Peter Anderson, Esq., Cal. Bar No. 88891
peteranderson@dwt.com
Sean M. Sullivan, Esq., Cal. Bar No. 229104
seansullivan@dwt.com
Eric H. Lamm, Esq., Cal. Bar No. 324153
ericlamm@dwt.com
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, 24th Floor
Los Angeles, CA 90017-2566
Tel: (213) 633-6800
Fax: (213) 633-6899

Attorneys for Defendants
SAMUEL SMITH, NORMANI KORDEI HAMILTON, also sued as SONGS OF NKH, JAMES NAPIER, TOR HERMANSEN and MIKKEL ERIKSON, also sued as STARGATE, UMG RECORDINGS, INC., UNIVERSAL MUSIC GROUP, INC., SONY MUSIC PUBLISHING (US) LLC, EMI BLACKWOOD MUSIC INC., EMI APRIL MUSIC INC., SONY CORPORATION OF AMERICA, 45TH AND 3RD MUSIC LLC, TIM & DANNY MUSIC LLC, and DOWNTOWN MUSIC PUBLISHING LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Sound and Color, LLC Plaintiff, v. Samuel Smith, Normani Kordei Hamilton, Stargate, Mikkel Storleer Eriksen, Tor Erik Hermansen, James John Napier, Universal Music Group, Universal Music Operations Limited UMG Recordings Inc., Sony Music Group, Sony Corporation of America, Sony/ATV Music Publishing LLC, Sony/ATV Music Publishing Ltd., Sony/ATV Songs LLC, EMI Music Publishing LTD, EMI April Music Inc., EMI Blackwood Music Inc., Downtown Music Publishing LLC, Salli Isaak Songs LTD, Naughty Words Limited, Songs of NKH, Stellar Songs Limited, Stellar (Continued on next page)	Case No. 2:22-cv-01508-AB-AS DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND TO STRIKE Date: August 26, 2022 Time: 10:00 a.m. Courtroom of the Honorable André Birotte, Jr. United States District Judge

Songs, Tim & Danny Music LLC, 45th & 3rd Music LLC,

Defendants.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

(a) Summary of Argument

Plaintiff Sound and Color, LLC's Complaint is rambling, repetitive, and filled with argument, and there are fundamental problems with the underlying allegation that Plaintiff's claimed copyrights in a song have been infringed. Some of those fundamental problems are identified below. However, Defendants' Motion raises different and clear defects in Plaintiff's claims.

Plaintiff's first claim for relief alleges that all Defendants are direct infringers. However, Plaintiff's second and third claims allege that all Defendants also are secondarily liable as contributory and vicarious infringers. The second and third claims fail as a matter of law because, by definition, an alleged direct infringer cannot be secondarily liable for the same alleged infringement, and also because the second and third claims are based solely on the Complaint's verbatim repetition of conclusory allegations, stripped of any facts making the claims plausible as to any Defendant, and failing to even identify for whom and why Defendants are supposedly secondarily liable. Under established pleading rules, each Defendant is entitled to notice of the basis on which Plaintiff alleges he, she, or it is not only a direct infringer, but also secondarily liable for the alleged infringement of unidentified others. Accordingly, these claims are properly dismissed. *See below* at 6-12.

In addition, Plaintiff includes in its Complaint claims for statutory damages and attorney's fees. However, Plaintiff's Complaint establishes that the alleged infringement commenced in January 2019 and that Plaintiff did not register the allegedly infringed copyrights with the U.S. Copyright Office until May 2019. Because the allegedly infringed copyrights were not registered before the alleged infringement commenced, statutory damages and attorney's fees are not potential remedies, and these claims are properly dismissed. *See below* at 13-14. Plaintiff also includes in its Complaint a claim for punitive or exemplary damages. But that claim

fails as a matter of law because punitive damages are not recoverable for alleged copyright infringement. *See below* at 15. Accordingly, it also is properly dismissed.

Moreover, these defects are not only plain on the face of the Complaint but also are known to Plaintiff's Pennsylvania counsel: in 2019 they filed in this District Court a complaint *with the exact same defects*, and the defendants' motion to dismiss those claims was granted.[1] Yet, despite that ruling and the underlying established law upon which that ruling was based, Plaintiff's counsel has refused to amend Plaintiff's Complaint to address the following defects.

Defendants respectfully submit that their Motion should be granted.

(b) Summary of the Complaint's Allegations

Solely for the purposes of this Motion, the Complaint's properly pleaded allegations, although strenuously disputed, are taken as true.

(1) Plaintiff's 2015 Song, "Dancing with Strangers"

Plaintiff claims ownership of the copyrights in a sound recording and the composition embodied in that sound recording, referred to as "Dancing with Strangers" ("Plaintiff's Song"), which Plaintiff alleges was created in 2015 by Jordan Vincent and Christopher Miranda. Complaint (Doc. 1) at 1, ¶¶ 5-7, 12, ¶ 64.[2] That same year, a music video of a performance of Plaintiff's Song was shot. *Id.* at 2, ¶ 8. Plaintiff's Song and the music video apparently were never released by a record company and, instead, Plaintiff alleges they were pitched in the industry and

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[1] *See Smith v. Weeknd*, No. CV 19-2507 PA (MRWX), 2019 WL 6998666, at *3 (C.D. Cal. Aug. 23, 2019).

[2] "Sound recordings and musical compositions are separate works with their own distinct copyrights." *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (quoting *Erickson v. Blake*, 839 F. Supp. 2d 1132, 1135 n.3 (D. Or. 2012)). "The distinction may be summed up as the difference between a copyright in a Cole Porter song, and copyright in Frank Sinatra's recorded performance of that song. The former would be a musical work copyright and the latter would be a sound recording copyright, although both may be embodied in the same phonorecord." 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.06 n.1 (2022).

Plaintiff's Song was posted on YouTube and elsewhere on the Internet. *Id.* at 2, ¶¶ 9-10.

(2) Plaintiff's Allegation that Defendants' 2019 *Dancing with a Stranger* Copies Plaintiff's Song

In 2019, the song *Dancing with a Stranger* featuring Sam Smith and Normani Kordei Hamilton ("*Dancing with a Stranger*") was released and became extremely successful. Complaint at 1, ¶¶ 1, 4. Plaintiff alleges that *Dancing with a Stranger* copies the title, "Dancing with Strangers," and music of Plaintiff's Song. *See, e.g.*, *id.* at 1, ¶ 2. However, the claim relies on hyperbole and ignores established circuit law.

As for the titles, they are not only different but, in any event, titles are not protectable.[3] Moreover, Plaintiff attaches to its Complaint a claimed expert report confirming that before Plaintiff's song there were other songs with such titles, including Cyndi Lauper's 1989 *Dancing with a Stranger*. *Id.* at Exh. 2 at 7.[4]

As for music, Plaintiff alleges that the choruses of *Dancing with a Stranger* and Plaintiff's Song include "a nearly identical melody and musical composition" and the two songs' lyrics and musical composition "are all the same." *Id.* at 1, ¶ 2. However, Plaintiff's allegations are repudiated by the claimed expert report attached to Plaintiff's Complaint.

For example, that report includes what it describes as a transcription of the relevant music transposed to the same key and which shows eight notes in *Dancing with a Stranger* and nine notes in Plaintiff's song. Even as transcribed by Plaintiff's expert, *only the first and sixth notes are the same*. *Id.* at Exh. 2 at 5. Given that an

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[3] *Benay v. Warner Bros. Entm't*, 607 F.3d 620, 628 (9th Cir. 2010), *overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

[4] Indeed, a search of the U.S. Copyright Office's online database reveals multiple songs and other works with the titles "Dancing with Strangers" or "Dancing with a Stranger." *See* U.S. Copyright Office Records Search.

uninterrupted sequence of four notes is not protected by copyright,[5] two non-contiguous notes cannot be protected.[6] Further, the report—rather than supporting the Complaint's allegation of "nearly identical melody"—acknowledges the melodies are different and instead claims similarity in "melodic contour" and rhythm. *Id.* However, melodic contour, or the shape of a melody, is too abstract to protect by copyright, and the claimed similar rhythm is largely repeated eighth notes, which also is not protected.[7] Remarkably, the report confirms the chord progressions in *Dancing with a Stranger* and Plaintiff's Song are different, but argues that "rotation of the chords"—that is, changing them—can make them "almost identical." *Id.* at Exh. 2 at 3. In any event, finding similarity in the chord progressions by changing them does no good because chord progressions also are not protected.[8]

Also, Plaintiff alleges that *Dancing with a Stranger* infringes both Plaintiff's claimed musical composition and sound recording copyrights. *See, e.g.*, *id.* at 32, ¶ 226-27. However, sound recording copyrights protect only against the recapture of "the actual sounds fixed in the sound recording."[9] Yet nowhere in Plaintiff's

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[5] *Skidmore*, 952 F.3d at 1071 (holding that copyright does not protect sequence of three notes, and reaffirming prior holding that "'a four-note sequence common in the music field' is not the copyrightable expression in a song." (quoting *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976))).

[6] In fact, Plaintiff's expert's reliance on *three* non-contiguous notes in another case was rejected by the Court. *Smith v. Weeknd*, No. CV 19-2507 PA (MRWX), 2020 WL 4932074, at *6 (C.D. Cal. July 22, 2020), *aff'd sub nom. Clover v. Tesfaye*, No. 20-55861, 2021 WL 4705512 (9th Cir. Oct. 8, 2021).

[7] *Gray v. Hudson*, 28 F.4th 87, 99 (9th Cir. 2022).

[8] *Gray*, 28 F.4th at 100.

[9] 17 U.S.C. § 114(b); *VMG Salsoul*, 824 F.3d at 883 ("A new recording that mimics the copyrighted recording is not an infringement, even if the mimicking is very well done, so long as there was no actual copying."); 2 NIMMER ON COPYRIGHT § 8.05[A] (Section 114 "limit[s] the right of reproduction [of sound recordings] to the recapture of the original sounds").

Complaint or its attached report are any supposedly recaptured actual sounds identified.

Aside from the Complaint's hyperbole—negated by its attached report—as to supposedly identical music, Plaintiff spends much of the Complaint speculating as to how the creators of *Dancing with a Stranger* might have learned of Plaintiff's Song.[10] Plaintiff even claims support in that both songs' music videos include a woman dancing alone (*id.* at 3-4, ¶¶ 20-21), even though that has been seen in countless music videos before Plaintiff's Song.

(3) The Claims that Plaintiff Asserts

Plaintiff's Complaint asserts "cause[s] of action," each expressly "Against All Defendants," for (1) direct copyright infringement, (2) contributory copyright infringement, and (3) vicarious copyright infringement. Complaint at 31-34, ¶¶ 218-40. However, in asserting all three claims against all Defendants, Plaintiff's Complaint relies on general allegations without identifying what each Defendant supposedly did or did not do, or for whose infringements they are supposedly liable.

Also, in a Prayer mislabeled "Claims for Relief," Plaintiff "demands," *inter alia*, statutory damages pursuant to 17 U.S.C. Section 504, attorney's fees, and punitive damages. Complaint at 34, ¶¶ (c), (g) & (i).

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[10] Of course, "[a]ccess may not be inferred through mere speculation or conjecture." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (1999)), *overruled on other grounds by Skidmore*, 952 F.3d 1051. Moreover, with *Skidmore*'s abandonment of the so-called inverse ratio rule, access is irrelevant if a plaintiff cannot prove substantial similarity in protected expression under this Circuit's extrinsic test. *Skidmore*, 952 F.3d at 1069 ("[A]ccess . . . in no way can prove substantial similarity").

2. PLAINTIFF'S SECOND AND THIRD CLAIMS FOR RELIEF AND CLAIMS FOR STATUTORY DAMAGES, ATTORNEY'S FEES AND PUNITIVE DAMAGES SHOULD BE DISMISSED

(a) The Standards Governing the Rule 12(b)(6) Motion to Dismiss

A Federal Rule of Civil Procedure 12(b)(6) motion "tests the legal sufficiency of the claims asserted in the complaint." *Ileto v. Glock. Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). While "[t]he Court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them" (*eCash Tech. v. Guargliardo*, 127 F. Supp. 2d 1069, 1074 (C.D. Cal. 2000)), the plaintiff must plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting* *Twombly*, 550 U.S. at 570. "A claim has 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.

(b) Plaintiff's Claims for Contributory and Vicarious Copyright Infringement Fail, Including Because Plaintiff Does Not Allege How the Allegedly Direct Infringers Are Secondarily Liable

There are fundamental and important differences between direct copyright infringement, contributory copyright infringement, and vicarious copyright infringement. A direct copyright infringement claim is based on pleading, *inter alia*, "that the alleged infringers violated at least one exclusive right granted to copyright holders under 17 U.S.C. § 106." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) ("*Giganews*") (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)). That is what Plaintiff pleads as its first claim for relief, "Against All Defendants." Complaint at 31:4, & 31-32, ¶¶ 219, 226.

In contrast, contributory and vicarious infringement are forms of secondary liability *for another's* infringement. Yet, Plaintiff's Complaint also alleges claims against "All Defendants" for contributory and vicarious infringement. Plaintiff thereby impermissibly (1) alleges that all Defendants are both directly and secondarily liable for the same alleged infringement; (2) fails to provide each Defendant with notice of how, and for what alleged direct infringements, he, she, or it are supposedly secondarily liable; and (3) relies on bare legal conclusions without any factual content.

(1) Plaintiff's Second Claim for Contributory Copyright Infringement Fails as a Matter of Law

Contributory copyright infringement is "a form of secondary liability" and applies if a defendant "(1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement." *Giganews*, 847 F.3d at 670 (quoting *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007)). Importantly, conclusory allegations are insufficient to state a claim for contributory copyright infringement. *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013) (Rule 12(b)(6) dismissal affirmed).

Plaintiff's second claim is for contributory infringement and asserted "Against All Defendants," but it incorporates all prior allegations, including Plaintiff's allegations that "All Defendants" are direct infringers. Complaint at 32: 23, & 32-33, ¶¶ 230-32. Moreover, the body of the second claim does not distinguish among Defendants or otherwise allege how they can be both direct and contributory infringers. Instead, Plaintiff merely characterizes the elements of contributory infringement and then adds the conclusory allegation that the elements are satisfied:

> "231. To state a claim for contributory copyright infringement a plaintiff must show that the defendants induced, caused, materially contributed to, and participated in the infringement of Plaintiff's copyrighted song, 'Dancing With a Stranger.'

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> "232. Defendants had and have knowledge of the ongoing infringing activity that is the subject of this lawsuit—the use of 'Dancing With A Stranger' in 'Dancing With A Stranger'—and have induced and materially contributed to the infringing conduct of the direct infringers of Plaintiff's copyrighted song."

Complaint at 32-33, ¶¶ 231-32.

As an initial defect, Plaintiff's claim fails because, by definition, a defendant cannot be—as the Complaint alleges—both directly and contributorily liable for the same infringement. That is so because contributory infringement is a secondary liability theory that imposes liability for "*another's* infringement." *Giganews*, 847 F.3d at 670 (quoting *Perfect 10*, 494 F.3d at 795; emphasis added); *A&M Records*, 239 F.3d at 1013 n.2 ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party"); *see, also Smith*, 2019 WL 6998666, at *3 ("[A] defendant cannot be secondarily liable for that defendant's own direct infringement."). Moreover, Plaintiff's allegation in paragraph 232 that Defendants, *the alleged direct infringers*, "have induced and materially contributed to the infringing conduct *of the direct infringers*"—that is, themselves—is nonsensical.

In addition, Plaintiff's claim for contributory infringement fails to notify each Defendant of the identity of the alleged direct infringer that he, she, or it supposedly induced or helped to infringe, and how he, she, or it supposedly induced or helped that unidentified alleged direct infringer to infringe. Further, to survive a Rule 12(b)(6) motion, a claim for contributory infringement must include factual content establishing that the contributory infringer "had the necessary specific knowledge of infringement …." *Luvdarts*, 710 F.3d at 1074. However, Plaintiff's claim merely (1) paraphrases the claim's required elements (paragraph 231) and then (2) alleges "Defendants had and have knowledge of the ongoing infringing activity … and have induced and materially contributed to the infringing conduct of the direct infringers"

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(paragraph 232). That is just the "formulaic recitation of the elements of a cause of action [and] will not do." *Twombly*, 550 U.S. at 555.

The failings of the second claim are not cured by Plaintiff's incorporation of the Complaint's preceding allegations. Instead, those preceding allegations simply copy and paste the same conclusory and self-contradicting allegations as to each Defendant.

For example, Plaintiff alleges that Mr. Smith directly infringed and that he "materially contributed and caused the infringement by, including but not limited to, promoting, distributing, and selling the infringing song 'Dancing with a Stranger' and/or permitting its use." Complaint at 13, ¶¶ 71, 73. Those are alleged direct infringements, and nowhere does Plaintiff identify "another's infringement" that Mr. Smith supposedly "materially contribute[d] to or … induce[d]."*Giganews*, 847 F.3d at 670 (quoting *Perfect 10*, 494 F.3d at 795). Further, Plaintiff relies on the same conclusory and incomplete language in charging each of the other individual Defendants,[11] as well as each of the entity Defendants,[12] with contributory infringement.

Plaintiff fares no better with the requirement that it plead factual content establishing that each Defendant "had the necessary specific knowledge of [another's] infringement." *Luvdarts*, 710 F.3d at 1074. Plaintiff alleges only that each Defendant "knew of the infringement," a bare assertion that the Complaint repeats twenty-four times. *See* Complaint at 13-28. However, "conclusory allegations that [a defendant] had the requisite knowledge of infringement are plainly insufficient." *Luvdarts*, 710 F.3d at 1072. By way of example, only, Plaintiff fails to allege any basis for claiming that any of the entity Defendants, or any individual Defendant not involved in the

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[11] *See*, Complaint at 14-17, ¶¶ 84, 86, 91, 93, 97, 99, 103, 105, 109, 111.

[12] *See*, *id.* at 17-28, ¶¶ 115, 117, 120, 122, 125, 127, 131, 133, 136, 138, 142, 144, 147, 149, 153, 155, 159, 161, 165, 167, 171, 173, 177, 179, 181, 183, 186, 188, 191, 193, 196, 198, 201, 203, 207, 209.

creation of the allegedly infringing chorus or without access to Plaintiff's Song, "knew of the infringement."

As a result, the Complaint, even taken as a whole, does not provide any Defendant with notice of what he, she, or it supposedly did to be contributorily liable; notice of the identity of the person or entity whose direct infringement he, she, or it supposedly materially contributed to or induced; or notice of how he, she, or it supposedly obtained a specific financial benefit. As a general pleading matter, the conclusory use of contributory infringement "labels and conclusions" is not sufficient. *Twombly*, 550 U.S. at 555; *see, also*, *Iqbal*, 556 U.S. at 678 (complaint must provide the defendant fair notice of the basis of the claim).

Neither can Plaintiff excuse its conclusory contributory infringement claim by arguing it needs discovery to determine if there are facts entitling it to sue anyone for contributory infringement. "Rule 8 [of the Federal Rules of Civil Procedure] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. If Plaintiff does not have a factual basis to sue a Defendant for contributory infringement, Plaintiff is not allowed to assert that claim against that Defendant.

Plaintiff's second claim for contributory copyright infringement impermissibly relies on conclusory allegations indiscriminately repeated verbatim as to each and every Defendant. Accordingly, this claim should be dismissed.

(2) Plaintiff's Claim for Vicarious Infringement Also Fails

Plaintiff's third claim also incorporates all prior allegations but is for vicarious copyright infringement. Complaint at 33-34, ¶¶ 235-40. "Vicarious copyright liability is an 'outgrowth' of respondeat superior [and] requires that the defendant had both the (1) 'right and ability to supervise the infringing activity' and (2) 'a direct financial interest' in the activity." *Luvdarts*, 710 F.3d at 1071 (quoting *A & M Records*, 239 F.3d at 1022). Conclusory allegations also are insufficient to state a claim for vicarious copyright infringement. *Luvdarts*, 710 F.3d at 1071-72.

Once again, the body of the Complaint's third claim does not distinguish among Defendants. It also does not allege how Defendants can be both direct and vicarious infringers. And once again, Plaintiff merely paraphrases the elements of the claim and alleges they apply to all Defendants:

> "236. To state a claim for vicarious copyright infringement the defendants must vicariously profit from the direct infringement while declining to exercise a right to stop or limit the direct infringement.
>
> "237. Here, all Defendants profit from the dissemination, sale, distribution, and licensing of the infringing song 'Dancing With A Stranger.'
>
> "238. Furthermore, Defendants, as producers, publishers, songwriters, and copyright holders, all have control over the dissemination, sale, distribution, and licensing of the infringing song 'Dancing With A Stranger.'"

Complaint at 33, ¶¶ 236-38.

The third claim suffers from the same initial defect that one cannot be both directly and secondarily liable for the same alleged infringement. *See above* at 8. In addition, the third claim also just relies on "labels and conclusions" (*Twombly*, 550 U.S. at 555) without providing each Defendant "fair notice of the basis of the claim" asserted against him, her, or it (*Iqbal*, 556 U.S. at 678).

The deficiencies of Plaintiff's third claim also are not cured by its incorporation of the Complaint's preceding allegations. Those preceding allegations repeat as to each Defendant the conclusory allegations that he, she, or it "had the right and ability to control or stop the infringing conduct but failed to do so" and has "received significant financial benefits as a result of the infringement."[13] Nowhere does the

[13] *See*, Complaint at 13-28, ¶¶ 72, 74, 85, 87, 92, 94, 98, 100, 104, 106, 110, 112, 116, 118, 121, 123, 126, 128, 132, 134, 137, 139, 143, 145, 148, 150, 154, 156, 160,

Complaint, for example, provide notice to any Defendant of the identity of the person or entity for whose alleged direct infringement the Defendant is supposedly vicariously liable.

Further, a vicarious infringement claim must allege factual content supporting that the allegedly vicariously liable defendant had the right and ability to supervise the alleged infringing activity. *Luvdarts*, 710 F.3d at 1071-72. Plaintiff's third claim alleges that Defendants, "as producers, publishers, songwriters, and copyright holders, all have control over the dissemination, sale, distribution, and licensing of" *Dancing with a Stranger*. Complaint at 33, ¶ 238. But that does not mean that any particular Defendant had the right to control any particular use, let alone some unidentified use by some unidentified user.

In addition, a claim for vicarious infringement must provide factual content establishing "a causal link between the infringing activities and a financial benefit to" the vicariously liable defendant. *Giganews*, 847 F.3d at 673. By failing to identify the alleged direct infringer, and also by failing to identify the relationship between that Defendant and the allegedly vicariously liable Defendant, the Complaint fails to plead the required causal link between any direct infringer and a financial benefit to any allegedly vicariously liable Defendant.

Plaintiff's third claim for vicarious copyright infringement ignores that a defendant cannot be both directly and secondarily liable for the same alleged infringement and also impermissibly relies on conclusory allegations indiscriminately repeated verbatim as to each and every Defendant. This claim should be dismissed.

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162, 166, 168, 172, 174, 177, 179, 182, 184, 187, 189, 192, 194, 197, 199, 202, 204, 208, 210.

(c) Plaintiff's Claims for Statutory Damages, Attorney's Fees, and Punitive Damages Also Fail as a Matter of Law

(1) A Rule 12(b)(6) Motion Is the Proper Procedure to Challenge Requested Remedies

Allegations and prayers for relief that is unavailable as a matter of law are properly challenged by a Rule 12(b)(6) motion to dismiss rather than a Rule 12(f) motion to strike. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75 (9th Cir. 2010); *In re Toyota Motor Corp. Unintended Acceleration Litig.*, 754 F. Supp. 2d 1145, 1169-70 (C.D. Cal. 2010).[14]

(2) Plaintiff's Failure to Timely Register Its Copyrights Bars its Claims for Statutory Damages and Attorney's Fees

Plaintiff's Complaint prays for, *inter alia*, statutory damages under 17 U.S.C. Section 504 and attorney's fees. Complaint at 34-35, ¶¶ (c) & (i). Presumably, attorney's fees are sought under 17 U.S.C. Section 505, insofar as the Complaint asserts only copyright claims. However, the Complaint's claims for statutory damages and for attorney's fees both fail as a matter of law.[15] That is so because the Copyright Act provides that a plaintiff cannot recover statutory damages or attorney's fees if he failed to register his claim to copyright before the infringement "commenced." 17 U.S.C. § 412. And here, Plaintiff alleges that the claimed infringements commenced on January 11, 2019 (Complaint at 6:2-3) and also attaches a copy of the

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[14] In case the Court determines that a Rule 12(f) motion to strike is the proper procedure to challenge Plaintiff's prayer for statutory damages, attorney's fees, and punitive damages, a motion to strike those requests is included in the alternative. *See* Notice of Motion & Motion at 2:11-15.

[15] As an additional defect mooted by dismissal of Plaintiff's claim for statutory damages, Plaintiff prays for separate statutory damage awards "per infringement." Complaint at 34, ¶ (c). However, only one statutory damage award is permitted "for all infringements involved in the action, with respect to any one work" for which, as Plaintiff alleges here, all defendants are jointly and severally liable. *See* 17 U.S.C. § 504(c)(1); *see, e.g.*, Complaint at 34:12-14.

Copyright Office's website summary showing that Plaintiff did not register its claimed sound recording and musical composition copyrights until May 27, 2019 (*id.* at 7, ¶ 7, & Exh. 1); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014) (in ruling on a Rule 12(b)(6) motion, the court considers, *inter alia*, "the complaint itself and its attached exhibits"); Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

Accordingly, statutory damages and attorney's fees are not potential remedies on Plaintiff's copyright infringement claims. *Derek Andrew, Inc. v. PoofApparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008) ("*the first act of infringement* in a series of ongoing infringements of the same kind marks the commencement of one continuing infringement under [17 U.S.C.] § 412" (emphasis in original)); *Por Los Rios, Inc. v. Lions Gate Entm't, Inc.*, No. 2:13-CV-7640-CBM-PLA, 2014 WL 12605374, at *2-3 (C.D. Cal. May 21, 2014) (granting Rule 12(b)(6) motion to dismiss request for statutory damages and attorney's fees where alleged infringements commenced prior to registration of allegedly infringed copyrights). Statutory damages and attorney's fees do not become available remedies for a plaintiff even if the alleged infringement continues after he or she registers. *Derek Andrews*, 528 F.3d at 701; *Por Los Rios*, 2014 WL 12605374, at *3 ("Courts are strict in determining when an infringement commenced, and statutory damages and attorney's fees cannot be recovered without a timely registration, regardless of alleged continuing or reoccurring infringements."); 2 NIMMER ON COPYRIGHT § 7.16[C][1][a][i] ("[E]nhanced damages are barred even if the infringement continues past the date of registration.").[16]

Accordingly, Plaintiff's claims for statutory damages and attorney's fees are properly dismissed.

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[16] Registration is a precondition only for the party alleging infringement to recover attorney's fees. 2 NIMMER ON COPYRIGHT § 7.16[C][1][a][iii]. Accordingly, Plaintiff's failure to timely register does not bar Defendants from seeking from Plaintiff the attorney's fees that Defendants incur in defending this action.

(3) Punitive Damages Are Not Recoverable on a Copyright Infringement Claim

Plaintiff's Complaint also prays for "[p]unitive and exemplary damages." Complaint at 34, ¶ (g). However, it is well-established that "[p]unitive damages are *never* available for copyright infringement actions brought under the 1976 Copyright Act." 6 William F. Patry, PATRY ON COPYRIGHT § 22:151 (2022) (emphasis in original); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 705 (9th Cir. 2004) (district court's dismissal of state law claims, leaving plaintiff with copyright infringement claim, "effectively precluded [plaintiff] from seeking punitive damages."); *Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 931 (7th Cir. 2003) (the Copyright Act "contains no provision for punitive damages."); *YellowCake, Inc. v. DashGo, Inc.*, No. 1:21-CV-0803 AWI BAM, 2022 WL 172934, at *3 (E.D. Cal. Jan. 19, 2022) ("Because punitive damages are unavailable in copyright infringement cases, dismissal of the prayer for punitive damages without leave to amend is appropriate"; gathering cases); 4 NIMMER ON COPYRIGHT § 14.02[C][2] ("[P]unitive damages are not available for statutory copyright infringement") & at 14.02[C][2] nn. 132-33.

"Copyright . . . is a creature of statute, and the only rights that exist under copyright law are those granted by statute." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 883–84 (9th Cir. 2005). And the Copyright Act identifies the potential remedies for copyright infringement and, in doing so, does not provide for the award of punitive damages. *See* 17 U.S.C. §§ 502-05. Accordingly, Plaintiff's claim for punitive damages also is properly dismissed.

3. CONCLUSION

Plaintiff's Complaint suffers from multiple defects that should be resolved at the pleading stage and before an answer is required.

Plaintiff alleges a claim for direct copyright infringement against all Defendants but then also alleges against all Defendants claims for contributory and vicarious

copyright infringement, based on conclusory allegations and without identifying for any Defendant those for whom it is supposedly secondarily liable and why. Each Defendant is entitled to notice of why he, she, or it is being sued for contributory and vicarious liability. In addition, Plaintiff's claims for statutory damages, attorney's fees, and punitive damages each fail as a matter of law.

Defendants respectfully submit that the Motion should be granted.

Dated: July 25, 2022

/s/ Peter Anderson

Peter Anderson, Esq.
Sean M. Sullivan, Esq.
Eric H. Lamm, Esq.
DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendants
SAMUEL SMITH, NORMANI KORDEI HAMILTON, JAMES NAPIER, TOR HERMANSEN, MIKKEL ERIKSON, UMG RECORDINGS, INC., UNIVERSAL MUSIC GROUP, INC., SONY MUSIC PUBLISHING (US) LLC, EMI BLACKWOOD MUSIC INC., EMI APRIL MUSIC INC., SONY CORPORATION OF AMERICA, 45TH AND 3RD MUSIC LLC, TIM & DANNY MUSIC LLC, and DOWNTOWN MUSIC PUBLISHING LLC