UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHAUNA MCKENZIE-MORRIS,

Plaintiff,

v.

V.P. RECORDS RETAIL OUTLET, INC., V.P. MUSIC GROUP, INC., V.P. RECORD DISTRIBUTORS, LLC, V.P. RECORDS OF BROOKLYN LLC, GREENSLEEVES PUBLISHING, LTD and STB MUSIC INC.

Defendants.

Civil Action No.: 1:22-cv-01138-GHW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

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I. PRELIMINARY STATEMENT

Plaintiff, who is a party to multiple agreements with Defendants through which Defendants obtained the right to exploit her musical works, has, since the inception of this lawsuit, unsuccessfully sought to expand this royalty payment dispute beyond her breach of contract claims. This motion to dismiss (the "**Motion**"), which Defendants make against the *fourth iteration of her Complaint*, again shows that Plaintiff's effort to assert non-breach of contract claims is unavailing as a matter of law. All these claims should be dismissed with prejudice.[1]

The implausibility of Plaintiff's non-breach of contract claims (and the new breach of contract claim that she seeks to add to her First Cause of Action), and their insufficiency as a matter of law, is exposed by her more than one-decade delay in raising them. These claims concern works VP Records included on "The Strong One" album released in 2008, the "Free Expressions" album released in 2011, and the "Better Tomorrow" album released in 2013. Plaintiff admits these release dates in the Third Amended Complaint (the "**TAC**") [DE 103]. Plaintiff's effort to assert claims now, in her TAC, based on Defendants' inclusion of works on these long-ago released albums speaks volumes about their baselessness. If these claims had merit – and they do not – she would have asserted them years ago, when the albums were released. Instead, she waited to assert them until long after they were barred under the applicable statutes of limitations as a matter of law.

The salutary policy of statutes of limitations in protecting against the assertion of stale claims is fully applicable here. Plaintiff sat by for years while Defendants exploited these albums with her full knowledge. The law does not permit her to wait until now, over a decade later, to claim that this open conduct that she knew of is unlawful. Defendants have incurred substantial time and expense refuting Plaintiff's first three pleadings, and now, additional time and expense

[1] For the avoidance of doubt, with respect to Plaintiff's three breach of contract causes of action, Defendants deny that they committed any breach.

opposing the TAC. At this point, Plaintiff's non-breach of contract claims should be dismissed with prejudice. Widening the scope of discovery to include her fraud and copyright ownership claims is without legal basis and would be prejudicial to Defendants.

Through this motion, Defendants seek to dismiss (i) the new breach of contract claim Plaintiff has added to her First Cause of Action, in which Plaintiff asserts that Defendants included eleven sound recordings on the first two albums in violation of the parties' 2007 Recording Agreement; (ii) Plaintiff's fourth cause of action for copyright infringement with respect to ten sound recordings, all of which Defendants have exploited for more than a decade with Plaintiff's knowledge; (iii) Plaintiff's fifth cause of action for fraud, which is based upon misrepresentations the "VP defendants" supposedly made in 2008; and (iv) Plaintiff's sixth cause of action for an accounting.

Plaintiff's new **breach of contract** claim must be dismissed for two reasons. *First*, it exceeds the limited leave to replead that the Court granted when it ruled on Defendants' prior motion to dismiss (*see* DE 75, p. 26) and permitted Plaintiff to file the TAC (*see* DE 98). *Second*, it is barred by New York's six-year statute of limitations, because any such claim would have accrued at *the time of the alleged breach*, which would have occurred in 2008 and 2011, when Plaintiff admits VP Records released the albums containing the sound recordings in issue (*see* TAC, ¶¶ 58, 61).

Plaintiff's fourth cause of action, for **copyright infringement**, is barred by the three-year statute of limitations applicable to copyright ownership claims. This statute of limitation accrues only once, *when a reasonably diligent plaintiff would have been put on inquiry notice of a dispute over ownership rights*. Plaintiff's copyright claim is premised on her argument that VP Records unlawfully exploited ten sound recordings over which Plaintiff claims ownership (TAC, ¶ 148),

consisting of six on her first album ("The Strong One") released in 2008, two on her second album ("Free Expressions") released in 2011, and one on her third album ("Better Tomorrow") released in 2013, respectively. *Id.*, ¶¶ 58, 61, 63 (admitting release dates). Plaintiff's allegations, and the exhibits to the TAC, make clear that a reasonably diligent plaintiff would have been on inquiry notice of a dispute over copyright ownership of all these sound recordings – thereby triggering the running of the three-year statute of limitations – when Defendants released the albums in issue with labels that unequivocally provided notice of VP Records' claim of sole copyright ownership of all sound recordings included on the albums.

Plaintiff's fifth cause of action for **fraud** is also defective. The Court has already dismissed two of the three components of this claim, *i.e.*, the "backdating" claim and the "fraudulent breach of contract" claim. *See* Order Granting (in part) Defendants' Motion to Dismiss First Amended Complaint (the "**MTD Order**") [DE 75, pp. 18-20]. The remaining component of the claim, which concerns supposed misrepresentations that the VP Defendants allegedly made about the relationship between Greensleeves Publishing, Ltd. ("**GPL**") and the VP Defendants, fails for multiple reasons, including that (i) Plaintiff has not adequately pleaded an actionable fraudulent misrepresentation; (ii) without explanation or new supporting allegations, and in defiance of the MTD Order, Plaintiff asserts this claim against not just the VP Defendants, but also against GPL and STB; and (iii) even assuming, *arguendo*, that the Court did not dismiss the fraud claim on the foregoing grounds, it is barred by the statute of limitations.

Finally, Plaintiff's sixth cause of action, for an **accounting**, fails because it seeks relief based upon Plaintiff's copyright ownership claim and, thus, is preempted by the Copyright Act.

II. FACTUAL BACKGROUND[2]

Plaintiff Shauna McKenzie-Morris ("**McKenzie**" or "**Plaintiff**") is a reggae recording artist and songwriter professionally known as "Etana." TAC, ¶¶ 1, 11. Plaintiff filed this lawsuit against Defendants V.P. Records Retail Outlet, Inc., V.P. Records Retail Outlet, Inc., V.P. Records of Brooklyn LLC, V.P. Record Distributors LLC,[3] STB and GPL. In addition to her non-breach of contract claims, she asserts claims based upon the following agreements (the "**Agreements**"):

- Recording Agreement made as of May 1, 2007, between McKenzie and VP Music Group, Inc. ("**2007 VP Recording Agreement**") (TAC, ¶¶ 55-72 and Ex. G thereto);
- Songwriter Agreement made as of December 2007, between McKenzie and GPL ("**2007 Songwriter Agreement**") (TAC, ¶¶ 73-83 and Ex. E thereto);
- Co-Publishing and Administration Agreement entered into as of March 20, 2014, between McKenzie and GPL (TAC, ¶¶ 92-98 and Ex. M thereto).[4]

The Agreements include provisions governing, *inter alia*, copyright ownership, the scope and duration of VP Music Group's and GPL's rights with respect to the Masters, Albums, Compositions and Recordings, and Defendants' royalty payment and accounting obligations to Plaintiff.

III. RELEVANT PROCEDURAL HISTORY

Plaintiff's TAC is her *fourth* Complaint in this matter. This context is important because (as discussed below) the Court has issued Orders limiting the permitted scope of the TAC. Relevant events preceding Plaintiff's filing of the TAC are as follows:

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[2] The "facts" are taken from the TAC for purposes of this Motion only and are not admitted.

[3] The TAC defines the four companies with "VP" in their name as "**VP Records**" (TAC, p. 1) and does not distinguish between them. For purposes of this Motion, "**VP Defendants**" refers to those four entities and "**Defendants**" refers to all Defendants sued in this lawsuit.

[4] Plaintiff and VP Music Group, Inc. also entered into a recording agreement as of November 1, 2014. The TAC does not allege that Defendants breached this recording agreement.

On March 28, 2022, Defendants moved to dismiss the original complaint [DE 18-20].[5] On April 18, 2022 – the due date for Plaintiff to oppose that motion – Plaintiff filed a First Amended Complaint ("**FAC**") [DE 21, 23]. As a result, the Court denied Defendants' motion to dismiss as moot [DE 22].

On May 24, 2022, Defendants moved to dismiss the FAC [DE 26-28]. On December 30, 2022, this Court granted, in part, Defendants' motion [DE 75]. In the MTD Order, the Court limited Plaintiff's leave to file a further amended complaint "to address[ing] the deficiencies identified in this order . . . ." *Id.*, p. 26. Thereafter, on January 13, 2023, Plaintiff filed her Second Amended Complaint ("**SAC**") [DE 79, 80].

On January 20, 2023, Defendants filed a letter requesting a pre-motion conference concerning their planned motion to dismiss the SAC [DE 81]. After Defendants filed that letter, Plaintiff terminated her counsel, and, on April 13, 2023, the Court issued an Order [DE 98] permitting Plaintiff, proceeding *pro se*, to amend the SAC in the following limited manner:

> The amendments in that amended complaint [*i.e.*, the TAC] should be within the scope of what the Court discussed at the April 11 conference – that is, (a) to correct any factual inaccuracies in the prior complaint, (b) to remove claims pleaded by the corporate Plaintiff Freemind Music LLC, and/or (c) to narrow the scope of the complaint, if necessary, to comply with the Court's prior order concerning leave to amend. See Dkt. No. 75 at 2526.

Plaintiff filed the TAC on April 25, 2023 [DE 103], and this Motion now follows.

IV. STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a complaint must include factual allegations that, taken as true, demonstrate plaintiff's plausible entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has

[5] Each pleading preceding the TAC included two plaintiffs – Plaintiff and Freemind Music LLC. For simplicity, in this Motion, including with respect to prior proceedings and prior iterations of the complaint, Defendants use the term "Plaintiff" instead of alternating between "Plaintiffs" and "Plaintiff".

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). To meet this standard, a plaintiff "must provide the grounds upon which [her] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (internal quotation marks and citation omitted). Further, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

"In determining the adequacy of the complaint, the court may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint." *Subaru Distribs. Corp. v. Subaru of Am., Inc*., 425 F.3d 119, 122 (2d Cir. 2015). Further, allegations included in a complaint that are contradicted by a document incorporated by reference are not entitled to a presumption of truth. *Poindexter v. EMI Record Group, Inc.,* 2012 WL 1027639, at *6 (S.D.N.Y. Mar. 27, 2012). Finally, while a *pro se* plaintiff is entitled to some leniency, "*pro se* status does not relieve a plaintiff of the pleading standards otherwise prescribed by the Federal Rules of Civil Procedure." *Saidin v. New York City Dep't of Educ.*, 498 F. Supp. 2d 683, 687 (S.D.N.Y. 2007).

V. LEGAL ARGUMENTS

A. PLAINTIFF'S NEW BREACH CLAIM IN HER FIRST CAUSE OF ACTION FAILS AS A MATTER OF LAW

Plaintiff's new breach claim (TAC, ¶¶ 106-107), *i.e.*, that the VP Defendants improperly included eleven works on her first two albums in breach of the 2007 Recording Agreement, must be dismissed because it (i) exceeds the scope of her limited right to replead, and (ii) is barred by New York's six-year statute of limitations for breach of contract claims.

1. Plaintiff's Breach of Contract Claim is Subject to Dismissal Because It Exceeds The Scope of Her Leave to Replead

Plaintiff's new claim of breach of the 2007 Recording Agreement was not included in her prior Complaints and impermissibly exceeds the scope of this Court's Order permitting Plaintiff to file the TAC [DE 98]. The amendments permitted in that Order were limited to (i) *correcting* factual inaccuracies in the SAC; (ii) *removing* claims pleaded by Plaintiff Freemind Music LLC; and/or (iii) *narrowing* the scope of the complaint, if necessary, to comply with the MTD Order. Plaintiff's new breach claim falls outside each of these permitted categories. In this claim, Plaintiff alleges for the first time that Defendants' inclusion of seven works on "The Strong One" album and four works on the "Free Expressions" album breached Sections 3.1 to 4.4 of the 2007 Recording Agreement. *See* TAC, ¶¶ 106-107. [6] The new claim exceeds each of these categories.

As this Court has held, "[g]iven the Court's power to impose conditions on leave to amend, '[t]he power to dismiss claims that exceed a leave to amend stems from the Court's inherent authority' to enforce its orders." *Doe v. Columbia Univ.*, 2022 WL 4537851, at *14 (S.D.N.Y. Sept. 28, 2022) (J. Woods) (quoting *Bravo v. Established Burger One, LLC*, 2013 WL 5549495, at *5 (S.D.N.Y. Oct. 8, 2013)). It is, thus, not surprising that "[d]istrict courts in this Circuit have routinely dismissed claims in amended complaints where the court granted leave to amend for a limited purpose and the plaintiff filed an amended complaint exceeding the scope of the permission granted." *Id.*; *see also Palm Beach Strategic Income, LP v. Salzman*, 457 F. App'x 40, 43 (2d Cir. 2012) (same); *Komatsu v. City of New York*, 2022 WL 3362502, at *1 (S.D.N.Y. Aug. 15, 2022) (same). Because Plaintiff's new breach claim exceeds the bounds of this Court's limited permission to re-plead, it must be dismissed.

[6] It is beyond dispute that this is a new claim. *See* DE 104, ¶¶ 106-107 (black-lined version of TAC).

2. Plaintiff's New Breach of Contract Claim Is, in any Event, Barred by the Six-Year Statute of Limitations

Even if the Court were to permit Plaintiff's new breach claim to proceed (which it should not), it still would fail as a matter of law because it is barred by the statute of limitations.

The statute of limitations for a cause of action based on breach of contract in New York is six years from the date of the breach. *Malmsteen v. Berdon, LLP*, 477 F. Supp. 2d 655, 665 (S.D.N.Y. 2007); *see also U.S. Bank Nat'l Ass'n as Tr. to Bank of Am., N.A. v. KeyBank, Nat'l Ass'n*, 2023 WL 2745210, at *9 (S.D.N.Y. Mar. 31, 2023) (statute of limitations "begins to run at the time of the breach, regardless of whether the plaintiff is aware of the breach at that time").

Here, Plaintiff alleges that VP Records breached the 2007 Recording Agreement by "improperly procuring song recordings" for her first two albums, "The Strong One" and "Free Expressions." *See* TAC, ¶ 106. Plaintiff admits that "The Strong One" album was released in 2008 and that "Free Expressions" was released in 2011. *Id.*, ¶¶ 58 and 61. Therefore, *at the very latest*, the statute of limitations expired on this new claim in 2014 with respect to the sound recordings included on "The Strong One", and in 2017 with respect to the sound recordings included on "Free Expressions."

The lack of a coherent and plausible underpinning for this time-barred claim is unmistakable. Plaintiff's new claim that she did not authorize seven sound recordings to be included on "The Strong One" album cannot be reconciled with her admission in the TAC (and her prior complaints) that "The Strong One" is one of the four "Albums" she provided to VP Records to satisfy her four-album recording obligation under the 2007 Recording Agreement. The following allegations and Exhibits to the TAC expose the baselessness of this claim:

(i) Plaintiff admits that she had a four-album recording obligation under the 2007 Recording Agreement. (TAC, ¶ 55);

(ii) Plaintiff admits "The Strong One" was one of the four albums she delivered to fulfill this recording obligation. (*Id.*, ¶¶ 58-68);

(iii) Plaintiff admits "The Strong One" contained "16-tracks" (*Id.*, ¶ 150); and

(iv) The 2007 Recording Agreement unambiguously defines "Album" to mean one or more "LPs"; "LP" to mean a long play Phonograph Record or equivalent embodying thereon "the equivalent of **not less than ten (10) "Sides**"; and "Side" to mean a recording sufficient to constitute one (1) side of a 7-inch, 45 rpm disc Phonograph Record. *Id.*, § 15.22 (emphasis added).

Indeed, under Plaintiff's new, implausible, contradicted and time-barred contention, "The Strong One" would not even qualify as an "Album" because only nine of its sixteen tracks, according to this claim, were authorized for inclusion, which is one less than the required ten tracks to be an "Album" under the 2007 Recording Agreement. Moreover, if this were the case, Plaintiff would not have satisfied her admitted four-album obligation under the 2007 Recording Agreement.

In sum, Plaintiff's new claim should be dismissed because it is (i) beyond the permitted scope of re-pleading, (ii) barred by the statute of limitations, and (iii) irredeemably implausible and irreconcilable with Plaintiff's other allegations that make clear that, for the fifteen (15) years preceding her raising this belated claim in the TAC, Plaintiff and Defendants alike regarded "The Strong One" as Plaintiff's first album under the 2007 Recording Agreement.

B. PLAINTIFF'S FOURTH CAUSE OF ACTION FOR COPYRIGHT INFRINGEMENT FAILS AS A MATTER OF LAW

Plaintiff's copyright claim asserts that she – rather than VP Records – owns the copyright to ten (10) sound recordings that VP Records included on three albums released under the 2007 Recording Agreement. *See* TAC ¶ 148. This claim should be dismissed on multiple grounds.

1. Plaintiff's Copyright Claim Fails with Respect to Eight of the Ten Works Because She Does Not Allege Ownership of A Sound Recording Copyrights In These Works

Plaintiff's copyright claim is based on her assertion that she "owns the copyright in the [ten] sound recordings" she specifies in this claim. *See* TAC, ¶ 148. [7] However, "[s]ound recordings and their underlying musical compositions are separate works with their own distinct copyrights." *In re Cellco P'ship*, 663 F. Supp. 2d 363, 368 (S.D.N.Y. 2009). Therefore, for Plaintiff to be able to state this infringement claim, she must properly allege that she owns sound recording in the sound recordings that are the subject of her claim (*i.e.*, that she owns "SR" copyright registrations). Instead of meeting this threshold burden, Plaintiff's TAC and its Exhibit A demonstrate that she has not satisfied it with respect to eight of the ten works, *i.e.*, "Wrong Address", "Roots", "Nuclear", "Don't Forget", "Live & Love Life," "Jah Chariot", "Free" and "Happy Heart". As to these, Plaintiff asserts that she owns "PA" (*i.e.*, composition) copyright registrations. *See* TAC, ¶ 148 and TAC, Ex. A. Plaintiff's assertion of "PA" copyright registrations does not remedy her failure to allege ownership of "SR" (*i.e.*, sound recording) copyright registrations as a matter of law. *See, e.g.*, *Dyer v. V.P. Recs. Retail Outlet, Inc.*, 2008 WL 2876494, at *3 (S.D.N.Y. July 24, 2008) (dismissing sound recording copyright infringement claim; "Because Plaintiffs have not registered the "Sinking Feeling" sound recording, they have

[7] Plaintiff's copyright claim concerns the following sound recordings: (i) "Wrong Address", "Roots", "Nuclear", "Don't Forget", "Live & Love Life" "Jah Chariot" and "I Am Not Afraid" on "The Strong One" album; (ii) "Free" and "Happy Heart" on the "Free Expressions" album; and (iii) "Beautiful Day" on the "Better Tomorrow" album. *Id.; see also* TAC, Ex. J [DE 103-1, p. 59 ("The Strong One" song list)]; *id.*, p. 63 ("Free Expressions" song list). Although Plaintiff did not attach the song list for the "Better Tomorrow" album to the TAC, the Court can take judicial notice that the "Beautiful Day" is included on "Better Tomorrow" album, as this information is widely available and cannot reasonably be questioned. *Poindexter v. Warner/Chappell Music Inc.*, 2009 WL 302064, at *1 n.1 (S.D.N.Y. Feb. 9, 2009) ("The Court takes judicial notice of the fact that the aforementioned titles appeared on The Persuaders' first two albums published in the 1970's"); *see* Declaration of Alan Friedman, dated May 29, 2023 ("**Friedman Decl." or Friedman Declaration"**), Ex. A thereto (copy of "Better Tomorrow" CD packaging containing song list).

no standing to claim its infringement"); *Greene v. Pete*, 2023 WL 2393873, at *3 (S.D.N.Y. Jan. 3, 2023) (dismissing copyright claim for infringement of compositions where plaintiff only had "sound recording" registrations at time of filing lawsuit); *Pickett v. Migos Touring, Inc.*, 420 F. Supp. 3d 197, 205 (S.D.N.Y. 2019) (granting motion to dismiss copyright claim for infringement of composition, where, "Plaintiff did not obtain a certificate of registration for his musical composition" and only attached a "sound recording" registration to the complaint).

As this Court has already ruled, "[a]bsent exceptions not relevant here, 'before pursuing an infringement claim in court,' a copyright claimant 'must comply with [17 U.S.C. § 411(a)'s requirement that 'registration of the copyright claim has been made.'" *Fourth Estate Publ. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Cot. 881, 887 (2019)." MTD Order [DE 75, at p. 7-8]. This rule mandates dismissal of Plaintiff's copyright claim here with respect to the alleged infringement of the "sound recording" copyright of eight of the ten works based upon Plaintiff's failure to properly allege ownership of "SR" copyright registrations.[8,9]

2. Plaintiff's Copyright Claim Is Barred In Its Entirety By The Copyright Act's Three-Year Statute of Limitations

Putting aside the deficiency with Plaintiff's copyright claim addressed in the preceding section, the claim also fails under the Copyright Act's three-year statute of limitations for copyright ownership claims, which accrues only once, *when a reasonably diligent plaintiff would have been*

[8] The only works for which Plaintiff alleges she owns "SR" copyright registrations are "Beautiful Day" (TAC, ¶ 148) and "I Am Not Afraid" (TAC, Ex. A [DE 103], p. 65]). Plaintiff's claims for these two works also fail because, as explained in the following section, they are barred by the statute of limitations.

[9] Plaintiff's sound recording infringement claims for "Compilation 1", "Compilation 2" and "Compilation 3" (collectively, the "**Compilations**") are based on the "Wrong Address" and "Roots" sound recordings (*see* TAC, ¶¶ 162-163). Both these sound recordings were included on "The Strong One" album, and Plaintiff's claim with respect to the Compilations fails for the same reasons her claim concerning the exploitation of these sound recordings on "The Strong One" fails, *i.e.*, Plaintiff's failure to allege ownership of "SR" copyrights in these works.

put on inquiry notice of a dispute over ownership rights. *See, e.g., Charles v. Seinfeld*, 410 F.Supp.3d 656, 660 (S.D.N.Y. 2019), *aff'd*, 803 Fed. Appx. 550, 551 (2d. Cir. 2020); *Howard v. Carter*, 615 F. Supp. 3d 190, 194 (W.D.N.Y. 2022) (same; granting Rule 12(b)(6) dismissal under Copyright Act's three-year statute of limitations). Accrual of a copyright ownership claim can be triggered by, *inter alia*, "another party's 'express assertion of sole authorship or ownership,"; by "implicit repudiation by conspicuously exploiting the copyright without paying royalties,"; or "when alleged co-owners learn they are entitled to royalties that they are not receiving." *Roberts v. BroadwayHD LLC*, 518 F. Supp. 3d 719, 731 (S.D.N.Y. 2021) (internal citations omitted).

Here, based upon the allegations in the TAC and its Exhibits, the statute of limitations has run. A reasonably diligent plaintiff would have been on inquiry notice of a dispute over ownership rights more than a decade before Plaintiff commenced this lawsuit. *See, e.g., Charles v. Seinfeld*, 410 F. Supp. 3d 656, 660 (S.D.N.Y. 2019) (dismissing copyright ownership claim under statute of limitations at motion to dismiss stage, where "SAC describes assertions made over three years before this lawsuit was filed that were sufficiently express as to put a reasonably diligent plaintiff on inquiry"); *Roberts v. BroadwayHD LLC*, 518 F. Supp. 3d 719, 731 (S.D.N.Y. 2021) (dismissing copyright ownership claim as time-barred where plaintiff knew of defendants' exploitation and licensing of disputed works by 1999). The accrual of the statute of limitations here was triggered by multiple items that put Plaintiff on inquiry notice of her purported claim far more than three years before she filed this lawsuit.

First, Plaintiff's TAC establishes that Plaintiff was on "inquiry notice" from the date the albums containing the sound recordings in issue were released, which Plaintiff admits occurred in 2008 (with respect to seven of the works), in 2011 (with respect to two of the works) and in 2013 (with respect to the remaining work). *See* TAC ¶¶ 148, 150 and 58, 61 and 63. Under *Twombly*,

it is *implausible* that Plaintiff did not know that these sound recordings were included on these albums, each of which she alleges she provided to VP Records to satisfy her four-album recording agreement under the 2007 Recording Agreement.[10] Accordingly, if, as Plaintiff asserts, she did not authorize VP Records to include these sound recordings on those albums, she would have known of her copyright ownership claim at the very moment that VP Records released the albums under the 2007 Recording Agreement, which, by its terms, expressly vested copyright ownership rights in VP Records. *See* TAC, ¶¶ 58-64; TAC, Ex. G [DE 103-1, p. 22], Art. 5.

Second, the copy of the CD and its packaging that Plaintiff attached to the TAC for "The Strong One" and "Free Expressions" expressly state VP Records' claim of sole copyright ownership to all sound recordings on these albums, which include nine of the ten sound recordings that comprise Plaintiff's copyright claim. Thus, they include in relevant part as follows:

> "© 2008 VP Music Group Inc. ℗ 2008 VP Music Group Inc. All rights reserved. Unauthorized duplication is a violation of applicable laws. Manufactured & Distributed by VP Records."
>
> "©℗ 2008 VP Music Group Inc. All rights reserved. Unauthorized duplication is a violation of applicable laws. Manufactured & Distributed by VP Records."

See TAC, Ex. J [DE 103-1, p. 55] (for "The Strong One"); *see id.*, p. 60 (for "Free Expression").[11] These CD labels demonstrate that Plaintiff was, at the very least, on inquiry notice of VP Records'

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[10] *See Sander v. Enerco Grp., Inc.*, 2023 WL 1779691, at *4 (S.D.N.Y. Feb. 6, 2023) (where "contradicted allegations are implausible, they will not defeat a motion to dismiss"); *Minden Pictures, Inc. v. Complex Media, Inc.*, 2023 WL 2648027, at *5 (S.D.N.Y. Mar. 27, 2023) (dismissing copyright claim under statute of limitations where "it is implausible" plaintiff would not have discovered alleged infringement earlier).

[11] Although not attached as an Exhibit to the Complaint, the Court can take judicial notice that the CD packaging for the "Better Tomorrow" album state VP Records' sole copyright ownership of the sound recordings included on that album, as this information is widely available and cannot reasonably be questioned. *See Jones v. Virgin Recs., Ltd.*, 643 F. Supp. 1153, 1158 (S.D.N.Y. 1986) ("The Court takes judicial notice of the fact that the 1960 version was printed (with notice of copyright) on the album cover of "JT", James Taylor's successful 1977 recording.") The CD packaging for "Better Tomorrow" states in relevant part: "© 2013 VP Music Group, Inc. All Rights Reserved Unauthorized Duplication Is A Violation of Applicable Laws. Manufactured & Distributed By VP Records." *See* Friedman Decl., Ex. A (attaching copy of CD packaging).

claims of copyright ownership over the sound recordings at issue from the moment VP Records' released the albums on which they were contained. Indeed, "[p]ublic distribution of the work at issue bearing copyright notices in the name of the defendant(s) which exclude the plaintiff claiming to own the subject copyright has been held to create sufficient notice to begin the running of the statute of limitations." *Ortiz v. Guitian Bros. Music Inc.,* 2008 WL 4449314, at *3 (S.D.N.Y. Sept. 29, 2008); *see also Mahan v. Roc Nation, LLC*, 2015 WL 1782095, at *3–4 (S.D.N.Y. Apr. 15, 2015) (granting motion to dismiss; "copyright notices printed on the Albums' packaging also should have given Plaintiff reason to know of his alleged injury. The packaging on the Albums—one released in 1999, and two released in 2000—lists only Roc–A–Fella as the Albums' copyright holder. The copyright notices on the Albums' packaging here, therefore, provide further evidence that Plaintiff had reason to know of his alleged injury in 2000, if not earlier.").

Third, the GPL royalty statements that Plaintiff attached to the TAC (TAC, Ex. L) separately placed Plaintiff on inquiry notice triggering the running of the statute of limitations at least as early as 2011. These royalty statements notified Plaintiff that Defendants were exploiting the works upon which Plaintiff bases her copyright claims. For example, Exhibit L to Plaintiff's TAC, at pages 2-7, contains a Royalty Statement sent to Plaintiff on April 9, 2009, that includes royalty reporting for "Live & Love Life", "Jah Chariot", "I Am Not Afraid", "Nuclear", "Roots", "Wrong Address" and "Don't Forget". Similarly, pages 42- 47 of Exhibit L contains a Royalty Summary sent to Plaintiff for the period from January to March 2010 that includes royalty reporting for "Happy Heart". These royalty statements put Plaintiff on inquiry notice that Defendants were exploiting these works as copyright owner because GPL's obligation to provide royalty statements to Plaintiff emanated from the 2007 Songwriter Agreement, which agreement vested GPL with copyright ownership rights to the works it exploited. *See* TAC, Ex. E, §§ 3, 8.

Fourth, Plaintiff was also put on inquiry notice of the copyright ownership dispute from Defendants' publicly available sound recording copyright registrations, which Defendants obtained for sound recordings that are the subject of Plaintiff's claim more than a decade before Plaintiff filed this lawsuit. For example, Plaintiff attached a copy of ***Defendants'*** *2009 "SR" copyright registration for sound recordings on "The Strong One" album*, which includes seven of the ten songs Plaintiff purports to include in her copyright claim. *See* TAC, Ex. J [DE 103-1 at p. 53].[12] The Copyright Act provides that "[r]ecordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document." 17 U.S.C. § 205(c). Here, Defendants' receipt of copyright registrations from the United States Copyright Office of their ownership of these sound recordings triggered Plaintiff's due inquiry notice at the time the Copyright Office issued the registrations in 2009 and 2011. *See, e.g.*, *Mahan v. Roc Nation, LLC*, 2015 WL 1782095, at *3–4 (S.D.N.Y. Apr. 15, 2015) ("Plaintiff's claims are time barred as a result of Roc–A–Fella's registrations with the United States Copyright Office. Roc–A–Fella recorded its copyrights in the Albums in three separate registrations, dated February 28, 2000; April 12, 2000; and December 11, 2000. None of these registrations mentioned Plaintiff as a joint copyright holder. Accordingly, no later than December 11, 2000, Plaintiff had constructive notice of Roc–A–Fella's assertion that it exclusively held the Albums' copyrights.").

Moreover, the 2007 Recording Agreement provided VP Records with the right to register copyrights in the sound recordings in its own name. *See* TAC, Ex. G [DE 103-1, p. 22, § 5.1]. As

[12] Although not attached to the TAC, this Court may take judicial notice of the United States Copyright Office "SR" copyright registration dated April 27, 2011 showing VP Records' ownership of the sound recordings on "Free Expression". *See, e.g.*, *Telebrands Corp. v. Del Labs., Inc.,* 719 F.Supp.2d 283, 287 n. 3 (S.D.N.Y.2010) ("The Court may properly take judicial notice of official records of the United States Patent and Trademark Office and the United States Copyright Office"); *Island Software and Computer Serv., Inc. v. Microsoft Corp.,* 413 F.3d 257, 261 (2d Cir.2005) (taking judicial notice of federal copyright registrations, as published in the Copyright Office's registry). A copy of VP Records' 2011 "SR" copyright registration for "Free Expressions" is attached as Exhibit B to the Friedman Declaration.

such, for purposes of triggering the due inquiry running of the statute of limitations, Plaintiff should have anticipated that VP Records would register the sound recording copyrights in VP Records' name. *See, e.g.*, *Aday v. Sony Music Ent., Inc.*, 1997 WL 598410, at *5 (S.D.N.Y. Sept. 25, 1997) (granting Rule 12(b)(6) dismissal of copyright ownership claim under statute of limitations; "[t]he terms of the Cleveland–Enterprises Agreement and the Cleveland–CBS Agreement clearly set forth that the rights to the sound recordings belong to Cleveland and CBS, not Enterprises or Meat Loaf. Therefore, plaintiffs had reason to know in 1977 about any of the problems with the 'work for hire' provision that they now contend violates the Copyright Act"); *Ortiz v. Guitian Bros. Music Inc.*, 2008 WL 4449314, at *4 (S.D.N.Y. Sept. 29, 2008) (defendants' "act of registration should have put [plaintiff author] on notice of his claim" because plaintiff authored a movie score "with the knowledge that it was going to be used" in the movie and "should reasonably have anticipated that [d]efendants would seek to copyright" the movie).[13]

Finally, although Plaintiff's copyright claim is limited to alleged sound recording copyright infringement, even if the TAC included claims based on composition copyrights, the statute of limitations would have run on any such claims for the same reasons that it has run on her sound recording copyright claim. Moreover, an additional point of "inquiry notice" – triggering the start of the running of the statute of limitations against GPL – occurred on September 24, 2012, when Mr. Olivier Chastan wrote to Plaintiff and expressly stated that "GPL shall continue to control all rights and interests in and to the results of your services under the Agreement, including but not limited to the titles, lyrics, and music of all Compositions written, composed, or created by you

[13] Moreover, Mr. Olivier Chastan, in a July 28, 2008 email from his VP Records email address that included his title as "VP Records, Vice-President, International", informed Plaintiff that "[w]e registered all of your compositions last week." *See* TAC, Ex. K, [DE 103-1, p. 67]. Based upon admissions in the TAC, this was approximately one month after VP Records released "The Strong One" album and just weeks after GPL and Plaintiff entered into the GPL Deal Memo. *See* TAC, ¶¶ 58, 74.

during the Term of the [2007 Songwriter] Agreement for the life of copyright in and to such works." *See* TAC, Ex. E [DE 103, p. 116]; *see also Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 249 (S.D.N.Y. 2000) (dismissing copyright ownership claim under statute of limitations at motion to dismiss stage based on "defendants' clear assertion of ownership and their repudiation of plaintiff's claims to both sole and co-ownership").

In short, each of the foregoing items individually suffices to have triggered the running of the statute of limitations on Plaintiff's copyright claim far more than three years prior to Plaintiff commencing this lawsuit. Further, these items, both individually and collectively, demonstrate that Plaintiff cannot plausibly assert a copyright claim that would not bet barred by the statute of limitations as a matter of law.

C. PLAINTIFF'S FIFTH CAUSE OF ACTION FOR FRAUD FAILS AS A MATTER OF LAW

Most of this claim should be dismissed for the reasons set forth in the MTD Order. The remainder should be dismissed for the reasons discussed in Section (C)(2) below.

1. Plaintiff Is Pursuing Claims Barred by The MTD Order

Most of Plaintiff's fraud claim is based upon two components: (i) Defendants' alleged fraudulent "backdating" of the 2007 Recording Agreement and the 2007 Songwriter Agreement (TAC, ¶¶ 192-194), and (ii) allegations Plaintiff repeats from the FAC that the Court previously rejected as duplicative of Plaintiff's contract claims or insufficiently pleaded. *See* MTD Order [DE 75, p. 18-20]; *compare* FAC [DE 21], ¶¶ 188-202 *with* TAC, ¶¶ 202-216).

With respect to the "backdating" allegations, the Court held that contractual "'as of' dates are common and uncontroversial contractual provisions; a party who signs a contract with an 'as of' date is presumed to agree to it and may be bound accordingly." *See* MTD Order, DE 75, p. 18. With respect to Plaintiff's fraud allegations that duplicate her contract claims, the Court has held

that they "must be dismissed as either duplicative of the contract-based claims or insufficiently pleaded . . . In their complaint, Plaintiffs allege that 'Defendants' wanton disregard of their obligations' under the applicable contracts 'emanates from their preconceived and undisclosed intention of not performing them and of continuing their dishonest accounting schemes . . . that have deprived Plaintiffs of millions of dollars in royalties.' . . . But that allegation echoes Plaintiffs' contract-based complaints . . . and therefore cannot form the basis of a separate fraud claim". *Id*., p. 19.; *see also Doe v. Columbia Univ.*, 2022 WL 4537851, at *15 (S.D.N.Y. Sept. 28, 2022) (court's "inherent authority" to enforce its orders is sufficient to confirm "the uncontroversial proposition that Plaintiff's claims previously dismissed without leave to amend must stay dismissed.") (J. Woods).

For these reasons, and for the reasons set forth in Plaintiff's motion to dismiss the FAC [DE 28, pp. 8, 9-10], the foregoing components of Plaintiff's fraud claim must again be dismissed.

2. The Remaining Portion of Plaintiff's Fraud Claim Also Fails

The third (and final) component of Plaintiff's fraud claim concerns her allegations that VP Records "misrepresented its relationship with Defendant GPL", "represented that VP Records did not administer [GPL] in the United States", and that Plaintiff understood that GPL was a "separate, distinctive entity" from VP Records when she entered into the 2007 Songwriter Agreement (TAC, ¶ 199). These allegations, taken alone or together, fail to state a claim of fraud as a matter of law.

i. Plaintiff Has Not Alleged Any Actionable "Misrepresentation"

Under New York law, the elements of fraud are (1) a material misrepresentation or omission of a fact, (2) knowledge of that fact's falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 170 (2d Cir. 2015). Further, allegations of fraud must satisfy the

heightened pleading standard of Rule 9(b). *See* Fed. R. Civ. P. 9(b). To do so, a fraud claim must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rios v. Cartagena*, 2015 WL 4470433, at *9 (S.D.N.Y. July 9, 2015) (quoting *Rombach v. Chang,* 355 F.3d 164, 170 (2d Cir. 2004)). Under these established standards, Plaintiff's fraud claim cannot proceed.[14]

This final component of Plaintiff's fraud claim is premised on Plaintiff's assertion that "VP Records knowingly made *this false representation* in an effort to induce McKenzie to rely on the independence of GPL as a separate, distinctive entity with which she would be contracting business." *See* TAC, ¶ 199 (emphasis added). However, there is no predicate for the reference to "*this false representation*", which appears to be a reference to the assertion in Paragraph 197 of the TAC, since there is no representation alleged in Paragraph 198.[15] Significantly, Plaintiff's Paragraph 197 sets forth a "representation" that Plaintiff admits was not made to her and was not made until 2021. As such this so-called "representation" is neither relevant to nor provides any support for Plaintiff's fraud claim.

Moreover, while the crux of Plaintiff's fraud claim is that she was defrauded to believe that VP Records and GPL were separate entities, the TAC – which is Plaintiff's fourth attempt to plead

[14] As a preliminary matter, despite the Court previously dismissing Plaintiff's fraud claim against GPL from the FAC (*see* DE 75, p. 18), Plaintiff has again asserted it against GPL and, for the first time, against STB in the TAC. Plaintiff's assertion of this claim against anyone other than the VP Defendants flouts the Court's prior ruling. *See* MTD Order [DE 75, p. 18] ("Plaintiffs' fraud claim, however, must be dismissed against GPL. Plaintiffs do not allege that GPL is responsible for Mr. Chastan's alleged misrepresentations"). For the reasons set forth in the MTD Order, this claim must be dismissed against GPL and STB.

[15] Paragraph 198 does not allege any misrepresentation. It states in full: "VP Records entered into the GPL [Deal] Memo with the intention of deceiving McKenzie into believing that she had, in fact, entered into an agreement with GPL." Not only does this allegation not make sense, but also any inference that it is false is contradicted by the GPL Deal Memo, which reflects that VP Records was not a party to that agreement and that the parties to it were McKenzie and GPL. *See* TAC, Ex. D [DE 103, p. 87].

a viable fraud claim – does not allege that VP Records made any such representation to her. Plaintiff's *only allegations* in support of this component of her fraud claim are that Mr. Chastan (i) represented in an October 2008 "email exchange" that VP Records did not administer GPL in the United States, and (ii) represented in a July 2008 "email exchange" that he did not have check signing authority for VP Records, only for GPL. *Id.*, ¶ 196. These allegations do not suffice to state a fraud claim as a matter of law.

Plaintiff's allegation regarding the representation as to who administered GPL in the United States is not sufficient to support a fraud claim. First, Plaintiff never alleges that this statement was false, so it cannot be an actionable misrepresentation.[16] Further, nothing in the statement supports the inference that Mr. Chastan made it with intent to mislead Plaintiff, nor could it since Plaintiff does not allege the statement was false. Far from having an intent to mislead, the statement provided Plaintiff with accurate information regarding how her works would be administered. Under Rule 9(b)'s heightened pleading standards, this "representation" cannot support a claim of fraud as a matter of law.

Plaintiff's allegation regarding Mr. Chastan's check-signing authority is, if anything, even more deficient. Again, the TAC does not allege that Mr. Chastan's statement that he did not have check-signing authority was false. Moreover, the context in which he made it demonstrates that he did not make it to mislead Plaintiff, but rather in response to an email from Plaintiff's attorney (Pierce Stanley). As Exhibit K to the TAC establishes, on July 31, 2008 @ 6:44 am Mr. Stanley complained that $2,000 in "tour support" was paid by GPL instead of VP Records (TAC, Ex. K [DE 103-1, p. 69), and, less than one-hour later, Mr. Chastan responded (on July 31, 2008 @ 7:12 am), explaining why the charge was applied to the GPL'S account, explaining that he did not have

[16] Moreover, consistent with Plaintiff's Rule 11 obligations, she cannot allege the representation was false.

check signing authority for VP Records, and advising Mr. Stanley of the people at VP Records who did have such authority, stating: "If you wish to transfer this advance to [Plaintiff's] VP Records royalty account then I think you should discuss it with Joel and Chris Chin." *See* TAC, Ex. K [DE 103-1, p. 68]. As such, the purportedly fraudulent statement – which, to be clear, Plaintiff does not allege was false – was plainly made in direct response to an issue Plaintiff's attorney raised and not for purposes of misleading anyone. This "representation" is not actionable. Assertion of a *bona fide* fraud claim that satisfies Rule 9(b) and can survive a motion to dismiss requires more than the sparse, conclusory allegations Plaintiff asserts here.[17]

ii. Plaintiff's Claim Is, In Any Event, Barred by the Applicable Statute of Limitations

Perhaps most devastating to Plaintiff's claim is that even if Plaintiff is assumed to have adequately pleaded a fraud claim with respect to whether she was defrauded into believing GPL

[17] Moreover, it is utterly implausible that VP Records was seeking to conceal the VP Records-GPL relationship from Plaintiff or anyone else at the time of the alleged "misrepresentations" in July and October 2008 because VP Records' acquisition of GPL was common knowledge in the music industry by then. For example, *Billboard*, published an article in its May 3, 2008 issue that reported about the acquisition under the headline *Seeing Green: VP Records Acquires Greensleeves and creates a reggae powerhouse*. *See* Friedman Decl., Ex. C (attaching copy of article). The Court may take judicial notice of this article for purposes of determining the information available to the public generally at the time (without regard to the specific facts of the acquisition included in the article). *See, e.g.*, *de Becdelievre v. Anastasia Musical LLC*, 2018 WL 1633769, at *8 (S.D.N.Y. Apr. 2, 2018) ("courts may 'take judicial notice of facts that various newspapers, magazines, and books were published *solely* as an indication of information in the public realm at the time'") (quoting 1-4 Weinstein's Evidence Manual § 4.02); E*ffie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 299 (S.D.N.Y. 2012) (same).

Significantly, *Billboard* has long been recognized as a preeminent resource in entertainment media. *See, e.g.*, *In re Landmark Distribs., Inc.*, 189 B.R. 290, 301 (D.N.J. 1995) ("virtually every witness before the court engaged in the music industry conceded that *Billboard* is the industry bible and that everyone reads *Billboard* magazine the day it is issued."); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2016 WL 6953462, at *2 (C.D. Cal. June 16, 2016) (choosing *Billboard* magazine as medium for publishing class notice plan to class (consisting of the copyright owners of sound recordings that were reproduced, performed, distributed or otherwise exploited by Sirius XM Radio) because of its "stature in the music entertainment realm and the strong likelihood that Class members are part of [its] regular readership."). Indeed, Plaintiff herself repeatedly cites *Billboard's* Reggae Charts in her TAC in an effort to demonstrate the success of her albums. *See, e.g.*, TAC, ¶¶ 2, 58, 61, 63, 65 (referring to the inclusion of various albums and singles on the "Reggae Billboard Charts").

was a "separate or distinctive entity" from VP Records – which she has not – the claim would be barred by New York's statute of limitations. In New York, the fraud claim statute of limitations is the longer of (i) six years from the date of the fraud, or (ii) two years from when the fraud was discovered *or could have been discovered with the exercise of reasonable diligence*. *Itakura v. Primavera Galleries Inc.*, 2009 WL 1873530, at *4 (S.D.N.Y. June 30, 2009). "On a motion to dismiss, when the facts alleged in the complaint indicate that, with reasonable diligence, plaintiffs should have uncovered the alleged fraud prior to the limitations period, the claim will be time-barred." *In re Merrill Lynch Ltd. Partnerships Litig.*, 7 F. Supp. 2d 256, 266 (S.D.N.Y. 1997).

Here, Plaintiff asserts, in conclusory fashion, that email communications from VP Records (Mr. Chastan) on October 13, 2008 and July 31, 2008 misrepresented the relationship between VP Records and GPL in a supposed effort to induce Plaintiff into believing that GPL and VP Records were separate and distinctive entities. *See* TAC, ¶ 199. However, even a cursory review of Plaintiff's TAC and its Exhibits demonstrates that the statute of limitations on this claim expired, at the latest, in October 2014, *i.e.*, many years before Plaintiff filed her lawsuit.

To the extent that Plaintiff's fraud claim accrued six years from the date of the fraud, the claim accrued when the emails were sent in 2008 and, therefore, expired by October 2014 (six years later). The other prong of the fraud statute of limitations – *i.e.*, two years from when, with reasonable diligence, Plaintiff should have discovered the alleged fraud – is even worse for Plaintiff. Under that prong, the statute of limitations would have expired in 2010. The exhibits Plaintiff attached to the TAC make clear that if she exercised just minimal diligence, let alone reasonable diligence, she would have been alerted to the alleged "fraud" (*i.e.*, the relationship between VP Records and GPL) in 2008. For example, during negotiation of the 2007 Songwriter Agreement in July 2008, Olivier Chastan communicated with Plaintiff and her attorney from his

"**oc@vprecords.com**" email address and disclosed his "**VP Records, Vice President, International**" title in the signature block of his email (*see* TAC, Exhibit K [DE 103-1, p. 67]). Moreover, in the same email thread, writing from his **oc@vprecords.com** email address, Mr. Chastan stated that he had "check signing authority" for GPL. These indicia alone were sufficient to have alerted Plaintiff – if she had acted with reasonable diligence – that VP Records and GPL were related entities or under common ownership – as that is a likely explanation of why a VP Records officer (i) was negotiating an agreement on behalf of GPL, and (ii) had check signing authority for GPL. *See In re Merrill Lynch Ltd. Partnerships Litig.*, 7 F. Supp. 2d 256, 266 (S.D.N.Y. 1997) (for two-year "discovery" statutory period to begin to run, "plaintiffs need not be able to learn the precise details of the fraud, but they must be capable of perceiving the general fraudulent scheme based on the information available to them").[18]

Under these circumstances, the failure to dismiss Plaintiff's fraud claim with prejudice would contravene the purpose of New York's statutes of limitations, *i.e.*, to "to protect defendants against stale or unduly delayed claims." *Chechele v. Morgan Stanley*, 896 F. Supp. 2d 297, 303 (S.D.N.Y. 2012).

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[18] Moreover, Plaintiff was separately put on inquiry notice because VP Records' business affairs attorney at the time, Alex Threadgold, was admittedly involved in the negotiation and drafting of Plaintiff's potential publishing agreement with STB and with her 2007 Songwriter Agreement with GPL. Plaintiff alleges that STB was a "publishing arm" of VP Records (TAC, ¶ 17), and she admits that "VP Records representative Alex Threadgold" was involved in drafting and negotiating the proposed STB publishing agreement in December 2007 (*see id*., ¶¶ 73, 76 and Ex. O [DE 103-2, p. 110-120]), which she asserts she did not enter into because she wanted to "to keep her recording and publishing separately managed." (*Id.* ¶ 201.)

Exhibit O shows that Mr. Threadgold had a VP Records' email address and was "Director of Business Affairs" for VP Records. *See* TAC, Ex. O [DE 103-2, p. 110. Given Plaintiff's knowledge of Mr. Threadgold's role at VP Records, her awareness in July 2008 of his involvement in communications regarding the GPL Deal Memo and 2007 Songwriter Agreement (*see* TAC, Ex. K [DE 103-1, pp. 68, 71]), further establishes that Plaintiff was on sufficient notice to trigger the running of the statute of limitations on Plaintiff's far-fetched claim that VP Records misrepresented the nature of its relationship with GPL in July 2008. *See* Ex. K [DE 103-1, p. 68-69].

D. PLAINTIFF'S SIXTH CAUSE OF ACTION FOR AN ACCOUNTING FAILS

Plaintiff's claim for an accounting must be dismissed. "[C]laims for accounting based on the defendant's alleged misappropriation and exploitation of a copyright work are preempted by the Copyright Act." *Baiul v. NBC Sports*, 2016 WL 1587250, at *10 (S.D.N.Y. Apr. 19, 2016).

Here, Plaintiff's claim is premised on her assertion that Defendants infringed her copyright ownership rights by exploiting the ten sound recordings that comprise her copyright infringement claim. Plaintiff alleges that the VP Defendants illegally acquired and distributed these works, that Defendants receive income and royalty payments from their distribution, and that Plaintiff is entitled to profits for same. *See* TAC, ¶ 220-230. This claim is preempted and must be dismissed: "Regardless of how plaintiff[] style[s] this claim, the basic allegation underlying it is that [she] has been deprived of royalties to which she is entitled based on [Defendants'] use and exploitation of [copyrighted] motion picture recordings of her performance." *Baiul*, 2016 WL 1587250, at *10.

In these circumstances, Plaintiff's claim is preempted and must be dismissed. *See, e.g., Weber v. Geffen Records, Inc.*, 63 F.Supp.2d 458, 463 (S.D.N.Y. 1999) (accounting claim preempted because "[i]t [was] only through th[e] basic [copyright] claim ... that anyone profiting must account to plaintiff"); *Gary Friedrich Enterprises, LLC v. Marvel Enterprises, Inc.*, 713 F. Supp. 2d 215, 233 (S.D.N.Y. 2010) ("The plaintiffs also assert the claim for accounting in connection to the unauthorized use of copyrightable work. However, accounting claims based primarily on copyright infringement do not satisfy the "extra element" test and are preempted.")[19]

[19] Moreover, if Plaintiff were to seek to avoid preemption by arguing that her claim for an accounting is based upon royalties she believes are due to her under her agreements with Defendants, this claim still would fail because, as the Court determined in the MTD Order, Plaintiff has failed to allege the requisite fiduciary relationship, which this Court has already ruled is necessary to maintain such a claim. *See* DE 75, p. 24.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to (1) dismiss with prejudice from the TAC (i) the new breach of contract claim that Plaintiff added to her First Cause of Action, and (ii) Plaintiff's Fourth, Fifth and Sixth causes of action in their entirety; (2) not permit Plaintiff to further amend her complaint; and (3) provide such other and further relief as the Court deems proper.

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Respectfully submitted,

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