13-55763

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BIKRAM'S YOGA COLLEGE OF INDIA, L.P., and BIKRAM CHOUDHURY,

Plaintiffs-Appellants,

v.

EVOLATION YOGA, LLC, MARK DROST, and ZEFEA SAMSON

Defendants-Appellees.

On Appeal From The United States District Court
For The Central District of California
Case No. 11-CV-05506-ODS (SSx)
The Honorable Otis D. Wright, District Judge

APPELLEES' ANSWERING BRIEF

ERIC R. MAIER
LOUIS E. SHOCH
MAIER SHOCH LLP
1001 Hermosa Avenue, Suite 206
Hermosa Beach, California 90254
(310) 994-9480

Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendant-Appellee Evolation Yoga, LLC states that no parent corporation or publicly-held corporation owns 10% or more of its stock.

s/ Eric R. Maier

ERIC R. MAIER
LOUIS E. SHOCH
MAIER SHOCH LLP
1001 Hermosa Avenue, Suite 206
Hermosa Beach, California 90254
(310) 994-9480

Attorneys for Defendants-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

INTRODUCTION

Appellant Bikram Choudhury ("Bikram") is the author of the copyrighted book, *Bikram's Beginning Yoga Class*. The book contains text and photographs describing and depicting a sequence of 26 hatha yoga[1] postures that Bikram selected from the public domain (the "Sequence") and uses in the yoga classes he offers to the public. Bikram and Appellant Bikram's Yoga College of India (the "Bikram Parties") sued Appellees' Evolation Yoga, Mark Drost and Zefea Samson (the "Evolation Parties") for copyright infringement for allegedly using the Sequence in yoga classes they offer to the public.

The district court granted the Evolation Parties' motion for partial summary judgment, ruling they cannot be liable for copyright infringement for teaching, using, or performing the Sequence described and depicted in the book. The order concerned the Sequence only; it did not concern the alleged use of any words, pictures, or descriptions contained in the book. The parties dismissed all other claims and issues, and the Bikram Parties appealed the summary judgment order. This appeal concerns that order only, and does not concern the alleged use of any of the words, pictures, or descriptions contained in *Bikram's Beginning Yoga Class* or any other copyrighted work.

---

[1] Hatha yoga is "a system of physical exercises for the control and perfection of the body that constitutes one of the four chief Hindu disciplines." *Merriam-Webster's Collegiate Dictionary* 532 (10th Ed. 1993).

STATEMENT OF ISSUES

1. A copyright in a work of authorship protects the author's expression, but not the ideas expressed. *Bikram's Beginning Yoga Class* contains words and pictures describing a sequence of 26 public-domain yoga postures (the "Sequence"). Does the copyright in the book prevent others from using the Sequence itself, provided they do not use the words or pictures from the book?

2. Copyright does not extend to any idea, procedure, process, system, or method embodied in a copyrighted work of authorship. Bikram developed the Sequence after years researching disease and medical techniques, and claims the Sequence helps to prevent, cure, and alleviate various diseases if done correctly. If the Sequence is embodied in a copyrighted work of authorship, does copyright protection extend to the Sequence itself?

3. Section 102 of the Copyright Act[2] specifies the subject matter of copyright. Section 103 states the subject matter specified in Section 102 includes compilations but that copyright protection does not extend to the preexisting materials. Does Section 103 mean that copyright law protects compilations falling outside the subject matter specified by Section 102?

---

[2] Unless otherwise stated, all statutory references are to the Copyright Act of 1976, 17 U.S.C. § 101, *et seq*.

STATEMENT OF THE CASE

On July 1, 2011, the Bikram Parties sued the Evolation Parties for copyright infringement, among other things. As the bases for their copyright-infringement claim, the Bikram Parties alleged the Evolation Parties offer yoga classes in which they use a sequence of 26-public domain yoga postures (the "Sequence") described in Bikram's book, *Bikram's Beginning Yoga Class*, and they alleged the Evolation Parties also recite the scripted instructions Bikram created to accompany the Sequence (the "Dialogue"). Excerpt of Records ("EOR") 016-18.

In February 2012, the Evolation Parties filed their answer to the Bikram Parties' complaint, and they filed counterclaims for declaratory judgment. The first counterclaim was for a declaratory judgment that using the Sequence itself in yoga classes offered to the public does not constitute copyright infringement. EOR 114-15. The second counterclaim was for declaratory judgment that using the Dialogue in such classes does not constitute copyright infringement. EOR 115.

On November 12, 2012, the Evolation Parties moved for partial summary judgment. The motion only sought adjudication of: (i) the Bikram Parties' claim that the Evolation Parties were committing copyright infringement by using the Sequence itself in yoga classes offered to the public; and (ii) the Evolation Parties' counterclaim for declaratory judgment that using the Sequence itself did not constitute copyright infringement. EOR 127-129. The Evolation Parties did not seek ad-

judication of any other issues, including the parties' respective claims regarding the Dialogue. *Id.* On December 14, 2012, the district court granted the Evolation Parties' motion for summary judgment, concluding:

> [T]he Court finds that the Sequence is not copyrightable subject matter; and thus, not included within the ambit of Choudhury's various copyrights for his books and audiovisual works. Defendants cannot be liable for copyright infringement for teaching, using, or performing the Sequence, as described and depicted in the copyrighted works. Therefore, the Court GRANTS Defendants' Motion for Partial Summary Judgment.

EOR 008. In a footnote, the district court reiterated that neither the motion nor the order addressed any allegations concerning the Dialogue. ER 008.

On April 4, 2013, the parties entered into a stipulation under which they dismissed all claims and counterclaims that were not resolved by the district court's order granting partial summary judgment, and the Bikram Parties reserved their right to appeal the district court's order. EOR 923-927. On May 2, 2013, the Bikram Parties filed a Notice of Appeal of the district court's order granting partial summary judgment. EOR 941-942.

STATEMENT OF FACTS

I. BIKRAM'S PUBLISHED BOOK, *BIKRAM'S BEGINNING YOGA CLASS*

In 1979, Bikram published a 211-page book entitled *Bikram's Beginning Yoga Class*. EOR 254 (Undisputed Fact ["UF"] 15), 274. The book describes a sequence of 26 hatha yoga postures and two breathing exercises, which Bikram selected from known postures in the public domain and arranged in a specific order (the "Sequence"). EOR 014, 254 (UF 15), 274.

Bikram created the Sequence after years of researching disease and medical techniques, and he claims the Sequence, if done properly, can help prevent, cure, and alleviate almost any disease. EOR 254-55 (UF 19-22). Since the early 1970s, Bikram has offered classes in the "Bikram Method" or "Bikram's Beginning Yoga System," in which the Sequence is accompanied by a scripted set of instructions (the "Dialogue") and done for 90 minutes in a room heated to over 100° Fahrenheit. EOR 018, 269.

Bikram's Beginning Yoga Class contains verbal expressions and photographs describing and depicting the postures that comprise the Sequence, and anecdotes from some of Bikram's students regarding their experiences with individual postures. EOR 274.

II. BIKRAM'S COPYRIGHT REGISTRATIONS

In 1979, Bikram registered his copyright in *Bikram's Beginning Yoga Class* with the United States Copyright Office. The Copyright Office issued Registration Certificate No. TX 179-160 for the book. EOR 252 (UF 6), 598-600.

In 2000, Bikram published a second edition of the book, which was revised to include updated photographs and explanations of the postures. EOR 274. In 2000, Bikram registered his copyright in the second edition of *Bikram's Beginning Yoga Class*, and the Copyright Office issued Certificate No. TX 5-259-325. EOR 252 (UF 7), 601-603.

In 2002, Bikram filed a supplementary registration for the original version of *Bikram's Beginning Yoga Class*. EOR 641-642. The original registration for the book identified Bikram as the author of "the entire text." EOR 599. The supplementary registration identified Bikram as the author of the "compilation of exercises" described in the book. EOR 641. The Copyright Office issued Certificate TX 5-624-003 as a supplement to TX 179-160. EOR 252 (UF 8), 641.

Bikram also authored the scripted Dialogue, which is recited verbatim in each Bikram Method class to guide students through the postures and exercises in the Sequence. EOR 269, 529-573. In 2002, Bikram registered his copyright in the

Dialogue, and the Copyright Office issued Certificate TXu 1-022-657. EOR 253 (UF 10), 643-645.[3]

III. THE EVOLATION PARTIES

The Bikram Parties provide training courses to aspiring Bikram Method instructors. EOR 271. Since the early 1970s, the Bikram Parties have trained and certified thousands of people to become certified Bikram Method instructors. EOR 271. Mark Drost completed the Bikram Parties' teacher training and became a certified Bikram Method instructor in 2002. EOR 019. Zefea Samson completed the training and became a certified Bikram Method instructor in 2005. EOR 019.

After becoming certified, Drost and Samson taught Bikram's Basic Yoga System at studios approved by Bikram. EOR 021. Bikram later banned Drost from teaching Bikram Yoga. EOR 021. Drost and Samson, who are husband and wife, then formed Evolation Yoga, LLC, which opened yoga studios in Buffalo, New York and Tampa, Florida. The Evolation Parties offer a few different types of yoga classes, including classes that utilize the 26 hatha yoga poses and two breathing exercises that comprise the Sequence. EOR 252.

---

[3] Bikram has registered at total of nine copyrights in his various works. EOR 252 (UF 5). In addition to the four mentioned above, the Copyright Office has issued the following certificates of registration: (1) TX-5-499-662 in 2002 for the sound cassette of *Bikram's Beginning Yoga Class*; (2) TXu-934-417 in 2002 for the outline of the Bikram Parties' teacher-training curriculum; (3) PA-1-053-335 in 2002 for the video, *Yoga for Pregnancy*; (4) TXu-1-323-218 in 2006 for a text entitled, *Bikram's Advanced Yoga Class*; and (5) TX-6-555-860 in 2007 for a text entitled, *Bikram Yoga*. EOR 253-254 (UF 6-14).

SUMMARY OF ARGUMENT

The Bikram Parties sued the Evolation Parties for, among other things, infringing on Bikram's copyright by offering yoga classes in which the Sequence is done. The district court granted partial summary judgment, ruling that using the Sequence to practice or teach yoga does not infringe on Bikram's copyrights. That order, which involves the Sequence only—and not the Dialogue or any other element of the Bikram Method—is the subject of this appeal. This Court reviews that order *de novo*, and can affirm it on any ground supported by the record. As demonstrated in the Argument below, undisputed facts demonstrate that the Evolation Parties did not infringe on any copyright by using the Sequence itself to practice or teach yoga.

As discussed in Section I of the Argument, registration of a copyright in a work of authorship is a prerequisite to maintaining a claim for infringement of the copyright. The Bikram Parties sued the Evolation Parties for infringing on the copyright that Bikram registered for the literary work, *Bikram's Beginning Yoga Class*. That is the only work of authorship at issue.

As discussed in Section II, consistent with the constitutional objective underlying copyright laws, copyright protects the author's expression in a work of authorship, but it does not protect the ideas expressed. This principle, known as the

"idea/expression dichotomy," is grounded in a century-long line of Supreme Court cases and is codified in Section 102(b) of the Copyright Act of 1976.

As discussed in Section III, the Sequence is not protected by copyright because it falls on the idea side of the idea/expression dichotomy. The copyrighted work at issue, *Bikram's Beginning Yoga Class*, is classified as a nondramatic literary work, in which the ideas are expressed in words and pictures. Those words and pictures describe and depict the postures that comprise the Sequence, which is the idea being expressed. Further, it is undisputed that Bikram developed the Sequence after years of researching disease and medical techniques, and the Sequence, if done correctly, is capable of helping to prevent, cure, and alleviate almost any disease. It squarely falls within the definition of a process, procedure, system, or method of operation, all of which are expressly excluded from copyright protection by Section 102(b) of the Copyright Act of 1976.

As discussed in Section IV, contrary to the Bikram Parties' contention, the Sequence is not protected by copyright as a compilation for three reasons. First, Bikram never registered any such copyright separate from his copyright in *Bikram's Beginning Yoga Class*. Second, the idea/expression dichotomy and Section 102(b) apply regardless of the work of authorship in which the Sequence is presented or embodied. And third, while a compilation amounting to a work of authorship may be protected by copyright if it falls within one of the eight categories

of authorship listed in Section 102(a), a compilation is not protected by copyright *per se*, without regard to the criteria set forth in Section 102(a). Neither yoga postures nor compilations of of yoga postures are among the categories of works of authorship protected by copyright under Section 102(a).

As discussed in Section V, contrary to the Bikram Parties' contention, the Sequence is not protected by copyright as a work of choreography for three reasons. First, Bikram never registered any such copyright in a work of choreography. Second, the idea/expression dichotomy applies to all works of authorship—literary works, choreography works, and all other types of work listed in Section 102(a). And third, the Sequence has nothing in common with a choreographic work. Choreography is the composition and arrangement of dance movements and patterns, and is usually set to music. The Sequence, on the other hand, is a species of hatha yoga—a system of physical exercises that constitutes one of the four chief Hindu disciplines—and is not permitted to be accompanied by music.

STANDARD OF REVIEW

This Court reviews a district court's grant of partial summary judgment *de novo*. *See Mueller v. Auker*, 576 F.3d 979, 991 (9th Cir. 2009). Thus, partial summary judgment may be affirmed on any ground supported by the record, including reasons not relied upon by the district court. *See White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007); *Jensen v. Lane County*, 222 F.3d 570, 573 (9th

Cir. 2000). Summary judgment should be granted where the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In a copyright case, summary judgment is particularly appropriate where the issue is whether the subject material is protected by copyright. *See Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir. 1983) (citing *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1983)).

ARGUMENT

I. THE COPYRIGHTED WORK AT ISSUE IS THE BOOK *BIKRAM'S BEGINNING YOGA CLASS*

Section 102 of the Copyright Act of 1976 governs the subject matter of copyright. Section 102(b), which limits copyright protection to certain elements of a copyrighted work of authorship, is discussed in more detail in Section II and III, below. Section 102(a), which sets forth the criteria for a copyright-protected work of authorship, states:

> Copyright protection subsists, in accordance with this title, in ***original works of authorship fixed in any tangible medium of expression***, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. ***Works of authorship include the following categories***:

> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works

17 U.S.C. § 102(a) (emphasis added).

The author of an original work of authorship described in Section 102(a) may register the claimed copyright by depositing a copy of the work of authorship with the Copyright Office, along with the requisite registration form and fee. *See* 17 U.S.C. § 408. Registration *Form TX* is used for registration of nondramatic literary works, including books of fiction and non-fiction; *Form PA* is used for registration of works of the performing arts, including musical works, choreographic works and motion pictures; *Form VA* is used for registration of works of visual arts—sculptural, pictorial, and graphic works; *Form SR* is used for registration of sound recordings; and *Form SE* is used for registration of serials, such as periodicals and newspapers. *See* 37 C.F.R. 202.3(b)(1) (identifying classes of works); *see also* EOR 599-603 (certificates of registration). The Copyright Office reviews the deposited work, determines whether the work is copyrightable, and if so, issues a certificate of registration for the work of authorship. *See* 17 U.S.C. § 410.

Registration of a copyright in a work of authorship is a prerequisite to maintaining a claim for infringement of the copyright. 17 U.S.C. § 411(a); *see also L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 852 (9th Cir. 2012) ("Copyright registration is a precondition to filing a copyright infringement action.").

In 1979, Bikram published a 211-page book entitled *Bikram's Beginning Yoga Class*. EOR 254 (UF 15). The book contains a verbal description of the Sequence and the postures that comprise it; photographs depicting the postures; and anecdotes from some of Bikram's students regarding their experiences with individual postures. EOR 254 (UF 15), EOR 274. Bikram obtained three certificates of registration for the book:

- In 1979, the Copyright Office issued Certificate of Registration TX-170-160 for the nondramatic literary work entitled *Bikram's Beginning Yoga Class.* EOR 252 (UF 6), 599-600 (registration).

- In 2000, the Copyright Office issued Certificate of Registration TX-5-259-325 for the nondramatic literary work entitled *Bikram's Beginning Yoga Class* (2d edition). EOR 252 (UF 7), 602-03 (registration).

- In 2002, the Copyright Office issued Certificate of Registration No. TX-5-624-003, which supplemented the 1979 registration for the nondramatic

literary work entitled *Bikram's Beginning Yoga Class*. EOR 252 (UF 8), 641-642 (registration).

Whereas the 1979 registration identified Bikram as the author of the "entire text," the 2002 registration added that Bikram was the author of the "compilation of exercises" in the book. EOR 599, 641. As the district court correctly noted, "the supplemental registration clarifies that Choudhury's contribution includes the Sequence; not that the registration was for the Sequence itself." EOR 004.

The Bikram Parties alleged that, by using the Sequence as part of yoga classes they offer to the public, the Evolation Parties have infringed on the copyright for the original version of *Bikram's Beginning Yoga Class*—Registration No. TX-170-160 and/or TX-5-624-003. EOR 017, 26-27. According to the Bikram Parties, the 1979 registration and the 2002 supplemental registration "clearly cover the Sequence." AOB 13-14; *see also* AOB 61. It is not clear what the Bikram Parties mean by "cover the Sequence." A copyright protects a *work of authorship*. As the certificates of registration plainly state, the work of authorship that is the subject of the registration and supplemental registration is the book entitled *Bikram's Beginning Yoga Class*. EOR 252 (UF 6-8); EOR 599-603. There is no dispute that the book describes the Sequence, but copyright law determines what elements of the copyrighted work are "covered"—*i.e.*, protected. As discussed below, copyright

law does not protect the Sequence itself, apart from the words and pictures used to describe and explain the Sequence in *Bikram's Beginning Yoga Class*.

II. COPYRIGHT PROTECTS THE EXPRESSION OF IDEAS IN A WORK OF AUTHORSHIP; IT DOES NOT PROTECT THE IDEAS THEMSELVES

The Constitution empowers Congress "[t]o promote the Progress of Science by securing for limited Times to Authors the exclusive Right to their Writings." *Golan v. Holder*, 132 S. Ct. 873, 884 (2012) (quoting U.S. CONST. art. I, § 8, cl. 8) (ellipses omitted). Consistent with this express constitutional objective, copyright law encourages the dissemination of ideas for public use by protecting the exclusive right to use and market the published expression of those ideas. *See Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985). Protecting one's exclusive right to the underlying ideas, on the other hand, would be inimical to the objective of copyright law. Indeed, "[t]he most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344-45 (1991) (citation omitted). This axiom is known as the "idea/expression dichotomy." *See Golan*, 132 S. Ct. at 890.

The idea/expression dichotomy was first discussed by the Supreme Court in the seminal case, *Baker v. Seldon*, 101 U.S. 99 (1880). The plaintiff in *Baker*, who had a copyright in a series of books describing a new system of bookkeeping, sued the author of a book describing the same bookkeeping system. *Id.* at 99-100. The

issue framed by the Court was "whether the exclusive property in a system of bookkeeping can be claimed, under the law of copyright, by means of a book in which that system is explained?" *Id.* at 101. Concluding that the plaintiff's copyright in the books did not protect the accounting system described therein, the Court explained: "The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use." *Id.* at 105.

Following *Baker*, the Supreme Court has repeatedly reiterated that copyright law protects the expression of an idea, but not the idea itself. *See Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself."); *Harper & Row*, 471 U.S. at 556 (reiterating that "[n]o author may copyright his ideas"). The Court in *Feist*, quoting *Baker*, explained:

> The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.

Feist, 499 U.S. at 350 (quoting *Baker*, 101 U.S. at 103). *See also Golan*, 132 S. Ct. at 890 ("Due to this idea/expression distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the mo-

ment of publication; the author's expression alone gains copyright protection.") (citation and internal quotation marks omitted).

The idea/expression dichotomy is incorporated into the statutory criteria for subject matter protected by copyright. As noted above, Section 102(a) of the Copyright Act of 1976 sets forth the criteria for a work of authorship to receive copyright protection. Section 102(b) provides that copyright protection for such a work of authorship extends only to the expression contained in the work, not to the ideas, procedures, processes, systems, methods, concepts, or principles expressed:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b).

III. THE SEQUENCE IS AN IDEA, NOT THE EXPRESSION OF AN IDEA

A. Bikram's Copyright Protects The Verbal Expression In *Bikram's Beginning Yoga Class*, Not The Idea Expressed

As *Baker* and its progeny make clear, the creator of a copyrighted work of authorship has copyright protection in the manner in which his or her ideas are expressed, but has no such protection in the ideas themselves. The issue in this case can be framed almost exactly as the Court in *Baker* framed the issue there—"whether the exclusive property in a system of bookkeeping can be claimed, under

the law of copyright, by means of a book in which that system is explained?" *Baker*, 101 U.S. at 101. The resolution of the issue here is the same, as well. As the author of a *Bikram's Beginning Yoga Class*, Bikram has the same copyright protection as the author of any other literary work—protection in the expression of his ideas in the book, but not in the ideas themselves. Bikram's copyright prevents others from using the same words and photographs used in the book to describe, depict, and express the Sequence, but it does not prevent others from using the idea itself—the Sequence.

The Bikram Parties acknowledge the significance of the idea/expression dichotomy, but they contend the Sequence falls on the expression side of this dichotomy. AOB 47. No legal authority supports the Bikram Parties' application of the idea/expression dichotomy in this case. In fact, the Bikram Parties single out *Palmer v. Brown*, 287 F. 3d 1325 (11th Cir. 2002), as a case that exemplifies the distinction between copyrightable expression and uncopyrightable idea. *See* AOB 49-50. The Bikram Parties are correct that *Palmer* is instructive, but *Palmer* squarely supports the conclusion that the copyright at issue in this case does not give Bikram the exclusive right to use or teach the Sequence.

The plaintiff in *Palmer* was the creator of a seminar in which students were taught to explore their own consciousness, and he registered his copyright in the written exercises he created for the seminar. *Palmer*, 287 F.3d at 1327-28. The

plaintiff brought a copyright-infringement claim against a former employee who used the plaintiff's written exercises to develop his own written exercises for a competing seminar. *Id*. The Eleventh Circuit noted "damning similarity" between the two sets of written exercises. *Id.* at 1331-32. But, affirming the denial of a preliminary injunction, the court explained that the plaintiff's copyright did not extend to the exercises themselves:

> [Defendant's] exercises are virtually identical to [Plaintiff's] exercises, and a layman might conclude that [Defendant's course] was appropriated from [Plaintiff's course]. However, [Defendant's] appropriation is actionable only if he copied [Plaintiff's] expression, not his ideas, procedures, and systems. *See* 17 U.S.C. § 102(b) (1996). [Plaintiff's] exercises, while undoubtedly the product of much time and effort, are, at bottom, simply a process for achieving increased consciousness. Such processes, even if original, cannot be protected by copyright.

Id. at 1334.

Palmer unequivocally held that the exercises in the plaintiff's copyrighted work were not protected by copyright, but the verbal expressions of those exercises were protected (except to the extent there was no other way to present the uncopyrightable exercises). What made *Palmer* a close case between infringement and non-infringement was that the defendant *used similar words to express identical exercises*, making it more difficult to separate protected verbal expression from

unprotected idea. Here, in contrast, it is undisputed—at least for purposes of this appeal—that the Evolation Parties *did not copy, utter, or display a single word or a single image* from the copyrighted work at issue, *Bikram's Beginning Yoga Class*. It would be difficult, if not impossible, to find a published appellate infringement case in which the component on which the defendant allegedly infringed more clearly fell on the idea side of the idea/expression dichotomy than it does in this case.

B. The Sequence Is Excluded From Copyright Protection By The Plain Language Of Section 102(b)

As discussed in Section I, *supra*, the copyrighted work at issue is the book *Bikram's Beginning Yoga Class*, which describes and explains the Sequence. The Bikram Parties contend that a copyright in the Sequence was registered separately from the copyright in the book, a contention that is belied by the certificates of registration in the summary judgment record. But regardless of what copyrighted work of authorship encompasses the Sequence—*i.e.*, a book, a "compilation of exercises," or a work of choreography—undisputed facts demonstrate that the Sequence is excluded from copyright protection by the plain language of Section 102(b) of the Copyright Act.

Section 102(b) of the Copyright Act of 1976, which codifies the idea/expression dichotomy, provides that copyright protection in a work of author-

ship does not extend to any idea, procedure, process, system, method, concept, principle or discovery:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102(b); *cf. Palmer*, 287 F.3d at 1334 (holding plaintiff's exercises were not protected by copyright because they were "a process for achieving increased consciousness").

Undisputed facts in the summary judgment record demonstrate that the Sequence is excluded from copyright protection as an idea, procedure, process, system, method of operation, concept, principle, or discovery:

- In *Bikram's Beginning Yoga Class*, Bikram Choudhury states: "I researched the diseases and the postures and after many years of research and verification, having used the methods taught to me by my guru and using modern medical measurement techniques, I arrived at the sequence of postures you will find in this book." EOR 254-55 (UF 20).
- In *Bikram's Beginning Yoga Class*, Bikram Choudhury states: "From the experience of teaching over a million and a half students, I can confidently say that my system of Hatha Yoga is capa-

ble of helping you avoid, correct, cure, heal, or at least alleviate the symptoms of almost any illness or injury." EOR 254 (UF 19).

- Bikram Choudhury claims that the intended benefits of Bikram Yoga cannot be derived unless the postures in the Sequence are done in the exact sequence in which he arranged them. EOR 255 (UF 22), 014 (Compl., ¶ 18).
- In their operative complaint, the Bikram Parties refer to the Sequence as part of "Bikram's Basic Yoga System." EOR 014-15 (Compl., ¶¶ 18-23).
- On their official website, the Bikram Parties state: "It has been proved and experienced by millions that these 26 postures systematically work every part of the body, to give all internal organs, all of the veins, all the ligaments, and all the muscles everything they need to maintain optimum health and maximum function." EOR 218.

According to Bikram, the Sequence is the product of years researching disease and modern medical measurement techniques, and, if the Sequence is performed in precisely the order and manner described in the book, it can help avoid, correct, cure, heal and alleviate almost any disease. Given these facts, the Sequence is plainly a procedure, process, or method of operation,[4] all of which are

[4] A *procedure* is "a particular way of accomplishing something or of acting." *Merriam-Webster's Collegiate Dictionary* 929 (10th Ed. 1999). A *process* is "a series of actions or operations conducing to an end." *Id.* A *method* is "a systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art." *Id.*, 732.

expressly excluded from copyright protection by the plain language of Section 102(b).

The conclusion that the Sequence is not protected by copyright is further bolstered by the Copyright Office's June 2012 Statement of Policy. According to the Copyright Office, an arrangement of exercise movements or yoga postures that is said to result in health benefits would be excluded from copyright protection by Section 102(b):

> In the view of the Copyright Office, a selection, coordination, or arrangement of exercise movements, such as a compilation of yoga poses, may be precluded from registration as a functional system or process in cases where the particular movements and the order in which they are performed are said to result in improvements in one's health or physical or mental condition . . . . While such a functional system or process may be aesthetically appealing, it is nevertheless uncopyrightable subject matter.

EOR 150 (Copyright Office Statement of Policy, 77 Fed. Reg. 37605, 37607 (June 22, 2012)).[5]

[5] The Bikram Parties erroneously argue that the Copyright Office and the district court applied the "useful article exception" by concluding that a system is not protected by copyright. AOB 54-59. Both the Copyright Office and the district court relied on Section 102(b) for this conclusion, which applies to ideas encompassed in any type of work. The useful article exception is an unrelated doctrine created by the definition of pictorial, sculptural and graphic works. *See* 17 U.S.C. § 101 (defining "pictorial, graphic and sculptural works" and "useful article").

The Copyright Office Statement of Policy echoes the conclusion compelled by the undisputed facts regarding the Sequence, as well as the plain meaning of Section 102(b) and more than a century of cases reiterating the idea/expression dichotomy. While the Statement of Policy is not necessary to grant or affirm partial summary judgment in this case, the Ninth Circuit has previously recognized, "The Register [of Copyright] has authority to interpret the copyright laws and its interpretations are entitled to judicial deference if reasonable." *Batjac Prod. Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998); (quoting *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991)). Contrary to the Bikram Parties' assertion, the district court did not give *Chevron* deference to the Statement of Policy. Moreover, this Court reviews *de novo* the district court's order granting partial summary judgment, so there is no basis for the Bikram Parties' prayer for this Court to remand the case to the district court "for reconsideration in accordance to the appropriate level of deference . . . ." *See* AOB 62.

It does not matter whether the Sequence is encompassed in *Bikram's Beginning Yoga Class* (which it is), or separately registered as a "compilation of yoga postures" or a work of choreography (which it is not). Copyright protection does not extend to the Sequence "regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b).

C. The Availability Of Alternative Ideas Does Not Give Rise To Copyright Protection For The Idea

Unable to explain how the Sequence can fall on the idea side of the idea/expression dichotomy, the Bikram Parties contend that copyright protection actually extends *to the idea* being expressed if that idea is not the sole means available to obtain a particular result. AOB 47-48. But the Bikram Parties have simply made up this rule. There is no authority for any such rule, including the three Ninth Circuit cases the Bikram Parties cite for it.

The Bikram Parties claim that *Practice Mgmt. Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), supports the proposition that an idea is protected by copyright if there are alternative ideas available to obtain the same result. *See* AOB 47-48. That case, however, does not address or support that principle. The issue in *Practice Mgmt.* was whether the AMA's copyright in a published book of medical codes remained valid after a federal agency mandated the use of the AMA codes for physicians submitting Medicare and Medicaid reimbursement claims. *Id.* at 517-18. The court held that the copyright in the book remained valid, which prevented the plaintiff, a book publisher, from reproducing and distributing the copyrighted book without permission. *Id.* at 520-21. The court in *Practice Mgmt.* did not discuss the distinction between protected expression and unprotected ideas, let alone hold that any idea was protected by copyright.

The other two Ninth Circuit cases cited by the Bikram Parties to support their proposed limitation on the idea/expression dichotomy concern issues specific to the components of computer programs that may be protected by copyright, and neither case supports the proposition for which the Bikram Parties cite it. *See Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (noting that even functional, non-copyrightable components of a computer program may involve creative, idiosyncratic choices by a computer programmer); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989) (stating that whether nonliteral components of a computer program are protected as expression depends on the particular facts of each case and the component in question).[6]

The objective of copyright law is the dissemination of ideas. *See Harper & Row*, 471 U.S. at 558. There is no legal authority supporting the bizarre proposition that copyright protects the exclusive right to use one's own ideas as long as the ideas are not so novel that no rival idea exists.

D. "Exact Duplication" Of An Idea Does Not Give Rise To Copyright Protection For The Idea

Tacitly acknowledging that the Sequence is an idea, not the expression of an idea, the Bikram Parties argue that copyright protects even an idea against "exact

---

[6] In the other case the Bikram Parties cited for this proposition, the First Circuit rejected the application of the merger doctrine despite the defendant's argument that protecting the author's expression of his theory would give the author a monopoly over his unprotected idea. *See Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83 (1st Cir. 1981).

duplication." AOB 51. As the cases the Bikram Parties cite for this proposition reveal, the Bikram Parties are conflating two distinct principles: the idea/expression dichotomy, on the one hand; and the "merger doctrine" on the other. As discussed above, the idea/expression dichotomy is the principle that the expression of an idea contained in a work of authorship is protected by copyright, but the idea itself is not. The merger doctrine, when applicable, is a limitation on the copyright protection otherwise afforded to *expression*. Under the merger doctrine, copyright does not protect even the expression of an idea in a copyrighted work "if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea." *Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068, 1082 (9th Cir. 2000).

Some courts have stated that when the merger doctrine applies, only exact copying *of the copyrighted work* will be actionable as infringement. The Bikram Parties erroneously cite such cases for the proposition that the exact copying of *an idea* is infringement. AOB 51-52. None of the cited cases supports this proposition. *See Sid and Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F. 2d 1157, 1168 (9th Cir. 1977) ("When idea and expression coincide, there will be protection against nothing other than identical copying of the work."); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F2d 832, 840 (Fed. Cir. 1992) (in case involving copying of video-game program, noting that "[e]ven for works warranting little

copyright protection, verbatim copying is infringement"); *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (holding that original elements of jellyfish sculpture was protected by copyright only against virtually identical copying).[7]

There is no legal authority for the proposition that copying an idea—even "exact duplication"—constitutes copyright infringement. When applicable, the merger doctrine limits the copyright protection otherwise afforded to expression—except, perhaps, when an entire work of authorship is duplicated. Here, it is undisputed that the Evolation Parties did not copy, utter, or display a single word or a single image from the copyrighted work, *Bikram's Beginning Yoga Class*. Thus, the merger doctrine—which could only serve to limit the copyright protection otherwise afforded to expression—is not applicable.

IV. THE SEQUENCE IS NOT PROTECTED AS A COMPILATION OF YOGA POSTURES

The Bikram Parties argue that copyright law protects the Sequence because it is a compilation of public-domain yoga postures. There are several reasons why this is not correct.

---

[7] Other cases cited in support of the Bikram Parties' "exact copying" argument merely reiterate the idea/expression dichotomy. *See Situation Mgmt. Sys. v. ASP Consulting LLC*, 560 F.3d 53, 61 (1st Cir. 2009) (holding author's system for effective negotiation and communication was not protected by copyright, but author's words used to describe the system were protected); *Brooks-Ngwenya v. Indianapolis Pub. Schools*, 564 F.3d 804, 808 (7th Cir. 2009) ("Because Brooks-Ngwenya has not shown that the form of words in which she embodied her ideas was copied, she cannot prevail in an infringement action.")

First, as discussed in Section I, registration of a copyright in a work of authorship is a prerequisite to maintaining a claim for infringement of the copyright in the work. 17 U.S.C. § 411(a). The copyright on which the Bikram Parties allege the Evolation Parties infringed is the copyright registered for *Bikram's Basic Yoga Class*, which was registered as a nondramatic literary work. *See* EOR 599-603, 641-42. Bikram did not register a separate copyright in a compilation of yoga postures. Thus, the Bikram Parties could not maintain a lawsuit for infringement of any such copyright.

Second, as discussed in Sections II and III, copyright protects only expression, not ideas, and a copyright in a work of authorship does not extend to ideas, processes, procedures, methods, systems, or discoveries. The Sequence is an idea, process, system, procedure, and/or method, and is not protected by copyright. This is true regardless of the work of authorship in which the Sequence is embodied. *See* 17 U.S.C. § 102(b) (excluding an idea, process, system, procedure, method, etc. from copyright protection "regardless of the form in which it is described, explained, illustrated, or embodied in such work").

Third, even putting aside the fact that Bikram did not register a copyright in the Sequence itself as a compilation of yoga postures, and the fact that the Sequence is excluded from copyright protection by the plain language of Section 102(b), the Sequence still would not be protected by copyright because a compila-

tion of yoga postures does not meet the criteria for a work subject to copyright protection, as specified by Section 102(a):

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works

17 U.S.C. § 102(a).

There is no category for yoga postures or a compilation of yoga postures, so the Bikram Parties argue that a compilation *of any kind* may be protected by copyright pursuant to Section 103, which states:

> The subject matter of copyright as specified in section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not

> extend to any part of the work in which such material has been used unlawfully.

17 U.S.C. § 103(a).

According to the Bikram Parties, Section 103 cloaks compilations with copyright protection whether or not they meet the criteria set forth in Section 102. *See* AOB 31-33. This interpretation, however, is defied by the plain meaning of Section 103. The plain meaning of the first clause of Section 103 is that a compilation may be copyrightable if it meets all of the other specifications of Section 102(a)—*i.e.*, constitutes an original work of authorship and fits within one of the enumerated categories—and to the extent the elements of the work are not excluded from copyright protection by Section 102(b).

The Bikram Parties eschew the plain meaning of Section 103, arguing that the statute would be superfluous unless it is read to exempt compilations and derivative works from the requirements of Section 102. Contrary to the Bikram Parties' argument, Section 103 is not superfluous, nor does it make compilations a separate and additional category of copyrightable works of authorship. Rather, as the Supreme Court noted in *Feist*, Section 103 was necessary to clarify Congress' rejection of prior "sweat of the brow" decisions that erroneously afforded copyright protection to the underlying facts compiled by an author of a compilation, and

to clarify that copyright protection extends only to certain parts of an otherwise copyrightable compilation or derivative work. *Feist*, 499 U.S. at 359-360.

The legislative history of the Copyright Act of 1976 reiterates the plain meaning of the statute—that compilations and derivative works are protected by copyright only if they constitute works of authorship that fall within one or more of the categories enumerated in Section 102(a):

> Section 103 complements section 102: ***A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102***. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material.

H.R. 94-1476, at 57 (1976) (emphasis added). There is no question that the categories listed in Section 102 do not include exercise or yoga routines—that is precisely why the Bikram Parties contend that Section 103 creates a category separate from and in addition to the categories listed in Section 102(a). But the plain language of Section 103 and the legislative history make clear that a compilation cannot be protected as a work of authorship unless it meets all of the criteria specified in Section 102—including that it "falls within one or more of the categories listed in section 102." H.R. 94-1476, at 57.

Alternatively, the Bikram Parties argue that courts are free to augment the categories listed in Section 102 as they see fit, because the categories listed in Section 102(a) are preceded by the sentence: "Works of authorship *include* the following categories." *See* AOB 26-30. The use of the word "include," according to the Bikram Parties, means that the list is not exhaustive and that Congress intended for the courts to recognize works of authorship outside of the listed categories. *Id.* It is clear from the legislative history, however, that Congress used the word "include" to make clear that the list of categories did not exhaust Congress's constitutional power under the Copyright Clause, and to leave room *for future Congresses*, not the courts, to recognize additional categories of authorship. *See* H.R. 94-1476, at 51 ("[T]here are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to."). Indeed, the Copyright Act of 1976 listed only seven categories of works of authorship; Congress added the eighth category, "architectural works," when it passed the Architectural Works Copyright Protection Act of 1990. *See Hunt v. Pasternack*, 192 F.3d 877, 878 (9th Cir. 1999) (explaining addition of "architectural works" to § 102(a)).

There are no published cases in which a court recognized federal copyright protection for a compilation that did not result in one of the categories set forth in Section 102(a). Indeed, all of the compilation cases cited by the Bikram Parties

involve compilations that resulted in literary works. *See Feist*, 499 U.S. at 343-44 (considering copyright protection afforded to elements of published telephone book); *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1257-58 (9th Cir. 1999) (affirming judgment against defendant for infringement of copyright in published price guide); *Urantia Found. v. Maaherra*, 114 F.3d 955, 956-57 (9th Cir. 1997) (holding that defendant infringed on copyright in published book); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989) (reversing judgment against defendant and holding that plaintiff was entitled to "only limited [copyright] protection" over certain elements in organizer registered as "literary work").

The conclusion that a compilation of yoga postures cannot constitute a copyrighted work of authorship is further bolstered by the Copyright Office's June 2012 Statement of Policy. Interpreting Sections 102 and 103, the Copyright Office recently stated that it would refuse registration for a claimed copyright in a compilation of yoga postures:

> [U]nder the policy stated herein, a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration. Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter.

EOR 150 (Copyright Office Statement of Policy, 77 Fed. Reg. 37605, 37607 (June 22, 2012)).

Even if the Sequence were not excluded from copyright protection under Section 102(b) as an idea, system, process, procedure, or method, it would not be protected by copyright because a sequence of yoga postures does not fit within any of the categories set forth in Section 102(a).

V. THE SEQUENCE IS NOT PROTECTED BY COPYRIGHT AS A CHOREOGRAPHIC WORK

The Bikram Parties also argue that copyright law protects the Sequence as a "choreographic work." There are several reasons why this is not correct.

First, Bikram did not register a copyright in a choreographic work. The certificates of registration for the copyright in which the Evolation Parties allegedly infringed clearly identify the work of authorship as the nondramatic literary work, *Bikram's Beginning Yoga Class*. EOR 252 (UF 6-8), 599-600, 641-42. Neither the original registration nor the supplemental registration even contains the word "choreography."[8] Thus, the Bikram Parties could not maintain an action for infringement on any such copyright.

Second, as discussed above, Section 102(b) of the Copyright Act of 1976 excludes the Sequence from copyright protection as an idea, process, procedure,

---

[8] Moreover, a work cannot be registered for federal copyright protection unless it is fixed in a tangible medium of expression. In the case of choreography, this requires that the work be filmed, videotaped, or notated. *See* H.R. 94-1476, at 131 (noting that a choreographic work that "has never been filmed or notated" has not been fixed in any tangible medium of expression). In order to register a claimed copyright, the creator of a work must deposit a copy of that work—in its fixed, tangible form—to the Copyright Office. 17 U.S.C. § 408. To register the copyrights at issue, Bikram deposited a copy of the literary work *Bikram's Beginning Yoga Class*.

system, or method. This is true regardless of the form in which the idea, process, procedure, system, or method is embodied. *See* 17 U.S.C. § 102(b). The Sequence is not protected by copyright—whether it is considered as an idea described in *Bikram's Beginning Yoga Class*, or a stand-alone work of authorship.

Third, the Sequence could not be protected by a copyright for a choreographic work because it is not choreography. "Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music." Compendium of Copyright Practices, Compendium II § 450.01 (1984). Hatha yoga, in contrast, is "a system of physical exercises for the control and perfection of the body that constitutes one of the four chief Hindu disciplines." *Merriam-Webster's Collegiate Dictionary* 532 (10th Ed. 1993). Whereas choreography, by definition, is usually set to music, it is undisputed that Bikram forbids music to be played to accompany the Sequence. EOR 255 (UF 23).

In their attempt to liken the Sequence to a composition and arrangement of dance movements and patterns, the Bikram Parties assert that the Dialogue is the equivalent of the musical accompaniment, and that it "drives the pace of the performance, and its verbal cues provide the cadence and rhythm that guide students through hundreds of continuous movements . . . ." AOB 40. Even if the analogy were sound, it would only further demonstrate why the Sequence is not choreography. As the Bikram Parties acknowledge, the Sequence itself embodies no pace,

cadence, or rhythm—those elements are supplied by the Dialogue. But this appeal does not concern any claim or allegation regarding the Dialogue. Likewise, the raised podium, mirrored and heated studio, and roomful of students admiring themselves—additional elements purportedly creating the feeling of a "performance"—all are irrelevant to this appeal. The only element that is at issue in this appeal is a sequence of 26 hatha yoga postures—"a system of physical exercises . . . ." *See Merriam-Webster's Collegiate Dictionary* 532 (10th Ed. 1993); *cf.* Compendium of Copyright Practices, Compendium II § 450.03(a) (1984) ("The movements must be more than mere exercises.") The Sequence is not a choreographic work.

CONCLUSION

The Court should affirm the district court's order granting partial summary judgment.

Dated: January 13, 2014

s/ Eric R. Maier

ERIC R. MAIER
LOUIS E. SHOCH
MAIER SHOCH LLP
1001 Hermosa Avenue, Suite 206
Hermosa Beach, California 90254
(310) 994-9480

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B) because it contains 8404 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Eric R. Maier

ERIC R. MAIER
LOUIS E. SHOCH
MAIER SHOCH LLP
1001 Hermosa Avenue, Suite 206
Hermosa Beach, California 90254
(310) 994-9480

Attorneys for Defendants-Appellees

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I hereby certify that I know of no related cases pending in this Court.

s/ Eric R. Maier

ERIC R. MAIER
LOUIS E. SHOCH
MAIER SHOCH LLP
1001 Hermosa Avenue, Suite 206
Hermosa Beach, California 90254
(310) 994-9480

Attorneys for Defendants-Appellees

9th Circuit Case Number(s) 13-55763

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) January 13, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Eric R. Maier

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)