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

11 CLEVELAND CONSTANTINE  
 12 BROWNE, et al.,  
 13 Plaintiffs,  
 14 v.  
 15 RODNEY SEBASTIAN CLARK  
 16 DONALDS, et al.,  
 17 Defendants.

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

**PLAINTIFFS’ OPPOSITION TO  
 BAD BUNNY AND RIMAS  
 MUSIC’S MOTION TO DISMISS  
 PLAINTIFFS’ SECOND  
 CONSOLIDATED AMENDED  
 COMPLAINT**

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

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## I. INTRODUCTION

The motion filed by Defendants Benito Ocasio p/k/a Bad Bunny and his label Rimas Music (together, “Bad Bunny”) fails because Plaintiffs adequately pled ownership of protectable expression in their *Fish Market* musical composition—an original, repetitive pattern of interlocking tiers of instruments, timbres, and harmonic and rhythmic elements—and Bad Bunny’s copying thereof. Instead of challenging the sufficiency of Plaintiffs’ allegations, Bad Bunny sidesteps the proper Rule 12(b)(6) inquiry altogether and argues that in fact the alleged similarities are of unprotectable expression. Bad Bunny is wrong.

First, there is nothing in the SCAC establishing that Plaintiffs’ expression is unprotectable. As such, the Court should decline Bad Bunny’s invitation to adjudicate the merits of Plaintiffs’ claims now, since courts regularly deny dispositive motions that seek to adjudicate the protectability of musical compositions without the aid of a sufficient factual record or expert testimony. Even if, at best, the individual elements of *Fish Market* are ultimately not protectable (a factual determination for later), the SCAC plausibly alleges that the *combination* of elements is protectable. And Bad Bunny never argues that *the overall selection and arrangement itself* of the elements in *Fish Market* is insufficiently original. As alleged, the *Fish Market* pattern is protectable expression, and Bad Bunny copied it. That suffices.

Second, Bad Bunny’s premature scenes a faire argument likewise fails. There is nothing in the SCAC establishing that *Fish Market* was built on stock elements in dancehall (the genre to which it belonged) at the time it was created, nor is it Plaintiffs’ burden to plead the many ways of creating songs in that genre. Analyzing this defense requires evidence of, and fact and expert discovery into, questions of substantial similarity and qualitative significance—questions that Bad Bunny fails to even *raise*, much less address, in his motion. Bad Bunny cites *zero* purportedly preexisting dancehall works and fails to show that any such works are identical to

1 Plaintiffs’ music or that the claimed similarities follow unavoidably from the use of  
2 that genre. Thus, his argument is too early *and* unsubstantiated.

3 In the end, Bad Bunny’s motion boils down to a sensationalist, unsupported  
4 suggestion that this case somehow ties up the reggaetón genre. Not so. Bad Bunny  
5 could have created reggaetón songs featuring compositional elements and  
6 combinations that are nothing like *Fish Market*—and tellingly, he does not argue  
7 otherwise. For these reasons, his motion should be denied.

## 8 II. RELEVANT FACTUAL ALLEGATIONS

9 In 1989, Plaintiffs Cleveland Browne p/k/a “Clevie” and the late Wycliffe  
10 Johnson p/k/a “Steely” (together, “Steely & Clevie”) created the *Fish Market* musical  
11 composition and sound recording.<sup>1</sup> *Fish Market* includes, *inter alia*, an original drum,  
12 percussion, and bass pattern that differentiates *Fish Market* from, and that did not  
13 exist in, prior works. Dkt. 305 (Second Consolidated Amended Complaint, “SCAC”)  
14 ¶¶173-75, 179-89, 648. Steely & Clevie then co-authored a song titled *Dem Bow*  
15 which incorporates the *Fish Market* musical composition. SCAC ¶¶180-89. *Dem Bow*  
16 became a massive hit in the dancehall genre. Unfortunately, *Fish Market* and *Dem*  
17 *Bow* have been widely copied, including in many songs in the reggaetón genre—a  
18 genre that did not exist as of *Fish Market*’s creation. *Id.*

19 Bad Bunny created and released 37 of the infringing songs at issue  
20 (collectively, the “Bad Bunny Works”). SCAC ¶¶329-67. Each post-dates *Fish Market*  
21 and, as set forth in the SCAC one-by-one, incorporates an unauthorized sample of, or  
22 otherwise copies from, *Fish Market*. SCAC ¶¶180-89, 329-69.

23  
24  
25  
26 <sup>1</sup> A “musical composition” protects the “generic sound that would necessarily result  
27 from any performance of the piece,” whereas the “sound recording” is the  
28 “aggregation of sounds captured in the recording.” *TufAmerica, Inc. v. Diamond*, 968  
F. Supp. 2d 588, 602 (S.D.N.Y.2013).



1           **III. LEGAL STANDARD**

2           To defeat a Rule 12(b)(6) motion, a pleading need only provide enough factual  
3 detail to “give the defendant fair notice of what the . . . claim is and the grounds upon  
4 which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading does  
5 so when it “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to  
6 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A  
7 court generally cannot consider materials other than facts alleged in the complaint and  
8 documents attached to the complaint. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th  
9 Cir. 1996). Taken as true, Plaintiffs’ allegations suffice.

10           **IV. ARGUMENT**

11           Plaintiffs adequately pled infringement. A “valid copyright infringement claim  
12 must allege only the basic elements of infringement.” *Rassamni v. Fresno Auto Spa,*  
13 *Inc.*, 365 F. Supp. 3d 1039, 1045 (E.D. Cal. 2019). The basic elements are “(1)  
14 ownership of a valid copyright; and (2) copying of constituent elements of the work  
15 that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361  
16 (1991). The second element contains two components: access and “unlawful  
17 appropriation.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018).

18           Bad Bunny does not challenge the sufficiency of Plaintiffs’ allegations that they  
19 own valid copyrights in *Fish Market* and *Dem Bow*; that Bad Bunny accessed those  
20 works; that the identified portions of the Bad Bunny Works are substantially similar to  
21 *Fish Market*; or that he sampled<sup>2</sup> *Fish Market* and/or *Dem Bow* (meaning those claims  
22 will continue regardless of this motion). Instead, Bad Bunny argues that *in fact* the  
23 alleged similarities (1) are of unprotectable material (Dkt. 330 (“Mot”). at 14-17), or  
24 alternatively (2) are of “scenes a faire” and not actionable (*id.* at 17-19). Bad Bunny is  
25 wrong on both counts, and his throw-away arguments attacking Plaintiffs’ secondary

26 \_\_\_\_\_  
27 <sup>2</sup> “‘Sampling’ is a ‘technique whereby a portion of an already existing sound  
28 recording is incorporated into a new work.’” *New Old Music Group, Inc. v. Gottwald*,  
122 F. Supp. 3d 78, 90 n.11 (S.D.N.Y. 2015) (citations omitted).

1 infringement claims and mischaracterizing the SCAC as a “shotgun pleading” are  
2 similarly unavailing. Therefore, this Court should deny Bad Bunny’s motion.

3 **A. Plaintiffs sufficiently allege unlawful appropriation**

4 The SCAC plausibly alleges that Bad Bunny copied protectable expression  
5 from *Fish Market*. Bad Bunny’s challenge inappropriately ventures beyond those  
6 allegations and into factual disputes. *See Levine v. McDonald’s Corp.*, 735 F. Supp.  
7 92, 96 (S.D.N.Y. 1990) (such arguments require “a determination that is usually one  
8 for the jury”), citing *Twentieth Century–Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327  
9 (9th Cir. 1983).

10 Plaintiffs need only “plausibly allege substantial similarity between the two  
11 works.” *Zindel as Tr. for David Zindel Tr. v. Fox Searchlight Pictures, Inc.*, 815 F.  
12 App’x 158, 159 (9th Cir. 2020). The Ninth Circuit uses a two-part test to evaluate  
13 “unlawful appropriation.” *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*,  
14 952 F.3d 1051, 1064 (9th Cir. 2020). The extrinsic test compares the objective  
15 similarities of specific expressive elements in the two works, and the intrinsic test  
16 focuses on similarity of expression from the standpoint of the ordinary reasonable  
17 observer with no expert assistance. *Id.* Only the extrinsic test is relevant to a motion to  
18 dismiss. *See Rentmeester*, 883 F.3d at 1118. Crucially, in cases involving musical  
19 compositions, “[t]he extrinsic test requires analytical dissection of a work and expert  
20 testimony.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004).<sup>3</sup>

21 Courts must be “cautious before dismissing a case for lack of substantial  
22 similarity on a motion to dismiss” because analytical dissection and substantial  
23 similarity between protected elements of works are “usually extremely close issue[s]”

24 \_\_\_\_\_  
25 <sup>3</sup> Expert testimony is critical here because specialized knowledge is required to  
26 analyze the objective elements of a musical composition. *See Bernal v. Paradigm*  
27 *Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1062–63 (C.D. Cal. 2010) (stating  
28 that a “music” case does not involve “subject matter readily understandable by any  
ordinary person, including the Court”); *see also Chiate v. Morris*, 972 F.2d 1337,  
1992 WL 197591 at \*5 (9th Cir. 1992) (musicologist testimony crucial to analysis).

1 of fact.” *Zindel*, 815 F. App’x at 159–60. To do so, “[i]t must be the case that  
 2 reasonable minds could not differ on,” and that “[t]here must be no additional  
 3 evidence that would be material to,” “the issue of substantial similarity.” *Id.* This is so  
 4 in cases involving musical compositions. *See, e.g., Skidmore*, 952 F.3d at 1086 (“We  
 5 are not well situated to determine whether a musical passage is original [as a matter of  
 6 law].”); *Hall v. Swift*, 2021 WL 6104160, at \*5 (C.D. Cal. 2021) (declining to resolve  
 7 a “battle of the experts”);

8 Bad Bunny seeks to adjudicate the merits of Plaintiffs’ claims without a factual  
 9 record or expert testimony,<sup>4</sup> but such a “record is insufficient to conduct the extrinsic  
 10 test.” *See Smith v. AMC Networks, Inc.*, 2019 WL 402360, at \*5-7 (N.D. Cal. 2019);  
 11 *see, e.g., Cabell v. Zorro Prods. Inc.*, 2017 WL 2335597, at \*8 (N.D. Cal. 2017)  
 12 (“[T]his case lacks the kind of comprehensive factual record and undisputed facts that  
 13 would allow the court to apply the ‘extrinsic test’ at this stage, and there is no support  
 14 for Defendants’ argument that doing so is required for the purposes of a motion to  
 15 dismiss”). Because Plaintiffs plead sufficient “similarities in the arrangements,  
 16 selections, and other plausibly protectable elements” in the songs at issue, Bad  
 17 Bunny’s motion fails. *See Kev & Cooper, LLC v. Furnish My Place, LLC*, 2022 WL  
 18 2161997, at \*2 (C.D. Cal. 2022).

### 19 **1. Plaintiffs’ allegations of protectability are plausible**

20 The SCAC plausibly alleges that *Fish Market* and its elements, on an individual  
 21 level *or* in combination,<sup>5</sup> is protectable expression. *See Swirsky*, 376 F.3d at 848. That  
 22

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23 <sup>4</sup> Plaintiffs have retained experts that will, at the appropriate time, opine on the  
 24 originality of *Fish Market* and the extrinsic similarity between Plaintiffs’ works and  
 25 the Bad Bunny Works. Now, though, is not the time for a “battle of the experts.”

26 <sup>5</sup> Plaintiffs do not have to choose or plead either theory now. *See Corgan v. Keema*,  
 27 765 F. App’x 228, 229 (9th Cir. 2019). Moreover, “Rule 12(b)(6) ‘does not provide a  
 28 mechanism for dismissing only a portion of a claim.’” *Franklin v. Midwest Recovery*  
*Sys., LLC*, No. 2020 WL 3213676, at \*1 (C.D. Cal. 2020). As such, contrary to Bad

1 is because “[t]he definition of originality is broad” (*Swirsky*, 376 F.3d at 851), a work  
 2 “need not be new, but only original, i.e., the product of the registrant,” *Sid & Marty*  
 3 *Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 n.3 (9th Cir.  
 4 1977), and musical compositions are generally afforded broad copyright protection.  
 5 *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th Cir. 2018).<sup>6</sup>

6 “No federal court has stated that a musical motive is not protectable because it  
 7 is an idea,” as even an “individual element of music can[] alone constitute an original  
 8 work of authorship.” *Swirsky*, 376 F.3d at 851; 2 Patry on Copyright § 3:93.  
 9 Originality can also exist in a combination of elements. *See, e.g., Three Boys Music*  
 10 *Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (upholding substantial similarity in  
 11 combination of five elements). Such a combination is protected when “those elements  
 12 are numerous enough and their selection and arrangement original enough that their  
 13 combination” is original. *See Lois v. Levin*, 2022 WL 4351968, at \*6 (C.D. Cal.  
 14 2022). Importantly, “the number of elements comprising a given combination does not  
 15 strictly determine its protectability in the aggregate, and supplies a less material  
 16 consideration than the overall combination’s originality.” *Id.*; *see also Santrayll v.*  
 17 *Burrell*, 1996 WL 134803, at \*1–2 (S.D.N.Y. 1996) (“[e]ven a combination of two  
 18

---

19 Bunny’s argument (Mot. at 14-17), neither Plaintiffs nor this Court “need [] now  
 20 identify each protectable and unprotectable element in [Plaintiffs’] works.” *See*  
 21 *Ehrenberg v. Walt Disney Co.*, 2022 WL 17080142, at \*3 n.3 (C.D. Cal. 2022). That  
 22 is because “the list of similarities in the [SCAC] is not exhaustive.” *See Fleener v.*  
*Trinity Broad. Network*, 203 F. Supp. 2d 1142, 1151 (C.D. Cal. 2001).

23 <sup>6</sup> Musical compositions are often entitled to “broad” copyright protection. *See, e.g.,*  
 24 *Swirsky*, 376 F.3d at 849; *Three Boys Music*, 212 F.3d at 485 (same). But this Court  
 25 “do[es] not need to reach this issue” now because it is “a sufficiency of evidence  
 26 argument,” not a pleading-stage argument. *See Skidmore*, 952 F.3d at 1076 n.13. The  
 27 range of expression, and the scope of protection afforded as a result, are evidentiary  
 28 issues not appropriate or suitable for adjudication now. *See Hall*, 2020 WL 5358390,  
 at \*4 (“[T]he Court cannot determine at this stage that there is a ‘narrow range of  
 available creative choices’ in this case”).

1 otherwise unprotectible elements can” be protectable); *Swirsky*, 376 F.3d at 851-52  
 2 (“[A]n arrangement of a limited number of notes can garner copyright protection”).

3 There is no uniform set of factors for analyzing a musical composition under  
 4 the extrinsic test because music “is comprised of a large array of elements.” *Swirsky*,  
 5 376 F.3d at 847-49, 851-52 (noting that “timbre, tone, spatial organization,  
 6 consonance, dissonance, accents, note choice, combinations, interplay of instruments,  
 7 basslines, and new technological sounds,” as well as “melody, harmony, rhythm,  
 8 pitch, tempo, phrasing, structure, chord progressions, and lyrics,” “can all be elements  
 9 of a musical composition”). “[S]o long as the plaintiff can demonstrate, through expert  
 10 testimony . . . , that the similarity was ‘substantial’ and to ‘protected elements’ of the  
 11 copyrighted work, the extrinsic test is satisfied.” *Id.*

12 Under this guidance, Plaintiffs have plausibly alleged protectable expression.  
 13 As alleged, the two-measure *Fish Market* pattern is original and consists of  
 14 interlocking tiers of instruments, timbres, and harmonic (bass) and rhythmic (kick,  
 15 snare, and ‘tom’ drums; hi-hats; timbales; and tambourine) elements repeated  
 16 throughout essentially the song’s entirety. The hi-hat and kick play together on beats  
 17 one to four, while the snare drum plays on the fourth, seventh, 12th and 15th sixteenth  
 18 beats of the bar with ghost notes<sup>7</sup> on the third and 11th sixteenth notes of the bar; the  
 19 hi-hat and tambourine play combinations of sixteenth and eighth notes; the ‘tom’  
 20 plays on beats one and three together with the bass; timbales play a combination of  
 21 sixteenth notes, a roll at the end of every second bar, and free improvisation over the  
 22 pattern; and a synthesized bass plays a Bb (b-flat) on beats one and three together with  
 23 the ‘tom.’ *See* SCAC ¶¶180-89, 648. That passes muster at this stage.

24 Courts have found triable fact issues as to the protectability of much more  
 25 minimal works. *See, e.g., Williams v. Bridgeport Music, Inc.*, 2014 WL 7877773, at

26 \_\_\_\_\_  
 27 <sup>7</sup> A “ghost note” is a “very soft note[] on the snare drum that fall[s] between the main  
 28 accents to help establish the underlying 16th note feel[.]” *New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78, 84 n.2 (S.D.N.Y. 2015).

1 \*18-19 (C.D. Cal. 2014). They have also done so with repeated drum grooves—even  
 2 ones that, unlike here, consist of *only* hi-hat and snare elements. *See Vargas v. Pfizer,*  
 3 *Inc.*, 418 F. Supp. 2d 369, 372–73 (S.D.N.Y. 2005) (finding factual disputes regarding  
 4 creative choices of combining “the high hat and snare drum elements of the  
 5 composition”); *New Old Music Grp*, 122 F. Supp. 3d at 83-84, 95-98 (without  
 6 discovery, unable to find that a “single measure” drum pattern of only “bass drum,  
 7 snare drum, and hi-hat parts” was unprotectable per se). Courts have held the same in  
 8 cases involving repeated words or phrases. *See, e.g., Levine*, 735 F. Supp. at 98–99  
 9 (“Repetitiveness does not make a work unoriginal.”); *Santrayll*, 1996 WL 134803 at  
 10 \*1–2 (holding “repetition of the non-protectible word ‘uh-oh’ in a distinctive rhythm”  
 11 was protectable); *Saunders v. Brown*, 2022 U.S. Dist. LEXIS 210910, at \*7-8 (C.D.  
 12 Cal. 2022) (“Plaintiffs have plausibly alleged that the rhythmic chanting of ‘wet’ in  
 13 Plaintiffs’ composition is protectable.”); *Hall*, 2020 WL 5358390 at \*3–4 and 2021  
 14 WL 6104160 at \*3–4 (holding that “a six-word phrase and a four-part lyrical  
 15 sequence” was “enough to sufficiently allege originality”); *May v. Sony Music Ent.*,  
 16 399 F. Supp. 3d 169, 182-83 (S.D.N.Y. 2019) (declining to dismiss claim over  
 17 expression of a “Jamaican saying”).

18 All of this underscores that dismissal is improper when an artist plausibly  
 19 alleges an original combination of elements. *See Lois*, 2022 WL 4351968 at \*5–6  
 20 (“[W]ithout additional evidence, the Court is unable to determine whether the  
 21 combination of elements that comprises the ‘Loveless Riff’ is so ‘common or trite’  
 22 that it is unprotectable”);<sup>8</sup> *Levine*, 735 F. Supp. at 95-98 (“[I]t is not clear to the Court  
 23 that [“the patter”] section is so lacking in creativity that it is non-copyrightable.”);  
 24 *BMS Ent./Heat Music LLC v. Bridges*, 2005 WL 1593013, \*3-5 (S.D.N.Y. 2005)  
 25 (finding triable fact issue because “an already-existing combination may be original to  
 26

27 <sup>8</sup> *See also Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 653 (6th Cir.  
 28 2004) (an “arpeggiated chord” could be “original”); *ZZ Top v. Chrysler Corp.*, 54 F.  
 Supp. 2d 983, 984–86 (W.D. Wash. 1999) (finding “guitar riff” original).

1 the author if independently created”). As long as the requisite minimal “spark” of  
 2 creativity is alleged, dismissing an infringement claim over music at the pleading  
 3 stage is erroneous, “[e]ven taking into account the matters of which [a] district court  
 4 [may properly take] judicial notice.”<sup>9</sup> See *Hall*, 786 F. App’x at 712.

5 Against this backdrop, Bad Bunny’s challenge fails.

6 **2. Nothing in the SCAC establishes Plaintiffs’ works as unprotectable**

7 Nothing in the SCAC establishes that *Fish Market* was too trite at the time of its  
 8 creation to warrant protection. To be sure, the unauthorized copying of the *Fish*  
 9 *Market* pattern now is widespread—copying that necessitated this case. But Bad  
 10 Bunny cites no authority for the proposition that widespread copying of an original  
 11 work somehow renders that work unprotectable. If anything, his alleged wholesale  
 12 exploitation of the pattern shows its creativity and appeal, and reinforces that  
 13 Plaintiffs plausibly unlawful appropriation.

14 Bad Bunny’s arguments to the contrary are unavailing. First, Bad Bunny’s  
 15 argument that *Fish Market* consists of “compositionally irrelevant elements,” and that  
 16 this Court should decide what elements are part of the *Fish Market* musical  
 17 composition now (Mot. at 15-16), is wrong. See, e.g., *Swirsky* 376 F.3d at 847-49,  
 18 851-52 (noting that “elements of a musical composition” can include “timbre,” “new  
 19 technological sounds,” and “interplay of instruments”); *Lois*, 2022 WL 4351968 at  
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21 <sup>9</sup> Bad Bunny’s “lodging” of “audio files” of some (but not all) of the works at issue is  
 22 improper. First, Bad Bunny does not request that this Court take judicial notice of  
 23 those “files,” nor does he attest, under penalty of perjury, that they are true and correct  
 24 copies of those “files.” Second, *Christianson v. W. Pub. Co.*, 149 F.2d 202 (9th Cir.  
 25 1945) does not support Bad Bunny’s inappropriate request that this Court listen to the  
 26 works at issue and decide the case now in chambers. See *Diamond Foods, Inc. v.*  
 27 *Hottrix, LLC*, 2016 WL 3880797, at \*10 (N.D. Cal. 2016) (“[The court] cannot base  
 28 any ruling on subjective determinations regarding its experience of the apps . . . . This  
 is true both for the combination of the elements, and for each protectable element  
 separately.”); *Acmet, Inc. v. Stage Stores, Inc.*, 2015 WL 12552063, at \*2 (C.D. Cal.  
 2015) (distinguishing *Christianson*, and denying motion).

1 \*5–6 (declining to “find whether the guitar riff or guitar feedback are part of the  
2 composition or not” at pleading stage). Bad Bunny’s argument that certain elements  
3 should be “defrocked” and analyzed in isolation (Mot. at 14-15) is also erroneous. *See*  
4 *Swirsky*, 376 F.3d at 847-49 (stating it is improper “[t]o pull these elements out of a  
5 song individually, without also looking at them in combination”).<sup>10</sup>

6 Second, Bad Bunny’s suggestion that a combination of two elements is per se  
7 unprotectable is incorrect. *See, e.g., Santrayll*, 1996 WL 134803 at \*1–2; *Lois*, 2022  
8 WL 4351968 at \*6 (“[T]he Court cannot accept the proposition that a selection and  
9 arrangement claim that has only two elements cannot be protectable as a matter of  
10 law.”). Bad Bunny cannot seriously argue that a selection and arrangement claim  
11 would amount to the alleged copying of a single element—there could plausibly be at  
12 least three (drum, percussion, bass) to seven (bass, kick, snare, ‘tom,’ hi-hats,  
13 timbales, and tambourine) creative choices copied. And Bad Bunny never argues that  
14 *the overall selection and arrangement itself* of the elements in *Fish Market* is  
15 insufficiently original. *See Lois*, 2022 WL 4351968 at \*6. That silence is fatal here.

16 And third, Bad Bunny’s mischaracterization of *Fish Market* as just “rhythm”  
17 (Mot. at 16-17) is absurd. He not only fails to define what he means by his use of the  
18 term “rhythm,” but also conflates the *expression* of particular “drum” and “bass”  
19 pattern with the *idea* of rhythm. Cases like *Vargas*, 418 F. Supp. 2d at 372–73, and  
20 *New Old Music Group*, 122 F. Supp. 3d at 83-84, 95-98, held that drum patterns (with  
21 even fewer allegedly copied elements than here) were not per se unoriginal. The *New*  
22 *Old Music Group* court so held even though “there [we]re no other harmonic,  
23 melodic, or lyrical similarities” involved (*see id.*), whereas here the bass adds a  
24 harmonic element. And Bad Bunny’s argument that minimalism is synonymous with  
25 unoriginality (Mot. at 16-17) contravenes *Feist*’s guidance on the “extremely low” bar

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27 <sup>10</sup> *See also Levine*, 735 F. Supp. at 95-98 (declining to “dissect[] LIFE into component  
28 parts”); *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1003-04 (2d Cir. 1995)  
(same).



1 for originality. *See Feist*, 111 S. Ct. at 1287–88. Ultimately, as alleged, Bad Bunny  
 2 took the heart of *Fish Market* and *Dem Bow* and “wrongfully appropriated something  
 3 which belongs to the plaintiff[s].” *New Old Music Group*, 122 F. Supp. 3d at 97. That  
 4 suffices.

5 Plaintiffs’ claim is also plausible given the “fragmented literal similarity” that  
 6 may exist here. “Fragmented literal similarity exists where the defendant copies a  
 7 portion of the plaintiff’s work exactly or nearly exactly, without appropriating the  
 8 work’s overall essence or structure.” *Newton v. Diamond*, 388 F.3d 1189, 1195 (9th  
 9 Cir. 2004). In such cases, “discovery is necessary to shed light on the qualitative  
 10 significance of the [claimed material] to the rest of the song, so the Court cannot  
 11 resolve ‘whether the copying goes to trivial or substantial elements of the original  
 12 work’ at this stage as a matter of law. *Hines v. W Chappell Music Corp.*, 2021 WL  
 13 2333621, at \*4 (S.D.N.Y. 2021) (internal citations omitted).

14 Bad Bunny’s cited authority does not counsel a different result. For example,  
 15 *Rentmeester*, 883 F.3d at 1121-23, addressed copying “general ideas,” not particular  
 16 expression (as Plaintiffs have alleged). Similarly, *Erickson v. Blake*, 839 F. Supp. 2d  
 17 1132, 1139-40 (D. Or. 2012) is inapplicable because it *declined* to address originality  
 18 and dealt instead with the protectability of facts.<sup>11</sup> And *McDonald v. West*, 138 F.  
 19 Supp. 3d 448, 459 (S.D.N.Y. 2015) is inapposite because the plaintiff claimed that the  
 20 defendant’s song *Made In America* copied plaintiff’s song *only because they shared*  
 21 *the same title*.

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 28 <sup>11</sup> Bad Bunny’s meritless “First Amendment” argument (Mot. at 12) is based on cases  
 involving fair use (*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 575 (1994)) or the  
 application of the idea/expression dichotomy to the copyrightability of factual  
 compilations (*Feist*, 499 U.S. 340, and *Bikram’s Yoga Coll. of India, L.P. v. Evolution*  
*Yoga, LLC*, 803 F.3d 1032 (9th Cir. 2015))—none of which are applicable.



1 In the end, the premise of Bad Bunny’s position is essentially that “[m]usic  
 2 could be distilled into a series of non-copyrightable rhythmic tones,” but that is not the  
 3 law. *See Enter. Mgmt. Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1118–19 (10th Cir. 2013).  
 4 Even if, at best, the individual elements of the *Fish Market* pattern are ultimately not  
 5 protectable (a factual determination for later), the SCAC plausibly alleges that the  
 6 *combination* is. Bad Bunny fails to cite *any* prior art using this particular combination,  
 7 nor does he point to anything in the SCAC establishing the pattern as too trite to  
 8 warrant protection. And his denigration of Plaintiffs’ works as not overwhelmingly  
 9 creative makes no difference. At bottom, Plaintiffs sufficiently allege that *Fish Market*  
 10 is protectable expression, and that Bad Bunny copied it. His motion should be denied.

11 **B. Bad Bunny’s scenes a faire argument fails**

12 Bad Bunny’s scenes a faire argument is premature, premised on an improper  
 13 attempt at incorporating “evidence” beyond the SCAC, and wrong.

14 Under that doctrine, only “certain commonplace expressions” that “are  
 15 indispensable” to “the treatment of a given idea” are not protectable. *Swirsky*, 376  
 16 F.3d at 849–50. A suggestion that an “element might be standard” is insufficient; there  
 17 must be “material evidence” that the “elements” are *necessary or inevitable* in a  
 18 “genre,” including an “explanation as to the range of expression common to all  
 19 [works]” therein.<sup>13</sup> *See Fleener*, 203 F. Supp. 2d at 1150-51. The “Ninth Circuit treats  
 20 scenes a faire as a defense to infringement rather than as a barrier to copyrightability.”  
 21 *Satava v. Lowry*, 323 F.3d 805, 810 n. 3 (9th Cir. 2003). Complaints need not  
 22 anticipate defenses. *See Gomez v. Toledo*, 446 U.S. 635 (1980). It is not Plaintiffs’  
 23 burden, at the pleading stage, to “introduce the entire corpus of relevant, industry-  
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 13 *See also, e.g., Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 223 (3d  
 Cir. 2019) (“Kangaroo points to no specific feature that necessarily results from the  
 costume’s subject matter”); *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d  
 1039, 1043 (8th Cir. 2003) (“[T]here are numerous ways of depicting Christmas  
 wreaths[.]”).

1 standard techniques just to prove that none of the material copied from his work  
 2 constituted scenes a faire.” *Compulife Software Inc. v. Newman*, 959 F.3d 1288,  
 3 1304–07 (11th Cir. 2020). That is why scenes a faire is often not adjudicated at the  
 4 pleading stage. *See, e.g., Plus EV Holdings, Inc. v. Thras.io, Inc.*, 2020 WL 8454919,  
 5 at \*3 (W.D. Mo. 2020).

6 Bad Bunny’s scenes a faire argument fails because he “not only relies on  
 7 extraneous documents and evidence, but also asks the Court to draw inferences in  
 8 favor of Defendants rather than the Plaintiff[s], which is an inversion of the motion to  
 9 dismiss standard.” *Est. of Darger v. Lerner*, 2023 WL 2664341, at \*5 (N.D. Ill. 2023).

### 10 **1. Bad Bunny’s scenes a faire argument is premature**

11 “[I]t is inappropriate to grant” a dispositive motion as a matter of law in a case  
 12 involving a musical composition “on the basis of scenes a faire” unless it is  
 13 “uncontested” and there is “independent evidence.” *See Swirsky*, 376 F.3d at 849–50;  
 14 *Saunders*, 2022 U.S. Dist. LEXIS 210910 at \*9-10 (a scenes a faire “determination at  
 15 this stage,” “using only its untrained ear, would be inappropriate”); *Rassamni*, 365 F.  
 16 Supp. 3d at 1047–49 (stating “[i]t is not readily apparent from the FAC that . . . the  
 17 language of a disclaimer is akin, in the legal profession, to a stock scene or character,”  
 18 and it was not plaintiff’s “burden [to] show[] that there are many ways of expressing  
 19 the idea of a liability disclaimer”). Analyzing this defense requires additional evidence  
 20 of, and fact and expert discovery into, dancehall—the genre to which *Fish Market*  
 21 belonged as of its creation. *See Swirsky*, 376 F.3d at 849–50.

### 22 **2. Bad Bunny’s scenes a faire argument is unsupported**

23 “[I]ndependent evidence,” even when introduced at the appropriate time, fails  
 24 to substantiate a scenes a faire defense when the allegedly preexisting references are  
 25 insufficiently numerous, or “are not in the same relevant ‘field’” as, or “identical” to,  
 26 the asserted work. *See Williams*, 2014 WL 7877773 at \*18-19; *Swirsky*, 376 F.3d at  
 27 849–51. In *Levine*, 735 F. Supp. at 98–99, the court held that “plaintiffs could have  
 28 composed a patter song in numerous ways, but chose instead the particular expression

1 that became LIFE,” and defendants failed to “show[] that the similarities between  
2 LIFE and MENU follow unavoidably from the use of the patter song concept.” And in  
3 *Swirsky*, 376 F.3d at 849–51, the Ninth Circuit reversed because “[t]he songs *One* and  
4 *Jolly Good* are not in the same relevant ‘field’ of music,” have different “chord  
5 progressions,” and “are not identical in meter, tempo, or key.” *See also Saunders*,  
6 2022 U.S. Dist. LEXIS 210910 at \*9-10 (“[M]erely repeating ‘wet’ is not the same as  
7 repeating ‘wet’ in the same rhythmic manner as Saunders does in ‘Wet’”).

8         Significantly, “the focus of the scenes a faire doctrine is on the circumstances  
9 presented to the creator, not the copier.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d  
10 1339, 1363–64 (Fed. Cir. 2014). In *Alfred v. Walt Disney Co.*, 821 F. App’x 727, 728–  
11 29 (9th Cir. 2020), the Ninth Circuit reversed because “at this stage of the litigation, it  
12 is difficult to know whether such elements are indeed unprotectible material,” and  
13 “[a]dditional evidence” (and “expert testimony”) was needed because “the blockbuster  
14 *Pirates of the Caribbean* film franchise may itself have shaped what are now  
15 considered pirate-movie tropes.” And in *TufAmerica*, 968 F. Supp. 2d at 603–04, the  
16 court held that it “cannot at the motion to dismiss stage conclude that” the phrase “say  
17 what” “is in fact a common phrase or was a common phrase at the time *Say What* was  
18 recorded.”

19         There is nothing in the SCAC establishing the *Fish Market* pattern as stock in  
20 dancehall—nor is it Plaintiffs’ burden to plead the diversity of dancehall or the many  
21 ways of creating songs in the genre. *See Rassamni*, 365 F. Supp. 3d at 1047–49. Bad  
22 Bunny’s assertion that the pattern is public domain is flatly unsubstantiated. *See id.*

23         Furthermore, because *Fish Market* is not a reggaetón song, it and the Bad  
24 Bunny Works “are not in the same relevant ‘field’ of music” and thus “do[] not tell the  
25 court whether” the asserted pattern “is an indispensable idea within” dancehall. *See*  
26 *Swirsky*, 376 F.3d at 849–51. The focus is on the circumstances presented to Steely &  
27 Cleve in 1989—when reggaetón *did not even exist*—when they created the *Fish*  
28 *Market* pattern, *not* what Bad Bunny encountered when he copied the same. Bad

1 Bunny offers nothing on this point and cites *zero* purportedly preexisting dancehall  
2 works, much less shows how any such works are identical to the asserted pattern or  
3 that the claimed similarities “follow unavoidably from the use of” the dancehall genre.  
4 *See Levine*, 735 F. Supp. at 98–99. There is simply no support for Bad Bunny’s  
5 suggestion that this case somehow ties up the reggaeton genre. *See id.* at 98. Bad  
6 Bunny could have created reggaeton songs featuring compositional elements and  
7 combinations that are nothing like *Fish Market*’s pattern, and he does not argue  
8 otherwise. *See JCW Investments v. Novelty, Inc.*, 482 F.3d 910, 917 (7th Cir. 2007).

9 At this stage, this Court has no evidence to analyze whether the *Fish Market*  
10 pattern is non-actionable scenes a faire. *See Kittrich Corp. v. United Indus. Corp.*,  
11 2017 WL 10434389, at \*4 (C.D. Cal. 2017) (“In some cases, everyday experience  
12 may not suffice[.]”). That determination depends on expert testimony informing the  
13 questions of substantial similarity and whether the alleged similarities are qualitatively  
14 significant—questions that Bad Bunny’s motion fails to even *raise*, much less answer.

15 The only scenes a faire “analysis” Bad Bunny conducts is far from compelling.  
16 First, he argues that “suing over 100 artists/songwriters . . . for allegedly interpolating  
17 the Dem Bow Rhythm in over 1,600 songs” somehow renders *Fish Market*  
18 unprotectable. Mot. at 18. That makes no difference. Even if *Fish Market* is *presently*  
19 used in numerous songs, Bad Bunny has not established, at this stage, that the *Fish*  
20 *Market* pattern was *in fact* embodied in sufficiently numerous, preexisting, identical  
21 works. *See TufAmerica*, 968 F. Supp. at 603–04. Second, his cites no authority  
22 supporting his conclusory argument that Steely & Cleve working on “genre-defining  
23 projects” *generally* somehow renders *Fish Market* scenes a faire. Mot. at 18. And  
24 third, his argument that *Fish Market* is somehow scenes a faire for being “widely  
25 copied” directly conflicts with Ninth Circuit law. *See Alfred*, 821 F. App’x at 728–29.

26 Bad Bunny’s scant cited authority does not help his cause. Neither *Williams*,  
27 895 F.3d 1106, nor *Skidmore*, 952 F.3d 1051, applied scenes a faire—*Skidmore* does  
28

1 not even use the term. And in *Swirsky*, 376 F.3d at 849–50, the Ninth Circuit *reversed*  
2 a dismissal based on scenes a faire.

### 3 **3. Virtually identical copying of scenes a faire material still infringes**

4 Even assuming *arguendo* that *Fish Market* incorporates scenes a faire elements,  
5 expressions of scenes a faire are still protected from virtually identical copying. *Ets-*  
6 *Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003). In *Rassamni*, 365 F.  
7 Supp. 3d at 1047–49, the court could not “conclude from the pleadings alone that  
8 merger or scenes a faire apply,” but even if it did the work would “still be entitled to  
9 thin protection” and support the claim. *See also Minx Int’l Inc. v. Club House*  
10 *Creations Inc.*, 2016 WL 878479, at \*5 (C.D. Cal. 2016).

11 The SCAC does not establish that scenes a faire applies. Even assuming  
12 *arguendo* it did, though, *Fish Market* would still be entitled to thin protection, and as  
13 alleged the Bad Bunny Works contain virtually identical copies thereof.

### 14 **4. Defense counsel’s declaration is inadmissible**

15 Bad Bunny’s offered declaration in support of this argument is inadmissible. A  
16 document may be incorporated by reference only if it is extensively referenced or  
17 forms the basis of the claim. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.  
18 2003). “[A]ffidavits are typically not allowed as pleading exhibits,” and “[t]he mere  
19 mention of the existence of a document is insufficient to incorporate the contents of a  
20 document by reference[.]” *See id.*

21 Here, Bad Bunny attempts to introduce, via a declaration from counsel, a copy  
22 of purported excerpts of a non-party’s publication (i.e., hearsay upon hearsay) that the  
23 SCAC mentions *once* and that in no way forms the basis of Plaintiffs’ claims (i.e.,  
24 nothing rises or falls based on its existence or the veracity of its contents). That is  
25 improper. *See, e.g., Woodall v. Walt Disney Co.*, 2021 WL 2982305, at \*4–6 (C.D.  
26 Cal. 2021) (declining to “rely on the common or generic cultural or literary elements  
27 in Defendants’ Ex. F”); *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006) (reversing  
28 because district court improperly considered materials outside pleading).





1 Similarly, Bad Bunny’s argument suggesting that Plaintiffs are required to  
 2 provide staff notation at the pleading stage, and that narratively describing the alleged  
 3 infringement is somehow “generic” (Mot. at 20), is meritless. Bad Bunny cites no  
 4 authority for this proposition—nor could he, as a complaint that identifies the original  
 5 works at issue and provides reference to the infringing material is sufficient. *See*  
 6 *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1121 (C.D. Cal.  
 7 2001). The parties will undoubtedly exchange sheet music notating the works at issue  
 8 during fact or expert discovery. *See Id.* Plus, in any event, “a court” may *not* “simply  
 9 compare the numerical representations of pitch sequences” or “the visual  
 10 representations of notes,” “without regard to other elements of the compositions,” to  
 11 determine if the asserted claim is plausible. *See Swirsky*, 376 F.3d at 847-48. Bad  
 12 Bunny’s request that this Court do so anyway is groundless.

13 Moreover, Plaintiffs are not required to “specifically identify each of the  
 14 infringed works and their protectable elements” in order to plausibly allege  
 15 infringement. *See Jean Royere*, 2022 WL 20275667 at \*4. Plus, since a transcription  
 16 of the pattern appears at least 25 times (*see* SCAC ¶¶188, 221-227, 278-296), Bad  
 17 Bunny cannot genuinely claim ignorance or lack of notice. *See Paramount Pictures*  
 18 *Corp. v. Axanar Prods., Inc.*, 2016 WL 2967959, at \*3 (C.D. Cal. 2016); *Perfect 10*,  
 19 167 F. Supp. 2d at 1120.

20 **D. Plaintiffs sufficiently allege Bad Bunny’s secondary infringement**

21 A defendant “contributorily infringes when he (1) has knowledge of another’s  
 22 infringement and (2) either (a) materially contributes to or (b) induces that  
 23 infringement.” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795 (9th Cir.  
 24 2007). A defendant vicariously infringes when they (1) “derive a direct financial  
 25 benefit from the infringement,” and (2) “ha[ve] the right and ability to supervise the  
 26 infringing activity.” *See Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004).

27 Bad Bunny argues that Plaintiffs’ secondary infringement claims fail if the  
 28 direct infringement claims fail (Mot. at 20-21), but for the reasons stated above

1 Plaintiffs’ direct infringement claim is adequately pleaded. Bad Bunny’s only other  
2 argument is that the SCAC does not sufficiently allege his knowledge of the allegedly  
3 infringing acts. *Id.* Not so. *See* SCAC ¶¶678-83. Plaintiffs are not required to plead  
4 additional information where the full scope of control and contribution by Bad Bunny  
5 is “particularly within” his possession. *See Friedman v. Live Nation Merch., Inc.*, 833  
6 F.3d 1180, 1189 (9th Cir. 2016).

7 **E. The Court should grant Plaintiffs leave to amend**

8 Plaintiffs have plausibly stated infringement claims against Bad Bunny. Should  
9 this Court believe that additional factual allegations are warranted, though, Plaintiffs  
10 respectfully request leave to amend. *See O.T. v. Babybjorn AB*, 2021 WL 4861447, at  
11 \*5 (C.D. Cal. 2021) (granting leave to amend).

12 Leave to amend is liberally granted unless “the pleading could not possibly be  
13 cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
14 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). Futility is no issue here  
15 because Plaintiffs can provide additional specificity and factual allegations in support  
16 of their infringement claims. *See Fisher v. Nissel*, 2022 WL 16961479, at \*8 (C.D.  
17 Cal. 2022) (granting leave because “Plaintiff represented to the Court at the hearing  
18 that he could allege additional facts”).

19 **V. CONCLUSION**

20 As alleged, Bad Bunny has misappropriated Steely & Clevie’s original music,  
21 and his specious attempt to short-circuit this case and evade liability should be  
22 soundly rejected. Under the proper Rule 12(b)(6) standard, Plaintiffs have adequately  
23 pleaded their infringement claims. Therefore, Plaintiffs respectfully request that this  
24 Court deny Bad Bunny’s motion or, alternatively, grant Plaintiffs leave to amend.

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Dated: August 3, 2023

Respectfully submitted,  
By: /s/ Scott Alan Burroughs  
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**L.R. 11-6.2. Certificate of Compliance**

1  
2 The undersigned certifies that this memorandum of points and authorities  
3 complies with the type-volume limitation of L.R. 11-6.1. This certification is made  
4 relying on the word count of the word-processing system used to prepare the  
5 document.

6 The undersigned, counsel of record for Plaintiff, certifies that this brief contains  
7 **6,997** words, which complies with the word limit of L.R. 11-6.

8 Dated: August 3, 2023

9 By: /s/ Benjamin F. Tookey  
10 Benjamin F. Tookey, Esq.  
11 DONIGER / BURROUGHS  
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14  
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