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18 UNITED STATES DISTRICT COURT

19 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

20 MARCUS GRAY (p/k/a FLAME), et
al.,

21 Plaintiffs,

22 v.

23 KATHERYN ELIZABETH HUDSON
24 (p/k/a KATY PERRY), et al.,

25 Defendants.

CASE NO. 2:15-cv-05642-CAS (JCx)

Honorable Christina A. Snyder

**DEFENDANTS’ NOTICE OF
MOTION AND MOTION FOR
MOTION FOR JUDGMENT AS A
MATTER OF LAW OR,
ALTERNATIVELY, FOR A NEW
TRIAL**

Date: January 27, 2020
Time: 10:00 a.m.
Ctrm: 8D—8th Fl., First Street

Filed: July 1, 2014
Trial: July 17, 2019

Mitchell
Silberberg &
Knupp LLP

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 27, 2020, in Courtroom 8D of the Federal Courthouse located at 350 West 1st Street, Los Angeles, CA 90012, Defendants Capitol Records, LLC, Jordan Houston, Lukasz Gottwald, Sarah Theresa Hudson, Karl Martin Sandberg, Henry Russell Walter, WB Music Corp., Kobalt Music Publishing America, Inc., Kasz Money, Inc., and Katheryn Elizabeth Hudson (collectively “Defendants”) will and hereby do move pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for judgment as a matter of law on the single claim for copyright infringement brought by Plaintiffs Marcus Gray, Chike Ojukwu, and Emanuel Lambert against all Defendants, or in the alternative, for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure.

The motion for judgment as a matter of law is made on the following grounds:

First, no legally sufficient evidentiary basis supports the jury’s finding that “Dark Horse” is substantially similar to “Joyful Noise” in original, protectable expression. The only claimed similarities between the two works are a small number of indisputably commonplace elements in the works’ ostinatos and the undisputed evidence at trial established the many differences between both the ostinatos and the works as a whole. As such, the proper application of the extrinsic and intrinsic tests to these facts requires a finding of no substantial similarity.

Second, no legally sufficient evidentiary basis supports the jury’s finding that Plaintiffs have sustained their burden of proving access to “Joyful Noise” by the relevant authors of “Dark Horse” (Walter and Gottwald) prior to creation of the allegedly infringing portion of “Dark Horse.” Plaintiffs did not present any direct

1 evidence of access or circumstantial evidence of a chain of events linking “Joyful
2 Noise” to the relevant authors of “Dark Horse.” Nor did Plaintiffs present
3 sufficient evidence of widespread dissemination of “Joyful Noise” that would give
4 rise to a reasonable opportunity to hear “Joyful Noise.” Further, the
5 uncontroverted evidence proved that, whatever the reach of “Joyful Noise,” neither
6 Walter nor Gottwald (or any other defendant author) availed himself of the
7 opportunity to hear “Joyful Noise.”

8
9 *Third*, no legally sufficient evidentiary basis supports the jury’s finding
10 against Defendants on the grounds that Defendants presented un rebutted and
11 unimpeached evidence at trial demonstrating that all of the authors of “Dark
12 Horse” independently created the composition.

13
14 *Fourth*, no legally sufficient evidentiary basis supports the jury’s finding that
15 Plaintiffs’ copyright registration in “Joyful Noise” protects the instrumental beat
16 created by Chike Ojukwu, which includes the allegedly infringed portion of
17 “Joyful Noise.” This is because “Joyful Noise” is a derivative work of that beat
18 and not a work of joint authorship. Plaintiffs lack a copyright registration for
19 Ojukwu’s beat itself.

20
21 *Fifth*, if the Court does not grant judgment as a matter of law as to all
22 Defendants, judgment should still be granted as a matter of law as to the following
23 Defendants: Kobalt Music Publishing America, Inc., WB Music Corp., Kasz
24 Money, Inc., Katheryn Hudson, Lukasz Gottwald, Sarah Hudson, Karl Martin
25 Sandberg, and Jordan Houston on grounds that Plaintiffs presented no evidence
26 that any of these defendants infringed Plaintiffs’ exclusive rights under the
27 Copyright Act. Moreover, Plaintiffs have no claim for vicarious liability or
28 contributory infringement.

1 *Sixth*, even if the Court does not grant judgment as a matter of in favor of
2 Defendants on liability, no legally sufficient evidentiary basis supports the jury’s
3 finding that 22.5% of the net profit earned by each Defendant from “Dark Horse”
4 was attributable to the use of the “Joyful Noise” musical composition in Ostinato 2
5 in “Dark Horse” as opposed to other factors. Plaintiffs failed to satisfy their
6 burden to prove Defendants’ gross revenue *attributable* to the infringement (i.e., a
7 causal link). Defendants presented the un rebutted testimony of two expert
8 witnesses who testified about the insignificance of Ostinato 2 to the commercial
9 success and profits of “Dark Horse” and *Prism*. Plaintiffs did not present their own
10 experts, or any other apportionment evidence.

11
12 *Seventh*, no legally sufficient evidentiary basis exists to support the jury’s
13 decision to exclude Capitol Records’ overhead costs in calculating its net profit.
14 As a matter of law, in accordance with this Court’s instructions and the un rebutted
15 and unimpeached evidence presented by Capitol at trial, the jury should have
16 deducted overhead and calculated Capitol’s net profit as equaling \$629,725.

17
18 The motion for a new trial is made on the following grounds:

19
20 *First*, for the reasons explained above, the jury’s findings of (i) substantial
21 similarity, (ii) access, including that Gottwald or Walter availed themselves of the
22 opportunity to hear “Joyful Noise,” (iii) that “Dark Horse” was not independently
23 created, and (iv) that the inclusion of the Beat created by Ojukwu was part of a
24 joint work of authorship were contrary to the weight of the evidence.

25
26 *Second*, a new trial is warranted due to the misconduct at trial by Plaintiffs’
27 counsel and witnesses. Plaintiffs’ musicologist Dr. Todd Tecker gave improper
28 and highly prejudicial testimony that invaded the province of the jury and during

1 closing argument, Plaintiff’s counsel made knowingly false and highly prejudicial
2 assertions warranting a new trial.

3
4 *Third*, in the event that the Court reached the jury’s damage award, it should
5 find that the award is contrary to the clear weight of the evidence and excessive.
6 As discussed above, as to Capitol, the jury wrongly ignored Capitol’s overhead in
7 calculating Capitol’s profit. Second, as discussed above, nothing supports the
8 jury’s conclusion that 22.5% of Defendant’s profits is attributable to the use of the
9 “Joyful Noise” musical composition in *Ostinato 2*. As such, at a minimum, the
10 Court should remit the amount of the damages awarded.

11
12 This Motion is and will be based upon this Notice of Motion and Motion;
13 the accompanying Memorandum of Points and Authorities; the exhibits and trial
14 testimony identified in this motion; all other relevant evidence introduced at trial;
15 the pleadings and papers on file herein; any Reply and supporting pleadings and
16 exhibits that may be filed in support; any oral argument that may be made; and
17 upon such other or further material as may be presented at or before the hearing of
18 this matter.

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1 For the foregoing reasons, as further discussed in Defendants’
2 accompanying Memorandum of Points and Authorities, Defendants’ motion for
3 judgment as a matter of law should be granted and judgment entered in
4 Defendants’ favor on Plaintiffs’ Third Amended Complaint and the claim for
5 copyright infringement asserted therein. In the alternative, Defendants’ motion for
6 a new trial should be granted.

7

8 DATED: October 9, 2019 MITCHELL SILBERBERG & KNUPP LLP

9

10 By: /s/ Aaron M. Wais
11 Aaron M. Wais (SBN 250671)
12 Attorneys for Defendants Capitol Records,
13 LLC, Jordan Houston, Lukasz Gottwald,
14 Sarah Theresa Hudson, Karl Martin Sandberg,
15 Henry Russell Walter, WB Music Corp.,
16 Kobalt Music Publishing America, Inc., and
17 Kasz Money, Inc.

15

16 DATED: October 9, 2019 GREENBERG TRAUIG, LLP

17

18 By: /s/ Vincent H. Chieffo
19 Vincent H. Chieffo (SBN 49069)
20 Attorneys for Defendant Katheryn Elizabeth
21 Hudson p/k/a Katy Perry

20

21 **ATTESTATION REGARDING SIGNATURES**

22 Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), I hereby attest that all Parties,
23 on whose behalf this filing is jointly submitted, concur in this filing’s content and
24 have authorized its filing.

25

26 DATED: October 9, 2019 /s/ Aaron M. Wais
27 Aaron M. Wais

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