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12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**
16

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18 MOONBUG ENTERTAINMENT LIMITED
and TREASURE STUDIO, INC.,

19 Plaintiffs,

20 v.

21 BABYBUS CO., LTD and BABYBUS
22 (FUJIAN) NETWORK TECHNOLOGY
CO., LTD,

23 Defendants.

Case No: 3:21-cv-06536-EMC

**BABYBUS DEFENDANTS' NOTICE
OF MOTION AND RENEWED MOTION
FOR JUDGMENT AS A MATTER OF
LAW**

[Concurrently filed with [Proposed] Order]

Date: January 11, 2024

Time: 1:30 pm

Judge: Hon. Edward M. Chen

Courtroom: 5, 17th Floor

Complaint Filed: August 24, 2021

Trial Date: July 5, 2023

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on January 11, 2024, at 1:30 p.m. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Edward M. Chen, Courtroom 5 on the 17th floor of the San Francisco Courthouse, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendants BabyBus Co. Ltd and BabyBus (Fujian) Network Technology Co., Ltd (together, “BabyBus”), will and hereby do move the Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, for judgment as a matter of law on all claims brought by Plaintiffs Moonbug Entertainment Ltd. and Treasure Studio, Inc. (“Moonbug”), including copyright infringement and copyright misrepresentation.

This Motion is made on the following grounds:

1. No legally sufficient evidentiary basis supports the jury’s finding that Moonbug’s JJ was infringed, either as a standalone character or as a basis for finding the disputed video copyrights infringed. None of JJ’s individual elements are independently protectable, and to the extent JJ is eligible for any protection, it is only against virtually identical copyright as to JoJo, which did not occur here.

2. No legally sufficient evidentiary basis supports the jury’s finding that Moonbug’s 2D family registration was infringed or that the family characters provided a ground for finding the disputed video copyrights infringed.

3. No legally sufficient evidentiary basis supports the jury’s finding that Moonbug’s 2D animal registration was infringed or that the family characters provided a ground for finding the disputed video copyrights infringed.

4. No legally sufficient evidentiary basis supports the jury’s infringement findings as to the disputed video copyrights. Without any of JJ, the family, or the animals, Moonbug can only establish infringement of each of the disputed video copyrights through protectable similarities in plots, sequences of events, themes, dialogue, mood, pace, and styles. No evidence supports a finding that any such protectable similarities existed.

5. No legally sufficient evidentiary basis supports a finding based on a

1 protectable selection and arrangement. Moonbug was not entitled to assert a single selection and
2 arrangement that applied to every disputed video copyright. Rather, Moonbug was required to assert
3 individual selection and arrangement claims as for each disputed video copyright. It did not do so.
4 Further, no evidence establishes that Moonbug has any valid selection and arrangement theory.

5 6. No legally sufficient evidentiary basis supports a finding based on
6 infringement of Moonbug's thumbnail images. Moonbug introduced no evidence that its thumbnails
7 are included in Moonbug's video works, or that BabyBus's thumbnails represent scenes from the
8 BabyBus's accused videos. Even if it *had* proven the thumbnails form part of the Moonbug video
9 works, Moonbug could not prove that BabyBus's alleged appropriation of the arrangement of a single
10 scene from these audiovisual works was anything more than *de minimis*.

11 7. No legally sufficiency evidentiary basis supports a finding of liability on
12 Moonbug's section 512(f) claim. Moonbug presented no evidence from which a reasonable jury
13 could conclude that BabyBus knowingly materially misrepresented that it had a good faith belief the
14 material or activity covered by the March 20 counter notification was removed or disabled by mistake
15 or misidentification.

16 8. No legally sufficiency evidentiary basis supports the jury award of copyright
17 infringement damages. There was no evidence to support a lost profits award if, as here, the jury
18 found that less than all CoComelon works had been infringed or less than all Super JoJo videos were
19 infringing.

20 9. No legally sufficiency evidentiary basis supports the jury's award of section
21 512(f) damages. Moonbug presented no evidence in support of actual damages for its section 512(f)
22 misrepresentation claim—which is why it request a dollar in nominal damages. No reasonable jury
23 could have awarded Moonbug \$10,000 in nominal damages on that claim.

24 This Motion is based upon this Notice of Motion and Motion; the accompanying
25 Memorandum of Points and Authorities; the exhibits and trial testimony identified in this motion; all
26 other relevant evidence introduced at trial; the pleadings and papers on file herein; any Reply and
27 supporting pleadings and exhibits that may be filed in support; any oral argument that may be made;
28 and upon such other or further material as may be presented at or before the hearing of this matter.

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DATED: November 27, 2023

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ Sam S. Stake

Sam S. Stake
Attorneys for BabyBus Co., Ltd. and BabyBus
(Fujian) Network Technology Co., Ltd.

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INTRODUCTION

1
2 The Court should vacate the legally unsupportable jury verdict as a grave miscarriage of
3 justice and antithetical to a vigorous public domain. No reasonable factfinder could have returned a
4 copyright infringement liability verdict in Moonbug’s favor on the 32 disputed copyrights based on
5 this record. Applying the proper standards to the trial record, Moonbug failed to carry its burden of
6 proving unlawful appropriation, and the Court should enter judgment as a matter of law for BabyBus.

7 Copyright law does not exist to enrich authors and monopolize the public domain; it exists
8 “to promote the Progress of ... Arts.” U.S. Const., Art. 1, § 8. It is thus a feature of copyright law,
9 not a flaw, that others are encouraged to build freely upon ideas and information in prior works.
10 Creators may borrow from predecessors’ works to create new ones, so giving exclusive rights to the
11 first person who used an idea or common element would frustrate copyright law and curtail the
12 creation of new works. But that will happen if the erroneous verdict, finding infringement based on
13 the acceptable use of unprotectable expression, is left standing. It would be an unprecedented
14 outcome; the Ninth Circuit has never affirmed a finding that a bona fide competitor infringed a visual
15 creative work—not in movies, television, video games, advertising, dolls, or sculpture.

16 No evidence supported a finding of actionable similarity. Moonbug’s liability expert,
17 Fran Krause, conceded that *none* of the elements he identified in the asserted works and the accused
18 works were protectable on their own. That left only a theory of selection and arrangement as a basis
19 for finding infringement. But Moonbug failed to introduce evidence of how any selection and
20 arrangement was original or unique. That should have doomed its claims. But Moonbug’s legally
21 flawed and prejudicial arguments confused and misled jurors into an unsupported verdict.

22 Controlling precedent compels the Court to correct this. The Ninth Circuit requires “a court
23 to ensure that whatever objective similarities the evidence establishes between two works are legally
24 sufficient to serve as the basis of a copyright infringement claim *regardless of the jury’s views.*”
25 *Gray v. Hudson*, 28 F.4th 87, 97 (9th Cir. 2022) (emphasis added). The undisputed record mandates
26 a finding that there is *no* extrinsic similarity of elements, either individually or in combination, related
27 to BabyBus’ JoJo or any of BabyBus videos. Nor could there be. Moonbug’s asserted similarities
28 are not unconventional creative flourishes, such as clothing designs, unexpected settings, or

1 superpowers. And even if some hint of similarity of protectable elements existed, Moonbug would
 2 only be entitled to thin protection given the narrow range of expression after unprotectable
 3 similarities are filtered out. As none of the disputed works are virtually identical, Moonbug cannot
 4 prevail on its claims.

5 BabyBus respectfully requests that the Court enter judgment as a matter of law in BabyBus'
 6 favor. To paraphrase the Ninth Circuit's decision about Barbie, "the all-American girl," "America
 7 thrives on competition; [JJ, "the every kid"], will too."

8 **FACTUAL BACKGROUND**

9 **A. Moonbug Witnesses Testified That CoComelon Is "Realistic" and "Relatable."**

10 The evidence at trial showed that CoComelon depicts realistic and relatable stories for
 11 preschoolers. The asserted videos revolve around JJ Smith, a 3.5-year-old "every kid," participating
 12 in everyday activities, with his generic family, the "Smiths," the most common last name in America.
 13 TT 325:5-10, 946:20-23; *see* TE 1250 at 8, 11. JJ looks like a typical toddler, with a round head,
 14 rosy cheeks, two front teeth, a tuft of hair, a button nose, a half-moon smile, big eyes, and solid
 15 eyebrows. TT 754:8-10-756:15. Like most kids his age, JJ is optimistic and curious, often wanting
 16 to be in the middle of things. TT 758:18-759:13.

17 CoComelon centers around JJ in "relatable moments," such as brushing teeth, bath time,
 18 going to school, getting ready for bed, and other everyday activities, often based on songs. TT
 19 325:12-326:3, 331:19-332:2; Ghani Dep. Tr. at 52:19-53:12. The theme of each episode is mostly
 20 about home and school life and learning from family. TT 766:7-12; 764:9-17. JJ's family, and his
 21 relationship with them, is realistic, idyllic, and relatable. TT 761:7. As Patrick Reese explained,
 22 "CoComelon turns important moments in a toddler's life into songs." TE 1020. Many songs are
 23 based on public domain nursery rhymes (TT 334:4-19), which form the structure of each episode and
 24 affect the way the stories are told. TT 292:3-4, 299:15-301:15, 764:9-17.

25 CoComelon has a "realistic" style, with stories, scenes, and animations that mimic real life.
 26 TT 758:18-23, 767:15-768:3. This realistic animation makes the characters' movements more
 27 relatable. TT 298:25-299:7, 758:5-7, 760:6-7. For example, because kids in real life make
 28 exaggerated movements, JJ makes exaggerated arm movements (the so-called 'wow' gesture) to

1 show excitement. TT 403:5-15.

2 **B. Mr. Krause Provided High-Level Testimony About Similarities.**

3 Mr. Krause offered broad, categorical testimony as to the reasons the disputed CoComelon
4 videos were infringed. He testified that videos infringed the JJ character, JJ’s relationship with his
5 family, plots/sequences, mood, settings, cinematography, songs, and/or style. But Mr. Krause only
6 identified three disputed videos for which he claimed Super JoJo copied scenes or plots in addition
7 to JJ. TT 795:24-802:4, 825:5-12 (Doctor Checkup), 790:15-795:17 (This is the Way), 802:5-808:18
8 (Swimming Song). For another seven videos, he claimed Super JoJo copied “style” elements plus
9 JJ. TT 808:20-811:21 (Rock-A-Bye Baby), 812:24-814:23 (Sick Song), *cf.* TT 827:19-23 (later
10 noting fewer elements), 823:23-824:9 (Yes Yes Bedtime), 824:20-825:4 (No No Bedtime, No No
11 Play Safe, No No Playground, and No No Table Manners). For twelve more videos, he merely
12 claimed they copied JJ. TT 823:13-22 (Yes Yes Playground), 827:1-18 (Peek A Boo); 826:11-25
13 (Opposites Song); 825:19-826:6 (Animal Dance, First Day of School, Five Little Monkeys, Getting
14 Ready for School Song, Hello Song, Jobs and Careers Song, Laughing Family with Baby, Looby
15 Loo, and One Potato, Two Potato). Mr. Krause failed to discuss another six videos entirely—Shape
16 Song, Teacher Song, Thank You Song, Traffic Safety, Wheels on the Bus, and Winter Song.

17 **C. Mr. Krause Testified About Unprotectable Elements in JJ and JoJo.**

18 Mr. Krause’s testified that every Super JoJo video infringed the JJ character. TT 311:25-4.
19 As to physical elements, Mr. Krause testified that JJ and JoJo share: (1) round, 3D-shaped heads,
20 with a slight flattening above the ears, (2) clay-like hair, (3) solid color and shaped eyebrows, (4)
21 similar sized eyes with a slight flattening at the bottom, and realistic irises, (5) a button nose with no
22 bridge, (6) a half-moon shaped mouth with two front teeth, (7) turquoise and yellow onesies, and (8)
23 similarly proportioned and arranged facial features. TT 780:4-781:1.

24 As to conceptual elements, Mr. Krause testified that JJ and JoJo are happy, upbeat, and
25 optimistic. TT 782:6-16. Mr. Krause also explained that JJ and JoJo have a similar family makeup—
26 mom, dad, brother, sister—and they interact with them in similar ways. TT 782:6-16, 815:7-18.
27 According to Mr. Krause, JJ and JoJo each “look like a baby” but act “like a child a few years older,”
28 including because they walk, sing, and dance. TT 782:17-23. He also testified that JJ and JoJo both

1 go about “daily routines” and “regular activities,” as well as learn to swim, brush their teeth, wash
2 their faces, and comb their hair. TT 782:24-783:2. Mr. Krause noted that “movement qualities” for
3 JJ and JoJo are similar because they are “realistic.” TT 781:2-9; *see* TT 783:8-13.

4 Mr. Krause also asserted counterfactual similarities. Unaware that JJ is 3.5 years old (TE
5 1250 at 11; TT 849:22-850:4), Mr. Krause claimed that JJ and JoJo both engaged in activities that
6 were atypical for a “baby” (TT 782:17-23). When confronted with JJ’s true age on cross, Mr. Krause
7 tacitly conceded that the conceptual similarities he identified based on activities beyond one’s years
8 were not, in fact, distinctive. *See* TT 850:2-4 (“Q. And so a three and a three and a half-year-old
9 being able to walk, dance, and sing, you’d expect that, wouldn’t you? A. Sure.”).

10 Mr. Krause’s testimony about the meaning of “similarity” was also inconsistent and
11 counterfactual. He conveniently found similarity whenever comparing the parties’ characters, even
12 when that meant mischaracterizing JoJo’s physical traits. *Compare* TT 943:3-5 (testifying JJ and
13 JoJo both have hair growing from their foreheads), *with* Dkt. 537 at 26 (showing only JJ’s hair grows
14 from his forehead); *compare also* TT 780:14-16 (testifying that JJ and JoJo both have flattening on
15 the sides of their heads above their ears), *with* Pltfs’ Closing Dem., at 48 (showing only JJ, not JoJo,
16 has flattening). But Mr. Krause insisted even more similar elements and features were distinct when
17 compared to third-party babies. *See, e.g.*, TT 882:18-22 (testifying Jack-Jack’s hair is “growing out
18 of the center of his head rather than kind of more the forehead like the JJ and JoJo characters”); *see*
19 *also* TT 881:23-883:11 (Jack-Jack), 885:21-887:12 (Arpo), 928:8-930:7 (LooLoo Kids’ Johny
20 Johny); TT 892:6-14 (as to the CoComelon and LooLoo Kids versions of “Once I Caught A Fish
21 Alive,” testifying the goggles in each video “are expressed in a totally different way” because “one
22 is blue with yellow trim and one is yellow with blue trim”).

23 Mr. Krause admitted that *no* Super JoJo videos copied the 2D family characters, and he did
24 not mention the 2D animal characters at all. TT 827:6-17.

25 **D. Mr. Krause Admitted the Similar Elements He Identified Are Not Protectable.**

26 Other than a “baby sleeping in a crib,” Mr. Krause could not identify anything he filtered out.
27 TT 769:2-19. But he admitted that *none* of the elements he identified as similarities are protectable.
28 TT 866:12-22, 874:25-875:13. Instead, he claimed that he was not relying on the elements identified

1 in his expert report, but on certain “specific” and “particular” expression of those elements in
 2 CoComelon and Super JoJo. *See* TT 754:11-754:13 (“this isn’t that these elements exist...; it’s that
 3 these elements are expressed in a *specific creative way*.” (emphasis added)). However, Mr. Krause
 4 rarely explained what was “specific” or “particular” *about* the claimed expression, just his say-so
 5 that CoComelon and Super JoJo express the elements in similar “specific” or “particular” ways.¹

6 The few times Mr. Krause explained what “specific” expression he saw in both CoComelon
 7 and Super JoJo, confirmed that he was *still* relying on unprotectable elements. For example, in
 8 describing why JJ’s teeth “contribute to his particular character design,” Mr. Krause testified that
 9 “JJ’s teeth are specific” because they are “two specifically sized shaped teeth” that “look like little
 10 [sic] two human baby teeth.” TT 754:14-21; *see also* TT 754:24-755:7, 755:9 (testifying JJ’s large
 11 round head is a “specific head shape” because “it’s a round shape” and “rendered in this 3D shape.”);
 12 TT 756:4-9 (JJ has “realistic eyes”).

13 **E. Moonbug Did Not Articulate A Valid Selection and Arrangement Theory.**

14 Moonbug introduced no evidence by the creator(s) of the JJ and family characters about how
 15 they were designed, much less testimony they represented an original or distinctive combination of
 16 elements. *See, e.g.*, TT 319:4-19 (Nahab) (no knowledge of the creation of JJ and his family); TT
 17 382:11-19 (Lee) (same); TT 440:8-442:17 (White) (same). And neither Mr. Krause nor Moonbug
 18 ever mentioned a “selection and arrangement” of unprotectable elements to the jury; the only time
 19 Mr. Krause ever used the word “arrangement” was in opining that JJ and JoJo share “facial features
 20 that are proportioned and arranged in a similar arrangement.” TT 780:25-781:1. When crossed on
 21 whether JJ has a combination of unprotectable elements, Mr. Krause testified, “No, it’s not the
 22 combination of the elements... I’m looking for combinations of elements that are expressed
 23 creatively with the same creative decisions and appear the same in that way.” TT 866:23-867:14.
 24 Mr. Krause did not “filter[] out any combination of [elements in other] babies that have those
 25 elements” or identify any other filtering. TT 870:24-871:2.

26
 27
 28 ¹ *E.g.*, TT 774:2-9 (JJ has a “*particular* design...”), 851:15-19 (JJ smiles and frowns in “in a *specific*
 way”), 852:2-7 (“JJ’s *particular* facial expressions), 865:12-14 (“a very *specific* head shape”), 870:8-
 871:2 (JJ’s teeth are expressed in a “*specific* way[]”) (emphases added).

ARGUMENT

I. JUDGMENT AS A MATTER OF LAW IS PROPER ON THE DISPUTED WORKS

A. Judgment As A Matter of Law Is Proper Under The Extrinsic Test.

Judgment as a matter of law is appropriate if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party.” Fed. R. Civ. P. 50(a)(1); *see* Fed. R. Civ. P. 50(b) (renewed motion post-trial). The standard is the same as summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citation omitted). However, an earlier denial of summary judgment does not preclude granting a Rule 50(b) motion, as the latter tests the sufficiency of the evidence presented at trial. *Gray*, 28 F.4th at 102-03 (affirming grant of Rule 50(b) motion on unprotectability, despite denial of summary judgment on the same issue, because the court “had the benefit of hearing testimony and a full presentation of the evidence when ruling on a post-trial JMOL motion,” which may provide “new insights into the legal sufficiency of the evidence”).

For each of its 35 disputed works, Moonbug was required to prove that BabyBus’ accused videos were sufficiently similar to Moonbug’s original, protectable expression. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018). Moonbug had the burden to establish the protected elements of its asserted works under the extrinsic test. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992). The extrinsic test has three parts: “(1) the plaintiff identifies similarities between the copyrighted work and the accused work; (2) of those similarities, the court disregards any that are based on unprotectable material or authorized use; and (3) the court must determine the scope of protection (‘thick’ or ‘thin’) to which the remainder is entitled ‘as a whole.’” *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020). “The extrinsic test is an objective test based on specific expressive elements,” focusing on “the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.” *Benay v. Warner Bros. Entm’t*, 607 F.3d 620, 624 (9th Cir. 2010). In applying the test, the “court must take care to inquire only whether the protect[able] elements, standing alone, are substantially similar.” *Id.*

The extrinsic test “is often resolved as a matter of law.” *Gray*, 28 F.4th at 97. Thus, a district court is not required to “defer to the jury’s determination that the [works] are substantially similar.” *Id.* at 96. “[E]ven when juries serve as the factfinders, judges retain an important gatekeeping role

1 in applying the law, including under the extrinsic test.” *Id.* at 96-97. The extrinsic test requires
 2 courts to ensure that whatever objective similarities the evidence establishes between two works are
 3 legally sufficient to serve as the basis of a copyright infringement claim regardless of the jury’s views.
 4 *Id.* at 97. A plaintiff who cannot pass the extrinsic test “necessarily loses.” *Kouf v. Walt Disney*
 5 *Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

6 **B. No Legally Sufficient Evidentiary Basis Supports The Jury’s Finding That JJ**
 7 **Was Infringed As A Stand-Alone Character Or As A Basis For Finding The**
 8 **Video Copyrights Infringed.**

9 **1. None of JJ’s Individual Elements Are Independently Protectable.**

10 No reasonable jury could have found JJ infringed because *every* element identified related to
 11 him is unprotectable and must be filtered out under the extrinsic test. Mr. Krause admitted as much
 12 on the stand. TT 866:16-22 (admitting his identified elements are unprotectable and just concepts).
 13 That concession is enough to doom Moonbug’s claim over JJ. But even without it, the law establishes
 14 that the shared elements that Mr. Krause identified are not protectable; they flow from Moonbug’s
 15 positioning of JJ as an “every kid” doing “everyday” things (TT 324:11-14, 766:9; TE 1250 at 11),
 16 and are the kind of broad, undeveloped traits copyright law does not protect. *E.g., Ets-Hokin v. Skyy*
 17 *Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (“[T]he less developed the characters, the less they
 18 can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”).

19 (a) JJ’s Physical Traits

20 Nearly all of JJ’s physical traits occur naturally in human babies, and “ideas, first expressed
 21 by nature, are the common heritage of humankind, and no artist may use copyright law to prevent
 22 others from depicting them.” *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003); *see also Folkens*
 23 *v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018) (finding no copyright protection over
 24 image of dolphins because “natural positioning and physiology are not protectable”); *Aliotti v. R.*
 25 *Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (plaintiff “may place no reliance upon any similarity
 26 in expression resulting from ... physiognomy”). Moonbug cannot claim protection over elements
 27 such as a round head, single colored eyebrow, realistic irises, prominent cheeks, a button nose, a half-
 28 moon smile, two front teeth, or similarly-proportioned facial features. Those elements naturally flow
 from the realistic depiction of human toddlers. TT 866:16-22; *see* TT 873:7-8 (“teeth look like real

1 baby teeth”); 862:25-863:7 (large head reflects nature), 863:20-864:6 (prominent cheeks are
2 common); 873:13-16 (“irises ... look like actual irises”).

3 Nor does it matter that some facial features, such as a big eyes or clay-like hair, are
4 exaggerated and stylized. As Marvin Lee testified, such exaggerated features naturally flow from a
5 universal understanding of “cuteness,” which is not protectable. TT 391:5-11; *Mattel, Inc. v. MGA*
6 *Ent., Inc.*, 782 F. Supp. 2d 911, 956-57 (C.D. Cal. 2011) (copyright does not protect facial features
7 that express the idea of a “cute baby,” such as “slightly larger heads, eyes and lips; slightly smaller
8 noses and waists; and slightly longer limbs,” as well as “proportionally shorter bodies”). As the
9 Ninth Circuit explained in *Mattel*, infringement could not be based on similarity of fashion dolls’
10 “exaggerated features,” such as “oversized heads and feet,” because “depicting a young, fashion-
11 forward female with exaggerated features, including an oversized head and feet, is ... unoriginal as
12 well as an unprotectable idea.” 616 F.3d 904, 915 (9th Cir. 2010). Likewise, a cute baby with
13 exaggerated, adorable features is unoriginal and unprotectable. *See id.*; *Satava*, 323 F.3d at 810
14 (“expressions that are standard, stock, or common to a ... subject matter ... are not protectable”).

15 Similarly, a toddler wearing turquoise and yellow onesie is not distinctive enough to be
16 protected.² *See, e.g., Daniels v. Walt Disney Co.*, 958 F.3d 767, 772 (9th Cir. 2020) (“colors
17 themselves are not generally copyrightable”); *Capcom U.S.A., Inc. v. Data E. Corp.*, 1994 WL
18 1751482, at *15 (N.D. Cal. Mar. 16, 1994) (“Thai kickboxers clad in traditional kickboxer attire,”
19 including “striped boxer shorts and wrist wrappings,” are unprotectable); *Shame on You Prods., Inc.*
20 *v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1168 (C.D. Cal. 2015) (“a brightly colored dress” is
21 “generic”); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (“magician ... dressed in
22 standard magician garb” is not distinctive); *Newt v. Twentieth Century Fox Film Corp.*, 2016 WL
23 4059691, at *11 (C.D. Cal. July 27, 2016) (“style and dress (e.g., jackets, coats, hats, dresses, hair
24

25 _____
26 ² Mr. Krause’s description of both onesie’s colors as “turquoise and yellow” is counterfactual to a
27 degree even he could not keep straight. JJ’s onesie is turquoise, with light blue, dark blue, teal, and
28 yellow accents. JoJo’s onesie is gold, with white and turquoise accents. *E.g.*, TE 454 at 0:15. Even
while looking at the images, Mr. Krause repeatedly said JJ’s onesie was “turquoise and blue.” TT
780:19-23 (“A. ... Both characters have a onesie that is turquoise and blue in design. ... Q. Did you
mean turquoise and yellow? A. Turquoise and yellow. Sorry.”); TT 939:14-939:16 (“I’ve seen him
in many videos with the turquoise and blue -- or the -- sorry -- turquoise and yellow onesie there.”).

1 styles, eyewear, and jewelry) are too common and generic”). In contrast, the overall whale-pattern
2 on JJ’s onesie does not flow directly from the idea of a cute, wholesome “every kid,” even though
3 animal patterned onesies are not a particularly creative concepts. *Cf. Mattel*, 616 F.3d at 916
4 (recognizing range of expression in clothing and accessories for fashion dolls). But JoJo’s onesie
5 does not have that pattern or whales; it has a single, centrally-placed panda head. TT 1265:15-24.

6 (b) JJ’s Conceptual Traits

7 JJ’s asserted conceptual traits fare no better. Mr. Krause testified that JJ’s conceptual traits
8 are creative because, even though JJ is a baby, he does things that a baby could not do, such as sing,
9 dance, and other activities beyond his age. TT 751:3-17. But JJ is a 3.5-year-old toddler, not a baby,
10 and Mr. Krause admitted the traits he identified were expected of a 3.5-year-old. *See* TT 849:22-
11 850:4. Mr. Krause described JJ as happy, positive, and optimistic, as well as wanting to be in the
12 middle of things and figure out his next lesson. TT 758:24-759:8. Mr. Krause said JJ does “daily
13 routines” and “regular activities.” TT 782:24-783:2. But the only examples he identified came from
14 just two videos: Swimming Song, when JJ learned to swim, and This Is The Way Song, where JJ
15 learned to brush his teeth, wash his face, and comb his hair. *Id.* Mr. Krause noted that JJ and JoJo
16 have a similar family makeup—mom, dad, brother, sister—and they interact with them in similar
17 ways. TT 782:6-16, 815:7-18.

18 In essence, JJ is a typical young child—in Moonbug’s own words an “every kid.” TT 324:11-
19 14. That is not protectable; it is the paradigm of a generic, undifferentiated character. *E.g., Thomas*
20 *v. Walt Disney Co.*, 2008 WL 425647, at *5 (N.D. Cal. Feb. 14, 2008) (ruling that “a young character
21 who is inquisitive and whose curiosity leads him or her into danger can be considered a stock
22 character”). Indeed, YouTube’s “Best Practices for Kids & Family Content”—the distribution
23 channel on which CoComelon got its start and the primary international platform for Super JoJo (TT
24 302:20-23, 1524:10-13)—recommends that videos include the very traits that Moonbug claims make
25 JJ distinct. TE 3492 at 6-7 (“model[] behaviors,” “learning and inspiring curiosity,” and “interaction
26 with real world issues”). Unlike the unexpected character traits of Jack-Jack, who Moonbug
27 described as having “God-like powers,” or the Boss Baby, who Moonbug described as a full grown
28 up (TT 258:16-18), JJ’s abstract traits do not move the needle off the stereotypical baseline for a

1 toddler character in the preschool content genre. *See Esplanade Prods., Inc. v. Walt Disney Co.*,
2 2017 WL 5635027, *12 (C.D. Cal. 2017) (no “interest in stereotyped characters”) (cleaned up).

3 (c) JJ’s Movements

4 JJ’s movements and animations are similarly not protectable. These reflect a “realistic” and
5 “relatable” animation style. TT 781:2-9 (testifying the “movement qualities” for JJ and JoJo are
6 similar because it’s a “realistic movement”); *see* TT 758:18-758:22 (JJ’s “animation style” is
7 “realistic.”); TT 783:11-13 (JJ and JoJo have “realistic observed” movements; “not cartoony and
8 over the top.”); TT 298:25-299:7 (JJ is animated for “relatability” because, in real life, “there’s a
9 bounciness to how a toddler moves and there’s a floppiness to how their arms [move]”). This
10 includes JJ’s so-called ‘wow’ gesture, which is based on how real toddlers react and overexaggerate.
11 TT 403:5-15 (because kids “overexaggerate[] themselves all the time,” “having JJ throw his arms in
12 the air was very much something I could see a kid doing”). *See, e.g., Folkens*, 882 F.3d at 775-76
13 (movements first expressed in nature are unprotectable); *Capcom U.S.A., Inc.*, 1994 WL 1751482, at
14 *12 (realistic martial arts moves in video game “constitute unprotectable expression”).

15 (d) JJ’s Family Relationships

16 JJ’s family, and his relationships with them, are similarly unprotectable. They merely reflect
17 the idea of a relatable and idyllic “every family,” with specific interactions reflecting real life. *See*
18 TT 761:9-13 (JJ’s interactions with his family are “relatable” and “feel like [they’re] coming out of
19 the lives of [real] people”); TT 761:20-22 (“we see a bit of real person in [JJ’s] mom”); TT 850:15-
20 851:5 (JJ’s mom is “relatable” like a real mom, and “JJ and his family engage in everyday activities”).
21 None of JJ’s family members have any history, development over time, or shifting interpersonal
22 relationships; rather, their stock traits such as being “patient” or “observed” are simply repeated in
23 multiple videos. *See* TT 762:6-23 (mom is clever, dad is goofy, brother and sister are patient); TT
24 758:20-22 (“When his mom holds him, it looks like it’s being animated by somebody who has at
25 least, you know, observed that kind of emotion and that kind of pose in a real situation.”).

26 In sum, none of Mr. Krause’s identified elements as to JJ are protectable. Judgment as a
27 matter of law is warranted as to JJ. *Gray*, 28 F.4th at 102 n.9 (“[O]nce we ‘disregard the non-
28 protectible elements’ in [the work], we are left with no objective similarities between [the asserted

1 work] and [the accused work] that may serve as the basis for plaintiffs’ copyright claims.”).

2 **2. At Most, JJ Is Eligible For Only Thin Protection Against Virtually**
3 **Identical Copying As To JoJo—Which Did Not Occur Here.**

4 If JJ has protectable expression in the asserted similarities at all, it is thin protection. This
5 determination is not made in the abstract, but specific to the claimed similarities in the case.
6 Determining the scope of protection has three steps: “(1) the plaintiff identifies similarities between
7 the copyrighted work and the accused work; (2) *of those similarities*, the court disregards any that
8 are based on unprotectable material or authorized use; and (3) the court must determine the scope of
9 protection (‘thick’ or ‘thin’) *to which the remainder* is entitled ‘as a whole.’” *Corbello*, 974 F.3d at
10 974 (citing *Apple Comp. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994)) (emphasis added).

11 Thus, the scope of protection depends on the range available to express the claimed similar
12 elements that remain after filtering out unprotectable elements—not the abstract question of whether
13 a different range of expression was possible if the defendant had made different choices, e.g., as to
14 gender, age, ethnicity, hairstyle, personality. *See, e.g., Mattel, Inc.*, 616 F.3d at 915 (“to determine
15 the scope of protection ..., we must first filter out any unprotectable elements”); *Apple Comp.*, 35
16 F.3d at 1447 (“Having correctly found that almost *all the similarities* spring ... from [unprotectable
17 elements], [the district court] correctly concluded that illicit copying could occur only if the works
18 as a whole are virtually identical.”) (emphasis added).

19 For example, a plaintiff that depicted a character in a karate video game as male with a
20 traditional white uniform, black belt, red hair band, bare feet, dark eyes, and black hair using a
21 conventional animation style is not entitled to protection except as to virtually identical copying by
22 a defendant whose character shared those conventional characteristics, which flow directly from the
23 idea of a male karate character. *See Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208-10 (9th
24 Cir. 1988). In contrast, if a plaintiff’s character performed karate in a peacock printed ballgown and
25 had flowing red hair and stiletto heels, the protectable range of expression would be greater.

26 Much like Mattel’s failed argument that its doll sculpts were entitled to broader expression
27 because “there are many ways one can depict an exaggerated human figure,” Mr. Krause insists that
28 there are “many ways to express a baby character.” TT 786:18-20. But Moonbug has not adduced

1 evidence that would justify taking the core elements of a “realistic,” “relatable,” and “cute” toddler
 2 out of the public domain and requiring, for example, that post-CoComelon, babies must have walrus
 3 teeth or donkey teeth. *Compare* TT 754:14-21 (distinguishing JJ’s teeth from cartoon donkey and
 4 walrus teeth) *with* 616 F.3d at 915 (“One could make a fashion doll with a large nose instead of a
 5 small one, or a potbelly instead of a narrow waist. But fashion dolls that look like Patty and Selma
 6 Bouvier don’t express the idea behind Bratz.”).

7 Mr. Krause’s testimony confirms why thin protection applies. He
 8 testified that JJ’s round teeth and JoJo’s square teeth was only a “small,”
 9 insignificant difference. TT 945:15-18. But when asked how else JoJo’s
 10 teeth could be depicted, Mr. Krause testified that JoJo could have “goofy”
 11 or gapped teeth, teeth in a “very different shape,” or teeth that “are just
 12 coming in.” TT 945:19-25. But those are not real solutions. Star-shaped
 13 teeth, snaggleteeth, or Goofy teeth would monopolize a cute, relatable
 14 toddler. Moonbug does not own the idea of two front teeth, nor does it
 15 own what is dictated by nature. *Skidmore v. Led Zeppelin*, 952 F.3d 1051,
 16 1069 (9th Cir. 2020) (“These building blocks belong in the public domain[.]”).



17 Finally, the constraints of preschool animation target market—one- to three-year-old
 18 toddlers—must be considered. *See Ets-Hokin*, 323 F.3d at 766 (“the range of protectable expression
 19 is constrained by both the subject-matter idea of the photograph and the conventions of the
 20 commercial product shot”). BabyBus’ target viewers constrain the range of protectable expression
 21 in terms of content and tone. To appeal to that market, a preschool animation series must feature
 22 happy, simple, “every baby” characters that are relatable to one- to three-year-old viewers.
 23 Characters who appear unusual (such as a toddler with a full head of neon hair) or who have
 24 complicated backstories (such as a toddler who teaches physics) are unlikely to appeal to the target
 25 market (or their parents). *Cf. Data East*, 862 F.2d at 209 (“Because of these constraints, karate is not
 26 susceptible of a wholly fanciful presentation.”).

27 **C. No Legally Sufficient Evidentiary Basis Supports The Jury’s Finding That The**
 28 **2D Family Registration Was Infringed Or That The Family Provided A**
Ground For Finding The Video Copyrights Infringed.

1 No reasonable jury could have found infringement of the 2D family registration or used the
2 family characters as a basis to find the video copyrights infringed. TE 1225. Unlike JJ, Moonbug
3 did not assert independent “character” copyrights over any family characters. Dkt. 546 at 22
4 (conceding the family characters are not unique “at the individual character level”); *see also* 6/13/23
5 PTC Tr. at 16:12-14, 17:1-7 (Tyz) (conceding the mom is not a standalone character).

6 Moonbug offered no proof at trial as to unlawful appropriation of the family through
7 protectable elements. Instead, Mr. Krause admitted that BabyBus **did not** copy any of the family
8 members. TT 827:6-17 (“I don’t think they copied the physical designs of the characters[.]”). Given
9 that admission from Moonbug’s own liability expert, no reasonable jury could have found the family
10 registration infringed. Nor did Mr. Krause identify any protectable conceptual traits of JJ’s family.
11 Instead, he described the family in the broadest possible terms: mom is “clever,” dad is “goofy,”
12 brother and sister are “patient.” TT 762:8-13, 822:8-22. Mr. Krause points to them “being helpful”
13 in one episode (TT 774:10-12), “all looking around and appreciating each other’s presence” in
14 another (TT 806:15-18), and the siblings helping JJ in the bathroom (TT 795:1-3). But as Moonbug
15 witnesses conceded, these traits are a function CoComelon’s “role modeling behavior”; they are “all
16 centered around helping [JJ] experience the world in the safest and most positive way.” TT 295:13-
17 25. Such “characters which naturally flow from a ‘basic plot idea’ are ‘scenes-a-faire’ not protected.”
18 *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1115 (N.D. Cal. 2010) (the idea of an older,
19 experienced mentor who teaches a younger, less experienced mentee is a stock character).

20 Likewise, Moonbug pointed to no evidence of protectable character traits in the family
21 members that would have been a basis for finding the video copyrights infringed. Mr. Krause
22 testified that JJ and JoJo have a similar family composition, including a mom, dad, brother, sister.
23 TT 815:7-18. But that is not protectable. *Griffin v. Peele*, 2018 WL 5117555, at *7 (C.D. Cal. Jan.
24 18, 2018) (similar “family units,” including “two parents, a sibling, and a dog,” are unprotectable);
25 *see* TT 454:13-15 (White) (admitting such family compositions appeared in prior works). The level
26 of asserted similarity in the conceptual traits of the Super JoJo family is equally abstract: they have
27 “similar personalities for the parents and brother and sister.” TT 783:783:3-7. Such generalizations
28 cannot support even a finding of substantial similarity between characters, much less the “sufficiently

1 delineated” and “especially distinctive” qualities to obtain character protection. *Esplanade Prods.*,
 2 2017 WL 5635027 at *12 (quoting *DC Comic v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015))
 3 (holding no protection as standalone characters or based on “generic” nature of traits like “cute,”
 4 “energetic” and “enthusiastic”); *Rice*, 330 F.3d at 1175 (“the magician is dressed in standard
 5 magician garb—black tuxedo with tails, a white tuxedo shirt, a black bow tie, and a black cape with
 6 red lining—and his role is limited to performing and revealing the magic tricks,” such that he is not
 7 an “especially distinct” character, but instead is a mere “chessman in the game of telling the story”).

8 **D. No Legally Sufficient Evidentiary Basis Supports The Jury’s Finding That The**
 9 **2D Animal Registration Was Infringed Or That The Animals Provided A**
 10 **Ground For Finding The Video Copyrights Infringed.**

11 There is also no legally sufficient evidentiary basis to support the jury’s finding as to the 2D
 12 animal characters. TE 1232. At trial, Mr. Krause never mentioned them once, much less claimed
 13 that BabyBus unlawfully appropriated expression from them. As Moonbug presented no evidence
 14 of the protectable elements in the animals, nor did it show substantial similarities of those elements,
 15 there no basis for the jury’s finding infringement. *See Esplanade Prods.*, 2017 WL 5635027, at *11-
 12 (holding 2D character designs of anthropomorphized animals were not protectable).

16 Nor did Moonbug provide evidence of protectable character traits in the animals that would
 17 have been a basis for finding the video copyrights infringed. Moonbug’s only mention of the animals
 18 came during closing, when its counsel argued a Super JoJo video copies the “wolf” in CoComelon’s
 19 One Potato, Two Potato. TT 1872:18-1872:23 (arguing the wolves in TE 1177 and TE 759 are
 20 similar).³ But that is not evidence. And it was contradicted by actual evidence, as Mr. Krause
 21 testified that JJ was the only element copied from One Potato, Two Potato. TT 826:9-10.

22
 23
 24 ³ In any event, the wolves are both conceptually and physically different in each work. *Compare*
 25 TE 1177 (JJ picking potatoes with siblings and animals), *with* TE 759 (wolf plays central role in
 26 video based on “Wolf and Seven Sheep” nursery rhyme). And the wolves are not substantially
 27 similar: they have different face, body, ear, and hand colorings, ear shapes, eyebrows, eye lashes,
 28 bottom eye lids, hands and fingernails, and bottom teeth, among other things. *See* Pltf’s Closing
 Dem. at 89. Any similarities stem from the idea of anthropomorphic wolves. *See, e.g., Mandeville-*
Anthony v. Walt Disney Co., 2012 WL 4017785, at *3 (C.D. Cal. July 28, 2012) (idea of
 anthropomorphic characters is unprotectable). Further, Moonbug has no copyright for the wolf
 alone; it was part of a collection of animal characters, which must all be shown together to give rise
 to a claim of infringement.

1 **E. No Legally Sufficient Evidentiary Basis Supports The Jury’s Infringement**
 2 **Findings As To the Video Works**

3 As discussed above, no reasonable jury could have found Moonbug’s video registrations
 4 infringed based on JJ, his family members, or the animal characters. *See supra*, §§ I.A, I.B, I.C.
 5 Thus, the only basis for a jury to conclude infringement of the disputed videos is based on “actual
 6 concrete elements” of “plot, theme, dialogue, mood, setting, pace, and sequence.” *Berkic v. Crichton*,
 7 761 F.2d 1289, 1293 (9th Cir. 1985). But as described below, no reasonable jury could have found
 8 any protectable similarities among those elements for the disputed videos.

9 **1. Plot and Sequence of Events**

10 The “general idea for a story” and “all situations and incidents which flow naturally from a
 11 basic plot premise” are not protectable. *Berkic*, 761 F.2d at 1293; *Briggs v. Blomkamp*, 70 F. Supp.
 12 3d 1155, 1170-71 (N.D. Cal. 2014) (“Similarities in general plot ideas” and “situations that ‘flow
 13 naturally from generic plot-lines’ ... are unprotected[.]”). For example, “the general premise of a
 14 child, invited by a moon-type character, who takes a journey through the night sky and returns safely
 15 to bed to fall asleep,” is a “basic plot idea” not protected by copyright. *Cavalier v. Random House*,
 16 *Inc.*, 297 F.3d 815, 824 (9th Cir. 2002); *see Buggs v. Dreamworks, Inc.*, 2010 WL 5790251, at *5
 17 (C.D. Cal. Dec. 28, 2010) (plot idea of anthropomorphic pests who are flushed down the drain and
 18 have adventures in the sewer is unprotectable); *Campbell*, 718 F. Supp. 2d at 1112 (storyline of a
 19 coach as a mentor to a player is unprotectable); *8th Wonder Ent., LLC v. Viacom Int’l, Inc.*, 2016 WL
 20 6882832, at *6 (C.D. Cal. Nov. 22, 2016) (daily lives of hip hops wives is unprotectable plot).

21 Mr. Krause identified three disputed videos that he testified contained similarities in plots and
 22 sequences of events: the Swimming Song, Doctor Check-Up Song, and This Is The Way. TT 795:9-
 23 12, 807:8-15, 825:8-12. But Mr. Krause failed to filter out general plot premises and other
 24 unprotectable ideas, e.g., helping a young child who is timid about the water to swim, role playing
 25 as a doctor, and showing a young child how to do basic self-care tasks like brush teeth, wash face,
 26 and comb hair. *Berkic*, 761 F.2d at 1293-94 (“familiar scenes and themes” are not protected). Far
 27 more detailed and imaginative plots have been held unprotectable. *E.g., id.* at 1293 (no protection
 28 despite both works detailing the “adventures of a young professional who courageously investigates,

1 and finally exposes, the criminal organization [which murders people to steal and sell their organs]”).

2 The specific isolated similarities in these works, such as both babies dipping a toe in the water
3 or standing against a green background with a foot held above the ground (TT 803:16-25), does not
4 render the plots and sequences protectable. As any number of dictionaries will readily confirm, to
5 “dip a toe in the water” means to try an activity briefly to see if it will be enjoyed. Having the baby
6 literally do that is the visual equivalent of saying a common phrase. It is unprotectable. And
7 capturing a random similarity of a frame of movement and color is the very sort of scattered similarity
8 that the Ninth Circuit has repeatedly held unprotected. *E.g.*, *Skidmore*, 952 F. 3d at 1075 (rejecting
9 plaintiff’s argument based on “random similarities scattered throughout the works”).

10 Further, the “sequence of events refers to the actual sequence of the scenes, not just having
11 similar scenes out of sequence.” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d
12 1043, 1072 (C.D. Cal. 2010). No similarity in sequences exists where an expert compares a “string
13 of out-of-order” events “as if both works have the same sequence of events.” *Id.* (rejecting sequence
14 of events claim where plaintiff’s expert referenced events at page 90 of the screenplay, then page
15 116, then page 45, then pages 116 and 117, then pages 52 and 53, and then page 116.) Yet that is
16 precisely what Mr. Krause did here. As in *Bernal*, Mr. Krause only referenced a string of isolated,
17 out-of-order events. *See* PD (Krause) at 9-17 (playing Super JoJo’s “This is the Way” with seven
18 seconds of clips between 1:32-1:43, then eight seconds of clips between 0:13-0:46); *id.* at 18-31
19 (playing Super JoJo’s “Baby Doctor Check Up” with three seconds of clips between 0:07-0:13, then
20 two seconds between 0:41-0:43, then six seconds between 0:16-0:42, then 1:13-1:16, then 2:01-2:02,
21 then 1:20-1:21, then six seconds between 2:27-2:37), *id.* at 32-45 (playing Super JoJo’s “Swimming
22 Song” with clips from six seconds between 0:14-0:30, then 1:39-1:40, then 2:01-2:06, then seven
23 seconds between 1:21-1:37, then 1:49-1:52, then 2:01-2:05, then 2:27-2:28). As such, Moonbug has
24 failed to establish similarity as to any plots or sequences, especially as to the 29 disputed videos for
25 which it did not even assert any.

26 **2. Theme**

27 Themes that are “staples of literature” are not protectable. *See Corbello*, 974 F.3d at 975;
28 *Cavalier*, 297 F.3d at 828 (“themes of teaching children to have confidence, to overcome their fears,

1 and to try are not only too general to be protected but are also standard topics in children’s literature”);
2 *Berkic*, 761 F.2d at 1294 (describing “depictions of the small miseries of domestic life, romantic
3 frolics at the beach, and conflicts between ambitious young people on one hand, and conservative or
4 evil bureaucracies on the other” as unprotectible “familiar scenes and themes” that are “staples of
5 modern American literature and film”). Nor are themes protectable when they arise naturally from
6 general plot premises. *See Benay*, 607 F.3d at 627 (themes of embittered war veteran, the fish-out-
7 of-water, and the clash between modernization and traditions “arise naturally from the premise of an
8 American war veteran who travels to Japan to fight the samurai.”); *Reflex Media, Inc. v. Pilgrim*
9 *Studios, Inc.*, 2018 WL 6566561, at *10 (C.D. Cal. Aug. 27, 2018) (finding unprotectable the “theme
10 of fun, adventure, and anticipation for the prospect of burgeoning romantic feelings”).

11 Mr. Krause did not testify that any disputed video was infringed as a result of a similar theme.
12 Instead, he merely testified that CoComelon’s “themes are mostly around domestic stories” in “the
13 household” and “school,” as well as “everyday-type activities” and “learning ... from [JJ’s] family.”
14 TT 766:2-12. Moonbug’s witnesses also admitted CoComelon’s themes are similar to experiences
15 of real families. *See* TT 439:16-440:7 (common themes for families with babies include putting the
16 baby to bed, the baby getting sick, and the baby learning colors). That is consistent with YouTube’s
17 Best Practices, which state that “content for very young children” should “focus on issues in their
18 immediate environment, such as learning to share their toys.” TE 3492-10. “Stock themes” like
19 these are not subject to copyright protection. *Cavalier*, 297 F.3d at 822; *see Basile v. Warner Bros.*
20 *Entm’t, Inc.*, 2016 WL 5867432, at *8 (C.D. Cal. Jan. 4, 2016) (“human origin and good-versus-
21 evil”); *Rosenfeld v. Twentieth Century Fox Film*, 2009 WL 212958, at *3 (C.D. Cal. Jan. 28, 2009)
22 (“the importance of believing in oneself and following one’s dreams”); *Campbell*, 718 F. Supp. 2d
23 at 1113 (“themes of self-reliance and the importance of friendship and teamwork”).

24 3. Dialogue

25 Only “extended similarity of dialogue” matters. *Olson v. Nat’l Broad. Co., Inc.*, 855 F.2d
26 1446, 1450 (9th Cir. 1988). Ordinary phrases are not entitled to protection, nor are “phrases [or]
27 expressions conveying an idea typically expressed in a limited number of stereotyped fashions.”
28 *Narell v. Freeman*, 872 F.2d 907, 911–12 (9th Cir. 1989). Moonbug did not set forth specific

1 evidence of extended similarity in dialogue. Mr. Krause merely testified that CoComelon’s Opposite
 2 Song had “chunks of lyrics” that were similar to an unidentified Super JoJo video. *See* TT 823:23-
 3 25, 826:16-25. The video he apparently had in mind—Super JoJo’s Open Shut Them video—does
 4 not contain similarity in extended protectable expression. *Compare* TE 382, with TE 1180. Rather,
 5 the video features unprotectable, common phrases such as “the opposite of hot is cold” and “the
 6 opposite of big is small.” *See Esplanade Prods., Inc.*, 2017 WL 5635027, at *13 (holding multiple
 7 lines of similar dialogue, including virtually identical dialogue “if you want to be an elephant, you
 8 can be an elephant,” were “too commonplace and ordinary to be protectable”).

9 4. Mood and Pace

10 A general mood or pace “that flows ‘naturally from unprotectible basic plot premises’ is not
 11 entitled to protection.” *Shame on You*, 120 F.Supp.3d at 1158; *see Rice*, 330 F.3d at 1177 (concluding
 12 that moods of secrecy and mystery in the magic genre are “generic [and] constitute scenes a faire”);
 13 *Olson*, 855 F.2d at 1451 (similarities in “quickly paced” works were “common to the genre of action-
 14 adventure television series and movies and therefore do not demonstrate substantial similarity”).

15 Mr. Krause identified only one disputed video, Doctor Checkup Song, with a similar mood
 16 of “happy” and “idealistic.” TT 801:16-17; *see* TT 766:13-16 (testifying CoComelon’s mood
 17 generally is “peaceful” and “idyllic”). But those moods are common in the preschool animation
 18 genre and naturally flows from basic premise of CoComelon’s kid-safe and encouraging
 19 programming. TT 766:17-24 (tacitly acknowledging that some other preschool programs have a
 20 similar mood); TT 295:13-25 (describing CoComelon’s kid-safe, encouraging programming). Those
 21 moods not protectable. *See Olson*, 855 F.2d at 1451 (comic mood is “common to the genre of action-
 22 adventure television series and movies therefore do not demonstrate substantial similarity.”); *Zella*
 23 *v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1136 (C.D. Cal. 2007) (“the relaxed, fun mood of the two
 24 shows is not a protectable element”); *Reflex Media*, 2018 WL 6566561, at *10 (moods of fun,
 25 adventure, and romance are unprotectable).

26 Mr. Krause did not identify any disputed videos with a similar pace. But he testified
 27 generally—and circularly—that CoComelon’s pace “is particularly CoComelon” that works with its
 28 “particular style.” TT 768:13-23. He further stated the pace is “kind of a melodic pacing” and “not

1 like a frantic pacing.” *Id.* But a “melodic” pace flows naturally from the song format of CoComelon
2 episodes. *See* TT 764:11-15 (“most of these episodes are built around nursery rhymes or songs,”
3 which “affect[s] the stories”). Thus it is unprotectable, as is a pace that is not “frantic.” *Briggs*, 70
4 F. Supp. 3d at 1177 (“The bare concept of a pace that is ‘fast but not frenetic’ is unprotectable.”).

5 **5. Settings**

6 “[C]ommonplace settings such as houses, front yards, offices, restaurants, interiors of cars,
7 and so on,’ without more, cannot show substantial similarity.” *Whitehead v. Netflix, Inc.*, 2022 WL
8 17342602, at *21 (N.D. Cal. Nov. 30, 2022) (citing cases). Mr. Krause identified similar settings in
9 three videos: *This Is The Way* (the bathroom), *Doctor Checkup* (the “playroom”), and *Swimming*
10 *Song* (the pool). *See* TT 790:16-790:25, 801:18-20, 806:10-13. But those generic similarities in
11 settings “are unprotectable scenes a faire that flow from stories set in [a toddler’s home].” *Whitehead*,
12 2022 WL 17342602, at *21; *see Ricketts v. CBS Corp.*, 439 F. Supp. 3d 1199, 1217 (C.D. Cal. 2020)
13 (“[S]cenes taking place at school and on the football field naturally flow from the basic plot points.”);
14 *Shame on You*, 120 F. Supp. 3d at 1159 (“a gentleman’s bedroom is a [scene a faire], since going
15 home with someone met at a bar, party, or club is an essential element of a walk of shame”).

16 Nor are those settings expressed the same way. For example, Mr. Krause claims that the
17 bathrooms are similar because “the blue [design] and the nautical theme on the tiles.” TT 790:16-
18 790:25. But a blue design and nautical theme both naturally flow from the idea of water in a
19 bathroom. Further, the two bathrooms have substantial differences: JJ’s bathroom features iridescent
20 tile, with aquatic stickers on the tile, and more playful bathroom cabinets and fixtures. *See* TT 1208
21 at 0:37. By contrast, JoJo’s bathroom features multi-color wall tiles in shades of blue, yellow, and
22 white, with actual sea life tiles (not stickers), along with a more modern, realistic bathroom cabinets
23 and fixtures. *See* TE 451 at 0:08. They are not substantially similar.

24 **6. Style**

25 “Style, no matter how creative, is an idea, and is not protectable by copyright.” *Tangle Inc.*
26 *v. Aritzia, Inc.*, No. 23-CV-01196-JSW, 2023 WL 6883369, at *3 (N.D. Cal. Oct. 18, 2023); *Zella*,
27 529 F. Supp. 2d at 1135 (“The ‘look’ of a show is not the proper subject of copyright protection.”);
28 *see* 2 Patry on Copyright § 4:14 (2017) (“[T]here is no protection for a communal style...”). Mr.

1 Krause’s testimony about the style elements, such as “camera angles,” “lighting” and “color design”
 2 (TT 791:4-9), are too generic, too broad, and too unoriginal to warrant copyright protection. *See*
 3 *Rentmeester*, 883 F.3d at 1119 (noting that while “choices related to subject matter, pose, lighting,
 4 camera angle, depth of field, and the like . . . none of those elements is subject to copyright protection
 5 when viewed in isolation.”). Indeed, his characterizations of the “cinematography” as “plac[ing] the
 6 camera in a way that gives a good sense of the emotions of the characters” (TT 763:1-16) sounds like
 7 the given objective of every filmmaker who features humans, as does his description of the animation
 8 style as “observed” (*i.e.*, realistic) (TT 767:15-768:3). More is required to show substantial similarity
 9 than scenes that use “wide shots” and “are shot from the subject’s left” and at a “medium distance.”
 10 *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 280- 288 (S.D.N.Y. 2016).

11 In sum, none of the other concrete elements of the disputed videos are protectable, and
 12 judgment as a matter of law of should be entered as to all disputed videos.⁴

13 **F. No Reasonable Jury Could Have Found Infringement Of A Protectable**
 14 **Selection And Arrangement.**

15 No reasonable jury could find Moonbug identified similarities in a protectable selection and
 16 arrangement. A combination of unprotectable elements may be protectable only “if those elements
 17 are numerous enough and their selection and arrangement original enough that their combination
 18 constitutes an original work of authorship.” *Skidmore*, 952 F.3d at 1074. Moonbug bears the burden
 19 of establishing whatever selection and arrangement it claims to have. *Gray v. Perry*, 2020 WL
 20 1275221, at *8 (C.D. Cal. Mar. 16, 2020), *aff’d*, 28 F.4th 87 (9th Cir. 2022). Moonbug fell far short
 21 of that burden here for multiple reasons.

22 **First**, Moonbug’s assertion that it has unified selection and arrangement *covering all its*
 23 *disputed works* is baseless. *See* Dkt. 546 at 16-17 (asserting Mr. Krause’s “identification of this

24 _____
 25 ⁴ But even if the Court found protectable similarities based on the elements above, the uncontroverted
 26 evidence establishes that numerous videos do not contain those elements. Specifically: (i) Moonbug
 27 identified no similarities as to six disputed videos: Shape Song, Teacher Song, Thank You Song,
 28 Traffic Song, Wheels on the Bus, and Winter Song; (ii) Moonbug offered no evidence as to any
 similar elements beyond JJ for another nine disputed videos: Animal Dance, First Day of School,
 Five Little Monkeys, Getting Ready for School Song, Hello Song, Jobs and Careers Song, Laughing
 Family with Baby, Looby Loo, and One Potato, Two Potato; (iii) Moonbug offered no evidence as
 to similarities beyond JJ and his relationship with his family for another two disputed videos: Yes
 Yes Playground and Peek-A-Boo. At minimum, judgment should be entered as to these 17 videos.

1 combination of elements ... was based on the entire set of Registered Works”). Moonbug asserted
2 42 individual copyrights, not a single collective copyright. *See* Dkt. 562 at 10. Thus, for each
3 individual copyright, Moonbug is “only entitled to protection of the original expression *in that*
4 *particular work*,” and Moonbug “cannot extend or enhance that protection by reference to a
5 compilation of the various works which make up [the CoComelon series] (i.e., each work must be
6 judged against any allegedly infringing work *on its own*, not as part of some larger whole claimed by
7 Plaintiffs).” *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1144 n.31 (C.D. Cal. 2001); *see id.*
8 (“It is ... a misnomer to refer to the eight works collectively, as if they make up a *single* work that is
9 entitled to protection of any original expression contained in any *one* of the eight.”). Moonbug’s
10 attempt to argue a single selection and arrangement theory that applies to all disputed videos lacks
11 merit. *See also Cabell v. Zorro Prods. Inc.*, 2018 WL 2183236, at *7 n.7 (N.D. Cal. May 11, 2018)
12 (“each work is only entitled to protection of the original expression in that particular work, and each
13 work must be judged against any allegedly infringing work on its own”).

14 **Second**, Moonbug did not assert individual selection and arrangement theories for each of its
15 35 disputed works at trial. To do so, Moonbug was required to show “the *particular way* in which
16 the artistic elements form a coherent pattern, synthesis, or design.” *Skidmore*, 952 F.3d at 1074. But
17 Moonbug “never once used the words ‘selection’ or ‘arrangement’ during trial,” nor did it ever
18 “present[] the argument to the jury.” *Id.* At best, it merely pointed to a “‘combination of
19 unprotectable elements’ without explaining how these elements are particularly selected and
20 arranged.” *Id.* at 1075. This “amounts to nothing more than trying to copyright commonplace
21 elements” and “random similarities scattered throughout ... the works.” *Id.*⁵

22 **Third**, Moonbug did not (and cannot) show that the combinations of unprotectable elements
23 were numerous enough and original enough to give rise to a selection and arrangement on each
24 individual copyright. *Skidmore*, 952 F.3d at 1075 (citations omitted). For most disputed videos, the
25 only similarity Moonbug identified at trial was JJ. That is a far cry from the 121 elements that Mr.

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28 ⁵ In fact, Moonbug has not even identified any combination for the six disputed videos that it never once mentioned during its case in chief. *See* TE 1190 (Shape Song), 1202 (Teacher Song), 1205 (Thank You Song), 1211 (Traffic Safety Song), 1214 (Wheels on the Bus), 1217 (Winter Song).

1 Krause championed to defeat summary judgment. *See* Dkt. 242 at 21. As a matter of law, the few
2 (if any) similarities that Mr. Krause identified as to each disputed video at trial were not “numerous
3 enough” to assert a selection and arrangement claim. *See Corbello*, 974 F.3d at 975 & n.2 (holding
4 that 12 unprotectable elements are not “numerous enough” to establish a “viable arrangement and
5 selection argument”). Nor were they original enough. There is nothing unique about a typical toddler
6 doing everyday activities with his generic family in realistic and relatable storylines. Moonbug’s
7 decision to use a “manifestly conventional arrangement” of elements, *Gray*, 28 F. 4th at 101-02,
8 elements that “flow naturally from a basic ... premise,” *Berkic*, 761 F. 2d at 1293, and choices
9 “dictated by convention or subject matter,” *Rentmeester*, 883 F.3d at 1120, does not create an
10 “original” selection and arrangement. That “is the penalty an author must bear for marking them too
11 indistinctly.” *Olson*, 855 F. 2d at 1452 (citation omitted).

12 *Last*, even if Moonbug had established selection and arrangements over each of its disputed
13 works (it did not), Mr. Krause did not establish that Super JoJo copied the “same” selection and
14 arrangement. *Skidmore*, 952 F.3d at 1075. The accused Super JoJo videos contain a vast array of
15 different expression. *See, e.g.*, TT 788:12-19 (discussing the show’s “redesign”); TT 812:17-20
16 (admitting episodes do not copy “the sequence of events” of a CoComelon episode); TT 939:6-19
17 (admitting that JoJo does not wear a turquoise and yellow onesie in many episodes). Enforcing a
18 claim as to the particular selection and arrangement of a single disputed CoComelon video against
19 300-plus Super JoJo videos, nearly all of which indisputably contain different plots and underlying
20 musical works and many of which are set in different settings, is simply not possible.

21 **G. No Reasonable Jury Could Have Found Infringement Based on Thumbnails**

22 Moonbug’s claim of copyright infringement over its thumbnails fails as a matter of law.
23 Moonbug introduced no evidence that its thumbnails are included in Moonbug’s video works. Nor
24 did it introduce evidence that BabyBus’s thumbnails represent scenes from the BabyBus’s accused
25 videos; the record shows otherwise. TT 817:16-21. Even if it *had* proven the thumbnails form part
26 of the Moonbug video works, Moonbug could not prove that BabyBus’s alleged appropriation of the
27 arrangement of a single scene from these audiovisual works was anything more than *de minimis*,
28 particularly after filtration is performed. *See, e.g., Newton v. Diamond*, 388 F.3d 1189, 1193 (9th

1 Cir. 2004) (copying is de minimis when “it is so meager and fragmentary that the average audience
 2 would not recognize the appropriation”). This is particularly the case given the only proven
 3 circumstance of display of any BabyBus thumbnail was on the BabyBus YouTube page, amongst
 4 more than a hundred others in a scattered order. *See* TE 115. Moonbug’s only other argument is that
 5 the thumbnails infringe JJ, but for the reasons above (*see supra*, § B.1), that claim fails too.

6 **H. No Reasonable Jury Could Have Found for Moonbug on the § 512(f) Claim.**

7 Judgment as a matter of law is also required on Moonbug’s section 512(f) claim. Moonbug
 8 was required to show that BabyBus “knowingly materially misrepresent[ed] that material or activity
 9 was removed or disabled by mistake or misidentification,” and that it incurred damages “as result of
 10 the service provider relying on such misrepresentation in replacing the removed material or ceasing
 11 to disable access to it.” But Moonbug’s own admission reflects the service provider relied on its
 12 failure to challenge BabyBus’ counternotice in replacing the video. TT 1498:22-1499:15.

13 Further, liability under section 512(f) does not attach “simply because an unknowing mistake
 14 is made, even if [the party] acted unreasonably in making the mistake.” *Rossi v. Motion Picture*
 15 *Ass’n of Am. Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004). Moonbug presented no evidence from which
 16 a reasonable jury could conclude that BabyBus knowingly and materially misrepresented that it had
 17 a good faith belief that the material or activity covered by the March 20, 2023 counter notification
 18 was removed or disabled by mistake or misidentification. Mr. Yan’s un rebutted testimony
 19 demonstrates that BabyBus submitted those notifications in good faith. *See, e.g.*, TT 536:10-22.
 20 Further, Moonbug’s admissions show that it was Moonbug’s failure to respond to the counter
 21 notification at issue that resulted in the video being reinstated on YouTube. TT 1498:22-1499:15
 22 (Moonbug’s responses to RFA Nos. 333 and 334); *see also* TT at 666:6-12 (unrebutted testimony).
 23 Moonbug also did not even present any damages as part of this claim. Moonbug thus could not
 24 convince a reasonable jury it has established all elements of this claim.

25 **II. NO REASONABLE JURY COULD HAVE AWARDED MOONBUG DAMAGES**

26 **A. No Reasonable Jury Could Have Awarded Copyright Infringement Damages**

27 No reasonable jury could award Moonbug copyright infringement damages. There was no
 28 evidence to support a lost profits award if, as here, the jury found that less than all CoComelon works

1 had been infringed or less than all Super JoJo videos were infringing. Moonbug’s expert, Dr. Jennifer
2 Vanderhart, instead presented a single figure (\$4,482,308) that assumed Moonbug scored a complete
3 victory and the jury found that every Super JoJo video, whether in the record or not, was infringing.
4 TT 1082:19-1083:3, 1096. Lost profits must be established with reasonable certainty. *Polar Bear*
5 *Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 710 (9th Cir. 2004) (“Damages must be proved, and not
6 just dreamed.”) (quoting *MindGames, Inc. v. Western Pub. Co.*, 218 F.3d 652, 658 (7th Cir. 2000)).
7 And “[e]xcessively speculative claims of damages are to be rejected.” *Jarvis v. K2 Inc.*, 486 F.3d
8 526, 534 (9th Cir. 2007). Dr. Vanderhart’s testimony did not come close to satisfying these standards.

9 The lost profits award is also excessive because it is based on Super JoJo videos that are not
10 in evidence. Moonbug’s only evidence of lost profits was Dr. Vanderhart’s testimony. She opined
11 that 32.8% of Super JoJo views would have gone to CoComelon videos. This 32.8% of Super JoJo
12 views, however, comes from the entire channel—not merely the 368 videos Moonbug claimed were
13 infringing. TT 1062:15-1063:7. As Moonbug’s claimed lost profits increase with each view that
14 moves from Super JoJo to CoComelon in the but-for world, Moonbug’s only evidence of damages
15 included videos that were not part of the record. With nothing else before it, the jury was left to work
16 backwards from that 32.8% figure in deciding how much lost profits to award for the fewer-than-all
17 registrations that it found were infringed. The jury, in other words, had no means to exclude views
18 that CoComelon lost on account of videos that the jury had not seen, let alone determined were
19 infringing. That result ignores the fundamental rule of copyright law that actual damages “must be
20 suffered ‘as a result of the infringement.’” *Crunchyroll, Inc. v. Pledge*, 2014 WL 1347492, at *3
21 (N.D. Cal. Mar. 31, 2014) (quoting *Polar Bear*, 384 F.3d at 708). As such, the award is unsustainable.

22 Like lost profits, the jury’s disgorgement award was based on Super JoJo videos that were
23 not in evidence. Instead of presenting revenues associated with any particular video, Dr. Vanderhart
24 testified about the revenues that BabyBus’ channels generated. TT 1050:10-1051:13. Those
25 channels undisputedly contain more than the 368 Super JoJo videos that Moonbug claimed were
26 infringing and moved into evidence. *See, e.g.*, Dkt. 302. Moonbug cannot sidestep this fact by
27 claiming that the channels in their entirety were infringing because every video featured the JoJo
28 character, and JoJo infringed the registration for JJ . TT 1166:7-1167:7 (Dr. Vanderhart testifying

1 that she did not have to itemize damages so long as the jury found the JJ registration to be infringed).
2 The jury rejected this theory, awarding less than the profits that Moonbug requested (\$13,539,568
3 versus \$14,540,983), despite finding that the JoJo character infringed the registration for JJ. Dkt.
4 579 (Verdict Form). This can only mean the jury found that only certain Super JoJo videos or certain
5 features of those videos were infringing.

6 Since the jury rejected Moonbug’s infringement-by-channel theory, the only way it could
7 permissibly identify BabyBus’ “unjust” profits was to sum up profits on infringing videos because
8 profits “must bear a legally significant relationship to the infringement.” *Polar Bear*, 384 F.3d at
9 711; *see id.* (“Although the statute only references the broad term ‘gross revenue,’ to conclude that a
10 copyright plaintiff need only provide the company’s overall gross revenue, without regard to the
11 infringement, would make little practical or legal sense.”); *see also Mackie v. Rieser*, 296 F.3d 909,
12 916 (9th Cir. 2002) (requiring “non-speculative evidence to support a causal relationship between
13 the infringement and the profits generated indirectly from such an infringement”). But the evidence
14 did not permit that analysis because it didn’t break out profits by video.

15 **B. No Reasonable Jury Could Have Awarded Section 512(f) Damages.**

16 Moonbug presented no evidence in support of actual damages for its section 512(f)
17 misrepresentation claim—which is why it request a dollar in nominal damages. TT 1886:6-13. The
18 jury’s award of \$10,000 is not supportable by evidence or as nominal damages, which are designed
19 to “clarify the identity of the prevailing party” and “to vindicate rights, the infringement of which
20 has not caused actual, provable injury.” *Cummings v. Connell*, 402 F.3d 936, 943 (9th Cir. 2005),
21 amended, No. 03-17095, 2005 WL 1154321 (9th Cir. May 17, 2005); *Romano v. U-Haul Int’l*, 233
22 F.3d 655, 671 (1st Cir. 2000) (rejecting \$15,000 award and noting that “an amount of even \$500
23 exceeds the appropriate higher boundary of nominal damages”); *Taquino v. Teledyne Monarch*
24 *Rubber*, 893 F.2d 1488, 1491 (5th Cir. 1990) (finding \$10,000 award to be excessive). No reasonable
25 jury could have awarded Moonbug damages on the claim.

26 **CONCLUSION**

27 For the above reasons, the Court should enter judgment as a matter of law for BabyBus.
28

1 DATED: November 27, 2023

QUINN EMANUEL URQUHART & SULLIVAN, LLP

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