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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

Honorable Christina A. Snyder

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, FOR A NEW TRIAL**

(Fed. R. Civ. P. 50(b) and, alternatively, Rule 59)

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

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

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1 **I. INTRODUCTION**

2 Pursuant to FRCP 50(b) and, alternatively, Rule 59, Defendants<sup>1</sup> respectfully  
3 ask this Court to overturn and vacate the legally unsupportable jury verdicts in this  
4 music copyright infringement case that are widely recognized within the music  
5 industry—and beyond—as a grave miscarriage of justice. No reasonable factfinder  
6 could have returned a copyright infringement liability verdict in Plaintiffs’ favor  
7 based upon the undisputed facts and paucity of Plaintiffs’ evidence. Applying the  
8 proper standards to the trial record in this case, Plaintiffs utterly failed to prove  
9 copying through access and substantial similarity, and the Court should enter  
10 judgment as a matter of law in Defendants’ favor or, at minimum, grant a new trial  
11 as the jury verdicts are against the clear weight of the evidence.

12 The erroneous verdicts in this case and the precedent established thereby  
13 present serious harm to music creators and to the music industry as a whole. As the  
14 recent spate of Ninth Circuit cases and briefings have shown, there is a deep level  
15 of interest in, and necessary attention being given by the courts to, the issue of  
16 where to draw the line between the permissible use of commonplace and  
17 unprotectable expression (or “building blocks”) in musical compositions and  
18 copyright infringement, as well as the application of existing copyright  
19 jurisprudence to those situations. While musical compositions employ a language  
20 unto themselves, they are not second-class citizens when it comes to the  
21 application of the United States copyright laws in infringement cases. Music  
22 creators who use commonplace expression in music are entitled to the same  
23 amount of breathing room afforded creators of other art forms; this breathing room  
24 is essential to the advancement and balancing of the goals of our copyright laws.

25 \_\_\_\_\_  
26 <sup>1</sup> “Defendants” are Capitol Records LLC, Jordan Houston, Lukasz Gottwald, Sarah  
27 Theresa Hudson, Karl Martin Sandberg, Henry Russell Walter, WB Music Corp.,  
28 Kobalt Music Publishing America, Inc., Kasz Money, Inc., and Katheryn Elizabeth  
Hudson. Defendants UMG Recordings, Inc., Universal Music Group, Inc., and  
Kitty Purry, Inc. were dismissed with prejudice during trial. Declaration of Aaron  
M. Wais dated October 9, 2019 (cited herein as “WD”), Ex. 6, p. 1113 l. 7-22.

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1 This case presents a critical opportunity to address these issues and rectify a wholly  
2 improper finding of infringement based on nothing more than the proper use of  
3 unprotectable expression that no creator can monopolize.

4 Here, the jury erroneously found both extrinsic and intrinsic similarity,  
5 which only could have occurred by it failing to follow the legal standards provided  
6 in the jury instructions and as applied to the undisputed evidence presented at trial.  
7 Plaintiffs' own expert musicologist testified that Plaintiffs' "Joyful Noise" ostinato  
8 is **comprised entirely** of commonplace (thus unprotectable) elements of music. The  
9 sole basis for the Plaintiffs' alleged substantial similarity claim is their expert's  
10 opinion that "Joyful Noise" created a purported "combination" of those  
11 unprotectable elements which are allegedly copied in "Dark Horse." As discussed  
12 below, under the proper application of the extrinsic test, the undisputed record  
13 mandates a finding that there is no extrinsic similarity based upon this  
14 "combination" allegedly in common between the two ostinatos at issue. Under  
15 copyright law, Plaintiffs' ostinato was entitled to only a "thin" copyright  
16 protection, at best, because it was an admitted combination of unprotectable  
17 elements. As such, no finding of substantial similarity could be found absent  
18 virtual identity between the two purported "combinations." Given Plaintiffs'  
19 expert's admissions and un rebutted proof that there are several differences in the  
20 purported combinations, no such virtual identity exists as a matter of law. Thus, the  
21 intrinsic test should never have been considered by the jury and the verdict  
22 rendered during the liability phase of the trial should have been for Defendants.<sup>2</sup>

23 Compounding these errors, no evidence whatsoever supported the jury's  
24 finding that "Joyful Noise" was "widely disseminated," which was Plaintiffs' sole  
25 flimsy "access" theory.<sup>3</sup> No reasonable factfinder could have concluded that

26 <sup>2</sup> This standard in all events was also clearly not followed as no reasonable juror  
27 could have found that the **works as wholes** were substantially similar. *Infra*  
§ II.B.3.c.

28 <sup>3</sup> Plaintiffs had no theory of access. *Infra* § II.C.

1 “Joyful Noise” was so well-known that it could be reasonably inferred that  
2 Defendants heard it, particularly in this digital age of content overload, with  
3 billions of videos and songs available to users with trillions of streams, as  
4 Defendants’ evidence demonstrated (and Plaintiffs failed to rebut). The few million  
5 views of “Joyful Noise” on the Internet presented by Plaintiffs, over a period of  
6 five years, equals an undisputed “drop in the bucket” in modern day view count  
7 statistics—and can hardly constitute widespread dissemination—as a matter of  
8 undisputed fact and law. Plaintiffs adduced no other evidence that could meet their  
9 burden of proving widespread dissemination.

10 Plaintiffs adduced no evidence of *any* sales and no documentary evidence of  
11 *any* radio or television play, or of actual performances of “Joyful Noise.” Indeed,  
12 Plaintiffs only proffered the self-serving testimony of one plaintiff and his wife in  
13 order to prove dissemination through live performances; however, even that  
14 testimony merely revealed that the song was played to audiences of unknown sizes,  
15 intermittently, and at mostly religious venues of unknown sizes. Most importantly,  
16 Plaintiffs failed to establish that any Defendant ever attended, or was even aware  
17 of, these performances. Finally, Plaintiffs’ evidence of critical acclaim for “Joyful  
18 Noise” was in a niche genre within which, indisputably, the relevant authors of  
19 “Dark Horse” do not participate. Under Ninth Circuit law, this evidence is wholly  
20 insufficient to give rise to a *reasonable* inference that Defendants had a *reasonable*  
21 opportunity to have heard “Joyful Noise”; the uncontroverted evidence was to the  
22 contrary. Here again, the jury’s verdict constitutes a dangerously wrong precedent  
23 if allowed to stand.

24 For these important reasons and the others set forth below, Defendants  
25 respectfully request that the Court enter judgment as a matter of law in their favor.  
26 Alternatively, they request a new trial or a reduction of the damage award.

27

28

1 **II. THE COURT SHOULD ENTER JUDGMENT AS A MATTER OF**  
 2 **LAW ON PLAINTIFFS' COPYRIGHT INFRINGEMENT CLAIM**

3 **A. Rule 50(b) Judgment As A Matter Of Law Standard**

4 If a Court does not grant a motion for judgment as a matter of law made at  
 5 the close of evidence and instead submits the issues to the jury, the moving party  
 6 may renew the motion after entry of judgment under Fed. R. Civ. P. 50(b). The  
 7 standard for subsections (a) and (b) is the same; judgment as a matter of law is  
 8 appropriate where “a party has been fully heard on an issue during a jury trial and  
 9 the court finds that a reasonable jury would not have a legally sufficient  
 10 evidentiary basis to find for the party on that issue.” Fed. R. Civ. P. 50(a); *Reeves*  
 11 *v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (same). *See also*  
 12 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (relevant inquiry is  
 13 “whether the evidence presents a sufficient disagreement to require submission to a  
 14 jury or whether it is so one-sided that one party must prevail as a matter of law.”).

15 On a Rule 50(b) motion, the court does not consider what the jury actually  
 16 found, but whether a sufficient evidentiary basis supported finding for the  
 17 nonmoving party. *See Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 724  
 18 (11th Cir. 2012) (“Only the sufficiency of the evidence matters; what the jury  
 19 actually found is irrelevant.”) (affirming grant of JMOL). Judgment as a matter of  
 20 law is not limited to situations where “there is a complete absence of probative  
 21 facts to support a jury verdict.” *In re Letterman Bros. Energy Sec. Lit.*, 799 F.2d  
 22 967, 972 (5th Cir. 1986). Indeed, a “mere scintilla” of evidence is not enough to  
 23 sustain a verdict for the prevailing party. *Id.* at 971; *Willis v. Marion Cnty.*  
 24 *Auditor’s Office*, 118 F.3d 542, 548 (7th Cir. 1997) (affirming post-verdict grant of  
 25 JMOL). And while courts “draw all reasonable inferences in [the non-movant’s]  
 26 favor,” a reasonable inference “cannot be supported by only threadbare conclusory  
 27 statements instead of *significant probative evidence*.” *Lakeside-Scott v.*  
 28 *Multnomah Cnty.*, 556 F.3d 797, 802 (9th Cir. 2009) (emphasis added) (reversing

1 denial of JMOL motion); *see also Genthe v. Lincoln*, 383 F.3d 713, 716 (8th Cir.  
 2 2004) (an inference is reasonable “when it may be drawn from the evidence  
 3 without resort to speculation”) (affirming grant of JMOL). As such, judgment as a  
 4 matter of law is also appropriate where the jury disregarded the evidence and jury  
 5 instructions at trial, or where “the jury could have relied only on speculation to  
 6 reach its verdict.” *Lakeside-Scott*, 556 F.3d at 803; *see also Home Design Servs,*  
 7 *Inc. v. Turner Heritage Homes, Inc.*, 101 F. Supp. 3d 1201, 1215 (N.D. Fla. 2015)  
 8 (granting motion for JMOL on basis that “no jury following the Court’s  
 9 instructions on the law” could have found substantial similarity); *Mag Jewelry Co.,*  
 10 *Inc. v. Cherokee, Inc.*, 496 F.3d 108, 118 (1st Cir. 2007) (affirming grant of JMOL  
 11 where plaintiff failed to satisfy burden of proving access). Moreover,  
 12 “unimpeached and uncontradicted evidence favorable to the movant [] can be  
 13 considered by [the court] in evaluating the merits” of a motion for judgment as a  
 14 matter of law. *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1314-  
 15 15 (2d Cir. 1990) (affirming grant of JMOL).

16 Under these standards, as explained further below, Defendants are entitled to  
 17 judgment as a matter of law. *See Lillie v. ManTech Int’l Corp.*, 2019 WL 3387732,  
 18 at \*24 (C.D. Cal. July 26, 2019) (Snyder, J.) (granting renewed motion for JMOL  
 19 to the defendant following a jury verdict in the plaintiff’s favor); *see also Fahmy v.*  
 20 *Jay-Z*, 2015 WL 6394455, at \*10 (C.D. Cal. Oct. 21, 2015) (Snyder, J.), *aff’d*, 908  
 21 F.3d 383 (9th Cir. 2018) (granting the defendants’ motion for JMOL).<sup>4</sup>

22

23 <sup>4</sup> “Although both motions employ the same legal standard, denial of a motion for  
 24 summary judgment does not mandate that a Rule 50 motion be denied, because the  
 25 latter tests the sufficiency of evidence actually presented at trial.” *Archibald v. Cty.*  
 26 *of San Bernardino*, 2018 WL 6017032, at \*4 n.3 (C.D. Cal. Oct. 2, 2018). Indeed,  
 27 “after trial, the court [may have] a better basis on which to determine the existence  
 28 of material issues, including that there was never a true issue of fact at all.” *Id.*  
 (citing *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 772 (9th Cir. 1981)); *Lillie*, 2019  
 WL 3387732, at \*22 (granting JMOL after denying summary judgment on the  
 same claims, noting that “[n]ow, viewing all the evidence in the light most  
 favorable to plaintiff, the Court finds that the evidentiary record does not permit a  
 reasonable jury to” find in favor of the plaintiff).

1           **B.    No Reasonable Jury Could Have Found “Joyful Noise” And**  
2           **“Dark Horse” To Be Substantially Similar Based On The**  
3           **Undisputed Evidence At Trial**<sup>5</sup>

4           **1.    It Is A Fundamental Tenet Of The Copyright Act That**  
5           **Commonplace Expression Is Not Copyrightable And May**  
6           **Not Be Monopolized**

7           The purpose of copyright law is not to provide copyright owners with all-  
8 encompassing monopoly rights so as to deter future authors from creating original  
9 works of their own. Quite the contrary, the goal of the Copyright Act is to  
10 “promot[e]” the creation and “public availability of literature, music, and the other  
11 arts.” *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 432 (1984)  
12 (citation omitted). *Accord, Golan v. Holder*, 132 S. Ct. 873, 889 (2012).

13           Consistent with this goal, copyright owners do not have exclusive rights  
14 over each and every element of their copyrighted works. *Feist Publ’ns, Inc.*, 499  
15 U.S. at 348. Rather, “expressions that are standard, stock or common to a particular  
16 subject matter or medium are not protectable under the copyright law.” *Satava v.*  
17 *Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). When an author creates a work  
18 incorporating commonplace “elements [which] are already in the public domain,”  
19 that author is entitled to “receive protection only for [her or] his original additions  
20 to the” new work. *Stewart v. Abend*, 495 U.S. 207, 234-35 (1990). *See also* Dkt.  
21 441, Jury Instr. 34 (“While an author of an original work may be entitled to prevent  
22 others from copying original, protectable expression in the author’s work,  
23 copyright protection does not extend to commonplace expression.”).

24 <sup>5</sup> “To establish copyright infringement, a plaintiff must prove two elements: (1)  
25 ownership of a valid copyright, and (2) copying of constituent elements of the  
26 work that are original.” *Loomis v. Cornish*, 836 F.3d 991, 994 (9th Cir. 2016),  
27 quoting *Feist Publ’ns, Inc. v. Rural Telephon Serv. Co.*, 499 U.S. 340, 361 (1991).  
28 Regarding the latter element, “[a]bsent direct evidence of copying,” Plaintiffs were  
required to prove that the Defendants had (1) access to “Joyful Noise” and (2) that  
“Joyful Noise” and “Dark Horse” are substantially similar in protected expression.  
*Loomis*, 836 F.3d at 994 (internal quote marks and citations omitted). This  
Memorandum addresses these elements in the order set forth in the Special Verdict  
Form. Dkt. 456.

1 Preventing copyright claimants from monopolizing commonplace  
2 expression is critical to accomplishing the Copyright Act’s ultimate goal of  
3 encouraging the creation of new artistic works. This is because “in art, there are,  
4 and can be, few, if any, things, which in an abstract sense, are strictly new and  
5 original throughout. Every book in literature, science and art, borrows, and must  
6 necessarily borrow, and use much which was well known and used before.”  
7 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (quoting *Emerson v.*  
8 *Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

9 Musical compositions are no exception to this rule; they are entitled to the  
10 same scope of copyright protection as any other creative work. *Smith v. Jackson*,  
11 84 F.3d 1213, 1216 n. 3 (9th Cir. 1996) (“common or trite” musical elements not  
12 protected); *see also* WD, Ex. 38, pp. 1947-51 (Amicus Brief of United States,  
13 *Skidmore v. Led Zeppelin*, Nos. 16-56057, 16-56287 (9th Cir.)). As the Ninth  
14 Circuit explained in *Newton v. Diamond (Newton II)*, an action concerning the  
15 alleged infringement of a musical composition:

16 ... [E]ven where the fact of copying is conceded, no legal  
17 consequences will follow from that fact unless the  
18 copying is *substantial*. ... The principle that trivial  
19 copying does not constitute actionable infringement has  
20 long been a part of copyright law.

21 388 F.3d 1189, 1192-93 (9th Cir. 2004) (emphasis added).

22 **2. The Substantial Similarity Test Must Be Applied In A**  
23 **Manner Consistent With The Purpose And Policy Of The**  
24 **Copyright Act**

25 **a. The Extrinsic Test**

26 In conducting the substantial similarity analysis, the trier of fact must first  
27 apply the extrinsic test. As the Ninth Circuit explained in *Swirsky v. Carey*, the  
28 extrinsic test “requires breaking the [plaintiff’s and defendant’s] works down into  
their constituent elements, and comparing those elements for proof of copying as



1 measured by substantial similarity.” 376 F.3d 841, 845 (9th Cir. 2004) (quotation  
 2 marks omitted). “Because the requirement is one of *substantial* similarity to  
 3 *protected* elements of the copyrighted work, it is *essential* to distinguish between  
 4 the protected and unprotected material” and *extract* the unprotected material before  
 5 comparing the two works. *Id.* (emphasis added); *see also Apple Computer, Inc. v.*  
 6 *Microsoft Corp.*, 35 F.3d 1435, 1446 (9th Cir. 1994).

7 In music copyright cases, this discerning and critical test must be applied to  
 8 extract the unprotectable elements within the allegedly infringing passages in  
 9 common with a plaintiff’s composition, prior to assessing substantial similarity.  
 10 This test is meant to ensure that commonplace material is not and may not be the  
 11 basis of any infringement claim. Courts should act as gatekeepers to ensure this  
 12 essential test is met because there are a “limited number of notes and chords  
 13 available to composers and ... common themes frequently reappear in various  
 14 compositions, especially in popular music.” *Gaste v. Kaiserman*, 863 F.2d 1061,  
 15 1068 (2d Cir. 1988) (citing *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d  
 16 275, 277 (2d Cir. 1936)).<sup>6</sup> “Given the limited number of musical notes (as opposed  
 17 to words in a language) and the combination of those notes and their phrasing, it is  
 18 not surprising that a simple composition of a short length might well be susceptible  
 19 to original creations by more than one composer.” *Calhoun v. Lillehas Publ’g*, 298  
 20 F.3d 1228, 1232 (11th Cir. 2002). If such commonplace musical devices are not  
 21 extracted from the extrinsic analysis, but are instead accorded copyright protection,  
 22 then “future authors, composers and artists will find a diminished store of ideas on  
 23 which to build their works.” *Oravec v. Sunny Isles Luxury Ventures, LC*, 527 F.3d

24 \_\_\_\_\_  
 25 <sup>6</sup> *See also Johnson v. Gordon*, 409 F.3d 12, 22 (1st Cir. 2005) (noting the “limited  
 26 musical vocabulary available to composers”); 1 Melville D. Nimmer & David  
 27 Nimmer, *Nimmer on Copyright* § 2.05[B] (rev. ed. 2017) (“In the field of popular  
 28 songs, many, if not most, compositions bear some similarity to prior songs.”).  
 Indeed, “while there are an enormous number of possible permutations of the  
 musical notes of the scale, only a few are pleasing; and much fewer still suit the  
 infantile demands of the popular ear.” *Darrell v. Joe Morris Music Co.*, 113 F.2d  
 80, 80 (2d Cir. 1940) (*per curiam*).

1 1218, 1225 (11th Cir. 2008) (quoting *Meade v. U.S.*, 27 Fed. Cl. 367, 372 (Fed. Cl.  
2 1992)).

3 Similarly, courts apply—and must apply—a further series of copyright  
4 limiting doctrines to ensure that claims of infringement of combinations of  
5 unprotectable expression do not stifle other creators from using the unprotectable  
6 expression within those combinations. Thus, and first, a combination of  
7 unprotectable musical elements may *only* be potentially subject to copyright  
8 protection *if* “those elements are numerous enough and their selection and  
9 arrangement original enough that their combination constitutes an original work of  
10 authorship.” *Satava*, 323 F.3d at 811; *see also Apple Computer*, 35 F.3d at 1445.<sup>7</sup>  
11 Second, and this next step in the analysis is critical, *even if* a combination of  
12 commonplace musical elements meets the above test, that combination is still only  
13 entitled, at most, to a “*thin copyright that protects against only virtually identical*  
14 *copying*.” *Satava*, 323 F.3d at 812 (emphasis added) (citing *Ets-Hokin v. Skyy*  
15 *Spirits, Inc.*, 323 F.3d at 766 (9th Cir. 2003) (“When we apply the limiting  
16 doctrines, subtracting the unoriginal elements, Ets Hokin is left with ... a ‘thin’  
17 copyright, which protects against only virtually identical copying.”); *Apple*  
18 *Computer*, 35 F.3d at 1439 (“When the range of protectable...expression is narrow,  
19 the appropriate standard for illicit copying is virtual identity.”).

20 The Ninth Circuit has routinely applied this “thin” copyright standard where  
21 the claimed similarity is the selection and arrangement of a limited number of  
22 unprotected elements in cases involving other artistic works. *Folkens v. Wyland*

23 \_\_\_\_\_  
24 <sup>7</sup> In its Order on Defendants’ Motion for Summary Judgment, the Court stated that  
25 “[t]o the extent the defendants seek to persuade the Court to deviate from the  
26 substantial similarity standard as it is articulated in *Swirsky*, the Court declines to  
27 do so.” Dkt. 299, p. 10 n.6. But the Ninth Circuit in *Swirsky* did not hold that music  
28 copyright cases are any different from copyright cases involving other works.  
Citing *Satava* with approval, the Court noted that “a substantial similarity **can** be  
found in a combination of elements, even if those elements are individually  
unprotected.” 376 F.3d at 848 (emphasis added). This is true and undisputed. A  
combination of unprotected elements **can** be protected **if** it meets the criteria set  
forth in *Satava*, *Apple Computer*, and numerous other cases.

1 *Worldwide, LLC*, 882 F.3d 768, 776 (9th Cir. 2018) (pen-and-ink drawing);  
 2 *Satava*, 323 F.3d at 812 (sculpture); *Frybarger v. Int’l Bus. Machines Corp.*, 812  
 3 F.2d 525, 530 (9th Cir. 1987) (video bingo game); *Feist*, 499 U.S. at 348-49  
 4 (compilations protected against copying “precise words used”).

5 Musical compositions are not to be treated any better or worse than any  
 6 other art form under the law and these doctrines, including the “thin copyright  
 7 doctrine,” equally apply to them, as this Court already recognized in instructing the  
 8 jury. *See* Dkt. 441, Jury Instr. 34.<sup>8</sup> These limiting doctrines—requiring the  
 9 extraction of unprotectable expression from consideration of substantial similarity  
 10 under the extrinsic test, and the affording of a thin copyright which protects against  
 11 only virtually identical copying to combinations of unprotectable expression—are  
 12 critically designed to insure that no creator monopolizes unprotectable expression  
 13 to the exclusion of other creators and in derogation of the principles of our  
 14 copyright laws.

#### 15 **b. The Intrinsic Test**

16 If a plaintiff fails to satisfy the extrinsic test, the inquiry is over. The  
 17 intrinsic test takes the inquiry to the next level, with the goal of only allowing  
 18 infringement to be found as to *substantial* copying of protectable expression in the  
 19 context of analyzing the works as a whole, including their differences. The jury

20 \_\_\_\_\_  
 21 <sup>8</sup> *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) addressed the thin copyright  
 22 doctrine in the context of a work as a whole and is thus not to the contrary. *Gaye*  
 23 did not address the issue of whether a specific phrase of a musical composition  
 24 concededly comprised of only a combination of a few unprotectable elements is  
 25 entitled to at most a thin copyright. Unlike the Plaintiffs in this action, the  
 26 counterclaim plaintiffs in *Williams* did *not* allege that only a discrete portion of the  
 27 musical composition “Got to Give It Up” was unlawfully copied by “Blurred  
 28 Lines.” Rather, the counterclaim plaintiffs alleged that “Blurred Lines” improperly  
 copied a “constellation” of musical elements from the *entirety* of “Got To Give It  
 Up.” On appeal, the Court rejected the counterclaim defendants’ argument that the  
*entire* musical composition “Got To Give It Up”—which unquestionably was  
 comprised of much more than merely a small number of unprotectable elements—  
 was only entitled to a “thin” copyright. There is no contention here that “Joyful  
 Noise,” considered as a musical composition in its entirety, is entitled to a thin  
 copyright. The ostinato at issue in “Joyful Noise,” however, is entitled to nothing  
 more than a thin copyright.

1 must consider whether the two works as a whole are “*substantially* similar in the  
 2 total concept and feel of the works.” *Cavalier v. Random House, Inc.*, 297 F.3d  
 3 815, 822 (9th Cir. 2002) (emphasis added, citation omitted). Again, this inquiry is  
 4 limited to the consideration only of similarities that are protectable expression, as  
 5 this Court properly instructed the jury. *See* Dkt. 441, Jury Instr. 37.

### 6 3. A Reasonable Jury Following The Court’s Instructions 7 Could Not Have Found Substantial Similarity

8 This Court properly instructed the jury to first apply the above principles of  
 9 the extrinsic test: “you must inquire only whether the protectable elements,  
 10 standing alone, are substantially similar, and must filter out and disregard the non-  
 11 protectable.” Dkt. 441, Jury Instr. 37. The Court further accurately instructed the  
 12 jury that “[a] combination of unprotectable elements may be eligible for copyright  
 13 protection if those elements are numerous enough and their selection and  
 14 arrangement original enough that their combination constitutes an original work of  
 15 authorship. Trivial elements of compilation and arrangement are not  
 16 copyrightable.” *Id.*, Jury Instr. 34. Critically here, in an instruction that focused  
 17 properly only on the ostinato in “Joyful Noise,” and not the entire composition, the  
 18 Court instructed that “when a work embodies only the minimum level of creativity  
 19 necessary for copyright, it is said to have ‘thin’ copyright protection. A thin  
 20 copyright only protects against virtually identical copying.” *Id.* Instructing on the  
 21 intrinsic test, the Court charged the jury with “determin[ing] whether ... the total  
 22 concept and feel of ‘Joyful Noise’ and ‘Dark Horse’ are substantially similar in  
 23 **original, protectable expression.**” *Id.*, Jury Instr. 37 (emphasis added).

24 No reasonable jury properly applying these legal standards would have  
 25 found that Plaintiffs met their burden under the extrinsic test to show that the  
 26 ostinatos in “Joyful Noise” and “Dark Horse” are substantially similar in protected  
 27 expression. *See Home Design Servs., Inc.*, 101 F. Supp. 3d at 1215 (granting  
 28 JMOL on grounds that “no jury following the Court’s instructions on the law could

1 reasonably find the ... designs substantially similar ... the jury in this case must  
 2 have disregarded the significant differences that existed at the level of protected  
 3 expression and focused instead on the unprotected similarities in the designs.”).  
 4 The inquiry should have stopped there, based upon the undisputed trial record.

5 A proper application of the Ninth Circuit’s legal standards to the factual  
 6 record establishes that the works do not meet the extrinsic test (no less the intrinsic  
 7 test), and there is no substantial similarity as a matter of law. *See, e.g., Benay v.*  
 8 *Warner Bros. Entm’t*, 607 F.3d 620, 624 (9th Cir. 2010) (substantial similarity  
 9 “may often be decided as a matter of law”) (quoting *Funky Films, Inc. v. Time*  
 10 *Warner Ent’mnt Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006)).

11 **a. The Only Claimed Similarities Are A Small Number**  
 12 **Of Undisputedly Commonplace Elements In The**  
 13 **Ostinatos**

14 At trial, the only portion of “Joyful Noise” which Plaintiffs claimed to be  
 15 infringed was its ostinato, and the only portion of “Dark Horse” which Plaintiffs  
 16 claimed to be infringing was its Ostinato 2. As the Court stated on the record: “this  
 17 whole case was about whether Ostinato No. 2 in Dark Horse infringed the ostinato  
 18 in Joyful Noise.” WD, Ex. 8, p. 1349 l. 24-1350 l. 3. The undisputed transcriptions  
 19 of these two ostinatos prior to the transposition to the same key (*see* WD, Ex. 28)  
 20 are set forth below:



26 As detailed below, it was undisputed by both parties’ expert musicologists  
 27 that all of the claimed similarities between the portions of the works at issue (the

1 ostinato in “Joyful Noise” and Ostinato 2 in “Dark Horse”) are commonplace, and  
2 that those ostinatos contain numerous differences.

3 At trial, Dr. Decker testified that these two ostinatos contained the following  
4 similarities: a pitch sequence of 3, 3, 3, 3, 2, 2 on evenly spaced notes (along with  
5 a melodic descent from 3 to 2 to 1); timbre (in the form of a “pingy” synthesizer  
6 sound); a purported phrase length of eight notes; and the “placement” of the  
7 ostinato in the sound recording’s mix. WD, Ex. 3, p. 445 l.17-446 l.3. Dr. Decker  
8 *conceded*, and thus it is undisputed fact, that each of these similarities was  
9 individually commonplace and unremarkable, testifying that “[a]ny single one of  
10 **those would not have been enough.**” *Id.* p. 524 l. 9-23. Rather, according to Dr.  
11 Decker, “[i]t’s the combination of them” that was purportedly significant. *Id.*<sup>9</sup>

12 In addition to the above clear concession by Plaintiffs’ expert that the  
13 purported similarities were individually not protectable, his specific testimony at  
14 trial further conceded and established the commonplace nature of each of the  
15 similarities between the portions of the two ostinatos, similarities that necessarily  
16 flow from an independent compositional choice of writing in the minor mode and  
17 using a descending ostinato. Dr. Decker acknowledged the obvious point that the  
18 use of an ostinato itself is not protectable, in that countless musical works have  
19 contained ostinatos. *Id.* p. 506 l. 14-507 l. 7. Nor can writing in the minor mode be  
20 copyrightable. With respect to the main similarity asserted by Dr. Decker of scale  
21 degrees “3, 3, 3, 3, 2, 2” (or “C, C, C, C, B, B”) on an evenly spaced rhythm:

- 22 • Scale degree 3 in the minor mode informs the listener that a song is “in the  
23 minor mode.” *Id.* p. 450 l. 13-14.
- 24 • Dr. Decker conceded that “scale degrees have tendencies” in that they “want  
25 to go places.” *Id.* p. 443 l. 24-444 l. 14; 450 l. 18-20. Specifically, “3 wants

26 \_\_\_\_\_  
27 <sup>9</sup> Dr. Decker’s assertion that the combination of commonplace elements in “Joyful  
28 Noise” was protectable and substantially similar to “Dark Horse,” is a conclusion  
of law that no expert witness is allowed to make. *See Nationwide Transp. Fin. v.*  
*Cass. Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008).

- 1 to go down to 2” and “2 desperately wants to go to 1” because “1 is our  
2 home note.” *Id.* p. 450 l. 19-22, 458 l. 6-7, 18-21. *See also id.* p. 459 l. 1-6.
- 3 • Dr. Decker conceded that repeating scale degree 3 is a technique composers  
4 use to build “up tension that wants to be released and it is released to 2” (*id.*  
5 p. 451 l. 22-23); “you repeat [scale degree 3] more often and it creates more  
6 of a desire for it to go down” (*id.* p. 450 l. 21-22).
  - 7 • Ostinato 1 in “Dark Horse,” which Dr. Decker concedes is not infringing,  
8 contains this same descent from 3 to 2 to 1. *Id.* p. 496 l. 9-497 l. 6.<sup>10</sup>
  - 9 • He admitted that a C note and a B note are two white keys next to each other  
10 on a piano, these notes are not hard to play, and it is relatively simple to hit  
11 four C notes in a row followed by two B notes. *Id.* p. 494 l. 1-7, 516 l. 1-14.
  - 12 • Dr. Decker admitted that evenly spaced notes are a “relatively simple  
13 rhythmic choice” that “no composer’s entitled to monopolize.” *Id.* p. 507 l.  
14 12-23, 516 l. 18-20.
  - 15 • Dr. Decker did not dispute that “Love Me Or Hate Me,” released prior to  
16 “Joyful Noise” in 2006 and co-written by Gottwald, contains a descending  
17 ostinato with a “3, 2, 1, 5” pitch content, evenly spaced notes, and a sparse  
18 texture. WD, Ex. 5 p. 913 l. 8-914 l. 11.
  - 19 • Dr. Decker did not dispute that “Brainchild,” released in 1996, and  
20 “Choosing Life,” released in 2002 (prior to “Joyful Noise”), also contain the  
21 repeating scale degrees (“3, 2, 1, 5” or “C, B, A, E”) that are present in both  
22 Ostinato 1 and Ostinato 2 in “Dark Horse.” *Id.* p. 884 l. 8-20, 886 l. 12-24.
  - 23 • The children’s song “Merrily We Roll Along” (found in a beginning  
24 instructional book for elementary school students) and the Christmas carol  
25 “Jolly Old St. Nicholas” also contain the pitch sequence 3, 3, 3, 3, 2, 2 on  
26 evenly spaced notes. *Id.* p. 904 l. 7-905 l. 17; 907 l. 17-908 l. 4. Dr. Decker

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27 <sup>10</sup> Dr. Decker’s admission regarding Ostinato 1 creates a further undisputed fact in  
28 support of this motion.

1 did not dispute this, and it is un rebutted.

2 With respect the purported shared phrase length of eight notes, Dr. Decker  
3 admitted that “[i]t’s characteristic for a phrase like this to last for eight beats.” WD,  
4 Ex. 3, p. 448 l. 3-9.<sup>11</sup>

5 While Dr. Decker testified that the “t[imbre] or the quality and color of the  
6 sound” is similar, in that both works are produced in a sound recording using a  
7 “pingy sound” with a synthesizer (WD, Ex. 3, p. 452 l. 21-453 l. 19) he conceded  
8 that the timbre of the songs are “not identical” (*id.*), and that a pingy synthesized  
9 timbre cannot be monopolized (*id.* p. 516 l. 21-517 l. 4).

10 Finally, un rebutted testimony from Dr. Ferrara established that sparse  
11 texture is commonplace. WD, Ex. 5 p. 912 l. 15-913 l. 7.<sup>12</sup>

12 **b. The Undisputed Evidence Establishes The Many**  
13 **Differences Between The Ostinatos In “Joyful Noise”**  
14 **And “Dark Horse”**

15 The undisputed record adduced at trial similarly establishes that the ostinato  
16 in “Joyful Noise” and Ostinato 2 in “Dark Horse” contain important differences:

- 17 • The pitch on Beat 7 of the ostinato in “Joyful Noise” is a B, while the pitch  
18 on Beat 7 of Ostinato 2 in “Dark Horse” is an A. WD, Ex. 3, p. 499 l. 8-16.
- 19 • The pitch on Beat 8 of the ostinato in “Joyful Noise” is an A or an F,  
20 depending on the iteration. The pitch on Beat 8 of Ostinato 2 in “Dark  
21 Horse” is an E. *Id.* p. 499 l. 18-501 l. 7.
- 22 • The B is repeated three times in the ostinato in “Joyful Noise” but is only  
23 repeated twice in Ostinato 2 in “Dark Horse.” Thus, Ostinato 2 descends to  
24 A a full beat before the ostinato in “Joyful Noise.” *Id.* p. 499 l. 8-16.

25 \_\_\_\_\_  
26 <sup>11</sup> In fact, the “Joyful Noise” ostinato consists of 16 beats. WD, Ex. 5 p. 918 l. 16-  
919 l. 13.

27 <sup>12</sup> As discussed *infra* § II.B.3.c, the “mix” of a sound recording is not an element of  
28 the underlying musical composition and therefore may not be considered in the  
substantial similarity analysis.



- 1 • The ostinato in “Joyful Noise” takes 16 beats for all of the melodic content  
2 in that ostinato to be expressed before it repeats. In contrast, it only takes 8  
3 beats for all the melodic content in Ostinato 2 in “Dark Horse” to be  
4 expressed. WD, Ex. 5 p. 918 l. 16-919 l. 13.
- 5 • The ostinato in “Joyful Noise” contains portamentos (also known as slides).  
6 WD, Ex. 3, p. 505 l. 9-22. In contrast, there are no such portamentos in  
7 “Dark Horse.” That gives the ostinato in “Joyful Noise” rhythmic and  
8 melodic content that is nowhere present in Ostinato 2 in “Dark Horse.” *Id.*
- 9 • The ostinato in “Joyful Noise” occurs throughout the entirety of “Joyful  
10 Noise”; in contrast, Ostinato 2 in “Dark Horse” is only iterated during the  
11 verse sections. *Id.* p. 495 l. 15-17.
- 12 • The ostinatos are in different keys (*id.* p.460 l. 5-25); the tempos are  
13 different (*id.* p. 462 l. 1-6, 504 l. 23-25); the harmony is different (*id.* p. 504  
14 l. 11-18); and the harmonic rhythm is different (*id.* p. 504 l. 19-22).<sup>13</sup>

15 **c. Proper Application Of The Extrinsic And Intrinsic**  
16 **Tests To These Facts Requires A Finding Of No**  
17 **Substantial Similarity**

18 **(i) The Extrinsic Test**

19 As discussed above, the proper application of the extrinsic test requires  
20 analytical dissection of the ostinatos, and extraction of all of the unprotectable and  
21 commonplace expression therein. Pursuant to this test, *all* of the claimed  
22 similarities between the ostinato in “Joyful Noise” and Ostinato 2 in “Dark Horse”  
23 must be extracted and filtered out because, as both parties’ experts agree, each of  
24 those similarities is commonplace and unremarkable. *Swirsky*, 376 F.3d at 845.

25 <sup>13</sup> Dr. Decker also admitted numerous differences between the works as wholes:  
26 Ostinato 2 (the only portion Dr. Decker claims is similar to “Joyful Noise”) does  
27 not play during 55% of the “Dark Horse” recording (*id.* p. 464 l. 24-465 l. 6);  
28 “Dark Horse” and “Joyful Noise” are in different keys (*id.* p. 460 l. 5-25); and the  
tempo, harmony, and harmonic rhythm of the works, and rhythm of the rap vocals  
in the works, are different (*id.* p. 462 l. 1-6; 504 l. 11-25; 505 l. 1-5). It is also  
undisputed that “this lawsuit doesn’t involve lyrics.” WD, Ex. 6 p. 1174 l. 6-10.

1 When the commonplace similarities are removed, nothing remains other than  
2 undisputed differences between the two ostinatos.

3 Nor do the allegedly infringed elements in the “Joyful Noise” ostinato  
4 constitute a sufficiently original selection, arrangement, and coordination of  
5 numerous enough commonplace elements to warrant copyright protection. Quite  
6 the contrary. The centerpiece of Plaintiffs’ infringement claim—the pitch sequence  
7 of 3, 3, 3, 3, 2, 2 (me, me, me, me, re, re) on evenly spaced notes—is a simplistic  
8 iteration of two white keys next to each other on the keyboard. It is wholly  
9 unremarkable, and concededly present in famous (and basic) compositions in the  
10 public domain, including “Jolly Old St. Nicholas” and “Merrily We Roll Along.”

11 Dr. Decker’s other claimed similarities—which he alleged to constitute a  
12 “combination” in tandem with the aforementioned trite similarity—are few in  
13 number, also admittedly commonplace, and do not remotely change the analysis.  
14 The 3, 2, 1 melodic progression is not only contained in Gottwald’s own prior art,  
15 but moreover, it is what the ear expects to hear, and where the pitches “want to  
16 go,” as Dr. Decker admitted. *Supra* § II.B.3.a. Dr. Decker further conceded that an  
17 eight-note length is “characteristic for a phrase like this.” *Id.* Dr. Decker also  
18 admitted that no composer can monopolize a “pingy” synthesizer tone, and that the  
19 timbres of the ostinatos at issue are, in fact, different. *Id.* Finally, a “sparse” mix of  
20 a recording is also commonplace in hip-hop and pop music (*id.*); moreover this is  
21 an element of the sound recording, not the composition, and accordingly should  
22 not even be considered as part of the substantial similarity analysis in any event.  
23 *Newton II*, 388 F.3d at 1194 (“unique performance elements” of a sound recording  
24 “must be filter[ed] out ... from consideration.”).

25 Even if, *arguendo*, the commonplace similarities at issue were accorded  
26 copyright protection in combination, the ostinato in “Joyful Noise” would at most  
27 be entitled to a “thin” copyright that would only protect against “virtually  
28 identical” copying. *Satava*, 323 F.3d at 812. There is no dispute that the ostinatos

1 at issue are *not* virtually identical, but instead have significant differences. The thin  
 2 copyright doctrine properly applied resoundingly negates Plaintiffs' infringement  
 3 claim for all of the legal and policy reasons discussed above.

4 No reasonable jury could have found for Plaintiffs on to the extrinsic test.

5 **(i) The Intrinsic Test**

6 Because the extrinsic test, properly applied, must result in a finding of no  
 7 substantial similarity, there should be no application of the intrinsic test. However,  
 8 a reasonable jury applying the intrinsic test also could never find substantial  
 9 similarity. The Court correctly explained to the jury that in applying the intrinsic  
 10 test, they must "determine whether ... the total concept and feel of 'Joyful Noise'  
 11 and 'Dark Horse' are substantially similar in **original, protectable expression.**"  
 12 Dkt. 441, Jury Instr. 37 (emphasis added). Because the ostinatos at issue have no  
 13 original, protectable expression in common, the intrinsic test cannot be met here.  
 14 Moreover, there is no dispute that the works wholes are very different (*supra* note  
 15 13), which further eliminates any finding of infringement under the intrinsic test.

16 **C. No Legally Sufficient Evidentiary Basis Supports The Jury's**  
 17 **Finding Of Access Based Solely On Plaintiffs' Claim Of Alleged**  
 18 **Widespread Dissemination Of "Joyful Noise"**

19 Proof of access requires "an opportunity to view or to copy plaintiff's work."  
 20 *Loomis*, 836 F.3d at 995. "To prove access, a plaintiff must show a reasonable  
 21 possibility, not merely a bare possibility, that an alleged infringer had the chance to  
 22 view the protected work." *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d  
 23 1138, 1143 (9th Cir. 2009). Put differently, a reasonable opportunity "does not  
 24 encompass any bare possibility in the sense that anything is possible." *Three Boys*  
 25 *Music Corp. v. Bolton*, 212 F.3d 477, 482-84 (9th Cir. 2000) (quoting 4 Nimmer  
 26 on Copyright § 13.02[A] (1999)). A reasonable opportunity requires more than  
 27 mere speculation or conjecture. *Id.* Yet, the jury's finding of access was just that:  
 28 mere speculation or conjecture.

1 Access can be proven through direct evidence of access or, “[w]here there is  
2 no direct evidence of access, circumstantial evidence can be used to prove access  
3 either by (1) establishing a chain of events linking the plaintiff’s work and the  
4 defendant’s access, or (2) showing that the plaintiff’s work has been widely  
5 disseminated.” *Loomis*, 836 F.3d at 995.

6 At trial, Plaintiffs conceded they had no proof for prong one above: no direct  
7 evidence of access or circumstantial evidence establishing a chain of events linking  
8 the plaintiff’s work and the defendant’s access. WD, Ex. 6 p. 1164 l. 7-14, 1166 l.  
9 7-13.<sup>14</sup> Plaintiffs solely relied on prong two above: widespread dissemination, and  
10 thus had the burden to prove that “Joyful Noise” was so widely disseminated as to  
11 make it reasonably possible that either Walter or Gottwald<sup>15</sup> had the opportunity to  
12 hear it. As discussed below, however, no legally sufficient evidentiary basis exists  
13 to support the jury’s finding that “Joyful Noise” was widely disseminated to  
14 provide Walter or Gottwald with a reasonable opportunity to hear “Joyful Noise”  
15 prior to creating “Dark Horse,” or to rebut Defendants’ showing that in all events  
16 they did not avail themselves of any such opportunity. Dkt. 456, Ques. 4 & 5. At  
17 best, Plaintiffs presented only a “mere scintilla” of evidence in support of their  
18 widespread dissemination theory, which is insufficient. *Letterman*, 799 F.2d at  
19 971. Further, the uncontroverted evidence proved that, whatever the reach of  
20 “Joyful Noise,” neither Walter nor Gottwald (or any other defendant author for that

21 <sup>14</sup> Plaintiffs admitted that they had never met, spoken to, or communicated with  
22 any defendant author and never sent any music to them directly or through an  
23 intermediary. WD, Ex. 2 p. 117 l. 12-120 l. 9; p. 217 l. 19-219 l. 19; WD, Ex. 3 p.  
24 337 l. 6-338 l. 24. They also admitted that they had no knowledge of any defendant  
25 author hearing “Joyful Noise” (*id.*), and each defendant author—without  
26 contradiction—denied ever hearing it. WD, Ex. 4 p. 683 l. 6-14; p. 627 l. 7-21, 647  
27 l. 22-650 l. 2; p. 595 l. 16-598 l. 2; p. 777 l. 11-780 l. 7; WD, Ex. 2 p. 168 l. 1-12.

28 <sup>15</sup> At trial, Plaintiffs conceded that only Walter and Gottwald are relevant to access.  
WD, Ex. 6 p. 1167 l. 2-9. The evidence proved that Walter and Gottwald created  
the “Dark Horse” ostinatos on a single day in March 2013. No other defendant had  
any involvement in creating the ostinatos. WD, Ex. 4 p. 334 l. 18-335 l. 13; p. 703  
l. 10-704 l. 18, 707 l. 6-708 l. 4; WD, Ex. 2 p. 151 l. 3-153 l. 12; WD, Ex. 3 p. 531  
l. 7-9, p. 531 l. 18-532 l. 5; WD, Ex. 2 p. 240 l. 4-11; WD, Ex. 4 p. 776 l. 2-22;  
WD, Ex. 3 p. 534 l. 6-24.

1 matter) availed himself of the opportunity to hear the song. Any other conclusion is  
2 impermissible speculation.<sup>16</sup>

3 **1. Plaintiffs’ Mischaracterization Of The Widespread**  
4 **Dissemination Doctrine Must Be Debunked.**

5 Plaintiffs’ description of the widespread dissemination doctrine was  
6 completely wrong. Plaintiffs claimed: “Joyful Noise” “*was out there* in the song  
7 universe, and it was available to professional songwriters who make a living  
8 listening to music” (WD, Ex. 6 p. 1167 l. 2-4). First, being “*out there*” is not the  
9 test for widespread dissemination; nor should it be.<sup>17</sup> This argument promotes  
10 nothing other than speculation in lieu of sound factual evidence demonstrating far  
11 and wide reaching distribution of a musical work. Being “out there” in no way  
12 shape or form constitutes “widespread dissemination” so as to support the  
13 conclusion that “Mr. Gottwald and Mr. Walter had a reasonable opportunity to  
14 hear [‘Joyful Noise’] ... before they created Dark Horse’s instrumental” (*id.* p.  
15 1167 l. 7-9).<sup>18</sup> Second, Plaintiffs’ contention that “it was available to professional  
16 songwriters who make a living listening to music”<sup>19</sup> is not only the antithesis of

17 <sup>16</sup> At the hearing on Defendants’ motion for summary judgment, the Court  
18 acknowledged that it could reassess its decision as it related to the issue of access  
19 after hearing evidence at trial. WD, Ex. 36, p. 1916 l. 11-16 (“And after hearing  
20 evidence, if we do go to trial, I may well come back and reassess based on Rule 50  
21 which I sometimes do because rather than granting summary judgment, it may  
22 make more sense to hear all the evidence and assess things.”). Indeed, Plaintiffs’  
23 lack of proof of access was confirmed at trial, and JMOL is mandated on access.  
24 *Archibald*, 2018 WL 6017032, at \*4 (denial of MSJ does not preclude JMOL);  
25 *Lillie*, 2019 WL 3387732, at \*22 (granting JMOL after denying summary  
26 judgment on the same claims, noting that “[n]ow, viewing all the evidence in the  
27 light most favorable to plaintiff, the Court finds that the evidentiary record does  
28 not permit a reasonable jury to” find in favor of the plaintiff).

<sup>17</sup> Based on its plain meaning, “widespread” is synonymous with “extensive,” “far-  
reaching,” and “sweeping.” See [https://merriam-webster.com/thesaurus/  
widespread](https://merriam-webster.com/thesaurus/widespread).

<sup>18</sup> This argument was presented on summary judgment, and Defendants submit  
that, just as at trial, it was raised to confuse the Court and jury and to lessen  
Plaintiffs’ burden on their sole access claim: widespread dissemination. Nothing in  
the record or the law supports this theory and it must be soundly rejected.

<sup>19</sup> WD, Ex. 6 p. 1167 l. 1-4 (Mr. Kahn: “Joyful Noise” “was available to  
professional songwriters who make a living listening to music”), p. 1167 l. 5-12  
(Mr. Kahn: Walter and Gottwald “have an incentive to be out there listening”); p.

1 widespread dissemination as narrowly focuses solely on professional songwriters,  
2 it is also a wholly incorrect factual statement (with zero proof and indeed contrary  
3 proof) that professional songwriters make their living “listening to music.”

4 Indeed, Gottwald testified that, in his experience, while “people think, oh,  
5 you just sit around and listen to music all day, .... in fact, that’s the opposite.” WD,  
6 Ex. 4 p. 685 l. 5-7. He elaborated:

7 [T]he reality is that you can’t [] listen to two songs at the  
8 same time. So if you’re working on music all the time,  
9 um, which I have been for a very long time, you actually  
10 listen to less music in my experience because also, when  
11 you’ve been workin’ on it all night, you know, it’s—you  
12 kind of want to get away from it sometimes.

13 *Id.* p. 685 l. 10-16. To the extent he did listen to music, he listened to music made  
14 by him and people he worked with. *Id.* p. 687 l. 6-9. Walter concurred, testifying  
15 that some days he is “creating so much music that I don’t feel like listening to any  
16 more music” and that when he did listen to music, he would “throw on some of my  
17 favorite music just to kind of relax or unwind.” *Id.* p. 656 l. 3-9. Both also testified  
18 that they did not listen to religious music, including Christian hip-hop. *Id.* p. 648 l.  
19 22-649 l. 3; 683 l. 15-24. This testimony was not contradicted or impeached.<sup>20</sup>

20  
21 1167 l. 24-1168 l. 1 (Mr. Kahn: “professional songwriters are more likely to pay  
22 attention to songs that are getting recognized and are getting nominated”); p. 1168  
23 l. 6-10 (Mr. Kahn: songwriters used Myspace pages “to seek out music”); p. 1170  
l. 14-20 (Mr. Kahn: “[Y]ou’re a professional songwriter. And you’ve listened to  
thousands and thousands of songs...”).

24 <sup>20</sup> As discussed in more detail below, Walter and Gottwald also explicitly testified  
25 that they did not search, including online, for music unknown to them, particularly  
26 religious music such as Christian hip-hop, and did not pay attention to Grammy  
27 nominations or Billboard charts other than for the categories that pertained to their  
28 music and their careers—*i.e.*, the pop categories. *See infra* § II.C.3. The testimony  
of the other defendant authors—also professional songwriters—was in accord.  
WD, Ex. 4, p. 598 l. 20-602 l. 2; p. 780 l. 2-19, p. 780 l. 24-782 l. 11; WD, Ex. 2 p.  
148 l. 5-149 l. 14, p. 168 l. 13-170 l. 4, p. 170 l. 9-171 l. 2. This evidence was  
uncontroverted.

1 Plaintiffs’ counsel’s improper attempt to shed Plaintiffs’ widespread  
2 dissemination burden and shift to Defendants a burden to disprove a false negative  
3 inference about professional songwriters undoubtedly impacted the jury as it  
4 promoted pure speculation. There is no legal or factual basis for his concocted  
5 proposition that professional songwriters seek out new music, whether online or  
6 otherwise, and it of course provides no substitute for evidence necessary to meet  
7 Plaintiffs’ burden to prove widespread dissemination of “Joyful Noise.”

8 **2. Joyful Noise Was Disseminated, At Most, In A Niche**  
9 **Market, Was Not Nationally Well Known And Was Not**  
10 **Extensively Available To A Large Group On A Wide Scale**

11 **a. The Views Of “Joyful Noise” On YouTube And**  
12 **Myspace Were The Opposite Of Widespread; They**  
13 **Were Undisputedly *De Minimis* In The Context Of The**  
14 **Online World Of Music**

15 Initially, “[t]he availability of a copyrighted work on the Internet, in and of  
16 itself, is insufficient to show access through widespread dissemination.” *Loomis v.*  
17 *Cornish*, 2013 WL 6044345, at \*12 (C.D. Cal. Nov. 13, 2013), *aff’d*, 836 F.3d 991  
18 (9th Cir. 2016); *Batts v. Adams*, 2011 WL 13217923, at \*4 (C.D. Cal. Feb. 8,  
19 2011) (“the posting of videos and/or songs on YouTube, Amazon.com, and iTunes  
20 by an unknown singer...is hardly ‘widespread’ [dissemination] and, in fact, is quite  
21 limited, and clearly insufficient to support a finding of access”).

22 Here, this Court is presented with the question as to whether Plaintiffs  
23 presented sufficient non-speculative proof necessary to establish widespread  
24 dissemination of “Joyful Noise” in the universe of content on the Internet, and in  
25 light of how that content is obtained by users. Defendants respectfully submit that  
26 Plaintiffs’ proof was woefully and indisputably insufficient.

27 On this issue, Plaintiffs relied solely on (1) six videos of “Joyful Noise”  
28 available on YouTube with a cumulative “view” count of **3.88** million views  
**between 2008 and 2012** and (2) the presence of “Joyful Noise” on the Myspace  
profile pages for Gray and Moore that had a cumulative “play” count of **2.49**

1 million plays during those same five years. While Plaintiffs' counsel then *argued*  
2 that these view counts proved the widespread dissemination of "Joyful Noise"  
3 because "6 million is a big number" (WD, Ex. 6 p. 1167 l. 19), his argument is not  
4 evidence. Plaintiffs bore the burden to prove that the view counts of "Joyful Noise"  
5 indeed constituted widespread dissemination *in the context of those platforms*.  
6 They completely failed to do so, which alone warrants rejecting the jury's finding  
7 of widespread dissemination.

8 Consistent with their false premise that widespread dissemination is equal to  
9 a work being "out there," Plaintiffs would have this Court ignore what widespread  
10 dissemination means in the context of online music. Indeed, it was Defendants who  
11 demonstrated by unrebutted evidence the insignificance of Plaintiffs' numbers in  
12 the context of the universe they relied on. Defendants' evidence established that  
13 the "Joyful Noise" view counts are a miniscule drop in the bucket when compared  
14 to the *trillions* of views/plays that YouTube and Myspace received *during the*  
15 *same time period*. The "Joyful Noise" view/play counts at issue do not remotely  
16 suggest *widespread* dissemination affording Walter and Gottwald a reasonable  
17 opportunity to find and listen to "Joyful Noise" on YouTube and Myspace.

18 As demonstrated by the stipulated facts and unrebutted testimony of Bill  
19 Rosenblatt regarding the YouTube platform, Plaintiffs' *six* videos were among  
20 *billions* of other available videos during the relevant time period, including  
21 *hundreds of millions* of music videos alone. WD, Ex. 4 p. 764 l. 24-766 l. 10, p.  
22 767 l. 11-21, p. 768 l. 8-24; Wais Decl, Ex. 5 p. 981 l. 4-982 l. 14. A view count of  
23 *3.88 million* pales compared to the *4.14 trillion* total views of videos during the  
24 relevant time period. WD, Ex. 4 p. 768 l. 8-771 l. 3; Wais Decl, Ex. 5 p. 979 l. 12-  
25 980 l. 7. Critically, Rosenblatt testified that to find a "Joyful Noise" video on  
26 YouTube, a user would have had to take affirmative steps to search for it by the  
27 song or artist's name; otherwise, trying to find it would be like trying to find six

28



1 people in China without knowing their names. This testimony was un rebutted.  
 2 Wais Decl, Ex. 5 p. 985 l. 14-987 l. 1.

3 Regarding the Myspace platform, Defendants' expert Zachary St. Martin  
 4 testified that the two Myspace pages presented by Plaintiffs were **two** out of **265**  
 5 **million** registered accounts, and that "Joyful Noise" was **one** song out of up to **53**  
 6 **million songs** from over **14 million** artists. WD, Ex. 4 p. 800 l. 12-801 l. 11. He  
 7 also testified that the **2.49 million** plays of "Joyful Noise" over four years were  
 8 dwarfed by the **billion plays every month** that occurred during the same time  
 9 period. *Id.* St. Martin also testified that the primary ways in which users could  
 10 access a song on Myspace were by searching for a particular artist or song that the  
 11 user already knew about and that users were not satisfied with search features of  
 12 Myspace because "there was so much music on the site and the ability to find it  
 13 was rudimentary." *Id.* p. 795 l. 9-797 l. 24, p. 798 l. 17-24, p. 801 l. 12-802 l. 2.  
 14 Songs "featured" on Myspace were popular, mainstream songs in the rap, rock, and  
 15 pop genres, *not* religious music or Christian hip-hop. *Id.* And the genre page would  
 16 have to be expanded to locate any Christian categories within the alphabetical list  
 17 of genres. *Id.* p.799 l.10-800 l.11<sup>21</sup>

18 Accordingly, there was no legally sufficient evidentiary basis for a  
 19 reasonable jury to conclude Plaintiffs proved widespread dissemination of "Joyful  
 20 Noise" based on the 6 million views/plays<sup>22</sup> in the context of YouTube and  
 21 Myspace. As a matter of law and undisputed fact, these numbers cannot be  
 22 considered widespread dissemination in the massive universe of online content.

23 \_\_\_\_\_  
 24 <sup>21</sup> Plaintiffs had no proof that any of the "Dark Horse" writers searched for  
 25 Christian rap on YouTube or Myspace, as was Plaintiffs' burden. Moreover, again,  
 26 Walter and Gottwald testified that they had never heard of Plaintiffs or their music,  
 including "Joyful Noise," before this lawsuit and did not search online for or listen  
 to religious music, including Christian hip-hop. *Infra* § II.C.3.

27 <sup>22</sup> Additionally, the undisputed evidence at trial established that view counts are  
 28 inherently unreliable, because there are repeat listeners and both YouTube and  
 Myspace suffered from view/play artificial inflation through the use of bots and  
 paid views/plays. WD, Ex. 4 p. 767 l. 22-768 l. 7; WD, Ex. 5 p. 989 l. 15-990 l. 18.

1 There is also an un rebutted bar to entry into that massive universe by virtue of the  
 2 fact that search terms need to be employed to find a work. Plaintiffs proffered no  
 3 evidence, and none exists, that any defendant searched for “Joyful Noise.”<sup>23</sup>

4 This un rebutted evidence shows Plaintiffs’ claim of access to “Joyful Noise”  
 5 is wholly speculative and without any evidentiary support from which to infer that  
 6 any defendant had a reasonable opportunity to hear it. It is “the modern day  
 7 equivalent of looking for a needle in a haystack—where the alleged seeker does  
 8 not know the needle exists, and isn’t looking for it.” *Batts*, 2011 WL 13217923, at  
 9 \*4 (using this analogy to describe the “posting of videos and/or songs on YouTube,  
 10 Amazon.com, and iTunes by an unknown singer”); *see also Loomis*, 836 F.3d at  
 11 998 (“Although there was a bare possibility that they heard Bright Red Chords on  
 12 the radio, or that they read about Loomis and the Lust in a magazine in the break  
 13 room of Playback Studios, or that they picked up one of Loomis’s promotional  
 14 CDs while at Playback, that is not enough to raise a triable issue of access.”); *id.*  
 15 (quoting Nimmer explaining that “evidence showing that Gloria Estefan was  
 16 present in a room with 15,000 records, including one containing plaintiff’s song”  
 17 was insufficient to demonstrate access). Nothing in this record demonstrates  
 18 anything remotely close to widespread dissemination of “Joyful Noise”—it offers  
 19 only sheer speculation as to access which is legally insufficient.

20 **b. Plaintiffs Had Virtually No Evidence Of Traditional**  
 21 **Dissemination Of “Joyful Noise”**

22 Since Plaintiffs failed to prove widespread dissemination of Joyful Noise  
 23 online, by their YouTube and Myspace views or otherwise, as discussed above, it  
 24 was incumbent upon them to fill that void with proof that could constitute “brick

25 <sup>23</sup> In this regard, *Loomis* confirms that it is also relevant that Plaintiffs and  
 26 Defendants operate in different music universes, a distinction that both sides  
 27 agreed upon. *See* WD, Ex. 3, p. 336 l. 13-337 l. 22 (Gray, Lambert, and Moore all  
 28 perform in the genre of Christian rap and, in that genre, they “cross paths and  
 encounter each other on a regular basis” but had never met or communicated with  
 any of the “Dark Horse” authors); WD, Ex. 4 p. 668 l. 13-669 l. 6; *see also supra*  
 notes 14 & 20.

1 and mortar” widespread distribution of Joyful Noise through traditional channels  
2 (e.g., sales, concerts, radio). There was no such widespread dissemination proof as  
3 a matter of law and undisputed fact.

4 • Sales: Plaintiffs did not offer proof of one single digital or brick-and-  
5 mortar sale of “Joyful Noise” or *Our World Redeemed* and admitted that they have  
6 no such evidence. WD, Ex. 3 p. 354 l. 2-5; WD, Ex. 2 p. 120 l. 22-121 l. 8; WD,  
7 Ex. 4 p. 736 l. 10-15. Thus, Plaintiffs failed to prove “Joyful Noise” or *Our World*  
8 *Redeemed* were sold at all, let alone in quantities sufficient to prove widespread  
9 dissemination.

10 • Radio/TV<sup>24</sup>: Plaintiffs did not prove that “Joyful Noise” received any  
11 radio or television play. Even if Gray’s testimony that it “may” have played *in the*  
12 *background* during, at most, a few hundred of his interviews touring unknown  
13 stations, at unknown times, and reaching an unknown audience, is credited, that  
14 testimony of course fails entirely to show any widespread dissemination by this  
15 means. WD, Ex. 2 p. 261 l. 3-11. There were absolutely no documents admitted  
16 regarding this channel of distribution.

17 • Live Performances<sup>25</sup>: Plaintiffs did not have any documentary  
18 evidence that Gray (or Lecrae Moore) performed “Joyful Noise” at large concerts  
19 attended by large crowds. Plaintiffs did not even have any documentary evidence  
20 showing it was played at any venue. Instead, Plaintiffs only testified that the two  
21 performed the song, at most, about 300 times over several years at unknown  
22 venues to audiences of unknown size. Their testimony confirmed that 70 percent of  
23 these concerts were at churches and other religious venues (WD, Ex. 3, p. 349 l.

24 \_\_\_\_\_  
25 <sup>24</sup> On summary judgment, the Court did not rely on evidence of radio and TV  
26 interviews because of the lack of “any evidence identifying the names of the  
27 television and radio stations that Gray claims to have been interviewed by.” Dkt.  
28 299, pp. 6-7, n.3. Plaintiffs’ evidence was no better at trial.

<sup>25</sup> On summary judgment, the Court noted that Plaintiffs failed to “identify[] the  
names of the venues where Gray performed or the size of the audience at any of his  
performances.” Dkt. 299, pp. 6-7, n.3. Plaintiffs’ evidence was no better at trial.

1 16-18; WD, Ex. 4 p. 723 l. 7-11, p. 743 l. 11-13) and, of the remaining 30 percent,  
 2 “a good portion” of those venues were still religious themed events. WD, Ex. 3 p.  
 3 406 l. 17-407 l. 8. Plaintiffs only testified to this; they presented no corroborating  
 4 evidence such as set lists or tapes of such performances. This testimony is not  
 5 evidence of widespread dissemination of “Joyful Noise”; and plaintiffs have no  
 6 proof, as none exists, that any defendant attended any of these 300 concerts.

7 • Critical Acclaim: Plaintiffs did not prove critical acclaim that would  
 8 suggest that anyone other than those who follow Christian and Gospel music  
 9 would have been made aware of “Joyful Noise.” While Plaintiffs presented  
 10 evidence that “Joyful Noise” and *Our World Redeemed* appeared on Billboard  
 11 charts in the Christian and Gospel music categories and were also nominated for  
 12 music awards in Christian or gospel music categories, these charts and nominations  
 13 do not evidence the *reach* of “Joyful Noise.” All this evidence proves is that the  
 14 name of a song or an album appeared on a chart or list of nominees for awards in a  
 15 niche genre of music Defendants did not know about and had no interest in  
 16 following. It is speculation to surmise from this that it is reasonably possible that  
 17 someone saw the name of the song, sought the song out, and listened to it. This is  
 18 particularly true for a niche genre like Christian hip hop.<sup>26</sup> Plaintiffs’ evidence  
 19 merely shows that the song achieved some amount of critical acclaim in the genre  
 20 of Christian music—a genre that both Walter and Gottwald testified that they did  
 21 not follow. Importantly, Plaintiffs presented no evidence to the contrary, nor did  
 22 they otherwise impeach or rebut that testimony. *See infra* § II.C.3.

23 Whether the Court considers this evidence by individual category or in the  
 24 aggregate, the case law makes clear that this sparse level of dissemination cannot

25 \_\_\_\_\_  
 26 <sup>26</sup> In fact, Billboard produces nearly 200 charts a week, of which Christian and  
 27 Gospel music categories are just two. Billboard’s most popular charts are the  
 28 Billboard Top 100 and the Billboard 200 and the charts relating to mainstream Top  
 40, rock, R&B and hip hop, and country music are larger in terms of market  
 volume and audience volume than the charts relating to gospel and Christian. WD,  
 Ex. 5 p. 1011 l. 1-13.

1 reasonably support a finding of *widespread* dissemination. *See, e.g., Loomis*, 836  
 2 F.3d at 994 (where the plaintiff’s song had won several awards, the Court found  
 3 that, “[d]espite these achievements, Bright Red Chords was not commercially  
 4 successful”); *Art Attacks Ink*, 581 F.3d at 1144 (T-shirt design not widely  
 5 disseminated where plaintiff sold 2,000 shirts a year and displayed the design at  
 6 fair booths and store kiosks); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th  
 7 Cir. 2003) (no widespread dissemination where plaintiff sold 17,000 copies of a  
 8 video over a 13 year period); *Loomis*, 2013 WL 6044345, at \*11 (“evidence of  
 9 small circulation . . . or local air time without other proof of access is generally not  
 10 enough to demonstrate a reasonable possibility of access”); *Jason v. Fonda*, 526 F.  
 11 Supp. 774, 776-77 (C.D. Cal. 1981) (book sales of no more than 2,000 copies  
 12 nationwide and no more than 700 copies in Southern California were insufficient).

13 In short, Plaintiffs were obligated to prove actual sales, radio plays, and  
 14 concert performances. In this regard, context matters. Simply saying that “Joyful  
 15 Noise” was “out there,” without proof of a sufficient number, level, or volume of  
 16 sales, radio plays, or performances, is wholly insufficient. All that Plaintiffs proved  
 17 here is speculation and a bare possibility of access through these channels, if that.<sup>27</sup>

18 The rule of widespread dissemination must be properly applied because  
 19 otherwise there cannot be a *reasonable* opportunity for any defendant to hear  
 20 “Joyful Noise.” Again, Plaintiffs have never claimed, nor can they, that any chain  
 21 or conduit exists. They must therefore show that “Joyful Noise” had a sufficiently

22 \_\_\_\_\_  
 23 <sup>27</sup> Even cases finding access make clear that context matters and that the plaintiff  
 24 has a duty to present evidence of dissemination sufficient to give rise to a  
 25 reasonable opportunity of access. In *Three Boys Music Corp.*, for example, the  
 26 Ninth Circuit upheld a jury’s finding that it was reasonable for the jury to infer that  
 27 the songwriters, Bolton and Goldmark, had heard plaintiff’s song because it “was  
 28 widely disseminated on radio and television stations *where Bolton and Goldmark  
 grew up*” (*Three Boys Music Corp.*, 212 F.3d at 483-84) (emphasis added) *and*  
 Bolton also admitted that he “grew up listening to groups such as the Isley  
 Brothers,” was a “huge fan,” a “collector of their music,” “kn[ew] everything [the  
 Isley Brothers had] done” (*id.*), and had even expressed concern to his co-writer  
 that they “were copying a song by another famous soul singer.” *Id.* at 484. Such  
 evidence is completely lacking here.

1 **wide** reach on commercial platforms such that there can be a reasonable inference  
 2 of access. Plaintiffs woefully failed to carry this burden.<sup>28</sup> Even if one combined  
 3 the drop in the bucket Internet evidence with the sparse traditional dissemination  
 4 proof, the unquestionable conclusion remains that there was no widespread  
 5 dissemination of “Joyful Noise.” Both the online and the brick and mortar proofs  
 6 of dissemination were quantifiably extremely low, not remotely widespread.

### 7 3. The Evidence Showed That Defendants Did Not Avail 8 Themselves Of The Opportunity To Hear “Joyful Noise”

9 In the face of this deficient proof of widespread dissemination, judgment for  
 10 Defendants is even more warranted by Defendants’ un rebutted and unimpeached  
 11 evidence that they did not avail themselves of any alleged opportunity to hear  
 12 “Joyful Noise” and, thus, did not copy. *See* WD, Ex. 4 p. 647 l. 22-650 l. 2, p. 650  
 13 l. 8-651 l. 10, p. 652 l. 9-16, p. 660 l. 7-16, p. 681 l. 22-684 l. 24, 688 l. 13-22, p.  
 14 695 l. 17-19.<sup>29</sup> This dispels any inference of copying. *See* Dkt. 403, p. 3 (citing 4  
 15 *Nimmer on Copyright*, § 13.02[A]). Plaintiffs offered no impeachment or other  
 16 evidence, and none exists, to contradict this testimony. Indeed, Walter and  
 17 Gottwald, who testified they never heard of Plaintiffs or their music, including  
 18 “Joyful Noise,” also:

- 19 • Explicitly disclaimed searching online for music unknown to them,  
 20 particularly religious music such as Christian hip-hop. *See* WD, Ex. 4 p. 650 l. 3-  
 21 651 l. 10 (Walter did not use Myspace to search for music or “browse” YouTube

22 <sup>28</sup> Plaintiffs had no alternative theory as they did not present any evidence that  
 23 Gottwald or Walter listened to, sought out, or followed religious music or attended  
 24 religious concerts, including those of Gray and Moore. The evidence was to the  
 25 contrary. WD, Ex. 4 p. 647 l. 22-650 l. 2; p. 651 l. 5-10; p. 683 l. 15-684 l. 24. The  
 26 other defendant authors’ testimony was in accord. WD, Ex. 2 p. 168 l. 1-170 l. 4, p.  
 27 171 l. 3-9; WD, Ex. 4 p. 592 l. 14-597 l. 18; p. 772 l. 22-774 l. 21, p. 777 l. 11-779  
 28 l. 17. *See Loomis*, 836 F.3d at 998 (no triable issue of fact arose from Santa  
 Barbara music scene being saturated with “Bright Red Chords” because the  
 “Domino” songwriters were not participating in that scene); *Guzman v. Hacienda  
 Records & Rec. Studio, Inc.*, 2014 WL 6982331, at \*5-6 (S.D. Tex. Dec. 9, 2014),  
*aff’d* 808 F.3d 1031 (5th Cir. 2015) (a song was not “widely disseminated” where  
 it “did not achieve popularity outside of the Tejano music scene”).

<sup>29</sup> *See also supra* note 14.

1 or look for religious music or Christian rap; he would “search for [his] favorite  
 2 songs,” listen to a song that a friend sent him a link to, or to “look up a funny  
 3 video”); p. 670 l. 25-671 l. 2 (Gottwald “may have listened to music on MySpace  
 4 if it was referred to me by somebody”); p. 688 l. 23-689 l. 6 (Gottwald explained  
 5 that “he is focused in the pop music genre” and has “never really looked at  
 6 [Christian music]”). *See also supra* notes 14 & 28.

7 • Explicitly testified that they did not know Gray or Moore and never  
 8 attended one of their concerts; never attended concerts of religious music; and did  
 9 not listen to religious music, including Christian hip-hop, meaning they were not  
 10 listening to the radio stations and shows on which Gray purportedly appeared. WD,  
 11 Ex. 4 p. 647 l. 22-650 l. 2, p. 681 l. 22-674 l. 24.

12 • Explicitly testified that they never listened to or heard of “Joyful  
 13 Noise” or *Our World Redeemed* prior to the filing of the instant action. *Id.* p. 627 l.  
 14 7-21, p. 649 l. 12-15 ; p. 683 l. 6-14.<sup>30</sup>

15 Finally, as to the Billboard charts and Grammy nomination, Walter and  
 16 Gottwald testified that they barely paid attention to either and, when they did, they  
 17 only paid attention to the categories that pertained to their music and their  
 18 careers—*i.e.*, the pop categories. *Id.* p. 616 l. 7-13; 651 l. 14-652 l. 2 (Walter  
 19 looked at Billboard’s Hot 100 chart but did not look at charts that his music was  
 20 not on or outside the Top 100); 652 l. 9-16 (Walter would pay attention to “Song of  
 21 the Year, Record of the Year” and “that’s kind of [] about it”; he was “not [] an  
 22 enthusiastic [] Grammy follower or watcher” and did not follow any of the awards  
 23 in any of the gospel or religious music categories); 686 l. 25-687 l. 5; p. 688 l. 1-22  
 24 (Gottwald, at times, looked at Billboard’s Hot 100 but would mostly just look at  
 25 “Top 10 of the Nielsen for pop” or the “top 10 of Media Base for radio”; he never  
 26 looked at gospel or Christian rap charts or religious music charts).

27 <sup>30</sup> Nor was there any evidence proffered at trial to suggest that either Gottwald or  
 28 Walter purchased “Joyful Noise” or *Our World Redeemed*, as there was no  
 evidence presented that *anyone* bought the song or album.

1 Defendants unquestionably established with un rebutted testimony,  
 2 particularly in the context of the sparse proof Plaintiffs presented, that they did not  
 3 avail themselves of any opportunity to hear “Joyful Noise.”

4 **D. No Legally Sufficient Evidentiary Basis Supports The Jury’s**  
 5 **Finding That Defendants Did Not Independently Create “Dark**  
 6 **Horse”**

7 A *prima facie* claim of copying can be rebutted by showing that the alleged  
 8 infringing work was independently created. *Three Boys Music*, 212 F.3d at 486  
 9 (“By establishing reasonable access and substantial similarity, a copyright plaintiff  
 10 creates a presumption of copying. The burden shifts to the defendant to rebut that  
 11 presumption through proof of independent creation.”) (citing *Granite Music Corp.*  
 12 *v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976)); *see also Herbert*  
 13 *Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (“It is  
 14 true that defendants had access to plaintiff’s [copyrighted] pin and that there is an  
 15 obvious similarity between plaintiff’s pin and those of defendants. These two facts  
 16 constitute strong circumstantial evidence of copying. But they are not conclusive,  
 17 and there was substantial evidence to support the trial court’s finding that  
 18 defendant’s pin was in fact an independent creation.”) (citations omitted).

19 Here, Defendants presented affirmative evidence of independent creation  
 20 that Plaintiffs failed to rebut or impeach. Specifically, Walter first testified about  
 21 his creative process that led to the creation of the beat, including Ostinatos 1 and 2,  
 22 which would eventually become the musical bed of “Dark Horse.” WD, Ex. 4 p.  
 23 634 l. 10-639 l. 9. He testified that, in March 2013, while he and Gottwald were at  
 24 Conway Studios waiting for an artist to show up, he took out his equipment and  
 25 started playing music. *Id.* p. 635 l. 4-24. He eventually played a simple downward  
 26 run of phrases—3, 2, 1, 5 (Ostinato 1). *Id.* p. 636 l. 24-637 l. 14. He liked the  
 27 sound so he recorded it to his music program, Cubase, and looped it. *Id.* However,  
 28 after about 13 seconds, the intro started to sound repetitive, so Walter decided to  
 stretch the notes out and slow it down to give it some space for an eventual verse.



1 *Id.* p. 637 l. 16-639 l. 9. In doing so, he simply kept his fingers on the same keys  
 2 and stretched it out by repeating the keys. *Id.* He repeated the 3 four times, the 2  
 3 two times, and again played the 1 and the 5, turning it into 3, 3, 3, 3, 2, 2, 1, 5  
 4 (Ostinato 2). *Id.* Then he added some drum sounds, copied Ostinato 1 into the  
 5 chorus, and made some additional modifications. *Id.* p. 639 l. 10-22. At that point,  
 6 Gottwald joined Walter and suggested adding some different underlying bass notes  
 7 to give it more depth. *Id.*; *see also id.* p. 639 l. 23-640 l. 17. Defendants introduced  
 8 this initial instrumental track, titled “Oh No!” into evidence. WD, Ex. 24.<sup>31</sup>

9 This testimony is also highly important in this case generally, because it  
 10 shows as a matter of undisputed fact that Ostinato 1 in “Dark Horse,” which Dr.  
 11 Decker admitted was not infringing (*supra* § II.B.3.a) was created first by Walter,  
 12 and it has the exact same pitches (3, 2, 1, 5) that are found in Ostinato 2 of “Dark  
 13 Horse.” This salient and undisputed fact not only demonstrates that the allegedly  
 14 infringed music is commonplace, unprotectable expression, it unequivocally  
 15 establishes that Defendants carried their burden of proving independent creation.

16 **E. No Legally Sufficient Evidentiary Basis Supports The Jury’s**  
 17 **Finding That The Inclusion Of Ojukwu’s Beat In “Joyful Noise”**  
 18 **Is Part Of A Joint Work of Authorship**

19 In order to prevail on a copyright infringement claim, a plaintiff must prove  
 20 that it owns the expression that is allegedly infringed. *Loomis*, 836 F.3d at 994.  
 21 Furthermore, under 17 U.S.C. § 411(a), “no civil action for infringement of the  
 22 copyright in any United States work shall be instituted until preregistration or  
 23 registration of the copyright claim has been made in accordance with this title.”  
 24 Without a registration that covers the expression that the plaintiff contends was

31 They and the other “Dark Horse” authors also testified about the process by  
 which they then created “Dark Horse” through songwriting sessions in Santa  
 Barbara with Perry, Sarah Hudson, and Max Martin, the addition of a rap verse by  
 Houston, and the continued refinement of the song. WD, Ex. 2 p. 160 l. 23-162 l.  
 11; WD, Ex. 3 p. 535 l. 18-536 l. 4; WD, Ex. 4 p. 642 l. 11-643 l. 18; p. 706 l. 9-  
 15; p. 594 l. 4-595 l. 15; p. 644 l. 15-646 l. 8; p. 706 l. 16-707 l. 5; p. 775 l. 23-776  
 l. 10. Ostinato 1 and 2, however, remained the same from the original beat created  
 by Walter. *Id.* p. 646 l. 13-647 l. 3; p. 707 l. 6-708 l. 4.

1 infringed, there is no claim.

2 Here, Plaintiffs only claim infringement of the ostinato in “Joyful Noise,”  
 3 part of the beat that Plaintiff Chike Ojukwu created. Ojukwu’s beat was a pre-  
 4 existing work that Ojukwu published to his Myspace page, and which Gray  
 5 purchased and later incorporated into “Joyful Noise.” WD, Ex. 2 p. 183 l. 17-184 l.  
 6 1, 118:19-119:3, p. 194 l. 19-22; WD, Ex. 3 p. 356 l. 6-8. Ojukwu’s pre-existing  
 7 beat is not part of a joint work with the rest of “Joyful Noise”; rather “Joyful  
 8 Noise” is a derivative work incorporating his beat. Since the copyright in this  
 9 derivative work does not protect the preexisting material embodied in the beat (17  
 10 U.S.C. § 103),<sup>32</sup> Plaintiffs cannot establish ownership of the beat or that their  
 11 registration covers the beat.

12 There are three criteria for determining whether a work is jointly authored,  
 13 the “most important” of which is whether the alleged author “superintended the  
 14 work by exercising control.” *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531  
 15 F.3d 962, 968 (9th Cir. 2008) (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234  
 16 (9th Cir. 2000)). Here, the undisputed evidence showed that Ojukwu had no  
 17 control whatsoever over “Joyful Noise.” After he sold the beat to Gray, Ojukwu  
 18 had no input into the lyrics or the mixing and mastering of “Joyful Noise”; no input  
 19 into the decision to replace the synthesizer sounds in the beat with guitars; and did  
 20 not receive any versions of “Joyful Noise” until after the song was finalized. WD,  
 21 Ex. 2 p. 213 l. 16-25; 215 l. 2-16.

22 Plaintiffs also made no objective manifestations of intent to be co-authors.  
 23 They made no agreement concerning ownership of the beat or any subsequent

24

25 <sup>32</sup> Although the copyright registration for “Joyful Noise” states that it is a “joint  
 26 work,” this is not *prima facie* evidence of the validity of the copyright or of the  
 27 facts stated in the certificate because the registration was not made within five  
 28 years after first publication of “Joyful Noise.” 17 U.S.C. § 410(c). The registration  
 for “Joyful Noise” should be accorded “no weight.” *See, e.g., Blue Underground  
 Inc. v. Caputo*, 2015 WL 12683972, at \*5 (C.D. Cal. Mar. 16, 2015) (citing *Sem-  
 Torq, Inc. v. KMart Corp.*, 936 F.2d 851, 853-54 (6th Cir. 1991)).

1 work by Gray that incorporated the beat (*id.* p. 209 l. 3-12; WD, Ex. 3 p. 359 l. 4-  
 2 9); had no discussions about the type of agreement for the purchase of the beat  
 3 (WD, Ex. 2 p. 210 l. 1-10); and Ojukwu did not even know Gray was going to pay  
 4 him for the beat (*id.* p. 209 l. 3-12). In the liner notes for “Joyful Noise,” Ojukwu  
 5 was not listed as a “writer.” WD, Ex. 19.<sup>33</sup> When “Joyful Noise” was nominated for  
 6 a Dove Award, he was not listed as a “writer.” WD, Ex. 17; WD, Ex. 3 p. 363 l. 7-  
 7 367 l. 10, p. 407 l. 9-409 l. 14. At no point until 2014, after this lawsuit was filed,  
 8 did Ojukwu enter into any written agreement concerning any ownership in “Joyful  
 9 Noise.” WD, Ex. 2 p. 211 l. 20-23, p. 212 l. 5-9; WD, Ex. 3 p. 389 l. 4-7.<sup>34</sup>

10 Under these circumstances, it is clear that “Joyful Noise” was not a joint  
 11 work incorporating Ojukwu’s beat. *Ford v. Ray*, 130 F. Supp. 3d 1358, 1362-64  
 12 (W.D. Wash. 2015), is illustrative. In that case, the plaintiff claimed that he was a  
 13 joint author of the song “Baby Got Back” because he created the “beat” for the  
 14 song. In finding that the plaintiff was **not** a joint author, the court relied on the fact  
 15 that, “[a]lthough plaintiff possessed initial control over his contribution to ‘Baby  
 16 Got Back,’ the ultimate decision as to how or whether to incorporate plaintiff’s  
 17 creations was left to defendant.” *Id.* at 1363. As the court noted, “[t]he choices  
 18 regarding whether to use one of the beats, in whole or in part, and whether to make  
 19 alterations to the track rested entirely with defendant.” *Id.*

20 This case is no different. The evidence at trial demonstrated not only that  
 21 Ojukwu did not “superintend[] the work by exercising control,” there is no  
 22 evidence that he had any role in even deciding whether his beat was incorporated  
 23 in “Joyful Noise.” Accordingly, Ojukwu cannot be said to be a joint author of

24 <sup>33</sup> He was listed as a “producer,” and admitted that he understands that there are  
 25 differences between producers and writers. WD, Ex. 2 p. 226 l. 18-21.

26 <sup>34</sup> Agreements executed after the creation of “Joyful Noise” cannot retroactively  
 27 create a joint work. 17 U.S.C. § 101; *see also Batiste v. Island Records Inc.*, 179  
 28 F.3d 217, 222 (5th Cir. 1999) (noting that the Copyright Act of 1976 “overruled  
 the so-called ‘Twelfth Street Rag’ doctrine, which had allowed an assignee of an  
 ownership interest in a composition to add elements to a pre-existing work and  
 create a ‘joint work’”).

1 “Joyful Noise.” Instead, “Joyful Noise” is a derivative work incorporating the beat,  
2 and the copyright in “Joyful Noise” does not protect the preexisting material  
3 embodied in the beat. 17 U.S.C. § 103.

4 **F. No Legally Sufficient Evidentiary Basis Supports The Jury’s**  
5 **Finding Of Liability As To Multiple Defendants**

6 Even if, *arguendo*, the jury could have properly concluded that “Dark  
7 Horse” infringes “Joyful Noise”—and it could not—there still was no basis to  
8 support the jury’s finding of liability against numerous of the Defendants. A  
9 plaintiff in a copyright case may only recover for direct infringement<sup>35</sup> against a  
10 defendant “who violates any of the exclusive rights of the copyright owner,”  
11 namely: the rights to reproduce, prepare derivative works, distribute, publicly  
12 perform, and display the copyrighted work. 17 U.S.C. §§ 501, 106. Here, Plaintiffs  
13 failed to present sufficient evidence of direct infringement by Kobalt Music  
14 Publishing America, Inc. (“Kobalt”), WB Music Corp. (“WB”), Kasz Money, Inc.  
15 (“KMI”), Katheryn Hudson, Gottwald, Sarah Hudson, Sandberg, and Houston.

16 As to Kobalt and WB, the sole evidence that Plaintiffs presented was that  
17 they “provide[] music publishing administrative services” for certain Defendants  
18 with respect to “Dark Horse.” WD, Ex. 34. Plaintiffs presented no evidence about  
19 what “administrative services” means, and no evidence to demonstrate that such  
20 activity violates any of the exclusive rights. Further, as the Court noted, 17 U.S.C.  
21 § 106 “does not include publishing” as an exclusive right. WD, Ex. 6 p. 1117 l. 7-  
22 9. Similarly, as to KMI, the sole evidence Plaintiffs presented was that it  
23 “furnished the production services of Walter and Gottwald for the ‘Dark Horse’  
24 sound recording.” WD, Ex. 34. Plaintiffs presented no evidence of what it means to  
25 “furnish” “production services,” or that doing so violates an exclusive right.

26  
27 <sup>35</sup> Plaintiffs asserted no claim against any defendant for vicarious or contributory  
28 infringement. WD, Ex. 5 p. 1030 l. 2-9; WD, Ex. 6 p. 1104 l. 22-23, p. 1107 l. 20-  
1108 l. 7 & p. 1110 l. 5-6.

1 As the Court aptly observed after all of the evidence had been presented in  
 2 the liability phase, “I’m not sure what all these [corporate] entities did [in  
 3 connection with “Dark Horse”] and I’m not sure the jury does either based on the  
 4 evidence before us. . . .” WD, Ex. 6 p. 1104 l. 10-12.

5 Plaintiffs similarly failed to present any evidence that Katheryn Hudson,  
 6 Gottwald, Sarah Hudson, Sandberg, or Houston copied or distributed “Joyful  
 7 Noise,” or violated any exclusive right under the Copyright Act. *Supra* § II.D &  
 8 notes 14, 15, 28 & 31.<sup>36</sup> Instead, at trial, Plaintiffs merely contended that these  
 9 individuals were all liable for copyright infringement simply by virtue of being co-  
 10 owners of the copyright in the “Dark Horse” composition. However, as the Court  
 11 acknowledged, all co-owners of a copyrighted work are not automatically liable for  
 12 direct copyright infringement by the mere fact of their co-ownership. WD, Ex. 6 p.  
 13 1121 l. 8-1122 l. 1. *Williams*, 895 F.3d at 1130-32 (rejecting argument that co-  
 14 owner of a copyright in an infringing work is *per se* liable as a matter of law).  
 15 Again, Plaintiffs did not assert a vicarious liability claim and presented no  
 16 evidence to support such a claim. *Supra* notes 15, 31 & 35.

17 **III. AS A MATTER OF LAW, PLAINTIFFS FAILED TO REBUT**  
 18 **DEFENDANTS’ PROOF OF APPORTIONMENT**

19 To recover a percentage of Defendants’ profits, Plaintiffs had the burden to  
 20 prove Defendants’ gross revenue *attributable* to the infringement. 17 U.S.C.  
 21 § 504(b). The Ninth Circuit takes “the statute’s general reference to ‘gross  
 22 revenue’ to mean the gross revenue associated with the infringement, as opposed to  
 23 the infringer’s overall gross sales resulting from all streams of revenue.” *Polar*  
 24 *Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711 n.8 (9th Cir. 2004) (citing  
 25 *Bouchat v. Baltimore Ravens Football Club*, 346 F.3d 514, 520-21 (4th Cir.2003)).

26 \_\_\_\_\_  
 27 <sup>36</sup> While Gottwald worked on the underlying instrumental track, the undisputed  
 28 evidence at trial was that his contribution thereto related only to elements that are  
 not alleged to infringe “Joyful Noise.” *Id.*

1 A “causal link between the infringement and the monetary remedy sought is a  
2 predicate to recovery of ... profits.” *Polar Bear*, 384 F.3d at 708; *see also Dash v.*  
3 *Mayweather*, 731 F.3d 303, 330 (4th Cir. 2013).<sup>37</sup>

4 If a causal link is established, the defendant has the **initial burden** to  
5 demonstrate that some or all of its profits were attributable to factors other than the  
6 infringement. 17 U.S.C. § 504(b); *Mackie*, 296 F.3d at 915. If the defendant meets  
7 its initial burden, then the **burden shifts to the plaintiff** to show that “at least  
8 some portion of the revenue was actually generated by the infringement, rather  
9 than by other factors.” *Dash*, 731 F.3d at 331.

10 At trial, the jury found that 22.5% percent of the net profit earned by each  
11 Defendant from “Dark Horse” was “attributable to the use of the ‘Joyful Noise’  
12 musical composition in Ostinato 2 in ‘Dark Horse’ as opposed to other factors.”  
13 Dkt. 456, Ques. 3. However, this was pure speculation unsupported by evidence.  
14 Defendants presented the un rebutted testimony of two expert witnesses who  
15 testified about the insignificance of Ostinato 2 to the commercial success and  
16 profits of “Dark Horse” and *Prism*.

17 **First**, with respect to the musicological value of Ostinato 2, Defendants  
18 offered the un rebutted testimony of Dr. Lawrence Ferrara that the ostinato was  
19 minimally valuable to “Dark Horse,” both qualitatively and quantitatively. *See*  
20 *generally*, WD, Ex. 9 p. 1474-1485. With respect to his **quantitative** analysis, Dr.  
21 Ferrara concluded that Ostinato 2 comprises 7.2% of the total note heads of “Dark  
22 Horse.” Next, Dr. Ferrara testified that, because the lyrics of “Dark Horse” are not  
23 at issue, and the lyrics constituted 50% of the music, the 7.2% total must be

24 \_\_\_\_\_  
25 <sup>37</sup> Based upon the un rebutted testimony discussed below, Plaintiffs also failed to  
26 establish a causal nexus between the claimed infringement and Defendants’ profits.  
27 Proving such a causal nexus requires the plaintiff to “(1) allege a ‘conceivable  
28 connection’ between the infringement and the claimed revenues and (2) offer  
nonspeculative evidence that a causal link exists.” *Dash*, 731 F.3d at 330; *see also*  
*Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002). Plaintiffs failed to proffer any  
evidence to rebut Defendants’ evidence regarding any lack of a causal connection.

1 reduced by half. As a result, Dr. Ferrara testified that 3.6% of the combined music  
2 and lyrics in “Dark Horse” are comprised of the notes in Ostinato 2. *Id.*; WD, Ex.  
3 28. Next, Dr. Ferrara performed a **qualitative** analysis to determine the value of  
4 this allegedly infringing expression to “Dark Horse” as a whole. Dr. Ferrara  
5 testified that because Ostinato 2 is **not** part of the hook (i.e., the most memorable  
6 part) of “Dark Horse,” this reduced the value of Ostinato 2 in the “Dark Horse”  
7 composition below 3.6%. WD, Ex. 9 p. 1474-1485.

8 **Second**, Defendants offered the unrebutted testimony of Dr. Jason King. As  
9 to “Dark Horse,” Dr. King categorized the various factors that drove its success  
10 and profit. The primary factors were the celebrity star power/branding of Katy  
11 Perry and Juicy J, as well as marketing efforts. *Id.* p. 1508 l. 9-24. The secondary  
12 factors were the “hook” of the song (i.e., the chorus), its vocal performances, its  
13 instrumental musical elements taken together, and production/arrangement. *Id.* p.  
14 1516 l. 22-1521 l. 5. Finally, he testified about the “tertiary factors,” those factors  
15 that “do[n’t] drive the song in and of itself.” *Id.* p. 1521 l. 8-1523 l. 17. These  
16 included the lyrics of the song and individual musical elements. And, as for  
17 Ostinato 2 specifically, Dr. King testified that, on its own, the ostinato had  
18 “relatively insignificant value” and that “nobody bought Dark Horse simply  
19 because of Ostinato No. 2 alone.” *Id.* p. 1522 l. 14-17. He elaborated that Ostinato  
20 2 could have been replaced with any number of trap synth parts and it would not  
21 have changed the success of the song. *Id.* p. 1522 l. 2-1523 l. 17.

22 As to the *Prism* album, Dr. King testified that the primary factors driving its  
23 success were Katy Perry’s celebrity star power/branding and the massive  
24 marketing efforts of Capitol. *Id.* p. 1523 l. 18-1528 l. 23. He further testified that  
25 “Dark Horse” was one of 13 or 16 tracks on the album and that if consumers “just  
26 wanted the single [as opposed to the entire album], they would just buy the single.”  
27 *Id.* p. 1524 l. 3-14. “Dark Horse” as a whole (as distinguished from Ostinato 2 in  
28 particular) was a secondary factor contributing to the success of *Prism*. However,

1 as to Ostinato 2, Dr. King testified that because “Ostinato 2 is just one element of  
2 Dark Horse,” its value was even more insignificant. *Id.* p. 1528 l. 24-1529 l. 15.

3 The testimony of Dr. Ferrara and Dr. King was uncontroverted. Plaintiffs did  
4 not present their own experts, or any other apportionment evidence. The jury was  
5 not permitted to simply ignore Defendants’ evidence and conclude—without  
6 proof—that Ostinato 2 drove any of the success of “Dark Horse” or *Prism*. Thus,  
7 the Court should hold as a matter of law that Defendants failed to rebut Plaintiffs’  
8 proof of apportionment. *See Bouchat*, 346 F.3d at 520-21.

9 **IV. AS A MATTER OF LAW, THE JURY SHOULD HAVE DEDUCTED**  
10 **CAPITOL’S OVERHEAD AND CALCULATED ITS NET PROFIT**  
11 **AS TOTALING \$629,725**

12 Finally, if the Court upholds the jury’s finding of a causal nexus and its  
13 apportionment calculation, as to defendant Capitol Records, no sufficient  
14 evidentiary basis exists to support the jury’s decision to exclude Capitol’s overhead  
15 costs in calculating its net profit. As a matter of law, the jury should have deducted  
16 overhead and calculated Capitol’s net profit as equaling \$629,725.

17 The Court instructed the jury on how to calculate each Defendant’s net  
18 profit, that “[a] defendant’s profit is determined by deducting all appropriate  
19 expenses incurred by that defendant from that defendant’s gross revenue.” Dkt.  
20 461, Jury Instr. 3. Expenses were defined to include “all appropriate costs,  
21 including but not necessarily limited to, appropriate operating costs, **overhead**  
22 **costs**, and production costs incurred in producing a defendant’s gross revenue.” *Id.*  
23 (emphasis added). This is the law. *Kamar Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d  
24 1326, 1333 (9th Cir. 1984); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*  
25 (“*Frank Music P*”), 772 F.2d 505, 515 (9th Cir. 1985); *Burns v. Imagine Films*  
26 *Entm’t, Inc.*, 2001 WL 34059379, at \*7 (W.D.N.Y. Aug. 23, 2001).

27 At trial, Capitol presented un rebutted and unimpeached evidence of its net  
28 profit through Capitol’s profit & loss statement and the backup thereto.



1 Specifically, it proved that its costs totaled \$11,772,912, including \$5,103,213 in  
2 overhead costs. WD, Ex. 30 p. 1762. Based on gross revenues of \$12,402,637,  
3 Capitol proved that its net profit totaled \$629,725. *Id.*.

4 Simple math makes clear that the jury ignored the Court’s instruction and  
5 Capitol’s undisputed evidence by not deducting Capitol’s overhead costs in  
6 calculating Capitol’s net profit. The jury determined Capitol’s net profit to equal  
7 \$5,732,938. Dkt. 456, Ques. 2. Mathematically, the only way to reach this number  
8 is to conclude that the jury accepted Capitol’s calculation of its gross revenues at  
9 \$12,402,637 and then deducted \$6,669,699 (i.e., the non-overhead costs):  
10 \$12,402,637 minus \$6,669,699 equals \$5,732,938. There was no basis for the jury  
11 to ignore Capitol’s overhead.

12 Defendants established in painstaking detail the existence and amount of  
13 overhead, as well as how the overhead supported the release and exploitation of  
14 “Dark Horse” and *Prism*, through Capitol’s profit & loss statement and the backup  
15 thereto, as well as through the trial testimony of Capitol’s financial designee,  
16 Steven Drellishak. *See* WD, Ex. 30 p. 1762; *id.* p. 1841-53; & WD, Ex. 9 p. 1428 l.  
17 14-1435 l. 11, p. 1449 l. 13-21, p. 1450 l. 12-1451 l. 12, p. 1463 l. 23-1467 l. 22.  
18 More specifically, Drellishak testified about how he calculated overhead,  
19 explaining that he limited overhead to the 18-month period following the release of  
20 *Prism* “when the label was active working the new release [*Prism*]” (*id.* p. 1429 l.  
21 17-25) and to 5.4% of total overhead for those 18 months, a percentage equal to the  
22 percentage of Capitol’s total sales attributable to *Prism* and “Dark Horse” (*id.* p.  
23 1464 l. 16-1465 l. 14). Drellishak testified what overhead consisted of, explaining  
24 it “is mainly the people that make up the company and the building and the phone  
25 lines and everything else required to run the business. And then lastly AFM and  
26 AFTRA, those are costs that we pay to the musicians unions mainly funding the  
27 pension plans.” *Id.* p. 1449 l. 16-21. He also explained why this overhead related to  
28 the exploitation of “Dark Horse” and *Prism*, noting that a Katy Perry release would

1 have “touched everyone” at the company and that “[a] release like this was a big  
 2 part of the [company’s overall] revenue. If we didn’t have an artist like Katy Perry,  
 3 we wouldn’t have as many people employed. So while not directly ... associated  
 4 with a specific release, ... if we didn’t have Katy Perry on the roster, Capitol’s  
 5 overhead would be smaller.” *Id.* p. 1432 l. 14-15, p. 1434 l. 4-11; *see also id.* p.  
 6 1463 l. 23-1464 l. 11, p. 1467 l. 1-20.

7 Plaintiffs, in response, did not present a single document or any witness to  
 8 refute or rebut the facts regarding Capitol’s overhead and its connection to the  
 9 exploitation of “Dark Horse” and *Prism*, as proven by the profit & loss statement,  
 10 backup, and Drellishak’s testimony. Indeed, although Plaintiffs had identified a  
 11 damages expert, Dr. Michael Einhorn, to rebut Defendants’ proof of costs,  
 12 Plaintiffs ultimately withdrew Dr. Einhorn as a witness at trial at the last minute.  
 13 *Defendants* presented Dr. Einhorn’s deposition testimony to the jury, in which he  
 14 admitted that Capitol incurred expenses in connection with exploiting “Dark  
 15 Horse” and *Prism*. WD, Ex. 10 p. 1604 l. 17-1605 l. 21. Thus as a matter of law,  
 16 the jury should have accepted Capitol’s proven overhead costs and deducted it  
 17 from Capitol’s revenue, which would make Capitol’s net profit equal \$629,725.

18 **V. ALTERNATIVELY, THE COURT SHOULD ORDER A NEW TRIAL<sup>38</sup>**

19 **A. Rule 59 New Trial And Remittitur Standard**

20 Under Fed. R. Civ. P. 59, a new trial may be granted “for any of the reasons  
 21 for which a new trial has heretofore been granted in an action at law in federal  
 22 court.” Fed. R. Civ. P. 59(a)(1). Those reasons include “if the verdict is contrary to  
 23 the clear weight of the evidence, is based upon false or perjurious evidence, or to  
 24 prevent a miscarriage of justice.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729  
 25 (9th Cir. 2007); *see also Lillie*, 2019 WL 3387732, at \*24 (new trial warranted  
 26

27 <sup>38</sup> In the event that the Court grants Defendants’ motion for judgment as a matter of  
 28 law under Fed. R. Civ. P. 50(b), Defendants respectfully request that the Court also  
 conditionally grant its motion for new trial pursuant to Fed. R. Civ. P. 50(c).

1 where “it is quite clear that the jury has reached a seriously erroneous result”  
2 (citation omitted). A new trial may also be ordered “when the conduct of counsel  
3 in argument causes prejudice to the opposing party and unfairly influences a jury’s  
4 verdict,” *Pappas v. Middle Earth Condo Ass’n*, 963 F.2d 534, 540 (2d. Cir. 1992),  
5 or where an expert witness provides “irrelevant and prejudicial” testimony.  
6 *Mahone v. Lehman*, 347 F.3d 1170, 1174 (9th Cir. 2003). Ultimately, the district  
7 court can grant a new trial under Rule 59 on any ground necessary to prevent a  
8 miscarriage of justice. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*,  
9 762 F.3d 829, 842 (9th Cir. 2014); Fed. R. Civ. P. 59(d).

10 “Unlike with a Rule 50 determination, the district court, in considering a  
11 Rule 59 motion for new trial, is not required to view the trial evidence in the light  
12 most favorable to the verdict.” *Experience Hendrix*, 762 F.3d at 842. Rather, the  
13 Ninth Circuit has emphasized that the district court has “the duty ... to weigh the  
14 evidence as [the court] saw it, and to set aside the verdict of the jury, ***even though***  
15 ***supported by substantial evidence***, where, in [the court’s] conscientious opinion,  
16 the verdict is contrary to the clear weight of the evidence.” *Molski*, 481 F.3d at 729  
17 (emphasis added). Importantly, “the district court can weigh the evidence, make  
18 credibility determinations, and grant a new trial for any reason necessary to prevent  
19 a miscarriage of justice.” *Experience Hendrix*, 762 F.3d at 841. Moreover,  
20 “cumulative error in a civil trial may suffice to warrant a new trial even if each  
21 error standing alone may not be prejudicial.” *Jerden v. Amstutz*, 430 F.3d 1231,  
22 1240-41 (9th Cir. 2005) (collecting cases).

23 If, on a motion for a new trial, the district court decides that the jury’s  
24 damages award is excessive, the district court may grant a new trial or deny the  
25 motion if the prevailing party accepts a remittitur. *Fenner v. Dependable Trucking*  
26 *Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). Where a court offers remittitur, the  
27 jury’s verdict should be reduced to the “maximum amount ***sustainable by the***  
28 ***proof.***” *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245,

1 1249 (9th Cir. 1982) (emphasis added). If the prevailing party does not consent to  
2 the reduced amount, a new trial must be granted. *Fenner*, 716 F. 2d at 603.

3 **B. The Court Should Grant A New Trial On Liability**

4 **1. The Jury’s Findings Were Against The Clear Weight Of  
5 The Evidence**

6 If the Court is not inclined to grant judgment as a matter of law, then the  
7 arguments set forth above apply with even more force under the relaxed Rule 59  
8 standard and necessitate a new trial. On each element discussed above,  
9 incorporated again herein by reference, the jury’s findings were wholly contrary to  
10 the weight of the evidence. Moreover, each defense witness proved entirely  
11 credible, never once being impeached or contradicted with evidence. By contrast,  
12 the Plaintiffs were impeached multiple times, including with prior inconsistent  
13 statements regarding the question of joint authorship. *See* WD, Ex. 2 p. 208 l. 9-  
14 210 l. 10; p. 211 l. 5-212 l. 9; p. 214 l. 11-215 l. 6; WD, Ex. 3 p. 358 l. 14-359 l. 9.  
15 The Court can and should determine that the Defendants’ witnesses offered  
16 credible testimony, while the Plaintiffs’ witnesses did not. *Experience Hendrix*,  
17 762 F.3d at 841 (court may make “credibility determinations” on Rule 59 motion).

18 **2. Misconduct By Plaintiffs’ Counsel And Witnesses Also  
19 Requires A New Trial.**

20 **a. Plaintiffs Offered Improper And Highly Prejudicial  
21 Testimony That Invaded The Province Of The Jury**

22 An expert musicologist in a copyright case may only offer testimony on the  
23 objective “extrinsic” test. *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996);  
24 *Swirsky*, 376 F.3d at 845. The “intrinsic test, which examines an ordinary person’s  
25 subjective impressions of the similarities between two works, is exclusively the  
26 province of the jury.” *Funky Films*, 462 F.3d at 1077; Dkt. 403, p. 32 (precluding  
27 “Decker from testifying about how the two songs are perceived by lay listeners”).  
28 Furthermore, it goes without saying that a musicologist cannot give an opinion as  
to the ultimate legal conclusion in a copyright infringement case: whether there

1 was **copying**. *Nationwide*, 523 F.3d at 1058 (“[A]n expert witness cannot give an  
2 opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.”).

3 During Dr. Decker’s testimony, he and Plaintiffs’ counsel flouted these well-  
4 established rules and violated—repeatedly and despite warnings from the Court—  
5 multiple evidentiary Orders of the Court. Dr. Decker offered highly improper  
6 testimony on (1) “musical borrowing,” (2) the intrinsic test, and (3) “striking  
7 similarity.” This prejudicial testimony warrants a new trial. *See, e.g., Mahone*, 347  
8 F.3d at 1174 (ordering new trial on ground that the expert testimony offered by the  
9 prevailing party at trial was “irrelevant and prejudicial”).

10 **First**, Dr. Decker’s testimony that the “Dark Horse” authors “borrowed” the  
11 ostinato in “Joyful Noise” was improper, pervasive, and highly prejudicial. Dr.  
12 Decker began his testimony by defining “musical borrowing.” He was clear that  
13 “borrowing” means “copying.” WD, Ex. 3 p. 426 l.19-427 l. 15 (“in musical  
14 borrowing, . . . you consider how a composer took material from another piece and  
15 used it in their own piece”); *id.* p. 427 l. 4-11 (“Borrowing means copying in this  
16 respect.”); *id.* p. 427 l. 12-15 (Q: “in analyzing different pieces for musical  
17 borrowing, are you looking to identify whether something is copied?” A: “Yes.”).  
18 Dr. Decker presented himself as an expert on this subject. *Id.* p. 426 l. 13-18.

19 In response, the Court cautioned Plaintiffs’ counsel that “obviously, we do  
20 not want [Dr. Decker] to opine on a fact that is to be decided by the jury.” *Id.* p.  
21 427 l. 12-22. In spite of this warning, counsel proceeded to draw from Dr. Decker  
22 testimony that “Dark Horse” borrows from “Joyful Noise.” *Id.* p. 439 l. 1-10 (Q:  
23 “***Do you think Dark Horse borrows from Joyful Noise?***” A: “***I do.***”) & p. 463 l. 8-  
24 20 (Q: “***[H]ow do these subtle distinctions impact your opinion related to***  
25 ***whether the authors of Dark Horse borrowed from Joyful Noise?***”).

26 Following these questions and answers, the Court **again** cautioned that  
27 whether something was “borrowed” from “Joyful Noise” “is ambiguous and is a  
28 jury question.” *Id.* p. 463 l. 18-20. The Court aptly stated that “the question is

1 similarity.” *Id.* But even after this second admonition, Dr. Decker brazenly argued  
2 to the jury that his expert opinion was that “Dark Horse is developing materials  
3 heard in . . . Joyful Noise. . . . [I]t’s working with them. It’s changing them in ways  
4 . . . **that to my ear have evidence for . . . borrowing.**” *Id.* p. 475 l. 17-476 l. 4.

5 In response , the Court was compelled to explain to the jury that:

6 [T]he difficulty and the reason we have these objections,  
7 ladies and gentlemen is there is a concern there may be a  
8 confusion between borrowing and copying. And you’re  
9 the people who have to decide whether something has  
10 been copied or not. That’s going to be part of your  
11 assignment. So we are trying to urge this witness not to  
12 use the word borrowing even though he’s using it in a  
13 purely musical sense and he’s not using it in the legal  
14 sense of copying so that’s why we’re going through this.

15 *Id.* 9. 476 l. 10-19.

16 Remarkably, however, Dr. Decker did not stop. After this **third** warning, he  
17 testified once again about the reasons he believes there was “musical borrowing”  
18 in this case. *Id.* p. 524 l. 1-23.

19 Dr. Decker’s impermissible testimony that the “Dark Horse” creators  
20 “borrowed” from “Joyful Noise” gave the imprimatur of expert credibility as to the  
21 ultimate fact conclusion reserved for the jury. *Perfect 10, Inc. v. Giganews, Inc.*,  
22 2014 WL 10894452, \*6 (C.D. Cal. Oct. 31, 2014) (excluding expert testimony that  
23 was “little more than an attempt to add the gloss of expert opinion to what are, at  
24 their core, factual questions that the jury must decide on their own”).

25 **Second**, Dr. Decker testified multiple times regarding the *subjective*  
26 similarities in the “sound” or “feeling” of the works, improperly invading the  
27 province of the jury to apply the intrinsic test in blatant violation of the Court’s *in*  
28 *limine* Order. Dkt. 403, pp. 31-32. When Plaintiffs’ counsel asked, “**for a**

1 **layperson like me** is [the difference in key] something that in your expert opinion  
2 is a difference that’s recognizable audibly”; Dr. Decker replied, “I would not think  
3 so. They are quite close. In fact they couldn’t be closer; right?” WD, Ex. 3 p. 460 l.  
4 23-461 l. 7.

5 As with his testimony about musical borrowing, the Court admonished that  
6 Dr. Decker “can’t give an expert opinion on what the jury has to decide. And if he  
7 persists in doing that and **if this continues, we will remove him from the stand.**”  
8 *Id.* p. 461 l. 12-15. But, again, Dr. Decker did not stop; instead, he told the jury that  
9 the subjective aural similarities between the works were central to his analysis:

10 the insistence in both pieces **that you feel** on the  
11 repetition of this melody. **You hear it** -- of this ostinato.  
12 **You hear it over and over again.** So that the, um, the  
13 piece itself, you know, the repetition also draws attention  
14 to the similarity.

15 *Id.* p. 524 l. 17-21 (emphasis added).

16 This is, without a doubt, an impermissible opinion on the **intrinsic** test; i.e.,  
17 “whether an ordinary, reasonable person would find the total concept and feel of  
18 ‘Joyful Noise’ and ‘Dark Horse’ are substantially similar in original, protectable  
19 expression.” Dkt. 441, Jury Instr. 37. But Dr. Decker is not an “ordinary,  
20 reasonable person” in the context of musical analysis. *Id.* He is a trained  
21 musicologist with a Ph.D. from “a top musicology program specifically for the  
22 study of American music,” who hears things that the ordinary listener would not.  
23 WD, Ex. 3 p. 425 l. 3-11. His subjective impressions of the works are irrelevant  
24 and barred as a matter of law. The jury nonetheless heard them, and this was  
25 plainly prejudicial to Defendants.

26 **Third**, in direct contravention of the Court’s order precluding him from  
27 opining that the works were “strikingly similar” (Dkt. 403, pp. 5-6), Dr. Decker  
28 testified no less than **three times** that the works bore “striking” similarity. *See* WD,

1 Ex. 3 p. 450 l. 18-23 (the fact that both ostinatos “step down to 2” “is striking”), p.  
2 454 l. 10-18 (similarities in texture are “striking”) & p. 456 l. 7-11 (same).

3 The intent behind these statements was evident. Although he never uttered  
4 the phrase “striking similarity” in two voluminous expert reports, he suddenly  
5 could not stop himself from doing so at trial. Particularly combined with Dr.  
6 Decker’s testimony regarding “*borrowing*” and the intrinsic “*feel*” of the works,  
7 the multiple references to “*striking*” prejudiced the Defendants by creating an  
8 inference that the works are so similar that the Plaintiffs did not need to prove  
9 access. That is precisely testimony which the Court ruled was impermissible, and it  
10 was given in violation of the Court’s Order. Dkt. 403, pp. 5-6.

11 Dr. Decker’s many improper statements undoubtedly confused and misled  
12 the jury. *See* WD, Ex. 3 p. 466 l. 25 (The Court: “This is a confused jury at this  
13 stage.”). This testimony was not harmless; it bore directly on the key elements of  
14 the Plaintiffs’ claims. Accordingly, a new trial should be granted.

15 **b. Plaintiffs’ Counsel Made Highly Prejudicial**  
16 **Assertions During His Closing Arguments**

17 During his closing arguments, Plaintiffs’ counsel made repeated assertions  
18 that Plaintiffs were not, and would not be, challenging: (a) Defendants’ right to  
19 exploit “Dark Horse” after the trial, or (b) Defendants’ right to keep 100% of the  
20 revenue and profit resulting from that subsequent exploitation.

- 21 • During his closing in the liability phase of the trial, Mr. Kahn stated that  
22 “after this trial is over, the defendants will continue on. They’ll be able to  
23 exploit Dark Horse in a wide variety. They’ll be able to keep selling the  
24 album. They’ll be able to keep doing other stuff with the song. This is the  
25 plaintiffs[’] one and only opportunity to seek some measure of justice and  
26 we are asking you for that justice.” WD, Ex. 6 p. 1205 l. 5-11.
- 27 • During his closing in the damages phase, he reiterated that “today is the  
28 plaintiffs’ last day for justice. Tomorrow, next week, next month, next year,



1 the defendants will be able to continue to exploit and make money from  
 2 Dark Horse and they'll be keeping 100 percent of the profits for every day  
 3 after today. So this is the one day for these plaintiffs.” WD, Ex. 10 p. 1588 l.  
 4 11-15.

- 5 • Later in that closing, he stated that “beginning tomorrow, [Defendants] will  
 6 keep a hundred percent of their profits going forward.” *Id.* p. 1597 l. 15-16.
- 7 • Finally, in rebuttal, he again repeated that Defendants “[will] get to keep a  
 8 hundred percent of the profits going forward.” *Id.* p. 1618 l. 2-3.

9 Plaintiffs’ highly prejudicial and improper assertions, cited above, were also  
 10 apparently false. On September 5, 2019, Defendants’ counsel sent an email to Mr.  
 11 Kahn, asking him to confirm that Plaintiffs would not be challenging or seeking  
 12 damages for Defendants’ exploitations of “Dark Horse” on a going-forward basis,  
 13 given his representations to the jury during closing arguments. Mr. Kahn then said  
 14 the opposite: “I acknowledge those statements. However, ***we reserve all rights and***  
 15 ***claims regarding damages.***” WD, Ex. 37 (emphasis added).<sup>39</sup>

16 Plaintiffs’ statements that Defendants would be entitled to exploit “Dark  
 17 Horse” on a going-forward basis, and retain all of their profits from same, were  
 18 completely illegitimate and irrelevant. By his message, however, Plaintiffs’  
 19 counsel improperly sought to convince the jurors to look beyond the evidence, and  
 20 render a verdict as “[P]laintiffs’ last day for justice.” In doing so, counsel  
 21 improperly and falsely contended Defendants would not be financially harmed.  
 22 These comments also violate the Court’s ruling that the comparative wealth of the  
 23 parties should not be adduced. *See* Dkt. 403, pp. 19-20.

24 A new trial is warranted based on these improper statements. *See generally*  
 25 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 346 (9th Cir.

26 \_\_\_\_\_  
 27 <sup>39</sup> Notwithstanding this belated “reservation of rights,” any attempt by Plaintiffs to  
 28 assert a new claim for infringement or seek relief for subsequent exploitations of  
 “Dark Horse” would fail based upon, *inter alia*, principles of waiver and estoppel.

1 1995). Notably, courts routinely overturn jury verdicts in civil cases when the  
 2 plaintiff’s counsel *truthfully* introduces extraneous and improper facts such as, for  
 3 example, saying that a damages verdict would be paid by a third-party insurance  
 4 company. Courts recognize this prejudicial commentary invites the jury to award  
 5 substantial damages on the irrelevant basis that doing so will not actually cause  
 6 financial harm to the defendant. *See, e.g., Ventura v. Kyle*, 825 F.3d 876, 886 (8th  
 7 Cir. 2016) (“it was utterly repugnant to a fair trial or ... a just verdict for the jury to  
 8 hear that the damages sued for ... will be taken care of by an insurance ...  
 9 company”) (citation omitted); *City of Cleveland v. Peter Kiewit Sons’ Co.*, 624  
 10 F.2d 749, 758 (6th Cir. 1980) (it is “well settled” that introducing “the fact that a  
 11 defendant in a tort action is protected by liability insurance, is prejudicial error and  
 12 grounds for a mistrial”) (citations omitted). Here, Plaintiffs’ statements to the jury  
 13 that an adverse verdict would not financially harm the Defendants were even more  
 14 egregious and prejudicial than the statements in the above-cited cases, because  
 15 Plaintiffs’ counsel states *they were not even truthful*. A new trial is warranted.

16 **C. The Court Should Remit The Amount Of The Damages Award**

17 If the Court reaches the jury’s damage award, it should find that the award is  
 18 contrary to the clear weight of authority and excessive for two reasons.

19 *First*, as discussed above, as to Capitol, because Capitol proved its overhead  
 20 costs through un rebutted documents and testimony, the jury should have deducted  
 21 overhead and calculated Capitol’s profit as totaling \$629,725.

22 *Second*, as discussed above, the percentage of each Defendant’s profit that  
 23 the jury awarded was excessive and lacking any basis in fact. *Supra* § III. Even if  
 24 the Court concludes that *some* percentage of Defendants’ profit is attributable to  
 25 the use of the “Joyful Noise” musical composition in Ostinato 2 in “Dark Horse”  
 26 as opposed to other factors, nothing supports this percentage equaling 22.5%.  
 27 Defendants satisfied their burden of proving that profits were attributable to factors  
 28 other than the use of “Joyful Noise” in Ostinato 2. While Defendants bore the

1 initial burden to apportion, Defendants were not required to prove to a  
2 mathematical certainty the profits that are attributable to other factors—Defendants  
3 need only provide a rational division. *See Sheldon v. Metro-Goldwyn Pictures*  
4 *Corp.*, 309 U.S. 390, 408-09 (1940); *Frank Music I*, 772 F.2d at 518; *Cream*  
5 *Records Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 829 (9th Cir. 1985); *Frank*  
6 *Music Corp. v. Metro-Goldwyn-Mayer, Inc.* (“*Frank Music II*”), 886 F.2d 1545,  
7 1549 (9th Cir. 1989). Defendants satisfied their burden and, as discussed above,  
8 proved that other factors drove the success of “Dark Horse.” *Supra* § III. Plaintiffs,  
9 in turn, presented no evidence; instead, Plaintiffs’ counsel’s simply argued—  
10 without a scintilla of evidence by expert testimony or otherwise—that Ostinato 2  
11 appears in 45% of “Dark Horse,” thereby entitling Plaintiffs to 45% of Defendants’  
12 profits. Simple math shows that Plaintiffs divided this 45% figure by two to reach  
13 their arbitrary 22.5%.

14 No evidence or logic supports this allocation. It is made up. Dr. Ferrara  
15 testified without contradiction that, quantitatively, only 3.6% of the combined  
16 music and lyrics in “Dark Horse” are comprised of the notes in Ostinato 2 and that  
17 the qualitative value of Ostinato 2 is even less. Dr. King, in turn, testified without  
18 contradiction that numerous other primary and secondary factors drove the success  
19 of “Dark Horse” and that Ostinato 2 was a relatively insignificant tertiary factor.  
20 Accordingly, the Court should remit the amount of damages sharply downward.

## 21 VI. CONCLUSION

22 WHEREFORE, Defendants respectfully request that the Court grant the  
23 relief sought here pursuant to Rule 50(b) or, alternatively, Rule 59.

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1 DATED: October 9, 2019

MITCHELL SILBERBERG & KNUPP LLP

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By: /s/ Aaron M. Wais

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**ATTESTATION REGARDING SIGNATURES**

14

Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), I hereby attest that all Parties,

15

on whose behalf this filing is jointly submitted, concur in this filing's content and

16

have authorized its filing.

17

DATED: October 9, 2019

/s/ Aaron M. Wais

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Aaron M. Wais

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