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9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

13 FORMAL ENTERTAINMENT LLC, a) Case No. 2:23-cv-7888 CMB (SKx)
Delaware Corporation,)
14 Plaintiff,) MEMORANDUM OF POINTS AND
15 vs.) AUTHORITIES IN SUPPORT OF
16 ZAIN JAVADD MALIK p/k/a ZAYN,) MOTION TO DISMISS AND TO
an individual; DAVID DEBRANDON) STRIKE
17 BROWN p/k/a LUCKY DAYE, an)
individual; DUSTIN ADRIAN BOWIE) [Fed. R. Civ. P. 12(b)(6) & 12(f)]
18 p/k/a DAB, an individual; MICHAEL)
LAVELL MCGREGOR, an individual;) Date: January 30, 2024
19 COLE ALAN CITRENBAUM, an) Time: 10:00 a.m.
individual; PHILIP VON BOCH)
20 SCULLY, an individual; SONY MUSIC)
ENTERTAINMENT, a Delaware)
21 General Partnership; and DOES 1)
through 100,)
22 Defendants.)
23)
24)

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

(a) Summary of Argument

Defendants Philip Von Boch Scully, Michael Lavell McGregor, David Debrandon Brown, and Sony Music Entertainment (“Defendants”) respectfully submit this Memorandum in support of their Motion to Dismiss and Strike directed to the First Amended Complaint of plaintiff Formal Entertainment LLC (“Plaintiff”).

Plaintiff alleges that its managing member created a musical composition that was supposedly copied by defendants’ song, *Better*. Pursuant to this Court’s Local Rule 7-3, Defendants identified what they believe to be defects in Plaintiff’s initial Complaint, and Plaintiff undertook to file an amended complaint. *See Nov. 21, 2023, Stip. (Doc. 13) & Nov. 27, 2023, Order (Doc. 14).*¹ However, Plaintiff’s First Amended Complaint perpetuates those defects rather than cures them.

In particular, Plaintiff retains the exact same deficient access allegations as its initial Complaint even though those allegations are insufficient as a matter of well-established law. Plaintiff’s failure to even try to fix its access theory proves there is nothing more Plaintiff can allege to plausibly plead that the creators of *Better* had access to Plaintiff’s work. Since Plaintiff’s failure to plausibly plead access is fatal for its claims for direct, contributory, and vicarious copyright infringement, they and this action are properly dismissed without leave to amend.

While that should end this case, there are additional defects in Plaintiff’s claims. Although required to plead substantial similarity, Plaintiff refers only to unidentified similarities in melody and other musical elements. Further, the only similarity identified in the First Amended Complaint is that both works include the word “fight,”

¹ This Memorandum contains hyperlinks to cited materials. Due apparently to the Court’s security measures, hyperlinks to internal pages of documents on PACER may instead lead to the first page of the documents.

1 in altogether different lyrics. That leaves Plaintiff with only conclusory allegations of
2 similarity, which are not sufficient. As a result, Plaintiff’s copyright infringement
3 claims also are properly dismissed for failing to allege the required substantial
4 similarity. In addition, Plaintiff, again in conclusory fashion, alleges the legal and
5 factual impossibility that all defendants are directly, contributorily, and vicariously
6 liable for the same alleged infringements. For this additional reason, Plaintiff’s
7 infringement claims are properly dismissed.

8 Finally, Plaintiff’s prayer assets claims for relief that are not available as a
9 matter of law, and Plaintiff’s First Amended Complaint alleges that Plaintiff has not
10 received credit and an ownership interest in *Better* even though those also are not
11 available remedies. Those claims and allegations are properly dismissed or stricken.

12 **(b) Summary of the First Amended Complaint’s Allegations**

13 Solely for the purposes of this Motion, the First Amended Complaint’s properly
14 pleaded allegations, although strenuously disputed, are taken as true.

15 **(1) Plaintiff’s 2018 Recording, “Somebody Tonight”**

16 Plaintiff is a Delaware limited liability company whose managing member is
17 Patrick Simmons, a composer and performer also known as “Havyn.” First Amended
18 Complaint (“FAC”) (Doc. 21) at 3:4-9. In 2018, Simmons recorded Plaintiff’s song,
19 “Somebody Tonight.” Plaintiff alleges the song had “many thousands of digital
20 streams on Spotify and streams on Spotify.” *Id.* at 6 ¶ 21.

21 In April 2020, Simmons engaged Talent Spotlite LLC, also referred to as
22 “Modern Music Marketing” (“MMM”), “a company involved in the promotion of
23 musical works,” to promote another song. Simmons’ contact at MMM, Jonah
24 Rindner, “indicated that MMM would promote ‘Somebody Tonight’ for free because
25 Rindner believed it was Simmons’ best song,” and, in return for “a finder’s fee,”
26 would send it to those in Rindner’s “contact list that work[] in the music industry....”
27 *Id.* at 8-9 ¶ 29. Plaintiff does not identify anyone to whom Rindner sent the song and
28 also does not allege Rindner’s efforts to place “Somebody Tonight” were successful.

1 **(2) Plaintiff’s Allegations that *Better* Copies Plaintiff’s**
2 **“Somebody Tonight”**

3 On or about September 25, 2020, the sound recording *Better*, featuring the
4 recording artist Zain Javadd Malik, professionally known as Zayn, was released to the
5 public. FAC at 1:15-17, 6:14-15. *Better* was written by Mr. Malik and the other
6 individual defendants and distributed by defendant Sony Music Entertainment. *Id.* at
7 6 ¶ 6:23-24.

8 Plaintiff alleges that when Simmons learned of *Better*, he contacted Rindner,
9 who said he had “worked [Plaintiff’s song,] implying that MMM promoted [it].”
10 There is no allegation as to what that implied promotion entailed and, moreover, no
11 allegation that Rindner claims to have provided “Something Tonight” to anyone
12 involved in the creation of *Better*. To the contrary, when Simmons asked Rindner if
13 *Better* is based on “Something Tonight,” Rindner responded “How would I know.”
14 *Id.* at 9 ¶ 30. Nevertheless, Plaintiff alleges, *only on information and belief*, that the
15 *Better* songwriters and Sony Music Entertainment “became aware of Simmons’
16 ‘Somebody Tonight’ by and through MMM.” *Id.* at 9-10 ¶ 31.

17 Plaintiff’s initial Complaint did not identify any similarities between *Better* and
18 “Somebody Tonight,” instead alleging they “contain essential compositional elements
19 so similar as to evidence the conscious copying of one in pursuit of the creation of the
20 other.” Complaint (Doc. 1) at 8-9 ¶ 29. Plaintiff’s First Amended Complaint adds
21 allegations of similarities in melody, chord progression, and other musical elements,
22 without identifying the similarities, and alleges the word “fight” appears in both
23 songs’ lyrics. FAC at 7-8 ¶¶ 24-27.

24 **(3) The Claims That Plaintiff Asserts**

25 Based on these allegations, Plaintiff asserts against all defendants a first claim
26 for direct copyright infringement, a second claim for contributory copyright
27 infringement, and a third claim for vicious copyright infringement. FAC at 11-18 ¶¶
28 38-82.

1 **2. PLAINTIFF’S CONTINUED FAILURE TO PLAUSIBLY PLEAD**
2 **ACCESS JUSTIFIES DISMISSAL WITHOUT LEAVE TO AMEND**

3 While there are many defects in Plaintiff’s claims, those claims fail for the
4 specific, distinct, and fundamental reason that they merely speculate that the creators
5 of *Better* might have heard Plaintiff’s work. Further, Plaintiff’s failure to change in
6 its First Amended Complaint a single allegation as to access confirms that Plaintiff
7 has no more to offer as to access and, as a result, amendment would be futile.

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

9 A Federal Rule of Civil Procedure 12(b)(6) motion “tests the legal sufficiency
10 of the claims asserted in the complaint.” *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-
11 1200 (9th Cir. 2003). While “[t]he Court must accept as true all material allegations
12 in the complaint, as well as reasonable inferences to be drawn from them” (*eCash*
13 *Tech. v. Guargliardo*, 127 F. Supp. 2d 1069, 1074 (C.D. Cal. 2000)), the plaintiff must
14 plead “more than labels and conclusions, and a formulaic recitation of the elements of
15 a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
16 (2007). Instead, “[t]o survive a motion to dismiss, a complaint must contain sufficient
17 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
18 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Twombly*, 550 U.S. at 570. “A
19 claim has facial plausibility when the plaintiff pleads factual content that allows the
20 court to draw the reasonable inference that the defendant is liable for the misconduct
21 alleged.” *Iqbal*, 556 U.S. at 678.

22 Further, any “suggest[ion] that courts retain discretion to permit discovery
23 whenever a plaintiff has failed to satisfy Rule 8’s plausibility standard, ... is simply
24 incompatible with *Iqbal* and *Twombly*.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 593
25 n.7 (9th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (“Because
26 respondent’s complaint is deficient under Rule 8, he is not entitled to discovery,
27 cabined or otherwise”) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“It
28 is no answer to say that a claim just shy of a plausible entitlement to relief can, if

1 groundless, be weeded out early in the discovery process through ‘careful case
2 management’’)).

3 Applying these unassailable, established principles compels dismissal of
4 Plaintiffs’ claims for failure to plead access, without leave to amend.

5 **(b) Plaintiff Fails to Plausibly Allege That Copying Occurred**

6 **(1) Plaintiff Must Plausibly Allege That Copying Occurred**

7 “To state a claim for copyright infringement, [the plaintiff] must plausibly
8 allege two things: (1) that he owns a valid copyright in his [work], and (2) that [the
9 defendant] copied protected aspects of the [work’s] expression.” *Rentmeester v. Nike*,
10 883 F.3d 1111, 1116-17 (9th Cir. 2018) (affirming Rule 12(b)(6) dismissal), *overruled*
11 *on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952
12 F.3d 1051 (9th Cir. 2020). “The second prong of the infringement analysis contains
13 two separate components: ‘copying’ and ‘unlawful appropriation’ [and a]lthough
14 these requirements are too often referred to in shorthand lingo as the need to prove
15 ‘substantial similarity,’ they are distinct concepts.” *Skidmore*, 952 F.3d at 1064.

16 The requirement that the copyright plaintiff plausibly plead that copying
17 occurred “is necessary because independent creation is a complete defense to
18 copyright infringement.” *Rentmeester*, 883 F.3d at 1117. As a result, “absent
19 copying, there can be no infringement of copyright, regardless of the extent of
20 similarity.” 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.01[A] (2023).
21 The historical fact of copying is pleaded by plausibly alleging (1) “striking similarity”
22 that can only be the result of copying, or (2) the defendant’s access to the plaintiff’s
23 work, plus substantial similarities that are probative of copying. *Malibu Textiles, Inc.*
24 *v. Label Lane Int’l Inc.*, 922 F.3d 946, 952 (9th Cir. 2019). Plaintiff fails to plausibly
25 plead either and, as a result, again fails to plead that copying even occurred.

26 **(2) Plaintiff Has Never Alleged Striking Similarity**

27 “[I]n rare cases, a plaintiff can prove copying even without proof of access if
28 he can show that the two works are not only similar, but are so strikingly similar as to

1 preclude the possibility of independent creation.” Gable v. Nat’l Broad. Co., 727 F.
 2 Supp. 2d 815, 823 (C.D. Cal. 2010), *aff’d sub nom. Gable v. Nat’l Broad. Co.*, 438 F.
 3 App’x 587 (9th Cir. 2011). Striking similarity means “the accused work *could not*
 4 *possibly* have been the result of independent creation.” Stabile v. Paul Ltd., 137 F.
 5 Supp. 3d 1173, 1188 (C.D. Cal. 2015) (quoting Seals-McClellan v. Dreamworks, Inc.,
 6 120 F. App’x 3, 4 (9th Cir. 2004) (emphasis in original)). “In other words, as a matter
 7 of logic, the only explanation for the similarities between the two works must be
 8 ‘copying rather than ... coincidence, independent creation, or prior common source.’”
 9 4 NIMMER ON COPYRIGHT § 13.02[B] (quoting Skidmore, 952 F.3d at 1064); Stabile,
 10 137 F. Supp. 3d at 1188 (“Striking similarity is a high bar.” (quoting Briggs v.
 11 Blomkamp, 70 F. Supp. 3d 1155, 1166–1167 (N.D. Cal. 2014))). Whether a plaintiff
 12 has plausibly alleged striking similarity may be decided at the pleading level. *See*,
 13 *e.g.*, Wongab Corp. v. Nordstrom, Inc., 2017 WL 10439833, at *6-7 (C.D. Cal. Sept.
 14 21, 2017) (granting motion to dismiss copyright infringement claim).

15 Here, neither Plaintiff’s initial Complaint nor its First Amended Complaint
 16 even mention, let alone plausibly allege, striking similarity that can only be the result
 17 of copying. To the contrary, Plaintiff’s First Amended Complaint alleges that *Better*
 18 and Plaintiff’s work are “substantially similar.” *See, e.g.*, FAC at 8:8-12 (the alleged
 19 copying of “the combination of chord progression, melody, timing of chord changes,
 20 rhythm, and enunciation of lyrical elements of the verses and chorus ... renders both
 21 pieces *substantially similar*.” (emphasis added)). Plaintiff’s allegations of substantial
 22 similarity negate striking similarity. *See, e.g.*, Jorgensen v. Epic/Sony Recs., 351 F.3d
 23 46, 56, 56 n.9 (2d Cir. 2003) (claim that works substantial similar precluded argument
 24 they were strikingly similar).

25 (3) Plaintiff Repeats its Allegations That Fail to Plead Access

26 Accordingly, to plead the required element of copying, Plaintiff must plausibly
 27 plead both “the defendant’s access to the plaintiff’s work, plus substantial similarities

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1 that are probative of copying.” *Malibu Textiles*, 922 F.3d at 952. Plaintiff trips as to
2 the first prong because Plaintiff has confirmed it cannot plausibly plead access.

3 **(i) The Required Pleading of Non-Speculative Access**

4 To assert a viable claim of access, a plaintiff must allege sufficient factual
5 content to establish a “reasonable possibility, not merely a bare possibility, that an
6 alleged infringer had the chance to view the protected work.” *Art Attacks Ink LLC v.*
7 *MGA Entm’t Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009). Access is generally shown
8 through facts “(1) establishing a chain of events linking the plaintiff’s work and the
9 defendant’s access, or (2) showing that plaintiff’s work has been widely
10 disseminated.” *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016). But “[a]ccess
11 may not be inferred through mere speculation or conjecture.” *Three Boys Music Corp.*
12 *v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (quoting 4 NIMMER ON COPYRIGHT §
13 13.02[A]), *overruled on other grounds by Skidmore*, 952 F.3d 1051. Further, Rule
14 12(b)(6) dismissal is proper when a complaint fails to allege factual content plausibly
15 pleading that the creators of the allegedly infringing work had a non-speculative
16 opportunity to see or hear the plaintiff’s work. *See, e.g., Jones v. Atlantic Records*,
17 *No. 22-CV-893 (ALC)*, 2023 WL 5577282, at *4 (S.D.N.Y. Aug. 29, 2023) (failure
18 to plead facts establishing non-speculative access; action dismissed with prejudice);
19 *Evans v. Warner Bros. Entm’t Inc.*, *No. CV 18-3951-DSF (ASX)*, 2018 WL 6133660,
20 at *3 (C.D. Cal. Sept. 17, 2018) (same; action dismissed with prejudice).

21 **(ii) Plaintiff Does Not Plead Widespread Dissemination**

22 Plaintiff alleges access “by and through MMM,” that is, by a chain-of-events
23 theory rather than by widespread dissemination. *FAC* at 9-10 ¶ 31. However,
24 Plaintiff’s allegations also fail to plausibly plead access by widespread dissemination.

25 “In most cases, ... widespread dissemination centers on the degree of a work’s
26 commercial success and on its distribution through radio, television, and other
27 relevant mediums.” *Loomis*, 836 F.3d at 997. “Allegations that support a finding of
28 access through wide dissemination are those that enable a court to infer plausibly that

1 the alleged protected works reached an audience sufficiently large and diverse to
2 render reasonable the possibility the alleged infringer himself is among that audience.”
3 Segal v. Segel, No. 20-CV-1382-BAS-JLB, 2022 WL 198699, at *9 (S.D. Cal. Jan.
4 21, 2022). “For musical works, plaintiffs often prove widespread dissemination with
5 evidence of frequent airplay, ‘record sales, awards, billboard charts, or royalty
6 revenues.’” Batiste v. Lewis, 976 F.3d 493, 503 (5th Cir. 2020) (quoting Guzman v.
7 Hacienda Recs. & Recording Studio, Inc., 808 F.3d 1031, 1038 (5th Cir. 2015)).
8 Widespread dissemination also might result from the “saturation [of the plaintiff’s
9 work] in a relevant market in which both the plaintiff and the defendant participate.”
10 Loomis, 836 F.3d at 997.

11 Here, Plaintiff does not claim its work received any awards, “charted” on
12 Billboard, or was released as physical recordings, let alone released by a record
13 company. Neither does Plaintiff claim, let alone plausibly claim, that its work
14 saturated the music industry. Instead, Plaintiff alleges that it posted its work on
15 Spotify and YouTube, “with many thousands of digital streams on Spotify, and [an
16 unstated number of] streams on YouTube.” FAC at 6 ¶ 21. However, there are
17 literally billions of hours of Spotify streams each year. See Defendants’
18 accompanying Request for Judicial Notice. Further, to establish “wide dissemination”
19 “a work’s degree of commercial success or notoriety must be substantial.” Woodland
20 v. Hill, No. 222CV03930ABMRWX, 2022 WL 19250191, at *3 (C.D. Cal. Dec. 8,
21 2022) (granting motion to dismiss (citing Rice v. Fox Broad. Co., 330 F.3d 1170, 1178
22 (9th Cir. 2003) (plaintiff’s sale of 17,000 copies of video did not establish wide
23 dissemination), *overruled on other grounds by* Skidmore, 952 F.3d 1051, and Art
24 Attacks, 581 F.3d at 1144-45 (plaintiff’s sale of 2,000 t-shirts bearing its artwork did
25 not establish wide dissemination))).

26 Further, “[i]n the context of the Internet, [c]ourts within this Circuit and our
27 sister Circuits have consistently held that the mere availability of a work online is
28 insufficient to establish widespread dissemination.” Woodland, 2022 WL 19250191,

1 at *3 (quoting *Lois v. Levin*, No. 222CV00926SVWADS, 2022 WL 4351968, at *3
 2 (C.D. Cal. Sept. 16, 2022) (availability of plaintiff’s song “through major streaming
 3 platforms including iTunes, Apple Music, Amazon Music, Spotify, Tidal, and
 4 SoundCloud” did not plausibly plead widespread dissemination (gathering cases))).
 5 “Put differently, that a work has the capacity to reach anyone with an internet
 6 connection by virtue of its presence on the worldwide web renders it merely possible,
 7 not reasonably possible, that the alleged infringer viewed that work.” *Id.* (quoting
 8 *Segal*, 2022 WL 198699, at *9); *see also Batts v. Adams*, No. CV 10-8123-JFW
 9 (RZX), 2011 WL 13217923, at *4 (C.D. Cal. Feb. 8, 2011) (possibility of finding a
 10 particular song on the Internet is the modern day equivalent of finding a needle in a
 11 haystack when the defendant is not looking for it and does not know it exists).

12 Courts that have found access by widespread dissemination on the Internet have
 13 relied on truly extensive dissemination on a grand scale. *See, e.g., Tee Turtle, LLC.*
 14 *v. Anhui Leadershow Household Indus. Co.*, No. CV 21-4703-CBM-(EX), 2021 WL
 15 4815018, at *2 (C.D. Cal. June 17, 2021) (widespread dissemination where plaintiff’s
 16 Tik Tok videos featuring its works had been viewed nearly 12,000,000 times and there
 17 had been 1,646,321 sales of its works, which had been extensively marketed, ranked
 18 as a best seller, and received significant media attention). Here, Plaintiff’s allegation
 19 of “many thousands of streams on Spotify and [unstated] streams on YouTube” falls
 20 far short of establishing widespread dissemination making it reasonable to infer
 21 Plaintiff’s work was heard by *Better*’s creators.

22 **(iii) Plaintiff Still Just Speculates That the Creators of *Better***
 23 **Might Have Received Plaintiff’s Work**

24 Accordingly, to avoid dismissal for failure to plausibly plead access, Plaintiff
 25 is left with “establishing a chain of events linking the plaintiff’s work and the
 26 defendant’s access....” *Loomis*, 836 F.3d at 995. A chain-of-events access theory
 27 requires “a nexus” between (1) a person with possession of the plaintiff’s work and
 28 (2) the individuals who created the allegedly infringing work. *Loomis*, 836 F.3d at

1 995-96. That nexus must be a “close relationship” with the individual creators (*id.*
2 (quoting *Towler v. Sayles*, 76 F.3d 579, 582–83 (4th Cir. 1996))), such as “a supervisor
3 with responsibility for the defendant’s project, [or someone who] was part of the same
4 work unit as the copier, or contributed creative ideas or material to the defendant’s
5 work.” *Loomis*, 836 F.3d at 995 (quoting *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586
6 F. Supp. 1346, 1355-56 (C.D. Cal. 1984)).

7 Here, Plaintiff has stayed with its initial Complaint’s allegations that MMM’s
8 Rindner agreed to “promote” Plaintiff’s work and send it to “every [unidentified]
9 person on [Rindner’s] contact list that works in the music industry...,” and that
10 Rindner later stated he had “worked [Plaintiff’s work]” but had no idea whether the
11 creators of *Better* used it. FAC at 8-9 ¶¶ 29-30. Plaintiff then simply concludes, *upon*
12 *unstated information and belief*, that the creators of *Better* somehow, in an unstated
13 way, “became aware of [Plaintiff’s work] by and through MMM.” *Id.* at 9 ¶ 31. Of
14 course, alleging access on information and belief “is wholly inadequate since it fails
15 to provide any actual facts to allow the Court to infer that any Defendant had access
16 to Plaintiff’s designs.” *Klauber Bros., Inc. v. QVC, Inc.*, No. 1:19-CV-09321, 2020
17 WL 7029088, at *9 (S.D.N.Y. Nov. 30, 2020) (complaint dismissed without leave to
18 amend where plaintiff plausibly pleaded other elements but alleged access on
19 information and belief).

20 Moreover, Plaintiff still fails to allege any nexus between *Better*’s creators and
21 any promotion by MMM. For example, there is no allegation that MMM provided
22 Plaintiff’s work to *Better*’s creators or to anyone with a “close relationship” with them.
23 *Loomis*, 836 F.3d at 995-96 (quoting *Towler*, 76 F.3d at 582–83). While there also is
24 no allegation that MMM provided Plaintiff’s work to anyone at Sony Music
25 Entertainment, access cannot be shown by “‘bare corporate receipt’ of [a plaintiff’s]
26 work by an individual who shares a common employer with the alleged copier.”
27 *Loomis*, 836 F.3d at 995-96 (quoting *Bernal v. Paradigm Talent & Literary Agency*,
28 788 F. Supp. 2d 1043, 1056 (C.D. Cal. 2010)).

1 Plaintiff's failure to allege factual content establishing that a person with
2 Plaintiff's work was involved in the creation of *Better* is a fatal flaw in Plaintiff's
3 claims. For example, in *Loomis* the plaintiff provided his recording to an artist and
4 repertoire ("A&R") representative at the record company that released the allegedly
5 infringing recording and whose job was to "'find' and 'share' music." However, there
6 was no evidence that the representative was involved in the defendant songwriters'
7 creation of that recording, and the plaintiff's "mere speculation" that the
8 representative might have been involved was insufficient to defeat summary
9 judgment. *Id.* at 995-96; *see also Rice*, 330 F.3d at 1178 (alleged statement by
10 defendant's talent agent that he liked plaintiff's video insufficient to establish talent
11 agent's client had access to video).

12 District Courts have repeatedly dismissed complaints when, as here, the
13 plaintiff relies on speculation that its work might have found its way to the creators of
14 the allegedly infringing work. *See, e.g., Klauber Bros., Inc. v. P.J. Salvage*, No.
15 CV185470MWFJPRX, 2018 WL 6984817, at *4 (C.D. Cal. Oct. 30, 2018)
16 (allegations that defendants could have learned of plaintiff's designs by visiting
17 plaintiff's showroom, through third parties, or by sales to the public, insufficient and
18 speculative; motion to dismiss granted); *Evans v. Warner Bros. Entm't Inc.*, No. CV
19 18-3951-DSF (ASX), 2018 WL 6133660, at *3 (C.D. Cal. Sept. 17, 2018) (allegation
20 that plaintiff's book given to two actors failed to plausibly plead that producer
21 received book; action dismissed with prejudice); *Schkeiban v. Cameron*, No. CV 12-
22 0636-R (MANX), 2012 WL 12895721, at *1 (C.D. Cal. July 20, 2012) (allegation that
23 plaintiff gave work to person who supposedly gave it to defendant insufficient where
24 plaintiff failed to allege relationship between that person and defendant); *see also*
25 *Klauber Bros., Inc. v. City Chic Collective Ltd.*, No. 22-1743-MWF (MRWX), 2022
26 WL 17184799, at *6 (C.D. Cal. Aug. 26, 2022) (allegations that plaintiff provided its
27 designs to its "authorized distributors" "do not demonstrate that ... its designs were
28 ///

1 readily available to *the particular Defendants*” who allegedly copied it (emphasis in
2 original)).

3 Nor may Plaintiff avoid dismissal by arguing that discovery might confirm his
4 speculation that the creators of *Better* received Plaintiff’s work. But that is just more
5 speculation. Further, after *Iqbal* and *Twombly*, courts no longer “retain discretion to
6 permit discovery whenever a plaintiff has failed to satisfy Rule 8’s plausibility
7 standard....” *Mujica*, 771 F.3d at 593 n.7. The simple fact—confirmed by Plaintiff’s
8 failure to amend its access allegations in its initial Complaint—is that Plaintiff has
9 improperly sued without an actual basis to allege that Defendants somehow learned
10 of its work.

11 Plaintiff’s failure to plead, let alone plausibly plead, that the individuals who
12 created *Better* had access to Plaintiff’s work dooms the first claim for direct copyright
13 infringement. Further, “[i]t is well-established that ‘[s]econdary liability for copyright
14 infringement does not exist in the absence of direct infringement....’” *UMG*
15 *Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1031 (9th Cir. 2013)
16 (quoting *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)). As
17 a result, Plaintiff’s second and third claims for contributory and vicarious
18 infringement claims fail for lack of a direct infringement claim.

19 Accordingly, the Motion to Dismiss should be granted and Plaintiff’s First
20 Amended Complaint dismissed, without leave to amend.

21 **3. IF NOT DISMISSED FOR LACK OF ACCESS, THE CLAIMS ARE**
22 **PROPERLY DISMISSED ON ADDITIONAL GROUNDS**

23 While Plaintiff’s inability to plead access—let alone plausibly plead access—
24 is dispositive, there are additional defects in the First Amended Complaint.

25 **(a) Plaintiff’s Allegations of Substantial Similarity Are Conclusory**

26 To plead the required element that copying occurred, a plaintiff must not only
27 plead access but also “substantial similarities that are probative of copying.” *Malibu*
28 *Textiles*, 922 F.3d at 952. To plead substantial similarities probative of copyright, the

1 complaint must allege “similarities one would not expect to arise if the two works had
2 been created independently.” Rentmeester, 883 F.3d at 1117.

3 Also, to plead copyright infringement the plaintiff must allege substantial
4 similarities in “protected elements of the plaintiff’s work.” Rentmeester, 883 F.3d at
5 1117. A two-part analysis is applied, consisting of an “extrinsic test” and an “intrinsic
6 test.” Skidmore, 952 F.3d at 1064. “The extrinsic test assesses the objective
7 similarities of the two works, focusing only on the protectable elements of the
8 plaintiff’s expression.” Rentmeester, 883 F.3d at 1118. Rule 12(b)(6) dismissal of a
9 case is appropriate if the claimed similarities are not in protected expression under the
10 extrinsic test. Id. at 1123 (affirming Rule 12(b)(6) dismissal for failure to plead
11 substantial similarity in protected expression).

12 Here, Plaintiff’s initial Complaint does not *identify* any musical notes, lyrics, or
13 other claimed similarities between Plaintiff’s work and *Better*. Instead, Plaintiff just
14 relied on conclusory references to “numerous significant compositional elements,”
15 “essential compositional and other elements,” “essential compositional elements,” and
16 “essential, distinctive, and recognizable elements [and] signature elements....”
17 Complaint at 7 ¶ 24, 8-9 ¶ 29, 12 ¶ 54, and 15 ¶ 68. After agreeing to amend, Plaintiff
18 identifies only one claimed similarity, namely the word “fight” in Plaintiff’s lyric
19 “fight anymore” and *Better*’s lyric “why wait to fight.” FAC at 8:1-3. And rather
20 than alleging any claimed similarity in musical notes or other musical elements,
21 Plaintiff refers to unidentified similarities in melody, chord progressions and the
22 timing of their chord changes, rhythm, “enunciation of lyrical elements,” and “soul.”
23 FAC at 7-8 ¶¶ 24-27. These allegations do not plead substantial similarity probative
24 of copying, let alone substantial similarity in protected expression.

25 First, bare references to melody and other musical terms without identifying
26 any claimed similarities are insufficient because a plaintiff must plead “more than
27 labels” and “give the defendant fair notice of what the ... claim is and the grounds
28 upon which it rests.” Twombly, 550 U.S. at 570 (citations omitted). Further, Plaintiff’s

1 references to musical elements do not establish substantial similarity in protected
2 expression because those musical elements are not themselves protected as a matter
3 of law. Plaintiff refers to unidentified similarity in melody, but melodies of three or
4 four notes, and perhaps up to seven notes, are not protected by copyright. *Skidmore*,
5 952 F.3d at 1071. As a result, incanting “melody” establishes nothing. Nor does
6 copyright protect chord progressions (*Gray v. Hudson*, 28 F.4th 87, 100 (9th Cir.
7 2022)) or rhythm (*id.* at 98-99; *see, also Batiste v. Najm*, 28 F. Supp. 3d 595, 616
8 (E.D. La. 2014) (“courts have been consistent in finding rhythm to be unprotectable”);
9 *Morrill v. Stefani*, 338 F. Supp. 3d 1051, 1060 (C.D. Cal. 2018) (“the use of a long-
10 short-long rhythm is too general to be protectable”)). The “enunciation of lyrics”—
11 that is, how a singer sings lyrics—is a performance element that is not protected by
12 the composition copyright that Plaintiff alleges was infringed. *Newton v. Diamond*,
13 388 F.3d 1189, 1194 (9th Cir. 2004) (how the plaintiff played flute and sang are
14 “performance elements” not protected by plaintiff’s musical composition copyright);
15 *Gray*, 28 F.4th at 99 (choice of instrument to play a song not protected by composition
16 copyright).² “Soul,” whatever that may mean, also is not protected by copyright. *See*,
17 *e.g., Gray*, 28 F.4th at 100 (no copyright protection in “musical texture”).

18 Finally, as to the one claimed similarity that Plaintiff *does* identify, the lyric
19 “fight anymore” is not substantially similar to the lyric “why wait to fight” and, in any
20 event, “[i]t is axiomatic that copyright law denies protection to ‘fragmentary words
21 and phrases’” *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1384 (Fed. Cir. 2007)
22 (quoting *CMM Cable Rep, Inc. v. Ocean Coast Props.*, 97 F.3d 1504, 1519 (1st Cir.
23

24 ² A *sound recording* copyright may protect against the incorporation of “the
25 actual sounds fixed in [a] sound recording.” 17 U.S.C. § 114(b). But Plaintiff claims
26 the alleged “copying of numerous significant *compositional elements* of” its work.
27 *FAC* at 6:12-13 (emphasis added); *see also id.* at 11 ¶ 39; *VMG Salsoul, LLC v.*
28 *Ciccone*, 824 F.3d 871, 877 (9th Cir. 2016) (“Sound recordings and musical
compositions are separate works with their own distinct copyrights.” (quoting
Erickson v. Blake, 839 F. Supp. 2d 1132, 1135 n.3 (D. Or. 2012))).

1 1996); *see also Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) (no copyright
 2 protection in admittedly copied phrases “river wound its way between muddy banks
 3 crawling with alligators,” “hordes of gold seekers,” “shanties and corrugated
 4 [iron/steel] shacks . . . were crowded together” and “beach was strewn with boxes,
 5 bales”); Copyright Office & Procedures, 37 C.F.R. § 202.1(a) (“[w]ords and short
 6 phrases” are not copyrightable); 1 NIMMER ON COPYRIGHT § 2.01[B][3] (“Cases also
 7 deny protection to fragmentary words or phrases”).

8 Plaintiff fails to identify the claimed similarities, and conclusory references to
 9 musical terms does not “give the defendant fair notice of what the . . . claim is and the
 10 grounds upon which it rests.” *Twombly*, 550 U.S. at 570. For this additional and
 11 independent reason, the Motion to Dismiss the claim for direct copyright
 12 infringement, and with it Plaintiff’s claims for contributory and vicarious copyright
 13 infringement (*see above* at 12:11-16), is properly granted.

14 **(b) Plaintiff’s Claims for Direct and Secondary Liability**

15 There are fundamental and important differences among direct copyright
 16 infringement, contributory infringement, and vicarious infringement. Yet Plaintiff,
 17 despite amending, once again improperly sues all defendants for all three claims and
 18 also fails to plead the elements of the latter two claims.

19 **(1) Defendants Cannot Be Both Directly and Secondarily Liable**

20 A direct copyright infringement claim is based on pleading, *inter alia*, “that the
 21 alleged infringers violated at least one exclusive right granted to copyright holders
 22 under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th
 23 Cir. 2017) (“*Giganews*”) (quoting *Napster*, 239 F.3d at 1013). Plaintiff’s first claim
 24 for relief is labeled as direct copyright infringement, “Against All Defendants” (FAC
 25 at 11:5-7), and alleges that all defendants have directly infringed Plaintiff’s claimed
 26 exclusive rights of “reproduction, distribution, performance, display, and creation of
 27 derivative work[s]” (*id.* at 11 ¶¶ 39-40).

28 ///

1 But Plaintiff also sues “All Defendants” for contributory and vicarious
2 infringement. *Id.* at 13:22-24, 16:14-16. Those are secondary liability claims that
3 require a “direct infringement by a third party.” *Napster*, 239 F.3d at 1013 n.2. As a
4 result, a defendant allegedly liable for contributory or vicarious infringement cannot
5 be directly liable for the same infringement. *See, e.g., Sound & Color, LLC v. Smith*,
6 No. 222CV01508ABASX, 2023 WL 2821881, at *16 (C.D. Cal. Feb. 28, 2023) (“a
7 defendant cannot be secondarily liable for their own direct infringement”); *Smith v.*
8 *Weeknd*, No. CV 19-2507 PA (MRWX), 2019 WL 6998666, at *3 (C.D. Cal. Aug.
9 23, 2019) (same).

10 In addition, Plaintiff not only impermissibly sues all defendants on all three
11 claims but also specifically alleges *in its first claim for direct infringement* that all
12 defendants “had the right and ability to control other infringers and have derived an
13 extreme financial benefit ... such that *Defendants must be found vicariously liable to*
14 *Plaintiff.*” FAC at 12 ¶ 48 (emphasis added). That allegation alone negates Plaintiff’s
15 claim for direct infringement because a defendant cannot be both directly and
16 vicariously liable for the same infringement.

17 In addition, “[l]iability is personal.... The Rules of Civil Procedure set up a
18 system of notice pleading [and e]ach defendant is entitled to know what he or she did
19 that is asserted to be wrongful.” *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th
20 Cir. 2013). But Plaintiff—by asserting its claim for direct infringement, as well as its
21 secondary liability claims, “Against All Defendants”—fails to give each “defendant
22 fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550
23 U.S. at 555 (citation omitted); *see also Yoakam v. Warner Music Grp. Corp.*, No.
24 221CV01165SVWMAA, 2021 WL 3774225, at *10 (C.D. Cal. July 12, 2021) (“[A]
25 complaint based on a theory of collective responsibility must be dismissed” (quoting
26 *Bank of America*, 725 F.3d at 818)). Since a defendant cannot be both directly and
27 secondarily liable, Plaintiff leaves each defendant to guess the alleged infringements

28 ///

1 for which he or it is supposedly directly liable and the alleged infringements for which
2 he or it is supposedly secondarily liable.

3 Rule 8 and caselaw interpreting it require more and, accordingly, Plaintiff fails
4 to plead its first claim for direct copyright infringement.

5 **(2) Plaintiff Fails to Plead Contributory Infringement**

6 Contributory copyright infringement is “a form of secondary liability” and
7 applies if a defendant “(1) has knowledge of another’s infringement and (2) either (a)
8 materially contributes to or (b) induces that infringement.” Giganews, 847 F.3d at
9 670 (quoting Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 795 (9th Cir.
10 2007)). Importantly, conclusory allegations are insufficient to state a claim for
11 contributory copyright infringement. Luvdarts, LLC v. AT & T Mobility, LLC, 710
12 F.3d 1068, 1072 (9th Cir. 2013) (Rule 12(b)(6) dismissal affirmed); *see also* Cobbler
13 Nevada, LLC v. Gonzales, 901 F.3d 1142, 1148 (9th Cir. 2018) (Rule 12(b)(6)
14 dismissal affirmed where plaintiff’s allegations failed to establish that supposed
15 contributory infringer “actively encourage[ed] (or induc[ed]) infringement through
16 specific acts” (citation omitted)).

17 Plaintiff’s second claim is for contributory infringement and asserted “Against
18 All Defendants,” but the claim incorporates all prior allegations, including Plaintiff’s
19 allegations that “All Defendants” are direct infringers. FAC at 13 ¶ 53. Moreover,
20 the body of Plaintiff’s contributory infringement claim is largely a cut-and-paste
21 repeating verbatim the first claim for direct infringement. *Compare id.* at 11-13 ¶¶
22 40-52 *with id.* at 13-16 ¶¶ 54-56, 59-68. None of those paragraphs even purport to
23 allege the elements of contributory infringement.

24 As for the two paragraphs in the second claim that Plaintiff added to those
25 Plaintiff copied from the first claim, they are limited to the following:

26 “57. Defendants actively participated in or subsequently ratified
27 and adopted, or both, each and all of the acts or conduct alleged herein
28 with full knowledge of each and every violation of Plaintiff’s rights.”

1 “58. By and through MMM and Rindner’s distribution of the
2 Original Work to Defendants, Defendants knew and or had reason to
3 know that the Infringing Work derived from the Original Work.
4 Notwithstanding this knowledge, Defendants continued to exploit the
5 Original Work in creating, producing, performing, and distributing the
6 Infringing Work.”

7 *Id.* at 14 ¶¶ 57-58. These added paragraphs do not save Plaintiff’s claim for
8 contributory infringement. First, neither paragraph includes the required allegations
9 establishing that a defendant materially contributed to or induced another’s
10 infringement. *See Giganews*, 847 F.3d at 670. Second, Plaintiff’s allegations that all
11 defendants “participated in” the alleged infringement and “continue[] to exploit the
12 Original Work in creating, producing, performing, and distributing the Infringing
13 Work” are direct infringement allegations that negate, rather than plead, contributory
14 liability. *See, e.g., Sound & Color*, 2023 WL 2821881, at *16 (granting Rule 12(b)(6)
15 motion to dismiss claim for contributory copyright infringement based on conclusory
16 allegations and without identifying the defendants allegedly contributorily rather than
17 directly liable); *Smith*, 2019 WL 6998666, at *3 (same).

18 In addition, these allegations are conclusory and “conclusory allegations ... are
19 plainly insufficient” to state a claim for contributory infringement. *Luvdarts*, 710 F.3d
20 at 1072 (Rule 12(b)(6) dismissal affirmed). For example, to state a claim for
21 contributory infringement a plaintiff must allege facts plausibly establishing the
22 defendant’s “‘actual knowledge of specific acts of infringement’ [that] is required for
23 contributory infringement liability.” *Id.* (quoting *Napster*, 239 F.3d at 1021). Here,
24 Plaintiff argues only that all defendants “knew or had reason to know” of the alleged
25 infringement because, Plaintiff alleges, MMM agreed to promote Plaintiff’s work.
26 FAC at 14:12-14. But since “actual knowledge” is required, an alleged “reason to
27 know” is not sufficient to plead contributory infringement.

28 ///

1 As for actual knowledge of the claimed infringement, Plaintiff relies on (1) its
2 conclusory allegation on information and belief that defendants learned of *Plaintiff's*
3 *work* because Rindner undertook to promote it, and (2) the conclusory assertion that
4 defendants also knew of *the alleged infringement*. But actual knowledge of an alleged
5 infringement is not established by actual knowledge of the plaintiff's work. *Luvdarts*,
6 710 F.3d at 1072-73 (plaintiff's allegation that it notified the defendants of the alleged
7 infringement insufficient where plaintiff's notices only listed its works). Plaintiff's
8 conclusory allegation that defendants somehow knew of the alleged infringement does
9 not plead "the requisite specific knowledge of infringement." *Id.* at 1072.

10 Adding to these defects, Plaintiff's contributory infringement claim as to "All
11 Defendants" fails to notify each defendant of the identity of the alleged direct infringer
12 that he or it supposedly induced or helped to infringe, and how he or it supposedly
13 induced or helped that unidentified alleged direct infringer to infringe. As a result,
14 Plaintiff fails to give each "defendant fair notice of what the ... claim [against him or
15 it] is and the grounds upon which it rests." *Twombly*, 550 U.S. at 570.

16 Plaintiff again fails to plead a claim for contributory infringement.

17 (3) Plaintiff also Fails to Plead Vicarious Infringement

18 Plaintiff's third and last claim incorporates all prior allegations but is for
19 vicarious contributory copyright infringement. FAC at 16:14-18. "Vicarious
20 copyright liability is an 'outgrowth' of respondeat superior [and] requires that the
21 defendant had both the (1) 'right and ability to supervise the infringing activity' and
22 (2) 'a direct financial interest' in the activity." *Luvdarts*, 710 F.3d at 1071 (quoting
23 *Napster*, 239 F.3d at 1022). Conclusory allegations also are insufficient to state a
24 claim for vicarious copyright infringement. *Id.* at 1071-72.

25 Once again, Plaintiff asserts this secondary theory of liability against all
26 defendants, even though Plaintiff alleges they all are direct infringers, and without any
27 facts supporting that any particular defendants are vicariously liable for another's
28 alleged infringements. Also, Plaintiff's vicarious infringement claim simply repeats

1 verbatim its first claim’s allegations. *Compare* FAC at 11-13 ¶¶ 39-52 *with id.* at 16-
2 18 ¶¶ 70-82. That includes repeating verbatim the first claim’s allegation that:

3 “78. Defendants had the right and ability to control each other as
4 well as other infringers and have derived an extreme financial benefit
5 from the continued infringement alleged herein, including that
6 infringement Defendants failed to control, such that Defendants must be
7 found vicariously liable to Plaintiff.”

8 FAC at 17-18 ¶ 78 (identical to *id.* at 12 ¶ 48). But that is just “a formulaic recitation
9 of the elements of a cause of action [and] will not do.” *Twombly*, 550 U.S. at 555.

10 Thus, the first requirement for vicarious liability is that the defendant has the
11 “right and ability to supervise the infringing activity....” *Luvdarts*, 710 F.3d at 1071
12 (quoting *Napster*, 239 F.3d at 1022). But Plaintiff merely alleges that “All
13 Defendants” “had the right and ability to control each other as well as other
14 [unidentified] infringers....” That conclusory allegation is insufficient and Plaintiff’s
15 failure to allege facts establishing that each Defendant had “a capacity to supervise
16 [allegedly infringing activity] is fatal to [the] claim of vicarious liability.” *Id.* at 1072.

17 The second requirement for vicarious liability is that the defendant had “‘a
18 direct financial interest’ in the activity.” *Id.* at 1071 (citation omitted). Alleging a
19 “direct” financial interest requires allegations establishing “a causal link between the
20 infringing activities and a financial benefit to” the vicariously liable defendant.
21 *Giganews*, 847 F.3d at 673. Yet Plaintiff merely offers the conclusory allegation that
22 defendants “have derived an extreme financial benefit from the continued
23 infringement alleged herein.” FAC at 17-18 ¶ 78.

24 Also, and once again, Plaintiff, by referring only to all defendants, fails to
25 provide each defendant any notice, let alone “fair notice,” of alleged infringement the
26 defendant is supposedly vicariously liable for, and “the grounds upon which [that
27 claim against that defendant] rests.” *Twombly*, 550 U.S. at 570.

28 As a result, Plaintiff also again fails to plead a claim for vicarious infringement.

1 (c) **Plaintiff’s Prayer Seeks Relief Not Available as a Matter of Law**

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

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

9 (2) **The Prayer for a Judicial Declaration of Infringement Asserts**
10 **an Unpleaded Claim That Is Duplicative of the Pleaded Claims**

11 The First Amended Complaint includes a prayer for “a judicial determination
12 and Declaration to the effect that Defendants have infringed the copyrighted work
13 alleged herein, ‘Somebody Tonight,’ in violation of the Copyright Act.” FAC at 19 ¶
14 A. But Plaintiff does not allege a claim for declaratory relief and, in any event, a
15 judicial declaration that “is entirely commensurate with the relief sought through
16 [Plaintiff’s] copyright infringement claim [is] duplicative and unnecessary.” *See, e.g.,*
17 Woodland, 2022 WL 19250191, at *5 (claim for declaration of alleged infringement
18 dismissed; “District courts dismiss declaratory judgment claims as unnecessary when
19 there are adequate forms of remedy at law available.” (gathering cases)). Accordingly,
20 Plaintiff’s prayer for declaratory relief is properly dismissed.

21 (3) **The Prayer Improperly Requests Compensatory and Special**
22 **Damages in Addition to Section 504(b) Damages**

23 After praying for “[a]n award of damages against Defendants pursuant to 17
24 U.S.C. § 504(b), including actual damages and disgorgement of profits reaped by
25

26 _____
27 ³ If the Court determines that a Rule 12(f) motion to strike is the proper procedure
28 to challenge Plaintiff’s prayer, Defendants’ Motion seeks that relief in the alternative.
See Defendants’ Notice of Motion & Motion at 2-3; *see below* at 24.

1 Defendants,” Plaintiff’s First Amended Complaint goes on to also pray for
 2 “[c]ompensatory and special damages according to proof offered and made at the time
 3 of trial.” FAC at 19 ¶¶ D-C. However, and aside from the fact that Plaintiff nowhere
 4 pleads special damages, “[t]he remedies for infringement ‘are only those prescribed
 5 by Congress.’” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431
 6 (1984) (quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)). And the damages
 7 recoverable for alleged copyright infringement are limited to those specified in
 8 Section 504. 17 U.S.C. § 504; *see, e.g., Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*,
 9 329 F.3d 923, 931 (7th Cir. 2003) (the Copyright Act “contains no provision for
 10 punitive damages” and, as result, they are not recoverable).⁴

11 Accordingly, Plaintiff’s prayer for compensatory and special damages beyond
 12 Section 504(b) damages is properly dismissed for failure to state a claim or,
 13 alternatively, duplicative of the prayer for Section 504(b) damages.

14 **4. IF THE ACTION IS NOT DISMISSED, THE MOTION TO STRIKE**
 15 **SHOULD BE GRANTED**

16 **(a) The Standards Governing the Rule 12(f) Motion to Strike**

17 “Under Rule 12(f), the Court may strike ‘any ... redundant, immaterial, [or]
 18 impertinent ... matter.’” *California Cap. Ins. Co. v. Maiden Reinsurance N. Am., Inc.*,
 19 472 F. Supp. 3d 754, 761 (C.D. Cal. 2020) (quoting Fed. R. Civ. P. 12(f); noting
 20 motions to strike are generally disfavored but granting motion to strike alleged tort
 21

22 ⁴ Plaintiff does not pray for statutory damages under Section 504(c) or attorney’s
 23 fees under Section 505 because Plaintiff did not register the allegedly infringed
 24 copyright until after the alleged infringement began. *See* 17 U.S.C. § 412; *Por Los*
 25 *Rios, Inc. v. Lions Gate Entm’t, Inc.*, No. 2:13-CV-7640-CBM-PLA, 2014 WL
 26 12605374, at *2 (C.D. Cal. May 21, 2014) (granting Rule 12(b)(6) motion to dismiss
 27 request for attorneys’ fees where alleged infringements commenced prior to
 28 registration of allegedly infringed copyrights). Because registration is a precondition
 only for the party alleging infringement to recover attorneys’ fees, Plaintiff’s failure
 to timely register does not bar Defendants from seeking from Plaintiff the attorneys’
 fees they incur in this action. *See, e.g.,* 2 NIMMER ON COPYRIGHT § 7.16[C][1][a][iii].

1 remedies under claim for breach of implied covenant of good faith and fair dealing).
 2 “[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and
 3 money that must arise from litigating spurious issues by dispensing with those issues
 4 prior to trial.” *Id.* (quoting *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th
 5 Cir. 1983)).

6 “Redundant matter is defined as including a needless repetition of allegations.”
 7 *Nguyen v. CTS Elecs. Mfg. Sols. Inc.*, 301 F.R.D. 337, 342 (N.D. Cal. 2014).

8 “Immaterial matter is that which has no essential or important relationship to the claim
 9 for relief or the defenses being plead.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d
 10 970, 974 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th
 11 Cir. 1993), *rev’d on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)).

12 “Impertinent matter consists of statements that do not pertain, and are not necessary,
 13 to the issues in question.” *Whittlestone*, 618 F.3d at 974 (quoting 5A C.A. WRIGHT &
 14 A.R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1382, at 706-07 (1990)).

15 (b) **The Allegations that Plaintiff Has Not Received Credit and an**
 16 **Interest in the Allegedly Infringing Better Are Properly Stricken**

17 Plaintiff’s initial Complaint repeatedly alleged that “Plaintiff has received no
 18 songwriter credit for, nor any copyright ownership interests in, any of the exploitations
 19 of “Better” or in the Infringing Work.” *See, e.g.*, Complaint at 11 ¶ 41. In the Local
 20 Rule 7-3 pre-filing process, Defendants raised that “[c]opyright . . . is a creature of
 21 statute, and the only rights that exist under copyright law are those granted by statute.”
 22 *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 883–84 (9th Cir. 2005). And the
 23 remedies the Copyright Act grants for copyright infringement do not include giving
 24 the plaintiff credit or an ownership interest in the defendant’s work. 17 U.S.C. §§
 25 502-05; *see, also*, *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) (failure to
 26 accord the copyright plaintiff credit is not copyright infringement); *Smith*, 2019 WL
 27 6998666, at *5 (C.D. Cal. Aug. 23, 2019) (“[N]o Ninth Circuit case has allowed the
 28 owner of the alleged underlying work to sue for a declaration that the original creator

1 is an owner or author of the allegedly infringing derivative work”). As a result, the
 2 initial Complaint’s repeated allegations that Plaintiff has not received credit and an
 3 interest in *Better* are redundant, immaterial, and impertinent, as those terms have been
 4 defined by the courts.

5 Now, Plaintiff’s First Amended Complaint repeats the same allegation that
 6 Plaintiff has been denied songwriter credit and an interest in *Better*, but this time adds,
 7 “demonstrating Defendants’ willful intention to violate Plaintiff’s copyright
 8 interests.” FAC at 12 ¶ 46, 15 ¶ 62, and 17 ¶ 76. But that is argument, and willfulness
 9 is relevant to statutory damages, which Plaintiff does not and cannot seek. 17 U.S.C.
 10 § 504(c)(2); *see above* at 22 n.4. In addition, Plaintiff’s argument is nonsensical
 11 because the fact he has not been credited or given an interest in *Better* does not prove
 12 the alleged infringement is willful since it also is completely consistent with a lack of
 13 knowledge of Plaintiff’s work as well as a reasonable belief there is no infringement.
 14 *See, e.g., Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1229 (9th
 15 Cir. 2012) (continued use of allegedly infringing work not willful where reasonable
 16 belief work not infringing); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir.
 17 2001) (“To hold that willfulness must be inferred whenever an alleged infringer uses
 18 an intellectual property in the face of disputed title would turn every copyright claim
 19 into willful infringement”).

20 Accordingly, the First Amended Complaint’s paragraphs 46, 62, and 76 are
 21 properly stricken as redundant, immaterial, and impertinent.

22 (c) **If Not Dismissed, the Prayer’s References to Declaratory Relief and**
 23 **Compensatory and Special Damages Should Be Stricken**

24 Plaintiff’s claims for declaratory relief and compensatory and special damages
 25 are properly dismissed pursuant to Rule 12(b)(6). *See above* at 21-22. If, however,
 26 the Court determines they are properly reached by a Rule 12(f) motion to strike,
 27 Defendants respectfully submit in the alternative that they should be stricken as
 28 redundant, immaterial, or impertinent.

1 **5. CONCLUSION**

2 Plaintiff's First Amended Complaint repeats its initial Complaint's access
3 allegations, and those allegations impermissibly rely on speculation and conjecture
4 and clearly and unequivocally fail to plead that the individuals who created *Better* had
5 a reasonable possibility to hear Plaintiff's work. For that reason alone, Defendants'
6 Motion to Dismiss should be granted, without leave to amend.

7 If for any reason that Motion is not granted without leave to amend, Defendants
8 respectfully submit that Plaintiff's direct, contributory, and vicarious copyright
9 infringement claims, as well as Plaintiff's prayers for declaratory relief and
10 compensatory and special damages, are properly dismissed or, in the alternative,
11 stricken along with Plaintiff's allegations that it has not been provided credit or an
12 ownership interest in *Better*.

13

14 Dated: January 2, 2024

/s/ Peter Anderson

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