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

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

15  
 16 Plaintiffs,

17 v.

18 RODNEY SEBASTIAN CLARK  
 19 DONALDS, *et al.*

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

**PLAINTIFFS’ OPPOSITION TO  
 CHASSMAN & SEELIG, 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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1           **I. INTRODUCTION**

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

5           The answer is “yes,” and this motion should be denied.

6           The Moving Defendants<sup>1</sup> cannot credibly argue they are unaware as to how  
7 they copied Plaintiffs’ works, so they purposely misconstrue Plaintiffs’ Second  
8 Consolidated Amended Complaint (“SCAC”) to argue it provides no basis for the  
9 relief sought. The challenge fails because Plaintiffs properly allege they own and  
10 registered the copyrights in both the musical composition and sound recording for  
11 *Fish Market*, the musical composition for *Dem Bow*, and the sound recording for  
12 *Pounder Dub Mix II* (“*Pounder*”) (collectively “Subject Works”), assert the  
13 original and protectible components of each, allege how each component was  
14 copied in the allegedly infringing works, and identify the party or parties  
15 responsible for each the infringing works. This is sufficient.

16           **II. FACTUAL ALLEGATIONS**

17           Plaintiffs Cleveland Constantine Browne p/k/a “Clevie” and Wycliffe  
18 Anthony Johnson p/k/a “Steely” are renowned musicians performing as the duo  
19 “Steely and Clevie.” SCAC ¶173. In 1989, Steely and Clevie wrote and record the  
20 instrumental song *Fish Market*. SCAC ¶179. They own the copyright for *Fish*  
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<sup>1</sup> Defendants represented by counsel from the law firm Chassman & Seelig and Wolfe Miami Law, P.A., are WK Records, Inc., Llandel Veguilla pka “Yandel,” Juan Luis Morera Luna pka “Wisin,” Ernest Padilla, Mr. 305 Inc., Marcos Alfonso, Ramirez Carrasquillo, Victor Rafael Torres Betancourt, La Base Music Group, LLC, Juan Luis Londono Arias pka “Maluma,” Carlos Alberto Vives Restrepo pka “Carlos Vives,” Daniel Oviedo pka “Ovy on the Drums,” Michael Monge pka “Myke Tower,” Rafael Torres pka “Del La Ghetto,” Geoffrey Royce pka “Prince Royce” Richard Camacho, Erick Brian Colon, Christopher Velez, and Zabdiel De Jesus (collectively the “Moving Defendants”). Plaintiffs will refer to all the Defendants named in this litigation simply as “Defendants.”

1 *Market*'s sound recording and composition and have registered both with the U.S.  
 2 Copyright Office. SCAC ¶177, 189. *Fish Market* is an original work that includes,  
 3 among other things, an original drum work that differentiates it from prior works.  
 4 SCAC ¶180. *Fish Market* features, *inter alia*, a programmed kick, snare, and hi-hat  
 5 playing a one bar pattern; percussion instruments, including a tambourine playing  
 6 through the entire bar, a synthesized 'tom' playing on beats one and three, and  
 7 timbales that play a roll at the end of every second bar and free improvisation over  
 8 the pattern for the duration of the song; and a synthesized Bb (b-flat) bass note on  
 9 beats one and three of each bar, which follows the aforementioned synthesized  
 10 'tom' pattern. *Id.*

11 Steely and Clevie co-authored *Dem Bow* with Shabba Ranks and co-own the  
 12 song's composition copyrights. SCAC ¶181. The composition for *Dem Bow* is  
 13 registered with the U.S. Copyright Office. *Id.* In 1990, after *Dem Bow*'s release  
 14 and success, the derivative work *Pounder Riddim* was created by Ephraim Barrett<sup>2</sup>  
 15 and Denis Halliburton, the latter of which performed the *Dem Bow* and *Fish*  
 16 *Market* composition to create a new work. SCAC ¶182. The *Pounder Riddim* was  
 17 then used to create the sound recordings of *Pounder Dub Mix II* ("*Pounder*"). *Id.*  
 18 For the *Pounder Riddim*,<sup>3</sup> and the derivative *Pounder* Denis Halliburton copied  
 19 *Dem Bow*'s instrumental, sound, arrangement, and composition, including the  
 20 drum pattern, the drum components, including the kick, snare, hi-hat, tom  
 21 and timbales as well as the full bassline. SCAC ¶183. The composition played by  
 22 Halliburton is virtually identical to *Fish Market*. SCAC ¶183. Thus, the *Fish*  
 23 *Market* composition is necessarily captured in the sound recordings for *Pounder*.  
 24 *Id.* A transcript of a portions of *Fish Market* is shown below. Any copying,

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26 <sup>2</sup> 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 <sup>3</sup> 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.

1 interpolating, or sampling of the *Pounder* is a copying or interpolation of *Fish*  
 2 *Market's* composition. SCAC ¶188.

3 **Fish Market**

4 Steely & Clevie

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14 Defendants copied Plaintiffs' work to create 1,819 works (collectively, the  
 15 "Infringing Works"), each of which infringes on Plaintiffs' copyrights in the Subject  
 16 Works. SCAC ¶192. Defendants' "sampling" (direct extraction and reproduction) of  
 17 *Fish Market* and/or<sup>4</sup> *Pounder* establishes access by way of striking similarity, if not  
 18 virtual identity. SCAC ¶667. Defendants infringed Plaintiffs' rights in *Fish Market* by  
 19 sampling the recordings for *Fish Market* and/or *Pounder* and reproducing such  
 20 samples in some of the Infringing Works. SCAC ¶668. Defendants also infringed

21 \_\_\_\_\_  
 22 <sup>4</sup> Moving Defendants challenge Plaintiffs "and/or" allegations. Plaintiffs, though, must  
 23 plead in the alternative because the facts relating to the creation of the songs are solely  
 24 within the possession of Moving Defendants and a plaintiff need not establish facts at  
 25 this stage that are "particularly within" the defendant's possession. *Friedman v. Live*  
 26 *Nation Merch., Inc.*, 833 F.3d 1180, 1189 (9th Cir. 2016). This rule "accords with ...  
 27 our general precedent that fairness dictates that a litigant ought not have the burden of  
 28 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 Plaintiffs’ rights in *Fish Market* by making a direct copy of the *Fish Market*  
2 composition in one or all of the Infringing Works. SCAC ¶669. The details of which  
3 Subject Work and how it is alleged in the SCAC to have been infringed by each  
4 Infringing Work are identified in Exhibit 1 to the Declaration of Frank R. Trechsel  
5 (“Trechsel Decl.”). Plaintiffs allege Defendants have “performed, distributed,  
6 streamed, sold, and/or otherwise exploited each of the Infringing Works, and/or  
7 authorized third parties to do so, within the three years preceding the filing of this  
8 action.” SCAC ¶650. And that “*Pounder* has been widely copied and/or sampled by  
9 the Defendants in this action, and each of them.” SCAC ¶188.

### 10 III. LEGAL STANDARD

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

### 27 IV. ARGUMENT

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

1           **A. Plaintiffs sufficiently allege the elements of a claim for copyright**  
 2           **infringement**

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

7           **1. Plaintiffs make claims only for works they own and have properly**  
 8           **registered**

9           The SCAC alleges Plaintiffs own and registered the composition and sound  
 10          recording for *Fish Market*, the composition for *Dem Bow*, and the sound recording for  
 11          *Pounder*.<sup>5</sup> SCAC ¶189. Because no more is required of Plaintiffs at this stage,  
 12          Moving Defendants’ contrary argument fails.

13          This includes Moving Defendants’ incorrect position that a registration be  
 14          required. While a plaintiff must generally provide a valid copyright registration  
 15          number and certificate to ultimately prove their claim, they are not required to plead  
 16          the specific registrations or number(s) at the pleadings stage. See, e.g., *Kuhmstedt v.*  
 17          *Enntech Media Group, LLC* 2022 WL 1769126, \*3 (C. D. Cal. Apr. 11, 2022)  
 18          (“Defendant’s formalistic contention that Plaintiff was further required to plead the  
 19          specific registration number[s] [] is unfounded”); *Hybrid Promotions, LLC v.*  
 20          *Zaslavsky*, 2016 WL 10988656, \*10 (C.D. Cal. Oct. 5, 2016) (“the failure to include  
 21          [the registration] is not fatal at the FRCP 12(b)(6) stage”); *Palmer Kane LLC v.*  
 22          *Scholastic Corp.*, 2013 WL 709276, at \*3 (S.D.N.Y. Feb. 27, 2013) (“The complaint  
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 25          <sup>5</sup> Moving Defendants state multiple times that Plaintiffs do not own a distinct work  
 26          *Pounder Riddim*, however, Plaintiffs make no claim to *Pounder Riddim* and do not  
 27          assert infringement of *Pounder Riddim* so these remarks can be ignored as nothing  
 28          less than a tactic to confuse or misstate Plaintiffs’ allegations to appear to be for  
 unregistered and unowned works. Def. Mtn. pgs. 8:3-11, 11:16-26. Plaintiffs claim  
 infringement of the *Pounder* sound recording which they do own and have registered.  
 SCAC ¶¶189, 656, 660.

1 properly alleges that the copyrights have been registered in stating that the copyrights  
 2 ‘[] have been registered with the United States Copyright Office.’ [...] the complaint  
 3 is not required to attach copies of registration certificates.’’) Plaintiffs satisfied this  
 4 requirement by alleging copyright registration for the Subject Works. SCAC ¶189.

## 5 **2. Defendants copied protectable portions of Plaintiffs’ Works**

6 As established in the preceding section, Plaintiffs have sufficient alleged  
 7 ownership and registration of each of the Subject Works meeting the first *prima*  
 8 *facie* element for copyright infringement. The second element of the infringement  
 9 analysis contains two separate components: “copying” (i.e., access) and “unlawful  
 10 appropriation.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116–17 (9th Cir. 2018)  
 11 (citing *Feist*, 499 U.S. at 361). Moving Defendants do not challenge Plaintiffs’  
 12 allegations related to copying (i.e., access). They do, however, seek challenge the  
 13 sufficiency of Plaintiffs’ allegations that Moving Defendants infringed upon  
 14 protectible portions of the *Dem Bow* and *Fish Market*<sup>6</sup> compositions, and the  
 15 *Pounder* and *Fish Market* sound recordings and that Plaintiffs’ claims are not  
 16 sufficiently particularized to put Moving Defendants on notice of the specific  
 17 claims lodged against them. These arguments fail as the Subject Works  
 18 undoubtably contain original protectable expression copied by Defendants in the  
 19 Infringing Works. Some of the Infringing Works contain compositional copies and  
 20 others contain unauthorized samples of the sound recordings and still others  
 21 contain both.

### 22 **a. The copied portions of the Subject Works are original and** 23 **protectible**

24 Copyright “protects only original expression,” but “it is not difficult to meet  
 25 the famously low bar for originality.” *Gray v. Hudson*, 28 F.4th 87, 97–98 (9th Cir.

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26  
 27 <sup>6</sup> Moving Defendants do not challenge Plaintiffs’ allegations related to *Pounder*  
 28 despite clear allegations that 37 of the Infringing Works are alleged to have sampled  
 the *Pounder* sound recording. Trechsel Decl. ¶ 3, Exhibit 1.

1 2022)(citations omitted). Indeed, the “vast majority of works make the grade quite  
 2 easily, as they possess some creative spark, no matter how crude, humble or  
 3 obvious it might be.” *Id.* (citations and internal quotation marks omitted).

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

19 The alleged copied portions of the Subject Works are not only original but  
 20 protectible. Musical compositions are generally afforded broad copyright  
 21 protection—i.e., to prove infringement thereof, the standard is substantial  
 22 similarity, not virtual identity.<sup>7</sup> See *Williams v. Gaye*, 895 F.3d 1106, 1120 (9th  
 23 Cir. 2018) (“Musical compositions are not confined to a narrow range of  
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25 <sup>7</sup> This Court “do[es] not need to reach” the issue of the level of protection because  
 26 it is “a sufficiency of evidence argument,” not a pleading-stage argument. See  
 27 *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1076  
 28 n.13 (9th Cir. 2020). The range of expression, and the scope of protection afforded  
 as a result, are fact issues not appropriate or suitable for adjudication at this stage.  
*Id.*

1 expression . . . . We have applied the substantial similarity standard to musical  
 2 infringement suits[.]” (internal citations omitted); *Swirsky v. Carey*, 376 F.3d 841,  
 3 849 (9<sup>th</sup> Circ, 2004), as amended on denial of reh’g (Aug. 24, 2004.)

4 *Fish Market* includes, among other things, an original drum, percussion, and  
 5 bass composite pattern that differentiates *Fish Market* from prior works. That is,  
 6 *Fish Market*<sup>8</sup> contains, inter alia, a composite of interlocking components  
 7 constructed and layered in tiers of instruments, timbres, and harmonic (bass) and  
 8 rhythmic (drums and percussion) patterns repeated throughout essentially the  
 9 song’s entirety: bass; kick drum, snare drum, a ‘tom’ drum, and hi-hats; and  
 10 timbales (played in various distinctive syncopated rhythms) and tambourine  
 11 (played in various distinctive sixteenth note and/or eighth note patterns). SCAC ¶¶  
 12 180-89, 648. Specifically, *Fish Market* features a programmed kick, snare, and hi-  
 13 hat playing a one bar pattern (hi-hat and kick drum playing together on beats one to  
 14 four, while the snare drum plays on the fourth, seventh, twelfth and fifteenth  
 15 sixteenth beats of the bar and ghost notes on the third and eleventh sixteenth notes  
 16 of the bar); percussion instruments, including a tambourine playing through the  
 17 entire bar (including a unique combination of sixteenth and eighth notes), a  
 18 synthesized ‘tom’ playing on beats one and three in concert with the bass, and  
 19 timbales that play a unique combination of sixteenth notes, a roll at the end of  
 20 every second bar, and free improvisation over the pattern for the duration of the  
 21 song; and a synthesized Bb (b-flat) bass note on beats one and three of each bar,  
 22 which is played in conjunction with the synthesized ‘tom’ pattern. This  
 23 combination of elements—i.e., the drum, percussion, and bass composite pattern of  
 24 interwoven hi-hat, snare, kick, tom, bass, tambourine, and timbale patterns—is

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 27  
 28 <sup>8</sup> Elements of a musical work are protectable, particularly in combination. *Swirsky*,  
 376 F.3d at 847-49, 851-52 (“new technological sounds” as well as “melody,  
 harmony, rhythm, pitch, tempo, phrasing, structure, chord progressions, and lyrics”  
 can be protectable).

1 original. Id. These elements are shown in the transcription exemplar provided,  
2 *supra*.

3 *Dem Bow*'s instrumental is based on the same multi-track recording as *Fish*  
4 *Market* meaning it contains the exact same original elements as *Fish Market* (laid  
5 out in detail in the preceding paragraph) plus additional protectible music and  
6 lyrical elements. SCAC ¶182. Thus, any copying or interpolation of the *Dem Bow*  
7 composition must necessarily make a copy of the *Fish Market* composition, while  
8 also potentially including independently protectible music and lyrical expression  
9 found only in *Dem Bow*. This applies to *Pounder* as well based on the same multi-  
10 track instrumental. Id.

11 The issue before this Court is whether Plaintiffs plausibly alleged that the  
12 drums, percussion, and bass composite patterns as alleged and described in the  
13 preceding paragraphs on an individual level **or** in combination,<sup>9</sup> are protectable.  
14 See *Swirsky*, 376 F.3d at 848. There is no factual record to review or any expert  
15 testimony upon which the Court may rely, and other courts have denied motions to  
16 dismiss in copyright cases where the “present record is insufficient to conduct the  
17 extrinsic test.” See *Smith*, 2019 WL 402360 at \*6. Consequently, “based on the  
18 record before the Court, the Court cannot conduct the analysis to separate the  
19 unprotectable elements from the protectable elements in [the Subject Works]. As  
20 such, the Court [should] den[y] Defendants’ motion[] to dismiss the copyright  
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22  
23 <sup>9</sup> 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*, 2020 WL 3213676, at \*1 (C.D. Cal.  
27 2020) (collecting cases). As such, neither Plaintiffs nor this Court “need [] now  
28 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 claim.” See *Smith v. AMC Networks, Inc.*, 2019 WL 402360 at \*6 (N.D. Cal.  
2 2019); see also *Irish Rover Ent., LLC v. Sims*, 2021 WL 408199, at \*2–3 (C.D. Cal.  
3 2021) (“Defendants also argue various elements of Plaintiff’s works are  
4 unprotectible . . . [A]t this stage of the litigation, it is difficult to know whether  
5 such elements are indeed unprotectible material”) (internal citations and quotations  
6 omitted). This Court should decline Moving Defendants’ “invitation to scrutinize  
7 the originality and protectability of the” “sonic characteristics,” “instrumentation,”  
8 “drum patterns,” “rhythm” and “tempo” of the Subject Works “at this stage  
9 because Plaintiff[s] plead[] more than enough similarities in the arrangements,  
10 selections, and other plausibly protectable elements . . . to survive a motion to  
11 dismiss.” See *Kev & Cooper, LLC v. Furnish My Place, LLC*, 2022 WL 2161997,  
12 at \*2 (C.D. Cal. 2022). Plaintiffs have satisfied the requirements to plead  
13 protectability and originality for the infringed portions of the Subject Works, and  
14 the Court should not make a determination as a matter of law on either point  
15 without the benefit of expert testimony and discovery. Moving Defendants  
16 contentions that the alleged copied elements are not protectible as a matter of law  
17 fail.

18 Moving Defendants cases don’t counsel a different outcome. For example,  
19 in *Lois v. Levin*, the court found that it need not conclude if elements such as  
20 “guitar feedback” and “guitar ‘slide’” are protectible parts of the composition  
21 because selection and arrangement needs only more than a single element to be  
22 protectible and plaintiffs had alleged at least four. *Lois v. Levin*, 2022 WL  
23 4351968, at \*6 (C.D. Cal. 2022)(“Even a selection and arrangement of two  
24 unprotectable elements may be protectible, if the combination is sufficiently  
25 original.”) Plaintiffs have alleged copying of multiple unique and protectible  
26 patterns both individually and in combination. Thus, Plaintiffs’ allegations are  
27 sufficient.

28

1 Moving Defendants also claim that the comparative transcriptions show that  
 2 the alleged similarities are non-existent. Def. Mtn. pg. 20:22-21:14. However,  
 3 Moving Defendants only discuss the transcriptions for two songs, *Besame* and  
 4 *Calypso*, and simply include a conclusory statement that all the other comparative  
 5 transcriptions show the same lack of similarity. Id. Not only is this analysis pre-  
 6 mature it is incomplete, as it ignores the other descriptions (SCAC ¶¶180-89, 648)  
 7 and comparisons in the pleadings. See *Nichols*, 235 F. Supp. 3d at 296 (substantial  
 8 similarity is “not an appropriate question on a motion to dismiss), citing *Prunte*,  
 9 484 F.Supp.2d at 41.

10 **b. Plaintiffs properly allege infringement of both their compositions**  
 11 **and sound recordings**

12 Plaintiffs allege ownership in two compositions, one for *Fish Market* and a  
 13 second for *Dem Bow*. SCAC ¶¶189. They also allege ownership in two sound  
 14 recordings, one for *Fish Market* and a second for *Pounder*. Id. Plaintiffs allege  
 15 copying and exploitation of their rights in one or more of these Subject Works.

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.<sup>10</sup>

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

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25  
 26 <sup>10</sup> 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 Mark*, 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. ¶1-2,  
5 Exhibit 1. Specifically, *Dem Bow*'s composition is allegedly infringed by only 10  
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. ¶1-2, Exhibit 1. These works are  
10 alleged to "interpolate[] *Dem Bow*" in Exhibit A, and for *Golpe de Estado* and  
11 *Calenton* the body of the SCAC also alleges that "each contain substantially  
12 similar if not virtually identical portions of *Dem Bow*, including the lyrical portions  
13 of *Dem Bow*." SCAC ¶¶273-275.

14 The *Pounder* sound recording is alleged to have been copied more  
15 frequently with 37 Infringing Works alleged to have included an unlawful sample  
16 of *Pounder* in their recording. See, Trechsel Decl. ¶1, 3, Exhibit 1. These  
17 allegations are all laid out not in Exhibit A but in the body of the SCAC, which  
18 specially alleges that the Infringing Work in question contains sounds "taken from  
19 samples derived from the *Pounder* recording" or "includes an audio sample taken  
20 from *Pounder*." See e.g. SCAC ¶¶334-335.

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

26 ///

27 ///

28 ///

1           **c.     Plaintiffs sufficiently allege infringement of their protected**  
 2           **original expression**

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

18           Indeed “[c]opyright claims need not be pled with particularity” and  
 19 “[p]laintiffs need not, as [d]efendants would suggest, identify the times,  
 20 similarities, or other details of the alleged infringements in their pleadings.”  
 21 *Marvel Enterps., Inc. v. NCSoft Corp.*, 74 U.S.P.Q.2d 1303, 1306 (C.D. Cal. 2005).  
 22 In cases like this, where there is a “wide variation in number” of infringing works  
 23 at issue, Rule 8 does not require a “highly detailed pleading.” *Id.*, quoting *Etereo*  
 24 *Spirits, LLC v. James R. Ling*, 2021 WL 3914256, at \*6 (C.D. Cal. Jul. 15, 2021);  
 25 See also, *Jean Royere SAS v. Edition Mod.*, 2022 WL 20275667, at \*4 (C.D. Cal.  
 26 Oct. 17, 2022)(“the Court rejects Defendants argument that Plaintiffs copyright  
 27 claim fails because they did not specifically identify each of the infringed works  
 28 and their protectable elements.”)

1 Plaintiff thus need not “specifically identify each of the infringed works and  
2 their protectable elements. *Jean Royere SAS*, 2022 WL 20275667, at \*4 (“the  
3 Court rejects Defendants argument that Plaintiffs copyright claim fails because  
4 they did not specifically identify each of the infringed works and their protectable  
5 elements.”). In cases like this, where there is a “wide variation in number” of  
6 Infringing Works at issue, Rule 8 does not require a “highly detailed pleading.” *Id.*,  
7 quoting *Etereo Spirits*, 2021 WL 3914256, at \*6.

8 Relevant here, “given the large number of” infringing songs at issue, “all of  
9 which Plaintiff alleges infringe on their copyright, Plaintiff is not required to  
10 identify each infringing item.” *Id.*, citing *Perfect 10*, 167 F. Supp. at 1120.  
11 Plaintiffs’ SCAC, which “identifies a set of” intellectual property – the  
12 compositions and sound recordings – sufficiently notifies Defendants “as to the  
13 type of infringing conduct and the source of the claims.” *Etereo Spirits*, 2021 WL  
14 3914256, at \*6, citing *Perfect 10*, 167 F. Supp 2d at 1120, citing *Leatherman v.*  
15 *Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160,  
16 122 L.Ed.2d 517 (1993).

17 *Perfect 10, Inc.* is instructive. There, given the “hundreds, even thousands,  
18 of alleged infringing” works at issue, the plaintiff did not have to identify each  
19 infringing work and could avail himself of the liberal pleading standards  
20 established by Rule 8. *Id.* at 1120. The defendant in that case, like Moving  
21 Defendants, argued that the plaintiff was required to “state, in its complaint, every  
22 copyright relied on, every individual image in the magazines that is being  
23 infringed, every image on specific web pages that does infringe, [and] the dates of  
24 any infringement.” *Id.* at 1120. But, this “misconstrue[d] the burden [plaintiff]  
25 faces in the pleadings stage. Copyright claims need not be pled with particularity.”  
26 *Id.*, citing, e.g., *Mid America Title Co. v. Kirk*, 991 F.2d 417, 421 (7th Cir.1993).  
27 Instead, “complaints simply alleging present ownership by plaintiff, registration in  
28 compliance with the applicable statute and infringement by defendant have been

1 held sufficient under the rules.” Id., citing id. at 421 n. 8, quoting 5 Wright &  
2 Miller, Federal Practice and Procedure § 1237, at 283 (1990)(citation omitted).  
3 Plaintiffs’ SCAC easily meets this standard, particularly in light of the massive  
4 number of infringing works, and Defendants request to consolidate the cases.

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

16 Even if they weren’t, Exhibit A to the SCAC provides additional details.  
17 Had Plaintiff included a separate paragraph and full transcriptions of each  
18 Infringing Work conveying the exact same information in the body of the SCAC  
19 rather than in an exhibit, the SCAC would have ballooned to potentially thousands  
20 of pages in violation of Rule 8. To avoid this issue, Plaintiffs’ Exhibit A simply  
21 and directly identifies exactly virtually all of the Infringing Works and one or more  
22 of the Defendants that is responsible for the work. SCAC, Exhibit A.

23 Further, Exhibit A is not meant to be reviewed in a vacuum but in  
24 conjunction with the SCAC where plain statements regarding Defendants’ alleged  
25 conduct regarding *Fish Market* are simply stated for each set of works by the  
26 primary artist on those works. Further, the SCAC specifically describes any  
27 infringement of the *Dem Bow* composition or *Pounder* sound recording leaving no  
28 doubt to when they are alleged to be copied, how, and by whom, even though such

1 detail is not required. *Marvel Enterps., Inc.*, 74 U.S.P.Q.2d at 1306 (no  
2 requirement to “identify the times, similarities, or other details of the alleged  
3 infringements in their pleadings.”); Trechsel Decl. ¶1, Exhibit 1.

4 Moving Defendants’ invite the Court to run an incredibly fact intensive  
5 analysis of over 33 allegedly Infringing Works without any additional evidence  
6 and adjudicate as a matter of law that none of the compositions contain a single  
7 similar element with the Subject Works they are alleged to have infringed. The  
8 Court should decline this invitation. Moving Defendants’ put the cart before the  
9 horse and are seeking adjudication of issues best left to summary judgment. At this  
10 stage, Plaintiffs’ claims have met their burden to merely plausibly allege  
11 substantial similarity between the two works. Thus, Moving Defendants’ request  
12 must be denied.

13 **B. Secondary Liability is sufficiently alleged**

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

24 Plaintiffs first allege direct infringement involving the creation of the  
25 Infringing Works. SCAC ¶¶656-669. Then Plaintiffs allege that numerous  
26 Defendants have infringed Plaintiffs’ rights in *Fish Market*, *Pounder*, and *Dem*  
27 *Bow* by, without limitation, exploiting the Infringing Works for profit by licensing,  
28

1 or otherwise authorizing third parties to use, reproduce and/or perform the  
2 Infringing Works for profit. SCAC ¶671 (listing names).

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

13 Defendants are also alleged to have “knowingly induced, participated in,  
14 aided and abetted in and profited from the illegal reproduction, distribution, and  
15 publication of the Infringing Works as alleged above.” SCAC ¶679. Specifically,  
16 the producers (i.e. Mr. 305, Inc., WK Records, Inc., and the LA Base Music  
17 Group) underwrote, facilitated, and participated in the illegal copying and  
18 infringing of the individual musician Defendants during the creation of the  
19 Infringing Works and realized profits through their respective distribution, and  
20 publication of the respective Infringing Works. Id. Defendants collaborated with  
21 other artists to create the Infringing Works, and, in doing so, knowingly  
22 incorporated material elements from the compositions and sound recordings of  
23 *Fish Market* and *Pounder* and the composition of *Dem Bow*, with knowledge that  
24 they did not have the requisite consent.” Id. And since information regarding the  
25 total scope of control and contribution by one defendant on behalf of the other is  
26 “particularly within” the possession of Defendants, Plaintiffs need not further plead  
27 such facts. *Friedman*, 833 F.3d at 1189.

28 ///

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 **C. If necessary, amendment is appropriate**

14 In the event the Court is inclined to grant any portion of the Moving  
 15 Defendants’ motion, Plaintiffs respectfully requests leave to amend their pleadings  
 16 under Fed. R. Civ. P. 15(a). Such leave should be granted unless “the pleading  
 17 could not possibly be cured by the allegation of other facts.” *Cook, Perkiss &*  
 18 *Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). This  
 19 policy favoring amendment should be applied with “extreme liberality.” *Owens v.*  
 20 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Amendment  
 21 would not be futile here because Plaintiffs can provide further details about the  
 22 Moving Defendants’ involvement with the songs, protectability, and substantial  
 23 similarity, if necessary. Plaintiff can also further clarify and provide additional  
 24 facts in support of its direct and secondary infringement allegations.

25 While Moving Defendants make much of the iterations of Plaintiffs’  
 26 complaints, this is only the second amendment since the vast majority of the claims  
 27 have been alleged and the first involving Plaintiff Barrett Estate and the *Pounder*  
 28 sound recording. Further, a complaint of this size against such a large number of



1 Defendants and involving so many works presents a unique challenge to both  
2 address all material aspects of the claims without also providing an impossibly  
3 large and unwieldy document.

4 Plaintiffs should be provided an opportunity to amend particularly to address  
5 curable deficiencies such as identifying with greater specificity Defendants for  
6 particular claims, and comparisons of the works at issue. Finally, should the Court  
7 be inclined to dismiss Plaintiffs’ claims with respect to certain works due to a lack  
8 of detail, Plaintiffs request those dismissals be without prejudice.

9 **V. Conclusion**

10 Moving Defendants take issue with respect to the number of allegedly  
11 Infringing Works contained in the SCAC, but these declamations prove too much.  
12 While the copyists are legion here, they certainly did copy, and the sheer amount  
13 of copying proves the creative and original nature of Plaintiffs’ work. Defendants  
14 want to exploit Plaintiffs’ creativity to build careers and reap financial success  
15 while denying Plaintiffs their just credit and compensation. The challenges to the  
16 SCAC are unavailing. Based on the foregoing, the Motion should be denied in its  
17 entirety. In the alternative, leave to amend to address only the allegations against  
18 the current Defendants should be given.

19 Respectfully submitted,

20  
21 Dated: August 3, 2023

By:

/s/ Scott Alan Burroughs  
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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 **6,278** 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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