

1 KELLY M. KLAUS (SBN 161091)  
kelly.klaus@mto.com  
2 ROHIT K. SINGLA (SBN 213057)  
rohit.singla@mto.com  
3 ELIA HERRERA (SBN 293278)  
elia.herrera@mto.com  
4 MUNGER, TOLLES & OLSON LLP  
560 Mission Street, 27th Floor  
5 San Francisco, California 94105-2907  
Telephone: (415) 512-4000  
6 Facsimile: (415) 512-4077

7 GLENN D. POMERANTZ (SBN 112503)  
glenn.pomerantz@mto.com  
8 JOHN L. SCHWAB (SBN 301386)  
john.schwab@mto.com  
9 MUNGER, TOLLES & OLSON LLP  
350 South Grand Avenue, 50th Floor  
10 Los Angeles, California 90071-3426  
Telephone: (213) 683-9100  
11 Facsimile: (213) 687-3702

12 *Attorneys for Defendants*

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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

16

SAN FRANCISCO DIVISION

17 REARDEN LLC and REARDEN MOVA  
18 LLC,

Case Nos. 3:17-cv-04006-JST  
3:17-cv-04191-JST  
3:17-cv-04192-JST

18

Plaintiffs,

19

vs.

**NOTICES OF MOTIONS AND MOTIONS  
TO DISMISS ALL COMPLAINTS  
PURSUANT TO FED. R. CIV. P. 12(b)(6)  
OR, ALTERNATIVELY, TO STAY;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

20

21 THE WALT DISNEY COMPANY, WALT  
DISNEY MOTION PICTURES GROUP,  
22 INC., BUENA VISTA HOME  
ENTERTAINMENT, INC., MARVEL  
23 STUDIOS, LLC, and MANDEVILLE  
FILMS, INC.,

Date: November 16, 2017  
Time: 2:00 p.m.  
Judge: Hon. Jon S. Tigar  
Ctrm.: 9 (19th Floor)

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Defendants.

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REARDEN LLC and REARDEN MOVA  
LLC,  
  
Plaintiffs,  
  
vs.  
  
TWENTIETH CENTURY FOX FILM  
CORPORATION and TWENTIETH  
CENTURY FOX HOME  
ENTERTAINMENT LLC,  
  
Defendants.

REARDEN LLC and REARDEN MOVA  
LLC,  
  
Plaintiffs,  
  
vs.  
  
PARAMOUNT PICTURES  
CORPORATION and PARAMOUNT  
HOME ENTERTAINMENT  
DISTRIBUTION INC.  
  
Defendants.

**NOTICES OF MOTIONS AND MOTIONS TO DISMISS**

To Plaintiffs Rearden LLC and Rearden MOVA LLC (“Plaintiffs” or “Rearden”) and their counsel of record:

PLEASE TAKE NOTICE that on November 16, 2017, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom No. 9 – 19th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Jon S. Tigar, United States District Judge, all defendants in Case No. 3:17-cv-04006-JST (The Walt Disney Company, Walt Disney Motion Pictures Group, Inc., Buena Vista Home Entertainment, Inc., Marvel Studios, LLC and Mandeville Films, Inc.) (collectively, “Disney”); both defendants in Case No. 3:17-cv-04191-JST (Twentieth Century Fox Film Corporation and Twentieth Century Fox Home Entertainment LLC) (jointly, “Fox”); and both defendants in Case No. 3:17-cv-04192-JST (Paramount Pictures Corporation and Paramount Home Entertainment Distribution Inc.) (jointly, “Paramount”) (Disney, Fox and Paramount are referred to collectively as “Defendants” or “Studios”), will and hereby do move the Court for an Order (1) dismissing all three complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that Rearden has failed to state any claim upon which relief may be granted, or, alternatively, (2) if the Court grants Virtual Global Holdings Limited’s (“VGH”) motion to stay proceedings in *Shenzhen Shi Haitiecheng Science and Technology Co., Ltd. et al. v. Rearden LLC et al.*, Case No. 3:15-cv-00797-JST (“*SHST v. Rearden*”), pending VGH’s requested appeal pursuant to Federal Rule of Civil Procedure 54(b), to stay proceedings in these cases pending the resolution of that appeal.

These Motions are based upon these Notices of Motions and Motions; the attached Memorandum of Points and Authorities<sup>1</sup>; all other materials supporting these Motions or the Reply brief filed in support thereof; all pleadings on file in this matter; and any other materials or arguments the Court may receive at or before the hearing on these Motions.

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<sup>1</sup> Defined terms in these Notices of Motions and Motions (e.g., “Rearden,” “Studios”) are also used in the accompanying Memorandum of Points and Authorities.

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DATED: September 15, 2017

MUNGER, TOLLES & OLSON LLP

By:           /s/ Kelly M. Klaus            
          KELLY M. KLAUS

*Attorneys for Defendants*

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*Torah Soft Ltd. v. Drosnin*,  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

In its complaints, Rearden distorts copyright law in a brazen attempt to convert its bitter ownership battle with Digital Domain 3.0 (“DD3”) into windfall damages claims against DD3’s customers. Rearden’s complaints are long on rhetoric—they charge the Studios, among other things, with “secretly” engaging known “thieves” to use “stolen” property, *e.g.*, Disney Compl. ¶¶ 3-4; Fox Compl. ¶¶ 4-8; Paramount Compl. ¶ 4—but short on the allegations required to state a viable claim.

First, Rearden asserts that all of the movies in issue are infringing derivative works of the “MOVA Contour” software program. Rearden, however, does not allege any code from this software is included in any of the movies. Instead, Rearden alleges that the Studios used “output files” generated through the use of the software after an actor is directed and filmed making numerous different facial gestures. Rearden claims that, because it is the alleged author (and owner) of the copyright in the program, Rearden also is the author (and owner) of those output files. This theory of authorship is invalid under copyright law. Indeed, if Rearden’s authorship-ownership theory were law, then Adobe or Microsoft would be deemed to be the author-owner of whatever expressive works the users of Photoshop or Word generate by using those programs. Even if the MOVA Contour copyright did extend to the output files, however, Rearden has not alleged that the output files themselves are substantially incorporated into the computer-generated (“CG”) characters or the movies in issue, none of which could possibly be derivative works of the MOVA Contour software program.

Second, Rearden claims that one Studio, Disney, actively induced DD3 to infringe five different patents related to MOVA. But Rearden has not alleged as it must that Disney knew about the specific patents-in-suit, knew that the work it contracted with DD3 to perform would infringe, or specifically intended for DD3 to commit patent infringement. Rearden’s conclusory assertion that Disney obtained the requisite high degree of knowledge because it conducted unspecified “intellectual property due diligence” is insufficient. To support this assertion, Rearden relies extensively on a March 2013 “Demand Letter” that Rearden sent to Greg LaSalle and that

1 Rearden alleges Disney knew about. Disney Compl. ¶ 90. Rearden, however, conspicuously  
 2 failed to attach the letter (which was a trial exhibit in *SHST v. Rearden*) to the complaint. A  
 3 review of the letter makes clear Rearden’s reliance on it is misplaced; the letter does not even use  
 4 the word “patent,” much less cite or claim ownership of any of the patents-in-suit.

5 Third, Rearden contends that all three Studios infringed its “MOVA” trademark in  
 6 promoting the movies. This claim also does not withstand scrutiny. Some of the alleged uses do  
 7 not exist; others are words uttered by third parties and therefore are not attributable to any Studio;  
 8 still others, such as calling the technology “MOVA” in the movie credits, are plainly nominative  
 9 fair uses.

10 At bottom, the Studios simply used DD3, a special effects vendor that offers its services  
 11 widely to the motion picture industry, to provide facial motion capture work along with many  
 12 other special effects services. That provides no basis for any claim by Rearden against the  
 13 Studios. The Studios respectfully submit that all of the complaints be dismissed. Alternatively, if  
 14 the Court stays proceedings in *SHST v. Rearden* pending VGH’s appeal of the Court’s ownership  
 15 judgment, the Court should stay proceedings in these cases pending resolution of that appeal,  
 16 which could moot these cases.

## 17 **II. SUMMARY OF COMPLAINTS**

18 Rearden alleges that it owns a registered copyright, five registered patents, and two  
 19 registered trademarks, all relating to the “MOVA” facial motion capture technology. Rearden  
 20 alleges infringement of these rights in connection with the Studios’ retention of DD3 to perform  
 21 facial motion capture services in connection with seven movies.<sup>1</sup> Issues concerning which party  
 22 owns MOVA are being litigated in *SHST v. Rearden*. The complaints—which in large part are  
 23 facsimiles of one another—allege the following claims:

24  
 25  
 26  
 27 <sup>1</sup> The movies are: *Beauty and the Beast*, *Avengers: Age of Ultron* and *Guardians of the Galaxy*  
 28 (*Rearden v. Disney*); *Deadpool*, *Fantastic Four* and *Night at the Museum: Secret of the Tomb*  
 (*Rearden v. Fox*); and *Terminator: Genisys* (*Rearden v. Paramount*).

1           **A. Copyright Claims—Against All Three Studios**

2           The gist of Rearden’s copyright claim is that (1) each Studio contracted with DD3 to  
3 perform facial motion capture services on one or more movies, (2) DD3 did not have Rearden’s  
4 authorization to use the copyrighted MOVA Contour program in connection with capturing the  
5 actors’ facial expressions, and (3) the movies are unauthorized derivative works of the MOVA  
6 Contour program. Disney Compl. ¶¶ 122-128, 139-144; Fox Compl. ¶¶ 126-132; Paramount  
7 Compl. ¶¶ 111-117.

8           The complaints allege that MOVA Contour “output files” were used in the process of  
9 creating at least one CG character in each movie. Disney Compl. ¶¶ 123, 140; Fox Compl. ¶ 127;  
10 Paramount Compl. ¶ 112. The output files consist of four types of data files: “Skin Texture,”  
11 “Makeup Pattern,” “Captured Surface,” and “Tracking Mesh.” Disney Compl. ¶ 42; Fox Compl.  
12 ¶ 43; Paramount Compl. ¶ 41. The files provide reference points for the artists who create three-  
13 dimensional images. The complaints do not allege that any output file or any MOVA Contour  
14 software code is actually contained in any movie.

15           Rearden alleges that the MOVA Contour software program “performs substantially all of  
16 the operations required to produce the Contour Program output files,” and that because Rearden  
17 authored the software program it also authored the output files. Disney Compl. ¶¶ 118, 135; Fox  
18 Compl. ¶ 123; Paramount Compl. ¶ 108. The conclusory allegation that MOVA Contour is  
19 responsible for “substantially all” of whatever copyrightable expression is in the output files is not  
20 supported by the complaints. In fact, it is clear from the face of the complaints that the human  
21 input involved in directing the actor’s facial performance, and the actor’s performance of the facial  
22 movements in response to that direction, are the critical and indispensable creative elements of  
23 whatever copyrightable expression may be embodied in the output files. *See, e.g.*, Disney Compl.  
24 ¶¶ 50-51, 109-111; Fox Compl. ¶¶ 52, 104, 113, 114; Paramount Compl. ¶¶ 50, 97.

25           **B. Patent Claims—Against Disney Only**

26           Rearden also alleges that Disney infringed five patents—Nos. 7,605,861; 7,567,293;  
27 7,548,272; 8,659,668 and 8,207,963 (collectively, “patents-in-suit”). Disney Compl. ¶¶ 194–252.

28

1 The complaint’s principal patent claim is that Disney actively induced infringement of the patents  
2 by contracting with DD3 to perform facial motion capture services.<sup>2</sup>

3 According to Rearden, Disney should have known DD3 was infringing the patents-in-suit  
4 and, therefore, Disney specifically intended to induce that infringement. First, Rearden alleges  
5 that Disney conducted unspecified “intellectual property due diligence” of Rearden and DD3 from  
6 which it learned that Rearden viewed MOVA Contour as embodying the patents-in-suit and from  
7 which Disney should have learned of those patents and that DD3’s actions infringed each patent.  
8 Disney Compl. ¶¶ 161, 182, 203, 226, 245. The complaint does not allege that Disney learned of  
9 these five patents, much less reviewed or analyzed them, or actually determined that using MOVA  
10 Contour would infringe those patents, as part of its alleged diligence. The complaint instead  
11 alleges—“on information and belief”—that Disney conducted due diligence of DD3 and that a  
12 “competent” diligence review would have revealed that DD3 did not have rights to the patents-in-  
13 suit. *Id.* ¶¶ 162, 183, 204, 227, 246.

14 Second, Rearden alleges that Disney was “notified” of a March 27, 2013 “Demand Letter”  
15 that Rearden’s lawyers sent to Greg LaSalle. *Id.* ¶¶ 90, 100, 106. The complaint does not allege  
16 that Disney received the letter. Moreover, the letter—which Rearden did not attach to the  
17 complaint—does not reference the patents-in-suit or any other patents; it does not even mention  
18 the word “patent.” RJN Ex. 1.

### 19 C. Trademark Claims—Against All Three Studios

20 Rearden’s final claim is that the Studios used the mark “MOVA” in press interviews,  
21 “featurette” material on Blu-ray discs and DVDs, or in movie credits. None of these alleged uses  
22 constitutes trademark infringement.

### 23 III. STANDARD OF REVIEW

24 To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter,  
25 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556  
26 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court

27 \_\_\_\_\_  
28 <sup>2</sup> Rearden makes the bare assertion that Disney directly infringed these patents but does not allege  
that Disney “makes, uses, offers to sell, or sells” MOVA Contour. 35 U.S.C. § 271(a).

1 need not “accept any unreasonable inferences or assume the truth of legal conclusions cast in the  
2 form of factual allegations.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013)  
3 (quotation omitted).

#### 4 **IV. ARGUMENT**

##### 5 **A. Rearden Does Not Allege A Plausible Copyright Infringement Claim**

6 Rearden’s copyright claims are based on the theory that its copyright in the MOVA  
7 Contour software program extends to the output files, and that the Studios’ CG characters and  
8 movies are derivative works of those output files. Both elements of this theory fail to state a  
9 plausible copyright claim. Rearden cannot show that the copyright in the software program  
10 extends to the output files; and even if it could, Rearden cannot show that the CG characters or the  
11 movies are derivative works of those files.

##### 12 **1. Rearden Has No Claim That The Copyright In The MOVA Contour 13 Software Extends To The Output Files**

14 Rearden bears the burden of alleging “ownership of a valid copyright” in the works in  
15 question. *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).  
16 According to Rearden, the relevant copyrighted works are the output files, which are data files that  
17 result from the use of MOVA Contour in the process of capturing an actor’s facial performance.  
18 Disney Compl. ¶¶ 33-35; Fox Compl. ¶¶ 33-35; Paramount Compl. ¶¶ 31-33. Rearden alleges that  
19 these data files, when rendered on a display device, show various types of images of the actor’s  
20 face or an on-screen wire mesh of the same. Disney Compl. ¶¶ 33-42, 117, 134; Fox Compl.  
21 ¶¶ 33-43, 121; Paramount Compl. ¶¶ 31-41, 106.

22 Copyright “vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). The  
23 author (and thus owner) generally “is the party who actually creates the work, that is, the person  
24 who translates an idea into a fixed, tangible expression entitled to copyright protection.”  
25 *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (emphasis added). To  
26 the extent the output files, when rendered or displayed, result in fixed images, the author of those  
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1 images would be the person who directed or photographed the performance, or in the case of a  
2 work made for hire, studio that produces the movie.<sup>3</sup>

3 In its seminal case, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884), the  
4 Supreme Court held that the photographer “authors” a photograph, because that is “the person who  
5 has superintended the arrangement, who has actually formed the picture by putting the person in  
6 position, and arranging the place where the people are to be.” *Id.*; see also *Garcia v. Google, Inc.*,  
7 786 F.3d 733, 744 (9th Cir. 2015) (en banc) (video crew shooting scene “fixed [an actor’s]  
8 performance in the tangible medium”). Rearden, however, alleges that it is the author (and thus  
9 the owner) of the output files because it is the author of the software program that purportedly  
10 “performs substantially all of the operations required to produce” the output files. Disney Compl.  
11 ¶¶ 118, 135; Fox Compl. ¶ 123; Paramount Compl. ¶ 108 (“the authors of the Contour Program  
12 are the authors of the Contour Program output files”).

13 Rearden’s theory is contrary to *Burrow-Giles* and *Garcia*, which make clear that a person  
14 who arranges the picture, not the creator of the recording equipment, is the author of the resulting  
15 fixed images. Here, that person would be the human being who directed the actor’s facial  
16 performance, almost certainly as a work made for hire for the movie’s producer. Rearden is not  
17 the copyright owner of whatever expressive content may be embodied in the output files.

18 Rearden’s theory that it is the author-owner of the copyrightable expression also is  
19 contrary to the leading Ninth Circuit case on the authorship of output files from computer  
20 software. In *Design Data Corp. v. Unigate Enterprise, Inc.*, 847 F.3d 1169 (9th Cir. 2017), the  
21 Ninth Circuit held that the copyright in a computer program does not generally extend to its  
22 output. The program at issue in *Design Data* was computer-aided design (“CAD”) software,  
23 which engineers used to create “two and three dimensional drawings and models of structural steel  
24 components.” *Design Data Corp. v. Unigate Enter., Inc.*, 63 F. Supp. 3d 1062, 1063 (N.D. Cal.  
25 2014) (district court decision affirmed in part and reversed in part by Ninth Circuit *Design Data*  
26

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27 <sup>3</sup> In many cases, the director and camera personnel on a movie will agree that their work product  
28 will be a “work made for hire” for the studio. Under the Copyright Act, the party that owns a  
work made for hire is deemed to be the “author” of the work so created. 17 U.S.C. § 201(b).

1 decision). The human user of the program used the CAD software to design the components, and  
2 the program generated image, text, and other output files that were used to “design, detail[],  
3 fabricate[], and erect[] . . . structural steel in buildings.” *Id.* Design Data, which owned the  
4 copyright in the program, alleged that defendants infringed by copying and selling the output files.  
5 The district court rejected the copyright claim, holding there was a fundamental distinction  
6 “between the source code that operates the program (and is protected by the copyright) and the  
7 output data (which is not protected by the copyright).” *Id.* at 1068. The Ninth Circuit affirmed on  
8 the ground that Design Data failed to show the output files “reflected the contents” of the  
9 copyrighted program. 847 F.3d at 1173.

10 The *Design Data* court noted that, in 2001, a district court in the Southern District of New  
11 York “suggest[ed] that the copyright protection afforded a computer program may” extend to its  
12 output files where the program does “the lion’s share of the work” in creating the output files and  
13 where “the user’s input is ‘marginal.’” *Id.* (citing *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276,  
14 283 (S.D.N.Y. 2001), and 4 Nimmer on Copyright § 13.03[F]). The court explained that it did not  
15 need to decide whether there was such an exception, because Design Data failed to show that the  
16 user’s participation was “marginal.” *Id.*

17 Even if there were a recognized exception to the rule that the copyright in a piece of  
18 software does not extend to the software’s output files, the human involvement would have to be  
19 extremely limited in order for the author of the software program to be deemed the author of the  
20 program’s output files. This is clear from *Torah Soft*, which the Ninth Circuit cited in *Design*  
21 *Data*. The output file in that case was a “matrix” that the program generated by searching an  
22 included database of words in the Hebrew Bible in response to the user’s input of a single search  
23 word or phrase. *Torah Soft*, 136 F. Supp. 2d at 283. It was this minimal degree of user input that  
24 the district court described as “marginal.” *Id.* The court specifically distinguished this “marginal”  
25 input from “the creative process used in many computer art programs, which permit an end-user to  
26 create an original work of art in an electronic medium”—circumstances where the users “often  
27 supply the lion’s share of the creativity to create the screen display.” *Id.*

28



1 Rearden’s conclusory allegation that the MOVA Contour program “performs substantially  
2 all” the work in creating the output files does not make this case anything close to *Torah Soft*.  
3 Nor does that allegation otherwise justify an exception to the rule that the copyright in a software  
4 program does not extend to this program’s output files. Rearden ignores what is obvious from the  
5 face of the complaint: a person is directing the performance of another person (the actor) to make  
6 the various facial motions that determine the output. *See, e.g.*, Disney Compl. ¶¶ 28, 35, 37, 38,  
7 50, 52; Fox Compl. ¶¶ 26, 35, 37, 38, 39, 51, 53; Paramount Compl. ¶¶ 24, 33, 35, 36, 37, 49. A  
8 person—not the MOVA Contour program—directed the performances of Brad Pitt, Arnold  
9 Schwarzenegger, Dan Stevens, and the other actors referenced or pictured in the complaints,  
10 including any facial expressions captured and expressed in the output files. *See, e.g.*, Disney  
11 Compl. ¶¶ 50, 109-111; Fox Compl. ¶¶ 104, 113, 114; Paramount Compl. ¶ 97. The clapperboard  
12 in the image of Dan Stevens’ facial capture session for *Beauty and the Beast*, as well as the  
13 various images of Mr. Stevens, Mr. Schwarzenegger, and the other actors performing on set or in  
14 the MOVA rig, show that the facial motions are superintended and directed by a person, not by the  
15 MOVA Contour software. Disney Compl. ¶¶ 108-111; Fox Compl. ¶¶ 104, 113-114; Paramount  
16 Compl. ¶¶ 96-100. The human contribution to the expressive components of the output file is  
17 substantial and performs “the lion’s share of the creativity” in the facial motion capture. The  
18 human contribution cannot be deemed “marginal” in any sense.<sup>4</sup>

19 Rearden attempts to minimize the human input to the contents of the output files by  
20 alleging that, if the MOVA Contour program is “[g]iven identical facial motion capture inputs,”  
21 the software “will produce identical output files.” Disney Compl. ¶¶ 118, 135; Fox Compl. ¶ 123;  
22 Paramount Compl. ¶ 108. This allegation only underscores the significance of the human  
23 creativity involved in creating whatever copyrightable expression may be embodied in the output  
24 files. No one uses MOVA Contour to create “identical output files.” The complaints make clear  
25 that the entire point of MOVA Contour is to enable the user to create highly unique output files

26 \_\_\_\_\_  
27 <sup>4</sup> Notably, Rearden does not allege that it operated the MOVA rig or controlled the software used  
28 in the creation of the output files. Those roles were performed by Digital Domain. Thus, to the  
extent the person(s) involved in those processes had any role in directing the actor’s facial  
performance, that would not give rise to any copyright interest in Rearden.

1 that reflect the expression embodied in the specific facial movements of a particular person. *See*,  
2 *e.g.*, Disney Compl. ¶ 21 (MOVA sought to address the problem that “no known technology at  
3 [the] time [of its creation] could capture and track the subtleties of human facial motion”); *id.* ¶ 37  
4 (“In fact, Contour output files capture the woman’s performance with such fidelity that observers  
5 of the animation have commented that despite the fact that the man’s CG face clearly has a male  
6 *shape*, the *motion* appears to be that of a female face) (emphases in original); *id.* ¶ 110 (“[T]he  
7 Contour output files retargeted to the CG 3D model brought the Beast’s face to life, retaining the  
8 expressiveness, subtlety, and humanity of Mr. Steven’s performance in the CG 3D model.”). The  
9 complaints include numerous examples showing output file images that correlate to particular  
10 actors and their specific facial expressions. *See, e.g.*, Disney Compl. ¶ 51; Fox Compl. ¶ 52;  
11 Paramount Compl. ¶ 50 (images of dozens of different Brad Pitt facial expressions for *The*  
12 *Curious Case of Benjamin Button*).

13 Rearden’s argument is analogous to Adobe or Microsoft claiming to own the expressive  
14 outputs created using Microsoft Word or Adobe Photoshop—whether a digital image or a novel—  
15 because the underlying software program controlled the mechanical operations of creating the  
16 digital file. Adobe owns the copyright in Photoshop and Microsoft owns the copyright in Word.  
17 To be sure, both license the use of their software to third parties. But it is unthinkable that they (or  
18 any software company) could (or would even attempt to) use the rules of copyright ownership to  
19 lay claim, as Rearden does, to the expressive content that results from the authorial choices and  
20 actions of the persons who use those programs.

21 In sum, Rearden fails to state a claim that it owns whatever copyright exists in the output  
22 files.

## 23 **2. Rearden Does Not Allege That The Studios’ CG Characters And** 24 **Movies Are Derivative Works Of The Output Files**

25 Even if Rearden could plead authorship of the output files, its copyright claims would still  
26 fail because Rearden has not alleged that the CG characters or the movies in which they appear are  
27 unauthorized derivative works of those files. To constitute a derivative work under copyright law,  
28 the new work “must substantially incorporate protected material from the preexisting work.”

1 *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1988); *Litchfield v. Spielberg*, 736  
2 F.2d 1352, 1357 (9th Cir. 1984) (“[A] work is not derivative unless it has been substantially  
3 copied from the prior work.”).

4 Rearden makes the conclusory allegation that the “CG characters incorporate some or all  
5 Contour Program output files,” and that the MOVA output files “are wholly and indivisibly  
6 merged in the derivative CG characters.” Disney Compl. ¶¶ 123, 140; Fox Compl. ¶ 127;  
7 Paramount Compl. ¶ 112. These allegations are not backed up by any factual allegations showing  
8 that any part of any output file is copied or otherwise incorporated into any CG character or  
9 movie.

10 The complaints and material they incorporate make clear that the output files are not  
11 incorporated into the CG characters or the movies. The complaints allege that the output files,  
12 when they are “rendered” or “displayed,” will appear to look like “normal skin” (“Skin Texture”),  
13 “a random pattern of green or blue” (“Makeup Pattern”), “a 3D bust of the performer’s skin in  
14 motion” (“Captured Surface”), or “a 3D mesh” of the actor’s facial movements (“Tracking  
15 Mesh”). Disney Compl. ¶¶ 117, 134; Fox Compl. ¶ 121; Paramount Compl. ¶ 106. Rearden  
16 includes images throughout the complaints that it says represent the rendering or display of these  
17 files. But Rearden nowhere alleges that any of these images—let alone the software code—were  
18 actually included in any of the movies.

19 The complaints instead allege that, following the creation of the various output files, one of  
20 those files—the Tracking Mesh file—“can then be retargeted to a CG face.” Disney Compl. ¶ 42;  
21 Fox Compl. ¶ 43; Paramount Compl. ¶ 41. But “retargeting” does not involve placing the  
22 Tracking Mesh into the CG character or the movie. Instead, the Tracking Mesh is used as a point  
23 of reference for the actor’s facial movements: the facial movements themselves are created on a  
24 three-dimensional bust, which may exist in physical form or in different computer files, none of  
25 which Rearden claims to author. Disney Compl. ¶ 53; Fox Compl. ¶ 54; Paramount Compl. ¶ 52.<sup>5</sup>

26  
27 <sup>5</sup> The complaints quote extensively from (and the Court therefore may take judicial notice of) a  
28 “TED Talk” given by DD3’s CEO, Ed Ulbrich, regarding facial motion capture for *The Curious  
Case of Benjamin Button*. Disney Compl. ¶¶ 44-53; Fox Compl. ¶¶ 45-54; Paramount Compl.

1 Moreover, the “final derivative face”—i.e., the face that “is integrated into the live-action footage  
 2 of the final scene”—is created only *after* many other steps in the creative process. Rearden says  
 3 only that these steps involve “texturing and lighting.” *Id.* “Texturing and lighting” is Rearden’s  
 4 euphemism for all of the creative work—none of which Rearden alleges it supplies—of creating  
 5 the actual filmed face of the Beast, Colossus, the Terminator, or any of the other CG characters.

6 The bottom line is that Rearden has not alleged that the actual CG characters copy or  
 7 incorporate any of the contents of the MOVA software code or output files. Hence, even if  
 8 Rearden could claim authorship of the output files (which it cannot), Rearden has failed to plead  
 9 that the CG characters and the movies themselves are derivative works of its software code or the  
 10 output files. *See VBCConversions, LLC v. Exida.com, LLC*, No. CV 13-8306 PSG, 2014 WL  
 11 12560807, at \*12 (C.D. Cal. Apr. 14, 2014) (plaintiff failed to plead that software program was  
 12 derivative of another work where “instead of explaining how” the versions were similar, it alleged  
 13 “in conclusory fashion” that the works were substantially similar).

14 **B. Rearden Has Failed To Plead A Plausible Claim That Disney Infringed The**  
 15 **Patents-In-Suit, Either By Active Inducement Or Directly**

16 **1. Rearden Fails To Meet The High Standards For Pleading Active**  
 17 **Inducement Of Patent Infringement**

18 To state a claim for actively inducing patent infringement, Rearden must set forth “facts  
 19 plausibly showing that” Disney actually knew of the specific patents-in-suit; that Disney knew that  
 20 the services it asked DD3 to perform “constituted infringement” of those patents; and that Disney  
 21 “specifically intended” for DD3 to infringe those patents. *In re Bill of Lading Transmission &*  
 22 *Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339-41 (Fed. Cir. 2012). *See also DSU Med. Corp.*  
 23 *v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir. 2006) (en banc). Rearden cannot satisfy these  
 24 standards with “conclusory allegations,” but must support them with specific, affirmative facts.

25 ¶¶ 43-52; RJN Ex. 10. In that talk, starting at the twelve-minute mark, Mr. Ulbrich explains how  
 26 filmed images of Mr. Pitt making specific facial motions to match the movement of the character  
 27 (Benjamin Button) were transposed onto lifelike maquettes of that character at different ages, and  
 28 how those transposed images were then incorporated into the actual movie. The output files of  
 MOVA Contour—which Mr. Ulbrich described earlier in the TED Talk—were not the files  
 transposed onto the maquettes. The TED Talk further confirms that the MOVA Contour files  
 provide data reference points rather than actual images that are copied into the movie.

1 *Avocet Sports Tech., Inc. v. Garmin Int'l, Inc.*, No. C-11-04049 JW, 2012 WL 1030031, at \*4  
 2 (N.D. Cal. Mar. 22, 2012). Rearden does not allege any facts to support any of the required  
 3 elements.

4 (a) *Rearden Does Not Allege That Disney Had Actual Knowledge Of*  
 5 *The Patents-In-Suit*

6 “The requirement that the alleged infringer knew or should have known his actions would  
 7 induce actual infringement necessarily includes the requirement that he or she knew of the patent.”  
 8 *DSU*, 471 F.3d at 1304. *See also Avocet*, 2012 WL 1030031, at \*4 (dismissing induced  
 9 infringement claim given lack of “any facts to suggest that Defendant . . . had knowledge of the  
 10 ‘427 Patent”). It is not enough that the defendant knew that plaintiffs had some unspecified  
 11 patents covering their products. For example, in *Evolved Wireless*, the plaintiff made multiple  
 12 “efforts to license the patents-in-suit to” defendants without specifying the numbers of any  
 13 particular patents. The court held that was plainly insufficient to establish actual knowledge of the  
 14 patents-in-suit. *See Evolved Wireless, LLC v. Samsung Elecs. Co.*, No. CV 15-545-SLR-SRF,  
 15 2016 WL 1019667, at \*3 (D. Del. Mar. 15, 2016), *report and recommendation adopted*, 2016 WL  
 16 1381765 (D. Del. Apr. 6, 2016).

17 Rearden makes no allegation whatsoever that Disney had actual knowledge of the five  
 18 patents-in-suit. Nor does Rearden cite the existence of any document alerting Disney that DD3’s  
 19 work for it would infringe any patent, much less these patents. Rearden alleges only that Disney  
 20 was “notified” of the March 27, 2013 “Demand Letter” to LaSalle and thereafter ceased  
 21 discussions with LaSalle about buying the MOVA technology. Disney Compl. ¶¶ 90, 100, 106.  
 22 Rearden obviously wants the Court to infer that, after being “notified” of the Demand Letter,  
 23 Disney knew of the patents-in-suit and knew that DD3’s use was infringing. Rearden could have  
 24 attached the Demand Letter to the complaint. Rearden did not do that, however, because the  
 25 actual contents of that letter belie the very basis for Rearden’s allegations: the letter does not even  
 26 use the word patent, much less say anything about the patents-in-suit.<sup>6</sup> RJN Ex. 1. The Demand

27 <sup>6</sup> Because the complaint incorporates the Demand Letter by reference, the Court can consider it in  
 28 this motion. *See, e.g., Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.  
 2002). The Demand Letter was admitted as Ex. 58 in the *SHST v. Rearden* trial.

1 Letter therefore does not, and cannot, support an inference that Disney had knowledge of the  
2 patents-in-suit or knowledge of infringement. *See Evolved Wireless, LLC*, 2016 WL 1019667, at  
3 \*3; *LaserDynamics USA, LLC v. Cinram Grp., Inc.*, No. 15 Civ. 1629 (RWS), 2015 WL 6657258,  
4 at \*6 (S.D.N.Y. Oct. 30, 2015) (“Plaintiff’s unadorned (and implicitly stated) infringement  
5 ‘notice’ . . . could have been received as unsubstantiated and unenforceable patent trolling just as  
6 they could have amounted to knowledge of likely infringement.”).

7 Rearden also alleges that Disney should have known about the patents-in-suit based on  
8 “intellectual property due diligence” (“IP diligence”) it allegedly conducted when hiring  
9 Rearden’s authorized agents (prior to 2013) and DD3 (after 2013). Disney Compl. ¶¶ 161-162,  
10 182-183, 203-204, 226-227, 245-246. But Rearden’s allegations of IP diligence are completely  
11 conclusory. The complaint sets forth no facts whatsoever regarding what constitutes such  
12 diligence. It does not even allege that Disney actually learned of the five patents-in-suit (or any  
13 others) through either alleged diligence effort. With respect to the alleged IP diligence of  
14 Rearden, the omission speaks volumes: Rearden, of course, has full knowledge of whatever  
15 diligence it claims to have provided Disney. As to the purported IP diligence of DD3, Rearden  
16 has no basis for its allegations, which are made only “on information and belief.” Disney Compl.  
17 ¶¶ 162, 183, 204, 227, 246. Where “some of the allegations are qualified with the phrase  
18 [information and belief] and others are not” it may be inferred “that plaintiff likely lacks  
19 knowledge of underlying facts to support the assertion.” *Delphix Corp. v. Actifo, Inc.*, No. C 13-  
20 4613 RS, 2014 WL 4628490, at \*1-2 (N.D. Cal. Mar. 19, 2014) (dismissing patent inducement  
21 claim where claim of actual knowledge “relie[d] primarily on” allegation made on “information  
22 and belief”).

23 Even if Rearden could allege that Disney learned of the five patents-in-suit in the course of  
24 IP diligence, that would not be enough. A claim of induced infringement requires that the  
25 defendant appreciated the specific importance of the specific patents to the infringement at issue.  
26 In *Evolved Wireless*, for example, one of the licensing efforts included a letter listing 85 patents  
27 and applications, *including the patents in suit*. *See Evolved Wireless, LLC*, 2016 WL 1019667, at  
28 \*3. The court held this was still insufficient because the list failed to “specifically identify the

1 patents-in-suit . . . from the list of eighty-five patents and patent applications.” *Id.* Merely seeing  
2 a long list of patents does not establish actual knowledge that these patents would be the ones  
3 potentially infringed. Rearden would need to allege—which it pointedly does not—that these five  
4 patents were brought to Disney’s attention with respect to the specific claim being raised here. *Cf.*  
5 *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, No. 15-cv-05008 NC, 2016 WL 6427850, at \*1  
6 (N.D. Cal. Oct. 31, 2016) (plaintiff failed to establish actual knowledge; although patents had been  
7 disclosed in a notice letter, the letter related to a different set of communication standards).

8 Rearden would also need to identify *who* learned that these specific patents covered the  
9 DD3 process. That an employee, a parent company, a subsidiary, or a sister company encountered  
10 the patents-in-suit is not enough to create a plausible inference that Disney itself had actual  
11 knowledge of the patent *at the time of DD3’s alleged infringement*. The employee with actual  
12 knowledge may, for example, have left the company before the alleged infringement—eliminating  
13 the actual knowledge required for induced infringement. *See, e.g., DermaFocus LLC v. Ulthera,*  
14 *Inc.*, 201 F. Supp. 3d 465, 471 (D. Del. 2016) (“Although it is certainly conceivable that [the  
15 defendant’s founder and board member] took note of the [patent-in-suit] a decade ago and shared  
16 his knowledge thereafter with others at his company, the court concludes that the allegations are  
17 neither likely nor reasonable.”). Similarly, an allegation (which Rearden has not made) that a  
18 Disney affiliate or subsidiary knew about the patents does not mean that Disney itself had  
19 knowledge. *McRO, Inc. v. Namco Bandai Games Am., Inc.*, 23 F. Supp. 3d 1113, 1125 (C.D. Cal.  
20 2013) (granting motion to dismiss and noting that “knowledge of a patent by a parent corporation  
21 is not necessarily imputed to the subsidiary”); *Varian Med. Sys., Inc. v. Elekta AB*, No. CV 15-  
22 871-LPS, 2016 WL 3748772, at \*5 (D. Del. July 12, 2016) (“Plaintiff needs to set out more than  
23 just the bare fact of the parent/subsidiary relationship in order to make out a plausible claim that”  
24 the parent had “the requisite knowledge of the patent-in-suit”).

25 Rearden would also need to identify *when* the purported “due diligence” occurred. Courts  
26 have “regularly required that plaintiffs plead knowledge of the actual patents at issue and not mere  
27 knowledge of the pendency of patent applications.” *LML Holdings, Inc. v. Pac. Coast Distrib.*  
28 *Inc.*, No. 11-CV-06173 YGR, 2012 WL 1965878, at \*4 (N.D. Cal. May 30, 2012) (collecting



1 cases). The patents-in-suit issued between 2009 and 2014. Disney Compl. ¶¶ 150, 170, 191, 212,  
2 235. Presumably, Rearden could plead exactly when Disney conducted the alleged IP diligence.  
3 Rearden did not do this. It is clear from the face of the complaint that Rearden cannot plausibly  
4 allege that Disney conducted IP diligence after the issuance of the '963 and '668 patents. Rearden  
5 alleges that Disney conducted the diligence and “worked with Rearden” on four movies that were  
6 released between 2010 and 2012. *E.g.*, Disney Compl. ¶ 226. But the '963 patent did not issue  
7 until June, 26, 2012 and the '668 patent issued on February 25, 2014, two years *after* the last of  
8 the four movies was released in theaters. *Id.* ¶¶ 212, 235.

9       Having failed to set forth any facts demonstrating Disney’s actual knowledge, Rearden  
10 makes the conclusory assertion that Disney was “willfully blind” to the existence of the patents.  
11 Disney Compl. ¶¶ 161, 182, 203, 226, 245. To allege willful blindness, however, Rearden must  
12 plead facts showing that Disney (1) subjectively believed the patents-in-suit existed *and*  
13 (2) affirmatively acted to avoid gaining knowledge of those patents. *Global-Tech Appliances, Inc.*  
14 *v. SEB S.A.*, 563 U.S. 754, 769 (2011); *see also Neology, Inc. v. Kapsch Trafficcom IVHS, Inc.*,  
15 No. CV 13 2052 LPS, 2014 WL 4675316, at \*5 (D. Del. Sept. 19, 2014) (“To plead willful  
16 blindness, a plaintiff must identify affirmative actions taken by the defendant to avoid gaining  
17 knowledge of the patents-in-suit or of acts that constituted patent infringement.”). There is no  
18 “affirmative duty to sniff out a potential patent,” which would go “far beyond any duty recognized  
19 by the Federal Circuit, this court or any other court.” *Boundaries Sols. Inc. v. CoreLogic, Inc.*,  
20 No. 5:14-cv-00761-PSG, 2014 WL 7463708, at \*2 (N.D. Cal. Dec. 30, 2014).

21       Here, Rearden has no factual allegations either that Disney believed these patents existed  
22 or that Disney took affirmative steps to avoid learning about them. Indeed, Rearden alleges the  
23 *opposite* of willful blindness: it claims that Disney engaged in IP diligence efforts. *E.g.*, Disney  
24 Compl. ¶ 72. Bare assertions of willful blindness that merely state a legal conclusion are  
25 insufficient, especially when contradicted by specific factual allegations. *See, e.g., Vasudevan*  
26 *Software, Inc. v. TIBCO Software Inc.*, No. C 11-06638 RS, 2012 WL 1831543, at \*6 (N.D. Cal.  
27 May 18, 2012); *see generally Iqbal*, 556 U.S. at 681.

28



1 (b) *Rearden Does Not Allege That Disney Knew DD3 Would Infringe*  
2 *The Patents-In-Suit Or That Disney Intended That DD3 Infringe*  
3 *Them*

4 In addition to actual knowledge of the patents-in-suit, Rearden is required to allege facts  
5 demonstrating that Disney actually knew that DD3 would infringe the patents and specifically  
6 intended that result. *DSU*, 471 F.3d at 1305. These are very high hurdles. First, the scienter  
7 requirement is specific intent, not general intent. In other words, it is not enough that Disney  
8 intended DD3 to perform motion capture activities that ended up infringing Plaintiffs' patents:  
9 "knowledge of the acts alleged to constitute infringement" is not enough." *Id.* (internal quotation  
10 marks omitted). Instead, Rearden must plausibly allege that Disney had the specific and  
11 affirmative intent to cause DD3 *to infringe*, and to infringe *these* patents. *See id.* Second, it is not  
12 enough that Disney thought infringement was *possible*; Rearden must allege facts making it  
13 plausible to believe Disney *knew* DD3 would infringe by performing the requested services.  
14 "[M]ere knowledge of possible infringement by others does not amount to inducement; specific  
15 intent and action to induce infringement must be proven." *Id.* (internal quotation marks omitted).

16 Thus, Rearden would have to allege facts plausibly demonstrating, at a minimum, that  
17 Disney (a) intended DD3 to infringe; (b) understood DD3's technology (or Rearden's technology);  
18 (c) compared the technology to the patent claims; (d) concluded that DD3 would infringe the  
19 patents by performing the requested services; and (e) knew that DD3 did not have licenses to these  
20 patents. Rearden does not allege facts showing any of this.

21 For example, there are no factual allegations that Disney understood how the DD3 system  
22 worked, or that Disney compared the DD3 system to the patents-in-suit, or that Disney concluded  
23 that DD3's use of that system would infringe the five patents. Rearden asserts that Disney knew  
24 that "Rearden regarded the MOVA Contour facial motion capture system and methods to be  
25 embodiments of the claims." *See, e.g., Disney Compl.* ¶ 161. Rearden alleges no facts to support  
26 the claim that Disney knew what Rearden believed. But even if the allegation were well-pleaded,  
27 Rearden's beliefs about its system and its patents is not an allegation that Disney had analyzed the  
28 issue and agreed with Rearden. Determining whether a patent is infringed requires an  
extraordinarily complex analysis. That is why the "mere knowledge of possible infringement" is

1 not enough. *DSU*, 471 F.3d at 1305 (internal quotation marks omitted). *Cf. Straight Path IP Grp.,*  
 2 *Inc. v. Apple Inc.*, No. C 16-03582 WHA, 2016 WL 8729942, at \*3 (N.D. Cal. Oct. 21, 2016) (“It  
 3 is simply implausible to infer that [defendant] performed analysis and concluded that its products  
 4 infringed the ’469 patent based solely on the fact that [plaintiffs] had asserted it against *others*.”).

5 It is particularly implausible, in light of the protracted *SHST v. Rearden* proceedings, for  
 6 Rearden to allege that Disney knew that DD3 did not have rights to these patents. It took more  
 7 than a year of litigation and a bench trial before this Court concluded that Rearden, and not DD3,  
 8 owned the rights to MOVA. It makes no sense to claim Disney must have reached that conclusion  
 9 based on unspecified IP diligence or the Demand Letter (assuming that Disney even received a  
 10 copy).

11 Rearden alleges that a “competent” diligence effort “would have included an examination  
 12 of the public record of assignments and/or attorney of record” of the patents. *See, e.g., Disney*  
 13 *Compl.* ¶ 162. This allegation fails to meet the standards for claiming inducement. The PTO’s  
 14 assignment records concern ownership of patents; there is no record at the PTO or elsewhere of  
 15 every patent license agreement. *See, e.g., Sanofi, S.A. v. Med-Tech Veterinarian Prods., Inc.*, 565  
 16 *F. Supp.* 931, 939 (D.N.J. 1983) (“[A]lthough assignments are required to be recorded in order for  
 17 an assignee to prevail against one who has acquired rights in the patent without notice . . . there is  
 18 no obligation to record a license.”). Moreover, patent licenses can be obtained implicitly, by  
 19 operation of law. *See, e.g., PPG Indus., Inc. v. Guardian Indus. Corp.*, 597 F.2d 1090, 1096 (6th  
 20 *Cir.* 1979).

21 In sum, Rearden fails to allege that Disney actively induced patent infringement.

22 **2. The Complaint Makes Clear That Rearden Has No Basis To Allege**  
 23 **That Disney Directly Infringed The Patents-In-Suit**

24 Rearden makes the bald assertion in each patent infringement claim that Disney is  
 25 responsible for its own “direct” infringements. *E.g., Disney Compl.* ¶¶ 165-167. A defendant is  
 26 not liable for direct infringement unless it “makes, uses, offers to sell, or sells” the patented  
 27 invention. 35 U.S.C. § 271(a). Rearden does not allege that Disney did any of these things. The  
 28 complaint instead alleges, repeatedly, that Disney hired DD3 to provide facial motion capture

1 services, and that DD3, not Disney, “provided such facial performance capture services.” *E.g.*,  
 2 Disney Compl. ¶¶ 93, 99, 105. In short, Rearden alleges no basis for a direct infringement claim.

3 **C. Rearden’s Trademark Claims Are Based On Materials That Do Not Use The**  
 4 **MOVA Marks, Third-Party Statements, Or Nominative Fair Uses Of The**  
 5 **Marks**

6 To state a trademark claim, Rearden must allege “(1) that it has a protectible ownership in  
 7 the mark; and (2) that the defendant’s use of the mark is likely to cause consumer confusion.”  
 8 *Dep’t of Parks & Recreation v. Bazaar del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006).  
 9 Rearden’s various trademark allegations fail for several reasons: in some cases, the marks are not  
 10 even used; in others, the alleged use was by a third party; in others, the use plainly constitutes  
 11 nominative fair use. This section addresses Rearden’s allegations by Studio and movie.

12 **1. Disney**

13 *Beauty and the Beast*: First, Rearden says that actor Dan Stevens used “MOVA” in  
 14 describing the technology used to capture his facial performance. Disney Compl. ¶¶ 2, 261. This  
 15 is clear-cut nominative fair use: Mr. Stevens was using “MOVA”—the name of the technology—  
 16 to describe that technology, and this use meets all of the Ninth Circuit’s requirements for  
 17 nominative fair use. *See New Kids on the Block v. News Am. Pub’g, Inc.*, 971 F.2d 302, 308 (9th  
 18 Cir. 1992). Referencing the technology would be difficult and inefficient without calling it  
 19 “MOVA.” *Id.* at 306 (“it is often virtually impossible to refer to a particular product for purposes  
 20 of comparison, criticism, point of reference or any other such purpose without using the mark”).<sup>7</sup>  
 21 He did not use any more or less of “MOVA” than necessary to refer to the technology. *Id.* at 308.  
 22 And the quoted statement does not suggest to any “reasonably prudent consumer in the  
 23 marketplace” that Rearden sponsored or endorsed *Beauty and the Beast*. *Arenas v. Shed Media*  
 24 *U.S., Inc.*, 881 F. Supp. 2d 1181, 1194 (C.D. Cal. 2011) (internal quotation marks omitted); *see*  
 25 *New Kids*, 971 F.2d at 308.

26 <sup>7</sup> It is clear from materials the complaint incorporates that there have been multiple types of facial  
 27 motion capture technologies since at least 2006. *See* Mr. Ulbrich’s “TED Talk” regarding *The*  
 28 *Curious Case of Benjamin Button* (cited in Disney Compl. ¶¶ 44-53; Fox Compl. ¶¶ 45-54;  
 Paramount Compl. ¶¶ 43-52). RJN Ex. 10. Hence, a generic reference to “facial motion capture  
 technology” would not have been accurate.

1 Second, Rearden alleges that Disney used the mark in the Blu-ray disc “featurette.”  
 2 Disney Compl. ¶¶ 108-111, 260. The Court can consider the incorporated-by-reference featurette;  
 3 it does not use “MOVA.” RJN Ex. 2.

4 Third, Rearden alleges that Disney used the mark in the movie credits. Disney Compl.  
 5 ¶¶ 262-263. Rearden includes no screenshot of this (as it does for other titles, *e.g.*, *id.* ¶ 259).  
 6 Again, the Court can consider the movie credits, which do not use the mark. RJN Ex. 2.

7 Finally, Rearden alleges that Disney released a promotional video to *USA Today*. Disney  
 8 Compl. ¶ 112. But the mark is not used in the video. RJN Ex. 3.

9 *Guardians of the Galaxy*: Rearden alleges that the ending credits state: “Facial motion  
 10 capture services were provided by Mova, a division of Digital Domain.” Disney Compl. ¶¶ 259,  
 11 262-263. The credits used “Mova” to describe a company, not a technology—a use that could not  
 12 create a likelihood of confusion that Rearden sponsored the movie. And, again, “Mova” is the  
 13 name of the technology, so the use in all events would be nominative fair use.<sup>8</sup>

## 14 2. Fox

15 *Deadpool*: As with *Guardians of the Galaxy*, Rearden claims that Fox’s reference to  
 16 “MOVA” in describing “artists” in *Deadpool*’s credits is trademark infringement. Fox Compl.  
 17 ¶ 141. For the reasons discussed above, calling “MOVA” “MOVA” in the film’s credits is  
 18 nominative fair use.

19 Rearden also alleges that a visual effects supervisor referred to “MOVA,” and that a  
 20 “MOVA” mark briefly appears in the Blu-ray featurette. Fox Compl. ¶¶ 3, 112-114, 143. Again,  
 21 these are nominative fair uses. The visual effects supervisor was referencing the technology, not  
 22 Fox’s products. *See* RJN Ex. 4; *see also 1800 Get Thin, LLC v. Hiltzik*, No. CV11-00505 ODW,  
 23 2011 WL 3206486, at \*3 (C.D. Cal. July 25, 2011) (finding nominative fair use where  
 24 “Defendants have used Plaintiff’s claimed trademark ‘1800 GET THIN’ to refer to Plaintiff’s  
 25 marketing service and not to their own products or services”).

26  
 27  
 28 <sup>8</sup> Rearden does not allege any infringing use of the mark in connection with *Avengers: Age of Ultron*.

1 *Fantastic Four*: Here, too, Rearden complains about the appearance of the word “MOVA”  
 2 in some Blu-ray featurette images. Fox Compl. ¶¶ 103, 142, 143. The word appears in a few  
 3 images, in the bottom right corner of the screen, within the context of speakers in the video  
 4 describing the MOVA technology. *See* RJN Ex. 5. Again, this is nominative fair use.

5 Rearden also alleges that a visual effects supervisor used “MOVA” in describing a session  
 6 the team had recorded using the technology. Fox Compl. ¶¶ 103, 143. This statement appears in a  
 7 single sentence in an article about the different visual effects used in the motion picture. *See* RJN  
 8 Ex. 6. It is clearly an instance of nominative fair use.<sup>9</sup>

### 9 3. Paramount

10 *Terminator: Genisys*: First, Rearden alleges that, in the Blu-ray featurette, a visual effects  
 11 supervisor (Sheldon Stopsack) “stated how MOVA Contour captured the subtle facial motions”  
 12 for the Terminator CG character and includes images from the featurette. Paramount Compl. ¶¶ 3,  
 13 97. But there is no reference to MOVA in the featurette. *See* RJN Ex. 7.

14 Second, Rearden alleges that Paramount used the mark when Mr. Stopsack stated in an  
 15 interview that the production team “had the opportunity to do a MOVA performance capture with  
 16 Arnold Schwarzenegger himself.” Paramount Compl. ¶ 95. (The word appears twice in the online  
 17 article that published the interview with Mr. Stopsack. RJN Ex. 8.) Once again, this is  
 18 nominative fair use. Mr. Stopsack simply used “MOVA” as the name for the technology—which  
 19 it is.

20 Third, Rearden includes allegations about the use of the mark in a YouTube video posted  
 21 by *WIRED* magazine. Paramount Compl. ¶¶ 96, 126. The video does refer to “MOVA video,”  
 22 “MOVA raw,” and “MOVA retarget.” RJN Ex. 9. But the statement in the video is *WIRED*’s not  
 23 Paramount’s, and the references to MOVA in any event would be nominative fair use.

24 Finally, Rearden alleges that Paramount used “MOVA” in posts on “promotional social  
 25 media pages.” Paramount Compl. ¶ 126. The only example Rearden provides does not include  
 26 “MOVA” at all. *Id.* ¶ 101.

27 \_\_\_\_\_  
 28 <sup>9</sup> Rearden does not allege any infringing use of the mark in connection with *Night at the Museum: Secret of the Tomb*.

\* \* \*

In sum, while Rearden asserts that the Studios engaged in rampant use of the “MOVA” mark, the actual allegations are much ado about nothing and provide no basis for a trademark infringement claim.

**D. If The Court Stays *SHST v. Rearden*, The Court Should Stay These Cases Also**

The parties in *SHST v. Rearden* have agreed that the Court’s judgment on the ownership of the MOVA technology should be certified for immediate appeal pursuant to Rule 54(b). See *SHST v. Rearden*, ECF No. 436-1, Ex. G (proposed judgment). VGH has indicated that, if the Court certifies the judgment for immediate appeal, “VGH will seek a stay of that case pending resolution of the appeal.” *Id.*, ECF No. 436 at 2.

If the Court grants VGH’s requested stay, the Studios respectfully request that the Court stay these cases as well. Rearden’s claims against the Studios are premised on its ownership of the MOVA copyright, patents, and trademarks. If the Court of Appeals reverses or vacates the ownership determination, Rearden has no basis upon which to sue the Studios. Proceeding with Rearden’s claims while VGH’s appeal is pending (and Rearden’s claims against VGH stayed) could mean wasted Court and party resources if the Court of Appeals determines Rearden does not own the MOVA assets. Even if the Court of Appeals affirms, there is a substantial risk of the Court and the parties litigating the same or overlapping issues multiple times.

**V. CONCLUSION**

The Studios respectfully request that the Court dismiss Rearden’s complaints or, alternatively, stay these proceedings if the Court stays proceedings in *SHST v. Rearden*.

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MUNGER, TOLLES & OLSON LLP

By:           /s/ Kelly M. Klaus            
 KELLY M. KLAUS

*Attorneys for Defendants*