

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

POET THEATRICALS MARINE, LLC, POET PRODUCTIONS, LLC, POET  
TECHNICAL SERVICES, LLC, and POET HOLDINGS, INC.,

*Plaintiffs/Appellees,*

v.

CELEBRITY CRUISES, INC.,

*Defendant/Appellant.*

—

On Appeal from the United States District Court  
Southern District of Florida, Case No. 1:20-cv-24619-CMA

—

**APPELLEE'S PRINCIPAL BRIEF**

—

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

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Poet Theatricals Marine, LLC, et al., v. Celebrity Cruises Inc, No. 21-10410

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**I. Corporate Disclosure Statement:**

Poet Theatricals Marine, LLC and all of the other appellees are non-government limited liability companies. There is no parent corporation or publicly traded corporation that owns more than 10% of any appellees' stock.

**II. Certificate of Interested Persons:**

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8. CruiseOne, Inc. (Dismissed Co-Defendant);
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21. Poet Holdings, Inc. (Plaintiff/Appellee);
22. Poet Productions, LLC (Plaintiff/Appellee);
23. Poet Technical Services, LLC (Plaintiff/Appellee);

24. Poet Theatricals Marine, LLC (Plaintiff/Appellee);
25. Proctor, Gray (Counsel for Plaintiffs/Appellees);
26. Riess, Cheryl L. (Counsel for Plaintiffs/Appellees);
27. Rodriguez, Juan J. (Counsel for Defendant/Appellant);
28. Royal Caribbean Cruises Ltd. (NYSE: RCL) (Parent Corporation of Defendant/Appellant);
29. Tourico Holidays, Inc. d/b/a LastMinuteCruise.com (Dismissed Co-Defendant);
30. World Travel Holdings (Dismissed Co-Defendant).

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellees (collectively “Poet”) produced and performed shows on five Celebrity cruise ships under a contract that gave Poet all rights to the intellectual property it created. After the licensing contracts expired, Celebrity used Poet’s intellectual property in violation of their agreement. The lower court held that the Copyright Act did not preempt Poet’s unjust enrichment claim, because “an extra element (expectation and agreement of payment)” rendered Poet’s claim qualitatively different from a copyright infringement claim.

The decision below was a straightforward application of two well-settled principles: first, that a contractual promise to pay is a qualitatively different “extra element” that makes preemption inappropriate; and second, that courts apply the extra element test on a case-by-case basis according to the facts alleged. Applying these principles, the district court correctly concluded an extra element is present in the case at bar, because Celebrity’s contractual promise to pay created a continuing expectation of payment, a recognized factor in proving that Celebrity’s enrichment here is unjust. Therefore, oral argument is not necessary for the Court to properly decide this case.

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## **STATEMENT OF THE ISSUE**

Whether Appellees' (collectively "Poet") unjust enrichment claim, which relies on proof of the parties' contract to establish an expectation of payment for Poet's intellectual property, is preempted by the Copyright Act, 17 U.S.C. § 301.

## **STATEMENT OF THE CASE**

Appellant Celebrity's statement of the proceedings below contains more detail than this appeal requires. To summarize, after Poet discovered Celebrity was still using pictures and videos of its shows to promote its cruises after the licensing contracts had expired, it sued Celebrity (and others not relevant here), for conversion and unjust enrichment in Florida state court. (D.E. 1-2). Celebrity removed the case to the Southern District of Florida, arguing that the claims were the functional equivalent of copyright infringement claims, and therefore preempted by the Copyright Act. (D.E. 1).

The district court held that Poet's unjust enrichment claim against Celebrity was not preempted because it included an "extra element" that rendered it qualitatively different from a copyright infringement claim. Celebrity's enrichment was "unjust," not merely because Poet owned the materials, but also because it violated "Plaintiffs' right to royalties and licensing fees for Celebrity's use of Plaintiffs' intellectual property based upon the agreed licensing terms between

Plaintiffs and Celebrity. Plaintiffs' additional allegation introduces an extra element (expectation and agreement of payment) that changes the nature of the claim." (D.E. 42, at 12). "Plaintiff's unjust enrichment claim is thus not preempted by the Copyright Act." (*Id.*).

The relevant facts for this appeal are the allegations in Poet's complaint. Poet is "long-established in the business of creating, producing and executing live marketing and entertainment concepts, including shows aboard cruise lines." (D.E. 1-2, at ¶ 18). Between 2007 and 2012, Celebrity contracted with Poet to develop and perform a total of fifteen shows, three for each of five ships. (D.E. 1-2, at ¶ 19). The last contract ended in 2016. (*Id.* at ¶ 20).

The dispute in this case arises from Celebrity's continued use of "numerous video recordings and still photographs of the Poet shows" to promote its cruises, in violation of the contracts. (*Id.* at ¶ 21). The contracts gave Celebrity the right to "use, perform or display [Poet]'s shows" on the vessels, "during the Term of this Agreement" only. (*Id.* at ¶ 22 (alteration in complaint)). They gave Poet ownership of all the intellectual property Poet created, defined as "Project Materials" in the contract. (*Id.* at ¶ 23 ("All Project Materials shall be and remain the sole property of Poet and shall be delivered to Poet upon termination of this agreement.")) (cleaned up)). The contract required Celebrity to negotiate a license before using Project

Materials for any other purpose. (*Id.* at ¶ 22 (“If Cruise Line wishes to use any Project Materials for any other purpose other than in Producer’s Shows within the scope of this Agreement, Cruise Line must obtain a license for such use from Producer.”)).

“Notwithstanding those limitations, Celebrity continued to use the video recordings and still photographs of scenes in Poet’s shows in promotional materials about cruises aboard vessels in Celebrity’s fleet following termination of the agreements between Poet and Celebrity.” (D.E. 1-2, at ¶ 24). “The promotional materials . . . were displayed on Celebrity’s own websites worldwide.” (*Id.* at ¶ 25). “They appeared as well in various digital and print brochures and posters used in marketing. . . .” (*Id.*). Additionally, the videos were used “on Celebrity’s YouTube channel as well as on Celebrity’s Press Center website where it invites media to request downloadable files of the video.” (*Id.*). “Celebrity knew that this use of Poet’s property following termination of the agreements was not permitted, but it continued nonetheless.” (*Id.* at ¶ 24).

Count II (Unjust Enrichment) further alleges that “Following the expiration of the agreements . . . Celebrity wrongfully continued to use [Poet’s intellectual property] without a license permitting its use, and continues to use it to date in certain promotional materials.” (*Id.* at ¶ 32). “The artistic works, concepts, ideas, and other

creations embodied in the images and recordings of Poet’s shows are Poet’s intellectual property, and its use by Celebrity is a benefit and privilege conferred by Poet for which it has received no payment.” (*Id.* at ¶ 33). “Celebrity’s receipt of the benefits and privileges Poet has conferred without paying royalties and other fees and charges owing to Poet in return for those benefits and privileges constitutes unjust enrichment and has damaged Poet.” (*Id.* at ¶ 34). Poet sought “damages in the amount of the royalties, license fees, and other fees and charges owing to Poet that were not previously sought or recovered.” (*Id.* at 12).

Celebrity appeals the district court’s order holding that the Copyright Act does not preempt Count II (Unjust Enrichment). The standard of review is *de novo*. *Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1310–11 (11th Cir. 2001).

### **SUMMARY OF THE ARGUMENT**

Copyright preemption turns on whether a state law claim is functionally a claim for copyright infringement. The elements of a copyright infringement claim are ownership of a copyright and copying of the material. If the claim includes an “extra element” not present in an infringement claim – for example, a contractual promise to pay – the claim is not preempted.

Applying the doctrine of preemption requires a case-by-case analysis. Courts do not merely engage in a rote comparison of the causes of action. Instead, they look

to the facts of each case as pleaded by the parties. In the present case, the extra element presented is Celebrity’s contractual promise, which created an expectation that Celebrity would pay a license fee if it used Project Materials to promote its cruises. Celebrity’s violation of this contractually derived expectation of payment proves the “unjust” element of Poet’s unjust enrichment claim. Count II (Unjust Enrichment), as alleged, therefore contains the extra element of a contractual promise. It is not preempted, and the Court should affirm.

### **ARGUMENT**

I. A State Law Cause of Action Is Not Preempted Where an “Extra Element” Such as a Contractual Promise to Pay Renders the Case Qualitatively Different from a Copyright Infringement Action.

If a work is within the subject matter of copyright, Section 301 of the Copyright Act preempts “[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.” 17 U.S.C. § 301(a). There is no preemption, however, “with respect to ... activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.” 17 U.S.C. § 301(b)(3). This Court has held that the Act therefore “preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe one of the exclusive rights provided by federal copyright law.” *Foley v.*

*Luster*, 249 F.3d 1281, 1285 (11th Cir. 2001) (quoting *Computer Assoc. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992)).

It is only if “the act of reproduction, performance, distribution, or display ... will *in itself* infringe the state created right, then such right is preempted.” *Donald Frederick Evans & Associates, Inc. v. Cont’l Homes, Inc.*, 785 F.2d 897, 914 (11th Cir. 1986) (emphasis in original). State law claims are not preempted if they contain an “extra element” that “changes the nature of the action . . . .” *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1549 (11th Cir. 1996) (no Copyright Act preemption where “state law trade secret claim is predicated upon the existence of an implied confidential relationship” not part of a copyright infringement claim). “[I]f an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created case of action, then the right does not lie within the general scope of copyright and there is no preemption.” *Foley*, 249 F.3d at 1285.

Rights created voluntarily by contract are not equivalent to the rights against strangers created by the Copyright Act. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996). This Court has concluded that “claims involving two-party contracts are not preempted because contracts do not create exclusive rights, but rather affect only their parties.” *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1318



(11th Cir. 2001) (citing *ProCD*, 86 F.3d at 1455). Thus, contract-based claims have an “extra element” that makes them qualitatively different from copyright infringement claims for preemption purposes.

As the next section explains, the “extra element” determination is a case-by-case inquiry, not merely a rote comparison of the elements of the cause of action in the abstract. To determine whether any particular claim is qualitatively different from copyright infringement, courts must look to the facts of the case as well.

II. The “Extra Element” Can Arise from the Facts Pleaded in Support of the Claim, Rather than a Rote Comparison to the Elements of a Copyright Infringement Claim.

Celebrity argues that the district court erred because a contractual “right to royalties or licensing fees” is not present in every unjust enrichment claim. (Appellant’s Br., at 18 (arguing that right to payment is “not *required in order to constitute* the state-law claim of unjust enrichment” (emphasis in original))). Celebrity’s mistake is asking the Court to restrict its inquiry to the elements of state law causes of action in the abstract. The law does not support such a generic, categorical approach to the “additional element” analysis. *Cont’l Homes, Inc.*, 785 F.2d at 915 (looking to “rights Plaintiffs seek to enforce in the case at bar” rather than other “hypothetical rights” also protected under FDUTPA); *see also Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1304 (D.C. Cir. 2002) (“courts generally

examine both the elements of the state law cause of action and the way the plaintiff has actually pled that cause of action”); *Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622, 636 (6th Cir. 2001) (explaining “preemption in this case, as in any case of federal preemption of state law, is highly dependent upon the facts presented and the claims actually pled by the parties”); *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1534 (S.D.N.Y. 1985) (“It is important, however, to focus on the facts of each case and the particular rights the plaintiff seeks to protect”); *Schuchart & Associates, Prof’l Engineers, Inc. v. Solo Serve Corp.*, 540 F. Supp. 928, 943 (W.D. Tex. 1982) (“comparing the elements of the two causes of action in the context of the specific facts in the case at bar”) (cited in *Cont’l Homes, supra*).

Accordingly, starting with its first preemption case, this Court has consistently looked to the facts of individual cases for qualitative differences from a copyright infringement action. *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983). The *Crow* court addressed Florida’s “Dealing in stolen property” statute, which criminalizes trafficking in property that a person knows or should know has been stolen. § 812.019, Fla. Stat. Ann. Rejecting a rote comparison of the statutory elements, the Court instead looked to the specific facts of the defendant’s offense to hold that the

Copyright Act preempted a state court prosecution for selling bootleg Tammy Wynette albums. 720 F.2d at 1226.

*Crow* establishes the analytical framework: “The proper method of analysis is to examine whether the elements of a cause of action for the tort of copyright infringement are equivalent to the elements of the crime of dealing in stolen property **as it applies in this case.**” *Id.* (emphasis added). Thus framed, the answer followed naturally because “[d]espite the name given the offense, the elements essential to establish a violation of the Florida statute **in this case** correspond almost exactly to those of the tort of copyright infringement.” *Id.* (emphasis added).

Subsequent cases cemented this approach. *E.g.*, *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1494 (11th Cir. 1990). In *M.G.B. Homes*, the Court held that a “claim for unfair competition based upon allegations of copying, and in the absence of proof of any element of unfair competition other than copying, is clearly pre-empted by the Act.” *Id.* Similarly, in *Lipscher*, the plaintiff alleged that the defendant obtained its works under false pretenses, with the intent to reproduce them. The Court relied on those allegations in holding that “[c]learly the rights Law Bulletin is attempting to protect in its acquisition misconduct claims are copyright rights.” 266 F.3d at 1311–12.

Thus, Celebrity misses the mark when it argues that the contract cannot be “an extra element as it pertains to the preemption analysis” because, in other cases it cites, unjust enrichment is proven in other ways. (Appellant’s Br., at 18). The correct question is whether, in this specific case, the contractual promises of the parties as alleged, and the expectation of payment that results, are factual elements of Count II (Unjust Enrichment). Unquestionably they are.

III. Poets’ Unjust Enrichment Claim Pleads an Extra Element That Defeats Preemption: A Contractually Derived Expectation of Payment That Renders Celebrity’s Enrichment Unjust.

As addressed above, Poet agrees that the “extra element test is not a rote comparison of the elements of a copyright claim against the state law claim asserted.” (Appellant’s Br., at 19 (citation omitted)). The Court must consider the allegations in Poet’s complaint, which make Count II (Unjust Enrichment) qualitatively different from an action for copyright infringement. The contracts that protected Poet’s Project Materials remain a key feature of the parties’ dispute, and a factual element Poet will use to prove the elements of unjust enrichment. In fact, the factual “elements essential to establish” unjust enrichment here “correspond almost exactly to” breach of contract. *Crow*, 720 F.2d at 1226. Thus, they provide an “extra element” that defeats preemption.

Under Florida law, the elements of an unjust enrichment claim are: “(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof.” *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (citations omitted). “The most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust.” *14th & Heinberg, LLC v. Terhaar & Cronley Gen. Contractors, Inc.*, 43 So. 3d 877, 881 (Fla. 1st DCA 2010). Injustice is determined case-by-case. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (in unjust enrichment claims, court “must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist”).

Here, Celebrity’s enrichment is “unjust” not merely because it did not own the Project Materials, but because it had explicitly promised Poet that it would not use them without negotiating and paying for a license. The contracts demonstrate a clear, agreed-upon expectation of payment for any use of the Project Materials. *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 806 (11th Cir. 1999) (explaining that expectation of compensation is “relevant to the question of whether it would be unjust to retain a benefit without having to pay for it.”); *see also Trinc, Inc. v.*

*Radial Wheel, LLC*, 07-12488, 2009 WL 606453, at \*9 (E.D. Mich. Feb. 25, 2009) (“an unjust enrichment claim may stand in some circumstances where a defendant inequitably retains a benefit following the termination of an express contract”).

The contracts are central to the parties’ relationship in this case. The Project Materials were not merely licensed according to the term of a contract, they were created for Celebrity pursuant to the contracts. (D.E. 1-2, at 8). Ownership of the Project Materials, however, remained with Poet. (D.E. 1-2, at 9). The contracts also require Celebrity to “to return all of Poet’s property” when the licenses expired. (D.E. 1-2, at 11). Instead, Celebrity used recordings of the Project Materials to promote its cruises. (D.E. 1-2, at 9-10). This violated the contracts, which provide “If Cruise Line wishes to use any Project Materials for any other purpose other than in Producer’s Shows within the scope of this Agreement, Cruise Line must obtain a license for such use from Producer.” (D.E. 1-2, at 8-9).<sup>1</sup> Thus, the contracts are essential to Poet’s claim, because it would be unjust to reward Celebrity for waiting until they expired to use Poet’s Project Materials without payment.

In addition to the lower court here, many other district courts have held that unjust enrichment claims based on a contract-based expectation of payment are not

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<sup>1</sup> This allegation contradicts Celebrity’s argument that Poet failed to plead a right to royalties or license fees. (Appellant’s Br., at 17-18).

preempted. *See AVKO Educ. Research Found. Inc. v. Wave 3 Learning Inc.*, 15-CV-3393, 2015 WL 6123547, at \*5 (N.D. Ill. Oct. 15, 2015) (no preemption of claim that “Defendants were unjustly enriched by their failure to pay royalties and licensing revenues” based on unfulfilled terms of contract with predecessor; “Plaintiff’s unjust enrichment claim in this case requires agreed upon terms between the parties and a financial benefit for Defendants, yet a copyright claim does not”).

Another district court found a claim for unjust enrichment arising from contract rights not to be preempted because the ““expectation of compensation by both parties”” renders the action ““assimilable to a contract cause of action.”” *Cadkin v. Loose*, SACV081580JVSSHX, 2008 WL 11336390, at \*3 (C.D. Cal. Apr. 24, 2008) (quoting Nimmer on Copyright § 1.01[B][1][g] at 1–52, 1–53 n. 353); *see also Wimer v. Reach Out Worldwide, Inc.*, CV 17-1917-RSWL-ASX, 2017 WL 5635461, at \*4 (C.D. Cal. July 13, 2017) (no preemption of unjust enrichment claim due to extra element of “an implied promise to compensate plaintiff”).

Yet another example comes from the Southern District of Florida. *Davis v. DreamWorks Animation SKG, Inc.*, 08-80506-CIV, 2009 WL 10700120 (S.D. Fla. May 14, 2009). In *Davis*, a studio executive invited the plaintiff to submit animations and stories for the purpose of entering a business venture. *Id.* at \*1. The plaintiff alleged that DreamWorks used his submissions in the movie *Madagascar* without

payment. *Id.* The *Davis* court reasoned that the plaintiff's allegation "that his submission of his work was for the purpose of entering into a financially profitable business relationship with Defendant" amounted to "a mutual understanding between the parties that compensation was to be paid as part of the business relationship." *Id.* at \*4. Therefore, the "claim for unjust enrichment survives preemption for the same reasons as breach of implied-in-law contract and breach of implied-in-fact contract claims: it alleges an 'extra element' that makes it qualitatively different from the copyright infringement claim." *Id.*

Despite these relevant and very similar cases, not to mention this Court's holdings that the preemption analysis turns on the facts of each case, Celebrity lumps all unjust enrichment claims together to suggest that unjust enrichment claims categorically are preempted because a quasi-contract is implied at law and is not technically a contract. (Appellant's Br., at 20). It cites to *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424 (2d Cir. 2012)) to attempt to support its position. *Forest Park*, of course, is about an implied-in-fact contract, and is not an unjust enrichment preemption case! Putting its dicta to one side, *Forest Park* is simply one of many cases holding that a contract implied in fact is, for preemption purposes, no different from any other contract. In both cases, there is mutual assent and a promise to pay, whether express or implied. *Id.* at 432.



Turning to the dicta Celebrity relies upon, *Forest Park* states that implied-in-law contracts generally are preempted “because the plaintiff need not allege the existence of an actual agreement between the parties.” *Id.* *Forest Park*, however, offers nothing relevant to Poet’s kind of unjust enrichment claim, which relies on a contractually derived expectation of payment. In fact, *Forest Park*’s approach supports Poet here. If, as in *Forest Park*, alleging an implied-in-fact agreement with an expectation of payment is sufficient to avoid preemption, certainly, alleging that an actual contract explicitly sets forth such an expectation (as in the present case) should likewise defeat preemption.

Further, a review of the authority cited in *Forest Park* reveals that its general observations on contracts implied in law should not control here. Tellingly, Celebrity does not mention *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001), the extensively cited Sixth Circuit case *Forest Park* relies upon. Unlike *Forest Park*, *Wrench LLC* offers guidance relevant to the present case, where Poet’s unjust enrichment claim incorporates a contractually derived expectation of compensation. *Id.* at 459 (citing 1 Nimmer on Copyright § 1.01[B][1][g] at 1–38 n. 166).

The *Wrench LLC* court explained that it was “the essential element of expectation of compensation” that makes an implied-in-fact contract qualitatively different from copyright infringement. *Id.* It also cites Nimmer for the proposition

that, if an expectation of payment exists, “unjust enrichment could be assimilable to a cause of action sounding in contract, for it would then contain an essential element not envisioned by Section 106. In that event, the unjust enrichment *cum* contract claim would not be pre-empted.” *Id.*: *see also Tooltrend, Inc.*, 198 F.3d at 806 (“Notwithstanding that claims for [implied in fact contracts] and unjust enrichment arise under distinct causes of action, they may at times share elements of proof such as an expectation of compensation.”). Applying the reasoning in *Wrench, LLC*, which is in fact the reasoning underlying the *Forest Park* decision as well, Poet’s claim is not preempted.

Celebrity creates a strawman by citing to authority holding that “enrichment” categorically is not an extra element. (Appellant’s Br., at 21 (citing *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004))).<sup>2</sup> Poet did not make any argument based on “enrichment,” nor does it ask the Court to take a categorical approach here. Poet’s case should be decided by looking to the facts of the case as pleaded.

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<sup>2</sup> The unpublished Second Circuit cases Celebrity cites merely apply *Briarpatch* without adding anything relevant to the analysis. (Appellant’s Br. at 22 (citing *Mourabit v. Klein*, 816 F. App’x 574, 579–80 (2d Cir. 2020); *Baiul v. NBC Sports, a Div. of NBCUniversal Media LLC*, 708 F. App’x 710, 712–13 (2d Cir. 2017))).

Celebrity’s other authority is no more availing. (Appellant’s Br., at 22-23 (arguing that “The Sixth and Tenth Circuits agree.”)). As stated above, the Sixth Circuit has favorably cited the portion of the Nimmer treatise that reasons that an unjust enrichment claim is not preempted where it relied on an expectation of compensation. *Wrench LLC*, 256 F.3d at 459. Poet wins under *Wrench LLC*, the other cases cited notwithstanding. Unlike the first case Celebrity cites, Poet’s unjust enrichment claim does not “depend[] on nothing more than [Celebrity]’s unauthorized use of plaintiffs’ work.” *Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622, 638 (6th Cir. 2001). The expired contracts create a legitimate expectation of payment, which in turn renders Celebrity’s enrichment unjust. Indeed, the *Murray Hill* court supports Poet’s claim here, because the contracts “add an element—namely the element of a promise to pay—to the acts of reproduction, performance, distribution or display that constitute the unauthorized use of plaintiffs’ work. . . .” *Id.* Celebrity’s promise to use the Project Materials only as permitted, and to pay a licensing fee for any other use of the Project Materials, satisfies the *Murray Hill* criteria.

The other Sixth Circuit case Celebrity cites features a competitor copying part numbers and illustrations from a transmission parts catalog. *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 713-14

(6th Cir. 2005). There is no discussion of any contractual relationship between the parties, implied or expressed, that was raised as an extra element. Celebrity may like the result, but there is no reasoning that applies to Count II (Unjust Enrichment) as alleged by Poet.

Another pair of cases from the Tenth Circuit are similarly irrelevant to this analysis, as they deal with materials stolen from an employer and a colleague. Again, neither theft violated an alleged contractual right. *R.W. Beck, Inc. v. E3 Consulting, LLC*, 577 F.3d 1133, 1146–49 (10th Cir. 2009); *Ehat v. Tanner*, 780 F.2d 876, 877-79 (10th Cir. 1985). The Tenth Circuit cases may be “typical unjust enrichment claims,” (Appellant’s Br., at 23), but they lack the contract element present in Poet’s claim.

In a footnote, Celebrity cites to a series of irrelevant district court cases finding unjust enrichment claims preempted as well. (Appellant’s Br., at 24 n. 5). The two cases from within the Eleventh Circuit do not feature any expectation of payment arising from contract, making them irrelevant to the present analysis. In one of the others, the Southern District of New York found that a claim for unjust enrichment was not cognizable because a valid contract existed; in the alternative, the court also found the claim preempted by the Copyright Act. *Spinelli v. Nat’l Football League*, 96 F. Supp. 3d 81, 135–39 (S.D.N.Y. 2015).

Although a contract was involved in *Spinelli*, there is no indication that the plaintiffs argued that the contract was an extra element of the unjust enrichment claim. From the opinion, it is clear the court did not consider the issue. *Id.* at 135-38. Moreover, the court explained that the facts alleged in support of the unjust enrichment claim were “identical” to the allegations underlying plaintiffs’ copyright infringement claims: copying, displaying, and distributing plaintiff’s photographs without permission. *Id.* at 136. Therefore, the court applied the well-settled rule that where an unjust enrichment claim is based solely on allegations of unauthorized reproduction, display, or distribution, it is preempted “because it seeks to vindicate legal and equitable rights that do not qualitatively differ from the rights protected under copyright law.” *Id.* at 137. *Spinelli* contributes nothing to the analysis of Poet’s unjust enrichment claim, which relies on the extra element of a contractually derived expectation of payment. Indeed, Poet has not even pleaded a copyright claim.

The final case in the footnote is wholly inapposite. *LTVN Holdings, LLC v. Odeh*, CIV.A.CCB-09-789, 2010 WL 2612690, at \*5 (D. Md. June 25, 2010). The *LTVN Holdings* court applied a rule that does not exist in the Eleventh Circuit, concluding: “As the breach of contract claim contains no extra element that would differentiate it from the copyright claim, it is preempted by the Copyright Act.” Unlike the Fourth Circuit, courts in the Eleventh Circuit recognize that a contractual

agreement itself is an extra element, regardless of what the parties promise to do. *Lipscher*, 266 F.3d at 1318 (citing *ProCD*, 86 F.3d at 1455). Celebrity has no legal basis to argue that the contract in this case cannot serve as an extra element. Further, unlike the *LTVN Holdings* plaintiff, Poet's unjust enrichment claim does not simply allege "that the defendants profited by using the plaintiffs' videos without authorization." *LTVN Holdings, LLC*, 2010 WL 2612690, at \*6. Here, the extra element of a contractually derived expectation of payment is present and alleged.

Celebrity's inability to cite to factually and legally similar precedent is significant. Celebrity knew from the trial court's order that it found the Poet/Celebrity contract and the expectation of payment that flowed from it to be significant to its decision finding an extra element. Even armed with that knowledge, Celebrity was unable to cite this Court to persuasive, factually similar, much less binding, precedent. The best it could do was to cite to and analyze "typical unjust enrichment claims" and ignore the clear distinction the trial court found dispositive.

Finally, Celebrity argues that "it is well settled" that claims arising from expired contracts must be pursued in copyright. (Appellant's Br., at 25). Celebrity's authority falls woefully short of "well settled." In neither case cited by Celebrity was an unjust enrichment claim even raised, much less found to be preempted. *MCA Television Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996); *Kamakazi Music Corp. v.*

*Robbins Music Corp.*, 684 F.2d 228, 230–31 (2d Cir. 1982). The law favors Poet here.

Public policy favors Poet as well. There is no merit to Celebrity’s concerns that federal uniformity will suffer unless Poet’s claim is preempted. (Appellant’s Br., at 26-28). Parties like Poet and Celebrity have voluntarily, through contract, agreed to a system of rights and remedies that suit their own particular business relationship. Copyright law was not intended to supplant this “private ordering, essential to the efficient functioning of markets.” *ProCD*, 86 F.3d at 1455; *see also* H.R. REP. 94-1476, 132, 1976 U.S.C.C.A.N. 5659, 5748 (“Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract”). Instead, copyright preemption exists to “prevent states from substituting their own regulatory systems for those of the national government.”<sup>3</sup> *ProCD*, 86 F.3d at 1455. The law should respect the private and presumably efficient decision to opt out of the copyright-based system of enforcement. *Utopia Provider Sys., Inc. v. Pro-Med*

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<sup>3</sup> Of course, complete preemption and ensuing removal jurisdiction is itself a significant break from “our long tradition of respect for the autonomy and authority of state courts.” *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 18 (2003) (Scalia, J., dissenting). Accordingly, federal courts are directed to construe removal statutes narrowly, with “due regard for the rightful independence of state governments.” *Id.* (citation omitted).

*Clinical Sys., L.L.C.*, 596 F.3d 1313, 1327 (11th Cir. 2010) (“Parties may enter a license agreement to avoid the cost of having to litigate the validity of a copyright, and this bargain between the parties should be honored”).

### CONCLUSION

There is no Copyright Act preemption when a state law cause of action contains a qualitatively different “extra element” not required for copyright infringement. This is not limited to comparing formal elements of a claim, but extends to “the way the plaintiff has actually pled that cause of action.” Here, the contract between Poet and Celebrity is a key extra element of the dispute, by which Poet will prove that it is unjust for Celebrity to be enriched by its unauthorized off-contract use of Poet’s intellectual property. The Court should affirm.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5019 words and 417 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/Gray R. Proctor