Appendix 1

Memorandum of Law in Support of
Mystic Seaport Museum, Inc.'s Motion for Summary Judgment

ECF No. 84-1

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ORAL ARGUMENT REQUESTED*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SPARKMAN & STEPHENS HOLDINGS, LLC and SPARKMAN & STEPHENS, LLC, Plaintiffs, v. MYSTIC SEAPORT MUSEUM, INC., Defendant.	Civil Action No. 1:21-cv-29-MSM-LDA

**MEMORANDUM OF LAW IN SUPPORT OF
MYSTIC SEAPORT MUSEUM, INC.'S MOTION FOR SUMMARY JUDGMENT**

[PUBLIC REDACTED VERSION]

* Defendant Mystic Seaport Museum, Inc. respectfully requests oral argument of no more than 30 minutes per side for this Motion.

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Defendant Mystic Seaport Museum, Inc. (the "Museum") respectfully submits this Memorandum of Law in Support of Its Motion for Summary Judgment.[1]

PRELIMINARY STATEMENT

Seven days after he closed on his acquisition of the historic Sparkman & Stephens ("S&S") yacht design firm in August 2018, Plaintiffs' new sole owner Donald Tofias assembled his staff for an introductory conference call. (SOF ¶¶ 1–2, 145, 162.)[2] On that call, Mr. Tofias outlined his new vision for the nearly 100-year-old company: Going forward, "Sparkman & Stephens should be involved in every refit project involving one of our designs." (Exh. AT at -5676; SOF ¶ 163.) In other words, if a current owner of any of the thousands of existing S&S-designed boats wanted to repair, restore, renovate, or dismantle and rebuild their own boat (a common enough occurrence for wooden boats that were designed and built as far back as the 1920s and 30s), S&S wanted a piece of the action.

Mr. Tofias understood that existing S&S boat owners doing refit projects might not want to work with the modern-day S&S. By the end of 2018, S&S employed only a single designer and, in Mr. Tofias' estimation, "was a shell" of its former self, having "been run into the ground" by "previous owners" and a former Chief Designer (the "village idiot"). (Exh. X (Tofias Tr.) at 680:13–681:14.) And so, he conceived a plan to strongarm existing boat owners to retain S&S to do any refit work: "If clients do not want to work with our Naval Architects to complete the project, then [S&S] will charge them a fee commensurate with them having done so in order to access the plans" to their own boats. (Exh. AT at -5676; SOF ¶ 163.) In other words,

[1] Two weeks before filing this Motion, the Museum asked Plaintiffs to consent to narrowing certain issues addressed herein. The Museum also offered to consider narrowing any issues identified by Plaintiffs. Plaintiffs did not respond.

[2] Citations to "SOF" are to the Museum's separate Statement of Undisputed Facts, filed herewith. Citations to "Exh." are to the exhibits to the Declaration of Nathan E. Denning, also filed herewith.

S&S would deny current owners access to the historical plans for their own boats unless those owners agreed to pay S&S a percentage of the cost of any refit work, regardless of who did the work. This new policy would be a big money-maker for S&S, Mr. Tofias reasoned, because owners of classic S&S-designed boats were, as he put it, "the trustafarion grandchildren of the Billionaire Boys Boat Club," who could afford to pay whatever Mr. Tofias wanted to charge for viewing these historical documents—as much as 10% of the cost of any work being done on the boat. (SOF ¶¶ 164–165.)

Mr. Tofias' idea was a revolutionary concept for S&S, which for decades had made historical plans available to owners working on restorations for no or nominal fee. (SOF ¶ 155; *see also* SOF ¶¶ 92–96, 156.) Even for the design of a new boat, S&S's fee had typically been approximately 1.5% of the cost of construction, far less than Mr. Tofias hoped to earn from selling access to historical plans for existing boats. (SOF ¶ 6.)

But to make his plan work, Mr. Tofias needed (and still needs) one thing he does not have—and it's the thing he asks the Court to give him in this case: Mr. Tofias needs to "control[] access" to S&S's historical plans. (Exh. AT at -5676.) This is essential because, if those plans are "freely available" to the public (*see* Exh. A § VI), then owners of existing S&S boats who want to look at the plans for their own boats will have no reason to pay Mr. Tofias' outsized fee.

Standing in the way of Mr. Tofias' control of S&S's historical plans is a 34-year-old Agreement between S&S and the Mystic Seaport Museum, a non-profit, AAM-accredited Museum in Mystic, Connecticut that is widely considered one of the world's foremost maritime museums. (SOF ¶¶ 28–31.) Pursuant to this Agreement between S&S and the Museum (the "1989 Agreement"), S&S donated and transferred ownership of its collection of thousands of

historical plan drawings to the Museum, which also holds more than 130 other collections of historic ships plans. (*See* Exh. A § II; SOF ¶¶ 32, 85–87, 121.) Key to the donation were the wishes of S&S co-founder and namesake Rod Stephens, who in 1989 served on the Museum committee responsible for overseeing its ships plans collections, and the wishes of Rod's older brother and S&S co-founder (and also namesake) Olin Stephens, a preeminent 20th-century yacht designer who also served as a trustee of the Museum for more than 40 years. (SOF ¶¶ 3, 38–39, 41, 43.)

The 1989 Agreement gave the Museum "title" to the plans and also gave the Museum the right (and the obligation) to make the plans available to the general public, including through the sale of copies. (Exh. A §§ II, VI, VII.) In other words, the 1989 Agreement gave the Museum, not S&S, control over the plans and required the Museum to make those plans available to the public.[3] This was almost 30 years before Mr. Tofias arrived at S&S.

From 1989 until Mr. Tofias acquired S&S in 2018, the Museum fulfilled S&S's wishes under the 1989 Agreement by storing the plans and making them available to anyone who was interested. (*See* SOF ¶¶ 111–112.) This included selling copies to people who wanted them for almost any reason—as a memento, as artwork, as a reference for building a model, or for purposes of repairing or restoring an existing S&S-designed boat. (*See, e.g.*, SOF ¶¶ 92–108, 112.) The Museum paid for all of this through donations or at its own expense, offset only in small part by the nominal fee it charged for copies of plans, as permitted by the 1989 Agreement.

[3] These terms are typical when donating to non-profit museums, which hold their collections for the public's benefit and, therefore, (1) are generally unwilling to take on the obligation of paying for the care of items owned by private persons and (2) try to permit public access to their collections (whether through in-person or online visits or, in the case of manuscripts and other paper objects, through the sale of copies at nominal fees). (*See* Exh. DX (American Alliance of Museums, *Public Trust and Accountability Standards*) ("In essence, [public trust] means the public owns the collections, and they should be kept available so the public can study them, enjoy them, and learn from them.").)

(SOF ¶ 117.) The Museum also did all of this with the full awareness of S&S, which was in regular contact with the Museum regarding the collection and which routinely referred people who were looking for copies of old plans to the Museum. (SOF ¶¶ 93–108.) These referrals from S&S to the Museum often involved people who were seeking plans for purposes of restoring an existing S&S boat. (*Id.*) Not once in the course of this almost three-decades-long relationship did anyone from S&S complain about the Museum's performance of any aspect of the 1989 Agreement. (*See, e.g.*, SOF ¶¶ 110, 120.) To the contrary, in 2011, S&S made a further donation to the Museum of thousands of additional historical drawings and related files on the exact same terms as the 1989 Agreement. (SOF ¶ 121.)

Mr. Tofias' pre-acquisition diligence of S&S (done by his prior counsel, the global law firm Reed Smith) revealed both the existence and terms of the 1989 Agreement—that S&S had "given" its historical drawings to the Museum, and that the drawings "***will be available freely for on-site study and inspection***" at the Museum and "***may be reproduced and sold by***" the Museum. (Exh. A §§ VI, VII (emphasis added); *see also* SOF ¶¶ 146–149.) His pre-acquisition diligence also revealed that, of the thousands of plans S&S had created over the past 90 years, "[t]he ***only*** plans covered under copyright registration" were a mere seven drawings created in 1936 for a boat named *Ranger* (which had been designed not just by S&S, but jointly by Olin Stephens and another preeminent yacht designer, W. Starling Burgess, both of whom were identified as authors). (Exh. AW (emphasis added); SOF ¶ 150.) Notwithstanding this knowledge, Mr. Tofias attempted to take control of S&S's historical plans within days after acquiring S&S. (SOF ¶ 159.) Just hours before his August 2018 introductory call with his new staff, Mr. Tofias asked the Museum to "suspend sales" of historical S&S plans. (SOF ¶ 160.) Mr. Tofias understood this request was inconsistent with the 1989 Agreement, reporting to his

staff later that day that "Mystic's reproduction and sale of Sparkman & Stephens plans and IP has been halted ***until a new agreement can be reached with them that is more favorable to our interests***." (<u>Exh. AT</u> at -5675 (emphasis added).)

Mr. Tofias was ultimately unable to negotiate a "new agreement" that was "more favorable to [his] interests." (*Id.*) Among his proposals was one in which the Museum would give away the entire S&S collection to a new "Sparkman & Stephens Museum" Mr. Tofias claimed he planned to create. (SOF ¶ 167.) As then-Museum President Steve White explained in a letter politely declining this proposal, "Mystic Seaport Museum [i] takes very seriously the promises it makes to collection donors," [ii] "will not substitute its will for a donor's intent," and [iii] "remains firmly committed to upholding the promise it made to the former owners of Sparkman & Stephens to house and maintain the original collection of plans at Mystic Seaport Museum for safekeeping and study." (<u>Exh. BX</u>; SOF ¶ 168.)

And so, unable to persuade the Museum to give him what he wanted, Mr. Tofias—acting through his solely owned entities, the Plaintiffs—filed this lawsuit. In it, he claims the Museum allegedly breached the 1989 Agreement (i) by selling copies of plans for use in the restoration of an S&S-designed yacht named *Gesture* to *Gesture*'s owner in May 2018 (prior to Mr. Tofias' acquisition of S&S) (ECF 35 ¶¶ 82–86); (ii) by failing to safekeep the material S&S donated to the Museum (*id.* ¶¶ 77–81); and (iii) by misplacing a log book of Museum sales from the years 2000 to 2004 (*id.* ¶¶ 87–88). He also brings six claims for copyright infringement, each of them premised on the Museum's 2018 sale of *Gesture* plans to *Gesture*'s owner. (*Id.* ¶¶ 13–75.) All of these claims—which contradict the terms of the 1989 Agreement, the testimony of every witness who has actual firsthand knowledge of the parties' Agreement, and the parties' three-decades-long course of dealing—were concocted not for the

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purpose of enforcing the 1989 Agreement, but for the purpose of destroying it. Indeed, the primary relief Mr. Tofias seeks is precisely what he was unable to obtain through negotiation: "***an order cancelling the 1989 Agreement and requiring MSM to return all of Sparkman & Stephens' materials to Plaintiffs***." (*Id.* ¶ 98 (emphasis added).)

With discovery now complete, it is clear Plaintiffs cannot obtain this (or any other relief) because Plaintiffs' claims are legally and factually deficient.

First, Plaintiffs cannot prevail on any of their claims for breach of the 1989 Agreement (Count Seven). Plaintiffs' claim for breach based on the Museum's sale of copies of *Gesture* plans to *Gesture*'s owner is barred by (1) the plain meaning of the contract; (2) the undisputed evidence that the persons who drafted, negotiated, and signed the 1989 Agreement for both parties all had the same plain-meaning understanding of the Agreement's key terms; and (3) the parties' course of dealing over three decades. (Plaintiffs' belated claims based on plan sales relating to the restorations of other boats—to the extent the Court even permits Plaintiffs to add those untimely claims, which it should not (*see* ECF 63)—are barred for the same reasons, among others.)

As for Plaintiffs' claim for breach based on the Museum's alleged failure to safekeep the S&S materials, there is simply no evidence in the record from which the jury could find for Plaintiffs. Indeed, Plaintiffs' own proffered expert on the Museum's storage conditions admitted that she had not identified ***any*** S&S materials that "[she] believe[s] have been damaged while in the care of the museum," eventually conceding that she "may not have enough information" to say "that the Mystic Seaport Museum has done a bad job specifically with the Sparkman & Stephens materials." (Exh. AH (Kinkade Tr.) at 301:7–21, 474:5–12; SOF ¶¶ 197–198.)

And, Plaintiffs' claim for breach based on a misplaced Museum sales notebook from the years 2000 to 2004 (a notebook S&S never requested before 2020 and, even then, requested only for the purposes of this lawsuit) is (1) time barred and (2) substantively meaningless, since all of the sales made during this period were ***to S&S itself*** and, in any event, individual sales invoices for that time period (*i.e.*, the invoices the Museum sent to S&S at the time) have been preserved.

Second, even if Plaintiffs could prove a breach by the Museum (they cannot), the primary remedy Plaintiffs seek in this case—rescission of the 1989 Agreement—is unavailable as a matter of law. Plaintiffs have not even attempted to satisfy any of the legal prerequisites for the extraordinary remedy of rescission based on breach of contract (particularly a contract from more than 30 years ago). Plaintiffs cannot show that any of the alleged breaches were "willful" or "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." Plaintiffs did not promptly declare their intention to rescind upon learning of the alleged breaches; to the contrary, they contend the 1989 Agreement remains in effect to this day. Plaintiffs did not offer to reimburse the Museum for its costs incurred in performing under the Agreement for the past 34 years; to the contrary, when asked whether he would be willing to do so, Mr. Tofias replied: "Absolutely not." (Exh. X (Tofias Tr.) at 682:13–19.) Nor have Plaintiffs shown that a return the status quo as of 34 years ago is remotely possible (surely it is not). The list of legal deficiencies here goes on and on.

Third, Plaintiffs' six copyright claims based on the yacht *Gesture* (Counts One through Six) fail for the same reason Plaintiffs' contract-based copying claims fail—the 1989 Agreement permitted the Museum to sell copies of *Gesture* plans to *Gesture*'s owner. These claims also fail for the more fundamental reason that Plaintiffs cannot prove they own (or ever

owned) any copyrights in the three 1940s drawings at issue, which were commissioned works done for the Fuller family. It is noteworthy that no copyrights were even sought until 2020, by Mr. Tofias in anticipation of this litigation; the actual designers never sought copyright protection for their plans (to the contrary, plans of *Gesture* were published freely in magazine articles in the 1940s (SOF ¶ 21)).

Fourth, Plaintiffs' claims for contributory infringement fail for the independent reason that Plaintiffs have no evidence the Museum induced anyone else to make copies of the three *Gesture* plans.

Finally, Plaintiffs cannot prevail on their quasi-contract claim for unjust enrichment because it is undisputed that a contract governs the parties' relationship and Plaintiffs' claims.

For these reasons, the Court should grant summary judgment to the Museum on Plaintiffs' claims and bring Mr. Tofias' malicious lawsuit to an end.

FACTUAL BACKGROUND

I. 1940s: Howard Fuller Commissions S&S to Design *Gesture*.

More than 80 years ago, Howard Fuller—future President of the Fuller Brush Company—commissioned S&S to design a yacht for him and his family. (SOF ¶¶ 7, 9.) S&S completed the design of the yacht, which was to be named *Gesture*, in 1941. (SOF ¶¶ 10–11.) S&S recorded *Gesture*'s design in a series of hand-drawn naval architecture drawings (SOF ¶ 12), three of which are at issue in this case: First, there was a Lines plan, which showed the shape of *Gesture*'s hull. (SOF ¶ 13; *see* ECF 1-6.) Second, there was a Deck plan, which showed a view of *Gesture*'s exterior deck from above. (SOF ¶ 15; *see* ECF 1-10.) Third, there was a sail plan called the Revised Sail plan, which showed how the boat's sails could be configured. (SOF ¶ 17; *see* ECF 1-8.) (This third drawing was created several years after the

other two, as a modification to the boat's original sail plan for the purposes of racing from Newport to Bermuda (SOF ¶ 19).) In addition to these three, S&S also created numerous other naval architecture drawings of *Gesture* that are not (or are no longer) at issue in this case. (SOF ¶ 20.)

In 1941, workers at the Quincy Adams Boat Yard in Quincy, Massachusetts built *Gesture* to S&S's design. (SOF ¶ 22.) *Gesture* launched in 1941. (SOF ¶ 23.) Contemporary newspaper accounts indicate Howard Fuller had success racing *Gesture* in the 1940s and 50s. (SOF ¶ 24.) In 1959, however, Howard Fuller was killed, along with his wife, in a car accident. (SOF ¶ 25.) Thereafter, *Gesture* was sold, changing hands several times over the years. (SOF ¶ 26.)

Gesture is just one of thousands of yachts designed by S&S since the company's founding in 1929. (SOF ¶ 5.)

II. 1980s: S&S and the Museum Enter Into the 1989 Agreement; S&S Donates Its Original Design Drawings to the Museum.

In the mid-1980s, S&S and the Museum began to discuss the possibility of S&S donating its original design drawings to the Museum. (SOF ¶ 27.) Among S&S's reasons for wanting to make such a donation were the following: First, S&S believed that the original drawings were not being adequately preserved on its own premises, where the drawings had been piled on top of one another in large, open stacks. (SOF ¶¶ 33–34; *see* Exh. CI ("preservation of the plans" was "not being done adequately on the S&S premises"); *see* Exh. EH (image showing plans at S&S circa 1987)). Second, S&S wanted to make these materials available to the general public, as the number of requests for historical plans and other information had become a distraction from their new design work. (SOF ¶ 35.) Third, S&S was in the process of

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downsizing its New York City offices, which meant there would be less space for storage of historical records. (SOF ¶ 36.)

During this same period, the Museum was actively trying to locate and preserve collections of original design drawings made by 20th-century yacht design firms, many of which were "dying." (SOF ¶ 37.) In an effort to avoid the permanent loss of these firms' history, a Museum advisory committee (the "Yachting Committee") made a concerted effort to identify historical design materials that were at risk so that they could be preserved. (SOF ¶¶ 38–39.) One member of that Committee was Rod Stephens, S&S's co-founder, who still owned a stake in S&S. (SOF ¶¶ 3, 41–42.) Rod's brother, Olin, another S&S co-founder, was a trustee of the Museum at the time. (SOF ¶¶ 3, 43.) Both Rod and Olin (by that time in their late 70s) expressed a desire for S&S to donate its original design drawings—drawings that they and those working for them had created—to the Museum so that the drawings could be preserved and made available to the public. (SOF ¶ 44; *see* Exh. C (B. Fuller Decl.) ¶ 4 ("Rod and Olin Stephens told me that they wanted S&S's plans to be donated to the Museum so that the plans would be available to the public.").)

With the Stephens' encouragement and backing, S&S and the Museum began working out the logistics of the donation. (SOF ¶¶ 27, 50.) Because S&S wanted the ability to refer back to historical plans as needed, the parties worked together on developing a protocol for microfilming (which was at that time a state-of-the-art technology) the drawings as they were given to the Museum. (SOF ¶¶ 49–50.) This work began as early as 1984—a full five years before the parties entered into the 1989 Agreement—and continued for years through a process of trial and error. (SOF ¶ 50.)

By 1986, the Museum's microfilming protocol was deemed sufficient, and the parties began working on what would become the 1989 Agreement. (SOF ¶ 51.) In July 1987, Maynard Bray, a member of the Museum's Yachting Committee, prepared and distributed a first draft of what would become the 1989 Agreement. (SOF ¶ 52.) Thereafter, the draft was passed back and forth between the parties and their attorneys via mail, with each turn of the document taking weeks or months. (SOF ¶ 53.) On S&S's side, the negotiations were handled by Alan Gilbert, S&S's Vice President and Chief Engineer. (SOF ¶¶ 45–46, 57.) On the Museum's side, the negotiations were handled by Ben Fuller (no known relation to Howard Fuller), the Museum's Curator. (SOF ¶¶ 47–48, 62–63.)[4]

The parties—Alan Gilbert on behalf of S&S and Ben Fuller on behalf of the Museum—finalized and signed the Agreement in February 1989. Under the terms of the final Agreement, the Museum would become the permanent owner and caretaker of the S&S donation: S&S "agreed to ***donate***" the material, the Museum would "***own*** and maintain" the material, and "***[t]itle to the material will be deemed to pass to [the Museum]***" when it was physically picked up at S&S. (Exh. A §§ preamble, I, II (emphases added).)

The only right "retained by the donor"—*i.e.*, S&S—was one "to grant access to the collection" in three specific situations. (*Id.* § VII.) The first two situations—when there is a request to view "[t]he lines, offsets, and construction drawings for aluminum 12 meters, and

[4] Alan Gilbert and Ben Fuller provided the Museum with sworn declarations in January and February 2023, respectively, setting forth their intentions and understanding regarding the 1989 Agreement, including at the time they negotiated and signed it. (*See* Exh. B (Gilbert Decl.); Exh. C (B. Fuller Decl.).) The Museum promptly produced these declarations to Plaintiffs, who then deposed Messrs. Gilbert and Fuller. At their depositions, both men testified under oath that their declarations were true. (Exh. T (B. Fuller Tr.) at 89:22–90:1 ("**Q.** And when you signed this declaration, Exhibit 585, in your view, everything in here was true. Correct? **A.** I wouldn't have signed it elsewhere – otherwise."); Exh. Q (Gilbert Tr.) at 146:9–12 ("**Q.** Do you believe everything in Exhibit 582, your declaration, is the truth? **A.** Yes.").)

designs produced for the U.S. Government" (*id.* § VI (emphasis in original)) and when there is a request to publish (such as in a book or magazine) drawings of a certain type (*id.* § VII)—are not at issue in this case.

This case is about the third situation, which is described in Section X of the 1989 Agreement, as follows: "Permission ***to build boats*** from any drawings in the S&S collection will be within the sole discretion of S&S who may negotiate directly with the ***builder***, and any inquiries of this nature that come to [the Museum] will be referred to S&S." (*Id.* § X (emphases added).) This language—"to build boats"—was, the parties understood and intended at the time, a reference to the construction of new boats using S&S's old designs, not a reference to the repair or restoration of existing boats by their owners. (SOF ¶ 80.) Mr. Bray, who originally wrote these words, testified that he understood and intended them to mean "[b]uilding brand new boats from scratch." (Exh. AB (Bray Tr.) at 107:1–4.) Mr. Gilbert, S&S's negotiator and signatory, testified that "the phrase 'to build boats' as used in the 1989 Agreement . . . refers to the construction of a new boat, not to the restoration of a boat that had already been built." (Exh. B (Gilbert Decl.) ¶ 10; *see also* Exh. Q (Gilbert Tr.) at 158:3–10 ("to build boats" means "[t]he building of new boats").) And Ben Fuller, the Museum's negotiator and signatory, also testified that "the phrase 'to build boats' as used in the 1989 Agreement . . . refers to the construction of a new boat, not to the restoration of a boat that had already been built." (Exh. C (B. Fuller Decl.) ¶ 9; *see also* Exh. T (B. Fuller Tr.) at 49:1–2 ("[']Permission to build boats['] tells me new construction.").)

The parties implemented this restriction on new boat construction by requiring people who wanted to purchase copies of certain types of plans (called "Category II" plans) to enter into a separate agreement with the Museum "stating that [the plans] will be used

exclusively for study or model-making, that they will not be copied, that they will not be used for ***boatbuilding***, and that they will not be published or passed on to others." (Exh. A § VII (emphasis added).) At the time, the parties understood this language, too, to be a prohibition on the purchaser's use of plans for the construction of new boats using S&S's old designs, not a prohibition on studying plans in the course of repair or restoration of existing S&S boats. (SOF ¶ 82.) Mr. Bray testified that he understood and intended the word "boatbuilding" to mean "new construction," as "[t]hat was the intent all along when this agreement was drafted." (*See* Exh. AB (Bray Tr.) at 36:8–12.) Mr. Gilbert testified that he, too, understood the word "boatbuilding" to mean "new construction." (*See* Exh. Q (Gilbert Tr.) at 103:15–104:7; Exh. B (Gilbert Decl.) ¶ 9 ("boatbuilding" refers to "the construction of a new boat").) And Ben Fuller testified that the word "boatbuilding" was "interchangeable with the phrase 'new boat construction.'" (Exh. T (B. Fuller Tr.) at 93:24–94:8; Exh. C (B. Fuller Decl.) ¶ 8 ("boatbuilding" refers to "the construction of a new boat").)

Other provisions of the final Agreement reinforced the parties' mutual intention to make the donation broadly available to the public, save for the construction of new boats using S&S's old designs. Section VI provides that "[t]he S&S collection at MSM [the Museum] will be available freely for onsite study and inspection." (Exh. A § VI.) Section VII provides that all drawings other than Category II drawings (which could be sold only with a separate agreement between the purchaser and the Museum) "may be reproduced and sold by MSM for research and publication." (*Id.* § VII.) Messrs. Bray, Gilbert, and Ben Fuller all confirmed under oath that obtaining and reviewing original plans in the course of a restoration constituted "research" and "study," as they understood and intended those terms to mean when they prepared and executed the 1989 Agreement. (*See* Exh. AB (Bray Tr.) at 286:6–19 ("**Q.** And, just to make sure I

understand your testimony[,] it's that the word study is broad enough to encompass looking at plans for purposes of doing a restoration? **A.** Yes. That's a nice way of putting it. **Q.** And you were also asked the question about research – the word research. And if I understood your testimony as to the word research that word is also broad enough to encompass looking at plans – **A.** Yep. **Q.** – for purposes of restoration? **A.** Yep."[5]); Exh. B (Gilbert Decl.) ¶ 8 ("My understanding of the words 'study' and 'research' as used in the 1989 Agreement is that those terms include review of plans by anyone who is interested, including someone who is working on a restoration of an S&S boat."), Exh. C (B. Fuller Decl.) ¶ 7 (same); *see also* SOF ¶ 77.) Furthermore, the 1989 Agreement provides that on January 1, 2040, S&S's right to control new construction will revert to the Museum, at which time the Museum's use of the donation will become "unrestricted." (Exh. A § VII; *see* Exh. Q (Gilbert Tr.) at 154:3–156:12.)

As soon as the 1989 Agreement was executed, Mr. Gilbert sent a memorandum to all S&S employees announcing the donation. It read, in part: "It is important for us to note that Sparkman & Stephens has made a very clear and firm commitment to the sport of yachting in making this information ***available to the general public*** through such a prestigious organization as Mystic Seaport Museum." (Exh. AO (emphasis added).)

III. 1990s, 2000s & 2010s: The Parties Perform Under the Agreement for Three Decades.

From 1989 until Mr. Tofias acquired S&S in August 2018, the parties operated under the same mutual understanding that the 1989 Agreement prohibited certain plan sales for new boat construction while permitting sales for restoration or repair (or, for that matter, any other reason). During that time, S&S understood the Museum was making reproductions of S&S

[5] For ease of reading, attorney objections have been omitted from transcript quotations throughout this brief.

plans for inquiring customers seeking to use the plans for every purpose (including for restorations) other than new boat construction. (*See* Exh. W (Johnson Tr.) at 69:7–11 (testifying that it "happens all the time," and that "it is allowed"); *see also* Exh. D at 50–51 (admitting that "prior to Mr. Tofias's acquisition of S&S on August 15, 2018, owners of S&S-designed boats had requested copies of existing plan drawings for their boats directly from S&S, including for purposes of repair, restoration, and re-build of those boats" and that Plaintiffs are "unaware of any instance prior to Mr. Tofias's acquisition . . . in which S&S declined a request from an owner of an S&S-designed boat for copies of the original plan drawings for the owner's boat").) Indeed, it was routine practice for S&S to refer boat owners seeking plans for use in restoration to the Museum. (*See* Exh. W (Johnson Tr.) at 116:14–117:11 (testifying that when boat owners asked for copies of historical plans, including for "purposes of restoration," he "sent them a copy of the plan list" and told them "to contact Mystic Seaport"); Exh. Z (Black Tr.) at 120:4–15 (testifying that he had asked the Museum to "[p]rovid[e] copies of plans" to people "under the understanding of the agreement, while [he] was at S&S" from 2005 to 2018); *see also* SOF ¶ 93–108; Exh. AU (S&S referring an inquiry for plans to be used in "an extensive rebuild of [*Chubasco*'s] bottom" to the Museum); Exh. AV (S&S referring an inquiry for plans to be used in "the restoration of the [*Pilgrim/Revonoc*]" to the Museum); Exh. BO (S&S agreeing with the Museum's proposal to sell plans of *Santana* to a Project Manager working on *Santana*'s "reconstruction"); Exh. CT (S&S referring an inquiry for plans to be used in building a model of *Mah Jong* to the Museum).)

There is no evidence S&S ever accused the Museum of ***any*** breach of the 1989 Agreement (including, but not limited to, any supposed breach based on the Museum's selling plans for purposes of restoration) at any time in the 29 years of performance prior to Mr. Tofias'

acquisition. (SOF ¶ 120; *see also* Exh. U (Abbott Tr.) at 34:12–20 ("**Q.** [P]rior to Mr. Tofias's acquisition in August of 2018, are you aware of anyone actually accusing the Mystic Seaport Museum of breaching the 1989 agreement? **A.** I don't think I am aware of a specific accusation toward Mystic Seaport."); Exh. X (Tofias Tr.) at 339:21–340:2 ("**Q.** Prior to you taking ownership of Sparkman & Stephens, the prior owners never told you Mystic Seaport Museum was in breach of the 1989 agreement; is that correct? **A.** Yes.").) To the contrary, in 2011—after more than 20 years of performance—S&S made a further donation of its remaining plans and materials on the ***exact same terms*** as the 1989 Agreement. (SOF ¶ 121.)

Meanwhile, over that same 29-year-long period, the Museum devoted, at a minimum, thousands of employee and volunteer hours and hundreds of thousands of dollars to the care of the S&S collection. (*See* SOF ¶ 111.) Although the Museum made changes to its facilities over these years—including, in the early 2000s, the construction of a state-of-the-art collections storage building with a fireproof vault (in which the S&S plans are now stored) (SOF ¶¶ 113–16)—the Museum continuously provided a safe home for, and public access to, the S&S material. (SOF ¶¶ 86, 112.)

IV. May 2018: Alexander Mehran, Jr., *Gesture*'s New Owner, Buys Copies of Plans for Use in *Gesture*'s Restoration.

In 2015, *Gesture* was rediscovered in Newport Beach, California. (*See* Exh. AA (Rutherford Tr.) at 24:16–26:4; *see also* SOF ¶ 123.) Jeff Rutherford, a boat builder and restorer, bought *Gesture* with the intention of restoring the boat. (Exh. AA (Rutherford Tr.) at 27:4–29:13; *see also* SOF ¶ 123.) Three years later, in July 2018, Mr. Rutherford sold *Gesture* to Alexander Mehran, Jr., who "thought it was important to get a piece of American history and restore it." (Exh. R (Mehran Tr.) at 28:22–31:23; SOF ¶ 124.)

In connection with his planned restoration, on April 29, 2018, Mr. Mehran contacted S&S's Chief Designer (by that time, one of just two remaining designers) Brendan Abbott, asking if there was a plan archive where he might find the original plans for *Gesture* to use in connection with the restoration. (SOF ¶ 127.) Mr. Abbott replied to Mr. Mehran the following day, writing that S&S "would love the opportunity to assist [Mr. Mehran] in any work," that "All S&S historic plans are archived at Mystic Seaport Museum in Mystic, CT," that "they [the Museum] require a few days notification to have a private plan viewing," and that Mr. Abbott would be "happy to arrange it with [the Museum] to pull the Gesture plans and meet with you there." (Exh. DI at -125; SOF ¶ 128.)

After receiving this response from Mr. Abbott, Mr. Mehran contacted the Museum to request copies of the original plans for *Gesture*. (SOF ¶ 129.) On May 1, 2018, the Museum sent Mr. Mehran the separate two-party agreement he would be required to sign to purchase Category II drawings of *Gesture*. (SOF ¶¶ 134–136.)[6] On May 4, 2018, Mr. Mehran informed Mr. Abbott that the Museum would be "reproducing the plans for" *Gesture* for Mr. Mehran and that he would call Mr. Abbott after he got "that stuff together." (Exh. DI at -125; SOF ¶ 130.) Mr. Abbott replied: "That would be great," and provided his mobile phone number. (Exh. DI at -125.)

On May 7, 2018, Mr. Mehran returned an executed version of the two-party agreement to the Museum. (Exh. BE; *see also* SOF ¶¶ 134–136.) A week later, on May 14, 2018, the Museum sent the *Gesture* plans to Mr. Mehran at his place of business, Sunset Development Company. (SOF ¶ 132.) No one at S&S told the Museum it could not copy plans

[6] Of the three *Gesture* drawings still at issue in this case, only one of them—the Lines plan—is a Category II drawing. (SOF ¶ 14.) The other two—the Deck plan and the Revised Sail plan—are Category I drawings. (SOF ¶¶ 16, 18.)

for Mr. Mehran or otherwise tried to stop the Museum from fulfilling this routine order. (SOF ¶¶ 137–138, *see also* Exh. U (Abbott Tr.) at 191:23–192:4 (testifying that he "understood on May 4th, 2018 that Mystic Seaport was making some copies of original S&S materials for Mr. Mehran"), 192:18–193:10 ("**Q.** Did you communicate with the Mystic Seaport Museum in May of 2018 to tell them you didn't want the museum to make copies of the *Gesture* plans for Mr. Mehran? **A.** I don't believe so."); *see also* Exh. F at 5 ("S&S admits that nobody from S&S expressly told Alexander Mehran, Jr. that Mr. Mehran could not obtain *Gesture* plans from the Museum" and "admits that nobody from S&S expressly told Alexander Mehran, Jr. that Mr. Mehran could only obtain copies of *Gesture* plans from the Museum with S&S's consent").)

V. August 2018: Mr. Tofias Acquires S&S.

Mr. Tofias acquired S&S three months later, on August 15, 2018. (SOF ¶ 145.) Notwithstanding his pre-acquisition diligence revealing that S&S's plans had been donated to the Museum and that the Museum was required to make those plans available to the public (SOF ¶¶ 146–149, 153–154), Mr. Tofias bragged in an October 2018 interview about what he called "the pearl" of his acquisition—the "intellectual properties of over 2600 designs." (Exh. EI at 3.) "I own them now," Mr. Tofias claimed. (*Id.*) But not only did Mr. Tofias know from the outset that he did not "own" and did not control access to S&S's historical plans, he also knew that S&S had a long history of providing historical plans to customers for no or nominal charge, a practice he derided as "stupid, stupid, stupid, Forrest Gump stupid." (Exh. X (Tofias Tr.) at 408:25–409:9; SOF ¶¶ 153–155, 158; *see also* Exh. X (Tofias Tr.) at 582:16–583:1 ("**Q.** Are you aware of what Bruce Johnson's policies were with regard to making plans available to Sparkman & Stephens owners? **A.** My understanding was that he was a terrible manager. He sat in the corner on his computer and regularly sent out, at no charge, plans of Sparkman & Stephens

boats. Absolute stupidity. But Bruce Johnson is an idiot with a silver spoon, so he didn't care.").)

Appointing himself "the new sheriff in town" (Exh. X (Tofias Tr.) at 45:10–11), Mr. Tofias moved quickly to revoke public access to the S&S material. He deleted the S&S-owned web blog, on which S&S had freely published the plan drawings for approximately 1,200 S&S boats (including plans for *Gesture*). (SOF ¶¶ 156–157, 169; Exh. EG (S&S blog entry for *Gesture*)[7].) And he asked that ***all*** plan inquiries received by the Museum be re-routed through him while the parties discussed his request for potential modifications to the 1989 Agreement. (SOF ¶ 160; *see also* Exh. BY (Mr. Tofias "has asked us [the Museum] to suspend sales at the moment until a new agreement has been negotiated"); Exh. AT ("Mystic's reproduction and sale of Sparkman & Stephens plans and IP has been halted until a new agreement can be reached with them that is more favorable to our [Plaintiffs'] interests").) The Museum obliged, believing that accommodating Mr. Tofias' request for a temporary hiatus in plan sales would get its

[7] In addition, S&S's blog had entries publicly posting plans for each of the other four boats Plaintiffs have belatedly sought to include in this case. (*See* SOF ¶ 157; Exh. EA; Exh. EB; Exh. EC; Exh. ED.) Notwithstanding Mr. Tofias' attempt to delete them, these posts are still publicly available for free (donation suggested) via the Internet Archive. *See*

- https://web.archive.org/web/20170430023455/http://sparkmanstephens.blogspot.com/2010/08/design-59-schooner-santana.html (*Santana*);
- https://web.archive.org/web/20180204145507/http://sparkmanstephens.blogspot.com/2011/03/chubasco-design-255.html (*Chubasco*);
- https://web.archive.org/web/20180803084545/http://sparkmanstephens.blogspot.com/2011/10/design-1261-mah-jong.html (*Mah Jong*); and
- https://web.archive.org/web/20170426213539/http://sparkmanstephens.blogspot.com/2011/04/design-602-revonoc.html (*Pilgrim/Revonoc*).

In fact, a complete list of the more than 3,000 entries at one time comprising the S&S blog (including links to archived versions of practically ***all of*** those entries) is still publicly available for free at:

- https://web.archive.org/web/*/http:/sparkmanstephens.blogspot.com/*.

relationship with S&S's latest owner started off on the right foot. (SOF ¶ 161; *see also* <u>Exh. AE</u> (O'Pecko Tr.) at 241:16–242:12 (Mr. Tofias "was somebody we [the Museum] hoped to work with closely"; the Museum hoped for "actually having a good partnership," "[i]nstead of angering somebody that is coming in as a new partner").)

Over the months that followed, Mr. Tofias' behavior became more and more unreasonable. By November 2018, Mr. Tofias was routinely denying requests from the public to access the S&S material at the Museum, regardless of purpose, unless the requestor agreed to pay extraordinary fees. (*See, e.g.*, <u>Exh. BV</u>; <u>Exh. EE</u> (compilation of responses to customer inquiries), at Tab 9 ("Firm at $█████"), Tab 13 ("No plans are ever given away. We are trying to monetize the intellectual property (IP) that we own."), Tab 15 ("Absolutely Not. !!!!!!!!"), Tab 16 ("The answer is No. dt"), Tab 19 ("The answer will always be 'No'. On the other hand 'money talks, nobody walks. $█████. maybe. Dt.").) On February 19, 2019, Mr. Tofias went further, demanding that the Museum cut off in-person access to anyone who conceivably might want to view the S&S collection:

> We are extremely concerned about who might be gaining access to plans and technical files in Mystic. Please be advised that Brooke Parish, Jason Black, Wesley Bemus, Rex Herbert, John Reuter, Michael Philips, Ken Lieby, Bruce Johnson, David Pedrick and many others we will list for you this week and beyond, absolutely NEVER should have any access to any 'Sparkman & Stephens' plans or technical files, with [sic] the express written permission of Donald Tofias or Brendan Abbott. Further no owner, builder, architect, model maker, yacht captain, yacht manager, other yacht specialists, and interior decorators shall never [sic] have access to the 'Sparkman & Stephens' "IP" and technical files without the express written permission of Donald Tofias and/or Brendan Abbott.

(<u>Exh. BU</u>; SOF ¶ 172.)

Mr. Tofias also began taking an interest in identifying individuals who had purchased copies of S&S material from the Museum in the past. (SOF ¶ 173; *see also* <u>Exh. BP</u>

("When we talked to Donald Tofias last week, he was interested in getting as much information as possible about who we sent plans to. He is going to get me a list.").) Mr. Tofias took a particular interest in Mr. Mehran, whom Mr. Tofias falsely and disparagingly referred to as "an Iranian terrorist." (SOF ¶¶ 175–176.) At one point, Mr. Tofias even threatened to sue Mr. Mehran "for restoring [his] own boat without using [Plaintiffs'] services." (SOF ¶ 177.)

Meanwhile, without telling the Museum, Mr. Tofias directed Plaintiffs to file for copyrights on five drawings of *Gesture*, approximately 80 years after those drawings were created and two years after the Museum sold copies of the drawings to Mr. Mehran. (SOF ¶ 178; *see also* ECF 1.2, 1.5, 1.7, 1.9, 1.11.) This was only the third time in S&S's almost 100-year history that it had tried to file for copyrights on the drawings of one of its boats. (SOF ¶ 179.)

VI. January 2021: Mr. Tofias, Acting Through S&S, Files This Lawsuit.

On January 15, 2021, Mr. Tofias—acting through his solely owned entities, the Plaintiffs—filed this lawsuit. (ECF 1.) He alleged the Museum's sale of copies of the *Gesture* plans to Mr. Mehran was a breach of the 1989 Agreement and an act of copyright infringement. (*Id.* ¶¶ 20, 27, 34, 41, 48.) In addition, perhaps sensing his copying claims were weak, Mr. Tofias concocted two additional claims—one alleging the Museum had not "properly preserved" the S&S material, and the other alleging the Museum had not maintained a log of its sales during the years 2000 to 2004 (between 14 and 18 years before he acquired S&S). (*Id.* ¶¶ 11, 12.)

Not long after filing suit, Mr. Tofias left a voicemail for Paul O'Pecko, the Museum's Vice President of Collections and a 39-year Museum employee who had hoped to have a "good partnership" with Mr. Tofias. (Exh. AE (O'Pecko Tr.) at 241:16–242:12.) In it, Mr. Tofias left no doubt about his aims in this case:

> Paul! Donald Tofias here. How are you? And a belated Happy New Year. Listen, we can play games all day long. I know you got your fancy thousand dollar an hour law firm down there in

> New Haven or Hartford, uh, I requested the plans and want the plans and stop bullshitting. OK. ***We're going to destroy you. Do you understand that? Those are my plans*** and you are not taking care of them and you let them fly out the back door for a couple of bucks. So, you want to be in court, we'll be in court. We'll be in court as soon as we can get there.

(Exh. BF (emphasis added); *see also* SOF ¶ 181.)

LEGAL STANDARD

I. Summary Judgment

"The court shall grant summary judgment if the movant shows that 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); *see White v. Hewlett Packard Enter. Co.*, 985 F.3d 61, 68 (1st Cir. 2021) ("Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). "A fact is material" only if it "has the potential to affect the outcome of the suit." *Abernathy v. Anderson*, 984 F.3rd 1, 5 (1st Cir. 2020). And a dispute is "genuine" only if "a reasonable jury could resolve the point in favor of the nonmoving party." *Staples v. Gerry*, 923 F.3d 7, 12–13 (1st Cir. 2019). A moving party "is to be spared a trial" on any issues for which it satisfies Rule 56(a)'s two conditions. *Brader v. Biogen Inc.*, 983 F.3d 39, 53 (1st Cir. 2020).

The Museum, as the moving party, "bears the initial responsibility of informing the district court of the basis for its motion." *Feliciano-Muñoz v. Rebarber-Ocasio*, 970 F.3d 53, 61 (1st Cir. 2020). Once the Museum has done so, the burden shifts to Plaintiffs, "with respect to each issue on which [they] ha[ve] the burden of proof, to demonstrate that a trier of fact reasonably could find in [their] favor." *Woodward v. Emulex Corp.*, 714 F.3d 632, 637 (1st Cir. 2013). Plaintiffs may not "rest upon mere allegation[s] or denials of [their] pleading," but must

instead "present affirmative evidence" and "set forth specific facts showing that there is a genuine issue for trial." *Thomas v. Harrington*, 909 F.3d 483, 490 (1st Cir. 2018); *see also Bellone v. Southwick-Tolland Reg'l Sch. Dist.*, 748 F.3d 418, 424 (1st Cir. 2014) ("Unsupported allegations and speculation do not demonstrate . . . the existence of a genuine issue of material fact sufficient to defeat summary judgment."). Even where "elusive concepts such as . . . intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Deutsche Bank Nat'l Tr. Co. as Tr. for Soundview Home Loan Tr. 2006-OPT5, Asset-Backed Certificates, Series 2006-OPT5 v. Wagner*, 2023 WL 1070210, at *2 (D.R.I. Jan. 27, 2023).

II. Choice of Law

Plaintiffs' state-law claims—for breach of contract (Count Seven), including Plaintiffs' request for rescission of the 1989 Agreement (ECF 35 ¶¶ 76–93), and for unjust enrichment (Count Eight)—are governed by New York law.

"In deciding which state's substantive law applies, federal courts follow the forum state's choice of law rules." *McKee v. Cosby*, 874 F.3d 54, 59 (1st Cir. 2017). Courts in Rhode Island have recognized two "frameworks" for determining which state's law applies to contract claims: (1) the place-of-contracting framework (sometimes called the "*lex loci contractus* doctrine") and (2) the interest-weighing framework. *Burt v. Bd. of Trs. of Univ. of R.I.*, 523 F. Supp. 3d 214, 227 (D.R.I. 2021). Under either framework, New York law governs the parties' contractual relationship in this case.

Under the place-of-contracting framework, "the applicable law is that of the state where the 'last act that forms the contract is performed.'" *Drummond v. Siemens Indus., Inc.*, 2019 WL 6318111, at *2 (D.R.I. Nov. 26, 2019); *see DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 484 (R.I. 2004) ("Rhode Island's conflict-of-laws doctrine provides that the law of the

state where the contract was executed governs."); *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 80 (1st Cir. 2009) (affirming the district court's use of the place-of-contracting test because it "remains good law"). It is undisputed that the "last act that form[ed]" the 1989 Agreement was Alan Gilbert's signing it, which he did in New York City, New York. (SOF ¶¶ 59, 66; Exh. AB (Bray Tr.) at 148:24–149:6.) New York law therefore applies under the place-of-contracting framework.

The result is the same under the alternative interest-weighing framework, which seeks to determine "the state that has the most significant relationship to the transaction," and considers: "(a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties." *Commerce Park Realty, LLC v. HR2-A Corp.*, 253 A.3d 1258, 1271 (R.I. 2021). Each of these interests points to New York law. First, the 1989 Agreement was executed in New York when S&S signed it. (SOF ¶¶ 55–56, 59.) Second, the 1989 Agreement was negotiated on S&S's behalf in New York. (*See, e.g.*, SOF ¶¶ 45–46, 58; Exh. BI at -1423 (denoting S&S's address as "79 Madison Avenue, New York, N.Y. 10016-7802").) Third, performance of the 1989 Agreement began in New York because title to the donation passed to the Museum in New York when the Museum picked up the donated material at S&S's New York office. (*See* SOF ¶ 85; Exh. A § II.) Fourth, the subject matter of the 1989 Agreement—the S&S material—was in New York before it was donated to the Museum. (*See* SOF ¶¶ 4, 34, 85.) Finally, S&S was incorporated and headquartered in New York not only when the 1989 Agreement was executed, but for the vast majority of the parties' decades-long contractual relationship. (*See* SOF ¶ 4; Exh. W

(Johnson Tr.) at 45:3–9 (testifying S&S moved from New York to Connecticut during his tenure as President, which began in 2009).)

Accordingly, whichever of Rhode Island's two frameworks the Court uses, New York law governs the parties' contractual relationship, including Plaintiffs' claims for breach of contract and unjust enrichment, as well as Plaintiffs' request for rescission of the 1989 Agreement. *See Saab 1 Enters., Inc. v. Colbea Enters., LLC*, 2014 WL 808153, at *3 (D.R.I. Feb. 28, 2014) (law governing parties' agreement also governed request to rescind the agreement).[8]

For similar reasons, Plaintiffs' state-law claims are subject to New York's statute of limitations. Here, too, this Court "looks to Rhode Island law to determine" which state's statute of limitations to apply, *see Moore v. Metro. Grp. Prop. & Cas. Ins. Co.*, 2010 WL

[8] Plaintiffs have contended that Connecticut law governs the parties' contractual relationship. (Exh. H at 17–18 ("S&S generally believes that Connecticut law is likely to govern the 1989 Agreement.").) Under the place-of-contracting framework, Plaintiffs are simply incorrect for the reasons set forth above. Under the interest-weighing framework, it is true that, after New York, Connecticut has the second-most significant relationship to the 1989 Agreement. The Museum was incorporated and has resided in Connecticut since its inception (*see* SOF ¶¶ 29, 86), the 1989 Agreement was partially negotiated and partially executed in Connecticut (SOF ¶¶ 29, 60, 61, 65), the Museum's performance under the 1989 Agreement has been almost entirely in Connecticut (SOF ¶¶ 86, 87; Exh. I at 3–6; Exh. J at 2), and the S&S material has been located in Connecticut since the Museum picked up that material from S&S in New York (SOF ¶¶ 86, 87). Thus, at a minimum, both New York and Connecticut have significant relationships to the 1989 Agreement. Either way, for purposes of this Motion, any differences between New York and Connecticut law are immaterial. Accordingly, although this Memorandum generally cites New York law, the result under Connecticut law would be the same.

By contrast, none of the interest-weighing factors point to Rhode Island. The 1989 Agreement was neither negotiated nor signed here; the Museum has neither resided nor performed under the 1989 Agreement here; and S&S has mostly performed elsewhere. Although Plaintiffs have stated Rhode Island law "might" apply because "Rhode Island is where this case was brought, where the Court sits, and where S&S is currently based" (Exh. H at 18), even Plaintiffs stop short of contending that these facts (the first two of which are really just one fact), standing alone, can displace the significant interests New York and Connecticut have in the contract at issue. *See, e.g.*, *Alifax Holding SpA v. Alcor Sci. Inc.*, 357 F. Supp. 3d 147, 157 (D.R.I. 2019).

5069856, at *4 (D.R.I. Dec. 6, 2010), and must choose the state "that bears the ***most significant relationship*** to the event and the parties," *Webster Bank, Nat'l Ass'n v. Rosenbaum*, 268 A.3d 556, 560 (R.I. 2022) (emphasis in original). For the reasons set forth above, New York bears the most significant relationship to this lawsuit. S&S negotiated the 1989 Agreement in New York (*see, e.g.*, SOF ¶¶ 45–46, 58), S&S executed the 1989 Agreement in New York (SOF ¶¶ 55–56, 59), and ownership and title to the S&S material transferred to the Museum in New York (SOF ¶ 85).

Moreover, at the time the parties executed the 1989 Agreement, it was predictable that New York law would govern the parties' Agreement. *See Pinkham v. Collyer Insulated Wire Co.*, 1994 WL 385375, at *10 (D.R.I. Mar. 2, 1994) ("parties [should] know at the time they enter the transaction that a particular result will follow regardless of where an incident occurs"). Although Plaintiffs now reside in Rhode Island, that fact alone is insufficient for Rhode Island's statute of limitations to apply and, moreover, Plaintiffs became residents only after the parties had been in the at-issue contractual relationship for decades. *See Moore*, 2010 WL 5069856, at *6 (Rhode Island's statute of limitations did not apply to contract claim where "the only connection of this case to Rhode Island is that [one set of parties] are Rhode Island corporations which have their headquarters in Rhode Island"); *Martin v. Law Offices Howard Lee Schiff, P.C.*, 2012 WL 7037743, at *4 (D.R.I. Dec. 10, 2012) (Rhode Island's statute of limitations did not apply to a contract where "Plaintiff's subsequent residency here provides the only tangible tie to this forum"); *see also* R.I. Gen. Laws § 9-1-18 (borrowing statute barring "a cause of action accruing outside this state which was barred by limitation or otherwise in the state, territory, or country in which the cause of action arose while he or she resided in the state"). Accordingly, New York's statute of limitations applies to Plaintiffs' state-law claims.

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Plaintiffs' six remaining claims under the Copyright Act (Counts One to Six) are governed by federal law.

ARGUMENT

I. Plaintiffs Cannot Prevail on Any of Their Claims for Breach of Contract.

Plaintiffs' claims for breach of contract are based on (i) the Museum's copying and sale of S&S drawings to the owners of existing S&S boats for purposes of restoring their own boats, (ii) the Museum's alleged failure to store the S&S collection properly, and (iii) the Museum's alleged failure to maintain a "log" of all sales of S&S drawings for the years 2000 to 2004. (ECF 35 ¶¶ 10–12.) Plaintiffs cannot prevail on any of these claims for the following reasons:

First, Plaintiffs cannot prevail on their copying claims because the Museum's actions were permitted by the 1989 Agreement. This is true whether the Court accepts the plain meaning of the 1989 Agreement (which unambiguously permits the Museum to sell copies of S&S drawings for purposes of restoration) or instead looks at the undisputed extrinsic evidence of both parties' intentions at the time of contracting (which establishes beyond doubt that both the Museum and S&S always intended that the Museum could sell copies of plans to existing boat owners for purposes of restoration). (*See infra* Arg. § I.A.)

Second, Plaintiffs cannot prevail on their storage claim because the only "evidence" Plaintiffs ever offered in support of this claim was the testimony of Plaintiffs' proffered expert on "Museum standards of care," Valerie Kinkade, who was forced to concede at her deposition that she had not visited the Museum for purposes of preparing her report, had never seen the S&S collection, had not identified any damage to any part of the S&S collection, could not say whether the Museum had done its best to care for the S&S collection, and,

ultimately, could not say whether or not the Museum had done a good or bad job in caring for the S&S collection. (*See infra* Arg. § I.B.)

Third, Plaintiffs cannot prevail on their logs claim because it is indisputable that, contrary to Plaintiffs' allegation, the Museum did in fact record every sale of a copy of an S&S drawing during the years 2000 to 2004. In addition, S&S already knew about all of these sales because, prior to 2007, ***all of the Museum's sales were to S&S***. In any event, given the six-year statute of limitations, this claim is untimely by more than a decade. (*See infra* Arg. § I.C.)

A. *Plaintiffs Cannot Prevail on Their Copying Claims Because, Among Other Reasons, the 1989 Agreement Permits the Museum to Sell Copies of S&S Drawings for Restorations.*

Much of this case turns on the answer to a single question: Did the 1989 Agreement permit the Museum to sell copies of S&S drawings to boat owners for purposes of restoring their existing S&S boats? The answer to this question requires interpretation of the 1989 Agreement. "When interpreting a contract under New York law, our primary objective is to give effect to the intent of the parties as revealed by the language of their agreement." *In re Motors Liquidation Co.*, 943 F.3d 125, 131 (2d Cir. 2019); *accord PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135, 145 (Conn. 2004) ("[A] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction."). New York courts interpret contracts using the "normal rules of contract interpretation: words and phrases should be given their plain meaning and a contract should be construed so as to give full meaning and effect to all of its provisions." *Orchard Hill Master Fund Ltd. v. SBA Commc'ns Corp.*, 830 F.3d 152, 156–157 (2d Cir. 2016); *accord RIDE, Inc. v. APS Tech., Inc.*, 2015 WL 9581728, at *4 (D. Conn. Dec. 30, 2015) ("[T]he words of the contract must be given their natural and ordinary meaning.").

Under New York law, unambiguous contracts are interpreted as a matter of law. *See L. Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F. 3d 458, 463 (2d Cir. 2010) (affirming summary judgment where contract terms were unambiguous and thus "appropriate for interpretation as a matter of law"); *accord RIDE*, 2015 WL 9581728, at *4 ("[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law."). Likewise, "[t]he question of whether the language of a contract is clear or ambiguous is a question of law to be decided by the court." *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000); *accord McNichols v. GEICO Gen. Ins. Co.*, 2021 WL 3079783, at *3 (D. Conn. July 21, 2021) (whether contract terms are unambiguous is a question of law).

A contract is ambiguous when the "language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). "The language of a contract is not made ambiguous simply because the parties urge different interpretations. Nor does ambiguity exist where one party's view strains the contract language beyond its reasonable and ordinary meaning." *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992); *accord RIDE*, 2015 WL 9581728, at *4 ("[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous.").

"If an ambiguity is found, the court may accept any available extrinsic evidence to ascertain ***the meaning intended by the parties during the formation of the contract***." *In re Motors*, 943 F.3d at 131 (emphasis added); *accord Foothills Forest Prod., LLC v. Stahl*, 2006 WL 932105, at *2 (Conn. Super. Ct. Mar. 21, 2006) (recognizing the "well-established rule that

in the event of ambiguity, a court may look at extrinsic evidence such as oral negotiations, course of dealing, and surrounding circumstances in order to determine ***the intent of the parties***" (emphasis added)). Even where ambiguities exist, summary judgment is appropriate if "the ambiguities may be resolved through extrinsic evidence that is itself capable of only one interpretation, or where there is no extrinsic evidence that would support a resolution of these ambiguities in favor of the nonmoving party's case." *Disney Enters., Inc. v. Finanz St. Honore, B.V.*, 2016 WL 7174650, at *5 (E.D.N.Y. Dec. 7, 2016). Courts can and should grant summary judgment even as to ambiguous contracts where the extrinsic evidence leaves no genuine dispute regarding the meaning intended by the parties at the formation of the contract. *See id.* at *5–6 (granting summary judgment where one party offered extrinsic evidence comprising "testimony from three witnesses involved in the Agreement's drafting," "all of whom confirm[ed] that the parties reached [the same] general understanding" in making the contract); *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 121 (2d Cir. 2010) (affirming a partial grant of summary judgment on the meaning of an ambiguous contract provision given the "strength of the extrinsic evidence" and the "lack of any evidence as to a contrary intent"); *TNT USA Inc. v. DHL Exp. (USA), Inc.*, 2012 WL 601452, at *7 (E.D.N.Y. Feb. 23, 2012) (granting summary judgment on contract liability because extrinsic evidence allowed for only one interpretation of the agreement); *accord Garfield v. Mason*, 1993 WL 451465, at *2 (Conn. Super. Ct. Oct. 22, 1993) (granting summary judgment in favor of a defendant where "the intent of the parties" regarding a contract was established, in part, by an affidavit submitted by the defendant).

In this case, it ultimately makes no difference whether the Court interprets the relevant contractual language in accordance with its plain meaning, or instead resorts to extrinsic evidence to resolve any perceived ambiguity. This is because the Museum's plain-meaning

interpretation of the text of the 1989 Agreement is the only reasonable interpretation, and the ***only*** extrinsic evidence of the parties' actual intentions in making the 1989 Agreement—sworn declarations and testimony from (1) the person who drafted the Agreement; (2) the person who negotiated and signed the Agreement for the Museum; and (3) the person who negotiated and signed the Agreement ***for S&S***—is unanimous: ***Everyone agrees that the 1989 Agreement was intended to permit the Museum to make sales of copies of drawings for purposes of restoration.*** Thus, whether the Court relies solely on the plain meaning of the text the 1989 Agreement or instead resorts to extrinsic evidence, the answer is the same: The 1989 Agreement permitted the Museum to sell copies of S&S drawings to boat owners for purposes of restoring their S&S boats.

1. The 1989 Agreement Unambiguously Permits the Museum to Sell Copies of S&S Plans for Purposes of Restoration.

The parties made their intentions known in the words they chose for their Agreement. Under the 1989 Agreement, the Museum is required to sell copies of the S&S drawings to members of the public unless, with certain other exceptions not relevant here, the purchaser seeks "[p]ermission ***to build boats***." (*See* Exh. A § X ("Permission ***to build boats*** from any drawings in the S&S collection will be within the sole discretion of S&S who may negotiate directly with the ***builder***, and any inquiries of this nature that come to MSM will be referred to S&S." (emphases added)).) So long as a purchaser is not seeking "[p]ermission to build boats," the Museum may (and must) reproduce and sell copies of Category I drawings "for research" and may (and must) sell copies of Category II drawings "under a legally-binding, two-party agreement stating that they will be used exclusively ***for study*** or model-making, that they will not be copied, that they ***will not be used for boatbuilding***, and that they will not be published or passed onto others." (*Id.* § VII (emphases added).)

To find the plain meaning of words in a contract, New York courts look to dictionaries. *See Goldman Sachs Lending Partners, LLC v. High River Ltd. P'ship*, 2011 WL 6989894, at *6 (N.Y. Sup. Ct. 2011) ("Plain and ordinary means as defined by a dictionary."); *Nat'l Util. Serv., Inc. v. Tiffany & Co.*, 2009 WL 755292, at *7 (S.D.N.Y. Mar. 20, 2009) (rejecting defendant's proposed definition of a contract term and finding "no ambiguity with regard to [the disputed] term's usage in the contract" because the "contract, considered as a whole, affirms [the] broad definition" found in *Webster's Third New International Dictionary*); *accord Washington v. Meachum*, 680 A.2d 262, 274 n.14 (Conn. 1996) ("In order to ascertain the plain meaning of a word, it is appropriate to look to the dictionary definition.").

The plain meaning of the phrase "to build boats" in Section X of the 1989 Agreement is that it refers to the creation of new boats, not the restoration or repair of existing boats that were built sometime in the past. "To build" means "to form by ordering and uniting materials by gradual means into a composite whole." (*Build*, Exh. DT (*Webster's Dictionary*); *see also Build*, Exh. DU (*Oxford English Dictionary*) ("to erect, construct (any work of masonry), and by extension, to construct by fitting together of separate parts; chiefly with reference to structures of considerable size, as a ship or boat, a carriage, an organ, a steam engine (not e.g. a watch or piano)"); *Build*, Exh. DV (*American Heritage Dictionary*) ("To form by combining materials or parts; construct.").) "Boats" are a type of "vessel" or "craft." (*See Boat*, Exh. DT (*Webster's Dictionary*) ("a small vessel with or without a deck propelled by oars or paddles or by sail or power"); *Boat*, Exh. DU (*Oxford English Dictionary*) ("a small, typically open vessel for travelling over water, propelled by oars, sails, an engine, etc."); *Boat*, Exh. DV (*American Heritage Dictionary*) ("A relatively small, usually open craft of a size that might be carried aboard a ship.").) Thus, "to build boats" means, simply enough, "to form" or "to

construct" a certain type of "vessel" or "craft" by "ordering and uniting materials by gradual means into a composite whole." In other words, one must "form" a boat—the "composite whole" vessel or craft—where previously there was none. This is also the most natural reading of the phrase, "to build [something]." Whether that "[something]" is a house, a shed, a boat, or a sandcastle, the phrase denotes the creation of something that did not exist before.

Likewise, the terms "research" and "study" have plain meanings that do not require extrinsic evidence to interpret. Both are broad terms meaning "to acquire knowledge." (*See Research*, Exh. DT (*Webster's Dictionary*) ("studious inquiry or examination"); *Research*, Exh. DU (*Oxford English Dictionary*) ("to investigate or study closely"); *Research*, Exh. DV (*American Heritage Dictionary*) ("Careful study of a given subject, field, or problem, undertaken to discover facts or principles."); *Study*, Exh. DT (*Webster's Dictionary*) ("the application of the mental faculties to the acquisition of knowledge"); *Study*, Exh. DU (*Oxford English Dictionary*) ("the application of the mind to the acquisition of learning"); *Study*, Exh. DV (*American Heritage Dictionary*) ("The effort to acquire knowledge, as by reading, observation, or research.").) Thus, giving these words their ordinary meaning, as one must, *Goldman Sachs*, 2011 WL 6989894, at *6, the consultation of historical boat plans for the purpose of learning how an old boat was built fits comfortably within the definitions of "research" and "study." Even Plaintiffs' Chief Designer, Brendan Abbott, acknowledged this is so. (*See* Exh. U (Abbott Tr.) at 76:4–78:3 ("**Q.** Do you ever look at old boat plans as part of your ***research***? **A.** Yes. **Q.** For what purpose do you look at old boat plans as part of your ***research***? **A.** . . . [F]rom a construction perspective, it's always interesting to go back and see how things were built. Especially, you know, in the case of some of these rebuilds, going back, some of the old materials aren't available anymore. . . . **Q.** And one of the reasons you might go back and look at

old plans as part of your ***research*** is for purposes of working on a design, is that fair? **A.** Yes. **Q.** And that design might be a brand new design? **A.** Yes. **Q.** And it might be some modifications you're making in the course of a restoration to an existing boat? **A.** Yes." (emphases added)); *id.* at 80:16–20 ("**Q.** And do you ever ***study*** the original plans as part of your work as a designer on one of those restorations? **A.** Yeah." (emphasis added)).)

Because plain meaning and common sense require the phrase "to build boats" to refer to the construction of boats that do not already exist, and because plain meaning and common sense also require the words "research" and "study" to include looking at historical documents for purposes of gathering historical information (including when that information ultimately facilitates the restoration or repair of an old boat, and also, for that matter, when it does not), the plain language of the 1989 Agreement permits the Museum's sales of copies of plans for use in restorations. And, for this reason alone, all of Plaintiffs' claims based on the Museum's sale of copies of plans to existing owners for use in restorations, whether based in contract (Count Seven) or copyright (Counts One to Six), fail as a matter of law.

Plaintiffs, who seem to understand that the 1989 Agreement's operative language in Section X ("to build boats") means the construction of new boats, have spent the majority of this case ignoring those words and instead pointing to a different word—"boatbuilding"—from a different part of the contract, Section VII. Among other things, Section VII requires the Museum to enter into a separate "two-party agreement" with any purchaser who buys Category II plans. (*See* <u>Exh. A</u> § VII.) This separate agreement must include a provision that the plans "will not be used for boatbuilding," among other requirements. (*See id.* § VII.) Plaintiffs (and their retained expert, Andy Tyska) say that the term "boatbuilding" in Section VII means a lot more than "to build boats"—it "means restoration activities, refit, sometimes repair, as well as new

boatbuilding." (Exh. S (Tyska Tr.) at 6:16–18.) Thus, Plaintiffs' argument goes, the 1989 Agreement prohibits any sale for any purpose that could fall within Plaintiffs' broad understanding of the term "boatbuilding."

But Section VII's use of the word "boatbuilding" does not help Plaintiffs, for at least four reasons: *First*, the plain meaning of the word "boatbuilding" conflicts with the broader definition Plaintiffs urge the Court to adopt. "Boatbuilding" is "the occupation or industry of ***building boats***." (*Boatbuilding*, Exh. DU (*Oxford English Dictionary*) (emphasis added); *see Boatbuilding*, Exh. DT (*Webster's Dictionary*) ("the occupation or industry of building boats"); *see also Boatbuilder*, Exh. DW (*Merriam-Webster Dictionary*) ("one that builds boats").) In other words, "boatbuilding" means "to build boats," the same as what is written in Section X.

Second, Section VII explicitly equates the term "boatbuilding" with "***boats being built***," which, of course, has the same plain meaning as "to build boats" in Section X. (*See* Exh. A § VII (identifying "boats being built without S&S agreement" as an example of a "[t]hird party violation of plan restrictions").) Reading the 1989 Agreement as a whole, as one must, shows that the only reasonable interpretation of Section VII ("boatbuilding") is that it helps to implement the restriction in Section X ("to build boats"). *See Orchard Hill*, 830 F.3d at 157 (interpretation of a contract should "give full meaning and effect to all of [the contract's] provisions").

Third, the 1989 Agreement's division of drawings into two categories—Category I and Category II, only the latter of which requires the purchaser to sign a special use agreement prohibiting "boatbuilding" (Exh. A § VII)—reinforces that "boatbuilding" means new boat construction. Both Category I and Category II plans can be useful in making a repair or performing a restoration. But Category I plans are, on their own, insufficient to build a new

boat. (*See* Exh. X (Tofias Tr.) at 245:8–19, 706:2–5, 708:19–709:12, 709:22–710:3.) Among other things, certain information critical to building the entire boat (such as the shape of the boat's hull) is found only in Category II plans. (*See* Exh. W (Johnson Tr.) at 70:11–15; Exh. X (Tofias Tr.) at 709:11–12; Exh. AD (Benjamin Tr.) at 40:20–41:16.) Thus, by making Category II plans subject to a special use agreement, the 1989 Agreement provides additional protection against the risk a purchaser will use S&S's historical plans to build a new boat. (*Accord* SOF ¶¶ 75, 82.) The fact that the 1989 Agreement specially protects the plans that are necessary to build a new boat with an agreement that prohibits the use of those plans for "boatbuilding" reinforces that "boatbuilding" means new boat construction.

Fourth, Plaintiffs' reading of the word "boatbuilding" to mean something broader than "to build boats" creates an incongruity between Sections VII and X of the 1989 Agreement. By its terms, the "boatbuilding" language in Section VII applies only to Category II drawings, not Category I drawings. By contrast, the prohibition on sales "to build boats" in Section X applies to Category I and II drawings equally. Thus, if "boatbuilding" in Section VII means something broader than "to build boats" in Section X, then that would mean the rules on selling plans for refit, restoration, and repair (all of which Plaintiffs say falls within the definition of "boatbuilding") would be different for Category II drawings (such sales would be prohibited) and Category I drawings (such sales would not be prohibited). But nothing in the text or structure of the 1989 Agreement remotely suggests this was the result the parties were trying to achieve. To the contrary, the only provision of the 1989 Agreement that contains an actual restriction on the Museum's sale of plans "for building purposes" (Exh. A § XII)—Section X—treats all drawings equally. (*See* Exh. A § X (applying to "***any*** drawings in the S&S collection" (emphasis added)).) Tellingly, not even Plaintiffs believe that Category I and II drawings should

be treated differently from one another when it comes to restorations; to the contrary, Plaintiffs contend in this case that the Museum's sales of copies of the *Gesture* Deck and Revised Sail plans (both Category I drawings) were as much breaches of the 1989 Agreement as was its sale of the *Gesture* Lines plan (a Category II drawing). In other words, Plaintiffs' interpretation of the Agreement—that the Agreement's prohibition on restorations derives from a "boatbuilding" restriction that, by its terms, applies only to Category II plans—is not even consistent with their theory of the case, which is that neither Category II ***nor Category I*** drawings may be used for restoration.

What is more, Plaintiffs' retained "expert" on this subject, Andy Tyska, readily conceded at his deposition that "boatbuilding" ***can*** mean new boat construction, *i.e.*, can mean the same thing as "to build boats." (*See* Exh. S (Tyska Tr.) at 58:23–59:3 (**Q.** At least one reasonable interpretation of the term 'boatbuilding' is that it refers to a new construction, correct? **A.** Correct.").) Thus, far from supporting Plaintiffs' contention that "boatbuilding" ***must be*** interpreted as including "restoration activities, refit, sometimes repair, as well as new boatbuilding," Mr. Tyska agrees that "boatbuilding" could indeed "mean[] new construction; ***not restoration***." (*Id.* at 6:16–9:20 (emphasis added).)[9] This testimony shows, at a minimum, that there is an accepted definition of the word "boatbuilding" that is consistent with the phrase "to build boats" in the operative language of the 1989 Agreement (language Plaintiffs are apparently

[9] Mr. Tyska offers two opinions in this case. The first is about the meaning of the term "boatbuilding" in what he calls the "marine services industry." (Exh. K (Tyska Rep.) ¶ 1.) The second is about the meaning of the term "boatbuilding" in the 1989 Agreement itself. (*Id.*) This latter opinion is improper, as it seeks to usurp the Court's role in interpreting the language of the contract. *See Richards v. Direct Energy Servs., LLC*, 915 F.3d 88, 98 (2d Cir. 2019) (affirming summary judgment and finding expert opinion irrelevant "even if [the expert] had opined on [the contract's] legal meaning because 'the construction of unambiguous contract terms is strictly a judicial function'"). Nonetheless, Mr. Tyska's admission that people in the "marine services industry" use the term "boatbuilding" to mean "new boat construction" may be considered in the event the Court finds it necessary to consider extrinsic evidence.

so concerned about that they did not even ask Mr. Tyska to offer an opinion on its meaning (*see id.* at 23:7–10 ("**Q.** You're not offering an opinion on the words 'to build boats,' correct? **A.** Correct.")).[10] Given this, the only reasonable conclusion to draw is that the parties meant the same thing—constructing new boats—in both places. *Brad H. v. City of N.Y.*, 951 N.E.2d 743, 746 (N.Y. 2011) (a "contract must be considered as a whole").

For each of these reasons, the Court can and should conclude (1) that consulting historical plans for purposes of restoring a classic boat falls within the plain meaning of "research" and "study"; (2) that consulting historical plans for purposes of restoring an existing boat does not offend the plain meaning of a prohibition against using those plans "to build boats"; and (3) that the plain language of the 1989 Agreement therefore permits the Museum to sell copies of historical plans to boat owners who wish to consult those plans for purposes of restoring their own boats. These conclusions are, on their own, sufficient to grant summary judgment to the Museum on all of Plaintiffs' copying contract claims (*see infra* Arg. § I.A.3.) and on all of Plaintiffs' copyright claims (*see infra* Arg. § III.).

2. Even If the 1989 Agreement Were Found to Be Ambiguous as a Matter of Law, the Undisputed Extrinsic Evidence Conclusively Establishes the Parties' Mutual Intention that the Museum Be Permitted to Sell Copies of Plans for Purposes of Restoration.

Even if there were any doubt about whether the plain language of the 1989 Agreement permits plan sales for purposes of restoration, a review of the extrinsic evidence of

[10] Even though Plaintiffs never asked, Mr. Tyska nonetheless admitted at his deposition that people use the phrase "to build boats" to refer to the construction of new boats. (SOF ¶ 81; *see* Exh. S (Tyska Tr.) at 60:4–8 ("**Q.** The phrase, 'to build boats' would be one of the ways you could refer to new boat construction? **A.** Yes."); *id.* at 99:3–8 ("**Q.** In your view, is it reasonable for someone to describe new construction as 'to build boats'? **A.** People do, and I do." (clarification omitted)); *id.* at 101:4–8 ("**Q.** [I]f someone is working on a new construction and uses the phrase 'to build boats' to refer to it, that makes sense to you, right? **A.** Yes.").) In other words, ***even Plaintiffs' retained expert agrees that a natural reading of the operative text in Section X of the 1989 Agreement permits the Museum to sell plans for purposes of restoration.***

the parties' intentions at the time of contract formation proves beyond doubt that the Museum is permitted to sell copies of plans to owners for purposes of restoring their own boats. Thus, whether the Court relies solely on the words the parties chose in their Agreement, or instead looks to extrinsic evidence, the answer is the same, and the Court should grant summary judgment to the Museum on Plaintiffs' copying-related claims (both contract and copyright). *See N.Y. Marine*, 599 F.3d at 121 (affirming a partial grant of summary judgment on the meaning of an ambiguous contract provision given the "strength of the extrinsic evidence" and the "lack of any evidence as to a contrary intent"); *accord Garfield*, 1993 WL 451465, at *2 (granting summary judgment after considering extrinsic evidence provided by the defendant establishing the parties' intent, where the plaintiff "ha[d] not submitted any evidence" to the contrary).

Here, the extrinsic evidence of the "intent of the parties in creating" the 1989 Agreement, *Disney Enters.*, 2016 WL 7174650, at *4, is entirely one-sided and conclusive: ***Everyone*** involved in the creation of the 1989 Agreement has given a sworn declaration and/or testified that the 1989 Agreement was intended to permit, not prohibit, the sale of copies of plans for purposes of restoration.

The 1989 Agreement's primary author, Maynard Bray, testified that during the drafting of the 1989 Agreement, all parties understood that S&S was trying to protect itself "against illegal new construction, not restoration, new construction; and there's a huge difference between the two." (Exh. AB (Bray Tr.) at 34:13–35:13; *see also* SOF ¶ 75–76.) Accordingly, Mr. Bray agreed, "no restriction, ultimately, was put on the use of plans for restoration." (Exh. AB (Bray Tr.) at 88:15–19; *see also* SOF ¶ 75–76.)

The two men who negotiated and signed the 1989 Agreement testified to having the same intention. (*See, e.g.*, SOF ¶¶ 74–77, 80, 82.) The negotiator and signatory for S&S,

Alan Gilbert, gave a sworn declaration stating that a "primary purpose of the 1989 donation from S&S's perspective was to make sure that S&S's historical plans would be ***made available to the general public***" and that "the 1989 Agreement gives [the Museum] the right to sell copies of plans for restorations, but not new boat construction, without seeking S&S's permission." (Exh. B (Gilbert Decl.) ¶¶ 6, 12 (emphasis added).) Likewise, the negotiator and signatory for the Museum, Ben Fuller, gave a sworn declaration stating that "[t]he overriding intention of this agreement was to ensure preservation of the collection, ***to make it accessible to anyone for study (including as needed for restoration)*** and model building, and to make sure that S&S controlled and benefited from any new boat construction." (Exh. C (B. Fuller Decl.) ¶¶ 5, 11 (emphasis added).)

No other person who was involved in the creation of the 1989 Agreement has testified in this case. There is simply no evidence of any intention contrary to the one sworn to by ***all*** of the witnesses who were actually involved in the formation of the contract.

What is more, these witnesses who were actually involved in the creation of the 1989 Agreement have explained precisely how the language of the 1989 Agreement effectuated their intent. To each of them, the words "study" and "research" were broad terms that encompassed review of plans for purposes of working on a restoration of an S&S boat. (SOF ¶ 77; *see also* Exh. AB (Bray Tr.) at 286:6–11 (testifying that "the word study is broad enough to encompass looking at plans for purposes of doing a restoration"), *id.* at 286:12–19 (testifying that "the word research" is "also broad enough to encompass looking at plans . . . for purposes of restoration"); Exh. B (Gilbert Decl.) ¶ 8 ("My understanding of the words 'study' and 'research' as used in the 1989 Agreement is that those terms include review of plans by anyone who is

interested, including someone who is working on a restoration of an S&S boat."); Exh. C (B. Fuller Decl.) ¶ 7 (same).)

Furthermore, Section X's restriction on the use of plans "to build boats" was, to the people involved in the creation of the 1989 Agreement, a clear reference to new boat construction. (SOF ¶ 80; *see also* Exh. AB (Bray Tr.) at 107:1–4 ("**Q.** What did the words, to build boats, mean in your mind? **A.** Building brand new boats from scratch."); Exh. B (Gilbert Decl.) ¶ 10 ("My understanding of the phrase 'to build boats' as used in the 1989 Agreement is that it refers to the construction of a new boat, not to the restoration of a boat that had already been built."); Exh. C (B. Fuller Decl.) ¶ 9 (same); Exh. T (B. Fuller Tr.) at 49:10–17 ("At least as far as I am concerned, [']permission to build boats to be referred to S&S['] says to me new construction."), 93:20–23 ("**Q.** . . . In your view, does – the phrase 'to build boats,' is that synonymous with the construction of a new boat? **A.** Yes.).)

Likewise, Section VII's use of the word "boatbuilding" was, for the people involved in the creation of the 1989 Agreement, also a reference to new boat construction. (SOF ¶ 82; *see also* Exh. AB (Bray Tr.) at 36:6–12 ("**Q.** . . . And I want to ask you about that word Boat Building in particular since you're one of the drafters of this Agreement, what does that word Boat Building mean? **A.** New construction. That was the intent all along when this Agreement was drafted."); Exh. B (Gilbert Decl.) ¶ 9 ("My understanding of the word 'boatbuilding' as used in the 1989 Agreement is that it refers to the construction of a new boat, not to the restoration of a boat that had already been built."); Exh. C (B. Fuller Decl.) ¶ 8 (same); Exh. Q (Gilbert Tr.) at 103:23–104:7 ("**Q.** So what's that understanding based on? **A.** That's based on my understanding of the word boat building or the attempt at the word boat building. It's for new construction. **Q.** Has it always meant that in your view? **A.** In my mind, yes.").)

Thus, every witness who was involved in the creation of the 1989 Agreement for either the Museum or S&S—the ***only*** people who can offer competent evidence on "***the meaning intended by the parties during the formation of the contract***," *In re Motors*, 943 F.3d at 131 (emphasis added)—agree that the 1989 Agreement permits the Museum to sell copies of plans for purposes of restorations. Plaintiffs' contrary positions in this case—fabricated long after the fact—are, as Mr. Bray agreed, nothing but inventions of Mr. Tofias, "created for purposes of this litigation." (Exh. AB (Bray Tr.) at 290:11–22.)

Moreover, the consistent and undisputed testimony of every witness involved in the creation of the 1989 Agreement is further supported by additional extrinsic evidence supporting the Museum's interpretation of the 1989 Agreement. *First*, there is a three-decades-long course of dealing between the parties during which the Museum, with S&S's knowledge (and frequently upon S&S's referral), sold copies of plans for purposes of restoration. *See Ward v. Nat'l Geographic Soc'y*, 284 F. App'x 822, 823–24 (2d Cir. 2008) (affirming grant of summary judgment based on evidence of a course of dealing contradicting plaintiffs' interpretation); *accord Ass'n Res., Inc. v. Wall*, 2 A.3d 873, 897 n.35 (Conn. 2010) ("course of dealing may be used to aid in [the] interpretation" of an ambiguous contact). Bruce Johnson, who worked at S&S from 1989 to 1994 and again from 1999 to 2012, eventually becoming S&S's President and part-owner (SOF ¶ 88), testified that the ability to obtain copies of plans for use in restorations of S&S boats was "one of the services that Sparkman & Stephens provided to the owners of the vessels it had designed." (Exh. W (Johnson Tr.) at 121:22–122:2; SOF ¶ 92.) Consistent with that, Mr. Johnson confirmed that the Museum was permitted to sell plans for restoration, that it "happens all the time," and that "it is allowed." (Exh. W (Johnson Tr.) at 69:1–11; SOF ¶¶ 92–110.) Similarly, Jason Black, the former Chief Operating Officer of S&S,

testified that S&S's "standard" response to customer inquiries for historic plans was to say that the plans "are archived at Mystic Seaport Museum and copies can be purchased directly through them." (Exh. Z (Black Tr.) at 207:17–208:11; SOF ¶¶ 89, 93.) This was true even when customers made requests to use historical plans for "refit works" (Exh. Z (Black Tr.) at 205:2–206:18), "retrofit" (*id.* at 207:10–209:2), "deconstructing" (*id.* at 215:4–217:20), "rebuild" (*id.* at 215:4–217:20), and "restoration" (*id.* at 222:7–223:17). (*See* SOF ¶ 95.)

Incredibly, Plaintiffs themselves have offered some of the most compelling evidence that the parties' course of dealing was always to permit plan sales by the Museum for purposes of restoration: Every one of the sales Plaintiffs have belatedly tried to bring into this case as an additional breach of contract—the ones based on *Santana*, *Chubasco*, *Pilgrim/Revonoc*, and *Mah Jong*—were the result of a referral from S&S to the Museum. (SOF ¶¶ 97–108; *see also* Exh. AU at -8764 (S&S referring an inquiry for plans to be used in "an extensive rebuild of [*Chubasco*'s] bottom" to the Museum); Exh. AV at -8855 (S&S referring an inquiry for plans to be used in "the restoration of the [*Pilgrim/Revonoc*]" to the Museum); Exh. BS (S&S agreeing with the Museum's proposal to sell plans of Santana to a Project Manager working on *Santana*'s "reconstruction"); Exh. CT (S&S referring an inquiry for plans to be used in building a model of *Mah Jong* to the Museum).)

What is more, the form "two-party agreement" S&S drafted and asked the Museum to use when selling Category II plans (*see* Exh. A § VII) further demonstrates that the parties never intended for the Agreement to prohibit anything other than new boat construction. Far from prohibiting everything falling under Plaintiffs' amorphous definition of "boatbuilding," the two-party agreement ***S&S prepared*** did not use the term "boatbuilding" at all; rather, it provided that "***no yacht may be built*** from the plan" (*see* Exh. BN at -1587 (emphasis added)),

which cannot seriously be interpreted to mean anything other than new boat construction. All of this course-of-dealing evidence, which covers ***three decades*** prior to Mr. Tofias' arrival, is independently sufficient for the Court to resolve any ambiguity in the 1989 Agreement regarding restorations in favor of the Museum. *Ward*, 284 F. App'x at 823–24.

Second, the three-decades-long lack of objections by S&S to the Museum's sale of copies of drawings to boat owners for purposes of restorations further reinforces that the 1989 Agreement permitted this behavior. *See id.* at 824 ("We have extended the course-of-dealings doctrine to include evidence that a party has ratified terms by failing to object, provided there is an indication of the common knowledge and understanding of the parties."); *accord Wall*, 2 A.3d at 897 n.35. Notwithstanding S&S's awareness that the Museum was selling plans for purposes of restoration "all the time" (Exh. W (Johnson Tr.) at 69:1–11; SOF ¶¶ 92–96), there is no evidence anywhere in the record that anyone from S&S ***ever*** objected to this practice in any communication with anyone at the Museum until after Mr. Tofias arrived in 2018 (SOF ¶ 110). Bruce Johnson testified that he never accused or had any basis to accuse the Museum of breaching any agreement. (*See* Exh. W (Johnson Tr.) at 11:15–23; *see also id.* at 16:20–20:5 (testifying that the Museum never breached the 1989 Agreement).) Similarly, Brendan Abbott—a ***current*** S&S employee—testified that he was unaware of S&S ever accusing the Museum of breaching the 1989 Agreement before August 2018. (*See* Exh. U (Abbott Tr.) at 34:10–20 ("I don't think I am aware of a specific accusation toward Mystic Seaport.").) The same was true of former S&S owner Brooke Parish. (*See* Exh. V (Parish Tr.) at 98:8–21 ("**Q.** Generally, if an S&S boat owner reached out to S&S for some access to their design plans, is that something you would give them access to? **A.** We always wanted to encourage, you know, the proper and accurate restoration of classic S&S boats and to the extent that it would be helpful in that, we

wanted to be involved. **Q.** But if you were not involved, you didn't try to stop the renovation, correct? **A.** I don't believe we had any grounds to.").) Mr. Tofias himself testified that prior owners "proverbially missed the boat on how they were handling requests for the plans" and that, upon his arrival in August 2018 "there [was] a new sheriff in town" who was changing the prior "liberal" policy of "giving away plans." (Exh. X (Tofias Tr.) at 38:17–21, 44:3–45:21.)[11]

Third, the very documents through which Mr. Tofias purchased S&S further reinforce that the 1989 Agreement permitted the Museum to make plan sales for purposes of restoration. The purchase agreement S&S's prior owners and Mr. Tofias executed in August 2018 expressly stated that there had been no breaches of the 1989 Agreement at the time of Mr. Tofias' acquisition. (*See* Exh. AN at -3863–3964, § 6.15(a)(iii) (warranting that S&S was unaware of any "violation or breach" of, or any basis "to cancel, terminate, or modify," any material agreement); *id.* at -3953, Schedule 6.15 (identifying the 1989 Agreement as a material agreement); *see also* SOF ¶ 120.) This agreement was signed by S&S's prior owners (*i.e.*, the people who sold S&S to Mr. Tofias), including not only Brooke Parish and Jason Black, but also ***Brendan Abbott***, who by that time had known for months that the Museum had provided Mr. Mehran with copies of plans for purposes of restoring *Gesture*. (*See* Exh. AN at -3873–3877.) Everywhere one looks there is evidence that the parties to the 1989 Agreement had, prior to Mr. Tofias' acquisition, always understood that the Agreement permitted the Museum to make plan sales for purposes of restoration.

Against this overwhelming evidence of the parties' intentions—both at the time of contracting and for three decades thereafter—Plaintiffs offer nothing of relevance. The only

[11] Ironically, Mr. Tofias himself was a beneficiary of this policy. In May 2018, three months prior to Mr. Tofias' acquisition of S&S, Brendan Abbott sent Mr. Tofias a free copy of a plan for the S&S boat *Aurora*, which was owned by one of Mr. Tofias' acquaintances. (SOF ¶ 109.)

"evidence" they offer are their ***personal*** views that the 1989 Agreement means something different than what everyone else ***knew and knows and have sworn it means***. But the personal views of Mr. Tofias, Mr. Abbott (whose purported views are inconsistent with what he told Mr. Tofias prior to the sale of S&S), and their paid expert Mr. Tyska tell us nothing about ***the meaning intended by the parties during the formation of the contract***." *In re Motors*, 943 F.3d at 131 (emphasis added); *accord Garfield*, 1993 WL 451465, at *2.

Confirming the irrelevance of their opinions, Mr. Tofias (Plaintiffs' 30(b)(6) representative) and his expert Mr. Tyska not only testified that they ***do not know*** what was intended by the 1989 Agreement, but they also testified that they ***do not care***. (*See* Exh. X (Tofias Tr.) at 309:17–19 ("**Q.** Okay, and what Maynard [Bray] says about the agreement, that doesn't matter to you, does it? . . . **A.** I have put no weight in anything that Jesus, Jesus, Jesus Maynard Bray has to say about the subject. This is the first I've heard that he drafted it."), 201:22–202:7 ("**Q.** Do you know what boat – Ben Fuller thought the term 'boatbuilding' means? **A.** I never asked him, so I don't know. **Q.** Do you know what [Alan] Gilbert thought the term 'boatbuilding' meant? **A.** I told you already and I testified to the fact that I've never spoken with Mr. Gilbert."); Exh. S (Tyska Tr.) at 34:20–25 ("**Q.** Beyond the words that you see on the page, you don't have any additional knowledge of what the person who drafted the 1989 Agreement intended for it to mean? **A.** That's correct."), 56:10–14 ("**Q.** So it doesn't matter to you at all what the people who actually wrote and signed the agreement intended those words to mean? **A.** Correct."); SOF ¶¶ 71, 73.) And Mr. Abbott, too, conceded that he had no knowledge of the parties' original intent. (SOF ¶ 72.) Furthermore, Mr. Tofias entirely disregards the parties' three-decades-long course of dealing prior to his arrival, chalking all of it up to his predecessors' "stupidity." (*See, e.g.*, Exh. X (Tofias Tr.) at 579:14–580:18 (Mr. Parish), 582:16–583:2 (Mr.

Johnson), 652:8–653:9 (Mr. Parish and Mr. Black).) He even went so far as to testify that "if Mystic sold plans to owners of S&S boats for renovations but the prior owners of S&S knew that Mystic was doing this," he "still believe[s] [he is] entitled to sue Mystic for those sales." (Exh. X (Tofias Tr.) at 205:21–206:3.)

In sum, Plaintiffs haven't just failed to offer any evidence of contrary intent at the time of contract formation, they haven't even tried. Thus, none of the extrinsic "evidence" Plaintiffs offer in support of their interpretation of the 1989 Agreement has any relevance, and it can all safely be ignored. *See Bjerke v. Bjerke*, 892 N.Y.S.2d 646, 648 (N.Y. App. Div. 2010) ("any ambiguity in the agreement's terms must be resolved by determining the parties' intent at the time of contracting"; "[t]he determinative issue . . . is the parties' intent at the time the stipulation was entered"); *accord Garfield*, 1993 WL 451465, at *2.

Because there is overwhelming evidence that the parties intended for the Museum to sell copies of plans to existing boat owners for purposes of restoration, and because Plaintiffs have nothing to offer that could give rise to a genuine dispute on that issue of fact, any ambiguity in the 1989 Agreement must be resolved in favor of the Museum as a matter of law. *See Trilegiant Corp. v. Sitel Corp.*, 2013 WL 2181193, at *6 (S.D.N.Y. May 20, 2013) (summary judgment is appropriate where "the non-moving party fails to point to any ***relevant*** extrinsic evidence supporting [their] interpretation of the ambiguous language" (emphasis added)); *accord Garfield*, 1993 WL 451465, at *2.

3. Plaintiffs Cannot Prevail on Their Copying Claims Because All of Those Claims Are Based on Plan Sales Allegedly for Purposes of Restoration, Not New Construction.

Plaintiffs allege that every plan sale they assert as a breach in this case was for purposes of restoring an existing boat, not for purposes of constructing a new boat. (*See* ECF 35 ¶ 10; Exh. X (Tofias Tr.) at 120:15–121:8.) Accordingly, because (1) the 1989 Agreement—

both unambiguously and as conclusively shown by ***all*** relevant extrinsic evidence—permits the Museum to sell copies of S&S drawings for the purpose of restoration; and (2) all of Plaintiffs' copying claims are based on sales they themselves allege were made for purposes of restoration, not new construction, Plaintiffs' breach claims based on the Museum's copying of S&S drawings cannot succeed, and summary judgment is appropriate. For this same reason, summary judgment is appropriate on all of Plaintiffs' copyright claims, too. (*See infra* Arg. § III.)

4. Plaintiffs' Copying Claims Based on Boats Other than *Gesture* Are Barred for Additional, Independent Reasons.

Plaintiffs' copying claims based on boats other than *Gesture* cannot succeed for at least three additional reasons. *First*, Plaintiffs' claims based on *Santana* and *Chubasco* are barred by New York's six-year statute of limitations. In New York,

> The statute of limitations for a breach of contract cause of action is six years. Generally, the statute of limitations begins to run when the cause of action accrues. A breach of contract cause of action accrues at the time of the breach, even though the injured party may not know the existence of the wrong or injury.

Azulay v. Malul, 194 A.D.3d 680 (N.Y. App. Div. 2021) (citing N.Y. C.P.L.R. 213(2) & N.Y. C.P.L.R. 203(a)); *accord* Conn. Gen. Stat. § 52-576(a) (six-year statute of limitations for contract claims brought under Connecticut law). The Museum sold copies of plans for the restorations of *Santana* and *Chubasco* in 2013 and 2014, respectively. (*See, e.g.*, SOF ¶¶ 97–102.) Because Plaintiffs assert the Museum breached the 1989 Agreement when it "sold" these copies (*e.g.*, Exh. G at 15–20), these claims accrued at the times of sale, in 2013 and 2014.[12] The limitations period for these sales therefore ran in 2019 and 2020, respectively. Plaintiffs did not file this lawsuit until January 2021 (ECF 1), making these claims untimely.

[12] S&S knew about both of these sales at the time they were made, as the Museum showed in its Motion to Strike, ECF 63.

Second, Plaintiffs' copying claims based on *Chubasco*, *Pilgrim/Revonoc*, and *Mah Jong* are barred for the additional, independent reason that Plaintiffs failed to disclose these claims in a timely fashion during discovery, as is set forth fully in the Museum's pending Motion to Strike, ECF 63.

Third, Plaintiffs' copying claim based on *Mah Jong* cannot prevail for the independent reason that Plaintiffs have no evidence the Museum knew the *Mah Jong* plans it sold would be used for any purpose other than "to make a half model of *Mah Jong* as a gift for the owner" (Exh. CU), which is not "to build boats" or "boatbuilding" even under Plaintiffs' definition.

Accordingly, Plaintiffs' claims based on boats other than *Gesture* fail for these additional reasons.

B. *Plaintiffs Cannot Prevail on Their Storage Claim Because the Museum's Storage of the S&S Collection Complies with the Museum's "Normal Policies and Practices," and Plaintiffs Have No Evidence to the Contrary.*

Before this litigation began, Plaintiffs had described the manner in which the Museum stores the S&S collection as "***museum quality ideal conditions***" (SOF ¶ 185 (emphasis added)) and the collection itself as having been "***safekept*** for many years, at great expense" (SOF ¶ 186 (emphasis added)). Even today, Plaintiffs' website acknowledges that the S&S "design plans and technical information have been ***faithfully preserved*** over the many decades" and are "***well preserved***." (SOF ¶ 187 (emphases added); *see also* Exh. W (Johnson Tr.) at 91:14–20 ("**Q.** To your knowledge, from the inception of the agreement in 1989 until the time you left Sparkman and Stephens in 2012, did anyone at S&S ever express concern to you regarding the way the Museum was keeping the plans? **A.** No.").) Yet, in this case, Plaintiffs contend the Museum breached the 1989 Agreement by "fail[ing] to properly preserve S&S materials."

(ECF 35 ¶¶ 77–81.) As with Plaintiffs' other contentions, this one is nothing more than an invention of Mr. Tofias, unsupported by any evidence.

As an initial matter, the 1989 Agreement does not say anything specific regarding how the Museum must store the S&S material. Beyond its aspirational language that one purpose of the Agreement is "long term preservation" and "safekeeping" of the material, the 1989 Agreement says only that "the [S&S] material will be maintained by [the Museum] pursuant to the normal policies and practices of [the Museum]." (Exh. A §§ preamble, I, II.) In other words, so long as the Museum is following its "normal policies and practices," the 1989 Agreement vests the Museum with discretion to decide how it will preserve the S&S material.

Plaintiffs have no evidence the Museum ever departed from its "normal policies and practices" in its care of the S&S material. (SOF ¶¶ 193, 199, 207–209.) Nor do Plaintiffs have any evidence the S&S material has not been "safekept" by the Museum. (SOF ¶¶ 193, 197.) For its part, and although it had no burden to do so, the Museum retained three industry experts—one from Yale, one from the Smithsonian, and one from the Peabody Essex Museum (the nation's oldest continuously operating museum)—to separately review the Museum's care of the S&S material and offer opinions on whether that care has been consistent with the Museum's "normal policies and procedures" and has otherwise been appropriate. (Exh. O (Kennedy Rep.) ¶ II.A; Exh. N (Johnston Rep.) ¶ II; Exh. L (Lipcan Rep.) ¶ II.) Each independently reached substantially the same conclusion. Tara Kennedy, a member of the Yale University Library's Preservation and Conservation department, concluded that the Museum's "stewardship of the S&S collection is consistent both with [the Museum's] own Collections Policy and with typical or standard museum practices for collections care." (Exh. O (Kennedy Rep.) ¶¶ I.A; V.A; *see* SOF ¶¶ 188–189, 190.) Paul Johnston, the Curator of Maritime History

and Transportation History at the Smithsonian National Museum of American History and the Acting Chair of the Smithsonian's Division of Political & Military History, concluded that the Museum's "care of the S&S collection easily meets [the Museum's] policy for collections care, and also meets or exceeds the practices followed by other reputable museums with collections of ship plans." (Exh. N (Johnston Rep.) ¶¶ I, V; *see* SOF ¶¶ 188–189, 191.) He went on to conclude that the Museum's "handling and maintenance of its plans collections (including the S&S collection) are as good as I have seen elsewhere." (Exh. N (Johnston Rep.) ¶ V.) And Dan Lipcan, the Ann C. Pingree Director of the Phillips Library at the Peabody Essex Museum, concluded that the Museum "is in compliance with its policy and with accepted museum practices for collections care in connection with the collection of S&S materials housed at [the Museum]." (Exh. L (Lipcan Rep.) ¶¶ I, V; *see* SOF ¶¶ 188–189, 192.)

By contrast, Plaintiffs, who ***do*** bear the burden on this claim, tried to meet it by hiring Valarie Kinkade, who worked in museums in the 1980s and 90s and now holds herself out as an expert in "Museum standards of care." (SOF ¶ 193; Exh. P (Kinkade Rep.) ¶¶ 1, 3.) Ms. Kinkade did not visit the Museum as part of her work on this case (SOF ¶ 194), nor did she ever view ***any*** of the S&S material at issue (SOF ¶ 195). Nonetheless, she prepared a report that was highly critical of the Museum's care of the S&S material. In that report, Ms. Kinkade opined that the Museum "has not complied with applicable Museum standards of care" with respect to the S&S material because the facilities that house the S&S collection "are substandard and put the materials at severe risk of water damage and potential fire damage" and because "the [S&S] materials themselves have not been properly cared for, as evidenced by the fact that many of them have not been unrolled, have not been put into acid-free folders, and have been kept for

years in cardboard boxes." (Exh. P (Kinkade Rep.) ¶ 2.) But at her deposition, Ms. Kinkade's opinions came apart at the seams.

First, Ms. Kinkade was unable to identify ***any*** deviation the Museum had made from its "normal policies and practices"—the standard set by the 1989 Agreement (Exh. A § II)—in dealing with the S&S material. (SOF ¶ 199; Exh. AH (Kinkade Tr.) at 450:12–451:5 ("**Q.** Is it fair to say that you don't know whether the Mystic Seaport Museum follows its normal policies and practices in the care of the Sparkman & Stephens materials? **A.** It seems to be deviating from its standard policies. **Q.** Okay. And the deviation is what? **A.** The deviation is that – I'm having difficulty. It's the end of the day, so I apologize. I cannot recall at this moment.").) To the contrary, Ms. Kinkade admitted that, as far as she knew, "the [M]useum's practices with respect to the Sparkman & Stephens materials are similar to its practices with respect to its other collections." (Exh. AH (Kinkade Tr.) at 108:5–109:5; SOF ¶ 199.)

Second, Ms. Kinkade also admitted that she had not done the work necessary to render an opinion on whether the Museum was doing "the best it can do" to care for the S&S material, even though the Museum's Collections Policy (*i.e.*, its "normal" policy (Exh. A § II)) requires only that the Museum "preserve its collections ***to the best of its abilities*** in accordance with current conservation standards." (Exh. BB at -43 (emphasis added); SOF ¶ 201; *see also* SOF ¶¶ 194–199.) Indeed, after asserting that one would need to assess a museum's "capacity"—(1) the number of staff, (2) the level staff training, (3) the museum's prioritization of its collections, and (4) the museum's financial resources—before reaching an opinion regarding whether that museum was caring for its collections appropriately, Ms. Kinkade admitted that, in the case of the Mystic Seaport Museum, she "didn't know anything about two of the four factors and . . . only had partial information on the other two factors," and, thus,

"could not assess the full capacity" of the Museum. (Exh. AH (Kinkade Tr.) at 187:9–189:1; *see also id.* at 167:8–168:11, 176:14–177:4.) For this reason, Ms. Kinkade was unable to say whether the Museum had done its best to care for the S&S material. (*Id.* at 129:21–130:10 ("**Q.** . . . Are you able to tell me whether the Mystic Seaport Museum has done the best it can do to care for the Sparkman & Stephens collections given the resources it has? Or can you not answer that question? **A.** I cannot answer that question.").) Thus, she could not possibly offer an opinion on whether the Museum had complied with its own Collections Policy.

Third, even setting aside the contractual requirement that the Museum merely follow its "normal policies and practices," Ms. Kinkade was unable even to defend the primary thrust of her report—namely, that the Museum was doing a bad job safekeeping the S&S material. To the contrary, Ms. Kinkade admitted the S&S plans the Museum had unrolled and stored in specialized "flat file" cabinets were ***properly*** stored. (Exh. AH (Kinkade Tr.) at 63:20–64:10, 65:15–66:3, 72:12–17; *see also* Exh. I at 3–6.) And, after learning for the first time at her deposition that approximately 75% of the S&S plans (including half of the plans S&S donated in 2011 and ***all*** of the plans S&S had donated previously) had been put into these flat file cabinets so far (Exh. AH (Kinkade Tr.) at 72:12–17; *see also* Exh. I at 3–6.), she acknowledged that the Museum was "doing a reasonable rate of processing" the donation (SOF ¶ 202). Furthermore, Ms. Kinkade did not know that the Museum's storage facility (called the "Collections Research Center" or "CRC") had been built new from the ground up in the early 2000s (Exh. AH (Kinkade Tr.) at 435:11–436:18; *see also* SOF ¶ 113), did not know what condition the S&S material was in when it was donated to the Museum, nor whether its condition had changed since (SOF ¶ 196), did not know whether ***any*** of the S&S material had been damaged while in the care of the Museum (SOF ¶ 197), did not know whether ***any*** of the S&S material had been rendered

unusable or illegible or lost ***any*** of its information as a result of the way the Museum had cared for it (<u>Exh. AH</u> (Kinkade Tr.) at 302:4–303:6), and did not know whether ***any*** of the S&S material had less value for "research" or "study" as a result of the way the Museum had cared for it (*id.* at 310:6–18).

Moreover, contrary to the statements in her report that the S&S material is "at severe risk of water damage and potential fire damage" (<u>Exh. P</u> (Kinkade Rep.) ¶ 2), Ms. Kinkade was not in fact offering the opinion that the Museum's sprinkler or fire-protection systems are substandard (SOF ¶ 203). And, notwithstanding her opinion in her report that the S&S material was being damaged by "acid molecules, inherent in the composition of most papers of this time period, . . . [which are] looking for a base to make the molecule[s] more stable" (<u>Exh. P</u> (Kinkade Rep.) ¶ 15), Ms. Kinkade admitted she is not in fact an expert in acid-base (or any other kind of) chemical reactions (SOF ¶ 204), could not identify "any study that quantifies the increased longevity of a collection of paper caused by housing it in acid-free folders" (<u>Exh. AH</u> (Kinkade Tr.) at 425:1–7; *see also id.* 422:18–423:3), did not know the pH (*i.e.*, acidity) of any of the boxes that the Museum uses to store the S&S material (*id.* at 404:6–15), and could not even say what pH level would cause her concern about acidity (*id.* at 482:17–20). Finally, Ms. Kinkade admitted that she had seen ***no evidence*** for her other criticisms (such as that the CRC supposedly has ceiling "water stains" over the S&S collection, has old and improper moment connections between the trusses, the beams, and the brick walls, and is a "fire trap"), beyond "taking Mr. Tofias' word for that." (*Id.* at 433:9–19, 434:12–435:5, 441:9–19, 443:1–7.)

Faced with the mountain of shortcomings in her work, Ms. Kinkade (who at one point during the deposition acknowledged she was "not doing very well" (*id.* at 184:2)) was forced to concede her ***entire opinion***, which she did in the following exchange:

> **Q.** [A]re you prepared to say at this time that the Mystic Seaport Museum has done a bad job specifically with the Sparkman & Stephens materials or do you not have enough information?
>
> **A.** I may not have enough information.

(*Id.* at 474:5–12.)

In fairness to Ms. Kinkade, at least some of the flaws in her work appear to be attributable to Plaintiffs' having restricted her from reviewing much of the key evidence in the case. To give just one example, for reasons that cannot possibly be justified by any valid methodology, Plaintiffs never told Ms. Kinkade about the Museum's interrogatory response setting forth detailed information on the Museum's care of the S&S material over the years. (*Id.* at 364:10–367:9; Exh. I at 3–6.) Thus, Ms. Kinkade could not consider any of this information when forming her opinions. When Museum counsel gave Ms. Kinkade the opportunity to review this information at her deposition, she agreed it was relevant, that "every single word in [the document was] new information," and that she would have liked to have seen it before forming her opinions. (Exh. AH (Kinkade Tr.) at 367:10–14, 368:4–369:14.)

Similarly, Ms. Kinkade testified that she had wanted to visit the Museum in connection with her work in this case—a "usual" practice when assessing a museum—but did not do so because she was told by Plaintiffs' counsel there was not enough time. (*Id.* at 27:10–28:12; 29:21–30:8, 30:19–21.) Why Plaintiffs' counsel would have told her that—particularly when Plaintiffs ***did*** send someone else (an architect with no Museum expertise and who offers no

opinions in this case, *see* SOF ¶¶ 205–206) to look at the Museum's storage facility—is a mystery.

In any event, whatever the root cause of the fundamental deficiencies in Ms. Kinkade's work on this case, Ms. Kinkade, to her credit, has admitted that she cannot render any opinion that would be helpful to the finder of fact. (Exh. AH (Kinkade Tr.) at 474:5–12.) Thus, Plaintiffs cannot possibly rely on Ms. Kinkade to carry their burden of proof on this claim. *See, e.g.*, *Price v. Gen. Motors Corp.*, 931 F.2d 162, 165 (1st Cir. 1991) (affirming summary judgment in favor of defendant where plaintiffs' expert's opinion was speculative and lacked adequate foundation, and was thus "insufficient to demonstrate a trialworthy issue"); *see also id.* (recognizing that "expert opinion predicated on [an] inadequate foundation [is] insufficient to generate [a] genuine issue" for summary judgment purposes (citing *Lynch v. Merrell–Nat'l Labs.*, 830 F.2d 1190, 1196 (1st Cir. 1987) (finding the district court's "firm rejection here of foundationless expert testimony" to be "necessary" and "admirable"))).

Nor do Plaintiffs have any other evidence with which they can carry their burden of proof on this claim. Although Plaintiffs asserted that Mr. Tofias and Mr. Abbott "witnessed the improper handling and maintenance of certain of S&S's materials during an on-site visit" to the Museum (Exh. G at 34), Mr. Abbott subsequently testified that he is "not an expert in museum storage" (Exh. U (Abbott Tr.) at 112:8–10), "not an expert in th[e] field" of the storage of historical documents (*id.* at 307:4–5), would have no basis to dispute the opinions of museum experts on the subject (*id.* at 58:12–19; *see also id.* at 70:19–71:8), did not know whether the conditions in which the Museum stores the S&S materials are "ideal" or not (*id.* at 59:19–25), and was unaware of the Museum's normal policies and practices for storage of ships plans (*id.* at 305:20–306:6). (*See* SOF ¶¶ 209–211.) Mr. Tofias, for his part, admitted that he also did not

know the Museum's "normal policies and practices" (SOF ¶¶ 207–208) and was otherwise badly confused (or intentionally deceitful[13]) about certain indisputable facts—such as his claim that the CRC is a "100-year-old-plus . . . fire trap[]" (Exh. X (Tofias Tr.) at 36:14–24), even though clear evidence shows it was built from the ground up in 2000, in compliance with applicable fire codes (*see* Exh. EJ).

In short, Plaintiffs have offered no evidence from which a jury could find the Museum deviated from its "normal policies and practices" when preserving the S&S material or otherwise failed to preserve the S&S material properly.

C. *Plaintiffs Cannot Prevail on Their Logs Claim Because the Museum Recorded Every Sale It Made and, in Any Event, This Claim Is Untimely by More Than a Decade.*

The 1989 Agreement requires the Museum to "maintain a log of all S&S drawings sold and make this information available to S&S upon request." (Exh. A § IX.) S&S's former President, Bruce Johnson, testified that this provision was considered "not important"

[13] Although not necessary to this Motion, Mr. Tofias, who has described lawsuits as his "normal course of business" (Exh. X (Tofias Tr.) at 748:25–749:6; *see also* Exh. W (Johnson Tr.) at 149:14–19 (Mr. Tofias "has a habit of suing people")), has a history of offering sworn testimony contradicted by indisputable evidence. For example, in *FSS, Inc. v. W-Class Yacht Co., LLC*, Judge Singal of the District of Maine "simply d[id] not find Tofias's self-serving statements to be credible." 2018 WL 953337, at *18 (D. Me. Feb. 20, 2018); *see also id.* at *9 n.6 ("The Court does not credit Tofias's claims . . . , especially in light of the fact that at trial Tofias vociferously denied seeing emails to which he had in fact responded."); *id.* at *9 n.14 (crediting another witness's testimony about conversations he had with Mr. Tofias "over Tofias's testimony that he never spoke with [the witness]"); *id.* at *9 n.17 (again declining to credit Mr. Tofias's testimony).

Moreover, it is apparent that Mr. Tofias is given to what are, at best, extreme exaggerations, even while under oath. For example, he testified the Museum's alleged conduct in this case is "as bad as the Defendants in these opioid cases" (Exh. X (Tofias Tr.) at 443:14–444:9) and that S&S's own care of its plans prior to the donation to the Museum is "a cheap, dirty way of storing plans" that reminds him "of human beings in Nazi concentration camps and in slave ships coming from Africa" (*id.* at 420:13–421:7). Presumably he does not truly believe any of these statements, but, either way, his say-so is insufficient to create a genuine issue of fact when contradicted by clear documentary evidence and the opinions of unquestionably qualified experts.

(SOF ¶ 215) and, indeed, there is no evidence S&S ever asked the Museum for its sales records before Mr. Tofias arrived (SOF ¶ 213.) It therefore came as a surprise when, in 2020, Mr. Tofias requested records showing all of the Museum's sales going back ***to 1989***. (SOF ¶ 216.) The Museum, which had dutifully maintained records of all of its sales since 1989, gathered the material it could readily find and sent it to Mr. Tofias, believing this was a good-faith attempt to gather information. (SOF ¶¶ 217–218.) Included in what the Museum sent were handwritten and electronic log books for every year going back to 1989, with the exception of the years 2000 to 2003, for which the handwritten notebook could not be found. (SOF ¶ 218.)

As it turned out, this request was nothing more than a fire drill. Mr. Tofias never looked at any of the dozens of years' worth of logs he received. (SOF ¶ 219.) Nor did his assistant, Richa Bentley. (SOF ¶ 220.) Brendan Abbott, the only other person who worked at S&S (SOF ¶ 222), did look through the logs, but not "for any purpose other than this litigation." (SOF ¶ 221.) The litigation purpose for which Mr. Abbott reviewed the logs was, it seems, to generate Plaintiffs' claim that the Museum's "failure to maintain" a handwritten sales "log" from 15 to 20 years earlier "constitutes a material breach of the 1989 Agreement." (ECF 35 ¶ 87.) If it seems an overreaction to make a federal case out of a 15-to-20-year-old sales log, it gets worse: Mr. Johnson (the former S&S President) testified that "up through at least 2006[,] sales of Sparkman & Stephens plans by Mystic Seaport Museum were routed ***through Sparkman & Stephens' office***" (Exh. W (Johnson Tr.) at 104:8–14 (emphasis added); SOF ¶ 214); thus, not only "would [S&S] have had at some point its own records of who had bought plans from Mystic Seaport" for the years 2006 and earlier, "they probably still do" have those records in their "QuickBooks" bookkeeping system, under the "category called existing plan sales" (Exh. W (Johnson Tr.) at 104:18–25, 107:16–108:7).

In any event, in the hopes it would satisfy Plaintiffs in this lawsuit, the Museum went through the trouble of retrieving the original invoices for its sales during the supposedly "missing" years so that it could reconstruct a "log" for Mr. Tofias. (SOF ¶ 223.) Sure enough, these invoices showed that the only sales during that period were ***to S&S***. (SOF ¶ 224.) But neither Mr. Tofias nor Mr. Abbott could be bothered to look at them. (SOF ¶ 225; Exh. U (Abbott Tr.) at 147:9–18, 149:21–150:8, 150:14–23; Exh. X (Tofias Tr.) at 66:24–77:13.)

The invoices maintained by the Museum were more than sufficient to satisfy the Museum's obligation to keep a "log" of its sales, and summary judgment is therefore appropriate. (Exh. X (Tofias Tr.) at 78:8–11 (the 1989 Agreement does not specify "how or where the log should be kept").) Moreover, this claim, which is premised on alleged breaches occurring between 2000 and 2004, is ***untimely by more than a decade***. *See* N.Y. C.P.L.R. 213(2); *accord* Conn. Gen. Stat. § 52-576(a).

II. Even If Plaintiffs Could Succeed on Their Claims for Breach of Contract (They Cannot), Rescission of the 1989 Agreement Would Be Unavailable as a Matter of Law.

The principal relief Plaintiffs seek in this case is "an order cancelling the 1989 Agreement and requiring [the Museum] to return all of Sparkman & Stephens' materials to Plaintiffs." (*See* ECF 35 ¶ 98.) A request to "cancel" a contract is "one and [the] same" as a request to "rescind" a contract. 13 Am. Jur. 2d Cancellation of Instruments § 1 (Feb. 2023 update) ("Courts have referred to this type of judicial termination by a variety of names, including 'cancellation,' 'rescission,' and 'equitable rescission' or 'rescission in equity.'"); 12A C.J.S. § 2, Interchangeability of cancellation and rescission (Apr. 2023 update) ("The terms 'cancellation' and 'rescission' are frequently regarded as being interchangeable or synonymous."); *see* 30 Williston on Contracts § 75:2 (4th ed.) ("The terms 'rescission' and 'cancellation' are virtually synonymous.").

"New York law does not presume the rescission or abandonment of a contract and the party asserting recission has the burden of proving it." *Graham v. James*, 144 F.3d 229, 238 (2d Cir. 1998); *accord LaFollette v. New England Dev. Assocs., LLC*, 2005 WL 2082895, at *1 (Conn. Super. Ct. Aug. 9, 2015) (party seeking rescission must prove entitlement to it by "clear and convincing evidence"). Furthermore, "[r]escission is an extraordinary remedy," *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 143 (2d Cir. 2000), and it "is usually only applicable . . . because of fraud, misrepresentation, or mistake," *Surlak v. Surlak*, 466 N.Y.S.2d 461, 469 (N.Y. App. Div. 1983); *accord Rios v. Thrifty Rent-A-Car Sys, Inc.*, 1996 WL 179861, at *2 (Conn. Super. Ct. Feb. 22, 1996) ("[C]ourts should enforce contracts voluntarily and fairly made between parties, unless the contract is voidable on grounds such as mistake, fraud or unconscionability."). As a remedy for breach of contract (the usual remedy for which is damages, *e.g.*, *Machen v. Johansson*, 174 F. Supp. 522 (S.D.N.Y. 1959)), rescission is even rarer. *Fink v. Friedman*, 78 Misc.2d 429, 435 (N.Y. Sup. Ct. 1974) ("Rescission, then, is a drastic remedy available only when certain conditions are met."). Unlike the usual remedy of damages (which are designed to put the non-breaching party in the position it would have been in had the breaching party performed), rescission is used to put both parties in the position they were in immediately prior to the execution of the agreement. *Unger v. Ganci*, 161 N.Y.S.3d 546, 549 (N.Y. App. Div. 2021) ("A claim for rescission, as opposed to a claim for breach of contract, seeks to restore the parties to [the] status quo, as if the parties had never entered the contract."); *accord Farrell v. Lemieux & Zahorsky, L.L.C.*, 1996 WL 761473, at *2 (Conn. Super. Ct. Dec. 24, 1996) ("[A] party who wishes to rescind a contract must place the opposite party in status quo.").

Only for the most extreme breaches of contract—ones in which "the breach is found to be material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract," will a court entertain rescission as a remedy for breach. *Paramount Pictures v. Puzo*, 2012 WL 4465574, at *9–10 (S.D.N.Y. Sept. 26, 2012). Put differently, "[r]escission of a contract is permitted where a breach is so substantial as to defeat the purpose of an entire transaction"; "[t]he breach must go to the very root of the contract, rendering performance different in substance than that agreed upon and depriving one party of the fruits of the agreement." *Fink*, 78 Misc.2d at 435 (breach must "go to the essence of the contract"); *see, e.g.*, *Powlus v. Chelsey Direct, LLC*, 2011 WL 135822, at *6 (S.D.N.Y. Jan. 10, 2011) (rescission unwarranted where plaintiffs alleged they received only 70% of monies due under an agreement); *Nolan v. Sam Fox Publ'g Co., Inc.*, 499 F.2d 1394, 1398–1399 (2d Cir. 1974) (rescission unwarranted even where defendant failed to pay plaintiff 74% of royalties owed); *accord Collins v. Sears, Roebuck & Co.*, 321 A.2d 444, 452 (Conn. 1973) ("Rescission is not warranted merely for a failure exactly to perform[,] but only for an unjustified default to perform the basic terms of a contract . . . . which go[es] to the essence or root of the [contract] or which would render the performance of the remainder a thing different in substance from that which was contracted for.").

Moreover, even where a plaintiff can show an extreme breach that might otherwise justify the "drastic remedy" of rescission, rescission is unavailable unless certain additional "conditions" are met. *Fink*, 78 Misc.2d at 435. Among other things, "[t]he party seeking rescission must act reasonably promptly to cancel the agreement after discovery of the defect" and "it must be reasonably feasible to place both parties back in the positions they occupied before the transaction took place." *Id.*; *accord Milford Yacht Realty Co. v. Milford*

Yacht Club, Inc., 72 A.2d 482, 485 (Conn. 1950) ("Prompt election and restoration of the innocent party to its former position [are] essential.")

As a matter of law, Plaintiffs cannot obtain rescission of the 34-year-old 1989 Agreement, for at least seven independent reasons.

First, even assuming Plaintiffs proved every one of their alleged breaches (which they cannot do), Plaintiffs have no evidence that any of these alleged breaches was "willful." *Paramount Pictures*, 2012 WL 4465574, at *9. A "willful" breach is one that is "intended to harm" the counterparty. *See Mina Inv. Holdings Ltd. v. Lefkowitz*, 16 F. Supp. 2d 355, 363 (S.D.N.Y. 1998). Here, there is no evidence anyone at the Museum ever intended to harm S&S. To the contrary, Mr. Abbott testified that, as far as he could tell, the Museum employees he had interacted with had always "acted with good faith" towards him (SOF ¶ 226) and that, if turns out the 1989 Agreement did not permit the Museum's sale of *Gesture* plans to Mr. Mehran, then it was "probably an honest mistake" (Exh. U (Abbott Tr.) at 196:16–23). Similarly, Mr. Tofias admitted the Museum "has tried the best they could" to maintain the S&S material and "should be given credit for the work they did since 1989." (*See* Exh. X (Tofias Tr.) at 175:24–176:4; SOF ¶ 200.) Nor can anyone dispute the Museum tried to maintain a log of every drawing it sold over 30 years. (*See* SOF ¶ 212.) What is more, it is indisputable that, at Mr. Tofias' request and for the entire time this case has been pending, the Museum has suspended sales of copies of the S&S material while the Court decides who is right about the parties' Agreement. (*See* SOF ¶¶ 160–161.) On this record, Plaintiffs cannot possibly show the Museum ever "intended to harm" S&S.

Second, none of Plaintiffs' claimed breaches—individually or in combination—comes close to being "so substantial and fundamental as to strongly tend to defeat the object of

the parties in making the contract." *See Canfield v. Reynolds*, 631 F.2d 169, 178 (2d Cir. 1980). Plaintiffs' copying claims are based on, at most, five sales out of hundreds the Museum has made since 1989. (*See, e.g.*, Exh. CV through Exh. DG (logs documenting the Museum's sales of copies of S&S material from 1989 to 2021); SOF ¶ 227; ECF 35 ¶¶ 84–85; Exh. G. at 15–20.) In addition, it is beyond genuine dispute S&S was aware of these sales at the time they were made. (*See supra* Arg. § I.A.2.) Thus, even if all five of these sales were somehow breaches, the undisputed fact that S&S let them go by without objection shows these sales did not "strongly tend to defeat the object of the parties in making the contract." *See Canfield*, 631 F.2d at 178.

Furthermore, notwithstanding Plaintiffs' second-guessing of the Museum's practices for storing the S&S material, it is undisputed the Museum has in fact stored the S&S material at all times since it was donated, and there is no evidence that any of the material has been in any way damaged while in the Museum's care. (SOF ¶¶ 86–87, 197.) None of Plaintiffs' complaints—that there should have been greater use of "acid-free" folders and cabinets, that the material should have been processed more quickly and then stored in a building without a fire sprinkler, that the CRC's "hallway" supposedly was "unsecure" and "less climate controlled" as other places—comes anywhere close to "strongly tend[ing] to defeat the object of the parties in making the contract." *See Canfield*, 631 F.2d at 178. The object of the parties in making the contract was the preservation and safekeeping of the S&S material, not the specific details on how that would be done. (*See* Exh. A §§ I, II; SOF ¶¶ 33–34, 44, 37–39.) And, in any event, even if the object of the contract had been the specific procedures the Museum would follow to store the S&S material, approximately 75% of the S&S plans are stored ***precisely how Plaintiffs' own expert says they should be***. (Exh. AH (Kinkade Tr.) at 63:20–64:10, 65:15–66:3; 72:12–17; *see also* Exh. I at 3–6.) These alleged breaches are woefully insufficient to

warrant rescission of a contract under New York law. *See, e.g.*, *Nolan*, 499 F.2d at 1398–99 (failure to pay 74% of royalties owed was insufficient to warrant rescission).

Moreover, no one could think the Museum's misplacing a 15-to-20-year-old log of sales "strongly tend[s] to defeat the object of the parties in making the contract." *See Canfield*, 631 F.2d at 178. This is especially true where the Museum indisputably kept records of all of its sales for the entire term of the Agreement even though S&S never requested (and did not even realize the Museum was keeping) such records. (SOF ¶¶ 212–213; *see* Exh. BW at -4546.) Even Plaintiffs, who made the first ever request for the Museum's sales records in 2020 (31 years into the Agreement's term), could not be bothered to look at those records for any purpose other than this litigation. (*See* SOF ¶¶ 213, 216, 219–221.) In sum, Plaintiffs have not come close to identifying a breach (or breaches) "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *See Canfield*, 631 F.2d at 178.

Third, Plaintiffs unreasonably delayed in declaring their intention to rescind. Rescission "must be announced without unreasonable delay," *Schenck v. State Line Tel. Co.*, 144 N.E. 592, 594 (N.Y. 1924), and "[r]escission claims have consistently been dismissed due to failure to seek the relief in less than ***one year***," *see Asset Mgmt. Assocs. of N.Y., Inc. v. Emerson Telecomm. Prods. LLC*, 2011 WL 318100, at *4 (E.D.N.Y. Jan. 25, 2011) (collecting cases and emphasis added); *accord Milford*, 72 A.2d at 485 ("Prompt election and restoration of the innocent party to its former position [are] essential."). Plaintiffs knew the bases for their contract claims years before they ever declared any intention to rescind the 1989 Agreement, which was done for the first time in Plaintiffs' Complaint. (*See, e.g.*, ECF 1 at ¶ 136; SOF ¶ 228; Exh. U (Abbott Tr.) at 5:14–7:11 (Abbott unaware of anyone at S&S telling the Museum S&S intended to terminate, cancel, or rescind the 1989 Agreement); Exh. X (Tofias Tr.) at 314:17–316:20

(Tofias unaware of any complaints made by S&S prior to his acquiring S&S), 480:23–481:9 (Tofias unaware of having ever told the Museum of his intention to rescind the 1989 Agreement).) Plaintiffs knew the Museum copied and sold plans for *Santana* in January 2014 (SOF ¶ 99), for *Chubasco* in February 2014 (SOF ¶ 102), for *Pilgrim/Revonoc* in November 2015 (SOF ¶ 105), for *Gesture* in May 2018 (SOF ¶ 131), and for *Mah Jong* in July 2018 (SOF ¶ 108). Plaintiffs also knew about the Museum's storage practices for years, as their representatives and predecessors visited the CRC and viewed the S&S material numerous times. (SOF ¶ 184.) Plaintiffs also believed (incorrectly) as early as 2005 that the Museum was not keeping any sales log. (*See* Exh. BW at -4546.) Plaintiffs' waiting for ***years***, and in some cases ***decades***, to declare their intention to rescind the 1989 Agreement was an unreasonable delay, which bars the remedy of rescission as a matter of law. *See Schenck*, 144 N.E. at 594; *Ariel (UK) Ltd. v. Reuters Grp. PLC*, 2006 WL 3161467, at *8 (S.D.N.Y. Oct. 31, 2006) (refusing to rescind a 30-year-old agreement under the which the parties "co-existed peacefully . . . for nearly three decades").

Fourth, Plaintiffs have over the years accepted the many benefits they have received under the 1989 Agreement and, remarkably, have even continued to accept (and insist on receiving) those benefits during this litigation. (SOF ¶¶ 229–231.) A plaintiff has no right to rescind if she "accepts benefits under the contract and thereby affirms it." *Gannett Co., Inc. v. Register Publ'g Co.*, 428 F. Supp. 818, 824–25, 828 (D. Conn. 1977) (collecting New York cases); *accord Laurel Convalescent Home, Inc. v. Haven Healthcare Mgmt., LLC*, 2003 WL 21498917, at *14 (Conn. Super. Ct. June 13, 2003) ("[P]laintiff has accepted the benefits of defendant's managing Laurel for a year and has not reimbursed defendant for those expenditures. Accordingly, plaintiff does not have the right to seek rescission of the agreement."). Not only

has the Museum stored and continued to store the S&S material, the Museum has also continued to make scans of plans at Plaintiffs' request. (*See* Exh. U (Abbott Tr.) at 21:3–17 ("I can say I expected [the Museum to abide by the 1989 Agreement even after this lawsuit was filed] because there are instances in which I reached out for plan scanning."); Exh. X (Tofias Tr.) at 482:2–483:6 (Tofias expects the Museum to continue to provide copies to S&S under the 1989 Agreement); SOF ¶¶ 229–231.) Far from repudiating a contract they claim should be unmade, Plaintiffs have admitted "the parties continue to be bound by, and obligated to perform under, the 1989 Agreement." (Exh. D at 5–6; SOF ¶ 68.) This, too, bars Plaintiffs' request for rescission as a matter of law.

Fifth, there is no evidence Plaintiffs offered to restore the Museum to its pre-1989 Agreement status quo. To obtain the remedy of rescission, "[t]he injured party must offer to restore the status quo ante by tendering what he has received in substantially as good condition as when it was transferred to him." *Gannett Co.*, 428 F. Supp. at 826; *accord Carlin v. Martinez*, 2021 WL 2011207, at *5 (Conn. Super. Ct. Apr. 26, 2011) ("[A] precondition for [rescission] is an offer to restore the adverse parties to their pre-agreement condition, to the extent possible."). Plaintiffs have admitted they "never offered to reimburse the Museum for any costs it has incurred in cataloging, microfilming, and storing the S&S Materials since 1989." (Exh. E at 6.) What's more, even today, Mr. Tofias ***refuses to do so***. (*See* Exh. X (Tofias Tr.) at 682:13–19 ("**Q.** If the museum could prove how much it spent over the years to store the Sparkman & Stephens materials since 1989, are you willing to reimburse that amount in order to get the drawings back? **A.** Absolutely not."); SOF ¶ 232.) This, too, bars Plaintiffs' request for rescission as a matter of law.

Sixth, even if Plaintiffs had offered to restore the status quo as it existed on February 14, 1989, just prior to the execution of the 1989 Agreement, there is no evidence they could do so. "Rescission . . . is appropriate only where, among other things, the status quo can be substantially restored." *Unger*, 161 N.Y.S.3d at 549; *accord Farrell*, 1996 WL 761473, at *2. In situations where services have been provided under a contract—even for periods far shorter than the more-than-34-year term of performance at issue in this case—courts have concluded the status quo cannot be restored, barring rescission. *See Strategic Growth Int'l, Inc. v. RemoteMDx, Inc.*, 2008 WL 4179235, at * (S.D.N.Y. Sept. 10, 2008) (status quo could not be restored where services had been provided under the contract over a period of approximately seven months); *Stryker Sec. Grp. Inc. v. Elite Investigations Ltd.*, 97 N.Y.S.3d 63, 65 (N.Y. App. Div. 2019) ("Defendant cannot rescind, because it cannot return that which it received and which plaintiff provided, viz., tens of thousands of hours of security guard services."); *accord Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. 1025, 1033 (D. Conn. 2009) (rescission unavailable where "[i]t would be extremely difficult to unravel each relationship and place a reasonable monetary value on the benefits rendered to plaintiffs," which included "a variety of marketing" and other services performed under franchise agreements that lasted "approximately one to five years"). It is difficult to imagine, much less prove, as Plaintiffs must, how it could ever be possible to unwind the clock 34 years to February 14, 1989. Over that period, the Museum, its employees, and its generous volunteers (supported by its generous donors) have spent thousands of hours picking up, cataloging, flattening, microfilming, copying, and storing the S&S material. (SOF ¶¶ 111–113.) The Museum has provided a storage facility, climate control, supervision, security, and public access over that same period. (SOF ¶¶ 111–116.) All of this was always on the understanding the S&S material was and would forever be the Museum's property to be held

in the public trust. (*See* SOF ¶ 74.) Ordering the Museum to give away the S&S material now would render all of these efforts meaningless.

Seventh, Plaintiffs cannot obtain the equitable remedy of rescission because Plaintiffs have not behaved equitably. When a plaintiff seeks equitable relief, "he must come into court with clean hands," meaning he must not have engaged in conduct "which would be condemned and pronounced wrongful by honest and fair-minded" people, even if that conduct is "not . . . sufficient to constitute the basis of a legal action." *Pecorella v. Greater Buffalo Press, Inc.*, 486 N.Y.S.2d 562, 563 (N.Y. App. Div. 1985); *accord Thompson v. Orcutt*, 777 A.2d 670, 676 (Conn. 2001) ("It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands."). Mr. Tofias' hands are not clean. He has used his wealth to try to bully a non-profit into giving him something that no one—literally no one—else believes is his. As Mr. Johnson, S&S's former President and part-owner testified, S&S's "founders," "Olin, Rod, guys like Alan Gilbert who wrote that [Agreement,] would be absolutely appalled." (Exh. W (Johnson Tr.) at 167:16–168:11.)

For each of these independent reasons, Plaintiffs cannot prevail on their request for an Order from this Court rescinding the 1989 Agreement. Accordingly, the Court should grant summary judgment to the Museum on this request.

III. Plaintiffs Cannot Prevail on Their Copyright Claims Because the 1989 Agreement Authorized the Museum's Sale to Mr. Mehran and Because Plaintiffs Cannot Prove They Own Any Copyrights in the *Gesture* Drawings.

Plaintiffs' copyright claims are all premised on the Museum's sale of copies of *Gesture* drawings to Mr. Mehran in May 2018 for his use in the restoration of *Gesture*. Plaintiffs cannot prevail on any of these claims for two independent reasons.

First, for the reasons set forth above (*see supra* Arg. § I.A.), the Museum's sale of copies for restoration was and is authorized by the 1989 Agreement. Thus, the Museum's sale to Mr. Mehran for purposes of restoring *Gesture* cannot form the basis of a copyright infringement claim. *Resnick v. Copyright Clearance Ctr., Inc.*, 422 F. Supp. 2d 252, 258 (D. Mass. 2006) ("Where the person making the copies has been 'authorized by the copyright owner to use the copyrighted work,' he has not infringed."). Accordingly, for this reason alone, the Court should grant summary judgment to the Museum on Plaintiffs' copyright claims (Counts One to Six).

Second, Plaintiffs cannot prevail on their copyright claims because they cannot prove that they own (or ever owned) valid copyrights in the three *Gesture* drawings at issue. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("ownership of a valid copyright" must be proved "[t]o establish infringement"); *Nat'l Ctr. for Jewish Film v. Goldman*, 943 F. Supp. 113, 115, 119 (D. Mass. 1996) (granting summary judgment on infringement claims where claimants offered only "legally suspect" evidence "to document the chain of title" to the copyrights).[14]

The drawings at issue were commissioned by Howard Fuller in the 1940s (SOF ¶ 10) and are thus governed by the then-applicable 1909 Copyright Act.[15] Under the 1909 Act,

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[14] In many cases, a plaintiff can prove ownership by relying on a statutory presumption that "the facts stated in the certificate" of registration—which include the identity of the copyright's owner—are true. 17 U.S.C. § 410(c). This presumption is available only where "the certificate of a registration [was] made before or within five years after first publication of the work." *Id.* Plaintiffs cannot rely on this presumption in this case because, even by their own reckoning, they did not register their purported copyrights until decades after first publication of the *Gesture* drawings. (*See* SOF ¶ 233; Exh. E at 8.)

[15] The current Copyright Act was enacted in 1976 and became effective in 1978. Because, however, the *Gesture* drawings at issue in this case were created in the 1940s, the 1909 Copyright Act governs the original ownership of any copyrights in those drawings. *Forward v. Thorogood*, 985 F.2d 604, 606 n.2 (1st Cir. 1993) (although "[t]he Copyright Act of 1976 altered the works for hire doctrine so that only certain types of commissioned works qualify as works for hire, . . . [t]he [1976] Act's provisions on works for hire operate prospectively and do not govern

the "author" of a work was the copyright holder, and "the word 'author' . . . include[d] an employer in the case of works made for hire." 17 U.S.C. § 62 (1940 ed.). Courts—including the First Circuit—interpreted this language in the 1909 Act expansively "to include commissioned works created by independent contractors." *Markham Concepts, Inc. v. Hasbro, Inc.*, 1 F.4th 74, 80 (1st Cir. 2021) (quoting *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993)). Absent clear and specific evidence of a contrary agreement between the commissioning and commissioned parties, courts apply "a presumption of copyright ownership in the commissioning party." *Id.*; *see also* 1 Nimmer on Copyright § 5.03[B][1][a][i] (under the 1909 Act, "the courts expanded the definition of 'employer' to include a hiring party who had the right to control or supervise the artist's work"). S&S has admitted "that Howard Fuller commissioned [S&S] to design *Gesture*." (Exh. D at 16–17; SOF ¶¶ 7, 10.) Thus, as a matter of law, there is a presumption Howard Fuller originally owned any copyrights in the *Gesture* drawings as "works made for hire."

To overcome this presumption, Plaintiffs "bear[] the burden of showing that . . . a contrary agreement was made" in which Howard Fuller agreed to transfer his copyrights to S&S. *Markham Concepts*, 1 F.4th at 85. "Courts generally demand clear and specific evidence of such an agreement." *Id.*; *see also Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (requiring "an express contractual reservation of the copyright in the artist" to rebut the presumption); *see also* 1 Nimmer on Copyright § 5.03[B][2][c] (requiring "persuasive evidence" of a contrary agreement); *Markham Concepts*, 1 F.4th at 86 (even an assignment agreement between the employer and the artist does not rebut the work-for-hire presumption

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this case."); *Markham Concepts, Inc. v. Hasbro, Inc.*, 1 F.4th 74, 81 (1st Cir. 2021) ("Because The Game of Life was created long before the 1976 Act took effect, there is no question that the standard for a work for hire under the 1909 Act governs.").

unless the agreement contains "the required express contractual reservation of the copyright in the artist"). This heightened evidentiary burden applies when considering a motion for summary judgment. *See, e.g.*, *R.I. Hosp. Tr. Nat. Bank v. Howard Commc'ns Corp.*, 980 F.2d 823, 828 (1st Cir. 1992) ("Where, as here, a claim must be established by clear and convincing evidence, evidence that is merely colorable or is not significantly probative cannot deter summary judgment.").

Plaintiffs have long understood their burden to come forward with evidence of a "clear and specific" agreement in which Howard Fuller transferred his copyrights to S&S. *Markham Concepts*, 1 F.4th at 85. During discovery, Plaintiffs wrote that "the original contract between S&S and Mr. Fuller is obviously of paramount importance in the litigation" (Exh. DM), explaining that they were "expending valuable resources to search for any agreements in this regard" (Exh. DN). Yet, despite extensive searches conducted by both sides, no such contract has ever been found. (Exh. E at 7–8). Without one, Plaintiffs cannot prove they are the owners of any copyrights in the *Gesture* drawings and therefore cannot pursue claims for infringement (direct or contributory) of any such copyrights.[16]

IV. Plaintiffs' Contributory Infringement Claims Fail for the Independent Reason that Plaintiffs Cannot Prove that the Museum Knew About or Induced Any Copies Made By Others.

Plaintiffs' claims for contributory infringement (Counts Four to Six) are based on additional copies of the *Gesture* plans allegedly made by Mr. Mehran (identified in the Amended

[16] Plaintiffs have at times contended they could prove ownership through evidence of supposedly longstanding corporate practice. (Exh. DP at 1–2.) But every witness has disclaimed having knowledge of S&S's practices in the 1940s. Thus, Plaintiffs have no proof of any corporate practice that could satisfy their burden here. Similarly, although Plaintiffs have contended that other, foundationless documents are "consistent with" their theory of ownership (*id.*), these contentions fall far short of proving by "clear and specific evidence" the existence of an agreement in which Howard Fuller assigned his copyrights to S&S.

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Complaint as "Sunset," Mr. Mehran's place of business). Even if Plaintiffs could prove ownership of any copyrights in the *Gesture* drawings (which they cannot do), they still could not prevail on these contributory infringement claims because Plaintiffs have no evidence the Museum, "with knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to the infringing conduct of another." *Sarvis v. Polyvore, Inc.*, 2013 WL 4056208, at *8 (D. Mass. Aug. 9, 2013)); *see also* 3 Nimmer on Copyright § 12.04[A][3][a] ("A party who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer."); *Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 404 (D. Mass. 2011) ("Knowledge and participation are the touchstones of contributory infringement.").

It is indisputable the Museum stamped the words "do not reproduce" on all of the plans it sold to Mr. Mehran (*see, e.g.*, Exh. DK (plan containing a stamp stating: "DO NOT REPRODUCE . . . This plan is not to be reproduced, published, or distributed in any form without the written permission of Mystic Seaport Museum, Inc."; SOF ¶ 133); *see also* Exh. AA (Rutherford Tr.) at 109:17–110:7; Exh. Y (Stewart Tr.) at 99:3–6), and that the Museum obtained a signed agreement from Mr. Mehran stating the plans "may not be reproduced, published or distributed in any form" (SOF ¶ 134–136). Further, Mr. Mehran testified that the Museum "would have no way to know that" he had made further copies of any *Gesture* plans and that he had not told the Museum that he had scanned the plans the Museum had sold him. (Exh. R (Mehran Tr.) at 102:16–25.) Likewise, Greg Stewart, Mr. Mehran's naval architect on the *Gesture* restoration, testified that he had not told the Museum he had made copies, that the Museum did not know he had made copies, and that the Museum did not induce or encourage him to make copies. (Exh. Y (Stewart Tr.) at 97:8–98:7.) And Jeff Rutherford, whom Mr.

Mehran hired to restore *Gesture*, testified that he "never told anyone" at the Museum that he was making any copies and that the Museum did not encourage him to make copies. (Exh. AA (Rutherford Tr.) at 110:8–16.) Consistent with this, the Museum's witnesses testified that they did not know whether Mr. Mehran had made further copies of any *Gesture* plans. (*See* Exh. AC (Matheson Tr.) at 74:22–75:2 ("**Q.** [I]f Mr. Mehran scanned his own digital copies of the plans for the Gesture that the [Museum] had supplied to him, would that be a violation [of the 1998 Agreement]? **A.** Well, that is an 'if.' We don't know."); Exh. AE (O'Pecko Tr.) at 121:20–122:3 ("I don't know what Mr. Mehran did or didn't do.").) Confirming Plaintiffs have no evidence to support these claims, Mr. Tofias, speaking as Plaintiffs' corporate representative, testified, "I don't know what Mystic told Mehran" and that he "can only speculate" on whether there is "any evidence that Mystic actually encouraged or induced Mehran to further reproduce, distribute, or display the plans." (Exh. X (Tofias Tr.) at 88:6–89:17.)

Without any evidence the Museum knew Mr. Mehran was making further copies of the plans—or that the Museum induced, caused, or materially contributed to any such copies—the Museum is entitled to summary judgment on Plaintiffs' contributory infringement claims.

V. Plaintiffs Cannot Succeed on Their Claim for Unjust Enrichment Because a Contract Governs the Parties' Relationship.

Under New York law, "the existence of an express contract between the parties governing the particular subject matter of plaintiff's claim for unjust enrichment precludes the plaintiff from maintaining a cause of action for unjust enrichment." *In re Ne. Indus. Dev. Corp.*, 2015 WL 3776390, at *6 (S.D.N.Y. June 16, 2015); *accord Richard Parks Corrosion Tech., Inc. v. Plas-Pak Indus., Inc.*, 2015 WL 5708539 (D. Conn. Sept. 29, 2015) ("Generally, litigants are precluded from asserting an unjust enrichment claim based on subject matter governed by an

express contract.”). Here, Plaintiffs have admitted that an express contract—the 1989 Agreement—governs the subject matter of their claims. (*See* Exh. H at 10–11 (“[T]he underlying factual bases for S&S’s claim for unjust enrichment are generally the same as the underlying factual bases for S&S’s claim for breach of contract.”); Exh. D at 59 (same).) Because there is no dispute a contract governs the parties’ relationship, and because there is no dispute Plaintiffs’ unjust enrichment claim covers the same subject matter as is governed by the contract (SOF ¶ 234), Plaintiffs’ unjust enrichment claim fails as a matter of law.

CONCLUSION

For these reasons, the Court should grant the Museum’s Motion in its entirety and enter judgment for the Museum on each of Plaintiffs’ claims.

Dated: April 24, 2023

RESPECTFULLY SUBMITTED,

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