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 8 **IN THE UNITED STATES DISTRICT COURT**
 9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

11 RITA C. HO, SUCCESSOR TRUSTEE
 12 OF THE HO 2012 REVOCABLE LIVING
 TRUST,

Case Number: 17-CV-06520-NC

13 *Plaintiff,*

**COMPLAINT FOR COPYRIGHT
 AND TRADEMARK
 INFRINGEMENT, CONVERSION,
 MISAPPROPRIATION, UNFAIR
 COMPETITION, ELDER ABUSE
 AND RELATED CAUSES OF
 ACTION**

14 VS.

15 ARCHITEKTUR, A GENERAL
 16 PARTNERSHIP, DOING BUSINESS AS
 17 THEMES+PROJECTS, FORMERLY
 DOING BUSINESS AS MODERNBOOK,
 18 AND MARK PINSUKANJANA AND
 19 BRYAN YEDINAK, INDIVIDUALS

(DEMAND FOR JURY TRIAL)

20 *Defendants.*

21
 22 By and for her Complaint against Architektur, a General Partnership, doing
 23 business as Themes+Projects, formerly doing business as Modernbook (“Architektur”),
 24 and Mark Pinsukanjana and Bryan Yedinak, individuals (Architektur and Messrs.
 25 Pinsukanjan and Yedinek collectively, “Defendants”), Rita C. Ho (“Trustee”), Successor
 26 Trustee of the Ho 2012 Revocable Living Trust dated February 22, 2012 (hereinafter the
 27 “Trust”), created by Trustee and her husband (Trustee and the Trust collectively,

1 “Plaintiff”) alleges as follows, with knowledge concerning her own actions and upon
2 information and belief as to all other matters.

3 **THE PARTIES**

4 1. This action is brought by and through Rita C. Ho, who is the surviving
5 spouse of Fan Ho and a resident of Santa Clara County.

6 2. Trustee is the presently-acting trustee of the Trust, a true and correct copy
7 of which is attached hereto as Exhibit 1 and is incorporated herein by this reference.

8 3. Fan Ho (hereinafter “Mr. Ho” or “Decedent”), Trustor Husband, died on
9 June 19, 2016. A true and correct copy of Decedent’s Death Certificate is attached hereto
10 as Exhibit 2 and is incorporated herein by this reference.

11 4. Concurrent with the formation of the Trust, Decedent executed a valid
12 pour-over will naming the Trust the sole beneficiary of his will. A true and correct copy
13 of the Last Will and Testament of Fan Ho is attached hereto as Exhibit 3 and is
14 incorporated herein by this reference.

15 5. The Trust is valid and has not been revoked, modified or amended in any
16 manner that would make the representations made herein untrue.

17 6. Trustee believes that the trust declaration under which she has been acting
18 as trustee is valid.

19 7. Decedent is most notably known and remembered as one of Hong Kong’s
20 best-known photographers, documenting life in 1950s and 1960s Hong Kong. During
21 Decedent’s lifetime, he won over 280 awards from exhibitions and competitions
22 worldwide for his photography; most recently, an exhibition was held in Sotheby’s in
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1 Hong Kong throughout the month of June 2017 titled “*Visual Dialogues: Hong Kong*
2 *through the Lens of Fan Ho.*” See printouts from the Sotheby’s website
3 ([http://www.sothebys.com/en/auctions/2017/visual-dialogues-hong-kong-through-the-](http://www.sothebys.com/en/auctions/2017/visual-dialogues-hong-kong-through-the-lens-of-fan-ho-hk0758.html)
4 [lens-of-fan-ho-hk0758.html](http://www.sothebys.com/en/auctions/2017/visual-dialogues-hong-kong-through-the-lens-of-fan-ho-hk0758.html)) attached hereto as Exhibit 4 and is incorporated herein by
5 this reference. Mr. Ho’s photographs sell for thousands of dollars each.
6

7 8. Defendants Mark Pinsukanjana and Bryan Yedinak are California residents
8 who co-founded, along with Janet Yedlinak (the three serving as initial directors of the
9 entity) Defendant Modernbook, a California corporation (entity number C2366903), on
10 or about November 14, 2001, with Ms. Yedinak (presumably a relation of defendant
11 Bryan Yedinak) named as the agent for service of process on the entity.
12

13 9. According to the California Secretary of State’s Business Search database,
14 the status of Modernbook is “FTB suspended.” See printout from Secretary of State’s
15 database attached hereto as Exhibit 5 and incorporated herein by reference.
16

17 10. Defendants Mark Pinsukanjana and Bryan Yedinak operate the
18 Modernbook Gallery, a gallery now located at 1275 Minnesota Street, Suite 205, San
19 Francisco, CA 94107 and the modernbook.com website.
20

21 11. While the California Secretary of State suspended authorization for
22 Modernbook to operate in the State, for all intents and purposes, Modernbook continues
23 to operate under the name “Themes+Projects by Modernbook,” which trade name is
24 prominent on the modernbook.com website, as reflected by the printouts attached hereto
25 as Exhibit 6 and incorporated herein by this reference.
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1 12. Themes+Projects by Modernbook also describes itself as a book publisher
2 on the modernbook.com website. See Id.

3 13. Defendants Mark Pinsukanjana and Bryan Yedinak (hereinafter the
4 “Individual Defendants”) also claim to have formed a general partnership under the name
5 Architektur, which purports to do business as Themes+Projects, formerly doing business
6 as Modernbook. While the exact relationship and status of Architektur, Modernbook and
7 Themes+Projects (hereinafter the “Defendant Entities”) is unclear, the Individual
8 Defendants control and dominate the Defendant Entities.
9
10

11 **ALTER EGO ALLEGATIONS**

12 14. In fact, the Defendant Entities are the alter ego of Mark Pinsukanjana and
13 Bryan Yedinak. There is a unity of ownership and interest by and between the Individual
14 Defendants and the Defendant Entities such that any separateness between them has
15 never existed.
16

17 15. One or more of the Defendant Entities was formed by the Individual
18 Defendants and operated with inadequate capitalization and a failure to respect corporate
19 or other formalities that would indicate a separate existence from the Individual
20 Defendants.
21

22 16. Individual Defendants comingled and failed to segregate the funds and
23 assets of one or more of the Defendant Entities from their own assets and treated the
24 assets of the Defendant Entities as their own funds.
25

26 17. Individual Defendants have controlled, dominated, managed and operated
27 the Defendant Entities since their inception for their own benefits.
28

1 18. The Defendant Entities are and at all times relevant and mentioned herein
2 were a mere shell, instrumentality, and conduit through which the Individual Defendants
3 carried on their activities.

4 19. Individual Defendants exercised and continue to exercise such complete
5 control and domination of the activities of the Defendant Entities that any individuality or
6 separateness of the Defendant Entities does not and did not at all times relevant exist.

7 20. The Defendant Entities exist for no other purpose than to shield Individual
8 Defendants from liability.
9

10 21. Upholding the corporate or other entity form of the Defendant Entities and
11 allowing the Individual Defendants to bypass personal liability for their actions, which
12 actions were conducted in bad faith, would promote fraud or other injustice. It would
13 permit an abuse of the privileges against liability afforded to companies and
14 organizations and would result in unfairness and an inequitable result to Plaintiff.
15 Moreover, it would promote injustice by allowing Individual Defendants Mark
16 Pinsukanjana and Bryan Yedinak to evade liability or veil assets that should in equity be
17 used to satisfy the judgment sought by Plaintiff in this action.
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21 **SUMMARY OF THE OTHER ALLEGATIONS**

22 22. At its heart, the instant action concerns a famous deceased photographer
23 who entered into an agreement with two individual owners of a gallery who promised to
24 promote his photographic works and share the proceeds of any sales of the works.
25 Leading up to and honoring the arrangement, the photographer turned over to the gallery
26 thousands of his photographs, in the form of negatives and prints. The relationship
27

1 quickly soured, however, as the gallery owners failed to make required payments, and
2 shortly before he passed away, the photographer terminated the relationship and sought to
3 regain control of his property and image. The gallery owners ignored his efforts and, to
4 this day, hold themselves out as authorized representatives of the photographer, despite
5 the decedent's family members' protests and efforts to regain control of the
6 photographer's legacy. The gallery owners continue to sell unauthorized copies of the
7 works and retain all the proceeds from those sales, belatedly (and in conflict with well-
8 settled principals of copyright law) now alleging that they are joint authors of some of the
9 works by virtue of what they claim to be artistic expression resulting from the automated
10 colorization of black and white photographs. This action reflects the efforts of the
11 photographer's wife and trustee of the trust formed by her and her husband, which trust
12 acquired all of the photographer's works by testament, to regain control of the works, to
13 prevent the gallery and its owners from continuing to sell or otherwise dispose of any
14 originals and copies of those works, including as embodied in unlawful compilations of
15 the photographs sold as authorized collection, and to secure compensation for the
16 defendants' actions, including their wrongful retention of the proceeds from the sales of
17 the works.

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22 23. In particular, Trustee herewith asserts claims for copyright infringement,
23 trademark infringement, false designation of origin, unfair competition, unfair trade
24 practices and cybersquatting, under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, the
25 Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and the laws of the State of California. Trustee
26 further alleges wrongful conveyance or transfer of property, breach of contract,
27

1 intentional use of an appropriation of another's name and likeness for commercial
2 benefit, conversion and financial elder abuse under Probate Code § 850, Civil Code §
3 3344.10, Welfare & Institutions Code § 15610.30 and the laws of the State of California.

4 24. In summary, Defendants have and continue to engage in the copying,
5 public exhibition, and commercial exploitation of the unpublished, copyrighted
6 photographs of Fan Ho, a photographer who died on June 19, 2016, and who has
7 achieved worldwide recognition and acclaim. Defendants have also falsely marketed and
8 promoted their infringing activities as authorized by Fan Ho and/or the Trust in order to
9 cause confusion among the public and to illicitly profit from that confusion. Defendants'
10 conduct has caused and continues to cause significant injury to the Plaintiff and has
11 resulted in unlawful profits to Defendants.

12 25. Defendants have further refuse to pay the Plaintiff for photographs and
13 books sold by Defendants, and refuse to turn over thousands of Fan Ho negatives and
14 prints wrongfully retained by Defendants. In an effort to defend their actions, Defendants
15 belatedly claim joint ownership of a small portion of the works. Defendants' claims of
16 joint ownership are not supportable under the law and, in any event, do not excuse the
17 vast majority of the wrongful acts alleged herein. See attached Exhibit 7, a copy of the
18 Cross-Complaint filed by Defendants in the Probate Court action, which Exhibit is
19 incorporated herein by reference.

20 26. Defendants' deceptive acts have allowed Defendants to illegally profit from
21 the Plaintiff's intellectual property and have caused significant injury to the Plaintiff,
22 including monetary damages and reputational harm. Defendants' conduct has also

1 deprived the Trustee of control over the manner in which Mr. Ho's works would and will
2 be introduced to the public, curated, published, and commercialized.

3 27. Trustee concurrently seeks an injunction against Defendants' further
4 infringement of the Plaintiff's intellectual property, seizure and forfeiture of originals and
5 all copies of Decedent's works in Defendants' possession, custody, or control, and all
6 monetary remedies available under law, including but not limited to the Plaintiff's
7 damages and Defendants' profits.
8

9 **JURISDICTION, VENUE & STANDING**

10
11 28. This Court has federal question jurisdiction under 28 U.S.C. §§ 1331 and
12 1338(a) inasmuch as the court is asked to determine proper ownership of copyright based
13 upon a disputed allegation arising under the Copyright Act.
14

15 29. The claims asserted herein arose in this judicial district and all arise out of
16 transactions that took place in this judicial district.

17 30. At all relevant times to this action, Decedent resided in Santa Clara County
18 and died in Santa Clara County, California.
19

20 31. The administration of the Trust is ongoing and such administration is
21 performed in Santa Clara County.

22 32. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) because
23 this is the judicial district in which a substantial part of the acts and omissions giving rise
24 to the claims occurred.
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FACTUAL BACKGROUND

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2 33. In the second paragraph of the Trust Agreement, the Decedent declared that
3 the property described in Schedule A attached to the Trust Agreement constitutes the
4 “Trust Plaintiff” to be held, administered and distributed by the Trustee. (See Schedule A
5 as attached to Exhibit 1 of this Complaint.)
6

7 34. Section 1.02(a) of the Trust Agreement provides that: The Trustors agree to
8 transfer and deliver to the Trustee by appropriate instrument(s), and by execution hereof
9 do transfer and assign, and then Trustee agrees to accept, all that property described in
10 Schedule A and do hereby change the beneficiary of those contractual rights described in
11 said Schedule attached hereto and made a part hereof, which, together with any other
12 property hereafter convey to said Trustee by any person, joint tenancies or contracts, shall
13 constitute and be referred to as the “Trust Plaintiff.”
14
15

16 35. Trustee believes that the assets described in Schedule A are subject to her
17 control as Trustee either under Schedule A attached to the Trust as part of the trust
18 declaration or as validly transferred and assigned under the Trust instrument.
19

20 36. It was the intent of the Decedent, by and through his Trust and Schedule A,
21 to include all of his photographic images (negatives and prints, sometimes collectively
22 referred to herein as the “Works”) as a Trust Asset.

23 37. Decedent enjoyed common law copyright rights in all the photographic
24 images and negatives transferred and assigned under the Assignment.
25

26 38. The Trust retains the Decedent’s interests in all of his photographs, images,
27 negatives, digital images, electronic copies, scans or other imaging duplicative copies,
28

1 whether hard or soft copy, and are assets subject to said Trust, and under the control of
2 Trustee as Successor Trustee under the Trust. Plaintiff believes that these assets are
3 described in Schedule A and are subject to her control as Trustee.

4 39. On November 20, 2017, Trustee filed three separate Visual Arts (VA)
5 Copyright Applications with the United States Copyright Office to acquire statutory
6 protection over representative works authored by Decedent. The case numbers for
7 Decedent's photographs pending registration with the United States Copyright Office are
8 as follows: 1-6024776951, 1-6024866235 and 1-6024866555. Trustee attaches true and
9 correct copies of the receipts evidencing submission of the copyright applications as
10 Exhibit 8 hereto.

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13 40. In addition to copyright rights in his photographic works (negatives and
14 prints, both printed and electronic), Decedent enjoyed common law trademark protection
15 for his name, Fan Ho, in connection with its use to denote the works Decedent created,
16 promoted, sold and distributed.

17 **DEFENDANTS' UNLAWFUL ACTIONS**

18
19 41. On or around October 31, 2012, Decedent executed a "Representing
20 Agreement" (hereinafter "Agreement") with Defendant Modernbook, which Defendants
21 describe as a predecessor entity to Architektur, and notwithstanding that the corporate
22 status (and right to enter into contracts) of Modernbook, a California corporation, had
23 been forfeited at that date. A true and correct copy of the Agreement is attached hereto as
24 Exhibit 9 and is incorporated herein by this reference.

1 42. The Agreement, in sum, states that Architektur was to represent, display
2 and sell Mr. Ho's photographs, images and art work and shall pay to Mr. Ho a percentage
3 of the profits resulting from the sales. In addition, the Agreement stated that Modernbook
4 was to pay to Mr. Ho the sum of \$66,340.84 (Exhibit A, B, C of the Agreement, which
5 serves as Exhibit 9 to this Complaint) at a rate of \$3,500 per month for a period of 18
6 months in compensation for the past due amounts owed from the sale of photographic
7 images and royalties from books from prior agreements, both written and oral.
8

9 43. It is believed that during Decedent's lifetime, Decedent gave Defendants
10 custody and control of as many as ten thousand photographic images, in the form of
11 negatives and prints (the "Works"). Defendants have never provided a full inventory of
12 the Works, despite continued requests by Decedent and more recently by Trustee.
13

14 44. On or around November 6, 2013, Mark Pinsukanjana ("Pinsukanjana")
15 acknowledged that he was indebted to Decedent under the Agreement. Pinsukanjana
16 further acknowledged that he himself was difficult to work with and "temperamental"
17 towards Decedent and his family.
18

19 45. In or around December 2014, Decedent, by and through his children
20 Claudia and William Ng, met with Pinsukanjana. The meeting resulted in a verbal
21 agreement that Pinsukanjana would inventory the images in Defendants' possession, as
22 well as work out a plan for the delinquent payments owed to Decedent pursuant to the
23 Agreement. Pinsukanjana provided a partial inventory of approximately 231 images from
24 the Works to Decedent and Trustee on or around January 21, 2015. No payment proposal
25 was forthcoming to address the delinquent account under the Agreement.
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1 46. The last partial payment received by Decedent under the Agreement was on
2 March 12, 2015. Trustee estimates that Defendants owed the Trust at least \$45,595.72 as
3 of that date under the terms of the Agreement. The amounts owed under the Agreement
4 have continued to grow given Defendants' continued, unauthorized sale of or use of the
5 Works.
6

7 47. On or around October 23, 2015, Decedent wrote a letter to Defendants,
8 through the Defendant Entities' agent for process, revoking the Agreement pursuant to
9 Section 1.B. thereof. (The Agreement provided that, upon "the termination of this
10 Agreement or at the request of [Fan Ho], Modernbook shall be responsible for returning
11 [the Works held by Defendants] to [Decedent] in satisfactory condition.") A true and
12 correct copy of the October 23, 2015 letter (the "Termination Notice") is attached hereto
13 as Exhibit 10 and is incorporated herein by this reference.
14
15

16 48. Defendants have breached numerous obligations under the Agreement and
17 have failed to acknowledge that the Agreement was canceled, or return the Works to
18 Decedent, or Trustee, as required under and as a result of Decedent's termination of the
19 Agreement.
20

21 49. Notwithstanding Decedent's termination of the Agreement and Trustee's
22 (and other Ho family members') repeated requests that Defendants cease their unlawful
23 behavior, Defendants continue to advertise, display and represent Decedent's
24 photographic images for use and sale to the public via the modernbook.com website and
25 other mediums. Defendants have been selling the unauthorized, posthumous prints of
26 Decedent's unpublished works for over \$1,000.00 each, and often for much higher prices,
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1 and books comprising collections of Decedent's photographs for \$75 each and more. See
2 printouts from the Defendants' modernbook.com website attached as Exhibit 6 and
3 incorporated herein by reference. Additionally, without authorization, Defendants have
4 published a perpetual calendar, *Fan Ho: Hong Kong Yesterday*, and are taking pre-orders
5 for a new edition of *Fan Ho: A Hong Kong Memoir* (2nd Edition). See Id.
6

7 50. Causing further harm to the Trust and Trustee, Defendants have and
8 currently operate a Facebook page (<https://www.facebook.com/fanhophotography>) using
9 Decedent's name, likeness and photograph, where they also post photographic images
10 taken by and owned by the Trust. See printouts from Defendant's Facebook page
11 attached hereto as Exhibit 11 incorporated herein by this reference.
12

13 51. Defendants also have and currently operate a standalone website
14 (fanhophotography.com) using Decedent's name, likeness and photograph, at which site
15 they post photographic images taken by Decedent and owned by the Trust. See printouts
16 from Defendant's fanhophotography.com website attached hereto as Exhibit 12
17 incorporated herein by this reference.
18

19 52. Both the Facebook page and the standalone website directly link to the
20 Defendant Entities and list Individual Defendants' contact information.
21

22 53. Defendants' continued operation of both the Facebook page and website
23 exploiting Decedent's name and likeness have prevented the Trustee from entering into
24 other potentially profitable agreements with other parties on behalf of the Trust.
25

26 54. Defendants unlawfully advertise themselves as representing Decedent
27 worldwide, utilize Decedent's name and likeness, and display, market and sell
28

1 Decedent's photographs and images for their own profits and commercial benefit without
2 Decedent's or Trustee's consent or any benefit to the Trust.

3 55. In an unsuccessful effort to curtail Defendants' unlawful actions, on
4 October 18, 2016, members of Decedent's family submitted a takedown notice to Google
5 under the Digital Millennium Copyright Act ("DMCA") in an effort to cause the removal
6 (takedown) of Decedent's copyrighted photographs offered at the
7 "fanhophotography.com" website operated by Defendants. See printouts of the notices
8 under the DMCA from the website <https://www.lumendatabase.org/notices/13218302>
9 attached as Exhibit 13 hereto.
10
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12 56. One week later, on October 25, 2016, the family submitted another
13 takedown notice to Google under the DMCA's guidelines in an effort to cause the
14 removal of Decedent's photographs from Defendants' modernbook.com website. See
15 printouts of the notices under the DMCA from the website
16 (<https://www.lumendatabase.org/notices/13261625> attached as Exhibit 14 hereto.
17

18 57. Defendants' websites at the domain names fanhophotography.com and
19 modernbooks.com remain accessible to the public and reflect the continued
20 misappropriation of the Works and Decedent's persona and trademark.
21

22 **CLAIMS FOR RELIEF**

23 **COUNT I – COPYRIGHT INFRINGEMENT**

24 58. Trustee repeats and incorporates by reference the allegations contained in
25 paragraphs 1 to 57 of this Complaint as if fully set forth herein.
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1 59. Decedent is the author of each of the original, unpublished photographs
2 identified in Exhibit 8.

3 60. Each of the photographs identified in Exhibit 8 is copyrightable subject
4 matter under the laws of the United States.

5 61. Pursuant to California law and the Copyright Act, 17 U.S.C. § 201(d)(1),
6 the Trust is the valid copyright holder in all Works authored by Decedent during his
7 lifetime, including the works depicted in Exhibit 8.

8 62. Defendants had access to the photographs in Exhibit 8 by virtue of
9 Decedent having provided the Works to Defendants under the Agreement in 2012 and
10 thereafter.
11

12 63. Defendants wrongfully created copies of the Works without the Trustee's
13 consent and engaged in acts of widespread infringement through posting the Works via
14 Defendants' websites, the organization of public exhibitions, and the creation and sale of
15 prints. Those unlawful actions continue to this day.
16

17 64. Defendants further infringed the Trust's rights under copyright by making
18 or causing to be made derivative works from the Works by producing and distributing
19 reproductions thereof without the Trust's permission. To the extent Defendants claim that
20 any prints or reproductions they made from negatives containing the Works are derivative
21 works rather than copies, those derivative works also infringe of the Trust's copyrights.
22

23 65. Defendants' acts of copyright infringement, as alleged above, have caused
24 the Trust to suffer, and to continue to suffer, substantial damage to it and its beneficiaries
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1 in the form of diversion of trade, loss of income and profits, and a dilution of the value of
2 the Trust's copyrights.

3 66. Further, as a direct result of the acts of copyright infringement, Defendants
4 have obtained direct and indirect profits they would not otherwise have realized but for
5 their infringement of the copyrighted Works. The Trust is entitled to disgorgement of
6 Defendants' profits directly and indirectly attributable to their infringement of the Works.
7

8 67. Defendants' actions have caused and are likely to cause substantial injury
9 to the public and to the Trust, its goodwill and reputation.
10

11 68. The Trust is entitled to injunctive relief prohibiting Defendants' further
12 infringement, and to recover Defendants' profits associated with the infringement and the
13 Trust's costs.

14 69. Defendants' film negatives, prints, copies, and other embodiments of the
15 Works from which copies can be reproduced should be forfeited to the Trust as
16 instruments of infringement, and all infringing copies created by Defendants should be
17 impounded and forfeited to the Trust, under 17 U.S.C. § 503.
18

19 **COUNT II – FALSE DESIGNATION OF ORIGIN (LANHAM ACT § 43(a))**
20

21 70. Trustee repeats and incorporates by reference the allegations contained in
22 paragraphs 1 to 69 this Complaint as if fully set forth herein.

23 71. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides in
24 pertinent part that “[a]ny person who, on or in connection with any goods or services ...
25 uses in commerce any word, term, name, symbol ... or any false designation of origin ...
26 which is likely to cause confusion or to cause mistake, or to deceive as to affiliation ... or
27

1 as to origin, sponsorship, or approval of goods [or] services ... shall be liable in a civil
2 action.”

3 72. Defendants’ use of confusingly similar imitations of the Trust’s trademark
4 and identity (hereinafter the “FAN HO Mark”), including the Defendants’
5 “fanhophotography.com” domain name, has caused confusion, deception, and mistake by
6 creating the false and misleading impression that Defendants’ business and services are
7 affiliated, connected, or associated with the Trust and its authorized business and
8 products.
9

10 73. Defendants continue to host the organization of worldwide public
11 exhibitions showcasing Decedent’s artwork, which acts are likely to cause even more
12 confusion to the public and hardship to the Trust and its beneficiaries.
13

14 74. Defendants’ actions demonstrate a malicious, intentional, willful, and bad
15 faith intent to trade on the Trust’s goodwill and to cause confusion, deception, and
16 mistake by intentionally portraying a non-existent affiliation or relationship between the
17 Trust and Defendants’ businesses, services, and websites, thereby causing significant and
18 irreparable injury to the Trust.
19

20 75. Defendants have willfully intended to trade on the recognition of, and have
21 willfully intended to harm the reputation of, the Trust and its FAN HO Mark.
22

23 76. Defendants’ aforementioned acts constitute false advertising, false
24 designation of origin and trademark infringement in violation of 15 U.S.C. § 1125(a)
25 (Section 43(a) of the Lanham Act).
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1 77. Defendants' actions have caused and are likely to cause substantial injury
2 to the public and to the Trust, its business, goodwill, and reputation.

3 78. The Trust is entitled to injunctive relief, and to recover Defendants' profits
4 associated with the infringement and the Trust's costs.
5

6 **COUNT III – FEDERAL UNFAIR COMPEITION (LANHAM ACT § 43(a))**

7 79. Trustee repeats and incorporates by reference the allegations contained in
8 paragraphs 1 to 78 of this Complaint as if fully set forth herein.
9

10 80. Defendants' aforementioned acts constitute unfair competition in violation
11 of 15 U.S.C. § 1125(a) (Section 43(a) of the Lanham Act).

12 81. Defendants' actions have caused and are likely to cause substantial injury
13 to the public and to the Trust, its business, goodwill, and reputation.
14

15 82. The Trust is entitled to injunctive relief, and to recover Defendants' profits
16 associated with the infringement, the Trust's costs, and the Trust's reasonable attorneys'
17 fees pursuant to 15 U.S.C. §§ 1116 and 1117.
18

19 **COUNT IV – CYBSERSQUATTING (LANHAM ACT § 43(d))**

20 83. Trustee repeats and incorporates by reference the allegations contained in
21 paragraphs 1 to 82 of this Complaint as if fully set forth herein.

22 84. Defendants have registered, trafficked in, and are using a domain name,
23 “fanhophotography.com,” that includes, and is virtually identical or confusingly similar
24 to, the Trust's FAN HO Mark. Defendants' domain name encompasses the Trust's
25 identity and FAN HO Mark in its entirety, along with the generic wording
26 “photography.” The FAN HO name and identity were distinctive and known to
27
28

1 Defendants at the time they registered and/or acquired the “fanhophotography.com”
2 domain name.

3 85. Defendants had and continue to have a bad faith intent to profit from the
4 fanhophotography.com domain name. Defendants have no valid trademark rights in the
5 “FAN HO” name and mark or any other mark incorporating the element FAN HO.
6

7 Instead, Defendants have used the domain name to divert actual or potential customers of
8 the Trust to Defendants’ fanhophotography.com website for the purpose of causing
9 confusion and exploiting and harming the goodwill of the FAN HO Mark and the Trust’s
10 identity, all for Defendants’ own commercial gain.
11

12 86. Defendants’ aforementioned acts constitute cybersquatting in violation of
13 15 U.S.C. § 1125(d) (Section 43(d) of the Lanham Act).
14

15 87. As a result of Defendants’ acts of cybersquatting, the Trust has suffered
16 detriment to its business, goodwill, reputation, and profits, all to its damage in an amount
17 yet to be determined, and subject to a treble damages award pursuant to 15 U.S.C. §
18 1117. In addition, the Trust is informed and believes that Defendants have derived and
19 will continue to derive unlawful gains and profits as a result of its unlawful acts.
20

21 Alternatively, the Trust is entitled to recover statutory damages.

22 88. This case is an exceptional case and the Trust is entitled to recover its
23 attorneys’ fees pursuant to 15 U.S.C. § 1117.
24

25 89. The Trust is entitled to a transfer of the “fanhophotography.com” domain
26 name from Defendants to the Trust.
27

1 90. Alternatively, the Court should order Defendants to forfeit the domain
2 name and order the domain name registration to be cancelled.

3 91. If the aforesaid acts are permitted to continue, further loss and damage and
4 irreparable injury will be sustained by the Trust, for which the Trust has no adequate
5 remedy at law. Injunctive relief against such continued conduct by Defendants should be
6 granted pursuant to this Court's authority under 15 U.S.C. §§ 1116 and 1118.

8 **COUNT V – COMMON LAW TRADEMARK INFRINGEMENT**

9 92. Trustee repeats and incorporates by reference the allegations contained in
10 paragraphs 1 to 91 of this Complaint as if fully set forth herein.

12 93. This claim arises under the common law of the State of California.

13 94. Defendants' aforementioned acts constitute trademark infringement in
14 violation of California common law.

15 95. Defendants have used confusingly similar imitations of the FAN HO Mark
16 and identity with the willful and calculated purpose of harming or trading on the Trust's
17 goodwill and reputation, and in a manner calculated to imply false sponsorship of or
18 approval by the Trust for the purpose of misleading and deceiving the public.

19 96. Defendants' conduct constitutes infringement of the Trust's common law
20 rights to its mark and has damaged and will continue to irreparably damage the Trust's
21 goodwill and reputation unless enjoined by this Court.

1 **COUNT VI – UNFAIR BUSINESS PRACTICES UNDER CALIFORNIA**
2 **BUSINESS AND PROFESSIONS CODE SECTION 17200**

3 97. Trustee repeats and incorporates by reference the allegations contained in
4 paragraphs 1 to 96 of this Complaint as if fully set forth herein.

5 98. Defendants’ adoption and use of the trademark “FAN HO” and their
6 conduct suggesting to consumers that their activities are or were endorsed, affiliated with,
7 or connected with Fan Ho or the Trust misrepresent the nature of those goods and
8 services and are likely to cause confusion, or to cause mistake, or to deceive as to the
9 origin, sponsorship, or approval of Defendants’ services and therefore constitute a
10 violation of the California Business and Professions Code § 17200.
11

12 99. As a result of Defendants’ acts, the Trust has suffered, and continues to
13 suffer irreparable injury to its reputation and goodwill.
14

15 **COUNT VII – COMMON LAW UNFAIR COMPETITION**

16 100. Trustee repeats and incorporates by reference the allegations contained in
17 paragraphs 1 to 99 of this Complaint as if fully set forth herein.
18

19 101. This claim arises under the common law of the State of California.

20 102. Defendants’ aforementioned acts constitute unfair competition in violation
21 of California common law.
22

23 103. Defendants have engaged in unfair competition through its reliance on and
24 exploitation of consumer mistake and confusion, and its deliberate efforts to exploit the
25 goodwill represented by the FAN HO Mark and the Trust’s identity.
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**COUNT IX – WRONGFUL TRANSFER OF PROPERTY BY
CONCEALMENT AND UNDUE INFLUENCE (PROBATE CODE § 850)**

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113. Trustee repeats and incorporates by reference the allegations contained in paragraphs 1 to 112 of this Complaint as if fully set forth herein.

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114. Decedent was over the age of 65 years (in fact, he was already in his 80s when he signed the Agreement) at all relevant times and throughout his dealings with Defendants.

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115. This cause of action is brought by the Trust as the successor trustee, and, therefore satisfies the standing requirements of Probate Code section 850(a).

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116. At all relevant times, Decedent was vulnerable to undue influence exerted on him by Defendants.

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117. Sometime prior to October 2012 (exact date unknown), Individual Defendants Bryan Yedinak and Mark Pinsukanjana convinced Decedent that they would sell his photographic images by displaying his photographs and images in their gallery and online via their website, and persuaded Decedent to give them an exclusive right to represent Decedent's artwork.

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118. Individual Defendants, either through misleading statements or by undue influence, convinced Decedent to transfer thousands of his images to them for the purposes of displaying and selling them for commercial benefit without the intent to share the proceeds from those sales.

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119. Part of the Agreement encompasses monies owed as part of oral agreements, as well as, an ongoing agreement regarding the division of the proceeds from the sale of images. Decedent was not represented by an attorney prior to signing the

1 Agreement and may not have understood the risks of giving Defendants virtually full
2 control of the Works.

3 120. The Defendants failed to make timely payments to Decedent pursuant to
4 the Agreement for the continued sale of or continued use of the Works.
5

6 121. Individual Defendants made multiple false promises to Decedent that
7 payments were imminent, so as to allow them to continue to hold the Works for the sale,
8 display and use by Defendants. Individual Defendants knew that no payments were
9 forthcoming and there was no intent to pay the Decedent for the sale, display and/or use
10 of the Works.
11

12 122. The last partial payment received by Decedent under the Agreement was on
13 March 12, 2015. The Trust estimates that at least \$45,595.72 is owed as of that date under
14 the terms of the Agreement. This amount does not include any amounts owed due to the
15 continued sale of or use of the Works since that date as no inventory, sales or other
16 accounting was provided to Decedent or the Trustee.
17

18 123. The Individual Defendants persuaded and/or unduly influenced Decedent to
19 transfer thousands of his images for the purposes of displaying and selling them for
20 commercial benefit without the intent to share proceeds from their sale.
21

22 124. Decedent was not a businessman. English was his second language.
23 Decedent did not have legal representation to review and advise him regarding the
24 Agreement. Further, the Individual Defendants gained use of and possession of hundreds,
25 if not thousands, of images prior to the Agreement. Individual Defendants were clearly in
26 an advantageous bargaining position at the time Decedent entered the Agreement.
27

1 125. Defendants continue to display, market, and/or sell Decedent's Works, as
2 well as, the personal likeness of Decedent, while operating several websites and a
3 Facebook page.

4 126. Defendants maintain possession of the Works, including images, negatives,
5 digital images, electronic copies, scans or other imaging duplicative copies of hundreds
6 of photograph images by Decedent for their exclusive use and commercial profit.

7 127. Neither Decedent, nor his estate, has received any payments under the
8 Agreement, or other share of the proceeds from any commercial sale or otherwise by
9 Defendants, since March 12, 2015.
10

11 128. Defendants acted in bad faith by wrongfully acquiring possession of the
12 Works, including images, negatives, digital images, electronic copies, scans or other
13 imaging duplicative copies of hundreds of photograph images by Decedent for their
14 exclusive use and commercial profit through concealment, fraud, and/or undue influence,
15 and therefore, are liable for twice the value of the property recovered pursuant to Probate
16 Code Section 859.
17

18
19 **COUNT X – CONVERSION**

20 129. Trustee repeats and incorporates by reference the allegations contained in
21 paragraphs 1 to 128 of this Complaint as if set forth fully herein.
22

23 130. On or around October 23, 2015, Decedent transmitted the Termination
24 Notice to Defendants revoking the Agreement pursuant to section 1.B. of the Agreement,
25 which provides, e.g., that upon “[a] the termination of this Agreement or at the request of
26
27

1 [Fan Ho], Modernbook shall be responsible for returning Art Work to Artist in
2 satisfactory condition.”

3 131. Defendants have refused to comply with the Agreement or return the
4 images to Decedent, Trustee or his estate, as required by Decedent’s termination of the
5 Agreement.
6

7 132. Defendants have converted the above-mentioned property (the Works),
8 have failed and refused, and continue to fail and refuse, to return the property to the
9 Decedent or Trust.
10

11 133. The Defendants’ aforementioned acts were willful, wanton, malicious, and
12 oppressive, and were undertaken with the intent to defraud, and justify the awarding of
13 exemplary and punitive damages, in addition to return of the Works and compensation
14 for their unauthorized sale.
15

16 **COUNT XI – FINANCIAL ELDER ABUSE**
17 **(WELF. & INST. CODE § 15610.30)**

18 134. Trustee repeats and incorporates by reference the allegations contained in
19 paragraphs 1 to 133 of this Complaint as if set forth fully herein.

20 135. At all times relevant to this action, Decedent was an “elder adult” pursuant
21 to Welfare & Institutions Code section 15610.27.

22 136. At all relevant times to this action, Decedent lacked capacity to manage his
23 financial affairs and/or was vulnerable to undue influence.
24

25 137. Prior to October 2012, but on an unknown date to Trustee, Individual
26 Defendants Bryan Yedinak and Mark Pinsukanjana represented to Decedent that they
27

1 would and could sell his photographic images by displaying his Works in their gallery
2 and online via the modernbook.com website.

3 138. Individual Defendants Bryan Yedinak and Mark Pinsukanjana persuaded
4 and/or unduly influenced Decedent to transfer hundreds of his images to them for the
5 purposes of displaying and selling them for commercial benefit without the intent to
6 share the profits.
7

8 139. Part of the Agreement ultimately executed by Decedent and the Individual
9 Defendants reflects monies owed as part of the earlier oral agreements between them, as
10 well as an ongoing agreement regarding the division of proceeds from the sale of the
11 Works. Decedent was not represented by an attorney prior to signing the Agreement.
12

13 140. Defendants failed to make timely payments to the Decedent pursuant to the
14 Agreement, or for the continued sale of and/or continued use of the Works.
15

16 141. Individual Defendants Bryan Yedinak and Mark Pinsukanjana continued to
17 make false promises to Decedent that payments were imminent, so as to permit them to
18 continue to offer the Works for sale, display and/or use of those images by Defendants.
19 Individual Defendants knew that no payments were forthcoming and there was no intent
20 to pay the Decedent for the sale, display and/or use of the Works.
21

22 142. The last partial payment was received by Decedent under the Agreement on
23 March 12, 2015. The Trust estimates that at least \$45,595.72 is owed to Decedent (and
24 now to the Trust) as of that date under the terms of the Agreement. This sum does not
25 include any amounts owed due to the continued sale of or use of the Works since that
26
27
28

1 date, as no inventory, sales, or other accounting has been received by Decedent or the
2 Trust.

3 143. Individual Defendants Bryan Yedinak and Mark Pinsukanjana persuaded
4 and/or unduly influenced Decedent to transfer hundreds of images to them for the
5 purposes of displaying and selling them for commercial benefit without the intent to
6 share the proceeds from those sales as required by the Agreement and otherwise.
7

8 144. Decedent was not a businessman. English was his second language.
9 Decedent did not have legal representation to review and advise him regarding the terms
10 of the Agreement. Further, Individual Defendants Bryan Yedinak and Mark Pinsukanjana
11 gained use and possession of hundreds of Decedent's images prior to the Agreement.
12 Individual Defendants were clearly in an advantageous bargaining position at the time
13 Decedent entered the Agreement.
14

15 145. Defendants continue to use, display, market, and/or sell the Works, as well
16 as the personal likeness of Decedent, while operating several websites and a Facebook
17 page.
18

19 146. In addition, Defendants unlawfully maintain possession of the Works,
20 including images, negatives, digital images, electronic copies, scans, or other imaging
21 duplicative copies of hundreds of photograph images made by Decedent for their
22 exclusive use and commercial profit.
23

24 147. Neither Decedent, nor the Trust have received any payments under the
25 Agreement, or other share of the proceeds from any commercial sale or otherwise of the
26 Works by Defendants, since March 12, 2015.
27

1 148. Defendants acted in bad faith by wrongfully acquiring possession of the
2 Works, including images, negatives, digital images, electronic copies, scans or other
3 imaging duplicative copies of hundreds of photograph images taken by Decedent for their
4 exclusive use and commercial profit through concealment, fraud, and/or undue influence,
5 and therefore, are liable for twice the value of the property recovered pursuant to Probate
6 Code Section 859.
7

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Trustee prays for judgment as follows:

10 1. An Order that the Decedent's interests in all of his photographs, images,
11 negatives, digital images, electronic copies, scans or other imaging duplicative copies,
12 whether hard or soft copy, belong to the Trust, and are assets subject to said Trust, and
13 under the control of Rita C. Ho, as Successor Trustee of the Ho 2012 Revocable Living
14 Trust Agreement dated February 22, 2012;
15

16 2. An Order that Defendants, and each of them, and their respective agents
17 and servants are enjoined from infringing the Trust's copyright rights in the Works in any
18 manner;
19

20 3. An Order that the Agreement, executed by Defendants at a time when the
21 Modernbook entity had forfeited its corporate status with the State of California, is void
22 and unenforceable by the Defendants.
23

24 4. That the Court order the impoundment, seizure, and forfeiture to the Trust
25 of all infringing copies of Fan Ho Works in Defendants' possession, custody, or control;
26
27
28

1 5. That the Court order the impoundment, seizure, and forfeiture to the Trust
2 of all plates, film negatives, masters, and other articles by means of which infringing
3 copies in violation of the exclusive rights of the Trust, the copyright owner, may be
4 reproduced;

5 6. That Defendants, and each of them, be permanently enjoined from using
6 FAN HO or any variant thereof as a trademark, trade name, corporate identity, domain
7 name, or indicia of origin;

8 7. That Defendants, and each of them, be permanently enjoined from
9 engaging in any conduct which will cause, or is likely to cause, confusion, mistake,
10 deception, or misunderstanding as to source, or confusion as to the affiliation, connection,
11 association, origin, sponsorship, or approval of Defendants' business, services, website or
12 other activities with the Trust or its trademarks;

13 8. That Defendants, and each of them, be ordered to transfer to the Trust the
14 "FanHophotographs.com" domain name (along with any other domains names
15 incorporating the Fan Ho name or any name confusingly similar thereto), or in the
16 alternative, be ordered to forfeit the domain name(s) or order the existing domain name
17 registration(s) be cancelled;

18 9. That the Trust be awarded either (a) all profits of Defendants, and each of
19 them, plus all losses of Fan Ho, attributable to their infringement, the exact sum to be
20 proven at the time of trial, or (b) statutory damages, as elected by the Trust prior to final
21 judgment;

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Certificate of Service

- I hereby certify that I electronically filed the foregoing Complaint with the Clerk of the United States District Court for the Northern District of California (San Jose Division) by using the CM/ECF system on December 13, 2017.
- Participants in the case who are registered CM/ECF users will be service by the Court's CM/ECF system.
- I further certify that some of the participants in the case are not (or not yet) registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatch it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Roger L. Meredith, Esq.
 Law Offices of Roger L. Meredith
 22 Battery Street, Suite 200
 San Francisco, CA 94111
 Counsel for Defendants and Cross-Claimants, Architektur, purportedly a General Partnership, doing business as Themes+Projects, and formerly doing business as Modernbook, and Mark Pinsukanjana and Bryan Yedinak, individuals



Dated: December 13, 2017

Allen J. Baden

4820-4920-9940, v. 3

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