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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 MELISSA JEFFERSON, professionally
14 known as LIZZO, an individual,

15 *Plaintiff,*

16 v.

17 JUSTIN RAISEN, an individual,
18 JEREMIAH RAISEN, an individual,
19 HEAVY DUTY MUSIC PUBLISHING,
20 YVES ROTHMAN, and DOES 1-10,

21 *Defendants.*

22 JUSTIN RAISEN, an individual,
23 JEREMIAH RAISEN, an individual,
24 HEAVY DUTY LLC (erroneously sued
25 as HEAVY DUTY MUSIC
26 PUBLISHING), and JUSTIN “YVES”
27 ROTHMAN, an individual,

28 *Counterclaimants,*

v.

MELISSA JEFFERSON, professionally
known as LIZZO, an individual, ERIC
FREDERIC, an individual, JESSE ST.
JOHN GELLER, an individual,
STEVEN CHEUNG, an individual, and
ROES 1-10

Counterdefendants.

Case No.
2:19-cv-09107-DMG-MAA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS
DEFENDANTS AND
COUNTERCLAIM PLAINTIFFS’
SECOND COUNTERCLAIM FOR A
DECLARATION OF CO-
OWNERSHIP IN “TRUTH HURTS,”
AND THIRD THROUGH FIFTH
COUNTERCLAIMS FOR
ROYALTIES AND OTHER RELIEF
RELATED TO SUCH
DECLARATION AND MOTION TO
STRIKE AFFIRMATIVE
DEFENSES DEVOID OF FACTUAL
SUPPORT**

Judge: Hon. Dolly M. Gee
Date: May 15, 2020
Time: 9:30 a.m.
Courtroom: 8C

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1 Plaintiff Melissa Jefferson, professionally known as Lizzo, respectfully submits
2 this Memorandum of Points and Authorities in support of her Motions to Dismiss and
3 to Strike.

4 **PRELIMINARY STATEMENT**

5 This Court should dismiss Defendants’ opportunistic and legally bankrupt claim
6 for a declaration that Defendants jointly authored and jointly own the musical
7 composition “Truth Hurts.” Defendants’ pleading makes abundantly clear what Lizzo
8 has maintained from the start: neither Justin nor Jeremiah Raisen nor Yves Rothman
9 *had any involvement in* the creation of “Truth Hurts.” In this circumstance, black letter
10 law is clear that Defendants cannot co-own, or seek unjustified credit as co-authors of,
11 “Truth Hurts” – a work they *did not* create.

12 Despite this black letter law, Defendants seek an unwarranted declaration that
13 they co-authored and/or co-own Lizzo’s hit song “Truth Hurts” simply because they
14 claim to have co-authored and to co-own a different purported work, namely an
15 unreleased “demo” titled “Healthy.” The unreleased demo contains a lyrical line – “I
16 just took a DNA test, I’m 100% that bitch” – that these Defendants admittedly *did not*
17 *write*, and which Lizzo chose to sing in a melody which these Defendants *do not claim*
18 *to have created*. Defendants nevertheless claim to co-own and to have co-authored
19 “Truth Hurts” because Lizzo also chose to sing that line, in that melody, in her song
20 “Truth Hurts” too.

21 Defendants are wrong that they can co-own “Truth Hurts” because (1)
22 Defendants allegedly co-own the unreleased demo and (2) “Truth Hurts” contains the
23 same DNA test line and melody as contained in that unreleased work. The Ninth
24 Circuit rejected that misguided theory 30 years ago. As the Ninth Circuit made clear in
25 *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir. 1990), a party’s alleged joint
26 authorship of a first work does *not* make that party a joint author of a second work that
27 uses material from the first. As both the Ninth and Second Circuits have recognized, it
28 would “eviscerate” fundamental copyright law if new works based upon jointly

1 authored works could be transformed into joint works, regardless of whether there had
 2 been any joint labor on the subsequent version. Because Defendants pleading makes
 3 clear that there was no such joint labor on “Truth Hurts,” Defendants’ Second
 4 Counterclaim for a declaration of co-ownership in “Truth Hurts” fails as a matter of
 5 law and cannot be cured. This Court should therefore dismiss the Second Counterclaim
 6 with prejudice, together with Defendants’ Third through Sixth Counterclaims in so far
 7 as they seek relief ancillary to the Second Counterclaim.

8 Lizzo and Defendants dispute many other aspects of this case, but those disputes
 9 are irrelevant to this Motion to Dismiss. For example, Lizzo disputes that she and the
 10 Raisens and Rothman “co-own” the unreleased demo and the nature and extent of the
 11 Raisens and Rothman’s contributions to that demo.¹ That dispute, however, is not
 12 relevant to this Motion to Dismiss because Defendants cannot co-own “Truth Hurts”
 13 even if they could co-own that prior work.

14 Lizzo and Defendants also dispute whether the supposed similarities between
 15 the unreleased demo and “Truth Hurts” are limited to the DNA test line and its
 16 accompanying melody or extend to other purported similarities that Defendants
 17 contrive in their pleading.² That too is irrelevant. The fundamental flaw in Defendants’

18 _____
 19 ¹ Lizzo contends that neither the Raisens nor Rothman (1) came up with the idea of
 20 including the DNA test line in the unreleased demo; (2) wrote any part of the DNA test
 21 line; or (3) helped Lizzo create the melody in which she chose to sing that line. While
 22 Defendants dispute the first point, contending that Defendant Jeremiah Raisen
 23 “enthusiastically suggested they add [the line] to the song” (Countercl. ¶ 23),
 24 Defendants’ pleading effectively concedes the remaining points. *First*, Defendants
 25 acknowledge that Co-Counterclaim Defendant Jesse Saint John found the DNA test
 26 line on the internet such that neither the Raisens nor Rothman could have written any
 27 part of it. (*Id.*). *Second*, Defendants tellingly do not allege that either the Raisens or
 28 Rothman helped to create the melody; they instead obfuscate and vaguely allege only
 that the melody “was created collaboratively among the participants at the April 11,
 2017 session.” *Id.* ¶ 54(e).

² These purported similarities are contrived and unconvincing. *See, e.g.*, Countercl. ¶
 54(b) (Lizzo generically “vamps” at the beginning of both songs,” but not in the same
 way); ¶ 54(c) (both songs use a “piano-sound,” but not playing the same notes); ¶
 54(d) (Lizzo sings the DNA test line in the second verse of the unreleased demo,
 followed by one specific phrase and Lizzo sings that line in a different verse of “Truth
 Hurts,” followed by a different phrase); ¶ 54(e) (characterizing a commonplace two-
 note sequence as a “distinctive musical phrase”); ¶ 54(f) (claiming that both pieces

1 claim remains the same regardless of Defendants’ attempt to exaggerate the extent of
 2 the supposed similarities between the unreleased demo and “Truth Hurts”: Defendants
 3 cannot jointly author and or jointly own a work they did not create.

4 Finally, Lizzo and the Raisens dispute whether the Raisens waived their claims
 5 when the Raisens, acting through their sophisticated music representatives, expressly
 6 withdrew their claims in multiple writings. (Compl. ¶¶ 24-27). Defendants have
 7 literally nothing to say about this overwhelming written evidence except for a puzzling
 8 denial of knowledge or information sufficient to form a belief regarding this clear
 9 conduct. (Answer ¶¶ 24-27).

10 Lizzo will address and put to bed these other issues at the appropriate stage of
 11 this case. But Defendants’ Second Counterclaim for a declaration that Defendants
 12 allegedly jointly own and jointly authored “Truth Hurts” is ripe for dismissal now.

13 This Court also should strike Defendants’ third, fifth through twelfth, fifteenth,
 14 seventeenth, and nineteenth affirmative defenses because they are pled in a rote,
 15 boilerplate fashion, and are devoid of factual support, whether judged under the “fair
 16 notice” standard that this Court has employed on similar Rule 12(f) motions or under
 17 the plausibility standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and
 18 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and/or are immaterial or impertinent.

19 FACTUAL BACKGROUND

20 **A. Allegations of the Counterclaims**

21 **1. The Parties**

22 Lizzo is a musical artist. Countercl. ¶ 5. In 2017, Lizzo recorded a musical
 23 composition titled “Truth Hurts,” which she then commercially released. *Id.* ¶ 34.
 24
 25

26 “break down” to a capella vocals but admitting that the unreleased demo includes a
 27 drum and thus never features just vocals); ¶ 54(g) (alleging that the vocals in the bridge
 28 sections follow only “almost” the same rhythm). The Counterclaims, finally, falsely
 allege that both pieces have identical structures (*id.* ¶ 54(a)), a contention Lizzo will
 disprove at the appropriate stage of this case.

1 Lizzo is credited as a co-writer of the “Truth Hurts” composition, along with other
2 songwriters who also are named as Counterclaim Defendants in this case. *Id.* ¶¶ 5-8.³

3 Justin Raisen, Jeremiah Raisen, and Yves Rothman are musicians. *Id.* ¶¶ 1-3.
4 Heavy Duty LLC is a music publishing company that owns rights to various musical
5 compositions that the Raisens purport to own. *Id.* ¶ 4.

6 **2. The Counterclaims**

7 Defendants assert five Counterclaims which together seek two different
8 declarations of ownership, along with related ancillary relief, regarding two different
9 purported works: “Truth Hurts” and an unreleased “demo” titled “Healthy” (the
10 “Unreleased Demo”). Defendants seek their two different declarations on two different
11 legal grounds.

12 In their First Counterclaim, Defendants seek a declaration that they co-own the
13 Unreleased Demo with Lizzo and others. Countercl. ¶¶ 56-62. Defendants seek this
14 declaration because the Raisens and Rothman participated with Lizzo in a writing and
15 recording session in April 2017, at which they recorded certain music, including the
16 Unreleased Demo, for potential inclusion in an album that Lizzo was working to
17 release. *Id.* ¶¶ 19, 22, 30. Lizzo has never disputed that she worked on material at
18 Justin Raisen’s studio at that time, and, indeed, she affirmatively alleged this fact in
19 her own claim for relief in this case. Complaint ¶¶ 18, 34. Lizzo, however, disputes (1)
20 that she and the Raisens and Rothman “co-own” the Unreleased Demo; and (2) the
21 nature and extent of the Raisens and Rothman’s contributions to the Unreleased Demo,
22 including with respect to the “I just took a DNA test” line (the “DNA Test Line”) and
23 the melody in which Lizzo sang that line (the “DNA Test Melody”). *Id.* ¶¶ 15, 19;
24 Countercl. ¶ 61.

25
26
27 ³ Defendants lodged their Counterclaims only 21 days ago, and none of these additional
28 Counterclaim Defendants have appeared in the case. Their presence, however, is not
necessary for this Court to resolve the Motion to Dismiss or Motion to Strike.

1 In their Second Counterclaim, Defendants seek a declaration that they co-own
 2 “Truth Hurts,” also along with Lizzo and others. Countercl. ¶¶ 63-69. In contrast to the
 3 disputed allegations regarding the Unreleased Demo, it is undisputed that neither the
 4 Raisens nor Rothman collaborated on the creation of “Truth Hurts.” Indeed,
 5 Defendants *do not allege* that either the Raisens or Rothman participated in the
 6 creation of “Truth Hurts,” and Defendants’ own allegations prove that these
 7 individuals *had no involvement* in this work. Defendants concede in their pleading both
 8 that they heard “Truth Hurts” for the first time only *after* Lizzo commercially released
 9 a recording of that song in September 2017 (*id.* ¶ 37) *and* that they have no personal
 10 knowledge regarding its creation (*id.* ¶¶ 32, 34) (alleging supposed facts about “Truth
 11 Hurts” on information and belief only); Answer ¶ 14 (acknowledging only that
 12 Defendants “are aware that a song called ‘Truth Hurts’ was commercially released”
 13 and denying knowledge or information about the writing and recording of the work.).

14 Given their dispositive allegations, Defendants do not assert co-ownership of
 15 “Truth Hurts” based on any purported collaboration by the Raisens or Rothman on this
 16 work. Instead, Defendants assert ownership of “Truth Hurts” because (1) they
 17 allegedly co-own the Unreleased Demo; and (2) some portions of “Truth Hurts”
 18 allegedly were “derived and copied from” the Unreleased Demo. Countercl. ¶ 37
 19 (“‘Truth Hurts’ was derived and copied from” the Unreleased Demo); ¶ 46 (“Truth
 20 contains some striking similar lyric and musical elements to those in” the Unreleased
 21 Demo); ¶ 65 (“‘Truth Hurts’ was substantially copied from” the Unreleased Demo; ¶
 22 66 (“Truth Hurts is a derivative work of the” Unreleased Demo).⁴

23 _____
 24 ⁴ In addition to seeking a declaration of co-ownership of “Truth Hurts,” the Second
 25 Counterclaim also seeks a declaration that Defendants are entitled to certain royalties
 26 and profits earned from the exploitation of this work, either because (1) as purported
 27 “co-owners” of “Truth Hurts,” Defendants allegedly are entitled to share in the
 28 earnings from that work as a whole (Countercl. ¶¶ 64-65), or (2) as purported co-
 owners of the Unreleased Demo, Defendants allegedly are entitled to some portion of
 Plaintiff’s earnings derived from the use of portions of the Unreleased Demo in “Truth
 Hurts” (*id.* ¶¶ 66). Defendants’ Fourth and Fifth Counterclaims seek, respectively, an
 Accounting and a Constructive Trust covering these same royalties and profits. *Id.* ¶¶
 73-77, 79-82. Defendants’ Third Counterclaim seeks unspecified further relief

LEGAL STANDARDS

To survive this motion to dismiss, Defendant’s Second Counterclaim (and the related Counterclaims seeking ancillary relief) must contain sufficient factual matter, accepted as true, to state claims for relief that are plausible on their face. *Iqbal*, 556 U.S. at 678. Even with this Court accepting Defendant’s factual allegations as true and construing them in the light most favorable to Defendants, *Nayab v. Capital One Bank (USA), N.A.*, 942 F.3d 480, 487 (9th Cir. 2019), this Court should dismiss Defendants’ Second Counterclaim (and the related Counterclaims seeking ancillary relief) because the Counterclaims (1) plead “insufficient facts under a cognizable legal claim” for co-ownership of “Truth Hurts” and/or (2) fail to plead a “cognizable legal theory” of co-ownership of “Truth Hurts.” *SmileCare Dental Grp. v. Delta Dental Plan of California*, 88 F.3d 780, 783 (9th Cir. 1996); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982 (9th Cir. 2017). This Court, moreover, should dismiss these Counterclaims with prejudice because they suffer from fatal defects that make any amendment futile. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1221 (9th Cir. 2020).

This Court should grant Lizzo’s motion to strike because Defendants’ noted affirmative defenses are “insufficient” and/or contain “immaterial [or] impertinent . . . matter.” Fed. R. Civ. P. 12(f). This Court previously has ruled that a court should strike affirmative defenses, like the ones here, that are devoid of facts and fail to give “fair notice” or that have “no possible relation to the controversy,” and which, generally, will cause prejudice. *Agricola Cuyuma SA v. Corona Seeds, Inc.*, 17-cv-8220, 2019 WL 1878353, at *1-2 (C.D. Cal. Feb. 20, 2019); *Schumacher v. Georgia-Pacific Corrugated LLC*, 19-cv-8632, 2019 WL 8013092, at *1-2 (C.D. Cal. Dec. 12, 2019). Other courts have held that affirmative defenses should be stricken if they fail to allege

ancillary to Defendants’ requested declaratory judgments. *Id.* ¶ 71. Plaintiff’s instant Motion to Dismiss seeks the dismissal of Defendants’ Second through Fifth Counterclaims as those counterclaims relate to Defendant’s alleged co-authorship and/or co-ownership of “Truth Hurts.” Plaintiff will seek the dismissal of Defendants’ remaining counterclaims at a later stage of these proceedings.

1 sufficient facts under the *Iqbal/Twombly* plausibility standards. *See, e.g., Vogel v.*
 2 *Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 440-41 (C.D. Cal. 2013)
 3 (The “majority of district courts in this Circuit ... ha[ve] consistently applied *Twombly*
 4 and *Iqbal* to both claims and affirmative defenses.”); *Barnes v. AT&T Pension Ben.*
 5 *Plan*, 718 F. Supp. 2d 1167, 1171-73 (N.D. Cal. 2010) (same); *see also GEOMC v.*
 6 *Calmare Therapeutics Inc.*, 918 F.3d 92, 97 (2d Cir. 2019) (applying *Iqbal/Twombly*
 7 standard to affirmative defenses). Defendants’ affirmative defenses fail under either
 8 standard.

9 ARGUMENT

10 **A. This Court Should Dismiss With Prejudice The Second Counterclaim** 11 **For A Declaration of Co-Ownership In “Truth Hurts” And The Third** 12 **Through Fifth Counterclaims Seeking Relief Ancillary To This** 13 **Declaration**

14 The Court should dismiss Defendants’ Counterclaim for a declaration of co-
 15 ownership in “Truth Hurts” (and the related Counterclaims seeking ancillary relief)
 16 because (1) Defendants’ contention that they co-own “Truth Hurts” because they
 17 allegedly co-own the Unreleased Demo is wrong as a matter of law under controlling
 18 Ninth Circuit precedent and other established law; and (2) Defendants do not allege,
 19 and cannot allege, that either the Raisens or Rothman participated in the creation of
 20 “Truth Hurts,” which is a fundamental element of their co-ownership claim.

21 Accordingly, even if Defendants could establish that they co-own the Unreleased
 22 Demo (and Lizzo contends they cannot), Defendants’ claim to co-own “Truth Hurts”
 23 still would fail as a matter of law and should be dismissed with prejudice.

24 The Ninth Circuit decision in *Ashton-Tate Corp. v. Ross*, 916 F.2d 516 (9th Cir.
 25 1990), forecloses Defendants’ Second Counterclaim because that decision establishes
 26 that a party’s alleged joint authorship of a first work does *not* make that party a joint
 27 author of a second work allegedly derived from the first. *Id.* 522-23. *Ashton-Tate*
 28 involved two software developers, Ross and Wigginton, who allegedly jointly created

1 a computer spreadsheet program (“Program I”). *Id.* at 517. Wigginton later created a
2 new spreadsheet program (“Program II”) whose user interface was “derived
3 substantially from” Program I. *Id.* at 518. Like Defendants here, Ross did not
4 participate in the creation of Program II. He nevertheless contended that he was a joint
5 author of that later work because (1) Ross was an alleged joint author of Program I,
6 which contained the user interface; and (2) Program II’s use of that same user interface
7 made Ross a joint author of Program II as well. *Id.*; *see also id.* at 522. The Ninth
8 Circuit rejected this argument. As the Ninth Circuit explained, “[j]oint authorship in a
9 prior work is insufficient to make one a joint author of a derivative work.” *Id.* at 522
10 (citation omitted); *see also id.* at 523 (“an author of a joint work does not acquire an
11 authorship interest in derivative works that utilize part of the joint work.”).
12 Accordingly, “[e]ven assuming, *arguendo*, that Ross does have a one-half interest in
13 the interface written by Wigginton, it does not follow that Ross is a joint author of
14 [Program II] because its interface is derived from his and Wigginton’s joint work
15 [Program I].” *Id.*

16 In so ruling, *Ashton-Tate* expressly adopted the Second Circuit decision of
17 *Weissmann v. Freeman*, 868 F.2d 1313 (2d Cir.), *cert denied*, 493 U.S. 883 (1989),
18 along with its reasoning (*Ashton-Tate*, 916 F.2d at 522), and *Weissmann* too forecloses
19 Defendants’ claim. In *Weissmann*, two scientists, Weissmann and Freeman, had co-
20 authored various versions of a scientific research paper (“Paper I”). *Id.* at 1315-16.
21 Weissmann published a new research paper (“Paper II”) that “admittedly was derived
22 from” Paper I, in that portions of Paper II “were taken verbatim from” that prior work.
23 *Id.* at 1316. The district court found that Freeman was a joint author of Paper II
24 because Paper II contained material from Paper I. *Id.* at 1317. The Second Circuit
25 reversed, ruling that Freeman was *not* a joint author of Paper II because (1) Freeman
26 “had no hand in [Paper II’s] preparation” and “had not participated in drafting the new
27 matter included in [Paper II],” and (2) copyright law, which affords independent
28 protection to new works derived from old works, would be “eviscerate[d]” if new

1 works “based upon jointly authored works” could be transformed “into joint works,
2 regardless of whether there had been any joint labor on the subsequent version.” *Id.* at
3 1317 (citing 17 U.S.C § 103(b)) and 1318. As the Second Circuit explained, “[e]ven
4 though one co-author has the right to revise a joint work in order to create an
5 individual derivative work, the other co-author acquires no property rights in the newly
6 created work prepared without his involvement.” *Id.* at 1318.

7 District courts have followed *Ashton-Tate* and *Weissmann* to hold that a party’s
8 joint authorship of a first work does *not* make that party a joint author of a second
9 work allegedly derived from the first. *See, e.g., Tilford v. Jones*, 05 Civ. 2989 (EW),
10 2006 WL 2612752 (S.D. Tex. Sept. 11, 2006) (dismissing claim for declaration of
11 ownership in “Song II” allegedly derived from “Song I,” because alleged joint author
12 of Song I was not alleged to have “collaborated in Song II’s creation, which is required
13 to make him a joint author and co-owner of Song II” and “joint authorship in a prior
14 work is insufficient to make one a joint author of a [newly created] derivative work”);
15 *Davis v. Blige*, 419 F. Supp. 2d 493, 501 (S.D.N.Y. 2005), *rev’d on other grounds*, 505
16 F.3d 90 (2007) (dismissing plaintiff’s claim for declaration of ownership in songs that
17 were allegedly “virtually identical” or “substantially similar” to earlier songs that
18 plaintiff had co-authored with defendant’s assignor because “[a] non-participating co-
19 owner acquires no property rights in a newly created derivative work.”).

20 Defendants’ Second Counterclaim for a declaration of co-ownership in “Truth
21 Hurts” (and Defendants’ related Counterclaims for ancillary relief) fails under *Ashton-*
22 *Tate*, *Weissmann*, *Tilford*, and *Blige* because Defendants (1) cannot allege that any of
23 the Raisens or Rothman collaborated in the creation of “Truth Hurts”; and (2)
24 Defendants cannot be co-authors or co-owners of “Truth Hurts” simply because
25 portions of that work allegedly were “derived and copied from” the Unreleased Demo
26 (Countercl. ¶ 37). For these reasons, Defendants’ Second Counterclaim (and the
27 related Counterclaims seeking ancillary relief) plead “insufficient facts under a
28

1 cognizable legal claim” and/or fail to plead a “cognizable legal theory” and should be
 2 dismissed. *SmileCare Dental*, 88 F.3d at 783; *Eichenberger*, 876 F.3d at 982.

3 Defendants’ inability to plead the requisite collaboration in “Truth Hurts” is a
 4 fatal and incurable defect, given the admissions in Defendants’ pleading that
 5 affirmatively prove that neither the Raisens nor Rothman collaborated on the “Truth
 6 Hurts” work which Defendants wrongly claim to co-own. For this reason, this Court
 7 should dismiss Defendants’ Second Counterclaim (and the related Counterclaims
 8 seeking ancillary relief) with prejudice and without leave to amend. *Parents for*
 9 *Privacy v. Barr*, 949 F.3d at 1221.⁵

10 **B. The Court Should Strike Defendants’ Third, Fifth Through Twelfth,**
 11 **Fifteenth, Seventeenth, and Nineteenth Affirmative Defenses As**
 12 **Insufficient, Immaterial, And Impertinent**

13 This Court should strike Defendants’ third, fifth through twelfth, fifteenth,
 14 seventeenth, and nineteenth affirmative defenses because they are pled in a rote,
 15 boilerplate fashion, and are devoid of factual support, whether judged under the “fair
 16 notice” standard that this Court has employed on similar Rule 12(f) motions (*see, e.g.,*
 17 *Agricola Cuyuma* and *Schumacher, supra* p. 6) or the *Iqbal/Twombly* plausibility
 18 standard (*see, e.g., GEOMC, Vogel, and Barnes, supra*, p. 7). Lizzo acknowledges that
 19

20 ⁵ Defendants’ Second Counterclaim (and the related Counterclaims for ancillary relief)
 21 remain foreclosed regardless of any supposed factual disputes regarding other issues in
 22 the case. It is irrelevant whether Defendants can co-own the Unreleased Demo because
 23 Defendants cannot co-own “Truth Hurts” even if they could co-own that prior work.
 24 *See, e.g., Ashton-Tate*, 916 F.2d at 522 (affirming the dismissal of plaintiff’s claim to
 25 co-own second work without needing to resolve whether plaintiff co-owned first
 26 work); *Tilford*, 2006 WL 2612752 at *1-3 (dismissing plaintiff’s claim to co-own
 27 second work while claim to co-own first work remained pending). It is similarly
 28 irrelevant whether the supposed similarities between the Unreleased Demo and “Truth
 Hurts” are limited to the DNA Test Line and accompanying DNA Test Melody or
 extend to other purported similarities that Defendants contrive in their pleading. *See,*
e.g., Ashton-Tate 916 F.2d at 518 (dismissing co-ownership claim even where user
 interface of second work was “derived substantially from” first work); *Tilford*, 2006
 WL 2612752, at *1 (dismissing co-ownership claim even where second work allegedly
 was essentially “a new version of” first work); *Blige*, 419 F. Supp. 2d at 501 (granting
 summary judgment for defendants on co-ownership claim even where second works
 were allegedly either “substantially similar” or “virtually identical” to first works).

1 this Court must afford Defendants leave to replead the sixth, seventh, ninth, eleventh,
2 twelfth, and nineteenth affirmative defenses, since those defenses are not immaterial or
3 impertinent, although Lizzo does not believe that Defendants can plausibly allege any
4 of them, and Lizzo therefore reserves the right to move to strike the defenses with
5 prejudice should Defendants replead. Lizzo submits that this Court should strike with
6 prejudice Defendants' third, fifth, eighth, tenth, fifteenth, and seventeenth defenses
7 because, in addition to being devoid of factual support, they raise immaterial and
8 impertinent defenses applicable solely to claims for damages and Lizzo's Complaint
9 seeks declaratory relief only.

10 As an initial matter, Defendants' sixth ("failure of condition"), ninth ("fraud"),
11 and thirteenth ("mistake or inadvertence") affirmative defenses are subject to the
12 heightened pleading requirements of Federal Rule of Civil Procedure 9, which requires
13 that a party alleging fraud, mistake, or failure of a condition precedent plead with
14 particularity. Fed. R. Civ. P. 9(b) and (c). Because these purported defenses wholly fail
15 to comply with Rule 9, they necessarily fail to provide fair notice and should be
16 stricken. *See, e.g., Agricola Cuyuma*, 2019 WL 1878353, at *2 (striking affirmative
17 defense of "condition precedent" for failure to meet the requirements of Rule 9 and
18 thus failure to provide fair notice); *see also Techshell, Inc. v. Max Interactive, Inc.*, 19-
19 cv-608, 2019 WL 4422682, at *4 (C.D. Cal. Aug. 5, 2019) (striking affirmative
20 defense of fraud for failure to meet pleading requirements of Rule 9). These defenses
21 also necessarily fail under the *Iqbal/Twombly* plausibility standard.

22 The remainder of the affirmative defenses should be stricken because they are
23 completely devoid of factual support and fail to give fair notice to Lizzo and/or fail to
24 meet the *Iqbal/Twombly* plausibility standards. These defenses comprise Defendants'
25 third ("apportionment of fault"), fifth ("comparative fault"), sixth ("consent"), eighth
26 ("failure to mitigate"), tenth ("intervening and superseding cause"), eleventh
27 ("justification/excuse"), twelfth ("laches"), fifteenth ("offset"), seventeenth
28 ("proximate cause – plaintiff"), and nineteenth ("waiver and estoppel") affirmative

1 defenses. This Court already has recognized that affirmative defenses of “avoidable
2 consequences,” “proximate cause,” and “unavoidable incidents or conditions” require
3 some factual support to provide fair notice and should be stricken where, as here, they
4 are pled in a rote, conclusory fashion. *Schumacher*, 2019 WL 8013092, at *2. The
5 defenses this Court struck in *Schumacher* are the same as Defendants’ tenth and
6 seventeenth defenses for “intervening and superseding cause” and “proximate cause –
7 plaintiff,” and this Court should strike Defendants’ tenth and seventeenth defenses for
8 the same reasons this Court articulated in *Schumacher*. The defenses this Court struck
9 in *Schumacher* also are “of a piece” with Defendants’ remaining affirmative defenses,
10 all of which depend upon supposed conduct of Lizzo or third parties but provide no
11 detail regarding the alleged conduct on which they are based. These other defenses
12 therefore also should be stricken because they are devoid of any factual basis and fair
13 to provide fair notice to Plaintiff. *Id.*; see also *Desert European Motorcars, Ltd. v.*
14 *Desert European Motorcars, Inc.*, 11-cv-197, 2011 WL 3809933, at *2 (C.D. Cal.
15 2011) (striking affirmative defenses of waiver, estoppel, and laches under fair notice
16 standard because they were devoid of factual support).

17 Each of Defendants’ third (“apportionment of fault”), fifth (“comparative
18 fault”), eighth (“failure to mitigate”), tenth (“intervening and superseding cause”),
19 fifteenth (“offset”), and seventeenth (“proximate cause – plaintiff”) affirmative
20 defenses should, moreover, be stricken with prejudice for the additional reason that
21 each raises immaterial and impertinent matter. Fed. R. Civ. P. 12(f). Each of the
22 defenses expressly seeks to extinguish or minimize a damages award, and has “no
23 possible relation to th[is]controversy” because Lizzo’s claims seek only declaratory
24 relief. *Agricola Cuyuma*, 2019 WL 1878353, at *1 (striking immaterial affirmative
25 defenses).

CONCLUSION

For the foregoing reasons, Lizzo respectfully requests that the Court (1) dismiss with prejudice Defendants’ Second Counterclaim seeking a declaration that Defendants are joint authors and co-owners of the musical composition “Truth Hurts” (and the related Counterclaims seeking related ancillary relief); (2) strike with prejudice Defendants’ third, fifth, eighth, tenth, fifteenth, and seventeenth affirmative defenses; and (3) strike without prejudice Defendants’ sixth, ninth, eleventh, twelfth, thirteenth, and nineteenth affirmative defenses.

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