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**MEMORANDUM OPINION, NINTH CIRCUIT\***  
**(JUNE 7, 2022)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GARY FRISBY, PKA G-MONEY,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, DBA RCA  
Records, a Delaware General Partnership; ET AL.,

*Defendants-Appellees.*

and

CORTEZ BRYANT, an Individual; ET AL.,

*Defendants.*

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Nos. 21-55586, 21-55587

D.C. Nos. 2:19-cv-01712-GW-AGR,  
2:19-cv-04167-GW-AGR

Appeal from the United States District Court  
for the Central District of California  
George H. Wu, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App.2a

Submitted May 19, 2022\*\*  
Pasadena, California

Before: OWENS and BRESS, Circuit Judges,  
and FITZWATER,\*\*\* District Judge.

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Plaintiff-Appellant Gary Frisby (“Frisby”) appeals the district court’s order granting summary judgment to Defendants on his sound recording and musical composition copyright infringement claims based on his beat track, *Shawty So Cold* (“*Shawty*”). He also appeals the denial of his motion for reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b) of the judgment dismissing his sound recording copyright infringement claim. Frisby alleges that Defendants-Appellees Sony Music Entertainment, Bryson Tiller, and Michael Hernandez are liable for copyright infringement based on their involvement with the platinum-selling hip-hop song, *Exchange*, which Frisby maintains copies key parts of *Shawty*.

Frisby asserted these claims in two separate lawsuits. The first—based on his sound recording copyright infringement claim—was docketed in the district court as Civil Action No. 2:19-cv-01712-GW-AGR (the “1712 Action”). The second—filed later and based on his musical composition copyright infringement claim—was docketed in the district court as Civil Action No. 2:19-cv-04167-GW-AGR (the “4167 Action”). We have

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\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

jurisdiction under 28 U.S.C. § 1291 over the appeal of the judgment of dismissal entered in the 1712 Action and the denial of Frisby's motion for reconsideration filed in that action. We lack jurisdiction over the appeal of the judgment of dismissal entered in the 4167 Action, for which no notice of appeal was filed. We affirm in part and dismiss in part.<sup>1</sup>

We review de novo whether we have subject matter jurisdiction over Frisby's appeals. *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1260 (9th Cir. 1997). We review a grant of summary judgment de novo, *Sandoval v. County of Sonoma*, 912 F.3d 509, 515 (9th Cir. 2018), and the denial of a motion under Rule 59(e) or 60(b) for abuse of discretion, *Ta Chong Bank Ltd. v. Hitachi High Technologies America, Inc.*, 610 F.3d 1063, 1066 (9th Cir. 2010); *Lemoge v. United States*, 587 F.3d 1188, 1191-92 (9th Cir. 2009).

1. We lack jurisdiction over Frisby's appeal of the judgment dismissing his musical composition copyright infringement claim asserted in the 4167 Action because Frisby did not file a notice of appeal from that judgment. See *United States v. Arevalo*, 408 F.3d 1233, 1236 (9th Cir. 2005) (“[F]ailure to file a timely or effective notice of appeal renders us without jurisdiction to consider the merits of the petitioner's claims.”).

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<sup>1</sup> We grant Defendants-Appellees' Motion to Take Judicial Notice of documents in other proceedings.

We deny Frisby's Motion to Take Judicial Notice because the subject documents are already part of the record on appeal, are duplicative of Defendants-Appellees' request, or are irrelevant to the jurisdictional question.

Frisby did file notices of appeal in the 1712 Action from the judgment dismissing his sound recording copyright infringement claim and the order denying his motion for reconsideration. But the notices of appeal filed in the 1712 Action do not confer jurisdiction on this court to consider Frisby's appeal of the separate judgment entered in the 4167 Action. Although the district court consolidated the two cases for pretrial purposes, the two actions remained "constituent cases [that] retain[ed] their separate identities." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018).<sup>2</sup> The Supreme Court has instructed that each case must be considered separately to determine whether a court has jurisdiction to consider the case's merits. *Id.* at 1130-31. The Supreme Court has thus "dismissed an appeal because the constitutional question that supplied [its] jurisdiction had been raised not in the case before [it], but instead only in other cases with which it had been consolidated." *Id.* at 1130 (citing *Butler v. Dexter*, 425 U.S. 262, 266-267 (1976) (per curiam)).

We therefore dismiss Frisby's purported appeal from the judgment in the 4167 Action.

2. The district court did not err in denying Frisby's motion for reconsideration in the 1712 Action.<sup>3</sup>

Frisby fails to raise on appeal arguments raised in his motion for reconsideration and otherwise fails specifically and distinctly to challenge the denial of

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<sup>2</sup> The limited scope of the consolidation is confirmed by the district court's entry of a separate judgment of dismissal in each case.

<sup>3</sup> The motion for reconsideration only pertained to the judgment entered in the 1712 Action.

his motion for reconsideration. *See Christian Legal Soc’y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) (“We review only issues [that] are argued specifically and distinctly in a party’s opening brief.” (alteration in original) (quoting *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010))); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.”).

To the extent that Frisby’s arguments are not waived, his challenge to the denial of his motion for reconsideration fails because he presented arguments that he had already raised (or could have raised) in his opposition to Defendants-Appellees’ motion for summary judgment. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (“The motion [under Rule 59(e)] was properly denied here because . . . it presented no arguments that had not already been raised in opposition to summary judgment.”). Moreover, it is not an abuse of discretion for a district court to deny a motion for reconsideration that is based on grounds that are only belatedly raised after summary judgment has been granted. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008).

3. Frisby’s remaining claim—his sound recording copyright infringement claim in the 1712 Action—fails because there is no genuine issue of material fact that Defendants-Appellees’ song does not capture actual sounds contained in *Shawty*. *See* 17 U.S.C. § 114(b) (stating that a sound recording copyright “is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording”);



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*VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016) (“[I]nfringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced. . . .” (emphasis omitted) (citation omitted)).

In fact, as Frisby acknowledges in his reply brief, “If this appeal were limited to Frisby’s claim of copyright infringement of the sound recording as alleged in 1712, his evidence of access and substantial similarity would be irrelevant and his appeal would be ruined.”

AFFIRMED IN PART, DISMISSED IN PART.

App.7a

**JUDGMENT, CASE 1712, DISTRICT COURT  
WITH IMAGE OF JUDGMENT  
(MARCH 15, 2021)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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GARY FRISBY, ETC.,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants.*

AND CONSOLIDATED ACTION

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Case No. 2:19-cv- 01712-GW-AGR<sub>x</sub>

Before: George H. WU, United States District Judge.

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The Court having granted the Motion of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment for Summary Judgment in Case No. 2: 19-cv-01712-GW-AGR<sub>x</sub> and Case No. 2:19-cv-04167-GW-AGR<sub>x</sub>,

IT IS ORDERED AND ADJUDGED that plaintiff Gary Frisby take nothing and that his First Amended Complaint in Case No. 2: 19-cv-01712-GW-AGR<sub>x</sub> and his Complaint in Case No. 2:19-cv-04167-GW-AGR<sub>x</sub>

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each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs.

/s/ The Honorable George H. Wu  
United States District Judge

Dated: March 15, 2021

**IMAGE OF JUDGMENT, CASE 1712**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

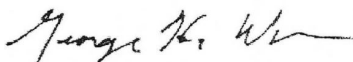
GARY FRISBY, <i>etc.</i> ,	)	Case No. 2:19-cv-01712-GW-AGRx
Plaintiff,	)	
v.	)	JUDGMENT
SONY MUSIC ENTERTAINMENT, <i>etc., et al.</i> ,	)	
Defendants.	)	
<hr/>		
AND CONSOLIDATED ACTION	)	

**JUDGMENT**

The Court having granted the Motion of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment for Summary Judgment in Case No. 2:19-cv-01712-GW-AGRx and Case No. 2:19-cv-04167-GW-AGRx,

**IT IS ORDERED AND ADJUDGED** that plaintiff Gary Frisby take nothing and that his First Amended Complaint in Case No. 2:19-cv-01712-GW-AGRx and his Complaint in Case No. 2:19-cv-04167-GW-AGRx each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs.

Dated: March 15, 2021



\_\_\_\_\_  
The Honorable George H. Wu  
United States District Judge

**JUDGMENT, CASE 4167, DISTRICT COURT  
AND IMAGE OF JUDGMENT  
(ENTERED MARCH 18, 2021)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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GARY FRISBY, ETC.,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants.*

AND CONSOLIDATED ACTION

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Case No. CV 19-1712-GW-AGR<sub>x</sub>,  
CV 19-4167-GW-AGR<sub>x</sub>

Date: March 2, 2020, Time: 8:30 a.m.

Before: George H. WU, United States District Judge.

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**JUDGMENT**

The Court having granted the Motion of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment for Summary Judgment in Case No. 2: 19-cv-01712-GW-AGR<sub>x</sub> and Case No. 2:19-cv-04167-GW-AGR<sub>x</sub>,

IT IS ORDERED AND ADJUDGED that plaintiff Gary Frisby take nothing and that his First Amended

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Complaint in Case No. 2:19-cv-01712-GW-AGR<sub>x</sub> and his Complaint in Case No. 2:19-cv-04167-GW-AGR<sub>x</sub> each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs.

/s/ The Honorable George H. Wu  
United States District Judge

Dated: March 15, 2021

**IMAGE OF JUDGMENT, CASE 4167**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

GARY FRISBY, *etc.*,

Plaintiff,

v.

SONY MUSIC ENTERTAINMENT,  
*etc., et al.*,

Defendants.

AND CONSOLIDATED ACTION

Case No. CV 19-1712-GW-AGR<sub>x</sub>  
CV 19-4167-GW-AGR<sub>x</sub>

JUDGMENT

Date: March 2, 2020  
Time: 8:30 a.m.

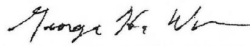
Courtroom of the Honorable  
George H. Wu  
United States District Judge

**JUDGMENT**

The Court having granted the Motion of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment for Summary Judgment in Case No. 2:19-cv-01712-GW-AGR<sub>x</sub> and Case No. 2:19-cv-04167-GW-AGR<sub>x</sub>,

**IT IS ORDERED AND ADJUDGED** that plaintiff Gary Frisby take nothing and that his First Amended Complaint in Case No. 2:19-cv-01712-GW-AGR<sub>x</sub> and his Complaint in Case No. 2:19-cv-04167-GW-AGR<sub>x</sub> each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs.

Dated: March 15, 2021



HON. GEORGE H. WU,  
United States District Judge

**STATEMENT OF RULING GRANTING  
MOTION FOR SUMMARY JUDGMENT,  
FILED IN CASE 1712 & CASE 4167  
(MARCH 11, 2021)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

---

GARY FRISBY

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

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Case Nos. CV 19-1712-GW-AGR<sub>x</sub>,  
2:19-cv-04167-GW-(AGR<sub>x</sub>)<sup>1</sup>

Before: George H. WU, United States District Judge.

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<sup>1</sup> Plaintiff initially filed *Frisby v. Sony Music Entm't, et al.*, Case No. 2:19-cv-01712-GW-(AGR<sub>x</sub>), on March 7, 2019. On March 15, 2019, he filed *Frisby v. Sony Music Entm't, et al.*, Case No. 2:19-cv-04167-GW-(AGR<sub>x</sub>). On July 11, 2019, the two cases were consolidated. As stated by Plaintiff's then-counsel, the allegations in the complaints in both cases "are substantially the same" with the "only material difference" being that the first case concerns a sound recording copyright whereas the second concerns a musical composition copyright. See page 2 of Docket No. 27 in *Frisby v. Sony Music Entm't, et al.*, Case No. 2:19-cv-04167-GW-(AGR<sub>x</sub>).

The ruling herein applies to both cases.



PROCEEDINGS:

Telephonic Hearing on Defendants Sony Music Entertainment, Bryson Tiller and Michael Hernandez’s Motion for Summary Judgment or Partial Summary Judgment [127]

Defendants Sony Music Entertainment d/b/a RCA Records (“Sony”), Bryson Tiller (“Tiller”), and Michael Hernandez (“M. Hernandez”) (collectively, “the Sony Defendants”) have filed a motion for summary judgment/partial summary judgment (“Motion”) in this copyright infringement action brought by Gary Frisby (“Plaintiff” or “Frisby”). *See* Docket No. 127-1. Plaintiff opposed the motion (the “Opposition”) (*see* Docket No. 136); and the Defendants in turn filed a reply (“Reply”). *See* Docket No. 146.

**I. Introduction**

This action arises out of a copyright dispute between Plaintiff and a number of defendants regarding the alleged use and infringement of Plaintiff’s musical composition entitled *Shawty So Cold* (“*Shawty*”), which bears United States Copyright Registration Nos. SRu001240028 and Pau003965398. *See* Plaintiff’s First Amended Complaint (“FAC”) ¶¶ 1, 5, Docket No. 79. Originally, there were a number of different defendants. The dispute as to the Sony Defendants arose out of their alleged use of copyrighted portions of *Shawty* in a song entitled “*Exchange*” that was released in March of 2016 by Tiller (the recording artist) and M. Hernandez (the record producer). *Id.* ¶¶ 6-8. Another set of defendants included Jermaine Cole (“Cole”), Universal Music Group, Inc. d/b/a Interscope Records, Dreamville Records NY, Inc., and Roc Nation LLC (collectively, the “UMG Defendants”),

who were accused of using *Shawty* copyrighted materials in the song “*Déjà Vu*.” *Id.* at ¶¶ 2-3, 10-14. One defendant, *i.e.* Cortez Bryant (“Bryant”), defaulted. *See* Docket No. 59. Two other defendants (*i.e.* Matthew Samuels, p/k/a “BOILDA,” and Anderson Hernandez, p/k/a “VINY LZ”) were voluntarily dismissed by Plaintiff (*see* Docket Nos. 89, 96). Subsequently, the UMG Defendants were dismissed pursuant to a stipulation among the parties (*see* Docket Nos. 132-33). Other than Bryant who defaulted, the Sony Defendants are the only remaining defendants still in this lawsuit.

On May 13, 2019, Plaintiff filed the FAC which includes causes of action for direct copyright infringement of *Shawty* against Tiller and Sony (*see* FAC ¶¶ 93-111), and contributory infringement against M. Hernandez allegedly for his role in causing *Shawty* to be used as the basis for *Exchange*. *Id.* ¶¶ 154-59. Plaintiff claims that, although 10% of *Shawty* is comprised of samples from the song *Swing My Way* (“*Swing*”) by artists K.P. and Envyi, his song is otherwise original and protected by applicable copyright laws. *See* FAC ¶¶ 35-37. The Sony Defendants deny all allegations of infringement and secondary liability. *See* Docket Nos. 94, 103, 113.

The Sony Defendants are moving for summary judgment arguing that: (1) Plaintiff owns no valid copyright in the portions of *Shawty* which he claims the Defendants utilized and, accordingly, cannot sue for infringement; (2) even if Plaintiff does have ownership, he has not established that any actionable copying occurred; and (3) Plaintiff is seeking to enforce copyright protections for unprotectable parts of his song. *See* Motion at 1-2. Further, Defendants contend

that Plaintiff's claims against M. Hernandez for contributory or vicarious liability as to *Exchange's* alleged violation of the *Shawty* copyright also come to naught because *Exchange* does not infringe upon any valid *Shawty* copyright. *Id.* at 2.

The Court finds that Plaintiff does not have a valid copyright in the portions of *Shawty* which he claims were incorporated into *Exchange*, and the Sony Defendants have established (and Plaintiff has not demonstrated that there is a material fact in contradiction) that *Exchange* has not copied any appreciable portion of *Shawty*.

## II. Procedural Standard

Summary judgment is proper when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005). To satisfy its burden at summary judgment, a moving party without the burden of persuasion—applicable to Defendants on all of the issues raised by this Motion—“must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (emphasis added); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*) (“When the nonmoving party has the burden of proof at trial, the moving party need only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting *Celotex Corp. v.*

*Catrett*, 477 U.S. 317, 325 (1986), and citing *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000)); *Fairbank*, 212 F.3d at 532 (holding that the *Celotex* “showing” can be made by “pointing out through argument . . . the absence of evidence to support plaintiff’s claim”).

If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

*T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted).

The opposing party must “cit[e] to particular parts of materials in the record” or show that the materials the moving party cited do not establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c)(1); *see also* Fed. R. Civ. P. 56(c)(3) (“The court need consider only the cited materials, but it may consider other materials in the record.”); Phillips & Stevenson, RUTTER GROUP PRAC. GUIDE, FEDERAL CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) (“*Phillips & Stevenson*”), ¶¶ 14:101.10-101.12, 14:102. In addition, under this Court’s Local Rules, where the moving party on a motion for summary judgment has “claimed and adequately supported” material facts, those facts “are admitted to exist without controversy except to

the extent that such material facts are (a) included in the ‘Statement of Genuine Disputes’ [described in Local Rule 56-2] and (b) controverted by declaration or other written evidence filed in opposition to the motion.” See C.D. Cal. L.R. 56-3; see also *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1058 (9th Cir. 2009) (“The ‘party opposing summary judgment must direct [the court’s] attention to specific, triable facts,’ and the reviewing court is ‘not required to comb through the record to find some reason to deny a motion for summary judgment.’”) (quoting *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (“[W]hatever establishes a genuine issue of fact must both be in the district court file *and* set forth in the response.”).

Factual assertions made in legal memoranda, but not supported by the evidence submitted, are insufficient. See *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1980). Similarly, one’s own allegations in the pleadings are generally not suitable to create a genuine dispute. See *Phillips & Stevenson*, ¶ 14:185. Materials presented on summary judgment must be admissible under the rules of evidence. *In re Sunset Bay Ass’n*, 944 F.2d 1503, 1514 (9th Cir. 1991).

“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In addition, a party may not argue claims that are not present in the pleadings. See *Phillips & Stevenson*, ¶ 14:106.5.

Generally speaking, in judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence, and views all evidence and draws all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Motley v. Parks*, 432 F.3d 1072, 1075 n.1 (9th Cir. 2005) (*en banc*); *Miranda*, 429 F.3d at 860 n.1. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979); *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004) (“In order to survive a motion for summary judgment, the non-moving party must be able to show sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy.”) (omitting internal quotation marks) (quoting *Godfrey v. Pulitzer Publ'g Co.*, 276 F.3d 405, 412 (8th Cir. 2002)); *see also Phillips & Stevenson* ¶ 14:171.

With all of these considerations in mind, the court must then determine whether “a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248; *see also Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (“The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient.”).

### III. Evidentiary Objections<sup>2</sup>

#### A. Defendants' Objections to Plaintiff's Declaration (*see* Docket Nos. 138, 146-2)

1. Sustain.
2. Sustain.
3. Sustain except as to his personal knowledge about his own experiences as a producer in the industry.
4. Sustain.
5. Sustain.
6. Sustain.
7. Sustain.
8. Sustain.
9. Sustain except for his reflections that the man with whom he was dealing was the actual Cortez Bryant.
10. Sustain.
11. Sustain.
12. Sustain.
13. Sustain except for Plaintiff's statements that he was aware that producers Boilda and Vinylz had produced beat tracks for Drake.
14. Overrule except for the quoted description from the Youtube posting.

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<sup>2</sup> The Court does not consider evidentiary objections that do not comply with its Standing Order regarding Summary Judgment Motions. *See* Docket No. 130.

15. Sustain except for Plaintiff's understanding that the Youtube posting description was a solicitation to submit his work to the video uploader.
16. Overrule.
17. Sustain.
18. Sustain.
19. Overrule.
20. Overrule. Pursuant to Fed. R. Evid. 801(d)(2)(A) and 803(20).
21. Overrule.
22. Overrule.<sup>3</sup>
23. Sustain.
24. Sustain.
25. Sustain except for Plaintiff's statement that he is aware that Bryant is a personal manager and not a creative artist, thereby establishing

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<sup>3</sup> The Sony Defendants' Objection No. 22 is overruled for two reasons. First, it refers to "page 8, paragraph 18, lines 10-13." See Docket No.146-2 at 15 of 29. However, page 8 lines 10-13 are in paragraph 17 and not 18. Second, Defendants cite to Peter Anderson's Reply Declaration in Support of Defendants' Motion ("Anderson Reply Decl."), referencing "Exh. 20 (Frisby Depo.) at 68:7-71:18." however none of those pages were included in that document. See Docket No. 146-1 at 10-11 of 23, Ex. 20—Deposition of Gary Frisby in Support of Peter Anderson ("Frisby Depo. ISO AR"). Instead, Exhibit 20 skips from page 26 to page 76. *Id.* Likewise, the Frisby deposition attached to the Motion (Ex. 19) only includes page 68. See Docket No. 127-29, Ex. 19, Deposition of Gary Frisby in Support of the Motion ("Frisby Depo ISO Motion"), 29-30. Accordingly, there is insufficient evidence to justify sustaining Defendants' objections to this paragraph.



that he was not involved in the artistic creation of the beats at issue.

26. Sustain except for Plaintiff's last sentence ("I have settled with the Déjà vu defendants").
27. Sustain, pursuant to 17 U.S.C. §§ 102(a)(2) & 114(a)-(b).
28. Sustain.
29. Sustain.
30. Sustain.
31. Sustain.
32. Sustain.
33. Sustain.
34. Sustain.
35. Sustain.
36. Sustain.
37. Sustain. Frisby submitted no rebuttal expert report and has no musicological training.
38. Sustain except for Plaintiff's admission that his claim relates only to the parts of Defendants' song which allegedly use the four-bar melody from *Swing*.
39. Sustain. Plaintiff has no expert foundation to state that Sony's expert "is demonstrably so incorrect that it could be considered musicologically incompetent."
40. Overrule. Though he may not provide expert testimony, he may still speak based on his personal knowledge as a layperson on social media platforms (twitter, Youtube, etc.) who

has seen public conversations on those platforms.

41. Sustain except for Plaintiff's assertion that he settled his claims against the *Déjà Vu* Defendants.
42. Sustain, pursuant to Fed. R. Evid. 602 and Fed. R. Civ. P. 37(c)(1).
43. Sustain.
44. Sustain.

**B. Defendants' Objections to James Belt's Declaration (Docket Nos. 140, 146-2)**

45. Sustain. Belt's declaration is stricken pursuant to the Court's November 26 Order (*see* Docket No. 123) and FRCP 37(c)(1).
46. Sustain.

**C. Defendants' Objections to Brian McBrearty's Declaration (Docket Nos. 139, 146-2)**

47. Overrule.<sup>4</sup>

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<sup>4</sup> The Sony Defendants object to this Court's consideration of any portion of Plaintiff's expert's (*i.e.* Brian McBrearty) October 9, 2019 declaration (*see* Docket No. 139) because portions of the declaration conflict with said expert's December 20, 2019 deposition testimony. It has been noted by the Supreme Court that a party cannot create a genuine issue of fact sufficient to survive a summary judgment motion simply by contradicting a previously sworn statement with a later-made sworn statement without explaining the contradiction or attempting to resolve the disparity. *See, e.g. Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806

## IV. Factual Background

### A. Defendants' Statement of Undisputed Facts and Plaintiff's Response

C.D. Cal. L.R. 56-1 provides that: "A party filing a notice of motion for summary judgment or partial summary judgment shall lodge a proposed 'Statement of Uncontroverted Facts and Conclusions of Law.'"

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(1999). Here, however, there is not really a contradiction, or at least not an unexplained contradiction.

While McBrearty does state in his declaration that the question of whether *Déjà Vu* or *Exchange* actually sampled *Shawty* was inconclusive, his justification does not establish a clear contradiction to his deposition testimony. See Docket No. 139, McBrearty Declaration in Opposition of the Motion ("McBrearty Decl."), at 3-4 ("While it appears possible that [Defendants] could have both sampled four bars of *Shawty* . . . includ[ing] the [*Swing*] Samples, there is no proof to negate the possibility they obtained their sample of [*Swing*] from another source."). This is not inconsistent with his clarification that, while he has not definitively concluded that *Shawty* was sampled by Defendants, he still opines that it is unlikely that sampling occurred. See Docket No. 127-28, McBrearty Depo. in Support of the Motion ("McBrearty Depo."), Ex. 18, at 6:2-8; see also McBrearty Depo. at 7:19-8:3 ("[I]t is my opinion that it is unlikely . . . that [*Shawty*] contains elements simultaneously along with [the *Swing*] sample . . . And [also] unlikely . . . that the *Exchange* material is the *Shawty* material[,] because I don't hear the . . . other elements in that ensemble."). In short, McBrearty is simply stating that he is reluctant to provide a definite answer to an open question. Thus, viewing this evidence in light most favorable to Plaintiff, McBrearty's declaration is not necessarily contradictory to his deposition. Nevertheless, as discussed *infra*, because McBrearty is Plaintiff's sole expert witness on an essential issue which requires expert testimony (at least Plaintiff's sole expert witness on the topic whose testimony is admissible in this litigation), even though the Court does consider McBrearty's testimony, it does not salvage Plaintiff's case.

Such proposed statement shall set forth the material facts as to which the moving party contends there is no genuine dispute.” C.D. Cal. L. R. 56-2 states that: “Any party who opposes the motion shall serve and file with the opposing papers a separate document containing a concise ‘Statement of Genuine Disputes’ setting forth all material facts as to which it is contended there exists a genuine dispute necessary to be litigated.” C.D. Cal. L.R. 56-3 indicates that: “In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the ‘Statement of Genuine Disputes’ and (b) controverted by declaration or other written evidence filed in opposition to the motion.”

As observed in *Phillips & Stevenson* ¶ 14:102.2:

Local rules relating to separate statements have the force of law and summary judgment may be upheld based on a party’s failure to comply therewith. The modest demand that the opposing party specify the facts in controversy is entirely compatible with Rule 56. Judges are not obliged to scour the record looking for a factual dispute without assistance from the parties . . . *Carmen v. San Francisco Unified School Dist.* (9th Cir. 2001) 237 F.3d 1026, 1029. . . .

Local rules—which provide that uncontroverted or inadequately controverted facts in a statement of genuine disputes will be deemed admitted for purposes of a summary judgment motion—are valid. *See Heinemann v. Satterberg*, 731 F.3d 914, 917 (9th Cir. 2013).

In their motion for summary judgment, the Sony Defendants set forth 166 statements of fact with concomitant evidentiary support. *See* Docket No. 127-32. Plaintiff only submitted responses to Fact Nos. 21-22, 33, 40, 47-53, 55, 58-59, 61-66, 68-69, 75- 77, 81, 84-87, 108, 110-12, 115-16, 118, 124-26. *See* Docket No. 135. Because Frisby has failed to proffer any response to the Sony Defendants' Facts Nos. 1-20, 23-32, 34-39, 41-46, 54, 56-57, 60, 67, 70-74, 78-80, 82-83, 88-109, 113-14, 117, 119-23, and 127-166 and because the Court finds Defendants' asserted facts to be adequately supported by their cited evidence, the Court accepts those facts as being true and uncontroverted for purposes of the present motion.

Additionally, even though Frisby has responded to some of the Sony Defendants' factual assertions, many of his responses are insufficient to create a genuine dispute of material fact because they: (1) are only supported by evidence for which this Court has sustained the Defendants' objections in Section II(B), *supra*; (2) are not supported by any cited evidence; (3) only consist of argument; (4) do not directly respond to or contradict the fact actually referenced by the Defendants; and/or (5) are merely Frisby's opinions which he does not have the expertise to establish. For example, in Fact No. 48 (*see* Docket No. 146-3 at 35-36 of 106), the Sony Defendants state that "Bryant was not involved in the creation of *Exchange* or *Déjà Vu*." Frisby's response initially concedes that fact but then goes on to contend that: Bryant "delivered the stem files of *Shawty*" (which Frisby provided to him "in trust and good faith") "to the producers/composers of the *Déjà Vu* beat track" who used those stems in creating *Déjà Vu* "believing that they were entitled to

do so because . . . [they] reasonably assum[ed] that in the usual course of business Mr. Bryant or his business cohorts” had obtained Frisby’s permission for the use of the *Shawty* beat track. *Id.* In support of his response, Plaintiff only cites to “Frisby Decl. ¶[¶] 2-6, 9-21.” *Id.* at 35 of 106. However, this Court sustained the Sony Defendants’ Objections Nos. 1-13, 15, 17-18, 23-39, and 41-46 which eliminate portions of paragraphs 2-3, 5, 6, 9-14, 16, and 18-21 of the Frisby Declaration. Furthermore, a majority of Plaintiff’s responses are based upon inadmissible hearsay and/or are without any evidentiary foundation. Finally, even if the Court were to ignore the lack of admissible evidence upon which Frisby’s contentions are based, his response does not create a material dispute of fact as to Bryant’s lack of involvement in the creation of the Sony Defendants’ *Exchange* which was released in October of 2015, as opposed to the production of *Déjà Vu* by an entirely different set of persons (*i.e.* the UMG Defendants) which was released more than a year later.

In delineating the following factual background below, the Court only incorporates (unless otherwise noted) the undisputed facts as established by the consideration of the Sony Defendants’ Statement of Uncontroverted Facts (*see* Docket No. 127-32), Plaintiff’s Statement of Genuine Disputes (*see* Docket No. 135), the Response to Plaintiff’s Statement of Genuine Disputes (*see* Docket No. 146-3), and the Court’s evidentiary rulings, *supra*.

### **B. Frisby’s 2013 Beat, *Shawty*, and His Sampling of *Swing My Way***

Plaintiff creates recorded “beats” – meaning the underlying music of a song – to provide to recording

artists instrumentals upon which they can supply lyrics, typically by rapping or singing over them. See Defendants' Response to Plaintiff's Statement of Genuine Disputes ("DR") ¶ 1, Docket No. 146-3 page 6 of 106. Plaintiff claims that, in 2013, he created a beat titled "*Shawty So Cold*." *Id.* ¶ 2. In producing *Shawty*, Frisby "sampled" another musical composition (*i.e.* *Swing My Way*). *Id.* ¶ 6. "Sampling" is digitally taking a portion of the actual sounds of a preexisting recording and including the taken "sample" in another sound recording. *Id.* ¶ 3. *Swing My Way* ("*Swing*") is a 1998 recording by the musical artists KP & Envyi that became a top-ten hit. *Id.* ¶ 4. Since its creation, *Swing* has been sampled in at least 25 other recordings (including the 2008 song *Brooklyn Girls* by Charles Hamilton). *Id.* ¶¶ 5, 94.

Plaintiff's sampling of *Swing* copied portions of both the *Swing* sound recording and its underlying musical composition. *Id.* ¶ 8. The *Swing* sound recording and musical composition are protected by copyrights that Plaintiff does not own. *Id.* ¶ 11. In incorporating samples from *Swing*, Plaintiff did not obtain the consent of the *Swing* copyright owners. *Id.* ¶ 12. The portions of *Swing* that Plaintiff sampled in *Shawty* are important parts of *Swing*. *Id.* ¶ 9.

*Shawty* begins with Plaintiff's sample of the eight-bar chorus of *Swing*. *Id.* ¶ 6. *Shawty* also includes a sample of the four-bar introduction of *Swing*. *Id.* ¶¶ 7, 20. The first 19 seconds of *Shawty* use Plaintiff's sample of eight bars of *Swing*'s chorus, and Plaintiff's sample of *Swing*'s four-bar introduction then repeats throughout the rest of *Shawty*. *Id.* ¶¶ 10, 20. Plaintiff's copyright claims in this action are based on the alleged copying of those parts of *Shawty* that use Plaintiff's

sample of the four-bar introduction of the *Swing* sound recording and musical composition (though Plaintiff characterizes his sampling as a transformative derivative work). *Id.* ¶¶ 13, 52.

### **C. Sony’s *Exchange* (2015) and UMG/Interscope’s *Déjà Vu* (2016)**

On or about October 2, 2015, Sony released an album titled *Trapsoul*, which included the sound recording *Exchange*, as performed by recording artist Bryson Tiller. *Id.* ¶ 14. M. Hernandez, also known as “Foreign Teck,” produced the *Exchange* sound recording. *Id.* ¶¶ 49, 119. *Exchange* has a four-bar sample of *Swing*’s introduction, and that sampling was authorized by *Swing*’s copyright owners. *Id.* ¶¶ 15-16, 20.

In December 2016, UMG/Interscope released *Déjà Vu*, featuring the performance of Jermaine Cole, a recording artist known professionally as “J. Cole.” *Id.* ¶ 17. *Déjà Vu* also includes a sample of *Swing*’s four-bar introduction, which was also authorized by *Swing*’s copyright owners. *Id.* ¶¶ 18-19. M. Hernandez was not involved in, and did not contribute to, the creation of *Déjà Vu*, nor did he induce the creators of *Déjà Vu* to include any materials or elements in it, or have any right or ability to control the creation or exploitation of *Déjà Vu*. *Id.* ¶¶ 120-23.

*Shawty* was not distributed to the public before the October 2015 release of the album containing *Exchange*.<sup>5</sup>

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<sup>5</sup> Plaintiff claims that “[a]lthough *Shawty* was not distributed to the public before October 2015, commencing on or about December 2, 2013, it was displayed on the YouTube channel of the OVO music label with a solicitation to lyric writers to submit lyrics. . . .”



### D. Plaintiff's Being Contacted Regarding Potential Interest in *Shawty*

Karen Civil is a publicist in the music industry. *Id.* ¶ 23. Bryant is a personal manager of recording artists and a music producer. *Id.* ¶ 24. Plaintiff's claim of access to *Shawty* by the Sony Defendants is based on his theory that, in 2013, he provided *Shawty* to a person representing himself to be Bryant, and the real Bryant knows or has business dealings with the producers involved in the creation of *Déjà Vu*, and that those producers copied portions of *Shawty*. *Id.* ¶ 46. He further contends that M. Hernandez (the producer of *Exchange*) copied portions of *Déjà Vu* in creating *Exchange*.<sup>6</sup> *Id.*

In May 2013, Plaintiff received an e-mail from someone using the e-mail address ymcmb.karencivil@gmail.com and displayed as "Karen Blueprint," identifying herself or himself as Karen Civil and stating that Bryant was interested in Plaintiff's "production." *Id.*

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*See* DR ¶ 22. However, Plaintiff fails to proffer any evidence as to the access that was generated by the presence of the song on the channel (e.g., was *Shawty* the only offering or were there hundreds or thousands more, how long was it on the channel, how many "hits" were there as to the *Shawty* posting, etc.). Plaintiff has also failed to provide any evidence that the Sony Defendants were aware of *Shawty* from its purported presence on a YouTube channel. The fact that an artistic work appears on some website does not establish that there was wide distribution of *Shawty* for purposes of the copyright infringement analysis. *See Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1144 (9th Cir. 2009).

<sup>6</sup> Plaintiff fails to proffer any admissible evidence to explain how the producer of *Exchange* (which was released in October of 2015) came to copy portions of *Déjà Vu* which was released over a year later at the end of 2016.

¶ 25. Plaintiff had never dealt with Karen Civil or Karen Blueprint before receiving this e-mail. *Id.* ¶ 26.

In May 2013, the person claiming to be Civil provided Plaintiff with the telephone number (786) 704-6454, representing it to be Bryant's telephone number. *Id.* ¶ 27. During that same month, Plaintiff used that telephone number and sent e-mails to an address at ymcmbcortezbryant@yahoo.com to communicate with a person claiming to be Bryant, who later told Plaintiff that he was interested in Plaintiff's recordings. *Id.* ¶¶ 28-29. Because the e-mail address used by the person claiming to be Bryant was a yahoo.com address rather than a company address, Plaintiff was concerned whether the person really was Bryant. *Id.* ¶ 30. On May 27, 2013, Plaintiff sent a copy of *Shawty* to the ymcmbcortezbryant@yahoo.com e-mail address. *Id.* ¶ 31.

The person claiming to be Bryant then told Plaintiff that he wanted Plaintiff to attend a recording session in Florida in June 2013 with his team of recording artists. *Id.* ¶ 32. He also told Plaintiff that if Plaintiff sent \$700, he would book Plaintiff's flight for him. *Id.* While Plaintiff was initially concerned about whether the person he was communicating with was actually Bryant, Plaintiff wired him \$700. *Id.* ¶ 33. No flight to Florida was ever booked for Plaintiff. *Id.* ¶ 34.

On June 10, 2013, Plaintiff's mother and business manager sent an e-mail to the person claiming to be Civil at the e-mail address that person had used, indicating that they had wired \$700 but had not been told when the flight would be leaving. *Id.* ¶ 35. That day, the person claiming to be Civil replied that she: (1) would speak with Bryant, (2) would have the booking agent take care of it, and (3) would have the

flight information e-mailed to them. *Id.* ¶ 36. Plaintiff never received any flight information and his \$700 was never returned. *Id.* ¶ 37. In addition, when Plaintiff later called the telephone number he had previously used to speak with the person claiming to be Bryant, Plaintiff learned that the number was no longer in service or had been disconnected. *Id.* ¶ 38.

Plaintiff filed a police report concerning theft of the \$700, but the police did nothing. *Id.* ¶ 39. Plaintiff also briefly engaged a private investigator, but the investigator was unable to determine whether or not the individuals Plaintiff interacted with were in fact Civil and/or Bryant. *Id.* ¶ 40.<sup>7</sup> Plaintiff's mother/business manager contacted another recording-industry figure who knew Bryant, but that individual's staff told Plaintiff that the people he had dealt with in 2013 were imposters. *Id.* ¶ 41. Plaintiff also learned that someone had conned concert promoters out of money by falsely claiming to be Bryant. *Id.* ¶ 42.

Plaintiff has never spoken directly with Civil, but after these events he communicated with her on social media, and she denied that she had sent the e-mails purported to be from her. *Id.* ¶ 43.

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<sup>7</sup> In paragraph 8 of his declaration, Plaintiff asserts that he “discontinued the engagement before the private investigator reported to Frisby whether or not Ms. Civil or Mr. Bryant were imposters.” Defendants in their statement of undisputed facts assert that “the private investigator was unable to determine whether the persons . . . were imposters.” See DR ¶ 40. Regardless, the parties are in agreement that the private investigator's efforts were inconclusive, and therefore it is undisputed that Plaintiff never confirmed whether the initial Ms. Civil and Mr. Bryant that he contacted were the real persons or simply imposters.

In June 2018, Plaintiff hired a lawyer who found the real Bryant’s e-mail address and sent him a demand letter, along with copies of the 2013 e-mails from the person claiming to be Civil, and accused Bryant of receiving *Shawty* from Plaintiff in 2013 and using it to copy *Shawty* into other works. *Id.* ¶ 44. The real Bryant responded to the lawyer’s letter by stating that he does not know Plaintiff, that he never had the telephone number in question, that he cannot recall the real Civil having the e-mail address purporting to belong to her, and that “[i]t’s highly likely that [Plaintiff] was caught up in a case of fraud.” *Id.* ¶ 45.

### **E. Plaintiff’s Allegations of Copying and Substantial Similarity**

In creating the *Shawty* sound recording, Plaintiff combined various sounds with the sample of *Swing*’s four-bar introduction. *Id.* ¶ 60. The structural, harmonic, rhythmic, melodic, and lyric substantial similarities between *Shawty* and *Exchange* are mainly limited to both songs’ use of the *Swing* sample—*e.g.*, their repeating of the two-bar chord-progression. *Id.* ¶¶ 54, 71, 73, 79, 83. *Exchange* adds additional bass notes that change the chords to make them different from the *Swing* sample and, as a result, different from *Shawty*. *Id.* ¶ 72.

Plaintiff admits that the different drum, synthesizer bass, and hi-hat sounds added to *Swing*’s four-bar introduction in both *Shawty* and *Exchange* are not substantially similar. *Id.* ¶¶ 55, 58. Additions to samples in this manner is a commonplace practice and/or element that predates *Shawty*, and their inclusion in *Exchange* is not musicologically significant. *Id.* ¶¶ 57, 113. Still, however, Plaintiff contends that *Exchange* added to its sample of the four-bar introduction of *Swing* sounds

that *Shawty* added to its sample of the same four-bar introduction of *Swing*. *Id.* ¶ 88.

In *Shawty* and *Exchange*, the *Swing* sample is sped-up (to different tempos) and pitched-up (to different keys), but speeding-up and/or pitching-up a sample are also commonplace practices that predate *Shawty*.<sup>8</sup> *Id.* ¶¶ 56, 89, 91-93, 95-98, 100-04, 117. Speeding up the tempo of a sample and pitching-up a sample to a different key are also not musicologically significant. *Id.* ¶¶ 90, 99. The natural result of a combined speeding-up and pitching-up of a recording is a “chipmunk” effect for recorded lyrics, another commonplace practice that predates *Shawty*.<sup>9</sup> *Id.* ¶¶ 105-07, 117.

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<sup>8</sup> For example, it is not disputed that both *Shawty* and *Exchange* speed up the *Swing* sample to a different tempo—*Shawty* from *Swing*’s original 70 beats per minute (“BPM”) to 93 BPM, and *Exchange* from 70 BPM to 80 BPM. See DR ¶¶ 91-93. Even then, the song, *Brooklyn Girls* by Charles Hamilton, which pre-dates *Shawty* by five years, also sampled the four-bar introduction of *Swing* and speed up the sample from 70 to 88 BPM. *Id.* at ¶¶ 94-96.

<sup>9</sup> Plaintiff proffered the declaration of James Belt as expert testimony to support the conclusion that “*Shawty So Cold* was the foundation of *Exchange* and it is more than likely than not, that the stems files for *Shawty So Cold* were used to create *Exchange*.” See Docket No. 140 at 5 of 6. However, this Court has sustained the Sony Defendants’ objection to the Belt declaration, *inter alia*, on the ground that it was filed in violation of the 11/16/19 Order which precluded Plaintiff from “designat[ing] any different or additional musicological and/or sound recording experts and . . . submit[ing] any additional musicological and/or sound recording expert reports [following the previously set close of expert discovery].” See Docket No. 123.

## V. Discussion

### A. Plaintiff's Direct Copyright Infringement Claim against the Sony Defendants

To prevail on his copyright infringement claim, Plaintiff “must demonstrate ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) (quoting *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) and *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)); see also *Skidmore as Trustee for Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (*en banc*). As to the second element, the Ninth Circuit has recently explained:

The second prong of the infringement analysis contains two separate components: “copying” and “unlawful appropriation.” *Rentmeester [v. Nike, Inc.]*, 883 F.3d [1111,] 1117 [(9th Cir. 2018)]. Although these requirements are too often referred to in shorthand lingo as the need to prove “substantial similarity,” they are distinct concepts.

Because independent creation is a complete defense to copyright infringement, a plaintiff must prove that a defendant copied the work. *Feist*, 499 U.S. at 345-46. In the absence of direct evidence of copying, which is the case here, the plaintiff “can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff’s work and that the two works share similarities probative of copying.” *Rentmeester*, 883 F.3d at 1117. This

type of probative or striking similarity shows that the similarities between the two works are due to “copying rather than . . . coincidence, independent creation, or prior common source.” *Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (omission in original) (quoting 4 Nimmer § 13.02[B]). A finding of such similarity may be based on the overlap of unprotectable as well as protectable elements. *Rentmeester*, 883 F.3d at 1117.

On the other hand, the hallmark of “unlawful appropriation” is that the works share substantial similarities. *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004). In our circuit, we use a two-part test to determine whether the defendant’s work is substantially similar to the plaintiff’s copyrighted work. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). The first part, the extrinsic test, compares the objective similarities of specific expressive elements in the two works. *Id.* Crucially, because only substantial similarity in protectable expression may constitute actionable copying that results in infringement liability, “it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.” *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004). The second part, the intrinsic test, “test[s] for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008) (quoting

*Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994)). Both tests must be satisfied for the works to be deemed substantially similar. *See Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

*Skidmore*, 952 F.3d at 1064.

### **1. Ownership and Rights to Grant Permission to Use the Works**

Frisby's first claim against the Sony Defendants is based on grounds of direct copyright infringement of a sound recording, in violation of the exclusive rights granted to copyright owners pursuant to 17 U.S.C. §§ 101 and 106. *See* FAC ¶¶ 93-95(d), 104. He specifically argues that, in copying the actual sounds affixed in the *Shawty* beat and laying lyrics over it for his song *Exchange*, Defendant Tiller created an unauthorized derivative work. *Id.* at ¶¶ 97, 99-100. Plaintiff alleges that Defendants have since performed *Exchange* publicly through audio transmissions and distributed copies of *Exchange* to the public. *Id.* at ¶¶ 101-02. Plaintiff argues that, in doing these acts, the Sony Defendants' knowingly and unlawfully exploited *Exchange's* improper use of *Shawty* without Frisby's consent, resulting in accumulation of massive profits, fame, and credit (to which Plaintiff was excluded). *Id.* at ¶¶ 106-07.

Defendants, in response, argue that "Frisby cannot prove any of the three required elements of a copyright infringement claim,"<sup>10</sup> and accordingly "cannot claim

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<sup>10</sup> What exactly the Sony Defendants mean by alluding to three required elements is unclear. As noted *supra*, normally proof of



copyright protection in his unauthorized use of another's copyrighted work." See Motion at 1. More specifically, Defendants argue that "[t]here are no valid sound recording or musical composition copyrights in *Shawty*—or at least none in the allegedly copied portions of *Shawty*—because Frisby copied *Swing My Way* without its owners' permission."<sup>11</sup> *Id.* at 7. Since "[*Swing*] became protected by 19 U.S.C. 302(a)[<sup>12</sup>], and Frisby unlawfully copied [important parts of] both [*Swing's*] sound recording and musical composition when he sampled [it] without [*Swing's* owners'] permission," Defendants reason, "he has no copyrights at all in *Shawty*." *Id.* at 8; see also Defendants Statement of Uncontroverted Facts and Conclusions of Law ("Defendants' Facts"),

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copyright infringement only requires: (1) proof of ownership of a valid copyright and (2) unauthorized copying of protected aspects of the work. *Feist Publ'ns*, 499 U.S. at 361; *Skidmore*, 952 F.3d at 1064. Admittedly, the second element has two components as delineated in *Skidmore*, 952 F.3d at 1064.

<sup>11</sup> Plaintiff has obtained a copyright registration for *Shawty* which creates a rebuttable presumption that the copyright is valid and owned by him. See 17 U.S.C. § 402(c); *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011).

<sup>12</sup> The statute cited by the Sony Defendants here does not exist under United States law. For sake of contextual inference, the Court will presume that this section of Defendants' brief was referencing 17 U.S.C. § 302(a), which pertains to durations of copyrighted works created on or after January 1, 1978. 17 U.S.C. § 302(a) states: "Copyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the author and 70 years after the author's death." Whereas *Swing My Way* was released in 1997, only 24 years have passed since the release and, therefore, *Swing* is still protected under this statute.

6-8, 10-11; Melville Nimmer and David Nimmer, 1 NIMMER ON COPYRIGHT (“NIMMER”) § 3.06.<sup>13</sup>

As defined in 17 U.S.C. § 101, a “derivative work” is “a work based upon one or more preexisting works, such as a . . . musical arrangement . . . [or] sound recording. . . .” 17 U.S.C. § 106(2) gives the owner of a copyright the exclusive right to prepare (or authorize the preparation of) a derivative work based upon the copyrighted work. In order to be a derivative work, the composition must exist in a concrete or permanent form and must substantially incorporate protected material from the preexisting work. *See Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998). Here, there can be no dispute that, at least as to the portion of the song involved in this case, *Shawty* is a derivative work in regards to *Swing* as it has “sampled” (*i.e.* directly copied from the sound recording as well as the underlying musical composition) important parts of *Swing*. These “important parts” include a sample of “*Swing My Way*’s four-bar introduction” and “the way he used [the] sample” to create the allegedly infringed portion of *Shawty*. *See* DR ¶¶ 9-10. As Plaintiff himself states, “[t]he Copyrighted Work and the Infringing Works are all based around a 4-bar pattern

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<sup>13</sup> As stated in NIMMER § 3.06:

If the pre-existing work that serves as the basis for a derivative or collective is itself protected by copyright, then its unauthorized incorporation into a derivative or collective work constitutes copyright infringement. Its incorporation into a collective work violates the right of reproduction in the pre-existing work. In a derivative work, that incorporation violates the right to prepare derivative works based upon the pre-existing work. [Footnotes omitted.]

containing the same sample of the song ‘*Swing My Way*’ by K.P. & Envyi.” FAC ¶ 60.

Plaintiff admits that his sampling constitutes infringement of *Swing*. See Frisby Declaration (“Frisby Decl.”) at ¶ 4, Docket No. 138 (“I am aware that the taking of a sample from a copyrighted sound recording and placing it in a newly-created beat track itself constitutes a copyright infringement. . . .”). However, he incorrectly believes that “until the sampled sound . . . becomes part of a commercially-released recording, the owner . . . has no knowledge that his work has been copied/infringed[,] and even if he did . . . [he] would not reasonably care because until a recording with his sample is commercially released, nobody has profited from the use of the sample.”<sup>14</sup> If an unauthorized third party prepares a derivative work, the copyright owner can sue for infringement. *DC Comics v. Towle*, 802 F.3d 1012, 1023 (9th Cir. 2015). A copyright owner also has the exclusive right to authorize others to prepare derivative works based on their copyrighted works. *Id.* (citing *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992)).

It has been held that the creator of a derivative work is not entitled to copyright protection where he lacked authority to create the derivative work from the original copyrighted opus. See *Gracen v. Bradford Exchange*, 698 F.2d 300, 302 (7th Cir. 1983) (stating that the creator of a derivative work is not entitled to

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<sup>14</sup> Pursuant to Defendants’ Request for Evidentiary Objections No. 3, all of ¶ 4 has been stricken except for Plaintiff’s admission that he was aware that his sampling of *Shawty* constituted infringement and also for any facts solely related to his personal knowledge—based on his own experiences as a producer in the industry—which are not expert testimony.

copyright protection where she lacked authority to create a derivative work); *Pamfiloff v. Giant Records, Inc.*, 794 F. Supp. 933, 938 (N.D. Cal. 1992). As noted in NIMMER § 3.06: “Section 103(a) provides that copyright in a derivative . . . work ‘does not extend to any part of the work in which such [pre-existing] material has been used unlawfully.’ By reason of this provision, only the portion of a derivative or collective work that employs the pre-existing work would be denied copyright. [Footnotes omitted.]” Plaintiff herein never received permission from the holders of the copyright in *Swing* to sample significant portions of it for use in *Shawty*. Accordingly, *Shawty* has unlawfully used *Swing* and thereby violated 17 U.S.C. § 103(a), which thereafter bars Plaintiff from suing anyone for infringement of those parts of *Shawty* which were taken from *Swing*. See 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”).

Plaintiff counters that “his copyright ownership in the *Shawty* beat track is a lawful derivative work based upon a pre-existing copyright in . . . *Swing*.” See Opposition at 4. There are three theories that Plaintiff uses to support his stance on ownership. First, he argues that “[h]is use of the underlying work in his beat track constitutes fair use as it is a transformative use of the underlying work to create his derivative work; and there is a genuine dispute as to whether Frisby’s beat track constitutes a fair use transformative work.” *Id.* at 3. Second, Plaintiff contends that the Sony Defendants are estopped from asserting their

Section 103(a) theory because Bryant “defrauded Frisby into transmitting” *Shawty* using false representations “that Drake was interested in creating a joint work . . . with Frisby,” and that “the downstream collaborator (Drake) . . . would fulfill the responsibility of obtaining the necessary permission from the [underlying work’s] owner” to do so. *Id.* Third, Plaintiff argues that because the Sony Defendants’ obtained permission from *Swing*’s owner and because it is the custom in the hip-hop music business to have downstream collaborators (here, the Sony Defendants) obtain such permission, “Frisby is therefore entitled under the circumstances to rely on the permission obtained by the infringers of his beat track” to establish that he obtained permission too. *Id.* at 7. The Court will address these three arguments separately below.<sup>15</sup>

### a) Plaintiff’s Fair Use Argument

Fair use is a mixed question of law and fact. *SOFA Entm’t, Inc. v. Dodget Productions, Inc.*, 709 F.3d 1273, 1277 (9th Cir. 2013). A court may appropriately decide a fair use issue on a summary judgment motion only when the material facts are not in dispute. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 800 (9th Cir. 2003). Normally, it is the defendant who bears the burden of proving fair use because it is an affirmative defense to an infringement claim. *See Henley v. DeYore*, 733 F. Supp. 2d 1144, 1151 (C.D. Cal. 2010). But here, Plaintiff is the party raising the issue in

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<sup>15</sup> Plaintiff actually makes a fourth argument, which will also be addressed below, that there were parts of *Shawty* (that were directly copied by the Sony Defendants in making *Exchange*) which were not lifted by Plaintiff either directly or indirectly from *Swing* and which are entitled to copyright protection.

order to overcome the Sony Defendants' argument as to the invalidity/unenforceability of his *Shawty* copyright. Thus, the Court would find that Plaintiff bears the burden of proof in this regard.

The Ninth Circuit has recently considered and extensively written on the subject of fair use. *See Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020). Because this Court finds that decision aptly summarizes the law in this Circuit, it will simply quote applicable portions rather than reinventing the wheel. As stated in *Dr. Seuss Enters.*:

The factors that determine fair use . . . are reflected in § 107 of the Copyright Act of 1976 as the following four non-exclusive factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

\* \* \* \*

All four factors are “to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell [v. Acuff-Rose Music, Inc.]*, 510 U.S. [569,] 578 [(1994)]. The Supreme Court teaches that we should eschew “bright-line rules” and “categories of presumptively fair use,” and instead engage in

a “case-by-case analysis.” *Id.* at 577, 584. As we have observed, fair use analysis can be elusive to the point of “approaching ‘the metaphysics of the law, where the distinctions are . . . very subtle and refined, and, sometimes, almost evanescent.’” *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1171 (9th Cir. 2012). . . .

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The first statutory factor examines “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). This factor has taken on a heightened significance because it influences the lens through which we consider two other fair use factors. The third factor—the amount and substantiality of use—“will harken back” to the first factor. *See Campbell*, 510 U.S. at 586. And the fourth factor, relating to market harm, is influenced by whether the commercial use was transformative. *See Monge*, 688 F.3d at 1181.

Although a commercial use is no longer considered presumptively unfair, the nature of the work remains “one element of the first factor enquiry.” *Campbell*, 510 U.S. at 584-85. As explained below, *Boldly* is not transformative, and its indisputably commercial use of Go! counsels against fair use. *See [Dr. Seuss Enters. v.] Penguin Books*, 109 F.3d [1394,] 1401 [(9th Cir. 1997)] (commerciality “further cuts against the fair use defense”

when there is “no effort to create a transformative work”).

The term “transformative” does not appear in § 107, yet it permeates copyright analysis because in *Campbell*, the Court interpreted the “central purpose” of the first-factor inquiry as determining “whether and to what extent the new work is ‘transformative.’” *Campbell*, 510 U.S. at 579. Transformative use of the original work can tip the first factor in favor of fair use.

A transformative work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* On the other hand, a work that “merely supersedes the objects of the original creation” is not transformative. *Id.* (quotation marks omitted). While the analysis of the first fair use factor “may be guided by the examples given in the preamble to § 107,” *i.e.*, criticism, comment, news reporting, teaching, scholarship, and research, *id.* at 578-79, not even these works compel “a per se finding of fair use,” *Monge*, 688 F.3d at 1173.

983 F.3d at 451-52.

Here, Plaintiff cites a Second Circuit case to justify the assertion that, “[i]n the context of the instance case, evaluating the four statutory considerations [to determine] whether [Plaintiff’s utilization of the *Swing*] sample [in] *Shawty* constitutes a transformative use is a genuine dispute of material fact[,] to be determined by the jury.” See Opposition at 9 (citing *Cariou v.*



*Prince*, 714 F.3d 694 (2d Cir. 2013)).<sup>16</sup> However, aside from the nearly three and a half page excerpt from that case<sup>17</sup> (see Opposition at 9-12), and two other conclusory references to the transformative manner that producers typically “sample” other songs for their own endeavors, Plaintiff does not articulate how *Shawty* satisfies the fair use criteria. *Id.* at 5 (“It is a common practice in the creation of hip-hop beat tracks for the producer . . . to include within [the producer’s song] a ‘sample’ . . . owned by third party and then present the sampled sound recording in an original, transformative manner . . . to create original material that will give the creator of the new beat track . . . ownership of a valid copyright in the derivative work,”); see also *id.* at 6 (“[Plaintiff’s] use of the underlying work in his beat track . . . is a transformative use of the underlying work and therefore he did not need permission of the

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<sup>16</sup> To the extent that Plaintiff is attempting to proffer the *Cariou* decision as a basis for arguing that transformative use is an issue always to be decided by a jury, that contention would be rejected as the Ninth Circuit in *Dr. Seuss Enters.* reversed the district court’s denial of summary judgment to the plaintiff on the issue of fair use. See *Dr. Seuss Enters.*, 983 F.3d at 461; see also *TCA TV Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016) (“Courts most frequently address a proffered fair use defense at summary judgment.”).

<sup>17</sup> The *Cariou* decision has been characterized by the Second Circuit itself as “the high-water mark of our court’s recognition of transformative works [and] it has drawn some criticism. See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) . . . ; see also *Nimmer* § 13.05[B][6], at 13.224.20 (stating with respect to *Cariou*: “It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that this doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.”).

copyright owner . . . to create his derivative work; and there is a genuine dispute of fact as to whether Frisby's beat track constitutes a fair use transformative work.”).

Initially, it is observed that Plaintiff's utilization of *Swing* was not for purposes of “criticism, comment, news reporting, teaching . . . , scholarship or research,” which would place it potentially within the category of fair use as provided in 17 U.S.C. § 107. Turning to the four factors delineated in Section 107 for determining whether, in the particular case, the copying work falls within the protection of the fair use doctrine, the Court finds that Plaintiff's argument fails with regard to those factors. First, Plaintiff's use of the copyrighted portions of *Swing* was indisputably for a commercial purpose.<sup>18</sup> As he himself admits, following the creation of *Shawty* (which sampled *Swing*), he offered “a standard one-year license” for the *Shawty* “beat.” See FAC ¶ 31. However, as noted in *Dr. Seuss Enters.*, even if the purpose of the infringing work is commercial, the

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<sup>18</sup> As observed in *Harper & Row Publs. v. Nation Enters.*:

The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. [417] at 451 [(1984)]. In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

471 U.S. 539, 562 (1985).

extent to which that work is “transformative” comes into play. See 983 F.3d at 451-52. As stated by the Supreme Court in *Campbell*:

The central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation . . . (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative” . . . . Although such transformative use is not absolutely necessary for a finding of fair use, . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

See 510 U.S. at 579. The issue as to whether Plaintiff’s *Shawty* is transformative is discussed, *infra*.

In regards to the second factor (*i.e.* the nature of the copyrighted work), as explained in NIMMER § 13.05[A][2][a], the focus is on the degree of originality of the opus. NIMMER states:

Under this factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff’s work, the broader

should be the scope of the fair use defense. “This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” [Footnotes omitted.]

*Id.*, quoting *Campbell*, 510 U.S. at 586. As recognized in NIMMER, “a creative song measures high under this second factor.” *Id.* That would certainly be true in the present case given not only due to the features of *Swing* itself but the fact that a large number of other artists have recognized the song’s unique/original elements and have chosen to sample it. Thus, the second factor also counsels against finding fair use by Plaintiff.

The third factor considers the amount and substantiality of what was taken from the copyrighted work, *i.e.* quantitative and qualitative aspects. Of the two, the latter is more significant as it has been held that copying a relatively small portion of the composition could still bar the application of fair use if the part taken was particularly expressive or essential to the copyrighted work. For example, in *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539 (1985), the Supreme Court found that the four factors were not satisfied where the defendant magazine had acquired a pre-publication copy of a former president’s memoirs and rushed into print an article consisting of quotes, paraphrases, and facts drawn from the manuscript. *Id.* at 569. Even though the article only copied 300 words from the 200,000-word manuscript, the Court found that the quoted portion was “essentially the heart of the book” and “among the most

powerful passages” in it. *Id.* at 564-65. In finding the third factor against the defendant, the Court cited to *Roy Exp. Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd* 672 F.2d 1095 (2d Cir. 1982), where the taking of 55 seconds from an hour and 29 minute film was deemed quantitatively substantial. *See* 471 U.S. at 565. There is no dispute that the portions of *Swing* sampled in *Shawty* are important parts of *Swing*. *See* DR ¶ 9. The sampling of *Swing* by the Plaintiff, the Sony Defendants, the UMG Defendants, Charles Hamilton and others have all focused on the same portions of *Swing*. Further, there is also no dispute that the sampled portions of *Swing* are essential to *Shawty* since the first 19 seconds of *Shawty* employ Plaintiff’s sample of eight bars of the *Swing* chorus and his sample of *Swing*’s four-bar introduction then repeats throughout the rest of *Shawty*. *See* DR ¶ 10.

The fourth factor relating to market harm also goes against finding fair use herein. As observed in NIMMER § 13.05[A][4]: “this factor . . . call[s] for the striking of a balance ‘between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need be shown to justify the use.’ [quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)].” “The fourth factor looks to adverse impact only by reason of usurpation of the demand for plaintiff’s work through defendant’s copying of protectible expression from such work.” *Id.*; *see also Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986) (considering whether the infringing work will usurp or supplant

the demand for the original). As stated in *Harper & Row*, 471 U.S. at 566-67:

This last factor is undoubtedly the single most important element of fair use. See 3 Nimmer § 13.05[A], at 13-76, and cases cited therein. “Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.” 1 Nimmer § 1.10[D], at 1-87.

In the present situation, there are at least two areas where the economic interests of the *Swing* copyright owners are adversely affected.<sup>19</sup> First, because *Swing* and *Shawty* are both within similar musical genres (*i.e.* hip-hop and rap), they are competitors in the marketplace. When *Shawty* copies important parts of *Swing*, it is to be expected that the latter’s sales and value will be diminished because the copy supersedes the objects of the original creation thereby supplanting the original. Second, as noted by the Supreme Court in a case involving the hip-hop/rap music genres, “[t]he enquiry ‘must take account not only of harm to the original but also of harm to the market for derivative works.’” *Campbell*, 510 U.S. at 590 (quoting *Harper & Row*, 471 U.S. at 568). There is apparently a flourishing market for derivative works of *Swing* in the hip-hop/rap genres (it has been sampled in at least

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<sup>19</sup> As noted by the Supreme Court, the fair use “proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.” See *Campbell*, 510 U.S. at 590. Here, Plaintiff presented no evidence as to this factor, which virtually prevents him from succeeding to establish fair use in this case. *Id.* n. 21.

25 other recordings).<sup>20</sup> If this Court were to find Plaintiff's sampling of *Swing* to constitute fair use herein, that ruling would destroy the market for derivative works based on *Swing*. Not only would no one thereafter bother to pay the *Swing* copyright holders any licensing fees for sampling the important portions of the song; but, if the unauthorized sampler is held to have a valid copyright in the new song, he or she could sue other persons who later did pay the *Swing* copyright holders a licensing fee—like the Plaintiff has done in this lawsuit as to two separate groups of defendants. Thus, finding fair use in this case would have an extremely adverse effect on the potential market for and value of *Swing*.

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<sup>20</sup> As noted in *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), the market for derivative works by means of sampling had grown so popular that:

As a result of actual, as well as threatened, litigation in the area of digital sampling infringement, several developments have occurred. Sampling clearinghouses serve as one recent outgrowth. These companies are similar to publisher clearinghouses in that they are authorized by member copyright owners to clear samples for use on albums according to an agreed upon fee structure. In addition, record companies and most music publishers have instituted certain licensing policies as more and more artists routinely seek clearance for their samples with the hope of avoiding litigation.

*Id.* at 804, n.19 (quoting A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 Fla. St. U. L. Rev. 135, 163 (1993) (footnote omitted)).

Turning to the underlying issue of whether Plaintiff's incorporation of *Swing* in *Shawty* was transformative, the Court finds that it is not. "The term 'transformative' does not appear in § 107, yet it permeates copyright/fair use analysis because in *Campbell*, the Court interpreted the 'central purpose' of the first-factor inquiry as determining 'whether and to what extent the new work is 'transformative.'"<sup>21</sup> *Dr. Seuss Enters.*, 983 F.3d at 452 (quoting *Campbell*, 510 U.S. at 579). "A transformative work 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" *Id.* A new work is not transformative if it

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<sup>21</sup> The idea that a "transformative" purpose could support fair use was put forth by Judge Pierre Leval, in his seminal article: *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). See *TCA TV Corp. v. McCollum*, 839 F.3d 168, 179 n.9 (2d Cir. 2016). Judge Leval's delineation of the scope of the fair use doctrine was substantially relied upon by the Supreme Court in *Campbell*, see 510 U.S. at 576 *et passim*. As stated by Judge Leval:

[T]he question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test. . . . If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

103 Harv. L. Rev. at 1111.



merely “supersedes the objects of the original creation.” *Campbell*, 510 U.S. at 579.

In the present case, Plaintiff digitally took the actual sounds (and, in turn, the underlying musical composition) from the *Swing* recording—its eight-bar chorus is used in the first 19 seconds of *Shawty*, and its four-bar introduction is repeated throughout the rest of *Shawty*. Plaintiff then manipulated the sampling by speeding up both the tempo and pitch which is a “commonplace” practice in the hip-hop/rap genres. He also added drums, synthesizer base (“synth base”), hi-hat and other sounds, which is also a commonplace practice. Plaintiff’s modifications of and additions to the *Swing* sampling do not appear to be particularly novel or unique. Indeed, five years before *Shawty*, Charles Hamilton released *Brooklyn Girls* which sampled the four-bar introduction from *Swing*; and he also sped up the sample from 70 beats per minute (“bpm”) to 88 and made further modifications.

The Court agrees with the Sony Defendants that Plaintiff has failed to establish that *Shawty* is a transformative work or a fair use of *Swing*. Plaintiff provides no justification to show how *Shawty* is a transformative work within the meaning of fair use doctrine. *Shawty* does not use the sampled portions of *Swing* in a different manner or for a different purpose than what was done in the original creation. He supplies no new information, aesthetics, insights or understandings. He does no more than someone who performs an interpretation of a song, although here Plaintiff not only copies from the musical composition but also the

actual sound recording as well.<sup>22</sup> Because Plaintiff is merely “repackaging” and “republishing” the original work with commonplace modifications, *Shawty* cannot be held to be transformative as to *Swing*.

Defendants are thereby correct that Plaintiff’s use of *Shawty*, without *Swing*’s copyright owner’s permission, constitutes an unlawful use of *Swing*. While

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<sup>22</sup> In taking this position, the Court does not deny that there can be a great deal of artistry involved in one person’s interpretation of another’s copyrighted music. For example, Miles Davis’s rendition of *My Funny Valentine* (Richard Rodgers, Lorenz Hart) and Jimi Hendrix’s version of *All Along the Watchtower* (Bob Dylan) are undeniably highpoints of art and originality which are separate from the underlying compositions. However, they are not examples of fair use of the underlying musical compositions for copyright purposes. Both Davis and Hendrix are exploiting the copyrighted material consistent with objects of the original creation. In that regard, they cannot do so “without paying the customary price.” *Harper & Row*, 471 U.S. at 562.

The example of the Hendrix version of *All Along the Watchtower* is instructive. There can be no doubt that Hendrix’s electrification of Dylan’s sparse rendition of the song uniquely changed it. As Dylan himself observed: “[H]e could find things inside a song and vigorously develop them. He found things that other people wouldn’t think of finding in there. He probably improved upon it by the spaces he was using.” See A Midnight Chat with Bob Dylan, Interview with John Dolen, Fort Lauderdale Sun Sentinel (Sept. 29, 1995), <https://www.interferenza.net/bcs/interw/florida.htm>. Indeed, not only has Hendrix’s version become more popular than Dylan’s, but more recording artists (including Dylan himself)—when performing the song in public—play Hendrix’s rendition rather than Dylan’s. See *The Long, Enduring History of “All Along the Watchtower”* Corey Irwin (Feb. 2, 2018), <https://ultimateclassicrock.com/all-along-the-watchtower-song-history/>; [https://en.wikipedia.org/wiki/All\\_Along\\_the\\_Watchtower](https://en.wikipedia.org/wiki/All_Along_the_Watchtower). Thus, to a substantial extent, the Hendrix version of the song has supplanted Dylan’s original.

fair use does serve as an affirmative defense to infringement, Plaintiff is not intending to use the doctrine for that purpose. Instead, Plaintiff intends to use fair use “as a ‘sword’ in order to vest copyright in an unauthorized derivative work, or at least to vest copyright in more of the work than that to which he would otherwise be entitled.” See *Sobhani v. @radical.media, Inc.*, 257 F. Supp. 2d 1234, 1238-39 (C.D. Cal. 2003). This case is analogous to *Sobhani* because, like the *Sobhani* plaintiff, here Frisby is invoking fair use as an offensive strategy against Defendants and yet “does not cite any cases supporting this novel application of Section 107,” even though “it is relatively clear that Congress did not contemplate such.” *Id.* Further, like in *Sobhani*, where that plaintiff’s initial filings did not deny that his work was an unauthorized derivative work until the hearing, Plaintiff did not disclose his fair use argument until later (*i.e.* in the Opposition but not his FAC). *Id.* at 1238. The court ultimately held that the pertinent question, in that case, was whether the works were unauthorized and, if so, “whether Plaintiff is entitled to copyright protection in the new elements of his works.” *Id.* at 1238-39. The answer to this question, however, is largely silent in Plaintiff’s filings, particularly after Plaintiff’s attempted expert testimony about the allegedly protectable elements of *Shawty* (independent of the *Swing* sample) are removed from the equation, pursuant to Defendants’ sustained evidentiary objections to Frisby’s declaration. See Docket No. 146-2. Accordingly, McBrearty is the only other permissible expert testimony that Plaintiff can offer which complies with the Court’s November 26 order. See Docket No. 123. However, not only was McBrearty hesitant to conclude that *Shawty* has protected elements other than the *Swing* sample, but he also stated that

“it is unlikely . . . [that] *Shawty* contains elements simultaneously along with [the] sample.” See McBrearty Depo. 7:19-24.

Accordingly, Plaintiff’s fair use argument fails for purposes of the present motion for summary judgment.

**b) Plaintiff’s Contention re the Sony Defendants’ Copying of *Elements of Shawty* Aside from the Initial *Swing* Sample**

Plaintiff also claims that he supplemented his sampling of *Swing* with “transformative compositional structures” (e.g., by altering its speed and timbre) and by adding new background instrumentation and sounds. See DR ¶ 52. Plaintiff argues that those elements were subject to his copyright and that the Sony Defendants violated that copyright by directly incorporating some or all of those elements into *Exchange. Id.*

To establish actionable copying, a plaintiff must demonstrate either (1) that the two works are “strikingly similar” or (2) that the two works at issue are “substantially similar” and that the defendant had access to the plaintiff’s subject piece. *Malibu Textiles, Inc. v. Label Lane Int’l, Inc.*, 922 F.3d 946, 952 (9th Cir. 2019). Striking similarity is a higher standard than substantial similarity.<sup>23</sup> *Kevin Barry*

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<sup>23</sup> As stated in *Briggs v. Blomkamp*, 70 F. Supp. 3d 1155, 1167 (N.D. Cal. 2014):

Striking similarity is a high bar. “At base, ‘striking similarity’ simply means that, in human experience, it is virtually impossible that the two works could

*Fine Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F. Supp. 3d 959, 968 (N.D. Cal. 2019).

Plaintiff's contention rests primarily on his own statements in his declaration. *See* Docket No. 138. The declaration includes no admissible evidence that, in fact, any Sony Defendant actually took portions of *Shawty* that were not originally from the *Swing* sound recording and placed them into *Exchange*.<sup>24</sup> Rather, Plaintiff relies on his own opinions that such misfeasance occurred, based on his examination of the songs. However, Plaintiff is not an expert, as he himself admits,<sup>25</sup> and hence is not qualified to provide expert

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have been independently created.” 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.02[B] (2005), quoted in *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1103 (C.D. Cal. 2005); *see also Bernal v. Paradigm Talent and Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010).

<sup>24</sup> M. Hernandez (the producer of *Exchange*), submitted a declaration stating that, prior to Frisby's assertion of a claim with respect to *Exchange*, Hernandez had never heard of either Frisby or his *Shawty* recording. *See* Docket No. 127-2 at 2 of 3. Plaintiff has not proffered any admissible evidence that M. Hernandez had access to *Shawty* on or before he created *Exchange*. While Plaintiff asserts that the producers of *Déjà Vu* did possess the stems for *Shawty*, he merely proffers either rank hearsay and/or pure speculation that M. Hernandez incorporated parts of *Déjà Vu* into *Exchange*. In its rulings on Defendants' evidentiary objections while the Court did not sustain the objections as to Plaintiff's discussions with other persons regarding the purported infringement of his copyrights, as related to the Sony Defendants. But those discussions provided no admissible evidence that any Sony Defendant had actual access to *Shawty* either before or during the creation of *Exchange*.

<sup>25</sup> In his deposition, Plaintiff admits he is not a musicologist or a member of any professional musicological society. *See* 12/27/2019 Deposition of Gary Frisby attached as Exhibit 20 to Reply

testimony on those matters. As noted in NIMMER § 13.02[B], “expert testimony may be necessary to establish striking similarity in ‘technical’ areas, such as music. . . .” *See also Krisko v. Marvel Entm’t, LLC*, 473 F. Supp. 3d 288, 305 (S.D.N.Y. 2020). This Court would find that expert testimony is required here because all of the songs at issue (*i.e. Shawty, Déjà Vu, Exchange*, and even *Brooklyn Girls*) were based on *Swing* and utilized common practices in the hip-hop/rap genres in regards to changing speeds and timbres plus adding instrumentations, etc. Therefore, to separate what constitutes portions of *Swing* from the other elements in the songs (plus determining if the newly created material is significant for purposes of the copyright analysis) requires the services of an expert in musicology.

The only expert that Plaintiff has properly proffered in this case fails to establish the proposition that Plaintiff asserts herein. Brian McBrearty is a musicologist who provided a five-page preliminary analysis of the songs involved in this lawsuit. *See* Docket No. 139. In his report, McBrearty stated:

The foremost of the similarities among these three songs is that they all make considerable use of a four-bar sample from a recording of *Swing My Way*, credited on iTunes to Mixto and featuring K. P. & Envyi, released in 1998.

My first analysis was to try to ascertain whether *Shawty So Cold* might have been

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Declaration of Peter Anderson, Docket No. 146-1 at 8 of 23. Plaintiff also testified that, while he taught himself to play the keyboard and drums, he cannot read or write sheet music. *Id.* at 9-10 of 23.

sampled for the productions of *Deja Vu* or *Exchange*. This was inconclusive. While it appears possible that the producers of either *Deja Vu* and *Exchange* could both have sampled four bars of *Shawty So Cold* that included the *Swing My Way* samples, I found nothing that would negate the possibility they obtained their sample of *Swing My Way* from another source.

\* \* \* \*

It is possible that the audio material from *Shawty So Cold* was employed in the production of both *Deja Vu* and *Exchange*. I found nothing that conclusively negates that possibility but nor did I find evidence that specifically confirms the fact.

*Id.* Further, in his deposition, McBrearty was equally unhelpful for Plaintiff, testifying that:

Q. And is it correct that you're unable to determine whether *Exchange* samples actual sounds in the *Shawty So Cold* recording?

A. Ultimately, yes.

\* \* \* \*

Q. Did you come to any opinion as to whether the *Déjà Vu* sound recording samples *Shawty So Cold*?

A. Yes.

Q. What's your opinion?

A. My opinion is that it is unlikely.

\* \* \* \*

- Q. [A]s to whether *Exchange* samples the sound—the *Shawty So Cold* sound recording?
- A. Whether *Exchange* samples the *Shawty So Cold* sound recording? I did not find evidence that it necessarily had.
- Q. Did you find any evidence that it had not?
- A. I did.
- Q. What evidence did you find?
- A. The evidence that I found, I characterized it as unlikely, it is my opinion that it is unlikely, and the evidence for that is that the—the *Shawty So Cold* ensemble, the production, I'll try to use consistent terminology, *Shawty So Cold* production contains elements simultaneously along with that sample. And so it is unlikely, in my opinion, that the *Exchange* material is the *Shawty So Cold* material, because I don't hear the—the other elements in that ensemble.

See December 20, 2019 Deposition of Brian McBrearty, Docket No. 127-28 at 4-8 of 32. Clearly, McBrearty provides no expert opinion to support the contention that *Exchange* includes any material from *Shawty*, except for those elements which were taken directly from *Swing*. As stated in *Vargas v. Transeau*, 514 F. Supp. 2d 439, 445 (S.D.N.Y. 2007), “[t]he testimony of an expert who equivocates on the level of similarity between two works need not be credited by the Court in resolving a motion for summary judgment.”

On the other hand, the Sony Defendants supplied unequivocal and convincing expert opinions establishing that *Exchange* does not include any copyrighted



elements from *Shawty*. They initially presented a 56-page report from Lawrence Ferrara, “Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in New York University’s Steinhardt School, and Professor of Music.” See Docket No. 127-5. Ferrara states:

On the basis of my musicological analysis, . . . it is my professional opinion that while SHAWTY and EXCHANGE both incorporate a digital sound recording sample from KP & Envyi’s 1998 “Swing My Way”, there are no sound recording elements from . . . SHAWTY present in EXCHANGE, other than the KP & Envyi sound recording sample. Further, I found that SHAWTY and EXCHANGE do not share any compositional elements outside of the composition embodied in the sound recording sample from KP & Envyi’s “Swing My Way”. Outside of the use of the opening bars of KP & Envyi’s “Swing My Way”, there are no musicologically significant musical similarities shared by SHAWTY and EXCHANGE. Moreover, there are significant differences between SHAWTY and EXCHANGE in their entireties. From a musicological perspective, the similarity between these two works is the idea of using a sound recording sample of the opening 4 bars of KP & Envyi’s “Swing My Way”. Indeed, KP & Envyi’s 1998 “Swing My Way” was well known (it reached #6 on the *Billboard Hot 100* for the weekend ending March 14, 1998) and was available prior to the creation of SHAWTY and EXCHANGE. “Brooklyn Girls” recorded by

Charles Hamilton and released as a single in 2008 (5 years prior to the alleged creation of Plaintiff's SHAWTY) also includes a sample of the opening 4 bars of KP & Envyi's "Swing My Way". As a result, when viewed in the context of insignificant musical similarities outside of the use of the KP & Envyi sample, significant differences, and the analysis of the 2008 work, "Brooklyn Girls", I found that there are no musicologically significant structural, harmonic, rhythmic, lyrical, or melodic similarities, individually or in the aggregate, between SHAWTY and EXCHANGE, and no musicological evidence that any non-KP & Envyi expression in SHAWTY was copied in EXCHANGE.

*Id.* at 2-3 of 56. Ferrara examined and compared *Shawty* and *Exchange* in regards to (1) form/structure, (2) harmony, (3) rhythm, (4) melody, and (5) lyrics and concluded that: "it is my professional opinion that the alleged similarities between SHAWTY and EXCHANGE either do not exist or are not musicologically significant, individually or in the aggregate."

*Id.* at 29 of 56. He also opined that: "SHAWTY and EXCHANGE use the KP & Envyi sample in different ways including different tempos, structural placements, chord progressions, overdubbed bass lines, overdubbed drum rhythms, and the near elimination of the KP & Envyi bass line in EXCHANGE resulting in a different harmony but not in SHAWTY." *Id.* at 28 of 56.

The Sony Defendants also provided a 27-page report from Paul Geluso (Assistant Music Professor and the Program Director of the Music Technology Department at New York University) on the issue of

whether the sound recording of *Exchange* embodied any portion of the sound recording of *Shawty*. See Docket No. 127-10. In reaching his conclusions, Geluso used: (1) critical listening (his personal hearing of the recordings for particular attributes—*e.g.*, pitch, timbre, tempo, note lengths, and perceived location of sounds in the stereo image); (2) waveform analysis (graphical representations of sounds viewed on test equipment); and (3) spectrogram comparisons. *Id.* ¶¶ 9-12. Geluso gave the following opinions:

- (a) The only actual sounds that appear in the sound recording *Shawty So Cold*, on the one hand, and the sound recordings *Exchange* or *Déjà Vu*, on the other hand, are sounds sampled from *Swing My Way*.
- (b) The sounds that *Shawty So Cold* added to its sample of *Swing My Way* do not appear in *Exchange*.
- (c) The sounds that *Shawty So Cold* added to its sample of *Swing My Way* do not appear in *Déjà Vu*.
- (d) The sample of *Swing My Way* that appears in *Exchange* was not copied from the sound recording *Shawty So Cold*.
- (e) The sample of *Swing My Way* that appears in *Déjà Vu* was not copied from the sound recording *Shawty So Cold*.
- (f) In the sound recordings *Shawty So Cold*, *Exchange*, and *Déjà Vu*, their respective samples of *Swing My Way* are each sped up and pitched up, causing the sampled lyrics of *Swing My Way* to be faster and higher

pitched, which Mr. McBrearty refers to as a “chipmunk” effect. But that is a natural result of speeding up a recording, and tempo. In addition, pitch shifting is very common in the music production industry, including to match the key of the sample to the key of the recording in which the sample is to be incorporated, which also is the effect of the pitch shifting here.

7. Based on my review and analysis of the sound recordings *Shawty So Cold*, *Exchange*, and *Swing My Why* [sic], the *Exchange* sound recording does not copy any actual sounds from *Shawty So Cold*.
8. Based on my review and analysis of the sound recordings *Shawty So Cold*, *Déjà Vu*, and *Swing My Why* [sic], the *Déjà Vu* sound recording does not copy any actual sounds from *Shawty So Cold*.

See Declaration of Prof. Paul Geluso, Docket No. 127-9 at 3-4 of 4.

In sum, the undisputed facts show that *Exchange* does not contain any portions of *Shawty* which are not direct samples from *Swing*.<sup>26</sup>

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<sup>26</sup> At Plaintiff’s counsel request, this Court listened to the all of the songs referenced in this case. In so doing, the Court would still hold that expert testimony would be required to establish whether there was actual copying of Plaintiff’s sound recording (*i.e.* *Shawty*) or whether *Exchange* and *Shawty* were strikingly similar. Nevertheless, after hearing copies of the songs which were provided by both Plaintiff and the Sony Defendants, this Court concluded that the only obvious similarities between *Shawty*, *Exchange* and *Deja Vu* boiled down to their sampling of parts of

**c) Plaintiff's Estoppel Argument**

Plaintiff's estoppel argument is, frankly, totally insufficient in regards to the Sony Defendants. Plaintiff asserts that:

In the instant case, the deceitful conduct of defaulted defendant Bryant led Frisby to reasonably believe that if his beat track were incorporated into a commercially-released recording, that Bryant or his cohorts in the music label releasing the recording would follow the custom and practice in the hip-hop music industry of obtaining the permission of the owner of sampled material used to create the upstream beat track. When Bryant gave the stem files of *Shawty* to the producers of *Déjà Vu* with permission to them to use the files for the creation of a beat track, it was the responsibility of Bryant to make sure that permission was obtained from the copyright owner of the sampled work before the collaborative recording created from that beat track was commercially released. Since that is the custom and practice in the industry, Frisby was entitled to trust that it would be complied with under the circumstances of this case. Bryant's which, [sic] constituted a contributory and/or vicarious infringement. Since the weight of the evidence suggests that the producers of *Déjà*

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*Swing My Way* and the manipulation of the sampling. Even then, the manipulations were not particularly alike. In the end, the Court could not hear any direct copying amongst the songs except for the common initial sampling of *Swing My Way*.

*Vu* innocently infringed *Shawty*, followed by a knowing and intentional infringement by the producer of *Exchange*, none of the downstream defendants that benefitted from the infringement are entitled to raise as a defense the claim that Frisby failed to get permission for the use of the *Swing* sample in the *Shawty* beat track.

Opposition at 10 (footnote omitted); *see also* DR ¶ 46.

First, Plaintiff has not established any relationship between Bryant and the Sony Defendants such that the latter can be held liable for any purported “deceitful conduct” of the former. While Plaintiff in his declaration has made certain assertions, his contentions: (1) are based on simple speculation without adequate evidentiary support; (2) rest on hearsay and other forms inadmissible evidence; (3) are dependent on portions of his declaration as to which the Court has sustained the Sony Defendants’ objections; and/or (4) even if the Court were to consider most of them, are insufficient to establish a basis for holding the Sony Defendants liable for Bryant’s alleged actions herein.<sup>27</sup>

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<sup>27</sup> To summarize briefly, Plaintiff contends that a copy of *Shawty* was displayed on the YouTube channel of the OVO music label which was owned by the hip-hop music artist Drake who in December 2013 was managed by Bryant. DR ¶ 22. Beginning in May 2013, Plaintiff was defrauded by persons purporting to be Karen Civil and Cortez Bryant into sending them a copy of *Shawty* plus \$700. DR ¶¶ 25-39. Plaintiff never found out if the person (who he thought at time was Bryant) was actually the real Bryant. DR ¶¶ 40-43. In June 2018, Plaintiff hired a lawyer who contacted the real Bryant; and the real Bryant stated he never dealt with Frisby, never had the telephone number or email address which Plaintiff used to contact the person who previously represented himself as being Cortez Bryant. DR ¶ 45. Plaintiff

Additionally, while Plaintiff states that Bryant gave a copy of *Shawty* to the producers of *Déjà Vu* (i.e. the UMG Defendants) who “innocently” infringed *Shawty* “since they reasonably believed they were entitled to use the *Shawty* beat track in their making of the *Déjà Vu*, he further contends without any evidentiary support that one of the producers of *Déjà Vu* (i.e. Vinylz) gave a finished version of the *Déjà Vu* beat track to M. Hernandez who wrongfully copied portions of it on *Exchange*. See Frisby Decl. ¶ 21. Again, even accepting Plaintiff’s scenario for purposes of argument, it would not give rise to any basis for an estoppel finding. While Plaintiff is entitled to attempt to litigate the infringement of his *Shawty* copyright by M. Hernandez when he allegedly copied portions of *Déjà Vu* which had copied portions of *Shawty* that sampled the important parts of *Swing*, Plaintiff must still show that he had a valid copyright in the copied parts of *Shawty* which, as delineated above, he has failed to do.<sup>28</sup> Therefore, his estoppel argument fails.

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states that he had phone conversations with the real Bryant in November 2018 where the latter “admitted that he had given access to the *Shawty* files to the producers of *Déjà Vu*.” DR ¶ 47, Frisby Decl. ¶ 18. Plaintiff’s statements as to what Bryant told him are inadmissible hearsay and the Court has sustained Defendants’ objections to paragraph 18 of Frisby’s declaration.

<sup>28</sup> As stated in *DC Comics*, 802 F.3d at 1024:

When a copyright owner authorizes a third party to prepare a derivative work, the owner of the underlying work retains a copyright in that derivative work with respect to all of the elements that the derivative creator drew from the underlying work and employed in the derivative work. See *Stewart*, 495 U.S. at 223. By contrast, the creator of the derivative work has a copyright only as to those original aspects of the work

### d) Defendants' License to Sample Swing

Third, Plaintiff's attempt—to avoid the consequences of his violation of the *Swing* copyright by trying to piggyback onto the Sony Defendants' licensing from the *Swing* copyright holders—is unavailing. Although the substance of *Swing* was used in both *Exchange* and *Shawty*, only the Sony Defendants compensated the copyright owners. See Reply, 16:11-19. Plaintiff does not cite to any law that would entitle him to get around his failure to obtain a license for his use of *Swing* or would allow him to benefit from the Sony Defendant's compliance, other than to refer to certain “maxims of jurisprudence” under California statutes which have no apparent application to this case. See Opposition at 9-11 (e.g., Cal. Civil Code § 3521: “He who takes the benefit must bear the burden.”). Since the Sony Defendants obtained the copyright owner's permission to sample *Swing*, Plaintiff argues, and “based on the aforesaid venerable principle that no one can take advantage of his own wrong, the substance

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that the derivative creator contributed, and only to the extent the derivative creator's contributions are “more than trivial.” *Parts Geek*, 692 F.3d at 1016; see also *Stewart*, 495 U.S. at 223. Moreover, a copyright in a derivative work “must not in any way affect the scope of any copyright protection in that preexisting material.”

See also Nimmer § 3.06 (“The House Report comments on the fact that the above-quoted provision of Section 103(a) conditions copyright in a derivative or collective work upon the pre-existing material not having been used ‘unlawfully’ rather than merely without the consent of the copyright owner of such preexisting material. The point is made that even without such consent, ‘the unauthorized reproduction of a work might be ‘lawful’ under the doctrine of fair use.’”).



of the situation requires the law to give credit to Frisby for having obtained [ ] permission for his beat track.” See Opposition at 11. Aside from these statements, Plaintiff does not offer any basis to support these broad (and really nonsensical) claims, outside of stating that “ruling to the contrary would be to exalt form over substance” and that “the law respects form less than substance” pursuant to Cal. Civil Code § 3528. *Id.* It would be ironic if the Sony Defendants’ compliance with the licensing requirement under copyright law for their sampling of *Swing* could be used against them by a plaintiff who failed to obtain and/or pay for any such permission.

#### **e) Conclusion as to Ownership and Use**

For the reasons stated above and based on the undisputed evidence, the Court finds that Plaintiff does not have a valid copyright in the portions of *Shawty* which sampled the important parts of *Swing*. It also finds that *Exchange* does not contain any portions of *Shawty* although both include a sampling of *Swing*. The Court concludes that the Sony Defendants did not directly infringe Plaintiff’s *Shawty* copyright.

#### **B. Contributory/Vicarious Liability**

In addition to the direct copyright infringement cause of action against Sony and Tiller, the FAC also includes a claim for “contributory copyright infringement of a sound recording [by] Foreign Teck [M. Hernandez], Bryant, Boilda, [and] Vinylz.” See Docket 79 at 28 of 40. Plaintiff alleges that:

158. Foreign Teck [M. Hernandez] had knowledge or was willfully blind to Bryant’s infringing activity whereby Bryant wrongfully

directly or indirectly duplicated the Copyrighted Work in a manner that recaptured actual sounds fixed in “Shawty So Cold,” such that his copying violated at least one of Frisby’s exclusive rights to his sound recording copyright. Foreign Teck received sound files directly or indirectly from Bryant through means of electronic communication.

159. After receiving electronic files from Bryant, Foreign Teck caused, induced, or made de minimus or immaterial contributions to “Shawty So Cold” that served as the basis for the sound recording underlying “Exchange,” which such contribution did not consist entirely of a fixation of other sounds that was independent of “Shawty So Cold.”

*Id.* at 29 of 40.

In order to establish a claim of contributory infringement of the *Shawty* copyright by M. Hernandez in regards to the *Exchange* song, Plaintiff would have to establish the direct infringement of that copyright by some third party that M. Hernandez generated and/or contributed to. As observed in *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001): “Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (“There can be no contributory infringement by a defendant without direct infringement by another.”).” See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007).

Because, as discussed above, Plaintiff's claim of direct infringement by Sony and Tiller as to the *Exchange* recording has been rejected, there is no basis for Plaintiff to bring an action for contributory and/or vicarious infringement against M. Hernandez as to his involvement with that song.

## **VI. Conclusion**

For the reasons stated above, the Court GRANTS the Sony Defendants' motion for summary judgment as to the consolidated cases.

**ORDER DENYING PETITION FOR PANEL  
REHEARING, NINTH CIRCUIT  
(JUNE 21, 2022)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GARY FRISBY, PKA G-MONEY,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, DBA RCA  
Records, a Delaware General Partnership; ET AL.,

*Defendants-Appellees.*

and

CORTEZ BRYANT, an Individual; ET AL.,

*Defendants.*

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Nos. 21-55586, 21-55587

D.C. Nos. 2:19-cv-01712-GW-AGR,  
2:19-cv-04167-GW-AGR

Central District of California, Los Angeles

Before: OWENS and BRESS, Circuit Judges,  
and FITZWATER,\* District Judge.

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\* The Honorable Sidney A. Fitzwater, United States District Judge  
for the Northern District of Texas, sitting by designation.

App.74a

Plaintiff-Appellant's petition for panel rehearing  
[Dkt. No. 58] is DENIED.

**RULE 59/60 MOTION FOR  
RECONSIDERATION, CASE 1712  
(MAY 13, 2021)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

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GARY FRISBY

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

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Case No. CV 19-1712-GW-AGR<sub>x</sub>

Before: George H. WU, United States District Judge.

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**PROCEEDINGS:**

In Chambers - Final Ruling Telephonic Hearing on Plaintiff's Motion for a New Trial, to Alter the Sony Music Entertainment, Summary Judgment Pursuant to FRCP 59, and for Relief from the Summary Judgment Pursuant to FRCP 60 [165]

**I. Background**

The factual and procedural backgrounds of this lawsuit are delineated in detail in this Court's grant of the Sony Music Defendants' (*i.e.* Sony Music Entertainment, Bryson Tiller, and Michael Hernandez)

Motion for Summary Judgment (*see* Docket No. 1561), and will not be repeated herein.

A “tentative” ruling was provided to the parties prior to the March 4, 2021 hearing on the motion for summary judgment, and extensive oral arguments were presented on that day. *See* Docket No. 154. The Court took the matter under submission and allowed further filing of evidentiary materials. *Id.* On March 11, 2021, a draft of a final decision granting the motion was provided to counsel, and the Court heard further arguments. *See* Docket No. 156. The Court adopted the draft as its final ruling on the motion (“SJ Decision”). *Id.*

On March 26, 2021, Plaintiff filed a Motion to Alter the SJ Decision, pursuant to Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 59, and a Motion for Relief from Judgment, pursuant to Fed. R. Civ. P. 60, concurrently in one comprehensive document (“Plaintiff’s Reconsideration Motion” or “Motion”). *See* Docket No. 165. Defendants opposed the Motion (“Opposition”) and Plaintiff filed a Reply. *See* Docket Nos. 167, 168.

## II. Legal Standard

While the Federal Rules of Civil Procedure do not expressly authorize a motion for reconsideration, “[a] district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment. . . .” *Smith v. Massachusetts*, 543 U.S. 462, 475 (2005) (internal quotes omitted). Where the court’s ruling is in the form of a grant of a motion for summary judgment, a motion for reconsideration must be

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<sup>1</sup> All references to docket entries are to Case No. 2:19-cv-01712-GW-(AGRx).

based either on Fed. R. Civ. P. 59(e) (a motion to alter or amend judgment) or Rule 60(b) (motion for relief from judgment). *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993); Phillips & Stevenson, *Rutter Group Prac. Guide: Federal Civ. Pro. Before Trial* (The Rutter Group 2021) (“*Phillips & Stevenson*”) §§ 12:159, 14:361.1. Under both Rule 59(e) and 60, “a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009), citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). “Whether or not to grant reconsideration is committed to the sound discretion of the court.” *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003); *Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). “The Ninth Circuit has also advised—in the context of a post-judgment motion for reconsideration—that a motion for reconsideration is an ‘extraordinary remedy, to be used sparingly.’” *IV Solutions, Inc. v. Connecticut General Life Insurance Co.*, No. CV 13-9026-GW-(AJWx), 2016 WL 78880, at \*1-2 (C.D. Cal. Dec. 5, 2016) (quoting *Kona Enters.*, 229 F.3d, at 890).

Motions for reconsideration under Rule 59(e) may not be used to present—for the first time—arguments or evidence that could reasonably have been presented earlier in the litigation. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Additionally, such motions may also be governed by local rules. *See Phillips &*



Stevenson § 12:160.5. Central District of California Local Rule (“C.D. Cal. L.R.”) 7-18 provides that:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Motions for reconsideration under Fed. R. Civ. P. 60(b) are not subject to C.D. Cal. L.R. 7-18. *See Phillips & Stevenson* § 12:160.7. However, Rule 60(b) sets forth six situations where such motions may be granted:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;

- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

### III. Discussion

#### A. Rule 59 Motion

Plaintiff moves “for a new trial and/or to alter the [Court’s Ruling] pursuant F.R.C.P. 59(a)(1)(B), (e), and for relief from the [Ruling] pursuant to F.R.C.P. 60 (b)(1).” *See* Motion, at page 6. The Court first addresses the Motion’s Rule 59(e) argument.<sup>2</sup>

Plaintiff’s 59(e) Motion “is made on the grounds that the Court committed clear error and/or the initial decision was manifestly unjust.” *See* Motion, at 6. Plaintiff lists five reasons to support his contention: (1) “the Court erroneously excluded portions of [Frisby’s] Declaration testimony” and that this “materially prejudiced his Opposition to the [motion for summary judgment with respect] to the issue[s] of ownership and copying, including the sub-issues of access and substantial similarity;” (2) the Court “erroneously excluded” his proposed expert witness James Belt’s report; (3) the Court “erroneously concluded” that (a) Frisby’s sample from *Swing My Way* (“*Swing*”) did not constitute

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<sup>2</sup> Because Fed. R. Civ. P. 59(a)(1)(B) is only implicated “after a nonjury trial” and the Motion here is seeking reconsideration of the Court’s Ruling on Defendants’ Motion for Summary Judgment, the Court finds Rule 59(a)(1)(B) is inapplicable to the present situation. Accordingly, the Court does not base its ruling herein on that provision.

fair use and that (b) Defendant Sony “should not be estopped from contesting plaintiff’s ownership [rights];” (4) the Court “erroneously concluded that there was no triable issue of fact as to the issue of access because it erroneously excluded his declaration testimony, which allegedly established that the *Déjà Vu* producers obtained the stem files for *Shawty So Cold* (“*Shawty*”) through Bryant [and] that said producers . . . gave a recording of the same to Hernandez;” and (5) the Court “erroneously concluded” that there was no genuine issue as to substantial similarity between the *Shawty* and *Exchange* beat tracks because (a) “[i]t erroneously found that the compositional structure” as to the two beats’ respective manipulation schemes were not substantially similar and (b) it erroneously received Frisby’s Expert Testimony (Brian McBrearty’s expert report), which opined that: “compositionally’ (i.e[.], compositional structure), the most compelling similarity [between the beats] is the ‘nearly identical’ manner in which the *Shawty* and *Exchange* beat tracks manipulated the sample from *Swing*”, that this manner of manipulation is “the most compelling similarity”, and “that no other musical work that . . . sampled the same portion of *Swing*. . . employed the same sample in the same manner as *Shawty*, *Déjà Vu*, and *Exchange*.” *Id.* at 6-7. All five of Plaintiff’s arguments fail to satisfy Rule 59(e) criteria and are each addressed individually below.

### **1. Frisby’s Excluded Declaration Testimony**

Plaintiff’s first argument contends that portions of his submitted declaration which this Court excluded in its evidentiary rulings in the SJ Decision (*see* Docket

No. 156 at pages 5-7 of 37),<sup>3</sup> could have helped establish genuine disputes as to ownership and copying

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<sup>3</sup> Although the operative Motion is silent on what specific provisions of Plaintiff's excluded declaration testimony he is referring to, apart from vague references to pages 15-27 (*see* Motion, at 27), Plaintiff's Reply specifically requests that the "Non-Opinion Expert Testimony of Plaintiff Contained in Paragraph 2 and 4 of his Declaration" be received in evidence. *See* Reply, at 9. He then clarifies that he "does not request that his musicological expert opinion testimony be received in evidence," and instead asks that "the Court receive in evidence [P]laintiff's testimony contained in paragraphs 2 and 4 of his Declaration based on his knowledge as a professional producer in the hip-hop music business." *Id* That testimony, he adds, "describes the collaborative manner in which hip-hop recordings are created and ultimately commercially released with regard to the collaboration of beat track producers . . . with composers of lyrics and melodies to be performed over the beat tracks" in order to show "how the record label that ultimately releases a hip-hop recording fulfills the responsibility of obtaining the permission and compensating the owner of any sampled music contained in the hip hop recording." *Id.* at 9-10.

Because it was Defendants' evidentiary objection Nos. 1-3 that specifically referenced those paragraphs, and because Frisby did not otherwise identify the relevant objections that he is contesting, the Court will only respond to the evidentiary objections—and their related implications—stemming from those three objections. *See* Docket No. 146-2, at 4-5. The Court sustained objections 1-2 in full, and sustained no. 3 in part (allowing all evidence "as to [Frisby's] personal knowledge about his own experiences as a producer in the industry" to remain). *See* SJ Decision at 6, Evid. Obj. No. 3.

Plaintiff's alleged "knowledge obtained through his activities as a beat track producer," though referenced in connection to Frisby's Rule 60(b) motion in his Reply, shall largely be addressed in the Court's Rule 59(e) analysis section because the 59(e) Motion is the one that expressly claims the Court erroneously excluded those parts of Frisby's testimony, thereby damaging Frisby's

(specifically, access and similarity) are hollow attempts to revive unsubstantiated contentions already made and rejected at the motion for summary judgment stage.<sup>4</sup> The excluded portions of Plaintiff's Declaration primarily concerned his statements which constituted expert opinions after he had failed to designate in this litigation that he would be providing such expert testimony. Plaintiff does not claim or now establish that this Court's decision on that issue was incorrect. Moreover, even if that were the gist of his first argument, that would be a matter which was raised and either was or could have been thoroughly vetted at the hearings on the summary judgment motion. Thus, it cannot be a basis for a motion for reconsideration.

Further, while the Court did exclude Plaintiff's testimony wherein he himself attempted to proffer expert testimony, the Court did not strike his testimony wherein he discussed his own personal experiences in the music industry. Thus, despite Frisby's misplaced contention, the Court has already granted the "proposed remedy" he is currently requesting. Namely, before posting the final judgment, the Court overruled Defendants' objections as "to [Frisby's] personal knowledge about his own experiences as a producer in the industry."

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arguments aimed at establishing his ownership rights. *See Reply*, at 10; *Motion*, at 6, 24, 27-33.

<sup>4</sup> While Plaintiff concedes the Court rightly rejected his contention that "Plaintiff [was] entitled to the benefit of the Sony defendants obtain[ed] permission from the owner of *Swing*," he still claims that the Court wrongly rejected his arguments that (a) *Shawty* did not infringe *Swing* because its use constituted a transformative, fair use and (b) the Defendants were estopped from denying Frisby's copyright ownership of *Shawty*. *See Motion*, at 23-24.

See SJ Decision, at 6. But, even assuming that his purported industry knowledge is true and accurate, Plaintiff still fails to establish—(1) how Plaintiff’s understanding of the “collaborative nature” of the manner in which established artists operate in the hip-hop music industry, (2) how the alleged procedures typically used by some persons to gain permission to sample a third-party sound recording, and (3) how Plaintiff’s own belief that a sample owner “would not reasonably care” that his or her work has been sampled—would somehow have prevented this Court’s rejection of his fair use and estoppel arguments in the motion for summary judgment. See Frisby Decl., ¶ 2, 4; Motion, 24-25. Further, although the Motion states that “Plaintiff’s analysis of [those] two points is developed in the main body of [the Motion],” his subsequent reference to Frisby’s “labor[ ]” and “hopes to place the beat track with a successful hip-hop lyrics/performer to finish the song for commercial release” (see Motion, at 30) are not helpful to his case. He argues, by way of the customary practices referenced in his own industry knowledge testimony, that there are essentially only two potential results that can occur from his unlicensed sampling of *Swing*—*i.e.* (1) the song not getting commercially released or (2) getting successfully commercially released), and that these results will either lead to: (1) “absolutely no harm” in the case of the former or (2) to “the public [being] rewarded,” “the creators of the recording [being] compensated, and the owners of [*Swing* being] compensated” in the case of the latter. *Id.* at 31. As discussed *infra*, these arguments are irrelevant and simply incorrect when placed beside the applicable copyright laws pertaining to ownership, the right to authorize derivative works, infringement, and fair use that govern

the outcome of this lawsuit. As such, the Court rejects the first ground of Plaintiff's Motion.

## 2. James Belt's Excluded Expert Report

Frisby claims that “[t]he Court erroneously excluded [the testimony of his expert James Belt], [which] was timely submitted by the February 7, 2020 expert witness discovery cutoff date,” and that “the earlier exchange date for expert witness reports pertained only to musicology and sound recording experts” whereas Belt “was engaged and submitted his report as an FL Studio Software expert.”<sup>5</sup> See Motion, at 6, ¶ 2. Plaintiff also states that Frisby's declaration and the accompanying exhibits—which are located in the middle and the end of the same document as the Motion itself—support this contention. *Id.* at 21. Belt's report allegedly “analyzes the issue of copying based upon his expert knowledge of how Hernandez would have used [the FL] software to copy, mute, delete, and otherwise manipulate the music from the *Déjà Vu* recording [ ] delivered to him” by the *Déjà Vu* producers. *Id.* at 16. Apart from these statements, however, Frisby's Motion neglects to explain how said analysis could overcome the Court's other mentioned issues (*i.e.* failure to prove ownership, fatal gaps in his chain of access theory, etc.).

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<sup>5</sup> In large part, the basis of Plaintiff's Fed. R. Civ. P. 60(b) Motion rests on this keen distinction between expert testimony concerning musicology versus testimony regarding FL Studio Software and also on his being a pro-se litigant at the time the expert disclosures were due. For the reasons discussed *infra*, these arguments fail as a matter of law.

The Court finds Plaintiff's second ground for reconsideration unpersuasive. "[A] motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could have reasonably have been raised earlier in the litigation.'" *IV Solutions, Inc.*, 2016 WL 7888011, at \* 2 (citing *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880). Here, the Court sent to counsel a tentative ruling on the summary judgment motion before the first hearing on March 4, 2021, and a draft of a final ruling before the March 11, 2021 continuation of the hearing—with the parties being allowed to make an additional filings in the interim. *See* Docket Nos. 154, 156. Although the parties had ample time to make additional arguments at the two separate hearings, Plaintiff's counsel did not raise the contentions he now makes as to the exclusion of the Belt declaration even though footnote 9 in both rulings discussed the reasons for excluding the Belt testimony. Thus, again, Plaintiff is seeking to use the Motion to reargue an issue that was or could have been raised previously.

Further, the Court rejects Plaintiff's contention that the Belt declaration and report were timely proffered by Frisby in this litigation. Initially, the scheduling order set February 7, 2020 as the closing date for expert discovery. *See* Docket No. 106. However, when this Court sets a discovery closing date, it means that the Fed. R. Civ. P. dates as to the initial disclosure of experts and their concomitant reports under Rule 26(b)(4), the exchange of rebuttal expert reports, and the depositions and other discovery as to all experts must be complete by the closing date. Recognizing that practice, the parties in this case "stipulated



to pursue early disclosures and discovery as to musicological and sound recording experts” and the Court issued an order consistent with that agreement. *See* Docket Nos. 111, 112. On November 26, 2019, the parties submitted another stipulation which provided that: (1) Plaintiff had identified two experts, but withdrew one, leaving Brian McBrearty as his sole expert, (2) McBrearty’s deposition would be conducted by December 20, 2019, and (3) Plaintiff “will not designate any different or additional musicological and/or sound recording experts and will not submit any additional musicological and/or sound recording expert reports.” *See* Docket No. 122. On November 26, 2019, this Court issued an order which stated *inter alia* that “Plaintiff may not designate any different or additional musicological and/or sound recording experts and will not submit any additional musicological and/or sound recording expert reports.” *See* Docket No. 123. Plaintiff claims that he provided defense counsel with a copy of Belt’s expert report on or before February 7, 2020. Nevertheless, Belt’s declaration and report are clearly untimely and were properly rejected by this Court in its ruling on the Defendant’s evidentiary rejection No. 45. *See* Docket Nos. 146-2, 156.

Plaintiff attempts to argue around that ruling by claiming that Belt’s testimony does not involve the areas of musicology or sound recording and therefore does not fall within the Court’s November 26, 2019 Order. That contention is simply specious. As stated in Belt’s expert report itself, he was retained “to provide my expert opinion on how the FL Studio software is used to compose, engineer, remix and manipulate digital music files in general and specifically as it relates to the manipulation and altering of the *Shawty So*

*Cold* sound recording file that resulted in the creation of the derivative work *Exchange*.” See Docket No. 140. Obviously, Belt proffers expert testimony in the areas of both musicology and sound recording. Indeed, his opinions deal in the same subject matter as covered by Defendants’ experts (*i.e.* Paul Geluso and Lawrence Ferrara).

In sum, the Court declines to alter its ruling on the exclusion of Belt’s report.

### **3. The Court’s Conclusion Regarding Frisby’s Fair Use and Estoppel Claims**

Plaintiff argues that “[r]espectfully, the Court’s application of the [fair use] rules [] was incorrect and resulted in an erroneous conclusion that plaintiff’s use of the *Swing* sample was not a fair use.” See Motion at 27. He further claims that the Court mischaracterized his infringement contentions in numerous ways. Be that as it may, Plaintiff’s proffered fair use analysis section does not specifically discuss that doctrine until several paragraphs later; instead he simply re-alleges assertions specifically rejected in the SJ Decision (*i.e.* that Hernandez performed unauthorized copying of his beat and compositional structure, and that he “believes” the *Déjà Vu* producers directly captured sounds from *Shawty* and sent the beat to Hernandez). *Id.* When he finally does turn to the fair use issue, he completely omits discussion of the first two factors;<sup>6</sup> and then, as

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<sup>6</sup> As stated in *Dr. Seuss Enters., L.P. v. ComixMix LLC*, 983 F.3d 443, 451:

The factors that determine fair use . . . are reflected in § 107 of the Copyright Act of 1976 as the following four non-exclusive factors:

to factor three, he claims that “the four bars of melody that are the subject of plaintiff’s infringement claim are not essentially ‘the heart’ of *Swing*.” *Id.* at 29 of 59. How Plaintiff reaches his conclusion is unfathomable since all of the recordings involved in this lawsuit (*i.e.* *Shawty*, *Exchange*, *Déjà Vu*, and *Brooklyn Girls*) sample the same portions of *Swing*. He then states that the Court’s “application of the [fourth fair use] factor was opposite of how that factor should properly be applied to the facts of this case,” repeating almost verbatim the Court’s statements on the standard (albeit without citing any of it) before stating that its analysis “sounds impressive, but is demonstrably incorrect. specious [sic].”<sup>7</sup> *Id.* at 30; compare SJ Decision at 24. As to this contention, Frisby has not: (1)

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- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.

\* \* \* \*

All four factors are “to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell [v. Acuff-Rose Music, Inc.]*, 510 U.S. [569,] 578 [(1994)].

<sup>7</sup> In support of its position on this point, the Court would refer to yet another decision in support of its position. As observed in *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1220 (9th Cir. 1997): “if copyright protection were given to derivative works that are virtually identical to the underlying works, then the owner of the underlying copyrighted work would effectively be prevented from permitting others to copy her work since the original derivative copyright holder would have a de

proffered any newly discovered evidence, (2) referenced any intervening change in the controlling law, and/or (3) established that the Court committed clear error on this point. Instead, Plaintiff relies upon the following syllogism. If Plaintiff samples a copyright holder's music without his or her notice or approval, and sends those "beats" to others for their addition of lyrics or raps to be placed on top of the sampling, there can only be two results: (1) no one elects to use Plaintiff's beats in which case there is no harm to the copyright holder or (2) someone utilizes the beat, gets it released as a commercial recording, and the record company that releases the recording will pay the copyright holder some compensation. Plaintiff cites to no evidence or caselaw that substantiates those assertions. As to the former scenario, Frisby utilizes a faulty premise—namely, that there can be no copyright infringement without the presence of actual damages. 17 U.S.C. § 106(2) provides that a copyright holder has the exclusive right to prepare derivative works based upon the copyrighted work. Thus, Frisby's sampling of *Swing* without a valid license from the copyright owners of the composition/recording and then sending it out to others seeking to capitalize on it constituted an infringement of those copyrights. While Plaintiff's commercial endeavors with his beats may not initially cause *Swing*'s copyright holders to suffer actual damages, nevertheless,

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facto monopoly due to her "considerable power to interfere with the creation of subsequent derivative works from the same underlying work." That is similar to what is happening here where a third-party who did obtain a license from the copyright holder of a song to sample its composition and recording is thereafter sued by a person who simply infringed those copyrights and thereafter had the chutzpah to sue the third-party holder of the license.

the copyright holders may be entitled to statutory damages. *See, e.g., Adobe Systems Inc. v. Tanvir*, No. 16-cv-6844 CRB, 2017 WL 2986219, \*7 n.3 (N.D. Cal. July 13, 2017). As to the second scenario, there is nothing to suggest that the record company which releases a recording that uses a sample from another work will necessarily know that the recording is a derivative work and, even if it does know, may not necessarily obtain a license from the copyright holder before it releases the work.

In short, the Court expressly rejects Plaintiff's supposition that "there is absolutely no harm to be accrued to the owners of *Swing*" if an unauthorized sample is not commercially released, or that—if it is indeed commercially released—"he [would] deserve[] to be paid" and given credit so that he "would not be relegated to using the court system" for relief *Id* at 31. Not only is this a shallow attempt to re-argue past arguments from his Opposition, but here he also does not cite any caselaw or statutes to support such a bold conclusion.

Further, Frisby's subsequent assertion that "plaintiff's private [fair use] sampling of *Swing*'s music" is "directly in line with the reason for the existence" of the fair use doctrine, and his reliance on Ninth Circuit case *Kelly v. Arriba Soft Corporation* to support it, are heavily misplaced. *See* Motion, at 32; *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) ("This exception 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'). For the reasons stated in the SJ Decision, Plaintiff's purported fair use claims stand in strong opposition to the purpose of the doctrine and

instead represent a brazen attempt to use the doctrine “as a ‘sword’ in order to vest copyright in an [otherwise] unauthorized derivative work,” and nothing more. SJ Decision at 27. Ultimately, Plaintiff’s fair use arguments fail as a matter of law.

Likewise, with respect to Frisby’s estoppel argument aimed at the Sony Defendants, he expressly “refers the Court back to [his] argument on this point in its previously-filed Opposition to the [motion for summary judgment]” without adding any new legal analysis (or legal citations at all). Indeed, these points are half-baked at best, an improper waste of valuable judicial resources, and prohibited by applicable caselaw as to motion for reconsideration. The Court therefore again rejects Plaintiff’s renewed fair use and estoppel arguments.

#### **4. The Court’s Conclusion as to Access**

Frisby argues the Court erroneously excluded his testimony “as to his phone conversation in 2018 with the real Bryant in which Bryant admitted that he had delivered the Shawty stem files to the Déjà Vu producers” because (a) his statements fall within the “statement against interest” exception to hearsay and (b) “[a]ny ambiguity in Bryant’s use of the word ‘might’ in relationship to having delivered the stem files presents a genuine issue of fact for the jury to determine” (*i.e.* whether he had in fact delivered them to the producers in question). *See* Motion, at 25. Again, Plaintiff is simply here re-arguing matters which the Court originally addressed in its SJ Decision without presenting any new evidence, applicable caselaw or viable demonstration of clear error. Plaintiff’s presentation of what allegedly some person (which he believed was

Bryant) said (but not under oath) for the true of the matter asserted is simply inadmissible hearsay. Without admissible evidence that Plaintiff spoke to the actual Bryant, what Bryant (if it was really him) actually said, and a basis for establishing that what Bryant said was in fact true, it is impossible to establish that the statements which Plaintiff seeks to interject here were made against interest.

The Court rejects Plaintiff's arguments as to access.

### **5. The Court's Conclusion as to Substantial Similarity**

Lastly, the Court is unmoved by Plaintiff's assertion that "the Court's conclusion as to substantial similarity is demonstrably incorrect." *See* Motion, at 15. To support this claim, Frisby states that "[t]he Court did not understand or appreciate McBrearty's opinion that the compositional structure in Shawty, Déjà Vu and Exchange" all sampled *Swing's* melody in "almost identical" ways, and that the Court accepted the "erroneous and deliberately deceptive—opinion of Ferrara that the compositional structure in which Shawty and Exchange manipulated the sampled melody was substantially different." *Id.* at 15-16. He further asserts that "[P]laintiff could rest his case on the issue of substantial similarity based on the properly understood opinion of McBrearty," but that instead, because the Court "expressed obvious admiration for the credentials and opinions of Ferrara, it behooves [P]laintiff to enlighten the Court as to [Ferrara's] deliberate deception practice[s]" at play here. *Id.* at 17. After admitting that he did not provide a rebuttal expert report to Ferrara at the motion for summary judgment stage, however, he

states: “As trial counsel I rebut Ferrara in argument by virtue of having simply listened to the beat tracks.” *Id.* at 18. As to the last contention, it is extremely doubtful that Plaintiff’s counsel himself can proffer expert testimony during consideration of a motion for reconsideration. Thus, again, Plaintiff offers no new evidence, new caselaw, or demonstration of clear error but merely regurgitates previously made contentions.

As with all of Plaintiff’s arguments thus far, his claims are fruitless. First, Plaintiff’s own statements are without factual basis and he cannot provide expert testimony on the subject. Next, the Court did explicitly address McBrearty’s expert report in detail and, in fact, overruled Defendants’ objections to the inconsistencies in his overall testimony (*see* SJ Decision at 8 n. 4). Nevertheless, even assuming *arguendo* that McBrearty’s statements are correct, they themselves are insufficient to establish the points which Plaintiff has raised herein. Indeed, McBrearty’s testimony only showed that his efforts were at best merely inconclusive.<sup>8</sup> Therefore,

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<sup>8</sup> As noted in the SJ Decision, McBrearty observed in his report that:

My first analysis was to try to ascertain whether *Shawty So Cold* might have been sampled for the productions of *Deja Vu* or *Exchange*. This was inconclusive. While it appears possible that the producers of either *Deja Vu* and *Exchange* could both have sampled four bars of *Shawty So Cold* that included the *Swing My Way* samples, I found nothing that would negate the possibility they obtained their sample of *Swing My Way* from another source.

*See* SJ Decision at 29. Likewise, his deposition testimony was actually antithetical to Plaintiff’s position:

Q. And is it correct that you’re unable to determine whether *Exchange* samples actual sounds in the



only expert testimony from Geluso and Ferrara remained on those points and McBrearty's statements did not establish any relevant material facts in dispute.

The Court therefore finds that Plaintiff has failed to establish his fifth contention in regards to substantial similarity.

In sum, all five of Plaintiff's grounds for seeking a reconsideration of the Court's SJ Decision are without merit and fail as a matter of law. As such, Plaintiff's Motion under Rule 59(e) is DENIED.

### **B. The Rule 60(b) Motion**

Plaintiff claims that, when he engaged James Belt as a FL (*i.e.* Fruit Loop, a beat production program) expert, "it was [his] understanding that [he] was not required to provide his [expert] report by the deadline for providing the musicology and sound recording expert reports." Motion/Frisby Declaration, at 10-11, ¶¶ 4-6. Apart from statements related to his claimed mistaken belief, and claims that Defendants would not be prejudiced by the admission of Frisby's non-opinion expert testimony, he makes no substantive arguments related to Rule 60(b) other than the same general recharacterizations discussed above in the Court's Rule 59(b) analysis.<sup>9</sup> Accordingly, the Court will only address the mistake and prejudice arguments here.

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*Shawty So Cold* recording? A. Ultimately, yes. \* \* \* \*  
Whether *Exchange* samples the *Shawty So Cold* sound recording? I did not find evidence that it necessarily had.

*Id.*

<sup>9</sup> What's more, although Frisby's "Notice of Motion" section explicitly states that he is filing two motions (under rule 59(e)

As stated above, even though the Court declined to admit Frisby's testimony from paragraph 2 of his Declaration (which generally discussed his industry experience as a hip hop producer and the collaborative customs that producers engage in "the hip-hop music business," the Court nonetheless allowed all statements relating to "his personal knowledge about his own experiences as a producer in the industry" to survive Defendants' evidentiary objections. For one, it is unclear what type of expert testimony Frisby would have claimed if he had properly taken the steps to be considered one for purposes of defeating the motion for summary judgment, for the cited paragraphs 2 and 4 specifically reference his industry experience, industry practices in making beats, and industry practices in having them commercially released by third-parties. Further, in his new declaration, he states that he "was unaware that [he] was required to designate [himself] as an expert witness if [he] intended to give testimony about technical aspects of how beat tracks are produced, customs, practices and other information as to how hip-hop beat tracks and final recordings . . . are collaboratively produced in the music business." See Motion, at 10, Frisby Decl. ¶ 3. The Court's characterization of portions of Frisby's testimony as inadmissible expert testimony, however, relate more sharply to his repeated attempts to proffer legal conclusions and opinions as to copyright infringement elements/considerations (*i.e.*,

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and 60(b)), and he explicitly states his multiple grounds for each one in that Notice section, Plaintiff's Memorandum of Points and Authorities completely neglects to distinguish the arguments from the motions. Instead, Plaintiff's Motion merges all of his arguments into large umbrellas (ownership, fair use, estoppel, etc.).

“since the beat track used in . . . *Exchange* is an infringement of the beat track of *Shawty*,” “[a]s soon as I heard *Exchange* after its commercial release I realized that its beat track was a strikingly similar reproduction of the beat track of *Shawty*,” “I did some research on the Internet since I knew that both the *Déjà Vu* and *Exchange* the [sic] tracks were infringements of the *Shawty* beat track,” “there is a fifth important musicological element that must be considered under the extrinsic test: timbre,” “in analyzing the concept of musical substantial similarity, it is important to have a reasonable understanding as to the conceptual degrees of similarity,” “[t]he presentation of the sample in both tracks is identical (as differentiated from merely similar, substantially similar, or strikingly similar) as to each of the . . . important musicological elements,” “I creatively presented the sample in a completely different transformative compositional structure from how it was presented in the *Swing* composition/sound recording, with a completely different transformative timbre from how it was presented in the *Swing* composition/sound recording. What was infringed in the creation of the *Déjà Vu* and *Exchange* beat tracks was my transformative copyrighted derivative work that I originally created in producing . . . *Shawty*.” See Docket No. 138, ¶ 5, 11, 23, 24, 25, 26. This list is illustrative, but not exhaustive, of the Court’s reasonable basis for declining to admit Frisby’s attempts to offer legal conclusions.

Further, even if Frisby was indeed qualified to serve as an expert in his desired capacity, and simply was mistaken about the applicable expert deadline, the Court agrees with Defendants that Frisby was represented by counsel at all relevant times that he

was required to satisfy the jointly stipulated expert disclosure requirements. He was represented by counsel on July 1, 2019, when the parties submitted their Joint Rule 26(f) Report (which included disclosure deadlines for both regular expert reports and musicologist expert reports). *See* Docket No. 105, at 10, 13. Likewise, he was represented by counsel in August when the parties stipulated to an earlier cutoff to provide expert disclosures. *See* Docket No. 111. Likewise, in September 2019, he was represented by counsel when the parties stipulated to an extension of the time to provide expert disclosures (namely, because his original counsel was resigning). *See* Docket No. 119. All of these filings provided Plaintiff and his counsel with ample opportunity to disclose that they intended to list him as an expert (which they neglected to do every time).

Lastly, once attorney Steinhart was retained as his counsel (in February 20, 2020), he had ample opportunity to raise this argument in attempt to get Frisby designated as an expert, including during the telephonic hearing (to which the Court had already posted a tentative ruling, including all of the evidentiary objection rulings referencing Frisby's proffered expert testimony). *See* Docket Nos. 134, 156. Again, a party is prohibited from using a reconsideration motion to raise arguments that could have been raised earlier. *See supra*. Accordingly, the Court declines to grant Plaintiff's 60(b) motion as well.<sup>10</sup>

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<sup>10</sup> Whereas the Court is declining to admit Frisby's aforementioned expert testimony, the Court sees no reason to address the obvious ways in which admitting that evidence would prejudice Defendants.

#### **IV. Conclusion**

Based on the foregoing discussion, the Court would DENY Plaintiff's motion for reconsideration.

**RELEVANT CONSTITUTIONAL AND  
STATUTORY PROVISIONS INVOLVED**

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**U.S. Const. amend. V**

**Grand Jury Indictment for Capital Crimes;  
Double Jeopardy; Self-Incrimination; Due Pro-  
cess of Law; Takings without Just Compensation**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**17 U.S.C. § 101**

**Definitions**

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An “anonymous work” is a work on the copies or phonorecords of which no natural person is identified as author.

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces

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and elements in the design, but does not include individual standard features.

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The “Berne Convention” is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The “best edition” of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person’s “children” are that person’s immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A “collective work” is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

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A “computer program” is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

“Copyright owner”, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A “Copyright Royalty Judge” is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of



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editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

A “device”, “machine”, or “process” is one now known or later developed.

A “digital transmission” is a transmission in whole or in part in a digital or other non-analog format.

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An “establishment” is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term “financial gain” includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for

purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A “food service or drinking establishment” is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The “Geneva Phonograms Convention” is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The “gross square feet of space” of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms “including” and “such as” are illustrative and not limitative.

An “international agreement” is—

- (1) the Universal Copyright Convention;
- (2) the Geneva Phonograms Convention;
- (3) the Berne Convention;
- (4) the WTO Agreement;
- (5) the WIPO Copyright Treaty;
- (6) the WIPO Performances and Phonograms Treaty; and

- (7) any other copyright treaty to which the United States is a party.

A “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term “motion picture exhibition facility” means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

“Motion pictures” are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A “performing rights society” is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on

behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed.

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a “proprietor” is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or

television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A “pseudonymous work” is a work on the copies or phonorecords of which the author is identified under a fictitious name.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work “publicly” means—

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by

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means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Registration”, for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

“State” includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A “transfer of copyright ownership” is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A “transmission program” is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To “transmit” a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A “treaty party” is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The “United States”, when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a “United States work” only if—

- (1) in the case of a published work, the work is first published—
  - (A) in the United States;
  - (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
  - (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
  - (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

- (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or
- (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.

The author’s “widow” or “widower” is the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the spouse has later remarried.

The “WIPO Copyright Treaty” is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The “WIPO Performances and Phonograms Treaty” is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A “work of visual art” is—

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in



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the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include-

- (A)
  - (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
  - (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
  - (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or
- (C) any work not subject to copyright protection under this title.

A “work of the United States Government” is a work prepared by an officer or employee of the

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United States Government as part of that person's official duties.

A "work made for hire" is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section

1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

- (A) shall be considered or otherwise given any legal significance, or
- (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms “WTO Agreement” and “WTO member country” have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

## **17 U.S.C. § 102**

### **Subject Matter of Copyright: In general**

- (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be

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perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

### **28 U.S.C. § 1254**

#### **Courts of appeals: certiorari: certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

## **28 U.S.C. § 1291**

### **Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## **Federal Rules of Civil Procedure Rule 42**

### **Consolidation; Separate Trials**

**(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or

- (3) issue any other orders to avoid unnecessary cost or delay.

**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

### **Federal Rules of Civil Procedure Rule 59 New Trial; Altering or Amending a Judgment**

#### **(a) In General**

**(1) Grounds for New Trial.** The court may, on motion, grant a new trial on all or some of the issues-and to any party-as follows:

- (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
- (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

**(2) Further Action After a Nonjury Trial.** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 28 days after the entry of judgment.

**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed

with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

**Federal Rules of Civil Procedure Rule 60—  
Relief from a Judgment or Order [Rule Text &  
Notes of Decisions subdivisions I to III]**

**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief

**(c) Timing and Effect of the Motion**

- (1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
- (2) **Effect on Finality.** The motion does not affect the judgment's finality or suspend its operation.

**(d) Other Powers to Grant Relief.** This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;



- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.

**(e) Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

### **Federal Rules of Evidence Rule 201, 28 U.S.C. Judicial Notice of Adjudicative Facts**

**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

**(c) Taking Notice.** The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

**(d) Timing.** The court may take judicial notice at any stage of the proceeding.

**(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of

taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

**FIRST AMENDED COMPLAINT, CASE 1712  
RELEVANT EXCERPTS  
(MARCH 7, 2019)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

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GARY FRISBY, p/k/a G-MONEY,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, d/b/a RCA  
RECORDS, a Delaware, General Partnership;  
BRYSON TILLER, an Individual; MICHAEL  
HERNANDEZ, p/k/a FOREIGN TECK, an Individual;  
CORTEZ BRYANT, an Individual; UNIVERSAL  
MUSIC GROUP, INC., d/b/a INTERSCOPE  
RECORDS, a Delaware Corporation; DREAMVILLE  
RECORDS NY, INC., a New York Corporation; ROC  
NATION RECORDS, LLC, a New York Limited  
Liability Company; JERMAINE COLE, p/k/a J.  
COLE, an Individual; MATTHEW SAMUELS, p/k/a  
BOILDA, an Individual; and ANDERSON  
HERNANDEZ, p/k/a VINYLZ, an Individual,

*Defendants.*

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Case No.: 2:19-cv-01712-GW-AGR

Demand for Injunctive Relief  
Demand for Jury Trial

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Plaintiff, GARY FRISBY, p/k/a G-MONEY (“Frisby”), sues Defendants, SONY MUSIC ENTERTAINMENT, d/b/a RCA RECORDS (“RCA”), BRYSON TILLER (“Tiller”), MICHAEL HERNANDEZ, p/k/a FOREIGN TECK (“Foreign Teck”), CORTEZ BRYANT (“Bryant”), UNIVERSAL MUSIC GROUP, INC., d/b/a INTERSCOPE RECORDS (“Interscope”), DREAMVILLE RECORDS NY, INC., (“Dreamville”), ROC NATION RECORDS, LLC (“Roc Nation”), JERMAINE COLE, p/k/a J. COLE (“Cole”), MATTHEW SAMUELS, p/k/a BOILDA (“Boilda), and ANDERSON HERNANDEZ, p/k/a VINYLZ (“Vinylz”) and alleges as follows:

### **NATURE OF THE ACTION**

1. This is an action for copyright infringement, pursuant to the Copyright Act of 1976, as amended (the “Copyright Act”), 17 U.S.C. §§ 101 *et seq.*, stemming both from Defendants’ direct or indirect copying a sound recording that Frisby owns and composed, entitled “*Shawty So Cold*,” which bears United States Copyright Registration No. SRu001240028 (interchangeably referred to herein as the “Copyrighted Work”).

2. The crux of the claims in this action is that there are substantial similarities between “*Shawty So Cold*” by Frisby and the sound recordings underlying the songs “*Exchange*” by Tiller and “*Deja Vu*” by Cole, including but not limited to the same kick pattern, snare pattern, FX swell and vocal strike. The substantial similarities between the three songs are of no coincidence and such similarities are legally significant because Frisby created “*Shawty So Cold*” years before

both “*Exchange*” and “*Deja Vu*” were distributed and publicly performed.

3. Defendants are the writers, producers, performers, record labels, publishers and distributors of the infringing works entitled “*Exchange*” and “*Deja Vu*.”

4. Frisby seeks all remedies afforded by federal law, including injunctive relief and money damages in the form of actual damages, statutory damages, and/or disgorgement of Defendants’ profits, as well as a recovery of attorneys’ fees and full costs, arising from Defendants’ willful conduct alleged herein.

## **PARTIES**

5. Frisby is *sui juris* and is a citizen of the State of Georgia. Frisby is a professional songwriter and music producer for “You Know I Made Tha Beat Productions,” located in Atlanta, Georgia. Frisby is the composer of the sound recording and music composition entitled “*Shawty So Cold*,” which he created in or around January 2013. Frisby is the sole owner of United States Copyright Registration No. SRu001240028 and PAu003965398 for “*Shawty So Cold*.” Accordingly, Frisby—and Frisby only—enjoys all exclusionary rights granted by Section 106 of the Copyright Act for “*Shawty So Cold*.”

6. Upon information and belief, RCA is an unincorporated division of Sony Music Entertainment, a Delaware general partnership. RCA is the record label for the song, “*Exchange*,” released on March 8, 2016 by Bryson Tiller. RCA assisted with publishing and caused copies of “*Exchange*” to be widely distributed to the public.

7. Tiller is *sui juris* and, upon information and belief, resides in Miami-Dade County, Florida. Tiller regularly conducts business as an entertainer in the County of Los Angeles, California. Tiller is an American singer, songwriter, and rapper who released the song “*Exchange*.”

8. Hernandez, p/k/a Foreign Teck is *sui juris* and, upon information and belief, resides in Miami-Dade County, Florida. Foreign Teck is a music producer and credited with the production of Tiller’s song “*Exchange*” through “The Mekanics,” a production company in which Foreign Teck owns an interest.

[ . . . ]

**COMPLAINT, CASE 4167  
RELEVANT EXCERPTS  
(MAY 14, 2019)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

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GARY FRISBY, p/k/a G-MONEY,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, d/b/a RCA  
RECORDS, a Delaware, General Partnership;  
BRYSON TILLER, an Individual; MICHAEL  
HERNANDEZ, p/k/a FOREIGN TECK, an Individual;  
CORTEZ BRYANT, an Individual; UNIVERSAL  
MUSIC GROUP, INC., d/b/a INTERSCOPE  
RECORDS, a Delaware Corporation; DREAMVILLE  
RECORDS NY, INC., a New York Corporation; ROC  
NATION RECORDS, LLC, a New York Limited  
Liability Company; JERMAINE COLE, p/k/a J.  
COLE, an Individual; MATTHEW SAMUELS, p/k/a  
BOILDA, an Individual; and ANDERSON  
HERNANDEZ, p/k/a VINYLZ, an Individual,

*Defendants.*

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Case No.: 2:19-cv-4167

Demand for Injunctive Relief  
Demand for Jury Trial

Plaintiff, GARY FRISBY, p/k/a G-MONEY (“Frisby”), sues Defendants, SONY MUSIC ENTERTAINMENT, d/b/a RCA RECORDS (“RCA”), BRYSON TILLER (“Tiller”), MICHAEL HERNANDEZ, p/k/a FOREIGN TECK (“Foreign Teck”), CORTEZ BRYANT (“Bryant”), UNIVERSAL MUSIC GROUP, INC., d/b/a INTERSCOPE RECORDS (“Interscope”), DREAMVILLE RECORDS NY, INC., (“Dreamville”), ROC NATION RECORDS, LLC (“Roc Nation”), JERMAINE COLE, p/k/a J. COLE (“Cole”), MATTHEW SAMUELS, p/k/a BOILDA (“Boilda”), and ANDERSON HERNANDEZ, p/k/a VINYLZ (“Vinylz”) and alleges as follows:

### **NATURE OF THE ACTION**

1. This is an action for copyright infringement, pursuant to the Copyright Act of 1976, as amended (the “Copyright Act”), 17 U.S.C. §§ 101 *et seq.*, stemming both from Defendants’ direct or indirect copying a music composition that Frisby owns and composed, entitled “*Shawty So Cold*,” which bears United States Copyright Registration No. PAu003965398 (interchangeably referred to herein as the “Copyrighted Work”).

2. The crux of the claims in this action is that there are substantial similarities between “*Shawty So Cold*” by Frisby and the music compositions underlying the songs “*Exchange*” by Tiller and “*Deja Vu*” by Cole, including but not limited to the same kick pattern, snare pattern, FX swell and vocal strike. The substantial similarities between the three songs are of no coincidence and such similarities are legally significant because Frisby created “*Shawty So Cold*” years before both “*Exchange*” and “*Deja Vu*” were distributed and publicly performed.



3. Defendants are the writers, producers, performers, record labels, publishers and distributors of the infringing works entitled “*Exchange*” and “*Deja Vu*.”

4. Frisby seeks all remedies afforded by federal law, including injunctive relief and money damages in the form of actual damages, statutory damages, and/or disgorgement of Defendants’ profits, arising from Defendants’ willful conduct alleged herein.

### **PARTIES**

5. Frisby is *sui Juris* and is a citizen of the State of Georgia. Frisby is a professional songwriter and music producer for “*You Know I Made Tha Beat Productions*,” located in Atlanta, Georgia. Frisby is the composer of the sound recording and music composition entitled “*Shawty So Cold*,” which he created in or around January 2013. Frisby is the sole owner of United States Copyright Registration Nos. SRu001240028 and PAu003965398 for “*Shawty So Cold*.” Accordingly, Frisby—and Frisby only—enjoys all exclusionary rights granted by Section 106 of the Copyright Act for “*Shawty So Cold*.”

6. Upon information and belief, RCA is an unincorporated division of Sony Music Entertainment, a Delaware general partnership. RCA is the record label for the song, “*Exchange*,” released on March 8, 2016 by Bryson Tiller. RCA assisted with publishing and caused copies of “*Exchange*” to be widely distributed to the public.

7. Tiller is *sui Juris* and, upon information and belief, resides in Miami-Dade County, Florida. Tiller is an American singer, songwriter, and rapper who released the song “*Exchange*.”

8. Hernandez, p/k/a Foreign Teck is *sui juris* and, upon information and belief, resides in Miami-Dade County, Florida. Foreign Teck is a music producer and credited with the production of Tiller's song "*Exchange*" through "The Mekanics," a production company in which Foreign Teck owns an interest.

9. Bryant is *sui Juris* and, upon information and belief, resides in Los Angeles County, California. Bryant is a manager and musical producer. Bryant is also the co-owner of the Blueprint Group and Aspire Music Group companies and . . .

[ . . . ]

**SCHEDULING CONFERENCE ORDER,  
CASE 1712  
(JULY 11, 2019)**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

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GARY FRISBY

v.

SONY MUSIC ENTERTAINMENT ET AL.,

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Case No.: 2:19-cv-01712-GW-AGR<sub>x</sub>

Before: The Honorable George H. WU,  
United States District Judge.

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Proceedings: Scheduling Conference

Court and counsel confer. For reasons stated on the record, the Court consolidates this action with, *Gary Frisby v. Sony Music Entertainment, et al.*, CV 19-4167-GW-AGR<sub>x</sub> for pretrial purposes. Counsel are directed to make all future filings in lead case CV 19-1712-GW-AGR<sub>x</sub>. The Clerk's Office will add any necessary parties and counsel in the lead case.

The Court sets the following:

Mediation Cutoff	December 13, 2019
Post-Mediation Status Conference	December 16, 2019 at 8:30 a.m.

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Discovery Cutoff	January 3, 2020
Expert Discovery Cutoff	February 7, 2020
Motion Hearing Cutoff	March 9, 2020
Pretrial Conference	April 9, 2020 at 8:30 a.m.
Jury Trial	April 21, 2020 at 9:00 a.m.

No further amendments allowed; compliance with FRCP 16 is required.

Counsel are to meet and stipulate to further scheduling including exchange of expert reports.

The parties are referred to ADR Procedure No. 3: Private Mediation.

JG

\_\_\_\_\_  
Initials of Preparer

**SUBSTITUTION OF ATTORNEY, CASE 1712  
(FEBRUARY 24, 2020)**

---

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

---

GARY FRISBY, ETC.,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants.*

AND CONSOLIDATED ACTION

---

Case No.: 2:19-cv-01712-GW-AGRx

Before: Hon. George H. WU,  
United States District Judge.

---

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4859 W. Slauson Avenue, Suite 407  
Los Angeles, California 90056  
(323) 933-8263  
Fax (323) 297-4333  
Bar No. 036196  
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*Attorney for Plaintiff*  
*Gary Frisby p/k/a G-MONEY*

TO ALL INTERESTED PARTIES AND ATTORNEYS:

PLEASE TAKE NOTICE that Plaintiff Gary Frisby, currently representing himself in pro per, hereby substitutes Terran T. Steinhart, Steinhart Law Offices, as his attorney. The contact information for Attorney Steinhart is set forth at the top of the face page of this document.

/s/ Gary Frisby  
Plaintiff

Date: February 18, 2020

/s/ Terran T. Steinhart<sup>1</sup>  
Attorney for Plaintiff  
Gary Frisby p/k/a G-MONEY

Date: February 18, 2020

---

<sup>1</sup> All other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

**MOTION FOR SUMMARY JUDGMENT,  
CASE 1712, RELEVANT EXCERPTS  
(JANUARY 31, 2020)**

---

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

---

GARY FRISBY, ETC.,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants.*

AND CONSOLIDATED ACTION

---

Case No.: 2:19-cv-01712-GW-AGR<sub>x</sub>

Before: Honorable George H. WU,  
United States District Judge.

---

TO PLAINTIFF GARY FRISBY:

PLEASE TAKE NOTICE that on March 2, 2020, at 8:30 a.m. or as soon thereafter as the matter may be heard in Courtroom 9D of the above-entitled Court located at 350 West 1st Street, Los Angeles, California, defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment (“Sony Music,” and, collectively, the “Sony Music Defendants”) will move the above-entitled Court, the Honorable George H. Wu, United

States District Judge presiding, for Summary Judgment on plaintiff Gary Frisby's First Amended Complaint in Case No. 2:19-cv-01712-GW-AGRx ("Case No. 1712"), and his Complaint in Case No. 2:19-cv-04167-GW-AGRx ("Case No. 4167"), and each claim asserted in the foregoing complaints, or, in the alternative, for Partial Summary Judgment.

This Motion for Summary Judgment is brought pursuant to Federal Rule of Civil Procedure 56 and on the grounds that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law because, as stated more fully in the accompanying Memorandum of Points and Authorities:

1. In these consolidated cases, plaintiff alleges that his use of a sample of a 1998 third-party sound recording, *Swing My Way*, in plaintiff's unpublished recording he refers to as *Shawty So Cold* ("*Shawty*"), was copied in two recordings that also sample the 1998 recording, *Swing My Way*:
  - (a) Sony Music's recording, *Exchange*, featuring the recording artist, Bryson Tiller, and
  - (b) Defendant Interscope Records' recording, *Déjà Vu*, featuring the recording artist, defendant Jerome Cole.
2. Based on the allegedly similar use of a sample of the 1998 *Swing My Way*:
  - (a) Plaintiff asserts against Mr. Tiller and Sony Music a claim in Case No. 1712 that *Exchange* directly infringes his . . . [ . . . ]



**RULE 59/60 MOTION FOR  
RECONSIDERATION, CASE 1712`  
(MARCH 26, 2021)**

---

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

---

GARY FRISBY, ETC.,

*Plaintiff,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants.*

AND CONSOLIDATED ACTION

---

Case No.: 2:19-cv-01712-GW-AGR<sub>x</sub>

Before: Hon. George H. WU,  
United States District Judge.

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**NOTICE OF APPEAL, CASE 1712  
(JUNE 3, 2021)**

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UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

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**Form 1. Notice of Appeal from a Judgment or  
Order of a United States District Court**

Name of U.S. District Court:

Central District of California

U.S. District Court case number:

[2:19-cv-01712-GR-AGR<sub>x</sub>

Date case was first filed in U.S. District Court:

03/07/2019

Date of judgment or order you are appealing:

03/15/2021

Fee paid for appeal?

*(appeal fees are paid at the U.S. District Court)*

Yes

List all Appellants

*(List each party filing the appeal. Do not use "et al." or  
other abbreviations.)*

Plaintiff Gary Frisby

Is this a cross-appeal?      No

Was there a previous appeal in this case?      No

Your mailing address:

Terran T. Steinhart, Steinhart Law Offices

App.141a

4859 W. Slauson Ave., Ste. 407  
City: Los Angeles  
State: CA  
Zip Code: 90056

/s/ Terran T. Steinhart  
Signature

Date May 20, 2021



**ELECTRONIC FILING MAILING LIST,  
CASE 1712**

---

**Mailing Information for a  
Case 2:19-cv-01712 GW-AGR  
Gary Frisby v. Sony Music Entertainment et al**

**Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

- Benjamin S. Akley  
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- William Archer  
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- KeAndra Z Barlow  
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deekeegan@dwt.com, LAXDocket@dwt.com
- Jean Monica Kim  
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donald.lagatree@lewisbrisbois.com
- Michael J Niborski  
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- Terran T Steinhart  
terran@steinhartlaw.com

### **Manual Notice List**

The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

**ELECTRONIC FILING MAILING LIST,  
CASE 4167**

---

**Mailing Information for a  
Case 2:19-cv-04167-GW-AGR  
Gary Frisby v. Sony Music Entertainment et al**

**Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

- Benjamin S. Akley  
bakley@pryorcashman.com,  
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- William Archer  
william@archerentertainmentlaw.com
- KeAndra Z Barlow  
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deekeegan@dwt.com, LAXDocket@dwt.com
- Michael J Niborski  
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- Coleman W Watson  
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courtney@watsonllp.com,  
docketing@watsonllp.com

**Manual Notice List**

The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who

## App.145a

therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

**DOCKET REPORT FOR  
CASE #: 2:19-CV-01712-GW-AGR**

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U.S. DISTRICT COURT  
CALIFORNIA CENTRAL DISTRICT  
(WESTERN DIVISION - LOS ANGELES)  
CIVIL DOCKET FOR CASE #: 2:19-cv-01712-GW-AGR

---

GARY FRISBY

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

---

Assigned to: Judge George H. Wu  
Referred to: Magistrate Judge Alicia G. Rosenberg

Related Case: 2:19-cv-04167-GW-(AGR<sub>x</sub>)  
Case in Other Court: 9th CCA, 21-55586,  
9th CCA, 21-55587

Cause: 17:501 Copyright Infringement

---

Date Filed: 03/07/2019  
Date Terminated: 03/15/2021  
Jury Demand: Plaintiff  
Nature of Suit: 820 Copyright  
Jurisdiction: Federal Question

03/07/2019

- 1 COMPLAINT Receipt No: 0973-23339750 –  
Fee: \$400, filed by Plaintiff GARY FRISBY.  
(Attorney Coleman W Watson added to party

GARY FRISBY(pty:pla)) (Watson, Coleman)  
(Entered: 03/07/2019)

03/07/2019

- 2 CIVIL COVER SHEET filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/07/2019)

03/07/2019

- 3 NOTICE of Interested Parties filed by Plaintiff GARY FRISBY, identifying None. (Watson, Coleman) (Entered: 03/07/2019)

03/08/2019

- 4 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/08/2019

- 5 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/08/2019

- 6 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/08/2019

- 7 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/08/2019

- 8 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/08/2019

- 9 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/08/2019)

03/11/2019

- 10 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/11/2019)

03/11/2019

- 11 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 Filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/11/2019)

03/11/2019

- 12 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/11/2019)

03/11/2019

- 13 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff GARY FRISBY. (Watson, Coleman) (Entered: 03/11/2019)

03/11/2019

- 14 NOTICE OF ASSIGNMENT to District Judge George H. Wu and Magistrate Judge Alicia G. Rosenberg. (et) (Entered: 03/11/2019)

03/11/2019

- 15 NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (et) (Entered: 03/11/2019)

03/11/2019

- 16 NOTICE OF DEFICIENCIES in Request to Issue Summons RE: Summons Request 11, Summons Request 4, Summons Request 12, Summons Request 6, Summons Request 8, Summons Request 5, Summons Request 13, Summons Request 7, Summons Request 10, Summons Request 9. The following error(s) was found: The caption of the summons must match the caption of the complaint verbatim. If the caption is too large to fit in the space provided, enter the name of the first party and then write see attached. Next, attach a face page of the complaint or a second page addendum to the Summons. The summons cannot be issued until this defect has been corrected. Please correct the defect and re-file your request. (et) (Entered: 03/11/2019)

03/11/2019

- 17 NOTICE TO COUNSEL RE: Copyright, Patent and Trademark Reporting Requirements. Counsel shall file the appropriate AO-120 and/or AO-121 form with the Clerk within 10 days. (et) (Entered: 03/11/2019)



03/11/2019

- 18 NOTICE OF PRO HAC VICE APPLICATION DUE for Non-Resident Attorney Leia V Leitner. A document recently filed in this case lists you as an out-of-state attorney of record. However, the Court has not been able to locate any record that you are admitted to the Bar of this Court, and you have not filed an application to appear Pro Hac Vice in this case. Accordingly, within 5 business days of the date of this notice, you must either (1) have your local counsel file an application to appear Pro Hac Vice (Form G-64) and pay the applicable fee, or (2) complete the next section of this form and return it to the court at [cacd\\_attyadm@cacd.uscourts.gov](mailto:cacd_attyadm@cacd.uscourts.gov). You have been removed as counsel of record from the docket in this case, and you will not be added back to the docket until your Pro Hac Vice status has been resolved. (et) (Entered: 03/11/2019)

03/12/2019

- 19 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 20 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

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03/12/2019

- 21 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 22 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 23 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 24 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 25 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

- 26 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

27 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

28 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

29 APPLICATION of Non-Resident Attorney Leia V. Leitner to Appear Pro Hac Vice on behalf of Plaintiff Gary Frisby (Pro Hac Vice Fee - \$400 Fee Paid, Receipt No. 0973- 23358911) filed by Plaintiff Gary Frisby. (Attachments: # 1. Proposed Order) (Watson, Coleman) (Entered: 03/12/2019)

03/12/2019

30 REPORT ON THE FILING OF AN ACTION regarding a copyright (Initial Notification) filed by Gary Frisby. (Watson, Coleman) (Entered: 03/12/2019)

03/13/2019

31 21 DAY Summons Issued re Complaint 1 as to Defendant Sony Music Entertainment. (lom) (Entered: 03/13/2019)

App.153a

03/13/2019

32 21 DAY Summons Issued re Complaint 1 as to Defendant Universal Music Group, Inc. (lom) (Entered: 03/13/2019)

03/13/2019

33 21 DAY Summons Issued re Complaint 1 as to Defendant Roc Nation Records LLC. (lom) (Entered: 03/13/2019)

03/13/2019

34 21 DAY Summons Issued re Complaint 1 as to Defendant Jermaine Cole. (lom) (Entered: 03/13/2019)

03/13/2019

35 21 DAY Summons Issued re Complaint 1 as to Defendant Dreamville Records NY, Inc. (lom) (Entered: 03/13/2019)

03/13/2019

36 21 DAY Summons Issued re Complaint 1 as to Defendant Cortez Bryant. (lom) (Entered: 03/13/2019)

03/13/2019

37 21 DAY Summons Issued re Complaint 1 as to Defendant Matthew Samuels. (lom) (Entered: 03/13/2019)

03/13/2019

38 21 DAY Summons Issued re Complaint 1 as to Defendant Michael Hernandez. (lom) (Entered: 03/13/2019)

App.154a

03/13/2019

39 21 DAY Summons Issued re Complaint 1 as to Defendant Anderson Hernandez. (lom) (Entered: 03/13/2019)

03/13/2019

40 21 DAY Summons Issued re Complaint 1 as to Defendant Bryson Tiller. (lom) (Entered: 03/13/2019)

03/13/2019

41 ORDER by Judge George H. Wu: granting 29 Non-Resident Attorney Leia V Leitner APPLICATION to Appear Pro Hac Vice on behalf of Gary Frisby, designating Coleman W. Watson as local counsel. (lom) (Entered: 03/14/2019)

03/20/2019

42 Standing Order Re Final Pre-Trial Conferences for Civil Jury Trials by Judge George H. Wu. (lom) (Entered: 03/20/2019)

03/21/2019

43 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Universal Music Group, Inc. served on 3/15/2019, answer due 4/5/2019. Service of the Summons and Complaint were executed upon Amy McLaren, Managing Agent in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 03/21/2019)

03/21/2019

44 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Sony Music Entertainment served on 3/15/2019, answer due 4/5/2019. Service of the Summons and Complaint were executed upon Lynanne Gares, Managing Agent in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 03/21/2019)

03/26/2019

45 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Dreamville Records NY, Inc. served on 3/19/2019, answer due 4/9/2019. Service of the Summons and Complaint were executed upon Paul Hopeck, Assistant V.P. in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 03/26/2019)

03/26/2019

46 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Roc Nation Records LLC served on 3/18/2019, answer due 4/8/2019. Service of the Summons and Complaint were executed upon Joanne "Doe", Authorized to Accept in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 03/26/2019)

03/28/2019

47 APPLICATION of Non-Resident Attorney Matthew E. Moats to Appear Pro Hac Vice on behalf of Plaintiff Gary Frisby (Pro Hac Vice Fee - \$400 Fee Paid, Receipt No. 0973-23454507) filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 03/28/2019)

03/29/2019

48 STIPULATION for Extension of Time to File as to Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 03/29/2019)

03/29/2019

49 STIPULATION for Extension of Time to File as to Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 03/29/2019)

03/29/2019

52 ORDER by Judge George H. Wu: GRANTING 47 Non-Resident Attorney Matthew E. Moats APPLICATION to Appear Pro Hac Vice on behalf of Plaintiff, Gary F. Frisby pka G-Money, designating Coleman W Watson as local counsel. (shb) (Entered: 04/01/2019)

04/01/2019

50 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Cortez Bryant served on 3/27/2019, answer due 4/17/2019.

Service of the Summons and Complaint were executed upon Danielle Walls, Assistant Authorized to Accept in compliance with Federal Rules of Civil Procedure by substituted service at home address and no service by mail was executed. Original Summons returned. (Watson, Coleman) (Entered: 04/01/2019)

04/01/2019

51 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Anderson Hernandez served on 3/19/2019, answer due 4/9/2019. Service of the Summons and Complaint were executed upon Anderson Hernandez in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 04/01/2019)

04/01/2019

53 ORDER ON STIPULATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT by Judge George H. Wu re Stipulation for Extension of Time to File Response/Reply 48. Defendant Universal Music Group, Inc.'s answer due 5/6/2019. (mrgo) (Entered: 04/02/2019)

04/01/2019

54 ORDER ON STIPULATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT by Judge George H. Wu re Stipulation for Extension of Time to File Response/Reply 49. Defendant Sony Music Entertainment's



answer due 5/6/2019. (mrgo) (Entered: 04/02/2019)

04/08/2019

55 Joint STIPULATION Extending Time to Answer the complaint as to Dreamville Records NY, Inc. answer now due 5/8/2019; Roc Nation Records LLC answer now due 5/8/2019, filed by defendants Dreamville Records NY, Inc.; Roc Nation Records LLC. (Attorney Benjamin S Akley added to party Dreamville Records NY, Inc. (pty:dft), Attorney Benjamin S Akley added to party Roc Nation Records LLC (pty:dft)) (Akley, Benjamin) (Entered: 04/08/2019)

04/09/2019

56 STIPULATION for Extension of Time to File as to Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 04/09/2019)

04/15/2019

57 ORDER ON STIPULATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT by Judge George H. Wu re: Stipulation for Extension of Time to File Response/Reply 56. Defendant Anderson Hernandez shall respond to the complaint on or before 5/6/2019. (mrgo) (Entered: 04/16/2019)

04/22/2019

58 REQUEST for Clerk to Enter Default against Defendant Cortez Bryant filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 04/22/2019)

04/23/2019

59 DEFAULT BY CLERK F.R.Civ.P.55(a) as to Cortez Bryant an individual. (mrgo) (Entered: 04/23/2019)

04/24/2019

60 NOTICE OF MOTION AND MOTION for Leave to file to Serve Discovery on Defendant Cortez Bryant filed by Plaintiff Gary Frisby. Motion set for hearing on 5/30/2019 at 08:30 AM before Judge George H. Wu. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 04/24/2019)

04/25/2019

61 NOTICE OF SERVICE filed by Plaintiff Gary Frisby, re Clerks Entry of Default (CV-37) – optional html form 59, NOTICE OF MOTION AND MOTION for Leave to file to Serve Discovery on Defendant Cortez Bryant 60 served on 04/25/2019. (Watson, Coleman) (Entered: 04/25/2019)

04/25/2019

62 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Service of the Summons and Complaint were executed upon Danielle Walls, Assistant Authorized to

Accept in compliance with Federal Rules of Civil Procedure by substituted service at business address and no service by mail was executed. Original Summons returned. (Watson, Coleman) (Entered: 04/25/2019)

05/03/2019

63 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Bryson Tiller served on 5/2/2019, answer due 5/23/2019. Service of the Summons and Complaint were executed upon Charlene Brown, Grandmother in compliance with Federal Rules of Civil Procedure by substituted service at home address and no service by mail was executed. Original Summons returned. (Watson, Coleman) (Entered: 05/03/2019)

05/03/2019

64 STIPULATION for Extension of Time to File Answer to May 17, 2019 re Complaint (Attorney Civil Case Opening) 1 filed by defendant Sony Music Entertainment. (Attachments: # 1 Proposed Order) (Attorney Peter J Anderson added to party Sony Music Entertainment (pty:dft)) (Anderson, Peter) (Entered: 05/03/2019)

05/03/2019

65 NOTICE of Interested Parties filed by defendant Sony Music Entertainment, identifying Sony Corporation. (Anderson, Peter) (Entered: 05/03/2019)

05/06/2019

66 Joint STIPULATION Extending Time to Answer the complaint as to Universal Music Group, Inc. answer now due 5/17/2019, filed by defendant Universal Music Group, Inc. (Attachments: # 1 Proposed Order) (Attorney Benjamin S Akley added to party Universal Music Group, Inc. (pty:dft)) (Akley, Benjamin) (Entered: 05/06/2019)

05/06/2019

67 Joint STIPULATION Extending Time to Answer the complaint as to Roc Nation Records LLC answer now due 5/17/2019, filed by defendant Roc Nation Records LLC. (Attachments: # 1 Proposed Order) (Akley, Benjamin) (Entered: 05/06/2019)

05/06/2019

68 NOTICE OF MOTION AND MOTION to Dismiss for Lack of Jurisdiction *And Improper Venue* filed by Defendant Anderson Hernandez. Motion set for hearing on 6/17/2019 at 08:30 AM before Judge George H. Wu. (Attachments: # 1 Proposed Order GRANTING MOTION OF DEFENDANT ANDERSON HERNANDEZ, p/k/a VINYLZ, TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF JURISDICTION AND IMPROPER VENUE) (Attorney Edwin F McPherson added to party Anderson Hernandez (pty:dft)) (McPherson, Edwin) (Entered: 05/06/2019)

05/07/2019

69 STIPULATION for Extension of Time to File Response as to Stipulation Extending Time to Answer (30 days or less), 55 filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 05/07/2019)

05/07/2019

70 Notice of Appearance or Withdrawal of Counsel: for attorney William Archer counsel for Defendant Jermaine Cole. Adding William Archer as counsel of record for Jermaine Cole, p/k/a J. Cole for the reason indicated in the G-123 Notice. Filed by Defendant Jermaine Cole, p/k/a J. Cole. (Attorney William Archer added to party Jermaine Cole (pty:dft)) (Archer, William) (Entered: 05/07/2019)

05/07/2019

71 [DOCUMENT STRICKEN PER DOC. NO. 73] Request for Approval of Substitution or Withdrawal of Counsel filed by Defendant Dreamville Records NY, Inc. *William Archer as new counsel for Dreamville Records NY, Inc.* (Archer, William) Modified on 5/8/2019 (mrgo). (Entered: 05/07/2019)

05/08/2019

72 NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Miscellaneous Document 71. The following error(s) was/were found: Incorrect event selected. Correct event to be used is: Requests > Substitute Attorney (G-01). Proposed Document

was not submitted as separate attachment. Other error(s) with document(s): A proposed order (G-01 Order) should be submitted as a separate attachment to the Request or to a Notice of Lodging. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (mrgo) (Entered: 05/08/2019)

05/08/2019

73 RESPONSE BY THE COURT TO NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS RE: Miscellaneous Document 71 by Clerk of Court. Docket No. 71 is stricken for the reason stated in the Notice 72 filed on May 8, 2019. Also, pursuant to L.R. 5-4.4.2, email the proposed order in either Word or Word-Perfect to Judge Wu's email address at GW\_chambers@cad.uscourts.gov. You can find the form in the Court's website under Forms. (mrgo) (Entered: 05/08/2019)

05/08/2019

74 REQUEST TO SUBSTITUTE ATTORNEY William Archer in place of attorney Michael J. Niborski and Benjamin S. Akley filed by Defendant Dreamville Records NY, Inc. (Attachments: # 1 Proposed Order) (Attorney William Archer added to party Dreamville

Records NY, Inc. (pty:dft) (Archer, William)  
(Entered: 05/08/2019)

05/08/2019

75 ORDER EXTENDING TIME FOR DEFENDANT UMG RECORDINGS, INC. TO RESPOND TO COMPLAINT TO ALLOW FOR PLAINTIFF'S FILING OF FIRST AMENDED COMPLAINT 66 by Judge George H. Wu. IT IS HEREBY ORDERED: 1. The time for UMG to respond to Plaintiff's Complaint be and hereby is extended to May 17, 2019; 2. On or before May 13, 2019, Plaintiff shall file a First Amended Complaint; and 3. In the event that Plaintiff files a First Amended Complaint, UMG shall have 21 days from Plaintiffs filing and service of the First Amended Complaint to respond to that pleading. (lom) (Entered: 05/09/2019)

05/08/2019

76 ORDER EXTENDING TIME FOR DEFENDANT ROC NATION RECORDS, LLC TO RESPOND TO COMPLAINT TO ALLOW FOR PLAINTIFF'S FILING OF FIRST AMENDED COMPLAINT 67 by Judge George H. Wu. IT IS HEREBY ORDERED: 1. The time for RN to respond to Plaintiff's Complaint be and hereby is extended to May 17, 2019; 2. On or before May 13, 2019, Plaintiff shall file a First Amended Complaint; and 3. In the event that Plaintiff files a First Amended Complaint, RN shall have 21 days from Plaintiffs filing and service of the First

Amended Complaint to respond to that pleading. (lom) Modified on 5/9/2019 (lom). (Entered: 05/09/2019)

05/08/2019

77 ORDER ON STIPULATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT 69 by Judge George H. Wu. Defendants, DREAMVILLE RECORDS NY, INC. and JERMAINE COLE, p/k/a J. COLE, shall respond to Frisby's anticipated Amended Complaint on or before June 3, 2019. (lom) (Entered: 05/09/2019)

05/08/2019

78 ORDER EXTENDING TIME FOR DEFENDANT SONY MUSIC ENTERTAINMENT TO RESPOND TO COMPLAINT TO ALLOW FOR PLAINTIFF'S FILING OF FIRST AMENDED COMPLAINT 64 by Judge George H. Wu. IT IS HEREBY ORDERED 1. that the time for Sony Music to respond to plaintiffs Complaint be and hereby is extended to May 17, 2019; 2. that on or before May 13, 2019, plaintiff shall file a First Amended Complaint; and 3. that Sony Music shall have twenty-one days from plaintiffs filing and service of his First Amended Complaint to respond to that pleading. (lom) (Entered: 05/09/2019)

05/13/2019

79 FIRST AMENDED COMPLAINT against Defendants Cortez Bryant, Jermaine Cole, Dreamville Records NY, Inc., Anderson



Hernandez, Michael Hernandez, Roc Nation Records LLC, Matthew Samuels, Sony Music Entertainment, Bryson Tiller, Universal Music Group, Inc. amending Complaint (Attorney Civil Case Opening) 1, filed by Plaintiff Gary Frisby (Watson, Coleman) (Entered: 05/13/2019)

05/13/2019

80 ORDER by Judge George H. Wu: granting 74 Request to Substitute Attorney. William Archer is substituted in place of attorney Michael J. Niborski and Benjamin S. Akley for Defendant Dreamville Records NY, Inc. Attorney Benjamin S Akley and Michael J Niborski terminated. (mrgo) (Entered: 05/14/2019)

05/15/2019

81 MINUTES (IN CHAMBERS) – COURT ORDER by Judge George H. Wu re: 68 MOTION to Dismiss for Lack of Jurisdiction. On May 13, 2019, Plaintiff filed a First Amended Complaint. In light of that filing, the Operative Complaint is no longer the original complaint. As such, the Court VACATES Defendant Anderson Hernandez p/k/a Vinylz's Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction and Improper Venue 68, filed on May 6, 2019, and set for hearing on June 17, 2019. (mrgo) (Entered: 05/15/2019)

05/23/2019

82 MINUTE ORDER (IN CHAMBERS) VACATING HEARING AND DENYING MOTION FOR LEAVE TO SERVE DISCOVERY by Judge George H. Wu re: 60 MOTION for Leave to File. (mrgo) (Entered: 05/24/2019)

05/28/2019

83 STIPULATION Extending Time to Answer the complaint as to Anderson Hernandez answer now due 6/3/2019, re Amended Complaint/Petition, 79 filed by Defendant Anderson Hernandez. (Attachments: # 1 Proposed Order ON STIPULATION FOR EXTENSION OF TIME FOR DEFENDANT ANDERSON HERNANDEZ, p/k/a VINYLZ, TO RESPOND TO FIRST AMENDED COMPLAINT) (Pine, Pierre) (Entered: 05/28/2019)

05/28/2019

84 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Michael Hernandez served on 5/23/2019, answer due 6/13/2019. Service of the Summons and Complaint were executed upon Sahi Hernandez, as Mother of Michael Hernandez, at Defendant's Usual Place of Abode in compliance with Federal Rules of Civil Procedure by substituted service at home address and by also mailing a copy. Original Summons returned. (Watson, Coleman) (Entered: 05/28/2019)

05/29/2019

88 ORDER ON STIPULATION FOR EXTENSION OF TIME FOR DEFENDANT

ANDERSON HERNANDEZ, p/k/a VINYLZ, TO RESPOND TO FIRST AMENDED COMPLAINT by Judge George H. Wu, re Stipulation Extending Time to Answer (30 days or less), 83. Defendant, ANDERSON HERNANDEZ, p/k/a VINYLZ, shall have until by or before June 3, 2019 to respond to the First Amended Complaint. (mrgo) (Entered: 05/31/2019)

05/30/2019

85 PROOF OF SERVICE filed by Plaintiff Gary Frisby, re Amended Complaint/Petition, 79, Order on Motion for Leave to File Document 82 served on May 15, 2019. (Watson, Coleman) (Entered: 05/30/2019)

05/30/2019

86 REQUEST for Clerk to Enter Default against Defendant Cortez Bryant filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 05/30/2019)

05/31/2019

87 DEFAULT BY CLERK F.R.Civ.P.55(a) as to Cortez Bryant an individual. (mrgo) (Entered: 05/31/2019)

06/03/2019

89 NOTICE OF DISMISSAL filed by Plaintiff Gary Frisby pursuant to FRCP 41a(1) as to Anderson Hernandez, Matthew Samuels. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 06/03/2019)

06/03/2019

90 NOTICE of Interested Parties filed by Defendant Roc Nation Records LLC, identifying Live Nation Worldwide, Inc; Live Nation Entertainment, Inc.; Marcy Media LLC. (Niborski, Michael) (Entered: 06/03/2019)

06/03/2019

91 ANSWER to Amended Complaint/Petition, 79 filed by Defendant Roc Nation Records LLC. (Niborski, Michael) (Entered: 06/03/2019)

06/03/2019

92 NOTICE of Interested Parties filed by Defendant Universal Music Group, Inc., identifying Universal Music Group Holdings, Inc.; Universal Music Group, Inc.; Vivendi, S.A.. (Niborski, Michael) (Entered: 06/03/2019)

06/03/2019

93 ANSWER to Amended Complaint/Petition, 79 filed by Defendant Universal Music Group, Inc. (Niborski, Michael) (Entered: 06/03/2019)

06/03/2019

94 ANSWER to Amended Complaint/Petition, 79 with JURY DEMAND filed by defendant Sony Music Entertainment. (Anderson, Peter) (Entered: 06/03/2019)

06/03/2019

95 ANSWER to Amended Complaint/Petition, 79 with JURY DEMAND filed by Defendants Jermaine Cole, Dreamville Records NY, Inc. (Archer, William) (Entered: 06/03/2019)

06/04/2019

96 ORDER ON NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO DEFENDANTS MATTHEW SAMUELS AND ANDERSON HERNANDEZ 89 by Judge George H. Wu. The Court hereby ORDERS and ADJUDGES as follows: 1. Defendant Matthew Samuels is dismissed from this action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). 2. Defendant Anderson Hernandez is dismissed from this action without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). (lom) (Entered: 06/04/2019)

06/04/2019

97 NOTICE of Appearance filed by attorney Jean Monica Kim on behalf of Defendants Jermaine Cole, Dreamville Records NY, Inc. (Attorney Jean Monica Kim added to party Jermaine Cole (pty:dft), Attorney Jean Monica Kim added to party Dreamville Records NY, Inc. (pty:dft)) (Kim, Jean) (Entered: 06/04/2019)

06/05/2019

98 MINUTE ORDER IN CHAMBERS – ORDER SETTING SCHEDULING CONFERENCE by Judge George H. Wu. (Rule 26 Meeting Report due by 7/1/2019. Scheduling Conference set for 7/11/2019 at 08:30 AM before Judge George H. Wu.) (mrgo) (Entered: 06/05/2019)

06/05/2019

99 NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice of Appearance, 97. The following error(s) was/were found: Incorrect event selected. Correct event to be used is: Notice of Appearance or Withdrawal of Counsel G123. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (ak) (Entered: 06/05/2019)

06/05/2019

100 Notice of Appearance or Withdrawal of Counsel: for attorney Edwin F McPherson counsel for Defendant Anderson Hernandez. Edwin F. McPherson will no longer receive service of documents from the Clerks Office for the reason indicated in the G-123 Notice. Edwin F. McPherson is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant ANDERSON HERNANDEZ, p/k/a VINYLZ. (McPherson, Edwin) (Entered: 06/05/2019)

06/05/2019

101 Notice of Appearance or Withdrawal of Counsel: for attorney Pierre B Pine counsel for Defendant Anderson Hernandez. Pierre B. Pine will no longer receive service of documents from the Clerks Office for the reason

indicated in the G-123 Notice. Pierre B. Pine is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant ANDERSON HERNANDEZ, p/k/a VINYLZ. (Pine, Pierre) (Entered: 06/05/2019)

06/21/2019

102 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Bryson Tiller served on 6/1/2019, answer due 6/24/2019. Service of the Summons and Complaint were executed upon Bryson Tiller in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 06/21/2019)

06/24/2019

103 ANSWER to Amended Complaint/Petition, 79 with JURY DEMAND filed by defendant Bryson Tiller. (Attorney Peter J Anderson added to party Bryson Tiller (pty:dft)) (Anderson, Peter) (Entered: 06/24/2019)

06/24/2019

104 NOTICE of Interested Parties filed by Defendant Bryson Tiller, identifying Sony Music Entertainment; Sony Corporation. (Anderson, Peter) (Entered: 06/24/2019)

07/01/2019

105 JOINT REPORT Rule 26(f) Discovery Plan; estimated length of trial 10-12 days, filed by

Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 07/01/2019)

07/11/2019

106 MINUTES OF SCHEDULING CONFERENCE held before Judge George H. Wu. For reasons stated on the record, the Court consolidates this action with, Gary Frisby v. Sony Music Entertainment, et al., CV 19-1712-GW-AGRx for pretrial purposes. Counsel are directed to make all future filings in the lead case CV 19-1712-GW-AGRx. The Clerk's Office will add any necessary parties and counsel in the lead case. The scheduling conference set for August 8, 2019, is VACATED. The Court sets the following: Discovery cut-off 1/3/2020. Motions due by 3/9/2020. Last date to conduct mediation is 12/13/2019. Post-Mediation Status Conference set for 12/16/2019 at 08:30 AM before Judge George H. Wu. Pretrial Conference set for 4/9/2020 at 08:30 AM before Judge George H. Wu. Jury Trial set for 4/21/2020 at 09:00 AM before Judge George H. Wu. Court Reporter: Katie E. Thibodeaux. (mrgo) Modified on 7/15/2019 (mrgo). (Entered: 07/15/2019)

07/15/2019

107 ANSWER to Complaint (Attorney Civil Case Opening) *1 in consolidated case no. 19-cv-4167* filed by defendant Universal Music Group, Inc. (Niborski, Michael) (Entered: 07/15/2019)

07/15/2019



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108 ANSWER to Complaint (Attorney Civil Case Opening) 1 *in consolidated case no 19-cv-4167* filed by defendant Roc Nation Records LLC. (Niborski, Michael) (Entered: 07/15/2019)

08/08/2019

109 STIPULATION for Protective Order filed by defendants Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Stipulated Protected Order marked against Magistrate Judge's form) (Anderson, Peter) (Entered: 08/08/2019)

08/12/2019

110 STIPULATED PROTECTIVE ORDER by Magistrate Judge Alicia G. Rosenberg. re Stipulation for Protective Order 109. (*See* Order for Further Details) (kl) (Entered: 08/12/2019)

08/16/2019

111 STIPULATION for Discovery as to EARLY MUSICOLOGIST AND SOUND RECORDING EXPERT DISCOVERY filed by defendants Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Anderson, Peter) (Entered: 08/16/2019)

08/19/2019

112 ORDER SETTING EARLY MUSICOLOGIST AND SOUND RECORDING EXPERT DISCOVERY by Judge George H. Wu, re Stipulation 111. *SEE* DOCUMENT FOR FURTHER INFORMATION. (twdb) (Entered: 08/19/2019)

08/20/2019

113 ANSWER to Amended Complaint/Petition, 79 with JURY DEMAND filed by defendant Michael Hernandez. (Attorney Peter J Anderson added to party Michael Hernandez (pty:dft)) (Anderson, Peter) (Entered: 08/20/2019)

08/20/2019

114 ANSWER to Complaint (Attorney Civil Case Opening) 1 with JURY DEMAND filed by defendant Michael Hernandez. (Anderson, Peter) (Entered: 08/20/2019)

08/20/2019

115 NOTICE of Interested Parties filed by defendant Michael Hernandez, identifying Bryson Tiller; Sony Music Entertainment, owned by Sony Corporation. (Anderson, Peter) (Entered: 08/20/2019)

09/17/2019

116 STIPULATION for Discovery as to Extend by One Week Deadline for Initial Exchange of Musicologist and Sound Recording Expert Disclosures filed by Defendants Jermaine Cole, Dreamville Records NY, Inc. (Attachments: # 1 Proposed Order) (Archer, William) (Entered: 09/17/2019)

09/18/2019

117 ORDER ON STIPULATION TO EXTEND BY ONE WEEK DEADLINE FOR INITIAL EXCHANGE OF MUSICOLOGIST AND

SOUND RECORDING EXPERT DISCLOSURES 116 by Judge George H. Wu. IT IS HEREBY ORDERED The deadline for all parties' respective initial musicologist and sound recording expert disclosures, and only those expert disclosures, shall be and hereby is extended from September 19, 2019 to September 26, 2019. (hr) (Entered: 09/20/2019)

09/23/2019

118 APPLICATION of Coleman W. Watson to Withdraw as Attorney filed by Plaintiff Gary Frisby. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 09/23/2019)

09/26/2019

119 STIPULATION for Discovery as to A FINAL EXTENSION, BY ANOTHER TWO WEEKS, OF THE DEADLINE FOR INITIAL EXCHANGE OF MUSICOLOGIST AND SOUND RECORDING EXPERT DISCLOSURES filed by Defendant Dreamville Records NY, Inc. (Attachments: # 1 Proposed Order) (Archer, William) (Entered: 09/26/2019)

09/30/2019

120 ORDER ON STIPULATION FOR A FINAL EXTENSION, BY ANOTHER TWO WEEKS, OF THE DEADLINE FOR INITIAL EXCHANGE OF MUSICOLOGIST AND SOUND RECORDING EXPERT DISCLOSURES 119 by Judge George H. Wu. The deadline for all parties' respective initial musicologist and sound recording expert

disclosures, and only those expert disclosures, shall be and hereby is extended from September 26, 2019 to October 10, 2019. This shall be the final such extension. (lom) (Entered: 10/01/2019)

09/30/2019

121 ORDER ON REQUEST FOR APPROVAL OF SUBSTITUTION OR WITHDRAWAL OF ATTORNEY by Judge George H. Wu: granting 118 APPLICATION to Substitute Gary Frisby in Pro SE and instead of Attorneys Coleman W Watson; Leia V Leitner and Matthew E Moats. (lom) (Entered: 10/01/2019)

11/26/2019

122 STIPULATION for Discovery as to extending early expert disclosure time to depose expert filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Anderson, Peter) (Entered: 11/26/2019)

11/26/2019

123 ORDER EXTENDING TIME TO DEPOSE PLAINTIFFS EXPERT WITNESS by Judge George H. Wu. IT IS HEREBY ORDERED that: The time for Defendants to depose plaintiffs designated expert, Brian McBrearty, be and hereby is extended to and including December 20, 2019. (*SEE ORDER FOR FURTHER DETAILS*) re Stipulation for Discovery 122 (yl) (Entered: 12/02/2019)

12/16/2019

124 MINUTES OF POST-MEDIATION STATUS CONFERENCE held before Judge George H. Wu. Plaintiff Gary Frisby, pro se, is not present. Court confers with defense counsel. Settlement is not reached. The Court reminds parties of pretrial and trial dates. Court Reporter: Terri A Hourigan. (lom) (Entered: 12/17/2019)

12/18/2019

125 STIPULATION to Continue Deposition from 12-19-2019 to 12-27-2019 filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Anderson, Peter) (Entered: 12/18/2019)

12/19/2019

126 ORDER RESCHEDULING DEPOSITION OF PLAINTIFF by Magistrate Judge Alicia G. Rosenberg, re Stipulation to Continue 125. IT IS HEREBY ORDERED that the deposition of Plaintiff presently noticed for December 19, 2019, be and hereby is rescheduled and Plaintiff shall instead appear for his deposition in these consolidated cases, commencing at 9:30 a.m. on December 27, 2019, at the following offices of counsel for the Sony Music Defendants: (see document for further details). (hr) (Entered: 12/19/2019)

01/31/2020

127 NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's

First Amended Complaint, Complaint, and Claims filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. Motion set for hearing on 3/2/2020 at 08:30 AM before Judge George H. Wu. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Michael Hernandez, # 3 Declaration of Dag Sandmark, # 4 Declaration of Dr. Lawrence Ferrara, # 5 Exhibit 4, # 6 Exhibit 6, # 7 Exhibit 10, # 8 Exhibit 11, # 9 Declaration of Prof. Paul Geluso, # 10 Exhibit 3, # 11 Exhibit 5, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Declaration of Peter Anderson, # 15 Exhibit 2, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 78, # 19 Exhibit 79, # 20 Exhibit 80, # 21 Exhibit 81, # 22 Exhibit 82, # 23 Exhibit 83, # 24 Exhibit 84, # 25 Exhibit 85, # 26 Exhibit 86, # 27 Exhibit 87, # 28 Exhibit 18, # 29 Exhibit 19, # 30 Notice of Lodging of Exhibit ISO MSJ, # 31 Notice of Manual Filing or Lodging, # 32 Proposed Statement of Uncontroverted Facts and Conclusions of Law, # 33 Proposed Order Granting MSJ or Partial Summary Judgment, # 34 Proposed Judgment, # 35 Proof of Service) (Anderson, Peter) (Entered: 01/31/2020)

02/03/2020

128 DECLARATION of Bryson Tiller In Support of Motion for Summary Judgment or Partial Summary Judgment NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's First Amended Complaint, Complaint, and Claims 127 filed by

App.180a

Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Anderson, Peter) (Entered: 02/03/2020)

02/03/2020

129 Amended NOTICE of Manual Filing filed by Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller of Audio CD. (Anderson, Peter) (Entered: 02/03/2020)

02/04/2020

130 Standing Order Re Summary Judgment Motions by Judge George H. Wu. (*See* document for details) (mrgo) (Entered: 02/04/2020)

02/14/2020

131 NOTICE OF NON-RECEIPT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT re NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's First Amended Complaint, Complaint, and Claims 127 filed by Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Anderson, Peter) (Entered: 02/14/2020)

02/21/2020

132 STIPULATION to Dismiss Case pursuant to FRCP 41(a)(1)(A)(ii) filed by Defendants Jermaine Cole, Dreamville Records NY, Inc., Roc Nation Records LLC, Universal Music Group, Inc. (Attachments: # 1 Proposed Order) (Attorney Michael J Niborski added

to party Jermaine Cole (pty:dft) (Niborski, Michael) (Entered: 02/21/2020)

02/21/2020

133 ORDER DISMISSING ACTION 132 by Judge George H. Wu. Pursuant to the Stipulation between plaintiff Gary Frisby, and defendants Roc Nation Records, LLC, UMG Recordings, Inc. (sued herein as “Universal Music Group d/b/a Interscope Records”), Dreamville Records NY, Inc. and Jermaine Cole, the consolidated actions are hereby dismissed against Roc Nation Records, LLC, UMG Recordings, Inc., Dreamville Records NY, Inc. and Jermaine Cole Roc, in their entirety, with prejudice, and with each party bearing its own costs, attorneys’ fees, and expenses. (lom) Modified on 2/24/2020 (lom). (Entered: 02/24/2020)

02/24/2020

134 NOTICE of Appearance filed by attorney Terran T Steinhart on behalf of Plaintiff Gary Frisby (Attorney Terran T Steinhart added to party Gary Frisby (pty:pla)) (Steinhart, Terran) (Entered: 02/24/2020)

02/24/2020

135 STATEMENT of Genuine Disputes NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff’s First Amended Complaint, Complaint, and Claims 127 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/24/2020)



02/24/2020

136 MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's First Amended Complaint, Complaint, and Claims 127 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/24/2020)

02/24/2020

137 OPPOSITION to NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's First Amended Complaint, Complaint, and Claims 127 Appendix of Exhibits filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/24/2020)

02/24/2020

138 DECLARATION of Gary Frisby in opposition to NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiffs First Amended Complaint, Complaint, and Claims 127 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/24/2020)

02/24/2020

139 DECLARATION of Brian McBrearty in opposition to NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiffs First Amended Complaint, Complaint, and Claims 127 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/24/2020)

02/25/2020

140 DECLARATION of James Belt in opposition to NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiffs First Amended Complaint, Complaint, and Claims 127 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/25/2020)

02/25/2020

141 REQUEST for Enlargement of Time to File Opposition to Motion for Summary Judgment filed by plaintiff Gary Frisby. Request set for hearing on 3/2/2022 at 08:30 AM before Judge George H. Wu. (Steinhart, Terran) (Entered: 02/25/2020)

02/25/2020

142 NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice of Appearance 134. The following error(s) was/were found: Incorrect event selected. Correct event to be used is: Substitute Attorney (G-01). See court's website for correct form – Request for Approval of Substitution or Withdrawal of Counsel; [Prop] Order. Docketing event for this form is by using search feature for form name and/or number. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (lom) (Entered: 02/25/2020)

02/26/2020

143 REQUEST TO SUBSTITUTE ATTORNEY Terran T. Steinhart in place of attorney Gary Frisby, pro per filed by plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 02/26/2020)

02/26/2020

144 MINUTES OF TELEPHONIC CONFERENCE held before Judge George H. Wu. Hearing is held off the record. The Court will accept Plaintiff's late Oppositions and will continue Defendants' Motion for Summary Judgment or Partial Summary Judgment 127, from March 2, 2020, to March 26, 2020 at 8:30 a.m. Defendants will have until March 12, 2020 to file their Replies. A Joint scheduling report is to be filed by March 12, 2020. Plaintiff's Informal Request for Extension of Time 141, is deemed MOOT. Court Reporter: None Present. (mrgo) (Entered: 02/27/2020)

02/27/2020

145 ORDER by Judge George H. Wu: granting 143 Request to Substitute Attorney, to substitute Terran T. Steinhart as counsel for plaintiff Gary Frisby. (sbou) (Entered: 03/02/2020)

03/12/2020

146 REPLY Support of Motion NOTICE OF MOTION AND MOTION for Summary Judgment as to As to Plaintiff's First Amended Complaint, Complaint, and Claims 127 filed by Defendants Michael Hernandez, Sony

Music Entertainment, Bryson Tiller. (Attachments: # 1 Declaration of Peter Anderson ISO Reply to Motion for Summary Judgment, # 2 Request for Evidentiary Rulings, # 3 Response to Plfts Statement of Genuine Disputes) (Anderson, Peter) (Entered: 03/12/2020)

03/12/2020

147 JOINT SCHEDULING REPORT of Pretrial Conference and Trial filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 03/12/2020)

03/24/2020

148 TEXT-ONLY ENTRY (IN CHAMBERS): by Judge George H. Wu: Pursuant to the Order of the Chief Judge No. 20-042, DEFENDANTS SONY MUSIC ENTERTAINMENT, BRYSON TILLER AND MICHAEL HERMANDEZ'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT 127, scheduled before this Court for March 26, 2020, is taken off-calendar. The Court will issue a decision as soon as it can based upon the filed papers. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 03/24/2020)

04/06/2020

149 MINUTE ORDER IN CHAMBERS by Judge George H. Wu. In light of the present coronavirus pandemic, the Orders of the Chief Judge Nos. 20-042 and -043 which have inter alia prohibited conducting civil jury trials at

this time, and the fact that the Court has taken the Defendants' motion for summary judgment under submission, the April 9, 2020 pre-trial conference and the April 21 trial dates are taken off-calendar. Those dates will be reset, if necessary, after the Court rules on summary judgment motion. (mrgo) (Entered: 04/06/2020)

09/30/2020

150 ORDER OF THE CHIEF JUDGE (#20-143) approved by Judge Philip S. Gutierrez. Pursuant to the recommended procedure adopted by the Court for the CREATION OF CALENDAR of Judge Stanley Blumenfeld, Jr., this case is transferred from Judge George H. Wu to the calendar of Judge Stanley Blumenfeld, Jr for all further proceedings. The case number will now reflect the initials of the transferee Judge 2:19-cv-01712 SB(AGR~~x~~). (rn) (Entered: 09/30/2020)

10/21/2020

151 ORDER OF THE CHIEF JUDGE (#20-170) approved by Chief Judge Philip S. Gutierrez. Amending Order of the Chief Judge 20-143 and vacating the transfer of this case to Judge Stanley Blumenfeld due to a related case and making this case ineligible for transfer. Accordingly, this case is returned to the calendar of Judge George H. Wu for all further proceedings. (rn) (Entered: 10/21/2020)

10/22/2020

152 Notice of Electronic Filing re Chief District Judge Transferring Case, 151 e-mailed to William Archer bounced due to No longer at firm. The primary e-mail address associated with the attorney record has been deleted. Pursuant to Local Rules it is the attorneys obligation to maintain all personal contact information including e-mail address in the CM/ECF system. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (lmh) TEXT ONLY ENTRY (Entered: 10/22/2020)

02/26/2021

153 TEXT-ONLY ENTRY – IN CHAMBERS: by Judge George H. Wu: The Court sets a hearing on DEFENDANTS SONY MUSIC ENTERTAINMENT, BRYSON TILLER AND MICHAEL HERNANDEZS MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT 127 for 3/4/2021 at 08:30 AM before Judge George H. Wu. The Court will provide parties with a tentative ruling at least 24 hours before the hearing. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 02/26/2021)

03/04/2021

154 MINUTES OF TELEPHONIC HEARING ON DEFENDANTS SONY MUSIC ENTERTAINMENT, BRYSON TILLER AND MICHAEL HERNANDEZ'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY

JUDGMENT 127 held before Judge George H. Wu. The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendants' Motion is continued to March 11, 2021 at 10:30 a.m. The parties are to submit their audio files at issue forthwith. Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 03/08/2021)

03/11/2021

155 Notice of Appearance or Withdrawal of Counsel: for attorney Arleen Fernandez counsel for Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. Adding Arleen Fernandez as counsel of record for Sony Music Entertainment, Bryson Tiller and Michael Hernandez for the reason indicated in the G-123 Notice. Filed by Defendants Sony Music Entertainment, Bryson Tiller and Michael Hernandez. (Attorney Arleen Fernandez added to party Michael Hernandez (pty:dft), Attorney Arleen Fernandez added to party Sony Music Entertainment (pty:dft), Attorney Arleen Fernandez added to party Bryson Tiller (pty:dft)) (Fernandez, Arleen) (Entered: 03/11/2021)

03/11/2021

156 MINUTES OF TELEPHONIC HEARING ON DEFENDANTS SONY MUSIC ENTERTAINMENT, BRYSON TILLER AND MICHAEL HERNANDEZ'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT 127 held before

Judge George H. Wu. Court hears further argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendants' Motion is GRANTED. Sony Defendants are to file a proposed judgment forthwith. A status conference as to Defendant Cortez Bryant is set for March 25, 2021 at 8:30 a.m. Plaintiff is to file a status report by noon on March 23, 2021. Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 03/12/2021)

03/12/2021

157 NOTICE OF LODGING filed *proposed Judgment* re Motion Hearing, Order on Motion for Summary Judgment, Set/Reset Deadlines/Hearings,, 156 (Attachments: # 1 proposed Judgment) (Anderson, Peter) (Entered: 03/12/2021)

03/14/2021

158 NOTICE OF LODGING filed *amended proposed Judgment* re Motion Hearing, Order on Motion for Summary Judgment,, Set/Reset Deadlines/Hearings,, 156 (Attachments: # 1 amended proposed Judgment) (Anderson, Peter) (Entered: 03/14/2021)

03/15/2021

159 JUDGMENT by Judge George H. Wu. IT IS ORDERED AND ADJUDGED that plaintiff Gary Frisby take nothing and that his First Amended Complaint in Case No. 2:19-cv-01712-GW-AGRx and his Complaint in Case



App.190a

No. 2:19-cv-04167-GW-AGR<sub>x</sub> each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs. (MD JS-6, Case Terminated). (lom) (Entered: 03/16/2021)

03/16/2021

160 REPORT ON THE DETERMINATION OF AN ACTION Regarding a Copyright. (Closing) (Attachments: # 1 Judgment) (lom) (Entered: 03/16/2021)

03/20/2021

161 STIPULATION for Extension of Time to File application to tax costs and motion for attorney's fees filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Anderson, Peter) (Entered: 03/20/2021)

03/22/2021

162 NOTICE OF DISMISSAL filed by plaintiff Gary Frisby pursuant to FRCP 41a(1) as to Cortez Bryant. (Steinhart, Terran) (Entered: 03/22/2021)

03/23/2021

163 ORDER EXTENDING TIME FOR THE SONY DEFENDANTS TO FILE MOTION FOR ATTORNEY'S FEES AND APPLICATION TO TAX COSTS by Judge George H. Wu, re Stipulation for Extension of Time to File 161.

If Plaintiff files by April 12, 2021, his planned motion pursuant to Federal Rules of Civil Procedure 59 and 60 then the time for the Sony Defendants to file an application to tax costs and a motion for attorney's fees is extended to fourteen days after entry of the Court's Order on Plaintiff's motion; or 2. If Plaintiff fails to file by April 12, 2021, his planned motion pursuant to Federal Rules of Civil Procedure 59 and 60, then the time for the Sony Defendants to file an application to tax costs and a motion for attorney's fees is extended to April 26, 2021. (mrgo) (Entered: 03/23/2021)

03/25/2021

164 MINUTES OF TELEPHONIC CONFERENCE held before Judge George H. Wu. Court and counsel confer. A dismissal as to remaining Defendant Cortez Bryant is filed on March 22, 2011. All that remains in this matter is Sony's motion for attorneys' fees and application to the clerk of court to tax costs. Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 03/26/2021)

03/25/2021

166 \*\*AMENDED MINUTES held before Judge George H. Wu re: Status Conference –optional html form, 164. Court and counsel confer. A dismissal as to remaining Defendant Cortez Bryant is filed on March 22, 2011. All that remains in this matter is Sonys motion for attorneys' fees and application to the clerk of court to tax costs. \*\*Counsel also advises the

Court that Plaintiff intends to file his Rule 59/60 Motion. (mrgo) (Entered: 03/29/2021)

03/26/2021

165 NOTICE OF MOTION AND MOTION for New Trial *and to Alter Summary Judgment per Rule 59, for Relief from Summary Judgment per Rule 60, Declaration and Memo of Points and Authorities, Request for Judicial Notice* filed by plaintiff Gary Frisby. Motion set for hearing on 4/26/2021 at 08:30 AM before Judge George H. Wu. (Steinhart, Terran) (Entered: 03/26/2021)

04/05/2021

167 MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION for New Trial *and to Alter Summary Judgment per Rule 59, for Relief from Summary Judgment per Rule 60, Declaration and Memo of Points and Authorities, Request for Judicial Notice* 165 filed by Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1. Declaration, # 2 Exhibit) (Anderson, Peter) (Entered: 04/05/2021)

04/11/2021

168 REPLY IN SUPPORT OF NOTICE OF MOTION AND MOTION for New Trial *and to Alter Summary Judgment per Rule 59, for Relief from Summary Judgment per Rule 60, Declaration and Memo of Points and Authorities, Request for Judicial Notice* 165 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 04/11/2021)

04/15/2021

169 TEXT-ONLY ENTRY – IN CHAMBERS: by Judge George H. Wu: The Court, on its own motion, CONTINUES PLAINTIFFS MOTION FOR A NEW TRIAL, TO ALTER THE SONY MUSIC ENTERTAINMENT, SUMMARY JUDGMENT PURSUANT TO FRCP 59, AND FOR RELIEF FROM THE SUMMARY JUDGMENT PURSUANT TO FRCP 60 165 previously scheduled for 04/26/2021 to 5/10/2021 at 08:30 AM before Judge George H. Wu. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 04/15/2021)

05/06/2021

170 TEXT-ONLY ENTRY – IN CHAMBERS: by Judge George H. Wu: Counsel are to appear telephonically for Monday's 05/10/2021 MOTION HEARING at 8:30 a.m. by contacting the court clerk at javier\_gonzalez@cacd.uscourts.gov for dial-in information. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 05/06/2021)

05/10/2021

171 MINUTES OF TELEPHONIC HEARING ON PLAINTIFF'S MOTION FOR A NEW TRIAL, TO ALTER THE SONY MUSIC ENTERTAINMENT, SUMMARY JUDGMENT PURSUANT TO FRCP 59, AND FOR RELIEF FROM THE SUMMARY JUDGMENT PURSUANT TO FRCP 60 165. held before Judge

George H. Wu. Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court DENIES Plaintiffs motion for reconsideration. Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 05/11/2021)

05/13/2021

172 MINUTE ORDER IN CHAMBERS – FINAL RULING TELEPHONIC HEARING ON PLAINTIFF'S MOTION FOR A NEW TRIAL, TO ALTER THE SONY MUSIC ENTERTAINMENT, SUMMARY JUDGMENT PURSUANT TO FRCP 59, AND FOR RELIEF FROM THE SUMMARY JUDGMENT PURSUANT TO FRCP 60 165 by Judge George H. Wu. Attached hereto is the Court's Final Ruling. The Court DENIES Plaintiffs motion for reconsideration. Defendant will prepare and file a proposed judgment forthwith. (mrgo) (Entered: 05/13/2021)

05/19/2021

173 APPLICATION to the Clerk to Tax Costs against defendants Bryson Tiller, Sony Music Entertainment, Michael Hernandez filed by defendants Bryson Tiller, Sony Music Entertainment, Michael Hernandez. (Attachments: # 1 Declaration of Peter Anderson, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5) (Anderson, Peter) (Entered: 05/19/2021)

05/24/2021

174 NOTICE OF MOTION AND MOTION for Attorney Fees filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. Motion set for hearing on 6/21/2021 at 08:30 AM before Judge George H. Wu. (Attachments: # 1 Memorandum, # 2 Declaration of Anderson, # 3 Exhibit 1, # 4 Exhibit Exhibit 2, # 5. Exhibit Exhibit 3, # 6 Exhibit Exhibit 4, # 7 Declaration of Goldberg, # 8 Declaration Declaration of Fanning, # 9 Proposed Order) (Anderson, Peter) (Entered: 05/24/2021)

06/01/2021

175 Plaintiff's Opposition to Defendants' Motion for Attorney's Fees opposition re: NOTICE OF MOTION AND MOTION for Attorney Fees 174 filed by Plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 06/01/2021)

06/03/2021

176 NOTICE of Appeal filed by plaintiff Gary Frisby. (Steinhart, Terran) (Entered: 06/03/2021)

06/03/2021

177 NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by plaintiff Gary Frisby. Appeal of Judgment, 159. (Appeal Fee - \$505 Fee Paid, Receipt No. ACACDC-31405985.) (Steinhart, Terran) (Entered: 06/03/2021)

06/04/2021

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178 NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by plaintiff Gary Frisby. Appeal of Minutes of In Chambers Order/Directive – no proceeding held, 172. (Appeal Fee – \$505 Fee Paid, Receipt No. ACACDC-31405987.) (Steinhart, Terran) (Entered: 06/04/2021)

06/04/2021

179 NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 21-55586 assigned to Notice of Appeal to 9th Circuit Court of Appeals 177 as to Plaintiff Gary Frisby. (lom) (Entered: 06/07/2021)

06/07/2021

180 NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 21-55587 assigned to Notice of Appeal to 9th Circuit Court of Appeals, 178 as to Plaintiff Gary Frisby. (lom) (Entered: 06/07/2021)

06/07/2021

181 REPLY in support of NOTICE OF MOTION AND MOTION for Attorney Fees 174 filed by Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Declaration Reply Declaration) (Anderson, Peter) (Entered: 06/07/2021)

06/09/2021

182 TEXT-ONLY ENTRY – IN CHAMBERS: by Judge George H. Wu: The Court, on its

own motion, CONTINUES DEFENDANTS MOTION FOR ATTORNEYS FEES 174 previously scheduled for 06/21/2021 to 7/8/2021 at 08:30 AM before Judge George H. Wu. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 06/09/2021)

06/14/2021

183 TRANSCRIPT ORDER re: Court of Appeals case number 21-55586 & 21-55587, as to plaintiff Gary Frisby for Court Reporter. Court will contact Terran T. Steinhart at terran@steinhartlaw.com with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the court reporter. (Steinhart, Terran) (Entered: 06/14/2021)

06/22/2021

184 BILL OF COSTS. Costs Taxed in amount of \$ \$3,974.65 in favor of Defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment and against Plaintiff. RE: APPLICATION to the Clerk to Tax Costs against defendants Bryson Tiller, Sony Music Entertainment, Michael Hernandez 173 (mca) (Entered: 06/22/2021)

07/07/2021

185 TRANSCRIPT for proceedings held on 3/4/2021 8:30 a.m. Court Reporter/Electronic Court Recorder: Terri Hourigan, phone number hourigan.terri@gmail.com. Transcript may be viewed at the court public terminal



or purchased through the Court Reporter/  
Electronic Court Recorder before the dead-  
line for Release of Transcript Restriction.  
After that date it may be obtained through  
PACER. Notice of Intent to Redact due within  
7 days of this date. Redaction Request due  
7/28/2021. Redacted Transcript Deadline set  
for 8/9/2021. Release of Transcript Restriction  
set for 10/5/2021. (Hourigan, Terri)  
(Entered: 07/07/2021)

07/07/2021

186 TRANSCRIPT for proceedings held on  
3/11/2021 8:30 a.m. Court Reporter/Electronic  
Court Recorder: Terri Hourigan, phone  
number hourigan.terri@gmail.com. Transcript  
may be viewed at the court public terminal  
or purchased through the Court Reporter/  
Electronic Court Recorder before the dead-  
line for Release of Transcript Restriction.  
After that date it may be obtained through  
PACER. Notice of Intent to Redact due within  
7 days of this date. Redaction Request due  
7/28/2021. Redacted Transcript Deadline set  
for 8/9/2021. Release of Transcript Restriction  
set for 10/5/2021. (Hourigan, Terri)  
(Entered: 07/07/2021)

07/07/2021

187 TRANSCRIPT for proceedings held on  
5/10/2021 8:30 a.m. Court Reporter/Electronic  
Court Recorder: Terri Hourigan, phone  
number hourigan.terri@gmail.com. Transcript  
may be viewed at the court public terminal  
or purchased through the Court Reporter/

Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 7/28/2021. Redacted Transcript Deadline set for 8/9/2021. Release of Transcript Restriction set for 10/5/2021. (Hourigan, Terri) (Entered: 07/07/2021)

07/07/2021

188 NOTICE OF FILING TRANSCRIPT filed for proceedings 3/4/2021; 3/11/2021; 5/10/2021 8:30 a.m. re Transcript 186, 187, 185 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (Hourigan, Terri) TEXT ONLY ENTRY (Entered: 07/07/2021)

07/08/2021

189 MINUTES OF TELEPHONIC HEARING ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES 174 Hearing held before Judge George H. Wu: Court hears oral argument. For reasons stated on the record, Defendant's Motion is taken under submission. Court Reporter: Terri A. Hourigan. (lc) (Entered: 07/09/2021)

07/13/2021

190 MINUTE ORDER (IN CHAMBERS) – FINAL RULING ON DEFENDANT'S MOTION FOR ATTORNEY'S FEES 174 by Judge George H. Wu re: 174 MOTION for Attorney Fees. IT IS HEREBY ORDERED that Defendants' Motion for Attorney Fees be and hereby is

App.200a

GRANTED and Defendants are awarded attorney's fees in the total amount of \$124,975.95. Fees awarded in favor of Sony Music Entertainment, Bryson Tiller, Michael Hernandez against Gary Frisby in the amount of \$124,975.95. (*See* document for details) (mrgo) (Entered: 07/14/2021)

01/12/2022

191 Notice of Appearance or Withdrawal of Counsel: for attorney Peter J. Anderson counsel for Defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. Arleen Fernandez is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by defendants Sony Music Entertainment, Bryson Tiller and Michael Hernandez. (Anderson, Peter) (Entered: 01/12/2022)

06/07/2022

192 MEMORANDUM from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 178 filed by Gary Frisby, Notice of Appeal to 9th Circuit Court of Appeals 177 filed by Gary Frisby. CCA #21-55586, 21-55587. The decision of the District Court is AFFIRMED IN PART, DISMISSED IN PART. (aco) (Entered: 06/08/2022)

06/29/2022

193 MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 178, Notice of Appeal to 9th Circuit Court of Appeals 177, CCA # 21-55586 and 21-55587. The judgment of this Court, entered June 07, 2022, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. USCA Memorandum 192 AFFIRMED IN PART, DISMISSED IN PART.] (mat) (Entered: 06/29/2022)

App.202a

**DOCKET REPORT FOR  
CASE #: 2:19-CV-04167-GW-AGR**

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U.S. DISTRICT COURT  
CALIFORNIA CENTRAL DISTRICT  
(WESTERN DIVISION - LOS ANGELES)  
CIVIL DOCKET FOR CASE #: 2:19-cv-04167-GW-AGR

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GARY FRISBY

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

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Assigned to: Judge George H. Wu  
Referred to: Magistrate Judge Alicia G. Rosenberg

Lead Case: 2:19-cv-01712-GW-AGR  
Related Case: 2:19-cv-01712-GW-AGR  
Cause: 17:101 Copyright Infringement

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Date Filed: 05/14/2019  
Date Terminated: 03/25/2021  
Jury Demand: Plaintiff  
Nature of Suit: 820 Copyright  
Jurisdiction: Federal Question

05/14/2019

- 1 COMPLAINT Receipt No: 0973-23735538 -  
Fee: \$400, filed by Plaintiff Gary Frisby.  
(Attorney Coleman W Watson added to party)

App.203a

Gary Frisby (pty:pla) (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

- 2 CIVIL COVER SHEET filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 05/14/2019)

05/14/2019

- 3 CORPORATE DISCLOSURE STATEMENT filed by Plaintiff Gary Frisby identifying none as Corporate Parent. (Watson, Coleman) (Entered: 05/14/2019)

05/14/2019

- 4 REPORT ON THE FILING OF AN ACTION regarding a copyright (Initial Notification) filed by Gary Frisby. (Watson, Coleman) (Entered: 05/14/2019)

05/14/2019

- 5 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 05/14/2019)

05/14/2019

- 6 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman) (Entered: 05/14/2019)

05/14/2019

- 7 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed

App.204a

by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

8 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

9 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

10 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

11 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

12 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

13 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed

App.205a

by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

14 Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening) 1 filed by Plaintiff Gary Frisby. (Watson, Coleman)  
(Entered: 05/14/2019)

05/14/2019

15 NOTICE OF ASSIGNMENT to District Judge John F. Walter and Magistrate Judge Karen L. Stevenson. (esa) (Entered: 05/14/2019)

05/14/2019

16 NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (esa)  
(Entered: 05/14/2019)

05/14/2019

17 21 DAY Summons issued re Complaint 1 as to defendant Sony Music Entertainment. (esa)  
(Entered: 05/14/2019)

05/14/2019

18 21 DAY Summons issued re Complaint 1 as to defendant Universal Music Group, Inc. (esa)  
(Entered: 05/14/2019)

05/14/2019

19 21 DAY Summons issued re Complaint 1 as to defendant ROC Nation Records, LLC. (esa)  
(Entered: 05/14/2019)



App.206a

05/14/2019

20 21 DAY Summons issued re Complaint 1 as to defendant Jermaine Cole. (esa) (Entered: 05/14/2019)

05/14/2019

21 21 DAY Summons issued re Complaint 1 as to defendant Dreamville Records NY, Inc. (esa) (Entered: 05/14/2019)

05/14/2019

22 21 DAY Summons issued re Complaint 1 as to defendant Cortez Bryant. (esa) (Entered: 05/14/2019)

05/14/2019

23 21 DAY Summons issued re Complaint 1 as to defendant Matthew Samuels. (esa) (Entered: 05/14/2019)

05/14/2019

24 21 DAY Summons issued re Complaint 1 as to defendant Michael Hernandez. (esa) (Entered: 05/14/2019)

05/14/2019

25 21 DAY Summons issued re Complaint 1 as to defendant Anderson Hernandez. (esa) (Entered: 05/14/2019)

05/14/2019

26 21 DAY Summons issued re Complaint 1 as to defendant Bryson Tiller. (esa) (Entered: 05/14/2019)

App.207a

05/14/2019

- 27 NOTICE of Related Case(s) filed by Plaintiff Gary Frisby. Related Case(s): 2:19-cv-01712-GW-AGR (Watson, Coleman) (Entered: 05/14/2019)

05/16/2019

- 28 STANDING ORDER by Judge John F. Walter. READ THIS ORDER CAREFULLY. IT CONTROLS THE CASE AND DIFFERS IN SOME RESPECTS FROM THE LOCAL RULES. This action has been assigned to the calendar of Judge John F. Walter. (iv) (Entered: 05/16/2019)

05/20/2019

- 29 ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 19-03-Related Case-filed. Related Case No: 2:19-cv-01712 GW(AGRx). Case transferred from Magistrate Judge Karen L. Stevenson and Judge John F. Walter to Judge George H. Wu and Magistrate Judge Alicia G. Rosenberg for all further proceedings. The case number will now reflect the initials of the transferee Judge 2:19-cv-4167 GW(AGRx). Signed by Judge George H. Wu (rn) (Entered: 05/20/2019)

05/22/2019

- 30 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. upon Sony Music Entertainment waiver sent by Plaintiff on 5/15/2019, answer due 7/15/2019. Waiver of Service signed by Peter Anderson, Esq. (Watson, Coleman) (Entered: 05/22/2019)

App.208a

05/22/2019

- 31 Standing Order Re Final Pre-Trial Conferences for Civil Jury Trials by Judge George H. Wu. (lom) (Entered: 05/23/2019)

05/23/2019

- 32 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. upon ROC Nation Records, LLC waiver sent by Plaintiff on 5/15/2019, answer due 7/15/2019. Waiver of Service signed by Michael J. Niborski, Esq. (Watson, Coleman) (Entered: 05/23/2019)

05/23/2019

- 33 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. upon Universal Music Group, Inc. waiver sent by Plaintiff on 5/15/2019, answer due 7/15/2019. Waiver of Service signed by Michael J. Niborski, Esq. (Watson, Coleman) (Entered: 05/23/2019)

05/24/2019

- 34 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. upon Anderson Hernandez waiver sent by Plaintiff on 5/15/2019, answer due 7/15/2019. Waiver of Service signed by Edwin F. McPherson. (Watson, Coleman) (Entered: 05/24/2019)

05/28/2019

- 35 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Michael Hernandez served on 5/23/2019, answer due

6/13/2019. Service of the Summons and Complaint were executed upon Sahi Hernandez, as Mother of Michael Hernandez, at Defendant's Usual Place of Abode in compliance with Federal Rules of Civil Procedure by substituted service at home address and by also mailing a copy. Original Summons returned. (Watson, Coleman) (Entered: 05/28/2019)

06/03/2019

36 NOTICE OF DISMISSAL filed by Plaintiff Gary Frisby pursuant to FRCP 41a(1) as to Anderson Hernandez, Matthew Samuels. (Attachments: # 1 Proposed Order) (Watson, Coleman) (Entered: 06/03/2019)

06/03/2019

37 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. upon Jermaine Cole waiver sent by Plaintiff on 5/22/2019, answer due 7/22/2019. Waiver of Service signed by William Archer, Esq. (Watson, Coleman) (Entered: 06/03/2019)

06/03/2019

38 WAIVER OF SERVICE Returned Executed filed by Plaintiff Gary Frisby. Upon Dreamville Records NY, Inc. waiver sent by Plaintiff on 5/22/2019, answer due 7/22/2019. Waiver of Service signed by William Archer, Esq. (Watson, Coleman) (Entered: 06/03/2019)

06/03/2019

39 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Cortez Bryant served on 5/23/2019, answer due 6/13/2019. Service of the Summons and Complaint were executed upon Danielle Walls, as Assistant to Cortez Bryant, at Defendant's Usual Place of Abode in compliance with Federal Rules of Civil Procedure by substituted service at home address and by also mailing a copy. Original Summons returned. (Watson, Coleman) (Entered: 06/03/2019)

06/04/2019

40 ORDER ON NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO DEFENDANTS MATTHEW SAMUELS AND ANDERSON HERNANDEZ by Judge George H. Wu, re Notice of Voluntary Dismissal of Party(ies) (Pursuant to FRCP 41a(1)) 36. Anderson Hernandez (pka Vinylz, an individual) and Matthew Samuels (pka Boilda, an individual) terminated. (mrgo) (Entered: 06/04/2019)

06/21/2019

41 PROOF OF SERVICE Executed by Plaintiff Gary Frisby, upon Defendant Bryson Tiller served on 6/1/2019, answer due 6/24/2019. Service of the Summons and Complaint were executed upon Bryson Tiller in compliance with Federal Rules of Civil Procedure by personal service. Original Summons returned. (Watson, Coleman) (Entered: 06/21/2019)

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06/24/2019

42 ANSWER to Complaint (Attorney Civil Case Opening) 1 with JURY DEMAND filed by defendant Bryson Tiller. (Attorney Peter J Anderson added to party Bryson Tiller (pty:dft)) (Anderson, Peter) (Entered: 06/24/2019)

06/24/2019

43 NOTICE of Interested Parties filed by Defendant Bryson Tiller, identifying Sony Music Entertainment; Sony Corporation. (Anderson, Peter) (Entered: 06/24/2019)

06/26/2019

44 MINUTE ORDER IN CHAMBERS by Judge George H. Wu: ORDER SETTING SCHEDULING CONFERENCE. A Joint 26(f) Report shall be filed with the Court no later than July 25, 2019. *See* Local Rule 26-1. Rule 26 Meeting Report due by 7/25/2019., Scheduling Conference set for 8/8/2019 at 08:30 AM before Judge George H. Wu. *SEE* DOCUMENT FOR FURTHER INFORMATION. (twdb) (Entered: 06/27/2019)

07/11/2019

45 Notice of Appearance or Withdrawal of Counsel: for attorney William Archer counsel for Defendants Jermaine Cole, Dreamville Records NY, Inc.. Adding William Archer as counsel of record for Jermaine Cole, p/k/a J. Cole and Dreamville Records NY, Inc. for the reason indicated in the G-123 Notice. Filed by Defendants Jermaine Cole, p/k/a J. Cole

and Dreamville Records NY, Inc. (Attorney William Archer added to party Jermaine Cole (pty:dft), Attorney William Archer added to party Dreamville Records NY, Inc. (pty:dft)) (Archer, William) (Entered: 07/11/2019)

07/11/2019

46 MINUTES OF SCHEDULING CONFERENCE held before Judge George H. Wu. For reasons stated on the record, the Court consolidates this action with, Gary Frisby v. Sony Music Entertainment, et al., CV 19-1712-GW-AGRx for pretrial purposes. Counsel are directed to make all future filings in the lead case CV 19-1712-GW-AGRx. The Clerk's Office will add any necessary parties and counsel in the lead case. The scheduling conference set for August 8, 2019, is VACATED. The Court sets the following: Discovery cut-off 1/3/2020. Motions due by 3/9/2020. Last date to conduct mediation is 12/13/2019. Post-Mediation Status Conference set for 12/16/2019 at 08:30 AM before Judge George H. Wu. Pretrial Conference set for 4/9/2020 at 08:30 AM before Judge George H. Wu. Jury Trial set for 4/21/2020 at 09:00 AM before Judge George H. Wu. Court Reporter: Katie E. Thibodeaux. (mrgo) Modified on 7/15/2019 (mrgo). (Entered: 07/15/2019)

07/15/2019

47 ANSWER to Complaint (Attorney Civil Case Opening) 1 with JURY DEMAND filed by

Defendant Sony Music Entertainment.  
(Anderson, Peter) (Entered: 07/15/2019)

07/15/2019

48 ANSWER to Complaint (Attorney Civil Case Opening) 1 filed by defendant Universal Music Group, Inc. (Attorney Michael J Niborski added to party Universal Music Group, Inc. (pty:dft)) (Niborski, Michael) (Entered: 07/15/2019)

07/15/2019

49 ANSWER to Complaint (Attorney Civil Case Opening) 1 filed by defendant ROC Nation records, LLC. (Attorney Michael J Niborski added to party ROC Nation Records, LLC (pty:dft)) (Niborski, Michael) (Entered: 07/15/2019)

07/16/2019

50 Notice of Appearance or Withdrawal of Counsel: for attorney Jean Monica Kim counsel for Defendants Jermaine Cole, Dreamville Records NY, Inc. Adding Jean Monica Kim as counsel of record for Jermaine Cole and Dreamville Records NY, Inc. for the reason indicated in the G-123 Notice. Filed by Defendant Jermaine Cole and Dreamville Records NY, Inc. (Attorney Jean Monica Kim added to party Jermaine Cole (pty:dft), Attorney Jean Monica Kim added to party Dreamville Records NY, Inc. (pty:dft)) (Kim, Jean) (Entered: 07/16/2019)



07/22/2019

51 ANSWER to Complaint (Attorney Civil Case Opening) 1 with JURY DEMAND filed by Defendants Jermaine Cole, Dreamville Records NY, Inc. (Archer, William) (Entered: 07/22/2019)

07/23/2019

52 NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Answer to Complaint (Attorney Civil Case Opening) 49, Answer to Complaint (Attorney Civil Case Opening) 48, Answer to Complaint (Attorney Civil Case Opening) 47. The following error(s) was/were found: Local Rule 7.1-1 No Notice of Interested Parties and/or no copies. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (mrgo) (Entered: 07/23/2019)

07/23/2019

53 NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Answer to Complaint (Attorney Civil Case Opening) 51. The following error(s) was/were found: Local Rule 7.1-1 No Notice of Interested Parties and/or no copies. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as

the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (mrgo) (Entered: 07/23/2019)

03/11/2021

55 MINUTES OF TELEPHONIC HEARING ON DEFENDANTS SONY MUSIC ENTERTAINMENT, BRYSON TILLER AND MICHAEL HERNANDEZ'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT 127 in CV 19- 1712-GW-AGRx held before Judge George H. Wu. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendants' Motion is GRANTED. Sony Defendants are to file a proposed judgment forthwith. A status conference is set for March 25, 2021 at 8:30 a.m. Plaintiff is to file a status report by noon on March 23, 2021. Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 03/17/2021)

03/12/2021

54 Notice of Appearance or Withdrawal of Counsel: for attorney Jean Monica Kim counsel for Defendant Jermaine Cole. Jean Monica Kim will no longer receive service of documents from the Clerks Office for the reason indicated in the G-123 Notice. Filed by Defendant Jermaine Cole, p/k/a J. Cole and Dreamville Records NY, Inc. (Kim, Jean) (Entered: 03/12/2021)

03/18/2021

56 JUDGMENT by Judge George H. Wu. IT IS ORDERED AND ADJUDGED that plaintiff Gary Frisby take nothing and that his First Amended Complaint in Case No. 2:19-cv-01712-GW-AGRx and his Complaint in Case No. 2:19-cv-04167-GW-AGRx each be dismissed on the merits and in favor of defendants Bryson Tiller, Michael Hernandez, and Sony Music Entertainment favor, with those defendants to recover their costs. (lom) (Entered: 03/18/2021)

03/20/2021

57 STIPULATION for Extension of Time to File application to tax costs and motion for attorney's fees filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Attorney Peter J. Anderson added to party Michael Hernandez (pty:dft)) (Anderson, Peter) (Entered: 03/20/2021)

03/20/2021

58 STIPULATION for Extension of Time to File application to tax costs and motion for attorney's fees filed by defendants Michael Hernandez, Sony Music Entertainment, Bryson Tiller. (Attachments: # 1 Proposed Order) (Attorney Peter J. Anderson added to party Michael Hernandez (pty:dft)) (Anderson, Peter) (Entered: 03/20/2021)

03/23/2021

59 TEXT-ONLY ENTRY – IN CHAMBERS: by Judge George H. Wu: Counsel are to appear

telephonically for Thursday's 03/25/2021 status conference at 8:30 a.m. by contacting the court clerk at javier\_gonzalez@cacd.uscourts.gov for dial-in information. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (jag) TEXT ONLY ENTRY (Entered: 03/23/2021)

03/23/2021

60 ORDER EXTENDING TIME FOR THE SONY DEFENDANTS TO FILE MOTION FOR ATTORNEY'S FEES AND APPLICATION TO TAX COSTS by Judge George H. Wu, re Stipulation for Extension of Time to File 58. If Plaintiff files by April 12, 2021, his planned motion pursuant to Federal Rules of Civil Procedure 59 and 60, then the time for the Sony Defendants to file an application to tax costs and a motion for attorney's fees is extended to fourteen days after entry of the Court's Order on Plaintiffs motion; or 2. If Plaintiff fails to file by April 12, 2021, his planned motion pursuant to Federal Rules of Civil Procedure 59 and 60, then the time for the Sony Defendants to file an application to tax costs and a motion for attorney's fees is extended to April 26, 2021. (mrgo) (Entered: 03/23/2021)

03/25/2021

61 MINUTES OF TELEPHONIC CONFERENCE held before Judge George H. Wu. Court and counsel confer. A dismissal as to remaining Defendant Cortez Bryant is filed on March 22, 2011. All that remains in this

matter is Sony's motion for attorneys' fees and application to the clerk of court to tax costs. (Made JS-6. Case Terminated.) Court Reporter: Terri A. Hourigan. (mrgo) (Entered: 03/26/2021)

03/25/2021

63 \*\*AMENDED MINUTES held before Judge George H. Wu re: Status Conference – optional html form,, Terminated Case, 61. Court and counsel confer. A dismissal as to remaining Defendant Cortez Bryant is filed on March 22, 2011. All that remains in this matter is Sonys motion for attorneys' fees and application to the clerk of court to tax costs. \*\*Counsel also advises the Court that Plaintiff intends to file his Rule 59/60 Motion. (mrgo) (Entered: 03/29/2021)

03/26/2021

62 REPORT ON THE DETERMINATION OF AN ACTION Regarding a Copyright. (Closing) (Attachments: # 1. Dismissal) (mrgo) (Entered: 03/26/2021)

**APPELLANT'S OPENING BRIEF,  
RELEVANT EXCERPTS  
(OCTOBER 8, 2021)**

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UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

---

GARY FRISBY, ETC.,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants-Appellees.*

---

Nos. 21-55586 & 21-55587

D.C. No. 2:19-cv-01712-GW-AGR<sub>x</sub>  
U.S. District Court for the Central District of  
California, Los Angeles

Appeal from the United States District Court  
for the Central District of California  
Honorable George H. Wu, District Judge Presiding

---

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*Attorney for Plaintiff and Appellant Gary Frisby*

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**ANSWERING BRIEF, RELEVANT EXCERPTS  
(JANUARY 12, 2022)**

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IN THE UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

---

GARY FRISBY,

*Plaintiff and Appellant,*

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

*Defendants and Appellees.*

---

Nos. 21-55586 & 21-55587

Appeal from the United States District Court  
for the Central District of California  
Hon. George H. Wu, District Judge  
Case No. 2:19-cv-01712-GW-AGR

---

Peter Anderson  
Andrew G. Row  
Davis Wright Tremaine LLP  
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Los Angeles, CA 90017-2566  
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*Attorney for Defendants and Appellees Sony Music  
Entertainment, Bryson Tiller, and Michael Hernandez*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for defendants and appellees confirms that Sony Music Entertainment is ultimately owned by Sony Group Corporation, a publicly traded company organized under the laws of Japan.

Respectfully submitted,

/s/ Peter Anderson

Davis Wright Tremaine LLP

Attorneys for Defendants and Appellees

Sony Music Entertainment,

Bryson Tiller, and Michael Hernandez

[ . . . ]

. . . protection for that sound recording; it is undisputed that the *Exchange* and *Déjà Vu* sound recordings do not recapture sounds from the *Shawty* sound recording; and extending copyright protection to his use of *Swing My Way* would impair *Swing My Way*'s copyrights. The Judgment in Case No. 1712 should be affirmed.

**2. Frisby Failed to Appeal the Judgment in Case No. 4167 Dismissing His Musical Composition Copyright Claims**

Frisby's Opening Brief ignores a fundamental problem he has expressly confirmed: he did not appeal from the Judgment filed in Case No. 4167.

**(a) Despite the District Court's Consolidation of the Cases for Pretrial Purposes, Case No. 4167 Must Be Analyzed Separately to Determine Appellate Jurisdiction**

This Court has "jurisdiction of appeals from all final decisions of the district courts" within this Circuit. 28 U.S.C. §§ 1291, 1294(1). "Under § 1291, 'any litigant armed with a final judgment from a lower federal court is entitled to take an appeal' . . . , which generally must be filed within 30 days, 28 U.S.C. § 2107(a)." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (quoting *Arizona v. Manypenny*, 451 U.S. 232, 244 (1981)). "Failure to comply with [the] jurisdictional time prescription . . . deprives [the C]ourt of adjudicatory authority over the case. . . ." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).

Here, the District Court consolidated Case No. 4167 with Case No. 1712 only "for pretrial purposes" (2-SER-409) and appeal is not a pretrial purpose. The

limited consolidation confirms a notice of appeal from the Judgment in Case No. 4167 was required.

Moreover, “actions do not lose their separate identity because of consolidation.” *Hall*, 138 S. Ct. at 1130 (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016)). When a district court has consolidated actions “each constituent case must be analyzed individually on appeal to ascertain jurisdiction. . . .” *Hall*, 138 S. Ct. at 1128. As a result, an appeal from a final decision in one consolidated case does not provide jurisdiction to reach issues raised in a consolidated case from which no appeal was taken. *See Hall*, 138 S. Ct. at 1130-31 (citing *Butler v. Dexter*, 425 U.S. 262, 266-267 (1976)).

Accordingly, Frisby was required to file a notice of appeal from the Judgment in Case No. 4167.

**(b) Frisby Failed to File a Notice of Appeal from the Judgment in Case No. 4167**

Although the District Court entered two separate Judgments in two separate actions for the alleged infringement of two separate copyrights, Frisby failed to file an appeal from the Judgment in Case No. 4167. Neither is his failure to appeal that Judgment disputed. In this Court, Frisby confirmed that he “did not file notices of appeal in Case No. 2:19-cv-04167-GW-AGR.” Stipulation (Dkt. Entry 9) at 1, ¶ 3. Frisby also did not include the Judgment in Case No. 4167 in his Excerpts of Record. *Cf.* 9th Cir. Rule 30-1.4(a) (“Volume 1 of the Excerpts of Record shall include all decisions being appealed, reviewed, or collaterally challenged”).

**(c) The Notices of Appeal that Frisby Filed in Case No. 1712 Do Not Confer Jurisdiction to Review the Judgment in Case No. 4167**

Frisby filed in Case No. 1712 notices of appeal from the Judgment and the Order denying post-Judgment relief in that action. Those notices of appeal do not provide this Court with jurisdiction to review the Judgment in Case No. 4167.

The District Court consolidated Case No. 1712 and Case No. 4167 only for pretrial purposes and filing a notice of appeal from a judgment is not a pretrial proceeding. Also, Frisby's notices of appeal in Case No. 1712 do not mention Case No. 4167 or the Judgment in that case. Although Federal Rule of Appellate Procedure 3(c)(1) provides that a "notice of appeal must," among other things, "designate the judgment, order, or part thereof being appealed . . .," Frisby's notices of appeal identify only the Judgment entered March 15, 2021, in Case No. 1712 and the Order entered May 13, 2021, in Case No. 1712. 4-ER-649, 643. Neither notice of appeal refers to the Judgment entered March 18, 2021, in Case No. 4167.

This is not a case where a party has filed a notice of appeal in the right case but identified the wrong judgment or order in that case. In those situations, the notice of appeal may be liberally construed as including another decision in that case. *See, e.g., West v. United States*, 853 F.3d 520, 523 (9th Cir. 2017). Here, Frisby did not file any notice of appeal in Case No. 4167. To rely on a notice of appeal filed in one case to assume jurisdiction to review a judgment entered in a different case would directly conflict with the Supreme Court's direction that, even when district

court actions are consolidated, “each constituent case must be analyzed individually on appeal to ascertain jurisdiction. . . .” *See above* at 35 (quoting *Hall*, 138 S. Ct. at 1128).

Frisby’s failure to file in Case No. 4167 a notice of appeal from the Judgment in that case must be treated just like any other failure to file a notice of appeal, namely it “deprives [the C]ourt of adjudicatory authority over the case. . . .” *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017).

[ . . . ]



UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

---

**Form 6. Representation Statement**

Appellant(s) (*List each party tiling the appeal, do not use "et al." or other abbreviations.*)

Name(s) of party/parties:

Plaintiff Gary Frisby

Name(s) of counsel (if any):

Terran T. Steinhart  
Steinhart Law Offices

Address:

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Telephone number(s): (323) 9333-8263  
Email(s): IterTan@steinhartlaw.com

Is counsel registered for Electronic Filing in the 9th Circuit?

Yes

Appellee(s) (*List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.*)

Name(s) of party/parties:

Defendants Sony Music Entertainment  
Defendant Bryson Tiller  
Defendant Michael Hernandez

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Name(s) of counsel (if any):

KeAndra Z. Barlow, Arleen Fernandez,  
Peter J. Anderson  
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**PROOF OF SERVICE BY CM/ECF SYSTEM**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4859 W. Slauson Ave., Suite 407, Los Angeles, California 90056, which is located in the county where the mailing described below took place.

On the date set forth below, at the aforesaid place of business, I caused a copy of the document described as NOTICE OF APPEAL FROM A JUDGMENT OF A UNITED STATES DISTRICT COURT to be sent by electronic transmittal to the Clerk's Office using the CM/ECF System for filing which generated a Notice of Electronic Filing to the CM/ECF registrants in this case.

I am a member of the bar of the State of California. I declare under penalty of perjury under the laws of the United States of America that foregoing is true and correct.

Executed on June 3, 2021 at Los Angeles, California.

/s/ Terran T. Steinhart  
Terran T. Steinhart

**Notice of Electronic Filing**

The following transaction was entered by Steinhart, Terran on 6/3/2021 at 11:59 PM PDT and tiled on 6/3/2021

Case Name:

Gary Frisby v. Sony Music Entertainment et al

Case Number: 2:19-cv-01712-GW-AGR

Filer: Gary Frisby

WARNING: CASE CLOSED on 03/15/2021

Document Number: 177

**Docket Text:**

NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by plaintiff Gary Frisby. Appeal of Judgment, [159]. (Appeal Fee - \$505 Fee Paid, Receipt No. ACACDC-31405985.) (Steinhart, Terran)

**2:19-cv-01712-GW-AGR Notice has been electronically mailed to:**

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App.234a

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**2:19-cv-01712-GW-AGR Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to:**

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: C:\fakepath\Notice of Appeal - 3-15-2021 Judgment - FINAL.pdf

Electronic document Stamp:

[STAMP cacdStamp\_ID=1020290914 [Date=6/3/2021] [FileNumber=32053856-0] [210391 caed b318b5fed4e48e0bbe3214b221d45dad824274399 5f73ad69b23f3a9eb84ba68390bele3c7027717f90 036d341fd6c3a8a9390abd34a5a71dbc14e]]

**APPELLANT'S REQUEST  
FOR JUDICIAL NOTICE  
(MARCH 3, 2022)**

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UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

---

GARY FRISBY, ETC.,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants-Appellees.*

---

Nos. 21-55586 & 21-55587

D.C. No. 2:19-cv-01712-GW-AGR<sub>x</sub>  
U.S. District Court for the Central District of Cali-  
fornia, Los Angeles

Appeal from the United States District Court  
for the Central District of California  
Honorable George H. Wu, District Judge Presiding

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Bar No. 036196

*Attorney for Plaintiff and Appellant Gary Frisby*

**APPELLANT’S MOTION TO TAKE JUDICIAL NOTICE**

Pursuant to Federal Rules of Evidence, Rule 201, Frisby hereby requests and moves that the Court take judicial notice of the following filed documents from the subject consolidated cases (copies of which documents are attached hereto under the following Exhibit numbers):

Exhibit 1: Frisby’s Notice of Substitution of Attorney, filed on February 24, 2020 in Case No. 1712.

Exhibit 2: Judgment, filed on March 15, 2021 in Case No. 1712.

Exhibit 3: Judgment, filed on March 18, 2021 in Case No. 4167.

Exhibit 4: Mailing Information for Case No. 1712.

Exhibit 5: Mailing Information for Case No. 4167.

This Motion is made in support of Argument Ito Frisby’s Reply Brief to which the Court’s attention is respectfully invited, and which is incorporated herein by reference.

The Court is reminded that in Frisby’s Opposition to Motion to Take Judicial Notice filed by Defendants, Frisby requested the Court to take judicial notice of the Civil Minutes–General, dated July 11, 2019, filed in Case No. 1712.

/s/ Terran T. Steinhart  
Attorney for Plaintiff and Appellant  
Gary Frisby

Date: March 3, 2022

**APPELLANT'S REPLY BRIEF  
RELEVANT EXCERPTS  
(MARCH 3, 2022)**

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UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

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GARY FRISBY, ETC.,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants-Appellees.*

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Nos. 21-55586 & 21-55587

D.C. No. 2:19-cv-01712-GW-AGR<sub>x</sub>  
U.S. District Court for the Central District of Cali-  
fornia, Los Angeles

Appeal from the United States District Court  
for the Central District of California  
Honorable George H. Wu, District Judge Presiding

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## PROCEDURAL ISSUES

### I. FRISBY DID NOT DISMISS HIS MUSICAL COMPOSITION COPYRIGHT CLAIM BY NOT FILING A NOTICE OF APPEAL IN CASE NO. 4167.

Copyright infringement of a sound recording requires that the defendant recapture (directly record) the sounds of the copyrighted sound recording whereas copyright infringement of a musical composition does not require such recapturing. Frisby does not have substantial evidence of either *Exchange* or *Déjà Vu*'s recapturing from *Shawty*, although he does have substantial evidence of copying by way of circumstantial evidence of access and substantial similarity, which is all that is required to establish copying of a musical composition as differentiated from a sound recording. If this appeal were limited to Frisby's claim of copyright infringement of the sound recording as alleged in 1712, his evidence of access and substantial similarity would be irrelevant and his appeal would be ruined. Therefore, whether the notices of appeal in 1712 apply to both his claims of infringement of the sound recording and also the underlying musical composition is of prime importance.<sup>1</sup>

In support of this Argument, concurrently with filing this Reply Brief Frisby is filing Appellant's

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<sup>1</sup> On this point, the Court's attention is respectfully invited to Appellant's Opening Brief at 10 ("AOB") in which Frisby points out that because beat tracks are digitally created in-studio by manipulating digital sounds on music creation software, the musical composition and sound recording are one and the same, identical, coexistent, coterminous, interchangeable, and inextricable, citing *Bridgeport Music, Inc. v. Recordings, Inc.* (Sixth Cir. 2009) 585 F.3d 267, 273, 276.

Motion to Take Judicial Notice of documents filed in Cases 1712 and 4167. Those documents reflect the following case history in the consolidated cases:

On July 11, 2019 the District Court consolidated Case No. 1712 and Case No. 4167 for “pretrial purposes;” and directed counsel to make “all future filings” (emphasis added) in 1712. Although the consolidation of the two cases was “for pretrial purposes,” the direction to counsel to make “all future filings” in 1712 was in a separate sentence and did not state “for pretrial purposes.”

Thereafter all filings by counsel were made only in 1712, both pre-judgment and post-judgment filings; however, a copy of the Judgment was filed by the Court in 4167. The Judgment filed in 4167 on 3-18-21 is a photocopy of the Judgment filed in 1712 on 3-15-21, the only difference being that the one filed in 1712 displays only 1712 next to the caption and the one filed in 4167 displays both case numbers next to the caption.

The Mailing Information<sup>2</sup> for 1712 contains the name and email address of Attorney Steinhart but not of Attorney Watson, who was Frisby’s attorney when the complaints in the consolidated cases were filed. The Mailing Information for 4167 contains the name and email address of Watson but not Steinhart. This is so because pursuant to the

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<sup>2</sup> Which indicates to whom electronic service copies will automatically be sent by the electronic filing system.

aforesaid Civil Minutes Steinhart substituted only into 1712. Because of the Mailing Information situation, Steinhart did not receive notice of any filings in 4167, including no notice of the filing of the Judgment in 4167 on 3-18-21, but received notice only of the filing of the Judgment in 1712 on 3-15-21.

In view of the above relevant case history, the notices of appeal filed in 1712 should be deemed to encompass an appeal with regard to Frisby's claim of copyright infringement of the sound recording as well as the underlying musical composition because:

The Judgment in each of the two consolidated cases is identical, and its substantive content refers both to the First Amended Complaint in Case No. 1712 and the Complaint in Case No. 4167.

The subject Civil Minutes which consolidated the two cases "for pretrial purposes" instructed counsel to make "all future filings" in lead Case No. 1712, and that instruction was set forth in a separate sentence which did not contain the phrase "for pretrial purposes."

The ordinary meaning and dictionary definition of "pretrial" is "occurring or existing before a trial." The purpose of a motion for summary judgment is to eliminate the necessity of a trial by obtaining a judgment before a trial occurs. Because the motion for summary judgment was granted, no trial occurred. Therefore, this case remains in a "pretrial" posture. If this Court reverses the Judgment, the case will be remanded to the

District Court in a pretrial posture and a trial will thereafter occur.

Although it was filed post-judgment, Frisby's motion for reconsideration and Defendants' opposition thereto were filed pretrial in 1712 pursuant to the Civil Minutes filing instructions. Similarly, although filed post-judgment, the subject notices of appeal were also filed pretrial in 1712.

Because Frisby's did not receive electronic notice of the filing of the Judgment in Case No. 4167, it would be a denial of procedural due process to hold that Frisby's claim of copyright infringement as to the underlying musical composition is not encompassed in the subject notices of appeal filed in Case No. 1712. No citation of authority is needed to support the proposition that prior notice and an opportunity to be heard are fundamental to procedural due notice.

**II. DEFENDANTS' CONTENTION—THAT FRISBY HAS WAIVED HIS CONTENTIONS OF "FAIR USE" AND "SELECTION AND ARRANGEMENT" BECAUSE HE DID NOT SPECIFICALLY PLEAD THOSE CONTENTIONS IN HIS COMPLAINT—LACKS MERIT.**

The complaints in 4167 and 1712 are substantially the same other than 4167 claims infringement of the underlying musical composition and 1712 claims . . .

[ . . . ]

**PETITION FOR PANEL REHEARING  
(JUNE 16, 2022)**

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UNITED STATES COURTS OF APPEALS  
FOR THE NINTH CIRCUIT

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GARY FRISBY, ETC.,

*Plaintiff-Appellant,*

v.

SONY MUSIC ENTERTAINMENT, ETC., ET AL.,

*Defendants-Appellees.*

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Nos. 21-55586 & 21-55587

D.C. No. 2:19-cv-01712-GW-AGR<sub>x</sub>  
U.S. District Court for the Central District of Cali-  
fornia, Los Angeles

Appeal from the United States District Court  
for the Central District of California  
Honorable George H. Wu, District Judge Presiding

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## **GROUNDS FOR PETITION**

Plaintiff-Appellant Frisby hereby petitions for a panel rehearing pursuant to Fed. R. App. P. 40 and 9th Cir. R. 40-1 on the ground that the Court's Memorandum decision (a copy of which is attached hereto) overlooked or misapprehended the following material points of fact or law set forth in Argument I of Appellant's Reply Brief:

1. The filing of the notice of appeal in Case 1712 constituted a "pretrial" filing within the meaning of the Scheduling Order of the District Court that consolidated Cases 1712 and 4167 for "pretrial purposes." 2-SER-409.

2. As a matter of procedural due process, the fact that Frisby filed a notice of appeal only in Case 1712 and not case 4167 should not be deemed to deprive this court of jurisdiction to rule upon the issue of copyright infringement of the musical composition (Case 4167) as well as copyright infringement of the sound recording (Case 1712).

This Petition is based upon this Court's Memorandum decision (DktEntry 57-1), Appellant's Opening Brief (DktEntry 11-1), Appellant's Notice of Motion to Take Judicial Notice (DktEntry 40), Appellant's Reply Brief (DktEntry 41), Motion for New Trial, etc. (2-ER-168), Scheduling Order (that consolidated Cases 1712 and 4167) (2-SER-409), Minute Order and Final Ruling on Motion for Summary Judgment (1-ER-18), Judgment in Case 1712 (1-ER-16), and Minute Order and Final Ruling on Motion for New Trial (1-ER-2).

App.244a

/s/ Terran T. Steinhart  
Attorney for Plaintiff-Appellant  
Garry Frisby

Date: June 15, 2022

## MEMORANDUM OF POINTS AND AUTHORITIES

### INTRODUCTION

When a party files an appeal he is asking an appellate court to discern that a trial court has committed reversible error. When a party files a petition for rehearing in an appellate court, he is asking the appellate court to exercise humbleness and integrity to discern that itself has committed reversible error.

The Information Regarding Judgment and Post-judgment Proceedings memorandum that accompanied the Memorandum decision of this Court states that a party should seek panel rehearing only if one or more of the following grounds exist . . . “A material point of fact or law was overlooked in the decision,” citing Fed. R. App. P.40 and 9th Cir. R. 40-1. Fed. R. App. P. 40(a)(2) provides in relevant part:

“Contents. The petition [for panel rehearing] must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” (Emphasis added).

Rule 40 is more expansive than the aforesaid Information Regarding Judgment and Post-Judgment Proceedings memorandum in that it permits a Petition for Panel Rehearing to be based on the ground that a point of law or fact was overlooked “or misapprehended.” Since Rule 40 is the official rule it must be deemed to supersede the aforesaid memorandum. Respectfully, even assuming that Rule 40 does not supersede the aforesaid memorandum, the material



points of fact and law focused upon in this Petition were both overlooked and misapprehended.

**I. THE FILING OF THE NOTICE OF APPEAL IN CASE 1712 CONSTITUTED A “PRETRIAL” FILING WITHIN THE MEANING OF THE SCHEDULING ORDER OF THE DISTRICT COURT THAT CONSOLIDATED CASES 1712 AND 4167 FOR “PRETRIAL PURPOSES,” AND PURSUANT TO THE REQUIREMENT THAT COUNSEL MAKE ALL FUTURE FILINGS IN LEAD CASE 1712, THE NOTICE OF APPEAL, WHICH CONSTITUTED A “PRETRIAL” FILING WAS PROPERLY FILED ONLY IN CASE 1712.**

The Memorandum decision failed to address and apprehend the “pretrial purposes” issue.

Rather, relying on *Hall v. Hall* (2018) 138 S. Ct. 1118, 1130-1131, and *Butler v. Dexter* (1976) 425 U.S. 262, 266-267 (per curiam), cited in *Hall*, the Memorandum decision held that the Supreme Court has instructed that each consolidated case must be considered separately to determine whether a court has jurisdiction to consider the case’s merits. In so instructing, *Hall* cited *Butler*, observing that *Butler* dismissed an appeal because the issue which supplied its jurisdiction had been raised not in the case before it on appeal, but instead only in other cases with which it had been consolidated.

Respectfully, in addition to failing to address and apprehend the “pretrial purposes” issue, the Memorandum decision misapplied *Hall* and *Butler* to the instant appeal because those cases are distinguishable from the instant case. In *Hall*, a mother sued her son and his law firm for breach of fiduciary duty, legal malpractice and related claims stemming from the

son's handling of the mother's real estate holdings. After the mother died her daughter was substituted in as plaintiff. The son filed a separate action against the daughter asserting a claim for intentional infliction of emotional distress (IIED) and related claims. The district court entered judgment in favor of the son in his IIED case, but subsequently granted daughter a new trial in the IIED case; and entered judgment against the daughter in her case against son and his law firm. The daughter appealed from the judgment entered against her, and the son and law firm moved to dismiss the daughter's appeal on jurisdictional grounds. In denying that motion, the Court held at 1131:

“What our decision does mean is that [consolidated] constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party.” (Emphasis supplied).

The only issue addressed in *Hall* was whether the daughter had the right to appeal from the final judgment against her in her consolidated case for breach of fiduciary duty and legal malpractice, even though the consolidated IIED case brought by the son remained pending against her in the district court. The Supreme Court specifically limited the scope of its decision to that issue, stating that consolidated cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. The principle for which the Memorandum decision cites *Hall* is non-binding dictum, not holding. Furthermore, the holding in *Hall* is not applicable to the instant case because the instant case does not involve the issue of whether a final decision in one

consolidated case is immediately appealable by the losing party.

The Court's ruling in *Butler*, referred to in *Hall*, is also distinguishable from the instant case. *Hall* summarized its holding in *Butler* as follows:

“In *Butler* . . . we dismissed an appeal because the constitutional question that supplied our jurisdiction had been raised not in the case before us, but instead only in other cases with which it had been consolidated. We explained that ‘[e]ach case . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.’”

In the instant case, the Minute Order and Final Ruling on Motion for Summary Judgment (1-ER-18) at the outset referenced both Case 1712 and Case 4167, and in footnote 1 (1-ER-19) stated that the complaints in both cases are substantially the same with the only material difference being that the first concerns a sound recording copyright whereas the second concerns a musical composition copyright.

That footnote then significantly stated: “The ruling herein applies to both cases.” (Emphasis added).

The content of the Judgment (1-ER-16) referred to the Court's aforesaid ruling which granted the motion for summary judgment in Cases 1712 and 4167 (1-ER-18), and thereupon ordered and adjudged that plaintiff take nothing by his First Amended Complaint in Case 1712 and his Complaint in Case 4167, and that each be dismissed on the merits.

In summary, the Minute Order ruling filed in Case 1712 expressly stated that, “the ruling herein applies to both cases:” and the Judgment filed in Case 1712 expressly ordered and adjudged that Frisby take nothing by his First Amended Complaint in Case 1712 and his Complaint in Case 4167, and that each be dismissed on the merits. Unlike the scenario in *Butler*, in which the issue that supplied the Court’s jurisdiction had been raised not in the case before it but instead only in other cases with which it had been consolidated, the claims as to copyright infringement of both the sound recording (Case 1712) and the musical composition (Case 4167) were expressly ruled upon in Case 1712 (1-ER-18), and also expressly included in the Judgment filed in case 1712 (1-ER-16). Thus, on appeal from the Judgment in Case 1712, the copyright infringement claims as to both the sound recording and musical composition are jurisdictionally before this Court.

The above analysis with respect to distinguishing *Butler* from the instant case is directly applicable to the procedural due process issue in Argument II, below. However, of necessity it was presented under Argument I for the purpose of distinguishing *Butler*.

The issue of “pretrial purposes” was raised in Argument I of Appellant’s Reply Brief (DktEntry 41) with reference to this Court’s jurisdiction to rule upon the claims of copyright infringement as to both the sound recording and the musical composition based upon on the notice of appeal filed in Case 1712. However, that “pretrial purposes” issue was not addressed in the Memorandum decision.

As noted in Appellant’s Reply Brief at 7, the ordinary meaning and dictionary definition of “pretrial”

is “occurring or existing before a trial.” The purpose of a motion for summary judgment is to eliminate the necessity of a trial by obtaining a judgment before a trial occurs. This concept was affirmed and applied by the District Court in its Minute Order and Final Ruling on Motion for New Trial (1-ER-2 at 5, including fn 2) in which it held:

“Plaintiff moves ‘for a new trial and/or to alter the [Court’s Ruling] pursuant to F.R.C.P. 59(a)(1)(B), (e), and for relief from the [Ruling] pursuant to F.R.C.P. 60(b)(1).’ . . . [fn 2] Because Fed. R. Civ. P. 59(a)(1)(B) is only implicated ‘after a nonjury trial’ and the Motion here is seeking reconsideration of the Court’s Ruling on Defendant’s’ Motion for Summary Judgment, the Court finds Rule 59(a)(1)(B) is inapplicable to the present situation. Accordingly, the Court does not base its ruling herein on that provision.” (Emphasis added).

In so holding, the District Court recognized the inescapable conclusion that a motion for summary judgment, as well as a motion for a new trial seeking reconsideration of a Court’s judgment granting the motion for summary judgment, are by definition pretrial proceedings, not post-trial proceedings, because both motions precede the holding of a trial. Furthermore, by force of logic, the filing of a notice of appeal seeking appellate review of a judgment granting a motion for summary judgment and/or appellate review of an order denying a motion for new trial seeking reconsideration of that Judgment, are pretrial proceedings because they precede the holding of a trial. Furthermore if the appeal is successful, the case will be

remanded to the trial court for the holding of a trial thereafter.

Because the Memorandum decision failed to address and/or apprehend the “pretrial purposes” issue, this Petition for Rehearing should be granted.

**II. AS A MATTER OF PROCEDURAL DUE PROCESS, THE FACT THAT FRISBY FILED A NOTICE OF APPEAL ONLY IN CASE 1712 AND NOT CASE 4167 SHOULD NOT BE DEEMED TO DEPRIVE THIS COURT OF JURISDICTION TO RULE UPON THE CLAIM AS TO COPYRIGHT INFRINGEMENT OF THE MUSICAL COMPOSITION (CASE 4167) AS WELL AS THE CLAIM AS TO COPYRIGHT INFRINGEMENT OF THE SOUND RECORDING (CASE 1712).**

Footnote 2 on page 4 of the Memorandum decision states:

“The limited scope of the consolidation is confirmed by the district court’s entry of a separate judgment of dismissal in each case.”

Respectfully, it would appear that the above footnoted comment was stated to support the Memorandum decision’s holding that the notice of appeal filed in Case 1712 only gives jurisdiction to this Court to rule upon the copyright infringement claim as to the sound recording (Case 1712), and not to rule upon the copyright infringement claim as to the musical composition (Case 4167).

Respectfully, the Memorandum decision’s holding violates Frisby’s procedural due process rights.

As elaborated upon under Argument 1, the Minute Order and Final Ruling on Motion for Summary Judgment (1-ER-18) expressly held that, “The ruling [on the motion for summary judgment] herein applies to both cases,” specifically referring to defendants’ motion for summary judgment in Cases 1712 and 4167. Furthermore, the Judgment (1-ER-16) expressly encompassed the complaints filed in each of the two cases.

By their express language, the Ruling on the motion for summary judgment (1-ER-18), and the Judgment (1-ER-16) entered upon that Ruling, encompassed both the copyright infringement claim as to the sound recording in Case 1712, and the copyright infringement claim as to the musical composition in Case 4167. In appealing from that Judgment, Frisby is appealing from a Judgment that encompasses both copyright infringement claims.

Under the circumstances, a ruling that Frisby’s notice of appeal filed only in Case 1712 does not encompass the copyright infringement claim as to the musical composition (Case 4167) is a denial of Frisby’s procedural due process rights.

The due process clause of the Fifth Amendment prohibits the federal government from depriving any person of life, liberty, or property, without due process of law.

“[T]he phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists

of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.” *Lassiter v. Department of Social Services of Durham, North Carolina* (1981) 42 U.S. 18, 101.

Originally, the meaning of the term “due process” was procedural, protecting against judicial or administrative procedure that by reason of denial of notice and opportunity for a hearing unfairly deprived one of property or personal rights.

The principle of notice is fundamental to due process:

“Ingrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered from mere failure to act.” *Lambert v. California* (1957) 78 S. Ct. 240, 243.

The comment of the Memorandum decision on page 4, footnote 2, “The limited scope of the consolidation is confirmed by the District Court’s entry of a separate judgment of dismissal in each case,” is legally irrelevant in the context of the fundamental due process requirement of notice. This is so because as noted in Argument 1 of Appellant’s Reply Brief (Dkt-Entry 41), Frisby did not receive notice of the filing of the Judgment in Case 4167 because the substitution of Steinhart as attorney for Frisby was properly filed



only in Case 1712 and therefore Steinhart was not listed on the electronic service of process list in Case 4167. The Scheduling Order of the District Court that consolidated Cases 1712 and 4167, amongst other things, instructed the Clerk's Office to add any necessary parties or counsel to the lead case, i.e., Case 1712. 2-SER-409.

In Appellant's Motion to Take Judicial Notice (DktEntry 40), Frisby requested the Court to take judicial notice of the mailing information for Case 1712 (Exhibit 4 at page 11) and the mailing information for Case 4167 (Exhibit 5 at page 12). That information discloses that only Frisby's former attorney, Coleman W. Watson, is listed on the Case 4167 mailing list, and only Frisby's current attorney, Terran T. Steinhart, is listed on the Case 1712 mailing list. As a result, Steinhart received notice that the Judgment was filed in Case 1712, but did not receive notice that the same Judgment was also filed in Case 4167.

The Memorandum decision denied Frisby's Motion to Take Judicial Notice "because the subject documents are already part of the record on appeal, or duplicative of Defendants-Appellees request, or are irrelevant to the jurisdictional question." (Emphasis added). The mailing lists in the two cases (Exhibits 4 and 5 to the Motion to Take Judicial Notice) were neither part of the record on appeal nor duplicative of Defendants-Appellees' request. Therefore, the reason for the denial of the motion to take judicial notice as to those lists would be that they "are irrelevant to the jurisdictional question."

Respectfully, those mailing lists are not irrelevant to the jurisdictional question because they contain evidence that Steinhart did not receive notice of the filing

of the Judgment in Case 4167, which lack of notice is the basis of Frisby's claim of denial of procedural due process.

In the context of the factual scenario of this case, the lack of notice to Steinhart (Frisby's current attorney) that the Judgment was filed in Case 4167 as well as in Case 1712 is a highly relevant circumstance. As noted above, both the contents of the District Court's Ruling on the motion for summary judgment (1-ER-18) which was filed and served upon Steinhart in Case 1712, and the contents of the Judgment (1-ER-16) filed and served upon Steinhart in Case 1712, expressly encompass rulings on both the copyright infringement claim as to the sound recording (Case 1712), and the copyright infringement claim as to the musical composition (Case 4167).

At the time of the filing of the notice of appeal in Case 1712, although a summary Judgment (1-ER-16) had been entered, by definition the case was in a "pretrial" posture because no trial had occurred. The Scheduling Order which consolidated the two cases (2-ER-409) required that counsel were to make all future filings in Case 1712. Under all of the above circumstances, in the absence of giving notice to Frisby (through Steinhart) that the same Judgment filed in Case 1712 had also been filed in Case 4167, Frisby (acting through Steinhart) reasonably filed the notice of appeal only in Case 1712.

In an apparent attempt to support the ruling of the Memorandum decision that the notice of appeal filed in Case 1712 only gave jurisdiction to this Court to rule upon the copyright infringement claim as to the sound recording (Case 1712), the Memorandum decision states at 5, fn 3:

“The motion for reconsideration [*i.e.*, Motion for New Trial, etc., 2-ER-168] only pertained to the judgment entered in the 1712 Action.”

Respectfully, the above footnoted comment is not correct. As noted above, both the Ruling on the motion for summary judgment (1-ER-18) and the Judgment (1-ER-16) expressly encompass both Cases 1712 and 4167. Therefore, by force of logic the motion for new trial/reconsideration of the Ruling and Judgment must be deemed to encompass both cases, not just Case 1712.

Furthermore, the contents of the Ruling on the motion for new trial (1-ER-2) clearly demonstrate that the Ruling encompassed both cases. As noted in the briefs of the parties on the merits, the copying element of a copyright infringement claim as to a sound recording requires that the defendant recapture (directly record) the sounds of the copyrighted sound recording. In other words, the copyrighted sound recording and the infringing sound recording must be literally identical by reason of direct recording.

However, the copying element of a copyright infringement claim as to a musical composition does not require proof of identical recapturing, but may be established by circumstantial evidence that the defendant had access to the copyrighted musical composition and that the infringing musical composition is substantially similar to the copyrighted musical composition. Furthermore, with respect to a copyright infringement claim as to a musical composition, plaintiff need not show access to demonstrate copying where the copyrighted composition and the infringing composition are not only substantially similar, but are strikingly similar. *Unicolors, Inc. v. Urban Outfitters, Inc.* (9th Cir. 2017) 853 F.3d 980, 988.

Proof of copying in a sound recording copyright infringement claim requires proof of identicalness between the copyrighted sound recording and the infringing sound recording. Proof of copying in a musical composition copyright infringement claim either requires proof that the copyrighted composition and the infringing composition are strikingly similar, or in the alternative, proof that defendant had access to the copyrighted composition and that the copyrighted composition and infringing composition are substantially similar.

The contents of Ruling of the District Court on the motion for new trial/reconsideration (1-ER-2) contain a section in which the District Court sets forth its conclusion as to the issue of access (1-ER-2 at 11), and a separate section in which it sets forth its conclusion as to the issue of substantial similarity (1-ER-2, at 12) Since the issues of access and substantial similarity are only involved in a copyright infringement claim as to a musical composition, the fact that the Ruling contains the Court's conclusions as to both of those issues demonstrates that the motion for new trial and the Ruling thereon involved both Case 1712 with respect to infringement of the sound recording, and Case 4167 with respect to infringement of the musical composition.

Respectfully, under the circumstances discussed above, the ruling in the Memorandum decision—that this Court does not have jurisdiction over the copyright infringement claim involving the musical composition (Case 4167) because Frisby only filed a notice of appeal in Case 1712—is a violation of the notice and fundamental fairness principles of procedural due process.

## CONCLUSION

For all of the reasons stated above, the Petition for Panel Rehearing should be granted. The Court should rule that it has jurisdiction of the copyright infringement claims as to both the sound recording (Case 1712) and the musical composition (Case 4167), and should thereupon consider the Briefs of the parties and rule upon the merits of the appeal.

Respectfully submitted,

/s/ Terran T. Steinhart  
Attorney for Plaintiff and Appellant  
Gary Frisby