

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL ELLIOT KWABENA OKYERE
DARKO (P/K/A “OBRAFOUR”),

Plaintiff,

v.

AUBREY DRAKE GRAHAM (P/K/A
“DRAKE”), ALEXANDER LUSTIG,
CHRISTIAN BEAU ANASTASIOU ASTROP,
DIAMANTE ANTHONY BLACKMON,
JOHANNES KLAHR, RICHARD ZASTENKER,
WARNERTAMERLANE PUBLISHING CORP.,
WARNER MUSIC GROUP CORP., UMG
RECORDINGS, INC., UNIVERSAL MUSIC
PUBLISHING INC., UNIVERSAL MUSIC
PUBLISHING AB, UNIVERSAL SONGS OF
POLYGRAM INTERNATIONAL INC.,
BREMER MUSIC GROUP AB, REPUBLIC
RECORDS, INC., and OVO SOUND LLC,

Defendants.

Civil Action No. 1:23-cv-03232-JMF

**MOTION OF DEFENDANTS UMG
RECORDINGS, INC., UNIVERSAL
MUSIC PUBLISHING, INC.,
UNIVERSAL SONGS OF
POLYGRAM INTERNATIONAL
INC., UNIVERSAL MUSIC
PUBLISHING AB, BREMER MUSIC
GROUP AB, WARNER MUSIC
GROUP CORP., WARNER-
TAMERLANE PUBLISHING
CORP., AUBREY DRAKE
GRAHAM (P/K/A DRAKE),
JOHANNES KLAHR, AND
RICHARD ZASTENKER TO
DISMISS PLAINTIFF’S FIRST
AMENDED COMPLAINT**

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants UMG Recordings, Inc., Universal Music Publishing, Inc., Universal Songs of Polygram International Inc., Universal Music Publishing AB, Bremer Music Group AB, Warner Music Group Corp. (“WMGC”), Warner-Tamerlane Publishing Corp. (“Warner-Tamerlane”), Aubrey Drake Graham (p/k/a Drake) (“Drake”), Johannes Klahr, and Richard Zastenker (collectively, “Defendants”) respectfully submit this Memorandum of Law in support of their Motion (the “Motion”) to dismiss Plaintiff’s First Amended Complaint, dated December 6, 2023 (the “First Amended Complaint” or “FAC”; ECF 87), in its entirety, with prejudice.

I. INTRODUCTION

In this action, Plaintiff Michael Elliot Kwabena Okyere Darko p/k/a Obrafour (“Plaintiff”) claims copyright infringement based solely on the allegedly unauthorized use by Defendants of a five-second vocal recording of the words “Killer cut, blood, killer cut” (the “Phrase”) contained in the allegedly infringed “Oye Ohene (Remix)” (the “Remix”).¹ It can be determined on this motion that the allegations of the FAC – Plaintiff’s second pleading – fail to establish any viable claim by Plaintiff of infringement here.

As a dispositive threshold matter, Defendants have ascertained that Plaintiff does not have standing to bring this case, because he does not own a valid copyright in either the recorded vocal performance of that Phrase, or the underlying words. Plaintiff’s claim of ownership is defeated because a copyright registration has been filed by a non-party with the Copyright Office in Ghana. As discussed below, Second Circuit law requires application of the laws of the country bearing the strongest relationship with the creation of the work as to any determination

¹ Solely for purposes of this Motion only, Defendants assume, but do not concede, that the Phrase was sampled in “Calling My Name” by recording artist Drake (hereinafter, “Defendants’ Work”). There is no claim that any other material contained in the Remix was sampled.

of ownership rights. As the Phrase was undisputedly created in Ghana, the laws of Ghana control the question of ownership thereof. Under Ghanaian law, the Ghanaian registration creates a presumption of ownership in the Phrase and defeats any claim of alleged ownership of the Phrase by Plaintiff which is entirely (and erroneously) predicated upon the filing of a U.S. copyright registration for the copyrights of *all* of the compositional and recorded material contained in the Remix, including the Phrase.²

As explained further below, Plaintiff has attempted to conceal his lack of copyright ownership in the Phrase under Ghanaian law, as well as that a non-party has asserted adverse authorship and ownership thereof (including by filing a copyright registration in Ghana).³ Specifically, in his original complaint, Plaintiff alleged, falsely, that *he* has a Ghanaian copyright registration in the Remix which incorporated the Phrase. Cmplt. ¶ 33. But he did not have such registration. Once Defendants raised that point, he changed his allegation in the FAC, but continued to conceal matters with further misleading allegations, including claiming copyright ownership of the Phrase as it appears in the Remix based upon alleged statements of a GHAMRO⁴ employee, while ignoring the registration of Mantse. However, GHAMRO is a performing rights society that has *no role* in determining ownership of a copyright under Ghanaian law. Further, in the FAC, Plaintiff still has calculatingly concealed the identity of the

² “Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.” *In re Celco P’ship*, 663 F. Supp. 2d 363, 368 (S.D.N.Y. 2009). “A musical composition consists of rhythm, harmony, and melody,” can be notated in sheet music, and can be performed by any musical performer with sufficient skill. *Rose v. Hewson*, No. 17CV1471 (DLC), 2018 WL 626350, at *2 (S.D.N.Y. Jan. 30, 2018). A sound recording captures “the sound produced by ... [a particular] performer’s rendition of” a musical composition. *Pryor v. Warner/Chappell Music, Inc.*, No. CV 13-4344 RSWL AJWX, 2014 WL 690153, at *5 (C.D. Cal. Feb. 20, 2014).

³ That non-party, Mantse Aryeequaye (“Mantse”), has publicly claimed he, not Plaintiff, owns all copyright interests in the Phrase. *See infra* at n.6.

⁴ As discussed *infra* at n.14, the Ghana Music Rights Organization (GHAMRO) is a rights organization for artists.

performer of the Phrase, never stating whose voice has been recorded. Plaintiff has made no allegations as to any documentation reflecting any transfer or authorization to use the Phrase in the Remix. Accordingly, Plaintiff's claim fails under Rules 12(b)(1) and (6) as he cannot establish ownership of a valid copyright in and to the Phrase, which is the first element of any copyright claim.

Alternatively, even assuming Plaintiff could prove his ownership of a valid copyright in the Phrase, and he cannot, Plaintiff cannot prove the further requisite elements of an infringement claim. *First*, his claim that any use of the Phrase infringes his purported copyright in the underlying words fails, because the words are not sufficiently original to warrant copyright protection. As Plaintiff admitted in his original pleading, the Phrase is comprised of commonplace, colloquial terms "universally associated with hip-hop culture," meaning "Great song, brother, great song." This short phrase is not protectable expression under copyright jurisprudence. *Second*, Plaintiff cannot establish "substantial similarity" under the applicable "fragmented literal similarity" test. A comparison of the works establishes that Plaintiff cannot demonstrate any copying of protectable elements (*i.e.*, not commonplace elements) that are both quantitatively and qualitatively sufficient to support a finding of substantial similarity. These fatal defects militate in favor of dismissal with prejudice on any one of the foregoing grounds.

While the above grounds should be dispositive, demonstrating Plaintiff cannot prove the elements of his infringement claim, additional pleading deficiencies exist providing independent grounds for dismissal. Plaintiff's FAC does not comply with Rule 8 because it relies on improper group pleading. Plaintiff utilizes conclusory allegations asserted against multiple defendants with no notice of what specific conduct each individual defendant allegedly engaged in that could potentially give rise to liability. Such allegations fail to meet the general pleading

standards under Rule 8 and under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In that regard, under all circumstances, defendant WMGC should be dismissed as Plaintiff makes no effort to, and cannot, state a claim against it. WMGC appears to have been included solely because it is one of the corporate parent companies of another Defendant, Warner-Tamerlane, which is not a sufficient basis to maintain a copyright infringement claim under black-letter law.

Finally, should dismissal not be fully granted, and it should, the Court should hold that Plaintiff is not entitled to statutory damages or attorneys' fees under any circumstance under the clear terms of the Copyright Act.

II. RELEVANT FACTUAL BACKGROUND

A. Plaintiff and the "Killer Cut, Blood" Phrase

Plaintiff is a Ghanaian musical artist. FAC ¶ 15. He alleges he is associated with "hiplife," a Ghanaian musical genre that, in part, has hip-hop influences. *Id.* On or around June 23, 2003, Plaintiff claims he commercially released an album on compact disc in the Ghanaian market titled *Nte Tee Pa*. *Id.* ¶ 32. One of the tracks included on the *Nte Tee Pa* album is a song titled "Oye Ohene (Remix)" (*i.e.*, the Remix). Attached to the accompanying Declaration of Bradley J. Mullins ("Mullins Decl.") as Exhibit A is the deposit copy of the Remix submitted to the U.S. Copyright Office by Plaintiff.⁵ The Remix is roughly seven-minutes long, the majority of which (almost 99%) consists of loud instrumentation (*inter alia* horns, multiple guitars, drums) and boisterous chanting, singing, and rapping by numerous men and women in Twi, one of the languages spoken in Ghana. Mullins Decl., Ex. A, at 00:05–7:06.

⁵ The version of the Remix that governs the scope of his alleged copyright is the version submitted to the U.S. Copyright Office in connection with his application to register the work (*i.e.*, the deposit copy). *See Nicholls v. Tufenkian Import/Export Ventures, Inc.*, 367 F. Supp. 2d 514, 520 (S.D.N.Y. 2005) ("[A] copyright does not encompass [elements] that vary in essential respects from what was presented to the Copyright Office. Otherwise, the purposes of the deposit requirement would be nullified.").

For approximately five seconds at the immediate outset of the Remix (or for roughly 1% of the song), a “male voice” is heard repeating the short phrase “Killer cut, blood, killer cut” (*i.e.*, the Phrase). FAC ¶ 36; Mullins Decl., Ex. A, at 00:00–00:05. Plaintiff does not allege that this “male voice” is his; rather, he intentionally fails to identify the performer of that Phrase in the FAC. Yet, Plaintiff is undoubtedly aware that the day after Plaintiff filed this lawsuit, Mantse claimed to be such performer, as well as publicly claimed sole copyright ownership of the Phrase as his solo work, and that it was used in the Remix without compensation.⁶

In light of these (and other) serious doubts concerning Plaintiff’s ownership rights to the Phrase, Defendants’ counsel sent a detailed letter to Plaintiff’s counsel requesting they address these matters. Mullins Decl., Ex. B. Plaintiff first failed to even acknowledge receipt of the letter for over a month. When Defendants’ counsel asked for a substantive response, Plaintiff’s counsel responded by baselessly arguing that such issues were “premature.” *Id.*, Ex. C.

While Plaintiff was refusing cooperation, Defendants were able to ascertain that in Ghana, as Plaintiff was undoubtedly aware, Mantse filed a Ghanaian copyright registration claiming sole ownership of the Phrase. On May 16, 2023, Mantse registered his “Killer Cut” spoken word recording with the Copyright Office of Ghana, negating Plaintiff’s claim of ownership under Ghanaian law as discussed below. Mullins Decl., Ex. D. While Plaintiff identified Mantse as a co-author of the Remix in Plaintiff’s U.S. copyright registration (*see* FAC, Ex. A), such registration is not a Ghanaian registration, and Plaintiff has none for the Remix or the Phrase. Nor does he allege having any documentation reflecting any permission to use the Phrase in the Remix, or transferring rights with respect thereto to him.

⁶ *See, e.g.*, Mantse Aryeequaye (@Accradotalt), TWITTER (Apr. 19, 2023, 11:19 a.m.), <https://x.com/Accradotalt/status/1648708008224911361?s=20> (“[T]he intellectual property more specifically the ‘KILLER CUT’ sound which was sampled by @Drake in the track ‘Calling My Name’ belongs to Mantse Aryeequaye and not to @iamobrafour.”).

B. Defendants and “Calling My Name”

Drake is an acclaimed hip-hop recording artist and songwriter. FAC ¶ 16. On June 17, 2022, Drake’s album *Honestly, Nevermind* (hereinafter, the “Album”) was released. *Id.* ¶ 41. One of the tracks on the Album is titled “Calling My Name” (*i.e.*, Defendants’ Work).⁷ *Id.* ¶ 45. A commercially available recording of Defendants’ Work is attached as **Exhibit E** to the accompanying Mullins Declaration. Plaintiff alleges that the Phrase is used in Defendants’ Work. FAC ¶ 45; Mullins Decl., Ex. E. Defendants’ Work is approximately two minutes and ten seconds long. *Id.* The first 53 seconds consists of R&B-style crooning about a romantic partner. Mullins Decl., Ex. E at 00:00-00:53. By contrast, the last 70 seconds of Defendants’ Work fuses the “house” style of music featuring bass grooves, with traditional hip hop. *Id.* at 00:59-2:10. In between these two portions of the song is an altered, approximately four-second excerpt of the Phrase. *Id.* at 00:54-00:58. Plaintiff alleges that certain live performances of Defendants’ Work start with the Phrase, followed by the “house” style music portion of Defendants’ Work. FAC ¶¶ 61-62.

C. Plaintiff’s Lawsuit

Plaintiff’s infringement claim relates solely to the alleged unauthorized use of the Phrase in Defendants’ Work,⁸ as there is no claim that Defendants’ Work has any other musical similarities or any lyrical similarities whatsoever to the Remix.

⁷ In the FAC, Plaintiff makes reference to the use of “a song derivative of and based upon [Defendants’ Work].” FAC ¶ 63. However, Plaintiff only asserts claims as to one “[] Work” (*id.* ¶ 2) so that is the sole work at issue.

⁸In his FAC, Plaintiff alleges claims against various alleged “writers, producers, performers, record labels, entertainment companies, publishers, managers, administrators, and/or distributors” of Defendants’ Work (*see* FAC ¶ 4), for direct, contributory, and vicarious copyright infringement due to their “direct and/or indirect copyright” of “vocal excerpts taken from the sound recording of [Plaintiff’s] [‘Oye Ohene (Remix)’].” *Id.* ¶¶ 1-2.

As soon as Defendants' Work was commercially released in June of 2022, instead of contacting Defendants or otherwise notifying them of his alleged copyright claims, Plaintiff sought to shore up (and fabricate) his alleged copyrights in the Remix.⁹ On or around September 6, 2022, approximately 19 years after the Remix was initially first released (*id.* ¶ 32), and over two months after Defendants' Work was commercially released (*id.* ¶ 2), the U.S. Copyright Office issued a copyright registration for the musical composition and sound recording of the Remix, Reg. No. SR0000953196 (the "Registration"). FAC, Ex. A. The Registration, applied for by Plaintiff, identifies individuals Nii Addo Quaynor, Edward Nana Poku Osei, Mantse, and Elivava Mensah Gbevi as co-authors of the "sound recording, music, [and] lyrics" of the Remix along with Plaintiff. FAC, Ex. A. The Registration lists the "first publication" date of the Remix as June 23, 2003. FAC, Ex. A.¹⁰

Plaintiff filed this copyright infringement lawsuit on April 18, 2023. ECF 1. In his Original Complaint, Plaintiff misrepresented to the Court that he had "***registered his exclusive copyrights in and to the Copyrighted Work 'Oye Ohene (Remix)' under Ghanaian copyright law and procedure.***" Cmpl. ¶ 33 (emphasis added). As alleged evidence of that "2003 registration," he annexed to the Original Complaint no document from the Copyright Office in Ghana, but instead a document allegedly obtained from GHAMRO, dated October 18, **2022**. *Id.*, Ex. B. As set forth in Defendants' original motion to dismiss (ECF 75; the "Original Motion"), these representations were blatantly false, as records from the Ghanaian Copyright Office

⁹ Plaintiff makes much of the fact that Defendants' representatives allegedly reached out seeking to license the Phrase. FAC ¶¶ 37-40, 42-43. These allegations are irrelevant where, as here, a use is non-infringing. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585, n.18, 114 S. Ct. 1164, 1174, 127 L. Ed. 2d 500 (1994).

¹⁰ Plaintiff no longer claims (as he did in his Original Complaint), that he registered an "exclusive" copyright in the U.S. FAC ¶ 35.

indicate that there is no copyright for any work entitled “Oye Ohene (Remix).” *See* ECF 77-3 (Oct. 4, 2023 correspondence from the Copyright Office of Ghana).¹¹ Rather, only the copyright for the original “Oye Ohene” (*which does not contain the Phrase*) was registered. *Id.*¹² Similarly, the purported GHAMRO document attached to the Original Complaint solely referenced “Oye Ohene” and not the “Remix” at issue. Cmplt., Ex. B.

In his FAC, Plaintiff now is compelled to concede he *never had a Ghanaian registration* for the Remix. FAC ¶ 34. Still intent on misrepresenting ownership, he claims now his alleged “sole and exclusive owner[ship] of the copyrights in and to [the Remix]” is manifest by the new declaration from GHAMRO CEO Abraham Adjatey, who wrote the GHAMRO letter attached to the Original Complaint. FAC, Ex. D. In this new declaration, Adjatey declares under penalty of perjury that “based upon [his] personal knowledge . . . [Plaintiff] is the owner of Ghanaian copyrights in and to the sound recording entitled “Oye Ohene (Remix).” *Id.* The “personal knowledge” referenced is the fact that Plaintiff “has solely been receiving royalties from GHAMRO in relation to the Song since it was released” and “since the release of the Song no one has challenged his sole right to receive royalties from GHAMRO to the Song.” *Id.* Adjatey further claims that his reference in the 2022 GHAMRO letter to “Oye Ohene,” rather than “Oye Ohene (Remix)” was a “typographical error[.]” *Id.* As discussed below, this misleading declaration is irrelevant as GHAMRO has no authority to speak to ownership rights under Ghanaian law.

¹¹ Courts commonly take judicial notice of (among other types of records) letters from government agencies. *See, e.g., Smith v. Westchester Cty.*, 769 F. Supp. 2d 448, 460-61 n.7, 12 (S.D.N.Y. 2011) (taking judicial notice of U.S. Department of Labor letters). The Copyright Office of Ghana constitutes a governmental entity, as it is a department under Ghana’s Ministry of Justice. *See* GHANA COPYRIGHT OFFICE, <https://www.copyright.gov.gh/> (last visited Jan. 10, 2024).

¹² Even that registration was for an album titled *TOFA*, *not Nte Tee Pa*, which was also not registered. *Id.*

III. ARGUMENT

A. Standard of Review

Fed. R. Civ. P. 12(b)(1) provides that a motion for lack of subject matter jurisdiction may be made in lieu of an answer. If a court determines that subject matter jurisdiction is lacking, the complaint must be dismissed. *See* Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court **must** dismiss the action.”) (emphasis added). Courts routinely dismiss copyright infringement actions for lack of subject matter jurisdiction. *See, e.g., Caldwell v. Rudnick*, No. 05 Civ. 7382 (NRB), 2006 WL 2109454, at *2 (S.D.N.Y. July 26, 2006); *Stockart.com, LLC v. Florists’ Transworld Delivery, Inc.*, No. 03 Civ. 3096 (LAK), 2003 WL 21542321, at *1 (S.D.N.Y. July 7, 2003).

To survive a motion pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, a cause of action must be supported by “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “[B]lanket assertions,” “labels and conclusions, and a formulaic recitation of the elements of a cause of action” fail to satisfy this threshold. *Id.* at 555 n.3; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”).

While it should accept as true well-pleaded material allegations in a complaint, the Court should not consider “conclusions of law or unwarranted deductions of fact[.]” *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994) (citation omitted). Further, “[a]lthough [courts] accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor, [courts] must dismiss a claim if a plaintiff pleads himself out of court by alleging facts which show that he has no claim[.]” *Soto v. Disney Severance Pay Plan*, 26 F.4th 114, 120 (2d Cir. 2022). Allegations in a complaint are “judicial admissions” by which a party is “bound throughout the course of the proceeding.” *Off. Comm. of Unsecured*

Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003); *see also Ferrari v. Cty. of Suffolk*, 790 F.Supp.2d 34, 38 n.4 (E.D.N.Y. 2011) (court may take “judicial notice of prior pleadings, orders, judgments, and other related documents that appear in the court records of prior litigation and that relate to the case *sub judice*”).

B. Plaintiff Cannot Establish Copyright Infringement as a Matter of Law

To establish copyright infringement, two elements must be proven: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). As Plaintiff cannot establish either element, this case should be dismissed.

1. Plaintiff Has No Standing to Maintain This Lawsuit

The Copyright Act provides that only “the legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.” 17 U.S.C. § 501(b). The Second Circuit has interpreted § 501(b) to limit standing to two types of claimants: “(1) owners of copyrights, and (2) persons who have been granted exclusive licenses by owners of copyrights.” *Urbont v. Sony Music Ent.*, 831 F.3d 80, 88, n.6 (2d Cir. 2016) (quoting *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27, 32 (2d Cir. 1982)); *see also ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971, 980 (2d Cir. 1991) (explaining that a party with no ownership interest has no standing to sue). The plaintiff bears the burden of pleading copyright ownership. *Int’l Media Films, Inc. v. Lucas Ent., Inc.*, 703 F. Supp. 2d 456, 462 (S.D.N.Y. 2010). Failure to do so warrants pleading-stage dismissal. *See, e.g., Hutson v. Notorious B.I.G., LLC*, No. 14-CV-2307 (RJS), 2015 WL 9450623, at *6 (S.D.N.Y. Dec. 22, 2015).

Ownership rights are determined by the law of the state with “the most significant relationship” to the property and the parties. *Itar-Tass Russian News Agency v. Russian Kurier*,

Inc., 153 F.3d 82, 90 (2d Cir. 1998). Here, there is no dispute based on the FAC that the Phrase was created by a Ghanaian national and first published in Ghana. Thus, Ghanaian law – not U.S. law – applies to determine ownership interests in same. *See id.* (applying Russian law to determine ownership issues for works created by Russian nationals and first published in Russia); *Super Express USA Publ’g Corp. v. Spring Publ’g Corp.*, No. 13-CV-2814 (DLI)(JO), 2017 WL 1274058, at *3 (E.D.N.Y. Mar. 24, 2017) (applying Polish law in U.S. action).

The Ghanaian Copyright Act is the main legislation governing copyright law in Ghana. *See* Copyright Act (Act No. 690) (Ghana) (2005) (the “Act”).¹³ Under the Act, copyright registration of a work by the Copyright Office of Ghana is *prima facie* evidence of ownership. *Id.* § 39(2) (“[t]he purposes of registration are . . . to give evidence of the ownership and authentication of property”); *id.* § 40(1) (“An individual whose name is indicated as the author on any work is presumed to be the author of the work in the absence of any proof to the contrary.”). Any assignment or transfer of copyright interests must be memorialized in writing and signed by the copyright owner. *Id.* § 9(4). Under the Act, GHAMRO’s authority is limited,¹⁴ and does not include making determinations as to authorship. *See id.* § 49; *see also* Copyright Regs., 2010 § 29 (L.I. 1962).¹⁵

Under this applicable framework, U.S. law does not determine rights of ownership and Plaintiff’s purported U.S. registration is thus irrelevant. Rather, Mantse’s *Ghanaian copyright registration* controls, providing a presumption of ownership sufficient to defeat the allegations of ownership by Plaintiff. *See id.* §§ 39(2), 40; Mullins Decl., Ex. D. *See also Lahiri v. Universal*

¹³ A copy of the Act is annexed to the Mullins Declaration as Exhibit G.

¹⁴ GHAMRO is similar to BMI and ASCAP in the U.S., as it is a rights organization for artists. *See id.* § 49(2) (“A collective administration society may acting on the authority of the owner of a right collect and distribute royalties and other remuneration accruing to the owners.”).

¹⁵ A copy of the Ghana Copyright Regulations (2010) is annexed to the Mullins Declaration as Exhibit H.

Music & Video Distribution, Inc., 513 F. Supp. 2d 1172, 1178 (C.D. Cal. 2007) (“Lahiri’s copyright registration, which would ordinarily raise a presumption of copyright ownership under American law, is irrelevant here – as ownership is determined according to India’s copyright law.”). At best, the Remix is a derivative work registered in the United States, and any rights in that derivative work would not extend to the preexisting Phrase, which rights, according to Mantse, were never transferred to Plaintiff.¹⁶

Plaintiff’s letter and declaration from a GHAMRO executive, based on “personal knowledge” and alleged GHAMRO records (FAC, Exs. C, D), in no way inform ownership rights under Ghanaian law, and certainly do not counter the presumption of ownership created by Mantse’s registration in Ghana, as GHAMRO has no authority to make determinations as to authorship. Act § 49; Copyright Regs., 2010 § 29 (L.I. 1962).

Plaintiff’s allegations of ownership are thus rebutted by the presumptively valid Ghanaian registration as to which this Court can and should take judicial notice, and thus cannot survive this motion. Plaintiff has no allegations that could establish a valid copyright in the Phrase under Ghanaian law, his claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for failing to establish subject matter jurisdiction. Additionally, Plaintiff’s FAC fails to state a cause of action because a key element of a copyright infringement claim – ownership of a valid copyright – is clearly missing. *See Reid v. American Soc’y of Composers, Authors and Publishers*, No. 92 Civ. 270 (SWK), 1994 WL 3409, at *2 (S.D.N.Y. Jan. 5, 1994) (dismissing copyright infringement cause of action under Rule 12(b)(6) for failure to state claim, as well as under Rule 12(b)(1) for lack of subject matter jurisdiction). Dismissal pursuant to either Fed. R. Civ. P. 12(b)(1) or 12(b)(6) on this ground alone is appropriate here.

¹⁶ Plaintiff does not allege that Mantse transferred any rights in the Phrase to him, which would be necessary under the given circumstances to confer any ownership rights to Plaintiff. *See* Act § 9.

2. Plaintiff Cannot Establish Actionable Copying

Even if Plaintiff had plausibly alleged copyright ownership under Ghanaian law of the Phrase which could support his U.S. registration – which he has not – his claim is independently unviable because he cannot satisfy the second element of a copyright claim, *i.e.*, under U.S. law, copying of constituent elements of the work that are original. To establish copying of constituent elements of the work that are original, the plaintiff must establish both (1) actual copying, which can be shown either through direct evidence of copying or through circumstantial evidence that the defendants had access to the plaintiff's work, and (ii) that the “portion copied amounts to an improper or unlawful appropriation.” *Boone v. Jackson*, No. 03 CIV. 8661 (GBD), 2005 WL 1560511, at *2 (S.D.N.Y. July 1, 2005), *aff'd*, 206 F. App'x 30 (2d Cir. 2006). To establish unlawful copying, the plaintiff must show that “a **substantial similarity** exists between the defendant's work and the **protect[able] elements** of plaintiffs'.” *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) (emphasis added).

Multiple tests exist to determine substantial similarity, including the “ordinary observer test” and “fragmented literal similarity test.” *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 596 (S.D.N.Y. 2013). The ordinary observer test asks “whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard the aesthetic appeal as the same.” *Peter F. Gaito*, 602 F.3d at 66. By contrast, “fragmented literal similarity exists where the defendant copies **a portion** of the plaintiff's work exactly or nearly exactly, without appropriating the work's overall essence or structure.” *TufAmerica*, 968 F.Supp.2d at 597. The fragmented literal similarity test “queries whether the copying is: (1) quantitatively; **and** (2) qualitatively sufficient to support a finding of infringement.” *Rose*, 2018 WL 626350, at *4. In determining substantial similarity in the quantitative sense, a court determines how much of the plaintiff's protected expression has been copied. *See id.* In determining substantial

similarity in the qualitative sense, a court considers whether the defendant copied important features of the plaintiff’s protected expression. *See id.* Both the quantitative and qualitative assessments are made with respect to the “original work,” *i.e.*, the plaintiff’s work, **not** the allegedly infringing work. *Id.* (quoting *TufAmerica*, 968 F. Supp. 2d at 598).

Once again, it is only the copying of the **protected elements** of a copyrighted work that the law forbids. *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 101 (2d Cir. 2014); *see also Rose*, 2018 WL 626350, at *2. Thus, “when faced with works that have both protectable and unprotectable elements, [the] analysis must be more discerning . . . [courts] [] must attempt to extract the unprotect[a]ble elements from [] consideration and ask whether the protect[a]ble elements, standing alone, are substantially similar.” *Peter F. Gaito*, 602 F.3d at 66; *see also Zalewski*, 754 F.3d at 100 (because “[n]ot every portion or aspect of a copyrighted work is given copyright law’s protection . . . not *all* copying is wrongful . . .) (emphasis in original); *Bell v. Blaze Mag.*, No. 99 CIV. 12342 (RCC), 2001 WL 262718, at *3 (S.D.N.Y. Mar. 16, 2001) (if a court concludes that alleged similarities pertain only to unprotected elements of the work, “it is appropriate for the court to dismiss the action because, as a matter of law, there is no copyright infringement”).

a. Defendants’ Use of the Unoriginal Short Phrase “Killer Cut, Blood” Cannot Form the Basis of a Claim for Copyright Infringement of a Musical Composition

It is well settled that “words and short phrases” are unprotectable under copyright law and cannot, as a matter of law, support a copyright infringement claim.¹⁷ *See McDonald v. West*, 138 F. Supp. 3d 448, 456 (S.D.N.Y. 2015), *aff’d*, 669 F. App’x 59 (2d Cir. 2016) (phrase “Made

¹⁷ Similarly, under Ghanaian law, “a work is not eligible for copyright unless . . . it is original in character[.]” Act, § 1(2)(a); *id.* § 2 (“Copyright shall not extend to ideas, concepts, procedures, methods, or things of a similar nature.”).

in America” not copyrightable because “it is far too brief, common, and unoriginal to create any exclusive right vested in Plaintiff”); *Bell*, 2001 WL 262718, at *2 (phrase “Hip Hop Behind Bars” not entitled to copyright protection).

Applying these principles, courts have routinely recognized that, because songwriters must be free to borrow sayings and expressions from popular culture, short and commonplace phrases are not protectable, even when used in repeated lyrics of a song. *See, e.g., Acuff-Rose Music, Inc. v. Jostens, Inc.*, 988 F. Supp. 289, 294 (S.D.N.Y. 1997), *aff’d*, 155 F.3d 140 (2d Cir. 1998) (song lyrics using common imagery – “you’ve got to stand for something, or you’ll fall for anything” – to convey message about life “lack[] the requisite originality”); *Pyatt v. Raymond*, 10 Civ. 8765(CM), 2011 WL 2078531, at *5-10 (S.D.N.Y. May 19, 2011), *aff’d*, 462 Fed. Appx. 22 (2d Cir. 2012) (“caught up” not protectable), *aff’d*, 462 F. App’x 22 (2d Cir. 2012); *Boone*, 206 F. App’x, at 33 (“holla back” not protectable); *Prunte v. Universal Music Grp., Inc.*, 699 F. Supp. 2d 15, 25-30 (D.D.C. 2010) (“fire in the hole,” “I’m so high,” “get it poppin,” “wish a mutherf—er would,” “just running their mouths,” “shoot to kill,” “I’m a maniac,” and “that’s what’s up” not subject to copyright protection).

In particular, “because copyright protects neither ideas nor style . . . a court will not take into account similarities merely of elements *typical to the genre*.” *Rose*, 2018 WL 626350, at *3 (emphasis added); *see also Jones v. Atl. Recs.*, No. 22-CV-893 (ALC), 2023 WL 5577282, at *2 (S.D.N.Y. Aug. 29, 2023) (lyrics “it’s that WAP WAP it’s some wet *ss p*****” and “why you in the club with n****s wildn[?]” were “no more than common phrases, employed frequently in popular culture and other Hip-Hop songs”); *Pickett v. Migos Touring, Inc.*, 420 F. Supp. 3d 197, 207 (S.D.N.Y. 2019) (“walk it like I talk it” not protectable because of its use by “other rap and hip-hop artists” since “songwriters must be free to borrow sayings and expressions from popular

culture”); *Prunte*, 699 F. Supp. 2d at 27-28 (phrase “we wish them muther f—ers would trip this year” not protectable because it express a common theme in the genre: “[t]he combination of a speaker’s wish plus a common swear word[.]”).

Just as in the cases cited above, any purported copying of the phrase “Killer cut, blood, killer cut” cannot sustain an infringement claim. Plaintiff *conceded* that the Phrase “incorporates use of slang terms *universally associated* with hip-hop culture . . . In this lexicon . . . ‘Killer,’ . . . means ‘great.’ A ‘cut’ is a colloquial way of referring to a song or piece of music . . . ‘Blood’ is a term of endearment or affection meaning ‘brother.’” Cmpl. ¶ 42, n.1. Given that these allegations are fatal to Plaintiff’s compositional claim, he conveniently modifies the allegations in the FAC to remove his admission that the terms used in the Phrase are “universally associated with hip-hop culture.” *Compare* Cmpl. ¶ 42 & n.1 *with* FAC ¶ 36. Such defensive modifications, however, cannot foreclose dismissal, as it is well settled that courts may consider allegations in an original complaint “[w]here a plaintiff blatantly changes [such] facts [] to respond to [a] motion to dismiss.” *Colliton v. Cravath, Swaine & Moore, L.L.P.*, No. 08-CV-0040 (NRB), 2008 WL 4386764, at *6 (S.D.N.Y. Sept. 24, 2008); *Ferrari v. Cty. of Suffolk*, 790 F.Supp.2d 34, 38 n.4 (E.D.N.Y. 2011) (“judicial notice of prior pleadings, orders, judgments, and other related document” that relate to the case).

Indeed, numerous dictionaries reflect that the phrase consists of three commonplace words expressing a common theme and/or idea: a positive adjective (“killer”) to describe a song or track off an album (a “cut”), with a reference to the subject, a friend or brother (“blood”). *See also* “Killer,” COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/killer#:~:text=4.-,Slang,person%20or%20thing> (last visited Jan. 10, 2024) (“*Slang* [for] . . . an extremely

successful, impressive, exciting, etc. person or thing”); “Cut,” FREE MUSIC DICTIONARY, <https://www.freemusicdictionary.com/definition/cut/> (last visited Jan. 10, 2024) (“A single song, track, or continuous musical selection on a vinyl record, or a single track on a CD or other recording medium.”); “Blood,” CYBER DEFINITIONS, <https://www.cyberdefinitions.com/definitions/BLOOD.html> (last visited Jan. 10, 2024) (“BLOOD is a slang word widely used to mean ‘Brother.’”); *see also Boone*, 206 F. App’x, at *4 (“The appearance of the phrase ‘holla back’ in the Urban Dictionary further supports defendant’s contention that the phrase is common and therefore unprotectable.”).

This unremarkable phrase – which Plaintiff himself admitted is comprised of “slang terms universally associated with hip hop culture” – is a textbook example of unoriginal and unprotectable material that cannot give rise to an infringement claim. Plaintiff’s copyright infringement claims as to the musical composition of the work at issue must therefore be dismissed. *See Off. Comm. of Unsecured Creditors*, 322 F.3d at 167 (dismissing complaint, in part, due to binding “judicial admissions” by plaintiff warranting dismissal).

b. Plaintiff Cannot Establish Substantial Similarity Under Any Standard, Including Under the Fragmented Literal Similarity Test

Because Plaintiff does not allege substantial similarity between the two works as a whole – rather, he claims that only a fragment (*i.e.*, the Phrase) was copied – the doctrine of “fragmented literal similarity” applies to determine liability for copyright infringement. *Rose*, 2018 WL 626350, at *4. As set forth *supra* at 12-13, in determining substantial similarity in the quantitative sense, a court determines how much of the plaintiff’s protected expression has been copied. *Rose*, 2018 WL 626350, at *4-5. In determining substantial similarity in the qualitative sense, a court considers whether the expression taken is “of great qualitative importance *to the [pre-existing] work as a whole.*” *TufAmerica*, 968 F. Supp. 2d at 598 (emphasis added).

As to quantitative significance, the Phrase is a minimal part of the Remix; it constitutes a mere five seconds (at best) out of a roughly seven minute song. Mullins Decl., Ex. A. In other words, it represents roughly 1% of the Remix. *See Newton v. Diamond*, 388 F.3d 1189, 1195 (9th Cir. 2004) (three-note segment lasting six seconds of a four-and-a-half-minute composition was quantitatively insufficient to establish substantial similarity). The Phrase does not appear in any other part of the Remix. *See Hines v. BMG Rts. Mgmt. (US) LLC*, No. 20-CV-3535 (JPO), 2023 WL 6214264, at *6 (S.D.N.Y. Sept. 25, 2023) (guitar riff in introduction only appearing once in song that “runs for a maximum of six seconds out of 192 seconds, measuring barely three percent of Help Me in total” not quantitatively significant).

As for the qualitative prong, considerations include whether the excerpt is “the heart of plaintiff’s composition,” whether the excerpt is “the title phrase” of the plaintiff’s song, whether the excerpt is repeated anywhere else in the plaintiff’s song, whether the excerpt’s melody is related to any other melody found in the plaintiff’s song, and/or whether the excerpt “encapsulates the overriding theme of the song.” *See, e.g., TufAmerica*, 968 F. Supp. 2d at 607; *Hines*, 2023 WL 6214264, at *6; *Rose*, 2018 WL 626350, at *5 (concluding that a fragment is “not qualitatively significant” because it “appears only once near the beginning of the recording”); *cf. May v. Sony Music Ent.*, 399 F. Supp. 3d 169, 186 (S.D.N.Y. 2019) (qualitative significance found because the “very title of the song draws upon the first half of the sample,” and sample “encapsulates the overriding theme of the song, which is male domination and control”). Accordingly, any alleged “qualitative importance” of the sample *to the defendant’s work* is *irrelevant* to this analysis. *See TufAmerica*, 968 F. Supp. 2d at 607 (“Plaintiff’s Amended Complaint improperly focuses on the importance of the Sample to the Beastie Boys song in which the Sample is used.”). Similarly irrelevant is any alleged public recognition of the

excerpt outside the context of the plaintiff's work, as what matters is the excerpt's importance *to the plaintiff's work*.

Here, the Phrase is not qualitatively significant, *i.e.*, “the heart of the work.” *Rose*, 2018 WL 626350, at *4. It is “not repeated anywhere else in [the Remix] and [] its melody is unrelated to any other melody found in the song.” *Hines*, 2023 WL 6214264, at *6 (finding no qualitative significance); *see also Steward v. West*, No. CV1302449BROJCX, 2014 WL 12591933, at *9 (C.D. Cal. Aug. 14, 2014) (“the sampled portions here, even if considered together, simply constitute a spoken introduction to the song.”); *Rose*, 2018 WL 626350, at *4 (“[I]t is not qualitatively significant, when measured against the entirety of plaintiff's composition. The fragment appears only once near the beginning of the recording; it is not repeated.”); *Newton*, 388 F.3d at 1195-96 (“[T]he three-note sequence appears only once in [the] composition” and “is no more significant than any other section”). It does not encapsulate the overriding theme of the song.

The Phrase is so qualitatively insignificant to the Remix that it does not even appear in versions of the work disseminated to the public by Plaintiff himself. For example, in the “Official Music Video” posted by Plaintiff to his YouTube page, it is omitted. *See Obrafour Ohene remix Feat Tinny Official Music Video*, @Obrafour, YOUTUBE (July 9, 2020), <https://www.youtube.com/watch?v=ohULQH4WbbQ>.¹⁸ This demonstrates how disjointed the Phrase is from the Remix, and how the Remix can stand on its own as a complete song when the Phrase is removed. In other words, it is not “the heart” of the work. In addition, the Phrase is so insignificant that Plaintiff did not even bother to obtain a registration for a work containing it with the Copyright Office of Ghana. *Mullins Decl.*, Ex. F; *see also Hines*, 2023 WL 6214264, at

¹⁸ “A district court [] has the discretion to take judicial notice of internet materials.” *Ganske v. Mensch*, 480 F. Supp. 3d 542, 545-46 (S.D.N.Y. 2020).

*6 (considering the fact that “Hines did not even think to include the Introduction in his deposit copy when he first registered the copyright for Help Me in 1969, and he endeavored to add the Introduction to the deposit copy only in a supplemental registration in 2019” in finding there was insufficient qualitative significance of the alleged sample to the work at issue).¹⁹ Thus, because Plaintiff cannot establish substantial similarity under the fragmented literal similarity test applied in this Circuit, his copyright infringement claims fail as to both his alleged composition rights and his alleged sound recording rights.

C. Plaintiff Fails to Adequately Allege Claims Against Each Defendant

Independent from the above bases for dismissal, the FAC should be dismissed because it fails to plausibly allege infringement claims against each of the defendants and does not meet the pleading requirements of Rule 8 for copyright infringement claims.²⁰

Under Rule 12(b)(6), “[i]t is well established that general allegations against all defendants cannot support liability against individual defendants who are not alleged to have actually engaged in the identified activity.” *Lopez v. Bonanza.com, Inc.*, No. 17 CIV. 8493 (LAP), 2019 WL 5199431, at *10 n.20 (S.D.N.Y. Sept. 30, 2019) (citing, *inter alia*, *Twombly*, 550 U.S. at 557). And Rule 8 “requires, at a minimum, that a complaint give *each* defendant ‘fair notice of what the plaintiff’s claim is and the ground upon which it rests.’” *Atuahene v. City of Hartford*, 10 F. App’x 3, 34 (2d Cir. 2001) (emphasis added) (quoting *Ferro v. Ry. Express*

¹⁹ Plaintiff’s FAC is littered with new allegations regarding the alleged importance of the Phrase *to Defendant’s Work* (FAC ¶¶ 56, 61, 62, Ex. J), the public’s alleged association of the Phrase to the Remix and its alleged popularity standing alone (FAC ¶¶ 36, 48, Ex. I), and Plaintiff’s alleged work “pioneering the use and proliferation . . . of introductions of this kind – also known as ‘signatures’ or ‘drops’” (*id.*). These facts are irrelevant to any determination of qualitative significance. *See supra* at 17-19.

²⁰ Rule 8 is just one basis for dismissal under Rule 12. *See Preacely v. U.S Dep’t of Hous. & Urb. Dev.*, No. 22CV6446ATKHP, 2023 WL 5020432, at *6 (S.D.N.Y. May 9, 2023), *report and recommendation adopted*, 2023 WL 4420345 (S.D.N.Y. July 10, 2023) (recommending that, “[i]n the event the Court finds that the Amended Petition complies with Rule 8 . . . the Amended Petition should instead be dismissed on the ground that it is frivolous and fails to state a claim on which relief can be granted”).

Agency, Inc., 296 F.2d 847, 851 (2d Cir. 1961)). A complaint fails to give fair notice when it “lump[s] all the defendants together in each claim and provid[es] no factual basis to distinguish their conduct[.]” *Id.* Such a deficient pleading is called improper “group pleading.” *See Holmes v. Allstate Corp.*, No. 11 Civ. 1543 (LTS) (DF), 2012 WL 627238, at *8-10 (S.D.N.Y. Jan. 27, 2012) (dismissing complaint as against Allstate where “Plaintiffs allege that ‘defendants’ failed to keep numerous promises” but did not “specify that a single promise was ever made or sanctioned by Allstate.”).

In copyright infringement cases such as this one, “particular infringing acts must be set out with some specificity. Broad, sweeping allegations of infringement do not comply with Rule 8.” *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 36 n.3 (S.D.N.Y. 1992), *aff’d*, 23 F.3d 398 (2d Cir. 1994), *cert. denied*, 513 U.S. 950 (1994); *see also Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 CIV. 9248 (HB), 1999 WL 816163, at *4 (S.D.N.Y. Oct. 13, 1999) (dismissing complaint making “vague and conclusory” allegations that defendant “did knowingly and willfully infringe upon Plaintiff’s copyright . . . by unlawfully purchasing and/or otherwise obtaining copies of the Subject Work” and has and will “exploit and profit from the Subject Work”); *Nygaard v. Bacon*, 2021 WL 3721347, at *7 (S.D.N.Y. Aug. 20, 2021) (dismissing complaint that was too “conclusory” to “put Defendant on notice of the claims against him”).

Here, the FAC asserts generalized allegations against all the numerous entities identified by *any* online source as being associated with Defendants’ Work, without any particularized allegations as to each such entity.²¹ The FAC rarely (if ever) specifies which Defendant allegedly engaged in particular acts giving rise to liability. Rather, most of the allegations

²¹ Presumably, Plaintiff’s addition of conclusory allegations in the FAC as to the conduct of each defendant is meant to remedy the deficiencies cited in the Original Motion. FAC ¶¶ 17-19, 26-30. These efforts are unavailing.

ambiguously state that the alleged conduct was carried out by “Defendants” or by numerous Defendants lumped into makeshift groups, including the “Label Defendants” (*see* FAC ¶ 64) and the “Individual Defendants” (*id.* ¶ 65). Indeed, Plaintiff broadly identifies “Defendants” as “the writers, producers, performers, record labels, entertainment companies, publishers, managers, administrators, and/or distributors of [Defendants’ Work]” who “among other things, license, publish, administer, and exploit the [Defendants’ Work], as well as authorize others to manufacture, distribute, sell, market, license, or exploit [Defendants’ Work].” FAC ¶

4. Plaintiff further alleges that “[a]ll of the claims asserted herein arise out of and are based on *Defendants’* copying, reproduction, distribution, public display, performance, sale, licensing, marketing, promotion and/or other exploitation of the [the Remix] without [Plaintiff’s] consent.” *Id.* ¶ 5 (emphasis added). While the term “Defendants” is defined to include *15 different parties*, the FAC refers to the collective, indiscriminate “Defendants” in the vast majority of instances to describe the conduct undergirding his claims. *See, e.g., id.* ¶¶ 4, 5, 7-12, 14, 57-62, 72-75, 78-81. Thus, Plaintiff’s “failure to isolate the key allegations against each [D]efendant supports dismissal.” *Ochre LLC v. Rockwell Architecture Plan. & Design, P.C.*, No. 12 CIV. 2837 KBF, 2012 WL 6082387, at *5-6 (S.D.N.Y. Dec. 3, 2012), *aff’d*, 530 F. App’x 19 (2d Cir. 2013).

D. Plaintiff Does Not (and Cannot) State a Claim Against WMGC

Under any circumstance, WMGC should still be dismissed from this action.

The FAC fails to sufficiently allege *any* substantive involvement of WMGC, which appears to have been included in this action solely because it is a corporate parent of Warner-Tamerlane. FAC ¶ 25. However, it is black-letter law that a parent corporation and its subsidiary are regarded as legally distinct entities. *See, e.g., Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988). The legal relationship between a parent and its subsidiary is insufficient to state a claim for copyright infringement against the parent. *See Banff Ltd. v.*

Limited, Inc., 869 F.Supp. 1103, 1108–09 (S.D.N.Y. 1994). So is the fact that a parent company benefits financially by virtue of its ownership of the subsidiary, since “[e]very parent will benefit from its subsidiary’s profit-generating activities, and every parent will have the opportunity to guide the affairs of its subsidiary.” *Id.* at 1106-07, 1110. As such, a more discerning standard applies to impute liability on a parent corporation, where courts look to whether the parent corporation has “a *substantial continuing involvement . . . specifically with respect to the allegedly infringing activity of the subsidiary*” (see *Dauman v. Hallmark Card, Inc.*, No. 96 CIV. 3608 (JFK), 1998 WL 54633, at *6 (S.D.N.Y. Feb. 9, 1998) (emphasis added)), as well as “indicia . . . showing that *the parent is actually involved with the decisions, processes, or personnel directly responsible for the infringing activity.*” *Banff*, 869 F.Supp. at 1109 (emphasis added). Courts have made clear that a “mere legal relationship” is not enough. *Id.*

Here, the FAC fails to sufficiently allege *any* substantive involvement of WMGC with respect to any alleged infringement by any Defendant (whether via decisions, processes, or personnel), let alone any direct liability of WMGC. The only allegations in the FAC directed to WMGC specifically are that “it is a major global music corporation” that is the “parent company of Co-Defendant Warner-Tamerlane,” that it has “assisted in and/or directly facilitated” the alleged conduct by Warner-Tamerlane, and that it “has derived substantial revenues and/or profits from the exploitation of the [the Remix].” FAC ¶ 25. These allegations are insufficient to sustain Plaintiff’s claims against WMGC. See *Banff*, 869 F.Supp. at 110 (allegations as to corporate relationship and parent corporation’s derivation of revenues and/or profits from the exploitation of the work at issue insufficient to state a claim as to direct or secondary liability for copyright infringement without more particularized allegations).

Similarly, allegations of “corporate proximity” are insufficient to allege liability. *In re*

Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2015 WL 1344429, at *3 (S.D.N.Y. Mar. 23, 2015); *see also Banff*, 869 F.Supp. at 1108–09 (legal relationship between a parent and its subsidiary is insufficient to state a claim for copyright infringement against the parent); *In re Digital Music Antitrust Litig.*, 812 F.Supp.2d 390, 417 (S.D.N.Y.2011) (finding insufficient a complaint that alleged direct involvement of the parent companies by way of generic references to “defendants”).

No amendment can cure the deficiencies in Plaintiff’s FAC. There is a complete lack of connection between WMGC and the conduct alleged in this lawsuit. WMGC is a holding company and an indirect parent company of Warner-Tamerlane (there are two other entities sitting in between them) that has nothing to do with this dispute or the works at issue, and it does not own, exploit, or administer copyrights. It should be dismissed from this case.

E. Plaintiff is Not Entitled to Statutory Damages or Attorneys’ Fees Due to His Untimely Registration

In no event may Plaintiff recover attorneys’ fees and statutory damages as to any of his claims (*see, e.g.*, FAC ¶¶ 5, 93, 94; “Prayer for Relief” ¶¶ e, g); such a recovery is statutorily barred. As a court in this District explained:

Section 412 of the Copyright Act provides in plain language that “*no award of statutory damages or of attorney’s fees*, as provided by sections 504 and section 505, *shall be made for*—(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) *any infringement of copyright commenced after first publication of the work and before the effective date of its registration*, unless such registration is made within three months after first publication of the work.” 17 U.S.C. § 412.

Yague v. Visionaire Publ’g LLC, No. 19-CV-11717 (LJL), 2021 WL 4481178, at *1 (S.D.N.Y. Sept. 29, 2021) (emphasis added); *see also Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158 (2d Cir. 2007) (“[A] plaintiff may not recover statutory damages or attorney’s fees for any infringement ‘commenced’ before the effective date of a copyright’s registration.”). “Section

412 has no exception excusing foreign works from its mandate: it requires registration to obtain statutory damages for both domestic and foreign works.” *The Football Ass’n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159, 162 (S.D.N.Y. 2009); *see also Super Express USA Publ’g Corp. v. Spring Publ’g Corp.*, No. 13-CV-2814 (DLI)(JO), 2018 WL 1559764, at *4 (E.D.N.Y. Mar. 30, 2018) (“statutory damages are precluded because the foreign copyrights were not registered with the U.S. Copyright Office”). This is because “Section 412 is intended to provide additional remedies of statutory damages and attorney’s fees as incentives to register.” *Yague*, 2021 WL 4481178, at *1.

Here, Plaintiff concedes that he did not register the Remix with the U.S. Copyright Office until September 6, 2022, *19 years* after it was first published (FAC ¶ 35), and – critically – over two months *after* the alleged infringement at issue commenced, on June 17, 2022. *Id.* ¶ 2. Thus, the alleged infringement “commenced” after first publication of Plaintiff’s Work and before Plaintiff registered a copyright in that composition. Plaintiff’s claim for attorneys’ fees and statutory damages is therefore barred as a matter of law, and should be dismissed. *See, e.g., Adlife Mktg. & Commc’ns Co., Inc. v. Buckingham Bros., LLC*, No. 519CV0796LEKCFH, 2020 WL 4795287, at *4 (N.D.N.Y. Aug. 18, 2020) (“courts in this Circuit often dismiss claims for statutory damages or attorney’s fees at the [pleading] stage if a work is neither registered before the infringement nor published before the infringement and within three months of registration, bases for dismissal under § 412 that both depend upon the alleged registration date.”).²²

²² While Plaintiff adds to the FAC certain allegations relating to live performances of Defendants’ Work post-dating the date of his registration, these alleged “continuing” infringements are irrelevant for purposes of determining remedies under Section 412. *See Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16 Civ. 724, 2016 WL 4126543, at *3 (S.D.N.Y. Aug. 2, 2016) (“[W]hen the same defendant infringes on the same protected work in the same manner as it did prior to the work’s registration, the post-registration infringement constitutes the continuation of a series of ongoing infringements”) (citing *Irwin v. ZDF Enters. GmbH*, No. 04 Civ. 8027, 2006 WL 374960, at *2 (S.D.N.Y. Feb. 16, 2006)).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss with prejudice Plaintiff's FAC, in its entirety. Alternatively, the Court should hold that Plaintiff is not entitled to statutory damages or attorneys' fees under any circumstance.

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MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Christine Lepera

Christine Lepera
Bradley J. Mullins
Lindsay R. Edelstein
437 Madison Ave., 25th Floor
New York, New York 10022
Telephone: (212) 509-3900
Facsimile: (212) 509-7239
Email: ctl@msk.com
Email: bym@msk.com
Email: lre@msk.com

*Attorneys for UMG Recordings, Inc.,
Universal Music Publishing, Inc.,
Universal Songs of Polygram
International Inc., Universal Music
Publishing AB, Bremer Music Group AB,
Warner Music Group Corp., Warner-
Tamerlane Publishing Corp., Aubrey
Drake Graham (p/k/a Drake), Johannes
Klahr, and Richard Zastenker*