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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 CLEVELAND CONSTANTINE
13 BROWNE, an individual; ANIKA
14 JOHNSON as personal representative of
15 the Estate of WYCLIFFE JOHNSON,
16 deceased; and STEELY & CLEVIE
17 PRODUCTIONS LTD.,

18 Plaintiffs,

19 v.

20 RODNEY SEBASTIAN CLARK
21 DONALDS, *et al.*

22 Defendants.

Case No.: 2:21-cv-02840-AB-AFM
Hon. André Birotte Jr. Presiding

**PLAINTIFFS’ OPPOSITION TO
PRYOR CASHMAN LLP-
REPRESENTED DEFENDANTS’
MOTION TO DISMISS
PLAINTIFFS’ SECOND
CONSOLIDATED AMENDED
COMPLAINT**

**[Declaration of Frank R. Trechsel;
Request for Judicial Notice; and
Application to File Exhibits Under
Seal filed concurrently herewith]**

Date: September 22, 2023
Time: 10:00 a.m.
Courtroom: 7B

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25 S. REP. NO. 102-19410

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I. INTRODUCTION

Before this Court is a simple question: Does a complaint sufficiently allege copyright infringement when it provides notice of Plaintiffs' original works at issue, how they were accessed and copied, and by whom?

The answer is "yes", and this motion should be denied.

The Moving Defendants¹ cannot credibly argue they are unaware as to how they copied Plaintiffs' works, so they purposely misconstrue Plaintiffs' Second Consolidated Amended Complaint ("SCAC") to argue it provides no basis for the relief sought. The challenge fails, though, because Plaintiffs properly allege that they own and registered the copyrights in both the musical composition and sound recording for *Fish Market*, the musical composition for *Dem Bow*, and the sound recording for *Pounder Dub Mix II* ("*Pounder*") (collectively, "Subject Works"), assert the original and protectible components of each, allege how each component was copied in the Infringing Works, and identify the party or parties responsible for each of the Infringing Works. This is sufficient.

II. PROCEDURAL HISTORY

On April 1, 2021, Plaintiffs filed a copyright infringement claim against 13 defendants for two infringing works by El Chombo, ("Chombo Case"). Original Complaint Dkt. 1. This pleading was later amended but no new works were added. See Dkt. 12, 30, 64. On October 19, 2021, Plaintiffs filed another infringement claim against 21 defendants for infringing works by artist Luis Fonsi ("Fonsi Case"). See C.D.CA Case No. 2:21-cv-08295-AB-AFM. On May 16, 2022, Plaintiffs filed a claim in the Southern District of New York against 24 defendants for 44 infringing works by Daddy Yankee ("*Yankee Case*"). See S.D.N.Y. Case

¹ Defendants represented by the law firm Pryor Cashman and listed in Appendix A to the Motion to Dismiss (Dkt. 331) are collectively referred to herein as "Moving Defendants." Plaintiffs will refer to all Defendants collectively as "Defendants." Moving Defendants' motion improperly addresses all Infringing Works not limited to their own, if dismissal is granted it should apply only to Moving Defendants.

1 No. 1:22-cv-03997-AT; C.D. CA Case No. 2:22-cv-03827-AB-AFM. These cases
2 all addressed, *inter alia*, the infringement of Plaintiffs' rights in *Fish Market*.

3 In response to an Order to Show Cause in the Yankee Case regarding transfer,
4 counsel for Moving Defendants, filed a letter requesting a transfer to the Central
5 District of California due to the two pending matters in California alleging
6 infringement of the same works. Id. at Dkt. 15. On May 31, 2022, the Yankee Case
7 was transferred to the Central District of California. Id. Dkt. 20.

8 On June 17, 2022, the subset of Moving Defendants then named in this
9 action moved to consolidate all three cases. Dkt. 89. On July 15, 2022, the three
10 cases were consolidated under this action's case number, and Plaintiffs filed a
11 consolidated complaint on July 29, 2022. Dkt. 93, 99. On August 25, 2022, counsel
12 for Moving Defendants and Plaintiffs met and conferred regarding Plaintiffs' intent
13 to file an amended complaint to expand the scope of Plaintiffs' claims to include
14 additional works and additional defendants because the case could not progress if
15 Plaintiffs were forced to consolidate new actions involving the Subject Works each
16 time they filed a new suit, which was their intent. Dkt. 112. Plaintiffs filed the First
17 Consolidated Amended Complaint on September 23, 2022 expanding the scope of
18 the case, and their Second Consolidated Amended Complaint ("SCAC") on April
19 21, 2023. Dkt. 116, 305. The size and scope of this case is a direct result of
20 Moving Defendants moving the Court to transfer and consolidate the prior actions.

21 **III. FACTUAL ALLEGATIONS**

22 Plaintiffs Cleveland Constantine Browne p/k/a Clevie and Wycliffe Anthony
23 Johnson p/k/a "Steely" are renowned musicians performing as the duo "Steely and
24 Clevie". SCAC ¶173. In 1989, Steely and Clevie wrote and record the instrumental
25 song *Fish Market*. SCAC ¶179. They own the copyright for *Fish Market's* sound
26 recording and composition and have registered both with the U.S. Copyright
27 Office. SCAC ¶177, 189. *Fish Market* is an original work that includes, among
28 other things, original drum work that differentiates it from prior works. SCAC

1 ¶180. *Fish Market* features, *inter alia*, a programmed kick, snare, and hi-hat
 2 playing a one bar pattern; percussion instruments, including a tambourine playing
 3 through the entire bar, a synthesized ‘tom’ playing on beats one and three, and
 4 timbales that play a roll at the end of every second bar and free improvisation over
 5 the pattern for the duration of the song; and a synthesized Bb (b-flat) bass note on
 6 beats one and three of each bar, which follows the aforementioned synthesized
 7 ‘tom’ pattern. *Id.*

8 Steely and Cleve co-authored *Dem Bow* with Shabba Ranks and co-own the
 9 song’s composition copyrights. SCAC ¶181. The composition for *Dem Bow* is
 10 registered with the U.S. Copyright Office. *Id.* In 1990, after *Dem Bow*’s release
 11 and success, the derivative work *Pounder Riddim* was created by Ephraim Barrett²
 12 and Denis Halliburton, the latter of which performed the *Dem Bow* and *Fish*
 13 *Market* composition to create a new work. SCAC ¶182. The *Pounder Riddim* was
 14 then used to create the sound recordings of *Pounder Dub Mix II* (“*Pounder*”). *Id.*
 15 For the *Pounder Riddim*,³ and the derivative *Pounder* Denis Halliburton copied
 16 *Dem Bow*’s instrumental, sound, arrangement, and composition, including the
 17 drum pattern, the drum components, including the kick, snare, hi-hat, tom
 18 and timbales as well as the full bassline. SCAC ¶183. The composition played by
 19 Halliburton is virtually identical to *Fish Market*. SCAC ¶183. Thus, the *Fish*
 20 *Market* composition is necessarily captured in the sound recordings for *Pounder*.
 21 *Id.* A transcript of a portions of *Fish Market* is shown below. Any copying,
 22 interpolating, or sampling of the *Pounder* is a copying or interpolation of *Fish*
 23 *Market*’s composition. SCAC ¶188.

24
 25
 26 ² Ephraim Barrett’s estate was added as a Plaintiff in the SCAC through its executor
 27 Carl Gibson (referred to herein as “Barrett Estate”). SCAC ¶6.

28 ³ The term “riddim” in Reggae Dancehall refers to an instrumental track that can be
 used to record multiple different songs. The term “riddim” in dancehall, similar to the
 term beat in hip hop, encompasses the entire track without vocals.

Fish Market

Steely & Cleve

Defendants copied Plaintiffs’ work to create 1,819 works (collectively, the “Infringing Works”), each of which infringes on Plaintiffs’ copyrights in the Subject Works. SCAC ¶192. Defendants’ “sampling” (direct extraction and reproduction) of *Fish Market* and/or⁴ *Pounder* establishes access by way of striking similarity, if not virtual identity. SCAC ¶667. Defendants infringed Plaintiffs’ rights in *Fish Market* by sampling the recordings for *Fish Market* and/or *Pounder* and reproducing such samples in some of the Infringing Works. SCAC ¶668. Defendants also infringed Plaintiffs’ rights in *Fish Market* by making a direct copy of the *Fish Market* composition in one or all of the Infringing Works. SCAC ¶669. The details of which Subject Work and how it is alleged in the SCAC to have been infringed by each

⁴ Moving Defendants challenge Plaintiffs “and/or” allegations. Plaintiffs, though, must plead in the alternative because the facts relating to the creation of the songs are solely within the possession of Moving Defendants and a plaintiff need not establish facts at this stage that are “particularly within” the defendant’s possession. *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1189 (9th Cir. 2016). This rule “accords with ... our general precedent that fairness dictates that a litigant ought not have the burden of proof with respect to facts particularly within the knowledge of the opposing party.” *Id.* (citation omitted). This applies to facts relating to the date Defendants’ infringement occurred, and the exact relationship between the Defendant artists, record companies, and publishers and their exploitation of the Infringing Works. Of course, these details are not required, as discussed, *infra*.

1 Infringing Work are identified in Exhibit 1 to the Declaration of Frank R. Trechsel
 2 (“Trechsel Decl.”)⁵. Plaintiffs allege Defendants have “performed, distributed,
 3 streamed, sold, and/or otherwise exploited each of the Infringing Works, and/or
 4 authorized third parties to do so, within the three years preceding the filing of this
 5 action.” SCAC ¶650. And that “Pounder has been widely copied and/or sampled by
 6 the Defendants in this action, and each of them.” SCAC ¶188.

7 **IV. LEGAL STANDARD**

8 To defeat a Rule 12(b)(6) motion, the complaint need only provide enough
 9 factual detail to “give the defendant fair notice of what the ... claim is and the
 10 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
 11 (2007). The allegations of the complaint must be taken as true and all reasonable
 12 inferences are drawn in plaintiff’s favor. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d
 13 336, 338 (9th Cir. 1996). And the court generally may not consider materials other
 14 than facts alleged in, and documents made part of, the complaint. *Anderson v.*
 15 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). Finally, dismissal is proper only where
 16 a complaint fails to plead either a cognizable legal theory or sufficient facts under a
 17 cognizable legal theory. *Unicolors, Inc. v. H&M Hennes & Mauritz LP*, No. CV
 18 16-02322-AB (SKX), 2016 WL 10646311, at *2 (C.D. Cal. 2016), citing, *Balistreri*
 19 *v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). If a Rule 12(b)(6)
 20 motion is granted, the “court should grant leave to amend... [] unless it determines
 21 that the pleading could not possibly be cured by the allegation of other facts.”
 22 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal citations and
 23 quotations omitted).

24 **V. ARGUMENT**

25 None of the bases for the Motion are meritorious, as follows.

27 ⁵ Moving Defendants’ accompanying spreadsheet (Dkt. 331-1) appears to contain
 28 duplicate works by the artists Cali y Dandee and a couple of works not alleged in the
 SCAC or its Exhibit A. Notice is sufficient despite the foregoing.

1 **A. Plaintiffs sufficiently allege the elements of an infringement claim**

2 To make a *prima facie* case for copyright infringement, a plaintiff needs
3 allege: (1) ownership of a valid copyright, and (2) copying of constituent parts of
4 the work that are original. See *Feist Publications, Inc. v. Rural Telephone Service*
5 *Co., Inc.* 499 U.S. 340, 361 (1991).

6 **1. Plaintiffs own the works at issue and have standing**

7 The SCAC alleges Plaintiffs own and registered the composition and sound
8 recording for *Fish Market*, the composition for *Dem Bow*, and the sound recording for
9 *Pounder*. SCAC ¶189. No more is required of Plaintiffs at this stage.

10 **a. Plaintiffs need not identify or attach their copyright registration**

11 A plaintiff is not required to plead the specific registrations or number(s) at
12 the pleadings stage. See, e.g., *Kuhmstedt v. Enntech Media Group, LLC* 2022 WL
13 1769126, *3 (C. D. Cal. 2022) (“contention that Plaintiff was further required to
14 plead the specific registration number[s] [] is unfounded”); *Hybrid Promotions,*
15 *LLC v. Zaslavsky*, 2016 WL 10988656, *10 (C.D. Cal. 2016) (“failure to include
16 [the registration] is not fatal at the FRCP 12(b)(6) stage”); *Palmer Kane LLC v.*
17 *Scholastic Corp.*, 2013 WL 709276, at *3 (S.D.N.Y. 2013) (“ complaint properly
18 alleges that the copyrights have been registered in stating that the copyrights ‘[]
19 have been registered with the United States Copyright Office.’ [...] the complaint
20 is not required to attach copies of registration certificates or provide registration
21 numbers[.]”). Plaintiffs satisfied this requirement by alleging copyright registration
22 for the Subject Works. SCAC ¶189.

23 **b. Plaintiffs sufficiently pled ownership and registration of the**
24 ***Pounder* sound recording**

25 While *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct.
26 881 (2019) requires a registration to issue before filing a copyright infringement
27 case, it is undisputed here that a registration *did* issue prior to Plaintiffs filing their
28 initial claim. That registration covered the *Fish Market* composition and sound

1 recording. The *Pounder* sound recording registration, which simply covered
2 *another* recording of the *Fish Market* composition, issued after the filing of the
3 claim but prior to the filing of the SCAC, but that should not require Plaintiffs to
4 file a separate claim that would likely then be consolidated with this action.

5 To be sure, Courts have approved amendments to add claims for a work
6 that was registered after the filing date for the initial complaint and before the
7 amendment. *Lickerish Ltd. v. Maven Coal., Inc.*, 2021 WL 3494638, at *1 (C.D.
8 Cal. 2021) (applying “Ninth Circuit policy” and holding that *Fourth Estate* “does
9 not preclude the amendment of an existing lawsuit to add a newly asserted claim
10 for copyright infringement as long as the copyright issued before the amendment
11 asserting the infringement claim was filed.”). see also *Ubiquiti Networks, Inc. v.*
12 *Cambium Networks, Inc.*, 2019 WL 6034116, *1 (N.D. Ill. 2019) (same). Relevant
13 here, Courts often allow amendment for efficiency’s sake and to avoid multiple
14 actions, finding such amendment compatible with *Fourth Estate*. *Philips N.*
15 *America LLC v. KPI Healthcare, Inc.*, 2020 WL 3032765, at *3 (C.D. Cal. 2020).
16 Given that the later-obtained registration is simply for a sound recording that was
17 not initially alleged to be infringed in the original complaint, this approach should
18 be followed here.

19 Courts have found such an amendment to be improper, and required the
20 plaintiff to refile the case, only when the plaintiff attempted to cure an already
21 premature filing, which undermined the *Fourth Estate* reasoning. See, e.g., *Izmo,*
22 *Inc. v. Roadster, Inc.*, 2019 WL 2359228, at *2 (N.D. Cal. 2019) (“[P]ermitting
23 amendment to cure a claimant’s failure to register its copyright before suing
24 would undermine the objectives animating the Supreme Court’s decision in
25 *Fourth Estate.*”) Moreover, *Izmo* and the other cases cited by Moving Defendants,
26 *Malibu Media, LLC v. Doe*, 2019 WL 145317 (S.D.N.Y. 2019) and *Kifle v.*
27 *Youtube LLC*, 2021 WL 1530942 (N.D. Cal. 2021), were filed before *any*
28 registrations issued. In those cases, the plaintiffs, who had violated the *Fourth*

1 *Estate* ruling by filing before they obtained any registration, were attempting to
 2 cure by amendment. See, *Izmo*, at *1 (“*Izmo* initiated this lawsuit in October
 3 2018, alleging that Roadster infringed [on 80 of] its copyright ... [but] only 11
 4 were registered prior to the filing of the original complaint”); *Malibu*, at *1
 5 (deciding “whether a plaintiff that improperly filed suit [alleging copyright
 6 infringement] before a copyright was registered can cure that defect by amending
 7 its complaint after the Register has completed registration of the copyright.”);
 8 *Kifle*, at *6 (“*Kifle* has not plausibly alleged that he obtained a valid copyright
 9 registration for any relevant video before initiating this lawsuit.”). This is because
 10 a registration, as the Supreme Court found, is a claims-processing requirement
 11 that must be addressed prior to filing a complaint.

12 Here, Plaintiffs held not one but two registrations for the music at issue
 13 before filing the case and thereafter obtained a third registration for an additional
 14 recording of that music. Plaintiffs’ SCAC adds allegations related to an additional
 15 work that was recently registered and adds the Barrett Estate,⁶ a co-owner of the
 16 *Pounder* sound recording, as a Plaintiff. It does **not** seek to cure a defect in an
 17 initial filing asserting premature claims for an unregistered work. To be sure, the
 18 *Pounder* sound recording was not at issue in the earlier complaints, so there is no
 19 defect to cure.

20 In short, “given the policy favoring amendment of complaints,” allowing
 21 the addition by amendment of additional claims is appropriate. *Lickerish*, at *1.

23 ⁶ Courts have allowed amendment to add newly registered copyright infringement
 24 claims where additional plaintiffs were added involving claims related to a newly
 25 registered work to an existing claim. *Waidhofer v. Cloudflare, Inc.*, 2021 WL
 26 8532943, at *5 (C.D. Cal. 2021) citing, *Philips*, at *3 (“because the original complaint
 27 was filed solely by Waidhofer, [citation omitted], and therefore did not assert
 28 copyright infringement claims on behalf of Ryuu Lavitz and McGehee, the court finds
 that their “copyright registration [and subsequent inclusion in the FAC] is not
 incompatible with federal copyright law, as interpreted by *Fourth Estate*, *Malibu
 Media*, and *Izmo*.”)

1 This is particularly because “an amended complaint supersedes the original
 2 complaint and renders it without legal effect[.]” *Lacey v. Maricopa Cnty.*, 693
 3 F.3d 896, 927 (9th Cir.2012); see also *Valadez–Lopez v. Chertoff*, 656 F.3d 851,
 4 857 (9th Cir.2011) (“amended complaint supersedes the original, the latter being
 5 treated thereafter as non-existent.”) (quotation marks omitted).

6 Finally, the consolidated nature of this action further militates in favor of
 7 allowing the case to include this additional recording. The driving intent behind
 8 consolidation was to resolve as fully as possible all claims related to *Fish Market*
 9 in a single action. Should the *Pounder* recording of *Fish Market* be removed from
 10 this case, Plaintiffs will have to refile those claims in a new action and that action
 11 will thereafter be consolidated with this one as the claims, songs, and parties
 12 greatly overlap. Indeed, any song that copies the *Pounder* sound recording **will**
 13 **also copy** the *Fish Market* composition, which is captured in that recording.
 14 SCAC ¶184. That would mean two cases addressing the same infringement in the
 15 same songs – one for the composition and one for the recording. This would be
 16 hugely inefficient and is another basis on which to reject Defendants’ argument.

17 Plaintiffs’ amendment properly added a new registration and Plaintiff and
 18 was not done to cure a defective initial claim. Particularly in light of the
 19 consolidation, these claims should proceed.⁷

20 **c. The *Dem Bow* registration is not limited to the lyrics**

21 The SCAC alleges Steely and Clevie co-authored *Dem Bow* and co-own the
 22 copyrights in its composition, which has been registered. SCAC ¶181. Moving
 23 Defendants claim that Plaintiffs’ registration is limited to the lyrics of *Dem Bow*
 24 even though it is settled that “the registration, renewal, deposit, and notice
 25

26 ⁷ Any dismissal of Plaintiffs’ claims must be without prejudice, as the court in each of
 27 Moving Defendants’ cited cases dismissed without prejudice, allowing the plaintiff to
 28 refile an action after registering. See, *Izmo, Inc.*, 2019 WL 2359228, at *2; *Malibu*
Media, 2019 WL 1454317, at *4; see also *Hardwell v. Parker*, 2023 WL 4155402, at
 *2 (C.D. Cal. May 10, 2023)(dismissing without prejudice.)

1 requirements **do not define the scope** of copyright protection but, rather, the
2 procedural steps necessary to obtain and maintain a copyright. Congress has
3 repeatedly stated that these requirements are mere ‘formalities.’” *Kahle v. Ashcroft*,
4 2004 WL 2663157, at *17 (N.D. Cal. 2004)(emphasis added), aff’d sub nom.
5 *Kahle v. Gonzales*, 474 F.3d 665 (9th Cir. 2007), opinion amended and superseded
6 on denial of reh’g, 487 F.3d 697 (9th Cir. 2007), and aff’d sub nom; . *Kahle v.*
7 *Gonzales*, 487 F.3d 697 (9th Cir. 2007)(emphasis added), citing, e.g., S. REP. NO.
8 102-194 at 5-6 (registration is a “formality”); citing S. REP. NO. 100-352 at 12
9 ((same); H.R.Rep. No. 83-2608, 1954 U.S.C.C.A.N. 3629, 3631 (1954) (same).
10 Thus, such “formalities do not alter the scope of copyright protection, but merely
11 determine the procedures necessary to obtain or maintain such protection. Id. And
12 even if they did, “[r]egistration is not a prerequisite to a valid copyright[.]” *Pringle*
13 *v. Adams*, No., 2011 WL 13227856, at *4 (C.D. Cal. Jan. 27, 2011), citing *S.O.S.,*
14 *Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989)(“[C]opyright vests
15 initially in the author or authors of a work[.]” so “regardless of whether Plaintiff’s
16 Certificate of Registration serves as prima facie evidence, Plaintiff can still
17 sufficiently allege ownership over a valid copyright.” Id. Thus, Plaintiffs can
18 pursue claims as to the entirety of the *Dem Bow* composition, irrespective of what
19 the registration states.

20 Indeed, an error in classification cannot affect the copyright protection
21 afforded the work. Section 5 of the registration, after listing each class in which
22 copyright registration may be made, provides that “the above specifications shall
23 not be held to limit the subject matter of copyright ... nor shall any error in
24 classification invalidate or impair the copyright protection secured under this title.”
25 Title 17 U.S.C. § 5; see also, *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 211
26 L. Ed. 2d 586, 142 S. Ct. 941, 946 (2022) (errors in copyright registration do not
27 invalidate the copyright or render it incapable of supporting an infringement
28

1 action). Here, the applications⁸ unambiguously claim not only “lyrics” but “music,
 2 lyrics, musical arrangement, Instrumental by applicant previously recorded –
 3 vocals added and mixed from multitrack recordings” and “music, lyrics”
 4 respectively. Trechsel Decl. ¶5, Exhibits 2-3. When the applications matured into
 5 registrations, the Copyright Office revised the Section to reflect the more limited
 6 language. Plaintiffs are in the process of addressing the issue with the Copyright
 7 Office to clarify that the music and lyrics are both covered by the registration. Id.⁹
 8 In any event, this issue with the registration’s language does not invalidate or limit
 9 Plaintiffs’ infringement claims. Defendants’ contention that claims regarding
 10 infringement of the music of *Dem Bow* should be dismissed or limited fails.

11 **2. Defendants copied protectable portions of Plaintiffs’ works**

12 As established in the above section IV.A.1, Plaintiffs have sufficiently
 13 alleged ownership and registration of each of the Subject Works meeting the first
 14 *prima facie* element for copyright infringement. The second element of the
 15 infringement analysis contains two separate components: “copying” (i.e., access)
 16 and “unlawful appropriation.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17
 17 (9th Cir. 2018) (citation omitted). Moving Defendants challenge the sufficiency of
 18 Plaintiffs’ pleadings on the grounds that they (1) are not sufficiently particularized
 19 to put them on notice of the specific claims of infringement and (2) do not establish
 20 that Plaintiffs’ works are original, protectible, or substantially similar to the
 21 Infringing Works. Both arguments fail.

22 **a. Plaintiffs’ creation of the Subject Works**

23 The Moving Defendants posture Plaintiffs’ ownership allegations as an
 24 unclear web of unregistered and unenforceable rights that plead infringement “by
 25
 26

27 ⁸ Applications for PA 2264496 and PA 2281747. Trechsel Decl. ¶5, Exhibits 2-3.

28 ⁹ Plaintiff will submit an updated registration from the Copyright Office, which tracks the application, upon its receipt.

1 extension.” See, Def. Mtn. § IV.B. This representation is false as Plaintiffs clearly
2 allege ownership, as follows:

3 **Creation of *Fish Market*:** Steely and Clevie authored and recorded *Fish*
4 *Market*, and co-authored *Dem Bow*. SCAC ¶¶179, 181, 657-659. Thus, they
5 secured copyright ownership in the composition and sound recording for *Fish*
6 *Market* and the composition for *Dem Bow* at the time of creation as a “copyright
7 vests initially in the author or authors of a work.” *S.O.S* at 1085 (citation omitted).
8 It is axiomatic that “[c]opyright protection subsists from the moment the work is
9 ‘fixed in any tangible medium of expression.’” *Id.* at 1085 (citation omitted).

10 As to originality, *Fish Market* includes, among other things, an original
11 drum, percussion, and bass composite pattern that differentiates *Fish Market* from
12 prior works. Plaintiff alleges that *Fish Market* contains, *inter alia*, a composite of
13 interlocking components constructed and layered in tiers of instruments, timbres,
14 and harmonic (bass) and rhythmic (drums and percussion) patterns repeated
15 throughout essentially the song’s entirety: bass; kick drum, snare drum, a ‘tom’
16 drum, and hi-hats; and timbales (played in various distinctive syncopated rhythms)
17 and tambourine (played in various distinctive sixteenth note and/or eighth note
18 patterns). SCAC ¶¶ 180-89, 648. Specifically, *Fish Market* features a programmed
19 kick, snare, and hi-hat playing a one bar pattern (hi-hat and kick drum playing
20 together on beats one to four, while the snare drum plays on the fourth, seventh,
21 twelfth and fifteenth sixteenth beats of the bar and ghost notes on the third and
22 eleventh sixteenth notes of the bar); percussion instruments, including a
23 tambourine playing through the entire bar (including a unique combination of
24 sixteenth and eighth notes), a synthesized ‘tom’ playing on beats one and three in
25 concert with the bass, and timbales that play a unique combination of sixteenth
26 notes, a roll at the end of every second bar, and free improvisation over the pattern
27 for the duration of the song; and a synthesized Bb (b-flat) bass note on beats one
28 and three of each bar, which is played in conjunction with the synthesized ‘tom’

1 pattern. Id. This combination of elements—i.e., the drum, percussion, and bass
 2 composite pattern of interwoven hi-hat, snare, kick, tom, bass, tambourine, and
 3 timbale patterns—is original. Id. These elements are shown in the transcription
 4 exemplar provided, *supra*.

5 **Creation of *Dem Bow*:** The owner of a copyright holds the right “to
 6 prepare derivative works,” which are works “based upon one or more
 7 preexisting works that recasts, transforms, or adapts the preexisting work[.]” 17
 8 U.S.C. §§ 101, 106. Steely and Clevie exercised that right in creating *Dem Bow*,
 9 which is a derivative work of *Fish Market*. “Logically, [], if a third party copies a
 10 derivative work without authorization, it infringes the original copyright owner’s
 11 copyright in the underlying work to the extent the unauthorized copy of the
 12 derivative work also copies the underlying work.” *DC Comics v. Towle*, 802 F.3d
 13 1012, 1023 (9th Cir. 2015). *Dem Bow*’s instrumental contains the exact same
 14 original elements as *Fish Market* (laid out in detail above) plus additional
 15 protectible music and lyrical elements. SCAC ¶182. Thus, Steely and Clevie, as
 16 co-authors of the derivative *Dem Bow*, own the original expression from *Fish*
 17 *Market* that is incorporated in the work and any distinct compositional elements
 18 found only in *Dem Bow*. Any copying or interpolation of the *Dem Bow*
 19 composition must necessarily make a copy of the *Fish Market* composition, while
 20 also potentially including independently protectible music and lyrical expression
 21 found only in *Dem Bow*. Moving Defendants’ claim that one cannot claim
 22 infringement “by extension” ignores the axiomatic law that the owner of the
 23 original protectible elements in an underlying work may sue for infringement of
 24 those elements in an unauthorized copy or derivative of a derivative work.

25 **Creation of *Pounder*:** *Pounder* was created using *Dem Bow*’s instrumental,
 26 sound, arrangement, and composition, including the drum pattern, the drum
 27 components, including the kick, snare, hi-hat, tom and timbales as well as the full
 28 bassline. SCAC ¶183. As a result, the composition of *Pounder* is also virtually

1 identical to *Fish Market*. Id. The *Fish Market* composition is captured in the sound
 2 recordings for the *Pounder*. SCAC ¶184. Plaintiffs allege ownership in the
 3 *Pounder* sound recording and that Defendants copied same. SCAC ¶¶188, 189,
 4 660. While Moving Defendants seek to challenge these assertions, they must be
 5 taken as true for purposes of this motion.

6 **b. Plaintiffs sufficiently allege infringement of their rights in both**
 7 **their compositions and sound recordings**

8 Plaintiffs allege ownership in the compositions for *Fish Market* and *Dem*
 9 *Bow*. SCAC ¶¶189. They also allege ownership in the sound recordings for *Fish*
 10 *Market* and *Pounder*. Id. Plaintiffs allege copying and exploitation of their rights in
 11 these Subject Works. They do not, as Moving Defendants suggest, allege
 12 infringement of unowned rights such as in the sound recording for *Dem Bow* (Def.
 13 Mtn. pg. 20:7-9) or in the elements of the *Pounder Riddim* composition that are not
 14 taken directly from *Fish Market* or *Dem Bow* (to the extent there are any). (Def.
 15 Mtn. pg. 13:27-28.).

16 When a plaintiff “alleges infringement of both the musical composition and
 17 the sound recording for each sample, the Court will address both, to the extent
 18 necessary. *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 602–03 (S.D.N.Y.
 19 2013), citing *Poindexter v. EMI Record Group Inc.*, 2012 WL 1027639, at *2 n. 3,
 20 (S.D.N.Y. 2012) (noting that “[s]ound recordings and their underlying musical
 21 compositions are ‘separate works with their own distinct copyrights’ ”)(citations
 22 omitted). “A musical composition’s copyright protects the generic sound that
 23 would necessarily result from any performance of the piece.” Id. (citation omitted).
 24 “The sound recording, on the other hand, is ‘the aggregation of sounds captured in
 25 the recording.’” Id., citing 17 U.S.C. § 101 (sound recordings are “works that result
 26 from the fixation of a series of musical, spoken, or other sounds”)(remaining
 27 citations omitted). Here, Plaintiffs allege that Defendants have copied both the *Fish*
 28 *Market* and *Dem Bow* compositions and the *Pounder* and *Fish Market* sound

1 recordings. Moving Defendants’ contention that it is unclear which Subject Works
 2 are alleged to be infringed by each infringing work is a willfully obtuse reading of
 3 Plaintiffs SCAC. And to be sure, the Defendants know better than even Plaintiffs
 4 which of Plaintiffs’ works they copied. Their claiming lack of notice here is
 5 implausible.

6 While not necessary under Rule 8, to simplify and clarify the allegations for
 7 the Court and Defendants, Plaintiffs have prepared an Exhibit which specifically
 8 cites where in the SCAC and Exhibit A allegations are made for a particular
 9 Infringing Work, what Subject Works it is alleged to have infringed, and which
 10 Defendants are responsible for said infringement. See Trechsel Decl. ¶1, Exhibit
 11 1.¹⁰

12 Plaintiffs allege that each of the Moving Defendants’ works at a minimum
 13 “incorporate an unauthorized sample of the *Fish Market* recording and a verbatim
 14 copy of the *Fish Market* composition as the primary rhythm / drum section of each
 15 work.” See, Trechsel Decl. ¶1, Exhibit 1, See, e.g. SCAC ¶299-300. And the
 16 location of the infringing use in the Infringing Work is identified as the “primary
 17 rhythm / drum section” of each work. Id. “A comparison of *Fish Market* and each
 18 of the [Infringing] Works establishes that each of the [Infringing] Works
 19 incorporates both qualitatively and quantitatively significant sections of the *Fish*
 20 *Market* recording and composition.” Id.

21 Moving Defendants’ assertion that Plaintiffs have failed to identify the
 22 protectible portions of the *Fish Market* composition and sound recording that they
 23 claim were duplicated is unfounded. Plaintiffs specifically allege and describe the
 24 protectible portions of *Fish Market* that have been copied and provide

25
 26 ¹⁰ Exhibit A to the SCAC states that an Infringing Work either “copied composition”
 27 meaning it infringed the *Fish Market* composition or contains a “sample that copies
 28 composition and copied composition” meaning it contains a sample infringing the
 sound recording of *Fish Market* containing the composition of *Fish Market*, and
 copied the composition of *Fish Market*.

1 transcriptions of *Fish Market*. SCAC ¶¶180, 188, 648; See also, Trechsel Decl. ¶1,
2 Exhibit 1.

3 The location and alleged infringement of the *Dem Bow* composition and the
4 *Pounder* sound recording is even more specifically alleged. Trechsel Decl. ¶1,
5 Exhibit 1. Specifically, *Dem Bow*'s composition is allegedly infringed by only
6 Infringing Works, *Llame Pa' Verte (Bailando Sexy)* and *Dembow* by Wisin &
7 Yandel, *Dembow 2020*, *Dembow Remix*, and *Mano al Aire* by Yandel, *Sal y*
8 *Perrea*, *Sal y Perrea Remix*, and *Se Va Viral* by Sech, *Golpe de Estado* and
9 *Calenton* by Daddy Yankee. Trechsel Decl. These works are alleged to
10 "interpolate[] *Dem Bow*" in Exhibit A, and for *Golpe de Estado* and *Calenton* the
11 body of the SCAC also alleges that "each contain substantially similar if not
12 virtually identical portions of *Dem Bow*, including the lyrical portions of *Dem*
13 *Bow*." SCAC ¶¶273-275.

14 The *Pounder* sound recording is alleged to have been copied more
15 frequently with 144 Infringing Works alleged to have included an unlawful sample
16 of *Pounder* in their recording. See, Trechsel Decl. ¶1, 4, Exhibit 1 (highlighted in
17 green). Plaintiff alleges that the Defendants "copied and/or sampled" *Pounder*
18 without consent. SCAC ¶188. These allegations are further laid out not in Exhibit
19 A but elsewhere in the body of the SCAC, which specially alleges that the
20 infringing work in question contains sounds "taken from samples derived from the
21 *Pounder* recording" or "includes an audio sample taken from *Pounder*." See e.g.
22 SCAC ¶¶334-335.

23 A full list of the paragraphs where these allegations are made in reference to
24 which Infringing Works is included on Exhibit 1 to the Trechsel Declaration. Thus,
25 Moving Defendants have notice of the allegations against them with respect to
26 which Subject Works were copied in which Infringing Work and how (i.e. via the
27 composition or sound recording). This is all that is required.

28 ///

1 **c. Plaintiffs sufficiently allege originality and protectability**

2 Copyright “protects only original expression,” but “it is not difficult to meet
3 the famously low bar for originality.” *Gray v. Hudson*, 28 F.4th 87, 97–98 (9th Cir.
4 2022)(citations omitted). Indeed, the “vast majority of works make the grade quite
5 easily, as they possess some creative spark, no matter how crude, humble or
6 obvious it might be.” *Id.* (citations and internal quotation marks omitted).

7 In the music context, challenges to a work’s originality should not be
8 decided at the pleading stage. See, e.g., *Nichols v. Club for Growth Action*, 235 F.
9 Supp. 3d 289, 296–97 (D.D.C. 2017)(“Defendant’s arguments about originality are
10 relevant to determining whether the two works are substantially similar, which is
11 not an appropriate question on a motion to dismiss.”), citing *Prunte v. Universal*
12 *Music Group*, 484 F.Supp.2d 32, 41 (D.D.C. 2007)(“Substantial similarity is a
13 question that should be decided either by a factfinder at trial or, in some cases, in
14 the context of a motion for summary judgment, not on a motion to dismiss for
15 failure to state a claim under Rule 12(b)(6).”). If “Plaintiffs adequately alleged that
16 the lyrics and musical composition are original[,]” that will suffice. *Id.* at 296.
17 Such is the case here – Plaintiff alleged originality and that is sufficient.

18 The allegedly copied portions of the Subject Works are not only original but
19 protectable. Musical compositions are generally afforded broad copyright
20 protection—i.e., to prove infringement thereof, the standard is substantial
21 similarity, not virtual identity.¹¹ See *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th
22 Cir. 2018)(“Musical compositions are not confined to a narrow range of expression
23 We have applied the substantial similarity standard to musical infringement
24

25
26
27
28

¹¹ This Court “do[es] not need to reach” the issue of the level of protection because
it is “a sufficiency of evidence argument,” not a pleading-stage argument. See
Skidmore, 952 F.3d at 1076 n.13. The range of expression, and the scope of
protection afforded as a result, are fact issues not suitable for adjudication now. *Id.*

1 suits[.]” (internal citations omitted); *Swirsky v. Carey*, 376 F.3d 841, 849 (9th Circ.
2 2004), *as amended on denial of reh’g* (Aug. 24, 2004).

3 Moving Defendants attack Plaintiffs’ claims stating that “sonic
4 characteristics,” “instrumentation,” “drum patterns,” “rhythm” and “tempo” are not
5 protectible as a matter of law. Def. Mtn. § IV.F. Not only is this incorrect,¹² but
6 also misrepresents the totality of Plaintiffs’ allegations which refer to, among other
7 things, a composite of interlocking components constructed and layered in four
8 tiers of instrumental timbres and harmonic (bass) and rhythmic (drums and
9 percussion) patterns: (1) bass; (2) kick drum; (3) snare drum and timbales, played
10 in various distinctive syncopated rhythms; and (4) hi-hat and tambourine, played in
11 various distinctive sixteenth note and/or eighth note patterns. SCAC ¶¶180-89,
12 648.

13 The issue before this Court is whether Plaintiffs **plausibly** alleged that the
14 drums, percussion, and bass composite pattern, as alleged and on an individual
15 level **or** in combination,¹³ are protectable. See *Swirsky* at 848. There is no factual
16 record to review or any expert testimony upon which the Court may rely, and other
17 courts have denied motions to dismiss in copyright cases where the “present record
18 is insufficient to conduct the extrinsic test.” See *Smith v. AMC Networks, Inc.*,

19
20 ¹² Elements of a musical work are protectable, particularly in combination. *Swirsky*,
21 376 F.3d at 847-49, 851-52 (“new technological sounds” as well as “melody,
22 harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics”
can be protectable).

23 ¹³ Plaintiffs do not have to choose or specifically plead either theory at this stage.
24 See *Corgan v. Keema*, 765 F. App’x 228, 229 (9th Cir. 2019). Moreover, “Rule
25 12(b)(6) ‘does not provide a mechanism for dismissing only a portion of a claim.’”
26 *Franklin v. Midwest Recovery Sys., LLC*, No. 8:18-CV-02085, 2020 WL 3213676,
27 at *1 (C.D. Cal. Mar. 9, 2020) (collecting cases). As such, neither Plaintiffs nor
28 this Court “need [] now identify each protectable and unprotectable element in
[Plaintiffs’] works. See *Ehrenberg v. Walt Disney Co.*, No. 2:22-CV-01136, 2022
WL 17080142, at *3 n.3 (C.D. Cal. Sept. 16, 2022) (denying motion to dismiss
copyright claim). That is because “the list of similarities in the [SCAC] is not
exhaustive. Additional facts . . . may significantly affect a jury’s analysis[.]”

1 2019 WL 402360 at *6 (N.D. Cal. 2019). Consequently, “based on the record
 2 before the Court, the Court cannot conduct the analysis to separate the
 3 unprotectable elements from the protectable elements in [the Subject Works]. As
 4 such, the Court [should] den[y] Defendants’ motion[] to dismiss the copyright
 5 claim.” See *Smith* at *5–7; see also *Irish Rover Ent., LLC v. Sims*, 2021 WL
 6 408199, at *2–3 (C.D. Cal. 2021) (“Defendants also argue various elements of
 7 Plaintiff’s works are unprotectible [A]t this stage of the litigation, it is difficult
 8 to know whether such elements are indeed unprotectible material”) (internal
 9 citations and quotations omitted). This Court should decline Moving Defendants’
 10 “invitation to scrutinize the originality and protectability of the” “sonic
 11 characteristics,” “instrumentation,” “drum patterns,” “rhythm” and “tempo” of the
 12 Subject Works “at this stage because Plaintiff[s] plead[] more than enough
 13 similarities in the arrangements, selections, and other plausibly protectable
 14 elements . . . to survive a motion to dismiss.” See *Kev & Cooper, LLC v. Furnish*
 15 *My Place, LLC*, 2022 WL 2161997, at *2 (C.D. Cal. 2022).

16 Moving Defendants argue that the comparative transcriptions show lack of
 17 similarity Def. Mtn. § IV.F pg. 25:7-9. However, Moving Defendants only identify
 18 the transcriptions for two songs, *Besame* and *Calypso*, and simply include a
 19 conclusory statement that all the other comparative transcriptions show the same
 20 lack of similarity. *Id.* pg. 25:9-20. Not only is this analysis pre-mature, it is
 21 incomplete and wrong, as it ignores the numerous other transcriptions (SCAC
 22 ¶¶180-89, 648) and comparisons in the pleadings. See *Nichols*, 235 F. Supp. 3d at
 23 296 (substantial similarity is “not an appropriate question on a motion to dismiss),
 24 citing *Prunte*, 484 F.Supp.2d at 41.

25 **d. Plaintiffs plausibly allege substantial similarity**

26 At this stage, Plaintiffs need only “plausibly allege substantial similarity
 27 between the two works.” *Zindel as Tr. for David Zindel Tr. v. Fox Searchlight*
 28 *Pictures, Inc.*, 815 F. App’x 158, 159 (9th Cir. 2020). In evaluating “unlawful

1 appropriation,” the Ninth Circuit uses a two-part test: the extrinsic test compares
2 the objective similarities of specific expressive elements in the two works and the
3 intrinsic test compares the similarity of expression from the standpoint of the
4 ordinary reasonable observer with no expert assistance. *Skidmore as Tr. For Randy*
5 *Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020)(internal
6 citations omitted). Generally, “[o]nly the extrinsic test’s application may be
7 decided by the court as a matter of law, so that is the only test relevant” to a motion
8 to dismiss. *Masterson v. Walt Disney Co.*, 821 F. App’x 779, 782 (9th Cir. 2020)
9 (internal citations omitted). Moving Defendants fail to even mention the extrinsic
10 test let alone properly apply it.

11 Crucially, in a copyright infringement case involving a musical composition,
12 “[t]he extrinsic test requires analytical dissection of a work *and expert testimony.*”
13 *Swirsky*, 376 F.3d at 845 (emphasis added). That is because the extrinsic test
14 “break[s] the works down into their constituent elements, and compar[es] those
15 elements for proof of copying as measured by substantial similarity.” *Skidmore*,
16 952 F.3d at 1064 (internal citations omitted); *Gray v. Hudson*, 28 F.4th 87, 96 (9th
17 Cir. 2022). “Courts must be just as cautious before dismissing a case for lack of
18 substantial similarity on a motion to dismiss” because analytical dissection and
19 substantial similarity between protected elements of works are “usually extremely
20 close issue[s] of fact.” *Zindel*, 815 F. App’x at 159–60; *Astor-White v. Strong*, 733
21 F. App’x 407, 409–10 (9th Cir. 2018) (internal citations omitted) (summary
22 judgment “‘not highly favored on the substantial similarity issue in copyright
23 cases,’ and should be even more disfavored on a motion to dismiss.”). Only works
24 that are “capable of examination and comparison” without any “additional
25 evidence that would be material to the question of substantial similarity” should be
26 analyzed for substantial similarity at this stage. *Id.* (internal citations omitted).
27 Musical compositions do not fall into this category. See *Skidmore*, 952 F.3d at
28

1 1086; *Hall v. Swift*, 2021 WL 6104160, at *5 (C.D. Cal. 2021) (“battle of the
2 experts” necessary).

3 Moving Defendants’ invite the Court to run an incredibly fact-intensive
4 analysis of over a thousand Infringing Works without any additional evidence and
5 conclude that none of the Infringing Works contain elements similar to the Subject
6 Works. The Court should decline this invitation as these issues are best left for
7 trial, or, at a minimum, summary judgment. Plaintiff have met their burden.

8 **B. Plaintiffs’ claims are not barred by equitable estoppel**

9 Moving Defendants’ estoppel argument fails. As “[e]quitable estoppel is
10 disfavored and should only be applied as needed to avoid injustice[,]” it certainly
11 cannot be applied at this stage. *Bangkok Broad. & T.V. Co. v. IPTV Corp.*, 742 F.
12 Supp. 2d 1101, 1115–16 (C.D. Cal. 2010)(citations omitted). Estoppel will only
13 apply if the artist “aided the defendant in infringing or otherwise induced [the
14 defendant] to infringe or has committed covert acts such as holding out ... by
15 silence or inaction.” *Field v. Google, Inc.*, 412 F.Supp.2d 1106, 1116 (D.Nev.
16 2006). Notably, “[t]he test for estoppel is more exacting than the test for laches,”
17 and “[t]he gravamen of estoppel ... is misleading and consequent loss.” *Petrella v.*
18 *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 684 (2014). Estoppel can only serve as
19 a defense “when a copyright owner engages in intentionally misleading
20 representations concerning his abstention from suit, and the alleged infringer
21 detrimentally relies on the copyright owner’s deception.” *Id.* There is no evidence
22 of this in the record and certainly not in the allegations in the SCAC.

23 Without addressing the elements of the defense, Moving Defendants argue
24 that Plaintiffs, in not hustling to court to sue them earlier, engaged in misleading
25 conduct. There is no evidence that Plaintiffs intended for Defendants to rely upon
26 that disinclination to rush to file or that defendants were ignorant of the true facts
27 (e.g, their lack of a license to copy Plaintiffs’ work). Defendants cite *Petrella* to
28

1 argue that a copyright holder’s inaction can give rise to such a defense,¹⁴ but the
 2 case counsels the opposite result, noting that “[d]elay may be involved, but is not
 3 an element of the defense.” *Petrella*, 134 S Ct. at 1977. Delay alone is insufficient
 4 and Moving Defendants do not establish that they were not “misled” or that they
 5 relied¹⁵ on any misstatement by Plaintiffs. Moving Defendants, like the defendant
 6 in *Petrella*, urge a rule that would require artists to rush to file their cases but the
 7 “three-year limitations period [and] the separate accrual rule, [] avoids such
 8 litigation profusion. It allows a copyright owner to defer suit until she can estimate
 9 whether litigation is worth the candle.” *Id.* at 682-83. Their argument thus fails.

10 **C. Secondary liability is sufficiently alleged**

11 Plaintiffs sufficiently allege secondary liability. A defendant “contributorily
 12 infringes when he (1) has knowledge of another’s infringement and (2) either (a)
 13 materially contributes to or (b) induces that infringement.” *Perfect 10, Inc. v. Visa*
 14 *Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007). A defendant vicariously
 15 infringes a copyright when he “derive[s] a direct financial benefit from the
 16 infringement and ha[s] the right and ability to supervise the infringing activity.”
 17 *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004). “A vicarious infringer
 18 ‘exercises control over a direct infringer when he has both a legal right to stop or
 19 limit the directly infringing conduct, as well as the practical ability to do so.’”
 20 *Williams*, 895 F.3d at 1132 (citation omitted).

21 Plaintiffs first allege direct infringement involving the creation of the
 22 Infringing Works. SCAC ¶¶656-669. Then Plaintiffs allege that numerous
 23 Defendants have infringed Plaintiffs’ rights in *Fish Market*, *Pounder*, and *Dem*
 24 _____

25 ¹⁴ Def. Mtn. IV.G pg. 25:7-12.

26 ¹⁵ Simply spending time and money to create the infringing songs is not detrimental
 27 reliance because “if this prejudice could consist merely of expenditures in [the
 28 allegedly infringing work], then relief would have to be denied in practically every
 case of delay.” *Internet Specialties West, Inc. v. Milon-DiGiorgio Enterprises, Inc.*,
 559 F.3d 985, 991-93 (9th Cir. 2009).

1 *Bow* by, without limitation, exploiting the Infringing Works for profit by licensing,
2 or otherwise authorizing third parties to use, reproduce and/or perform the
3 Infringing Works for profit. SCAC ¶671 (listing names).

4 Defendants are also alleged to have (a) authorized the reproduction,
5 distribution and sale of records and digital downloads of the Infringing Works,
6 through the execution of licenses, and/or actually reproducing, and/or selling and
7 distributing physical or digital or electronic copies of the Infringing Works through
8 various physical and online sources and applications, including without limitation,
9 through Amazon.com, Walmart, Target and iTunes; (b) streamed and/or publicly
10 performed or authorized the streaming and/or public performance of the Infringing
11 Works through, without limitation, Spotify, YouTube, and Apple Music; and (c)
12 participated in and furthered the aforementioned infringing acts, and/or shared in
13 the proceeds therefrom. SCAC ¶672.

14 Defendants are also alleged to have “knowingly induced, participated in,
15 aided and abetted in and profited from the illegal reproduction, distribution, and
16 publication of the Infringing Works as alleged above.” SCAC ¶679. Specifically,
17 the producers, publishers, and record companies (including, but not limited to,
18 Sony, Ultra, UMG,) underwrote, facilitated, and participated in the illegal copying
19 and infringing of the individual musician Defendants during the creation of the
20 Infringing Works and realized profits through their respective distribution, and
21 publication of the respective Infringing Works. *Id.* Defendants collaborated with
22 other artists to create the Infringing Works, and, in doing so, knowingly
23 incorporated material elements from the compositions and sound recordings of
24 *Fish Market* and *Pounder* and the composition of *Dem Bow*, with knowledge that
25 they did not have the requisite consent.” *Id.* And since information regarding the
26 total scope of control and contribution by one defendant on behalf of the other is
27 “particularly within” the possession of Defendants, Plaintiffs need not further plead
28 such facts. *Friedman*, 833 F.3d at 1189.

1 Moving Defendants argue that Plaintiffs failed to lodge specific allegations
 2 for particular Defendants and failed to identify direct infringement ignores the
 3 SCAC’s Paragraph 671 and 673, in which Plaintiffs specifically identify record
 4 label and publishing Defendants involved in the licensing and authorization of
 5 third party distributors exploitation of the Infringing Work by both physical and
 6 online sources such as Amazon.com, Walmart, Target, and iTunes, as well as
 7 digital sources like Spotify, Youtube, and Apple Music. SCAC ¶¶671, 673.
 8 Plaintiffs do much more than allege the elements of the cause of action but identify
 9 specific acts of contributory and vicarious infringement by specific Defendants.
 10 Thus, Plaintiffs allegations are not analogous to those in *Kilina Am., Inc. v. Bonded*
 11 *Apparel, Inc.*, and *Sound & Color v. Smith*, cited by Moving Defendants. Plaintiffs
 12 sufficiently pled their secondary liability claims.

13 **D. The SCAC provides proper notice and is not a “shotgun” pleading**

14 Moving Defendants again misread the SCAC to argue that Plaintiffs failed to
 15 set forth Rule 8-compliant factual allegations as to how Defendants infringed
 16 Plaintiffs’ copyrights. Def. Mtn. at 18:20-21. Rule 8 requires a plaintiff to “give the
 17 defendant fair notice of what the [...] claim is and the grounds upon which it rests.”
 18 *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)). And each allegation of a
 19 complaint must be “simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1) (emphasis
 20 added). As such, Plaintiffs are **not** required to plead every act and instance of
 21 infringement, as Defendants urge. See, e.g., *Paramount Pictures Corp. v. Axanar*
 22 *Prods., Inc.*, 2016 WL 2967959, at *3 (C.D. Cal. 2016) (“[C]ourts find a complaint
 23 sufficiently pled if it alleges representative acts of infringement rather than a
 24 comprehensive listing.”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp.
 25 2d 1114, 1120 (C.D. Cal. 2001) (“Perfect 10 alleges the existence of hundreds,
 26 even thousands of infringing photographs... Requiring a statement of each and
 27 every example would defeat the regime established by Rule 8.”). Plaintiffs’ SCAC
 28 is sufficient.

1 Indeed, “simply alleging present ownership by plaintiff, registration in
2 compliance with the applicable statute and infringement by defendant” is sufficient
3 to state a claim for copyright infringement. *Crispin v. Christian Audigier, Inc.*,
4 2010 WL 11508342, at *4 (C.D. Cal. 2010), quoting *Perfect 10, Inc.*, 167 F. Supp.
5 2d at 1120. And, notably, “[c]opyright claims need not be pled with particularity”
6 and “[p]laintiffs need not, as [d]efendants would suggest, identify the times,
7 similarities, or other details of the alleged infringements in their pleadings.”
8 *Marvel Enterps., Inc. v. NCSoft Corp.*, 74 U.S.P.Q.2d 1303, 1306 (C.D. Cal. 2005).

9 Plaintiff thus need not “specifically identify each of the infringed works and
10 their protectable elements. *Jean Royere SAS v. Edition Mod.*, 2022 WL 20275667,
11 at *4 (C.D. Cal. 2022)(“the Court rejects Defendants argument that Plaintiffs
12 copyright claim fails because they did not specifically identify each of the
13 infringed works and their protectable elements.”). In cases like this, where there is
14 a “wide variation in number” of Infringing Works at issue, Rule 8 does not require
15 a “highly detailed pleading.” *Id.*, quoting *Etereo Spirits, LLC v. James R. Ling*,
16 2021 WL 3914256, at *6 (C.D. Cal. 2021).

17 Relevant here, “given the large number of” infringing songs at issue, “all of
18 which Plaintiff alleges infringe on their copyright, Plaintiff is not required to
19 identify each infringing item.” *Id.*, citing *Perfect 10*, 167 F. Supp. at 1120.
20 Plaintiffs’ SCAC, which “identifies a set of” intellectual property – the
21 compositions and sound recordings – sufficiently notifies Defendants “as to the
22 type of infringing conduct and the source of the claims.” *Etereo Spirits*, 2021 WL
23 3914256, at *6, citing *Perfect 10*, 167 F. Supp 2d at 1120, citing *Leatherman v.*
24 *Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, (1993).

25 *Perfect 10, Inc.* is instructive. There, the Court rejected the argument that the
26 plaintiff was required to identify the “hundreds, even thousands, of alleged
27 infringing” works at issue and found that plaintiff could avail himself of the liberal
28 pleading standards established by Rule 8. *Id.* at 1120 (plaintiff not required to

1 “state, in its complaint, every copyright relied on, every individual image in the
2 magazines that is being infringed, every image on specific web pages that does
3 infringe, [and] the dates of any infringement.”) Such an argument “misconstrues
4 the burden [plaintiff] faces in the pleadings stage. Copyright claims need not be
5 pled with particularity.” *Id.*, citing, e.g., *Mid America Title Co. v. Kirk*, 991 F.2d
6 417, 421 (7th Cir.1993). Instead, “complaints simply alleging present ownership
7 by plaintiff, registration in compliance with the applicable statute and infringement
8 by defendant have been held sufficient under the rules.” *Id.*, citing *id.* at 421 n. 8,
9 quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1237, at 283
10 (1990)(citation omitted). Plaintiffs’ SCAC easily meets this standard, particularly
11 in light of the massive number of Infringing Works and Defendants request to
12 consolidate the cases.

13 The SCAC identifies the Subject Works and alleges what Defendants copied
14 from those works. See, Trechsel Decl. at 1, Exhibit 1. Thus, Defendants have
15 notice sufficient for them to ascertain the grounds for the claims. Notably, the
16 SCAC provides numerous examples of “sample” infringements, which are
17 sufficient to provide notice as to the scope of the action. *Perfect 10*, 167 F. Supp.
18 2d at 1120 (noting that allegations of “sample” infringements may “establish the
19 scope of the [alleged] infringement”); 3 M. & D. Nimmer, *Nimmer on Copyright* §
20 12.09(A)(2) (“To avoid unwieldiness, courts have approved a complaint that
21 simply alleges representative acts of infringement, rather than a comprehensive
22 listing.”). Given the “unwieldiness” engendered by the massive scope of the
23 infringement and the request to consolidate, the “representative acts” in the SCAC
24 are sufficient.

25 Even if they weren’t, Exhibit A to the SCAC provides additional details.
26 Had Plaintiff included a separate paragraph and full transcriptions of each
27 Infringing Work conveying the exact same information in the body of the SCAC
28 rather than in an exhibit, the SCAC would have ballooned to potentially thousands

1 of pages in violation of Rule 8. To avoid this issue, Plaintiffs’ Exhibit A simply
2 and directly identifies virtually all of the Infringing Works and one or more of the
3 Defendants that is responsible for each. SCAC, Exhibit A.

4 Further, Exhibit A is not meant to be reviewed in a vacuum but in
5 conjunction with the SCAC where plain statements regarding Defendants’ alleged
6 conduct regarding *Fish Market* are simply stated for each set of works by the
7 primary artist on those works. Further, the SCAC specifically describes any
8 infringement of the *Dem Bow* composition or *Pounder* sound recording making it
9 clear what was copied, how, and by which party, even though such detail is not
10 required. *Marvel Enterps., Inc.*, 74 U.S.P.Q.2d at 1306 (no requirement to “identify
11 the times, similarities, or other details of the alleged infringements in their
12 pleadings.”); Trechsel Decl. ¶1, Exhibit 1.

13 The SCAC is simply not a “shotgun pleading” because it does not
14 “overwhelm defendants with an unclear mass of allegations and make it difficult or
15 impossible for defendants to make informed responses to the plaintiff’s
16 allegations[.]” *Sollberger v. Wachovia Sec., LLC*, 2010 WL 2674456 *4–*5 (CD.
17 Cal. 2010). To the extent the pleadings are “overwhelming” (they are not), that is
18 due to Defendants’ request to consolidate a number of more manageable cases.

19 And Defendants are not impermissibly lumped together. Indeed, a quick
20 search for a particular Defendant on Exhibit A to the SCAC will show virtually all
21 of the Infringing Works Plaintiffs allege that Defendant is responsible for, and the
22 manner of the infringing allegations (i.e. whether they copied the compositions or
23 the compositions and sound recordings at issue). Trechsel Decl. ¶1, Exhibit 1. This
24 applies to all Defendants including the 42 Defendants that Moving Defendants
25 state are found only on Exhibit A, where it is clearly stated what songs they are
26
27
28

1 alleged to have copied and in which of the Infringing Songs.¹⁶ Given these clear
 2 pleadings and roadmaps identifying each of the Moving Defendants’
 3 infringements, Moving Defendants cannot claim to be overwhelmed by an unclear
 4 mass of collective allegations. See *Savage v. Tweedy*, 2012 WL 6618184, at *4–5
 5 (D. Or. Dec. 13, 2012) (denying motion because allegations were not
 6 “overwhelming”). Plaintiffs provide clear notice as to the infringement at issue and
 7 each of the Defendants have knowledge as to how they copied each song at issue.

8 Moving Defendants’ cited cases are inapposite. Unlike the plaintiff in
 9 *Martinez v. Robinhood Crypto, LLC*, Plaintiffs list by name the particular
 10 Defendants alleged to be liable for each Infringing Work. No. 2:22-cv-2651-AB-
 11 KS WL 2836792 at *4 (C.D. Cal. 2023) (“Plaintiff never identifies actions taken
 12 by Robinhood Markets, Inc. specifically, and instead lumps at least three and up to
 13 five defendants into the terms ‘Defendants’ and ‘Robinhood.’”) Here, Plaintiffs
 14 allege that each Defendant copied one of its musical works and distributed an
 15 unauthorized derivative. And the number of works and parties here are far more
 16 numerous. Even so, Defendants can still identify the Infringing Works with which
 17 they were involved.

18 Moving Defendants’ other cited cases are distinguishable for the same
 19 reasons. In *Lynwood Invs. CY Ltd. v. Konovalov* there was no helpful exhibit and
 20 plaintiff’s claim “lumps together all defendants against whom the claim is
 21 brought.” 2022 WL 3370795, at *19-20 (N.D. Cal. 2022). In *Richtek Tech. Corp.*
 22 *v. UPI Semiconductor Corp.* the plaintiff’s claims failed because “the complaint
 23 describes the works whose copyrights are allegedly infringed... but provides no
 24 such description of the acts or works that allegedly infringement them.” 2011 WL
 25

26
 27 ¹⁶ Moving Defendants identify certain songs listed in the SCAC that are not found in
 28 Exhibit A and the SCAC does not independently identify additional Defendants other
 than the primary artist responsible for them. This is sufficient to put the primary artist
 Defendant on notice, and nothing more is required.

1 166198, at *3 (N.D. Cal. 2011). In *Synoposys, Inc., v. AtopTech, Inc.* the plaintiff
2 failed to plead allegations that made its allegations plausible nor did it identify
3 what defendants copied. 2013 WL 5770542, at *4 (N.D. Cal. 2013). Again, in
4 *Plakhova v. Hood*, the plaintiff failed to specify which of twenty-eight lamps were
5 copied or further specify what part of the other proprietary works were copied.
6 2017 WL 10592315, at *1 (C.D. Cal. 2017). Finally, in *Fournerat v. Vettrans*
7 *Admin.*, the complaint was dismissed because its claims were “buried in a
8 needlessly lengthy and rambling narrative the does not clearly and concisely
9 identify the nature of each of Plaintiff’s legal claims.” WL 5413839, at *3 (C.D.
10 Cal. 2020).

11 This is not the case here, as Plaintiffs’ clearly identify their works and the
12 infringing acts at issue, providing precisely the type of information missing from
13 the preceding cases. Plaintiff identifies which Subject Works are being infringed
14 and how, identifies the Infringing Works¹⁷ that are alleged to be infringing, and
15 specifically sets out which Defendants are responsible for each work. Finally, the
16 allegations related to what elements of the Subject Works have been copied and
17 can be found in the Infringing Works is alleged. This is more than enough.

18 Music infringement cases are “highly circumstantial” and require “fact-
19 based showings,” so, “at the pleading stage the Court need only determine whether
20 Plaintiff has sufficiently alleged infringement, not whether it occurred in fact.”
21 *Pringle*, 2011 WL 13227856, at *6; see also *Kelly v. Arriba Soft Corp.*, 336 F.3d
22 811, 817 (9th Cir. 2003) (allegations of ownership and copying of protected
23

24 ¹⁷ Moving Defendants make much of the fact that Plaintiffs don’t define the
25 Infringing Works as compositions or sound recordings, but that is not the
26 appropriate inquiry. There are 1819 Infringing Works identified in the SCAC and
27 Exhibit A and paragraphs in the SCAC explain what those Infringing Works are
28 alleged to have infringed and whether that infringement is of the composition,
sound recording, or both. There is no requirement and Defendants do not cite to a
requirement that Plaintiffs must specify if the Infringing Works are compositions
or sound recordings rather than songs encompassing both.

1 elements is sufficient). Plaintiffs have done so here, particularly given the number
2 of parties and Infringing Works, as well as the case consolidation.

3 **E. If necessary, amendment is appropriate**

4 In the event the Court is inclined to grant any portion of the Moving
5 Defendants’ motion, Plaintiffs respectfully requests leave to amend his pleadings.
6 Such leave should be granted unless “the pleading could not possibly be cured by
7 the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection*
8 *Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). Amendment would not be futile here
9 because Plaintiffs can provide further details about the Moving Defendant’s
10 involvement with the songs, protectability, and substantial similarity, if necessary.
11 Plaintiff can also further clarify and provide additional facts in support of its direct
12 and secondary infringement allegations. Plaintiffs therefore requests leave to
13 amend pursuant to Fed. R. Civ. P. 15(a) should this Court find any deficiency.
14 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

15 While Moving Defendants make much of the many iterations of Plaintiffs’
16 complaints this is only the second amendment since the vast majority of the claims
17 have been alleged and the first involving Plaintiff Barrett Estate and the *Pounder*
18 sound recording. Further, a complaint of this size against such a large number of
19 Defendants and involving so many works presents a unique challenge to both
20 address all material aspects of the claims without also providing an impossibly
21 large and unwieldy document. Thus, should the Court deem it necessary, Plaintiffs
22 should be provided an opportunity to amend particularly to address curable
23 deficiencies such as identifying with greater specificity Defendants for particular
24 claims, and comparisons of the works at issue. Finally, should the Court be
25 inclined to dismiss Plaintiffs’ claims with respect to certain works due to a lack of
26 detail, Plaintiffs request those dismissals be without prejudice.

27 ///

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L.R. 11-6.2. Certificate of Compliance

The undersigned certifies that this memorandum of points and authorities complies with the type-volume limitation of L.R. 11-6.1. This certification is made relying on the word count of the word-processing system used to prepare the document.

The undersigned, counsel of record for Plaintiff, certifies that this brief contains **9,947** words, which complies with the word limit of L.R. 11-6.

Dated: August 3, 2023

By: /s/ Frank R. Trechsel
Frank R. Trechsel

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