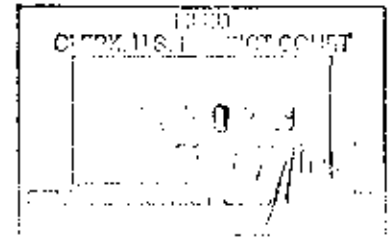


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CHRISTIAN AUDIGIER, INC.; NERVOUS TATTOO, INC.;
12 SHOP ON STAGE, INC.; AND CHRISTIAN AUDIGIER

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

15 BRYAN CALLAN, an Individual,
16 Plaintiff,

17 v.

18 CHRISTIAN AUDIGIER, INC., a
California Corporation; NERVOUS
19 TATTOO, INC., a California Corporation;
SHOP ON STATE, INC., a California
20 Corporation; CHRISTIAN AUDIGIER, an
Individual; and DOES 1-10, inclusive,
21 Defendants.

22 CHRISTIAN AUDIGIER, INC.; a
California corporation; and CHRISTIAN
23 AUDIGIER, an individual;

24 Counterclaimants,

25 v.

26 BRYAN CALLAN, an individual,
27 Counterdefendant.
28

Civil Action No.

CV08-8072 GW (JWJx)

**DEFENDANTS CHRISTIAN
AUDIGIER, INC.'S;
NERVOUS TATTOO, INC.'S;
SHOP ON STAGE, INC.'S;
AND CHRISTIAN
AUDIGIER'S ANSWER TO
FIRST AMENDED
COMPLAINT AND
COUNTERCLAIMS**

DEMAND FOR JURY TRIAL

Honorable George Wu

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1 Defendants, Christian Audigier, Inc. ("CAI"); Nervous Tattoo, Inc.
2 ("NTI"); Shop on Stage, Inc. ("SOS"); and Christian Audigier ("Audigier")
3 (collectively "Defendants"), hereby respond to the First Amended Complaint
4 ("Complaint") of Plaintiff Bryan Callan ("Plaintiff" or "Callan"). Defendants
5 CAI and Augdier also state counterclaims against Plaintiff. Defendants further
6 demand a trial by jury. The numbered paragraphs of this Answer correspond to
7 the numbered paragraphs in the Complaint.

8 INTRODUCTION

9 Responding to the allegations contained in the Introduction of the
10 Complaint, Defendants admit that CAI and Audigier entered into a written
11 agreement ("the Agreement") with Callan whereby Callan sold to CAI and
12 Audigier Plaintiff's original artworks, as well as the copyright rights thereto,
13 and whereby CAI and Audigier could use Plaintiff's original artworks in
14 connection with Audigier's eponymous product line. Defendants further admit
15 that a term of the Agreement was that, subject to an exception, every use of
16 Callan's art was required to display Plaintiff's logo. Defendants also admit that
17 this logo employs a four leaf clover motif and that "Mr. Lucky" is the name
18 under which Callan creates his art.

19 With respect to the last paragraph of the Introduction of the Complaint,
20 Defendants admit that Plaintiff has filed a Complaint making certain allegations.

21 Defendants lack information sufficient to form a belief as to whether prior
22 to March 2006 Plaintiff granted to Audigier an oral license to use certain of
23 Plaintiff's works of art or whether the exposure Callan was allegedly to receive
24 through inclusion of his name and logo on Defendants CAI's and Audigier's use
25 of his artwork was the main factor in inducing him to enter into the Agreement,
26 and on that basis, deny those allegations.

27 Defendants deny the remainder of the allegations contained in the
28 Introduction of the Complaint.

1 **JURISDICTION AND VENUE**

2 1. Defendants assert that this is primarily a breach of contract claim
3 under California law. Defendants admit that Plaintiff has asserted one claim for
4 relief arising under the Trademark Act of 1946 (the "Lanham Act"), as
5 amended. Defendants deny that this Action properly arises under the Copyright
6 Act of 1976 ("the Copyright Act"), as amended, because the Court lacks subject
7 matter jurisdiction under the Copyright Act on the ground that Plaintiff has not
8 asserted that any registered copyrights are infringed. Defendants further assert
9 that to the extent Plaintiff's California state law claims are based upon alleged
10 improper use of Plaintiff's artwork, these claims are preempted by the
11 Copyright Act, 17 U.S.C. § 301.

12 2. Defendants admit that this Court has federal question jurisdiction
13 over one claim for relief under 28 U.S.C. § 1331 and § 1338 (a) and (b).
14 Defendants also admit that this Court has supplemental jurisdiction over the
15 California statutory and common law claims pursuant to 28 U.S.C. § 1367(a)
16 because the state law claims are so related to the federal claims under the
17 Lanham Act that they form part of the same case or controversy, but assert that
18 the breach of contract claim under California law is the primary basis of this
19 lawsuit. Defendants deny the remainder of the allegations contained in
20 Paragraph 2 of the Complaint.

21 3. Defendants admit the allegations contained in paragraph 3 of the
22 Complaint.

23 **PARTIES**

24 4. Defendants lack information sufficient to form a belief as to the
25 truth or falsity of the allegations contained in paragraph 4 of the Complaint, and
26 on that basis, deny those allegations.

27 5. Defendants admit that CAI is a California corporation. Defendants
28 deny that CAI has a mailing address or registered office located at 1135 N.

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1 Mansfield Avenue, Los Angeles, CA 90038. CAI's mailing address and
2 registered office is located at 8680 Hayden Place, Culver City, CA 90232.

3 6. Defendants admit that NTI is a California corporation. Defendants
4 deny that NTI has a mailing address or registered office located at 1135 N.
5 Mansfield Avenue, Los Angeles, CA 90038. NTI's mailing address and
6 registered office is located at 8680 Hayden Place, Culver City, CA 90232.

7 7. Defendants admit that SOS is a California corporation. Defendants
8 deny that SOS has a mailing address or registered office located at 1135 N.
9 Mansfield Avenue, Los Angeles, CA 90038. SOS's mailing address and
10 registered office is located at 8680 Hayden Place, Culver City, CA 90232.

11 8. Defendants admit the allegations contained in paragraph 8 of the
12 Complaint.

13 9. Defendants lack information sufficient to form a belief as to the
14 truth or falsity of the allegations contained in paragraph 9 of the Complaint, and
15 on that basis, deny those allegations.

16 10. Defendants deny the allegations contained in paragraph 10 of the
17 Complaint.

18 **FACTUAL ALLEGATIONS**

19 11. Defendants lack information sufficient to form a belief as to the
20 truth or falsity of the allegations contained in paragraph 11 of the Complaint,
21 and on that basis, deny those allegations.

22 12. Defendants admit that Plaintiff's nickname is "Mr. Lucky" and his
23 logo ("Mr. Lucky logo") employs a text and four-leaf clover motif. Defendants
24 lack information sufficient to form a belief as to the truth or falsity of the
25 remainder of the allegations contained in paragraph 12 of the Complaint, and on
26 that basis, deny those allegations.

27 13. Defendants deny that they have infringed any rights owned by
28 Callan and that Callan owns any copyright rights in the artwork purchased from

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1 him by Defendants CAI or Audigier. Defendants lack information sufficient to
2 form a belief as to the truth or falsity of the remainder of the allegations
3 contained in paragraph 13 of the Complaint, and on that basis, deny those
4 allegations.

5 14. Defendants lack information sufficient to form a belief as to the
6 truth or falsity of the allegation that prior to March 2, 2006, Callan and Audigier
7 entered into an oral license, and on that basis, deny that allegation. Defendants
8 admit that on or about March 2, 2006, Callan and CAI and Audigier executed
9 the Agreement, which was to allow the use of certain of Callan's works of art.
10 Defendants deny the remainder of the allegations contained in paragraph 14 of
11 the Complaint.

12 15. Defendants lack information sufficient to form a belief as to the
13 truth or falsity of the allegations contained in paragraph 15 of the Complaint,
14 and on that basis, deny those allegations.

15 16. Defendants admit that the Agreement required that CAI and
16 Audigier (but not NTI or SOS) accompany "each and every use of [Callan's]
17 Artwork, or part thereof", with a "clearly visible" Mr. Lucky logo. Defendants
18 deny the remainder of the allegations contained in paragraph 16 of the
19 Complaint.

20 17. Defendants admit that the Agreement required that CAI and
21 Audigier (but not NTI or SOS) use "commercially best efforts and a good faith
22 effort to market and advertise Lucky's logo and/or name in each and every
23 marketing, public relations and advertising effort" made in connection with their
24 use of Callan's artwork. Defendants deny the remainder of the allegations
25 contained in paragraph 17 of the Complaint.

26 18. Defendants admit that the Agreement required that CAI and
27 Audigier (but not NTI or SOS) provide Callan with the right of first refusal if
28 they make "the decision to sell, lease, license, or in any manner otherwise

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1 provide any third party with the right to utilize [Callan's] Artwork in any way."
2 Defendants deny the remainder of the allegations contained in paragraph 18 of
3 the Complaint.

4 19. Defendants admit that Callan, CAI and Audigier (but not NTI or
5 SOS) duly executed the Agreement. Defendants deny the remainder of the
6 allegations contained in paragraph 19 of the Complaint.

7 20. Defendants admit that they each offer products for sale around the
8 world, selling millions of units. Defendants further admit that they each operate
9 retail stores in high-end shopping outlets, hold fashion shows, operate branded
10 stores, hold a network of sub-licensees, and advertise in the United States.
11 Defendants further admit there is a nightclub in Las Vegas called "Christian
12 Audigier. The Nightclub", but deny that any of the Defendants own it.
13 Defendants deny the remainder of the allegations contained in paragraph 20 of
14 the Complaint.

15 21. Defendants admit that CAI, Audigier and SOS (but not NTI) have
16 manufactured, imported, marketed, purchased and/or sold garments and other
17 products incorporating Callan's claimed works of art. Defendants deny the
18 remainder of the allegations contained in paragraph 21 of the Complaint.

19 22. Defendants admit that CAI'S sub-licensees and contractors have
20 created products incorporating Plaintiff's claimed work and that these products
21 include wines, air fresheners, handbags and shoes. Defendants deny the
22 remainder of the allegations contained in paragraph 22 of the Complaint.

23 23. Defendants deny the allegations contained in paragraph 23 of the
24 Complaint.

25 24. Defendants deny the allegations contained in paragraph 24 of the
26 Complaint.

27 25. Defendants admit that CAI, Audigier and SOS (but not NTI), as
28 well as CAI's and NTI's sub-licensees and contractors, have manufactured,

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1 distributed and/or sold some products incorporating Callan's claimed artwork
2 without the Mr. Lucky logo. Defendants further admit that advertising
3 campaigns, marketing materials, and pictures of celebrities wearing apparel
4 incorporating Plaintiff's claimed artwork, have been published and distributed
5 in the United States by CAI, Audigier and SOS (but not NTI), and that in some
6 of such depictions the Mr. Lucky logo is not visible. Defendants deny the
7 remainder of the allegations contained in paragraph 25 of the Complaint.

8 26. Defendants admit that in an interview with *Sense* magazine,
9 Audigier was asked about his CHRISTIAN AUDIGIER® clothing line, and that
10 the printed version of that interview quoted Audigier's response in part as: "It's
11 me, it's mine." Defendants also admit that when Audigier was asked about
12 artists that he emulates, the printed version of Audigier's response in part was:
13 "You know, there are many influences." Defendants further admit that no
14 reference to Callan was made in the printed article. Defendants deny the
15 remainder of the allegations contained in paragraph 26 of the Complaint.

16 27. Defendants deny the allegations contained in paragraph 27 of the
17 Complaint.

18 28. Defendants lack information sufficient to form a belief as to
19 whether any of the alleged promises described in paragraph 28 of the Complaint
20 induced Callan to enter into the Agreement, and on that basis, deny those
21 allegations. Defendants deny the remainder of the allegations contained in
22 paragraph 27 of the Complaint.

23 29. Defendants deny the allegations contained in paragraph 29 of the
24 Complaint.

25 30. Defendants deny the allegations contained in paragraph 30 of the
26 Complaint.

27 31. Defendants deny the allegations contained in paragraph 31 of the
28 Complaint.

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1 32. Defendants deny the allegations contained in paragraph 32 of the
2 Complaint.

3 33. Defendants deny the allegations contained in paragraph 33 of the
4 Complaint.

5 34. Defendants deny the allegations contained in paragraph 34 of the
6 Complaint.

7 **FIRST CLAIM FOR RELIEF**

8 35. Defendants CAI and Audigier repeat and reallege the responses to
9 the allegations contained in paragraphs 1-34 of the Complaint as if fully set
10 forth herein.

11 36. Defendants CAI and Audigier admit that on or about March 2,
12 2006, Plaintiff entered into a written contract with CAI and Audigier referred to
13 herein as the Agreement. Defendants deny that NTI and SOS entered into such
14 an agreement with Plaintiff.

15 37. Defendants CAI and Audigier deny the allegations contained in
16 paragraph 37 of the Complaint.

17 38. Defendants CAI and Audigier deny the allegations contained in
18 paragraph 38 of the Complaint.

19 39. Defendants CAI and Audigier deny the allegations contained in
20 paragraph 39 of the Complaint.

21 **SECOND CLAIM FOR RELIEF**

22 40. Defendants repeat and reallege the responses to the allegations
23 contained in paragraph 1-39 of the complaint as if fully set forth herein.

24 41. Defendants lack information sufficient to form a belief as to the
25 truth or falsity of the allegations contained in paragraph 41 of the Complaint,
26 and on that basis, deny those allegations.

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1 42. Defendants lack information sufficient to form a belief as to the
2 truth or falsity of the allegations contained in paragraph 42 of the Complaint,
3 and on that basis, deny those allegations.

4 43. Defendants lack information sufficient to form a belief as to the
5 truth or falsity of the allegations contained in paragraph 43 of the Complaint,
6 and on that basis, deny those allegations.

7 44. Defendants deny the allegations contained in paragraph 44 of the
8 Complaint.

9 45. Defendants deny the allegations contained in paragraph 45 of the
10 Complaint.

11 46. Defendants deny the allegations contained in paragraph 46 of the
12 Complaint.

13 **THIRD CLAIM FOR RELIEF**

14 47. Defendants repeat and reallege the responses to the allegations
15 contained in paragraphs 1-46 of the Complaint as if fully set forth herein.

16 48. Defendants deny the allegations contained in paragraph 48 of the
17 Complaint.

18 49. Defendants deny the allegations contained in paragraph 49 of the
19 Complaint.

20 50. Defendants deny the allegations contained in paragraph 50 of the
21 Complaint.

22 51. Defendants deny the allegations contained in paragraph 51 of the
23 Complaint.

24 52. Defendants deny the allegations contained in paragraph 52 of the
25 Complaint.

26 53. Defendants deny the allegations contained in paragraph 53 of the
27 Complaint.

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1 54. Defendants deny the allegations contained in paragraph 54 of the
2 Complaint.

3 55. Defendants deny the allegations contained in paragraph 55 of the
4 Complaint.

5 56. Defendants deny the allegations contained in paragraph 56 of the
6 Complaint.

7 57. Defendants deny the allegations contained in paragraph 57 of the
8 Complaint.

9 58. Defendants deny the allegations contained in paragraph 58 of the
10 Complaint.

11 59. Defendants lack information sufficient to form a belief as to
12 whether certain of Plaintiff's claimed works of art were applied for to be
13 copyrighted and whether any such applications were within the time period
14 required to seek statutory damages and attorney's fees, and on that basis, deny
15 those allegations. Defendants deny the remainder of the allegations contained in
16 paragraph 59 of the Complaint.

17 **FOURTH CLAIM FOR RELIEF**

18 60. Defendants repeat and reallege the responses to the allegations
19 contained in paragraphs 1-59 of the Complaint as if fully set forth herein.

20 61. Defendants deny the allegations contained in paragraph 61 of the
21 Complaint.

22 62. Defendants deny the allegations contained in paragraph 62 of the
23 Complaint.

24 63. Defendants deny the allegations contained in paragraph 63 of the
25 Complaint.

26 64. Defendants deny the allegations contained in paragraph 64 of the
27 Complaint.

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1 65. Defendants deny the allegations contained in paragraph 65 of the
2 Complaint.

3 66. Defendants admit that Plaintiff seeks a permanent injunction as set
4 forth in the Complaint. Defendants deny the remainder of the allegations
5 contained in paragraph 66 of the Complaint.

6 67. Defendants deny the allegations contained in paragraph 67 of the
7 Complaint.

8 68. Defendants deny the allegations contained in paragraph 68 of the
9 Complaint.

10 69. Defendants deny the allegations contained in paragraph 69 of the
11 Complaint.

12 **FIFTH CLAIM FOR RELIEF**

13 70. Defendants repeat and reallege the responses to the allegations
14 contained in paragraphs 1-69 of the Complaint as if fully set forth herein.

15 71. Defendants deny the allegations contained in paragraph 71 of the
16 Complaint.

17 72. Defendants deny the allegations contained in paragraph 72 of the
18 Complaint.

19 73. Defendants deny the allegations contained in paragraph 73 of the
20 Complaint.

21 74. Defendants deny the allegations contained in paragraph 74 of the
22 Complaint.

23 **SIXTH CLAIM FOR RELIEF**

24 75. Defendants repeat and reallege the responses to the allegations
25 contained in paragraphs 1-74 of the Complaint as if fully set forth herein.

26 76. Defendants deny the allegations contained in paragraph 76 of the
27 Complaint.

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1 77. Defendants deny the allegations contained in paragraph 77 of the
2 Complaint.

3 78. Defendants deny the allegations contained in paragraph 78 of the
4 Complaint.

5 **SEVENTH CLAIM FOR RELIEF**

6 79. Defendants CAI and Audigier repeat and reallege the responses to
7 the allegations contained in paragraphs 1-78 of the Complaint as if fully set
8 forth herein.

9 80. Defendants CAI and Audigier deny the allegations contained in
10 paragraph 80 of the Complaint.

11 81. Defendants CAI and Audigier admit that they have entered into a
12 written contract with Plaintiff. Defendants deny the remainder of the allegations
13 contained in paragraph 81 of the Complaint.

14 82. Defendants CAI and Audigier deny the allegations contained in
15 paragraph 82 of the Complaint.

16 83. Defendants CAI and Audigier deny the allegations contained in
17 paragraph 83 of the Complaint.

18 84. Defendants CAI and Audigier deny the allegations contained in
19 paragraph 84 of the Complaint.

20 85. Defendants deny the allegations contained in paragraph 85 of the
21 Complaint.

22 **EIGHTH CLAIM FOR RELIEF**

23 86. Defendants repeat and reallege the responses to the allegations
24 contained in paragraphs 1-85 of the Complaint as if fully set forth herein.

25 87. Defendants deny the allegations contained in paragraph 87 of the
26 Complaint.

27 88. Defendants deny the allegations contained in paragraph 88 of the
28 Complaint.

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1 89. Defendants deny the allegations contained in paragraph 89 of the
2 Complaint.

3 90. Defendants deny the allegations contained in paragraph 90 of the
4 Complaint.

5 91. Defendants deny the allegations contained in paragraph 91 of the
6 Complaint.

7 **NINTH CLAIM FOR RELIEF**

8 92. Defendants repeat and reallege the responses to the allegations
9 contained in paragraphs 1-91 of the Complaint as if fully set forth herein.

10 93. Defendants deny the allegations contained in paragraph 93 of the
11 Complaint.

12 94. Defendants admit that Plaintiff requests a declaratory judgment as
13 set forth in the Complaint. Defendants deny the remainder of the allegations
14 contained in paragraph 94 of the Complaint.

15 **TENTH CLAIM FOR RELIEF**

16 95. Defendants repeat and reallege the responses to the allegations
17 contained in paragraphs 1-94 of the Complaint as if fully set forth herein.

18 96. Defendants admit that CAI, Audigier and SOS (but not NTI) have
19 in their possession, or an interest in, products and material incorporating, in
20 whole or in part, Plaintiff's claimed works of art. Defendants further admit that
21 they have realized revenues from the sale of products that incorporate Plaintiff's
22 claimed artwork. Defendants deny the remainder of the allegations contained in
23 paragraph 96 of the Complaint.

24 97. Defendants deny the allegations contained in paragraph 97 of the
25 Complaint.

26 98. Defendants deny the allegations contained in paragraph 98 of the
27 Complaint.

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1 99. Defendants deny the allegations contained in paragraph 99 of the
2 Complaint.

3 100. Defendants deny the allegations contained in paragraph 100 of the
4 Complaint.

5 101. Defendants deny the allegations contained in paragraph 101 of the
6 Complaint.

7 102. Defendants admit that Plaintiff seeks an imposition of a
8 constructive trust as set forth in the Complaint. Defendants deny the remainder
9 of the allegations contained in paragraph 102 of the Complaint.

10 **AFFIRMATIVE DEFENSES**

11 **First Affirmative Defense**

12 **(Failure to State a Claim)**

13 103. Plaintiff has failed to state a claim upon which relief may be
14 granted.

15 **Second Affirmative Defense**

16 **(Waiver of Breach of Contract)**

17 104. Plaintiff waived any alleged breach of written or oral contract by
18 electing to treat any such contract as still alive, and continuing to perform and
19 accept further performance of any such contract from CAI and Audigier, with
20 knowledge of the alleged breach of the Agreement by CAI and Audigier.

21 **Third Affirmative Defense**

22 **(Laches)**

23 105. Plaintiff's claims are barred by the doctrine of laches by reason of
24 Plaintiff's undue delay in presentation of his claims against Defendants, which
25 delay has created a prejudice to Defendants.

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Fourth Affirmative Defense

(Estoppel)

106. Plaintiff's claims are barred by the doctrine of estoppel by reason of, at a minimum, Plaintiff's approval and ratification of Defendants' CAI's and Audigier's use of Plaintiff's artwork and other actions.

Fifth Affirmative Defense

(Unclean Hands)

107. Plaintiff's claims are barred by the doctrine of unclean hands.

Sixth Affirmative Defense

(Waiver)

108. Plaintiff's claims are barred by waiver.

Seventh Affirmative Defense

(Failure to Mitigate Damages)

109. To the extent that Plaintiff has suffered any damages, which Defendants expressly deny, Plaintiff has failed to take reasonable steps to mitigate his alleged damages.

Eighth Affirmative Defense

(Lack of Subject Matter Jurisdiction/Failure to Register)

110. Plaintiff's copyright claims are barred for a lack of subject matter jurisdiction because he lacks valid copyright registrations for the intellectual property rights asserted, owns no copyright rights in any works purchased from him by CAI or Audigier, or has not properly or timely registered the works in question.

Ninth Affirmative Defense

(License and Consent)

111. Plaintiff's claims are barred by Plaintiff's sale and/or license of the claimed works, and consent to any of the Defendants' use of Plaintiff's work.

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Tenth Affirmative Defense
(Authorized Use/Implied License)

112. To the extent Defendants do not own outright all right, title and interest in and to the claimed works and the copyright rights thereto, Plaintiff authorized, implicitly or explicitly, the allegedly infringing use by any of the Defendants of his claimed works, and his claims are therefore barred by the doctrine of implied license.

Eleventh Affirmative Defense
(Ratification)

113. Plaintiff's claims are barred, in whole or in part, because Plaintiff has ratified and approved the purported actions of which it now complains.

Twelfth Affirmative Defense
(Acquiescence)

114. Plaintiff's claims are barred by the doctrine of acquiescence.

Thirteenth Affirmative Defense
(Abandonment)

115. Plaintiff's claims are barred to the extent he has abandoned any intellectual property rights in the subject artwork by the terms of the Agreement.

Fourteenth Affirmative Defense
(Preemption)

116. To the extent Plaintiff's California state law claims are based upon alleged improper use of Plaintiff's artwork, these claims are preempted by the Copyright Act, 17 U.S.C. § 301.

Fifteenth Affirmative Defense
(Standing)

117. Plaintiff lacks standing to pursue his copyright claims against Defendants because, *inter alia*, he lacks valid copyright registrations for the intellectual property rights asserted, owns no copyright rights in any works

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1 purchased from him by CAI or Audigier, or has not properly or timely
2 registered the works in question.

3 **Sixteenth Affirmative Defense**

4 **(Invalidity of Copyright)**

5 118. Plaintiff's alleged copyrights, and any registrations he may obtain
6 for these copyrights, are invalid because Plaintiff owns no copyright rights in
7 any works purchased from him by CAI or Audigier.

8 **Seventeenth Affirmative Defense**

9 **(Fraud on the Copyright Office)**

10 119. Plaintiff's copyright claim is barred, in whole or in part, due to
11 Plaintiff's fraud on the Copyright Office in applying for copyright registrations
12 which Plaintiff knew he had assigned to Defendants CAI and/or Audigier.

13 **Eighteenth Affirmative Defense**

14 **(Lack of Association/Lack of Indicia of Source)**

15 120. Plaintiff's artwork is not associated with any good or service of the
16 Plaintiff nor is his artwork indicative of the source of any good or service.

17 **Nineteenth Affirmative Defense**

18 **(Lack of Secondary Meaning)**

19 121. Plaintiff's artwork lacks secondary meaning within the relevant
20 consuming public.

21 **Twentieth Affirmative Defense**

22 **(Breach by Plaintiff)**

23 122. Plaintiff failed to perform his obligations under the written contract
24 by, *inter alia*, his failure to produce and provide to CAI or Audigier a minimum
25 of ten original pieces of artwork each and every month, as well as his failure to
26 provide artwork in a timely manner.

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Twenty-First Affirmative Defense

(Statute of Frauds)

123. Plaintiff's claims as to an alleged oral contract are barred by the provisions of Section 1624 of the California Civil Code, i.e., the Statute of Frauds.

Twenty-Second Affirmative Defense

(Statute of Limitations)

124. Defendants are informed and believe and thereon allege that to the extent any such rights ever existed, Plaintiff's claims are barred, in whole or in part, by the statutes of limitations set forth in Section 339 of the California Civil Code and Section 507 of the Copyright Act, 17 U.S.C. § 507(b).

Twenty-Third Affirmative Defense

(No Breach of Duty)

125. Plaintiff's claims are barred, in whole or in part, because Defendants have not breached any duty owed to Plaintiff.

Twenty-Fourth Affirmative Defense

(Good Faith/No Willful Intent)

126. Plaintiff's claims are barred, in whole or in part, because Defendants at all times acted in good faith, and without willful intent.

Twenty-Fifth Affirmative Defense

(Modification)

127. The alleged oral contract in question, if any, was modified by the parties, and Plaintiff is barred from recovery on the unmodified original contract, if any, by reason of said modification.

Twenty-Sixth Affirmative Defense

(Release)

128. Plaintiff's actions constituted a full release by Plaintiff of any and all claims which he may have against any of the Defendants.

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Twenty-Seventh Affirmative Defense

(Unjust Enrichment)

129. Plaintiff's causes of action and his prayer for Defendants' revenues and profits, are barred, in whole or in part, because Plaintiff would be unjustly enriched by any recovery.

Twenty-Eighth Affirmative Defense

(Mootness)

130. Plaintiff's claims seeking injunctive relief are barred, in whole or in part, by the doctrine of mootness.

Twenty-Ninth Affirmative Defense

(Adequacy of Remedy at Law)

131. Plaintiff's claims seeking injunctive relief are barred, in whole or in part, because Plaintiff has an adequate remedy at law.

Thirtieth Affirmative Defense

(Offset)

132. Any recovery will be subject to offset to the extent Plaintiff breached his duties to Defendants CAI or Audigier under the written contract.

Thirty-First Affirmative Defense

(Parol Evidence Rule)

133. Plaintiff's claim as to an alleged oral contract is barred by the parol evidence rule.

Additional Defenses

134. Defendants reserve the right to allege other affirmative defenses as they may arise during the course of discovery.

COUNTERCLAIMS

For their counterclaims against Plaintiff Bryan Callan ("Plaintiff" or "Callan" or "Counterdefendant"), Defendants Christian Audigier, Inc. and Christian Audigier (collectively "Counterclaimants") allege as follows:

1 JURISDICTION AND VENUE

2 1. This action arises under California state law and the Declaratory
3 Judgments Act, 28 U.S.C. §§ 2201 and 2202, based on an actual controversy
4 between Callan and Counterclaimants. This Court has supplemental jurisdiction
5 over the counterclaims below pursuant to 28 U.S.C. § 1367(a) because they
6 arise out of the same transactions or occurrences that are the subject matter of
7 Plaintiff's claims, and therefore, are so related to the claims in this action that
8 they form part of the same case or controversy.

9 2. Plaintiff has submitted to the personal jurisdiction of this Court by
10 filing his Complaint.

11 3. Plaintiff has acknowledged that venue is proper in this judicial
12 district by filing his Complaint.

13 THE PARTIES

14 4. Counterclaimant Christian Audigier, Inc. ("CAI") is a California
15 corporation with its mailing address and registered office located at 8680
16 Hayden Place, Culver City, CA 90232.

17 5. Counterclaimant Christian Audigier ("Audigier") is an individual
18 residing in Los Angeles County, California at 600 South Muirfield Road, and is
19 the Registered Agent for CAI.

20 6. According to the allegations set forth in the Complaint,
21 Counterdefendant Callan is an individual residing in Los Angeles County,
22 California.

23 FACTUAL BACKGROUND

24 7. On or about March 2, 2006, CAI and Audigier entered an
25 agreement ("the Agreement") with Callan, whereby CAI and Audigier
26 purchased Plaintiff's original artworks, and the copyright rights thereto, for use
27 in connection with Audigier's eponymous product line.

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1 8. The parties duly executed the Agreement on or about March 2,
2 2006.

3 9. The Agreement required that Callan produce and provide to
4 Counterclaimants a minimum of ten original pieces of artwork each and every
5 month and that such artwork be provided on "a mutually agreeable time and
6 determined schedule." This provision has been breached by Callan by his
7 failure to produce and provide to Counterclaimants a minimum of ten original
8 pieces of artwork each and every month, as well as his failure to provide
9 artwork in a timely manner.

10 10. The Agreement transferred ownership of the original artwork and
11 copyrights in Callan's artwork to CAI and Audigier upon payment for the
12 artwork.

13 11. In September 2008, Callan requested that CAI loan him some of
14 Callan's original artwork that CAI had purchased. Callan said that he knew
15 CAI owned the artwork, but wanted to borrow it to show the art in a gallery.

16 12. CAI's Design and Branding Manager personally delivered 20-30
17 pieces of Callan's original artwork to Callan's home at his request. Callan has
18 failed to return the artwork.

19 13. Counterclaimants are informed and believe, and on that basis
20 allege, that in "borrowing" said artwork, Callan intended to convert the artwork
21 to his own possession and use.

22 14. Counterclaimants are informed and believe, and on that basis
23 allege, that Callan has applied for federal copyright registration for certain
24 pieces of artwork that he sold to CAI and/or Audigier, and that he has falsely
25 represented that he is the copyright owner of the artwork in those applications.

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1 **FIRST COUNTERCLAIM**

2 **(Breach of Contract)**

3 15. Counterclaimants reallege and incorporate by reference the
4 allegations set forth in paragraphs 1-14.

5 16. On or about March 2, 2006, Counterclaimants entered into a
6 written contract with Callan, referred to herein as the Agreement.

7 17. Counterclaimants have not materially breached this Agreement, or
8 any such breach has been excused.

9 18. Callan had full knowledge of any alleged breach of the Agreement
10 by Counterclaimants during the course of this Agreement and elected to treat the
11 Agreement as still alive by continuing to produce and provide to
12 Counterclaimants pieces of artwork pursuant to the Agreement and accept
13 performance of the Agreement by Counterclaimants by purchase of such pieces
14 of artwork, and as such, waived any alleged breach of contract claim against
15 Counterclaimants.

16 19. Callan has breached the Agreement by failing to produce and
17 provide to Counterclaimants a minimum of ten original pieces of artwork each
18 and every month and by failing to provide artwork in a timely manner.

19 20. As a proximate result of Callan's breach of the Agreement,
20 Counterclaimants have suffered and continue to suffer general and special
21 damages in an amount to be determined at trial.

22 **SECOND COUNTERCLAIM**

23 **(Declaration of Copyright Ownership and Rights as to Artwork)**

24 21. Counterclaimants reallege and incorporate by reference the
25 allegations set forth in paragraphs 1-20.

26 22. There exists an actual case or controversy between Callan and CAI
27 and Audigier concerning the ownership of the original artwork and copyright in

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1 the artwork purchased from Callan by CAI or Audigier, by virtue of the
2 allegations of Callan's Complaint in this action.

3 23. Counterclaimants own the original artwork and copyrights in the
4 artwork they purchased from Callan because the Agreement transferred
5 ownership of the copyrights and original artwork upon payment for the artwork.

6 24. Counterclaimants seek a declaratory judgment that
7 Counterclaimants are the sole owners of the original artwork and copyrights in
8 the artwork purchased from Callan by CAI or Audigier, and that Callan has no
9 rights in such artwork, other than those set forth under the terms of the
10 Agreement.

11 THIRD COUNTERCLAIM

12 (Possession of Personal Property/Conversion)

13 25. Counterclaimants reallege and incorporate by reference the
14 allegations set forth in paragraphs 1-24.

15 26. Counterclaimants are the lawful owners of the original artwork that
16 Callan "borrowed" in September 2008.

17 27. Callan has not returned to Counterclaimants said original artwork.

18 28. Counterclaimants are entitled to immediate recovery of said
19 original artwork.

20 29. Counterclaimants are also entitled to recover damages for the
21 deprivation of possession of said original artwork.

22 30. If the original artwork is not returned to Counterclaimants,
23 Counterclaimants are entitled to damages in an amount to be proved at trial
24 resulting from conversion of the artwork to Callan's own possession and use.

25 31. The aforementioned acts by Callan were willful and malicious and
26 justify the awarding of exemplary and punitive damages in an amount to be
27 determined at trial.

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1 **FOURTH COUNTERCLAIM**

2 **(Constructive Trust as to Original Artwork)**

3 32. Counterclaimants reallege and incorporate by reference the
4 allegations set forth in paragraphs 1-31.

5 33. Callan has in his possession, or an interest in, pieces of original
6 artwork, which he sold to Counterclaimants and which legally belong to
7 Counterclaimants and which he "borrowed" from Counterclaimants and now
8 has in his possession.

9 34. Callan had and has no rights to possess or use said artwork.

10 35. Given that Callan has no rights in said artwork, Counterclaimants
11 have an interest in, and a right to recover, all such artwork.

12 36. Under Cal. Civ. Code § 2223, Callan has wrongfully detained a res
13 over which he has no right, and as such is now an involuntary trustee over said
14 res for the benefit of Counterclaimants.

15 37. Under Cal. Civ. Code § 2224, Callan has gained a res through
16 wrongful conduct, and as such, he has become an involuntary trustee over said
17 res for the benefit of Counterclaimants.

18 38. Due to the above, Counterclaimants seek an imposition of a
19 constructive trust over all artwork "borrowed" from Counterclaimants and
20 which has been purchased by Counterclaimants from Callan.

21 **FIFTH COUNTERCLAIM**

22 **(Constructive Trust as to Copyright Registrations)**

23 39. Counterclaimants reallege and incorporate by reference the
24 allegations set forth in paragraphs 1-38.

25 40. Counterclaimants are informed and believe, and on that basis
26 allege, that Callan has in his possession, or an interest in, federal copyright
27 registrations or applications for copyright registrations which may soon become

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1 registrations, for certain pieces of artwork which he sold to CAI and/or Audigier
2 and which legally belong to Counterclaimants.

3 41. Callan had and has no rights to apply for copyright registrations or
4 possess copyright registrations for the artwork he sold to CAI and/or Audigier,
5 which instead belong to CAI and Audigier.

6 42. Given that Callan has no copyright rights in the artwork he sold to
7 CAI and/or Audigier, Counterclaimants have an interest in, and a right to
8 recover, all such registrations which may be granted by the U.S. Copyright
9 Office, and all applications for such registrations.

10 43. Under Cal. Civ. Code § 2223, Callan has wrongfully detained a res
11 over which he has no right, and as such is now an involuntary trustee over said
12 res for the benefit of Counterclaimants.

13 44. Under Cal. Civ. Code § 2224, Callan has gained a res through
14 wrongful conduct, and as such, he has become an involuntary trustee over said
15 res for the benefit of Counterclaimants.

16 45. Due to the above, Counterclaimants seek an imposition of a
17 constructive trust over all copyright registrations obtained from the U.S.
18 Copyright Office by Callan for artwork which has been purchased by
19 Counterclaimants from Callan, and all applications for such registrations.

20 **PRAYER FOR RELIEF**

21 Wherefore, Defendants and Counterclaimants hereby pray as follows:

22 A. That Plaintiff take nothing by way of his Complaint and that the
23 same be dismissed in its entirety, with prejudice;

24 B. That Defendants be awarded their attorneys' fees and costs
25 incurred in defending this action;

26 C. That the Court enter judgment that Counterdefendant Callan has
27 breached the Agreement by failing to produce and provide to Counterclaimants

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1 a minimum of ten original pieces of artwork each and every month and by
2 failing to provide artwork in a timely manner;

3 D. That the Court impose a constructive trust over all artwork
4 "borrowed" from Counterclaimants and which has been purchased by
5 Counterclaimants from Callan;

6 E. That the Court enter judgment that Counterclaimants are the sole
7 owners of the original artwork and copyrights in the artwork purchased from
8 Callan by CAI or Audigier, and that Callan has no rights in such artwork, other
9 than those set forth under the terms of the Agreement;

10 F. That the Court impose a constructive trust over any and all
11 copyright registrations obtained from the U.S. Copyright Office by Callan for
12 artwork which has been purchased by Counterclaimants from Callan, and all
13 applications for such registrations;

14 G. That Counterclaimants be awarded general and special damages as
15 a result of Counterdefendant's breach of contract and conversion;

16 H. That Counterclaimants be awarded pre-judgment interest as
17 allowed by law;

18 I. That Counterclaimants be awarded punitive damages in an amount
19 sufficient to deter and punish Counterdefendant, on account of
20 Counterdefendant's willful violation of California law; and

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1 J. That the Court award such other and further relief as it may deem
2 just and proper.

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Respectfully submitted,
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 20, 2009

By: Karen Vogel Weil
Steven J. Natapolsky
Karen Vogel Weil
Brian C. Horne

Attorneys for Defendants
CHRISTIAN AUDIGIER, INC.; NERVOUS
TATTOO, INC.; SHOP ON STAGE, INC.; and
CHRISTIAN AUDIGIER

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DEMAND FOR JURY

Pursuant to Fed. R. Civ. P. 38 and Rule 38-1 of the Local Rules of the United States District Court for the Central District of California, Defendants, Christian Audigier, Inc.; Nervous Tattoo, Inc.; Shop on Stage, Inc.; and Christian Audigier hereby demand trial by jury on all issues so triable.

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: March 20, 2009

By: Karen Vogel Weil
Steven J. Natapolsky
Karen Vogel Weil
Brian C. Horne

Attorneys for Defendants
CHRISTIAN AUDIGIER, INC.; NERVOUS
TATTOO, INC.; SHOP ON STAGE, INC.; and
CHRISTIAN AUDIGIER

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1 PROOF OF SERVICE

2 I am a citizen of the United States of America and I am employed in Los
3 Angeles, California. I am over the age of 18 and not a party to the within
4 action. My business address is 1901 Avenue of the Stars, Suite 1500, Los
5 Angeles, California. On March 20, 2009, I served the within **DEFENDANTS**
6 **CHRISTIAN AUDIGIER, INC.'S; NERVOUS TATTOO, INC.'S; SHOP**
7 **ON STAGE, INC.'S; AND CHRISTIAN AUDIGIER'S FIRST AMENDED**
8 **ANSWER TO COMPLAINT AND COUNTERCLAIMS** on the parties or
9 their counsel shown below, by placing it in a sealed envelope addressed as
10 follows:

11 VIA US MAIL:

12 Stephen M. Doniger, Esq.
13 Scott A. Burroughs, Esq.
14 DONIGER LAW FIRM APC
300 Corporate Pointe, Suite 355
Culver City, CA 90230

15 I declare that I am employed in the office of a member of the bar of this
16 Court at whose direction the service was made.

17 Executed on March 20, 2009 at Los Angeles, California.

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19 
20 Doreen P. Buluran

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