numerous
11 other variations of “Missoni” style zig-zag patterns. From this evidence, Zulily
12 argues that the “zig-zag pattern is a ubiquitous design concept common in the
13 fashion industry, which was popularized not by the plaintiff, but by the well-
14 known Missoni fashion house decades ago.” See Docket 23-1, 7:22-24. But this
15 evidence proves too much—a review of the different “Missoni” style zig-zag
16 patterns presented by Zulily demonstrate that they are in fact a myriad of ways to
17 create original zig-zag patterns.

18 Moreover, it is entirely irrelevant and of no consequence that zig-zag
19 patterns are “a ubiquitous design concept common in the fashion industry,” or that
20 “[t]his precise kind of design has been done, by Missoni and all its many imitators
21 throughout the fashion industry, repeatedly, for decades.” See Docket 23-1, 8:3-4.
22 Star Fabrics is not claiming protection in the zig-zag “concept” or “kind of
23 design,” it is merely claiming protection in its own original variation on that
24 “concept” or “kind of design.” Zulily would be entirely correct to argue that no
25 person is entitled to monopolize the idea of zig-zag designs, just as no person
26 would be entitled to claim a copyright on the idea of floral designs, paisley
27 designs, animal skin artwork, and many other types of artwork commonly used in
28

1 the fashion industry. But as long as protectable artistic expression exists—even if it
2 is of well-trodden subject matter—that specific expression is protectable under
3 copyright.

4 Indeed, in *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th
5 Cir. 2012), *as amended on denial of reh'g and reh'g en banc* (June 13, 2012), the
6 Ninth Circuit reversed a district Court’s grant of summary judgment on a ditsy
7 floral print. Rejecting the defendants’ arguments that such designs were
8 ubiquitous, unoriginal, and are generally indistinguishable from one another, the
9 Court found that “there are gazillions of ways to combine petals, buds, stems,
10 leaves, and colors in floral designs on fabric” and that such designs therefore are
11 not only entitled to copyright protection, but broad protection. *Id.* at 850–51. Thus,
12 while a copyright plaintiff may not claim protection in the idea of a floral design
13 (or zig-zag, or paisley, etc...) it may certainly claim copyright protection on its
14 particular expression of that idea.⁵

15 Similarly, in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003) the Ninth Circuit
16 explained that while the ideas of animals are free for all artists to draw from, an
17 artist may “protect the original expression he or she contributes to these ideas. An
18 Artist may vary the pose, attitude, gesture, muscle structure, facial expression,
19 coat, or texture of the animal...” 323 F.3d 813. *Satava* concerned glass-in-glass
20 jellyfish sculptures and while the Ninth Circuit in that case reversed the trial
21 court’s finding of infringement because it found no evidence that protectable
22 expression was copied, it specifically acknowledged that Satava’s work was
23 protectable by copyright with respect to “the distinctive curls of particular tendrils;
24 the arrangement of certain hues; the unique shape of jellyfishes' bells... and other
25

26 ⁵ Page 16 of Zulily’s motion (lines 23-26) fails to recognize that the *Aeropostale*
27 court was simply discussing the idea-expression dichotomy when it noted that the
28 floral design at issue in that case “had elements that are not protectable, for
example the combination of open flowers and closed buds in a single bouquet...”

1 artistic choices [that] were not governed by jellyfish physiology or the glass-in-
2 glass medium”. 323 F.3d at 812. ⁶

3 Zulily correctly notes that basic geometric shapes including “straight or
4 curved lines” are not protectable under the Copyright Act. See Docket 23-1, 19:13-
5 15 (citing U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT
6 OFFICE PRACTICES § 906.1 (3d ed. 2017). But *Satava* and *Aeropostale* make
7 clear that original expression contributed to stylized renderings of geometric
8 designs are certainly entitled to copyright protection. Thus, again, the relevant
9 question is only whether Design A includes original artistic expression.

10 As should be clear from Star’s complaint, Design A is not a generic zig-zag,
11 but a stylized design⁷ featuring significant artistic expression in the varying
12 techniques used and effects reached in each “line” of the zig-zag, as can be seen
13 below (from Paragraph 17 of Star’s Complaint):

14 **Subject Design A**



15 **Subject Product A**



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24 ⁶ *Satava* also falls directly in line *Mattel*, which holds “[s]ubstantial similarity for
25 copyright infringement requires a similarity of expression, not ideas.” *Mattel, Inc.*
26 *v. MGA Entm’t, Inc.*, 616 F.3d 904, 917 (9th Cir. 2010), *as amended on denial of*
reh’g (Oct. 21, 2010), citing *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir.
1987).

27 ⁷ Indeed, Zulily’s motion admits that Design A is a zig-zag design created in a
28 specific style, i.e., the Missoni style.

1 As further highlighted in Section 2 below, Design A is composed of lines of
2 differing thicknesses, some of which are solid, others of which are composed of
3 stylized dashes (some of which move from right to left as they go from top to
4 bottom, while the dashes that make up other lines go from left to right as they go
5 from top to bottom), and still others of which are made up of other shapes.

6 There can be no real question that Design A is entitled to copyright
7 protection. Indeed, the Supreme Court recently held that infringement may lie from
8 copying garments featuring nothing more than a series of lines, zig-zags, and color
9 blocks having much less originality than Design A. In *Star Athletica, L. L.*
10 *C. v. Varsity Brands, Inc.*, 580 U. S. ___, 137 S.Ct. 1002, 197 L.Ed. 354
11 (2017), the Court considered the validity of “200 U.S. copyright registrations for
12 two-dimensional designs appearing on the surface of... uniforms and other
13 garments... [which] are primarily ‘combinations, positionings, and arrangements
14 of elements’ that include ‘chevrons ..., lines, curves, stripes, angles, diagonals,
15 inverted [chevrons], coloring, and shapes.’” 137 S.Ct. 1007. The Court concluded
16 that such designs were entitled to copyright protection and affirmed the Court of
17 Appeals (which held that plaintiff was entitled to proceed on its infringement
18 claims). *Id.* at 1018 (“[an] arrangement of colors, shapes, stripes, and chevrons on
19 the surface of the cheerleading uniforms...would qualify as ‘two-dimensional ...
20 works of ... art’”).

21 Below is a relevant sampling of the designs at issue in *Star Athletica* (from
22 the Appendix to the Opinion of the Court):

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8 Zulily’s argument that “[a]s far as [it] can tell, nothing about Subject Design
9 A is conceivably original, except, perhaps, the color selection” (Dkt. 23-1, 20:22-
10 24) demonstrates a fundamental misunderstanding of protectability under
11 copyright law. The artistic zig-zag rendering in Design A does not “necessarily
12 flow” from the idea of a zig-zag—such designs do not inherently have either lines
13 of varying thickness and composition or any particular ordering of the color palate.

14 A quick study of Design A readily reveals the artistic expression contained
15 in it and Zulily has offered this Court no basis to rebut the presumption of
16 originality Star Fabrics holds in Design A. Therefore, this motion must be denied
17 to the extent it is based on the argument that Design A lacks protectable artistic
18 expression.

19 **B. A comparison of the designs in the Complaint is sufficient to**
20 **support Star’s claim for copying.**

21 In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 572 US ___, 188
22 L.Ed.2d 979 (2014), the Supreme Court stated that in a copyright infringement
23 case, “[k]ey evidence in the litigation, then, will be the certificate, the original
24 work, and the allegedly infringing work. And adjudication will often turn on the
25 factfinder’s direct comparison of the original and the infringing work, *i.e.*, on the
26 factfinder’s ‘good eyes and common sense’ in comparing the two works’ ‘overall
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1 concept and overall feel.” 134 S.Ct. 1977 (citing *Peter F. Gaito Architecture, LLC*
2 *v. Simone Development Corp.*, 602 F. 3d 57, 66 (2nd Cir. 2010)).

3 Zulily’s motion attempts to apply the far more complicated “abstraction-
4 filtration” test to this case, and spills much ink discussing its component merger
5 and scenes-a-faire doctrines. But it is well-settled that those tests are inapplicable
6 to two-dimensional artwork infringement cases; rather, the *Petrella* standard set
7 forth above is to be applied.

8 In *King Zak Industries, Inc. v. Toys 4 U USA, Corp.*, 7-16-cv-09676, a case
9 decided just two months ago, the court partially denied defendant's motion for
10 judgment on the pleadings, rejecting defendant's argument that the court should
11 apply the "abstraction-filtration-comparison" test to the works at issue when
12 determining substantial similarity. The Court held:

13 "few federal courts have applied the ['abstraction-filtration-
14 comparison' ('AFC')] test outside the context of computer
15 program copyrights. . . . That test--a version of which was
16 originally created by Learned Hand and applied in the context
17 of plays and novels . . . was reformulated in *Computer*
18 *Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d
19 Cir. 1992), specifically to address the complex nature of
20 computer programs, which 'are likely to be somewhat
21 impenetrable by lay observers--whether they be judges or
22 juries--and, thus, seem to fall outside the category of works
23 contemplated by those who engineered the [ordinary
24 observer] test.' . . . [I]n a case such as this, where the works
25 contains both protectable and unprotectable elements, the
'inquiry is more holistic' and the Court is to compare the
works' 'total concept and overall feel . . . as instructed by our
good eyes and common sense.' . . . [B]ecause Plaintiff's
copyright is easily analyzed by a layperson, I need not apply
the complex AFC test."

26 The recent *King Zak Industries* case is consistent with controlling Ninth
27 Circuit authority. In *Aeropostale*, the Court noted that “[i]n comparing fabric
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1 designs, we examine the similarities in their "objective details in appearance,"
2 including, but not limited to, 'the subject matter, shapes, colors, materials, and
3 arrangement of the representations.'"676 F.3d at 849. It said nothing about any
4 other test (other than acknowledging that unprotectable ideas be separated from
5 protectable artistic expression of those ideas). To the contrary, the *Aeropostale*
6 Court specifically brought the Ninth Circuit's standard for comparing fabric
7 designs in line with the Second Circuit, noting that:

8 the Second Circuit has rejected the argument that, "in
9 comparing [fabric] designs for copyright infringement," a
10 court must "dissect them into their separate components,
11 and compare only those elements which are in
12 themselves copyrightable... " *Knitwaves, Inc. v.*
13 *Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir.1995))...
14 Though the Second Circuit's "ordinary observer" and
15 "more discerning ordinary observer" tests differ
16 somewhat from our two-part extrinsic/intrinsic test for
substantial similarity, its reasoning, at least in the context
of fabric designs, is persuasive, and it guides our
comparison of the designs in this case.

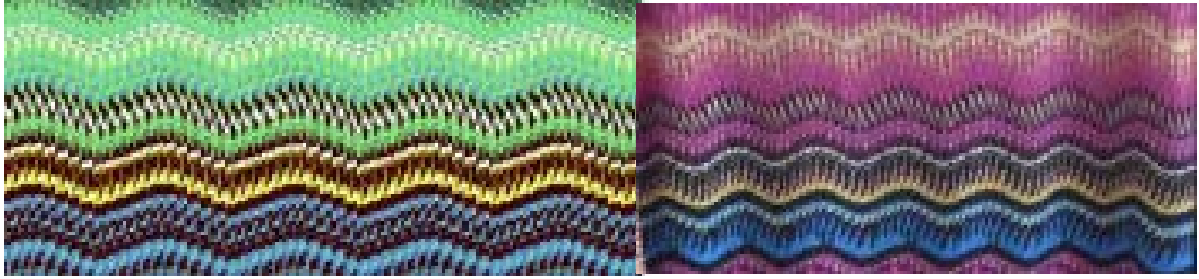
17 *Id.* at 849-850.⁸

18 In this case, an examination of the original and the infringing work
19 establishes at least a question of fact as to whether copying has occurred. To
20 facilitate that examination, below is a portion of the images contained in Paragraph
21 17 of the Complaint (of Design A and Zulily's offending artwork), slightly
22 enlarged to facilitate viewing of the respective designs:

23 ///

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25 _____
26 ⁸ The cases relied on by Zulily in which the abstraction-filtration test was applied to
27 separate out scenes a faire and the merger doctrine are not two-dimensional art
28 cases—rather, they concern software, plays, novels, and a 1933 decision regarding
a "silent photoplay"—all cases in which a juror could not easily look at and
compare the works at issue.



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6 Moving from top to bottom, both designs consist of an initial zig-zag—green in
7 Design A and pink in Zulily’s design—followed by a crème colored gap of space.
8 If the green coloring in Design A were changed to pink, the top half of both
9 designs would be virtually indistinguishable. Next, both designs feature a zig-zag
10 made up of black left to right back-slashes against a crème background—in Design
11 A it is between two green zig-zag lines and in the Zulily design it is between two
12 pink zig-zag lines. Then, under the respective green and pink lines there is a thin
13 black line, under which is a thin crème line, under which is a thick black zig-zag
14 line which incorporates a knife design that drops from right to left and merges into
15 the solid yellow zig-zag line beneath. Under that are a substantially similar series
16 of black and blue lines.

17 Given the remarkable line-by-line similarity set forth above, there is at least
18 a question for the jury as to whether the similarity of the designs in this case is the
19 result of copying—particularly where, as here, Zulily has put forth no evidence in
20 support of independent creation or any other defense.

21 Zulily may attempt to argue perceived differences between the designs, but
22 perceived differences cannot defeat an infringement claim where it otherwise
23 appears that protectable artistic expression was copied. Indeed, in *Aeropostale* the
24 Court noted that “a rational jury could find that these differences result from the
25 fabric-printing process generally and are ‘inconsequential.’” *Id.* at 851. The Court
26 further explained:

1 The differences noted by the district court do not compel
 2 the conclusion that no reasonable juror could find that
 3 Defendants' design is substantially similar to C30020.
 4 Rather, in light of the similarities described above, the
 5 differences support the opposite conclusion, that there is
 6 a genuine dispute of material fact on substantial
 7 similarity.

8 *Id.* (citing 4 Nimmer on Copyright § 13.03[B][1][a] ("It is entirely immaterial that,
 9 in many respects, plaintiff's and defendant's works are dissimilar, if in other
 10 respects, similarity as to a substantial element of plaintiff's work can be shown.")).

11 And even if Design A were only entitled to "thin" protection, the above
 12 analysis would preclude granting this motion since the standard for striking
 13 similarity is not verbatim reproduction, but rather that the alleged copy is "so
 14 strikingly similar as to preclude the possibility of independent creation." *Lipton v.*
 15 *Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995); see also *Selle v. Gibb*, 741 F.2d 896,
 16 903 (7th Cir. 1984) (a striking similarity is one sufficiently unique or complex as to
 17 make it unlikely that it was independently created). Given the remarkable line-by-
 18 line similarity set forth above, there would still be a question for the jury as to
 19 striking similarity even if differences could be articulated.

20 When the factfinders in this case uses their "'good eyes and common sense'
 21 in comparing the two works' 'overall concept and overall feel'"—as directed by
 22 the Supreme Court in *Petrella*, they certainly will have grounds to find that Zulily
 23 infringed on Design A. Therefore, this motion must be denied.

24 **III. SHOULD THE COURT FIND STAR'S COMPLAINT**
 25 **DEFICIENT IN ANY REGARD, LEAVE TO AMEND**
 26 **SHOULD BE GRANTED.**

27 Assuming arguendo the Complaint failed to sufficiently allege ownership of
 28 a valid copyright or copying of protectable expression, this Court should grant
 leave to amend so that Star may more clearly plead those elements since "[l]eave

1 to amend ‘shall be freely given when justice so requires,’ ... and this policy is to be
2 applied with extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893
3 F.2d 1074, 1079 (9th Cir. 1990), quoting Fed. R. Civ. P. 15(a)(2). Should this
4 Court deem it necessary, Star can certainly incorporate additional images and/or
5 analysis into its Compliant to more clearly spell out what it believes is already
6 clear from Paragraphs 14-17—that Zulily has copied protectable original artwork
7 from Design A and should resultantly be found liable for infringement.

8 **IV. CONCLUSION**

9 Zulily admits that Design A is a stylized rendition of a zig-zag pattern and
10 cannot in good faith deny that said rendition contains protectable artistic
11 expression. Moreover, a simple comparison of Design A and the offending Zulily
12 design reveals striking similarity of that very same artistic expression, line-by-line.
13 So owing, this motion must be denied.

14
15 Respectfully submitted,

16
17 Dated: February 2, 2018

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