

The Attorney General has instructed BOP facilities to transfer appropriate qualifying inmates from institutional incarceration to home confinement pursuant to the recently enacted “CARES Act,” P.L. 116-136, 134 Stat. 281 (Mar. 27, 2020). Indeed, the Court was informed at the hearing on the present motion that FMC Devens was preparing to transfer petitioner Grinis to home confinement in early May, but that he had objected to one of the steps in the process, completion of a fourteen-day quarantine period. It is not clear what his status is now. Unlike petitioner Grinis, however, petitioners Gordon and Soliz are serving lengthy sentences for serious drug offenses. They have not shown that it is likely that they would qualify for transfer from incarceration to home confinement under the current BOP eligibility requirement, and therefore they have not shown that they personally have a likelihood of success in obtaining the relief prayed for in their petition.

[8] Finally, the petitioners’ request to be admitted to bail also lacks merit. While a district court may have “inherent power” to release a habeas petitioner pending determination of the merits of the petition, see *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972), a bail decision is a highly particularized one, involving detailed consideration of factors such as the nature and circumstances of the offense of conviction, the history and characteristics of the petitioner, and the nature or seriousness of any danger to the community from the release of the prisoner. See 18 U.S.C. § 3142(g). The petitioners do not address such considerations, instead basing their request for bail on the circumstances of their confinement alone, rather than on the particular factors as applied to each of them. So even if this action is properly characterized as a habeas petition, which is subject to doubt, the basis for making a considered bail decision is lacking.

For the foregoing reasons, the Motion for Immediate Bail Consideration, Temporary Restraining Order, and Preliminary Injunctive Relief (dkt. no. 3) is DENIED.

It is SO ORDERED.



Leah BASSETT, Plaintiff,

v.

Monica JENSEN, Jon Blitt, Mile High Distribution, Inc., Joshua Spafford, April Carter, Gamma Entertainment, William Gray, and Fiore J. Barbini, Defendants.

Civil Action No. 18-10576-PBS

United States District Court,  
D. Massachusetts.

Filed 05/11/2020

**Background:** Lessor of residential property brought action against lessee and other parties who were allegedly involved in filming pornographic videos on property without owner’s permission, asserting claims for, among other things, breach of contract, trespass, negligence, and violation of the Copyright Act. Both sides moved for summary judgment.

**Holdings:** The District Court, Patti B. Saris, J., held that:

- (1) artwork in home was original, as required to be copyrightable; but
- (2) slipcovers and pillows were not copyrightable;
- (3) questions of material fact precluded summary judgment on issue of whether use was de minimis;

- (4) homeowner's anxiety and acute distress disorder were "physical harms" supporting claim for negligent infliction of emotional distress;
- (5) unauthorized filming of professional pornographic videos in rental home was an unfair or deceptive practice under Massachusetts statute; and
- (6) injuries homeowner suffered were not result of pattern of racketeering, as required to support civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim.

Ordered accordingly.

#### 1. Federal Civil Procedure $\Leftrightarrow$ 2534

When parties cross-move for summary judgment, court must evaluate each motion separately, drawing inferences against each movant in turn. Fed. R. Civ. P. 56(a).

#### 2. Copyrights and Intellectual Property $\Leftrightarrow$ 83(3.5)

In a copyright infringement suit, a certificate of copyright registration constitutes prima facie evidence of copyrightability and shifts burden to defendant to demonstrate why copyright is not valid.

#### 3. Federal Civil Procedure $\Leftrightarrow$ 2493

Genuine issue of material fact as to whether copyrighted works of art were previously published on owner's website or on an online store, so as to render their registration as unpublished collection invalid, precluded summary judgment on claim for copyright infringement. 17 U.S.C.A. § 101 et seq.

#### 4. Copyrights and Intellectual Property $\Leftrightarrow$ 12(1)

In context of applicability of the Copyright Act's protections to allegedly unique works, the originality bar is set quite low. Fed. R. Civ. P. 56(a).

#### 5. Copyrights and Intellectual Property $\Leftrightarrow$ 6

Artwork in leased home was original, and thus copyrightable, as required for homeowner's copyright infringement claims against renter who had used rental property, without authorization, to film pornographic movies that included the works; artwork included drawings, paintings, photographs, wall hangings, collages, and pottery created by homeowner, as well as designs stenciled on tabletops that were all original to homeowner. 17 U.S.C.A. § 101 et seq.

#### 6. Federal Civil Procedure $\Leftrightarrow$ 2493

Genuine issue of material fact as to whether design of fireplace in rental home was attributable to homeowner precluded summary judgment on homeowner's claim against short-term renter for copyright infringement based on his unauthorized use of home to film pornographic movies that included the fireplace. 17 U.S.C.A. § 101 et seq.

#### 7. Copyrights and Intellectual Property $\Leftrightarrow$ 12(1)

Slipcovers and pillows in rental home were not original, as required for copyright protection in homeowner's claim against 6-month renter for copyright infringement based on his unauthorized use of home to film pornographic movies that included the items, even though they were made by homeowner, since works were created from fabric not designed by homeowner and their shapes were chosen for functional purposes of covering items of furniture also not designed by homeowner. 17 U.S.C.A. § 101 et seq.

#### 8. Copyrights and Intellectual Property $\Leftrightarrow$ 53(1)

De minimis copying, as permitted under Copyright Act, is best viewed not as a separate defense to copyright infringement but rather as a statement regarding the

strength of plaintiff's proof of substantial similarity. 17 U.S.C.A. § 101 et seq.

**9. Copyrights and Intellectual Property**  
↔53(1)

When copyrighted material is featured in another work, the question is whether the admitted copying occurred to an extent sufficient to constitute actionable copying, i.e., infringement.

**10. Copyrights and Intellectual Property**  
↔53(1)

When copyrighted material is featured in another work, infringement depends on: (1) the observability of the copied work; (2) the length of time the copied work is observable in the allegedly infringing work; and (3) such factors as focus, lighting, camera angles, and prominence.

**11. Copyrights and Intellectual Property**  
↔53(1)

Even background uses of copyrighted materials in another's work require payment of a license fee. 7 C.F.R. § 253.8.

**12. Federal Civil Procedure** ↔2493

Genuine issue of material facts as to which of homeowner's copyrighted works appeared in pornographic film created without authorization at her home by renter, what films they appeared in, length of time they appeared in each film, and level of detail used in each film, precluded summary judgment on issue of renter's claim use was de minimis in homeowner's action for copyright infringement. 17 U.S.C.A. § 101 et seq.; 7 C.F.R. § 253.8.

**13. Copyrights and Intellectual Property**  
↔53.2

The primary inquiry as to the purpose and character of an infringing use of copyrighted work, as factor in determining fair use, is whether and to what extent the new work is transformative. 17 U.S.C.A. § 107.

**14. Copyrights and Intellectual Property**  
↔53.2

A work is "transformative," and thus fair use of copyrighted material, if it adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. 17 U.S.C.A. § 107.

See publication Words and Phrases for other judicial constructions and definitions.

**15. Federal Civil Procedure** ↔2493

Genuine issue of material fact as to whether renter's unauthorized use of copyrighted artwork in rental home that appeared in background of his pornographic film was fair use of the material precluded summary judgment on homeowner's claim against renter for copyright infringement. 17 U.S.C.A. § 107.

**16. Copyrights and Intellectual Property**  
↔53.2

The nature of the copyrighted work, as factor in determining fair use, has two aspects: first, the extent to which it is a creative work enjoying broader copyright protection as opposed to a factual work requiring broader dissemination, and second, whether it is unpublished, in which case the right of first publication is implicated. 17 U.S.C.A. § 107.

**17. Copyrights and Intellectual Property**  
↔53.2

The amount and substantiality of the portion used in relation to the copyrighted work as a whole, as factor in determining fair use of a copyright, is a pliable factor, not a cold calculation of the percentage of a work used versus unused. 17 U.S.C.A. § 107.

**18. Copyrights and Intellectual Property**  
↔53.2

When no market exists for a copyrighted work because the copyright holder

never tried to sell work, it supports a finding of fair use on claim for copyright infringement. 17 U.S.C.A. § 107.

**19. Copyrights and Intellectual Property**  
 ⇨87(1)

Compensable damages for copyright infringement include (1) actual damages, which consist of all income and profits lost as a consequence of the infringement, and (2) any nonduplicative profits earned by defendant as a consequence of the copyright infringement. 17 U.S.C.A. § 504(b).

**20. Copyrights and Intellectual Property**  
 ⇨77

The Copyright Act permits vicarious liability of a corporate officer for copyright infringement if the officer was the dominant influence in the corporation, and determined the policies that resulted in the infringement. 17 U.S.C.A. § 101 et seq.

**21. Federal Civil Procedure** ⇨2493

Genuine issue of material fact as to whether son of owner of pornographic film company, who worked at company during father's illness, was the dominant influence in the corporation and determined policies that resulted in the infringement of copyrighted works located in rental home where film was shot, precluded summary judgment on homeowner's claim against son for vicarious liability for company's copyright infringement.

**22. Damages** ⇨57.21

Under Massachusetts law, to prevail on a claim of intentional infliction of emotional distress (IIED), plaintiff must prove (1) defendant either intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct, (2) that the conduct was extreme and outrageous and beyond all possible bounds of decency and was utterly intolerable in a civilized community, (3) that defendant's actions caused plaintiff's emotional distress, and (4) that

plaintiff sustained severe emotional distress.

**23. Damages** ⇨208(6)

Under Massachusetts law, there is an issue for the jury on claim for intentional infliction of emotional distress (IIED) if reasonable people could differ on whether the conduct is extreme and outrageous.

**24. Damages** ⇨57.25(1)

Under Massachusetts law, pornographic website owner's alleged refusal to remove infringing videos from the site and his labeling owner of home where the videos were shot as "homophobic," involved insults, indignities, threats, annoyances or petty oppressions, rather than "extreme and outrageous conduct" as would form basis of claim for intentional infliction of emotional distress (IIED).

See publication Words and Phrases for other judicial constructions and definitions.

**25. Federal Civil Procedure** ⇨2515

Genuine issue of material fact as to whether renter's unauthorized recording of professional pornographic film in residence was extreme and outrageous conduct precluded summary judgment on homeowner's claim for intentional infliction of emotional distress (IIED) under Massachusetts law.

**26. Damages** ⇨57.14

Under Massachusetts law, the elements of a claim for negligent infliction of emotional distress (NIED) are: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.

**27. Damages** ⇨192

Under Massachusetts law, for a plaintiff to survive summary judgment on the physical harm requirement of claim for

negligent infliction of emotional distress (NIED), she must corroborate her mental distress claims with enough objective evidence of harm to convince judge that claims present a sufficient likelihood of genuineness to go to trial.

### 28. Damages ⇨57.18

Under Massachusetts law, homeowner suffered “physical harm,” supporting claim against renter for negligent infliction of emotional distress (NIED) based on his unauthorized filming of professional pornographic videos in her residence, where after learning of the videos, she frequently felt ill and was unable to sleep, leading to diagnoses of anxiety and acute distress disorder.

See publication Words and Phrases for other judicial constructions and definitions.

### 29. Torts ⇨212

Under Massachusetts law, plaintiff claiming tortious interference with contractual relations must establish that: (1) she had a contract with a third party; (2) defendant knowingly induced third party to break it; (3) interference was improper in motive or means; and (4) interference caused plaintiff harm.

### 30. Federal Civil Procedure ⇨2515

Genuine issue of material fact as to whether pornographic film producer induced her camera man to break his six-month lease of residential property where unauthorized commercial videos were being recorded precluded summary judgment on homeowner’s claim against producer for tortious interference with contractual relations under Massachusetts law.

### 31. Torts ⇨214

Under Massachusetts law, plaintiff claiming tortious interference with prospective economic advantages must produce competent evidence of a specific busi-

ness relationship, the consummation of which was reasonably likely.

### 32. Antitrust and Trade Regulation ⇨151

Homeowner’s short-term rental of her own residence was a “private transaction” not undertaken in the ordinary course of a trade or business, and thus excluded from coverage under Massachusetts law governing unfair or deceptive acts done within context of trade or commerce. Mass. Gen. Laws Ann. ch. 93A, § 9.

See publication Words and Phrases for other judicial constructions and definitions.

### 33. Antitrust and Trade Regulation ⇨290

Homeowner who unknowingly rented out her residence to professional pornographic film maker for six-month period was a “person who had been injured” by film maker’s commercial practices within meaning of Massachusetts law governing unfair or deceptive acts. Mass. Gen. Laws Ann. ch. 93A, § 9.

See publication Words and Phrases for other judicial constructions and definitions.

### 34. Antitrust and Trade Regulation ⇨200

Film maker’s alleged practice of shooting commercial pornographic films in a leased home without the owner’s consent, and in violation of the lease, was an “unfair or deceptive practice” within meaning of Massachusetts statute prohibiting such practices. Mass. Gen. Laws Ann. ch. 93A, § 9.

See publication Words and Phrases for other judicial constructions and definitions.

### 35. Conspiracy ⇨472

Under Massachusetts law, civil conspiracy requires (1) a common design or an agreement between two or more persons

to do a wrongful act, and (2) proof of some tortious act in furtherance of the agreement.

### 36. Conspiracy ⇨475, 515

Massachusetts law recognizes a very limited form of civil conspiracy where it is the act of agreeing that constitutes the wrong, such as collusive behavior among market competitors.

### 37. Federal Civil Procedure ⇨2491.7

Genuine issue of material fact as to whether pornographic film director and her camera man actually agreed to break camera man's lease agreement with homeowner where unauthorized commercial pornographic videos were being recorded precluded summary judgment on homeowner's claim against the two for civil conspiracy under Massachusetts law.

### 38. Contracts ⇨326

Under Massachusetts law, to prevail on a claim for breach of contract, plaintiff must demonstrate that: (1) there was an agreement between the parties; (2) the agreement was supported by consideration; (3) plaintiff was ready, willing, and able to perform his or her part of the contract; (4) defendant committed a breach of the contract; and (5) plaintiff suffered harm as a result.

### 39. Landlord and Tenant ⇨604, 1021

Under Massachusetts law, pornographic film producer was not liable for her camera man's breach of six-month lease of residence where he recorded unauthorized commercial pornographic videos, since she was not a party to the lease and camera man was not acting as her agent when he signed lease.

### 40. Trespass ⇨2, 12, 20(1)

The elements of trespass under Massachusetts law are: (1) plaintiff's actual possession of the property at issue, and (2) an intentional and illegal entry by defendant.

### 41. Limitation of Actions ⇨95(1)

Under the Massachusetts "discovery rule," a cause of action accrues when an event or events have occurred that were reasonably likely to put plaintiff on notice that someone may have caused her injury.

See publication Words and Phrases for other judicial constructions and definitions.

### 42. Limitation of Actions ⇨95(7)

Under Massachusetts' discovery rule, homeowner's cause of action against her renter for trespass accrued, and three-year limitations period began to run, once homeowner learned there had been an intentional and illegal entry into her locked master bedroom closet, not later when she learned why. Mass. Gen. Laws Ann. ch. 260, § 2A.

### 43. Negligence ⇨1507.1

Common law negligence claims under Massachusetts law are subject to a three-year statute of limitations.

### 44. Limitation of Actions ⇨95(3)

Under Massachusetts law, for purposes of claim for negligence, a plaintiff need not know the full extent of her injury before the three-year statute of limitations starts to run.

### 45. Limitation of Actions ⇨95(7)

Under Massachusetts law, homeowner's cause of action against her renter for negligence accrued, and three-year limitations period began to run, once homeowner learned of physical damage caused by individuals who were on her property working as actors during renter's unauthorized filming of professional pornographic videos.

### 46. Fraud ⇨3

To prove fraud under Massachusetts law, plaintiff must show that defendant made a false representation of a material fact with knowledge of its falsity for the

purpose of inducing the plaintiff to act thereon, and that plaintiff relied upon the representation as true and acted upon it to his damage.

**47. Fraud** ⇨4

Under Massachusetts law, even though pornographic film creator who rented residence for six months eventually filmed pornographic video there, there was no evidence that at the time he entered into rental agreement he intended to use the home for anything other than as a residence, in accordance with lease, as required to support homeowner’s claim for fraud, based on detrimental reliance on renter’s allegedly false representations.

**48. Racketeer Influenced and Corrupt Organizations** ⇨3

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiff must prove four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C.A. § 1961 et seq.

**49. Racketeer Influenced and Corrupt Organizations** ⇨7

Criminal infringement of a copyright, as predicate act supporting civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, requires willful infringement, meaning defendant specifically intended to violate someone’s copyright, rather than simply knew that he was making copies. 18 U.S.C.A. § 1961(1).

**50. Racketeer Influenced and Corrupt Organizations** ⇨7

Criminal infringement of a copyright, as listed predicate act supporting civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, does not subject all acts of intentional infringement to RICO liability; instead it targets counterfeiting and piracy organizations. 18 U.S.C.A. § 1961(1).

**51. Racketeer Influenced and Corrupt Organizations** ⇨7

Even if pornographic film creator’s actions in recording professional pornographic video in rental home, without authorization, constituted civil copyright infringement of homeowner’s art, such actions did not rise to the level of criminal infringement, as would support homeowner’s civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim against him, since they did not involve counterfeiting or piracy. 17 U.S.C.A. § 101 et seq.; 18 U.S.C.A. § 1961(1).

**52. Racketeer Influenced and Corrupt Organizations** ⇨28

Under Racketeer Influenced and Corrupt Organizations Act (RICO), in order to constitute a “pattern of racketeering,” predicate acts must amount to or pose a threat of continued criminal activity. 18 U.S.C.A. § 1961 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

**53. Racketeer Influenced and Corrupt Organizations** ⇨28, 29

Continuity of criminal activity, as element of claim for civil Racketeer Influenced and Corrupt Organizations Act (RICO) violation, can be open- or closed-ended; for open-ended continuity, a RICO plaintiff must show a realistic prospect of continuity over an open-ended period yet to come, and for closed-ended continuity, plaintiff must show a series of related predicates extending over a substantial period of time. 18 U.S.C.A. § 1961 et seq.

**54. Racketeer Influenced and Corrupt Organizations** ⇨62

When a court evaluates a Racketeer Influenced and Corrupt Organizations Act (RICO) claim for proximate causation, the central question it must ask is whether the

alleged violation led directly to plaintiff's injuries. 18 U.S.C.A. § 1964(c).

**55. Racketeer Influenced and Corrupt Organizations** ⇨27, 30

Injuries homeowner suffered when copyrighted artwork in her home was used as part of her renter's unauthorized production of professional pornographic film was the result of a single, narrow scheme, targeting only one victim within a closed timeframe, rather than through a pattern of racketeering, as would support her claim against renter and production company for civil Racketeer Influenced and Corrupt Organizations Act (RICO) violations. 18 U.S.C.A. § 1964(c).

**56. Libel and Slander** ⇨1

Under Massachusetts law, the elements of a defamation claim are: (1) defendant made a statement, concerning plaintiff, to a third party; (2) statement was defamatory such that it could damage plaintiff's reputation in the community; (3) defendant was at fault in making the statement; and (4) statement either caused plaintiff economic loss or is actionable without proof of economic loss.

**57. Libel and Slander** ⇨6(1)

Under Massachusetts law, statements of pure opinion cannot be considered defamatory because they are not susceptible of being proved true or false.

**58. Libel and Slander** ⇨6(1)

Under Massachusetts law, even if an opinion implies a provably false assertion of fact, that statement will not be actionable defamation if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.

**59. Libel and Slander** ⇨6(1)

Under Massachusetts law, a speaker is protected from defamation liability if he

communicates the non-defamatory facts that undergird his opinion.

**60. Libel and Slander** ⇨6(1)

Under Massachusetts law, Internet blog post that explicitly discussed homeowner's lawsuit against renter, and described it as filed by "a viciously homophobic and transphobic woman," expressed a subjective view, rather than claiming to be in possession of objectively verifiable facts, and thus did not constitute defamation.

---

John A. Taylor, Taylor Legal Counsel, Bristol, NH, for Plaintiff.

Natalie R. Megaloudis, Stephen A. Roach, Roache, Ioannidis & Megaloudis, LLC, Boston, MA, for Defendant Monica Jensen.

Gary Jay Kaufman, Pro Hac Vice, Noam Y. Reiffman, Pro Hac Vice, Yvette Essakhar, Pro Hac Vice, The Kaufman Law Group, Los Angeles, CA, Natalie R. Megaloudis, Stephen A. Roach, Roache, Ioannidis & Megaloudis, LLC, Boston, MA, for Defendants Jon Blitt, Mile High Distribution, Inc.

**MEMORANDUM AND ORDER**

Saris, D.J.

**INTRODUCTION**

Plaintiff Leah Bassett rented her Martha's Vineyard home to Defendant Joshua Spafford for personal residential purposes. Unbeknownst to Bassett, the property was then used as a set for pornographic videos and photographs, as well as housing for cast and crewmembers.

In March 2018, Bassett filed this suit alleging ten counts: (I) breach of contract, (II) trespass, (III) negligence, (IV) violations of Chapter 93A, (V) civil conspiracy,



(VI) civil fraud, (VII) infliction of emotional distress, (VIII) interference with advantageous business relations, (IX) copyright infringement, and (X) civil RICO violations. An eleventh count of (XI) defamation was added in May 2018.

Three defendants — Monica Jensen, Jon Blitt and Mile High Distribution, LLC (collectively, “Defendants”<sup>1</sup>) — have moved for summary judgment on all claims. Bassett cross-moved for summary judgment on four counts — Chapter 93A, civil conspiracy, infliction of emotional distress, and copyright infringement.

After hearing, the Court **ALLOWS IN PART** (Counts I, II, III, VI, X, XI) and **DENIES IN PART** (Counts IV, V, VII, and VIII) Defendants’ motion for summary judgment (Docket No. 86). The Court defers ruling on Count IX pending Plaintiff’s submission within 45 days of an analysis of all appearances of her copyrighted works in Defendants’ films. The Court also **DENIES** Bassett’s motion for partial summary judgment as to Counts IV, V, and VII (Docket No. 99) and defers ruling as to Count IX.

### **FACTUAL BACKGROUND**

The parties have filed cross-motions for summary judgment. With respect to Defendants’ motion, the following facts are presented in the light most favorable to the Plaintiff, unless otherwise noted.

#### **I. Lease Agreement**

In October 2014, Leah Bassett signed an agreement with Joshua Spafford to lease her Martha’s Vineyard residence from October 4, 2014 until May 15, 2015. The lease was “for use as a personal residence, excluding all other uses.” Dkt. 89-1 at 2. The lease also provided that the residence was to be “used and occupied only by the members of the Tenant’s family.” *Id.* The lease

prohibited Spafford from assigning or subletting the property without prior consent. Although Bassett would be out of the country for the term of her lease, several members of her family lived on the same private road as her property and periodically assisted Spafford with tasks like clearing snow from the driveway.

#### **II. Use of Bassett’s Property**

Spafford had come to Martha’s Vineyard to work as a still photographer and camera man for Monica Jensen, an adult film director with the professional pseudonym of Nica Noelle. Jensen was directing pornographic films for distribution by Mile High Distribution, Inc. (“Mile High”), a Quebec-based adult film distribution company.

Spafford initially rented Bassett’s house for his own residential purposes, believing that filming would take place at other locations on the island. However, Jensen soon pressured him to use Bassett’s residence as both a filming location and as housing for cast and crew. Jensen promised to cover the property’s rental costs and threatened to fire Spafford if he did not agree.

According to Defendants, Bassett’s home and household items appear in scenes from nine films that were distributed by Mile High, as well as still images accompanying five other films. Scenes showing Bassett’s home also appear in two compilation titles that were distributed by Mile High. Bassett asserts that she has found twenty-one films featuring scenes or stills from her house. In addition, cast members took promotional photos at the property that they posted on their own social media accounts.

The extent of Jon Blitt’s role in Mile High during this period and his involve-

1. Although Bassett named additional defendants in this action, including Spafford, no

other defendant remaining in the case has entered an appearance.

ment with Jensen's projects is disputed. Blitt asserts he was helping to run Mile High on behalf of his father, who was ill, but was not an employee and had no direct involvement in Jensen's activities on Martha's Vineyard. Bassett claims Blitt held a managerial position at Mile High, where he developed and then directly oversaw two "brands" of pornographic films, titled "Icon Male" and "Transsensual," which included the films directed by Jensen on Martha's Vineyard.

### III. Breaking of Lease

On March 15, 2015, over five months into the lease, Spafford sent Bassett an email that he had been "let go from [his] job" and would be "completely unable to finish [his] payments on [the] lease from March to the end (May)." Dkt. 89-2 at 2. He wrote that the house was "in good condition" but that there were clothes, photography gear, and bags of garbage left behind. *Id.* He also wrote that he had disabled all the carbon monoxide alarms when they went off in the middle of the night, including one alarm in Bassett's locked master closet.

The next day, on March 16, 2015, Bassett's mother went to check on the property. She saw "strangers, not authorized guests, unpacking their luggage." Dkt. 89-3 at 2. Bassett's mother then encountered Jensen, who said she was subletting the property. Soon after, Jensen spoke with Bassett by phone and said she had paid Spafford for the February and March rent. Jensen offered to take over the lease for the remaining months. At this time, Bassett did not know Jensen was an adult film director or that her residence had been used as an adult film set. On March 20, 2015, Bassett's mother and stepmother sent her photographs of the condition of the house, including some damage to the property.

Bassett responded to Spafford by email on March 22, 2015. She informed Spafford that he was in breach of the lease agreement and owed "a minimum of \$7,933" for unpaid rent and incidentals, as well as additional charges for damage to the property, which had not yet been assessed. Dkt. 89-3 at 3-4. She told Spafford that his "story about the alarm sounding, even if true, isn't grounds for breaking and entering" into the bedroom closet. *Id.* at 3. Bassett informed Spafford that she would accept \$4,000 to settle his debt but would pursue legal action if he refused her offer or did not respond within a week.

Bassett first learned pornographic movies had been filmed in her house on March 26, 2015. While in discussions with Jensen about continuing the lease, Bassett received an email from an address she did not recognize. She searched the name online and discovered Jensen's pseudonym, as well as her affiliation with Mile High. To her distress, Bassett saw her own house in online promotional materials.

The next day, on March 27, 2020, Jensen emailed Bassett and offered to "pay [Bassett] a sum of money . . . in exchange for a signed release." Dkt. 98-3 at 8. Jensen still did not disclose that the house had been used to shoot pornographic films and images, although Bassett now knew. Bassett refused the offer and told Jensen to vacate the premises.

### IV. Post-Lease Events

In May 2015, Bassett returned home and "spent weeks" repairing the damage to her property. Dkt. 98-3 at 9. Bassett was nonetheless able to rent her house during the summer season and "did not lose any rental income" in the summers of 2015, 2016, or 2017. Dkt. 89-4 at 8-9. She believes she lost income in the summer of 2018 because she "had to cancel [her] rent-

al website when [she] filed the lawsuit because of the bad publicity.” *Id.* at 9.

In the meantime, Bassett was “experiencing anxiety, inability to sleep, [and] lack of concentration” in the wake of these events. Dkt. 89-27 at 4. She became “paranoid” and suffered from “sadness and anxiety [that was] deep, dark and seemingly endless.” Dkt. 98-3 at 8. In September 2015, she began to see a therapist. Her therapist, a licensed social worker, diagnosed Bassett with Post-Traumatic Stress Disorder (“PTSD”), although the diagnosis later shifted to “acute distress disorder.” Dkt. 98-2 at 30, 35. In 2018 and 2019, Bassett was prescribed medications for anxiety and depression.

#### V. Bassett’s Copyright Filings

On September 30, 2016, a year and a half after learning about the pornographic movies, Bassett filed three certificates of registration with the United States Copyright Office under the category of “Unpublished Collection.” The collections are (1) “Bathroom 1 Drawing, et al.,” which comprises twenty-one drawings, paintings, and photographs; (2) “Handsewn and Designed Slipcover 2, et al.,” which comprises twenty-two works, including handsewn slipcovers and pillows, wall hangings, and collages; and (3) “Table 1 Hand-painted Top, et al.,” which comprises ten works, including painted tabletops, a fireplace, and items of pottery. Dkt. 89-18 to 89-23.

Bassett registered the copyrights because she “knew that there was a possibility [she] would have to file a lawsuit.” Dkt. 89-4 at 38. She had never sought registration before because she “never had to sue anybody for using [her] artwork.” *Id.* The works were “solely being used to add decorative touches to [Bassett’s] personal home in a manner that [she] felt would be warm and aesthetically pleasing.” Dkt. 89-17 at 5.

At one point, Bassett had a website at LeahBassett.com, as well as Facebook and

Instagram pages, showing her artwork. However, she took the pages down before filing the present suit because she was fearful of Jensen “attacking [her] in some way online.” Dkt. 89-4 at 63. She also had an Etsy page offering her work for sale, which she closed before filing suit. Bassett never sought to promote or sell any of the works in her copyrights on these sites.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A genuine dispute exists where the evidence “is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 87 (1st Cir. 2018) (quoting *Cherkaoui v. City of Quincy*, 877 F.3d 14, 23-24 (1st Cir. 2017)). A material fact is one with the “potential of changing a case’s outcome.” *Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 79 (1st Cir. 2018).

[1] “The court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in [its] favor.” *Carlson v. Univ. of New Eng.*, 899 F.3d 36, 43 (1st Cir. 2018). When parties cross-move for summary judgment, the court must evaluate each motion “separately, drawing inferences against each movant in turn.” *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 21 (1st Cir. 2018) (quoting *EEOC v. Steamship Clerks Union*, 48 F.3d 594, 603 n.8 (1st Cir. 1995)).

#### DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

##### I. Copyright Claims

Defendants argue the Court may grant summary judgment on Bassett’s copyright

claim on several independent bases, namely: (1) the registrations are invalid because the items were not “unpublished” collections or do not qualify for copyright protection; (2) the use of any validly copyrighted items is de minimis; (3) any use is fair use; and (4) Bassett has stated no recoverable damages. Jon Blitt also seeks dismissal in his personal capacity.

#### A. Validity and Scope of Copyrights

[2] “[A] certificate of copyright registration constitutes prima facie evidence of copyrightability and shifts the burden to the defendant to demonstrate why the copyright is not valid.” Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 40 (1st Cir. 2012) (citation omitted).

Defendants first argue that Bassett’s copyrighted works were previously published on her website and/or online store, rendering their registration as “unpublished collections” invalid. See Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, LLC, 925 F.3d 1140, 1145-46 (9th Cir. 2019) (affirming summary judgment based on invalidity of “unpublished collection” of designs that had previously been sold).

[3] While Bassett admits she had a website and an Etsy store, Defendants have put forth no evidence that any of the copyrighted works appeared on those sites. Bassett flatly denies that she ever “sought to sell, reproduce, license or otherwise seek a profit from any of the 53 works that were included in [the] 3 [copyright] applications.” Dkt. 98-3 ¶ 33. Defendants are not entitled to summary judgment based on invalidity of Bassett’s “unpublished collections.”

Defendants next contend that the registrations are at least partially invalid because many of the copyrighted works either are not original or serve only a utilitarian purpose. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347, 111 S.Ct. 1282, 113 L.Ed.2d 358

(1991) (“[C]opyright protection may extend only to those components of a work that are original to the author.”); Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 34-35 (1st Cir. 2001) (noting copyright protection does not extend to “an essentially functional design choice”).

[4, 5] “Courts assessing the applicability of the Copyright Act’s protections to allegedly unique works frequently note that the ‘originality’ bar is set quite low.” Gregory, 689 F.3d at 47. Most of the works in Bassett’s registrations are entitled to copyright protection under this “light burden.” Id. (citation omitted). The works titled as drawings, paintings, photographs, wall hangings, collages, and pottery exceed the low originality bar. The designs on the tabletops also qualify to the extent the color and placement of the stenciled designs are original to Bassett. See Star Athletica, L.L.C. v. Varsity Brands, Inc., — U.S. —, 137 S. Ct. 1002, 1012, 197 L.Ed.2d 354 (2017) (“[A] feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.”)

[6] While the functionalist elements of the fireplace are not copyrightable, the aesthetic design choices are. Defendants argue the fireplace is not “attributable” to Bassett because her father testified that a former boyfriend designed it, not Bassett. Bassett testified that she co-designed the fireplace and submitted sketches of its design. Whether the fireplace is attributable to Bassett is a disputed issue of fact appropriate for determination by a factfinder.

[7] Finally, the slippers and pillows do not surpass the low originality bar. Those works were made from fabric not designed by Bassett and their shapes were

chosen for the functional purpose of covering items of furniture also not designed by Bassett. Those works are not entitled to copyright protection and will not be considered in the Court's further analysis.

### B. De Minimis Doctrine

[8] Defendants next argue that any use of Bassett's validly copyrighted works is *de minimis* and therefore falls outside the scope of the Copyright Act's protections. In the First Circuit, "*de minimis* copying is best viewed not as a separate defense to copyright infringement but rather as a statement regarding the strength of the plaintiff's proof of substantial similarity." Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC, 560 F.3d 53, 59 (1st Cir. 2009).

[9, 10] In a seminal case, the Second Circuit explained that where, as here, copyrighted material is undisputedly featured in another work, the question is "whether the admitted copying occurred to an extent sufficient to constitute actionable copying, *i.e.*, infringement." Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997). A primary factor in cases "involving visual works" is "the observability of the copied work — the length of time the copied work is observable in the allegedly infringing work and such factors as focus, lighting, camera angles, and prominence." *Id.*

In Ringgold, a television show featured a poster of a copyrighted artwork, called "Church Picnic," in the background of a scene. The Second Circuit described the work's appearance:

In the scene, at least a portion of the poster is shown a total of nine times. In some of those instances, the poster is at the center of the screen, although nothing in the dialogue, action, or camera work particularly calls the viewer's attention to the poster. The nine sequences in which a portion of the poster

is visible range in duration from 1.86 to 4.16 seconds. The aggregate duration of all nine sequences is 26.75 seconds.

*Id.* at 73.

[11] The court noted that, by regulation, even "background" uses of copyrighted materials require payment of a license fee. *Id.* at 77. (citing 7 C.F.R. § 253.8 (1996)). It found that "the principal four-to-five-second segment in which almost all of the poster is clearly visible, albeit in less than perfect focus, reenforced [sic] by the briefer segments in which smaller portions are visible, all totaling 26 to 27 seconds, are not *de minimis* copying." *Id.* The court also noted that "Church Picnic" would be "recognizable as a painting, and with sufficient observable detail for the average lay observer to discern African-Americans in Ringgold's colorful, virtually two-dimensional style." *Id.* (citation omitted). Ringgold did not create a bright-line rule requiring thematic relevance, as Defendants have suggested.

Defendants cite a series of post-Ringgold cases that further defined the contours of the *de minimis* doctrine. See Sandoval v. New Line Cinema Corp., 147 F.3d 215, 216, 218 (2d Cir. 1998) (finding *de minimis* the appearance of copyrighted photographs for a total of 35.6 seconds where, due to poor lighting, great distance, and lack of focus, the photographs were "not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them"); Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625, 630 (S.D.N.Y. 2008) (finding *de minimis* the appearance of copyrighted pinball machine design in the background of a three-and-a-half-minute scene where it appeared "for seconds at a time," "always partially obscured," and no "character ever refer[red] to it"); Gayle v. Home Box Office, Inc., 17-CV-

5867 (JMF), 2018 WL 2059657, at \*3 (S.D.N.Y. May 1, 2018) (finding de minimis the two-to-three-second use of plaintiff's graffiti in a television show where it was "at best, shown in the background at an oblique angle and in low, uneven light" such that it was "next to impossible to notice when viewing the episode in real time").

[12] On the current record, the Court is unable to determine whether Defendants' use of Bassett's copyrighted work is de minimis. At hearing, Plaintiff's counsel proposed several sources to determine which works appeared in Defendants' films and to what extent, but none is sufficient for the Court to determine whether Bassett can meet her burden of proof.

The first is an affidavit by Stephanie Lahar analyzing the appearance of Bassett's works in a representative film, "My TS Student." Dkt. 98-4. However, the affidavit uses a numbering system to identify each copyrighted work without a corresponding key. It is impossible for the Court to determine whether the works that were featured are ones that pass the originality bar. Furthermore, the Court cannot determine the detail in which the works are visible, a key component of the Ringgold analysis.

Second, Bassett offers as exhibits screenshots from Defendants' films. Dkt. Nos. 98-6, 98-8, 98-10, 98-11, 98-12, 98-13, 98-14. In those screenshots, her works are "recognizable as" decorative art and "with sufficient observable detail" to see the content and style of the work. See Ringgold, 126 F.3d at 77. However, the Court is unable to determine the length of time the works appear in that manner.

Another attached exhibit lists the works that appear in each scene of various films. It too is insufficient because it does not track how long or the detail in which each work appears. Dkt. 98-3 at 18-25.

Finally, Bassett points to her own affidavit filed with her earlier motion for a preliminary injunction. Dkt. 62-1. Although that affidavit provides the aggregate length of time that her works are visible in a number of films, it fails to identify the specific works and in what level of detail they appear.

Thus, each source in the current record lacks critical information that the Court would need to undertake a de minimis analysis under Ringgold. The Court requires a document describing which of Bassett's copyrighted works appear in which films, for how long, and in what level of detail. This analysis should include representative screenshots. Because the de minimis doctrine relates to an element of plaintiff's claim, Situation Mgmt. Sys., 560 F.3d at 59, Bassett bears the burden of proof and must provide this analysis to the Court within 45 days if she intends to pursue her copyright claim.

### C. Fair Use

Defendants next assert the affirmative defense of fair use, on which they bear the burden of proof. See Gregory, 689 F.3d at 59. A court analyzing fair use considers four non-exhaustive statutory factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The Court addresses each factor in turn.

**i. Purpose and Character of Use**

[13, 14] The primary inquiry as to the purpose and character of an infringing use is “whether and to what extent the new work is ‘transformative.’” Gregory, 689 F.3d at 59 (citation omitted). A work is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994)).

[15] Defendants do not argue that their use was transformative, but rather stake their fair use claim on the “incidental” nature of their use. The Ringgold court explicitly rejected an “incidental use” argument, writing that it “could be said of virtually all set decorations, thereby expanding fair use to permit wholesale appropriation of copyrighted art for movies and television.” 126 F.3d at 80. Instead, the Second Circuit found that defendants’ use of “Church Picnic” was not transformative where it was used for “decorative effect . . . precisely as a poster purchaser would use it to decorate a home.” Id. at 79. Similarly, here, Bassett’s works were featured in Mile High films as decorative elements, precisely how Bassett used them in her home. Furthermore, the use here was “of a commercial nature,” which weighs against fair use in the first factor. See 17 U.S.C. § 107.

The first factor of purpose and character weighs in Bassett’s favor.

**ii. Nature of Copyrighted Work**

[16] The nature of the copyrighted work has two aspects: “first, the extent to which it is a creative work enjoying broader copyright protection as opposed to a factual work requiring broader dissemination and second, whether it is unpublished, in which case the right of first publication is implicated.” Núñez v. Caribbean Int’l

News Corp., 235 F.3d 18, 23 (1st Cir. 2000) (citations omitted).

The first aspect weighs in Bassett’s favor — her copyrighted works are artistic rather than factual. The second aspect weighs somewhat in Bassett’s favor. Bassett’s copyrights are for “unpublished collections,” but she never intended to sell her works, so Defendants did not usurp her opportunity to publish. See Núñez, 235 F.3d at 24 (noting this factor weighs less where copyrighted works are not “confidential or secret”). On the whole, the second factor weighs in Bassett’s favor.

**iii. Amount and Substantiality of Work Used**

[17] The “amount and substantiality of the portion used in relation to the copyrighted work as a whole” is a “pliable” factor, not a “cold calculation[ ] of the percentage of a work used versus unused.” Gregory, 689 F.3d at 62; see also Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 188 (D. Mass. 2007) (“This factor weighs less when considering a photograph — where all or most of the work often must be used in order to preserve any meaning at all — than a work such as a text or musical composition, where bits and pieces can be excerpted without losing all value.”)

Here, some of Bassett’s copyrighted works appear in full in screenshots from Defendants’ films. This factor weighs in Bassett’s favor.

**iv. Effect on Potential Market or Value of Work**

[18] Where no market exists for a copyrighted work because the copyright holder “[n]ever tried to sell” it, the fourth factor favors fair use. See Núñez, 235 F.3d at 25. Market effect is “the single most important element of fair use.” Gregory, 689 F.3d at 64 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471

U.S. 539, 566, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)).

The fourth factor favors Defendants. By her own testimony, Bassett never intended to sell her copyrighted works.

**v. Fair Use Conclusion**

Three factors weigh in favor of Bassett and one factor — albeit the “most important” one, Gregory, 689 F.3d at 64 — weighs for Defendants. Balancing the factors, Defendants are not entitled to summary judgment on fair use.

**D. Damages**

Defendants also argue that, even assuming Bassett can show infringement, she has stated no recoverable damages.

Under the Copyright Act, a plaintiff who proves infringement may recover one of either (1) compensable damages pursuant to 17 U.S.C. § 504(b) or (2) statutory damages pursuant to 17 U.S.C. § 504(c). Bassett is not entitled to “statutory damages” under 17 U.S.C. § 504(c) because she did not register her copyrights prior to the infringement. See 17 U.S.C. § 412 (“[N]o award of statutory damages . . . shall be made for . . . any infringement of copyright in an unpublished work commenced before the effective date of its registration”).

[19] She may, however, be entitled to certain forms of compensable damages. Compensable damages under 17 U.S.C. § 504(b) include “(1) actual damages, which consist of all income and profits lost as a consequence of the infringement; and (2) any nonduplicative profits earned by the defendant as a consequence of the copyright infringement.” Bruce v. Weekly World News, Inc., 310 F.3d 25, 28 (1st Cir. 2002).

One form of actual damages recoverable by a copyright holder is a “reasonable fair market licensing fee[.]” Id. In her summary judgment briefing, Bassett seeks a reasonable licensing fee. Because all dam-

ages discovery was stayed in this case, Bassett has not had the opportunity to develop the factual record regarding what fee, if any, Defendants would have paid to license her copyrighted materials. If the Court determines that Defendants’ use of Bassett’s copyrighted work was greater than de minimis, it will authorize further discovery on this issue.

Bassett also seeks “profits . . . attributable to the infringement,” which are recoverable as compensable damages under 17 U.S.C. § 504(b) to the extent they are not duplicative of actual damages. See Bruce, 310 F.3d at 28. The Court declines to address this form of damages until it can discern which films, if any, feature Bassett’s work in a capacity that is greater than de minimis.

**E. Jon Blitt’s Individual Liability**

[20] Jon Blitt argues he cannot be held liable for copyright infringement in his personal capacity. The Copyright Act permits vicarious liability of a corporate officer where, among other cases, “the officer was the dominant influence in the corporation, and determined the policies which resulted in the infringement.” Marvin Music Co. v. BHC Ltd. P’ship, 830 F. Supp. 651, 654-55 (D. Mass. 1993).

[21] Blitt’s role in Mile High Productions is a disputed issue of fact. Blitt admits that he was helping to run Mile High during the events in question while his father was ill. Bassett asserts that Blitt developed the “Icon Male” and “Transsensual” brands, which featured the films made at Bassett’s house. Joshua Spafford told Blitt they were improperly shooting out of Bassett’s home. Spafford also said Blitt “let[] [Jensen’s] behaviour [] slide because she is a ‘golden cow’” who brought in high profits for Mile High. Dkt. 98-2 at 27.



The reasonable inference in Bassett's favor is that Blitt "determined the policies [at Mile High] which resulted in the infringement" during the relevant period.

## II. Infliction of Emotional Distress

[22] Massachusetts law recognizes both intentional and negligent infliction of emotional distress. To prevail on a claim of intentional infliction of emotional distress ("IIED"), a plaintiff must prove:

(1) the defendant either intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of [defendant's] conduct; (2) that the conduct was "extreme and outrageous" and beyond all possible bounds of decency and was "utterly intolerable in a civilized community"; (3) that the defendant's actions caused the plaintiff's emotional distress and (4) that the plaintiff sustained severe emotional distress.

McGrath v. Town of Sandwich, 22 F. Supp. 3d 58, 70 (D. Mass. 2014) (citation omitted).

[23–25] Defendants first contend that their conduct was not "extreme and outrageous." "[T]here is an issue for the jury if reasonable people could differ on whether the conduct is 'extreme and outrageous.'" Vittands v. Sudduth, 49 Mass.App.Ct. 401, 730 N.E.2d 325, 335 (2000) (citation omitted). A reasonable juror could find renting a residential home and then filming commercial pornographic films over many months while housing cast and crew members, all without the homeowner's consent, to be "beyond all possible bounds of decency." McGrath, 22 F. Supp. 3d at 70.<sup>2</sup>

Defendants next argue that even if their conduct was extreme and outrageous, it

did not cause Bassett's distress because Bassett admitted that the stress of bringing this lawsuit was "definitely a big part of [her] emotional distress." Dkt. 89-4 at 44. Although Bassett cannot recover for emotional distress caused by this lawsuit, record evidence supports Bassett's position that Defendants' conduct directly caused her severe emotional distress. Bassett sought mental health counseling in September 2015, long before she filed this suit.

The element of intent presents the hardest inquiry. Defendants' intent was that Bassett never learn of their use of her residence as a pornographic film set. Nonetheless, a factfinder could reasonably conclude that Defendants recklessly disregarded that they were likely to cause Bassett emotional distress. See Nancy P. v. D'Amato, 401 Mass. 516, 517 N.E.2d 824, 827 (1988) (noting in relation to an IIED claim by the mother and brother of a child whom the defendant sexually abused that although "[i]t was [Defendant's] hope that they would never learn of his misconduct[,] . . . it would be a question for the trier of fact whether [Defendant] acted recklessly, indifferent to the likely effect of his conduct on family members who would be apt in time to learn of his outrageous conduct"). Here, there is evidence in the record that Defendants knew that Bassett's family lived on the same private road as her property, were warned that the local press might be aware of their activities, and caused damage to Bassett's property. A reasonable factfinder could conclude that Defendants should have known Bassett was "apt in time to learn of [their] outrageous conduct." See id.

2. By contrast, Defendants' post-lawsuit conduct of allegedly refusing to take down infringing videos and labeling Bassett as homophobic falls into the category of "insults, indignities, threats, annoyances [or] petty op-

pressions" which cannot form the basis of an IIED claim. See Roman v. Tr. of Tufts Coll., 461 Mass. 707, 964 N.E.2d 331, 341 (2012) (citation omitted).

[26] The elements of a claim for negligent infliction of emotional distress (“NIED”) are:

- (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.

Opalenik v. LaBrie, 945 F. Supp. 2d 168, 196 (D. Mass. 2013) (quoting Sullivan v. Bos. Gas Co., 414 Mass. 129, 605 N.E.2d 805, 807 (1993)).

[27, 28] As to NIED, Defendants contest only the element of “physical harm manifested by objective symptomatology.” Under Massachusetts law, for a plaintiff to survive summary judgment on the physical harm requirement, she “must corroborate [her] mental distress claims with enough objective evidence of harm to convince a judge that [her] claims present a sufficient likelihood of genuineness to go to trial.” Sullivan, 605 N.E.2d. at 810. The testimony from Bassett’s therapist that Bassett frequently felt ill and was unable to sleep as a result of these events — leading to diagnoses of anxiety and acute distress disorder — meets that threshold. See id. (favorably citing case where “headaches, insomnia, loss of appetite and muscle tension for several months” was sufficient).

### III. Interference with Contractual Relations

[29] Under Massachusetts law, a plaintiff claiming tortious interference with contractual relations must establish that (1) she “had a contract with a third party,” (2) “which the defendant knowingly induced the third party to break,” (3) the interference “was improper in motive or means,” and (4) the interference caused the plaintiff harm. Sindi v. El-Moslimany, 896 F.3d 1, 23 (1st Cir. 2018) (quoting Abramian v.

Pres. & Fellows of Harvard Coll., 432 Mass. 107, 731 N.E.2d 1075, 1088 (2000)).

[30] A reasonable factfinder could conclude that Defendants induced Spafford to break his contract with Bassett when Jensen, as an agent of Mile High and Blitt, persuaded or coerced Spafford to allow commercial filming on the property, to house cast and crew members, and to sublet the residence to Jensen, all in knowing violation of the lease agreement. Jensen employed “improper means” when she threatened to fire Spafford if he did not breach the lease agreement. See United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 551 N.E.2d 20, 24 (1990) (listing “us[ing] threats” as an example of “improper means”). Finally, Defendants’ interference caused Bassett harm because Bassett terminated the lease two months early in response to Spafford’s breaches, losing rental income.

[31] Bassett also alleges that Defendants interfered with prospective leases because Bassett has declined to seek winter rentals since Defendants’ actions. A plaintiff claiming tortious interference with prospective economic advantages must produce “competent evidence of a specific business relationship, the consummation of which was reasonably likely.” Sindi, 896 F.3d at 25. Here, Bassett concedes that no identifiable prospective lessee has refused to rent her property because of Defendants’ conduct. Bassett’s decision not to seek renters during winter months does not involve a “specific business relationship” with which Defendants interfered. See id. Defendants are entitled to summary judgment on this portion of Bassett’s claim.

Only Defendants’ interference with Bassett and Spafford’s lease agreement survives their motion for summary judgment.

#### IV. Chapter 93A

Chapter 93A provides a private cause of action to two categories of plaintiffs. Section 9, on which Bassett relies in her complaint, provides a private cause of action to “Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person’s use or employment of [unfair or deceptive acts or practices in the conduct of any trade or commerce].” Mass. Gen. Laws ch. 93A §§ 2, 9.

Section 11 provides relief for “[a]ny person who engages in the conduct of any trade or commerce” and suffers a loss of money or property as a result of the use of unfair deceptive acts or practices “by another person who engages in any trade or commerce.” Mass. Gen. Laws ch. 93A § 11. “By their terms . . . the two sections of chapter 93A that create private rights of action are mutually exclusive.” Cont’l Ins. Co. v. Bahnan, 216 F.3d 150, 156 (1st Cir. 2000).

Defendants argue Bassett cannot invoke § 9 because, in the only commercial transaction to which she was a party in this case, she acted as a landlord and so was “engage[d] in the conduct of [ ] trade or commerce.” See *id.* (“[S]ection 9 affords no relief to persons engaged in trade or commerce”).

However, certain landlord-tenant relationships are “of a private nature, and in no way concern[ ] a trade or business” for purposes of Chapter 93A. Billings v. Wilson, 397 Mass. 614, 493 N.E.2d 187, 188 (1986). Significantly, courts have held that in certain circumstances, renting a unit in an owner-occupied residence is of a private nature. Compare *id.* (finding 93A did not apply to landlord-tenant dispute “concerning the rental of a dwelling unit in an owner-occupied two-family house, where the landlord owns no other rental real property” and “his motivation — that of mitigating the economic burden of sup-

porting his home — is of a personal rather than a business nature”) and Young v. Patukonis, 24 Mass.App.Ct. 907, 506 N.E.2d 1164, 1168 (1987) (finding “owner-occupant of a three-family building, whose primary objective is personal” was not subject to suit as someone engaged in trade or commerce under 93A), with Bahnan, 216 F.3d at 156 (holding landlord could not bring suit under § 9 where he “rented out the subject property, [but] himself lived elsewhere, . . . he applied for and received a business owner’s policy, and in the process completed a commercial insurance application in which he described his business as ‘apartments’”).

[32, 33] Bassett never owned any real estate besides the Martha’s Vineyard home at issue and typically lived there when it was not rented. The rentals were driven by “financial necessity due to [her] still outstanding ‘construction’ mortgage, and the high real estate taxes [and] property insurance” on Martha’s Vineyard. Dkt 112-3 at 4. There is no evidence that Bassett rented the home in a business context. The short-term rental of her own home was a private transaction not “undertaken in the ordinary course of a trade or business.” Billings, 493 N.E.2d at 188. Provided Bassett can meet the other requirements of Chapter 93A, like causation, she may proceed under § 9 as a “person . . . who has been injured” by Defendant’s commercial practices. See Mass. Gen. Laws ch. 93A § 9; Aspinall v. Philip Morris Co., Inc., 442 Mass. 381, 813 N.E.2d 476, 491 (2004) (“[C]ausation is a required element of a successful [Chapter] 93A claim.”)

[34] The alleged practice of shooting commercial pornographic films in a leased home without the owner’s consent and in violation of the lease falls within Chapter 93A’s broad definition of an “unfair or deceptive practice.” See Walsh v. TelTech Sys., Inc., 821 F.3d 155, 160 (1st Cir. 2016)

(“Under Chapter 93A, an act or practice is unfair if it falls within at least the penumbra of some common-law, statutory, or other established concept of unfairness; is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to consumers” (cleaned up)); Aspinall, 813 N.E.2d at 486 (“A practice is deceptive, for purposes of [Chapter] 93A, if it could reasonably be found to have caused a person to act differently from the way he or she otherwise would have acted” (cleaned up)).

### V. Civil Conspiracy

[35, 36] In Massachusetts, a civil conspiracy requires (1) “a common design or an agreement . . . between two or more persons to do a wrongful act” and (2) “proof of some tortious act in furtherance of the agreement.” Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1564 (1st Cir. 1994). To establish civil conspiracy, a plaintiff must provide “evidence that the defendants agreed together” to commit an underlying tort. Gutierrez v. Mass. Bay Transp. Auth., 437 Mass. 396, 772 N.E.2d 552, 568 (2002).<sup>3</sup>

[37] Viewing the evidence in Bassett’s favor, Jensen — as an agent of Blitt and Mile High — and Spafford agreed to break the lease agreement and to shoot commercial pornographic videos in Bassett’s home without her consent, giving rise to viable tort claims for interference with contractual relations and infliction of emotional distress.

### VI. Breach of Contract

[38] “To prevail on a claim for breach of contract, a plaintiff must demonstrate that (1) there was an agreement between the parties; (2) the agreement was supported by consideration; (3) the plaintiff was ready, willing, and able to perform his

or her part of the contract; (4) the defendant committed a breach of the contract; and (5) the plaintiff suffered harm as a result.” Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 46 N.E.3d 24, 39 (2016) (numbering added).

[39] The first and most basic element is at issue here. Defendants argue that Bassett’s breach of contract claim must fail because they were not parties to her lease agreement with Spafford, nor was Spafford acting as Defendants’ agent when he signed the lease. The record is undisputed on both counts. Although Defendants may be liable for interfering with the contract between Spafford and Bassett, as discussed above, they cannot be held directly liable for its breach.

### VII. Trespass

[40, 41] The elements of trespass under Massachusetts law are “(1) plaintiff’s actual possession of the property at issue and 2) an intentional and illegal entry by defendant.” Fed. Ins. Co. v. Bos. Water & Sewer Comm’n, 583 F. Supp. 2d 225, 229 (D. Mass. 2008). Defendants argue Bassett’s trespass claim is barred by the statute of limitations, which is three years “after the cause of action accrues.” Mass. Gen. Laws ch. 260, § 2A; Doherty v. Admiral’s Flagship Condo. Tr., 80 Mass.App.Ct. 104, 951 N.E.2d 936, 940 (2011). Under the Massachusetts “discovery rule,” a cause of action accrues “when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.” Bowen v. Eli Lilly Co., 408 Mass. 204, 557 N.E.2d 739, 741 (1990).

Bassett’s trespass claim is based on the allegation that Spafford or another Mile

3. Massachusetts also recognizes a “very limited” form of civil conspiracy where “it is the act of agreeing that constitutes the wrong”

such as “[c]ollusive behavior among market competitors.” Snyder v. Collura, 812 F.3d 46, 52 (1st Cir. 2016). It does not apply here.

High-affiliated party broke into her master bedroom closet in order to disable the carbon monoxide detector within. The locked closet was excluded from a tenant's authorized use in the lease agreement between Spafford and Bassett. Dkt. 89-1 at 7. ("The Landlord reserves the right to the exclusive use of locked storage areas in the closets, basement and attic for storage of her personal property.")

[42] Bassett knew that someone had forcibly opened the closet to disable the alarm on March 15, 2015, when Spafford informed her by email that he had done so. In her return email on March 22, Bassett referred to this as "breaking and entering." While Bassett later learned that the trespass occurred in the midst of filming, the cause of action accrued when she learned there had been an "intentional and illegal entry," not when she learned why. See Federal Insurance, 583 F. Supp. 2d at 229.

Because the cause of action accrued more than three years before Bassett filed suit on March 26, 2018, it is barred by the statute of limitations.<sup>4</sup>

### VIII. Negligence

[43] Bassett's common law negligence claim is also subject to a three-year statute of limitations. Doherty, 951 N.E.2d at 940. To fall within the statute of limitations, it must have accrued no earlier than March 26, 2015.

Bassett's negligence claim is based on physical damage caused by "the negligent actions of one or more of the persons present on her premises while in the employ of the Mile High-associated Defendants." Dkt. 1 ¶ 51. The record reflects that Bassett was aware of physical damage to her home at the latest on March 20,

2015, when her mother and stepmother sent her photos documenting damage. Bassett confirmed that she was aware of damage to her home in her March 22, 2015 email to Spafford.

[44, 45] Bassett contends that her negligence claim nonetheless had not accrued because, at that time, she still did not know the full extent of the damage or how it had been caused. "The plaintiff need not know the full extent of the injury before the statute [of limitations] starts to run." Bowen, 557 N.E.2d at 741. As of March 20, 2015, Bassett was "on notice that someone may have caused her injury" so her negligence claim is barred by the statute of limitations. See id.

### IX. Civil Fraud

[46] To prove fraud in Massachusetts, a plaintiff must show "that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage." Barrett Assocs., Inc. v. Aronson, 346 Mass. 150, 190 N.E.2d 867, 868 (1963) (citation omitted). Bassett argues she detrimentally relied on Spafford's false representations that her home would be used only as a residence and that because the films shot in her home are owned by Mile High, Defendants are liable.

[47] It is undisputed that when Spafford first signed the lease, he intended to use it only as a residence, exactly as he represented to Bassett. Spafford made no misrepresentations to Bassett when she agreed to enter into the lease agreement. Although Jensen arguably misrepresented

4. Even if Bassett's trespass claim were based on the general unauthorized entry of Jensen and Mile High-affiliated parties, Bassett

learned of that entry on March 16, 2015, when her mother encountered "strangers" on the property.

her intentions in seeking to take over the lease from Spafford in March 2015, Bassett declined to extend the lease to Jensen and so did not rely on that misrepresentation to her detriment. Even viewing all the facts in Bassett's favor, Defendants' actions do not meet the elements of fraud under Massachusetts law.

#### X. Civil RICO

[48] To prevail on a civil RICO claim, a plaintiff must prove four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Giuliano v. Fulton, 399 F.3d 381, 386 (1st Cir. 2005) (citation omitted). The "predicate acts" for racketeering activity are determined by reference to the exhaustive list at 18 U.S.C. § 1961(1). Beck v. Prupis, 529 U.S. 494, 497 n.2, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). Here, Bassett alleges predicate acts of "dealing in obscene matter," "mail fraud [or] wire fraud," "retaliating against a witness, victim, or informant," and/or "criminal infringement of a copyright." Dkt. 98 at 24-25.

Bassett is unable to establish the last three of these four predicate acts. Bassett provides no factual basis for the predicate act of "mail fraud [or] wire fraud." Bassett also provides no factual basis for the predicate act of "retaliating against a witness, victim, or informant." The predicate act of retaliation requires that someone "kill," "caus[e] bodily injury," or "damage[] the tangible property" of the witness or attempt to do one of those acts. 18 U.S.C. § 1513. None of that occurred here.

[49-51] As to "criminal infringement of a copyright," that predicate act requires "willful infringement," meaning a defendant specifically intended to violate someone's copyright, rather than simply knew that he was making copies. See United States v. Liu, 731 F.3d 982, 989-90 (9th Cir. 2013). In including this predicate act, "Congress did not intend to . . . subject all

multiple acts of intentional infringement to RICO liability" and instead intended to target "counterfeiting and piracy organizations." CoStar Realty Info., Inc. v. Field, 612 F. Supp. 2d 660, 676 (D. Md. 2009) (citation omitted). Defendants' conduct, even if it proves to constitute civil copyright infringement, does not rise to the level of criminal infringement.

Finally, Bassett asserts that Defendants have committed predicate acts of "dealing in obscene matter," which is a predicate offense if it is "chargeable under State law and punishable by imprisonment for more than one year," 18 U.S.C. § 1961(1)(A), or would be indictable under federal criminal statutes prohibiting the mailing, import, or production for sale of "obscene, lewd, lascivious, or filthy . . . film[s]," 18 U.S.C. §§ 1461-65. On its face, one or more of the federal statutes may apply to Defendants' business, which distributes adult pornographic films for sale, including through the mail. Based on the Court's review, these statutes are now rarely used to prosecute cases involving adult pornography, but they are not dead letter. See Alexander v. United States, 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (considering forfeiture challenges related to prosecution of "adult entertainment" business in Minnesota where obscenity statutes were prosecuted independently and served as predicate for criminal RICO); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (upholding constitutionality of prosecution of adult bookstores under state criminal RICO statute).

[52, 53] Bassett's claim nonetheless fails because the type of injury she suffered from Defendants' predicate acts was limited in scope and time. In order to constitute a "pattern" of racketeering, predicate acts must amount to or pose a threat of continued criminal activity. See

*H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Continuity can be open- or closed-ended. *Id.* at 237, 241, 109 S.Ct. 2893. For “open-ended” continuity, a RICO plaintiff must show “a realistic prospect of continuity over an open-ended period yet to come.” *Feinstein v. Resolution Tr. Corp.*, 942 F.2d 34, 45 (1st Cir. 1991). For “closed-ended” continuity, a plaintiff must show “a series of related predicates extending over a substantial period of time.” *Giuliano v. Fulton*, 399 F.3d 381, 387 (1st Cir. 2005) (quoting *H.J. Inc.*, 492 U.S. at 239, 109 S.Ct. 2893). The First Circuit has “consistently declined to find continuity where the RICO claim concerns a single, narrow scheme targeting few victims.” *Id.* at 390.

[54] In addition, a civil RICO plaintiff must have been “injured . . . by reason of” the predicate RICO acts. 18 U.S.C. § 1964(c). Pursuant to this section, a civil RICO plaintiff must show both but-for and proximate causation. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006). “When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.” *Id.* at 461, 126 S.Ct. 1991.

[55] Bassett was arguably directly injured by Defendants’ predicate act of sending obscene films through the mail because it compounded the reach of Defendants’ alleged civil copyright infringement. But the injuries Bassett has standing to pursue were the result of a “single, narrow scheme” targeting only one victim within a closed timeframe. See *Giuliano*, 399 F.3d at 390.

Defendants unequivocally assert they have removed from distribution all films and photographs within their control that were shot at Bassett’s house. Although Bassett previously contended that she continued to find infringing videos and images

online, she does not maintain this claim in the affidavits she submitted to the summary judgment record. And even if other individuals continue to distribute Defendants’ films without authorization, there is no evidence such unauthorized distribution was part of these Defendants’ scheme. Finally, Bassett’s vague references to other homeowners or copyright holders who suffered similar harm do not transform her highly fact-specific injuries into a RICO scheme.

## XI. Defamation

[56] The four elements of a defamation claim under Massachusetts law are:

- (1) that “[t]he defendant made a statement, concerning the plaintiff, to a third party”;
- (2) that the statement was defamatory such that it “could damage the plaintiff’s reputation in the community”;
- (3) that “[t]he defendant was at fault in making the statement”; and
- (4) that “[t]he statement either caused the plaintiff economic loss . . . or is actionable without proof of economic loss.”

*Shay v. Walters*, 702 F.3d 76, 81 (1st Cir. 2012) (quoting *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 782 N.E.2d 508, 510–11 (Mass. 2003)).

[57–59] Statements of pure opinion are constitutionally protected and cannot be considered “defamatory” because “they are not susceptible of being proved true or false.” *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015). Even if an opinion implies a provably false assertion of fact, that statement will not be actionable if “it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.” *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (quoting *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000)). A speaker is protected from

defamation liability if he “communicates the non-defamatory facts that undergird his opinion.” Piccone, 785 F.3d at 771.

Bassett’s defamation claim is based on statements in a social media post by Jensen and a blog by a Mile High production manager, William Gray aka “Billy Santoro.”<sup>5</sup> Jensen posted on social media that she was “Fighting homophobic and transphobic bullshit,” but made no direct reference to Bassett or this lawsuit. Dkt. 89-25 at 6.

[60] Gray’s blog post explicitly discussed Bassett’s lawsuit and described it as filed by “a viciously homophobic and transphobic woman.” Dkt. 11 ¶ 65. This statement “express[es] a subjective view, . . . rather than claiming to be in possession of objectively verifiable facts.” See Riley, 292 F.3d at 289. Gray’s assessment of Bassett’s character was based on her filing this lawsuit. A reasonable reader would not infer that the author possessed further information not accessible to others. See Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724, 730-31 (1st Cir. 1992). Instead, the assertion that Bassett was motivated by prejudice “reasonably could be understood only as [Gray’s] personal conclusion about the information presented, not as a statement of fact.” Id. at 730.

#### **BASSETT’S MOTION FOR SUMMARY JUDGMENT**

Bassett cross-moves for summary judgment on four counts: copyright infringement, infliction of emotional distress, Chapter 93A and civil conspiracy. In analyzing Bassett’s cross-motion, the Court must view the evidence in the light most favorable to Defendants. See Lawless, 894 F.3d at 21.

Beginning with infliction of emotional distress (Count VII), there remain disput-

ed issues of fact on several elements of Bassett’s IIED claim. A reasonable factfinder could decide that Defendants should not have known Bassett was likely to learn of their activities and suffer distress, as required to meet the intent element. A reasonable factfinder could also determine that Defendants’ actions were not so “utterly intolerable in a civilized community” as to meet the extreme and outrageous element. McGrath, 22 F. Supp. 3d at 70. Bassett did not seek summary judgment as to NIED.

Bassett’s viable claim for civil conspiracy (Count V) relies on the facts underlying her tort claims for infliction of emotional distress and interference with contractual relations. In addition to the disputed issues of fact regarding IIED discussed above, there remain disputed facts on the interference claim, such as whether Jensen knew the terms of Spafford’s lease, whether she threatened Spafford, and whether she was acting as an agent of Jon Blitt and Mile High. Finally, there are disputed issues as to whether Defendants’ acts were unfair and deceptive and caused Bassett injury (Count IV).

Because the Court requires further submissions from Bassett to analyze the de minimis doctrine, it defers ruling on Count IX, the copyright infringement claim.

#### **ORDER**

Defendants’ motion for summary judgment (Dkt. 86) is **ALLOWED** as to Counts I (Breach of Contract), II (Trespass), III (Negligence), VI (Civil Fraud), X (Civil RICO), and XI (Defamation) and **DENIED** as to Counts IV (Chapter 93A), V (Civil Conspiracy), VII (Infliction of Emotional and Mental Distress), and VIII (Interference with Contractual Relations). Bassett’s motion for partial summary judg-

5. Gray is a named co-defendant but has not

filed an appearance in this case.



ment (Dkt. 99) is **DENIED** as to Counts IV, V, and VII.

The Court defers ruling on both parties' motions as to the copyright claim (Count IX) pending Bassett's submission, within 45 days, of a spreadsheet or other analysis that describes exactly how long each copyrighted work appears in each film, with accompanying screenshots for each period of time. The stay on damages discovery remains in place until the Court rules on the copyright claim.

SO ORDERED.



**Maria Alejandra Celimen SAVINO, Julio Cesar Medeiros Neves, and all those similarly situated, Plaintiffs-Petitioners,**

v.

**Steven J. SOUZA, Superintendent of Bristol County House of Correction in his official capacity, Defendant-Respondent.**

**CIVIL ACTION NO. 20-10617-WGY**

United States District Court,  
D. Massachusetts.

Filed 05/12/2020

**Background:** Immigration detainees held at county house of correction brought class action alleging that conditions of confinement amidst COVID-19 pandemic violated their due process rights and seeking release. Detainees filed motion for preliminary injunction.

**Holdings:** The District Court, William G. Young, J., held that:

- (1) detainees held at county house of correction showed likelihood of irreparable harm;
- (2) detainees were likely to succeed on merits; and

- (3) balance of hardships and public interest weighed in favor of issuing preliminary injunction.

Motion granted.

**1. Aliens, Immigration, and Citizenship**  
⌘485

Immigration detainees were permitted to challenge conditions of confinement amidst COVID-19 pandemic in their class action, despite claim that detainees could not make such challenge in § 2241 habeas action; detainees styled action as both habeas petition under § 2241 and complaint seeking declaratory and injunctive relief and, thus, cause of action for equitable relief relating to conditions of confinement was available wholly apart from habeas. 28 U.S.C.A. § 2241.

**2. Injunction** ⌘1073

A preliminary injunction is interim equitable relief whose purpose is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.

**3. Equity** ⌘3

Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.

**4. Aliens, Immigration, and Citizenship**  
⌘485

Statute prohibiting federal courts from granting classwide injunctive relief against operation of certain provisions of Immigration and Nationality Act did not bar district court from granting preliminary injunction requiring COVID-19 testing and halting admissions of new immigration detainees to particular facility; immigration statutes were silent as to COVID-19 testing and halting admission of new detainees, and, to extent that statute providing that Attorney General shall