

THE HONORABLE JAMES P. DONOHUE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHIHULY, INC., a Washington corporation
and PORTLAND PRESS, INC., a Washington
corporation,

Plaintiffs,

vs.

ROBERT KAINDL, an individual; BRYAN
RUBINO, individually and on behalf of his
marital community; ART GLASS
PRODUCTION, a Washington company,

Defendants.

NO. C05-1801JPD

ANSWER TO AMENDED COMPLAINT,
AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS OF DEFENDANT
BRYAN RUBINO

JURY DEMANDED

Defendant Bryan Rubino, individually and on behalf of his marital community ("Defendant Rubino"), responds to the plaintiffs' First Amended Complaint for Injunctive Relief and Damages ("Amended Complaint") as follows:

ANSWER

I. INTRODUCTION.

1. Answering paragraph 1 of the Amended Complaint, Defendant Rubino admits that plaintiffs have filed an Amended Complaint against him. Defendant Rubino admits that

ANSWER TO AMENDED COMPLAINT, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS OF DEFENDANT BRYAN RUBINO - 1
(Case No. C05-1801JPD)

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1 the Amended Complaint asserts causes of action for copyright infringement; trademark
 2 infringement, unfair competition under the Lanham Act, violations of the Anti-
 3 Cybersquatting Consumer Protection Act, trade mark infringement under Washington law,
 4 violations of the Washington State Consumer Protection Act, civil conspiracy, breach of
 5 contract, intentional interference with contract and declaratory and injunctive relief. Rubino
 6 denies the remaining allegations in paragraph 1 of the Amended Complaint.

7 2. Answering paragraph 2 of the Amended Complaint, defendant Rubino denies
 8 that he made “unauthorized copies of Plaintiffs’ copyrighted works” and that he reviewed
 9 picture books of “Chihuly works to be copied” with Kaindl or anyone else. Rubino further
 10 denies the allegation that he “sells these copies to Kaindl.” Defendant Rubino is without
 11 knowledge or information sufficient to form a belief as to the truth of the allegations
 12 concerning Kaindl’s “domain names,” metatags, website, and representations concerning
 13 Kaindl’s co-authorship of various Chihuly works, or Kaindl’s affiliation with plaintiffs, and
 14 therefore denies them. Rubino denies the remaining allegations in paragraph 2 of the
 15 Amended Complaint.

16 3. To the extent that an Answer is required, Defendant Rubino denies the
 17 allegations in paragraph 3 of the Amended Complaint.

18 **II. PARTIES.**

19 4. Answering paragraph 4 of the Amended Complaint, Defendant Rubino admits
 20 that Plaintiff Chihuly Inc. (“CI”) is a Washington for-profit corporation with its principal
 21 place of business in Seattle, King County, Washington. To the extent that the remaining
 22 allegations in paragraph 4 call for an answer, Defendant Rubino denies the same.

23 5. Answering paragraph 5 of the Amended Complaint, Defendant Rubino admits
 24 that Plaintiff Portland Press, Inc. (“PPI”) is a Washington for-profit corporation with its
 25 principal place of business in Tacoma, Pierce County, Washington that publishes books,

1 videos and DVDs about Dale Chihuly and glassmaking. Defendant Rubino also admits that
2 PPI distributes and sells certain blown glass sculptures as "Studio Editions." Defendant
3 Rubino is without knowledge or information sufficient to form a belief as to the truth of the
4 remaining allegations in paragraph 5 of the Amended Complaint and therefore denies them.

5 6. Defendant Rubino is without knowledge or information sufficient to form a
6 belief as to the allegations in paragraph 6 of the Amended Complaint and therefore denies
7 them.

8 7. Defendant Rubino is without knowledge or information sufficient to form a
9 belief as to the allegations in paragraph 6 of the Amended Complaint and therefore denies
10 them.

11 8. Answering paragraph 8 of the Amended Complaint, Defendant Rubino admits
12 that Bryan Rubino is a married individual residing in Thurston County, Washington.
13 Defendant Rubino further admits that Bryan Rubino was either an employee or an
14 independent contractor of CI until 1999 and any relationship between Bryan Rubino and
15 plaintiffs from 1999 to 2004 was that of an independent contractor. Defendant Rubino
16 further admits that Bryan Rubino produces original blown glass sculptures for Rubino Glass,
17 Inc., which maintains a studio at 52 West Fredson Road, Shelton, Washington 98584.
18 Defendant Rubino denies the remaining allegations in paragraph 8 of the Amended
19 Complaint.

20 **III. JURISDICTION AND VENUE.**

21 9. Answering paragraph 9 of the Amended Complaint, Defendant Rubino admits
22 that this Court has jurisdiction over properly pled and asserted claims. By way of further
23 answer, Defendant Rubino denies that Plaintiffs have properly pled and asserted copyright
24 and trademark claims. Defendant Rubino admits the remaining allegations in paragraph 9 of
25 the Amended Complaint.

10. Answering paragraph 10 of the Amended Complaint, Defendant Rubino admits that venue is proper in this Court.

IV. FACTS.

A. Background, Facts and Relationship of the Plaintiffs.

1. Dale Chihuly

11. Answering paragraph 11 of the Amended Complaint, Defendant Rubino admits that Dale Chihuly attended the University of Wisconsin at Madison, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 11 of the Amended Complaint and therefore denies them.

12. Answering paragraph 12 of the Amended Complaint, Defendant Rubino admits that Dale Chihuly has an M.F.A. degree from the Rhode Island School of Design and apprenticed in Murano, Italy, where Dale Chihuly observed the concept of team glassmaking from master glass blowers. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies them.

13. Answering paragraph 13 of the Amended Complaint, Defendant Rubino admits that Dale Chihuly returned to the United States and co-founded the Pilchuck Glass School. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 of the Amended Complaint and therefore denies them.

14. Answering paragraph 14 of the Amended Complaint, Defendant Rubino denies that Dale Chihuly was "a pioneer in the shift from symmetrical shapes to more off-centered and asymmetrical forms." Defendant Rubino admits that glass blowing has been an art form for millennia. Defendant Rubino is without knowledge or information sufficient to

1 form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended
2 Complaint and therefore denies them.

3 15. Answering paragraph 15 of the Amended Complaint, Defendant Rubino
4 admits that Dale Chihuly has sustained injuries and that because of them, he has not blown
5 glass for many years. Defendant Rubino admits that Dale Chihuly sometimes makes abstract
6 paintings to communicate to his glassblowing team his broad idea or ideas for a particular
7 project or work. Defendant Rubino either denies or is without knowledge or information
8 sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 of the
9 Amended Complaint and therefore denies them.

10 16. Answering paragraph 16 of the Amended Complaint, Defendant Rubino
11 admits that a team of glass blowers sometimes endeavors to create one of Dale Chihuly's
12 abstract paintings into a blown glass project. Defendant Rubino either denies or is without
13 knowledge or information sufficient to form a belief as to the truth of the remaining
14 allegations in paragraph 16 of the Amended Complaint and therefore denies them.

15 17. Defendant Rubino is without knowledge or information sufficient to form a
16 belief as to the truth of the allegations in paragraph 17 of the Amended Complaint and
17 therefore denies them.

18 **2. Chihuly, Inc. ("CI")**

19 18. Answering paragraph 18 of the Amended Complaint, Defendant Rubino
20 admits that CI was founded through investment by Dale Chihuly and that CI hired a team of
21 employees to create glass artwork. Defendant Rubino is without knowledge or information
22 sufficient to form a belief as to the truth of the remaining allegations in paragraph 18 of the
23 Amended Complaint and therefore denies them.

24 19. Answering paragraph 19 of the Amended Complaint, Defendant Rubino
25 admits that CI hired or contracted with individuals to form a collaborative team of

1 glassblowers to create blown glass sculptures. Defendant Rubino is without knowledge or
2 information sufficient to form a belief as to the truth of the remaining allegations in
3 paragraph 19 of the Amended Complaint and therefore denies them.

4 20. Answering paragraph 20 of the Amended Complaint, Defendant Rubino
5 admits that no two glass sculptures are identical, and that glass sculptures are "one of a kind."
6 Defendant Rubino denies the remaining allegations in paragraph 20 of the Amended
7 Complaint.

8 21. Answering paragraph 21 of the Amended Complaint, Defendant Rubino
9 admits he was an employee of CI and a member of CI's glassblowing "team" between 1988
10 to 1995 and again from 1997 to 1999. Rubino denies the remaining allegations in paragraph
11 21 of the Amended Complaint.

12 22. Defendant Rubino denies the allegations in paragraph 22 of the Amended
13 Complaint.

14 23. Answering paragraph 23 of the Amended Complaint, Defendant Rubino
15 admits that each individual sculpture is unique. Defendant Rubino either denies or is without
16 knowledge or information sufficient to form a belief as to the truth of the remaining
17 allegations in paragraph 23 of the Amended Complaint and therefore denies them.

18 24. Answering paragraph 24 of the Amended Complaint, Defendant Rubino
19 admits that Dale Chihuly owns the registration no. 2,418,821 for the CHIHULY mark,
20 registered on January 8, 2001 in connection with "sculptures made primarily of glass" in
21 International Class 21. Defendant Rubino denies the remaining allegations in paragraph 24
22 of the Amended Complaint.

23 25. Answering paragraph 25 of the Amended Complaint, Defendant Rubino is
24 without knowledge or information sufficient to form a belief as to the truth of the allegations
25 in paragraph 25 concerning CI's protection of its alleged intellectual property and so denies

1 them. Defendant Rubino denies that the December 6, 1999 "Confidentiality Agreement" has
2 anything whatsoever to do with intellectual property rights of CI and further states that the
3 terms of the "Confidentiality Agreement" speak for themselves. Defendant Rubino denies
4 the remaining allegations in paragraph 25 of the Amended Complaint.

5 26. Answering paragraph 26 of the Amended Complaint, Defendant Rubino
6 denies that the "Confidentiality Agreement" restricts his right to blow glass or otherwise use
7 techniques that CI and its principals and employees use in making glass art that are know by
8 glass makers through out the world. By way of further answer, Defendant Rubino states that
9 the terms of the "Confidentiality Agreement" speak for themselves, and that the
10 "Confidentiality Agreement" does contain a prevailing party attorneys' fees provision.
11 Defendant Rubino denies the remaining allegations in paragraph 26 of the Amended
12 Complaint.

13 27. Answering paragraph 27 of the Amended Complaint, Defendant Rubino
14 admits that at some point in the fall of 1999, Dale Chihuly approached Bryan Rubino about
15 securing a space for another glassblowing studio. CI paid Rubino as an independent
16 consultant to locate suitable space for the glassblowing studio. Initially, Rubino secured
17 space for CI on Fifth Avenue in Seattle and then, in about late 1999 or early 2000, Rubino
18 located space for CI in the Martin Blank Studio in Seattle. Defendant Rubino further admits
19 that after 2000 Rubino often was engaged as an independent contractor for CI. Rubino
20 designed and fabricated various glass blowing pieces without any creative input whatsoever
21 from CI or Dale Chihuly, which pieces were subsequently claimed by CI and/or Dale
22 Chihuly to have been designed and/or produced under the supervision of CI/Dale Chihuly.
23 Defendant Rubino further admits he signed a document dated February 6, 2004, called "R &
24 D Agreement," the terms of which document speaks for themselves. Defendant Rubino
25 specifically denies the characterization of the "R & D Agreement" set forth in paragraph 27

1 of the Amended Complaint. Defendant Rubino denies the remaining allegations, if any, of
2 paragraph 27 of the Amended Complaint.

3 28. Answering paragraph 28 of the Amended Complaint, Defendant Rubino
4 admits that he worked as an independent contractor on several works on which Plaintiffs
5 claim a copyright. Defendant Rubino denies the remaining allegations, if any, of paragraph
6 28 of the Amended Complaint.

7 **3. *Portland Press, Inc. ("PPI")***

8 29. Answering paragraph 29 of the Amended Complaint, Defendant Rubino
9 admits that PPI produces books, videos DVDs note cards, calendars, postcards and posters
10 about Dale Chihuly and glass blowing. Defendant Rubino is without knowledge or
11 information sufficient to form a belief as to the truth of the remaining allegations in
12 paragraph 29 of the Amended Complaint and therefore denies them.

13 30. Answering paragraph 30 of the Amended Complaint, Defendant Rubino
14 admits that PPI sells certain edition blown glass sculptures that are called "Studio Editions,"
15 which are reproduced in limited numbers. Because they are hand-blown, Defendant Rubino
16 admits that each piece will vary in color, size, and shape. Defendant Rubino admits that
17 these so called "Studio Editions" are sold on PPI's website at <www.portlandpress.net>.
18 Defendant Rubino is without knowledge or information sufficient to form a belief as to the
19 truth of the remaining allegations in paragraph 30 of the Amended Complaint and therefore
20 denies them.

21 31. Answering paragraph 31 of the Amended Complaint, Defendant Rubino
22 admits that the glass artwork that PPI sells are "published" within the meaning of federal
23 copyright laws, but either denies or is without knowledge or information sufficient to form a
24 belief as to the truth of the remaining allegations in paragraph 31 of the Amended Complaint
25 and therefore denies them.

1 32. Defendant Rubino is without knowledge or information sufficient to form a
2 belief as to the truth of the allegations in paragraph 32 of the Amended Complaint and
3 therefore denies them.

4 **4. Plaintiffs' Glass and Other Works**

5 **a. Basket Series**

6 33. Defendant Rubino is without knowledge or information sufficient to form a
7 belief as to the truth of the allegations in paragraph 33 of the Amended Complaint and
8 therefore denies them.

9 34. Defendant Rubino either denies or is without knowledge or information
10 sufficient to form a belief as to the truth of the allegations in paragraph 34 of the Amended
11 Complaint and therefore denies them.

12 35. Answering paragraph 35 of the Amended Complaint, Defendant Rubino
13 admits that glass sculptures including nested internal elements each with unique shapes have
14 been known by glass artists for at least hundreds of years. Defendant Rubino is without
15 knowledge or information sufficient to form a belief as to the truth of the remaining
16 allegations in paragraph 35 of the Amended Complaint and therefore denies them.

17 36. Defendant Rubino is without knowledge or information sufficient to form a
18 belief as to the truth of the allegations in paragraph 36 of the Amended Complaint and
19 therefore denies them.

20 37. Answering paragraph 37 of the Amended Complaint, Defendant Rubino
21 admits that PPI is listed as the sole author and owner on the certificate of copyright
22 registration for "Paris Blue Basket Set" [VA 1-216-408]; Defendant Rubino is without
23 knowledge or information sufficient to form a belief as to the truth of the remaining
24 allegations in paragraph 37 of the Amended Complaint and therefore denies them.

1 38. Answering paragraph 38 of the Amended Complaint, Defendant Rubino
2 admits that CI is listed as the sole author and owner on a certificate of copyright registration
3 for the "Pearlized Purple Basket with Yellow Lip Wrap" [VAu635-050]. Defendant Rubino
4 is without knowledge or information sufficient to form a belief as to the truth of the
5 remaining allegations in paragraph 38 of the Amended Complaint and therefore denies them

6 **b. *Seaform Series***

7 39. Defendant Rubino either denies or is without knowledge or information
8 sufficient to form a belief as to the truth of the allegations in paragraph 39 of the Amended
9 Complaint and therefore denies them.

10 40. Defendant Rubino is without knowledge or information sufficient to form a
11 belief as to the truth of the allegations in paragraph 40 of the Amended Complaint and
12 therefore denies them.

13 41. Answering paragraph 41 of the Amended Complaint, Defendant Rubino
14 admits that PPI is listed as the sole author and owner on a certificate of copyright registration
15 for "Larkspur Seaform Pair with Gold Lip Wraps" [VA 1-216-413]. Defendant Rubino is
16 without knowledge or information sufficient to form a belief as to the truth of the allegations
17 in paragraph 41 of the Amended Complaint and therefore denies them.

18 **c. *Macchia Series***

19 42. Defendant Rubino is without knowledge or information sufficient to form a
20 belief as to the truth of the allegations in paragraph 42 of the Amended Complaint and
21 therefore denies them.

22 43. Defendant Rubino is without knowledge or information sufficient to form a
23 belief as to the truth of the allegations in paragraph 43 of the Amended Complaint and
24 therefore denies them.

1 44. Defendant Rubino is without knowledge or information sufficient to form a
2 belief as to the truth of the allegations in paragraph 44 of the Amended Complaint and
3 therefore denies them.

4 45. Defendant Rubino is without knowledge or information sufficient to form a
5 belief as to the truth of the allegations in paragraph 45 of the Amended Complaint and
6 therefore denies them.

7 46. Answering paragraph 46 of the Amended Complaint, Defendant Rubino
8 admits that CI is listed as the sole author and owner on certificates of copyright registration
9 for "Lime Balm Green Macchia with Orange Lip Wrap" [VAu635-054]. Defendant Rubino
10 is without knowledge or information sufficient to form a belief as to the truth of the
11 remaining allegations in paragraph 46 of the Amended Complaint and therefore denies them.

12 **d. *Persian Series***

13 47. Defendant Rubino is without knowledge or information sufficient to form a
14 belief as to the truth of the allegations in paragraph 47 of the Amended Complaint and
15 therefore denies them.

16 48. Defendant Rubino is without knowledge or information sufficient to form a
17 belief as to the truth of the allegations in paragraph 48 of the Amended Complaint and
18 therefore denies them.

19 49. Answering paragraph 49 of the Amended Complaint, Defendant Rubino
20 admits that PPI is listed as the sole author and owner on the certificate of copyright
21 registration for "Imperial Iris Persian with Chartreuse Lip Wraps" [VA 1-216-412].
22 Defendant Rubino is without knowledge or information sufficient to form a belief as to the
23 truth of the remaining allegations in paragraph 49 of the Amended Complaint and therefore
24 denies them.
25

1 50. Answering paragraph 50 of the Amended Complaint, Defendant Rubino
 2 admits that CI is listed as the sole author and owner on the certificate of copyright
 3 registration for "Plum Persian Set with Saffron Yellow Lip Wraps" [VAu635-062].
 4 Defendant Rubino is without knowledge or information sufficient to form a belief as to the
 5 truth of the remaining allegations in paragraph 50 of the Amended Complaint and therefore
 6 denies them.

7 51. Answering paragraph 51 of the Amended Complaint Defendant Rubino
 8 admits that CI's collaborative team arranged glass works for wall installations that CI refers
 9 generally to "Persian Wall Installations." Defendant Rubino denies the remaining allegations
 10 in paragraph 51 of the Amended Complaint.

11 52. Answering paragraph 51 of the Amended Complaint, Defendant Rubino
 12 admits that CI is listed as the sole author and owner on the certificate of copyright
 13 registration for "Autumn Persian Wall Installation" [VAu635-061]. Defendant Rubino is
 14 without knowledge or information sufficient to form a belief as to the truth of the remaining
 15 allegations in paragraph 52 of the Amended Complaint and therefore denies them.

16 **d. Other Series by Plaintiffs**

17 53. ***Ikebanas.*** Answering paragraph 53 of the Amended Complaint, Defendant
 18 Rubino admits that CI's collaborative team created works that CI identifies as its Ikebana
 19 series having blown glass flowers and stems in glass bases and which take their inspiration
 20 from Japanese Ikebana flower arrangements. Defendant Rubino is without knowledge or
 21 information sufficient to form a belief as to the truth of the remaining allegations in
 22 paragraph 53 of the Amended Complaint and therefore denies them.

23 54. ***Chandelier Series.*** Answering paragraph 54 of the Amended Complaint,
 24 Defendant Rubino admits that CI's collaborative team created works that CI identifies as its
 25 Chandelier Series featuring numerous blown pieces arranged on a hanging armature.

1 Defendant Rubino admits that CI's glass chandeliers are installed at the Seattle Art Museum
2 and Benaroya Hall. Defendant Rubino is without knowledge or information sufficient to
3 form a belief as to the truth of the remaining allegations in paragraph 54 of the Amended
4 Complaint and therefore denies them.

5 55. *Architectural Installations.* Answering paragraph 55 of the Amended
6 Complaint, Defendant Rubino admits that CI's collaborative team has created architectural
7 installations, at Tacoma's Union Station Federal Courthouse, the Bellagio Hotel in Las
8 Vegas, the Atlantis Hotel in the Bahamas the Garfield Park Conservatory in Chicago and at
9 the 2002 Olympic Games in Salt Lake City. Defendant Rubino further admits that CI's
10 collaborative team has created architectural installations at Venice, Italy and Jerusalem,
11 Israel. Defendant Rubino is without knowledge or information sufficient to form a belief as
12 to the truth of the remaining allegations in paragraph 55 of the Amended Complaint and
13 therefore denies them.

14 56. *Fiori Series.* Answering paragraph 56 of the Amended Complaint, Defendant
15 Rubino admits that PPI is listed as the sole author and owner on the certificate of copyright
16 registration for Bel Fiore [VA 1-315-480]. Defendant Rubino is without knowledge or
17 information sufficient to form a belief as to the truth of the remaining allegations in
18 paragraph 56 of the Amended Complaint and therefore denies them.

19 57. Defendant Rubino is without knowledge or information sufficient to form a
20 belief as to the truth of the allegations in paragraph 57 of the Amended Complaint and
21 therefore denies them.

B. Defendants and Their Infringing Acts.

1. Kaindl and His Infringing Acts

58. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58 of the Amended Complaint and therefore denies them.

59. Defendant Rubino denies the allegations in paragraph 59 of the Amended Complaint.

60. Defendant Rubino denies the allegations in paragraph 60 of the Amended Complaint.

61. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61 of the Amended Complaint and therefore denies them.

62. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62 of the Amended Complaint and therefore denies them.

63. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 of the Amended Complaint and therefore denies them.

64. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64 of the Amended Complaint and therefore denies them.

65. Defendant Rubino is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65 of the Amended Complaint and therefore denies them.

1 66. Defendant Rubino is without knowledge or information sufficient to form a
2 belief as to the truth of the allegations in paragraph 66 of the Amended Complaint and
3 therefore denies them.

4 67. Defendant Rubino is without knowledge or information sufficient to form a
5 belief as to the truth of the allegations in paragraph 67 of the Amended Complaint and
6 therefore denies them.

7 68. Defendant Rubino is without knowledge or information sufficient to form a
8 belief as to the truth of the allegations in paragraph 68 of the Amended Complaint and
9 therefore denies them.

10 69. Defendant Rubino is without knowledge or information sufficient to form a
11 belief as to the truth of the allegations in paragraph 69 of the Amended Complaint and
12 therefore denies them.

13 70. Defendant Rubino is without knowledge or information sufficient to form a
14 belief as to the truth of the allegations in paragraph 70 of the Amended Complaint and
15 therefore denies them.

16 71. Defendant Rubino is without knowledge or information sufficient to form a
17 belief as to the truth of the allegations in paragraph 71 of the Amended Complaint and
18 therefore denies them.

19 72. Defendant Rubino is without knowledge or information sufficient to form a
20 belief as to the truth of the allegations in paragraph 72 of the Amended Complaint and
21 therefore denies them.

22 73. Defendant Rubino is without knowledge or information sufficient to form a
23 belief as to the truth of the allegations in paragraph 73 of the Amended Complaint and
24 therefore denies them.
25

1 74. Defendant Rubino is without knowledge or information sufficient to form a
2 belief as to the truth of the allegations in paragraph 74 of the Amended Complaint and
3 therefore denies them.

4 75. Defendant Rubino is without knowledge or information sufficient to form a
5 belief as to the truth of the allegations in paragraph 75 of the Amended Complaint and
6 therefore denies them.

7 76. Defendant Rubino is without knowledge or information sufficient to form a
8 belief as to the truth of the allegations in paragraph 76 of the Amended Complaint and
9 therefore denies them.

10 77. Defendant Rubino is without knowledge or information sufficient to form a
11 belief as to the truth of the allegations in paragraph 77 of the Amended Complaint and
12 therefore denies them.

13 78. Defendant Rubino is without knowledge or information sufficient to form a
14 belief as to the truth of the allegations in paragraph 78 of the Amended Complaint and
15 therefore denies them.

16 **2. Rubino's Infringing Acts**

17 79. Defendant Rubino denies the allegations in paragraph 79 of the Amended
18 Complaint.

19 80. Defendant Rubino denies the allegations in paragraph 80 of the Amended
20 Complaint.

21 81. Defendant Rubino denies the allegations in paragraph 81 of the Amended
22 Complaint.

23 82. Defendant Rubino denies the allegations in paragraph 82 of the Amended
24 Complaint.

**FIRST CAUSE OF ACTION
COPYRIGHT INFRINGEMENT
(AGAINST ALL DEFENDANTS)**

83. In response to paragraph 83 of the Amended Complaint, Defendant Rubino incorporates his answers to paragraphs 1 through 82 as though fully set forth herein.

84. Defendant Rubino denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant Rubino denies the allegations in paragraph 85 of the Amended Complaint.

86. Defendant Rubino denies the allegations in paragraph 86 of the Amended Complaint.

87. Defendant Rubino is without information or belief sufficient to form a belief as to the truth of the allegations in paragraph 87 of the Amended Complaint and therefore denies them.

88. Defendant Rubino denies the allegations in paragraph 88 of the Amended Complaint.

89. Defendant Rubino denies the allegations in paragraph 89 of the Amended Complaint.

90. Defendant Rubino denies the allegations in paragraph 90 of the Amended Complaint.

91. Defendant Rubino denies the allegations in paragraph 91 of the Amended Complaint.

92. Defendant Rubino denies the allegations in paragraph 92 of the Amended Complaint.

**SECOND CAUSE OF ACTION
VIOLATIONS OF THE LANHAM ACT AND UNFAIR
COMPETITION
(AGAINST ALL DEFENDANTS)**

93. In response to paragraph 93 of the Amended Complaint, Defendant Rubino incorporates his answers to paragraphs 1 through 92 as though fully set forth herein.

94. Defendant Rubino denies the allegations in paragraph 94 of the Amended Complaint.

95. Defendant Rubino denies the allegations in paragraph 95 of the Amended Complaint.

96. Defendant Rubino denies the allegations in paragraph 96 of the Amended Complaint.

97. Defendant Rubino denies the allegations in paragraph 97 of the Amended Complaint.

98. Defendant Rubino denies the allegations in paragraph 98 of the Amended Complaint.

99. Defendant Rubino denies the allegations in paragraph 99 of the Amended Complaint.

100. Defendant Rubino denies the allegations in paragraph 100 of the Amended Complaint.

**THIRD CAUSE OF ACTION
VIOLATION OF THE ANTI-CYBERSQUATTING
PROTECTION ACT 15 U.S.C. § 1125(d)
(AGAINST DEFENDANT KAINDL)**

101. In response to paragraph 101 of the Amended Complaint, Defendant Rubino incorporates his answers to paragraphs 1 through 100 as though fully set forth herein.

1 102. Defendant Rubino is without information or belief sufficient to form a belief
2 as to the truth of the allegations in paragraph 101 of the Amended Complaint and therefore
3 denies them.

4 103. Defendant Rubino is without information or belief sufficient to form a belief
5 as to the truth of the allegations in paragraph 103 of the Amended Complaint and therefore
6 denies them.

7 104. Defendant Rubino is without information or belief sufficient to form a belief
8 as to the truth of the allegations in paragraph 104 of the Amended Complaint and therefore
9 denies them.

10 105. Defendant Rubino is without information or belief sufficient to form a belief
11 as to the truth of the allegations in paragraph 105 of the Amended Complaint and therefore
12 denies them.

13 **FOURTH CAUSE OF ACTION**
14 **TRADEMARK INFRINGEMENT UNDER**
 WASHINGTON LAW

15 106. In response to paragraph 106 of the Amended Complaint, Defendant Rubino
16 incorporates his answers to paragraphs 1 through 105 as though fully set forth herein.

17 107. Defendant Rubino denies the allegations in paragraph 107 of the Amended
18 Complaint.

19 108. Defendant Rubino denies the allegations in paragraph 108 of the Amended
20 Complaint.

21 **FIFTH CAUSE OF ACTION**
22 **VIOLATION OF THE WASHINGTON STATE**
23 **CONSUMER PROTECTION ACT**
 (AGAINST ALL DEFENDANTS)

24 109. In response to paragraph 109 of the Amended Complaint, Defendant Rubino
25 incorporates his answers to paragraphs 1 through 108 as though fully set forth herein.

1 110. Defendant Rubino denies the allegations in paragraph 110 of the Amended
2 Complaint.

3 111. Defendant Rubino denies the allegations in paragraph 111 of the Amended
4 Complaint.

5 112. Defendant Rubino denies the allegations in paragraph 112 of the Amended
6 Complaint.

7 113. Defendant Rubino denies the allegations in paragraph 113 of the Amended
8 Complaint.

9
10 **SIXTH CAUSE OF ACTION**
CIVIL CONSPIRACY
(AGAINST ALL DEFENDANTS)

11 114. In response to paragraph 114 of the Amended Complaint, Defendant Rubino
12 incorporates his answers to paragraphs 1 through 113 as though fully set forth herein.

13 115. Defendant Rubino denies the allegations in paragraph 115 of the Amended
14 Complaint.

15 116. Defendant Rubino denies the allegations in paragraph 116 of the Amended
16 Complaint.

17 117. Defendant Rubino denies the allegations in paragraph 117 of the Amended
18 Complaint.

19
20 **SEVENTH CAUSE OF ACTION**
BREACH OF CONTRACT
(AGAINST DEFENDANT BRYAN RUBINO)

21 118. In response to paragraph 118 of the Amended Complaint, Defendant Rubino
22 incorporates his answers to paragraphs 1 through 117 as though fully set forth herein.

23 119. Defendant Rubino denies the allegations in paragraph 119 of the Amended
24 Complaint.
25

1 120. Defendant Rubino denies the allegations in paragraph 120 of the Amended
2 Complaint.

3 121. Defendant Rubino denies the allegations in paragraph 120 of the Amended
4 Complaint.

5 **EIGHTH CAUSE OF ACTION**
6 **INTENTIONAL INTERFERENCE WITH CONTRACT**
7 **(AGAINST DEFENDANT KAINDL)**

8 122. In response to paragraph 122 of the Amended Complaint, Defendant Rubino
9 incorporates his answers to paragraphs 1 through 121 as though fully set forth herein.

10 123. Defendant Rubino denies the allegations in paragraph 123 of the Amended
11 Complaint.

12 124. Defendant Rubino is without information or belief sufficient to form a belief
13 as to the truth of the allegations in paragraph 124 of the Amended Complaint and therefore
14 denies them.

15 125. Defendant Rubino either denies or is without information or belief sufficient
16 to form a belief as to the truth of the allegations in paragraph 125 of the Amended Complaint
17 and therefore denies them.

18 126. Defendant Rubino is without information or belief sufficient to form a belief
19 as to the truth of the allegations in paragraph 126 of the Amended Complaint and therefore
20 denies them.

21 127. Defendant Rubino is without information or belief sufficient to form a belief
22 as to the truth of the allegations in paragraph 127 of the Complaint and therefore denies
23 them.
24
25

**NINTH CLAIM FOR RELIEF
INJUNCTIVE RELIEF
(AGAINST ALL DEFENDANTS)**

128. In response to paragraph 128 of the Amended Complaint, Defendant Rubino incorporates his answers to paragraphs 1 through 127 as though fully set forth herein.

129. Defendant Rubino denies the allegations in paragraph 129 of the Amended Complaint.

130. Defendant Rubino denies the allegations in paragraph 130 of the Amended Complaint.

131. Defendant Rubino denies the allegations in paragraph 131 of the Amended Complaint.

132. Defendant Rubino denies the allegations in paragraph 132 of the Amended Complaint.

133. Defendant Rubino denies the allegations in paragraph 133 of the Amended Complaint.

**TENTH CAUSE OF ACTION
DECLARATORY RELIEF
(AGAINST ALL DEFENDANTS)**

134. In response to paragraph 134 of the Amended Complaint, Defendant Rubino incorporates his answers to paragraphs 1 through 133 as though fully set forth herein.

135. Defendant Rubino denies the allegations in paragraph 135 of the Amended Complaint.

136. Defendant Rubino denies the allegations in paragraph 136 of the Amended Complaint.

137. Defendant Rubino denies the allegations in paragraph 137 of the Amended Complaint.

1 138. Defendant Rubino denies the allegations in paragraph 138 of the Amended
2 Complaint.

3 139. Defendant Rubino denies the allegations in paragraph 39 of the Amended
4 Complaint.

5 140. Defendant Rubino denies the allegations in paragraph 140 of the Amended
6 Complaint.

7 **AFFIRMATIVE DEFENSES**

8 By way of further answer, Defendant Rubino asserts the following affirmative
9 defenses:

- 10 1. The Complaint fails to state a claim upon which relief may be granted.
- 11 2. Several copyright registrations listed in the Complaint lack prima facie
12 validity.
- 13 3. Most if not all of the copyright registrations are not for original works.
- 14 4. Many of the copyright registrations that Plaintiffs claim are not enforceable as
15 Plaintiffs intentionally failed to identify all of the correct copyright authors and claimants.
- 16 5. One or more of the copyrights alleged in the Complaint are invalid for failing
17 to disclose previous derivative works and that such failure to disclose was intentional.
- 18 6. Plaintiffs' copyright registrations are works that are themselves derivatives of
19 previous works that do not amount to sufficient originality to acquire copyright protection.
- 20 7. Many of Plaintiffs' copyright registrations were filed more than five years
21 from the date of publication and are not prima facie evidence of copyright validity.
- 22 8. Plaintiffs have failed to submit registration deposits for allegedly infringed
23 copyrighted works in which the registration deposits are bone fide copies of the works.

1 9. Plaintiffs have misused their copyrights by attempting to secure exclusive
2 rights or limited monopolies for genres and techniques through copyright laws but rights not
3 granted to Plaintiffs by the Copyright Office.

4 10. Rubino independently authored or co-authored several of the works identified
5 in the Complaint.

6 11. To the extent that there is copyright protection, Rubino is a co-author and co-
7 owner and cannot as a matter of law infringe his own co-authored/co-owned works.

8 12. Defendant Rubino independently created his own works.

9 13. None of Defendant Rubino's artwork infringes Plaintiffs' registered
10 copyrights or other intellectual property rights.

11 14. The Court has no jurisdiction over claims of copyright infringement for any of
12 the unregistered works in a series, including those works in which copyright registration
13 applications have been recently filed but have not issued.

14 15. To the extent that Defendant Kaindl has infringed any copyright to a work that
15 Rubino created while an independent contractor, Rubino has licensed Kaindl nonexclusive
16 rights to use the copyrighted works.

17 16. Plaintiffs have failed to state a claim upon which relief may be granted as to
18 the trade dress claim as no elements of Plaintiffs non-functional trade dress have been
19 identified. Moreover, certain features that Plaintiffs employ are functional, (e.g., optic,
20 ribbed molds used to strengthen thin-walled glass) and, therefore, such features are not
21 entitled to trade dress protection.

22 17. Plaintiffs have no trade dress rights to genres of glass art.

23 18. Many other glass artists routinely create asymmetrical and/or biomorphic
24 glass shapes with or without wavy sidewalls and lip wraps or create glass inspired from sea
25

1 life or create abstract spiraling elongated members and form installed chandeliers such that
2 the works do not and cannot identify a single source.

3 19. Plaintiffs have failed to state a claim against Defendant Rubino for trademark
4 infringement.

5 20. Defendant Rubino has not used the CHIHULY mark (stylized or otherwise)
6 on his work nor has he induced anyone to use the CHIHULY mark.

7 21. Plaintiffs have failed to state a claim against Defendant Rubino for
8 conspiracy.

9 22. Plaintiffs have failed to state a claim against Defendant Rubino for unfair
10 business practices.

11 23. Plaintiffs have failed to state a claim against Defendant Rubino for violations
12 of the Washington Consumer Protection Act, RCW 19.86.

13 24. Plaintiffs have failed to state a claim against Defendant Rubino for the
14 damages requested by Plaintiffs.

15 25. There has been a failure of consideration on any and all contracts which
16 Defendant Rubino signed or had with Plaintiffs.

17 26. Defendant Rubino has not breached any of the contracts which he signed or
18 had with the Plaintiffs that are supported by adequate consideration.

19 **COUNTERCLAIMS**

20 By way of further answer, Defendant Rubino asserts the following counterclaims
21 against plaintiffs Chihuly, Inc. and Portland Press, Inc. as follows:

22 **I. JURISDICTION**

23 1. This is a civil action for claims arising under the federal copyright and
24 trademark laws of the United States, and supplemental claims arising under Washington state
25 law. This Court has original jurisdiction over the federal copyright and trademark claims

1 pursuant to 28 U.S.C. § 1338(a), 28 U.S.C. § 1331 and 15 U.S.C. § 1121; and jurisdiction
2 over the state law claims pursuant to 28 U.S.C. § 1338(b).

3 2. Venue is proper in the United States District Court for the Western District of
4 Washington pursuant to 28 U.S.C. § 1391(a) and (c). Plaintiffs have transacted business in,
5 and have had continuous and systematic contact with, this District. A substantial part of the
6 events or omissions giving rise to the claims occurred in this District.

7 **II. PARTIES**

8 **Bryan Rubino**

9 3. Defendant and counter-claimant, artist Bryan Rubino, has lived in the Puget
10 Sound area for over 40 years and is a master glass blower who has been professionally
11 blowing glass for over 20 years. Defendant Rubino had significant experience in the art of
12 glass blowing well prior to meeting Dale Chihuly and his employment with CI in 1988. An
13 example of the type of work that he created in 1986, long before working at CI, is attached
14 hereto as **Exhibit A**.

15 4. Rubino first became employed by CI in September 1988 and was an employee
16 at CI through October 1, 1995. In 1995, Rubino started his own business, Rubino Glass as a
17 sole proprietorship and provided his artistic talents to others in an independent contractor
18 capacity. He has provided independent contractor services through Rubino Glass to CI, Lino
19 Inc, and Dorothy Hafner, amongst others. Rubino also sold his own works to Foster White
20 Gallery in Seattle, Washington.

21 5. Thereafter, Rubino continued to sell his own works to galleries, both in
22 Washington and elsewhere in 1996 and beyond. He continued to act as an independent
23 contractor for CI in 1996. In April 1997, Rubino again became an employee of CI and
24 continued to be an employee of CI until April 1999. After April 1999, Rubino was never an
25 employee of CI again.

1 6. Rubino never signed a non-compete agreement with CI. In fact, there have
2 been only five written agreements that Rubino entered into with CI. One of those agreements
3 entitled "Chihuly, Inc." is dated August 24, 1995 and is attached hereto as **Exhibit B**. One of
4 those agreements entitled "Release" is dated October 25, 1999 and is attached hereto as
5 **Exhibit C**. One of those agreements entitled "Confidentiality Agreement" is dated
6 December 6, 1999 and is attached hereto as **Exhibit D**. One of those agreements entitled
7 "R&D Agreement" is dated February 6, 2004 and is attached hereto as **Exhibit E**. One of
8 those agreements is a letter dated November 5, 2003 regarding CI's intent to lease certain
9 space from Rubino Glass, Inc. attached hereto as **Exhibit F**. A letter dated October 31, 2005
10 (attached hereto as **Exhibit G**) canceled the Rubino Glass, Inc.-CI lease agreement. CI
11 requested that Bryan Rubino sign an "Independent Contractor Agreement" (attached hereto
12 as **Exhibit H**), but Rubino refused to sign it. CI/PPI also requested that Rubino sign a
13 "Chihuly, Inc./Portland Press Employee Confidentiality and Proprietary Rights and
14 Obligations Agreement" (attached hereto as **Exhibit I**) but Rubino refused to sign it, as well.

15 7. When Rubino was an independent contractor, Dale Chihuly would often ask
16 Rubino to "come up with something" for Dale Chihuly to review and purchase for CI, so that
17 CI could sell it. For example, Dale Chihuly sent Rubino a fax dated December 10, 2003
18 (attached hereto as **Exhibit J**) which states: "Here's a little sketch but make whatever you
19 want. We'll get everything up to Tacoma when you're done and I'll try to come down while
20 you're blowing. Till then, Chihuly."

21 8. Because of Rubino's talent and artistic flair, Rubino would be the creator of
22 color selections for repeat work that CI was producing. Oftentimes Rubino would be the sole
23 creator of a particular shape and color scheme with no direction from Dale Chihuly or the
24 CI/PPI organizations.

9. With regard to the specified copyright registrations identified in the original Complaint, Rubino was at least a co-author for several of the works identified in the Complaint. For example, Rubino either created or co-created the work identified as “Ruby Macchia” in U.S. Copyright Registration No. VA 1-216-409, which lists “Portland Press” as author and owner. As another example, Rubino either created or co-created the work identified as “Paradise Persian” in U.S. Copyright Registration No. VA 1-216-426, which lists “Portland Press” as author and owner. Yet another example is one in which Rubino either created or co-created the work identified as “Ocean Macchia” in U.S. Copyright Registration No. VA 1-216-417 and lists “Portland Press” as author and owner. Non-certified copies of these registrations and accompanying deposit photographs are attached hereto as **Exhibits K, L, M**, respectively. Neither Dale Chihuly nor the Plaintiffs attribute or have attributed Rubino as a co-creator/co-author of these works. Because Rubino did not transfer ownership in his rights to Plaintiffs, Rubino is also a co-owner in these works. Rubino is likely to be at least a co-author and co-owner in several to many works identified by title in the Amended Complaint. Rubino was also the sole author of the work identified as “Bel Fiore” [VA 1-315-480] but was not identified as the author on the copyright registration. Further, Dale Chihuly took full artistic credit for creating the Bel Fiore work that he did not create. Neither Dale Chihuly nor the Plaintiffs attribute Rubino with creation/authorship of the Bel Fiore work.

10. In December of 1999, Rubino incorporated his business to form Rubino Glass, Inc. (“RGI”), a Washington corporation with its principal place of business in Seattle. In 2001, RGI opened a hot shop in Shelton, Washington and has remained in that location ever since.

1 11. Examples of Rubino's art can be found on his company's website at
2 <www.rubinoglass.com>. Copies of representative works are also attached hereto as
3 **Exhibit N**.

4 12. Operating a hot shop requires that the glass furnace be operating at all times
5 ("24/7") as it is too costly to start and stop the glass furnace that contains the molten glass.
6 Because of the high fixed overhead costs involved with running and operating a hot shop, it
7 is important to have sufficient business to offset the overhead costs.

8 13. RGI provided extensive independent contractor services to CI, from 2000 to
9 2003. In 2000, CI paid \$429,857 to RGI for RGI's glass blowing services. A copy of CI's
10 Form 1099 to RGI for the tax year 2000 is attached hereto as **Exhibit O**. CI and Dale
11 Chihuly made representations to Rubino which induced RGI to open its own glass hot shop
12 in Shelton, Washington in 2001. Dale Chihuly and CI represented that they would contract
13 with RGI to rent significant amounts of time in the RGI hot shop. These representations
14 were false in that after 2003, CI gave very little work to RGI. In 2004 CI provided no
15 contract work to RGI. Rubino was forced to secure other glass blowers to use his shop to
16 cover RGI's overhead and expenses, one of whom was Defendant Kaindl. Kaindl began
17 renting RGI's hot shop in or about November 2004.

18 **Chihuly, Inc.**

19 14. Plaintiff/counter-claim defendant Chihuly, Inc. ("CI") is a Washington state
20 for-profit corporation with its principal place of business in Seattle, King County,
21 Washington. CI represents the artwork allegedly produced by Dale Chihuly and his
22 collaborative team.

23 **Portland Press, Inc.**

24 15. Plaintiff/counter-claim defendant Portland Press, Inc. ("PPI") is a Washington
25 state for-profit corporation with its principal place of business in Tacoma, Pierce County,

1 Washington. PPI publishes books, videos and DVDs about Dale Chihuly and glassmaking.
2 PPI also presents certain edition blown glass sculptures ("Studio Editions") and limited
3 edition prints.

4 **III. BACKGROUND FACTS**

5 16. Glass art has been well-known for millennia. At least since the 4th century,
6 decorative blown glass baskets have been created. Examples of this are found at The
7 Metropolitan Museum of Art, New York City, and Corning Glass Art Museum in Corning,
8 New York and are attached hereto as **Exhibit P**.

9 17. Blown glass art is a combination of glass, centrifugal force, gravity, heat, and
10 optional color. In order to achieve a temperature where the glass becomes molten and
11 sufficiently malleable to "work," the glass furnaces are operated at a temperature of about
12 2150°F. Glass must be continually reheated in the creation process or the glass cools and the
13 piece is not workable. Certain shapes are inherently easier to form because of the need to
14 keep the glass rotating on a rod (a punti) and from the air bubble blown into the molten glass
15 at the end of a blow pipe. Basket shapes and shapes that are "free flowing" are inherently the
16 easiest to create as once the piece has stopped rotating and is taken out of the intense heat of
17 the furnace, gravity will naturally cause the glass sculpture to collapse, resulting in the
18 undulating, "wavy" biomorphic shapes at the edges or "lips" of the piece. However, unless
19 one creates glass from a mold, no two pieces of blown glass can be identical, as the colors,
20 spinning, heat, and gravity will cause subtle or bold differences in each piece every time.

21 18. Dale Chihuly and CI's team of glass artists have furthered the genre of glass
22 art and have indeed made glass art collecting more popular than ever. Plaintiffs' works take
23 inspiration from nature. Much of Plaintiffs' works are the open "basket style" which has
24 been in existence since at least the fourth century A.D. as noted above. Indeed, the open
25 "basket style" shapes with their biomorphic curved "lips," and "nested" glass shapes (which

1 plaintiffs claim to have originated) have been in existence since at least the late Roman
2 Empire as shown in **Exhibit P**.

3 19. Similarly, glass blown baskets, wall hangings, chandeliers, and sculptures
4 have been part of a popular art glass movement that is not solely reflective of any one artist.
5 Most artists, especially those located in the Northwest, take inspiration from nature, such as
6 sea shapes. Glass blown baskets and vases, wall hangings, sculptures, and chandeliers are
7 popular with many glass artists or communal art groups, including the following:

8 • Jeau Bishop, whose work can be viewed at jeaubishop.bigstep.com, an
9 example of whose work is attached hereto as **Exhibit Q**.

10 • White Elk, the work of which can be viewed at whiteelks.com/wallart.htm.
11 An example of White Elk's work is attached hereto as **Exhibit R**.

12 • Jud Scott, whose work can be viewed at judscott.com, an example of whose
13 work is attached hereto as **Exhibit S**.

14 • Aaron Gross, whose work can be viewed at austinartglass.com, an example of
15 whose work is attached hereto as **Exhibit T**.

16 • Dozer Lane, the work of which can be viewed at
17 dozerlane.com/html/glass.html. An example of Dozer Lane's work is attached hereto as
18 **Exhibit U**.

19 • Elements Glass Studio, the work of which can be viewed at
20 elementsglassstudio.com/images/vessel6___large.jpg. An example of Elements Glass
21 Studio's work is attached hereto as **Exhibit V**.

22 • Jordan Valley Glassworks, the work of which can be viewed at
23 jordanvalleyglassworks.com/shop. An example of Jordan Valley Glassworks' work is
24 attached hereto as **Exhibit W**.

• Mercurial Arts, the work of which can be viewed at mercurialarts.com/unique_sculpture.html. An example of Mercurial Arts' work is attached hereto as **Exhibit X**.

• James Nowak, whose work can be viewed at emeraldfoxygallery.com and jamesnowak.com/blownw.htm, an example of whose work is attached hereto as **Exhibit Y**.

• Robert Kuster, whose work can be viewed at glassartistsgallery.com, an example of whose work is attached hereto as **Exhibit Z**.

• Michael Church, whose work can be viewed at glassartistsgallery.com/sum--0--1-117-artist--.htm, an example of whose work is attached hereto as **Exhibit AA**.

• Anchor Bend Glassworks, the work of which can be viewed at glassartistsgallery.com/item-0-0-0-1-3788-142-artist--.htm. An example of Anchor Bend Glassworks' work is attached hereto as **Exhibit BB**.

As can be seen by viewing the websites of these glass artists, and the examples of their works attached hereto as exhibits, many and perhaps most contemporary glass artists incorporate in their work "baskets" with biomorphic curves, "nested" baskets or bowls, wall hangings, sculptures, and chandeliers that utilize elements which Plaintiffs claim are their own proprietary information, styles or designs. In other words, Plaintiffs claim to have a monopoly on any and all glass art that is curved, nested or uses certain kinds of colors. Plaintiffs cannot use copyright registrations to protect an idea or process that is so elementary that it would preclude any other glass artist from working or creating any glass art at all. Moreover, the styles referenced above and the examples of those styles attached hereto as exhibits cannot be attributed to any single source, including Dale Chihuly or the Plaintiffs.

20. The Tacoma Museum of Glass displays many genres of glass art. For example, spotted glass vessels, such as the type Plaintiffs' call "Macchias" are common and not associated with any particular artist, but rather a glass art movement. Indeed, the Tacoma

1 Museum of Glass teaches the general public how to build a spotted glass vessel or “Macchia”
 2 on its virtual website <http://www.museumofglass.org/s02_virtual_hotshop.jsp>.

3 **Exhibit CC.**

4 21. Plaintiffs in their Complaint are impermissibly and unlawfully attempting to
 5 prevent Bryan Rubino from pursuing his livelihood as a glass blower by asserting that
 6 plaintiffs can copyright the biomorphic form of asymmetrical glass and/or other features such
 7 as colors, arrangements and presentation. None of these elements is copyrightable in and of
 8 themselves, but even if the combination is copyrightable, there is no indication that Bryan
 9 Rubino has sought to infringe Plaintiffs’ alleged copyrighted works by making glass objects
 10 that naturally assume a “biomorphic shape” when worked in a manner well known by all
 11 glass blowers. Moreover, Plaintiffs cannot claim copyright protection on the use of a color
 12 or colors on glass objects created by Bryan Rubino.

13 **IV. COUNTERCLAIMS**

14 22. Defendant Rubino realleges and incorporates by reference the allegations in
 15 the foregoing paragraphs 1 through 21 of the Counterclaims as though fully set forth herein.

16 23. Defendant Rubino requests that this Court issue a declaratory judgment
 17 pursuant to 28 U.S.C. § 2201, *et seq.*

18 24. There is an actual and existing controversy between Plaintiffs and Defendant
 19 Rubino requiring immediate resolution. Rubino has genuine and opposing interests to that of
 20 Plaintiffs. Rubino’s interests are direct and substantial, including significant artistic and
 21 economic interests. A judicial determination of the controversy will be final and conclusive
 22 as to the rights and obligations of the parties.

23 25. Defendant Rubino worked as an independent contractor creating glass
 24 sculptures for Plaintiffs CI and PPI and had no contractual obligations to transfer his rights in
 25

1 the subject works to Plaintiffs. Plaintiffs are impermissibly seeking to apply copyright
2 protection to many of Defendant Rubino's original works.

3 26. Defendant Rubino therefore requests that the Court declare that Defendant
4 Rubino is entitled to continue to make glass in biomorphic shapes that uses any color
5 combinations which Rubino desires, and further requests that the court declare that none of
6 the work of Rubino which Plaintiffs have identified as infringing their copyrights or other
7 intellectual property protections is, in fact, a violation of Plaintiffs' rights.

8 27. Because of the immediate and ongoing harm to Defendant Rubino from the
9 present controversy, Rubino further requests that, pursuant to Fed. R. Civ. P. 57, the Court
10 order a speedy hearing of Plaintiff's request for declaratory judgment.

11 28. Because Rubino at least co-authored works in which Plaintiffs claim copyright
12 protection while Rubino was an independent contractor and had not signed nor agreed to any
13 transfer of copyright ownership to Plaintiffs, Rubino is a co-author and co-owner of at least
14 works identified in U.S. Copyright Registrations VA 1-216-426, VA 1-216-417, and VA 1-
15 216, 409 and other works to be determined at trial and is entitled to all rights, including
16 attribution and profits pertaining from same. Plaintiffs intentionally failed to claim correct
17 authorship/ownership in these works.

18 29. Rubino is the sole author of the Bel Fiore work claimed in Plaintiff PPI's U.S.
19 Copyright Registration VA -1315-480 and is entitled to attribution in this work. Plaintiffs
20 intentionally failed to claim correct authorship in this work.

21 **PRAYER FOR RELIEF ON ALL CLAIMS/DEFENSES**

22 WHEREFORE having previously answered and having stated affirmative defenses,
23 Defendant Rubino prays as follows:

- 24 1. For finding that Rubino has not infringed any right owned by Plaintiffs.
25

1 2. For finding that Rubino has not breached any contractual obligation with
2 Plaintiffs.

3 3. For enjoining plaintiffs from bringing any other harassing and unsubstantiated
4 legal action against Rubino for merely creating glass art, and selling or distributing his glass
5 art.

6 4. For canceling certain copyright registrations determined at trial based on
7 intentional misrepresentations by Plaintiffs.

8 5. For granting Rubino co-authorship in at least U.S. Copyright Registrations
9 VA-1-216-426, VA 1-216-417, and VA 1-216-409 and other copyrighted works determined
10 at trial and ordering the U.S. Copyright Office either change authorship in these registered
11 works to Rubino or to add Rubino as a co-author/co-claimant (co-owner) on these existing
12 copyright registrations. And for granting Rubino authorship in at least U.S. Copyright
13 Registration VA 1-315-480.

14 6. For ordering Plaintiffs to attribute Rubino's authorship contributions in
15 Plaintiffs' works that Rubino has at least co-authored.

16 7. For granting Rubino discretionary attorneys' fees as prevailing party in a
17 copyright infringement suit.

18 8. For ordering an accounting from Plaintiffs regarding any works that Rubino is
19 deemed an author or co-author.

20 9. For ordering Plaintiffs to disgorge any profits for any works that Rubino is
21 deemed an author or co-author.

22 10. For granting Rubino's attorneys' fees and cost related to defending the breach
23 of confidentiality agreement.

24 11. For ordering the confidentiality contract to be herewith terminated.

25 12. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Defendant Rubino demands trial by jury of all triable issues in this matter.

DATED this 18th day of May, 2006.

TODD & WAKEFIELD

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STOKES LAWRENCE, P.S.

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Attorneys for Counterclaimant Rubino

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2006, I electronically filed the following documents:

1. Answer to Amended Complaint, Affirmative Defenses and Counterclaims of Defendant Bryan Rubino with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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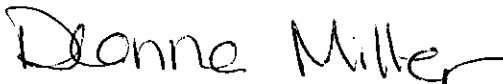
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and I hereby certify that I also have delivered, via ABC Messenger Service, a hard copy of the Answer to Amended Complaint, Affirmative Defenses and Counterclaims of Defendant Bryan Rubino, with color exhibits, to the above CM/ECF participants and a courtesy copy to the Court.


DEANNA MILLER