

13-0005-cv

United States Court of Appeals for the Second Circuit

OCHRE LLC, a New York Limited Liability Company,

Plaintiff-Appellant,

– v. –

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Defendants,

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, DBA FRIEDMUTTER GROUP,
NEVADA PROPERTY 1 LLC, a Nevada Limited Liability Corporation
and whollyowned subsidiary of DEUTSCHE BANK TRUST COMPANY
AMERICAS, a New York Corporation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLANT

GOETZ FITZPATRICK LLP
Attorneys for Plaintiff-Appellant
Ochre LLC
One Penn Plaza, Suite 4400
New York, New York 10119
(212) 695-8100

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, plaintiff-appellant states that it has no parent corporation and that no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW	7
SUMMARY OF ARGUMENT	11
<u>LEGAL ARGUMENT</u>	
I. STANDARD OF REVIEW	12
II. THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFF-APPELLANT’S ARCTIC PEAR LIGHTING FIXTURES ARE NOT COPYRIGHTABLE BECAUSE THEY ARE SOLELY USEFUL ARTICLES.....	13
III. THE DISTRICT COURT ERRED IN FINDING THAT THE COPYRIGHT CLAIM AGAINST CERTAIN DEFENDANTS WAS DEFECTIVE AS A MATTER OF LAW DUE TO PLEADING DEFICIENCIES.....	24
CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page(s)
Federal Cases:	
<i>Allstate Ins. Co. v. Rozenberg</i> , 771 F. Supp. 2d 254 (E.D.N.Y. 2011)	29
<i>Aqua Creations USA Inc. v. Hilton Hotels Corp.</i> , 10 CIV. 246 PGG, 2011 WL 1239793 (S.D.N.Y. Mar. 28, 2011) <i>aff'd sub nom.</i> <i>Aqua Creations USA Inc. v. Hilton Worldwide, Inc.</i> , 487 F. App'x 627 (2d Cir. 2012).....	15, 16, 17, 18, 19, 20, 23
<i>Atuahene v. City of Hartford</i> , 10 F. App'x 33 (2d Cir. 2001)	28
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	12
<i>Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.</i> , 834 F.2d 1142 (2d Cir. 1987)	1, 11, 14, 17, 18, 19
<i>Carol Barnhart Inc. v. Econ. Cover Corp.</i> , 773 F.2d 411 (2d Cir. 1985)	13
<i>Chosun Int'l, Inc. v. Chrisha Creations, Ltd.</i> , 413 F.3d 324 (2d Cir. 2005)	1, 15, 16, 17, 18
<i>Colony at Holbrook, Inc. v. Strata G.C., Inc.</i> , 928 F. Supp. 1224 (E.D.N.Y. 1996)	30
<i>Disney Enterprises, Inc. v. Hotfile Corp.</i> , 798 F. Supp. 2d 1303 (S.D. Fla. 2011)	29
<i>Faulkner v. Nat'l Geographic Soc'y</i> , 211 F. Supp.2d 450 (S.D.N.Y. 2002) <i>opinion modified on denial of reconsideration</i> , 220 F. Supp. 2d 237 (S.D.N.Y. 2002) <i>aff'd sub nom. Faulkner v. Nat'l Geographic</i> <i>Enterprises Inc.</i> , 409 F.3d 26 (2d Cir. 2005) <i>and aff'd sub nom.</i> <i>Faulkner v. Nat'l Geographic Enterprises Inc.</i> , 409 F.3d 26 (2d Cir. 2005)	25, 26, 27
<i>Gershwin Publishing Corp. v. Columbia Artists Management, Inc.</i> , 443 F.2d 1159 (2d Cir. 1971).....	25, 27
<i>Heptagon Creations, Ltd. v. Core Group Mktg. LLC</i> , 12-317-CV, 2013 WL 135409 (2d Cir. Jan. 11, 2013).....	18, 19, 20

<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003)	25
<i>Kieselstein-Cord v. Accessories by Pearl, Inc.</i> , 632 F.2d 989 (2d Cir. 1980)	13, 19, 22
<i>Liranzo v. United States</i> , 690 F.3d 78 (2d Cir. 2012).....	4
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954).....	14
<i>Operating Local 649 Annual Trust Fund v. Smith Barney Fund Mgmt. LLC</i> , 595 F.3d 86 (2d Cir. 2010)	12
<i>Pivot Point International, Inc. v. Charlene Products, Inc.</i> , 372 F.3d 913 (7th Cir. 2004)	14
<i>RSO Records, Inc. v. Peri</i> , 596 F. Supp. 849 (S.D.N.Y. 1984)	30
<i>Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.</i> , 453 F.2d 552 (2d Cir. 1972).....	25
<i>Shapiro, Bernstein & Co. v. Goody</i> , 248 F.2d 260 (2d Cir. 1957).....	25
State Cases:	
<i>Savage v. Tweedy</i> , 3:12-CV-1317-HZ, 2012 WL 6618184 (D. Or. Dec. 13, 2012).....	29
Statutes:	
17 U.S.C. § 101	13
28 U.S.C. § 1291	3
28 U.S.C. § 1294.....	3
28 U.S.C. § 1331	3
28 U.S.C. § 1338(a)	3
Copyright Act, § 102(a)(5)	14, 23
Fed. R. App. P. 4(a)(1)(A)	3
Fed. R. Civ. P. 9(b)	29
Fed. R. Civ. P. 12(b)(6).....	1, 3, 4, 12, 29

PRELIMINARY STATEMENT

In *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005), this Court held that “one may not copyright the general shape of a lamp.” This appeal raises the question of whether the “general shape of a lamp” prohibition has evolved into a *per se* rule that a lighting fixture, regardless of how it is configured and without regard for its aesthetic properties or value, can never be afforded copyright protection. Plaintiff-appellant Ochre, LLC (“Ochre”) submits that the law has not, and should not, evolve to that point.

A number of recent cases decided by this Court suggest that the rule of *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987), in which the Court ruled that “a copyrighted work of art does not lose its protected status merely because it subsequently is put to a functional use,” has been eviscerated to the point of having been overruled *sub silentio*. This case presents an ideal opportunity for this Court to demonstrate that under the right circumstances, a creator of lighting designs can meet the elevated standards of the Copyright Act for protection of useful articles under the minimal standards for stating a cause of action of infringement under Fed. R. Civ. P. 12(b)(6).

There are two reasons this is that case. One is that the “useful article” involved, and for which copyright protection was denied by the district court – plaintiff-appellant Ochre, LLC’s celebrated “Arctic Pear” lighting design – is

highly unusual for its widely-acclaimed aesthetic qualities, entirely separate and apart from its ability to provide illumination. The second reason is that the facts describing the respects in which the Arctic Pear fixtures embody protectable, aesthetic components that are clearly separable from the object's utilitarian ones have been pleaded explicitly, precisely and plausibly, in plaintiff's Second Amended Complaint ("Complaint").

The district court nonetheless dismissed the Complaint because it applied an incorrect legal standard, requiring not only that a lighting fixture's separable aesthetic features be pled explicitly but holding that such allegations are of no legal significance if those features have any role, even a non-exclusive or incidental one, connected or "related to" illumination under any circumstances. This is contrary to the rule of *Brandir*. Additionally, the district court erred by overlooking allegations in the complaint that, if properly considered, would have met the legal standard it enunciated anyway.

The second ground of dismissal by the district court, at least with respect to all but one defendant in this infringement case, was improper "lumping" of claims against the respective defendants. The district court erred in applying this doctrine, normally reserved for causes of action sounding in fraud or complex transactions in which the respective parties cannot tell from the pleadings what they are being accused of. Here the relationships were straightforward and well defined. The

facts concern a narrowly defined scope of time and a series of transactions with which all the defendants are familiar. Moreover, under the pleadings standards for both direct and secondary copyright infringement (both vicarious and contributory), the court's lumping determination was inappropriate considering the general rule of joint and several liability for copyright infringement and the minimal requirements of Fed. R. Civ. P. 12(b)(6).

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). This Court has appellate jurisdiction from a final decision of a U.S. District Court under 28 U.S.C. §§ 1291 and 1294. Ochre filed a timely Notice of Appeal pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in dismissing the complaint under Fed. R. Civ. 12(b)(6) on the ground that the lighting fixture whose copyright was claimed to have been infringed was not copyrightable as a useful object, despite the explicit allegations of separable aesthetic qualities apart from its illuminative function?

2. Did the district court err in dismissing the copyright claims in the complaint as against all but one defendant under Fed. R. Civ. 12(b)(6) on the ground of "lumping" where the copyright claims do not involve allegations of

fraud and involve a series of events based on a preexisting business relationship involving all the parties?

3. Did the district court err in dismissing the copyright claims in the complaint as against all but one defendant under Fed. R. Civ. 12(b)(6) on the ground of “lumping” where the allegations meet the established standards for pleading direct and secondary copyright infringement?

STATEMENT OF THE CASE

For purposes of this appeal, the following facts taken from Ochre’s complaint are assumed to be true. See *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012) (in a motion to dismiss for lack of subject matter jurisdiction, court takes facts alleged in the complaint as true). The district court summarized many key factual and procedural points in its decision, *Ochre LLC v. Rockwell Architecture Planning & Design, P.C.*, 12 CIV. 2837 KBF, 2012 WL 6082387 (S.D.N.Y. Dec. 3, 2012), from which all the following is taken:

Ochre is a specialized furniture, lighting, and accessory design company. Among its products are a line of “Arctic Pear” specialty chandeliers with rows of glass “drop” elements shaped like the eponymous fruit. Ochre filed a single copyright application for both the “Arctic Pear Round 45” and “Arctic Pear Round 60” designs with the U.S. Copyright Office on March 22, 2012. (Complaint Ex. C.)

The Copyright Office denied the application on May 14, 2012, on the basis that the two designs were for a “useful article” and lacked “any separable authorship” from the functional aspects of the article. (Complaint Ex. D.)

In May 2009, defendant Rockwell, a specialty design firm, solicited plaintiff to submit prototype lighting fixtures for the Cosmo Room, a model room at the Cosmopolitan hotel and condominium complex then under construction in Las Vegas. Ochre provided defendant Project Dynamics, the procurement agent for the Cosmopolitan, with shop drawings and design information for lighting fixtures for the Cosmo Room, based on the “Round 45” and “Round 60” designs. Plaintiff alleges that Project Dynamics shared the shop drawings and design information with Rockwell and defendant Friedmutter, the chief architectural firm on the project. After Project Dynamics approved the drawings, plaintiff sent prototype fixtures to the hotel for display in the model room.

Plaintiff alleges it only submitted the detailed designs and samples to “defendants” on the “express understanding” that it was going to be awarded a contract to provide hundreds of similar fixtures for the Cosmopolitan. But shortly after sending the prototypes, Project Dynamics informed Ochre that it would have to go through a competitive bidding process. As part of that process, Ochre submitted what it characterizes as “confidential” financial and other information relating to the designs, information it told Project Dynamics it was furnishing “in

good faith that the [purchase order] deposit will be received in a timely manner.” Defendants assured it that the bidding process run by Deutsche Bank's “eAuction” system was merely a “formality.”

Friedmutter, the architect, issued two specifications for the light fixtures in September 2009, both of which included photographs of Ochre's Arctic Pear design for “inspiration” and the “look of” only, and referred to a drawing that allegedly incorporated the designs Ochre had provided to Rockwell and Project Dynamics. The Friedmutter specifications falsely claimed that “[t]he custom item described herein is the proprietary design of Nevada Properties 1 dba the Cosmopolitan Resort and Casino.”

Despite the assurances of defendants, Ochre did not receive a purchase order, perhaps because cost-cutting in light of the Las Vegas housing bust and the related sale of the Cosmopolitan to Deutsche Bank in the summer of 2008 prompted defendants to outfit the hotel “on the cheap.” Defendants nonetheless had used Ochre's design, specifications and shop drawings to procure unlicensed copies or “knockoffs” of the Arctic Pear Chandeliers from a cheap overseas supplier. On information and belief, Ochre states that the knockoffs were installed in “hundreds or perhaps thousands” of hotel rooms not only at the Cosmopolitan, but also at other hotels where defendants had design responsibility.

Ochre filed suit on April 10, 2012. It amended its complaint on June 15, 2012. At the initial pretrial conference on June 27, 2012, the Court permitted plaintiff to file one “final” amendment. In response, plaintiff filed the Complaint on June 28, 2012, which added a cause of action for misappropriation and unfair competition and included information regarding the denial of plaintiff's copyright application. Defendants Friedmutter, Deutsche Bank, Rockwell, and Project Dynamics, filed motions to dismiss the Complaint for failure to state a claim. The motions were fully briefed as of October 12, 2012 and the district court issued its ruling dismissing the complaint on grounds of non-copyrightability and, with respect to all defendants other than Deutsche Bank, a failure to adequately plead its copyright claims under the “lumping” doctrine, on December 3, 2012.

**STATEMENT OF FACTS RELEVANT
TO THE ISSUES SUBMITTED FOR REVIEW**

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. [A 4.] These glass “drops” or “pears” are not light bulbs, as seen most clearly in the shop drawings [A-54, A-55, A-62, A-65] which describe them as made of clear glass surrounding a central lighting fixture, also readily seen in the photograph in one of the specifications also attached to the Complaint [A-68].

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 in the Complaint as Figure A. [A 4-5.] Another popular 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 displayed in the Complaint as Figure B. [A 5-6.]

Ochre’s Arctic Pear fixtures have been and continue to be exhibited at leading design and architectural exhibitions and displays in the U.S. and Europe. Arctic Pear fixtures have been prominently featured in high-end popular interior

design and fashion periodicals, whose readership consists of high-income, sophisticated consumers of interior design services and luxury travel 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*. [A 6-8.] For example, in a spring 2011 story in *Elle Décor* magazine, 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 screen shot depicting the Internet version of the article and the reference to the Ochre Arctic Pear fixture is depicted in the Complaint as Figure C. [A 7.]

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. [A 7-8.]

The Cosmopolitan Hotel is a luxury resort casino and hotel in Las Vegas consisting of two high-rise towers (the “Cosmopolitan”), and is owned by defendants NP1 and Deutsche Bank. Construction on the Cosmopolitan began in October 2005 and took over five years at the cost of over \$3.9 billion. The Cosmopolitan's design team was led by defendant Friedmutter as executive architect. Interior design at the Cosmopolitan was handled by Friedmutter which worked with various specialty design firms, including defendant Rockwell. [A 30.] Defendant Project Dynamics was the subcontractor responsible for procuring custom-designed light fixtures for the Cosmopolitan. [A 31.] In May of 2009, Ochre was contacted by Rockwell and asked to participate in process of supplying Arctic Pear light fixtures for use in the Cosmopolitan. [A 30-31.] Ochre interacted repeatedly with Project Dynamics, which in turn conveyed information and specifications among Ochre, Friedmutter and Rockwell, in connection with the project. [A 31-39].

Ultimately, despite publishing what amounted to a requests 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 subsequently 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. [A 39.]

Ochre filed a single copyright application for both the "Arctic Pear Round 45" and "Arctic Pear Round 60" designs with the U.S. Copyright Office on March 22, 2012. [A 71-75.] The Copyright Office denied the application on May 14, 2012, on the basis that the two designs were for a "useful article" and lacked "any separable authorship" from the functional aspects of the article. [A 76-77.]

SUMMARY OF ARGUMENT

This Court should reverse the district court's order because the district court applies the incorrect standard in evaluating whether the Arctic Pearl lighting fixture is entitled to any copyright protection, erroneously holding that any aesthetic feature which in any way "relates to" the transmission of light is per se a functional feature. The court's holding made no allowance for the rule in *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987) that "a copyrighted work of art does not lose its protected status merely because it subsequently is put to a functional use." The district court also erroneously omitted

consideration of allegations that specifically set out entirely aesthetic features of the Arctic Pearl separate and apart from the function of providing illumination.

The district court also erred in dismissing the copyright claims against all but one defendant on the ground that they were improperly “lumped.” The rule against lumping is not appropriately employed with respect to claims for direct and secondary copyright infringement, as were pled in the Complaint, and the facts in this case were also not appropriate for application of that principle.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

A district court’s grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*, “accept[ing] all well-pleaded allegations in the complaint as true [and] drawing all reasonable inferences in the plaintiff’s favor.” *Operating Local 649 Annual Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010). A claim must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFF-APPELLANT’S ARCTIC PEAR LIGHTING FIXTURES ARE NOT COPYRIGHTABLE BECAUSE THEY ARE SOLELY USEFUL ARTICLES.

The Copyright Act excludes from copyright protection “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, which provides as follows (emphasis added):

[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified **separately from**, and are **capable of existing independently of**, the utilitarian aspects of the article

This requirement of “separation” – between the utilitarian and the aesthetic – need not be physical, but, as the Court explained in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), can be conceptual. In *Kieselstein-Cord*, the Court upheld the copyrightability of two ornamental western belt-buckles, finding that they were eligible for protection because their sculptural features could be identified conceptually as separate from, and were capable of existing independently of, their utilitarian aspects. *Kieselstein-Cord* was elucidated five years later in *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985), in which the Court explained that because the ornamented surfaces of the buckles held copyrightable in *Kieselstein-Cord* were not required by their

utilitarian functions, the artistic and aesthetic features could be deemed as having been added to or superimposed upon an otherwise utilitarian article. Finally, in *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987), the Court made it clear that “a copyrighted work of art does not lose its protected status merely because it subsequently is put to a functional use.” As the Seventh Circuit explained in *Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (7th Cir. 2004), quoting *Brandir, supra*:

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).”

This distinction between a merely utilitarian object on the one hand, and a decorative sculptural object that can also have a useful function – and hence is protectable – is also reflected in § 102(a)(5) of the Copyright Act. *See, Mazer v. Stein*, 347 U.S. 201, 212–13 (1954).

This application of “separability” to a particular kind of useful object – lighting fixtures (the subject of this appeal) – was addressed by the Court in *Chosun Intern., Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005). In *Chosun* the Court explained that “one may not copyright the general shape of a

lamp, because its overall shape contributes to its ability to illuminate the reaches of a room. But one can copyright the fanciful designs imprinted on, or carved into, the lamp's base, so long as those designs are unrelated to the lamp's utilitarian function as a device used to combat darkness.” *Id.* at 328 (citations omitted; emphasis supplied). These are the legal standards whose application is at issue on this appeal, which involves a lighting fixture design widely recognized as a work of decorative art on its own merits. And, as set out more fully below, that work – the Arctic Pear – incorporates numerous design elements that neither bestow it with functionality nor enhances the function of lighting up a dark room.

In its opinion dismissing plaintiff's case on the ground that it was a useful object, the district court held that Ochre had

not plausibly alleged physical or conceptual aspects of the Arctic Pear chandeliers separable from their functional aspects. Nowhere does the [Complaint] allege that any element of the Arctic Pear design is physically separable from the fixture such that it could be sold without impacting the article's functionality. Nor does the [Complaint] allege conceptual separability.

Ochre Creations, 2012 WL 1239793, at *6. In so holding the district court quoted *Aqua Creations USA Inc. v. Hilton Hotels Corp.*, 10 CIV. 246 PGG, 2011 WL 1239793 (S.D.N.Y. Mar. 28, 2011) *aff'd sub nom. Aqua Creations USA Inc. v. Hilton Worldwide, Inc.*, 487 F. App'x 627 (2d Cir. 2012), which itself quotes *Chosun's* formulation that “a component of a useful article can actually be removed from the original item and separately sold, **without adversely impacting**

the article's functionality,” *Chosun*, 413 F.3d at 327 (emphasis added). The district court, however, when describing the *Ochre* Complaint, restates that formulation omitting the word “adversely,” stating, again, the Complaint fails to allege “that any element of the Arctic Pear design is physically separable from the fixture such that it could be sold **without impacting** the article's functionality.”

As to conceptual separation, relying further on *Aqua*, the court found that “It strains belief that the creator of the . . . designs would have selected a shape for the lamp shades without giving any consideration to the need for illumination.” Continuing, the district court concluded that plaintiff’s claims of conceptual separability were incredible:

That the Arctic Pear designs provided to the Cosmopolitan were designed to illuminate hotel rooms – no matter how stylish – suggests that the functional aspect of those designs is conceptually inseparable from their functional aspects. . . .

[B]ecause those drops aid in the transmission and dissemination of electric light, their ornamental aspects are inextricably intertwined with the utilitarian function of those lamps. While it would be possible to operate the lamp without the drops, that does not mean the ornamental aspects are “not in any way required.” Rather, without the presence of the glass drops, the utilitarian function of the electric lamp would be diminished. It is not conceptually possible to separate one function from the other.

Id. In so holding, however, the district court erred in two respects.

The first error was in interpreting the doctrine of separability as a Manichean mandate by which anything that so much as complements functionality cannot be

aesthetic. Only by utilizing such an approach, which is contrary to *Brandir*, could the district court conclude that because the Arctic Pear’s glass drops can “aid in the transmission and dissemination of light,” they can only be functional.

Secondly, the district court erred in reasoning that *Chosun*’s requirement that a lighting fixture’s creative elements must be separable from its utilitarian elements – illumination – means that its creative, protectable elements **can never implicate or integrate light**. Taken to its logical conclusion, naturally, this latter proposition cannot be literally true. No object is perceived visually except by virtue of how it interacts with light, whether or not the object itself provides that light. The district court, however, presumably took its cue from *Aqua*’s formulation to the effect that copyright will not protect an aspect of an article that “contributes to its ability to illuminate the reaches of a room,”– the word “only” being silently inserted – only “the fanciful designs imprinted on, or carved into, the lamp’s base, so long as those designs are unrelated to the lamp’s utilitarian function as a device used to combat darkness.”

Strictly read, these words – especially the word “unrelated” – might be understood to mean that anything that could be construed as the “light parts” of a lamp (e.g., a lightshade) can never be protectable because they “contribute” to the lamp’s illumination function. Such a reading is not supported by anything in the Copyright Act, however. Neither *Chosun*, *Aqua* nor any other case establishes a

facile distinction between “light parts” and “non-light parts” for protectability. There is no basis in the Copyright Act that establishes a special, restrictive rule for light such that, unlike other physical qualities, nothing implicated in its emission, reflection or appearance can be deemed a cognizable aesthetic work protectable by copyright. To the contrary: the creative use and manipulation of light can be and is a separate, protectable creative aspect of any object, and that can be true even if that object also has a separate functional, illuminating aspect. To hold otherwise is to ignore the controlling holding of *Brandir* that “a copyrighted work of art does not lose its protected status merely because it subsequently is put to a functional use.”

Aqua and *Chosun* did not overrule *Brandir*. The distinction they posit is not between “light parts” and “non-light parts,” though the district court seemed to apply that incorrect test. Rather, the law distinguishes between features that **only** serve “to illuminate the reaches of a room” – which are unprotectable -- and aspects of design that are themselves **aesthetic features** of the work, even if they have some unavoidable relation, or even contribute in some way, to the lamp’s lighting function – which are protectable.

The recent ruling in *Heptagon Creations, Ltd. v. Core Group Mktg. LLC*, 12-317-CV, 2013 WL 135409 (2d Cir. Jan. 11, 2013) that “The design elements that the complaint identifies in the lamps, including the texture of the lamp shades,

are not akin to ‘fanciful designs’ . . . but rather are related to “the lamp[s]’ utilitarian function as [devices] used to combat darkness,” is not contrary to this analysis. In *Heptagon* the designer sought protection for the mere choice of material used to embody the object’s function, i.e., this or that sort of lampshade. As in *Aqua*, however, the words “related to” in *Heptagon* do not suffice to establish that this Court overruled *Brandir* by forbidding any “relation” between functionality and aesthetics – an almost impossible achievement in a unitary physical object, as recognized both in *Brandir* and *Kieselstein-Cord*.

Unlike here, in *Heptagon* and *Aqua* the plaintiffs did not adequately plead a cognizable separation between the aesthetic and the functional. In contrast, the Ochre complaint describes and depicts precisely a creative integration of light, metal and glass that creates a localized, self-defined aesthetic experience – a three-dimensional sculpture that offers the added benefit of adding light to the room when it gets dark. The entitlement of such an original work to protection under copyright is not, contrary to the district court’s ruling, negated by the fact that the Arctic Pear lamp can, separate and apart from being a sculptural work, also emit light. The district court asserted that “It is not conceptually possible to separate one function from the other.” But it did not reckon with ¶ 15 of the Complaint, in which Ochre explicitly sets forth the following “design elements . . . reflecting the designer’s artistic judgment exercised independently of functional influences”:

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.**

[A-26 (emphasis added).] The original, separable aesthetic component of the work described here is alleged in the words set off above in bold type above.

There are many ways to shield light bulbs, and to arrange them in an array, so that they will effectively “illuminate the reaches of a room.” But that is not what the paragraph above describes. Ochre is not seeking protection of its choice of materials or some ordinary enhancement of a utilitarian, light-radiating function as this Court rejected in *Aqua* and *Heptagon*. Rather, the allegations describe the creation of a “visual impression” where what is “illuminated” is **the work itself** – not the hotel room mini-bar. The “glowing incandescent ‘pears’ of pristine Arctic ice” have nothing to do with “combatting darkness” next to the complimentary drip-coffee maker; they are an independent aesthetic phenomenon. Every single word in the foregoing paragraph from the Complaint describes the visual impression on a viewer observing the fixtures themselves as *objets d’art*.

The district court, while repeating the now-familiar standards courts refer to when rejecting typical copyright claims for lighting fixtures, made no reference at all to these allegations. Nor does the opinion below address the description of the

Arctic Pear's original features with respect to the allegations as to the manner in which the Arctic Pear manipulates, displays and enhances, for purposes of the visual effect it presents, light from **other** sources – “the reflected light of the other drops and other ambient light sources.” In so doing, the object creates, not just more light in the room, but “a visual impression of being naturally formed, glowing incandescent ‘pears’ of pristine Arctic ice.” And this is what the Copyright Act protects.

Indeed, while the Complaint omits a formulaic, conclusory recitation of conceptual or physical separability, these allegations as well as the photographs included in the Complaint support this conception of the Arctic Pear as a self-contained visual phenomenon, not just a “light.” Figure A, appended to ¶ 15, depicts an Arctic Pear “Round 45” Chandelier hanging in a sparsely-lit room. Behind the fixture is the outline of a window, unable to contain a wash of sunshine providing all the apparent illumination in the space shown. The lamps on the Arctic Pear fixture are burning dimly, yellow incandescent beams mingling with the bright sun glare – a demonstration of a visual effect that includes light; features light; adores light; and may or may not radiate light. It demonstrates, and alleges, an aesthetic experience in which illumination actually provided by the chandelier may be incidental, and where it is conceptually separate to say the least.

Figure B, appended to ¶ 17, is comparable; the image suggests a cluster of warm, amber glass grapes illuminated by the single lit lamp component nearly hidden by the characteristic pear-shaped glass decorations that give the Arctic Pear its name.

And Figure C demonstrates an Arctic Pear chandelier prominent in a photograph from a “celebrity homes” feature in the upscale *Elle* magazine about the interior decoration of a restored West Village brownstone belonging to a movie and television performer. The room is shown in the blaze of full day, its brightly-hued interior reflecting white sunshine streaming through an adjacent full-length window and reflecting off the round antique mirror above a fireplace as well as off the glass “pears” of the Arctic Pear fixture. **The fixture is unlit** – demonstrating cognizable physical separability in actual fact; for all the viewer of the photograph knows, the fixture may not even be attached to any wiring. Yet in describing the room with obvious approval, the article describes the inert “light fixture” as a “feature” of the living room – even though it is not lighting anything up. The allegation here is that for one interested in stylish interior design aesthetics, an Arctic Pear is a thing to **have** in one’s room, not – or not merely – a way to find one’s room. And this comports with the standard enunciated in *Kieselstein-Cord* of sculptural features that are capable of existing independently of their utilitarian aspects.

Yet the district court completely omitted any consideration § 102(a)(5) of the Act, which protects “sculptural works” – a provision on which plaintiff explicitly relied in its opposition to defendants’ motion. Contrary to the district court’s mechanical analysis, the cases interpreting the application of copyright protection to creative works that are also lighting fixtures do not hold that running a wire through a sculpture and screwing a light bulb to the end of it does not automatically deprive that work of protectable originality. Nothing in the Act requires that emitting or reflecting photons renders what would otherwise be copyrightable merely utilitarian. The glass pear-shaped arrays of glass drops that distinguish the various Arctic Pear lights are an artistic feature wholly independent of, or at best merely complementary to, their lighting function.

Unlike in *Aqua Creations*, where the plaintiff did “not plead any facts at all in support of its conclusions that the lamps have separable elements . . . [did] not even identify what those elements are [and merely] assert[ed] that its lamps are conceptually and physically separable,” 487 F. App'x at 629, here the complaint explicitly plead a coherent, affirmative conceptual separation – and, as set forth below, arguably physical separation – between utilitarian and aesthetic functions, and describes a work that is not merely an attractive light but an attraction.

The complaint here describes and, in the attached photographs, depicts a sculptural work that also has a light in it. In the dark this work can bestow a useful

benefit when an electric current is passed through the lone fixture that the “pears” surround, just as a fountain nymph directs water but is a sculpture all the same. But this usefulness does not nullify the creative and aesthetic qualities of the overall work for purposes of the Copyright Act. An aesthetic effect manifested by the manipulation of interacting and cross-refracting glass surfaces is no less entitled to protection than that created by screwing a Mickey Mouse figurine onto a lamp base or silkscreening a Hello Kitty icon onto a lampshade.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE COPYRIGHT CLAIM AGAINST CERTAIN DEFENDANTS WAS DEFECTIVE AS A MATTER OF LAW DUE TO PLEADING DEFICIENCIES.

The district court also dismissed Ochre’s claims on the ground of insufficient pleading and “lumping,” writing as follows:

A plaintiff cannot merely lump all the defendants together in each claim and provide no factual basis to distinguish their conduct.

Ochre lists a number of undifferentiated allegations in the Complaint. For instance, the Complaint alleges “defendants” gave an “express understanding” that Ochre would win the full purchase order; that “defendants” used “Ochre's design[s] ... to procure unlicensed copies or ‘knockoffs,’” and that “defendants ... 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.” These statements do not allege which of the defendants or agents of those defendants engaged in the infringing activities, even where, as with the “express understanding,” Ochre would have had a course of dealing with particular individuals and could allege which of those individuals made improper representations to Ochre.

Ochre LLC, 2012 WL 6082387 at *6-*7 (citations omitted). The court's analysis, however, is incomplete, and it applied an erroneous legal standard.

“Copyright infringement is in the nature of a tort, for which all who participate in the infringement are jointly and severally liable.” *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552, 554 (2d Cir. 1972). “[T]he liability of each infringer, whether he be manufacturer, distributor or retailer, is several.” *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 267 (2d Cir. 1957). Beyond this, parties can be “contributory” infringers if they have knowledge of or reason to know of the infringing activity of another and materially contribute to the infringement. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Such knowledge may be actual or constructive. *Faulkner v. Nat'l Geographic Soc'y*, 211 F.Supp.2d 450, 474 (S.D.N.Y. 2002), *aff'd*, *Faulkner v. Nat'l Geographic Enters. Inc.*, 409 F.3d 26 (2d Cir. 2005). “Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement).” *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

The other variety of secondary liability for infringement, vicarious liability, which the Complaint alleges as well, “extends beyond an employer/employee relationship to cases in which a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities. Benefit

and control are the signposts of vicarious liability.” *Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450, 472 (S.D.N.Y. 2002) *opinion modified on denial of reconsideration*, 220 F. Supp. 2d 237 (S.D.N.Y. 2002) *aff'd sub nom. Faulkner v. Nat'l Geographic Enterprises Inc.*, 409 F.3d 26 (2d Cir. 2005) *and aff'd sub nom. Faulkner v. Nat'l Geographic Enterprises Inc.*, 409 F.3d 26 (2d Cir. 2005) (citations omitted).

The district court disregarded both the contributory and vicarious standards in dismissing the copyright claim, however. Regarding defendant Rockwell, for example, the district court wrote, “Rockwell is alleged to have 1) discussed the Cosmo Room with plaintiff, 2) forwarded the proposed design Ochre submitted for the model room, and 3) received the proprietary information that Ochre sent to Project Dynamics. (Complaint ¶¶ 28, 29–30, 45.) None of those allegations go to whether Rockwell copied or wrongfully displayed Ochre's designs.” *Ochre LLC* at *5. Two of these allegations, however, were not meant to “go to” plaintiff's copyright infringement claims at all, but were relevant to the other claims not addressed substantively in the opinion below. The allegation, however, that Rockwell “forwarded the proposed design Ochre submitted for the model room” and the allegation that Rockwell was responsible for the interior design at the hotel (¶ 27) is sufficient for purposes of contributory infringement a material contribution to the infringement.

These allegations also meet the standard of vicarious liability, for all that requires is an allegation that “a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities” – which describes each and every defendant’s relationship to the hotel, which ultimately committed the infringement.¹ Because parties can be contributory infringers merely because they have knowledge of or reason to know of the infringing activity of another and materially contribute to the infringement, *Gershwin, supra*, 443 F.2d at 1162, or merely benefit from the infringement and have a modicum of control over the process, *Faulkner*, 211 F. Supp. 2d at 472, Rockwell’s central role in the narrative of infringement was adequately pleaded here. Similarly, the district court wrote as follows regarding defendant Friedmutter:

[A]s regards Friedmutter, the Complaint makes three specific allegations: first, that “Cosmopolitan's design team was led by defendant Friedmutter as executive architect;” second, that “Interior design ... was handled by Friedmutter which worked with various specialty design firms, including Rockwell” (Complaint ¶¶ 26–27); and third, that Friedmutter issued the specifications for the bidding process. (*Id.* ¶¶ 71–79.) The Complaint contains no specific allegations that Friedmutter was involved in the selection of the fixture supplier or caused any “knockoffs” to be produced.

¹ The district court acknowledged that the allegation “that Deutsche Bank, as owner of the property, has caused and continues to cause infringing products to be displayed at the hotel and on its website” would, “if supported by a sufficiently pled allegation of a valid copyright, might support a copyright infringement cause of action on an unauthorized public display theory.” *Id.* Indeed, the allegations support a claim of vicarious liability based on agency for all the defendants, not only Deutsche Bank.

Ochre LLC at *5. Given the legal tests, again, the allegation that Friedmutter was responsible, along with Rockwell, for interior design on a project where those responsible chose to infringe a copyright to meet their interior design needs should be more than sufficient an allegation of both direct and secondary liability under either the vicarious or contributory doctrines.

As to Project Dynamics, the district court wrote, “The allegations with respect to Project Dynamics are similarly insufficient. The only allegations specific to Project Dynamics in the Complaint state that Project Dynamics acted as the procurement agent for the Cosmopolitan—a role in which it was essentially the owner's agent.” *Id.* But these allegations are sufficient, because Ochre sought relief on the ground of vicarious liability (§ 101), given the district court's acknowledgment of an agency relationship between Project Dynamics and Deutsche Bank, even if the broad “willful blindness” standard for pleading contributory infringement were not.

Similarly, what the district court refers to as “lumping” is not more than a claim for joint and several liability, and in the alternative secondary liability, for a tortious act. The district relied on this court's holding, in *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001), that “By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, Atuahene's complaint failed to satisfy [the] minimum [pleading] standard.”

“Lumping,” however, while not strictly limited to Rule 9(b) challenges, is a concept applied almost universally to cases involving allegations of fraud or conspiracy – and seldom to intellectual property cases, regarding which no reported decisions dismissing claims based on lumping have come to plaintiff’s attention.

In general a defendant may not be excused at the pleading stage from answering for allegations of tort liability merely because it is not named as many times or its actions or omissions are not specified as often as other defendants with whom it is alleged to have acted in concert. *See, Allstate Ins. Co. v. Rozenberg*, 771 F. Supp. 2d 254 (E.D.N.Y. 2011). “Even after *Twombly* . . . a plaintiff need not allege all facts in novelistic detail.” *Disney Enterprises, Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1311 (S.D. Fla. 2011) (denying 12(b)(6) motion seeking dismissal of contributory infringement claim). As the court in *Savage v. Tweedy*, 3:12-CV-1317-HZ, 2012 WL 6618184 (D. Or. Dec. 13, 2012) explained:

This is simply not a case where lumping or “shotgun pleadings” are a concern, because the parties are well aware of the nature of their relationship and the specific infringement that is the subject of the complaint. Defendants assert that all of Plaintiffs' claims for relief must be dismissed because the Complaint “impermissibly engaged in ‘group’ or ‘shotgun’ pleading.” Defendants contend that Plaintiffs improperly group all the Defendants together without identifying which particular Defendant is liable under which of the two claims. . . .

“[S]hotgun pleadings” [are] pleadings that overwhelm defendants with an unclear mass of allegations and make it difficult or impossible for defendants to make informed responses to the plaintiff’s

allegations” . . . The claims here are not so vague as to overwhelm Defendants with an unclear mass of allegations and do not make it difficult or impossible for Defendants to adequately respond. . . .

Defendants' motion to dismiss on the basis that Plaintiffs engaged in “shotgun pleadings” is denied.

There is no “minimal involvement” standard in an allegation of copyright infringement or enhanced level of detail such as is required for fraud-based pleadings. “Whether a participant in an infringing activity is classed as a contributory infringer does not depend upon his or her ‘quantitative contribution’ to the infringement. Rather, resolution of the issue ... depends upon a determination of the function [the alleged infringer] plays in the total [reproduction] process.” *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 852 (S.D.N.Y. 1984). At the pleading stage Ochre can only speculate about the specific role of any particular defendant here, such facts being “peculiarly within the opposing party's knowledge” and hence appropriately subsumed by the general allegations against all the defendants. *See, e.g., Colony at Holbrook, Inc. v. Strata G.C., Inc.*, 928 F. Supp. 1224, 1231 (E.D.N.Y. 1996).

Nothing about the transactions or relationships among the defendants, or their relationship to the plaintiff, is a mystery to any of these defendants. The infringement claimed is readily comprehensible. What plaintiff cannot allege, and which it is not required to allege at the pleading stage, is the specific identity or affiliation of the person or persons who decided to infringe the Arctic Pear

copyright instead of paying Ochre to produce authentic Arctic Pear fixtures for use on the project in which they were all involved, which defendants participated in that infringement, and which ones knowingly benefitted from it. The discovery of those matters is the purpose of pretrial discovery.

CONCLUSION

For the above reasons, Ochre respectfully requests that the district court's dismissal of Ochre's copyright claim (Count I) be reversed and the case be remanded back to the Southern District of New York.

Respectfully submitted,

GOETZ FITZPATRICK, LLP
Attorneys for Defendants-Appellants
One Penn Plaza – Suite 4401
rcoleman@goetzfitz.com

Dated: February 13, 2013

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 7,333 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

Dated: February 13, 2013