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26 Michael Monge pka “Myke Tower,”
27 Geoffrey Royce Rojas pka “Prince Royce,”
28 Rafael Torres pka “De La Ghetto”
Richard Camacho,
Erick Brian Colon,
Christopher Velez and
Zabdiel De Jesus

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

1 CLEVELAND CONSTANTINE
2 BROWNE, et al.

3 Plaintiffs,

4 vs.

5 RODNEY SEBASTIAN CLARK
6 DONALDS, et al.

7 Defendants.
8

Case No.: 2:21-cv-02840-AB-AFM

Assigned to: Hon. André Birotte

**DEFENDANTS’ REPLY TO
PLAINTIFFS’ OPPOSITION
(DE 377) TO MOTION TO DISMISS
(DE 322)**

Date: September 22, 2023

Time: 10:00AM

Place: Courtroom 7B

9
10 **INTRODUCTION**

11 Plaintiffs assert that more than 300 defendants (who comprise almost the
12 entire market of artists within the genre of reggaeton music) have released 1,819
13 separate sound recordings, which they claim infringe upon their copyrights.
14 Plaintiffs opposition misses the mark of the motion to dismiss, which is NOT based
15 upon the originality of Plaintiffs’ recordings. Rather, it is based upon the
16 copyrightability of the basic drum beats which are nothing more than basic building
17 blocks of music; so common (to an entire genre) that these basic single note drum
18 hits do not, as a matter of law, rise to the level of being protectable.¹

19 Plaintiffs describe the infringing material as a single hit or note struck on a
20 snare, tom or high hat drum or tambourine, in a pattern. That pattern can only be
21 described as a “rhythm.” Plaintiffs break the 1,815 alleged infringing recordings into
22 3 categories: (1.) Those where they compare their copyrights to the Defendants’
23 works in sheet music format (none of these Moving Defendants’ works fall into that
24 category); (2.) Those where within the Defendants’ works, they claim the infringing
25 material “exists” (only 15 works of Maluma and 9 works of Wisin and Yandel fall
26 into that category); and (3.) Those where Plaintiffs merely describe the Defendants’
27 infringement generically, as a conclusion of law and providing none of the requisite

28
¹ See SCAC, para. 180-181 and 188.

1 detail.

2 At paragraph 193 of the SCAC, Plaintiffs claim the Defendants fall into 59
 3 sub sets. Notably, two of these Moving Defendants (Prince Royce and Ovy on the
 4 Drums) are not even described therein, and NO allegations are made as to any of
 5 their alleged infringing copyrights. As to the other of the Moving Defendants, the
 6 following summarizes the allegations against their recordings:

7 Defendant	8 Subset (p. 193)	9 Number of Infringing Works	10 What is Alleged to Be Infringing
11 CNCO ²	12 15	13 35 (p. 397)	14 Comp. ³ and Sr ⁴ of Drum Section ⁵
15 De La Ghetto	16 17	17 36(p. 413)	18 Comp. and Sr of Drum Section
19 Los Legendarios	20 37	21 20 (p. 504)	22 Sr/Comp. Rhythm/Drum Section
23 Maluma	24 39	25 84 (p. 512)	26 Sr./Comp. Rhythm/Drum Section ⁶
27 Myke Tower	28 41	29 23 (p. 538)	30 Sr/Comp. Rhythm/Drum Section
31 Wisin	32 54	33 69 (p. 629)	34 Sr/Comp.

35 ² Defendants Camacho, Colon, Velez and De Jesus comprise CNCO.

36 ³ “Comp.” means Plaintiffs’ composition, *Dem Bow*.

37 ⁴ “Sr” means Plaintiffs’ sound recording, *Fish Market*.

38 ⁵ “Drum Section” refers to Plaintiffs’ generic claim that its copyrighted material is comprised of basic drumbeats.

39 ⁶ On only the recordings: ADMV, bella-k, Ansiedad, Booty,Cielo a un Diable,Copas de vino el Peredor, Costinitas de la USA, Extamandote, Felices Los 4 La Flaca,Madrid, Me Endmore de Ti,Parce, Shh Calla, and Sin Contrato (see p 514-529 of SCAC). Nowhere do Plaintiffs even attempt to describe what is alleged to be infringing, and nothing is described with respect to the other 75 Maluma recordings.

1				
2	Wisín & Yandel	55	119 (p. 618)	Sr/Comp.Rhythm/Drum Section ⁷
3				
4	Yandel	57	80 (p. 637)	Sr/Comp. Rhythm/Drum Section
5				
6	Carlos Vives	13	15(p. 391)	Sr/Comp. Rhythm/Drum Section
7				
8	Prince Royce ⁸	n/a	None	
9				
10	Ovy on the Drums ⁹	n/a	None	

11 Since there is no allegation of direct copying by any of the Moving
 12 Defendants, the test for copyright infringement is substantial similarity. If one
 13 follows Plaintiffs’ illogical arguments (that all 1,819 recordings) sound substantially
 14 similar to *Fish Market*, that would mean, for example, that the 119 Wisin y Yandel
 15 recordings and the 84 Maluma recordings all sound alike, etc. This proposition
 16 makes no logical sense.

17 The Court should dismiss the SCAC, upon a finding that similar (single note
 18 drum beats) are, as a matter of law, unprotectable and no reasonable jury could find
 19 that these 1,819 recordings, let alone the particular recordings of the Moving
 20 Defendants, are substantially similar to Plaintiffs’ old and obscure work.

21 **The alleged infringed material is a basic building block**

22 Plaintiffs claim they wrote and recorded *Fish Market* which is an instrumental

24
 25 ⁷ On only on recordings: Aullando, Callao, Chica Bombastic,Dame Algo,Daseo,Guaya, La luz,
 26 Reggaeton en lo Oscuro, Todo Comienza En Al Disco (see p 620-628). Nowhere do Plaintiffs
 even attempt to describe what is alleged to be infringing, but nothing is described with respect to
 the other 108 Wisin y Yandel recordings.

27 ⁸ “Prince Royce” refers to Defendant, Geoffrey Royce Rojas.

28 ⁹ “Ovy on the Drums” refers to Defendant, Daniel Oviedo.

1 work consisting of:

2 an original drum pattern . . . a programmed kick, snare,
3 and hi-hat playing a one bar pattern[,] percussion
4 instruments, including a tambourine playing through the
5 entire bar, a synthesized ‘tom’ playing on beats one and
6 three, and timbales that play a roll at the end of every
7 second bar and free improvisation over the pattern for the
8 duration of the song[,] and a synthesized Bb (b-flat) bass
note on beats one and three of each bar, which follows the
aforementioned synthesized ‘tom’ pattern.” (*Id.* ¶ 180.)

9 Plaintiffs also claim to have co-authored another composition, *Dem Bow*,
10 which they describe as a “drum pattern, drum components, including the kick, snare,
11 hi-hat, tom and timbales as well as the full bassline.” (SCAC 183.)

12 Plaintiffs claim that “Pounder Riddim,” is a derivative work of either Fish
13 Market or Dembow. However, the SCAC does not provide any comparison of
14 common notes, chords, melody, rhythms, etc. Plaintiffs admit Pounder Riddim is not
15 registered with U.S. Copyright Office as a derivative work and Plaintiffs never
16 claimed they owned “Pounder Riddim.”

17 **The Allegedly Infringing Works and The Moving Defendants**

18 Other than the 15 Maluma recordings described in paragraphs 514-529 and
19 the 9 Wisin y Yandel recordings described in paragraphs 620-628, Plaintiffs do not
20 attempt to allege what portion of the remaining works infringe upon the Plaintiffs’
21 copyrights, other than the generic and legally deficient description of “primary
22 rhythm/drum section.” As to the 15 Maluma recordings described in paragraphs 514-
23 529 and the 9 Wisin & Yandel recordings described in para. 620-628, it is obvious
24 from the descriptions contained therein that the alleged infringing material is a
25 simple, basic building block which only contains a minimal or *de minimis* portion of
26 the rhythm of the overall recording. For example, (1.) 9 seconds of drum tracks of
27 *ADMV*; (2.) 2 beats of *Bella K, Ansidad* and “drum patterns” see (SCAC para 515);

28

1 and (3.) remaining of the allegations admit the portion is “minimalistic and anchors
2 the root of the chord.”

3 The remaining allegations of the Maluma recordings assert infringement of
4 minimal drum patterns of *Pounder*. Yet, even assuming the drum patterns were
5 protectible, Plaintiffs do not claim that they own a copyright registration for *Pounder*
6 and nowhere do they allege they own that small portion of *Pounder* that these
7 Maluma recordings are alleged to have copied. As to the 9 Wisin & Yandel
8 recordings (described in paragraphs 620-628), the same registration infirmities apply
9 as the Maluma recordings. Moving Defendants adopt the registration defect theories
10 set forth in their Motion to Dismiss, as well as that of other Defendants, *e.g.* DE 331
11 at 10:19-12:14, and DE 331, at 15:21-18:13.

12 13 ARGUMENT

14 Rule 12(b)(6) Legal Standard

15 Plaintiffs do not challenge the standard asserted in the Motion to dismiss that
16 “[B]lanket assertions,” “labels and conclusions,” and a “formulaic recitation of the
17 elements of a cause of action” are insufficient to overcome a motion to dismiss in
18 general and in a copyright case a plaintiff must plead “*which portions, aspects, lyrics*
19 *or other elements of the two works are substantially similar.*” *Hayes v. Minaj*, 2012
20 WL 12887393 (C.D. Cal. Dec. 18, 2012); *Shaheed-Edwards v. Syco Entm’t, Inc.*,
21 2017 WL 6403091 (C.D. Cal. Dec. 14, 2017) (dismissing complaint for failure to
22 state a claim where “Plaintiffs’ allegations that the chorus, concept, and cadence of
23 the two songs are similar [were] merely conclusory and [could not] be sustained
24 without more specificity”); *Blizzard Entm’t, Inc. v. Lilith Games (Shanghai) Co.*,
25 2018 WL 1242053, at *3-5 (N.D. Cal. March 8, 2018) (dismissing claims where
26 plaintiff did not sufficiently allege which elements of allegedly infringed work were
27 substantially similar to protectable elements in plaintiff’s works). Except for the 15
28 Maluma recordings and the 9 Wisin & Yandel recordings (described in paragraphs

1 514-529 and 620-628 of the SCAC, respectively) Plaintiffs do not even attempt to
2 do so. As to those 24 recordings, the Court can easily review the allegations of the
3 SCAC to reach the conclusion that those portions that are alleged to be infringing
4 are not protectable, because what is alleged is nothing more than basic building
5 blocks of non-protectable single note drum beats.

6 **Plaintiffs Do Not Have Proof of a Registration For the Dem Bow**
7 **Composition, nor of Pounder**

8 Plaintiffs do not own or even claim to own “Pounder Riddim.” Plaintiffs
9 nonetheless assert that any musical work that infringes work (*Pounder Riddim*) must
10 also somehow infringe either (*Fish Market*) or (*Pounder Dub Mix II*). (SCAC ¶¶
11 184, 188, “”Any copying, interpolating, or sampling of the *Pounder Riddim* is a
12 copying or interpolation of *Fish Market*’s composition, SCAC ¶ 188, n. 5, ¶ 226).

13 It is axiomatic that Plaintiffs cannot sue for infringement of copyrights they
14 do not own. (the “Pounder Riddim”) and they do not claim the Moving Defendants
15 infringed (the *Pounder Dub Mix II*), or upon the lyrics of *Dem Bow*, which is the
16 only portion of *Dem Bow* to be registered. That leaves Plaintiffs with only *Fish*
17 *Market* and the lyrics of *Dem Bow*. Plaintiffs only generally claim that the Moving
18 Defendants infringed upon *Fish Market*, and no similar lyrics are described
19 anywhere. See SCAC paragraphs 238, 389, 391, 506, 530, 616, 630, and 638.

20
21 **The Limited Portions of Plaintiffs’ Works That They Claim the Moving**
22 **Defendants have Infringed is, As a Matter of Law, Common Drum**
23 **Beats and Basic Rhythms Which are Nothing More than Unprotectable**
24 **Basic Building Blocks of Music.**

25 Courts have consistently held that copyright infringement claims cannot
26 survive a motion to dismiss where the alleged protected work was (as here) nothing
27 more than “basic building blocks of music.” Plaintiffs do not even attempt to rebut
28 or distinguish the case law cited in the Motion to Dismiss for this proposition: See
e.g. Structured Asset Sales, LLC v. Sheeran, 2023 U.S. Dist. LEXIS 86847 (S.D.

1 N.Y. 2023) (basic chord progressions and harmonic rhythms), *Gray v. Hudson*, 28
2 F. 4th 87, 102 (9th Cir. 2022) (two-note snippet of a descending minor scale with
3 some repeating notes consisted entirely of commonplace musical elements), *Cottrill*
4 *v. Spears*, 2003 U.S. Dist. LEXIS 8823 (E.D. P.A. 2003) (four commonplace
5 musical elements were not numerous enough to warrant protection). In a case cited
6 more than 300 times, *Gaste v. Kaiserman*, 863 F. 2d 1061, 1068 (2nd Cir. 1988), the
7 court stated there are “limited number of notes and chords available to composers
8 (acknowledging) that common themes frequently reappear in various compositions.”
9 *Nwosuocha v. Glover*, 2023 U.S. Dist. LEXIS 50764 (S.D. N.Y. 2023) (granting the
10 defendants’ motion to dismiss finding copyright protections exclude “basic building
11 blocks of music including tempo and individualized notes”) (emphasis added). Other
12 courts have found that common rhythms, song structures and harmonic progressions,
13 as well as lyrical themes, similar concepts, short phrases, and similar melodies, are
14 not protectable. See e.g. *Guity v. Santos*, 2019 U.S. Dist. LEXIS 210125 (S.D. N.Y.
15 2019); *Intersongs-USA v. CBS, Inc.*, 757 F. Supp 274, 282 (S.D. N.Y. 1991)
16 (concluding that common elements like song structure patterns and harmonic
17 progressions are found in many other well-known songs constitute “scenes a faire”
18 or ordinary, unprotectable expression) (citing *Walker v. Time Life Films, Inc.*, 784
19 F. 2d 44, 50 (2nd Cir. 1986). *Currin v. Arista Records, Inc.*, 724 F. Supp 2d 286
20 (tempo cannot be protected by copyright). *Batiste v. Najim*, 28 F. Supp. 3d 595 (E.D.
21 La. 2014). (“beats, chords, chants, horns, lyrics which are nothing more than short
22 phrases, and “gliss” are not protectable, as “basic harmonic and rhythmic building
23 blocks of music.” *Gray v. Perry*, 2020 WL 1275221 (C.D. Cal. 2020) (“rhythm is
24 not a protectable element”). *Currin v. Arista Records, Inc.*, 724 F. Supp. 2d 286, 291
25 (S.D.N.Y. Apr. 15, 2010 (“courts have held that certain commonly-used elements
26 such as . . . the use of the eight-measure phrase, or the use of 4/4 rhythm, are not, in
27 themselves, protectable”); *Lane v. Knowles-Carter*, 14 CIV. 6798 PAE, 2015 WL
28 6395940, at *5 (S.D.N.Y. Oct. 21, 2015) (“meter and tempo” and “common rhythms

1 [and] song structures” not protectable); *Rose v Hewson*, No. 17-cv-1471, 2018 WL
2 626350, at *7 (S.D.N.Y. Jan. 30, 2018) (“general rhythmic style” not protectable);
3 *McDonald v. West*, 138 F. Supp. 3d 448, 458 (S.D.N.Y. 2015), *aff’d*, 669 Fed. Appx.
4 59 (2d Cir. 2016) (a “rhythm’s style or general feel [are] both uncopyrightable”);
5 *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1070 (9th Cir. 2020) (en banc) (“[A]
6 musical building block . . . is something that no one can possibly own.”).

7 Plaintiffs cite to *Swirsky v. Carey*, 376 F. 3d 841 (9th Cir 2004) is unavailing.
8 There, the court held “the two songs chorus’ shared a basic shape and pitch emphasis
9 in their melodies which were played over highly similar basslines and chord changes
10 at very nearly the same tempo and in the same generic style . . . which shared a similar
11 structure in that measures 5 through 7 of each chorus were almost exactly the same
12 as the first 3 measures of each chorus..” *Id* at 845. Here, there is no highly similar
13 basslines or chord changes. Both parties cite to *Gray v Hudson*, 28 F. 4th 87 (9th Cir.
14 2022). These Moving Defendants believe the facts in *Gray* are especially on point
15 with the allegations here. There, the 9th circuit affirmed a judgment, vacating a jury’s
16 finding of infringement, holding “the alleged infringing material consisting of
17 similar ostinatos (defined as “a repeating musical figure),” having the same “length,
18 similar 8 notes, similar rhythm, space within the recording and based on the same
19 minor scale was “entirely commonplace musical elements”. The court found that,
20 like the basic drum beats here, none of the musical elements were copyrightable, as
21 a matter of law.

22
23 **In the Few Instances Where Plaintiffs Have Identified Alleged**
24 **“Similarities” Between a Defendant’s Work and *Fish Market*, The**
25 **Comparison Demonstrates That There Is No Similarity In a Protectable**
26 **Expression.**

26 As to the allegations against the 15 Maluma and 9 Wisin & Yandel recordings,
27 the allegations regarding the use of basic drum beats and common patterns show
28 that the alleged infringing material is nothing more than “hi-hat patterns”, “snare

1 drum patterns”, “rim shots”, a “2 bar timbale” or “kick drums”) and it is alleged to
2 be similar only in the tempo being played. Tempo, as a matter of law, is
3 commonplace and unprotectable. Comparing Plaintiffs’ description of the specific
4 portion that is alleged to be infringed to the cases cited above, it is clear that these
5 portions are not.

6 The transcribed drum beats purportedly contained in *Fish Market* and
7 *Besame*¹⁰ shows that the only similarities between the two works are that the kick
8 drum in both works are playing a basic quarter note pattern in 4/4 time. (See SCAC
9 ¶ 221). Plaintiffs do not assert if there are tambourine or timbale rhythms in any of
10 the works of the Moving Defendants, let alone those that are similar to those in *Fish*
11 *Market*. The transcriptions reveal that the *Besame* drum beats are not similar (let
12 alone substantially similar) to the *Fish Market* drum beat.

13 Likewise, the transcribed drum beats purportedly contained in *Fish Market*
14 and *Calypso*¹¹ show that the only similarities between the two works are that the
15 kick drum in both works are playing a basic quarter note pattern in 4/4 time. (See
16 SCAC ¶ 222.) The rhythmic pattern being played by the snare, hi hat and bass in
17 *Calypso* are different than the pattern being played by those instruments in *Fish*
18 *Market*. There are no hi hat, tom, tambourine or timbale rhythms in *Calypso*, let
19 alone any similar to those in *Fish Market*. These particular transcriptions reveal that
20 the drum beats are not even similar (let alone substantially similar) to the transcribed
21 *Fish Market* drum beat and is presented for demonstrative purposes to show the
22 infringed portion is not protectable. A review of the other comparative transcription
23 pairs (SCAC ¶¶ 223-229; 280-296; 336-344) likewise shows the same lack of
24 similarity to any protectable element of *Fish Market*.

25 **Dismissal is Appropriate for Claims of Secondary Liability**

26
27 _____
28 ¹⁰ This is a sound recording of Luis Fonsi (not the Moving Defendants), and is demonstrative of the allegations that there is no infringement of anything protectable.

¹¹ Also a sound recording of Luis Fonsi.

1 Finally, as to the 3 Moving Defendants that are only alleged to be vicariously
2 liable for infringement of their artists (Mr. 305, Inc [regarding recordings by Pitbull],
3 WK Records, Inc [regarding recordings by Los Legendarios] and LA Base Music
4 Group, Inc [regarding recordings of De La Ghetto), the claims against them should
5 be dismissed for the same reasons set forth with respect to their underlying artists.
6 *A and M Records v. Napster*, 239 F. 3d 1004 (9th Cir. 2000).

7 **The Moving Defendants Adopt and Join in the Arguments and**
8 **Authorities Advocated by the Remaining 280 or so other Defendants.**

9 **CONCLUSION**

10 The Court should dismiss the SCAC with prejudice.

11
12 Respectfully submitted,

13
14 DATED: August 31, 2023

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Certificate of Compliance

The undersigned, counsel of record for Defendants WK Records, Inc., Llandel Veguilla pka “Yandel,” Juan Luis Morera Luna pka “Wisin,” Ernest Padilla, Mr. 305 Inc., Marcos Alfonso, Ramirez Carrasquillo, Victor Rafael Torres Betancourt, La Base Music Group, LLC, Juan Luis Londono Arias pka “Maluma,” Carlos Alberto Vives Restrepo pka “Carlos Vives,” Daniel Oviedo pka “Ovy on the Drums,” Michael Monge pka “Myke Tower,” Geoffrey Royce Rojas pka “Prince Royce,” Rafael Torres pka “De La Ghetto,” Richard Camacho, Erick Brian Colon, Christopher Velez and Zabdiel De Jesus, certifies that this brief contains 2,619 words, which complies with the word limit of L.R. 11-6.1.

Dated: August 31, 2023

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