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Cristine Melo*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CRISTINE MELO )

Plaintiff, )

v. )

FRIDA KAHLO CORPORATION, a  
Panamanian corporation, and FRIDA  
KAHLO INVESTMENTS, S.A., a  
Panamanian corporation,

Defendant. )

Case No. )

**PLAINTIFF’S DECLARATORY  
JUDGMENT COMPLAINT FOR (1)  
CANCELATION DUE TO NAKED  
ASSIGNMENT; (2) CANCELATION  
DUE TO FRAUD; (3) NON-  
INFRINGEMENT; (4) NOMINATIVE  
FAIR USE; (5) NON-INFRINGEMENT  
DUE TO THE FIRST AMENDMENT;  
(6) CANCELATION DUE TO  
ABANDONEMENT; (7) TORTIOUS  
INTERFERENCE WITH  
PROSPECTIVE BUSINESS  
ADVANTAGE; and (8) UNLAWFUL  
AND UNFAIR COMPETITION**

**DECLARATORY JUDGMENT COMPLAINT**

By and through her undersigned counsel, Declaratory Judgment Plaintiff Cristine Melo respectfully files this Complaint against the Frida Kahlo Corporation and Frida Kahlo Investments in order to stop Defendants’ improper trademark allegations aimed at preventing artists from creating homages in the name and image of Frida Kahlo.

**NATURE OF THE ACTION**

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2 1. This is an action for declaratory judgment of non-infringement and cancelation  
3 arising under the trademark laws of the United States, 15 U.S.C. §§ 1051 *et seq.*, and for California  
4 state law claims for: (1) tortious interference with prospective business advantage; and (2)  
5 unlawful and unfair trade practices. Plaintiff Cristine Melo also seeks attorney’s fees pursuant to  
6 Section 35 of the Lanham Act, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545,  
7 134 S. Ct. 1749 (2014), 28 U.S.C. §1927, and California’s Private Attorney General Statute.  
8

**THE PARTIES**

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10 2. Declaratory Judgment Plaintiff Cristine Melo is a Brazilian artist who paints  
11 portraits of the famed Mexican painter Frida Kahlo, and has been doing so for nearly two decades,  
12 long before trademarks of any kind were filed for FRIDA KAHLO and long before the formation  
13 of Defendants Frida Kahlo Corporation and Frida Kahlo Investments.  
14

15 3. Declaratory Judgment Defendants the Frida Kahlo Corporation and Kahlo  
16 Investments, S.A. (“FKC”) are Panamanian Corporations, each with a principal place of business  
17 in Florida.<sup>1</sup> In violation of the Lanham Act, the First Amendment, and the Fair Use Doctrine,  
18 FKC has engaged in a mass campaign to stop artists from creating homages in the name and image  
19 of Frida Kahlo, to remove Frida Kahlo from the public domain, and to eliminate and/or monetize  
20 all expressive works referencing Frida Kahlo.  
21

**JURISDICTION AND VENUE**

22 4. This Complaint arises under the Federal Declaratory Judgment Act, 28 U.S.C. §§  
23 2201 *et seq.* based on FKC’s improper service upon artist platforms, such as eBay, Etsy, Zazzle,  
24 and Redbubble, multiple intellectual property takedowns of Ms. Melo’s artwork thereby giving  
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27 \_\_\_\_\_  
28 <sup>1</sup> FKC will be referred to in the singular for readability.

1 rise to an actual case or controversy under 28 U.S.C. §§ 2201 and 2202.

2 5. This Court has supplemental jurisdiction over Ms. Melo's state law claims pursuant  
3 to 28 U.S.C. §§ 1338 and 1367.

4 6. This Court has jurisdiction to determine the right to registration and to order  
5 cancelation of a registration pursuant to 15 U.S.C. § 1119.

6 7. This Court has specific jurisdiction over FKC. FKC has repeatedly reached into  
7 California to take advantage of its companies and laws. FKC has repeatedly relied upon California  
8 companies to enforce its intellectual property. FKC has intentionally circumvented the court  
9 system by using California companies to improperly enforce FKC's limited trademark rights  
10 beyond their actual boundaries. As to Ms. Melo alone, over the past eight (8) years FKC has sent  
11 multiple takedown notices to platforms such as Redbubble and Etsy, both in San Francisco, and  
12 Zazzle, in Redwood City, in order to effectuate removal of the artwork of Ms. Melo, also a  
13 resident of this district. FKC has a contractual relationship with Zazzle in order to monetize and  
14 improperly monopolize artistic works referencing Frida Kahlo on Zazzle.com. *See*  
15 <https://www.zazzle.com/store/fkfanmerch/getstarted>.

16 8. Venue is proper in this judicial district because a substantial part of the events  
17 giving rise to the claim occurred herein, including the harms and injuries to Ms. Melo and  
18 California residents, and FKC's improper contract/agreement with Zazzle.

19  
20  
21 **FACTUAL BACKGROUND**

22 9. **Frida Kahlo** (1907 - 1954) is now regarded as one of the most significant artists of  
23 the twentieth century.<sup>2</sup> By 1984, Frida Kahlo's reputation as an artist had grown to such extent  
24 that Mexico declared her works to be National Cultural Heritage, prohibiting their export from the  
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28 <sup>2</sup> <https://www.tate.org.uk/whats-on/tate-modern/exhibition/frida-kahlo>

1 country.<sup>3</sup>

2 10. As a result, her paintings seldom appear in international auctions and  
3 comprehensive retrospectives are rare.<sup>4</sup> Regardless, her paintings have still broken records for  
4 Latin American art at auction. In addition to her acknowledged, critically important art, Frida  
5 Kahlo is an iconic figure to many communities, including the Latin, communist, feminist, human  
6 beings with disabilities, and gay communities world-wide.<sup>5</sup>

7  
8 11. Frida Kahlo died intestate in Mexico in 1954. To the extent that the United States  
9 would recognize the publicity rights of Mexico, any publicity rights in the name and image of  
10 Frida Kahlo expired fifty (50) years after her death, in 2004.

11 12. Frida Kahlo has attracted such immense popular interest that the term “Fridamania”  
12 has been coined to describe the phenomenon. Material to this case, she is considered one of the  
13 most instantly recognizable artists world-wide.<sup>6</sup>

14 13. Throughout her incomparable life, Frida Kahlo was known to favor and support the  
15 artwork and craft of local artisans.<sup>7</sup>

16  
17 14. **Plaintiff Cristine Melo** is an American portrait artist of Brazilian birth who has  
18 painted portraits of Frida Kahlo since 2001, long before the formation of FKC and long before any  
19 entity attempted to register the name “Frida Kahlo” as a trademark in any class.

20 15. An example of Ms. Melo’s portraiture includes:  
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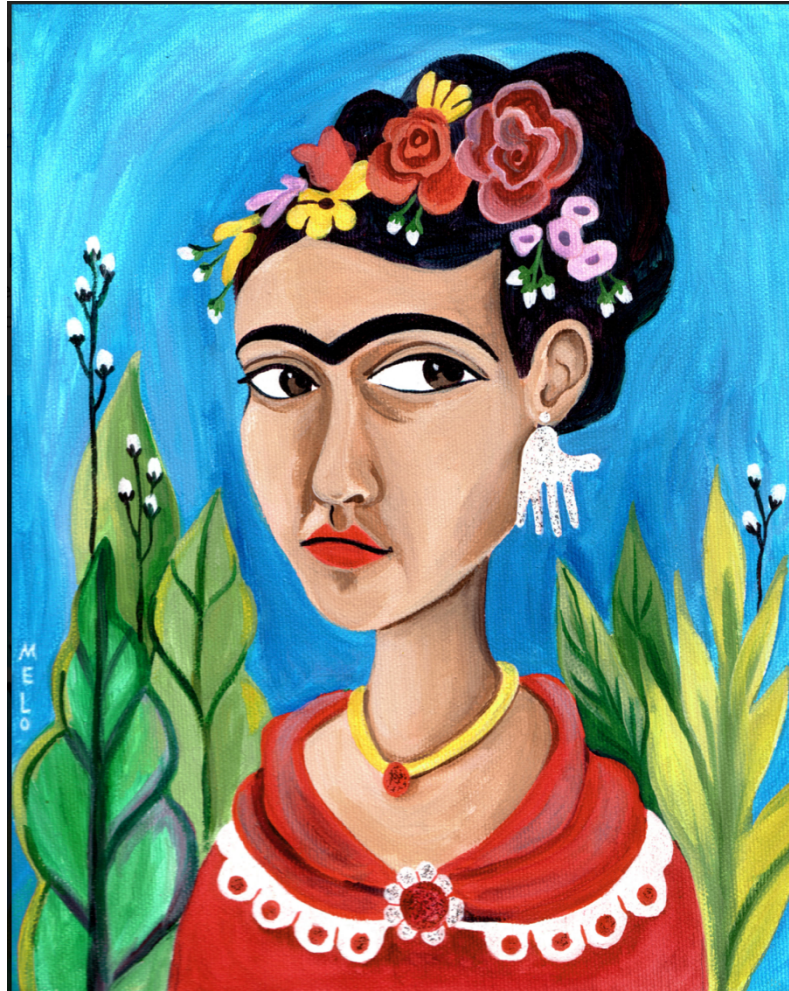
23  
24 <sup>3</sup> *Theran, Susan (1999). Leonard's Price Index of Latin American Art at Auction. Auction Index, Inc. ISBN 978-1-349-15086-1.*

25 <sup>4</sup> <https://news.artnet.com/market/frida-kahlo-market-scarcity-284667>

26 <sup>5</sup> *Baddeley, Oriana (2005). "Reflecting on Kahlo: Mirrors, Masquerade and the Politics of Identification". In Dexter, Emma (ed.). Frida Kahlo. Tate Modern. ISBN 1-85437-586-5.*

27 <sup>6</sup> *Id.*; see also Frida Kahlo’s well-curated Wikipedia page, attached hereto and incorporated by reference herein.

28 <sup>7</sup> [https://www.sfmoma.org/artist/Frida\\_Kahlo/](https://www.sfmoma.org/artist/Frida_Kahlo/)



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17 16. Ms. Melo has been selling her portraits of Frida Kahlo on eBay since 2001, on Etsy  
18 since 2005, Zazzle since 2009, and Redbubble since 2015.

19 17. Ms. Melo and her community of female artists have painted portraits of Frida Kahlo  
20 for more than eighteen (18) years.

21 18. **The Frida Kahlo Corporation** (FKC) is a Panamanian Corporation owned in whole  
22 or in part by Carlos Dorado.

23  
24 19. Dorado admits that he used his skills “as a used car salesman,” to con the family of  
25 Frida Kahlo into letting him commercialize the artist.”<sup>8</sup>

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27 <sup>8</sup> Global Opinions, Frida Kahlo Corporation, by Marina García, Published on January 1, 2017,  
28 attached as Exhibit A.

1           20.     According to documents filed with the USPTO, it appears that, on May 25, 2007,  
2 the grandniece of Frida Kahlo assigned *a limited number of trademark's* to FKC, including six  
3 registered US trademarks and three pending US trademarks.<sup>9</sup> Since then, three of those marks  
4 have been abandoned and, as described below, many of the others were maintained by fraud or are  
5 being enforced improperly.

6           21.     Even though the Kahlo Family assigned a limited number of trademarks to FKC,  
7 FKC represents that it holds all rights world-wide to FRIDA KAHLO:  
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9           *frida kahlo corporation owns the trademark rights and*  
10           *interests to the name frida kahlo worldwide*



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15 <https://fridakahlocorporation.com>

16           22.     But FKC's representations are false. FKC does not own, for example, "interests" in  
17 Frida Kahlo's name; Frida Kahlo's publicity rights expired in 2004.

18           23.     And the 2007 assignment is silent on several critical rights.

19           24.     Materially, as discussed below, the 2007 limited assignment from the Kahlo Family  
20 to FKC is rife with fatal issues, including that said assignment is naked or an assignment in gross,  
21 and as such is void.  
22

23           25.     *Frida Kahlo's Family (the "Kahlo Family")*. When Frida Kahlo died without a  
24 will in 1954, her publicity rights passed to her closest living relative, Isolda Kahlo, the daughter of  
25 Frida's sister Cristina (*i.e.*, Frida Kahlo's niece).  
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27 \_\_\_\_\_  
28 <sup>9</sup> FKC's registrations, Exhibit B.

1 26. It appears that Isolda did nothing to protect or preserve any publicity or trademark  
2 rights in Frida Kahlo for nearly fifty (50) years, until 2002, when Selma Hayek’s Frida Kahlo  
3 biopic was released.

4 27. Shortly after the release of the Frida Kahlo movie, Isolda began applying for  
5 trademarks but her applications were “intent to use,” *i.e.*, Isolda did not commercialize in the US  
6 any products bearing “Frida Kahlo”.

7 28. As for FKC, according to the Kahlo Family, “We entered into a partnership with  
8 [FKC], we never sold them our rights. The agreement with the Corporation was that [the family]  
9 would provide the brand name, while [FKC] would provide the resources and the know-how.”<sup>10</sup>

10 29. But, according to the family, FKC was and is a rogue partner, neither  
11 communicating with the family, nor following the family’s wishes.<sup>11</sup>

12 30. And it appears many third parties have some form of rights in Frida Kahlo.

13 31. For example, FKC attempted to seize FridaKahlo.com from a third party in 2010  
14 but lost that litigation because the owner of that site, dedicated to the life and work of Frida Kahlo,  
15 started said website in 1985, seventeen years (17) before the first Frida Kahlo trademark  
16 application was filed, nineteen (19) years before FKC was formed:

17 <https://www.adrforum.com/domaindecisions/1340890.htm>

18 32. Additional websites devoted solely to Frida Kahlo (and employing “Frida Kahlo” in  
19 the domain name), owned by *neither* FKC nor the Kahlo Family include:

20 a. [www.fridakahlo.com](http://www.fridakahlo.com)

21 b. [www.FridaKahlo.org](http://www.FridaKahlo.org)

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27 <sup>10</sup> El Universal, Legal battle over Frida Kahlo brand,  
<https://www.eluniversal.com.mx/english/legal-battle-over-frida-kahlo-brand>, Exhibit C.

28 <sup>11</sup> *Id.*

- c. <https://www.frida-kahlo-foundation.org>
- d. <http://www.fridakahlo.it>
- e. <https://www.fridakahlofans.com>
- f. <https://www.museofridakahlo.org.mx/en>
- g. <https://www.fridafashions.com>

To name but a handful.

33. Regardless, on or about April 18, 2018, the Kahlo Family published on their Frida Kahlo Facebook page, an open letter to the public claiming, *inter alia*, that a court in Mexico has issued a decree that FKC cannot use the brand, image, and work of Frida Kahlo without consent of the family.

34. The letter also goes on to state that FKC is to refrain from, “any act tending to commercialize products that have the brand and image of Frida Kahlo.”

35. **Rupert Garcia** is a renowned San Francisco artist, art teacher, and activist who has been painting portraits of Frida Kahlo since, at least, 1975.<sup>12</sup> *See*:

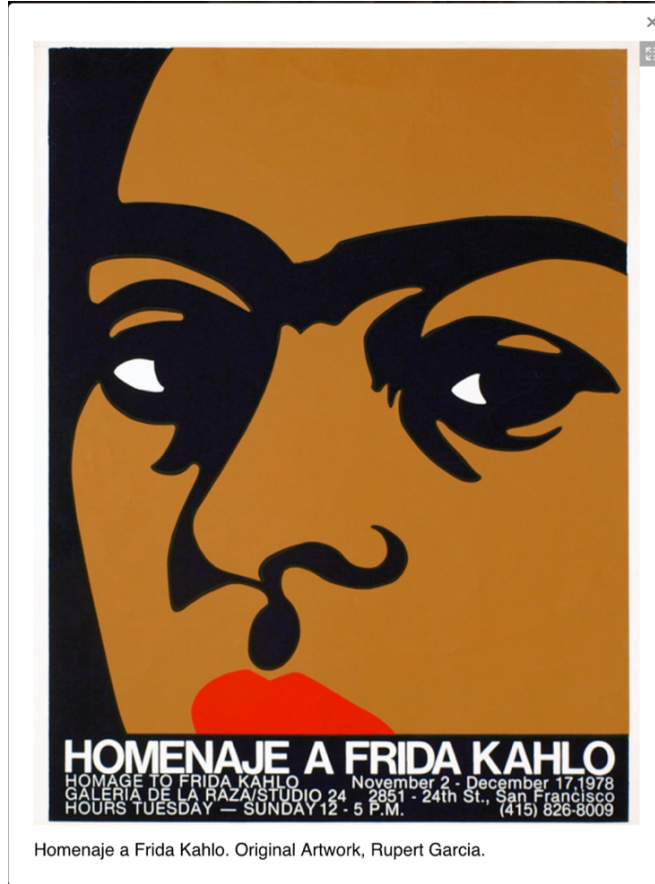
[remainder of page intentionally left blank]

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<sup>12</sup> <https://americanart.si.edu/artist/rupert-garcia-1732>



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Homenaje a Frida Kahlo. Original Artwork, Rupert Garcia.



36. FKC's claims to own trademark rights in portraiture artwork labeled "Frida Kahlo"

1 is rendered barren by fact that renowned artists, including artists in this district, have been creating  
2 Frida Kahlo portraits for decades prior to the formation of FKC.

3 **COUNT I:**

4 **CANCELATION DUE TO NAKED ASSIGNMENT**

5 **(15 U.S.C. § 1060(a)(1))**

6 37. Paragraphs 1-36 are incorporated by reference herein.

7  
8 38. A trademark registration symbolizes the public's confidence or goodwill in a  
9 particular product. A trademark registration is no more than that, and is insignificant if separated  
10 from that confidence. Therefore, a trademark is not the subject of property except in connection  
11 with the transfer of goodwill.

12 39. In 2007, Isolda's daughter, ostensibly acting as her guardian, assigned an  
13 enumerated number of trademark applications and registrations to FKC.<sup>13</sup>

14 40. The assignment has multiple, fatal flaws.

15  
16 41. The assignment amounts to a naked or in gross assignment as it fails to transfer  
17 goodwill, both under the express terms of the agreement and as evidenced by the conduct of the  
18 parties to the assignment.

19 42. For example, the Kahlo Family has stated they were not consulted in Mattel's Frida  
20 Kahlo Barbie and that, "I would have liked the doll to have traits more like Frida's, not this doll  
21 with light-colored eyes," Romeo said at the time. "I would have liked her to have a unibrow, for  
22 her clothes to be made by Mexican artisans."<sup>14</sup>  
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27 <sup>13</sup> Exhibit D, Frida Kahlo Beauty TM File Histry, Assignment, pps. 15-23.

28 <sup>14</sup> <https://hyperallergic.com/442262/barbie-lawsuit-frida-kahlo-licensing-company-artists-relative/>

1 43. Indeed, Mattel's Frida Kahlo Barbie, ostensibly designed in collaboration with  
2 FKC, bears little resemblance to the doll created by the family and used as a Specimen in the doll  
3 trademark prosecution:



15 44. The stark contrast between the doll designed by the Family and the Mattel Frida  
16 Kahlo Barbie is evidence of a lack of transferred goodwill, among other evidence demonstrating  
17 an absence of transferred goodwill.

18  
19 45. Each of the trademark registrations and applications in the 2007 assignment, and all  
20 assignments depending thereupon, must be canceled as part of an in gross assignment.

21 **COUNT II:**

22 **CANCELATION DUE TO FRAUD (15 U.S.C. § 1064(3))**

23 46. Paragraphs 1-45 are incorporated by reference herein.

24 47. FKC purports to hold a registration in International Classification 16, which  
25 includes art: Registration No. 3318902 (the '902 Registration).  
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28

1 48. Frida Kahlo's niece Isolda Pinedo Kahlo first filed an intent-to-use application in  
2 2002 for FRIDA KAHLO for books.

3 49. Ms. Pinedo filed Statement of Use extensions for three years, until 2007, when she  
4 filed a Specimen for a notebook.

5 50. That was the only Specimen ever filed in support of the '902 Registration by Ms.  
6 Pinedo Kahlo.

7 51. On 10/23/2007, Ms. Pinedo Kahlo received a registration on the Principal Register  
8 for FRIDA KAHLO for the category of goods listed, including books, art, and notebooks.<sup>15</sup>  
9

10 52. In January 2011, FKC filed an assignment of the '902 Registration with the  
11 USPTO.

12 53. On 10/23/2012, FKC's attorney David Farber submitted a Combined Declaration of  
13 Use and Incontestability under Sections 8 & 15 to the USPTO.

14 54. With this submission, FKC's representative Beatriz Alvarado submitted a  
15 declaration that stated that *all of the goods listed* were being used by FKC and that *all of the goods*  
16 *listed* had been *in continuous use in commerce for five (5) consecutive years*.  
17

18 55. These statements appear to be fraudulent.

19 56. Ms. Alvarado also signed a declaration stating that she understood that willful false  
20 statements could invalidate the '902 Registration.

21 57. Ms. Alvarado and FKC's "evidence" of use appears to be willfully false.

22 58. Specimen number 1 contains pictures of Frida Kahlo's own artwork. (Exh. E, at  
23 33.)  
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28 <sup>15</sup> The goods listing is extensive. See Exhibit E.



13 59. Frida Kahlo's own artwork, painted more than sixty (60) years prior, cannot  
14 evidence continuous use in commerce by FKC from 2007 to 2012.

15 60. The submission of photographs of Frida Kahlo's own artwork in an attempt to  
16 satisfy FKC's proof of use in commerce for artwork is so specious that a reasonable factfinder  
17 could conclude that it was submitted with a knowing intent to defraud the USPTO.

18 61. Specimen number two is a book written, in Spanish, by Isola Pinedo Kahlo and,  
19 upon information and belief, was not sold in the United States from 2007 to 2012, and not by FKC.

20 62. Specimen number two does not evidence continuous use in commerce by FKC from  
21 2007 to 2012.

22 63. Specimen number 3 seems to suggest that Ms. Pinedo Kahlo took a license from  
23 FKC for her own book. This is unlikely.

24 64. Specimen number 4 appears to be notebooks of the type sold in Mexico and likely  
25 does not evidence use in commerce in the United States by FKC.

26 65. Specimen number 5 is a screenshot of a PBS (Public Broadcasting Station) special  
27  
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1 about Frida Kahlo and does not evidence use in commerce by FKC.

2 66. The PBS posting is from March 2005 and is about a film by third parties having  
3 nothing to do with FKC.

4 67. No reasonable trademark practitioner could believe that PBS' website evidences use  
5 in commerce by FKC from 2007 to 2012.

6 68. Specimen number 6 contains pictures of Frida Kahlo, taken during her lifetime, and  
7 not by FKC.

8 a. Some were taken by Frida Kahlo's father nearly a decade ago.

9 b. Some were taken by famous photographers such as Nickolas Muray.

10 c. The Muray estate has not given FKC permission to use his photographs.

11 69. No reasonable trademark practitioner could believe that portraits taken of Frida  
12 Kahlo, taken by third parties, decades before the formation of FKC, could evidence continuous use  
13 in commerce by FKC from 2007 to 2012.

14 70. The specimen submissions are completely without factual and legal basis such that  
15 no reasonable trademark practitioner could have submitted them unless fraud was the intent.

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18 **COUNT III: NON-INFRINGEMENT**

19 71. Paragraphs 1-70 are incorporated by reference herein.

20 72. Ms. Melo paints portraits of Frida Kahlo and identifies the subject of the portraits  
21 and either "Frida" or "Frida Kahlo".

22 73. FKC issued takedowns for portraits of Frida Kahlo merely identified as "Frida," for  
23 example:  
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**More information:**

**Rights holder:** Frida Kahlo Corporation

**Subject matter:** Frida Kahlo trademark

**Affected Artwork:**

	Frida's Blues <a href="https://www.redbubble.com/people/meloeearth/works/15642634-fridas-blues">https://www.redbubble.com/people/meloeearth/works/15642634-fridas-blues</a>
	Happy Frida <a href="https://www.redbubble.com/people/meloeearth/works/22492692-happy-frida">https://www.redbubble.com/people/meloeearth/works/22492692-happy-frida</a>
	Frida's Heart <a href="https://www.redbubble.com/people/meloeearth/works/28514027-fridas-heart">https://www.redbubble.com/people/meloeearth/works/28514027-fridas-heart</a>

74. FKC does not own rights in the name “Frida” alone.

75. FKC does not own rights in Frida Kahlo’s image.

76. FKC does not hold Frida Kahlo’s publicity rights.

77. Frida Kahlo’s publicity rights expired in 2004 (assuming *arguendo*, California recognizes Mexico’s publicity rights law. If not, they expired in 1954).

78. And any alleged rights in the full name “Frida Kahlo” would not be infringed by Ms. Melo’s use here.

79. Identifying the subject of one’s painting as the historical figure Frida Kahlo is not trademark (brand identifying) use.

80. In order to promote and support her portraits, Ms. Melo also offers some of her portraits for sale to be placed on products (*e.g.*, on Zazzle and Redbubble).

81. But the name “Frida Kahlo” does not appear on her portraits.

1 82. Thus, even if applied to products, the use would not infringe any rights held by  
2 FKC as FKC does not hold any rights to products not bearing their purported FRIDA KAHLO  
3 registration(s).

4 83. Further, FKC issues a blanket takedown on POD sites such as Zazzle and  
5 Redbubble even though FKC does not trademark rights for some or all of the classes of products  
6 on those sites.<sup>16</sup>

7  
8 84. Thus, even if the name Frida Kahlo appeared on Ms. Melo's actual portraits (they  
9 don't), they would not infringe any of FKC's purported trademark registrations.

10 **COUNT IV:**

11 **NOMINATIVE FAIR USE**

12 85. Paragraphs 1-84 are incorporated by reference herein.

13 86. Paintings depicting Frida Kahlo would not be readily identifiable and/or locatable  
14 without use of the descriptor "Frida Kahlo".

15 87. Ms. Melo used only so much of the mark as was reasonably necessary to find  
16 and/or identify her paintings.

17 88. Ms. Melo did nothing that would suggest sponsorship or endorsement by FKC.

18 89. Ms. Melo's paintings depicting Frida Kahlo cannot infringe FKC's purported  
19 "Frida Kahlo" registration under the nominative fair use doctrine.  
20

21 **COUNT V:**

22 **NON-INFRINGEMENT OF AN ARTISTIC WORK**

23 **(THE FIRST AMENDMENT PROTECTS MS. MELO'S ESPRESSIVE WORKS)**

24 90. Paragraphs 1-89 are incorporated by reference herein.  
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26  
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28 <sup>16</sup> FKC's registrations are listed on Exhibit B.



1 91. The First Amendment protects expressive and artistic works from trademark  
2 infringement allegations.

3 92. The Lanham Act is construed to apply to artistic works only where the public  
4 interest in avoiding consumer confusion outweighs the public interest in free expression.

5 93. Consumers expect a title of a book or the subject of a painting to communicate a  
6 message about the book or painting, but they do not expect it to identify the publisher or  
7 manufacturer.  
8

9 94. The name of a painting does not violate the Lanham Act unless the name has no  
10 artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the  
11 title explicitly misleads as to the source or the content of the work. Here, neither concern applies.

12 95. Clearly the name “Frida Kahlo” has artistic relevance to the artistic work  
13 comprising a painting depicting Frida Kahlo.

14 96. And the name “Frida Kahlo” does not explicitly mislead as to the source; instead it  
15 simply and accurately identifies the historical figure depicted in the painting.  
16

17 97. Further, the First Amendment protects Ms. Melo’s artwork on cell phone cases, for  
18 example, to the same extent that it protects her work on canvas.

19 98. Borrowing language from the California Supreme Court, “[Frida Kahlo’s] likeness  
20 appears in the [phone cases] for precisely the same reason [it] appears on the original [painting].”

21 99. The First Amendment protects Ms. Melo’s expressive and artistic works.  
22

23 **COUNT VI:**

24 **CANCELATION DUE TO ABANDONEMENT**

25 100. Paragraphs 1-99 are incorporated by reference herein.

26 101. As detailed in Count I, there is no evidence that FKC has ever sold FRIDA KAHLO  
27 branded artwork, much less continuous in commerce.  
28

1 102. And certainly not for all of the goods listed in the registry.

2 103. Registration No. '902, and any other registration implicated here, should be  
3 canceled as abandoned.

4 **COUNT VII:**

5 **TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE**

6 104. Paragraphs 1-103 are incorporated by reference herein.

7 105. **Platforms**: art has been democratized in a sense with the internet. Artists can now  
8 sell their own art directly to the public, though mediated by online platforms such as eBay, Etsy,  
9 Redbubble, and Zazzle, to name a handful of examples relevant here.

10 106. In many ways, these platforms benefit the artists but, given the current state of  
11 platform dominance, the artists are now held captive to these marketplaces and each platform's  
12 own individual interpretations of their obligations to and methods for intellectual property  
13 enforcement.

14 107. As will be shown, an entity like FKC can submit thousands of improper takedowns  
15 with little recourse or fear of reprisal given the one-sided nature of platform enforcement.

16 108. **Redbubble** is a platform for artists to sell their work, at <https://www.redbubble.com>.

17 109. Redbubble was started to "give independent artists a meaningful new way to sell  
18 their creations."

19 110. As to Ms. Melo and just over this past year alone, FKC has sent at least five (5)  
20 takedown notices to Redbubble, removing Ms. Melo's Frida Kahlo portraits from the site.

21 111. When FKC submits a takedown notice to Redbubble, it appears that Redbubble  
22 does not even require FKC to provide the actual trademark number being asserted.

23 112. If an artist wants to provide a counternotice demonstrating non-infringement, "such  
24 counter-notice must provide . . . a statement by [the artist] that [she] consents to the jurisdiction of  
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1 the Federal District Court, San Francisco County, California, United States and that [she] will  
2 accept service of process from the person who provided notification described above or an agent of  
3 such person[.]”<sup>17</sup>

4 113. Redbubble explains, “In many circumstances, however, we will forward your  
5 counter notice directly to the complainant, which will include your personal contact information.  
6 At that time the complainant may take legal court action against you in the United States. If after  
7 14 days the complainant has not taken legal action against you, you may contact us to request that  
8 we reinstate your work. If your work otherwise complies with our User Agreement and  
9 IP/Publicity Rights Policy, we may reinstate your work at that time.”

11 114. And, “It is Redbubble’s policy, in appropriate circumstances, to disable and/or  
12 terminate the accounts of users who repeatedly infringe or are repeatedly charged with infringing  
13 the copyrights, trademark rights, other intellectual property rights or publicity rights of others.”

15 115. Further, “by removing the work, we are not stating that your work does or does not  
16 infringe copyright, trademark or publicity rights law.”

17 116. Redbubble will remove an artist’s work and reserves the right to cancel the artists  
18 entire account if said artists receives multiple complaints. Even if, like Ms. Melo, their work does  
19 not actually infringe any alleged trademark rights.

20 117. Zazzle is a Redwood City based company that allows artists to sell their artwork  
21 online as part of a print on demand (POD) service.

22 118. Zazzle is in a contractual relationship with FKC. *See*  
23 <https://www.zazzle.com/store/fkfanmerch/getstarted>.

25 119. Zazzle’s relationship with FKC started in 2017.

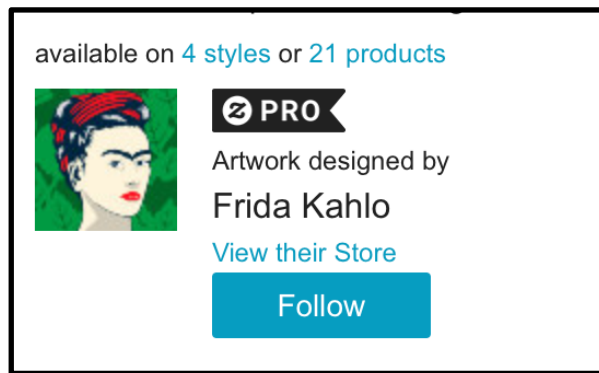
27 \_\_\_\_\_  
28 <sup>17</sup> Redbubble’s Intellectual Property Policy is attached as Exhibit F.

1 120. The Zazzle relationship is emblematic of the kind of misrepresentations FKC  
2 conveys to the public, including California residents.

3 121. On Zazzle, FKC tells the public that the art available on FKC's store is designed by  
4 Frida Kahlo.

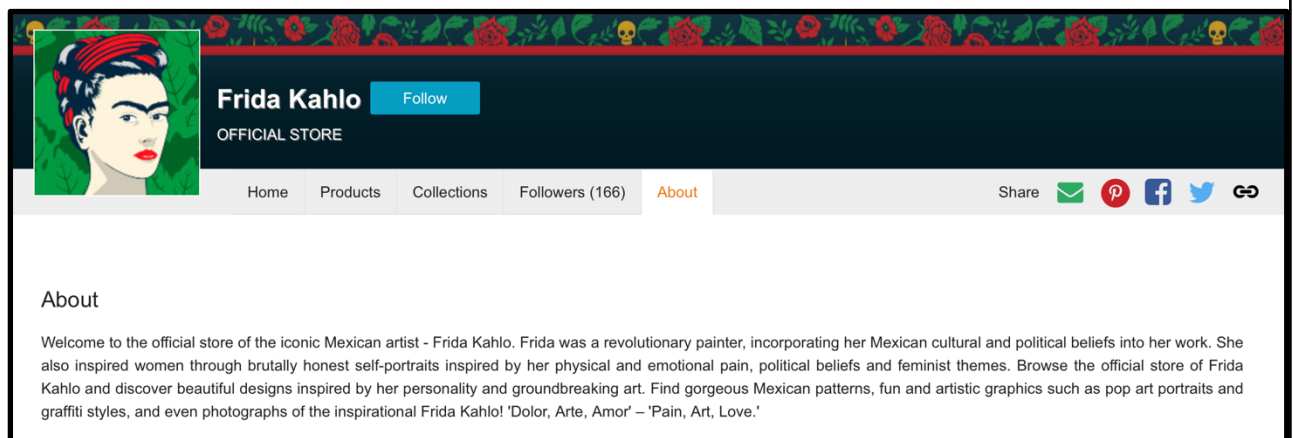
5 122. There is no ® displayed by the name Frida Kahlo.

6 123. FKC is representing that the art was designed by the actual Frida Kahlo:  
7



14 [https://www.zazzle.com/frida\\_kahlo\\_vintage\\_floral\\_otterbox\\_iphone\\_case-256067553283085685](https://www.zazzle.com/frida_kahlo_vintage_floral_otterbox_iphone_case-256067553283085685)

15 124. And, this from FKC: “Welcome to the official store of the iconic Mexican artist –  
16 Frida Kahlo”:  
17



25 125. FKC is telling the public, including California residents, that the products on Zazzle  
26 at the Frida Kahlo Official Store are designed by the iconic Mexican painter, Frida Kahlo.

27 126. FKC knew and intended that its allegations of trademark infringement would result  
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1 in Ms. Melo's artwork being removed from platforms such as eBay, Etsy, Zazzle, and Redbubble.

2 127. FKC has known that the complained of use is not infringing since, at least, April  
3 2018.

4 128. FKC understood its maintenance of the '902 Registration to be based on fraud.

5 129. FKC understood that it had abandoned the '902 Registration by not maintaining use  
6 for all goods listed in the registration.

7 130. Even though FKC knows that Frida Kahlo portraits do not infringe the '902  
8 Registration, and even though FKC understands its registration to be invalid and abandoned, FKC  
9 continues to submit takedown notices.

10 131. These takedown notices are thus intentional and improper interference with  
11 prospective business advantage causing economic damage in the form of actual lost sales for the  
12 deactivated products, in an amount that is ongoing.

13  
14 **COUNT VIII:**

15 **UNLAWFUL AND UNFAIR COMPETITION (CAL. BUS. & PROF.CODE § 17200 et seq.)**

16 132. Paragraphs 1-131 are incorporated by reference herein.

17 133. The predicate law for the unlawful competition prong is fraud upon the USPTO.

18 134. FKC has engaged in unlawful and unfair trade practices.

19 135. Specifically, FKC submitted false trademark takedowns to platforms claiming that  
20 Ms. Melo's non-infringing use was in fact infringing.

21 136. And FKC submitted false trademark takedowns to platforms asserting a registration  
22 it understands to have been abandoned and fraudulently maintained.

23 137. The unlawful and unfair trade practice (the improper takedown) occurred in the  
24 course of FKC's business, vocation, or occupation. Specifically, FKC repeatedly sends improper  
25 takedowns to platforms.  
26  
27  
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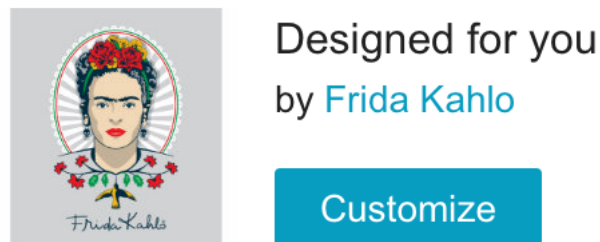
1 138. Further, FKC appears to be misleading the public into believing the designs on  
2 Zazzle are designs by the actual Frida Kahlo, to the detriment of the public and other artists on  
3 Zazzle, including Ms. Melo.

4 139. Indeed, the design currently employed by FKC on its Zazzle store infringes  
5 Nickolas Muray's copyright in his famous photo of Frida Kahlo:  
6



13 (Nickolas Muray's copyrighted photograph on left; FKC's image on its Zazzle products on right.)

14 140. And yet, FKC tells consumers the image was designed by Frida Kahlo:  
15



21 <https://www.zazzle.com/store/fridakahlo>

22 141. FKC's misrepresentations create an unfair and unlawful advantage, harming Ms.  
23 Melo, harming other artists, and harming the consuming public.

24 142. Further, FKC's contract and/or business relationship with Zazzle is Unfair under the  
25 UCL.

26 143. For example, the royalty rate for artists who are forced to sell art under the FKC  
27 program appears to be lower than the standard royalty rate for artists on Zazzle.  
28

1 144. Generally, artists on Zazzle are allowed to charge any royalty desired but artists  
2 forced into the FKC program receive a fixed ten percent royalty.

3 145. Ten percent is the lowest percentage royalty recommended by Zazzle under the  
4 non-FKC programs.

5 146. Thus, it appears that FKC serves improper, wide-ranging takedown notices,  
6 effectuated by Zazzle, forcing artists to either stop making art in homage to Frida Kahlo, or join  
7 FKC's program.

8 147. These deceptive or unfair trade practice significantly impacts the artists, and the  
9 public as actual or potential consumers.

10 148. Ms. Melo seeks an injunction, narrowly tailored, to end the harms to California  
11 consumers caused by FKC's improper takedowns and trademark assertions.

12 149. Ms. Melo seeks restitution to the extent allowable, reasonable attorneys' fees  
13 pursuant to C.C.P. §1021.5, costs and expenses, and all other remedies permitted by law.

14 150. Ms. Melo seeks all compensatory and statutory damages allowed under Section  
15 17200's Unfair Business Practices prong.

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18 **JURY TRIAL DEMAND**

19 Ms. Melo requests a trial by a jury of her peers.

20  
21 **PRAYER FOR RELIEF**

22 Ms. Melo seeks an Order(s):

- 23 i. finding that Ms. Melo's artwork does not infringe the registration(s) at-issue;  
24 ii. mandating that FKC provide to all platforms a rescission of its takedown notices;  
25 iii. an injunction narrowly tailored to the harms at-issue;  
26 iv. cancelling the registration at-issue;  
27 v. mandating damages for all financial harms suffered by Ms. Melo, including loss of  
28 revenue; and  
vi. awarding Ms. Melo her attorney's fees and costs.

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Respectfully submitted,

*Rachael D. Lamkin*

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Rachael D. Lamkin

*Attorneys for DJ Plaintiff  
Cristine Melo*