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Plaintiff In Pro Per,

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MATTHEW R. WALSH

Plaintiff In Pro Per,

vs.

ROKOKO ELECTRONICS
(AND DOES 1 THROUGH 50, INCLUSIVE)
DEFENDANT

Case No.: 2:25-CV-05340-ODW-RAO

[Assigned to Hon. Otis D. Wright, II, Courtroom 5D; Hon. Rozella A. Oliver, Courtroom 590]

PLAINTIFF'S REPLY IN SUPPORT OF HIS PARTIAL MOTION FOR SUMMARY JUDGMENT

State Court Action Filed: May 12, 2025
Removal Date: June 12, 2025
Discovery Cutoff: August 10, 2026
Trial Date: March 9, 2027

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ISSUES REQUIRING COURT INTERVENTION BEFORE RULING

Under Rule 37(c)(1), exclusion is mandatory unless the nondisclosure was substantially justified or harmless. In evaluating this, courts consider: (1) surprise to the opposing party; (2) ability to cure; (3) disruption to proceedings; (4) importance of the evidence; and (5) the nondisclosing party's explanation. S. States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 596-97 (4th Cir. 2003). Crucially, a finding of bad faith is not required for exclusion. Id.

1. **Katherine J. Ellena's Declaration Is Improper and Must Be Disregarded**

Counsel's declaration is improper substantive testimony from a non-percipient witness never disclosed as such. Under FRE 602, a declarant must have personal knowledge; yet counsel admitted she *"do[es] not understand"* the evidence *("It might as well be Russian to me"),* confirming she lacks any competent basis to testify (*"Rokoko further objects that information regarding the interpretation of facts and evidence by Reed Smith LLP employees is not relevant to any claims or defenses of any party in this action").* Furthermore, Defendant cannot substitute attorney declarations for evidence it failed to produce in discovery under FRCP 37(c)(1). Accordingly, the Court should disregard the declaration insofar as it attempts to establish disputed facts.

2. **The Overby Declaration Is Improper And Must Be Disregarded**

The Overby Declaration is equally deficient. Despite eight months of discovery requests and multiple motions to compel, Defendant suppressed the very internal records, logs, and platform data (e.g., login activity and file counts) that Overby now purports to summarize. Under Rule 37(c)(1), a party cannot withhold documents—specifically those responsive to RFP No. 9 and Interrogatory No. 11—and then use a declaration to "testify" to their contents to manufacture a factual dispute. Because the declaration relies on undisclosed evidence rather than firsthand personal knowledge, it is improper and must be disregarded.

3. The Defendant's Are Estopped

Defendant is judicially estopped from asserting Plaintiff accepted the 2022 or 2025 Terms. To prevail on its Motion to Dismiss in January, Defendant explicitly argued the 2025 Terms "never applied to Plaintiff." It cannot now reverse course to manufacture a license defense, nor can it request more discovery hoping to undo that position. Furthermore, the Overby Declaration's claims regarding post-2025 activity rely on usage logs and account data Defendant suppressed during discovery despite requests for the same:

> *"**REQUEST FOR PRODUCTION No. 41:** Produce documents along with associated metadata sufficient to demonstrate each time in which Plaintiff has agreed to the*

Rokoko Studio Terms & Conditions 498 from January 1, 2020 to January 1, 2025."

"RESPONSE TO REQUEST FOR PRODUCTION NO. 41.

...calls for the disclosure of privileged or protected information, including without limitation, information subject to the attorney-client privilege, attorney work product doctrine, or any other statutory or common-law privilege")

Under Rule 37(c)(1), Defendant is doubly barred: it cannot flip its prior legal position, nor can it introduce undisclosed evidence to support it.

4. Rokoko Exceeded The Word Count Of Their Opposition By Double, Used Evidentiary Objections To Continue Argument

Defendant's opposition flagrantly violates Local Rule 11-6.1, which limits memoranda to 7,000 words. Having exhausted that limit, Defendant improperly offloaded 7,000+ additional words of substantive argument into a 24-page narrative "Evidentiary Objections" (Dkt #173-3) filing and various declarations. Evidentiary objections are **[strictly]** for admissibility challenges, not a "backdoor" for supplemental briefing or case law analysis designed to circumvent the Court's hard caps. Because Defendant uses these materials to advance arguments omitted from its primary memorandum, the Court should disregard the document as a whole. Alternatively, Plaintiff requests leave to file a proportional response to the 14,000+ words improperly presented.

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ARGUMENT

REPLY TO ROKOKO (A) – Rokoko Is Not Entitled To Relief Under 56(d)

5. Rokoko's Request Under 56(d) Fails As A Matter of Law

The purpose behind Rule 56(d) is to ensure that litigants receive *"'a full opportunity to conduct discovery' to be able to successfully defeat a motion for summary judgment."* Ball v. Union Carbide Corp., 385 F.3d 713, 719 (6th Cir. 2004) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "*A party invoking [the] protections [of Rule 56(d)] must do so **[in good faith]** by affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact."* E.M.A Nationwide, Inc., 767 F.3d at 623 (quoting Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 297 (8th Cir. 1975)). The affidavit must *"indicate to the district court [the party's] need for discovery, what material facts it hopes to uncover, and why it has not [**10] previously discovered the information."* Ball, 385 F.3d at 720 (quoting Cacevic v. City of Hazel Park, 226 F.3d 483, 488 (6th Cir. 2000)).

Rokoko has no such explanation as they created the crisis they now find themselves in.

6. Rokoko Has Remained Focused On Dismissal While Entirely Disinterested In Discovery (until just now)

Rokoko has not made their intentions a muted secret throughout this matter: Four filed Motions to Dismiss, a fifth forthcoming while openly stating to this Court during a discovery hearing:

> ***Rokoko:*** *"But I will say, Your Honor — not to sound like other lawyers who appear before you, I will say that, you know, our — our client feels strongly that the — the motion to dismiss the amended complaint should be decided before I think they'll be really interested in determining how it may — whatever may be left should be resolved."*

Across nearly eight months of discovery, Rokoko has substantively responded to only two requests for production; neither productions were compliant to what was asked or required. Each time dismissal was granted, Rokoko would re-object to the [unanswered] RFP's and Admissions stating *"No longer relevant"*. Problematically, this behavior has caused the peril that they have not developed their own record; presumably because they didn't expect the case to persist.

"[a] . . . motion requesting time for additional discovery should be granted almost as a matter of ***course unless the non-moving party has not diligently pursued discovery of the evidence****."* E.M.A. Nationwide, Inc., 767 F.3d at 623 n.7 (second

alteration in original) (internal quotation marks omitted) (quoting Convertino v. U.S. Dep't of Justice, 684 F.3d 93, 99 (D.C. Cir. 2012)); see also id. Whether this Court considers the specific requirements of 56(d) or the legal theory behind it's mechanism; Rokoko's actions cause both conditions to fail *("[D]istrict courts should construe motions that invoke [Rule 56(d)] generously, holding parties to the rule's spirit rather than its letter."* (quoting Resolution Trust Corp. v. N. Bridge Assocs., 22 F.3d 1198, 1203 (1st Cir. 1994)).

7. Rokoko Possesses A Complete Record Which Plaintiff Developed, Additional Discovery Will Not Yield Further Result To Defeat The MSJ

Considering the third factor listed in Plott, the *"main inquiry is 'whether the moving [*17] party was diligent in pursuing discovery.'"* E.M.A. Nationwide, Inc., 767 F.3d at 623 (quoting Dowling v. Cleveland Clinic Found., 593 F.3d 472, 478 (6th Cir. 2010)). The Court must ask whether Rokoko was diligent or dilatory in their discovery efforts; that answer is well detailed in chronology throughout the record – they have been essentially a non-participant, while the Plaintiff has provided them with over 4,000 bates stamped pages of evidence in multiple formats and a highly professional production package which has been provided to the Court for reference *(see USB drive: 'Folder: 03___(Non-Motion) Plaintiff's entire discovery production')*.

Surely, [between the (1) Defendants international company, (2) two partners and two associates at ReedSmith, (3) GravityStack discovery vendors, (4) Rokoko's vast wealth (5) Rokoko's access to many industry professionals and; (6) Rokoko's own engineers and developers] the Defendants could have produced *something* compliant in the nearly eight months since discovery was opened, yet they have not even produced threshold requirements such as (1) a single privilege log or; (2) statements of withholding or; (3) an expected production timeline nor; (4) a single compliant discovery production. In fact, Rokoko falsely claimed 'No such documents exist' when Plaintiff already possessed the DocuSign evidence of those documents. As Plaintiff sought those documents from third-parties due to Rokoko's non-production; Rokoko eluded that they may exist afterall, however, failed to supplement as required by 26(e).

8. Rokoko Agreed With The Court To Participate In Discovery, Then Refused

This is not an accident, mistake, surprise or inadvertence. In fact, Rokoko made an affirmative agreement to produce documents before this very Court if Plaintiff would simply agree to a protective order, which he did; yet, no compliant production followed.

> ***Hon. Oliver:*** *"So, then, why don't I just task Ms. Ellena …with circulating the final version of the protective order… the court*

will look for that to be filed …no later than this Friday, which is February 6th."

Rokoko: *"And then once that [protective order] is in place — and we'll be — we'll be looking for it and ready to do our part"*

Hon. Oliver: *"Then, Ms. Ellena, I assume whatever discovery has been held off, the production has been held off in abeyance until that was issued, then, that can move apace. Does that sound reasonable?"*

Rokoko: *"It does, Your Honor."*

No compliant production followed in the nearly 90 days since this affirmative agreement with the Court; nor Rokoko's repeated statements to the Plaintiff that they would produce "soon". *"Defendant's repeated assurances that it would comply by… May… before … summary judgment … further suggests the possibility of a strategic delay motivated by a desire to deprive Plaintiffs of a full opportunity for discovery."* Doe v. City of Memphis, 2019 U.S. App. LEXIS 19225 (6th Cir. June 27, 2019)

There is no question that Rokoko's current posture is not one of happenstance and unfortunately is not unique in litigation. (*"a major portion of what Defendant produced in response to Plaintiffs' discovery requests was not turned over until after it had filed for summary judgment... Defendant offered no*

valid excuse for its failure to produce the documents Plaintiffs requested... Defendant's delay in producing discovery suggests that it could have been hoping to obtain summary judgment before having to comply in full with Plaintiffs' discovery requests.") Doe v. City of Memphis, 2019 U.S. App. LEXIS 19225 (6th Cir. June 27, 2019).

9. The Discovery Period Length Was Sufficient For Fact Finding

Courts routinely find *"A discovery period lasting nearly five months was ["a sufficient amount of time . . . to conduct some discovery" and therefore the factor did not favor either party. E.M.A. Nationwide, Inc., 767 F.3d at 625]; see also Emmons, 874 F.2d at 359 n.8 ("We do not believe that nine months before entry of summary judgment is necessarily [*24] too short a period in which to expect discovery to be completed.")* quoting Doe v. City of Memphis, 2019 U.S. App. LEXIS 19225 (6th Cir. June 27, 2019).

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REPLY TO ROKOKO (B) – Plaintiff's Evidence Is Authenticated Expressly

The Defendant's objection to the authenticity of Plaintiff's exhibits should be overruled. Under Federal Rule of Civil Procedure 56(c)(4), a party may support a motion for summary judgment with a declaration made on personal knowledge that sets out facts that would be admissible in evidence.

Plaintiff's declaration, signed under penalty of perjury pursuant to 28 U.S.C. § 1746, explicitly states that the exhibits are true and accurate copies received or made by Plaintiff.

Furthermore, Federal Rule of Evidence 901(a) only requires *"evidence sufficient to support a finding that the item is what the proponent claims it is"*. Federal courts have held that at the summary judgment stage, evidence does not need to be in a perfectly admissible form, so long as it is capable of being presented in an admissible form at trial. Plaintiff's sworn statement and the certification therein provides a foundation for these documents to meet this "very low" burden:

> *"CERTIFICATE OF AUTHENTICITY FOR ALL EXHIBITS*
> *All text, images and exhibits herein are true and accurate copies which I have received or have made and* ***I am authenticating each and every one of them under the penalty of perjury."***

REPLY TO ROKOKO (C) – Plaintiff Owns A Valid Copyright

Defendant's argument fails because it attempts to relitigate issues already resolved at the pleading stage without offering any evidence to support its position. The Court has already determined:

1. *"Rokoko argues that Walsh failed to allege what purportedly derivative work "[is] 'substantially similar' ... creating a derivative work is only one of several ways that a defendant can commit copyright infringement."*
2. *"Indeed, Walsh's theory is not that Rokoko created a derivative work based on Walsh's video game, but that Rokoko "sub-license[d] [Walsh's] intellectual property to third-parties." Rokoko's argument fails as it misapprehends Walsh's theory of liability."*
3. *"Walsh alleges that he could not have agreed to Rokoko's licensing agreement because it was imposed "after [he] was no longer a user... If true, this would mean that there was no licensing agreement in place at the time of the alleged infringement, defeating Rokoko's potential affirmative defense."*

The Court has already determined that Plaintiff satisfies the threshold requirement to bring a copyright claim under 17 U.S.C. § 411. At summary judgment, Defendant must present evidence creating a genuine dispute as to ownership or protectability. It has not done so.

Instead, Defendant offers only speculation and requests for additional discovery after nearly eight months of self-inflicted inactivity, which are insufficient under Rule 56 to defeat summary judgment. Under 17 U.S.C. § 102, Plaintiff's animation works constitute original works of authorship, and Defendant presents no evidence to the contrary.

10. In response to IV(c)(1) "Plaintiff Fails To Present Any Evidence Defining The Scope Of His Purported Copyright":

Defendant attempts to relitigate ownership, scope, and protectability without offering any evidence. Having already survived dismissal, Plaintiff's claim proceeds to summary judgment, where Defendant must present evidence—not speculation—to create a genuine dispute. It has not done so.

11. In response to IV(c)(2): **Plaintiff Fails To Present Any Evidence That His Works Constitute Protectible Expression Under The Copyright Laws**:

Plaintiff has identified the copyrighted work, produced the animation files at issue, and Defendant admits those animations are part of Plaintiff's video game (see also AMF No. 16). Defendant offers no evidence creating a dispute as to scope and instead raises argument, which is insufficient under Rule 56.

12. In response to IV(c)(3): **Additional Discovery Is Necessary To Confirm That Plaintiff Does Not Have A Valid Copyright**:

Rokoko is barred under 56(d) due to their own actions. Further, Defendant offers no evidence—expert or otherwise—that Plaintiff's works lack protectible expression under 17 U.S.C. § 102 or that a valid copyright exists. Conclusory attorney argument does not create a genuine dispute of material fact. The definitions of 17 U.S.C. § 102 are statutory and clear.

REPLY TO ROKOKO (D): Rokoko Admitted To Copying Already

Defendant's argument fails because copying is not genuinely disputed. Defendant produced Plaintiff's animation files in discovery, establishing possession and copying. Defendant offers no evidence to the contrary and instead relies on speculation and argument, which do not create a triable issue of fact under Rule 56. Defendant's additional arguments fail as a matter of law: (i) alleged user conduct does not authorize copying; (ii) lack of sublicensing or AI use is irrelevant to liability; (iii) Defendant identifies no agreement granting it the right to copy Plaintiff's works; and (iv) requests for additional discovery are improper.

13. In response to IV(D)(1): Plaintiff—Not Rokoko—Caused The Copying:

Defendant's argument fails because it conflates the mechanism of copying with authorization. Even if Plaintiff's use of the software initiated the copying process (it didn't), Defendant does not dispute that it possessed and produced Plaintiff's animation files, establishing copying. Defendant identifies no agreement

authorizing the copying or retention of Plaintiff's works. Accordingly, no genuine dispute of material fact exists.

14. In response to IV(D)(2): Rokoko Did Not Sublicense Plaintiff's Data Or Use It For AITraining:

Defendant's argument is immaterial. Whether Defendant sublicensed Plaintiff's data or used it for AI training has no bearing on liability for copyright infringement, which arises upon unauthorized copying. Defendant does not dispute that it possessed and produced Plaintiff's animation files, establishing copying. Defendant identifies no agreement authorizing such copying or retention. Accordingly, no genuine dispute of material fact exists.

15. In response to IV(D)(3) "Rokoko Has A License To Use Plaintiff's Intellectual Property":

Defendant's license defense fails as a matter of law. The 2020 and 2022 Terms permit only limited technical data collection and explicitly prohibit the copying or retention of user-created animations (in 2022: beyond 'to provide use of the services' aka using the software whatsoever). Furthermore, Defendant is estopped from invoking the 2025 Terms after previously representing they *"never applied to Plaintiff*."

Even if they did apply, Defendant offers no admissible evidence of assent. Even if it existed, they are estopped or precluded as they refused under RFP No. 9,

Interrogatory No. 11 and RFP No. 41. Relying instead on conclusory assertions and undisclosed telemetry data it suppressed during discovery. Under Rule 37(c)(1), this evidence must be disregarded. Because Defendant identifies no operative agreement authorizing the copying or retention of Plaintiff's works, summary judgment is appropriate.

16. In response to IV(D)(4) "Additional Discovery Is Necessary To Confirm That Rokoko Did Not Copy Plaintiff's Works, And Alternatively, That It Had A License To Do So."*:*

Defendant's position is irreconcilably inconsistent: it now here asserts an express license while in the same opposition simultaneously seeks Rule 56(d) discovery to determine if one exists. A party cannot avoid summary judgment by claiming a complete defense while professing to lack the facts to support it. Furthermore, Rokoko is estopped from reversing its prior successful representation that the 2025 Terms "never applied to Plaintiff" (Dkt #153 at 11–12). Finally, copying is undisputed; Defendant produced 274 of Plaintiff's animation files in discovery, establishing possession and copying, yet identifies no operative agreement authorizing either.

SUMMARY JUDGMENT IS MANDATED IN ROKOKO'S ABSENCE OF EVIDENTIARY AND EXPERT MATTER

1. **Rokoko Has Failed To Produce Any Admissible Evidence or Expert**

After adequate time for discovery, a party's failure to produce evidence on an essential element mandates summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Here, Rokoko has produced no admissible evidence, no fact witnesses, and no expert testimony to rebut Plaintiff's evidentiary record. Under Rule 56, this is dispositive. A *"complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."* Id.

Accordingly, there is no genuine dispute of material fact, and Plaintiff is entitled to judgment as a matter of law.

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CONCLUSION

Once Plaintiff establishes copying and lack of authorization, the burden shifts to Defendant to prove a license or defense. Defendant has failed. Summary judgment is required when evidence is *"so one-sided that one party must prevail as a matter of law."* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Here, Defendant has produced no evidence, no experts, and no witnesses to dispute the technical facts. Most importantly, Defendant is judicially estopped from stating that the 2022 or 2025 license agreements ever applied to Plaintiff—a position it

successfully leveraged earlier. Because Defendant fails to establish a genuine dispute or justify relief under Rule 56(d), Plaintiff respectfully requests partial summary judgment on Copyright Infringement.

Matthew R. Walsh
Plaintiff In Pro Per

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff appearing in pro per, certifies that this brief contains 2,886 words, which complies with the word limit of L.R. 11-6.2.