

1 Workers Local 135 (UFCW Local 135) on personal knowledge as to their own
2 actions and on information and belief as to the actions of others, as follows:

3
4 **JURISDICTION AND VENUE**

5 1. This action arises under section 106A of the Copyright Act of 1976, as
6 amended in 1990 to include the Visual Artists Rights Act (“VARA”). This Court
7 has jurisdiction over matters arising under VARA pursuant to 28 U.S.C. § 1331
8 (federal question actions), 28 U.S.C. § 1338 (a) (exclusive jurisdiction over
9 copyright actions) and 17 U.S.C. § 501 (remedies for copyright infringement
10 include rights under VARA). This Court has supplemental jurisdiction pursuant to
11 28 U.S.C. § 1367 over the state law claims because they arise from the same facts
12 and concern the same subject matter as the federal claims.
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15 2. Defendants are subject to the personal jurisdiction of this Court
16 inasmuch as they are located in California or have purposefully availed themselves
17 of the privileges of doing business in California with regard to the actions alleged
18 herein, and such jurisdiction is reasonable.
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21 3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1),
22 28 U.S.C. § 1391(b)(2) and 28 U.S.C. § 1391(b)(3).
23

24 **PARTIES**

25 4. Plaintiff s Jeanne and John Whelan are individuals residing in San Diego
26 County, California. The Whelans are accomplished muralists and artists who,
27 created the mural known as the “Providing The Feast” that is at issue in this action.
28

1 College, attended classes at Chenards and Art Center, and began a long and
2 successful career in the arts.

3 10. Jeanne and John Whalen have been commissioned to and has created
4 many public works of art including:
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6 a. 1985 Coronado High School, Coronado, CA “Puzzled Pelican”;
7

8 b. 1997 San Diego Airport Commuter Terminal, San Diego, CA “Lucky
9 Spirit”;
10

11 c. 1998 UFCW Union Building, San Diego, CA “Providing the Feast”;
12

13 d. 1999 Valencia Center, Valencia, CA “Harvest Song”
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15 e. 2005 City of Riverside, CA Freeway Underpass Mural Project at Tyler
16 Street.

17 f. Ramona HEART Mural Committee

18 g. Robert Coffin Residence

19 h. The Forum in Encinitas, CA

20 i. La Jolla Village Center

21 j. Harvest Song on Big Five Exterior in Los Angeles

22 k. Bank of America in Pacific Beach, CA

23 l. Cell Phone Towers in Penasquitos, CA

24 m. Tony Roma Restaurant in Hazard Center

25 n. Wells Fargo Bank, Riverside, CA

26 o. San Diego County Library
27
28

1 11. John Whelan has held jobs in teaching, design, and as Art Director for
2 KPBS-Public Television.

3 12. John Whalen has received awards for his murals, most notably the 1997-
4 American Institute of Architect's Orchid Award for the "Lucky Spirit Mural" and
5 the 1999- American Institute of Architect's Orchid Award for the "Providing the
6 Feast Mural" which is the subject of this action.
7

8 13. On information and belief, sometime in November of 2013, Defendant
9 ordered that the "Providing the Feast Mural" be removed from the defendant's
10 wall. Thereafter, defendant either ordered the murals destroyed, or was so grossly
11 negligent in the care and protection of said murals that the murals were so severely
12 damaged and destroyed.
13

14 14. Defendants did not attempt to contact Jeanne or John Whelan, and the
15 Whelans subsequently learned of the destruction of the "Providing the Feast
16 Mural" in early 2014.
17

18 15. Because the mural was destroyed without notice, the Whelans were not
19 able to document the mural further. Nor were they provided the opportunity to
20 speak with the defendant about possibly restoring the mural, removing the mural or
21 garnering support from the community for the mural.
22

23 16. On information and belief, "Providing the Feast Mural" could have been
24 removed from the building without substantial physical defacement, mutilation,
25 alteration or destruction.
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FIRST CAUSE OF ACTION

(Infringement of Right of Integrity (17 U.S.C. § 106A) Against All Defendants)

17. Plaintiffs reallege and reincorporates paragraphs 1-16 above, as though set forth fully herein.

18. Plaintiffs are the authors of a work of visual art entitled “Providing the Feast Mural”. “Providing the Feast Mural” is a work of visual art.

19. On or about November of 2013, Defendants willfully and intentionally distorted, mutilated or otherwise modified “Providing the Feast Mural” in a way that would be prejudicial or harmful to Plaintiffs’ honor and reputation, all in violation of Plaintiff’s right of integrity, as set forth in Title 17, Section 106A(a)(3)(A) and Section 106A(a)(3)(B) of the United States Code. Defendants did so by, among other things, removing and destroying the mural completely.

20. Defendants’ acts were at least grossly negligent. On information and belief, Defendants were on notice as to Plaintiff’s legal right of integrity and its protection under the laws of the United States and California. Plaintiff has not waived any of his rights of integrity under 17 U.S.C. § 106A.

21. “Providing the Feast Mural” could have been removed without the destruction, distortion, mutilation or other modification described in section 106A.

22. None of the Defendants made a diligent or diligent good faith attempt to notify Plaintiff of the intent to remove “Providing the Feast Mural” and/or destroy the mural.

1 23. Defendants' acts described above were willful and intentional and/or
2 grossly negligent. Defendants' desecration, distortion, mutilation and other
3 modification of "Providing the Feast Mural" is the proximate cause of prejudice to
4 Plaintiffs' honor or reputation.
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6 SECOND CAUSE OF ACTION
7 (Intentional Desecration of Fine Art – Cal. Civ. Code § 987(c) (1) Against All
8 Defendants)
9

10 24. Plaintiffs incorporate paragraphs 1-23, above, as though set forth fully
11 herein.
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13 25. As more fully set forth above, Plaintiffs created the "Providing the Feast
14 Mural" a work of fine art and of recognized quality, located at 2001 Camino Del
15 Rio South, San Diego CA.
16

17 26. On or about November of, 2013 Defendants willfully and intentionally
18 defaced, mutilated, altered or destroyed, or authorized the mutilation, alteration or
19 destruction of, "Providing the Feast Mural," in violation of Plaintiffs' right of
20 integrity, as set forth in Cal. Civ. Code § 987. Defendants did so by, among other
21 things, removing and destroying the mural, without notice. Defendants were on
22 notice as to Plaintiff's right of integrity, as protected both under the laws of the
23 United States and California.
24

25 27. Defendants' willful and intentional distortion, mutilation and other
26 modification of Plaintiffs' mural is the proximate cause of damage in an amount
27 to be shown at the time of trial.
28

1 28. In committing the acts described in this complaint, Defendants, and
2 each of them, acted in conscious disregard of the rights of Plaintiffs and without
3 taking advantage of preservation techniques that would have saved the
4 mural for future enjoyment. The conduct of Defendants warrants an assessment of
5 punitive damages to the extent such damages are available against each Defendant,
6 in an amount appropriate to punish Defendants and deter others from engaging in
7 similar wrongful conduct.
8
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10 **THIRD CAUSE OF ACTION**
11 **(Conversion Against All Defendants)**

12 29. Plaintiff incorporates paragraphs 1 - 28 above, as though set forth
13 fully herein.
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15 30. As more fully set forth above, in 1969, Plaintiffs painted the “Providing
16 the Feast Mural” in San Diego, California. Plaintiffs did not relinquish their
17 ownership or title rights to “Providing the Feast Mural.”
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19 31. On or about November of, 2013 Defendants intentionally deprived
20 plaintiff of those rights by ultimately desecrating “Providing the Feast Mural”.
21 Defendants’ acts constitute a permanent deprivation of Plaintiffs’ rights and
22 constitute a conversion under California law.
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24 32. On information and belief, the conduct of Defendants in converting
25 Plaintiffs’ property was carried on by Defendants in conscious disregard of
26 Plaintiffs’ rights. The conduct of Defendants was so malicious, fraudulent and
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1 oppressive as to warrant an assessment of punitive damages, to the extent such
2 damages are available against each Defendant, in an amount appropriate to punish
3 Defendants and deter others from engaging in similar wrongful conduct.
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5 **FOURTH CAUSE OF ACTION**
6 **(Negligence Against All Defendants)**

7 33. Plaintiffs incorporate paragraphs 1-32, above, as though set forth fully
8 herein.

9 34. As more fully set forth above, Plaintiffs are the owners of the above
10 specified rights in the "Providing the Feast Mural".
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12 35. By undertaking work on the mural, Defendants took on a duty of due
13 care to Plaintiffs to preserve the mural.
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15 36. On or about November of 2013, Defendants breached their duty of due
16 care by authorizing the destruction of the mural and painting.
17

18 37. As a foreseeable and proximate result of those acts, Plaintiffs have lost
19 all of their property rights in the "Providing the Feast Mural", and have suffered
20 great harm to their professional reputation.
21

22 **PRAYER FOR RELIEF**

23 **WHEREFORE**, Plaintiff demands trial by jury and prays for judgment in his
24 favor and against Defendants as follows:
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26 a. That the Court order Defendants to pay to damages sufficient to
27 compensate him for all damages resulting from desecration, distortion, mutilation
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1 and alteration of mural, including, but not limited to deprivation of Plaintiff's
2 property rights and damage to his honor and reputation;

3 b. That the Court order Defendants to pay to Plaintiff damages sufficient
4 to compensate him for all damages proximately caused by their negligence;

5 c. That the Court assess punitive damages against Defendants sufficient
6 to punish others from engaging in similar conduct in the future;

7 d. That the Court award plaintiffs Treble Damages for the destruction of the
8 work;

9 e. That the Court award Plaintiff statutorily mandated costs of this action,
10 which include expert fees and attorneys' fees; and

11 f. That the Court grants such other and further relief as the Court deems just
12 and equitable.

13 Dated: December 29, 2014

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19 Respectfully Submitted,

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22 /s/Gastone Bebi
23 GASTONE BEBI
24 Attorney for Plaintiffs
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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Jeanne Whalen and John Whalen

(b) County of Residence of First Listed Plaintiff San Diego (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Gastone Bebi, The Law Offices of Gastone Bebi, Gerald Bodow, 501 West Broadway Suite 1340, San Diego CA 92101, 619-237-0514

DEFENDANTS

United Food and Commercial Workers Local 135

County of Residence of First Listed Defendant San Diego (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'14CV3017 W BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 17 U.S.C. § 106A. Brief description of cause: VIOLATION OF THE VISUAL ARTISTS ACT OF 1990

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/29/2014 SIGNATURE OF ATTORNEY OF RECORD s/Gastone Bebi

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 - Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
 - Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 - Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 - Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.