

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OCHRE LLC, a New York Limited
Liability Company,

Plaintiff,

- vs. -

ROCKWELL ARCHITECTURE,
PLANNING AND DESIGN, P.C., *a New
York Professional Corporation*; PROJECT
DYNAMICS, INC., *a Delaware
Corporation*; BRAD H. FRIEDMUTTER-
CA, INC., *a California Corporation Doing
Business as FRIEDMUTTER GROUP*,
NEVADA PROPERTY 1 LLC, *a Nevada
Limited Liability Corporation and wholly-
owned subsidiary of DEUTSCHE BANK
TRUST COMPANY AMERICAS, a New
York Corporation,*

Defendants.

CIVIL ACTION NO.

1:12-cv-02837-KBF

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED
COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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PRELIMINARY STATEMENT

“What happens in Vegas,” it is said, “stays in Vegas.” The none-too-subtle message of this advertising slogan is that Nevada’s famed “city of sin” is a discrete haven for conduct the rest of society condemns as seedy, illicit or shameful. As an advertisement for delinquency, the campaign is a compelling, if amoral, invitation to so-called “victimless” vice. But “stays in Vegas” is no formula for commerce, notwithstanding the assertions in defendants’ motion to dismiss the the Second Amended Complaint (the Complaint) pursuant to Fed. R. Civ. P. 12(b)(6).

Ochre LLC (“Ochre”) submits this memorandum of law in opposition to defendants’ motion to dismiss a lawsuit necessitated by defendants’ calculated and cynical conduct. The Amended Complaint sets out conduct beyond the bounds of conventional commercial practice, but defendants seek its dismissal by invoking conventional rhetoric. This is a case, they assert, of a “slighted Ochre” seeking succor for its disappointment over not getting a sought-after contract to supply the lighting fixtures for the Cosmopolitan Hotel and casino in Las Vegas. The facts, however – specific, explicit and damning – tell a very different story: That Ochre originated the fixtures; designed them; and, in every meaningful sense, did in fact supply them. Like Las Vegas casino hostesses plying casino “guests” with drinks to hasten the process by which their pockets are emptied as they pursue an elusive jackpot, defendants ultimately squeezed Ochre dry in a game of “chance” that only the house could win.

Ochre did supply the lighting fixtures, but due to defendants’ actions, they and others profited from Ochre’s creativity, innovation and exertion, leaving Ochre high and dry. In nonetheless urging dismissal of Ochre’s claim, defendants rely upon inapplicable case law and mischaracterize the facts alleged in the Complaint. They are reduced to arguing that Ochre’s

widely admired and celebrated creations are mere utilitarian devices. They slalom through the Amended Complaint, ignoring the fine grain of names, dates and places – the catalog of who, what, when and where – in order to claim that Ochre failed to plead facts specific enough to support its claims for fraudulent inducement, quantum meruit and promissory estoppel. Defendants similarly urge this Court not to allow those claims to proceed past the pleading stage because they cloaked their misappropriation in an elaborate “eAuction,” even as they pumped Ochre for more technical information – supposedly to “enhance” its so-called “bid” but, in fact, to provide its intended knockoff manufacturer with the best possible specifications from the most knowledgeable possible source. Relying on the calculated ambiguity of their manipulation of Ochre’s hopes and ambitions, they deny that Ochre has failed to allege that it reasonably relied upon a “clear and unambiguous promise” to support its claim for promissory estoppel. And only by ignoring the broad remedial scope of New York’s legal recourse against misappropriation can they assert that Ochre’s state law claims are preempted by the Copyright Act.

Ochre addresses, and endeavors in the space available to correct, these mischaracterizations of law and fact below, and thereby to demonstrate that defendants’ motions to dismiss should be denied.

STATEMENT OF FACTS

As alleged in the Complaint, Ochre is a specialized furniture, lighting and accessory design company based in New York City that sells its products both directly to individuals and in partnership with leading interior designers and architects to create warm, luxurious and elegant interiors for their residential and commercial clients. Ochre’s design individuality is expressed through the use of complementary materials to make each piece truly unique and timeless, all of

which are produced by individual craftsmen in the U.S., and can be made to customized specifications to meet individual needs.

Ochre is internationally renowned for its “Arctic Pear” line of chandeliers and lighting fixtures. The name Arctic Pear refers to one of the prominent elements of the line: numerous exquisite glass pear-shaped light “drops” arranged in various forms, such as circular hanging fixtures, table lamps or wall sconces. These unique drops give a visual impression, when illuminated all at once from their respective individual lighting elements, as well as by the reflected light of the other drops and other ambient light sources, of being naturally formed, glowing incandescent “pears” of pristine Arctic ice. One popular version of the Arctic Pear light is the “Round 45” chandelier, consisting of two rows of drops suspended from two concentric halo-shaped frames of which the larger is 45 centimeters in diameter, the inner rows being suspended lower to give a tapering effect. A photograph of the Round 45, as displayed in a design setting on the Ochre website, is set forth in the Complaint as Figure A.

Another version of the Arctic Pear light is the “Round 60” chandelier, consisting of three rows of drops suspended from two concentric halo-shaped frames of which the larger is 60 centimeters in diameter, each successive row from the exterior inward being suspended lower than the previous one to give a tapering effect. A photograph of the Round 60, as displayed in a design setting on the Ochre website, is set forth in the Complaint as Figure B.

Along with other Ochre creations, Arctic Pear fixtures by Ochre have been and continue to be exhibited at leading design and architectural exhibitions and displays in the U.S. and Europe, and have been prominently featured in high-end popular interior design and fashion periodicals, such as *Elle Decor*, *House and Garden*, *WA’s Best Homes*, the *Telegraph Magazine* of London and the Russian-language edition of the interior decorating magazine *Ideas*. In a

spring 2011 story in *Elle Décor*, for example, an Arctic Pear chandelier figured prominently in the first photograph of a “celebrity homes” feature about the interior decoration in the restored West Village brownstone of movie and television star Keri Russell. A true copy of a screen shot depicting the Internet version of the article and the reference to the Ochre Arctic Pear fixture is set forth in the Complaint as Figure C. The Arctic Pear’s popularity and perceived desirability extends beyond the design and luxury worlds and the “jet set,” being the subject of numerous blog posts and commentaries by professionals and amateurs alike interested in interior design. For example, the website Houzz.com, a leading destination site for home design enthusiasts that features over 250,000 high quality interior and exterior photos, thousands of articles written by design experts, product recommendations and social tools to manage the remodeling and decorating process, includes 398 professional-quality interior design photographs of installations featuring the Ochre Arctic Pear, each of which has been “added” to hundreds or thousands of online “Ideabooks” by which users indicate their interest in the designs and furnishings shown.

The Cosmopolitan Hotel, built between 2005 and 2010 to the tune of \$3.9 Billion, is a luxury resort casino and hotel in Las Vegas consisting of two high-rise towers (the “Cosmopolitan”), and is owned by defendants Nevada Property 1 LLC (“NP1”) and Deutsche Bank Trust Company Americas (“Deutsche Bank”). The Cosmopolitan’s design team was led by defendant Brad H. Friedmutter–CA, Inc. (“Friedmutter”) as executive architect, which, for the purposes of interior design, worked with worked with various specialty design firms, including defendant Rockwell Architecture, Planning And Design, P.C. (“Rockwell”).

In May of 2009, Ochre was contacted by Rockwell to discuss lighting options for the “Cosmo Room Project” and Rockwell’s designers eventually decided that they wanted a customized version of Ochre’s Arctic Pear chandeliers for the use in a standardized, designer

hotel guest room in the Cosmopolitan then referred to as the Cosmo Room. In response to Rockwell's request, Ochre submitted a unique, original and proprietary custom version of its Arctic Pear chandeliers, fundamentally based on the Round 60 and Round 45 chandeliers, and customized to Rockwell's specifications for use in the Cosmopolitan, for consideration by defendants. The adaptation by Ochre was approved by defendants, and in June of 2009, Ochre was told to formalize its proposal by responding to a written Request for Quotation dated June 8, 2009 for the model rooms from defendant Project Dynamics Inc. (the "Model RFQ," a true copy of which is attached to the Complaint as Exhibit A. The Model RFQ, which consisted of specifications prepared by, and bearing the name of Rockwell, stated that Project Dynamics was acting as agent for NP1 and, in fact, Project Dynamics was the subcontractor responsible for procurement of, among other things, custom-designed chandeliers for the Cosmopolitan project.

Among the specifications included in the Model RFQ was one designated MOD-LGT-8006, describing an "Extended Arm Fixture" which: (1) referred specifically and repeatedly to Ochre as manufacturer; (2) utilized graphic depictions and drawings of Ochre Arctic Pear fixtures; and (3) even incorporated certain specifications by indicating reference to the "Original Ochre 'Arctic Pear Table Lamp.'" Shortly thereafter, Ochre transmitted a quote for the model rooms discussed, and by the end of June, Ochre was formally awarded the project to prepare custom-designed Arctic Pear chandeliers for the model rooms, invoiced the project and began preliminary design work. The Arctic Pear fixtures designed by Ochre and customized to defendants' specifications are unique, original and proprietary to Ochre.

Among the things required of Ochre by defendants was the provision of detailed shop drawings with respect to the customized Arctic Pear models discussed, which are proprietary to Ochre, and which included dimensions, manufacturing conventions, and special fabrication and

installation instructions. This proprietary information, which was transmitted by Ochre directly to defendant Project Dynamics, was in turn transmitted to and used by defendants Rockwell and Friedmutter and, upon information and belief, defendants named herein as well. Ochre provided these drawings and the related information on the express understanding and in reliance on representation by the defendants that Ochre was transmitting its design and these specifications in the furtherance and on condition of Ochre's selection as the designer, fabricator and provider of the custom-designed chandeliers to be utilized in the Cosmo Room.

After reviewing Ochre's shop drawings and samples of the proposed finish and glass to be utilized in the fixtures, on July 20, 2009, Project Dynamics emailed to Ochre its approvals of the Ochre shop drawings, and on August 6, 2009, Ochre shipped the model room fixtures to the hotel. The Ochre Arctic Pear samples and specifications were a success, and on October 5, 2009, Project Dynamics emailed bid package forms to Ochre in connection with its engagement as designer, fabricator and provider of customized Arctic Pear chandeliers for the Cosmo Room. Late in the bidding period, defendants asked Ochre for detailed production and delivery scheduling information, and confidential financial information to ensure its financial wherewithal to complete the project, and Ochre provided all the requested information.

In light of Ochre's increasing and substantial investment in the design and specification of the fixtures, as well as its provision of detailed and proprietary shop drawings for the Arctic Pear chandelier, Ochre sent an email to defendants' representative stating as follows: "Ochre is comfortable moving forward with shop drawings, samples & prototypes upon receipt of the purchase order, prior to receipt of funds. We will do this in good faith that the deposit will be received in a timely manner." In response, defendants represented to Ochre that the bidding mechanism was essentially a formality required by the project's senior financing sources, and

that Ochre was by far the likeliest candidate and most favored to win the bid to fabricate and provide the chandeliers for the Cosmopolitan. In reliance on these representations and this conduct, and in light of the above alleged circumstances, Ochre yielded to defendants' entreaties for more and more detailed specification and design information, without waiting for the anticipated purchase order. Ochre would not have created, refined and transmitted its proprietary designs, nor shared its proprietary, specialized shop drawings and specifications for its Arctic Pear chandeliers, if it had not relied on defendants' representations that they sought to award the ultimate contract for Arctic Pear chandeliers to Ochre.

Moreover, Ochre's expectation was that if ultimately the contract for room chandeliers were awarded to a different company, the chandeliers provided would have comparable physical dimensions and properties to the Arctic Pear, but utilizing a different design, and certainly not one that infringes on Ochre's design. In the period prior to the finalization of the bids, Ochre was pushed by defendants to lower its proposed bid price as much as possible, which further reinforced Ochre's impression that defendants were committed to the Arctic Pear design and that consequently Ochre's selection as the winning bidder to outfit the hotel's real rooms was virtually assured. This expectation was premised on the understanding that, if it were the case that all the vendors were merely bidding on pricing for the provision of the same design, i.e., the Arctic Pear chandelier, defendants would not have any reason to seek better pricing from Ochre but would merely have selected the vendor whose price was lowest.

In contradistinction, if Ochre had been aware that defendants' intention was to select a vendor to manufacture Arctic Pear chandeliers, or more precisely – in the event that another vendor were chosen, that it would be chosen to manufacture unauthorized and unlicensed copies of Ochre's Arctic Pear design, Ochre would certainly not have participated in the bidding

process. Moreover, if Ochre had not been misled by defendants' statements and conduct in light of all the circumstances, Ochre would have objected vociferously regarding, and likely taken legal action to prevent, defendants' abuse of its trust in providing models and technical specifications and the proposed infringement of its rights. In reliance, however, on defendants' representations and conduct in light of the circumstances, Ochre participated in and fulfilled all the requirements of the bidding process, offering an initial price quote – following its acquiescence to defendants' persistent requests that it submit its lowest possible bid – in the amount of \$1,056,000.00, exclusive of shipping, handling, and installation fees, and which represented a significant discount of Ochre's otherwise standard pricing.

Unbeknownst to Ochre, the construction and development of the Cosmopolitan had been plagued with controversy and financial problems almost from the beginning. For example, in January 2008, it was reported that the project faced foreclosure because the original developer defaulted on a \$760 million construction loan from Deutsche Bank, when the developer missed a payment after failing to secure refinancing for the project. Indeed, in March of 2008, the developer announced that Deutsche Bank would begin foreclosure proceedings, and Deutsche Bank ultimately bought the hotel for \$1 billion during the summer, hired new developers to make strategic changes in the project and the development process, and became directly involved in negotiations and communications with Ochre with respect to the chandelier project.

The Cosmopolitan's problems continued, however and in June 2009, 400 purchasers of condominium apartments in the projected hotel filed a lawsuit against the developers, claiming breach of contract and seeking refunds for their deposits. The suit claimed that the projected finish date of June 2010 was unrealistic and expressed fear that the developers might turn some or all of areas designated as condominiums into hotel rooms only, or even merely finish the

building as a shell and not do any interior work. Thus the management of the Cosmopolitan project was rife with financial pressure, and while developers by all indications sought to acquire and vest the Cosmopolitan with the trappings of high-end glamour and beauty associated with Las Vegas hotel-casinos and necessary for their success, they were under increasing pressure to do so on the cheap.

On or about September 30, 2009, Friedmutter issued a Specification for a “Pendant Fixture” for the “Park West Rooms” in the Cosmopolitan Hotel, designated LTG-8507 (the “Friedmutter ‘07 Specification”). A true copy of the Friedmutter ‘07 Specification is attached to the Complaint as Exhibit B. In the field marked, “Model No.,” the Friedmutter ‘07 Specification stated, “Specification is based upon Rockwell Group Spec # LGT-8006,” the above-referenced specification included in the Model RFQ. In the field marked, “Description,” the Friedmutter ‘07 Specification stated, “Custom pendant light fixture with clear solid glass ‘droplets’ (refer to attached drawing for style).” The Friedmutter ‘07 Specification also included a photograph of an Arctic Pear fixture copied, without Ochre’s permission, from the Ochre website, with the legend, “Pendant image for inspiration / ‘look of’ only / refer to attached drawings for overall design intent.” In fact, defendants “intended” far more.

For example, “attached drawing” referred to in the Friedmutter ‘07 Specification consisted of material copied from the Model RFQ, which depicted and incorporated the specifications for Ochre’s Arctic Pear fixture provided by Ochre. Even then, the Friedmutter ‘07 Specification also stated, “The custom item described herein is the proprietary design of Nevada Properties 1 dba the Cosmopolitan Resort and Casino. All rights reserved.” While truthfully acknowledging that proprietary quality of Ochre’s designs, this statement in the Friedmutter ‘07 Specification was substantially false, because they were **Ochre’s designs**. A second Friedmutter

specification of that same date, designated LTG-9201 (the “Friedmutter ’01 Specification”) followed an identical pattern.

Having made a major investment in the preparation of its bid, including extensive efforts in obtaining manufacturing, production, shipment, materials and technical information – much of it at defendants’ specific request – and still having to go through the bidding process, Ochre was not in a position to protest the false statements of ownership on the Friedmutter specifications described above. And in fact, through September and October of 2009, defendants continued to request additional technical and production information from Ochre related to the Arctic Pear fixtures. Ochre provided it, believing that by doing so it was enhancing the attractiveness of its own bid.

In October, Ochre submitted its quotation to manufacture the Cosmopolitan fixtures via an “eAuction,” an automated bidding process coordinated and managed by Deutsche Bank. Ultimately, despite publishing what amounted to a request for quotes to manufacture Arctic Pear fixtures based on Ochre’s drawings, photographs and proprietary specifications, to the dismay of Ochre, defendants did not award Ochre the contract to provide and install Ochre’s custom versions of its Arctic Pear chandeliers for the Cosmopolitan. Ochre was even more dismayed when it came to learn that while defendants did not purchase Ochre’s Arctic Pear chandeliers, defendants had, without informing Ochre and without Ochre’s authorization, utilized Ochre’s design, specifications and shop drawings to procure unlicensed copies or “knockoffs” of the Arctic Pear Chandeliers from a cheap overseas supplier.

In light of the foregoing facts, it is apparent that defendants chose this approach because it allowed them to take advantage of Ochre’s original, well-known and prestigious Arctic Pear chandelier design plus the detailed know-how, specifications and shop drawings Ochre

transmitted to defendants in anticipation of a contract, obtaining copies of the chandeliers at a greatly reduced cost by cutting Ochre out of the transaction. The ultimate manufacturers of the replica Arctic Pear chandeliers used in the Cosmopolitan Hotel would not have had the technical and artistic know-how to fabricate sufficiently high-quality copies of the fixtures if Ochre had not, in reliance on defendants' representations, provided defendants with the wealth of knowledge, experience, drawings and know-how as alleged herein.

The slavish copies of Ochre's proprietary Arctic Pear chandelier designs commissioned by defendants were subsequently, and without Ochre's permission or notice, installed at and displayed not only in hundreds or perhaps thousands of rooms, including the rooms now known as the Terrace Suite or Terrace Studio or rooms known by other names in the Cosmopolitan Hotel, but upon information and belief at other hotels and facilities for which defendants or some of them have design responsibility. While Ochre was paid for the fabrication and installation of its Arctic Pear chandelier designs at the model Cosmo Room, it has neither given permission or been compensated for the use of its design, specifications or shop drawings in connection with those designs at any facility.

The defendants have not only continued to use and wrongfully benefit from Ochre's designs and provision of proprietary information, but have actually held out the chandeliers utilized at the Cosmopolitan as authentic Ochre creations in communications to the public, in response to inquiries and otherwise.

LEGAL ARGUMENT

I. LEGAL STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light

most favorable to the Ochre, a court finds that Ochre has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). A complaint will survive a motion under Fed. R. Civ. P. 12(b)(6) if it states plausible grounds for Ochre's entitlement to the relief sought, *id.* at 1965-66, i.e., it need merely contain sufficient factual allegations to raise a right to relief above the speculative level, *id.* at 1965. The issue before the Court upon consideration of such a motion is not whether Ochre "will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 839 F. Supp. 2d 562, 565 (E.D.N.Y. 2012) (citing to *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir.2001)).

As set forth in detail below, Ochre has met this standard of review, well within the meaning of the foregoing case law, thus warranting denial of defendants' motions in their entirety.

II. OCHRE'S CLAIM FOR COPYRIGHT INFRINGEMENT SUFFICIENTLY STATES A CLAIM OF COPYRIGHTABILITY.

Defendants argue that Ochre has failed to demonstrate ownership of a valid copyright because it has not identified aspects of the Arctic Pear Chandeliers that are physically or conceptually separable from the functional/utilitarian aspects of the fixtures. This argument, mainly developed in the brief by Deutsche Bank, ironically relies on the formulaic accusation that the Complaint's allegations are "conclusory" – a "conclusion" Deutsche Bank can only reach by simply omitting discussion of the myriad allegations that readily negate their claim and ignoring case law that establishes the correct legal standard.

Defendants contend that the Arctic Pearl chandeliers are "useful articles" under the Copyright Act (the "Act"), which extends copyright protection only to those portions of the designs that can be "identified separately from, and are capable of existing independently of, the

utilitarian aspects of the article.” 17 U.S.C. § 101. They fail, however, to even address § 102(a)(5) of the Act, which protects “sculptural works.” While a “useful article” is defined by the Act as an article “having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information,” 17 U.S.C. § 101, under 102(a)(5) the Act makes what courts acknowledge to be a distinction between a merely utilitarian object and a decorative sculptural object that can also have a useful function, and contemplates that one object can encompass both qualities.

In fact, based on this distinction, the creativity embodied in the original design of a lighting fixture can be protected by the Act where, as here, it represents a work of artistic craftsmanship. *Mazer v. Stein*, 347 U.S. 201, 212–13 (1954). Courts in a myriad of cases have applied the principle that if elements of a useful sculptural article can be conceptually separated from the utilitarian aspects of the article, and not physically separated, they may still be copyrighted. For example, in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), the Second Circuit rejected the argument of the infringing manufacturer that copyrightability could not “adhere in the ‘conceptual’ separation of an artistic element,” stating that the argument flew in the face of legislative history which specifically referred to separability occurring “physically or conceptually.” *Id.* at 993. As a result, the Court upheld the copyrightability of two ornamental western belt-buckles, finding that their sculptural features could, conceptually, be identified separately from, and were capable of existing independently of, their utilitarian aspects.

Five years later, in *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) the Court explained that, under *Kieselstein-Cord*, the ornamented surfaces of the buckles held copyrightable in *Kieselstein-Cord* were not in any respect required by their utilitarian

functions, and – critically – that the artistic and aesthetic features could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article. Following and citing this Circuit’s enunciation of the standard in *Carol Barnhart*, the Seventh Circuit in *Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004), surveyed the various “tests” employed by various courts that have considered the matter and elucidated the concept as follows:

Conceptual separability exists, therefore, when the artistic aspects of an article can be “conceptualized as existing independently of their utilitarian function.” *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411, 418 (2d Cir.1985). This independence is necessarily informed by “whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences.” *Brandir Int’l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir.1987). If the elements do reflect the independent, artistic judgment of the designer, conceptual separability exists. Conversely, when the design of a useful article is “as much the result of utilitarian pressures as aesthetic choices,” *id.* at 1147, the useful and aesthetic elements are not conceptually separable.

Id. at 917. Only “if a useful article has aesthetic features that cannot be identified separately from the article, copyright protection is not available.” *Collezione Europa U.S.A., Inc. v. Hillsdale House, Ltd.*, 243 F. Supp. 2d 444, 454 (M.D.N.C. 2003).

These decisions stand for the proposition, contrary to defendants’ benighted suggestions, that running a wire through a sculpture and screwing a light bulb to the end of it does not magically deprive that work of protectable originality. Nothing in the Act suggests that emitting photons renders what would otherwise be copyrightable merely utilitarian. Yet defendants neither acknowledge this line of cases nor do they acknowledge those allegations of the Complaint that most obviously beggar such consideration. They fail to do so because such an analysis would shed too much light on their “conclusory” conclusion, one they hope the Court will adopt by keeping the Court in the dark about the relevant legal standard.

But a little light dispels much darkness. Defendants, for example, ignore ¶ 15 of the

Complaint, in which Ochre which explicitly sets forth the following “design elements . . . reflecting the designer's artistic judgment exercised independently of functional influences” (emphasis added):

The name Arctic Pear refers to one of the prominent elements of the line: numerous exquisite **glass pear-shaped light “drops” arranged in various forms, such as circular hanging fixtures, table lamps or wall sconces.** These unique drops give a visual impression, when illuminated all at once from their respective individual lighting elements as well as by the reflected light of the other drops and other ambient light sources, of being naturally formed, glowing incandescent “pears” of pristine Arctic ice.

The original component of the work alleged here is described by the words set off above in bold type in ¶ 15 – and it is this conceptual, creative work which, as alleged, may be arranged in the form of – or, more accurately, superimposed upon – various types of lighting fixtures. The end result may be **useful** as well as beautiful, but this does not make it utilitarian; the unique artistic properties of the Arctic Pear chandeliers do not lose their original, creative component by virtue of such superimposition. To the contrary, the glass pear-shaped drops that distinguish the various Arctic Pear lights are an artistic feature wholly independent of the lighting fixture; they could have been spheres, cubes, triangles, or any number of shapes.

Contrary to the arguments advanced by defendant Deutsche Bank, the aesthetic choices that result in Arctic Pear chandeliers do not contemplate the utilitarian need for the fixture to produce light suitable for interior spaces. The suggestion by this defendant that the characteristic pear-shaped drops are utilitarian because without them, the light bulbs would be unshielded, causing an uncomfortable glare, is perhaps the dimmest argument in their papers. That the bulbs would, without the pear drops, no longer have their light diffused by the pear drops, is undeniable, as are all tautologies. But it is completely irrelevant. The Cosmopolitan did not seek these fixtures, and the critics and designers and copyrights are not obsessed with the Arctic Pear,

because they know no other way to avoid having to squint at light bulbs, have never heard of dimmer switches or are unable to conceive of replacing the lamps in the fixtures with frosted or lower-watt bulbs.

Nor is the Court limited, in its analysis of the question of creativity here, to verbal descriptions. Figures A and B, which are no less a part of the Complaint than the words used to describe them, depict these glass, pear-shaped light “drops” – the physically and conceptually distinct aspect of these designs – as arranged into the “Round 45” and “Round 60” Chandeliers which incorporate wires and filaments – the utilitarian components – with the original works. Comparison of these two works with the photographs of the infringing fixtures, which are not exact copies of the lighting fixtures but do, in fact, infringe on the conceptually (and, arguably, physically) separable creative sculptural work reveals exactly what right is protected here.

It is this originality that has caused the Arctic Pear line to receive the press, trade and design enthusiast attention it has. As specifically set out in the Complaint in vivid detail, the Arctic Pear has been recognized as original, influential and unique by name and the source of its originality is widely acknowledged to be Ochre. This recognition is so widespread and intuitively obvious that, as alleged in ¶89, when queried about the origin of these distinctive fixtures by a hotel guest, a helpful representative of one defendant readily referred the inquiring guest, not to a hardware store or an electrical fixtures catalog, but to Ochre. It is this fame, and this recognition of its uniqueness and originality, that caused the Arctic Pear to be the subject of defendants’ initial inquiry to Ochre in the first place.

No electrician receives such third-party acknowledgments of creativity as alleged here – certainly, in and of themselves, sufficient to raise a fact question as to that “modicum of originality” required to establish copyrightability under the Act. *See, Dolori Fabrics, Inc. v.*

Ltd., Inc., 662 F. Supp. 1347, 1353 (S.D.N.Y. 1987). Defendants' suggestion that the subject chandeliers incorporating the unique and famous Arctic Pear design are, **as a matter of law**, just a bunch of light bulbs strung together in a bunch must be rejected in light of the specific allegations detailing the non-functional design elements of the works and acknowledging widespread recognition of Ochre's creativity.

Taken as a whole, these allegations are much more than the unenlightened statements of physical and conceptual separability that defendants would have this Court believe. These chandeliers are designed, and are acknowledged by innumerable third parties, to be far more than light sources. They are designed to be beautiful and decorative in a room even during the day, when illumination is unnecessary, and for this reason were chosen by defendants to enhance the materialistic environment of their casinos by lending them a feeling of glamour, beauty and – very clearly – originality.

The Cosmopolitan could have lit up its guest rooms with lights from the Home Depot or from any number of ordinary purveyors of utilitarian lighting fixtures. Instead it sought out the distinguished, acclaimed and unusual Arctic Pear for its facility. The fact that it wanted these works, but didn't want to pay the price for them, is the story of this lawsuit. But their actions belie their claims here, in which they deny that the unique design of the Arctic Pear chandeliers is subject to copyright protection as a sculptural work, well within the meaning of the Act as interpreted by the case law set forth above.

III. OCHRE HAS SUFFICIENTLY ALLEGED FACTS TO SUPPORT ITS CLAIMS FOR MISAPPROPRIATION AND UNFAIR COMPETITION UNDER NEW YORK LAW.

With specific regard to Ochre's claims for misappropriation and unfair competition, all three defendants argue that Ochre's state law claims are preempted by the Copyright Act, and

that the claims are "nothing more than dressed up allegations of copying." As set forth below, proper application of the legal standards to the facts in the Complaint do not support their position. Ochre addresses the New York claims for misappropriation and unfair competition.

The essence of a claim for unfair competition under New York common law is the bad-faith misappropriation by one business of another's expenditure of labor, skill, and money, which is likely to cause confusion or deceive purchasers as to the origin of the goods. *Monsanto Co. v. Haskel Trading, Inc.*, 13 F. Supp. 2d 349, 361 (E.D.N.Y. 1998). An unfair competition claim involving misappropriation usually concerns the taking and use of a plaintiff's property to compete against the plaintiff's own use of the same property. *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982). Courts have also characterized this tort as the bad faith misappropriation of a commercial advantage belonging to another via the exploitation of proprietary information or trade secrets. *See, Opals on Ice Lingerie v. BodyLines, Inc.*, 425 F. Supp. 2d 286, 295 (E.D.N.Y. 2004), *citing Eagle Comtronics, Inc. v. Pico Products, Inc.*, 682 N.Y.S.2d 505 (1998).

Federal copyright law preempts a New York common law misappropriation claim when the claim contains no element to qualitatively differentiate it from those areas protected by copyright. *Kregos v. Associated Press*, 3 F.3d 656 (2d Cir. 1993). Defendants maintain on the one hand that the Arctic Pear design is merely utilitarian, and not subject to copyright protection, but on the other that because copyright preempts this area of protection, no state law protection is available to Ochre. This inconsistency is not addressed by defendants, but it is in the cases:

Under 17 U.S.C. § 301, a state law claim is preempted when: (i) the state law claim seeks to vindicate "legal or equitable rights that are equivalent" to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106—styled the "general scope requirement"; and (ii) the particular work to which the state law claim is being applied falls within the type of works protected by the Copyright Act under Sections 102 and 103—styled the "subject matter

requirement.”⁴

Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997) (“*NBA*”). The tort of misappropriation may, under certain circumstances, withstand preemption. *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 894 (2d Cir. 2011) (nonetheless finding preemption in purported “hot news” context). “A work need not consist entirely of copyrightable material in order to meet the subject matter requirement, but instead need only fit into one of the copyrightable categories in a broad sense.” *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004).

The question then arises whether, if – as defendants allege – a work is merely utilitarian or functional, it can be said to fit into these broad categories. The answer is no, for as the Second Circuit explained in *Barclays Capital*, § 301 preemption bars state law misappropriation only “if the work as a whole satisfies the subject matter requirement” 650 F.3d at 892. “Congress has **explicitly refused copyright protection** for works of applied art or industrial design which have aesthetic or artistic features that cannot be identified separately from the useful article.” *Carol Barnhart, supra*, 773 F.2d at 418 (emphasis added). Because defendants’ copyrightability defense is, in fact, based on such grounds – i.e., their assertion that Arctic Pear is utilitarian and not copyrightable subject matter – and not on the argument that the design is in fact a sculptural work, but one that lacks originality – their argument itself preempts a claim of preemption under the Act. See *id.*, n. 26.

Moreover, the Act does not preempt misappropriation claims based on allegations that a defendant “passed off” copies of a work made by one creator as those of another, an exception to exemption under patent law noted in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964) and whose applicability to copyright was acknowledged in *Princess Fabrics, Inc. v. CHF, Inc.*, 922 F.2d 99, 104 (2d Cir.1990). Such passing off is what it is claimed in the

Complaint (*see* Complaint ¶¶ 28-60, 71-89). The allegations paint a vivid picture of a case of unfair competition and misappropriation squarely within the meaning of the case law set forth above. Ochre has sufficiently alleged that the defendants Rockwell and Friedmutter engaged in a series of acts by which they obtained Ochre's detailed proprietary design information for the Arctic Pear Chandeliers under the pretext of using Ochre as the vendor who would eventually be awarded the contract for this specific scope of work at the Cosmopolitan Hotel. The Complaint further alleges that defendants Rockwell and Friedmutter misappropriated Ochre's proprietary design by incorporating it into their own design specifications without Ochre's permission by way of the Model RFQ, MOD-LGT-8006, and Friedmutter '01/07' Specifications. Most significantly, these two defendants stole credit for the design, "passing it off" as their own, and used the proprietary information contained in these designs to assist a third party in undercutting Ochre's bid price in what was apparently a scheme to lock Ochre out of the "eAuction" referred to herein. With specific regard to Deutsche Bank's role in this entire process, paragraph "67" of the Complaint alleges that Deutsche Bank personnel were directly involved in negotiations and communications with Ochre with respect to the chandelier project.

At the pleading level, having set forth the fundamental basis for a New York misappropriation cause of action, Ochre has easily met its burden of stating such a claim.

IV. OCHRE HAS SUFFICIENTLY ALLEGED FACTS TO SUPPORT ITS CLAIMS FOR FRAUDULENT INDUCEMENT

Under New York Law, the elements of a claim for common-law fraudulent inducement are: (1) the misrepresentation of a material fact; (2) which was known by the defendant to be false and intended to be relied on when made; and that (3) there was justifiable reliance and resulting injury." *Ventur Group, LLC v. Finnerty*, 68 A.D.3d 638, 639 (2009). The allegations here more than adequately support Ochre's cause of action for fraudulent inducement. Time and

time again, the Complaint refers to instances in which the defendants encouraged Ochre to continue to submit its proprietary design information it would not otherwise have provided upon assurances, albeit implicit, that Ochre would be rewarded with the contract to provide chandeliers for the Cosmopolitan. The fact that the defendants misappropriated Ochre's design certainly raises a plausible inference, sufficient to permit Ochre to seek discovery on the issue, that at some point one or more of the defendants knew that the Cosmopolitan would not actually engage Ochre to provide the fixtures, but continued squeezing Ochre for proprietary technical and financial data right up to the closing of bids. These claims very clearly address the actions of defendants Rockwell and Friedmutter. With specific regard to defendant Deutsche Bank, Ochre has alleged that Deutsche Bank was directly involved in the sequence of events which ultimately resulted in the misappropriation of its proprietary design. No more than this is needed: Concerning claims of misappropriation, a motion to dismiss is properly denied if further discovery would yield material evidence or material facts in the movant's exclusive knowledge which would allow them to proceed with their claim. *See, Rochester Linoleum and Carpet Center, Inc. v. Cassin*, 61 A.D.3d 1201 (3d Dep't 2009).

V. OCHRE HAS SUFFICIENTLY ALLEGED FACTS TO SUPPORT ITS CLAIMS FOR UNJUST ENRICHMENT, QUANTUM MERUIT AND QUASI-CONTRACT.

All three defendants have argued that Ochre's equity-based claims are invalid, and that the benefits conferred by Ochre, and the services materials it provided as alleged in the Complaint, were part of Ochre's participation in the bidding process and thus not compensable. Again, consideration of the claims as alleged and the appropriate legal standards suggest a different conclusion.

All three theories of recovery are similar in nature. With respect to quantum meruit

claims, a plaintiff must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation for the services, and (4) the reasonable value of the services. *Martin H. Bauman Assoc., Inc. v. H & M Intl. Transport, Inc.*, 171 A.D.2d 479, 484, (1st Dept. 1991). Unjust enrichment is a quasi-contract claim. *Feigen v. Advance Capital Mgt. Corp.*, 150 A.D.2d 281, 283, 541 N.Y.S.2d 797, 799 (1st Dept. 1989). To recover for unjust enrichment, a plaintiff must demonstrate that (1) the defendant was enriched (2) the enrichment was at the plaintiff's expense; and (3) the circumstances were such that equity and good conscience requires the defendant's to make restitution. *Violette v. Armonk Associates, L.P.*, 872 F.Supp. 1279, 1282 (S.D.N.Y. 1995). A defendant is unjustly enriched when it would be unjust for him to retain a benefit received, considering the circumstances of the transfer and the parties' relationship. See, *McGrath v. Hilding*, 41 N.Y.2d 625 (1977). The person enriched need not commit any wrongful act for such a claim to lie. *Reckson Operating Partnership L.P. v. New York State Urban Development Corp.*, 2001 WL 1649258, **4-5 (N.Y.Sup. September 18, 2001), citing *Simonds v. Simonds*, 45 N.Y.2d 233 (1978). The Complaint here certainly alleges that the defendants have been unjustly enriched by the services rendered and the valuable proprietary information provided by Ochre to the benefit of the defendants. Applying the above standards to the allegations of the Complaint militates that the quantum meruit and unjust enrichment causes of action should remain.

Moreover, it is well settled that where, as here, there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed upon a theory of quantum meruit. *American Telephone & Utility Consultants, Inc. v. Beth Israel Medical Center*, 307 A.D.2d 834, 835 (1st Dept. 2003) (reversing a decision to dismiss an unjust enrichment claim due to existence of bona fide dispute over whether contract covered dispute at issue). See also, *Fisher v. A. W. Miller*

Technical Sales, Inc., 306 A.D.2d 829, 831, 762 N.Y.S.2d 205, 207 (4th Dept. 2003) (pleading one claim in contract and one in quasi contract permissible where there is a bona fide dispute over contract formation).

Contrary to the arguments advanced by the defendants regarding Ochre's services having been provided as part of the bidding process, the quasi contract claims asserted by Ochre are based upon: (1) the allegations that Ochre was actually promised that it would be awarded the bid for the Chandelier work when the defendants advised Ocher that the bidding process was just a formality, thus establishing an implied contract which was later broken; and (2) the fact that all of the defendants were unjustly enriched when they misappropriated Ochre's proprietary design and used it to undercut Ocher's bid and obtain cheap knock-offs of the Arctic Pear chandeliers. These unauthorized copies were later installed in the Cosmopolitan Hotel, resulting in a profit gained by defendants Rockwell, Friedmutter, and Deutsche Bank, at Ochre's expense.

VI. OCHRE HAS SUFFICIENTLY ALLEGED FACTS TO SUPPORT ITS CLAIMS FOR PROMISSORY ESTOPPEL

Defendants argue that Ochre's claim for promissory estoppel should be dismissed, denying that the well-established element of this cause of action – a clear and definite promise, made with the expectation of reliance, reasonably relied on, and detriment to the claimant – is set forth in the Complaint. Specifically, Ochre alleges that all of the defendants' statements and conduct left Ochre with the reasonable belief that its provision of its proprietary design, know-how, and technical assets to defendants was preliminary to the award by defendants to Ochre of the contract to fabricate and install its propriety Arctic Pear chandelier designs at the Cosmopolitan Hotel, Complaint ¶¶ 126; that it relied on the defendants' representations and conduct, and undertook all the foregoing actions in explicit reliance on them, ¶ 128; that its reliance was reasonable under the circumstances, ¶ 130; and that Ochre was damaged, ¶ 132.

Defendants' attack on this portion of Ochre's claim is based primarily upon their erroneous assertion that "Ochre has not alleged any clear and unambiguous promise," relying on language taken from ¶ 53 of the Complaint:

[D]efendants represented to Ochre that the bidding mechanism was essentially a formality required by the project's senior financing sources, and that Ochre was by far the likeliest candidate and most favored to win the bid to fabricate and provide the chandeliers Ochre for the Cosmopolitan

This would appear to be an allegation of a clear and unambiguous promise, but defendants focus on the allegation that defendants' representation was merely that Ochre was "the **likeliest** candidate to win the bid." Such a statement, they assert, is too ambiguous enough to meet the standards for pleading promissory estoppel.

Defendants err, however, not only by placing excessive weight on one word in the language quoting, but by wrenching the entire passage from its context. It is well settled that the determination of whether a promise is clear and unambiguous requires consideration of "specific factual circumstances." *U.S. West Financial Services, Inc. v. Tollman*, 786 F.Supp. 333, 343 (S.D.N.Y.1992). Significantly, this Court in *U.S. West* acknowledges that "there are situations in which sophisticated businessmen may be forced by circumstances to rely on promises they ordinarily would consider risky or uncertain," citing *Sosnoff v. Carter*, 165 A.D.2d 486, 492, 568 N.Y.S.2d 43, 47 (1991).

The facts in the case at bar paint such a picture, and it is submitted that the specific factual circumstances alleged in the Complaint make it abundantly clear that there was no doubt as to whether or not Ochre would be awarded the contract for the Cosmopolitan. This situation might have been different if the defendants would have been forthcoming with Ochre regarding the Deutsche Bank takeover of the hotel. In their obsession over the word "likeliest," defendants have sidestepped the significant allegation that Ochre was led to believe that the bidding

mechanism was essentially a **formality** required by the project's senior financing sources. This language is critical, particularly in light of the fact that the defendants failed to disclose to Ochre the turmoil regarding the construction and development of the Cosmopolitan. For these reasons, Ochre's promissory estoppel claim should not be dismissed.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court deny defendants' motions to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

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