

1 MARK B. CHASSMAN (SBN 119619)  
2 CHASSMAN & SEELIG, LLP  
3 Email: mchassman@chassmanseelig.com

4 ANA VASQUEZ (SBN 231903)  
5 Email: avasquez@chassmanseelig.com  
6 1250 Sixth Street, Suite 403  
7 Santa Monica, CA 90401  
8 Telephone: (310) 929-7192  
9 Facsimile: (310) 929-7627

10 RICHARD C. WOLFE (*Pending Pro Hac Vice Admission*)

11 WOLFE LAW MIAMI, P.A.  
12 Email: rwolfe@wolfelawmiami.com

13 Latitude One Building  
14 175 SW 7<sup>th</sup> Street, Suite 2410  
15 Miami, Florida 331310  
16 Telephone: (305) 384-7370  
17 Facsimile: (305) 384-7371

18 Attorneys for Defendants WK Records, Inc.  
19 Llandel Veguilla pka “Yandel,”  
20 Juan Luis Morera Luna pka “Wisin,”  
21 Ernest Padilla, Mr. 305 Inc., Marcos Alfonso,  
22 Ramirez Carrasquillo, Victor Rafael Torres Betancourt,  
23 La Base Music Group, LLC, Juan Luis Londono Arias pka “Maluma”  
24 Carlos Alberto Vivies Restrepo pka “Carlos Vives,”  
25 Daniel Oviedo pka “Ovy on the Drums,”  
26 Michael Monge pka “Myke Tower,”  
27 Geoffrey Royce Rojas pka “Prince Royce,”  
28 Rafael Torres pka “De La Ghetto”  
Richard Camacho,  
Erick Brian Colon,  
Christopher Velez, and  
Zabdiel De Jesus

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CLEVELAND CONSTANTINE  
BROWNE, et al.

Plaintiffs,

vs.

RODNEY SEBASTIAN CLARK  
DONALDS, et al.

Defendants.

Case No.: 2:21-cv-02840-AB-AFM

Assigned to: Hon. André Birotte

**DEFENDANTS’ MOTION TO DISMISS**

Date: September 22, 2023

Time: 10:00AM

Place: Courtroom 7B

**TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on September 22, 2023, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Andre Birotte, United States District Court, Central District of California, Courtroom 7B, 350 W. First Street, Los Angeles, California, Defendants WK Records, Inc., Llandel Veguilla pka “Yandel,” Juan Luis Morera Luna pka “Wisin,” Ernest Padilla, Mr. 305 Inc., Marcos Alfonso, Ramirez Carrasquillo, Victor Rafael Torres Betancourt, La Base Music Group, LLC, Juan Luis Londono Arias pka “Maluma,” Carlos Alberto Vives Restrepo pka “Carlos Vives,” Daniel Oviedo pka “Ovy on the Drums,” Michael Monge pka “Myke Tower,” Rafael Torres pka “Del La Ghetto,” Geoffrey Royce pka “Prince Royce” Richard Camacho, Erick Brian Colon, Christopher Velez, and Zabdiel De Jesus (collectively the “Moving Defendants”) will move the Court pursuant to Federal Rules of Civil Procedure 12(b)(6) to dismiss the Complaint for failure to state a claim.

This motion is based on the Notice of Motion and Motion to Dismiss; the attached Memorandum of Points and Authorities; the papers and records on file in

1 this action; and such other written and oral argument as may be presented to the  
2 Court, including the motions of the other Defendants.

3 This Motion is made following the conference of counsel pursuant to Local  
4 Rule 7-3, which took place on June 5, 2023.

5

6

Respectfully submitted,

7

CHASSMAN & SEELIG, LLP

8

9

DATED: June 15, 2023

By: /s/ Mark B. Chassman

10

MARK B. CHASSMAN

11

Attorneys for Defendants

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

I. SUMMARY OF ARGUMENT ..... 4

II. INTRODUCTION..... 4

III. BACKGROUND AND SUMMARY OF ALLEGATIONS ..... 6

    A. Plaintiffs’ Claimed Ownership of Four Works..... 6

        1. Fish Market ..... 7

        2. Dem Bow ..... 7

        3. Pounder Riddim ..... 8

        4. Pounder Dub Mix II ..... 8

    B. The Allegedly Infringing Works and The Moving Defendants ..... 8

IV. ARGUMENT ..... 8

    A. Rule 12(b)(6) Legal Standard ..... 8

    B. Pleading Standards Applied to Copyright Infringement Actions ..... 9

    C. Plaintiffs Improperly Claim Infringement of Works They Do Not Own And for Which They Have No Standing To Sue..... 11

        1. Plaintiff Do Not Claim That The Moving Defendants Have Infringed Upon Protectible Portions of *Dem Bow* ..... 11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 2. The SCAC Fails to Distinguish Between Infringement Claims Involving Sound Recordings From Infringement Claims Involving Musical Compositions ..... 14
- 3. Even for Works Alleged to Infringe Timely-Registered Copyrights, Plaintiffs Fail to Satisfy the Relevant Pleading Standards..... 16
- 4. Deficient Allegations of the Infringement of the *Fish Market* Composition ..... 17
- 5. In the Few Instances Where Plaintiffs Have Identified Alleged “Similarities” Between A Defendant’s Work and *Fish Market*, The Comparison Demonstrates That There Is No Similarity In A Protectable Expression..... 18
- 6. Dismissal is Appropriate for Claims of Secondary Liability ..... 22
- 7. The Moving Defendants Adopt and Join in the Arguments and Authorities Advocated by the Other Defendants ..... 22

- V. CONCLUSION ..... 22
- CERTIFICATE OF MEET AND CONFER..... 22

**TABLE OF AUTHORITIES**

**CASES**

1

2

3 *A and M Records v. Napster*

4 239 F.3d 1004 (9<sup>th</sup> Cir. 2000) ..... 22

5 *Anthony v. Pro Custom Solar, LLC*

6 2022 WL 1634870, at \*4 (C.D. Cal. Jan. 21, 2022) ..... 15

7 *Apps v. Universal Music Group, Inc.*

8 283 F. Supp.3d. 946 (D. Nev. Apr. 27, 2018),

9 *aff’d*, 763 Fed. Appx. 599 (9th Cir. 2019) ..... 12

10 *Ashcroft v. Iqbal*

11 556 U.S. 662 (2009)..... 9

12 *Batiste v. Najm*

13 28 F. Supp. 3d 595 (E.D. La. 2014)..... 13, 19

14 *Bell Atl. Corp. v. Twombly*

15 550 U.S. 544 (2007)..... 9, 15,

16 18

17 *Blizzard Entm’t, Inc. v. Lilith Games (Shanghi) Co.*

18 2018 WL 1242053, at \*3-5 (N.D. Cal. March 8, 2018) ..... 10, 14

19 *Christianson v. West Pub. Co.*

20 149 F.2d 202 (9<sup>th</sup> Cir. 1945) ..... 21

21 *Cottrill v. Spears*

22 2023 U.S. Dist. LEXIS 88823 (E.D. P.A. 2003) ..... 12

23 *Currin v. Arista Records, Inc.*

24 724 F. Supp 2d 286 ..... 13, 19

25 *Drive-In Music Co., Inc. v. Sony Music Ent.*

26 2011 WL 13217236, at \*3 (C.D. Cal. Apr. 18, 2011) ..... 15, 16

27

28

1 *Elohim EPF USA, Inc. v. Total Music Connection, Inc.*  
 2 2015 WL 12655556, at \*8 (C.D. Cal. Oct. 1, 2015)..... 9  
 3  
 4 *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co, Inc.*  
 5 449 U.S. 340 (1991)..... 10  
 6  
 7 *Gaste v. Kaiserman*  
 8 863 F. 2d 1061 (2<sup>nd</sup> Cir. 1988)..... 12  
 9  
 10 *Gray v. Hudson*  
 11 28 F. 4th 87 (9th Cir. 2022) ..... 12  
 12  
 13 *Gray v. Perry*  
 14 2020 WL 1275221 (C.D. Cal. 2020) ..... 13, 20  
 15  
 16 *Guity v. Santos*  
 17 2019 U.S. Dist. LEXIS 210125 (S.D. N.Y. 2019)..... 13  
 18  
 19 *Hanagami v. Epic Games Inc.*  
 20 2022 U.S. Dist. LEXIS 161823 (C.D. Cal. 2022) ..... 14  
 21  
 22 *Hayes v. Minaj*  
 23 2012 WL 12887393 (C.D. Cal. Dec. 18, 2012)..... 10,  
 24 14, 18  
 25  
 26 *Intersongs-USA v. CBS, Inc.*  
 27 757 F. Supp. 274 (S.D. N.Y. 1991) ..... 13  
 28  
 29 *Johnson v. Gordon*  
 30 409 F.3d 12 (1<sup>st</sup> Cir. 2005)..... 14  
 31  
 32 *Lane v. Knowles-Carter*  
 33 2015 WL 6395940, at \*5 (S.D.N.Y. Oct. 21, 2015)..... 19  
 34  
 35 *Lois v. Levin*  
 36 2022 U.S. Dist. LEXIS 168358 at \*12 (C.D. Cal., 2022) ..... 13, 14

1 *Marshall v. Huffman*  
 2 2010 WL 5115418, at \*4 (N.D. Cal. Dec. 9, 2010)..... 16

3 *Masterson v. Walt Disney Co.*  
 4 821 F. Appx. 779 (9th Cir. 2020) ..... 10

5 *McDonald v. West*  
 6 138 F. Supp. 3d 448 (S.D.N.Y. 2015), *aff'd*,  
 7 669 Fed. Appx. 59 (2d Cir. 2016)..... 19

8 *Merchant Transaction Systems, Inc. v. Nelcela, Inc.*  
 9 2009 WL 2355807 (D. Ariz., July 28, 2009)..... 14

10  
 11 *Newton v. Diamond*  
 12 204 F. Supp. 2d 1244 (C.D. Cal. 2002) ..... 15

13 *Nwosuocha v. Glover*  
 14 2023 U.S. Dist. LEXIS 50764 (S.D. N.Y. 2023)..... 13

15  
 16 *Ricketts v. Haah*  
 17 2013 WL 3242947, at \*2 (C.D. Cal. June 26, 2013) ..... 9

18 *Rose v. Hewson*  
 19 2018 WL 626350, at \*7 (S.D. N.Y. Jan. 30, 2018) ..... 19

20  
 21 *Shaheed-Edwards v. Syco Entm't, Inc.*  
 22 2017 WL 6403091 (C.D. Cal. Dec. 14, 2017)..... 10, 14

23 *Skidmore v. Led Zeppelin*  
 24 952 F.3d 1051 (9<sup>th</sup> Cir. 2020) ..... 19

25  
 26 *Steel Warehouse Cleveland, LLC v. Velocity Outdoor, Inc.*  
 27 2023 WL 2264257, at \*2 (N.D. Ohio Feb. 28, 2023)..... 14

28



1 *Steward v. West*  
 2 2014 WL 12591933, at \*10 (C.D. Cal Aug. 14, 2014) ..... 21  
 3  
 4 *Structured Asset Sales, LLC v. Sheeran*  
 5 2023 U.S. Dist. LEXIS 86847 (S.D. N.Y. 2023)..... 12  
 6  
 7 *Swirksky v. Carey*  
 8 376 F.3d 841 (9th Cir. 2004) ..... 10  
 9  
 10 *Tellabs, Inc. v. Makor Issues & Rights, Ltd*  
 11 551 U.S. 308 (2007)..... 9  
 12  
 13 *VMG Salsoul, LLC v. Ciccone*  
 14 824 F. 3d 871 (9<sup>th</sup> Cir. 2016) ..... 21  
 15  
 16 *Walker v. Time Life Films, Inc.*  
 17 784 F. 2d 44 (2<sup>nd</sup> Cir. 1986)..... 13  
 18  
 19 *Weber v. Dep’t of Veteran Affairs*  
 20 521 F.3d 1061 (9th Cir. 2008) ..... 9  
 21  
 22 *Williams v. Gaye*  
 23 895 F.3d 1106 (9th Cir. 2018) ..... 10  
 24  
 25 *Zany Toys, LLC v. Pearl Enterprises, LLC*  
 26 2014 WL 2168415, at \*12 (D. N.J. May 23, 2014)..... 16  
 27  
 28 **STATUTES**  
 17 U.S.C. § 114(b) ..... 15  
  
**RULES**  
 Fed. Rules Civ. Proc., rule 8 ..... 12  
 Fed. Rules Civ. Proc., rule 12(b)(6)..... 5, 9,  
 11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**SUMMARY OF ARGUMENT**

Plaintiffs assert claims for copyright infringement against more than 300 parties, including the Moving Defendants. Because Plaintiffs cannot show the infringement occurred with respect to protectable copyrights owned by Plaintiffs, this Complaint should be dismissed with prejudice.

**II.**

**INTRODUCTION**

Plaintiffs’ Second Consolidated Amended Complaint (“SCAC”) is the sixth complaint they have filed in this action. Plaintiffs claim ownership of an entire genre of basic core music – the ‘rhythm of “reggaeton” based upon simple, rote, unprotectable common music elements, which are nothing more than common drum beats of single notes.

Plaintiffs’ SCAC fails to plead the most fundamental elements of a copyright infringement claim, in that it fails to allege: 1) what works Plaintiffs actually own; 2) what protectable elements in which musical compositions or sound recordings have allegedly been infringed; and most relevant, 3) what elements in any of the Moving Defendants’ works are infringing and whether that infringing is of a musical composition, sound recording or both. The particular (minimal) allegations against the Moving Defendants do not compare Plaintiffs’ work to any of the works of these Defendants, eliminating those portions that are not alleged to be infringing.

Plaintiffs’ theory of the case is a modern day version of copyright, “whisper down the lane.” Plaintiffs allege that Steeley and Clevie created “Fish Market” in 1989. (SCAC, ¶180), which was a “dance Hall song released in Jamaica in 1989 on an obscure record label and then, in 1990, non-party, Shabba Ranks copied “Fish

1 Market” when he created “Dem Bow (SCAC, ¶181), which then morphed into  
2 “Pounder” recorded by non-party, Dennis “The Menace” Halliburton (SCAC,  
3 ¶182) which became “Pounder Riddim II,” and somewhere down this lane, each of  
4 the 300 or so defendants copied the basic building blocks that emanated with Fish  
5 Market. Plaintiffs admit that they do own and have no copyright registration for  
6 “Dem Bow,” “Pounder” or “Pounder Riddim II” and there is ONLY a copyright  
7 registration for Fish Market.

8 However, the minimal portion of each of the infringed works (that is alleged  
9 to be infringed) are nothing more than basic building blocks of music and which  
10 are described in SCAC, paragraphs 180, 181, and 188. Plaintiffs admit these basic  
11 building blocks is what defines the genre of Reggaeton music. This is no  
12 different to basic “down beats” that defines the genre of Reggae, or the same four-  
13 chords that defines classic rock (E, B, C minor and A) or the same organ music  
14 that defines church music, or the same basic building blocks of rhythms that  
15 defines salsa music, etc. Throughout this motion, these Moving Defendants  
16 describe the unflinching law holding that no one claimant can own such basic  
17 building blocks of music.

18 Moving Defendants are entitled to an order of dismissal under Rule 12(b)(6)  
19 for at least five reasons:

20 (1) Plaintiffs have no standing to assert claims for infringement of the  
21 alleged infringed portions of the underlying music of *Dem Bow*, the “Pounder  
22 Riddim,” or *Pounder Dub Mix II*. Yet, the SCAC repeatedly alleges infringement  
23 of those works, and infringement of *Fish Market* (a work that Plaintiff may or may  
24 not own) by “extension” through copying of what is merely unspecified portions of  
25 one or more of the works created by these Defendants, which these Defendants  
26 have described as copyright “Whisper Down the Lane.”

27 (2) The SCAC does not identify what original copyrightable elements in  
28 *Fish Market* have been infringed by the Moving Defendants, other than loosely

1 describing generic common drum beats and “minimalistic bass lines” (SCAC,  
2 ¶180), which this Court can easily determine are non-protectable portions of  
3 Plaintiffs’ works, and Plaintiffs have merely generally claimed similarities to  
4 Moving Defendants’ works.

5 (3) The SCAC offers only conclusory allegations that some of the allegedly  
6 infringing works incorporate a “sample” or exact copy of the *Fish Market* sound  
7 recording and/or composition, without pleading any specific facts or identifying  
8 the exact sample.

9 (4) The SCAC does not describe whether the infringement claim relates to  
10 the *Fish Market* composition or the *Fish Market* sound recording and does not set  
11 forth that any of the Moving Defendants have infringed either.

12 (5) The SCAC does not have any specific factual allegations as to any of the  
13 Moving Defendants, only loosely claiming “protectable elements” in Plaintiffs’  
14 works have been infringed without describing what these protectible elements are  
15 (other than in SCAC, ¶180).

16 The test for copyright infringement is substantial similarity. If one follows  
17 Plaintiffs’ arguments that all 1,700 songs sound substantially similar to *Fish*  
18 *Market*, that would mean, for example, that every Pitbull song sounds alike, every  
19 Maluma song sounds alike, etc. The Court should dismiss the SCAC upon a  
20 finding that the similar drum beats are unprotectable and no reasonable jury could  
21 find that these 1,700 songs sound substantially similar to Plaintiffs’ old and  
22 obscure work.

23  
24 **III.**

25 **BACKGROUND AND SUMMARY OF ALLEGATIONS**

26 **A. Plaintiffs’ Claimed Ownership of Four Works**

27 Plaintiffs claim to own “rights” in (but not ownership of) four “works”: (i)  
28 the *Fish Market* composition; (ii) the *Fish Market* sound recording; (iii) the *Dem*

1 *Bow* musical composition; and (iv) the *Pounder Dub Mix II* sound recording.  
2 (SCAC, ¶¶ 4-7; 179-184.) As shown below, Plaintiffs do not own all four works  
3 and Plaintiffs do not plead that Moving Defendants infringed upon protectible  
4 elements of the work Plaintiffs do own.

5  
6 **1. Fish Market**

7 Browne and Johnson claim they wrote and recorded *Fish Market* in 1989, in  
8 Jamaica and before Jamaica had any copyright laws. (SCAC, ¶¶ 175, 179.) *Fish*  
9 *Market* is an instrumental work consisting of:

10 “[A]n original drum pattern . . . a programmed kick, snare, and  
11 hi-hat playing a one bar pattern[,] percussion instruments,  
12 including a tambourine playing through the entire bar, a  
13 synthesized ‘tom’ playing on beats one and three, and timbales  
14 that play a roll at the end of every second bar and free  
15 improvisation over the pattern for the duration of the song[,] and  
16 a synthesized Bb (b-flat) bass note on beats one and three of each  
17 bar, which follows the aforementioned synthesized ‘tom’  
18 pattern.” (SCAC, ¶ 180.)

19  
20 As shown below, as a matter of law, this common instrumental of simple,  
21 basic one note drum beats or patterns is so basic, it is not (and cannot be)  
22 protectable.

23  
24 **2. Dem Bow**

25 Browne and Johnson claim to have co-authored another composition, *Dem*  
26 *Bow*, with Shabba Ranks, which they describe as a “drum pattern, the drum  
27 components, including the kick, snare, hi-hat, tom and timbales as well as the full  
28 bassline.” (SCAC, ¶183.) Plaintiffs do not assert that any of the Moving

1 Defendants have infringed upon this composition.

2

3 **3. Pounder Riddim**

4 Plaintiffs claim that “Pounder Riddim,” created by Dennis “The Menace”  
5 Haliburton is a derivative work of either Fish Market or Dembow. However, the  
6 SCAC does not provide any comparison of common notes, chords, melody,  
7 rhythms, etc. Plaintiffs admit Pounder Riddim is not registered with the U.S.  
8 Copyright Office as a derivative work and Plaintiffs never claimed they owned  
9 “Pounder Riddim.” While Plaintiffs make the conclusory allegation that “Pounder  
10 Riddim” is “virtually identical” to *Fish Market*, they provide no detail of same and  
11 they do not claim these Moving Defendants infringed upon Pounder Riddim.

12

13 **4. Pounder Dub Mix II**

14 Plaintiffs do not allege that any of the Moving Defendants infringed upon  
15 *Pounder Dub Mix II*. Plaintiffs then claim *Pounder Riddim* was used to create the  
16 sound recording for *Pounder Dub Mix II*, and that *Pounder Dub Mix II* “has been  
17 sampled by numerous artists, but not these Moving Defendants.” (SCAC, ¶184.)

18

19 **B. The Allegedly Infringing Works and The Moving Defendants**

20 The SCAC alleges that anywhere from some 1,678 to 4,000 compositions  
21 “and/or” recordings infringe one or more of these four works. Plaintiffs do not  
22 identify *which* of these Moving Defendants’ works is infringing upon what  
23 copyright.

24

25

26

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IV.  
ARGUMENT**

**A. Rule 12(b)(6) Legal Standard**

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[B]lanket assertions,” “labels and conclusions,” and a “formulaic recitation of the elements of a cause of action” fail to satisfy this threshold. *Twombly*, supra, 550 U.S. at 555 n. 3; see also *Iqbal*, supra, 556 U.S. at 678 (explaining that Rule 8(a)(2)’s pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”).

In ruling on a Rule 12(b)(6) motion, a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, supra, 556 U.S. at 678. A complaint is properly dismissed if it fails to “plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Weber v. Dep’t of Veteran Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Twombly*, supra, 550 U.S. at 555).

On a Rule 12(b)(6) motion, the Court may consider “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). This includes copyright registration certificates and information from the U.S. Copyright Office’s online public catalog. See, e.g., *Elohim EPF USA, Inc. v. Total Music Connection, Inc.*, No. CV 14-02496-BRO (EX), 2015 WL 12655556, at \*8 (C.D. Cal. Oct. 1, 2015); *Ricketts v. Haah*, No. 2:13-CV-00521-ODW, 2013 WL 3242947, at \*2 (C.D. Cal. June 26, 2013).

**B. Pleading Standards Applied to Copyright Infringement Actions**

To establish copyright infringement, Plaintiffs must allege: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are

1 original.” *Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361  
2 (1991).

3 “[A]bsent direct evidence of copying” (and none is alleged here as to the  
4 Moving Defendants), a plaintiff may satisfy the copying elements with “fact based  
5 showings that the defendant had access to the plaintiff’s work and that the two  
6 works are ‘substantially similar.’” *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir.  
7 2018). The *Twombly* standard “demands more than listing elements in [a] vague  
8 and conclusory fashion (as Plaintiffs have done in the SCAC); it requires a plaintiff  
9 to ‘*compar[e] those elements for proof of copying.*’” *Hayes v. Minaj*, 2012 WL  
10 12887393 (C.D. Cal. Dec. 18, 2012). A plaintiff must plead “*which portions,*  
11 *aspects, lyrics or other elements of the two works are substantially similar.*” *Id.* at  
12 \*5 (dismissing complaint for failure to sufficiently allege similarity, stating, “[t]o  
13 avoid dismissal, Plaintiff must identify the particular aspects of the book that are  
14 allegedly copied in the Series”); *Shaheed-Edwards v. Syco Entm’t, Inc.*, 2017 WL  
15 6403091 (C.D. Cal. Dec. 14, 2017) (dismissing complaint for failure to state a  
16 claim where “Plaintiffs’ allegations that the chorus, concept, and cadence of the  
17 two songs are similar [were] merely conclusory and [could not] be sustained  
18 without more specificity”); *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*,  
19 2018 WL 1242053, at \*3-5 (N.D. Cal. March 8, 2018) (dismissing claims where  
20 plaintiff did not sufficiently allege which elements of allegedly infringed work  
21 were substantially similar to protectable elements in plaintiff’s works). Dismissal  
22 is appropriate at the motion to dismiss stage “where the alleged similarities is only  
23 of unprotectable material.” *Masterson v. Walt Disney Co.*, 821 F. Appx. 779, 781  
24 (9<sup>th</sup> Cir. 2020).

25 Moreover, in order to satisfy the copying prong, a plaintiff is required to  
26 allege that the defendant’s work copied *protectable* elements of plaintiff’s work.  
27 Copyright protection only protects the plaintiff’s protected *original expression*.  
28 See *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004), as amended on denial of



1 reh’g (Aug. 24, 2004). Originality is “the *sine qua non* of copyright; accordingly,  
2 copyright protection may extend only to those components of a work that are  
3 original to the author.” *Feist*, supra, 499 U.S. at 348. The critical inquiry is  
4 whether the defendant copied any original element of the plaintiff’s work that is  
5 protected by copyright law. (emphasis added). *Id.* at 348, 361. As shown below,  
6 the minimal portions of Plaintiffs’ works (that they claim is infringed upon) are  
7 nothing more than non-protectible drum beats, common rhythms, which as a matter  
8 of law cannot form the basis of an infringement action.

9  
10 **C. Plaintiffs Improperly Claim Infringement of Works They Do Not Own**  
11 **And for Which They Have No Standing To Sue**

12 The SCAC alleges that Plaintiffs “possess copyright ownership and U.S.  
13 [copyright] registration” in four (4) works (SCAC, ¶¶ 179, 189, 200.) Yet,  
14 nowhere do Plaintiffs identify or attach a copyright registration for *any* of the four  
15 works.

16 Plaintiffs do not own or even claim to own “*Pounder Riddim*.” Plaintiffs  
17 nonetheless assert that any musical work that infringes work (*Pounder Riddim*)  
18 must also somehow infringe either (*Fish Market*) or (*Pounder Dub Mix II*). SCAC,  
19 ¶¶ 184, 188. Any copying, interpolating, or sampling of the *Pounder Riddim* is a  
20 copying or interpolation of *Fish Market’s* composition. SCAC, ¶ 188, n. 5, ¶ 226.)

21 It is axiomatic that Plaintiffs cannot sue for infringement of copyrights they  
22 do not own. (the “*Pounder Riddim*”) and they do not claim the Moving  
23 Defendants infringed on the *Pounder Dub Mix II*, or upon the lyrics of *Dem Bow*.  
24 That leaves Plaintiffs with only *Fish Market* and the lyrics of *Dem Bow*. Plaintiffs  
25 only generally claim that the Moving Defendants infringed upon *Fish Market*. *See*  
26 SCAC, ¶¶ 238, 389, 391, 506, 530, 616, 630, and 638.

1           **1. Plaintiffs Do Not Claim That The Moving Defendants Have**  
2           **Infringed Upon Protectible Portions of *Dem Bow***

3           To satisfy Rule 8 and Rule 12(b)(6) in a copyright infringement action,  
4 Plaintiffs must plead infringement of their protected *original expression*. *Apps v.*  
5 *Universal Music Group, Inc.*, 283 F. Supp.3d. 946, 952 (D. Nev. Apr. 27, 2018),  
6 *aff'd*, 763 Fed. Appx. 599 (9th Cir. 2019). *See also Feist*, 499 U.S. at 361 (“not all  
7 copying is copyright infringement”).

8           Plaintiffs do not plead which portions of the Moving Defendants’ allegedly  
9 infringing works includes protectable elements of Plaintiffs’ *copyrighted works*.  
10 As demonstrated below, the limited portions of Plaintiffs’ works that they do claim  
11 the Moving Defendants have infringed is, as a matter of law, unprotectable  
12 common drum beats and basic rhythms.

13           Other courts have held that copyright infringement claims cannot be  
14 established where the allegedly protected work was deemed to be merely  
15 comprised of “basic building blocks of music.” *See Structured Asset Sales, LLC v.*  
16 *Sheeran*, 2023 U.S. Dist. LEXIS 86847 (S.D. N.Y. 2023) (granting defendant’s  
17 motion for summary judgment where basic chord progressions and harmonic  
18 rhythms were at issue), *Gray v. Hudson*, 28 F. 4th 87, 102 (9<sup>th</sup> Cir. 2022)  
19 (affirming the trial court’s decision to grant defendant’s motion for judgment as a  
20 matter of law because the two-note snippet of a descending minor scale with some  
21 repeating notes consisted entirely of commonplace musical elements that are not  
22 protected by copyright), *Cottrill v. Spears*, 2003 U.S. Dist. LEXIS 8823 (E.D.  
23 P.A. 2003) (granting defendants’ motion for summary judgment finding four  
24 commonplace musical elements were not numerous enough to warrant protection).

25           In a case cited more than 300 times, *Gaste v. Kaiserman*, the 2<sup>nd</sup> Circuit  
26 considered the “limited number of notes and chords available to composers  
27 (acknowledging) that common themes frequently reappear in various  
28 compositions, especially in popular music”. *See* 863 F. 2d 1061, 1068 (2<sup>nd</sup> Cir.

1 1988). *Nwosuocha v. Glover*, 2023 U.S. Dist. LEXIS 50764 (S.D. N.Y. 2023)  
2 (granting the defendants’ motion to dismiss finding copyright protections exclude  
3 “basic building blocks of music including tempo and individualized notes”). Other  
4 courts have found that common rhythms, song structures and harmonic  
5 progressions, as well as lyrical themes, similar concepts, short phrases, and similar  
6 melody, are not protectable. See e.g. *Guity v. Santos*, 2019 U.S. Dist. LEXIS  
7 210125 (S.D. N.Y. 2019); *Intersongs-USA v. CBS, Inc.*, 757 F. Supp 274, 282  
8 (S.D. N.Y. 1991) (concluding that common elements like song structure patterns  
9 and harmonic progressions are found in many other well-known songs and are  
10 therefore unoriginal and constitute “scenes a faire”, or ordinary, unprotectable  
11 expression) (citing *Walker v. Time Life Films, Inc.*, 784 F. 2d 44, 50 (2<sup>nd</sup> Cir.  
12 1986). *Currin v. Arista Records, Inc.*, 724 F. Supp 2d 286 (granting defendant’s  
13 motion for summary judgment holding tempo cannot be protected by copyright).  
14 *Batiste v. Najm*, 28 F. Supp. 3d 595 (E.D. La. 2014). (“beats, chords, chants, horns,  
15 lyrics which are nothing more than short phrases, and “gliss” are not protectable, as  
16 “basic harmonic and rhythmic building blocks of music.” There can be no clearer  
17 example of “basic building blocks of music” than the basic drum beats and the  
18 “minimalistic bass line” alleged in this case. Also see *Gray v. Perry*, 2020 WL  
19 1275221 (C.D. Cal. 2020) (rhythm is not a protectable element).

20 The Court should consider the contra holding in *Lois v. Levin*, 2022 U.S.  
21 Dist. LEXIS 168358 at \*12 (C.D. Cal., 2022) where a motion to dismiss was  
22 denied and compare that case to Plaintiffs’ allegations in paragraph 180 of the  
23 SCAC. In *Lois*, the court held that a pleading of infringement upon “note  
24 intervals, beat patterns, use of a guitar slide...AND guitar feedback...” may be  
25 sufficient for a jury to base a finding of striking similarity.” These elements (guitar  
26 slide and guitar feedback) are more unique and expressive, as opposed to the basic  
27 common single note drum beats described in paragraph 180 of the SCAC, because  
28 they demonstrate a far greater modicum of creativity. Also compare Judge

1 Wilson’s ruling in *Lois* to his ruling in *Hanagami v. Epic Games Inc.*, 2022 U.S.  
2 Dist. LEXIS 161823 (C.D. Cal. 2022) where he granted a motion to dismiss upon  
3 finding that certain dance moves (such as a basic waltz step, a basic hustle step and  
4 the second position of classical ballet were uncopyrightable) as compared to  
5 copyrightable choreography.

6 This Court should dismiss this copyright infringement action at the 12(b)(6)  
7 stage, upon a finding that the allegations in paragraph 180 of the SCAC do not  
8 meet the pleading sufficiency described in *Lois*. See *Hayes*, 2012 WL 12887393,  
9 at \*5; *Shaheed-Edwards*, 2017 WL 6403091, at \*3; *Blizzard Entm’t, Inc.*, 2018  
10 WL 1242053, at \*3-5. Plaintiffs have failed to satisfy their pleading requirements  
11 because alleged copying must identify what elements in what work are copied, not  
12 through some daisy chain of alleged “derivative” works. See *id.*; see also, e.g.  
13 *Johnson v. Gordon*, 409 F.3d 12, 19-20 (1st Cir. 2005) (a plaintiff “may bring a  
14 suit for unauthorized distribution of an unregistered derivative work” only if “the  
15 suit is *based on elements ‘borrowed’ from a registered underlying work and not*  
16 *on elements original to the derivative work*”); *id.* at 19 (a “plaintiff cannot, as a  
17 matter of law, stretch the carapace of [its] ownership [or one registered copyrighted  
18 work] to garner copyright protection for elements unique to [an unregistered  
19 derivative] long version” of that work); *Merchant Transaction Systems, Inc. v.*  
20 *Nelcela, Inc.*, 2009 WL 2355807 (D. Ariz., July 28, 2009), at \*3 (“the MTSI  
21 software may serve as a basis for the Lexcel Parties’ infringement claim *only to*  
22 *the extent that the MTSI software contains the same identified, protectable*  
23 *elements as the Lexcel software*”). Emphasis added.

24  
25 **2. The SCAC Fails to Distinguish Between Infringement Claims**  
26 **Involving Sound Recordings From Infringement Claims Involving**  
27 **Musical Compositions**

28 With respect to the *Fish Market* sound recording, Plaintiffs plead that either

1 the *Fish Market* musical composition “**and/or**” the *Fish Market* sound recording  
2 have been infringed. [Emphasis added.] (*See, e.g., SCAC*, ¶¶ 204, 219, 277, 299,  
3 300.) That is improper. *See, e.g., Anthony v. Pro Custom Solar, LLC*, 2022 WL  
4 1634870, at \*4 (C.D. Cal. Jan. 21, 2022) (finding “and/or” allegations insufficient  
5 because it alleged one of two possibilities); *Steel Warehouse Cleveland, LLC v.*  
6 *Velocity Outdoor, Inc.*, 2023 WL 2264257, at \*2 (N.D. Ohio Feb. 28, 2023)  
7 (“Plaintiff’s ‘and/or pleading’ gambit falls short of the basic requirements of Rule  
8 8 and *Twombly*.”).

9 Contrary to the allegations of paragraph 194 of the SCAC, Exhibit A  
10 provides no information whether the any of the Moving Defendants’ “songs” or  
11 sound recordings have infringed Plaintiffs’ musical compositions or sound  
12 recordings.

13 The SCAC’s failure to specify whether Plaintiffs’ works were infringed by  
14 defendants’ sound recordings or musical compositions fails to comply with Rule 8.  
15 “Sound recordings and their underlying musical compositions are separate works  
16 with their own distinct copyrights.” *Drive-In Music Co., Inc. v. Sony Music Ent.*,  
17 2011 WL 13217236, at \*3 (C.D. Cal. Apr. 18, 2011); *see also Newton v. Diamond*,  
18 204 F. Supp. 2d 1244, 1248-49 (C.D. Cal. 2002).

19 Not only are sound recordings and musical compositions separate works  
20 with separate copyrights, they are owned by separate defendants and the rights  
21 protected are different. “The rights of a copyright in a sound recording do not  
22 extend to the song itself, and vice versa.” *Drive-In Music*, 2011 WL 13217236, at  
23 \*3 (citing H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 56, reprinted in 1976 U.S.  
24 Code Cong. & Ad. News 5659, 5669)). “The exclusive right of the owner of a  
25 copyright in a sound recording ... is limited to the right to duplicate the sound in  
26 the form of phonorecords or copies that directly or indirectly **recapture the actual**  
27 **sounds fixed in the recording.**” 17 U.S.C. § 114(b). “The exclusive rights of the  
28 owner of copyright in a sound recording ... do not extend to the making or

1 duplication of another sound recording that consists of an entirely independent  
2 fixation of other sounds, *even though such sounds imitate or simulate those in*  
3 *the copyrighted sound recording.*” [Emphasis added.] *Id.*; accord see 2 Nimmer  
4 on Copyright, § 8.05[A] (2021) (explaining that “mere similarity due to imitation  
5 will not suffice to establish infringement”).

6 Where the complaint does not allege that the actual sounds fixed in the  
7 sound recording were duplicated, the complaint will be dismissed. *See Marshall v.*  
8 *Huffman*, 2010 WL 5115418, at \*4 (N.D. Cal. Dec. 9, 2010); *see also, e.g., Drive-*  
9 *In Music*, 2011 WL 13217236, at \*4; *Zany Toys, LLC v. Pearl Enterprises, LLC*,  
10 2014 WL 2168415, at \*12 (D. N.J. May 23, 2014) (the Copyright Act “confers  
11 more limited rights” to sound recordings than to other types of copyrighted works,  
12 and finding that “[w]ithout any factual allegations that the actual sounds fixed in  
13 [the plaintiff’s] copyrighted recording were directly duplicated by [the defendant]  
14 into its product, rather than imitated (even if such imitation [was] deliberate), [the  
15 plaintiff] ... failed to properly allege a claim for copyright infringement of its  
16 sound recordings.”).

17  
18 **3. Even for Works Alleged to Infringe Timely-Registered**  
19 **Copyrights, Plaintiffs Fail to Satisfy the Relevant Pleading**  
20 **Standards**

21 Even for the works for which Plaintiffs have properly pled ownership and  
22 standing, they have failed to sufficiently plead a claim for infringement. In  
23 paragraph 193 of the SCAC, Plaintiffs plead that the groups of Defendants fall into  
24 59 categories and these Moving Defendants fall into the following groups.

25 13 Works of Carlos Vives

26 15 Works of CNCO

27 19 Works of De La Ghetto

28 37 Works of Los Legendarios

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 39 Works of Maluma
- 41 Works of Myke Tower
- 46 Works of Pitbull
- 54 Works of Wisin
- 55 Works of Wisin & Yandel (also see para. 238)
- 57 Works of Yandel

Plaintiffs’ complaint asserts that each one of these artists (each) has the exact same underlying musical bed in more than 30 of their songs. See SCAC ¶¶ 190. However Plaintiffs are not clear if the works of the Moving Defendants infringe upon Fish Market, Dem Bow OR Pounder. See SCAC 198.

Nowhere does the SCAC even identify *which* of Plaintiffs’ copyrighted works (if any) were allegedly infringed by *which of these Moving Defendants*, let alone the specific protectable elements that were infringed by the specific defendant.

**4. Deficient Allegations of the Infringement of the *Fish Market* Composition**

While the SCAC claims 1672 to 4000 allegedly infringing works, Plaintiffs provide transcriptions identifying the alleged similarities between an alleged infringing work and *Fish Market* for only 33 of those works. (See, e.g., SCAC, ¶¶ 221-229; 279-296; 336-344, except as the allegations in para. 238, 269 and para. 389-392 (as to Carlos Vives), para 397 — 400 (as to CNCO) para. 413-416 (as to De La Ghetto), para. 504-507 (as to Los Legendarios) and para. 512-531 (as to Maluma), para 536-539 (as to Myke Tower), para 614-617 (as to Wisin) para 618-630 ( as to Wisin and Yandel) and para 635-638 (as to Yandel).

In these pleadings, Plaintiffs only generally plead the Moving Defendants’ works copy “primary rhythm/drum sections.” Most relevantly, no substantial similarity of any protectable copyrighted material is even pled for any of the

1 Moving Defendants.

2 For all but 33 works (but none of these Moving Defendants), the SCAC  
3 lacks any non-conclusory allegations of infringement. Instead, Plaintiffs  
4 sometimes also use the improper “and/or” allegation, merely alleging that those  
5 works “incorporate ... a verbatim copy of the Fish Market Composition as the  
6 primary rhythm/drum section.”

7 As to Maluma, in paragraphs 514 — 529, and as to Wisin and Yandel in  
8 paragraphs 621-628) the Plaintiffs do make more detailed pleadings of the alleged  
9 infringing material however, these pleading clearly show the only infringed  
10 material is nothing more than non-protectable basic drum beats and core  
11 rhythms....*i.e.*, the so-called “basic building blocks of music.”

12 These vague “catch all” allegations do not suffice under the *Twombly*  
13 particularity standard, which requires “more than labels and conclusions” or a  
14 “formulaic recitation of the elements of a cause of action,” especially since the  
15 allegations are of nothing more than “basic building blocks of music.” *Twombly*,  
16 550 U.S. at 555. It requires a plaintiff to identify in its pleading “*which portions,*  
17 *aspects, lyrics or other elements of the two works are substantially similar,*” and  
18 to “*compar[e] those elements for proof of copying.*” Emphasis added *Hayes*,  
19 2012 WL 12887393, at \*5.

20 The SCAC’s failure to plead any non-conclusory allegations of substantial  
21 similarity between the allegedly infringing works and the *Fish Market* composition  
22 requires the dismissal of these Moving Defendants.

23

24 **5. In the Few Instances Where Plaintiffs Have Identified Alleged**  
25 **“Similarities” Between A Defendant’s Work and *Fish Market*,**  
26 **The Comparison Demonstrates That There Is No Similarity In A**  
27 **Protectable Expression**

28 Finally, for the 33 works for which Plaintiff provided transcriptions (*See*



1 SCAC, ¶¶ 221-229; 280-296; 336-344), and as to the allegations against Maluma  
 2 and Wisin and Yandel the allegations regarding the use of basic drum beats and  
 3 common patterns show that the alleged infringing material is nothing more than ”  
 4 hi-hat patterns”, “ snare drum patterns”, “rim shots”, a “2 bar timbale” or “kick  
 5 drums”) and it is alleged to be similar only in the tempo being played. Tempo,  
 6 as a matter of law, is commonplace and unprotectable. This court should take note  
 7 NONE of the alleged infringed material goes beyond the basic building blocks of  
 8 underlying drum beats of single notes played at a common tempo.

9 The Plaintiffs cannot claim copyright in a rhythm based upon a common  
 10 tempo. *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286, 291 (S.D.N.Y. Apr.  
 11 15, 2010 (“courts have held that certain commonly-used elements such as . . . the  
 12 use of the eight-measure phrase, or the use of 4/4 rhythm, are not, in themselves,  
 13 protectable”); *Lane v. Knowles-Carter*, 14 CIV. 6798 PAE, 2015 WL 6395940, at  
 14 \*5 (S.D.N.Y. Oct. 21, 2015) (“meter and tempo” and “common rhythms [and]  
 15 song structures” not protectable); *Rose v Hewson*, No. 17-cv-1471, 2018 WL  
 16 626350, at \*7 (S.D.N.Y. Jan. 30, 2018) (“general rhythmic style” not protectable);  
 17 *McDonald v. West*, 138 F. Supp. 3d 448, 458 (S.D.N.Y. 2015), *aff'd*, 669 Fed.  
 18 Appx. 59 (2d Cir. 2016) (a “rhythm’s style or general feel [are] both  
 19 uncopyrightable”); *Batiste v. Najm*, 28 F. Supp. 3d 595, 616 (E.D. La.  
 20 2014)(“[O]riginality of rhythm is a rarity, if not an impossibility,” as “there are  
 21 only a limited number of tempos, and ‘these appear to have been long since  
 22 exhausted.’” Thus, “courts have been consistent on finding rhythm to be  
 23 unprotectable.”); *see also Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1070 (9th Cir.  
 24 2020) (en banc) (“[A] musical building block . . . is something that no one can  
 25 possibly own.”).

26 In *Batiste*, the plaintiff brought a copyright infringement action against  
 27 dozens of defendants, alleging that 45 of his music compositions were infringed in  
 28 various beats, chords and lyrics in 63 of the defendant’s songs. The Eastern

1 District Court of Louisiana granted the defendant’s motion in part, finding that  
 2 customary chords and beats in popular music are unprotectable “scenes a’ faire”  
 3 or material that is standard to a particular subject matter. *Id.* at 600. “Basic  
 4 rhythmic building blocks of music have long been treated by the courts as  
 5 unoriginal elements that are not entitled to copyright protection.” *Id.* at 615.  
 6 “Exploiting a chord progression in an original manner is a rarity.” *Id.* at 616.

7 In *Gray v. Perry*, No. 215CV05642CASJCX, 2020 WL 1275221, at \*4-5  
 8 (C.D. Cal. Mar. 16, 2020), the court held that the plaintiffs could not claim that  
 9 the instrumental beat of the ostinato – “a short musical phrase or rhythmic pattern  
 10 repeated in a musical composition” – in their allegedly infringed work was  
 11 protectable original expression. *Id.* at 5. Noting that “many if not most of the  
 12 elements that appear in popular music are not individually protectable,” *citing* 1  
 13 Nimmer on Copyright § 2.05 (2019) (“In the field of popular songs, many, if not  
 14 most, compositions bear some similarity to prior songs.”), the court stated that  
 15 “[m]usical elements that are ‘common or trite’ – such as the *‘use of a long-short-*  
 16 *long rhythm’* ... certain *‘tempos,’* ... the *‘alternating ‘emphasis of strong and*  
 17 *weak beats,’ ‘syncopation,’* ... or the use of ‘basic musical devices in different  
 18 manners,’ ... *are, accordingly, not protectable.*” *Id.* (citing cases). “*Nor are other*  
 19 *elements* ‘ubiquitous in popular music’ *like ‘rhythms,’ ‘glissando[s],’ ‘chants,’*  
 20 *‘the use of horns,’* or ‘jingling or pulsing synthesizer element[s]’ *entitled to*  
 21 *protection.* *Id.* (citing cases). Emphasis added.

22 Here, for example, the transcribed drum beats purportedly contained in *Fish*  
 23 *Market* shows that the only similarities between the two works are that the kick  
 24 drum in both works are playing a basic quarter note pattern in 4/4 time. (See  
 25 SCAC ¶ 221). The rhythmic pattern being played by the tom, snare, hi hat and  
 26 bass in *Besame* are all materially different than the pattern being played by those  
 27 instruments in *Fish Market*. Plaintiffs do not assert if there are tambourine or  
 28 timbale rhythms in any of the works of the Moving Defendants, let alone those

1 that are similar to those in *Fish Market*. The transcriptions reveal that the *Besame*  
2 drum beats are not similar (let alone substantially similar) to the *Fish Market*  
3 drum beat.

4 Similarly, the transcribed drum beats purportedly contained in *Fish Market*  
5 and *Calypso* show that the only similarities between the two works are that the  
6 kick drum in both works are playing a basic quarter note pattern in 4/4 time. (See  
7 SCAC, ¶ 222). The rhythmic pattern being played by the snare, hi hat and bass in  
8 *Calypso* are different than the pattern being played by those instruments in *Fish*  
9 *Market*. There are no hi hat, tom, tambourine or timbale rhythms in *Calypso*, let  
10 alone any similar to those in *Fish Market*. The transcriptions reveal that the drum  
11 beats are not even similar (let alone substantially similar) to the transcribed *Fish*  
12 *Market* drum beat. A review of the other comparative transcription pairs (SCAC  
13 ¶¶ 223-229; 280-296; 336-344) shows the same lack of similarity to any  
14 protectable element of *Fish Market*.

15 The Court should dismiss a claim based on substantial similarity if it finds  
16 that no reasonable juror would listen to the portions of the two recordings at issue  
17 and recognize them as substantially similar in protectable expression. See  
18 *Steward v. West*, CV1302449BROJCX, 2014 WL 12591933, at \*10 (C.D. Cal  
19 Aug. 14, 2014) (granting 12(b)(6) motion to dismiss copyright infringement claim  
20 because “it is clear from the recordings that ‘the average audience, or ordinary  
21 observer,’ would not recognize these works as the same.”); *VMG Salsoul, LLC v.*  
22 *Ciccone*, 824 F. 3d 871, 879 (9th Cir 2016) (“listening to the audio recordings  
23 confirms what the foregoing analysis of the composition strongly suggests: A  
24 reasonable jury could not conclude that an average audience would recognize an  
25 appropriation....”); *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9<sup>th</sup> Cir.  
26 1945) (“There is ample authority for holding that when the copyrighted work and  
27 the alleged infringement are both before the court, capable of examination and  
28 comparison, non-infringement can be determined on a motion to dismiss.”).

1 While these Moving Defendants are not suggesting that (at this stage) the  
2 Court should listen to the thousands of recordings at issue, it is undeniable that  
3 based on Plaintiffs’ transcriptions and the minimal descriptions of the alleged  
4 infringing portions of the Defendants recordings, no reasonable juror could find  
5 any actionable similarity between any protectable element of *Fish Market*.

6  
7 **6. Dismissal is Appropriate for Claims of Secondary Liability**

8 Finally, as to the 3 Moving Defendants that are only alleged to be  
9 vicariously liable for infringement of their artists (Mr. 305, Inc, WK Records, Inc.,  
10 and LA Base Music Group, Inc) the claims against them should be dismissed for  
11 the same reasons set forth with respect to their underlying artists. *A and M*  
12 *Records v. Napster*, 239 F. 3d 1004 (9<sup>th</sup> Cir. 2000).

13  
14 **7. The Moving Defendants Adopt and Join in the Arguments and**  
15 **Authorities Advocated by the Other Defendants.**

16  
17 **V.**

18 **CONCLUSION**

19 Based upon the foregoing, the SCAC should be dismissed with prejudice.

20  
21 **Certificate of Meet and Confer**

22 Richard Wolfe certifies that on June 5, 2023, he met and conferred with  
23 counsel for Plaintiff, and was unable to reach an agreement with respect to the  
24 relief sought in the foregoing motion.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted,  
CHASSMAN & SEELIG, LLP

DATED: June 15, 2023

By: /s/ Mark B. Chassman  
Mark B. Chassman (CA Bar No. 119619)  
Email: mchassman@chassmanseelig.com  
CHASSMAN & SEELIG LLP  
1250 Sixth Street, Suite 403  
Santa Monica, CA 90401  
Telephone: (310) 929-7192  
Fax: (310) 929-7627

Richard C. Wolfe  
(*Pending Pro Hac Vice*)  
Email: rwolf@wolfelawmiami.com  
WOLFE LAW MIAMI, P.A.  
Latitude One Building  
175 SW 7<sup>th</sup> Street, Suite 2410  
Miami, Florida 33130  
Telephone: (305) 384-7370  
Fax: (305) 384-7371

Attorneys for Defendants WK Records, Inc.,  
Llandel Veguilla pka "Yandel," Juan Luis  
Morera Luna pka "Wisin," Ernest Padilla,  
Mr. 305 Inc., Marcos Alfonso, Ramirez  
Carrasquillo, Victor Rafael Torres  
Betancourt, La Base Music Group, LLC,  
Juan Luis Londono Arias pka "Maluma,"  
Carlos Alberto Vives Restrepo pka "Carlos  
Vives," Daniel Oviedo pka "Ovy on the  
Drums," Michael Monge pka "Myke  
Tower," Geoffrey Royce Rojas pka "Prince  
Royce," Rafael Torres pka "De La Ghetto,"  
Richard Camacho, Erick Brian Colon,  
Christopher Velez, and Zabdiel De Jesus