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

7 JOELLE SIGNORELLI,

8 Plaintiff,

9 vs.

10 NORTH COAST BREWING CO., INC., A
CALIFORNIA CORPORATION, AND DOES 1-10,

11 Defendants.

Case No.: 4:18-cv-02914

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

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1 **1. Facts Alleged**

2 NCB took advantage of Eduardo Smissen in 2005. It solicited a contract to buy his
3 painting and use it for a beer label. But NCB did not follow through – it didn’t execute the
4 contract much less obtain the copyright. NCB may well have had an implied in fact agreement to
5 use of the painting on the label of its flagship beer, but that agreement was for a very limited use,
6 as reflected by the modest price negotiated: \$1,150.00. NCB’s brand became wildly successful;
7 its use of the painting on its beer label exceeded the scope of the parties’ agreement. Complaint
8 paras. 12-17, 19.

9
10 NCB took further advantage. By 2006-07 NCB was plastering Smissen’s painting all
11 over its merchandise – from coasters to tee-shirts that it offered for sale in its shop -- and on
12 posters, billboards and trucks to advertise the brewery itself. None of this was the parties’ intent.
13 Complaint paras. 18-21.

14
15 By approximately 2010-12, NCB had recognized its impropriety and now asked Smissen
16 to enter into a contract to design merchandise. These drawings remain with NCB. Complaint
17 para. 22.

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19 When Smissen died in 2015, NCB made an explicit overture to redress its misuse of
20 Smissen’s work: its principal asked Smissen’s widow, Joelle Signorelli, the plaintiff here, if an
21 NCB-funded scholarship fund for the plaintiff’s three children would be acceptable redress and
22 “make this right.” NCB provided two checks to plaintiff – one in August 2016 and again in June
23 2017. These amounts were small, their continuation uncertain, and the amounts abruptly stopped.
24 Complaint paras. 23-24.

1 Six months later, plaintiff determined she needed to take affirmative steps to preserve her
2 rights to fair payment. On or about December 28, 2017 plaintiff obtained copyright registration
3 for the one design she had a copy of – the painting of 2005. Less than five months later, on May
4 18, 2018, plaintiff issued a cease and desist letter to NCB and filed this lawsuit. Complaint paras.
5 25-26.
6

7 It is understandable that NCB chooses to present this case as simple, deficient and stale.
8 Motion To Dismiss (“MTD”), passim. It has to do this in order to bring its motion to dismiss.
9 But NCB is simply wrong – not just about the case but about each of the claims alleged against it
10 in the complaint.
11

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13 **2. The complaint alleges a beer label license that was exclusive and limited – not**
14 **non-exclusive and unlimited.**

15 NCB asked Smissen if he would be interested in designing a bottle label featuring
16 Thelonious Monk for its Brother Thelonious Abbey Ale. Complaint para. 12. The parties
17 exchanged email indicating they had reached a deal. Complaint paras. 14-15. NCB even wanted
18 to buy the original painting from Smissen and received it. Complaint paras. 13-17. The only
19 reasonable inference from these allegations is that NCB and Smissen were negotiating an
20 exclusive license to use Smissen’s painting for its Brother Thelonious Abbey Ale. The fact that
21 the negotiations involved only a beer label, not merchandise licensing, can only reasonably
22 suggest that the license negotiated was limited. The fact that years later, NCB asked Smissen to
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1 contract for merchandising, Complaint para. 22, can only reasonably suggest that merchandising
2 a part from the beer label, was not part of the original deal.¹

3 NCB says Smissen didn't say or show that he wanted to retain control over the use of his
4 painting, so as a matter of law NCB had a non-exclusive unlimited and irrevocable license – i.e.,
5 it had the right to use his painting for any purpose forever. MTD at 6:19. This assertion simply
6 ignores the facts alleged above.²

7
8 The key case NCB cites, *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748 (9th Cir. 2008),
9 cert. den. 556 U.S. 1258 (2009), supports plaintiff here, not NCB. Under *Asset Mktg. Sys.*, an
10 exclusive, limited license is established by an objective view of the conduct of the parties. 542
11 F.3d at 756. Precisely the same standard is used in the other case NCB cites, *Fontana v. Harra*,
12 2013 U.S. Dist. LEXIS 35067, *11 (C.D. Cal. 2013). The only objective view of the facts alleged
13 by plaintiff is that the parties had an exclusive, limited license.
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24 ¹ Plaintiff's choice not to attach any email correspondence to the complaint is consistent with the
25 requirements of Fed. R. Civ. P. 8 and takes nothing away from the reasonable inference of the
26 facts alleged above, as claimed by NCB (MTD at 7:6-10).

27 ² NCB's claim that plaintiff's complaint includes "judicial admissions" to the contrary, MTD at
28 6:24-7:2, is specious. Nothing about the plaintiff's developing view that the payment received by
NCB was unfair says anything about her view, much less that of her husband, that the contract
was exclusive and limited.

1 **3. The complaint does not allege that NCB violated its beer label license by placing**
2 **photographs of the beer bottle in advertising. Rather, it alleges that NCB used**
3 **Smissen’s painting on various knick-knacks that it sold and further, to advertise**
4 **Its corporate brand, whether on these knick-knacks or on the banners and**
5 **trucks with which it marketed its company.**
6

7 NCB points out that if it has the right to put Smissen’s painting on a beer label, it has the
8 concomitant right to take a photograph of the beer bottle displaying that label and place that in
9 advertising print. MTD at 7:17-8:9. That is true.

10 But NCB does not have the right to divide the painting from its beer bottle use and slap it
11 on other products that it offers for sale, or on items with which it advertises its company
12 generally.
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14 None of the cases cited by NCB support its contention that such usage is “fair use.”³
15 NCB’s key case, *Major v. Sony Music Entertainment, Inc.*, 1992 U.S. Dist. LEXIS 12316
16 (S.D.N.Y. 1992) makes this explicitly clear. That was a case involving a license over a photo to
17 be used for a video package cover. The claim was that the defendant had used the photo in a way
18 broader than intended by the parties by placing the photo in magazines. The court said “no,”
19 because the ad simply featured the video package cover itself. 1992 U.S. Dist. LEXIS, *7-9.

20 “Scrutiny of the advertisements,” the court stated, “reveals that they each contain text referring to
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26 ³ The cases, moreover, point out that the question of “fair use” is necessarily one for summary
27 judgment, not a motion to dismiss: the elements of “fair use” are an affirmative defense. *See,*
28 *e.g., Wild v. Benchmark Pest Control, Inc.*, 2016 U.S. Dist. LEXIS 34089, *10 (E.D. Cal. 2016).

1 the availability of the video.” *Id.*, *10. The court specifically rejected plaintiff’s claim that the
2 photograph had been reproduced in different media. *Id.*

3 If NCB’s position were actually the law (and not a position assembled out of whole cloth
4 (MTD at 8:10-21), there would be no such thing as an exclusive limited license: once a license is
5 granted for any particular use, any other use would be encompassed and allowed. This is not the
6 law. See, e.g., *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1156-1157 (9th Cir.
7 2006) (licensee exceeded scope of license where owner of copyright in architectural plans
8 granted license for use in one community but didn’t authorize it for use in other communities);
9 *Michaels v. Nohr*, 2015 U.S. Dist. LEXIS 191429 (C.D. Cal. 2015) (proper obtaining of
10 plaintiff’s work through licensing agreement yet violation of copyright by subsequent sale on
11 websites without permission); *see also Jones v. Corbis Corp.*, 815 F. Supp. 2d 1108, 1116 (C.D.
12 Cal. 2011) (copyright license to image doesn’t include license to use image to advertise another
13 product).
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18 **4. Plaintiff’s allegations do what they must: they put NCB on notice of the facts**
19 **that provide the backbone of her claim and the legal grounds for the relief she**
20 **seeks.**

21 This is not summary judgment, where plaintiff must explicitly set forth every element of
22 each challenged claim in order to proceed to trial. This is the pleading stage, and all that “notice
23 pleading” requires is that plaintiff has alleged enough so that defendant knows what the case is
24 about and can respond. Fed. R. Civ. P. 8; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562
25 (2007) (a complaint must “contain either direct or inferential allegations respecting all the
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1 material elements necessary to sustain recovery under some viable legal theory”); *see, e.g.*,
2 *Missud v. City & Cnty. of San Francisco*, 2017 U.S. Dist. LEXIS 40799, *31-32 (N.D. Cal.
3 2017).

4 Here, plaintiff has alleged far more than “defendant harmed me,” *Ashcroft v. Iqbal*, 556
5 U.S. 662, 678 (2009) – that is evident from the way NCB emphasizes certain allegations while
6 ignoring others.

7
8 Plaintiff is not required to “set out in detail the facts upon which (s)he bases (her)
9 claim.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S.
10 163, 168 (1993), quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Nor is Plaintiff required to
11 separately identify the particular facts that justify relief under each claim alleged. *See id.*
12 Plaintiff’s incorporation of factual allegations from one claim into another does not render any
13 particular claim deficient (MTD 11:19-12:3); rather, it readily serves the “short and plain
14 statement of the claim” demanded by Fed. R. Civ. P. 8. *See, e.g., Ginocchi v. Grand Home*
15 *Holdings, Inc.*, 2011 U.S. Dist. LEXIS 88108, *9-10 (S.D. Cal. 2011) (allegations in fraud claim
16 incorporated by reference into defamation claim support request for punitive damages).⁴
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27 ⁴ The appropriate challenge, if one were appropriate here, would have been a motion for a more
definite statement under Fed. R. Civ. P. 12(e).

- 1 5. **Each state claim is viable and not preempted by federal copyright law because**
2 **each is supported by at least one fact that is not an element of a claim for**
3 **copyright violation.**

4
5 NCB fails to set forth the test for preemption: it is whether any alleged state law violation
6 contains an “extra element” beyond that required for a federal copyright infringement claim. *See*
7 *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1125 (N.D. Cal. 2001) (Bryer, C.).
8 Incorporation by reference not some sort of admission they are the same. (MTD at 10:11-15.)
9 Here, plaintiff alleges state law causes of action under California Civil Code section 980 (the
10 state copyright act), conversion, unjust enrichment/restitution, and contract. There are factual
11 allegations – “either direct or inferential,” *Twombly*, 550 U.S. at 562 -- which support each of
12 these claims. They have been incorporated by reference into each claim because that is consistent
13 with a “short and plain” statement under Rule 8, but they are not hard to identify among the facts
14 that support specifically a federal copyright claim. But if this court finds that these facts should
15 either be stated more directly than inferentially, or that they should be stated in specific reference
16 to a particular claim, plaintiff can do so and requests the opportunity to do so in an amended
17 complaint.

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20 a. Section 980

21 As NCB points out, section 980 covers work “that is not fixed in any tangible medium of
22 expression.” MTD at 10:16-27. Section 980 applies to the design(s) provided by Smissen for
23 merchandise design (not for the beer bottle) in 2010-12 (not in 2005). These designs are *different*
24 from the painting that was commissioned for the beer bottle label and was used not just for the
25 beer bottle label but for assorted merchandising made available for sale. Compare Complaint
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1 paras. 18-21 with Complaint para. 22. Plaintiff has not alleged that these 2010-12 designs were
2 adopted by NCB, and, most important, NCB has not submitted any declaration stating they
3 were.⁵ As a result they are not alleged to be “fixed in a tangible form.” *See, e.g., Trenton v.*
4 *Infinity Broad. Corp.*, 865 F. Supp. 1416, 1424-25 (C.D. Cal. 1994). According to the
5 allegations, there have yet to be a “distribution of tangible copies of the work.” *See Williams v.*
6 *Weisser*, 273 Cal.App.2d 726, 740-41 (1969).

8 b. Conversion

9 As NCB points out, California law of conversion requires defendant’s “wrongful
10 disposition.” MTD AT 11:1-11. While it is true that plaintiff’s claim against misuse of the 2005
11 painting is the subject of federal copyright law – whether through greater use in beer labelling or
12 through different use in the sale of miscellaneous merchandise or the general advertisement of
13 the brewery – the 2010-12 drawings are not covered in that they are alleged to have been useful
14 for NCB’s merchandising, whether helping NCB sell the merchandising itself or the beer. More,
15 the drawings are not alleged to have been either purchased or returned to plaintiff. Complaint
16 para. 22. A claim for conversion of tangible property cannot be preempted. *See G.S. Rasmussen*
17 *& Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992) (cited by NCB);
18 *Oddo v. Ries*, 743 F.2d 630, 635 (9th Cir. 1984); *Firoozye v. Earthlink Network, supra*, 153
19 F.Supp.2d at 1129-30 (“unauthorized *possession* or use of a specific piece of property” key to
20 distinguishing conversion claim). More, a secondary use of Smissen’s 2005 painting, namely
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26 ⁵ In the context of a 12(b)(6) motion to dismiss, NCB had the option to submit a declaration thus
27 rendering its motion regarding this particular motion a summary judgment motion under Rule 56.
28 *See, e.g., Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1422 (C.D. Cal. 1994).

1 NCB's use of the painting as a basis of the 2010-12 work with Smissen for merchandising
2 design, supports a claim of conversion. *See, e.g., G.S. Rasmussen, supra* (where defendant
3 copied a certificate plaintiff had received from the FAA and used it to shortcut its own
4 application for a certified design from the FAA).

5
6 c. Contract and quasi-contract (unjust enrichment)

7 As NCB points out, California law of contract (whether express or implied in fact)
8 requires a contract between the parties, and quasi-contract (or contract implied in law/unjust
9 enrichment) requires defendant's possession or retention of something it should not equitably
10 have and should either return or pay for. MTD AT 11:12-12:12-28. *See Firoozye v. Earthlink*
11 *Network*, 153 F.Supp.2d at 1126-28. All contract claims apply here because the parties either
12 agreed upon or anticipated payment for services rendered – or payment should have been
13 provided based upon the value of the work.

14
15 d. Tortious breach of covenant of good faith and fair dealing

16 A claim of breach of the covenant of good faith and fair dealing, as NCB points out as
17 well, requires breach of some duty other than that imposed by the contract itself. This is a tort
18 claim, not a contract claim. MTD at 12:17-28. The duty here arises out of the explicit overture
19 NCB made to plaintiff to redress its misuse of Smissen's work: its principal asked Smissen's
20 widow, Joelle Signorelli, the plaintiff here, if an NCB-funded scholarship fund for the plaintiff's
21 three children would be acceptable redress and "make this right." This is a duty assumed and
22 partially followed through, before it was abandoned. *See Friedman v. Merck & Co.*, 107
23 Cal.App.4th 454, 470-75, review den. 203 Cal. LEXIS 3558 (2003). NCB provided two checks to
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1 plaintiff – one in August 2016 and again in June 2017. These amounts were small, their
2 continuation uncertain. And NCB abandoned its effort. Complaint paras. 23-24.

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5 **6. Plaintiff's claims are timely because they were filed within one year of the last**
6 **act of NCB evidencing its acknowledgement of its liability.**

7 When Smissen died in 2015, NCB made an explicit overture to redress its misuse of
8 Smissen's work: its principal asked Smissen's widow, Joelle Signorelli, the plaintiff here, if an
9 NCB-funded scholarship fund for the plaintiff's three children would be acceptable redress and
10 "make this right." NCB provided two checks to plaintiff – one in August 2016 and again in June
11 2017. These amounts were small, their continuation uncertain. The last payment by NCB was
12 June 2017. Complaint paras. 23-24. Plaintiff issued her cease and desist letter and filed this
13 action within the year. Complaint paras. 25-26.

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15 Partial payment on a debt "has always been deemed, unless accompanied by
16 qualifications, an unequivocal acknowledgement of a subsisting contract or liability from which
17 a new contract to pay the debt must be inferred." *Minifie v. Rowley*, 187 Cal. 481, 485 (1921).
18 *See also Eilke v. Rice*, 45 Cal.2d 66, 72-74 (1955) and Cal. Code Civ. Proc. sec. 360.

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20 Even assuming that NCB's payments were evidence of a new contract, plaintiff's time for
21 bringing suit commenced upon the first of the breach of that contract or her discovery of her
22 claim. *See Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110-11 (1988). Plaintiff has alleged her
23 discovery on or about December 28, 2017 – the date she determined she ought to obtain
24 copyright registration for the one design she had a copy of – the painting of 2005. From this date
25 it was less than five months later, on May 18, 2018, that plaintiff issued a cease and desist letter
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1 to NCB and filed this lawsuit. Complaint paras. 25-26. Every statute of limitations cited by NCB
 2 is longer than that. MTD at 11:24-28 (conversion: 3 years); 12:4-9 (unjust enrichment: 3 years);
 3 13:8-16 (contract: 2-4 years; tort of violation of implied covenant of good faith and fair dealing:
 4 2-4 years). Because it does not “clearly and affirmatively appear on the face of the complaint that
 5 the action is barred by the statute of limitations” no motion to dismiss on this basis is proper. *See*
 6 *Geneva Towers, Ltd. Partnership v. City and County of San Francisco*, 29 Cal.4th 769, 782
 7 (2003); *E-Fab, Inc. v. Accountants, Inc. Services*, 153 Cal.App.4th 1308, 1324-26 (2007); *see*
 8 *generally* Cal. Code Civ. Proc. sec. 338(d).
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12 **7. Plaintiff’s claim for punitive damages is permitted under state law.**

13 NCB’s authority makes clear that punitive damages are permitted under at least the state
 14 law of copyright and conversion, so long as the evidence ultimately establishes the predicate
 15 facts (MTD at 13:17-14:10). *See, e.g., Read v. Turner*, 239 Cal.App.2d 504, 515 (1966) (“an
 16 intent to vex, annoy or injure”) (section 980); *Haigler v. Donnelly*, 18 Cal.2d 674, 681 (1941)
 17 (“malice, fraud, or oppression”) (conversion). The same is true for the tortious breach of the
 18 covenant of good faith and fair dealing. *See Harris v. Atlantic Richfield Co.*, 14 Cal.App.4th 70,
 19 77-78, review den., 1993 Cal. LEXIS 2964 (1993). *See generally* Cal. Civ. Code sec. 3294(a)
 20 (where “the defendant has been guilty of oppression, fraud, or malice”).⁶
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26 ⁶ *Goel v. Coalition Am. Holding Co. Inc.*, 2011 U.S. Dist. LEXIS 160745, *26-27 (C.D. Cal. 2011), cited by NCB,
 27 does not state, as indicated, that “punitive relief is not available in California for claims rooted in contract or equity,”
 MTD at 14:5-7; rather, it explains that punitive damages do not lie for claims for breach of contract, whether
 express, implied in fact or implied in law.

1 Here, when Smissen died in 2015, NCB made an explicit overture to redress its misuse of
 2 Smissen’s work: its principal asked Smissen’s widow, Joelle Signorelli, the plaintiff here, if an
 3 NCB-funded scholarship fund for the plaintiff’s three children would be acceptable redress and
 4 “make this right.” NCB provided two checks to plaintiff – one in August 2016 and again in June
 5 2017. These amounts were small, their continuation uncertain, and the amounts abruptly stopped.
 6
 7 Complaint paras. 23-24. Given the duty of care assumed by NCB (see discussion above), this
 8 conduct is sufficient to support allegations of “deliberate indifference as to the right[] of
 9 [p]laintiff[.]” *Martinez v. Cnty. of Sonoma*, 2015 U.S. Dist. LEXIS 122427, *38-39 (N.D. Cal.
 10 2015) (finding sufficient allegation of facts to withstand motion to dismiss).
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 13 **8. Plaintiff’s claim for attorneys’ fees is permitted under state law.**

14 NCB asks this court to dismiss the prayer for attorneys’ fees because the facts alleged
 15 don’t support a claim for fees under the federal copyright statute (MTD 14:11-15:1). Plaintiff
 16 concedes that the complaint does not, at present, allege facts to support a claim for attorneys’
 17 fees under the federal statute;⁷ plaintiff’s complaint alleges *state law tort claims*, statutory and
 18 common law, for which attorneys’ fees *are* available. *See, e.g., Brandt v. Sup. Ct.*, 37 Cal.3d
 19 813, 820 n.8 (1985) (tortious breach of covenant of good faith and fair dealing); *Bensinger v.*
 20 *Davidson*, 147 F. Supp. 240, 248-49 (S.D. Cal. 1956) (California law of unjust enrichment);
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 27 ⁷ Plaintiff reserves the right to seek approval from the court to amend its complaint to allege any such facts as
 discovered herein.

1 **9. Leave to amend should be granted, if needed.**

2 NCB correctly states that leave to amend should be denied only where it is clear that
3 granting leave to amend is futile (MTD at 15:2-12). This is a necessarily rare occurrence,
4 especially so early in the case.⁸ The case plaintiff cites, *Gardner v. Martino*, 563 F.3d 981,
5 990 (9th Cir. 2009), dealt with a *post-decision* motion to amend. Far more common is the
6 situation here, where, if a court finds a complaint defective, the court will allow plaintiff the
7 chance to embellish arguments suggested, even briefly, by its complaint or during oral
8 argument. *See, e.g., Holley v. Crank*, 386 F.3d 1248, 1257 (9th Cir. 2004).

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11 Respectfully submitted,

12 Dated July 6, 2018.

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16 David M. Rosenberg-Wohl
17 HERSHENSON ROSENBERG-WOHL
18 A PROFESSIONAL CORPORATION

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26 ⁸ The fact that plaintiff amended once before is irrelevant, as that amendment had nothing to do with NCB's
27 arguments (the amendment was before NCB filed its motion to dismiss) and in no way suggests plaintiff could not
28 do so to address concerns this court may have.